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carry on the Government of the country, the Government would have to come for the deficiency to Parliament, and the answer would be, "We refuse to grant it unless you expend the sums reserved by the schedules to the Appropriation Ordinance in the manner indicated by us in the estimates of expenditure." It is impossible therefore to hold that there is any duty resting on the Government to make provision for the payment of the annual allowance of £400 to the plaintiff, and in the absence of such a duty, the Government cannot be held liable in this case as trustees. The action must therefore fail on this ground also. The judgment of the Court must be for the defendant, but inasmuch as the suit is a friendly one, and the defendant does not press for costs, there will be no order as to costs.

[Plaintiff's Attorneys, FAIRBRIDGE, ARDERNE & SCANLEN.
Defendant's Attorneys, J. & H. REID & NEPHEW.]

EWERS *vs.* THE RESIDENT MAGISTRATE OF OUDTSHOORN AND THE TRUSTEE IN THE INSOLVENT ESTATE OF ROBERTS.

General Bond.—Promissory Note.—Novation.

R. passed in favour of E. a general bond to secure a promissory note for £412, *which had been given by R. to E., the condition of the bond being that if the appearer properly took up the note with interest, costs and charges due thereon, then the bond should be null and void, but otherwise should be and remain in full force and effect. On the date when the note became due, R. being unable to pay it, passed in favour of E. two promissory notes, one for* £200, *and the other for* £212, *and also paid all costs, charges, and interest, due up to that date. On the face of the original note was written "settled by renewal bills,* £200 *due 1st November,* 1879, *and* £200 *due 1st February,* 1880." *Before the latter of these notes became due, and before the former was paid, R. became insolvent, and E. claimed to be allowed to prove the bond on his estate. R.'s trustee objected in the name of several creditors to this proof, on the ground that the promissory note for* £412 *had been*

properly taken up, and that therefore the bond was null and void, and the Resident Magistrate sustained this objection. Held, *on review of Magistrate's decision, that under the circumstances the giving of the two smaller promissory notes did not amount to a proper taking up of the larger note, and that therefore the condition of the bond having been unfulfilled it was still in full force, and E. was entitled to prove it in R.'s insolvent estate.* Held, *also, that there was no novation of the original debt.*

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Ewers *vs.* R. M. of Oudtshoorn and Trustee in Insolvent Estate of Roberts.

This was a motion for a review of a decision of the Resident Magistrate of Oudtshoorn. The facts of the case were as follows:—One Robb being indebted to Ewers in the sum of £412 on a promissory note, passed a general bond in Ewers' favour to secure payment; the condition of the bond was that if the appearer properly took up and redeemed the note with interest, costs and charges due thereon, then the bond should be null and void, but otherwise it should remain in full force and effect. At the due date of the note, Robb being unable to pay, passed two promissory notes for £200 and £212 respectively, and also paid all costs, charges and interest due up to that date. On the face of the original note for £412 was written "Settled by renewal bills, £200 due 1st November, 1879, £200 due 1st February, 1880." Before the latter of these notes became due, and before the former was paid, Robb became insolvent. Ewers claimed to prove the bond in the insolvent estate, but the trustee objected on the ground that the note for £412 had been properly taken up and that the bond was therefore null and void. The Magistrate sustained the objection.

Leonard, for applicant. A novation is not to be presumed unless the intention to effect a novation is clear (*Van der Linden*, Inst. bk. 1, cap. 18, § 2).

Upington, A.G., contra, cited *Burge* (vol. iii., p. 387), and the case of *Cannon* vs. *Ford* (1 *Menzies*, p. 95).

Leonard, in reply. An extension of time does not discharge a security (*Grot.*, Introd. bk. 3, cap. 43).

Cur. adv. vult.

Postea (Feb. 12th),—

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Ewers *vs.* R. M. of Oudtshoorn and Trustee in Insolvent Estate of Roberts.

DE VILLIERS, C.J.:—This is an application for a review of the decision of the Resident Magistrate of Oudtshoorn in a case arising in insolvency. The applicant proved upon the insolvent estate a certain bond which had been passed in his favour by the insolvent on the 27th of May, 1879, to secure a promissory note for the sum of £412, which had been made by the insolvent in his favour. The condition of the bond was, that if the appearer properly took up the note with interest, costs and charges due thereon, then the bond should be null and void, but otherwise it should be and remain in full force and effect. The note fell due on the 1st of October, 1879, and on that day the insolvent passed two promissory notes in favour of the applicant, together making up the full amount of £412, the amount of the original note. At the time when these renewals were passed, all costs, charges and interest due up to that date were paid by the insolvent, and on the face of the original note the following words were written: "Settled by renewal bills, £200 due 1st of November, 1879, and £200 due 1st of February, 1880." The question which arises in this case is a very important one, namely, whether the giving of these two promissory notes in renewal of the original note amounts to an extinguishment of the original note given in favour of the applicant; in other words, whether the condition of the bond has been fulfilled, because it is perfectly clear that if the condition of the bond has been fulfilled, the applicant is not entitled to prove upon the insolvent estate. The words are "If the appearer properly takes up and redeems the promissory note," and the question is whether he has so taken up and redeemed the promissory note. In my opinion he has not, and consequently the bond remains in force.

But quite independently of the terms of the bond I am of opinion that the debt, to secure which the bond was passed, was not extinguished by the renewal notes, and that therefore the security was not extinguished. The rules for deciding whether or not a debt has been extinguished by novation have from time to time undergone considerable alteration, but they may now be considered as fairly settled. According to *Justinian* (Inst. 3, 29, 3): "The ancients were of opinion that the novation only took place when the second obligation was entered into for the purpose of making the novation, and doubts consequently arose as to the

existence of this intention, and different presumptions were introduced by those who treated the subject according to the different cases they had to settle. In consequence our Constitution was published, in which it was clearly decided that novation shall only take place when the contracting parties have expressly declared that their object in making the new contract is to extinguish the old one." The Constitution referred to is too long to quote, but one sentence in it sums up the whole: *Generaliter definimus voluntate solum esse, non lege novandum. Groenewegen,* in his comments upon the passage in the *Institute,* says that he concurs with *Grotius* in the view that the rule there laid down was still in force in Holland. But *Grotius* (Introd. 3, 43, 4) does not go quite so far, for he says: "When doubts are entertained as to the intentions of the contracting parties, then with us it is considered that novation does not take place, as, for instance, when the time is prolonged, for in such case neither the securities nor the pledges are considered as released thereby." From this I do not infer that, in his opinion, novation could not take place unless the contracting parties had expressly so declared. *Voet* treats the question very fully (46, 2, 3), and comes to the conclusion that where it is perfectly clear that the parties intended to retire from the first contract and transfer its obligation to a second contract, there is an implied intention to effect a novation, which dispenses with the necessity of an express declaration to that effect. This appears to me a very reasonable view, and is certainly that which I have always understood this Court to hold. It is quite consistent with this view that, as *Van der Keessel* says (*Thes.* 836): "A prorogation or postponement of the day of payment is not a novation, and therefore does not discharge a surety. It is otherwise as regards the prorogation of an obligation contracted for a particular time." The result of the authorities is that the question is one of intention and that, in the absence of any express declaration of the parties, the intention to effect a novation cannot be held to exist except by way of necessary inference from all the circumstances of the case. Now the mere fact that a debtor has given his own promissory note to his creditor for the amount of the debt certainly does not lead to the necessary inference that the parties intended to substitute the note for the debt. What they really intended was that the creditor should

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have a liquid proof of his debt which he can negotiate, if he sees fit, and upon which he can sue the debtor at maturity, and that until maturity the creditor's claim should be suspended, but that upon dishonour of the note, after maturity, the creditor's claim should revive in respect of the original debt. It would make no difference if the original debt were a liquid one, such as a promissory note, instead of an illiquid one, unless the creditor so dealt with the original promissory note as to make it perfectly clear that he relinquished all right of suing on it. For instance, if, having no security for the original note, he hands it over unconditionally to the debtor, the necessary presumption would be that he accepted the renewal note in substitution for and in satisfaction of the original. But if, as in the present case, he, with the debtor's consent, retains a bond given to him by the debtor to secure the original note and writes on that note, not the word "settled" or "paid" only, but "settled by two promissory notes," the inference, in my opinion, would be that the original debt was not intended to be extinguished unless the renewal notes were paid. It is not clear, in the present case, whether the applicant retained the original note or handed it back to the insolvent, but the point is not material, because the proved facts, especially the retention of the bond, with the consent of the insolvent, sufficiently rebut any presumption that the parties intended to extinguish the debt secured by the bond. *Pothier*, in his book on Bills of Exchange (c. 6, § 28), discusses the question whether novation takes place where A, the drawee of a bill, drawn by B in favour of C, instead of accepting it gives C, the payee, another bill at a shorter date, drawn by A upon D in favour of C, and C, after writing on the original bill "settled by bill on D," gives it to A. After stating that *Scacchius* was of opinion that there was a novation, so that C could not sue B upon dishonour of both bills, *Pothier* gives his own opinion against the novation. "The intention to create a novation," thus he reasons, "must be clear and not founded upon mere presumption. Such intention would have been clear if a simple receipt had been given, but C by expressly stating on the original bill that the settlement was by bill drawn upon D, clearly showed that he had no intention to discharge the original bill unless the second bill were paid," and he adds that there would have been even

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less reason for doubt if C had kept the first bill until the second was paid. The case is not in all respects similar to the present, but *Pothier's* reasoning fully supports the conclusion at which we have arrived. The appeal must be allowed, with costs, against the estate, but certainly not against the Magistrate, who acted *bonâ fide* and in his judicial capacity, and ought not to have been called upon to show cause why he should not pay the applicant's costs.

DWYER and STOCKENSTRÖM, JJ., concurred.

[Applicant's Attorney, C. H. VAN ZYL.]

ZEEDERBERG & Co. *vs.* BOSMAN & Co.

Broker.—General Agent.

B. & Co. employed J. & Co., brokers, with whom they had previously had similar transactions, to sell meal for them, and instructed J. & Co. not to sell more than 1000 *sacks, and not to take less than* 27*s. a sack. J. & Co. sold to Z. & Co.* 1500 *sacks at* 26*s.* 6*d. a sack. B. & Co. refused to recognise the sale.* Held, *in an action for damages for breach of contract, by Z. & Co. against B. & Co., that, as J. & Co. had exceeded their instructions, and as the fact that they had been employed by B. & Co. in several special transactions did not constitute them the general agents of the latter, B. & Co. were entitled to repudiate the agreement entered into by J. & Co. and Z. & Co.*

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Zeederberg & Co. *vs.* Bosma & Co.

The facts of the case were as follows:—Bosman & Co., of Stellenbosch, employed Jansen & Co., brokers in Cape Town, with whom they had previously had similar transactions, to sell meal for them. Jansen & Co. sold to Zeederberg & Co., of Cape Town, 1500 sacks of meal at 26*s.* 6*d.* per sack. Bosman & Co. refused to recognise the sale, alleging that they had instructed Jansen & Co. not to sell more than 1000 sacks, and not to take a less price than 27*s.* a sack. Thereupon Zeederberg sued Bosman & Co. for damages for non-delivery of the 1500 sacks. The points to be decided in the case were, what instructions were given by defendants to