(2) KANTOR v. HOGAN.

1915. *October* 28; *November* 1. MASON, J.

Execution.—Attachment of incorporeals.—Documents imposing obligations upon debtor.—Assignability.—Jurisdiction of R.M. Court.—Proc. 21 *of* 1902, *sec.* 14, *and R.M. Court Rules* 40 *to* 45.—*Practice.*

The messenger has no jurisdiction to attach in execution of a judgment of the R.M. Court rights of a judgment debtor conferred and represented by documents which also impose obligations assignable only by consent of the obligees.

Attachment therefore of a judgment debtor's rights under a hire-purchase agreement and a lease set aside; *Connolly* v. *Ferguson* (1909, T.S. 195) criticised and applied.

An application to set aside such an attachment should be made in the R.M. Court; *Israel* v. *Messenger, Lichtenburg* (1910, T.S. 648) distinguished.

To levy execution under a R.M. Court judgment upon incorporeal rights of this nature, the proper procedure is to have such judgment first made a judgment of this Court; *Gunningham* v. *James* (1903, T.H. 491) disapproved. This being done, the Court authorised the Sheriff to sell the judgment debtor's rights under the documents aforesaid, subject to the consent of the respective obligees.

(1) Application by a judgment debtor to have set aside an attachment under a resident magistrate's court judgment of the debtor's rights in, and represented by, certain hire-purchase agreement and certain lease.

(2) Application by the judgment creditor to have such resident magistrate's Court judgment made a judgment of this Court.

The facts appear from the judgment.

L. Greenberg, for Hogan: The Messenger has only jurisdiction to attach movable corporeals, see *Connolly* v. *Ferguson* (1909, T.S., p. 197, *per* INNES, C.J.). On the counter-petition, the Court has no power to confer powers on the messenger which the law has not given him.

[MASON, J.: The Court can make a resident magistrate's Court judgment a judgment of this Court.]

The judgment creditor must first exhaust his remedies in the resident magistrate's Court. This is comparable with the procedure for process in aid, and with garnishee proceedings in which the Court always requires a *nulla bona* return.

J. P. van Hoytema, for the Messenger, and for Kantor: In *Connolly's* case it was sought to attach wages due to the debtor. Proc. 21 of 1902, sec. 14 is very wide. "Movable property" there includes both corporeal and incorporeal rights. See also the R.M. Court Rules 42, 43, 44. If the incorporeal sought to be attached is contained in a document which can be attached, *Connolly's* case does not apply. See further resident magistrate's Court Rule 45, and *Amod* v. *The Messenger* (1909, T.S. 13). The lease here is comparable with the bond, see *Connolly's* case, p. 199, *per* INNES, C.J. See also *Ex parte Robson and Holton* (1908, T.S. 199); *Reinhardt* v. *Rieker and David* (1905, T.S. 179, at p. 186). As to the counter-petition, to make the judgment one of this Court is in accordance with the practice. As to costs, the application should have been made in the resident magistrate's Court, see *Van Straten* v. *Van Vuren* (1907, T.S. 521); *Olivier* v. *Haarhof and Co.* (1906, T.S. 497). The costs to be set off against the judgment.

Greenberg, in reply: As to *Amod's* case the books had a value in themselves. The Court is bound by *Connolly's* case. A *spes* cannot be attached, see *S.A. Securities* v. *Douglas and Others* (1910, T.H. 217).

[MASON, J.: There was no right in existence in that case.]

There is none here.

As to costs, there is nothing here directly giving the resident magistrate's Court jurisdiction, see *Israel* v. *Messenger, Lichtenburg* (1910, T.S. 698). *Van Straten's* case was one for civil imprisonment; and see *Amod's* case.

Cur. adv. vult.

Postea (November 1).

MASON, J.: Upon the 28th September, 1915, Kantor obtained a judgment against Mrs. Hogan, in the resident magistrate's Court, for £40 10s. 4d., and costs (£4 13s. 6d.) Under the writ of execution the messenger attached all Mrs. Hogan's right, title, and interest in (*a*) a hire-purchase agreement between a Mrs. Furby and herself, and (*b*) in a lease between one Beresford and Mrs. Furby, and ceded by the latter to Mrs. Hogan.

Under the hire-purchase agreement which was in the usual form, Mrs. Hogan was given the possession of certain furniture and effects contained in the Commercial Tea Rooms, the ownership remaining with Mrs. Furby until payment of the last instalment of

the purchase-price. Under the lease, the premises known as the Commercial Tea rooms, were let to Mrs. Furby for a period of two years, and it was provided, *inter alia*, that the lessee was not to assign or sub-let the premises without the lessor's written consent.

The attachment was carried into effect by the seizure of the documents containing these two agreements.

Mrs. Hogan now applies to have this atachment set aside on the ground that the messenger has no jurisdiction to attach incorporeal rights even though represented by the documents. For that contention the case of *Connolly* v. *Ferguson* (1909, T.S. 195), is relied on, where a decision of the magistrate declining to attach a debt in the shape of wages due by a third party to the judgment debtor at the instance of a judgment creditor was upheld on appeal on the ground that sec. 14 of Proc. 21 of 1902 did not cover incorporeal debts. The two judgments there delivered though not based on quite the same reasoning agree substantially in this that the messenger is entitled only to levy upon incorporeals which could be seized and followed by the *deurwaarder*, and it was definitely held that the reference to movable property in the resident magistrate's Court did not cover incorporeal movables. I have carefully considered that judgment, and must confess to great difficulty in following some of the reasoning. It seems to me that when sec. 14 of Proc. 21 of 1902 enacted execution first against movables, and if there were not movables enough to satisfy the judgment, then against the immovable property, that the law intended that all movables of whatever description were to be levied upon. It is true that the resident magistrate's Court Rules (40 to 44), only contemplate corporeal property, but the statute seems to have intended a wider process. It is curious, moreover, that the law should be held to contain no power to attach incorporeals which may be less valuable than corporeal movables such as jewels, which can undoubtedly be attached. As for Rule 45 I hardly think that when that was framed the only documents it contemplated were documents of antiquarian interest. But in face of the reasoning of the two judgments referred to, I have come, though with hesitation, to the conclusion that I am not entitled to differ. The judgment of INNES, C.J., however, guards itself from including bonds, scrip, and assets of that kind which can be pointed out, and which are negotiable in the sense that all the rights of a holder can be ceded by delivery without reference to the debtor under the document.

The documents attached here are not within that description, for in the case of the hire-purchase agreement the ownership of the furniture remains in the lessor until complete payment, and in the case of the lease considerable obligations are cast upon the lessee;—thus neither document is freely assignable, so that a 3rd party can at once step into the shoes of the obligee. Imposing obligations as these documents do upon their owner, they do not fall within the reservation laid down by INNES, C.J., in *Connolly's* case. I feel bound, therefore, to set aside the attachment as being beyond the messenger's powers.

Concurrently with this, a second application is made by Kantor to have the resident magistrate's Court judgment made a judgment of this Court. It follows from my decision that this is a remedy to which Kantor is entitled.

In *Gunningham* v. *James* (1903, T.H. 491), SOLOMON, J., attached funds belonging to a judgment debtor in the hands of a 3rd party in execution of a resident magistrate's Court judgment without judgment being first obtained in this Court on the lower Court judgment.

It seems to me, in view of *Connolly's* case, that that was not the right procedure. As the resident magistrate's Court has no jurisdiction to make an attachment of this kind, it is impossible for the Courts to give it that right. The proper procedure, therefore, was to make the resident magistrate's judgment a judgment of this Court.

I am asked further to allow the Sheriff to attach and sell the rights conferred by these documents.

The difficulty is to confer power to sell non-assignable rights in the absence of machinery in the form of a receiver as there is in England, but I can authorise the sale subject in the one case to the consent of the owner of the furniture, and in the other to that of the lessor.

As to costs, Mrs. Hogan is entitled to the costs of setting aside the attachment, but the application should have been made in the resident magistrate's Court. I have been referred to *Israel's* case (*supra*) as an authority to the contrary, but there the 3rd party was held not entitled to proceed by way of interpleader, and there is nothing to show that the case was otherwise within the resident magistrate's jurisdiction.

In *Connolly's* case the whole proceedings were in the resident magistrate's Court.

Mrs. Hogan's application is therefore granted with resident magistrate's Court costs against Kantor, he to be entitled to set them off against his judgment.

The resident magistrate's Court judgment is made a judgment of this Court without costs (as agreed at the hearing). As to execution against the lease and the hire-purchase agreement the Sheriff is ordered to attach and sell the former upon prior consent of the lessor, and the latter upon prior consent of the owner of the furniture, or otherwise subject to the purchaser at the sale paying the full balance of the purchase-price under the hire-purchase agreement. The judgment creditor is entitled to the costs of execution and sale by the Sheriff.

Attorney for Mrs. Hogan: *G. O. Veit*; Attorneys for the Messenger and Kantor: *Marks, Saltman & Gluckmann.*

[G. H.].

JEWISH PUBLISHING SYNDICATE v. POLSKY.

1915. *November* 26. WARD, J.

Registration of businesses.—Act No. 36 *of* 1909, *sec.* 4 (1).—*Advertisement of transfer or abandonment.—Meaning of "newspaper."*

Section 4 (1) of Act 36 of 1909 provides that notice of a proposed transfer, sale or abandonment of a business shall be advertised in three consecutive ordinary issues of the *Gazette* and "once in each week for three consecutive weeks in a newspaper circulating in every district wherein the business premises are situate."

Held, that the Legislature did not intend to restrict the meaning of the word "newspaper" any further than the sub-section indicates, and that, consequently, a newspaper printed in any language is a newspaper within the meaning of the sub-section.

Semble, where a debtor desiring to transfer his business purposely advertises his intention in a newspaper of such circulation and printed in such a language that his creditors are not likely to see the advertisements, he may be held to have failed to comply with the provisions of the sub-section.

Special case stated under Rule 46.

Plaintiff was the owner of a weekly newspaper printed in the Yiddish language, and published weekly in Johannesburg, where