1915. *August* 26; *September* 6. GREGOROWSKI, J.

Gaming and Wagering.—Interdict.—Proceeds of bookmaker's right.—Adverse claims.—Rules of Racing Club.—Payment of betting debts.—Legality.—Act 37 *of* 1909.

R, a bookmaker, had by agreement with respondent club the right (known as a bookmaker's right) to carry on his business at all race meetings held by the club subject to the club's right to sell the right and devote the proceeds under its rules to the payment of *inter alia* his betting engagements made at such race meetings, with the public, in the event of his defaulting. R, in May, made a written cession of his right to applicant in security of a debt, notice of cession being given to the club on the 5th August. On R defaulting the club, relying on its agreement and alternatively on a prior verbal cession, sold the right on the 16th August and was about to devote the proceeds to meet R's bets.

In an application for confirmation of a rule restraining the club from parting with such proceeds, *Held*, discharging the rule, that the debts which the club proposed to pay were not in view of Act 37 of 1909 *contra bonos mores*, but entitled to such recognition as the law gave to a *naturalis obligatio;* that whether or not there had been a prior cession to the club, applicant could have no greater right to the proceeds than R; that R's right thereto was subject to the club's rules, and that therefore applicant could only execute upon any balance left after compliance with the rules.

S.A. Tattersalls v. *Myers Brothers* (1905, T.S. 769), followed: *Dempers* v. *O'Connor and S.A. Tattersalls* (1903, T.H. 520) disapproved.

Return day of a rule *nisi* calling upon the club to show cause why it should not be restrained from parting with the proceeds of a bookmaker's right belonging to the second respondent. The facts appear from the judgment.

J. P. van Hoytema, for the applicant, moved for confirmation of the rule.

R. MacWilliam, for the first respondent: Applicant's case rests on a cession, and alternatively on the claim that in any event an interdict should be granted to prevent money being paid out for gambling debts. It is submitted that applicant has shown no clear right, first, because there has not been delivery of the instrument containing the right. See *Smith* v. *Farrelly's Trustees* (1904, T.S. 949); *Kessler* v. *Krogman* (1908, T.S. 296). Secondly, the right is not capable of cession, as being in its nature an essentially personal right; see *Eastern Rand Exploration Company* v. *Nel* (1903, T.S. 42) and the club's rules. Thirdly, the club has a prior cession.

As to the legality of meeting the bets in question; see Act 37 of 1909, sections 3, 5 and 7; *Dodd* v. *Hadley* (1905, T.S. 439); *Blackett* v. *S.A. Turf Club* (26 S.C. 45 at p. 51).

Van Hoytema, in reply: The cession to us was not in breach of the club's rules; but simply a right entitling us to get payment of the proceeds.

On the question of legality see section 10 of Act 37 of 1909; *Dempers* v. *O'Connor and S. A. Tattersalls* (1903, T.H. 520). Assisting the club would be enforcing an unenforceable agreement. We hold subject only to rights which are unenforceable, and therefore we must prevail.

The pledge to us without delivery is perfectly good *inter partes,* and if we can compel Roberts to deliver we have a clear right. On the facts, the club does not rely on a prior pledge but claims under the agreement; in any event it could not act on the pledge without coming to Court.

The second respondent did not appear.

Cur. adv. vult.

Postea (September 6.)

GREGOROWSKI, J.: On the 16th August, 1915, a rule *nisi* was granted in this matter calling upon Samuel Roberts and the Auckland Park Sporting Club Limited, to show cause, on the 26th of August, why the club should not be interdicted from parting with the proceeds of the sale of the bookmaker's right of the respondent, Samuel Roberts, pending action by the applicant against the said Roberts and one, W. P. Skinner, and the Auckland Park Sporting Club Limited, for the recovery of certain money due to the applicant by Roberts and Skinner and why the respondents should not pay the costs.

On the 25th March, 1915, Roberts and Skinner made a promissory note for £165 payable on the 24th April, 1915, bearing interest at the rate of £15 per month in favour of the applicant. On this promissory note the respondents still owe £150 and £31 interest.

When the note fell due on the 24th April, 1915, Roberts gave applicant a document ceding and transferring all his right, title and interest in his bookmaker's right registered with the Auckland Park Sporting Club Limited, as security for the payment of the balance due on the note, the cession not to become operative until the 23rd

May, 1915. Of this cession, notice was given to the club on the 5th August, 1915.

The bookmaker's right referred to was an agreement in writing by which the club admitted Roberts to the right and privilege of carrying on the business of a turf accountant or bookmaker at all race meetings held by the club on their racecourse at Auckland Park on certain conditions which are stated in the agreement.

Roberts became a defaulter, and on the 16th August, 1915, the directors of the club, in terms of their agreement, put up the bookmaker's right of Roberts to public auction, and sold the same for £225 from which price has to be deducted the auctioneer's commission, leaving a sum of something over £200 at the disposal of the club. This sum the applicant wishes to interdict and render available when he has got judgment against Roberts.

On the return day of the rule, Roberts was not represented though the rule had been served on him, but the club put in an appearance, and according to the affidavit of Mr. Plunkett, the chairman and managing director of the club, it was alleged that the agreement with Roberts was in the possession of the club and had been pledged and ceded to the club by Roberts as security for his obligations to the club and its members and other persons attending the race meetings with whom Roberts had made bets in his capacity as bookmaker on the course. The club had possession of the agreement, but there was no written pledge or cession, but it was alleged that the pledge or cession was verbal. It was admitted that Roberts had failed in his engagements and that various persons, members of the club and others had notified the club that Roberts had not paid his bets. A large number of claims of this nature amounting to £325 had been lodged with the club and had been investigated by the committee appointed by the directors under the rules and regulations of the club and had been substantiated, and the club claimed the right to pay these claims *pro rata* out of the proceeds realised by the sale of Roberts bookmaker's rights under the agreement, in priority to any debts that might be owing to the applicant or any other creditors of Roberts. It is not disputed that these claims arise out of bets made on the racecourse in connection with races run on the course and permissible in terms of Act 37 of 1909. Independently of the alleged cession, the club claims the right to sell the rights of Roberts and dispose of the proceeds as prescribed by the terms of the agreement. Another defence raised by the club was that on the

13th August, 1915, a notice was served on the club by the messenger of the resident magistrate's court of Johannesburg attaching "all the right, title and interest of Roberts in certain bookmaker's rights in the Auckland Park Sporting Club Limited" in execution of a judgment obtained by one, G. F. Meyers against Roberts, for the sum of £112 18s. 1d. less £30 paid on account. It is not necessary to say anything further about this defence, as Mr. Meyers, who was in Court, was not prepared to support his claim, and it is obvious, in view of the decision in *Connolly* v. *Ferguson* (1909, T.S. 195), that the messenger of the magistrate's court had no right to attach Roberts' rights under this agreement in execution of a judgment of the magistrate's court.

In terms of the agreement by which Roberts obtained the bookmaker's right from the club, it was provided that if he proved a defaulter the club could sell his rights and with the proceeds liquidate his debts to the club and to the members of the club and to persons who had made bets with him on the course. It was certainly a very proper thing for the club to make a stipulation of this kind, and there is nothing illegal in such a provision. The club put it in the power of Roberts to make these bets on the course, and the club could not be indifferent as to whether these bets were paid or not. Under Act 37 of 1909 all bets are illegal and punishable except bets made on the course and with reference to the races then and there run, and it seems to me that such bets, though not legally enforceable by action, cannot be regarded after this express sanction by the legislature as *contra bonos mores*, or as lacking the recognition given by our law to *naturales obligationes*.

Mr. *van Hoytema*, who appeared for the applicant, relied on the decision in *Dempers* v. *O'Connor and the S.A. Tattersalls' Subscription Room* (1903, T.H. 520), which appears to be on all fours with the present case. When the case was cited it seemed to be strange that a creditor of Roberts should have more rights than Roberts himself would have. Under the contract itself it was provided that if Roberts did not fulfil the engagements incurred by him under the powers given him by the club, the club could step in, sell the agreement and use the proceeds to meet Roberts' obligations. If the club, acting under the contract, sold Roberts' rights and had the proceeds in its possession, it is hard to see how Roberts could dispossess the club, and

if Roberts could not do so, it is still harder to see how Roberts' creditors could be more effective. Roberts would be bound by his contract and would have no more right as against the club than the contract gave him, and the proceeds of the sale would be subject to the terms of the contract. The conduct of the club in selling the right and allocating the proceeds would be strictly in terms of the contract by which both parties were bound.

Mr. *Van Hoytema* was not aware, and it was not brought to the notice of the Court that the decision in *Dempers* v. *O'Connor and the S.A. Tattersalls' Subscription Rooms* had been overruled in the case of the *South African Tattersalls' Subscription Rooms* v. *Meyers Brothers* (1905, T.S. 769), in which it was laid down that the defaulting bookmaker's right to the proceeds of the sale was subject to the provisions of the rules of the association, and that a judgment creditor could only execute on the balance, if any due, to such member under the rules.

Under these circumstances the rule must be discharged, with costs.

Applicant's Attorneys: *Zwarenstein and Heimann;* Respondent's Attorneys: *Baumann and Gilfillan.*

[G. H.]