4.3.1 The principle is unacceptable in toto

4.3.1.1 The Golden rule

It is trite law that the real right of mortgage is of an accessory nature and the continued existence of a real right is dependent upon the principal obligation remaining alive. Thus, the extinction of the principal obligation terminates the real right of security. The locus classicus is the case of Kilburn v Estate Kilburn.[10] Here, Wessels A C J, with whom Stratford J A, Roos J A and Hutton A J A concurred, held:-

> "It is true that you can secure any obligation whether it be present or future, or whether it be actually claimable or contingent. The security may be suspended until the obligation arises, but there must always be some obligation even if it be only a natural one to which the security obligation is accessory . . . It is therefore clear that by our law there must be a legal or natural obligation to which the hypothecation is accessory. If there is no obligation whatever there can be no hypothecation giving rise to a substantive claim."

10. 1931 AD 501 at 506.

This golden rule or essential of mortgage has been referred to in numerous Appellate Division cases, for example Oliff v Minnie,[11] Mahomed & Son Ltd v Estate Horvitch,[12] and Thienhaus N O v Metje and Ziegler Ltd. and another.[13]

In scrutinising numerous cases where the courts have held that a mortgage bond is defective, one will detect that the destruction of the mortgage was due to a non-existent obligation or an invalid principal obligation.[14] Thus in the case of Kadrinka v Lourentz,[15] where an ordinance prohibited recovery of any consideration in respect of liquor supplied on credit, the court held that a mortgage bond covering such

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11. 1953 (1) SA 1 (A) at 3.

12. 1928 AD 1.

13. 1965 (3) SA 25 (A).

14. Supra

15. 1914 TPD at 32.

consideration would similarly be invalid due to an illegal principal obligation.

It is instructive to note that a provision of Voet's commentaries, namely 20 1 19 (misquoted in the judgment as 21 1 19) which has a similar import to Voet 20 6 16, was canvassed by counsel in the Kilburn case. The eminent acting Chief Justice Wessels (who has written one of the leading text books on Roman Dutch law) stated as follows:-

> "Mr Milne quoted Voet (21 1 19) for the contention that our law allowed a mortgage or hypothecation to stand even though the principal obligation ceased to exist. A careful consideration of Voet will show that this is not the case . . . It is, however, very doubtful whether the text is not corrupt."

The learned judge then cites Donellus, Godofredus and Cujacius, who were also cited by Voet in support of this latter proposition, and thereafter goes on to say:-

> "Voet points out that in those cases where apparently a pledge remains whilst the obligation is extinguished, the sticti juris obligation disappears by virtue of the ... Jus Civile, but nevertheless there remains an equitable obligation which keeps the pledge alive. If the cases from the Digest relied upon are examined it will be seen that the Praetor enforced the debt because a natural obligation remained . . .

> It is therefore clear that by our law there must be a legal or natural obligation to which the hypothecation is accessory. If there is no obligation whatever there can be no hypothecation giving rise to a substantive claim." 16

Thus if one adopts the veracious reasoning of the learned judge to the principal of retention, once the prior obligation is extinguished by payment the creditor cannot then be heard to say that the mortgaged property is to be retained to secure an entirely different indebtedness.

4.3.1.2 Academic criticism

In the light of this reliance upon the axiomatic principle of an underlying valid principal obligation in our law of mortgage (pledge and suretyship), it is impossible to accept the retention principle as forming part of our law. This observation has been echoed by Lubbe G F:-[17]

> "This so called 'right of retention' is said to exist even though the principal obligation has been extinguished by payment. It thus flies in the face of the accessory nature of the real right."

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16. *Idem* at 506.

17. Lubbe G F "Mortgage and Pledge" in Joubert W A (ed) *The Law of South Africa* (1983) vol 17 287 at 295.

De Wet and Yeats[18] state:-

> "Alhoewel soms verklaar word dat die skuldeiser, selfs na tot niet gaan van die versekerde skuld, die pand of verband mag behou wanneer die skuldenaar nog ander skulde teenoor hom het, lyk dit in stryd met die aksessore karakter van pandreg en verband."

Further persuasive authority may be found in Van der Merwe C G,[19] who endorses the criticism of De Wet and Yeats. Schoeman[20] is also ad idem with the opinions of these writers. Wille,[21] on the other hand, appears to accept the principle without comment or argument.

4.3.1.3 Adverse case law

Case law which tends to counter the argument that the principle is unacceptable in toto comprises of Brink's Trustees v S A Bank;[22] Haarhoff v Cape of Good Hope Bank;[23] Hirschberg v Jackson;[24] Smith v Farrelly's Trustee;[25]

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18. Die Suid-Afrikaanse Kontraktereg en Handelsreg 4th ed by de Wet J C and van Wyk A H (1978) at 363.

19. Sakereg (1979) at 456 and in Lee & Honore Family, Things and Succession 2nd ed by Erasmus H J, van der Merwe C G and van Wyk A H (1983) 353 at 458.

20. Silberberg and Schoeman The Law of Property 2nd ed (1983) at 463 n131.

21. The Law of Mortgage and Pledge in South Africa 2nd ed (1961) at 91.

22. (1848) 2 M 381.

23. (1887) 4 HCG 304.

24. 1933 CPD 238.

25. 1904 TS 949 at 962.

Van den Heever v Cloete:[26] The most important of these cases was that of Smith v Farrelly's Trustee. One of the points which came up for decision in this case was whether a claim in respect of a half share of rental and assessment rates was to be regarded as preferent. The learned judge, Smith J, stated the position as follows:-

> "The law appears to be settled that a creditor has a right of retention over a thing pledged in respect of another liquid debt accrued due while the pledge remains in force (van Leeuwen Cens. For, 4 37 2) but that this right exists only against the debtor and cannot be maintained against his creditors (Voet 20 6 16; Van der Keessel, Thes 435 and 450) and the Supreme Court of the Cape so decided in the case of Brink's Trustees v SA Bank (2 Menz 399)."[27]

It may be mentioned that the above passage should be treated as obiter, as the court decided the preference as to rental and assessment rates on the basis of those expenses being necessary and incurred in the preservation of the property pledged, as per Voet 13 7 10. In any event, it is submitted that the dicta in the Kilburn case relating to the extinction of the principal obligation, and subsequent Appellate Division cases which were all decided after the Farrelly case referred to above, have put the matter beyond any doubt. These cases will hereafter be analysed in greater detail.

26. (1904) 21 SC 113.

27. Supra at 962.

4.3.1.4 <u>Legislation</u>

It is submitted that the Deeds Registries Act 47 of 1937, read together with the Insolvency Act 24 of 1936, contains an implied prohibition against the right of retention with its attendant right of consolidation. This prohibition would be applicable where the creditor attempts to retain immovable property of the debtor where its concomitant principal obligation has been extinguished and a further independent indebtedness by the debtor to the creditor is already secured by way of a mortgage bond. This situation would arise where the creditor might feel that the existing security is inadequate to cover the debtors liability.

In this regard one might refer to section 53(1) of the Deeds Registries Act 47 of 1937 which <u>inter alia</u> states that, save as provided in any law, the registrar shall not attest any mortgage bond which contains the clause commonly known as the general clause purporting to bind generally all the immovable property of the debtor. Section 102 of the same Act defines 'mortgage bond' as being a bond attested by the registrar <u>specially</u> hypothecating immovable property. Section 86 of the Insolvency Act 24 of 1936 specifies that:-

> "no general mortgage bond registered after the 31st day of December 1916 shall confer any preference in respect of immovable property, and no general clause in a mortgage bond hypothecating immovable property registered after the said date shall confer any preference in respect of any property: Provided that the preceding provision of this section shall not affect any preference conferred by a general clause in a mortgage bond passed before the commencement of this Act by a widower or widow in favour of a Master, for the purpose of securing the payment to his or her child of any sum of money due to the child from the estate of the widower's or widow's deceased spouse."

In the light of the above sections it is submitted that a creditor who purports to bind the additional immovable property of the debtor, would be contravening the provisions of the Deeds Registries Act 47 of 1937 and thus would not acquire any preference whatsoever.

Waters D F and Jooste R D[28] submit inter alia:-

> "failure to comply with any requirements of the law as to the execution or registration deprives the bond of its efficacy as security."

Wille[29] likewise states:-

> "Every mortgage bond must contain a full and clear description of the property to be hypothecated, including the extent thereof, and when two or more mortgaged properties are to be hypothecated each property must be described in a separate paragraph. ... The registrar may not attest any mortgage bond ... which contains a clause commonly known as the general clause which purports to buy generally all immovable or movable property of the debtor."

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28. Mars The Law of Insolvency in South Africa 7th ed (1980) 353 para 18 4.

29. The Law of Mortgage and Pledge in South Africa 2nd ed (1961) at 42.

It may be mentioned that regulation 41(2), the regulations promulgated under the Deeds Registries Act 47 of 1937, prescribe in detail how the mortgaged property is to be described in the mortgage bond.

4.3.2 Tender

Voet in 20 6 16, being a utilitarian Romanist, relied on the Code of Justinian, Book 8 26 1 and 8 27 1. The latter provides as follows:-

> "Iure enim contendis debitores eam solam pecuniam, cuius nomine pignora obligaverunt, offerentes audiri non oportere, nisi pro illa etiam satisfecerint, quam mutuam simpliciter acceperint. 3 Quod in secundo creditore locum non habet: nec enim necessitas ei imponitur chirographarium etiam debitum priori creditori offere." 30

. . . .

30. "For you very properly assert that if the debtors only tender the money which they have given the said pledge to secure, they should not be heard, unless they also pay the other which they simply received as a loan. The rule does not apply to the second creditor, for he is not obliged to tender the first amount of the debt which is evidenced by written instrument." (Translated by Scott S P.)

It is submitted that by the use of the word 'offerentes'[31] the provisions of 8.27 1 are restricted to situations where the principal obligation has not yet been extinguished. However, where the tender has been accepted the principal obligation would thus be extinguished and accordingly retention of the security would not apply. van der Keessel states:-

> "Voet. ad t. D. quib. mod. pign. vel hyp. solv. n. 16 ius istud simpliciter enarrat et ex Iure Romano probat, de usu hodierno nihil monens." 32

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31. Offerentes and offeratur, (the latter word was also used in Van Leeuwen Censura Forensis (See infra) unquestionably denotes 'tender' as opposed to 'payment'. Aside from its common meaning, the sentence structure undeniably supports this conclusion. The subjunctive is utilised in order to convey a hypothetical or conditional action. If the term was used in order to denote payment as opposed to tender, the indicative would have been utilized. As the word 'offerentes' is covered by a participle, the subjunctive form cannot be used as to avoid a profusion of verbs. This however relates purely to the structure of the sentence and does not derogate from the hypothetical or conditional attributes of the sentence. Furthermore, it is evident that the exerpt of the Code is not intended to be hypothetical in toto. The reasons for this conclusion are twofold: Firstly the exerpt related to a decided case, and secondly, the indicative may be found in sentences before and after the sentence containing the term 'tender'. These observations are equally apposite to the exerpt of Van Leeuwen's Censura Forensis.

32. Prael vol III at 491 as translated by Van Warmelo and others 1964: "Voet sit daardie reg eenvoudig uiteen en bewys dit uit die Romeinse Reg sonder om iets oor die hedendaagse gebruik te sê."

It appears that the only authority used by Voet in support of his views as propounded in 20 6 16, is the Code. If that is the case, then Voet has unnecessarily broadened the principal to encompass the situation where the pledge is retained even where the principal obligation has in fact been extinguished.

Simon van Leeuwen utilises the term "offeratur":-

> "Non folvitur tamen pignus ipfius debiti oppignorati exfolutione, fi ex alia caufa aliud creditori debeat idem debitor, qui enim in pignoris pofleffione eft, nifi illud quoque quod fine pignore debetur offeratur, ad reftituendum pignus compelli non poteft. l. unic. Cod. etiam ob Chirograph. pec. pign. retineri. adeoque id quod ex certa caufa obligatum eft, pro alio etiam debito liquido retinere licet: etiam quod poft contractum pignus intercefferit." 33

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33. Translation by Barber S H and MacFaden W A Simon van Leeuwen's Censura Forensis 1896:

"A pledge, however, is not freed by payment of the debt secured by the pledge, if the same debtor owes the creditor anything on another account, for he who is in possession of a pledge cannot be compelled to restore the pledge unless the sum owed and not secured by the pledge is also tendered (l. unic. Cod. etiam ob Chirograph. pec. pign. retineri), and so it is lawful to retain for another liquid debt also that which is bound on some other account even for that which has arisen after the pledge has been effected. . ."

It is submitted that if this principle is to be accepted as being part of the South African law, it can only be accepted on the basis that the retention is valid only if the principal obligation remains valid. The exception should be limited to affecting the principles of 'tender' and not the cornerstone of 'mortgage'. It is submitted that this was the approach taken in the Farrelly[34] case.

However, if this approach is without merit, then one is obliged to go on to the third argument hereunder.

4.3.3 Pledge

It is argued that in the event of the right of retention being applicable, it should be reserved for use in the field of pledge of movables and not in respect of mortgage of immovable property.

34. See *infra*.

This argument is based on the fact that the South African legislature has imposed various requirements on the registration of immovable property as referred to in the first argument hereof. The Deeds Registries Act 47 of 1937 requires a mortgage bond to be registered at the deeds office and the regulations to such Act require an endorsement to be placed on the title deed of the property. If this exception is permitted in respect of mortgages over immovable property, it is evident that the provisions of the Deeds Registries Act would not be adhered to and there would be no notification to the public that the property concerned is subject to a further mortgage bond, which further mortgage bond would not be endorsed against the title deed to the land in question. Thus Wille[35] submits in the modern law the mortgage of immovable

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35. Wille The Law of Mortgage and Pledge in South Africa 2nd ed (1961) at 96.

property without the consent of the owner is rendered practically impossible by our system of registration. It may thus be argued that this exception relates only to the real right of pledge and not a real right created by mortgage.

Gane P[36] in his translation of Voet 20 6 16 uses the term 'pledge' as opposed to 'mortgage'. It may be mentioned that the term 'mortgage' is an English term and was unknown to Roman Dutch writers. Gane[37] in his translator's note states that in his translation the English word 'mortgage', though not known in the Netherlands law, is generally used where immovables are concerned. In the translation by Lorentz C A[38] of Van der Keessel's Thesis Selectae 450, the term 'pledge' is used. The term 'pledge' is also used in Barber's[39] translation of Van Leeuwen.

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36. Although it may well be argued that Gane's translation is in fact incorrect in that it appears that Voet relied solely on the Code of Justinian 8 26 (27) 1. This latter passage refers to the security being in the form of fundus.

37. See infra.

38. Select Theses on the Law of Holland and Zeeland 2nd ed (1901) at 159.

39. Simon van Leeuwen's Censura Forensis (1896) at 65.

Wessels J A in the case of Thienhaus N O v Metje and Ziegler Ltd and another,[40] while not accepting the right of retention, refers to the right with regard to pledge but not mortgage.

Accordingly it appears that this exception has no applicability to immovable property.

4.3.4 Promissory notes

The second aspect to be dealt with is whether the second indebtedness, that is the debt which the creditor wishes to secure with the pledge which has been extinguished, must be of any particular nature. Voet refers to the other debt as being 'on a note of hand'. The Nederlandsch - Engelsch dictionary of K Ten Bruggencate refers to a 'note of hand' as being a promesse or a promissory note.[41] The translators[42] of Van Leeuwen refer to it as a liquid debt or sum

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40. 1965 (3) SA 25 (A) at 34.

41. 3rd ed (1903) at 428.

42. idem.

owed and the translators[43] of Van der Keessel refer to it as a <u>skriftelike skulderkenning - bewys</u> and in the Lorentz[44] translation he refers to such debt as a chirograph-debt. It thus appears that the second indebtedness would be best limited to the promissory note in form. In this regard the case of <u>Union Government</u> v <u>Fisher's Executrix</u>[45] is authority for the fact that a mortgage bond is not a negotiable instrument.

4.3.5 <u>Competing creditors</u>

The Roman Dutch writers and the code have a further proviso that the exception cannot be raised if another creditor claims it (i e the security). Voet refers to a hypothecatory creditor, whereas Van der Keessel refers to creditors generally. The Code also refers purely to a second creditor. Van der Keessel in his <u>Praelectiones</u> in an instructive paragraph states:-

> "<u>Nam ius istud retinendi pignus pro debito chirographario d.L. un. C. etiam ob chirogr. pec. pign. ret. deflectit a regulis iuris, secundum quas soluto eo, pro quo pignus obli-</u>

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43. van Warmelo P, Coertzer L I and Gonin H L at 211.

44. <u>Supra</u> at 159.

45. 1921 TPD 328.

> gatum est, pignus solvitur L. 11 & 3 D. ...de pignor., adeoque ultra terminos novae legis non est extendendum L. 14 D. de legib. Lex autem ista nominatim adversus debitores ipsos hoc ius retentionis concedit. Accedit quod ipsa illa lex diserte addat, id ius in secundo creditore locum non habere sed posse illum, oblato debito hypothecario, a primo creditore pignus consequi, licet chirographarium debitum ipsi non offer[illegible]t; quod probat ius istud retinendi pignoris oper[illegible]i quidem adversus debitorem, sed tertio creditori praeiudicium inferre non posse."[46]

It has been stated by the learned judge in the *Farrelly* case that this proviso has been accepted by *Brink's Trustees* v *S A Bank*.[47] This latter case dealt with a pledge of a mortgage bond which was retained in order to secure another indebtedness, which was in fact six promissory notes which were unsecured and unsatisfied. Unfortunately the case does

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46. "Want daardie reg om ʼn pand te behou vir ʼn skuld op ʼn skriftelike stuk gebaseer (o.g.v. Cod. 8 26 1) is ʼn afwyking van die regsreëls waarvolgens ʼn pand by betaling van die bedrag waarvoor die pand verbind is, bevry word, en dit moet dus nie buite die perke van die nuwe reël uitgebrei word nie. En daardie (Codex-)reël verleen hierdie terughoudingsreg uitdruklik teen die skuldenaars self. Daarby kom nog dat daardie wet moet soveel woorde byvoeg dat daardie reg nie in die geval van ʼn tweede skuldeiser geld nie, maar dat hy na aanbod van (betaling van) die verbandskuld, die pand van die eerste skuldeiser kan verkry, hoewel hy vir hom nie (betaling van) ʼn skuld uit hoofde van ʼn skriftelike stuk aanbied nie; en dit dien as bewys dat daardie reg om die pand te behou weliswaar teen die skuldenaar geld, maar ʼn derde as skuldeiser nie kan benadeel nie."

    (Translation by van Warmelo and others *ibid* at 491.)

47. (1848) [illegible] 381.

not afford us with a detailed judgment. The headnote however, states as follows:-

> "The pledgee of a bond, pledged by writing, and delivered to him in security of a sum specified in the writing, has no _jus retentionis_ of the bond against the creditors of the pledgee in respect of any other debt due by him to the pledgee."

Lubbe[48] suggests that the principle was explained in argument (accepted by the court at page 385) as being based on the fact that an _exceptio doli mali_ would be available to a creditor holding a pledge against the debtor claiming return of the pledge against payment of the debt for which it was given while refusing to pay other debts due to the pledgee. This defence, it was argued, could not be raised against the body of creditors on insolvency.[49]

In the case of _Smith_ v _Farrelly's Trustee_, Smith J cited _Brink's_ case in support of the proposition that the right exists only against the debtor and cannot be maintained against his creditors

48. _Supra_ at 296 n4.

49. The _exceptio doli_ is to be discussed _infra_.

Reliance was also placed on Voet and Van der Keessel by the learned judge.

4.4 Case study

4.4.1 Smith v Farrelly's Trustee[50]

The point to be decided here was whether a half share of rental and of assessment rates was to be regarded as preferent. The Court held that these expenses were necessary expenses incurred for the preservation of the property and accordingly were afforded preference. The Court submitted that it appears to be settled that a creditor has a right of retention over a thing pledged in respect of another liquid debt accrued due whilst the pledge remains in force. The following points are to be noted-

(1) The above passage is obiter, as the matter was decided on the basis that the expenses were necessary.

(2) The learned judge referred to a liquid debt which was accrued due as opposed to using the term 'mortgage bond'. It is submitted that the latter may have in-

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50. 1904 TS 949 at 962.

cluded the former but the former does not include the latter.

(3) The learned judge cites Van Leeuwen only, in support of the right of retention as opposed to other learned writers, such as Voet, who gives the principle a wide interpretation and Van der Keessel, both of whom are quoted in support of the proviso to the principle. In this regard Van Leeuwen states as follows:-

> "pro alio etiam debito liquido retineri poteft, modo pignoris vinculum prioris debiti ratione fubfit, atque ea voluntate res a debitore creditori fuerit tranflata, aut conceffa, quod omnino requiritur."[51]

(4) Reference is made to creditors generally and not hypothecary creditors as submitted by Voet, albeit that Voet is used as a reference together with Van der Keessel.

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51. "... a thing bound for a certain course or in a particular event can be retained also for another liquid debt, provided the bond of the pledge survives by reason of the prior debt, and it is on the strength of that that the thing has been transferred or given up by the debtor to the creditor, a point which is absolutely necessary." (Translated by Barber S H and MacFadyen W A *ibid* at 264. (The writers underlining.)

(5) Lastly, it may be mentioned that this case was decided prior to the aforementioned legislative provisions regarding general bonds and prior to the Appellate Division case of Kilburn v Estate Kilburn referred to supra.

4.4.2 Haarhoff v Cape of Good Hope Bank

In the case of Haarhoff v Cape of Good Hope Bank[52] the facts were as follows:-

H was a member of a firm of attorneys, and after dissolution of the firm pledged certain shares to a bank as security for a debt then owing by him to the bank. On his bringing an action for delivery of the shares, the bank pleaded that at the date of the pledge the firm of which H was a member was indebted to the bank in a certain sum, a portion of which was still owing, and that H was liable to the bank for the said sum, and they retained the shares as security for it. The Court held that in terms of the pledge as set forth it only covered the individual liability of H to the bank and not that of the firm.

52. (1887) 4 HCG 304 at 307.

No mention is made in this case of the exception, and thus it cannot be viewed as supporting the adoption of the retention principle.

4.4.3 Van den Heever v Cloete

This case[53] dealt with a cession of a sheep leased as security for a debt which was thereafter receded to the respondent. The debtor tendered the amount of the debts to the respondent who refused to hand back the lease, claiming the right to retain it as security for a promissory note made by the debtor which was not yet due. The court held that whatever rights the respondent might have had, if the debtor had himself ceded the lease to the respondent he had not as cessionary any greater rights in respect of the lease than the first creditor had. Therefore he was bound to hand the lease back to the debtor upon tender by the debtor of the debt due by him to the first creditor.

The following remarks may be made in respect of this case -

53. (1904) 21 SC 113.

(1) Wille[54] submits that the right of retention does not pass to a cessionary from the mortgagee, that is the cessionary cannot retain property for a debt due by the original pledgor to himself.

It is arguable whether this interpretation by Wille of the judgment of de Villiers C J is in fact correct. The learned judge states:- 55

"... there is not a title of evidence to show any intention on the part of the applicant to grant this lease as security to the respondent for any debts that may be owing to the respondent."

He thereafter submits[56] that it is not necessary to go into the question of the right of retention because the case is:-

"... a case arising between the pledgee and person who was not a party to the giving of the pledge." ..

Thus, when the learned judge submitted that even if the promissory note had been due:-

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54. The Law of Mortgage and Pledge in South Africa 2nd ed (1961) at 91.

55. Ibid at 116.

56. Ibid at 117.

"... the lease could not have been legally retained as security for a debt with which it had no connection."

The learned judge was indicating that there was no connection due to their being no intention to cede and not that the principle of the right of retention should be restricted to the debts of a cedent and not that of a cessionary.

(2) This case dealt with pledge and not mortgage.

(3) The further indebtedness was a promissory note which, if one accepts the doctrine of right of retention, would have been an applicable indebtedness. However, such indebtedness appears to have been secured in this case. The learned judge submitted:-[57]

"... I am inclined to believe the statement that the respondent had held these policies as security for the promissory note."

However, it appears that the learned judge's reference to the aspect of security was not in respect of the applicability of the right of retention but rather to ascertain

57. *Idem.*

whether the parties had intended to cede the lease agreement in question.

(4) The debt in this instance was not due and thus the right of retention would not have been applicable.

(5). In the light of the above facts the learned judge's utterances are <u>obiter</u>.

4.4.4 <u>Hirschberg</u> v <u>Jackson</u> .

Briefly the facts of this case[58] were as follows:-

The holder of two mortgage bonds had applied for provisional sentence on the two bonds. Judgement was granted on the one bond only. The landed property was attached and the parties thereafter came to an agreement whereby execution was stayed in order to afford the debtor the time and opportunity of completing the sale of the property. In consideration for such extension it was further agreed that additional interest and costs be paid. The property was eventually sold as contemplated. The debtor claimed an order compelling the bondholder to either cede or cancel the bonds against payment by the

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58. 1933 CPD 238.

debtor of the amounts due by the bondholder on the two bonds. It was held per Van Zyl J that by virtue of the special agreement between the parties the further amounts due by the debtor under the agreement had become associated and identified with the amounts due under the two bonds. They had to be regarded as forming portion of the moneys due by the debtor to the bondholder under the two bonds and the judgement. He held further that, as between the parties themselves, the bondholder was entitled to retain the bonds until all moneys due under the special agreement between the parties had also been provided for.

The following points are to be noted with regard to this case:-

(1) The court treated the transaction as a special agreement which was distinctly related to the mortgage bonds themselves and was not an entirely separate indebtedness. Thus the learned judge stated:-[59]

59. *Ibid* at 242-3.

"... that an additional money became definitely associated and identified with the amounts due under the two bonds and the judgment by virtue of the special agreement entered into between the parties and that additional money must now as between the applicant and the respondent be treated as forming part and parcel of the moneys due by the applicant to the respondent under the new bonds and the judgment."

(2) The reference to Van der Keessel and Voet in the light of the above was <u>obiter</u>. Thus the learned judge stated:-[60]

"It would appear from Van der Keessel (435 and 450) and Voet (20 6 16) that even without such a special agreement the respondent would as against the applicant, but not as against the applicant creditors, have the right of retention over the bonds in respect of another liquid debt."

(3) If Van der Keessel and Voet were to be relied upon, then he submitted that difficulty would have been encountered in that the exception relates to pledge as opposed to mortgage, and secondly the further indebtedness is not a promissory note.

(4) Furthermore, the learned judge indicated that the exception could not have been entertained if the debtor had other creditors.

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60. <u>Ibid</u> at 243.

(5) It is arguable whether the learned judge was correct in his reasoning. It is difficult to see how this special agreement formed part and parcel of the moneys due by the applicant to the respondent under the two bonds and the judgment. One would have to apply for amendment of the terms of the mortgage bond. Further it appears that the judgment was novated by the agreement entered into between the parties. The judgment however is not capable of novating the mortgage bond itself but is a confirmation of it. In this regard the case of Walter Evans and Verity (Pty) Ltd v Cragg[61] is supportive.

4.4.5 Burger v Rautenbach

In this case[62] Vos J held that where a universitas rerum is pledged, such as stock in trade or a flock of sheep, the collection remains subject

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61. 1939 WLD 23 at 32. In this case provisional sentence was granted on a mortgage bond on which judgment had previously been given which had not been proceeded with as the mortgagee had condoned the mortgagor default. The court granted provisional sentence. See too Kadrinka v Lorentz 1914 TPD 32.

62. 1980 (4) SA 650 (C).

to the pledge despite the fact that there has been a change in the goods. Where a res singularis is pledged and this is replaced, then the article is not subject to the pledge. The learned judge said the following:-[63]

> "Mnr Veldhuizen het aangevoer dat die pandooreenkoms ook toekomstige skuld dek. Dit kom my voor hy het gelyk. Vide Wille Mortgage and Pledge 2de uitg te 90-91; Smith v Farrelly's Trustee 1904 TS 949 te 962; Hirschberg v Jackson 1933 CPD 238 te 242. Ook op die feite lyk dit so: applikant beweer dat die pand bedoel is om as sekuriteit te dien vir die bedrag wat Wellington Slagtery (Edms) Bpk aan hom verskuldig is; dws ook nadat die pandooreenkoms aangegaan is. Respondent erken dit op die stukke, en sy advokaat het mnr Veldhuizen se submissie nie betwis nie."

The following points may be mentioned:-

(1) The previous statements with regard to pledge, promissory notes, and pledges to creditors, are apposite here as well.

(2) The principal obligation had not been extinguished.

(3) This was an application for an interdict and, accordingly the judges opinion which does not appear to be fully reasoned, is obiter.

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63. Ibid at 654.

Thus in the light of the aforegoing remarks and the aforegoing observations it may be safely concluded that our case law is scant. It is further manifest that the underlying principles have not been fully examined or reasoned by our courts and the dictum of the Appellate Division in the Kilburn case appears to have been overlooked in the more recent cases.

5. Exceptio Doli

It may be argued that an attempt to retain security for another indebtedness which was never intended by the parties, is an exhibition of bad faith. Thus, Botha J in Rand Bank Ltd v Rubenstein,[64] held that the creditor, in seeking to rely on the wide wording of the deed of suretyship, was attempting to abuse the right it acquired for a particular purpose at that time, and to convert that right into a remedy in respect of a latter unforseen event which would undoubtedly constitute unconscionable conduct on the part of the creditor and would undoubtedly result in gross injustice or great inequity towards the debtor and in fact to other creditors. The learned judge dismissed the submission that the debtor himself to blame for his present predicament,

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64. 1981 (2) SA 207 (W) at 215.

because he chose to sign a deed of suretyship in its unqualified form, and went on to say that he could not see how the debtors carelessness could excuse unconscionable conduct on the part of the creditor.

The abovementioned decision was applied and approved in the case of Edwards v Tuckers Land and Development Corporation (Pty) Ltd.[65] In the case of Neuhoff v York Timbers Ltd[66] the learned judge Ackermann J held that the judgment in the Rand Bank case was distinguishable from the Neuhoff case in two material respects-

(1) The suretyship in the Neuhoff case could not be said to be used for a different purpose than that contemplated by the parties;

(2) It could also not be said in the Neuhoff case that the creditor was seeking to convert a right into a remedy in respect of a later unforseen event.

Accordingly, it is submitted that the Rand Bank case may well be raised against a creditor who retains the security for another indebtedness.

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65. 1983 (1) SA 617 (W).

66. 1981 (4) SA 667 (T).

6. Continuing Covering Clause

It may be argued that the retention of security could be exercised by virtue of a clause known as a continuing covering clause.[67] This however presupposes that the principal obligation is still in existence. The debt that the creditor is attempting to secure must fall within the ambit of such clause.

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67. Section 50(2) of the Deeds Registries Act 47 of 1937.

Chapter V

ANALYSIS OF DEFECTS RELATING TO THE ACCESSORY OBLIGATION

1. General statutory formalities

1.1 Main statutory provisions

The requisite formalities in order to create a valid mortgage bond affording preference, are to be found in the Deeds Registries Act 47 of 1937, read with the Insolvency Act 24 of 1936.

1.1.1 Registration

Section 50(1) of the Deeds Registries Act 47 of 1937 provides *inter alia* that a mortgage bond shall be executed in the presence of the registrar by the owner of the immovable property, or by the owner's conveyancer, and shall also be attested by the registrar. Section 13 of the same Act provides *inter alia* that a mortgage bond attested by the registrar shall be deemed to have been registered upon the fixing of the registrar's signature thereto. If by inadvertance the registrar's signature has not been affixed to the mortgage bond attested by him, he may affix his signature thereto when the omission is discovered. The mortgage bond shall thereafter be deemed to have been registered at the time when the registrar's signature should have been affixed.

With regard to section 50(1) of the abovementioned Act, Fischer J P, in the case Ex parte Badenhorst,[1] held that the word "owner" would include a fiduciary in whose name immovable property is registered.

Further, the aforementioned provision has been held by Erasmus J in the case of Swart N O v Abramowitz[2] to be directory and not peremptory. Thus it does not exclude the conveyancer who signs a mortgage bond while authorised by an agent of the owner instead of the owner himself.

An instructive case where both section 50(1) and section 13(1) were examined, was the case of Standard Bank van SA Bpk

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1. 1947 (2) SA 561 (O).

2. 1977 (3) SA 331 (O).

v Breitenbach en andere.[3] The pertinent facts of this case were that the registrar of deeds failed to sign an endorsement on the title deed in respect of a mortgage bond. Further, the numbering clerk omitted to number the bond endorsement. Eloff J held that, notwithstanding the fact that the mortgage bond had not been correctly endorsed, the mortgage bond was nevertheless validly registered. The learned judge[4] held that the practice of endorsing the title deed concerned was a practice of the deeds office only and was not a provision of statute or regulation and, accordingly, did not have the effect of constituting an additional act as a requirement for validity.

This case was strongly criticised by Heyl J W S.[5] The main thrust of his criticism is as follows:-

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3. 1977 (1) SA 151 (T), that culminated in the case of Muller N O and others v Government of the Republic of South Africa 1980 (3) SA 970 (T), which dealt with a claim for damages in terms of Section 99 of the Deeds Registries Act 47 of 1937.

4. Ibid at 156.

5. Heyl J W A "Land Registration in South Africa" (1978) De Rebus 236 at 238-9.

(a) The provisions of section 3(1)(v) of the Deeds Registries Act 47 of 1937 were nowhere referred to by the Court, nor did the Court refer to the completeness and linking of records. He submits that if the bond is not endorsed, it would make a myth of the security of title which a bondholder acquires. It is respectfully submitted that this argument is based on an incorrect premise that our system of conveyancing in South Africa is that of registration of title. The learned author submits[6] that there is a positive guarantee by the State, as contained in Section 99 of the said Act which holds the State liable for damages where the registrar or other deeds office official has not acted with reasonable care and diligence. This, however, is not entirely correct. Section 99 of the Deeds Registries Act 47 of 1937 in fact holds that no act or omission of any registrar, or of any officer employed in a deeds registry, shall render the Government or such registrar or officer liable for damages sustained by any person in consequence of such act or

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6. *Ibid* at 240.

omission; provided, that if such act or omission is mala fide, or if such registrar or officer has not exercised reasonable care and diligence in carrying out his duties in connection with such act or omission, the Government shall be liable for the damages in question. It is submitted that the views of Birch H W[7] are to be preferred. Accordingly, the Standard Bank case cannot be criticised on this point. Schoeman says[8] that admittedly section 3(1)(v) of the said act in effect places a statutory duty on the registrar to see to the linking of the records by means of endorsements; however, there is no indication that this is essential for completion of registration. He feels that the Standard Bank case is but a clear example of the need for statutory reform in this branch of our law. Schoeman's approach to the above section is correct, although it is suggested that statutory reform is not

7. "Indefeasibility of title to land" (1961) 78 SALJ 65, where he persuasively argues that our system of conveyancing is not that or registration of title.

8. Silberberg and Schoeman The Law of Property 2nd ed by Schoeman J, (1983) at 95.

necessary, especially in view of the fact that the probabilities of the facts in the Standard Bank case recurring are extremely remote. Furthermore, Heyl submits that even without section 3(1)(v) the registrar would be obliged to endorse the relevant title deed, as it is imperative that the title deed disclose the factual situation, otherwise there would be no indication to third parties that the owner as such is under an obligation to endure and respect the rights of the holder of such registered rights. This too is open to dispute, as a copy of the registered mortgage bond, although not recorded against the title deed of the property concerned, is filed at the deeds office and, furthermore, the property index maintained by the deeds office would reflect the existence of such mortgage bond.

(b) There is, however, some merit in Heyl's[9] reference to section 13(3) of the said Act. This provision provides *inter alia*

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9. *Ibid* at 237 & 239 - Heyl relies on *Van Vuuren and others v Registrar of Deeds* 1907 TS 289 at 295, *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 at 16 and *Myers v Van Heerde* 1966 (2) SA 649 (C) at 652 in support of his contention that endorsement of deeds is indispensable.

that all endorsements or entries made on deeds or in registers shall be deemed to have been effected simultaneously with the affixing of the signature of the registrar thereto in respect of deeds executed or attested by a registrar, although in fact they may have been made subsequent thereto. It thus appears that the legislature has placed some importance on the simultaneous aspect of endorsements, which in turn would indicate the importance of an endorsement itself. Heyl further remarks that the Court was not sufficiently apprised of the deeds office procedure with regard to the process of endorsements in terms of section 13(3) of the Act, as well as the difference between the terms attestation and registration.

1.1.2 Cancellation

The relevant provision of the Deeds Registries Act 47 of 1937 pertaining to cancellation is section 56(1). This section provides *inter alia* that no transfer of mortgage land shall be attested or executed by the registrar until the mortgage bond is cancelled, or the land concerned has been released from the operation of such mortgage bond. The provision has a condition to the effect that a cancellation or release is not necessary, _inter alia_, if the transfer is made in execution of a judgment of the court, by the trustee of an insolvent estate, by an executor administering an estate in terms of section 34 of the Administration of Estates Act 66 of 1965 or by the liquidator of a company which is unable to pay its debts. Rabie J in _Acton N O v Reek N O and others_[10] confirmed that the property could in terms of section 56 of the Deeds Registries Act 47 of 1937, be transferred out of an insolvent estate without reference to the second bondholder. In the instant case, a second bond was passed over property which the mortgagor was divested of in terms of section 21(1) of the Insolvency Act 24 of 1936. It was accordingly not competent for the mortgagor to pass the mortgage bond, but for some unexplained reason the error was not detected by the registrar of deeds who subsequently registered the bond. Accordingly, the mortgage bond was invalid _ab initio_. The reference to the term 'company' in the proviso to section 56 of the Deeds Registries Act 47 of 1937 has been held to include a

10. 1966 (3) SA 640 (T).

co-operative society.[11]

The question arises as to what would be the effect on a validly constituted mortgage bond if the above provision is not complied with. In a brief judgment of De Villiers C J in the case of Mutual Life Assurance Co v Hudson's Trustee,[12] the learned judge held that where land was transferred without there being a minute of the mortgage, that mortgage would rank as preferent. The second mortgagee's right in respect of a mortgage passed after the transfer of the land would then only extend to the balance of the proceeds of the land. In a more recent case, namely Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal, en 'n ander[13] a similar situation arose. In the instant case immovable property which had been properly burdened by a mortgage bond was alienated to a *bona fide* third person without the mortgagee's consent in terms of section 56(1) of the Deeds Registries

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11. As per Strydom J in Brandt en 'n ander N N O v Registrateur van Aktes 1985 (2) SA 606 (SWA).

12. (1884) 3 SC 264.

13. 1975 (4) SA 936 (T).

Act 47 of 1937. The court, per Coetzee J, held that the mortgagee does not lose his rights in the immovable property, the bona fides of the procurer not being relevant. This decision was confirmed by the Standard Bank case supra.[14]

The reverse situation to the Barclays Bank case fell to be decided in McEwan's Curators v Pietermaritzburg Corporation.[15] It was held that the cancellation of a lunatic's mortgage bond by the curator before due date of payment, without the authority of the court, was void.

A further exception to section 56 can be found in section 57 of the same Act. Subject to certain limitations, it is possible to substitute the transferee for the transferor as debtor in respect of the mortgage bond. Section 57(4)(a) provides that substitution is not permissible where the mortgaged land is to be transferred to the person who would not himself be competent to mortgage it. However,

14. The translation of this case in the South African Law Reports at 67 incorrectly states that it is distinguishable from the Barclays Bank case due to a mistranslation of the word 'onondeskeibaar'.

15. (1885) 6 NLR 209.

in the case of Ex parte Ross[16] Davis J held that a minor with authority of the court was competent to take over liability under an existing mortgage bond, and accordingly the proviso to section 57 was not applicable. Jones R J M[17] submits that several learned counsel have voiced the opinion, based on the wording of section 57 and on the form of the consent prescribed, that where a substitution is effected in respect of a covering bond, whether it is under section 45, 45*bis* or 57 of the same Act, the mortgagee will enjoy no preference in respect of any readvance to the new debtor.

1.1.3 Preference

Section 88 of the Insolvency Act 24 of 1936 imposes a further statutory formality relating to the time period within which to lodge a mortgage bond. Thus, a mortgage bond, other than a *kustingsbrief*, passed for the purposes of securing payment of a debt not previously secured, which was incurred more than two months prior to the lodging of the mortgage

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16. 1940 CPD 6 at 7.

17. Conveyancing in South Africa (1985) 3rd ed at 137.

bond with the registrar of deeds concerned, shall not confer any preference, if the estate of the mortgagor debtor is sequestrated within a period of six months after such lodging. A mortgage bond shall be deemed not to have been lodged as aforesaid, if it was withdrawn from registration.[18]

1.1.4 Transfer as security

Section 91 of the Deeds Registries Act 47 of 1937 expressly excludes transfer of immovable property as security. Although a transaction of this kind is not a mortgage bond in form, it may nevertheless be viewed as a mortgage bond in nature. The procedure whereby one transfers immovable property as security was in fact the earliest form of mortgage under the Roman law and was probably first recognised in the third century B C.[19] It was held in Lewis v Petsch Properties (Pty) Ltd,[20] per Warner A J, that the aforementioned section

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18. Presumably the legislature, by referring to withdrawal from registration, is referring to that period after lodgment of the documents at the deeds office but prior to registration of the mortgage bond.

19. This form of mortgage was known as *fiducia cum creditore*.

20. 1961 (1) SA 290 (D).

does not make void a transfer which ex facie is an out and out transfer but is in fact, by arrangement between the parties, a transfer as security. The learned judge correctly held that the section merely prohibits the registrar from attesting such a transfer if it is ex facie a transfer as security. It does not impose upon the registrar of deeds a duty to enquire in each case into the background of the transaction in order to ascertain whether it in fact is a transfer of security or whether it is an out and out transfer.

The English legal system introduced the legislation in 1925 in order to disallow transfer by way of security for a debt.[21]

It appears that it is still possible to transfer property as security in the United States of America.[22]

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21. The law of Property Act 1925 15 Geo V c20. See supra.

22. See supra.

2. Contents of mortgage bond

2.1 Essentialia

Section 51(1) of the Deeds Registries Act 47 of 1937 provides that a mortgage bond shall not be of any force or effect for the purpose of giving preference in respect of any debt incurred after the registration of such mortgage bond, unless it is expressly stipulated that the bond is intended to secure future debts generally, or some particular future debt described therein. Further, a sum must be prescribed in the mortgage bond, being an amount beyond which future debts shall not be secured by such mortgage bond. The statute provides that the costs of delivering and realising security, fire insurance premiums, cost of notice or bank exchange shall be deemed to be future debts. Our courts have held that interest is not to be regarded as a future debt.[1]

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1. Klagbruns Incorporated v Adjunk-Balju, Bronkhorstspruit 1979 (2) SA 169 (T) at 171. See too Rooth & Wessels v Benjamins's Trustee and the Natal Bank Ltd 1905 TS 624 at 630 and Ex parte Gangat: In re Mohangi v Sooknandan 1938 NPD 464.

2.2 Invalid provisions

2.2.1 Preference

A mortgage bond may not be passed in favour of two or more mortgagees where it is stipulated that the share of one holder shall rank prior in order of preference to the share of the other. The transaction may also not be registered if the transaction would have the effect of giving preference to one share in such bond over another share.[2]

2.2.2 General clauses

The registrar is prohibited from attesting any mortgage bond which purports to bind movable property or contains a clause commonly known as the 'general clause' which purports to bind generally all the immovable or movable property of the debtor or both.[3] In Hymie Tucker Finance Company (Pty) Ltd v Alloyex (Pty) Ltd[4] the court held that a notarial bond was invalid as it appeared that most of the assets hypothecated were in fact immovables.

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2. Section 55(2) of the Deeds Registries Act 47 of 1937.

3. Section 53(1) of the Deeds Registries Act 47 of 1937.

4. 1981 (4) SA 175 (N).

2.2.3 Agency

The Deeds Registries Act[5] prohibits a mortgage bond being passed in favour of a person as an agent of a principal. In the leading case of Lief N O v Dettman[6] the above provision was scrutinised. Van Wyk J A[7] found counsel's contention that the provision merely relates to the manner and form in which a bond is to be registered, untenable. He concluded that the legal effect of the provision was that an agreement to hold a mortgage bond on behalf of a principal could not vest any rights in such mortgage bond in the principal.

The learned judge held[8] that the Act did not permit a distinction to be drawn between the registered mortgagee as a purely nominal holder, and some other person, who would be regarded in law as the beneficial holder of rights. Accordingly, the court held that the nominee did not acquire any real right in and under the bond.

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5. Section 54 of the Deeds Registries Act 47 of 1937.

6. 1964 (2) SA 252 (A) at 260, 261, 273 and 274.

7. Ibid at 260 and 261.

8. Ibid at 273.

The above case was referred to in Bay Loan Investment (Pty) Ltd v Bay View (Pty) Ltd[9] where van Winsen J[10] held that the Lief judgment did not, in terms, decide that the nominal holder could not enforce performance by the mortgagor of the obligations under the mortgage bond. Nor did it decide that the mortgage bond was a nullity by reason of the conflict with section 54 of the said Act. The learned judge submitted[11] that the section contains an injunction directed to the registrar of deeds similar to sections 50, 52 and 53. Thus, in his view, the effect of the section is that only the registered mortgagee will hold rights under the bond recognisable in law, and not the beneficial holder. The learned judge accepts that the words of the provision are peremptory in form but argues that it cannot necessary be inferred therefrom that the legislature intended to visit non compliance with nullity. He goes on to say that:-

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9. 1972 (2) SA 313 (C).

10. Ibid at 314 - 15.

11. Ibid at 315.

"A Court would not really hold that a registered mortgage bond, regular on the face of it, was in fact a nullity. To do so in the absence, inter alia, of fraud or error could lead to greater inconvenience or impropriety then to allow it to retain its validity. It seems that by enacting sec. 54 the Legislature had in mind to eliminate the uncertainty as to the identity of the holder of the rights of a mortgagee which uncertainty might flow from the fact that the identity of the mortgagee has to be sought in a contract de hors bond, e.g. a contract of agency. Such a contract would be subject to variations not reflected in the bond. If certainty can be achieved by recognising the mortgagee named in the bond as the only holder of the rights thereunder, no good reason seems to exist for a presumed intention on the part of the legislature to hold that the bond should be visited with nullity.

I conclude, therefore, that the bond in the present case is not a nullity." 12

The dictum of Van Winsen J referred to above is not without merit, and it is submitted that the learned judge has placed the correct interpretation on section 54 of the said Act. The provision was again discussed in the case of Goodricke and Son (Pty) Ltd v Registrar of Deeds Natal.[13] Here Muller J held that trustees were not agents, and accordingly section 54 of the said Act had not been contravened.

12. Ibid at 315 - 16.

13. 1974 (1) SA 404 (N).

2.2.4 Parate Executie

Wille[1] defines parate executie as a sale by a creditor of property which belongs to the debtor, without the assistance or intervention of the legal authorities.

This concept has been the subject of much legal dispute, and writers such as Wessels J W[2] and Stapleton F G[3] have referred to it as belonging to the jus controversum. Krause L E[4] submitted that this state of affairs was due to the existence of two opposing and contending principles or tendencies in law. These are freedom of contract on the one hand, and taking the law into one's own hands on the other. He submits that the history of parate executie is a struggle between these two tendencies.

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1. The Law of Mortgage and Pledge in South Africa 2nd ed (1961) at 77.

2. Wessels J W History of Roman Dutch Law (1908) at 596.

3. Stapleton F G, "Parate execution" (1915) 32 SALJ 144 at 148.

4. Krause L E "Notes to Voet 42 1 48 - The History of Parate Executie" (1924) 41 SALJ 20.

In contemporary South African law we are not subject to such vicissitudes that prevailed during Roman Dutch times[5] and early South African

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5. Krause L E, supra, submits that under the Roman law at Justinians time, the creditor had the right of parate executie which was not confined to movables. Apropos of Roman Dutch law he contends that the position was by no means certain. He cites Voet as indicating that parate executie was invalid. He submits that the writers on Roman Dutch law in Friesland were generally in favour of parate executie as opposed to those writers in Holland. Of the former category, he cites Sande, Ulric Huber and Johannes van der Linden. Of the later category, he cites Grotius, Van Leeuwen, Merula, Groenewegen, Neostad, Van Alphen, Voet, Matthaeus of Utrecht, Lijbrecht and Kersteman.

He thereafter goes on to cite certain later writers, who he opines declare the parate executie as valid. He cites Bynkershoek, notes of Juris D Lulius and Van der Linden on Merula, Van der Keessel, Van der Linden, Decker's note to Van Leeuwens Commentaries and Van Zutphen.

He submits that the latest writers limit this right to movable property only.

Claassen J, with whom Hill and Trengove J J concurred, in Iscor Housing Utility Company and another v Chief Registrar of Deeds, 1971(1) SA 613 (T) at 619 examined the Roman Dutch writings. He states that he has not come across one writer who has stated specifically that parate executie was permissible in respect of immovable property. With regard to this latter contention, the learned judge spent some time analysing the writings of Van der Keessel and Van Bynkershoek and concludes that Kotze's appendix to the second edition of Roman Dutch Law of Van Leeuwen is incorrect with regard to the submission that the jurist had extended the parate executie principle to movables and immovables.

Claassen J at 62 concludes that ".... I can find no positive indication of its applicability to immovables. On the contrary the latest writer on the subject, Van der Keessel seems to be against such a finding."

law.[6] One of the leading cases on parate executie is Iscor Housing Utility Co and another v Chief Registrar of Deeds and another.[7] Here Claassen J., with whom Hill J and Tengrove J concurred, held that a power of attorney in rem suam authorising a mortgagee to sell the property to the mortgagor without reference to such mortgagor gives effect to a parate executie and is accordingly invalid. At the outset one must make certain cautionary remarks, namely:-

(i) Parate executie has been accepted as forming part of our law with regard to movable property.[8]

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6. In early South African law the question was raised in the case of Guldenpfenning v de Villiers 1889 SA REP where it was held that parate executie was not applicable to South African law. The aforementioned case was cited in John v Trimble and others 1902 TH 146 at 155 (misquoted as Guldenppenning v de Villiers). The case of Estate van Wijk v Joubert C J (1897) 4 Off Rep 360, appeared to give partial recognition to such execution. The case of Ex parte Mabunya 1903 SC 165, was decided on the basis that a further agreement was entered; see too In re Cradock Building Society (1896) 13 SC 99.

7. 1971 (1) SA 613 (T).

8. Osry v Hirsch, Loubser & Co Ltd 1922 CPD 531 at 541, per Kotze J P, who held that an agreement for the sale of movables by means of parate executie is valid in our law. However, the learned judge went on to say (at 547) that it is open to the debtor to seek the protection of the court if the creditor has acted in a manner which has prejudiced him in his rights.

(ii) It appears to be accepted law that if the mortgagor agrees, when he is in default, to the mortgagee realising the mortgaged property, such act would not be declared void.[9]

(iii) There are certain statutory exceptions to the above rule which permit the sale of immovable property by the creditor, without recourse to the courts.[10]

There have been various permutations as to the form of such parate executie.

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9. Iscor Housing Utility Co and another v Chief Registrar of Deeds and another 1971 (1) SA 613 (T) at 617.

10. There are various ordinances which permit the local authority concerned to sell the debtor's property in order to recoup arrear assessment rates. See section 94(1) of the Municipal Ordinance 20 of 1974 (C), as amended by Municipal Amendment Ordinance 6 of 1982 (C); Section 117(3)(a) of the Local Government Ordinance 8 of 1962 (O). See also sections 50(1) and 55(2)(b) of the Land Bank Act 13 of 1944 and section 37 of the Agricultural Credit Act 28 of 1966.

1. In the Iscor case referred to above, the mortgagor appointed the mortgagee irrevocab and in rem suam as his attorney and agent to sell in his name the mortgaged immovable property by way of public auction or private treaty at a price which the mortgagee at his sole discretion deemed to be reasonable.

2. In the case of Mardin Agency (Pty) Ltd v Rand Townships Registrar[11] an irrevocable power of attorney was granted to a surety as opposed to the mortgagee. Viljoen J held that this case was in principle indistinguishable from the Iscor case referred to above and accordingly held that the power of attorney was invalid.

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11. 1978 (3) SA 947 (W).

3. In the case of Tenner v Leeufontein Mines (Pty) Ltd and another the learned judge, Steyn J, held that an option coupled with a deed of suretyship could in its effect not be distinguished from an irrevocable power of attorney *in rem suam* authorising the creditor to take or give transfer of the affected property. The option was the instrument to carry out the *parate executie* and thus that instrument was invalid *ab initio* and therefore conferred no rights.

What now remains to be discussed is the possible development of *parate executie* in our law. Scholtens J E[13] submits that there is no cogent reason why, once *parate executie* is accepted in respect of a pledge of movables, it should be indiscriminately rejected in respect of immovable property. Isakow L E[14] quotes Claassen J in the Iscor Housing case as follows:-

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12. 1982 (4) SA 586 (T).

13. "Law of Property (including Mortgage and Pledge)" (1971) Annual Survey of South African Law 189 at 205.

14. "Parate Executie" (1971) 88 SALJ 310 at 311.

> "The creditor may honestly, but mistakenly, be certain that a debtor is in default. He then sells the debtor's house without notice to him, passes transfer to an innocent third party ... The mortgagor may have had a valid defence ... One can forseec many legal complications."15

She thus submits that if parate executie were permissible in respect of immovables, this would prejudice the debtor by precluding him from raising other defences he would otherwise have had.

Claasen J, in the Iscor case,[16] submits that the objections usually advanced against parate executie are founded upon the following:-

1. The prohibition has been introduced to protect debtors and to prevent creditors from taking undue advantage of the impecunious position of the debtor.

2. Exercising the power of parate executie is tantamount to the creditor taking the law into his own hands.

3. The creditor may honestly but mistakenly be certain that the debtor is in default, as mentioned above.

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15. *Ibid* at 617.

16. *Ibid* at 616.

It may be argued that, aside from motives of malice, the creditor would acquire no undue advantage in selling the debtors property. The creditor would merely be taking the relevant steps to restore what is rightfully due to him. Any excess after sale would be repaid to the debtor.

An important consideration in the learned judge's approach to the matter, appears to be that of notification. In analysing the comments of Van Bynkershoek,[17] he says:-

> "These words that I have underlined convey to me the meaning that Bynkershoek must have had in mind the debtor who had <u>knowledge</u> of the execution and either agreed <u>thereto or</u> raised no objection." 18

Furthermore the learned judge says:-[19]

> "... the Court often requires notice of setdown to be given to the defendant. ...In a <u>parate executie</u> matter the power of attorney <u>may have been given</u> years before the proposed execution. <u>Without notice</u> to the debtor such execution <u>would be most</u> undesirable.

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17. <u>Ibid</u> at 620.

18. The underlining being the writer's addition.

19. <u>Ibid</u> at 623.

> To grant the applicant's prayer and to permit execution in respect of immovable property without reference to the mortgagor would in my opinion be contrary to the dignity, equity and spirit of our legal procedure." 20

It is proferred in the light of the above quotation that, if it could be proved by the creditor that the debtor had actual notice of the proposed sale and if the debtor is entitled to recourse to the courts as per the Osry case, then one wonders whether the debtor has in fact suffered any prejudice. It appears that other legal systems do permit of a parate executie.[21]

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20. The underlining being the writer's addition.

21. Tyler E L G "Mortgage" Halsbury's Laws of England Lord Hailsham 4th ed (1980) vol 32 para 708:
"So long as the equity of redemption remains vested in the mortgagor, the mortgagee may not sell the property except under an express or implied power of sale, or under a statutory power, or with the mortgagor's concurence. It was usual to insert in mortgages executed before the 1st January 1882 an express power of sale, and although unusual, this may still be done where on account of special circumstances, or of the importance of the transaction, the intending mortgagee prefers not to rely on the statutory power."

Any mortgage made after 1881 is governed by Section 101(1)(i) of the Law of Property Act of 1925 15 Geo V c20, which inter alia provides that a mortgagee has the power, when the mortgaged money has become due, to sell the mortgaged property by public auction or by private contract.

2.2.5 Pactum Commissorium

Wille[1] submits that a pactum commissorium is an agreement to the effect that, if a debt is not paid by a certain date or if the mortgagor is otherwise in default, the mortgagor may hold or keep the security as his own property.

The pactum commissorium was prohibited in the Roman law,[2] and the Roman Dutch law,[3] and was firs accepted as not forming part of South African law in 1905 by Lange A J P in the case of Dawson v Eckstein.[4] The learned judge held that such an agreement was both illegal and inequitable. A contrary view appears to have been taken in the case of Ex parte Mabunya,[5]

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1. The Law of Mortgage and Pledge in South Africa 2nd ed (1961) at 79.

2. C 8 34 3.

3. Grotius 2 48 41, Van Leeuwen 1 4 8 7 and Voet 20 1 25 and 26. Voet states that the underlying reason for illegality of the pactum commissorium is that things of greater import and value may be used by a desperate debtor to pay off a paultry liability.

4. (1905) 10 HCG 15.

5. (1903) 20 SC 165 - the facts of this case were as follows:-

A borrowed from M the sum of £20 and in order to secure the loan rented M an erf for a period of two years at a rental which was equivalent to the interest on the loan. It was agreed that should A fail to repay the amount within the aforesaid period, the land would become the property of M and the amount of the debt would be considered to be the purchase price. A failed to pay the debt, and M remained in possession of the erf for a number of years, and he was treated by A as being an owner in every respect save that

(continued overlea:

which has been regarded by academics[6] and by the judiciary[7] as being incorrect, or alternatively not fully reasoned.

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transfer was not passed to him. After the death of A, a rule nisi was obtained by M for the registration of the land into his name. The rule was opposed by A's heir, who tendered the amount of the debt but did not allege that the price agreed upon was in any way unjust or unreasonable. It was held that the purchase price was fair and reasonable and accordingly the rule was made absolute.

6. Somerset Bell W H "Clause in Mortgage Bond allowing Mortgagee to Sell in Case of Non-Payment of a Debt" (1910) 27 SALJ 527 at 528. The learned author said that a judicial utterance in the Mabunya case, which appears to be in conflict with the Trimble case, was unnecessary and accordingly could be regarded as an unconsidered obiter dictum.

7. McGregor J, in the case of van Rensburg v Weiblen 1916 OPD 247 at 256, made the following comments with regard to the Mabunya case:-

(i) the judgment was that of the same learned judge who subsequently gave utterance to the dictum in the case of National Bank of SA Ltd v Cohen's Trustee 1911 AD 235 at 242, where the learned judge quoted Voet 20 1 25;

(ii) the ruling may have to be viewed in conjunction with the special facts of the case.

Mabunya's case was also referred to in the case of Mapenduka v Ashington 1919 AD 343 at 345, where de Villiers C J stated that the reasoning of the former case could not be entirely supported.