under section 18 of the schedule, he always has the opportunity of instituting new proceedings by taking out summons in the usual way. In the present instance I think both proceedings were open to the plaintiff. He could have proceeded *de novo*, or he could have proceeded under section 18 of the schedule. The cause of action was not such a difficult matter that the Court could certify that it was a proper action to be brought in the Supreme Court. The proof, as I have said, was liquid in its nature; the plaintiff had documents which showed that the defendants had done what they had no right to do; they had taken judgment for a larger amount, when the case had been settled out of Court for a smaller amount. Under these circumstances, I think the judgment must be as stated—namely, in favour of the plaintiff, but only with costs on the magistrate's court scale.

Attorneys for plaintiff: *Rooth & Wessels.*

[A. D.]

EX PARTE CRAGGS AND OTHERS.

1915. *September* 2, 3. CURLEWIS, J.

Husband and wife.—Antenuptial contract.—Alteration of.— Durante matrimonio.—*Practice.*

The Court has power on sufficient cause being shown to authorize the revocation of all or any of the settlements and conditions of an antenuptial contract *durante matrimonio*, but parties must place the Court in possession of the fullest information as to the reasons for and the effect of the desired revocation.

Application for an order authorising the Registrar of Deeds to register a notarial contract under which (1) the first applicant, J. C. Craggs, and the second applicant, Marion Craggs, who were married out of community of property, made a donation to their son, Ralph Craggs, the third applicant, of a life policy settled by the first applicant upon the second applicant by antenuptial contract prior to their marriage, and (2) the second applicant made a donation to the third applicant of certain furniture.

Further facts appear from the judgment of the Court.

W. Pittman, for applicants.

CURLEWIS, J.: This application came before me yesterday, but I decided not to give any order until I had had an opportunity of ascertaining the reasons of the Registrar of Deeds for refusing to register the notarial document executed between the applicants and their son. Before the rising of the Court, however, counsel for the applicants handed me a memorandum signed by the Registrar of Deeds, addressed to the notary before whom the contract was drawn up, in which he sets out his reasons for refusing to register the contract. It is a pity that the Registrar's reasons were not brought to the attention of the Court during the hearing yesterday, because they are of great assistance to the Court in deciding this matter. It only shows how careful the Court should be, in applications to compel the Registrar of Deeds to register documents, always to have before it the Registrar's report or his reasons for refusing to register.

The application is for leave to register a certain notarial contract entered into by Mr. and Mrs. Craggs, of the one part, and their son, of the other, under which they make a donation to their son of a certain life policy, and Mrs. Craggs makes a donation to her son of certain furniture. The life policy and part of the furniture formed the subject of an antenuptial contract executed in Graaff-Reinet in 1883 by Mr. and Mrs. Craggs prior to their marriage. Under that antenuptial contract Mr. Craggs settled on his intended spouse a certain life policy in the Royal Insurance Company for £500, under certain conditions set out in clause 6 of the antenuptial contract. It is not necessary to read the whole of the clause; but the policy is settled on the trustee—the trustee named in the contract being Mr. Benton, who has since died, and in whose place another trustee, Mr. Mundy, has been appointed "In trust to have, hold and receive, take and enjoy the said policy, and during the lifetime of the said James Charlton Craggs see that the premiums which may from time to time become due in respect of the same are regularly paid by the said James Charlton Craggs, so that the said policy is properly kept on foot, and that the said trustee shall at and immediately upon the death of the said James Charlton Craggs recover and receive the said sum of £500 sterling or any further sum which may be due and payable in respect of the said policy of insurance, and invest and lay out the same at interest upon good security, and in case the said Marion Goodhead shall survive him to pay over the annual income, interest or profits arising therefrom to her the said Marion Goodhead from time to

time during all the days of her natural life for her own sole and separate use and benefit, and not to be subject to the acts, control or engagements of any other husband or husbands with whom she may at any time hereafter intermarry." Then there is a clause which provides that: "In case the said Marion Goodhead shall predecease the said James Charlton Craggs then the said policy of insurance shall revert to and again become the property of the said James Charlton Craggs." There is apparently no provision in the antenuptial contract as to what shall become of the capital amount of the life insurance policy in case Mrs. Craggs survives her husband, and in case she dies. The notarial deed provides, as I have said, for the settlement on the son of certain furniture as well as the policy. It states that Mr. and Mrs. Craggs donate the policy in consideration of the natural love and affection which they bear their son, and Mrs. Craggs, assisted as far as need be by her husband, donates to her son "all her right, title and interest in and to the furniture, goods, effects and chattels more fully described and set forth in the schedule or list hereunto annexed marked "A." Whether this forms part of the furniture which was settled on Mrs. Craggs by the antenuptial contract does not seem quite clear. One would hardly imagine that the furniture which was settled on her at Graaff-Reinet in 1883 is part of the furniture which she holds here in Pretoria to-day. But the effect of the contract is that, if it is valid, the son would become the absolute owner of the life policy and of all the furniture set out in the list attached to the notarial contract. When this application came before my brother GREGOROWSKI, on the 27th August, he ordered it to stand over for notice to the trustee. In the petition it had been alleged that Mr. Mundy, the trustee, refused, without any reason, to give his consent to the donation. Yesterday a letter was handed in, from Messrs. Podlashuc and Nicholson, addressed to the attorneys for the applicants, in which they state that "Mr. Mundy at no time refused to give his consent to the donation, but on the contrary expressed his willingness to do so as soon as he would be placed in possession of the written desire of the parents thereto." I take it that Messrs. Podlashuc and Nicholson are authorised, on behalf of the trustee, to consent, as they do in this letter, to the donation being effected and the notarial contract being registered.

But the matter does not end there, because under the Roman-Dutch law the general rule is that any settlement of this nature made in an antenuptial contract cannot be revoked by the parties

to the contract while the marriage is still in existence. The Registrar of Deeds, in his memorandum, calls the notary's attention to certain decisions which are of considerable importance. The first decision to which he refers is *Ex parte Slack and Another* (1909, T.S. 1118), which was an application for the appointment of a new trustee under an antenuptial contract in the place of one who had died. There the Court held that though as a general rule an antenuptial contract could not be varied by the spouses after marriage, yet as the property was settled absolutely on the wife and there was no prejudice to creditors the Court would under the circumstances direct the Registrar of Deeds to register the agreement. The other case to which the Registrar of Deeds has called attention was, he says, decided in the Cape in December last. I have been able to get a report of the case—*Ex parte Smuts* (1914, C.P.D. 1034). The head note reads as follows: "Though the rule of the Roman-Dutch law is that an antenuptial contract cannot be revoked *durante matrimonio* even by the mutual consent of the husband and wife, yet upon good cause shown the parties can obtain an alteration or revocation of such contract through a judgment of the Court." KOTZÉ, J., gave a judgment in the matter, in which he examined the decisions in two previous cases reported in 1 Menzies. He pointed out the difference between the application before him and the decision of the Court in *Buissinne* v. *Mulder et uxor* (1 Menz. 162) and distinguished that case from the one before him; and he laid down the rule that though under Roman-Dutch law the contract cannot be revoked *durante matrimonio* even by the consent of the husband and wife, the Court had authority, on good cause being shown, to authorise such a revocation in whole or in part. In that case it was only a part revocation. He says (p. 1037): "Antenuptial contracts are not so irrevocable that their provisions cannot, upon just grounds appearing to the Court, be by it annulled or departed from. Circumstances may arise, apart from a proceeding of dissolution of the marriage and a forfeiture of benefits secured under an antenuptial contract, where the Court may, in the exercise of its power and discretion, sanction a departure from the terms of an antenuptial contract." He points out, further on in his judgment (p. 1039): "There is nothing before me to induce me to think that this application is in any way intended to benefit the husband, so as to operate as a gift between husband and wife, which the Roman-Dutch text writers give as the main reason why an antenuptial contract cannot, *stante matri-*

monio, be revoked even by the mutual consent of the parties to it." In the application now before me there is no statement by the applicants as to the reasons or motives for which they wish to deprive themselves of this property and donate it to their son. The object of the antenuptial contract, I take it, on the part of the husband, was to provide for his wife after his death. A policy of £500 which was in force in 1883 would probably be of much greater value to-day, and I take it the husband's object was that after his death his wife should have the interest on the amount of the policy for her support and maintenance. The applicants have not attempted to give any reason or show any cause why they wish to abandon this beneficial provision for the wife and to donate the benefits of the policy to their son. All that is stated in the deed is that because of the natural love and affection which they bear their son they propose to make the donation of the policy and the furniture. Nor is there anything to show whether the applicants have any creditors. It is possible that they may have creditors, and that the donation may be very much to the creditors' prejudice. In *Slack's* case there were no creditors, and as there was no prejudice to creditors the Court authorised the application. I think before the Court should grant an application of this nature it should have before it such information as to show that there is sufficient good cause for making the donation and annulling the provisions of the antenuptial contract. I raised the question whether there were other children of this marriage—without wishing to give an interpretation of the antenuptial contract and as to what must become of the capital of the insurance policy on the death of the wife. It was suggested that if there are other children they cannot be interested in the matter, because there is no disposition of the property in their favour. But I think, apart from that, the Court should have the fullest information before it, when two spouses ask for the authority of the Court to register a document revoking the settlements and conditions of the antenuptial contract which they have executed. It is true that if there are creditors, and this is in fraud of creditors, the creditors can always follow up the property or recover the value of it from the son. But if there are creditors the Court should not put them in the position of having to proceed against a third party for the value. I do not suggest for a moment that this is in fraud of creditors, nor do I suggest that the indirect object may be for the one spouse to benefit the other by gift *stante matrimonio*, which is not lawful under

our law. But the Court should have such full information before it that any possibility either of prejudice to creditors, or of a gift, direct or indirect, taking place between the spouses by means of such a donation to the son, is out of the question. Before the Court can give the relief asked for that should be made absolutely clear. I think the Court should also have the advantage of knowing whether the applicants have other children and whether those children are majors or minors. It does not appear from the letter from Podlashuc and Nicholson that the trustee has enquired into the donation or whether he has satisfied himself that it is perfectly *bona fide* or not. Apparently, so far as he is concerned, he gives his consent, so far as it may be necessary. But before the Court can sanction the contract it should have all that information, so that it can satisfy itself that this is a *bona fide* transaction and that there is sufficient cause for the Court to interfere and authorise the practical revocation of the conditions of the antenuptial contract relating to the life policy and the furniture. Under the circumstances I do not feel justified in making any order on this application. There will be no order on the application, but it may be renewed upon further information.

Postea (October 20). Such information having been furnished to the satisfaction of the Court, CURLEWIS, J., granted the order prayed for.

Applicants' Attorneys: *Lapin & Lapin.*

[A. D.]

REX v. MOHR.

1915. *August* 9; *September* 6. DE VILLIERS, J.P. and MASON, J.

*Insolvency.—Undue preference.—Handing over of cattle.—Payment.—*Law* 13 *of* 1895, *sections* 37 *and* 147 (*e*).

An accused was charged with and convicted of the crime of culpable insolvency by giving an undue preference in that he at a time when he could expect the

* Sec. 37 of Law 13 of 1895, reads: "Every alienation of any portion of the estate, and every payment made by the insolvent to a creditor, and every mortgage or pledge constituted by him for the benefit of a creditor upon any portion of the estate at a time when he could expect the sequestration of his estate, with the intention to benefit such creditor directly or indirectly, above the other creditors, constitutes an undue preference . . . .

"Every alienation made by the insolvent as above and every mortgage or pledge constituted by him in favour of any person whomsoever as above, with the intention thereby to benefit one of his creditors directly or indirectly, above the others, constitutes an undue preference." . . . .