

CORPORATIONS AND NATIONALITY—DOCTRINE OF *in fraudem legis*—
ROMAN-DUTCH LAW.

Dadoo, Lim. and others v. Municipal Council of Krugersdorp.

By the law of the Transvaal, an Asiatic is prohibited from owning immovable property in that Province. What then shall be said if an Indian turn himself into a company and purchase "stands" or town-plots in the company's name? The question came before the Supreme Court of South Africa in the above-named case.

Of the 150 shares in Dadoo, Lim., 149 were owned by Dadoo, and the other share by Dindar, both of whom were admittedly Asiatic. In May, 1915, Dadoo, Lim., took transfer of certain stands in the township of Krugersdorp. Yet both by the Gold Law and by a condition embodied in the title to the stands, Asiatics were prohibited from owning them. Consequently, the municipality brought an action to have the transfer set aside, under the rule of Roman-Dutch Law by which a third party intended to benefit under a contract may enforce the contract by action. (Their *locus standi* was, however, contested, the point being left undecided.)

In the court of first instance, Wessels, J., held that the transfer was *in fraudem legis*, since the intention of the Legislature was to prohibit Asiatics from obtaining control of land. On appeal, however, the Appellate Division of the Supreme Court held by a majority (Innes, C.J., and Solomon, J.A., de Villiers, J.A., dissenting) that the transfer could not be set aside.

The argument turned upon the operation of the doctrine of *in fraudem legis*, based on texts in the Corpus Juris, notably D.1.3.29 and 1.3.30:—"Contra legem facit qui id facit quod lex prohibet, in fraudem vero qui salvis verbis legis, sententiam ejus circumvenit. Fraus enim legi fit ubi, quod fieri noluist, fieri autem non vetuit, id fit: et quod distat dictum a sententia, hoc distat fraus ab eo quod contra legem fit." These maxims seem sufficiently wide; but after considering their application, both in the Digest and in the civilians, and particularly their application to the SC. Macedonianum (forbidding loans to a filiusfamilias), the Court held that the doctrine was not in fact more extensive than the corresponding doctrine of English law; and was aimed not at transactions which successfully kept outside the law, but at those which, while really coming within it, were so disguised as to appear to be outside it. The intention of the Legislature must be gathered from the words of the statute. Since then the law forbade the ownership of land by Asiatics, and since Dadoo, Lim., a juristic person, was clearly not an Asiatic, the ownership of stands by Dadoo, Lim., was not contrary to law. (The statute has since been amended.) *Salomon v. Salomon & Co.* [1897] A. C. was cited; the *Daimler Case* [1916] A. C. was distinguished, rather cursorily it is submitted, and described as "a very special case."

De Villiers, J.A., in a dissenting judgment, held, with Wessels, J., in the Court below, that the transaction violated the *sententia* or *mens legis*, and was therefore *in fraudem legis*; and he added the interesting suggestion that the formation of the company itself was unlawful, since it was not an association "for a lawful purpose" as required by the Companies Act (Act 31 of 1909).

The point was apparently not directly taken, that, though the company itself could not be said to be of any race or nation, the fact of its being

controlled by Asiatics invested it, for some purposes, with their nationality. Yet the analogy to the *Daimler Case* is obvious. The case is an excellent illustration of the difficulties which must arise whenever doctrines based upon human characteristics have to be applied to juristic persons. One is reminded of the chapter in American law dealing with the State-citizenship of incorporated banks; a chapter opening with the judgment of Marshall, C.J., in *Bank of U. S. v. Deveaux* (1809) 9 U. S., and closing apparently with the *St. Louis Railway Case*, 161 U. S. 545, whereby it was conclusively presumed, *not* that an incorporated bank is a citizen of the State where it is registered, but that all the "corporators" of such a bank are *ipso facto* citizens of that State! It is submitted that the law should not blind itself to facts without very good cause; and that in certain classes of case a too rigid enforcement of what Maitland calls the "Fiction Theory" of corporations is fraught with undesirable consequences to the living and flexible body of the law. As de Villiers, J.A., remarked in this case, "No doubt the corporation is a distinct *persona*; but it does not follow that in a matter such as this the Court is necessarily debarred from looking at the character of the individual shareholders."

J. C. M.

CONTRACT—ENEMY. CHARACTER OF CORPORATIONS—WAR—DISSOLUTION
AND SUSPENSION OF CONTRACTS.

In re Badische Co.; Bayer Co., &c. [1921] 2 Ch. 331.

THIS consolidated group of actions arising out of pre-war contracts for German dye-stuffs illustrates the importance of at least three principles of the Law of Contract. The issue was to decide whether claims arising out of the non-fulfilment of these contracts should be admitted as debts due from the companies, which were being wound up as enemy concerns under controllers. Did the outbreak of war dissolve the contracts, either by reason of the enemy character of the companies, or failing that, for the reason that continued performance involved intercourse across the line of war, or for any other reason? The case occupies many pages of the reports and the actual facts are involved, but it will be sufficient to note three principles of law discussed therein.

1. The effect of the outbreak of war as regards the dissolution of a contract with a company controlled by enemy aliens.

2. The effect of a suspensory clause in the event of "war."

3. The principle of frustration of adventure.

1. As regards the first point, Russell, J., discussed the scope of the *Daimler Case* (*Daimler Co. v. Continental Tyre and Rubber Co.* [1916] 2 A. C. 307). This, very briefly, decided that, while a company registered and carrying on business in England is *not* an alien enemy (even though all the shareholders and directors are of enemy nationality, and resident in enemy territory), yet such a company cannot maintain an action through its secretary, if he has no authority to sue, and can only obtain such authority by intercourse across the line of war with his enemy directors. In the case before the Court it appeared that the vendor company was