1886. March 9. — Van der Veen vs. Franken

consider the question whether cases might not arise in which the Court would grant leave to institute an action where, although the injury complained of was committed a short time *before* the sequestration of his estate, the plaintiff could not possibly institute action until *after* such sequestration.

BURGERS and BRAND, JJ., concurred.

TAYLOR *vs.* HOLLARD.

Foreign Agreement—Foreign Judgment—Usury.

Where H. entered into an agreement in England with T. to repay the latter double the amount of the money lent by him to H., with interest at 8 per cent., the Court refused to enforce the agreement in the Transvaal, as being of an usurious and unconscionable nature, and contrary to the principles of R.-D. law, and accordingly reduced the amount to the original sum borrowed, with interest at 8 per cent.

The Court is not bound by international comity to enforce foreign contracts or judgments which violate the policy of the law of the land.

Weatherley vs. *Weatherley* (1 *Kotzé Rep.* 83) *followed.*

1886. March 19. „ 20. „ 23. „ 24. „ 26. May 12. — Taylor *vs.* Hollard.

Hollard borrowed £7000 from Taylor in England, and gave him promissory notes, and accepted a bill of exchange to the total amount of £14,000 in return. Taylor obtained judgment in England against Hollard for £15,069 9*s.* 11*d.*, being the latter amount with interest and costs. Taylor subsequently obtained provisional judgment on the English judgment for the said sum of £15,069 9*s.* 11*d.* in the Transvaal, whereupon Hollard went into the principal case and denied liability on various grounds.

Keet, with him *S. Jorissen*, for Hollard :—

The first plea is that there are assets in England belonging to the defendant which can be taken in execution. (*Vide* 3

Burge, pp. 751, 1033, 1064, 1079; *Story, Conflict of Laws*, § 364.)

The second plea is that the judgment in England was not final. (*Vide Story, Conflict of Laws*, §§ 598–9; 3 *Burge*, pp. 1024, 1063; 4 *Phillimore, International Law*, p. 755, § 956.)

The third plea is that Taylor and Hollard were partners in the transactions which were the cause of this action.

The fourth plea is that the agreement cannot be enforced in the Transvaal, as being usurious. (*Vide* 3 *Burge*, pp. 1052, 1053, 1071.)

The fifth plea is that a *novation* was effected. (*Vide Lybrechts, Red. Vertoog*, vol. 2, ch. 37, p. 315; *Aanmerkingen op Lybrechts*, vol. 2, p. 704; 3 *Burge*, pp. 1032–3; *Schorer ad Grot.*, bk. 3, ch. 49, p. 710, n. 11; also p. 684, n. 2; *Addison on Contracts*, 7th ed., p. 278.)

S. Jorissen, on the same side, quoted, in connection with the first plea, *Voet, de re judicata*, 42, 1, 41; *Groeneweg, de re judicata*, 42, 1, 15; *Papegay*, vol. i., pp. 583–5.

In connection with the fourth plea he quoted *Story*, § 258; *Asser, Inter. Priv. Recht*, p. 55.

Ford, with him *Kingsmill*, for Taylor:—

It has not been proved that there are any assets in England that could be attached in execution. (*Vide Atkinson, Sheriff Law*, 6th ed., pp. 184–5; *Harrison* vs. *Painter*, 6 M. & W. p. 387; *Archbold's Q. B. Practice*, 13th ed., pp. 560, 628–9; *Leake on Contracts*, p. 131; 3 *Burge*, p. 1079.) It is clear that the judgment in England against Hollard was final and conclusive. The defence of partnership has not been proved. With regard to the plea of *usury*, it is sufficient to point out that the agreement was entered into in England, and presumably had to be carried out in England, and that the usury laws were repealed in England by 17 & 18 Vict. c. 90. (*Vide Story*, § 242.) There was no *novation*. There must be a clear intention to novate. (*Vide Van der Linden*, pp. 188–9; *Pothier on Obligations*, § 559; *Addison on Contracts*, 7th ed., p. 272; *Van der Keessel, Thesis* 835; *Grot.* 3, 43, 4.)

Cur. adv. vult.

Postea (May 12th, 1886).

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

Taylor *vs.* Hollard.

KOTZE, C.J. In this case the plaintiff, Taylor, obtained a judgment in the Queen's Bench Division of the High Court of Justice of England, against the defendant Hollard, for the sum of £15,069 9*s.* 11*d.*, being the amount of certain promissory notes made by the said defendant, and a bill of exchange accepted by him, together with interest and costs. The defendant, domiciled in the Transvaal, was temporarily in England when he made and signed the notes, and accepted the bill of exchange, and appeared to the writ of summons against him at suit of the plaintiff. In September last the plaintiff sought to have the judgment of the English Court enforced in this State, and obtained provisional sentence thereon against the defendant. The defendant objected, by his counsel, to the mode of procedure adopted, and maintained that a foreign judgment could only be declared executable in this State by means of a simple original action, or, in other words, a regular suit. Mr. Justice Burgers, however, overruled the objection. From this ruling defendant appealed to the full Bench, under provisions of our local Acts. The appeal was, however, disallowed,* because, although it is laid down by Van der Linden (*Jud. Pract.*, vol. 2, bk. 4, ch. 4, § 5) that a plaintiff seeking to enforce a foreign judgment must proceed by means of *rau-actie*, this does not necessarily imply that he cannot proceed by way of provisional summons; for the term *rau-actie*, which means an action in the first instance, as opposed to a suit in reformation or appeal (*Jud. Pract.*, vol. 1, bk. 2, ch. 6, § 2; *Wassenaar, Woorden Boek*, at end of vol. 2 of his *Jud. Pract.*), also includes a claim for provisional sentence. (*Vide Van der Linden, Jud. Pract.*, vol. 1, bk. 2, ch. 6, §§ 10–13.) A plaintiff would, however, as this very case has proved, act wisely in at once instituting a full action to enforce in this country a judgment obtained elsewhere. This was the course adopted in *Acutt, Blaine & Co.* vs. *The Col. Mar. Insurance Coy.* (1 Juta, 402). Provisional judgment having been pronounced against him, the defendant has entered into the principal case, and prays the Court to set aside the said provision, and dismiss the plaintiff's claim, with costs, upon the following grounds: (1st) That the plaintiff is not entitled

* *Vid. ante*, page 68.

to institute proceedings against the defendant in this State, inasmuch as there are assets of defendant in England, which have not yet been attached in execution of the said English judgment. (2nd) That the plaintiff does not allege in his summons that the judgment of the English tribunal is final and conclusive on the points in dispute between the parties, who mutually agreed in London that the plaintiff should sign judgment against the defendant solely with the view of forcing the Balkis Company to come to a settlement, and not of taking out any execution on such judgment against defendant. (3rd) That there exists a partnership between the plaintiff and defendant as to the transactions upon which the judgment was obtained. (4th) That the transactions and contracts upon which the judgment was obtained in the Queen's Bench Division were founded upon usury, and are, therefore, illegal and void, and cannot be enforced in this country. (5th) That after the said judgment was obtained in England, the plaintiff and defendant entered into a new undertaking and contract, whereby a novation was created of the original debt of the defendant, and all right of the plaintiff under the said judgment was destroyed.

I shall deal with each of these defences *seriatim*, and first as to the allegation that there are assets in England which can be taken in execution of the judgment delivered in that country. It is not necessary for the Court to decide whether it will enquire into the validity of the foreign judgment, or whether it is necessary that the assets, if any, which may be within the jurisdiction of the foreign tribunal, must first be taken in execution of its judgment. These questions are discussed by *Voet*, 42, 1, 41, and other authorities cited during the argument. It is sufficient to observe that the defendant has failed to show that there exist any assets in England which can be taken in satisfaction of the judgment signed against him there. In fact, since his return to Pretoria, he has repeatedly asked for time to satisfy that judgment. In the next place, as to the finality and conclusiveness of the English judgment. This sufficiently appears from the documents and rules under which the judgment was obtained. Nor is there any evidence whatever in support of the assertion that the parties agreed that judgment should be signed against the defendant solely

1836.
March 19.
" 20.
" 23.
" 24.
" 26.
May 12.

Taylor vs. Hollard.

with the view of forcing the Balkis Company to come to a settlement. On the contrary, the defendant himself says that the plaintiff was desirous of having judgment against the defendant in order, as he thought, to render his position, as against defendant, more secure. The third defence of partnership has wholly failed. The simple stipulation in the Deed of December 4th, 1883, that defendant shall pay to the plaintiff a tenth part of the proceeds arising from the sale of any of defendant's interests in properties situated in the Transvaal, in consideration of an extension of time for payment granted him by the plaintiff, does not constitute a partnership between the parties. The fourth plea is of some importance. It is asserted that inasmuch as the transactions between the parties, upon which judgment was obtained, are founded on usury, the judgment cannot be enforced in this country, where usury is forbidden by law. The question is not free from difficulty, and it will be desirable briefly to state the facts of the case so far as they have reference to this point. It appears that certain sums of money were advanced to the defendant by the plaintiff, upon consideration that the defendant would repay the sums advanced, together with a bonus or commission, as it is called in the indentures between them, of equal amount with the principal sums advanced. It was further stipulated that if the moneys advanced, together with the bonus, were not duly paid, interest should run upon both the capital and bonus at the rate of 8 per cent. The defendant also accepted a bill of exchange, and passed his promissory notes in favour of the plaintiff for the full amount of capital advanced and bonus as agreed upon These promissory notes were signed and made payable in London, and the bill of exchange was drawn and accepted by the defendant in London. Although no place of payment is mentioned in the bill, we may, under the circumstances, take it that the intention was for the bill to be honoured and paid in London. The actual amount which the defendant received from the plaintiff is £7000, but the notes and bill were given for that sum and the bonus already mentioned, or £14,000 in all. The judgment is, however, for £15,060 9*s.* 11*d.*, being £14,000 together with interest, charges, and costs. The answer of the plaintiff to the plea of illegality on the ground of usury is that, inasmuch as the

usury laws have been repealed in England, the *locus contractûs*, by 17 and 18 Victoria, c. 90, the foreign judgment can be executed in this State. The contract in the present instance was made in England, and was, moreover, to be performed in England; for the covenant by defendant to pass a mortgage bond of all his interests in property situated here according to the law of this State, is merely collateral to the principal obligation, and does not deprive the contract of its English nature and character. (*Story*, § 293; *Voet*, 22, 1, 6 *in fin.*). It is also laid down by these authorities that if the rate of interest in the place where the contract is made, and is to be executed, is greater than in another place, the law of the place where the contract was entered into, and has to be performed, shall prevail. In other words, if the legal and customary rate of interest in England is greater than that observed and allowed in the Transvaal, an English contract stipulating for payment of such higher interest may be enforced here in this country. The parties, however, did not merely agree to pay a fair rate of interest as allowed in England; for if they had simply done that, and the English rate of interest were higher than that followed in this State, the contract between them would not, upon that simple ground alone, have been void for usury in this State. (*Story*, § 291 *et seq.*, § 293, b.; *Voet*, 22, 1, 6.) In the present instance, however, the plaintiff stipulated not merely for interest in the event of nonpayment of the loan on the due date, but, further, that he should receive in addition, by way of bonus, a sum of money equal in amount to that advanced. He merely lent the defendant £7000, and took from him notes and bills to the extent of £14,000, upon which interest was to run at 8 per cent. This is something quite different from a stipulation for the payment of a legal and current rate of interest, which may happen to be higher than that allowed and adopted in this State. It seems to me no argument in favour of the plaintiff to contend that by an English Statute, 17 and 18 Victoria, c. 90, the usury laws have been repealed. An agreement like that entered into between plaintiff and defendant may be lawful in England, but it does not follow that the Court here is bound to enforce a judgment based upon such an unconscionable agreement. It is indeed true that, according to the principles of inter-

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

Taylor vs. Hollard.

national law, the validity of a contract, not to be performed elsewhere, entirely depends upon the *lex loci contractûs.* If the contract be valid there, it is valid in every other country. But this rule admits of the important qualification that such contract be not contrary to the public law and morality of the place where it is sought to be enforced. (*Story*, §§ 244, 258; *Wheaton*, § 91; *Forsyth, Const. Law*, 240; *Hope* vs. *Hope*, 3 Jur. N. S. 454, *per Turner, L.J.*) I adhere to what I said in *Weatherley* vs. *Weatherley*, decided in this Court in 1879 (Kotzé's Reports, p. 83), that the law of a foreign country can only be allowed to have effect in this State "in so far as it does not interfere with our law and the authority of our Courts, or with the rights of our citizens, with good government and public utility." For this position no higher authority than that of Huberus can be cited: "*Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium praejudicetur.*" (*Praelect*, vol. 2, *de conflictu legum*, § 2.) The simple question, therefore, is whether an agreement of the nature of that upon which the English judgment is based comes within the exception, or within the rule in favour of the universal validity of contracts good by the *lex loci contractûs.* By Roman-Dutch law excessive usury was not only prohibited, it could also be punished criminally. (See opinion of *Grotius in Cons. and Advys.*, vol. 3 (*Rotd.*) *Cons.* 169; *Van der Linden* (Henry's edition), pp. 218 and 352.) By edict of the Emperor Charles V. (October 4th, 1530, § 8) transactions by merchants founded in usury, as being prejudicial to the general welfare, are rendered null and void. There are several cases reported in 1 *Menzies*, where the defence of usury was set up by a defendant, but not decided by the Court. In *Sutherland* vs. *Elliott Bros.* (1 Menz. p. 101), however, Menzies, J., gave it as his opinion that the laws against usury were in full force in South Africa. Although at the present day criminal proceedings are not likely to be instituted against usurers, Courts of Justice will not countenance usury (using that term in the sense of excessive and exorbitant, and not merely high interest), upon the ground that this would be contrary to good morals, the interest of our citizens, and the policy of our laws. I also think that an

obligation or agreement in which usury, *i.e.*, interest above the current rate, is charged, will no longer in South Africa be considered absolutely void, but that the obligation will be held valid and enforceable so far as it is possible for the Courts to do so, without, however, allowing *excessive* usury. For instance, A lends B £100, and the latter passes his promissory note for £200. If now A sues B on the note, and the defence of usury be raised, the Court will reduce the amount and give judgment for the actual sum lent, together with interest at the current rate. A similar practice prevails in the Court of Chancery in England, even after repeal of the usury laws, in the case of unconscionable bargains, a rule which the Courts of Equity there enforce with reference to the obligations of all young persons, whether minors or not. In one case the person relieved against his own contract was twenty-six years of age, and a member of parliament, when he entered into the transaction. (*Tyler* vs. *Yates*, L. R. 6 Ch. App. 665.) I do not wish it to be inferred that the defendant in the present case can be considered in the light of an unwary young man in the hands of an unscrupulous person ready to take advantage of his necessities (which is the principle upon which Courts of Equity act in disallowing unconscionable bargains), but merely to point out that the same rule, which this Court will enforce against all transactions like the one now before it, is also applied by Courts of Equity in England in certain classes of cases. In like manner the provisions of the Roman-Dutch law, that the interest may not exceed the capital or be turned into capital, are still observed in practice (4 E. D. C. Rep., p. 22). This Court will refuse to enforce, to its full extent, a contract made by our citizens, in which double the amount advanced, with interest, is stipulated for, not so much in protection of the promissor, but because to countenance such proceedings would be contrary to good morals, the interests of our citizens, and the policy of our law. The fact that we have to deal with a foreign contract, made in a country where the usury laws are repealed, can make no difference, for I have already pointed out that we are not bound by international comity to enforce foreign contracts or judgments which violate the policy of our laws. The fifth and last defence, viz., that of *novation*, may be easily disposed of. The

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

Taylor *vs.* Hollard.

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 9*s.* 11*d.*, 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 Transvaal 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