chose, and it was the deliberate act of his own free will to employ him as driver. He could direct him to do one class of work one day and another class of work another day, and if that is so then it seems to me that at the time in question he was in the employment of George, and under his control.

I therefore come to the conclusion that at the time of the accident Franz, although he was in the general employ of Angehrn and Piel, was not acting as the servant of Angehrn and Piel but of George.

Roos, for the plaintiff: The plaintiff should have costs until discovery of the letter of December, 1912, disclosing the contract between the defendants and George. To the letter of demand there was merely a denial of liability.

Barry, for the defendants: The plaintiff has not been prejudiced. Costs should follow the event. Besides the plea discloses the special defence.

DE VILLIERS, J.P.: In this case the Court yesterday reserved the question of costs. Upon consideration we have come to the conclusion that the defendant will have to pay the costs of the action up to the time the plea was filed and that after that, seeing that the plaintiff has failed, the plaintiff is liable for costs.

BRISTOWE, J.: I agree.

Attorney for Plaintiff: *A. Kantor*; Attorney for Defendants: *J. MacIntosh.*

[G. v. P.]

OPPERMAN v. DE BEER.

1915. *March* 23, 24. WESSELS and GREGOROWSKI, JJ.

Cession.— Bond.— Notice not given to mortgagor. — Compromise between mortgagor and mortgagee after cession.

A mortgagee had ceded a bond to defendant as security for an advance of the amount of the bond. No notice of the cession was given to the mortgagor. In an action by the mortgagor for cancellation of the bond he relied on an agreement entered into after the cession between himself and the mortgagee in terms whereof the mortgagee agreed that he sold certain shares on behalf of

the plaintiff and, that after giving the latter credit for the amount so realized, the balance due under the bond was only an amount which the plaintiff tendered against cancellation, *Held*, that the plaintiff could not rely on the said agreement as against the defendant.

Action for cancellation of a bond.

Plaintiff alleged in his declaration that on March 30, 1912, he passed a bond over his farm Goedgelegen No. 11 Heidelberg, for £750 in favour of one Kearney. That the bond was payable on March 4th, 1913, and that there was an agreement between himself and Kearney to renew it for another year. That in January, 1914, it was agreed between him and Kearney that certain 500 shares in the Van Ryn Deep, Ltd., which Kearney held on behalf of the plaintiff, should be sold, and that the amount of the purchase price should be applied towards the reduction of the bond. That in accordance with this agreement these 500 shares were actually sold, some of them at 44s. a share, and others at 42s. 6d. a share, and that if the price of the shares were deducted from the amount of the bond it would leave a balance of £203 10s. That after this arrangement had been made between himself and Kearney, he on the 4th May, 1914, became aware of the fact that the bond had been ceded by Kearney to the defendant; that he got no notice, either from Kearney or the defendant of this cession, and that therefore the cession could not alter the arrangement between himself and Kearney by which so much of the bond was wiped out that only a balance of £203 10s. remained due. He therefore claimed a cancellation of the bond against a payment by him of the sum of £203 10s.

The defendant practically admitted that he did not give any notice of the cession of the bond, but he denied that there was any payment of the bond or any compensation, and the question to decide was which of these two contentions was the correct one. The defendant counterclaimed for payment of the sum of £750 with interest and costs, and for an order declaring executable the property specially hypothecated.

G. T. Morice, K.C. (with him *W. Pierson*), for the plaintiff: Plaintiff is entitled to set off the amount that Kearney said he held on his behalf. See *Voet* (18, 4, 13, 15). The declaration states that there was an agreed balance, and Kearney was bound by that agreed balance, and could not recover more than £203. See *Eaton* v. *Registrar of Deeds* (7 S.C. 240, at p. 254).

B. A. Tindall, for the defendant: The *onus* is on the plaintiff to prove that he had paid the bond. See *Sutton* v. *Nulliah* (21 N.L.R. 282). Plaintiff must prove the sale of the shares; Kearney held no shares. See further *Voet* (18, 4, 15). Registration in the Deeds Office is notice to the world; Act 25 of 1909, sec. 5 (*d*) and sec. 6.

Morice, K.C., replied.

WESSELS, J. (after stating the facts as above set out): It appears clearly from the evidence that the transaction between the parties was as follows: Opperman became friendly with Kearney, and Kearney visited Opperman's farm where he was in the habit of shooting. Kearney told Opperman that, in return for his friendship in allowing him to shoot upon the farm, he would also like to do something for Opperman. He told Opperman that he was on the stock exchange, that he knew a good deal about shares, and that he could speculate for him. Opperman allowed him to do so, and, as always happens in these cases, Opperman was the loser. Eventually it transpired that in these speculations Opperman had lost the sum of £750. Kearney then induced Opperman to pass a bond in his favour. To this Opperman agreed. This was early in 1912. After the bond had been passed, Kearney incurred certain debts with de Beer, a stock broker, until he was indebted to the latter to an amount exceeding £750. He then passed the bond over to de Beer as security against the advances, but, in as much as the bond was only given to de Beer as security, Kearney undertook to collect from Opperman the interest due. The interest on the bond was 5 per cent. per annum, whereas Kearney was paying de Beer at the rate of £1 per month. De Beer considered that there was no necessity to give notice to Opperman. No doubt de Beer thought Kearney would liquidate his account at some time or other and then he would simply hand back the bond.

Kearney continued his visits to Opperman's farm and continued to shoot his game. Apparently he felt it was rather hard on Opperman that he should have lost £750, and he induced Opperman to start some more speculation, advising him at that time to buy Van Ryn Deeps. Opperman was prepared once more to risk a sum of £500, and he informed Kearney that Kearney might buy for him Van Ryn Deeps to that extent. Kearney went into the market and actually bought 500 shares for Opperman, on

whose account he held them. The arrangement between Kearney and Opperman was that Kearney should advance the money on a 30 days option. Kearney did advance the money, but, finding it was difficult to hold the shares, he got a man named Brodie to carry them. Brodie carried them for some time, and then Kearney transferred them to London to be sold on the London market, and from the evidence that we have before us it appears that they were actually sold on the London market at a small loss. Kearney, however, had this consideration for Opperman, that he paid the loss himself and never called upon Opperman to do so.

There is no evidence whatever that Kearney bought any shares for Opperman after this transaction; no evidence from Mr. Pettyt; no evidence from the books; in fact it is confessed by counsel for the plaintiff that the books of Kearney are in such a state of confusion that nothing can be proved from them.

The first question that I ask myself is what was the actual nature of this share speculation between Kearney and Opperman. I take it that it was this: Kearney thought it was possible that he might liquidate Opperman's debt to him of £750 by a rise in the market, and he had some information about Van Ryns which was not worthless because eventually these shares did rise. It was agreed that Kearney should pay for the shares and should have the discretion of selling them when he thought fit. That of course is only natural. If Opperman had paid for the shares and Kearney had held them on Opperman's behalf, the latter might be able to say, "You ought not to have sold these shares without consulting me"; but it was perfectly clear from the nature of the transaction that he was holding these shares for Opperman as a speculation and that he was entitled to sell them at any time that he thought fit. That being the case these shares were disposed of, and there were no shares in the estate of Kearney belonging to Opperman. Kearney held no shares which he could in January, 1914, sell for Opperman.

It appears that early in March, 1914, Kearney's affairs were so involved that he had to leave this country. About six weeks before leaving he met Opperman and the latter asked him about the share transaction, and Kearney then told Opperman that he had sold the shares at 42s. and 44s. He calculated on a piece of paper the profit that he had made for Opperman and told him that a sum of £203 was all that was due by Opperman to him. I have no doubt that Kearney did tell this to Opperman, nor have I any

doubt that Kearney had been playing upon Opperman and deceiving him all through, and at this stage, when he knew he was about to leave the country, he did not want to tell Opperman the truth of the transaction, so that they might part in a friendly spirit. Consequently he told Opperman this lie—that he sold these shares at 42s. and 44s. There is no doubt that it was a lie. At this time his affairs were so involved that it is imposible to expect that he would hold such a quantity of shares for Opperman.

Mr. *Morice's* contention is that because Kearney told Opperman this lie, therefore Opperman is entitled to set off the amount of money that Kearney said he held on his behalf against the £750. That seems to me a very extraordinary contention. Mr. *Morice* says, because Opperman had no notice, therefore whatever equities there are between Opperman and Kearney, the same equities exist between Opperman and de Beer.

I cannot see that there are any equities at all between Opperman and Kearney as regards this transaction. Opperman had not lost a single penny. Opperman was owing Kearney £750, and he then had the hope that by successful speculations he might wipe out that £750, but he never paid Kearney one single cent. Kearney did speculate on behalf of Opperman, and Kearney did advance money for Opperman's speculations, and Kearney, speculating for Opperman, lost him more money; but I cannot see that there is any equity between Kearney and Opperman as regards this matter.

The next contention is that there was a remission to the extent of some £497. At that time Kearney had ceded the bond to de Beer, and, having ceded the bond, he had no further rights in it at all. He, strictly speaking, had no right to receive the payment. The person who had the right to receive payment after the cession of the bond was de Beer, not Kearney. But our law provides that if the cedent or the cessionary of a bond does not give notice to the mortgagor, payment by the debtor to the cedent is a good discharge. That is to say, if neither de Beer nor Kearney gave notice to Opperman, and Opperman, in ignorance that the bond had been ceded, had paid off the amount of this bond to Kearney, he could not be called upon again by de Beer, the cessionary, to pay the money, because he would be paying twice. It would be due entirely to the negligence of the cessionary that the money was paid to the cedent, for it was his duty to give notice to the debtor.

But Mr. *Morice* puts it on another ground. He contends that there is here an actual compromise between Kearney and Opperman because at that time, as far as Opperman was concerned, he thought he was obliged to pay Kearney, and Kearney therefore was entitled to make an agreement with him that £497 of the debt should be wiped out, and as Opperman could enforce this contract of compromise against Kearney he can now enforce the contract against de Beer.

I am not prepared to say that this is our law. I do not think that our law allows the debtor to set off, as against the cessionary when he had no notice of the cession, any transaction between himself and the cedent; in other words, a contract between Opperman and Kearney after Kearney had ceded the bond is not a contract which affects the bond itself. As far as I am aware the only equities that can be relied upon, the only defence that can be set up, are defences which are *in rem*, defences which are connected with the bond itself. For instance, you can say that the bond was obtained by the cedent by fraud; or that he obtained it by force; or that the bond is prescribed; or that it has been paid; or compensated by a liquid claim. I can understand defences being advanced which attach to the bond itself, but I cannot understand that the debtor can set up against the cessionary, as a defence, a separate contract which only gives him a claim *in personam* against the cedent.

In these circumstances, therefore, viewing the case in every possible light, it seems to me that the plaintiff must fail. There must be judgment in favour of the defendant with costs on the claim in convention, and he is entitled on the counter-claim to the payment of £750, together with interest at 5 per cent. from 1st May, 1914, and to have the property declared executable.

GREGOROWSKI: I concur.

Plaintiff's Attorneys: *de Beer & Slade;* Defendant's Attorneys: *Lunnon & Nixon.*

[G. v. P.]
