1914. *October* 8, 27, *November* 10. GREGOROWSKI, J.

Insolvency.—Proof of debt.—Cause of debt.—Description.—Bond in favour of third person.—Preference.

An affidavit and proof of debt in respect of a bond need merely follow the terms of the bond, even though the latter wrongly describes the original cause of the debt (*Pienaar and Frankel* v. *Fourie's Trustees*, 1913, C.P.D. 227, followed).

A bond passed by a debtor in favour of a third person, who is either a nominee or a creditor of the first creditor, is not voidable as an undue preference on the debtor's insolvency.

A owed B £250, and B owed C £125. A passed a bond in favour of C for £250 in order to secure his indebtedness to B. C ceded the bond to B. On A's insolvency, B was held entitled to a preference for £250.

Application to expunge a proof of debt or in the alternative to have the same declared concurrent and not preferent.

The affidavit of proof of debt stated that the insolvent was indebted to the applicant in the sum of £250 by virtue of a bond passed by the insolvent on November 28th, 1911, in favour of Abraham Lichter, and ceded to applicant on October 15th, 1913. The further facts appear fully in the judgment.

L. Greenberg, for the applicant: The proof of debt is wrongly framed; it does not set out the true cause of debt nor does the bond. Further, the insolvent was not indebted to Lichter and therefore there can be no proof of a debt which never existed. In any case, the respondent is only entitled to a preference for £125.

Manfred Nathan (with him *C. T. Blakeway*), for the respondent: The bond has not been set aside; no relief can be granted, while it is still in existence (*Buyskes' Trustees* v. *Wright*, 1 S.C. 46). The affidavit and proof of debt need merely follow the terms of the bond and not set out the original cause of the debt (*Pienaar & Frankel* v. *Fourie's Trustees*, 1913, C.P.D. 227). There has been no misdescription; the usual form has been followed. The original obligation need not necessarily exist between the same parties as the bond. (Anders, *Cession of Actions*, p. 13; Maasdorp, Vol. II, p. 225; Voet, 20, 1, 18); Voet (46, 2, 13), says a debtor may cede to his creditor as security a debt owing to himself.

Blakeway (on the same side), referred to *Stoll's Trustee* v. *Kriege and Bosman* (3 M. 448) and *Naude's Exor.* v. *Maritz, Hall and Naude's Trustee* (19 S.C. 171).

Greenberg, in reply.

Cur. adv. vult.

Postea (November 10, 1914).

GREGOROWSKI, J.: This is an application by the trustee of the Insolvent Estate of B. Goodman against the respondent, Goldberg, who is a brother-in-law of the insolvent, for expunging the proof of a debt which was made by the respondent and admitted as preferent on the 2nd April, 1914, at the second meeting of creditors under a bond for £250 dated 18th November, 1911, passed by the insolvent in favour of one Abraham Lichter and ceded to the respondent on the 13th October, 1913.

The applicant claims to have this proof of debt expunged on the grounds *inter alia* that the affidavit attached to the proof of debt does not set out the cause of debt, that the bond describes the debt as for money lent and advanced, whereas if there were a debt, the *causa debiti* was the purchase price of the mortgaged property.

There are further claims that there was no consideration for the bond, or that the consideration was illegal and that the object of the bond was to defraud the creditors of the insolvent. It is also alleged that of the amount of the bond a sum of £25 5s. 3d. was not owing at the time the bond was passed but arose subsequently.

The petition attaches the evidence given by the respondent and by Lichter before a Commissioner in insolvency as to the circumstances under which the bond was passed. At that time the respondent owed Lichter £125 and the insolvent owed the respondent about £250 more or less. In reply to the petition the respondent has filed his own affidavit and certain other affidavits.

Mr. *Greenberg*, on behalf of the petitioner contended that he was entitled to succeed on the facts which are admitted by the respondent, and which are not in dispute. Some of the points raised in the petition depend on allegations which are in dispute, and which can only be established by action or at any rate by subjecting the witnesses to oral examination and cross-examination, and these allegations have not been dealt with before me and it is not necessary for me to refer to them. I have only to regard the facts admitted by the respondent. It is necessary to state these facts and then to enquire whether they entitle the petitioner to the relief he asks.

It appears that the respondent since 1907 advanced money to the insolvent, and in this way on the 28th April, 1911, the insolvent owed the respondent the sum of £100, and a document was then drawn up and signed by the insolvent in which the insolvent acknowledged being indebted to the respondent in the sum of £100, and agreed not to sell or encumber a certain Stand, No. 212, New-

town until the £100 was repaid. This stand had been purchased by the insolvent from the Municipality of Johannesburg, but the full purchase price had not been paid, and the municipality had not yet given transfer of it. The document provided that the respondent had the right to pay the municipality the balance of the purchase price which was £50, and if he did this and the insolvent got transfer, the respondent was to get a bond over the property.

Nothing further was done until July, 1911, when the parties, for some reason or other which is in dispute, entered into a new arrangement. The insolvent sold the stand to the respondent for the sum of £250, and the deed of sale dated 15th July, 1911, provided that the purchase price of £250 was to be accounted for by deducting the £100 due to the respondent, by paying the £50—the balance of the purchase price due to the municipality, so that transfer could be got; and by distributing the remaining £100, more or less, among the insolvent's creditors.

The respondent proceeded to pay the municipality the £50, and in due course the municipality gave transfer of the stand to the insolvent, and the insolvent transferred the stand to the respondent.

After this, for some reason which is not apparent and the motive for which is in dispute, the parties in November, 1911, entered into a fresh arrangement. It was agreed to cancel the transfer of the stand to the respondent, and on the 28th November, 1911, the respondent re-transferred the stand to the insolvent, and on the same day passed a bond over the property for £250 in favour of one Abraham Lichter, and on the 15th October, 1913, Lichter ceded this bond to the respondent. On the 14th January, 1914, the insolvent passed a general bond for £20 6s. 10d. in favour of one Hortin now deceased, and shortly afterwards became insolvent, and the petitioner was appointed sole trustee. The respondent proved in the insolvent estate in respect of the bond of £250 which had been ceded to him, which proof is now challenged.

For the purposes of this application it must be taken that on the 28th November, 1911, the insolvent was indebted to the respondent in the sum of £250. One would naturally have expected in view of this fact, that when the respondent retransferred the property to the insolvent, a bond would have been passed in the respondent's favour for this amount. As a fact the bond for this amount was passed in favour of Lichter. It must further be taken that prior

to the 28th November, 1911, the respondent was indebted to Lichter in the sum of £125 and that Lichter wanted security for this £125, and as he knew that Stand No. 212, Newtown, was registered in the name of the respondent he had required the respondent to secure the £125 by giving him a bond on this property, and to this the respondent had agreed. Subsequently Lichter was informed that the respondent intended retransferring the stand to the insolvent, and thus could not give the bond he had promised, and Lichter then agreed, instead of getting a bond for £125 to be passed by the respondent, to accept cession of a bond to be passed by the insolvent in favour of the respondent for £250. In the carrying out of this arrangement a bond was not passed by the insolvent in favour of the respondent and ceded to Lichter in security of his £125, but in lieu thereof the insolvent passed a bond of £250 in favour of Lichter direct. This bond was not handed to Lichter but kept by the respondent under his own control. Thereafter the respondent paid Lichter the £125 which he owed him and got cession of the bond. Lichter says he did not know that he was making cession of a bond of £250 passed in his own favour, he thought he was cancelling a cession in his own favour of a bond of £250 passed in favour of the respondent which had been ceded to him; and that this was the security he released when he was paid his debt of £125.

All these transactions are certainly unusual and the petitioner challenges them as in fraud of creditors, and it is possible that they may be proved to be such, but these questions were not dealt with before me, as it is recognised that if fraud is to be established an action will have to be instituted. I have only to deal with the facts as admitted by the respondent.

It is objected to the affidavit accompanying the proof of debt that it does not describe the real cause of the indebtedness and is therefore insufficient, and further that the formal proof of debt is also defective for the same reason. But it seems to me that it is sufficient for the affidavit and the proof to follow the terms of the bond (*Pienaar and Frankel* v. *Fourie's Trustees*, 1913, C.P.D. 227). Assuming that the respondent, when he retransferred the stand to the insolvent and had to get back the £250 which revived as a debt to himself, described the debt as money lent and advanced—and not as the purchase price of the property, there is nothing surprising in this. He might well consider that as he gave back the property, the money due to him was the money he had originally advanced to the insolvent.

The further objection is that the bond for £250 was passed in favour of Lichter, and the insolvent did not owe Lichter a penny, and therefore there can be no proof on the insolvent estate for a debt which never existed. But this is too narrow a view to take. It is necessary to consider whether the debt for which the bond was passed really existed, and to identify the debt to which the bond gives preference. If the insolvent owed the respondent £250, and passed a bond in favour of a third person nominated by the respondent, the bond would be a good bond, whether the third person were a creditor of the respondent or a bare nominee. In the present case a complex transaction took place. There was no *delegatio* or *novatio* intended. The debt of £250 and the debt of £125 were left as they were, but the bond of £250 was passed in the name of Lichter, so that Lichter might have security for his debt of £125. Voet (46, 2, 13), seems to refer to such an arrange- in which a debtor cedes as security a debt owing to himself to his creditor—accompanied with the right of collecting it. If Lichter had enforced the bond, he would have had to account to the respondent for any balance. The insolvent could not resist a claim by Lichter under the bond, as he had undertaken to pay the £250 he owed the respondent to Lichter. The arrangement which was made is obvious when once it is admitted that the insolvent owed the £250 to the respondent, and the respondent owed Lichter £125, and the object of the parties was to furnish security for the latter debt.

The next point was that the bond could only be preferent for £125, and that the respondent could not claim preference for the whole of the £250. This seems to me to depend on the question to which debt does the bond security attach. If the insolvent were indebted to Lichter in £125, or if he had undertaken to pay Lichter the £125 owing by the respondent and the only object of the bond were to secure this £125, then the contention of the petitioner would be correct, but the circumstances show that the bond was passed to secure the debt of £250 owing to the respondent by the insolvent, and was given to Lichter merely as collateral security for his debt of £125. I do not think that the bond can be narrowed down to a bond merely for £125. The bond was not given for the £125 owing by the respondent to Lichter, but it was given for the debt of £250 owing by the insolvent to the respondent.

Under these circumstances the petition fails and must be dismissed. The petitioner may wish, on the other grounds to which

his petition refers, to institute action, and if he institutes action within a month the costs of this application are to be costs in the cause, otherwise they must be paid by the petitioner.

Applicant's Attorneys: *Marks & Holland;* Respondent's Attorney: *E. Nathan.*

[G.W.]

EX PARTE KINGDOM.

1914. *November* 12, 17. BRISTOWE, J.

Insolvency.—Voluntary surrender.—Law 13 *of* 1895, *sec.* 3.—*Schedules.—Computation of time.*

In computing the period of 14 days from the date of the first publication of a notice of intention to surrender, required by law 13 of 1895, sec. 3, the date of publication must be excluded.

Application for voluntary surrender.

Notice of intention to surrender was given in the Gazette of the 2nd October, and the schedules had lain for the inspection of creditors from the 3rd to the 17th October. There was the usual certificate from the Master.

M. Nathan, for the applicant: For the method of computation see sec. 5 of (Union) Act 5 of 1910. Sec. 3 of Law 13 of 1895 has been complied with.

[BRISTOWE, J.: Should not the fourteen days begin on the 2nd October.]

No, 'from' there means 'after.' In any case the Master has waived the point. No objection has been lodged to the schedules, and there is no question of prejudice to creditors. *In re Siedat* (19 N.L.R. 96), is in point.

Cur. adv. vult.

Postea (November 17).

BRISTOWE, J.: (After stating the facts), I am quite satisfied that the schedules in this matter have lain for the full period of fourteen days in terms of Act 5 of 1910 (Union), sec. 5, but the difficulty for decision is the day on which the computation should commence in view of sec. 3 of law 13 of 1895. That section requires the schedules to lie for inspection for fourteen days "from" the first publication in the Gazette of the notice of inten-