Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Tatham and another, Assignees of Ledward's Estate, v. *Andree and another, from the Supreme Court of Ceylon. Report dated July* 27, 1863; *Judgment delivered August* 3, 1863.

Present:

LORD KINGSDOWN.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.

TWO objections are made to the securities in this case:

1. That they must be considered void, on the ground that the property mentioned in them was left in the order and disposition of the Insolvent at the time of his insolvency, with the consent of the true owner.

2. That the instruments of pledge being unaccompanied with possession, are void against the general creditors under the Insolvent Act.

It appears to us that neither objection can be maintained.

As to the first, we think the insolvency must be held to have taken place when the petition for an adjudication of insolvency was presented, and the adjudication was made. But at a meeting some weeks before the Respondents had claimed the property pledged to them, and it had been agreed that it should be placed in the hands of third persons and sold. This was done, and the property therefore before the insolvency had ceased to be in the order and disposition of the insolvent. This appears to us to have been settled by the case referred to in the argument *Ex parte* Littledale, *re* Pearse (6 de Gex, M. and G., 714). In that case the Petitioner had lent money to the Bankrupt, in order to

enable him to purchase stock in a public Company. The stock was purchased and transferred into the name of the Bankrupt, in order to qualify him to be a Director of the Company. It remained standing in his name at the time when he became Bankrupt; but he had made an assignment of the stock to the Petitioner at the time when it was purchased; and five days before the Bankruptcy, the Petitioner had given notice of his assignment to the Directors, and this was held sufficient to take the case out of the operation of the statute.

This is a case of great authority, for it was decided by the Lord Chancellor and the Lords Justices; and though upon another transaction of a similar character in the same case, some doubt was expressed by one of the Lords Justices, such doubt did not extend to the transaction of which we have stated the particulars.

In the present case the Petitioner's creditor's debt was not due till 5th January, 1858, and the act of bankruptcy was on the 8th February, 1858.

The meeting of the creditors, and notice of the claims of the mortgagees, was on the 23rd or 24th December, 1857.

A further point was raised as to one of these securities, that of the Respondent Andree, that it was void on the ground of fraudulent preference; but we are satisfied upon the evidence that this security cannot be impeached upon that ground.

Then as to the necessity of possession under the Roman-Dutch Law, in order to support the securities.

The general rule of the civil law is that possession of moveables is not necessary to the validity of a lien, whether created by contract or act of law, and that such lien will attach upon moveable property, even in the hands of a *bonâ fide* purchaser, without notice.

Upon this principle it has been decided by the Judicial Committee that if a ship which has been in fault in a collision be afterwards sold, she is liable to be attached in the hands of a *bonâ fide* purchaser for value, without notice, in a suit instituted after the sale to recover damages for the loss occasioned by the collision. (Harmer *v.* Bell, "The Bold Buccleugh," 7 Moore, 267).

This rule has been modified by the Roman-Dutch law to this extent,—that if the goods left in the

possession of the mortgagor are sold, or mortgaged by him to another person, they cannot be followed into the hands of such transferee for value, but the contract is binding on the debtor, and the goods themselves may be taken if they remain in his hands.

This is the law as collected by Mr. Burge from the authorities to which he refers, and which those authorities seem fully to warrant.

Mr. Burge proceeds, "Even in a concursus of creditors the contract alone would not give the creditors any preference or lien on the goods unless the mortgage had been followed by the delivery of them."

This passage is said by the learned Judge in the Court below not to be supported by the text of Voet to which reference is made, and certainly we cannot find there sufficient warrant for it in the sense put upon it by the Appellant's Counsel. The law upon this subject appears to have differed in different provinces in Holland, and both the District Judge who decided in favour of the Appellants, and the Supreme Court which decided in favour of the Respondents, agree in this, that according to the Roman-Dutch Law as prevailing in Ceylon a mortgage of moveables by writing before a notary, though unattended with possession, is valid not only against the debtor himself but against his general creditors.

The Assignee under the Insolvent Act stands in the place of the general creditors, and takes the property of the insolvent, subject to the charges to which it was subject, in the hands of the debtor, unless in cases where either on the doctrine of fraudulent preference or of the statutable provision with respect to goods left in the order and disposition of the insolvent, a right is given to them which in other cases they would not possess.

But in this case there cannot be properly said to have been any concursus. The property had been taken out of the hands of the mortgagor before the general creditors had any claim upon it.

Their Lordships are of opinion that the securities in the present case are not open to objection on either of these points, and that the Judgment of the Court below is right, and they have humbly advised Her Majesty to affirm it with costs.