

1886  
March 19.  
" 20.  
" 23.  
" 24.  
" 26.  
May 12.

Taylor vs.  
Holland.

security bond of August 18th, 1885, executed by defendant, in which he acknowledges to be indebted to Taylor in the sum of £18,000 (being moneys advanced, bonus, and interest), and gives as security all his rights, &c., in certain properties situated in this State, does not create a novation of the original obligation, nor destroy the effect of the foreign judgment founded on such obligation. The bond was given in pursuance of a covenant to that effect, inserted in the indentures executed by defendant in England. The passing of the bond, therefore, is simply completing and carrying out what was originally agreed upon by the parties, and cannot, therefore, operate as a novation of the original contract. Upon the whole, therefore, there must be final judgment for the plaintiff. The amount of £15,060 9s. 11d., for which provisional sentence was given, must be reduced to £7000 (the sum actually advanced), with interest at 8 per cent. from the due date of the notes and bill. As no tender has been made of this latter amount by defendant, he must pay the taxed costs of suit.

I wish to add that my brother Brand concurs in the judgment I have just delivered, and so does my brother Burgers, who is absent on leave, and proposes to deliver a written judgment at a later date.

---

KILGOUR vs. CREDITORS IN THE INSOLVENT ESTATE OF THE  
LISBON BERLIN TRANSVAAL GOLD FIELDS LIMITED.

*Insolvency—Preferent Creditors—Domestic Servants.*

*No employés, except domestic servants, are entitled to rank as preferent creditors in the insolvent estate of their employer.*

1886.  
March 25.  
April 1.  
Kilgour vs.  
Creditors in the  
Insolvent Estate  
of the Lisbon  
Berlin Trans-  
vaal Gold Fields  
Limited.

The petitioner, Kilgour, who was a creditor in the insolvent estate of the Lisbon Berlin Transvaal Gold Fields Limited, applied to the Court for an order declaring that certain employés of the company were not entitled to rank as preferent creditors, but only as concurrent creditors. The Master of the High Court had allowed their claims to

rank as preferent. These persons were a resident director, two foremen, four diggers, two overseers, a mason, a millwright, a carpenter, and a store-keeper. The petitioner maintained that as these persons were not domestic servants, they could rank only as concurrent creditors.

1886.  
March 25.  
April 1.  
Kilgour vs.  
Creditors in the  
Insolvent Estate  
of the Lisbon  
Berlin Trans-  
vaal Gold Fields  
Limited.

*Cooper*, for the applicant. The local laws do not define what servants and employés are entitled to rank as preferent creditors, and therefore we must turn to the Roman-Dutch law. (*Vide Van der Linden*, 1. 12. 4; *Van der Keessel*, *Thesis* 454, where he speaks of *domestic* servants; *Van Leeuwen*, *Roman-Dutch Law*, 4. 13. 21, where he says that the domestic servants must actually be in the employ of the insolvent at the time of his insolvency; *Censura Forensis*, 4. 11. 19; *Falconer vs. Juta*, Buch. 1879, p. 22; *Kersteman Rechtsgeleerd Woorden Boek*, *sub voce* *preferentie*, p. 358; *Aanhangsel tot Rechtsgeleerd Woorden Boek*, *sub voce* *Hypotheek*, p. 631; Act No. 5 of 1861 (*Cape Colony*); *Clark vs. Denny*, 4 Buch. E. D. C., p. 300.)

*Holland*, for some of the creditors:—

*Matthaeus de Auctionibus*, 1. 20. 6, extends the right to rank as preferent creditors to others besides *domestic* servants. As to the meaning of “*bediende*” (employé) *vide Law No. 13 of 1880*, § 2.

*Ford*, for the remaining creditors:—

*Van der Keessel*, in *Thesis* 454, merely speaks of the customs of different provinces. (*Vide Grotius*, 2. 48. 13.)

*Postea* (April 1st, 1886).

KOTZÉ, C.J. The respondents, not being *domestic* servants, are not entitled to rank as preferent creditors in the insolvent estate of the company, but merely as concurrent creditors. The application to have their names removed from the list of preferent creditors must therefore be granted. The costs must come out of the estate.

BURGERS, J., concurred.

---