Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Standard Bank of South Africa, Limited, v. Heydenrych, from the Supreme Court of the Colony of the Cape of Good Hope; delivered the 20th June 1907.

Present at the Hearing:
THE LORD CHANCELLOR.
LORD ROBERTSON.
LORD COLLINS.
SIR FORD NORTH.
SIR ARTHUR WILSON.

[*Delivered by Lord Collins.*]

The question on this Appeal is one of preference between creditors in the insolvency of Messrs. Mackie, Young, & Co., a firm carrying on business in Cape Town. On 23rd April 1901 a general notarial bond was passed by the above firm in favour of Cresswell, Sons, & Co., who were about to act as their agents in London. By the said instrument the obligors acknowledged themselves bound to Cresswell, Sons, & Co., thereinafter styled the mortgagee, in the sum of 5,000*l.*, and, after reciting that they, desiring to extend their business operations, had applied to the mortgagee to be granted an open credit and certain other facilities which the mortgagee had agreed to grant on certain terms, they declared the condition of the bond to be that, if they should pay at due dates to the mortgagee all sum and sums of money which then or at any time thereafter should be or become

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due by them to him, whether arising from promissory notes, drafts, acceptances, goods sold and delivered, interest, charges, moneys paid or from what cause soever, and should perform all the conditions agreed upon between them and the mortgagee, then those presents should be null and void, but otherwise of full force and effect.

This bond was registered at the Deeds Office in Cape Town, on the 25th of April 1901.

On the 12th December 1902 it was ceded by the mortgagee to the Standard Bank (the now Appellants), and the cession was registered on the 5th of December 1903. In determining the rights to preference in the liquidation on the insolvency of Mackie, Young, & Co., the Master held that the Standard Bank were entitled to preference as against the now Respondent, and that decision was upheld by Buchanan, Acting C.J., on appeal. But the point now raised before their Lordships did not come up for discussion. Nor when the case came on Appeal before the Supreme Court was the point raised by the parties. It was, however, taken by the Court itself, who accordingly directed a re-argument, and, though agreeing with the opinion of the Court below on the argument as there presented, reversed their decision and gave Judgment awarding a preference to the now Respondent, and it is against that Judgment that the present Appeal is brought. The Court, on looking closely into the facts, ascertained that, at the date of the incurring by the Insolvents of the debts in respect of which the now Respondent claimed preference, no sum had yet been lent by Messrs. Creswell or the Standard Bank to the Insolvents under their security; that thus, though the bond under which the Bank claimed was prior in date of execution and of registration to that set up by the Respondent, still preference was to be determined by the date of

the debts and not of the securities, and that a security earlier in point of date but under which no advance had been made must therefore give place to one that was later but given for an actual advance. The learned Counsel for the Appellants could not dispute that the law as laid down by Sir H. de Villiers, C.J., based as it was on a passage from Gaius, confirmed by modern authorities, was correct; but he sought to raise a distinction upon the special terms of the bond relied on by the Appellants. His contention was that the bond itself evidenced a present debt, and that therefore the security was effective from its date. But it is quite clear that no present debt was in fact created by the bond. In certain events which might or might not happen a debt might arise which might be described as *solvendum in futuro*, but until those conditions were fulfilled nothing became *debitum* at all either in the present or the future. This disposes of the main argument for the Appellants. A faint suggestion was, however, made that the Appellants, notwithstanding the fact that the Respondent's security was on the register and an advance was made under it before the Appellants had found any money for the mortgagor, must be assumed to have had no notice of the registration of a security subsequent in date to their own and therefore were entitled to preference for their advance notwithstanding the intervening security and advance under it of the Respondent. But even if, consistently with the Cape law as above ascertained, the absence of notice of the existence of a security subsequent to their own could be material, where on the facts the later security had been followed by an advance before anything had been advanced by the Appellants, the onus was clearly upon the Appellants to establish the absence of notice, actual or constructive, having

regard to what is laid down both by Buchanan, J., and by the Supreme Court as to the effect of the law and practice with regard to the registration of such deeds in the Colony. But no authority was cited, or principle invoked, which in any way threw doubt on the position thus taken by the learned Judges in both Courts below, and it seems therefore unnecessary to pursue the point further.

Their Lordships will therefore humbly advise His Majesty that the Appeal be dismissed.

The Appellants will pay the costs of the Appeal.