1914. *December* 15, 28. DE VILLIERS, J.P.

Pledge.—Book debts.—Construction of bonds.—Knowledge of prior pledge.—Cession.—Delivery.

A clause in a bond pledging "All the machinery, plant, appliances, tools, book-debts, furniture, fixtures, fittings, goods and effects of every kind and nature whatsoever on certain premises, or which may hereafter be placed thereon belonging to the mortgagor," refers, as far as the bookdebts are concerned, to book debts only in existence when the bond was passed.

The rule in *Coaton* v. *Alexander* (1879 Buch. 17) that a person obtaining a pledge with knowledge of another pledgee's prior rights acquires no preference, does not apply to knowledge of a bond so ambiguous in its terms that from a perusal thereof the subsequent pledgee could not have known that it referred to the same property which was subsequently pledged to him.

A pledge of book debts together with a grant by the debtor to the creditor of "Special power and authority to collect, get in, and receive all such debts," is a power irrevocable and *in rem suam*, implying a right in the creditor to sue, and manifesting an intention on the part of the debtor to cede his right to the creditor.

Application to amend a distribution account filed by the first respondent, the trustee in the insolvent estate of one Yull. The second respondents had been awarded a preference by virtue of a notarial bond for £1,000, duly registered, pledging to them, *inter alia*, the "bookdebts" of the said Yull. The applicants now claimed that they were preferent by virtue of a subsequent notarial bond for £2,500, also duly registered, pledging to them, *inter alia*, the "outstanding debts, present as well as future," of the said Yull. The further facts appear from the judgment.

B. A. Tindall (with him, *A. Alexander*), for the applicants: The only method of pledging a right of action is by cession (*Smith* v. *Farelly's Trustee*, 1904, T.S., at p. 955; Puchta, *Pandekten*, sec. 208; Windscheid, *Pandekten*, Vol. II, sec. 239; *National Bank* v. *Cohen's Trustee*, 1911, A.D. 235, *per* INNES, J., at p. 251). The cession is completed by the agreement between the cedent and the cessionary. The power of attorney in our bond is irrevocable, see *Natal Bank Limited* v. *Natorp* (1908, T.S. 1016). Sande (*Cession of Actions*, ch. ii, sec. 1), points out that one of the methods of cession is by mandate. Hence the pledge of the bookdebts to us, coupled with the power of attorney, made our cession complete. Voet (18, 4, 11), says that in the sale of an action the vendor is bound to make cession of it to the plaintiff;

see Berwick's note thereon (Voet's *Commentary*, p. 98). The intention to cede must be clear, *Wright's Trustees* v. *Brown* (14 E.D.C. 125).

[DE VILLIERS, J.P.: What is the equivalent to delivery in the case of a debt?]

I submit that delivery takes effect as soon as the thing pledged comes into existence. A future action may be ceded (Sande, ch. 5, sec. 6). So may future salary (*Consolidated Finance Co.* v. *Reuvid*, 1912, T.P.D. 1019). See also *Brice* v. *Bannister* (3 Q.B.D. 569).

Voet (20, 1, 17), says: "Hypothec has this effect, that the creditor may discuss the debts due to his own debtor, without any cession of action." The respondents may rely on this passage, but I submit Voet is wrong. Sande (*Dec. Frisiae*, 3, 12, defin. 24), on the contrary, says a cession is necessary. In *Hanau and Wicke* v. *Standard Bank* (4 S.A.R. 130), the Court agreed with Sande, and differed from Voet.

As to the contention that we knew of respondent's prior bond, they may rely on *Coaton* v. *Alexander* (1879, Buch. 17); the principle, however, there laid down has no application, as there had been delivery to the prior pledgee.

[DE VILLIERS, J.P.: Does not the principle of knowledge apply?]

I submit not. Voet (20, 4, 8), is inconsistent with the doctrine that notice can take away our rights.

R. Feetham (with him *L. Blackwell*), for the respondents: Our pledge of the book debts was complete without the necessity of our giving notice to the debtors, and therefore we are preferent to the applicants (Voet 20, 1, 17; *Morkel* v. *Holm*, 2 S.C. 57; *Pick* v. *Neylan's Trustee*, 1910, C.P.D. 100; 20 C.T.R. 475; *Greyling* v. *V. D. Heever's Trustees*, 24 S.C. 414). Voet is further supported by *Mackenzie* v. *Mutual Life Insurance Company of New York* (1906, T.H. 116); Burge (vol. 3, p. 347); Sande (ch. 2, secs. 9 and 10) and Groenewegen, (*Ad. cod.* 8, 42, 3). A cedent cannot derogate from his grant; Voet (18, 4, 15, 16); Sande (ch. 12, secs. 1-5); and *Rothschild* v. *Lowndes* (1908, T.S. 493). The cession of an incorporeal right is complete without delivery (*Jacobsohn's Trustee* v. *Standard Bank*, 16, S.C. 201).

On the question of applicant's knowledge of our prior bond. If ours was a general bond, then we are only entitled to preference on insolvency; if a special bond, not followed by delivery, applicants

obtain no greater right than we (Maasdorp, vol. 2, p. 270; *Coaton* v. *Alexander*, 1879, Buch. 17; *Meyer* v. *Botha & Others*, 1, S.A.R. 47).

Tindall, in reply: Respondents did nothing in terms of their bond to effectually make a cession; "pledge" is not equivalent to "cession." We have a pledge completed in every sense, and therefore are in the better position. *Jacobsohn's* case is in conflict with *Mackenzie's* case; see Pothier (*Vente*, sec. 558).

Cur. adv. vult.

Postea (December 28, 1914).

DE VILLIERS, J.P.: This application involves a question of preference between the applicant and the second respondent in the insolvent estate of one Yull of which the first respondent is the trustee. The estate of Yull, who was carrying on an iron foundry at Turffontein was provisionally sequestrated on the 12th and finally on the 18th June last. As far back as 11th June, 1908, Yull passed a notarial bond (duly registered) in favour of the Building Society for the sum of £1,000, pledging *inter alia*, his bookdebts to the Society and containing the general clause. This bond falls to be construed in the present application. On 22nd March, 1912, Yull passed a notarial bond, also duly registered, for £2,500 in favour of the bank pledging, *inter alia* the outstanding debts, present as well as future, and authorising the bank to collect them. Purporting to act by virtue of this bond, the bank on 3rd June, 1914, caused a notice to be sent to certain debtors of the insolvent telling them that the amount of their indebtedness to Yull had been ceded to the bank, and warning them to pay to the bank. It is only in respect of moneys collected from debtors to whom the bank had given such notice that the present application is brought. The Building Society, it must be stated, gave notice on the 9th June to the debtors warning them against making any payment to the bank as the society claimed to be entitled to any moneys due to Yull by virtue of its prior bond. The trustee has collected book-debts to an amount of £1,893 11s. 9d. The bank proved in the estate for £2,499, while the building society proved for £1,944. After paying the landlord £50 for rent, the balance for distribution amounted to £1,621 9s. 6d. The trustee in his distribution account awarded the society a preference in respect of the book-debts and the proceeds of certain movables and paid the balance

of its claim amounting to £925 8s. in full, on the ground that the bond of 1908 gave the society a first preference on the assets realised. To the bank he awarded the balance of the £1,621 9s. 6d., viz., an amount of £696 1s. 6d. by virtue of its bond of March, 1912. The bank in its petition claims the balance of the bookdebts collected: £1,197 10s. 3d. Another amount of £241 10s., proceeds of certain other movables said to have been specially pledged were also claimed by the bank, but this claim has been abandoned. The only question, therefore, is whether the bank is entitled to a preference in respect of the bookdebts which the trustee has collected after insolvency. This depends upon the construction of the two notarial bonds. It may be remarked that all the bookdebts, except as regards the sum of £4 15s. 9d. came into existence after the passing of the bond to the bank. It was urged on behalf of the society that future as well as present bookdebts were included in the pledge, and that there was a sufficient cession, express or implied, of all the bookdebts to give the society a preference. For the bank, on the other hand, it was contended that the bookdebts pledged to the society were only the bookdebts in existence at the time when the bond was passed, and that therefore the society cannot claim a preference as these debts came into existence after that date. If, however, the bookdebts include future bookdebts, then it was said there was no proper cession, and, in any event, as the bank had given notice first to the debtors, it was entitled to a preference on the authority of Sande (*Cession of Actions*, ch. 12 par. 8). It was further argued that not only were the present and future bookdebts ceded to it but the bank by the bond had obtained an irrevocable power *in rem suam* to collect and sue for the debts; and it therefore had a proper cession which the society had not.

It is unnecessary for me to deal with all these arguments, for I have come to the conclusion that the bank obtained a cession of bookdebts present as well as future, while the society only obtained a pledge of bookdebts in existence at the time the bond was passed. By clause 2 of his bond to the society, Yull declares "to pledge and hypothecate all the machinery, plant, appliances, tools, bookdebts, furniture, fixtures, fittings, goods and effects of every kind and nature whatsoever now on the said premises or which may hereafter be placed thereon belonging to the mortgagor." In my opinion bookdebts here must be confined to the bookdebts in existence when the bond was passed. For

bookdebts without more would not comprise future bookdebts, and the words: "which may hereafter be placed thereon" can only apply to corporeals. It was argued on behalf of the society that while the words are more appropriate to corporeals, they may be taken to refer to the bookdebts as well. But the reply to this appears to me that not only are the words only appropriate to corporeals, but they are quite inappropriate to the bookdebts and cannot be taken to apply to them.

We may suspect that it was the intention to include future bookdebts in the pledge, but if so, the parties failed to embody this intention in the bond. It is for the person who exacts a pledge from another to make it quite clear what is covered by the pledge, and in the present case the society has failed to employ language which covers future bookdebts. But even if the language on its proper construction includes future bookdebts there was no cession of the bookdebts, present or future to the society. Simply to pledge a bookdebt does not without more imply its cession, for the pledge may be made without the intention to cede, in the same way as movables may be pledged, and were pledged in the present instance, without delivery. And if the society did not obtain a cession of the bookdebts, the subsequent special pledge of the bookdebts to the bank if accompanied by a cession thereof would give the bank a preference unless indeed the bank obtained the pledge with knowledge of the society's prior rights (*Coaton* v. *Alexander*, 1879, Buch. 17). Now with such an ambiguous bond before it, it cannot be said that the bank knew or ought to have known that the future bookdebts had been pledged to the society, and the latter would therefore only have itself to blame for losing any rights of preference it might otherwise have had.

The bank, on the other hand, obtained a special pledge not only of present, but also of future bookdebts. In addition special power and authority was granted "by the debtor to the creditor or legal holder for the time being of this bond from time to time to collect, get in and receive all such outstanding debts, . . . and to give and grant for and on behalf of the said debtor the necessary receipts and discharges for the payment of such amounts."

Now a power to collect a debt does not necessarily imply a power to sue. But here the power to collect was given to the pledgee, and it follows, I think, that it was a power irrevocable and *in rem suam*, which implied a power to sue. A bookdebt being a right of action, the pledgor by giving the pledgee the right to collect it in

fulfilment of his agreement of pledge must be taken to have intended to cede his right of action to the pledgee, or to whomsoever the pledgee may have ceded the bond to. By our law no particular form of words is necessary to constitute a cession, provided the intention to cede be clear (*Wright* v. *Colonial Government*, 8 S.C. 260). Neither the word "cession," nor the words "*procuratio in rem suam*" are used, but in my opinion, the language employed sufficiently manifests an intention on the part of Yull to divest himself of the right to collect these debts, and to cede his right to the pledgee. Apart from the bond, there was no instrument constituting the debt which could be delivered to the pledgee. (*Smuts* v. *Stack* (1828) 1 M. 297, and *Smith* v. *Farelly's Trustee*, 1904, T.S. 949). Under these circumstances it is unnecessary to consider what the exact effect of the notice of the 3rd June was.

And as a special pledge, accompanied by delivery, is preferent to the general clause in a prior bond, the applicant is declared entitled to a preference to the bookdebts collected (except as regards the £4 15s. 9d.), and the trustee is ordered to rank the applicant accordingly.

The society must pay the costs of the application.

Applicant's Attorneys: *B. Alexander & Bros.;* Respondent's Attorneys: *Baumann & Gilfillan.*

[G.W.]