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The Need for Coherence in Security by Means of Claims

by

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Summary

This research shall focus on the need for coherency in the law of security by means of personal rights. Chapter 1 will provide a background of the topic. Chapter 2 will provide a historical background for the law of cession generally and the law in security by means of personal rights in particular, by exploring the Roman and Roman-Dutch law. There will also be a comparison of foreign jurisdictions that share the same legal history with South Africa. Chapter 3 will provide an overview of the basic principles on which the law of security by means of claims are based. These will be a summary of the ordinary pledge and the law of cession. Chapter 4 will discuss the application and development of this security by means of personal rights through the courts. Chapter 5 will discuss the principles of these two theories. This research will conclude with chapter 6, which summarises this law and offers suggestions that will create coherency and certainty in this area of law.

Acknowledgements

To God, the Alighty, to my supervisor Professor R Brits for the support you have given me. Without your help I could not have achieved this. To my late wife, my sons and a daughter. Lastly to my friend, Blessing Mamabolo, who introduced me to this wonderful university.

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Chapter 1:
Introduction

This research shall focus on the need for a statutory framework for the law regarding security by means of claims. Modern commercial realities require legal certainty. The development of the credit industry plays a significant role in the development of the economy and particularly small and medium enterprises. In order for the government to realise its goal of job creation and development of the economy, a conducive environment in terms of legislative framework and certainty has to be created.

Creditors these days usually require security when advancing credit to potential debtors, and therefore debtors must be able to utilise both their corporeal and incorporeal assets to secure whatever credit facility they wish for. Present security options like the Security by Means of Movable Property Act 57 of 1993 provide limited protection for the credit providers as it does not cover incorporeal movables. If one wants to use movable incorporeal assets like personal rights, one has to turn to the common law. It is settled law that personal rights can be transferred from one person to another and they can also be utilised to secure a debt.[1] The only way of transferring personal rights from one person to another is through cession.[2] The problem with the use of personal rights for security purposes is which form of cession is going to be used to transfer these personal rights from the debtor to the creditor. The theoretical debate is divided between pledging of these rights, whereby the dominium of the personal rights is not transferred to the creditor and complete transferring of this right to the creditor in the form of fiduciary security cession with an agreement between the parties to recede the right after payment of the principal right.[3]

This research will trace the development of the law of security by means of personal rights in Roman law and Roman-Dutch law, and further discuss how other foreign jurisdictions are regulating this field of law. There will also be a discussion of the principles of the law of security, the ordinary pledge and the ordinary cession. A further discussion will be provided on the development of this law through the courts and also the principles regulating the pledge of personal rights and the fiduciary

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[1] S Scott "*Scott on Cession, A Treatise on the law in South Africa*" 1st ed 2018 Juta 13.
[2] *Supra* 13.
[3] R Brits "*Real Security law*" 2016 Juta 276.

security cession as developed through case law. This will conclude with the recommendations on how personal rights can be used as security for a debt.

Chapter 2:
Early development of security by means of personal rights and the position in other foreign jurisdictions

2.1 Introduction

Personal rights are rights that a creditor can claim performance of an obligation from his debtor.[4] They may arise either from the terms of a contract, delict or unjustified enrichment.[5] In terms of the law of property, personal rights are assets in a legal subject's estate, and like real rights, they can be transferred from one party to another.[6] Personal rights as incorporeal movables cannot be physically transferred from one party to another and therefore the law of cession was developed to facilitate the quasi-delivery of this incorporeal asset.[7] This chapter will introduce the use of personal rights as security for a debt. The concepts personal rights or claims will be used interchangeably. As mentioned above, the manner in which personal rights can be used as security for a debt is a controversial issue. The controversy is between the appropriate methods through which security by means of claims will be used.[8] Academics, judges and other commentators have for over a longer period of time distinguished between the pledge of claims construction and the fiduciary security cession (out-and-out cession).[9] This transfer of personal rights for security purposes shall be traced from Roman law and Roman Dutch law, and to how it was introduced into South African law. There will also be a short discussion on how foreign jurisdictions that share the same legal history with South Africa are regulating the transfer of personal rights as security for debts.

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[4] R Brits "*Real Security Law*" 2016 Juta 273.
[5] *Supra*.
[6] S Scott "*The law of cession*" 2nd ed 1991 Juta 3.
[7] *Supra* 1.
[8] *Supra* 235.
[9] Van Huyssteen et al "*General Principles of Contract*" 5th ed. 2016 Juta.

2.2 Development of cession in *securitatem debiti* in Roman and Roman-Dutch law

In order to understand the historical development of cession *in securitatem debiti*, we should begin with the historical development of the law of cession. Cession in its modern guise was unknown to Roman law, but the same economic effect was achieved through what was known as *procuratio in rem sua*.[10] In terms of this institution, a procedural agent was authorised to enforce another's claim.[11] This practically meant that the cedent (debtor) appointed the cessionary (creditor) as his procedural agent to recover the debt, with the authority to retain the proceeds for himself.[12] In this situation, the personal right itself was not transferred.[13] Later this developed into *actio utilis* in which the creditor (cessionary) could act in his own name against the personal right.[14] In this case the transferor (cedent) remained with the *actio directa*, which the cessionary will only use in the name of the cedent to claim on the ceded debt.[15] The transferee (cessionary) will protect himself against any extinguishment of the ceded debt by the transferor by giving notice to the debtor of his claim thereto.[16] Such notice was termed *denuntiatio*.[17] But the needs of commerce prompted gradual development of the use of personal rights for security purposes.[18]

In Roman-Dutch law, there was a divergence between the strict Romanistic approach and the pragmatic approach.[19] Despite a practical need for the transfer of personal rights, Frisian writers such as Sande and Huber and Romanists such as Vinnius and Noodt adhered to Roman law precepts that personal rights cannot be transferred.[20] They held the view that the transferor retained the *actio directa* and the transferee was acting by means of a *mandatum in rem suam*, the *actio directa aliena* and *actio utilis*, whereby he could act in his own name against the ceded debt.[21] Ownership of the personal right remained with the transferor.[22] In Holland, Roman-

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[10] Van Huyssteen et al "*General Principles of Contract*" 5th ed. 2016 Juta 431.
[11] S Scott "*Scott on Cession, A Treatise in South Africa*" 1st ed 2018 Juta 5.
[12] PM Nienaber " Cession" LAWSA 2nd ed. Vol 2 Part 2 2003 LexisNexis 10 para 11.
[13] *Ibid*.
[14] *Ibid*.
[15] PM Nienaber "Cession" LAWSA 2nd ed. Vol 2 Part 2 2003 LexisNexis 10 para 11.
[16] *Ibid*.
[17] *Supra*.
[18] S Scott "*Scott on Cession, A Treatise in South Africa*" 1st ed 2018 Juta.
[19] PM Nienaber "Cession" LAWSA 2nd ed. Vol 2 Part 2 2003 LexisNexis 10 para 12.
[20] *Ibid*.
[21] *Ibid*.
[22] *Ibid*.

Dutch authors such as Groenewegen, Voet, Van Leeuwen, Van Bynkershoek and Van der Kessel recognised that cession according to the common law effected a true transfer of the personal right.[23] A complete gain of the right by the cessionary and a corresponding loss thereby by the cedent.[24] But the debtor who rendered performance to the transferor in ignorance of the transfer of the personal right was absolved.[25] The divergence between the strict Romanists who were made up by the Northern parts of Netherlands and Roman-Dutch authors in Holland had significant legal consequences.[26] In the strict Romanistic approach, the transferor allowed the transferee to claim the personal right in his own name, without transferring ownership to the transferee.[27] This had the implications that if the transferor died, or became insolvent before the ceded debtor is informed or if his creditors were to attach the ceded debt or he enter into a settlement with the ceded debtor, the transferee would be the loser.[28] None of this would occur in the pragmatic approach of the Holland authors, as the personal right was transferred completely to the transferee.[29] This pragmatic approach became the foundation of the law of cession in South African law.[30] The Roman praetor later developed *fiducia cum creditore* as a legal institution that could transfer personal rights as security and this achieved the same object as the modern out-and-out security cession.[31] According to Voet, incorporeal rights could be freely pledged.[32] And the only way to pledge them was by way of cession.[33] Critics of the pledge construction like De Wet and Yeats criticise the pledge of personal rights as having no historical background but disregarded what Voet stated, namely that "everything which may be sold, may be pledged".[34] Even Huber who was in favour of pledge of personal rights for practical purposes was ignored.[35] Cession in *securitatem debiti* was introduced in South Africa through Roman-Dutch law.[36]

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[23] PM Nienaber "Cession" LAWSA 2nd ed. Vol 2 Part 2 2003 LexisNexis 10 para 13.
[24] *Ibid*.
[25] *Ibid*.
[26] PM Nienaber "Cession" LAWSA 2nd ed .Vol 2 Part 2 2003 LexisNexis 10 para 14.
[27] *Supra* 11.
[28] *Supra* 11.
[29] *Supra* 11.
[30] *Supra* 11.
[31] S Scott "*The Law of Cession*" 2nd ed. 1991 Juta 247.
[32] S Scott "*The Law of Cession*" 2nd ed. 1991 Juta 236 footnote 20; Voet *Commentarius* 20 3 1.
[33] *Ibid*.
[34] *Ibid*.
[35] S Scott "*The Law of Cession*" 2nd ed. 1991 Juta 236 footnote 20; Huber *Rechtsgeleertheyt* 2 47 1.
[36] *Ibid*.

2.3 The position of foreign jurisdictions in regulating the transfer of personal rights for security purposes

Generally one may say that cession *in securitatem debiti* did not trigger theoretical debate in South Africa only. Most jurisdictions that share the same legal history with South Africa experience challenges on the appropriate method in which personal rights may be used as security for a debt. The theoretical debate has been between the fiduciary security cession and the pledge of claims.[37] These jurisdictions belong to the same legal family with South Africa, namely the Romano-Germanic legal family.[38] The following discussion will show how countries like Belgium, Germany and France had codified their law of security by means of personal rights in favour of pledge of claims. In practice, the fiduciary security cession is the most favoured method of effecting security by means of claims.[39] Academics, practitioners and the courts recently acknowledge the two forms of security by means of claims.[40] English law in the field of cession has not significantly influenced the law of South Africa.[41] However, an important aspect inherited from the English law is the doctrine of *stare decisis* which results in the development of case law through precedence.[42]

2.3.1 France

French law previously acknowledged a fiduciary cession whereby the personal right could be completely transferred to the creditor for security purposes.[43] Presently, the French law through the Code of Napoleon provides that these fiduciary transfers are now regarded as constituting a pledge of claims.[44] In France, transfer of personal rights for security purposes has been codified.[45] Article 2355 of Code of Napoleon permits only a pledge of present and future incorporeal movables.[46]

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[37] R Brits "*Real Security Law*" 2016 Juta 302.
[38] S Scott "*Scott on cession, A Treatise on the Law in South Africa*" 1st ed. 2018 Juta 417.
[39] *Supra* 411.
[40] *Ibid*.
[41] PM Nienaber "Cession" LAWSA 2nd ed. Vol 2 Part 2 2003 LexisNexis 11 para 15.
[42] S Scott "*Scott on cession, A Treatise on the Law in South Africa*" 1st ed. 2018 Juta 423.
[43] R Brits "*Real Security Law*" 2016 Juta 302.
[44] R Brits "*Real Security Law*" 2016 Juta 302.
[45] *Ibid*; see footnote 143 on 302.
[46] *Ibid*.

2.3.2 Germany

The German jurisdiction has an interesting development of security by means of claims. German law acknowledges two forms of security by means of personal rights.[47] Both the pledge of claims and the out-and-out cession are applied.[48] The German *Burgeliches Gesetzbuch*, which was adopted in 1900, explicitly provides that ownership of personal rights (*Eigentum en Forderungen*) was impossible.[49] The code make an exception for a pledge of personal rights.[50] Paragraph 1280 of the *Burgeliches Gesetzbuch* requires notice of the cession to the debtor for the constitution of a pledge of personal rights.[51] This was unacceptable to most of the parties involved in security transactions as they prefer confidential transactions.[52] In reaction to this, fiduciary security cessions became the more attractive form of effecting security transactions.[53] This prompted legal practitioners and the courts to develop fiduciary cessions as an alternative form to pledge of claims as provided in the *Burgerliches Gesetzbuch*.[54] They drafted deeds of cessions that give effect to the wishes of their clients.[55] The courts engaged their interpretative skills relying both on traditional Roman law concepts and unique German concepts.[56] The legislator followed by amending the insolvency law and the law of civil procedure to accommodate fiduciary security cession which the *Burgeliches Gesetzbuch* did not provide.[57] Some of the other reasons why fiduciary security cessions became popular as an appropriate means of providing security using personal rights were aspects like the revolving or continuing securities, strict rules that were provided by the *Burgeliches Getsetzbuch* for the realisation of security objects and as mentioned above, the notification of the debtor.[58] Similar to South African law, German law applies an analogy of pledge of moveable corporeal to the pledge of personal rights,[59] but with

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[47] S Scott "*Scott on cession, A Treatise on the Law in South Africa*" 1st ed. 2018 Juta 410.
[48] *Ibid*.
[49] *Ibid*.
[50] *Ibid*.
[51] *Supra* 411.
[52] *Ibid*.
[53] *Ibid*.
[54] *Supra* 412.
[55] *Ibid*.
[56] *Ibid*.
[57] S Scott "*Scott on cession, A Treatise on the Law in South Africa*" 1st ed. 2018 Juta 412.
[58] *Supra* 411.
[59] *Supra*.

some adaptation like notification of the ceded debtor serving the principle of publicity as in corporeal movables.[60]

2.3.3 The Netherlands

In the Netherlands, transfer of personal rights for security purposes has been codified.[61] The old *Burgerlijk Wetboek* made provision for the pledge of personal rights.[62] But in practice, the majority of security by means of personal rights transactions continued to be effected in the form of fiduciary security cessions.[63] The new *Burgerlijk Wetboek* in article 3:84(3) now excludes any form of fiduciary transfer as security for a debt.[64] It provides only for a pledge of personal rights.[65] The code provides for a variety of pledges which parties can choose from, depending on their intentions.[66] Article 3:236 of the code provides for a possessory pledge (*vuispandt*) of movables or personal rights.[67] Article 3:237 provides for a non-possessory pledge (*bezitloos pandrecht*) of movables and personal rights directed at the bearer.[68] A *stil pandrecht* is a pledge of personal rights without publicity, and is provided in article 3:239.[69]

2.3.4 England and Wales

The most important influence of English law for South Africa is in the operation of the doctrine of *stare decisis*.[70] With this doctrine, precedence in case law influenced the development of the law of cession generally and the law of security by means of personal rights in particular.[71] In English law, personal rights can be used as security for a debt in the form of a charge over such a claim.[72] Notification to the debtor is not required.[73] Personal rights can also be transferred fully for security purposes by means

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[60] *Supra*.
[61] S Scott "*Scott on cession, A Treatise on the Law in South Africa*" 1st ed. 2018 Juta 418.
[62] *Ibid*.
[63] *Ibid*.
[64] *Ibid*; see footnote 68 in *Scott on cession, A Treatise on the Law in South Africa*.
[65] *Supra* 418.
[66] *Ibid*.
[67] *Ibid*; see footnote 69 in *Scott on cession, A Treatise on the Law in South Africa*.
[68] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 418 footnote 70.
[69] *Ibid*; see footnote 71 in *Scott on cession, A Treatise on the law in South Africa*.
[70] S Scott "One hundred years of security cession" 25 *SA Merc LJ* (2013) 525.
[71] *Supra*.
[72] R Brits "*Real Security Law*" 2016 Juta 302.
[73] *Ibid*.

of statutory assignment, but here the debtor must be notified.[74] Security by means of book debt is also possible but will only give a preference in insolvency if it is registered in a public register.[75]

2.3.5 Belgium

A recent court decision in Belgium by Dirix JA in *Vanden Avenne-Ooigen v Landbouwkrediet en Andere*[76] provides an explicit picture of the present law of security by means of personal rights in Belgium.[77] The case, similar to the South African case of *National Bank v Cohen's Trustee*,[78] dealt with insolvency issues.[79] In the court *a quo*, it was held that the transaction reflected a fiduciary security cession, whereby the personal right was completely removed from the cedent's estate.[80] In the supreme court, the court referred to sections 7, 8 and 9 of the *Hypotheekwet* of 1851 and held that "[c]onsequently an agreement in terms of which a claim (personal rights) is transferred as security can in a *concursus creditorum* (insolvency) never afford this creditor against other creditors more rights than in the case of a pledge over such a claim so that the transferee of the claim (cessionary) cannot exercise more rights than those of a pledgee".[81] Belgium law contains a legal concept known as "*gerechtelijke conversie van rechtshandelinge*" translated as judicial conversion of legal acts for security cession.[82] In terms of this concept, a court can give effect to a legal act that is against the law by converting it into a valid legal act.[83] It must be noted that prior to this court decision, there was uncertainty pertaining to the effect of fiduciary security cessions over the preceding ten years.[84] After this decision the Belgium legislator responded by embarking on a comprehensive project to render security rights of movables more functional by acknowledging a pledge of personal rights.[85] In terms of article 62 of the *Burgelijk Wetboek* a pledge of a personal right can be created by

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[74] *Ibid*.
[75] *Supra* 303.
[76] 3 Desember 2010 (C.09.o459.N/1).
[77] S Scott "One hundred years of security cession" 25 *SA Merc LJ* (2013) 528.
[78] 1911 AD 235.
[79] S Scott "One hundred years of security cession" 25 *SA Merc LJ* (2013) 528.
[80] *Ibid*.
[81] S Scott "Hundred years of security cession" 25 *SA Merc LJ* (2013) 529.
[82] *Ibid*.
[83] *Ibid*.
[84] *Ibid*.
[85] R Brits "*Real Security Law*" 2016 Juta 303.

giving the pledgee control of the asset.[86] This is done by giving the pledgee the entitlement to notify the third party debtor that the claim has been encumbered.[87]

2.4 Conclusion

The law of cession in *securitatem debiti* developed gradually in the middle ages, which is why literature on this early development of this area of law is limited. Generally, as seen above, the majority of foreign jurisdictions have embraced the pledge of claims particularly on pragmatic grounds. Some of these jurisdictions have even codified the law of security by means of personal rights. South African law, with its rich development of case law in this field of law, is arguably ready for the codification of this law. Practical reality on the ground is in need of the two forms of security by means of personal rights to co-exist, each with its own clarified principles and requirements.[88] The reality is that South African courts vacillate between the two constructions, and to some extent, even intermingle the principles relating to the two constructions.[89]

[86] *Ibid*; see footnote 154 in R Brits "*Real Security Law*" 2016 Juta.
[87] *Ibid*.
[88] *Supra* 281.
[89] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 415. See also S Scott "One hundred years of security cession" 25 *SA Merc LJ* (2013) 518.

Chapter 3:
An overview of the principles of the law of real security, the ordinary pledge and cession

3.1 Introduction

In order to understand cession in *securitatem debiti* as a category of the law of limited security rights, it is imperative to have knowledge of the general principles of the law of security. Also, knowledge of the ordinary pledge of corporeal movables and the law of cession is necessary in order to understand the basic principles on which the transfer of personal rights for security is rooted. As indicated in chapter 1, the law of cession in *securitatem debiti* is a contested field of law.[90] For over a century there has been a debate on the appropriate method through which personal rights can be utilised to secure a debt.[91] Although *Grobler v Oosthuizen*[92] settled in favour of the pledge construction, this debate continues to be divided between the pragmatists and the dogmatists.[93] Commentators who advocate for the pledge construction appreciate the pragmatic approach that this construction offers to the commercial world, especially during the insolvency of either party.[94] Proponents of the absolute cession theory, such as De Wet and Van Wyk base their arguments on the historical background and dogmatic soundness of this approach.[95] Cession in *securitatem debiti* in South Africa is regulated by common law as set out and developed in case law.[96] Different decisions were made in the courts with regard to these two theories. This is because security by means of personal rights conflate the principles of the law of property and

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[90] R Brits "*Real Security Law*" 2016 Juta 280; S Scott "*The law of cession*" 2nd ed 1991 Juta 233; Van Huyssteen et al "*General Principles of Contract*" 5th ed. 2016 Juta 471; and S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 415.
[91] R Brits "*Real Security Law*" 2016 Juta 280.
[92] 2009 (5) SA 500 (SCA).
[93] Van Huyssteen et al " *General Principles of Contract*" 5th ed. 2016 Juta 471; R Brits "*Real Security Law*" 2016 Juta 280; JR Harker "Cession in Securitatem debiti" 98 *SALJ* (1981) 58; S Scott "The law of cession" 2nd ed 1991 233; and S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 410.
[94] *National Bank of SA Ltd v Cohen's Trustee* 1911 AD 235; *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA).
[95] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 422; see footnote 94 in S Scott "*Scott on cession, A Treatise on the law in South Africa*" on De Wet and Van Wyk's textbook, "*Kontraktereg*".
[96] *Supra* 419.

the law of contract.[97] The law of real security forms part of the law of property and is regulated by its specific principles.[98] Pledge is a form of security for a debt using moveable corporeal property, and has its own unique principles that must be applied in conjunction with the general principles of the law of real security.[99] The law of cession is regulated by its own specific principles including the general principles of the law of contract.[100] It is this conflation that leads to different opinions and decisions on which construction between pledging of the personal rights and completely transferring the right to the creditor is appropriate for securing a debt.[101] Scott suggests that the two theories can both be applicable in South African law.[102] It is the object of this dissertation to suggest ways in which coherency in security by means of personal rights could be achieved. In this chapter, an overview of the general principles of the law of real security will be discussed, followed by summaries of the ordinary pledge of corporeal movables and the ordinary cession.

3.2 The general principles of the law of real security

As alluded to above, real security law forms part of the law of property. In terms of the principles of the law of property, different parties can have different rights in the same property.[103] These parties can either have real rights or limited real rights in the same property (*jus in re aliena*).[104] Real security rights are examples of limited real rights that one party may have in another party's property.[105] Security rights result from an obligation between the debtor and the creditor.[106] These obligations can either emanate from a contract, a delict or unjustified enrichment.[107] The main purpose of security rights is to provide security for the fulfilment of the debtor's obligation towards

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[97] R Brits "*Real Security Law*" 2016 Juta 276; S Scott "*The law of cession*" 2nd ed. 1991 Juta 232.
[98] AJ van der Walt & GJ Pienaar "*Introduction to the law of property*" 6th ed. 2009 Juta 258.
[99] *Supra* 59; R Brits "*Real Security Law*" 2016 Juta 106.
[100] S Scott "*The law of cession*" 2nd ed. 1991 Juta 13; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 3.
[101] *Supra* 232 and 419 respectively.
[102] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 410; S Scott "One hundred years of cession" 25 *SALJ* (2013) 518; S Scott "Evaluation of security by means of claims: Problems and possible solutions: Section B: Possible solutions" 60 *THRHR* (1997) 434.
[103] AJ van der Walt & GJ Pienaar "*Introduction to the law of property*" 6th ed. 2009 Juta 23.
[104] *Ibid*.
[105] *Supra* 258.
[106] R Brits "*Real Security Law*" 2016 Juta 1 and 273; AJ van der Walt & GJ Pienaar "*Introduction to the law of property*" 6th ed. 2009 Juta 257.
[107] *Ibid*.

the creditor.[108] In real security law the creditor acquires a limited real in the property of the debtor (or of a third party) for the payment of the principal debt due by the debtor.[109]

Like any other field of law, real security law is regulated by general principles which will regulate the various forms of security rights. The different forms of security rights are distinguished by the object of security, which are individually regulated by their specific principles and requirements, depending on whether the property is movable or immovable, corporeal or incorporeal.[110] Cession in *securitatem debiti* forms one of the categories of real security law, which in principle have to satisfy the general principles of real security law.[111] As alluded to above, the age-old debate about security by means of personal rights results from the merging of the principles of the law of property with that of the law of contract, in particular cession.[112]

One of the general principles of real security law is the existence of a principal debt.[113] The security right must be accessory to the principal debt.[114] When the principal debt is null and void *ab initio*, the security right extinguishes automatically.[115] When the principal debt has been paid up, the object of security reverts to the debtor.[116] This right must be enforceable personally against the debtor and the world at large.[117] Other third parties must respect the limited real right of the creditor against the property of the debtor.[118] The main purpose for why a creditor would want security for the debt, is to protect his interest in those exceptional circumstances.[119] In the ordinary business transactions between the creditor and the debtor, there will be no necessity for the creditor to use the security object. It is only when the debtor defaults on his obligation to perform that the security holder will utilise his security against the

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[108] R Brits "*Real Security Law*" 2016 Juta 3; AJ van der Walt & GJ Pienaar "*Introduction to the law of property*" 6th ed. 2009 Juta 259.
[109] *Supra* 4 and 259 respectively.
[110] R Brits "*Real Security Law*" 2016 Juta 3 and 6.
[111] AJ van der Walt & GJ Pienaar "*Introduction to the law of property*" 6th ed. 2009 Juta 258.
[112] R Brits "*Real Security Law'* 2016 Juta 273, 274.
[113] R Brits "*Real Security Law*" 2016 Juta 1; AJ Van der Walt & GJ Pienaar "*Introduction to the law of property*" 6th ed. 2009 Juta 259.
[114] *Ibid*.
[115] AJ van der Walt & GJ Pienaar "*Introduction to the law of property*" 6th ed. 2009 Juta 259; *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) para 21.
[116] AJ van der Walt & GJ Pienaar " *Introduction to the law of property*" 6th ed. 2009 Juta 259.
[117] R Brits "*Real Security Law*" 2016 Juta 3; *Supra* at 259.
[118] *Ibid*.
[119] R Brits "*Real Security Law*" 2016 Juta 2.

debtor.[120] When the debtor defaults and the debt becomes due, the creditor has to utilise the judicial process before the realisation of the property, unless the parties had agreed on summary execution.[121]

Another general principle of the law of security is that the security right usually does not offer entitlements of use and enjoyment of the property to the creditor.[122] The exception to this lies where there is an agreement between the parties in terms of a *pactum antichresis* in lieu of payment of interest to the principal debt.[123] The creditor has a duty of care towards the property of the debtor.[124] On satisfaction of the principal debt, depending on the object of security, there should be cancellation, redelivery or automatic recession of the asset back to the debtor.[125] It is possible, in terms of the principles of real security law, that a debtor can use the property of another person as security for the security.[126]

3.3 The pledge of movable corporeal property (the traditional pledge)

As alluded to above, the object of security determines the form of security to be provided.[127] The ordinary pledge as a form of security is provided by means of movable corporeal property.[128] The traditional pledge, notwithstanding the general requirements of security law, also has to satisfy the specific requirements in order to constitute a valid pledge.[129] One requirement is that there must be a specific movable thing designated to be the object of real security.[130] This means that the object that will serve as security must be identifiable with specificity.[131] There must be a real

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[120] *Ibid*.
[121] *Ibid*; AJ van der Walt & GJ Pienaar "*Introduction to the law of property*" 6th ed. 2009 Juta 259, S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 439. See also in general R Brits "Pledge of movables under the National Credit Act: secured loans, pawn transactions and summary execution clauses" (2013) 25 *SA Merc LJ* 555
[122] *ibid* on *Introduction to the law of property.*
[123] *Supra* 259 and 443 respectively.
[124] R Brits "*Real Security Law*" 2016 Juta 145.
[125] *Supra* 3.
[126] Ibid, AJ van der Walt & GJ Pienaar "*Introduction to the law of property*" 6th ed. 2009 Juta 259.
[127] See footnote 107.
[128] R Brits "*Real Security Law*" 2016 Juta 106, 108 , AJ Van der Merwe & GJ Pienaar "*Introduction to the law of property*" 6th ed. 2009 Juta 259.
[129] AJ Van der Merwe & GJ Pienaar "*Introduction to the law of property*" 6th ed. 2009 Juta 259.
[130] *Ibid.*
[131] R Brits "*Real Security Law*" 2016 Juta 108.

agreement between the parties that expresses both parties' willingness to use the specific, identified object of security for the relevant debt.[132]

Another important principle of pledge of corporeal movables is the delivery requirement.[133] The object of security must be delivered to the pledgee in any of the recognised ways of delivery.[134] Delivery of the pledged object has the effect that the pledgee, who becomes the holder of the property, must continue holding it until satisfaction of the debt by the debtor.[135]

The maxim of *mobilia non habent sequalam*[136] plays a significant role.[137] If the pledgee willingly loses his security object, his security right is terminated.[138] A pledge as a limited real security right has the effect of affording rights to the pledgee.[139] He acquires the limited real right to the pledged object as security for due performance of the principal debt.[140] The principal debt is accessory to the pledge contract and on payment of the principal debt, the pledgor has a right of redelivery of his pledged object.[141] Basically, the object of security is to guard against the debtor's default, and when this occurs, the creditor/pledgee can enforce his rights on the pledged object by obtaining judgment against the pledger.[142] The court will issue a warrant of execution in favour of the pledgee, who will then enjoy preferential rights to the proceeds of the pledged object for the satisfaction of the debt.[143] Besides the individual debt enforcement measure mentioned above, section 95 of the Insolvency Act 24 of 1936 provides a pledgee with a preferential claim to the proceeds of the pledged object.[144]

The pledgee has a right to be compensated for any economic enhancement to the pledged object.[145] The pledgee does not only enjoy rights against the pledged

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[132] *Supra* 117.
[133] AJ Van der Merwe & GJ Pienaar "*Introduction to the law of property*" 6th ed. 2009 Juta 260; R Brits "*Real Security Law*" 2016 Juta 121.
[134] *Supra* 260 and 123 respectively.
[135] *Supra* 260 and 150 respectively.
[136] The maxim essentially means that if a pledgee voluntarily gives up possession of the pledged thing, the pledgee loses its right of pledge.
[137] *Ibid*.
[138] *Ibid*.
[139] *Supra* 260 and 142 respectively.
[140] *Ibid*.
[141] R Brits "*Real Security Law*" 2016 Juta 116.
[142] AJ Van der Merwe & GJ Pienaar "*Introduction to the law of property*" 6th ed. 2009 Juta 261; R Brits "*Real Security Law*" 2016 Juta 159.
[143] *Ibid*.
[144] *Supra* 261 and 161 respectively.
[145] AJ Van der Merwe & GJ Pienaar "*Introduction to the law of property*" 6th ed. 2009 Juta 261; R Brits "*Real Security Law*" 2016 Juta 149.

object, but has obligations to perform in relation to the pledged object. One important duty of the pledgee is to care for it as a *bonus paterfamilias*.[146] This means that he has a duty to take care of the pledged object like a reasonable man.[147] The pledgee must account for the balance of the proceeds of the pledged object after satisfaction of the debt.[148] The pledgee does not have the rights to use and enjoy the pledged object.[149] The pledgee may use and enjoy the property only if the parties have agreed to *pactum antichresis*.[150] He may not alienate the property unless authorised by a court of law.[151] In certain instances, the pledgor may require the pledgee to offer security in case of negligence with regard to the pledged object.[152] The pledgee will be obliged to pay compensation to the pledgor in case the pledged object is destroyed (due to the fault or negligence of the pledgee).[153]

It is important to note that when the pledgor delivers the pledged object to the pledgee, ownership (*dominium*) of the property is not transferred from the debtor/pledgor to the creditor/pledgee.[154] The pledgor remains the owner of the property, and the pledgee only acquires limited real rights against the pledged object as security for the debt.[155] When the pledgor becomes insolvent, the pledged property vest in his insolvent estate, to be administered by the trustee of the insolvent estate.[156] This principle of retention of *dominium* by the pledgor will be seen below as we discuss the controversy of security by means of claims. Having the background of the pledge of movable corporeal property, will help us understand the analogy with this ordinary pledge with pledge of personal rights (incorporeal property). This will also help us understand why judgments like *National Bank of South Africa* v *Cohen's Trustee* and *Grobler v Oosthuizen* decided in favour of the pledge theory.[157]

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[146] *Ibid* and R Brits "Real Security Law" 2016 Juta 145.
[147] *Ibid*.
[148] R Brits "*Real Security Law*" 2016 Juta 115.
[149] See footnote 141 and pages 261 and 142 respectively.
[150] *Ibid*. The *pactum antichresis* is a clause that permits the pledgee to use the property.
[151] R Brits "*Real Security Law*" 2016 Juta 162; AJ Van der Merwe & GJ Pienaar "*Introduction to the law of property*" 6th ed. 2009 Juta 261.
[152] *Supra* 149 and 261 respectively.
[153] *Ibid*.
[154] R Brits "*Real Security Law*" 2016 Juta 108.
[155] *Ibid*.
[156] *Supra* 161.
[157] 1911 AD 235; 2009 (5) SA 500 (SCA).

3.4 The ordinary cession

The law of cession forms part of the law of contract.[158] Like the preceding paragraph, it is important to have an overview of the law of cession. The reason for this is that cession plays a central role in security by means of personal rights. The only way of transferring these rights from the debtor to the creditor is by way of cession.[159] Cession is an act of transfer of personal rights.[160] Cession as an act of transfer of personal rights has historical background.[161] Initially Roman law did not recognise cession of personal rights.[162] Commercial reality prompted the praetor to use the doctrine of *procuratio in rem suam* to achieve the cession of personal rights.[163] The Roman-Dutch scholars developed this *procuratio in rem suam*.[164] Roman-Dutch law influenced our modern law of cession.[165] As indicated above, there is no other way in which a creditor's claim can be transferred from the debtor to creditor besides cession. The ordinary cession, unlike a security cession, is all about the alienation of the personal right (claim).[166] Modern South African law accepts cession of a personal right (claim) as akin to delivery of corporeal property from the estate of the cedent to that of the cessionary.[167] The law of property requires for a valid delivery in the case of pledge, the transfer of physical possession.[168] In the case of cession, the delivery of the object is performed in pursuance of a real agreement.[169] In terms of the transfer agreement, the cedent divests himself of the right, which vests in the estate of the cessionary.[170] It is these principles that will be discussed below that prolonged the debate on security

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158 Van Huyssteen et al "*General principles of contract*" 5th ed. 2016 Juta 430.
159 *Ibid*; S Scott "*The law of cession*" 2nd ed. 1991 Juta 7; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 2; PM Nienaber "Cession" LAWSA 2nd ed. Vol. 2 Part 2 2003 LexisNexis 3 para 2.
160 *Ibid*.
161 Van Huyssteen et al "*General principles of contract*" 5th ed. 2016 Juta 431; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 3; PM Nienaber "Cession" LAWSA 2nd ed. Vol. 2 Part 2 2003 LexisNexis 9 para 10.
162 Van Huyssteen et al "*General principles of contract*" 5th ed. 2016 Juta 431; PM Nienaber "Cession" LAWSA 2nd ed. Vol.2 Part 2 2003 LexisNexis 10 para 11.
163 *Ibid*.
164 Supra 431 and 10 para 12 respectively; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 7.
165 *Ibid*.
166 Van Huyssteen et al "*General principles of contract*" 5th ed. 2016 Juta 471.
167 S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 17; PM Nienaber "Cession" LAWSA 2nd ed. Vol. 2 Part 2 2003 LexisNexis 9 para 9.
168 *Ibid*.
169 S Scott "*The law of cession*" 2nd ed. 1991 Juta 23; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 27; PM Nienaber "Cession" LAWSA 2nd ed. Vol. 2 Part 2 2003 LexisNexis 7 para 8.
170 *Ibid*.

by means of claims. In delivery, there must be some movement of the pledgor's object, either actual movement to the pledgee or constructive movement, whereas in cession, transfer of the personal rights occur immediately upon the conclusion of the transfer agreement.[171] Cession may be transacted either formally and in writing or informally expressly or tacitly.[172] It can be executed conditionally, subject to either a suspensive condition or time clause relating to the cession, in which event the right will not pass until the condition has been fulfilled.[173]

There should be a causa for the cession.[174] Both the cedent and the cessionary must have the capacity to contract.[175] The causa for the cession must not be illegal or prohibited by statute, the common law or be *contra bonos mores*.[176] The cessionary has a duty to restore the personal right to the cedent in the event of the invalidity of the contract.[177] Delivery of the document evidencing the personal right is not a requirement.[178] The cessionary receives the object of cession with all the advantages and disadvantages.[179] As the personal right is transferred completely to the cessionary, it forms part of his estate and during insolvency, his creditors will directly benefit from it.[180] In both cessions, notification of the third party debtor is not a requirement, and cession can be effected even against the will of the original debtor irrespective of which type of cession entered into.[181]

3.5 Conclusion

From the above discussion, it can be seen that the confusion and uncertainty created regarding security by means of personal rights is exacerbated by the fact that it has to satisfy different principles from various fields of law. As a category of the law of security, it must satisfy the principles of the law of property. As a type of cession, it

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[171] *Supra* 23 and 27 respectively. Nienaber 25 par 33.
[172] PM Nienaber "cession" LAWSA 2nd ed. Vol. 2 Part 2 2003 LexisNexis 19 para 26.
[173] *Ibid*.
[174] *Supra* para 28.
[175] *Supra* para 30.
[176] *Supra* 23 para 31.
[177] *Supra* 24 para 32.
[178] *Supra* 25 para 33; S Scott "*The law of cession*" 2nd ed. 1991 Juta 27.
[179] S Scott "*The law of cession*" 2nd ed. 1991 Juta 20; Van Huyssteen et al "*General principles of contract*" 5th ed. 2016 Juta 468; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed.2018 Juta 396.
[180] *Supra* 132; 467 and 344 respectively; PM Nienaber "Cession" LAWSA 2nd ed. Vol 2 Part 2 2003 LexisNexis 35 para 44.
[181] *Supra* 95, 460, 308, 5 para 6 respectively.

must satisfy the principles of the law of cession. It is also one of the reasons why academics like Scott have suggested for the intervention of the legislature.[182] In a pledge of claims the courts require no form of publicity and the pledgee becomes the holder of the personal right after the cession and before the maturity of the principal debt, and the pledgee acquires *locus standi* and is the only person who can institute action.[183]

In a fiduciary security cession the complete transfer of the personal right have the effect that during insolvency of either party, the personal right form part of the cessionary's estate.[184] The courts realised that this complete transfer of the personal right will result in inequity and thus they fall back on the pledge construction to protect the interest of the pledgor and his creditors in the event of insolvency.[185] Under the influence of De Wet, courts have recognised the need expressed in practice for a fiduciary security cession because of its dogmatic soundness, but paid insufficient attention to the complex nature of this legal institution.[186] The main aim of this dissertation is to suggest proposals in which coherency and certainty can be reached in security by means of personal rights. Academic authors like Brits, Scott, Harker, Domanski and De Wet and Yeats have contributed immensely in the development of this law of security by means of claims.[187] Some have even suggested that South African courts have met the needs of practice by the creation of a pledge of a *sui generis* nature, while others suggested the amendment of the Insolvency Act 24 of 1936.[188]

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[182] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 426; S Scott "Evaluation of security by means of claims: Problems and possible solutions : Section B: Possible solutions" 60 *THRHR* 454.
[183] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 443; S Scott "*The law of cession*" 2nd ed. 1991 Juta 237; R Brits "*Real Security Law*" 2016 Juta 304.
[184] *Ibid*.
[185] R Brits "*Real Security Law*" 2016 Juta 297; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 415.
[186] *Supra* 281; 413 and 421 respectively.
[187] R Brits "*Real Security Law*" 2016 Juta 273; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 408; JR Harker "Cession in Securitatem debit" 98 *SALJ* 56 (1981) 56; A Domanski "Cession in securitatem debiti: *National Bank v Cohen'sTrustees* Reconsidered" 7 *SALJ* (1995) 427; JC de Wet & JP Yeats "Die Suid-Afrikaanse kontraktereg en handelsreg" 2nd ed. 1953 298-300.
[188] JR Harker "Cession in Securitatem debiti" 98 *SALJ* 56; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 422; S Scott "Evaluation of security by means of claims: Problems and possible solutions: Section B: Possible solutions" 60 *THRHR* (1997) 454.

Chapter 4:
Development of security by means of claims through the courts

4.1 Introduction

The most important sources of the law regarding security by means of claims are the common law and case law. The nature of a security by means of claims is a controversial issue.[189] Not only is this law controversial in South Africa, but as mentioned above, foreign jurisdictions faced challenges in this respect as well.[190] Jurisdictions like Belgium and the Netherlands have codified their laws in favour of the pledge theory, but commercial reality reflects the need for fiduciary security cessions in these jurisdictions.[191] Before the union of South Africa in 1910, the various administrations in the country, the two Boer Republics and the Natal and Cape colonies gave divergent judgments on the appropriate method to follow in effecting security by means of personal rights.[192] Careful analysis of South African law on security by means of personal rights reveals the following: "some judges referred to a pledge of personal rights and applied the principles pertaining to pledge correctly, while others use terminology pertaining to fiduciary security cessions and applied the principles applicable to this form of security correctly."[193] Furthermore: "In some judgments the judges used pledge terminology but applied principles pertaining to fiduciary cession."[194] This reflects a state of confusion and uncertainty in this area of law. Two divergent judgments were made by the Appellate Division. One in 1911 held that the pledge is the appropriate way in which security by means of claims might be effected.[195] In 1964, without using authority or overruling the *Cohen's Trustee*

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[189] MP Nienaber "Cession" LAWSA 2nd ed. Vol 2 Part 2 2003 LexisNexis 47 para 53; Van Huyssteen *et al* "*General principles of contract*" 5th ed. 2016 Juta 471; R Brits "*Real Security Law*" 2016 Juta 276; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 408; JR Harker "Cession in *securitatem debiti*" 98 *SALJ* (1981) 56.
[190] See chapter 2 2.3.1-2.3.5 above.
[191] *Ibid*.
[192] R Brits "*Real Security Law*" 2016 Juta 278; see *Smith v Farrelly's Trustee* 1904 TS 955; *Lucas' Trustee v Ishmael* (1905) cited in *National Bank v Cohen's Trustee* 1911 AD 235; *Rothschild v Lowndes* 1908 TS 493.
[193] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 419.
[194] *Ibid*.
[195] *National Bank of South Africa Ltd v Cohen's Trustee* 1911 AD 235.

judgment, as *obiter dictum*, the court in *Lief NO v Dettmann* declared out-and-out cession as the only way in cession in *securitatem debiti* may be effected.[196] The following cases to be discussed in this chapter were chosen for the significant part they played in the development of security by means of personal rights. *National Bank of South Africa v Cohen's Trustee* is discussed on the basis of declaring the pledge of claims as the appropriate method in which security by means of claims may be effected. *Frankfurt v Rand Tea Room* is discussed on the basis that even though it applied the pledge construction, the court cautioned that "analogy with the position of pledge of corporeal movables should not be pressed too far when it comes to pledge remedies".[197] This reignited the debate on the appropriate method to be used for security by means of claims. *Barclays Bank and Another* is discussed on the basis of the confusion with regard *locus standi* between the parties during the subsistence of security cession, in particular the retention of dominium and the transfer of the powers to sue or realise on the pledgee or cessionary. *Lief NO v Dettmann* is discussed on the basis of declaring fiduciary security cession as the only way in which security by means of claims will be effected, while *Grobler v Oosthuizen* is discussed because it confirmed Cohen's Trustee as authority for the pledge of claims as the default position for security by means of personal rights.

4.2 *National Bank of South Africa Ltd v Cohen's Trustee*

This case settled the law in favour of pledge of claims.[198] It served as authority for the law of cession in *securitatem debiti* until uncertainty re-emerged with the *obiter dictum* in *Lief NO v Dettmann* but is still used as authority for the pledge of claims as it was confirmed in *Grobler v Oosthuizen*.[199] This latter case settled the law in favour of the pledge of claims in confirmation of *Cohen's Trustee* case.[200] It must be understood from the outset that the decision in *Grobler* did not exclude absolute (out-and-out)

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[196] *Lief NO v Dettmann* 1964 (2) SA 252 (A).
[197] *Frankfurt v Rand Tea Rooms Ltd and Sheffield* 1924 WLD 253.
[198] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 412; Van Huyssteen et al "*General principles of contract*" 5th ed. 2016 Juta 471; R Brits "*Real Security Rights*" 2016 Juta 283; S Scott "*The law of cession*" 2nd ed.1991 Juta 233; *National Bank of South Africa Ltd v Cohen's Trustee* 1911 AD 235.
[199] *Ibid*.
[200] *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) para 17; see also R Brits "*Real Security Law*" 2016 Juta 294; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 416-417.

cession as an option for effecting security by means of claims.[201] It declared the pledge of claims as default option in case there is ambiguity on the option chosen between the parties to effect security by means of claims.[202]

4.2.1 The legal question

The legal question which the Appellate Division had to determine was whether the trustee of an insolvent estate is entitled to claim and administer the amount payable by a fire assurance company in respect of a fire which took place before insolvency, under a policy which had been ceded by the insolvent as security for a debt owing by him to one of his creditors.[203]

4.2.2 Facts of the case

Phillip Cohen and Robert Cohen were trading as Cohen Bros.[204] They had banking facilities with the National Bank of South Africa Ltd.[205] Cohen Bros was indebted to the bank to the sum of £450.[206] As security for the debt, they passed a mortgage to a certain erven in Nijlstroom in favour of the bank for the repayment of the £450 with interest.[207] The two parties further entered into an agreement that the bank should make additional banking facilities to the Cohen Bros trading either in their own name or any of their businesses.[208] They also agreed on an additional security which will operate as a continuing or revolving security, meaning irrespective of whether the debt by Cohen Bros is extinguished or not, the security right will remain.[209] In passing the additional security in favour of the bank, Phillip Cohen insured the buildings on one of the erven for their full value and ceded the policy to the bank.[210]

The insurance policy was taken with Atlas Assurance Company.[211] It was handed to the bank on 24 September 1909, with the following endorsement: “I hereby cede and transfer all my rights, title and interest in and to the within policy to the *National*

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[201] S Scott “*Scott on cession, A Treatise on the law in South Africa*” 1st ed. 2018 Juta 417.
[202] *Ibid*; see also *Grobler v Oosthuizen* above at fn 195.
[203] *National Bank of South Africa Ltd v Cohen’s Trustee* 1911 AD 242.
[204] *Supra* 236.
[205] *Ibid*.
[206] *Ibid*.
[207] *Supra* 237.
[208] *Ibid*.
[209] *Ibid*.
[210] *Supra* 238.
[211] *Supra* 237.

Bank of South Africa".[212] Notice was given to the insurer.[213] During the subsistence of the cession with the bank, a store on one of the erven mentioned in the bond burned down.[214] On 31 December 1909 the insurance company issued a cheque of £800 which was payable to Phillip Cohen and National Bank of South Africa but four days before, 28 December 1909, Phillip Cohen's estate was provisionally declared insolvent, and finally declared insolvent on the 6th January 1910.[215] The bank handed over £64,25.9d to Cohen's trustee.[216] Subsequently Cohen's trustee brought an action against the bank to claim payment of the remaining insurance money to the insolvent estate.[217]

4.2.3 Ratio decidendi

The four judges who heard this matter came to the same conclusion but for different reasons. Maasdorp JP concurred without giving reasons for his judgment.[218] Dove Wilson J concurred with the judgment and reasons given by the Chief Justice.[219] The decision of the Transvaal Provincial Division was upheld, and the appeal dismissed.[220] Although the three judges concurred, they came to the same conclusion with different reasons. The main judgment was given by Lord De Villiers CJ who drew a direct analogy between a cession in *securitatem debiti* and a pledge of corporeal movables.[221] Innes J emphasised the retention of *dominium* with the pledgor and held that it was time to reconsider all the decisions made in favour of the fiduciary security cession.[222] In short, Lord De Villiers revealed an exclusion of fiduciary security cession as an option to effect cession *in securitatem debiti*. Innes J explained the fiduciary security cession, but held that *in casu* a pledge of claims was effected.[223] Laurence J

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[212] *Ibid*.
[213] *Ibid*.
[214] *Ibid*.
[215] *Supra* 238.
[216] *Ibid*.
[217] *Ibid*.
[218] *Supra* 259.
[219] *Supra* 259.
[220] *Ibid*.
[221] *National Bank of South Africa v Cohen's Trustee* 1911 AD 242; see also R Brits "*Real Security Law*" 2016 Juta 283.
[222] *Supra* 250 and 284 respectively.
[223] *National Bank of South Africa v Cohen's Trustee* 1911 AD 244, 250, 251.

explained the intention of the parties regarding the effect of security by means of claims.[224]

Lord De Villiers CJ

The Chief Justice started his judgment with an analogy with a pledge of corporeal movables: "If this had been the case of a chattel delivered by the insolvent to the creditor as security for the debt, there would have been no doubt as to the rights of the trustee".[225] From his initial reasoning, it became clear that the Chief Justice held the view that in any transactions where personal rights are used as security for a debt, the only way was to pledge those rights.[226] He stated that "the transaction would be a pledge by whatever name the parties may have called it, and it would remain subject to all the incidents of the law relating to pledges".[227] In terms of a pledge of corporeal movables, the pledgor retains ownership of the article pledged notwithstanding the delivery.[228] The pledgee enjoys rights of action, that is, rights to realise or sue on the article pledged.[229] But the pledgee only exercises his rights when the pledgor defaults on payment of the principal debt.[230] The Chief Justice explained that although the deed of cession or the endorsement on the policy document reflected an out-and-out cession of all of Cohen's right, title and interest thereto, the evidence as provided from the court *a quo* confirmed that cession of that policy to the bank was made *in securitatem debiti*.[231] Citing *Osmond's Trustee v Hofmeyr* where a pledge of a life policy was ceded to a pledgee and where it was held that the trustee was entitled to the life policy, the judge explained that although the case differed in form with the present one, they all aimed at securing a debt.[232] Cohen's policy document was endorsed as out-and-out cession whereas in the *Osmond* case, a pledge of life policy

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[224] *Supra* 257.
[225] *Supra* 242.
[226] *Ibid*.
[227] *Ibid*.
[228] *Ibid*; see also S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 427; R Brits "*Real Security Law*" 2016 Juta 324; *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) para 15 and 16.
[229] *Ibid*.
[230] *National Bank of South Africa Ltd v Cohen's Trustee* 1911 AD 242, see also S Scott "*The law of cession*" 2nd ed. 1991 Juta 240-242; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 445-465; S Scott "The evergreen topic of locus standi and security cessions: *Thekweni properties (Pty) Ltd v Picardi Hotels Ltd and Picardi Hotels Ltd v Thekweni properties (Pty) Ltd*" (2009) 21 *SA Merc LJ* 405.
[231] *National Bank of South Africa Ltd v Cohen's Trustee* 1911 AD 243.
[232] *Supra* 245; *Osmond's Trustee v Hofmeyr* 4 CSC 43.

was effected, but to the Chief Justice, the transactions were substantially the same.[233] They transferred personal rights to secure indebtedness of the pledgor.[234] He emphasised the main object of the transaction, being to secure a debt.[235] He explained that in terms of the principles of pledge, when a right is ceded, the *dominium* remains with the pledgor, subject to the extensive powers of the pledgee.[236] In response to counsel for appellant's argument that the extensive powers enjoyed by the cessionary, like claiming from third party debtor in certain circumstances is conclusive proof that the dominium had passed to the cessionary, the Chief Justice explained that that is similar to concluding that, "where the pledgee of an article delivered to him can sell it and appropriate the proceeds to the payment of the debt owing to him, he is the owner before such sale can be effected".[237] He emphasised that the cessionary could only exercise his rights in relation to the thing pledged when the principal debt matures.[238] Maturity of the principal debt is when the debtor defaults and the debt becomes overdue.[239] Before maturity of the principal debt, the cessionary could not realise the personal right or claim from the ceded debt.[240]

Confirmation that Lord De Villiers CJ held the view that the only manner in which transfer of personal for security purposes is in the form of pledge is revealed in his citation of the earlier decision in *Trautman v Imperial Fire Assurance* where it was found that, "so long as the debt is unpaid, the pledge is equal to a cession, so far as the cessionary is concerned, but added, although this is an out-and-out cession, its effect is to make it a pledge of this policy".[241] This is also seen in his citation of *Rothschild v Lowndes* where it was held that, "[a] person who makes cession of a right of action, even as security for a debt, retains no such attachable interest".[242] With the above statement in *Rothschild* he explained that too much importance was given to

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[233] *Ibid*.
[234] *Ibid*.
[235] *Ibid*.
[236] *Ibid*.
[237] *Ibid*; see also S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 447; PM Nienaber "Cession" LAWSA 2nd ed. Vol. 2 Part 2 2003 LexisNexis 52 para 55.
[238] *National Bank of South Africa v Cohen's Trustee* 1911 AD 245, 246; see also S Scott "*The law of cession*" 2nd ed. 1991 Juta 240, 241, 242.
[239] S Scott "*The law of cession*" 2nd ed. 1991 Juta 242; S Scott "The question of locus standi in revolving security cessions, *Springtex Ltd v Spencer Steward* & Co 1990-11-16 case no 6135/88 unreported 840".
[240] *Ibid*.
[241] *National Bank of South Africa v Cohen's Trustee* 1911 AD 245; *Trautman v Imperial Fire Assurance* Co 3 SC 86.
[242] *Ibid*; *Rothchild v Lowndes* 1908 TSC 493.

the form and too little to the substance of such a transaction.[243] In his opinion, when cession is made with the object of securing a debt, it was impossible to imagine that in whatever form, cession of that right takes *dominium* out of the cedent.[244]

In support of his reasons, the Chief Justice referred to English law. He acknowledged that English law had little influence on South African law in terms of cession in *securitatem debiti*.[245] However, he explained that a little similarity occurred between South African law and English law on the retention of *dominium* by the pledgor after cession of the personal right.[246] The English law has what is termed the doctrine of the equity of redemption, which is similar to the South African law of pledge, and protects the debtor's right of property in the thing mortgaged or pledged, even where in form he had been completely divested of the right.[247] The Chief Justice held that when the fire insurance money was paid to the bank, it disturbed the *concursus creditorum* in that, according to the common law, it should not be in the power of the creditors to decide for themselves how much they should take and how much they should leave for distribution among the other creditors.[248] The appeal was dismissed with costs.[249]

Innes J

The judge's exposition of the two forms of security by means of claims showed an acknowledgment of existence of two ways of using personal rights as security for a debt. He started by explaining the law of pledge.[250] He confirmed that the main principle of pledge is that *dominium* is not transferred to the pledgee.[251] When a debtor and a creditor agree on a pledge as a form of security for a debt, the pledgor retains ownership of the pledged article.[252] When insolvency supervenes, the trustee retains

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[243] *National Bank of South Africa v Cohen's Trustee* 1911 AD 246.
[244] *Ibid*.
[245] *Supra* 247; see also R Brits "*Real Security Law*" 2016 Juta 302 and 330 in support of what the Chief Justice said.
[246] *Supra* 247; see also R Brits "*Real Security Law*" 2016 Juta 330.
[247] *Ibid*.
[248] *Supra* 248.
[249] *Supra* 249.
[250] *Supra* 250.
[251] *Ibid*; see also R Brits "*Real Security Law*" 2016 Juta 324; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. Juta 427; S Scott "Evaluation of security by means of claims: Problems and possible solutions: Section A ; Problems" 60 *THRHR* (1997) 192.
[252] *Ibid*.

the *dominium* that the insolvent debtor had.[253] The trustee then acquires rights to demand the return of all pledged objects of the insolvent debtor, in order to realise and distribute the proceeds for the benefit of the insolvent estate.[254] *In casu*, the trustee demanded the proceeds of a fire policy which was transferred to the bank before insolvency, which cession was absolute in form, but was intended to secure a pre-existing debt.[255]

The judge explained that the question to be decided was whether the cession that was made by way of security constituted a pledge only or to something more.[256] If it was pledge only, the trustee had rights to the proceeds of the fire policy and if it was an ordinary or a fiduciary security cession, then the bank would have rights to the proceeds.[257] He explained that in constituting a pledge of personal rights, it is not mandatory to administer a formal, written deed of pledge.[258] The judge then turned to fiduciary security cessions. He explained that it is a general practice in South Africa to require a fiduciary cession to be constituted formally.[259] In the security agreement, a fiduciary agreement must be included which provides that after the debtor has paid up the principal debt, the personal right be re-ceded to the cedent or after realisation of the personal right, the cessionary had to account for any surplus after satisfaction of the principal debt.[260] In support of the fiduciary security cession, he cited cases like *Trautman v Imperial Co* where "[t]he owner of property destroyed by fire, who had ceded the relative policy in security of a debt, was held disentitled to complain of an alleged inadequate reinstatement by the insurance company, so long as his debt to the cessionary remained unpaid".[261] Again, he cited *Rothschild v Lowndes* "[w]here the Transvaal court refused to attach the interest of the original creditor in chose of action, all right and title to which he had ceded as security for a debt".[262] This is where he concluded his reasoning why in the present case a pledge of the fire policy was done.[263] He held that in *Rothschild*, the law was stated too widely: "That, however

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[253] *Ibid*.
[254] *Ibid*; see section 69 of the Insolvency Act 24 of 1936.
[255] *Ibid*.
[256] *Ibid*.
[257] *Ibid*.
[258] *Ibid*; also see R Brits "*Real Security Law*" 2016 Juta 308.
[259] *Supra* 251.
[260] *Ibid*; see S Scott "*The law of cession*" 2nd ed. 1991 Juta 249; R Brits "*Real Security Law*" 2016 Juta 345; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 476.
[261] *National Bank of South Africa v Cohen's Trustee* 1911 AD 251; *Trautman v Imperial Co*. 12 SC 38.
[262] *National Bank of South Africa v Cohen's Trustee* 1911 AD 252; *Rothschild v Lowndes* 1908 TS 493.
[263] *Ibid*.

extensive may be the right of a cessionary to enforce in his own name an obligation ceded to him by way of security, still the mere fact that the cession was in terms absolute, would not suffice to take the dominium out of the cedent, if it was clear that the parties did not intend it to pass".[264] The judge concurred with the main judgment that a pledge of the fire policy was done, beside endorsement of out-and-out cession on the policy.[265] The intention of the parties was to secure Cohen's debt, and had there been no insolvency, Cohen would have claimed the policy back on payment of the principal debt.[266] The appeal was dismissed.[267]

Laurence J

The judge also concurred on the findings with the other judges. His reasoning was similar to the reasons articulated by Innes J. He started his elaboration by acknowledging that the issue of security by means of claims has persistently been decided in the courts, with divergent decisions, and many of them difficult to reconcile.[268] According to him, the question to be answered was on the legal effect of the cession on the appellant bank.[269] Whether the cession was absolute, and if like that, the bank was entitled to the proceeds of the policy, and if not, the insolvent estate was entitled to the proceeds.[270] On the absolute cession of the policy, the judge had in mind the fiduciary security cession because he stated that, if the absolute cession is confirmed, the respondent would have to succeed on the second alternative claim which is to be paid the difference of the proceeds after satisfaction of the principal debt.[271] Unlike Innes J, he did not elaborate more on the requirement of the fiduciary security cession, but concentrated on the main principle of pledge.[272] Similar to the other judges, he emphasised the retention of *dominium* by the pledgor after cession of the personal right.[273] He explained that the rights of the cessionary after cession of the object of security will only be exercised when the pledgor defaults.[274] If this

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[264] *Supra* 254.
[265] *Ibid*.
[266] *Ibid*.
[267] *Supra* 255.
[268] *National Bank of South Africa v Cohen's Trustee* 1911 AD 255.
[269] *Ibid*.
[270] *Ibid*.
[271] *Ibid*.
[272] *Supra* 256.
[273] *Ibid*.
[274] *Ibid*.

happens, the pledgee alone can give a third debtor a discharge or maintain an action for the due amount, or can even claim directly from the ceded debtor.[275] These rights enjoyed by the pledgee does not indicate that *dominium* had passed to him.[276]

In the present case, the endorsement on the policy purported to be absolute.[277] But according to the judge, the wording of the deed of cession is not conclusive proof on the real intention of the parties when effecting the cession of the policy.[278] The whole transaction has to be analysed, because transfer of *dominium* cannot take place without the intention of the transferor to transfer ownership to the transferee and acceptance by the transferee of that ownership.[279] According to him, there should be a concurrence of minds on both the transferor and the transferee. In the present case, this intention of the two parties could be seen by the fact that cession of the policy was preceded by the execution by the cedent of a mortgage bond to secure the sum of £450 by hypothecating a certain immovable property.[280] The mortgagor undertook to insure the buildings on the property in question for their full value and ceded the policy as additional security for the due payment of the £450. The parties in leading of evidence also agreed that this was done to secure the said debt. The judge concluded that with this notion, Cohen could not have contemplated that in the event of fire, the bank would retain the proceeds as this might have amounted to more than three times the principal debt.[281] He concluded that the trustee was entitled to the restoration of the proceeds of the policy, and the appeal was dismissed.[282]

4.2.4 Analysis

Although *Cohen's Trustee* had settled the law, post 1910 there was uncertainty in terms of which form of transfer of personal rights should be applied. This antagonised the dogmatists because well-established principles of both the law of pledge and the law of cession were contravened. Most cases usually heard were based on insolvency issues, and to do justice between the litigants, the substance of the transaction is usually considered over the form of the transaction. This is the reason why courts fall

[275] *Supra* 257.
[276] *Ibid*.
[277] *Ibid*.
[278] *Supra* 258.
[279] *Ibid*.
[280] *Ibid*.
[281] *Ibid*.
[282] *Supra* 259.

back on the pledge construction for pragmatic purposes. This is what dominated the Chief Justice. His reasons for the judgment was dominated by the object of the transaction. To him, there is no other way in which security for a debt can be effected than pledging that personal right. He did not attempt to discuss the other form of effecting a security for a debt by using personal rights. His main concentration was on the principles of law of security. He did not consider the development of the law of transfer of personal rights for security purposes in other jurisdictions. He did not explain the concept of revolving or continuing security as effected by many of the parties in security transactions. His analogy with the pledge of corporeal movables with the pledge of personal rights contravenes some of the basic principle of pledge like publicity. He succeeded in explaining the confusion on the retention of *dominium* by the pledgor with the entitlements of the cessionary during the subsistence of the cession, and during the maturity of the principal debt. But he probably should have gone further by explaining the fiduciary cession and setting out why it was not applicable to the present case.

Innes J's reasons for the judgment is important with regard to this area of law because it gave clarity to some of the important aspects on the development of this area of law. Besides judging in favour of a pledge of rights in the present case, he succeeded in acknowledging that in the transfer of personal rights for security purposes, there exist two forms or constructions. His emphasis on the intention of the parties on the appropriate form to be used, assisted in the development of this area of law. His articulation on the constitution of a written deed of cession is important in as far as fiduciary security cession is concerned because it is in fiduciary agreement in which the parties can articulate their terms of cession for security purposes. Laurence J's judgment in terms of the development of the law of security by means of claims is important is as far as going further in explaining the intention of the parties on the appropriate choice for security purposes.

4.3 Frankfurt v Rand Tea Rooms Ltd and Sheffield

The legal position between the pledgor and the pledgee creates confusion between judges, academics and legal practitioners in a pledge of claims particularly during the subsistence of the cession.[283] This case is one that deals with the *locus standi* of the pledgor and the pledgee during the subsistence of the cession *in securitatem debiti*.[284] As shown above, security by means of claims poses challenges in the exceptional circumstances of insolvency, attachments and the legal position (*locus standi*) of the parties in a pledge of claims during the subsistence of the cession.[285] In a fiduciary security cession, the right is completely transferred to the cessionary and the legal position between the parties is regulated by the fiduciary agreement.[286] *National Bank v Cohen'Trustee*[287] confirmed the common law principle that in a pledge, the pledgor does not transfer ownership of the pledged object after delivery and this is true even in the pledge of personal rights.[288] After the *Cohen's Trustee* decision, subsequent judgments used it as authority for the law of security by means of claims.[289] It was only in 1924, when the authority of it on security by means of claims was questioned, particularly with regard to the retention of *dominium*.[290] As indicated above, the central issues in these cases are always the retention of dominium by the pledgor/cedent in the pledge of claims and the transfer of actions to the pledgee/cessionary. Scott has written immensely on this topic.[291]

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[283] S Scott "Evaluation of security by means of claims: Problems and possible solutions: Section A: Problems" 60 *THRHR* (1997) 190; S Scott "The Evergreen topic of *locus standi* and security cessions: *Thekweni properties (Pty) Ltd v Picardi Hotels Ltd and Picardi Hotels Ltd v Thekweni properties (Pty) Ltd*" 21 *SA Merc LJ* (2009) 405; S Scott "The question of *locus standi* in revolving security cessions, *Springtex Ltd v Spencer Steward & Co.* 1990-11-16 case no 6135/88 unreported".

[284] *Frankfurt v Rand Tea Rooms, Ltd and Sheffield* 1924 WLD 254; see also fn 279 above.

[285] See fn 279 above.

[286] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 474; S Scott "*The law of cession*" 2nd ed.1991 Juta 246; *Lief NO v Dettmann* 1964 (2) SA 252 (A) 271; R Brits "*Real Security Law*" 2016 Juta 345.

[287] 1911 AD 235.

[288] *National Bank of South Africa v Cohen's Trustee* 1911 AD 242; R Brits "*Real Security Law*" 2016 Juta 324; S Scott "*The law of cession*" 2nd ed. 1991 Juta 235.

[289] See R Brits "*Real Security Law*" 2016 Juta 328 footnote 257 for examples of judgments that applied the pledge theory subsequent to *National Bank of South Africa v Cohen's Trustee* 1911 AD 235.

[290] *Frankfurt v Rand Tea Room, Ltd and Sheffield* 1924 WLD 254.

[291] S Scott "The Evergreen topic of locus standi and security cessions: *Thekweni properties (Pty) Ltd v Picardi Hotels Ltd and Picardi Hotels Ltd v Thekweni properties (Pty) Ltd*" 21 *SA Merc LJ* (2009) 404; S Scott "The question of locus standi in revolving security cessions, *Springtex Ltd v Spencer Steward & Co*. 1990-11-16 case no 6135/88 unreported"; S Scott "Evaluation of security by means of claims: Problems and possible solutions: Section A: Problems" 60 *THRHR* 1997 190.

4.3.1 The legal question

The court had to decide if a lessor who had ceded a lease to a third party *in securitatem debiti* can himself exercise a right to cancel the lease agreement when the lessee defaults during the subsistence of the cession *in securitatem debiti*.[292]

4.3.2 Facts of the case

In this case, Jack and Marie Frankfurt leased certain premises known as Lounge Tea Rooms to the respondent.[293] One of the terms of their lease contract, which became a cause of action for this case, was clause 13, which read that, "should the rent or hire as aforesaid become at any time overdue and unpaid for a period of fourteen (14) days after the same shall have become due and payable, or should the lessee contravene or permit the contravention of any one or more of the provisions and conditions of this Agreement, or fail in the observance of any one or more of the same, the lessors shall have the right and option, notwithstanding anything to the contrary herein contained, of cancelling this Agreement forthwith and of immediate re-entry and re-possession of the said premises, and the lessee shall nevertheless liable for the payment of any and all rent and other moneys that may or shall be owing under this Agreement".[294]

The lessees occupied the premises on 15 January 1920 and on 17 January 1920 the lessors ceded the lease as security to the African Guarantee and Indemnity Company Ltd.[295] The endorsement on the lease read as follows: "We do hereby cede, transfer and make over all our right, title and interest in and to the within written lease to and in favour of the African Guarantee and Indemnity Company, Ltd, as collateral security."[296]

When the lessors failed to pay the rent on 1 April 1924, and even after the lapsing of the 14 days period as per the terms of the lease contract, the lessors instructed their attorney to initiate cancellation of the lease contract in terms of clause 3 of the agreement.[297]

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[292] *Frankfurt v Rand Tea Rooms, Ltd and Sheffield* 1924 WLD 253.
[293] *Supra* 254.
[294] *Ibid*.
[295] *Ibid*.
[296] *Ibid*.
[297] *Supra* 255.

4.3.3 Ratio decidendi

The court had to decide whether a lessor who had ceded a lease to a third party *in securitatem debiti* could exercise a right to cancel the lease agreement when the lessee committed a breach of contract.[298] Both the applicant and the respondent cited *National Bank of South Africa v Cohen'sTrustee*[299] as authority for their arguments.[300] The respondent argued that the lessor had no right to cancel the lease agreement at the time and date it purported to do so.[301] To support its findings, the court cited Innes J in *Cohen's Trustee*.[302] In that case, the Innes J used the quotation that was used in *Wetzlar v General Insurance Co*[303] on the legal position of the pledgee during the subsistence of the cession in *securitatem debiti*: "The secured creditor, so far as the enforcement of the right is concerned, would seem to occupy a position equivalent to that of an owner. He alone can sue upon the ceded obligation, and he may do so for the full amount; However much in excess of the secured debt."[304] In addition to that, the court cited Lord De Villiers CJ where the Chief Justice cited *Van der Byl v Findlay & Kihn*[305] that, "until the debt for which the original security given was paid, he is entitled to all rights of a cessionary".[306] With that, the court concluded that the applicants were not entitled on 17 April to cancel the lease.[307]

4.3.4 Analysis

This case had led to the development of security by means of claims in as far as it gave clarity to the legal position of the parties during the subsistence of the cession *in securitatem debiti*. The judgment confirmed the position taken in *Cohen's Trustee*.[308] What is transferred is the power to realise the pledged object or the right of action, and this power will only be used when the debtor defaults.[309] During the subsistence of the

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[298] *Ibid*.
[299] 1911 AD 235.
[300] *Frankfurt v Tea Rooms, Ltd and Sheffield* 1924 WLD 255.
[301] *Ibid*.
[302] *Ibid*; 1911 AD 235.
[303] 3 J 86.
[304] *Frankfurt v Tea Rooms, Ltd and Sheffield* 1924 WLD 257.
[305] (1891-1892) 9 SC 178.
[306] *Frankfurt v Tea Rooms, Ltd and Sheffield* 1924 WLD 257.
[307] *Supra* 258.
[308] *National Bank of South Africa v Cohen's Trustee* 1911 AD 235.
[309] See S Scott "*The law of cession*" 2nd ed. 1991 Juta 240; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 455; R Brits "*Real Security Law*" 2016 Juta 327; *National Bank of South Africa v Cohen's Trustee* 1911 AD 235; *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA); S Scott "One hundred years of security cession" 25 *SA Merc LJ* (2013) 520.

security, only the pledgee/cessionary has the right of action.[310] In certain circumstances, the pledgee or cessionary can claim directly in terms of the ceded debt. The court cautioned that "the analogy with the position of the pledge of corporeal movables should not be pressed too far when it comes to the pledgee's remedies".[311] This resuscitated the theoretical debate because it created confusion on this legal position of the pledgee before the default of the pledgor.

4.4 Barclays Bank (D, C & O) and Another v Riverside Dried Fruit Co (Pty) Ltd

The *dominium* retained by the pledgor/cedent and the transfer of the right of action (*locus standi*) to the pledgee/cessionary became an issue to be determined also in this case. As indicated above, these are the main contested aspects in the security by means of claims.[312] In this case, the court had to decide if the pledgor had a right to make an application for the winding up of a company, which obligation it ceded as security for a debt.[313] The company to be liquidated was suspected to be facing financial challenges as evidenced by the losses it made, and non-payment of the due account.[314]

4.4.1 The legal question

The court had to decide if Marshall Food Products had the rights to initiate winding up proceedings against Riverside Dried Fruit Company which had defaulted on its payments, which obligation had been ceded to the bank as security for a debt.[315] Secondly, the court had to decide if Barclays Bank concurred when Marshall issued notice of demand on 23 March 1948.[316]

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[310] *Ibid*.
[311] *Frankfurt v Tea Rooms, Ltd and Sheffield* 1924 WLD 256.
[312] S Scott "The Evergreen Topic of locus standi and security cessions: *Thekweni properties (Pty)Ltd v Picardi Hotels Ltd and Picardi Hotels Ltd v Thekweni properties (Pty) Ltd*" (2009) 21 *SA Merc LJ* 405-419; S Scott "The question of locus standi in revolving security cessions *Springtex Ltd v Spencer Steward & Co* 1990 -11-16 case number 6135/88 (C) unreported".
[313] *Barclays Bank (D,C& O) and Another v Riverside Dried Fruit Co. (Pty) Ltd* (1949) 2 All SA 165 (C).
[314] *Supra* 167.
[315] *Supra* 169.
[316] *Ibid*.

4.4.2 Facts of the case

In this case there was a loan agreement between Marshalls Food Products Limited and Riverside Dried Fruit Company in terms of which Marshall undertook to grant Riverside a loan of twenty five thousand pounds.[317] The terms of the loan agreement were that the money should be employed for the discharge of any bond or bonds at present registered against movable and/or immovable property of Riverside.[318] This loan had to be used to discharge any of its indebtedness to its bankers at the date when the loan was granted.[319] The balance remaining was to be utilised to run the day to day activities of the company.[320] As security for the loan, Riverside passed a covering bond mortgaging all its immovable property to cover the debt against the mortgagee generally up to but not exceeding a maximum of £75000.[321] A collateral bond hypothecating all Riverside movables was also passed in favour of Marshall.[322]

The mortgage bond was passed on 24 September 1947, and on the same day, Marshall ceded these bonds to Barclays Bank as security for Marshall's existing and future indebtedness to the bank.[323] These cessions were registered with the office of the Registrar of Deeds, Cape Town.[324] Between 1947 and 1948 Riverside started experiencing financial problems.[325] In these financial years, it made losses of between £4000 and £5000 respectively.[326] This resulted in Riverside being unable to meet its financial obligations.[327] When it failed to pay the £30000 or any portion of it to Marshall, on 23 September 1948, Marshall wrote a letter of demand requesting Riverside to make payments immediately.[328] It was in this letter of demand that Riverside realised that the deed of hypothecation was ceded to Barclays Bank.[329] When Riverside failed to meet the demand, Marshall on 5 November 1948 petitioned the court for an order of winding up Riverside company.[330]

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[317] *Supra* 166.
[318] *Ibid*.
[319] *Ibid*.
[320] *Ibid*.
[321] *Ibid*.
[322] *Ibid*.
[323] *Supra* 167.
[324] *Ibid*.
[325] *Supra* 168.
[326] *Ibid*.
[327] *Ibid*.
[328] *Ibid*.
[329] *Ibid*.
[330] *Supra* 169.

4.4.3 Ratio decidendi

The court cited Sande,[331] where he said, "[t]he rights of the creditor/ cedent consists chiefly in the power of releasing the debtor in any legal manner and of recovering the amount owing. These rights are deemed to be transferred to the cessionary, and further whatever is permitted by law or statute in demanding the debt and in exercising the action in regard to the pledge or person of the debtor pursuant to the contract with the cedent".[332]

The court confirmed the principles of the law of pledge of personal rights as stated in *Cohen's Trustee*.[333] The pledgor retains *dominium* of the personal right.[334] This *dominium*, the court said, may be misleading unless carefully considered.[335] It stated that Watermeyer J[336] had described it as a "reversionary interest", and Stratford J[337] also described it as an interest which gives the holder of the *dominium* no right to exercise the rights of a *dominus*.[338] To the courts' interpretation, this was important in as far as the enforcement of the rights is concerned.[339] It was for this reason that the court held that the bank, as cessionary, was the only one which was entitled to make demands for the payment from the third party debtor.[340] In using *Van Zyl v Strandfontein Namaqualand Estates (Pty) Ltd*,[341] the court quoted Watermeyer J when it found that "the dominium in a ceded bond held as security for a debt remained in the pledgor, so long as the cession stands, the cessionary is the only person who can call up the bond".[342] The court held that there was no evidence to show that there was any concurrence between Marshall and the bank in terms of the application for the winding up of the respondent.[343] The application was dismissed and the rule *nisi* discharged.[344]

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[331] Cessions of Actions, Ch. IX, P. 170 (Anders' translation).
[332] *Barclays Bank (D, C & O) and Another v Riverside Dried Fruit Co. (Pty)Ltd* (1949) 2 All SA (C) 171.
[333] 1911 AD 235.
[334] *Barclays Bank (D, C & O) and Another v Riverside Dried Fruit Co. (Pty)Ltd)* (1949) 2 All SA (C) 172.
[335] *Ibid*.
[336] In *Van Zyl v Strandfontein Namaqualand Estates (Pty) Ltd* (1930,C,P,D,270).
[337] *Ibid*.
[338] *Barclays Bank (D,C & O) and Another v Riverside Dried Fruit Co.(Pty)Ltd* (1949) 2 All SA (C) 173.
[339] *Ibid*.
[340] *Ibid*.
[341] 1930 C,P,D,270.
[342] *Barclays Bank (D,C & O) and Another v Riverside Dried Fruit Co.(Pty)Ltd)* (1949) 2 All SA (C) 173.
[343] *Ibid*.
[344] *Supra* 178.

4.4.4 Analysis

This case, similar to the above ones, contributed to the development of pledge of claims. It confirmed the legal position of the pledgor and the pledgee during the subsistence of the cession in *securitatem debiti*.[345] It gave clarity on the concept of dominium.[346] This implies that cession of the personal right did not transfer *dominium* to the pledgee.[347] The use of this *dominium* had been criticised as being unsuitable and confusing.[348] This was explained as "reversionary interest" which means that control of the personal right will revert to the pledgor after payment of the principal debt.[349]

4.5 Lief NO v Dettmann

This is one case in which, despite the authority of *National Bank of South Africa v Cohen's Trustee*,[350] the court could not reconcile with the idea that *dominium* remains in the cedent after cession of the personal right to the cessionary.[351] Even though it was an Appellate Division decision, it did not overrule the decision made in *National Bank of South Africa v Cohen s' Trustee*.[352] The *Lief NO* case shall be discussed here in as far as it relates to the law on security by means of personal rights.

The legal issues to be determined by the court in this case related to the registration of cessions of mortgage bonds in terms of the common law and the Deeds Registries Act 47 of 1937.[353] The declaration by the court, although made as *obiter dictum* on an out-and out cession as the only way for using personal rights as security, reignited the debate on the appropriate method in which security by means of personal rights might be constituted.[354] To understand the dynamics of this case that led to this *obiter dictum*, a discussion of the case in as far as it specifically relate to cession of personal rights for security shall be provided.

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[345] See S Scott "*The Law of cession*" 2nd ed. 1991 Juta 240.
[346] *Ibid*.
[347] R Brits "*Real Security Law*" 2016 Juta 324-344; S Scott "*The law of cession*" 2nd ed.1991 Juta 239.
[348] *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) para 22; A Macaulay "Cession of reversionary rights in book debts" (1983) *De Rebus* 526.
[349] R Brits "*Real Security Law*" 2016 Juta 344.
[350] 1911 AD 235.
[351] *Lief NO v Dettmann* 1964 (2) SA 252 (A) 271.
[352] *ibid*; 1911 AD 235.
[353] *Lief NO v Dettmann* 1964 (2) SA 252 (A).
[354] *Supra* 271.

4.5.1 The legal question

The legal question *in casu* was not about cession in *securitatem debiti*. The statement made with regard to out-and-out cession as the only manner in which security by means of claims could be effected was made as an *obiter dictum*.[355] The legal questions to be answered in the case were, in terms of a grant of participation in a bond, was there evidence of common intention on the part of the Board and the participant to effect a cession of rights in, to, and under the bond in question? The second question to be answered was, in terms of the intention to effect cession, was cession effected in law even if it was not registered as required by the Deeds Registry Act 47 of 1937 and lastly was it possible in view of section 54 of the Deeds Registry Act that a beneficial interest in a duly registered mortgage bond vest in a person other than the person referred to in the bond?[356]

4.5.2 Facts of the case

This case was an appeal against the judgment of Galgut J in the Witwatersrand Local Division.[357] The court *a quo* dismissed exceptions filed by the liquidator of South African Board of Executors and Trust Co Ltd.[358] This Company was placed under liquidation on 1 May 1962.[359] The company, as part of its business, acted on behalf of its clients who invested money on the security of mortgage bonds over immovable property.[360] In this case the respondent contended that the grant by the board of a participation in a mortgage bond registered in its name constituted a cession by the company to the participant of a determined share or portion of its rights as mortgagee.[361] The respondent contended further that cession effectively vested rights in, to and under the bond in the participant as cessionary notwithstanding the absence of registration thereof in terms of the relevant provisions of the Deeds Registries Act 47 of 1937.[362]

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[355] *Ibid*.
[356] *Supra* 264.
[357] *Supra* 261.
[358] *Supra* 262.
[359] *Ibid*.
[360] *Ibid*.
[361] *Supra* 263.
[362] *Ibid*.

4.5.3 Ratio decidendi

There were two judgments in this case: the main judgment by Wessels JA and the judgment of Van Wyk JA.[363] The two judgments concurred on the findings, but differed in terms of the reasons for the orders made. Van Wyk JA's judgment made no comments on cession for security purposes.[364] The court held that the real rights under a mortgage bond are immovable but the principal debt that led to the registration of the hypothecation of the immovable property is a movable property.[365] Cession of real rights in the immovable property require registration, but cession of a debt under the mortgage bond, as incorporeal, requires only an agreement to cede.[366] The court found that in this case no cession of any of the bonds were registered and therefore the claims to the real rights in the bonds or secured claims in respect of the proceeds of the immovable property failed.[367]

The main judgment as delivered by Wessels JA made significant pronouncement on cession of personal rights for security purposes, although as obiter dictum.[368] This started with the contention made by the respondent that the provisions of the Deeds Registries Act 47 of 1937 do not require the cession of a mortgage bond to be registered in order that it should be valid, in the sense of divesting the mortgagee of his rights under the bond and vesting those rights in the cessionary.[369] The court made reference to a number of sections in the Act where provision is made for the registration of cession of mortgage bonds or real rights from one person to another.[370] Of importance for this discussion is section 16 of the Act which provides that: "Save as otherwise provided in this Act or in any other law the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the register, and any other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by the registrar" and section 91 which states that: "No transfer of land and no cession of any registered lease or sub-lease or other real right in land made as security for a debt or other obligation shall be attested by any registrar or registered in

[363] *Supra* 259 and 261.
[364] *Supra* 259.
[365] *Ibid*.
[366] *Supra* 260.
[367] *Ibid*.
[368] *Supra* 271.
[369] *Supra* 270.
[370] *Ibid*.

any deeds registry."[371] The respondent used section 91 to argue that registration of cession of mortgage bonds was unnecessary as provided in this section.[372] It submitted that the term "other real rights in land" in section 16 must be interpreted to exclude mortgage bonds, because if this was not done section 91 would conflict with section 3(f) of the Act.[373] The court held that the conflict could only relate to that part of section 3(f) which requires the registrar to register cession of registered mortgage bonds made as security, and not the registration of cessions made for alienation of the cedent's rights under a registered mortgage bond.[374] Then it stated that a mortgage bond is *sui generis* in that it has a dual character.[375] It is both an acknowledgement of debt, which is created by the principal debt and which is a personal right against the mortgagor, and an instrument hypothecating the immovable property that created the real right in land to the mortgagee.[376] This practically means that this right of action empowers the mortgagee to pursue against the mortgagor, and the real right to the immovable property is conveyed to the mortgagee so that he will be holder of a secured right of action as opposed to unsecured.[377]

When a mortgagee wishes to use his rights under a registered mortgage bond as a form of security for a debt or other obligation, two things will take place.[378] One is where he transfers his personal right completely to the cessionary and secondly where the cedent and the cessionary agree on a recession of the third party debt after satisfaction of the principal debt.[379] The court held, in an *obiter dictum*, that "the only manner in which a right of action (either secured or unsecured) can be furnished as security for a debt is by way of cession, i.e, by a transaction which in our law results in the cedent being divested of his rights and those rights vesting in the cessionary. Where the cession is said to be made as security for a debt, it does not, in my opinion, signify that the cedent in fact retains any right in the subject matter of the cession; his continued interest therein flows from the agreement, either express or implied, with the cessionary that the right of action will be ceded back to him upon the discharge

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[371] *Ibid*.
[372] *Supra* 271.
[373] *Ibid*.
[374] *Ibid*.
[375] *Ibid*.
[376] *Ibid*.
[377] *Ibid*.
[378] *Ibid*.
[379] *Ibid*.

of his debt."[380] On dealing with the conflict envisaged in section 91 and 3(f), the court stated that in a cession of a mortgage bond for security purposes, the cedent in fact aims at the alienation of his rights, and the records of the Deeds Registry will accurately reflect the true nature of the transaction.[381] Therefore, no conflict arises between sections 91 and 3(f) if section 16 is construed as applying to the real right embodied in a mortgage bond.[382]

4.5.4 Analysis

The influence of De Wet can be seen in this case.[383] Besides citing *Jeffrey v Pollack and Freemantle*[384] as authority for its conclusion, the court cited De Wet and Yeats as authority for a fiduciary security cession.[385] In this textbook, De Wet had introduced the concept of fiduciary security cession into our law without discussing its theoretical basis and complex nature.[386] He relied on the German *Pandectists* to suggest that, "on the basis of general principles, a fiduciary security cession is the only construction for a security cession".[387] He was aware of certain negative aspects of this form of security, such as the position on insolvency but paid no attention to possible solutions.[388] Although the only problem with the statement made by the court was its declaration of a fiduciary security cession as the only manner in which security by means of personal rights might be constituted, it had contributed to the development of the law of security by means of personal rights. It reignited the debate on which the appropriate method can be utilised to constitute this kind of cession. There is a need for clarification of the principles and requirements of fiduciary security cessions. The German model of this type of security need to be clarified and adapted to the South African law. Scott has suggested that the legislature has to intervene, particularly on the exceptional situations like insolvency and attachment.[389]

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[380] *Ibid*.
[381] *Supra* 272.
[382] *Ibid*.
[383] De Wet considered fiduciary security cession as the only construction that can be given as a security cession. He was influenced by the *Pandectists* and the German contract law in general. He referred to a pledge of personal rights as a right to a right, as not existing (*onbestaanbaar*), a fallacy (*dwaalleer*) and a contraption (*gedoente*).
[384] 1938 AD 1.
[385] *Lief NO v Dettmann* 1964 (2) SA 252 (A) 271.
[386] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 421.
[387] S Scott "One hundred years of security cession" (2013) 25 *SA Merc LJ* 517.
[388] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 421.
[389] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 426.

4.6 Grobler v Oosthuizen

This case outlines important matters of the law with regard to cession in *securitatem debiti*. Scott submits that this case is praiseworthy because it creates certainty on the very contentious topic of the nature of a security cession.[390] She says that it takes note of academic writing, which is lacking in most judgments.[391] It has also fulfilled the requirement of legal certainty by respecting the principle of *stare decisis*.[392] She regards this as obligatory to move within the confines of judicial precedence.[393] The case has given clarity to most of the important issues of the law with regard to cession in *securitatem debiti* because the court strived to bring clarity to matters like the retention of *dominium* by the cedent after having ceded the personal right to the cessionary.[394] It gave clarity on the question of automatic recession of the personal right to the cedent in relation to the accessory nature of the security transaction to the principal debt.[395]

Another important aspect of the decision is that it once again brought the law to certainty since *Lief NO v Detmann*, though it did not make a determination on either the South African law permits two forms of cession in *securitatem debiti*.[396] The issue of intention of the parties need more clarity because the majority of transactions are written in concepts that are applicable to both forms of cessions. This often leads to problems of interpretation as some courts mingle the concepts between the two theories or vacillate between them.[397] The courts or the legislature must give clarity on this aspect of the intention of the parties, particularly on the choice between the two options. At this point in time, it is unnecessary to continue with the debate on the nature of security cessions. The bulk of decisions made in favour of the pledge construction is proof that, for pragmatic purposes, this theory answers most of the problems encountered in practice in relation to this law. The principles and requirements for fiduciary security cessions also need to be clarified, and similar to the German approach, the legislature must intervene particularly on the position of the insolvency of the cedent.

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[390] S Scott “One hundred years of security cession” (2013) *SA Merc LJ* 525, 526.
[391] *Ibid*.
[392] *Supra* 525.
[393] *Ibid*.
[394] *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) para 22.
[395] *Supra* para 20.
[396] *Supra* para 24.
[397] See S Scott “*Scott on cession, A Treatise on the law in South Africa*” 1st ed. 2018 Juta 419.

4.6.1 The legal question

The court had to determine whether the cession of the policies that were made by Grobler (cedent) to Oosthuizen (deceased cessionary) were made as an ordinary cession for the payment of the purchase price or was made as security for a debt. If the cession was made as security for a debt, which nature of security by means of personal rights was effected?[398]

4.6.2 Facts of the case

On 14 August 1991 Grobler entered into an agreement of sale with a company called Mothibi Crushers & Transport (Pty) Ltd.[399] He purchased an immovable property situated in Mothibistat.[400] The purchase price of the property was R300 000.[401] To secure the debt, Grobler had to acquire an insurance policy from an approved insurance company which guaranteed payment of R1.2 million on 30 June 2001 and which he had to cede to the seller.[402] It would seem that cession of the policy to the seller was a form of payment of the property but on proper analysis of the sale contract, this policy was to serve as security for the principal debt.[403] The sale contract became null and void because in terms of the laws of the erstwhile Republic of Bophuthatswana, Grobler as a non-citizen of that area needed the consent of the minister, which he never obtained.[404] After the death of the cessionary, the executors surrendered some of the policies for payment and ceded the remaining two to Oosthuizen, the only heir in the deceased estate.[405] She surrendered the policies to Sanlam who duly paid her the sum of R741 677.24 on 16 September 1997.[406] On 9 June 2000 Grobler issued summons for reclaiming the proceeds of the policy made as security for a debt in terms of a null and void contract.[407]

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[398] *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA).
[399] *Supra* para 1.
[400] *Ibid*.
[401] *Supra* para 4.
[402] *Supra* para 5.
[403] *Supra* para 8.
[404] *Supra* para 6.
[405] *Supra* para 7.
[406] *Ibid*.
[407] *Supra* para 1.

4.6.3 Ratio decidendi

The court started with the determination of whether the null and void sale contract between Grobler and the deceased was made as an ordinary cession for the payment of the purchase price.[408] In an ordinary cession, the cedent is divested of the personal right and this right is vested in the cessionary who becomes the creditor in his stead.[409] According to the court, the deed of cession in clause 2 of the contract was written in an unusual manner.[410] It read as follows: "the purchase price of R300 000 together with interest at 15 per cent, capitalised monthly, from 1 July 1991 payable on 30 June 2001, for which amount the purchaser would acquire an insurance policy from an approved insurance company which guaranteed payment of R1.2 million on 30 June 2001 and which policy the purchaser would then cede to the seller."[411] Clause 5 provided that "the purchaser would be entitled to possession of the property sold 'at the time of the out-and-out cession of the policy in terms of clause 2".[412] Further evidence of an out-and-out cession appeared on the addendum which was signed on 14 August 1991, the same date of the deed of sale, which provided that Grobler will be liable for the tax which will become due on the proceeds of the policy which had been ceded to the seller in discharge of the purchase price.[413]

Clauses 21, 23 and 24 provided respectively that there must be registration of the covering bond over the property sold in favour of the deceased, as security for payment of the purchase price, together with interest, and Grobler must deliver the policy documents to the deceased as security for the outstanding balance of the purchase price and lastly, and if upon the death of Grobler, and the proceeds prove to be less than the purchase price, the deceased will rely on the covering bond.[414] The court concluded from the above reasons that it was obvious that cession of the policies was made in *securitatem debiti*.[415]

Having concluded on the absence of the ordinary cession in the null and void sale transaction, the court then had to determine the nature of the cession in

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[408] *Supra* para 7.
[409] See S Scott "*The law of cession*" 2nd ed. 1991 Juta 246, R Brits "*Real Security Law*" 2016 Juta 345.
[410] *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) para 4.
[411] *Ibid*.
[412] *Supra* para 11.
[413] *Ibid*.
[414] *Supra* para 12.
[415] *Supra* para 14.

securitatem debiti.[416] It referred to the two forms of security by means of claims available in South African law and discussed different arguments levelled for and against them as made by different academics and previous court decisions.[417] The court explained that if it concluded that the nature of cession in *securitatem debiti* constituted was that of a fiduciary security cession (out-and-out security), then the plea of prescription must be upheld because Grobler's contention would then depend on a claim for re-cession which arose in August 1991.[418] The court reasoned that if an out-and-out cession was agreed upon, because of a null and void sale contract, the right of re-cession would have accrued immediately and therefore Grobler should have demanded the re-cession of the policy in August 1991.[419]

The court then turned to the pledge of claims. It explained that despite doctrinal challenges with the pledge theory "this Court on a series of decisions for pragmatic reasons, accepted the pledge theory in preference to the outright cession".[420] The court decided in favour of the pledge of claims.[421]

The SCA concurred with the findings of the trial court but differed with the reasons for the conclusion.[422] The trial court had concluded that the parties had effected a pledge of personal rights.[423] The trial court reasoned that after the pledging of the policies to the deceased, *dominium* or ownership of the personal rights remained with Grobler, who had the right to enforce the personal right with a *rei vindicatio*, which in terms of section 1 of the Prescription Act 68 of 1969 prescribes after 30 years.[424] This implied according to the trial court that the plea for prescription did not hold.[425] The SCA explained that the remedy of *rei vindicatio* is not enforced on incorporeal movables but corporeal and therefore the trial court's reasoning could not hold.[426] The court then explained the concept of *dominium* or ownership that remains with the pledgor after the transferring of the personal right.[427] The court, citing *Moola v Moola's*

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[416] *Supra* para 15.
[417] *ibid*
[418] *Supra* para 17
[419] *ibid*
[420] *ibid*
[421] *ibid*
[422] *Supra* para 18
[423] *ibid*
[424] *ibid*
[425] *ibid*
[426] *ibid*
[427] *Supra* para 19

Estate[428] where the court had held that "the literal sense of the concepts dominium or ownership is ill-suited to describe the interest remaining in the cedent, in particular where the principal debt had been discharged before action was instituted".[429] The court said that "when Sanlam paid out the policies the principal debt was already extinguished and therefore Grobler would then be the owner of nothing".[430]

The court also referred to the reasons of the High Court, on conceptualising the interest that was retained by the cedent after the cession as "reversionary interest" and held that the Full Bench understood this "reversionary interest as an interest that lie in a claim of re-cession of the policies".[431] The SCA refuted this understanding because this will result in a recapitulation of the of the outright cession-*pactum fiduciae* theory.[432] This understanding will be in conflict with findings made that the right automatically reverts back to the cedent after the payment of the principal debt.[433] The principal debt is accessory to the security, and therefore an extinguishment of the principal debt automatically reverts the personal right back to the cedent.[434] No recession is necessary.[435] The court then defined the concept "reversionary interest" by citing Nienaber JA: "This reversionary interest, properly understood, refers to the cedent's interest in the debtor's performance (satisfaction of the principal debt by the debtor) rather that to his interest in the cessionary's performance (re-cession of the principal debt on satisfaction of the secured debt-which is a right *ex contractu* against the cessionary."[436] The court concluded that Grobler's personal right reverted automatically because of an invalid sale contract and he never acquired re-cession from the deceased.[437]

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[428] 1957 (2) SA 463 (N) 464 B-D
[429] *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) para 22.
[430] *Supra* para 23.
[431] *Supra* para 19.
[432] *Supra* para 20.
[433] *Ibid*.
[434] *Ibid*.
[435] *Ibid*.
[436] *Supra* para 22.
[437] *Supra* para 23.

4.6.4 Analysis

Grobler v Oosthuizen[438] confirmed *National Bank of South Africa v Cohen's Trustee*[439] on pledge of personal rights for pragmatic purposes. In the first place, it settled the law with regard to cession in *securitatem debiti* where there was uncertainty since *Lief NO v Dettmann* and *Trust Bank of Africa v Standard Bank of South Africa*.[440] The court settled the law of cession in *securitatem debiti* in favour of the pledge theory as default position.[441] Any party claiming otherwise, bears the burden of proof.[442] In many respects the court's finding is based on what Scott had written on the law of cession *in securitatem debiti*.[443] The reason for this is that, in relation to any transaction related to cession in *securitatem debiti*, the intention of the parties should be the deciding factor.[444] It will not always be easy to determine the intention of the parties in a deed of cession where parties use vague language in drafting deeds. It is easier to differentiate the ordinary cession from the cession in *securitatem debiti*, but not always simple to differentiate the two theories because sometimes certain contracts use terminology that is used in either theories.

4.7 Conclusion

Deciding cases dealing with cession *in securitatem debiti* has not been easy. One of the reason for this difficulty is that this law intermingle the principles of the law of contract and that of the law of obligations.[445] Courts even before 1910 had been divided between strict adherence to the principles of the law and pragmatic approach to the law.[446] There is arguably a need for intervention by the legislature in this area of the law. Although the law is settled in favour of the pledge theory for pragmatic purposes, uncertainty still prevails, particularly where there was no confirmation or declaration about the applicability of the fiduciary security cessions. Other jurisdictions like the Netherlands and Belgium had codified this area of law in favour of the pledge

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[438] 2009 (5) SA 500 (SCA).
[439] 1911 AD 235.
[440] 1964 (2) SA 252 (A) 271; 1968 (3) SA 166 (A).
[441] *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) para 17.
[442] *Ibid*.
[443] See S Scott "*The law of cession*" 2nd ed. 1991 Juta 234-235.
[444] *Ibid*.
[445] R Brits "*Real Security Law*" 2016 Juta 273.
[446] See *Trautman v Imperial Fire Ass* 12 SC 38; *Brink's Trustee v S.A Bank* 2 M 399; *Smith v Farrelly's Trustee* (1904) TS 949; *Cape of Good Hope Bank v Melle* 10 Juta 280 in *National Bank of South Africa v Cohen'sTrustee* 1911 AD 235.

of claims. If the concept of the “intention of the parties” includes also the acceptance of the fiduciary security cession, there must be clarification of the principles and requirements of this option. This “intention of the parties” must also be clarified in relation to the appropriate terminology to be used for drafting deeds of cession using either theory.

Chapter 5:

The two constructions of cession in *securitatem debiti*

5.1 Introduction

The previous chapter provides an overview of some of the developments of the law of cession *in securitatem debiti* developed through the courts. Case law has played an important role in the development of this area of law, starting with post-union Appellate decision in *National Bank of South Africa v Cohen's Trustee*[447] in 1911 to the post-apartheid SCA decision in *Grobler v Oosthuizen*[448] in 2009. For almost a century the courts, practitioners and academics have been divided between the pledge theory and the fiduciary security cession. The two theories are extracted from two different fields of law: the law of property for the pledge construction, and the law of cession for the outright cession.[449]

Basically the two theories differ in terms of ownership of the personal right after the cedent had transferred this right to the cessionary. This results in different legal consequences especially on the *locus standi* of the parties during the subsistence of the security cession and the position in exceptional circumstances like insolvency and attachment.[450] In an outright cession, the personal right is ceded completely to the cessionary.[451] In terms of this transaction, the cedent is removed from the scene in relation to the ceded right.[452] The only interest the cedent has, is a personal right against the cessionary which is constituted in terms of *pactum fiduciae*.[453] The latter is an agreement whereby the parties agree that after the payment of the principal debt, the personal right will be re-ceded to the cedent.[454]

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[447] 1911 AD 235.
[448] 2009 (5) SA 500 (SCA).
[449] R Brits "*Real Security Law*" 2016 Juta 273; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta.
[450] See S Scott " Evaluation of security by means of claims: Problems and possible solutions: Section A: Problems" 60 *THRHR* 179 (1997) 190.
[451] *Supra* 192; S Scott "The law of cession" 2nd ed 1991 Juta 246; Van Huysteen et al "*General principles of contract*" 5th ed. 2016 Juta 474; PM Nienaber "Cession" LAWSA 2nd ed. Vol 2 Part 2 2003 LexisNexis 47 para 53.
[452] *Ibid*.
[453] *Ibid*.
[454] *Ibid*.

In a pledge of claims, the *dominium* or ownership of the personal right remains with the pledgor.[455] The two theories differ in terms of the insolvency of either of the parties to the contract.[456] In an outright cession, when the cessionary becomes insolvent, his creditors will benefit from the personal right, as an asset in his estate.[457] The cedent will only have a personal right against the trustee of the cessionary for the re-cession of the right.[458] In terms of the pledge theory, the personal right remains the pledgor's asset and his creditors will benefit from this asset if he becomes insolvent, and the cessionary becomes a secured creditor.[459] The following discussion will focus on the principles regulating the respective constructions.

5.2 The pledge of claims

South African law accepts the pledge of claims.[460] This was confirmed in *National Bank of South Africa v Cohen's Trustee*[461] and settled as default law in *Grobler v Oosthuizen*.[462] The pledge of personal rights has been criticised on dogmatic grounds, and academics like De Wet and Yeats have argued that the pledge of personal rights would involve something impossible.[463] However, this theory was accepted in law on pragmatic grounds where an analogy with the pledge of corporeal movables is made.[464] In most foreign jurisdictions, the pledge of claims has been accepted on this functional approach.[465] The German jurists explained the theory of pledge of personal rights as referring to a situation whereby the cedent remains the holder of the right, but the power to institute action is separated from the right and transferred to the cessionary.[466]

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[455] *National Bank of South Africa v Cohen's Trustee* 1911 AD 242; *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) para 17.
[456] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 415; R Brits "*Real Security Law*" 2016 Juta 301.
[457] *Ibid*.
[458] *Ibid*.
[459] *Supra* in Scott 462-464 and Brits 327-344.
[460] *National Bank of South Africa v Cohen's Trustee* 1911 AD 235.
[461] 1911 AD 235.
[462] 2009 (5) SA 500 (SCA).
[463] R Brits "*Real Security Law*" 2016 Juta footnote 79, with reference to JC de Wet & JP Yeats "*Die Suid-Afrikaanse kontraktereg en handelsreg*" 3 ed (1964).
[464] *National Bank of South Africa v Cohen's Trustee* 1911 AD 235; *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) para 17.
[465] See chapter 2 above, 2.3.1-2.3.5.
[466] S Scott "*The law of cession*" 2nd ed. 1991 Juta 231.

The following principles of the ordinary pledge will be discussed as adapted to the pledge of personal rights.

5.2.1 Publicity

In real security law, third parties must not be misled by the availability of a property of a potential debtor, and therefore it is imperative that the right must be publicised.[467] In the case of corporeal movables, publicity is provided in the form of delivery of the pledged object to the pledgee.[468] In the ordinary pledge, the corporeal moveable is physically transferred from the control or possession of the pledgor to the control and possession of the pledgee.[469] In the case of incorporeal assets like personal rights, physical movement of the asset will not be possible, and therefore in the place of delivery, the personal right is ceded to the pledgee.[470] Only the power to realise the personal right is transferred to the pledgee.[471] Ownership or *dominium* of the personal right remains with the pledgor.[472] On the insolvency of the cedent/pledgor, the personal right vests in the estate of the insolvent pledgor/cedent.[473] Critics of the pledge theory, like De Wet, argue that this transfer of the power to realise cannot be regarded as fulfilling the publicity requirement.[474] Notification to the original debtor was suggested as a way in which publicity requirement can be achieved, but this has not been settled.[475] Delivery of the document evidencing the right was also suggested, but also this was not settled.[476] In a pledge of personal right, delivery of the document evidencing the personal right is presently not a requirement for the constitution of the pledge.[477]

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[467] *Supra* 237; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 443; see also R Brits "*Real Security Law*" 2016 Juta 121 on the transfer of the corporeal movable.
[468] *Ibid*.
[469] *Ibid*.
[470] *Ibid*; see also R Brits "Real Security Law" 2016 Juta 274; JR Harker "Cession in securitatem debiti" 98 *SALJ* 56 (1981) 58.
[471] S Scott "Evaluation of security by means of claims: Problems and possible solutions: Section A:Problems" 60 *THRHR* 179 (1997) 190; JR Harker " Cession in securitatem debiti" 98 *SALJ* 56 (1981) 59; *Frankfurt v Rand Tea Rooms Ltd and Sheffield* 1924 WLD 257; *Barclays Bank (D, C & O) and Another v Riverside Dried Fruit Co. (Pty), Ltd* (1949) 2 All SA 165 (C) 172.
[472] *National Bank of South Africa v Cohen's Trustee* 1911 AD 242; S Scott "*The law of cession*" 2nd ed. 1991 Juta 239; R Brits "*Real Security Law*" 2016 Juta 327; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 447; *Bank of Lisbon and SA v The Master* 1987 1 SA 276 (A) 294.
[473] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 468; *National Bank of South Africa v Cohen's Trustee* 1911 AD 242; R Brits "*Real Security Law*" 2016 Juta 342; *Bank of Lisbon and SA v The Master* 187 1 Sa 276 (A) 294.
[474] R Brits "*Real Security Law*" 2016 Juta 286-287.
[475] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 445; R Brits "*Real Security Law*' 2016 Juta 312.
[476] S Scott "*The law of cession*" 2nd ed. 1991 Juta 238; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 445; R Brits '*Real Security Law*" 2016 Juta 309.
[477] *Ibid*.

5.2.2 Specificity

Another basic requirement of the pledge of corporeal movables is specificity of the asset pledged. In the case of incorporeal property, the asset must be described clearly in the deed of cession.[478] In a pledge of claims, this can be achieved because it is easy to identify or specify the particular personal right that will serve as security for a debt, like a life policy with a particular insurance company or shares in a particular company. This specificity requirement shall not be fulfilled in revolving personal rights like book debts because extinguished book debts will be replaced by new ones, making it difficult to specify which personal right was pledged.[479]

5.2.3 Accessory nature of pledge

When parties agree on a loan or other credit facility, they usually agree to secure the principal debt for the due performance by the debtor. This becomes a *causa* for the creation of the security right.[480] When the *causa* for the security right is non-existent, there will be no reason for the security cession.[481] When the principal debt is extinguished, the security right also lapses, and the security object reverts to the cedent/pledgor.[482] In a pledge of corporeals where delivery of the asset was made to the pledgee, after the discharge of the debt, the pledgee has to deliver the pledged object back to the owner.[483] In the case of a pledge of a personal right, the power to realise the right is transferred to the pledgee/cessionary.[484] After payment of the principal debt, the power to realise the ceded personal right reverts to the cedent/pledgor automatically.[485] No re-cession of the personal right is needed.[486]

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[478] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 443.
[479] *Supra* 479.
[480] S Scott "*The law of cession*" 2nd ed. 1991 Juta 238; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 438; R Brits "*Real Security Law*" 2016 Juta 344; *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) para 17.
[481] *Ibid*; *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) para 17.
[482] *Ibid*.
[483] *Ibid*.
[484] *Ibid*.
[485] *Ibid*.
[486] *Ibid*.

5.2.4 Constitution of the pledge

For the constitution of a valid pledge, a security agreement and a cession agreement are needed.[487] Notification of the original debtor is not a requirement.[488] The security agreement becomes an obligation whereby the pledgor has a duty to make the object of pledge available for security and the pledgee acquires a right to have the principal debt secured.[489] Therefore, both parties must have the intention to create a security right and nothing else.[490] Their intention to create a pledge and not any other form of security must be reflected from the deed of pledge.[491] It must appear from the transaction that what is being transferred is only the power to realise the right and not the transfer of *dominium*.[492] As indicated above the role of notification to the debtor has not yet been settled.[493] A pledge of claims may be effected and valid without the original debtor being aware of the cession.[494] Scott argues that if notification to the debtor can be accepted as a requirement on the constitution of a valid pledge, most parties will be reluctant to opt for this form of security by means of personal rights.[495] The reason for this is that usually creditors do not want their debtors to be aware of their affairs as they prefer confidential transactions.[496]

5.2.5 Legal position of the parties

After cession of the personal right to the pledgee, the pledgor retains *dominium* of the right.[497] This *dominium* of the right is described as reversionary interest.[498] The pledgor only transfers the power to realise the personal right to the pledgee.[499] The retention

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[487] S Scott "*The Law of cession*" 2nd ed. 1991 Juta 239; R Brits "*Real Security Law*" 2016 Juta 327; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 438.
[488] *Ibid*.
[489] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 439; S Scott "*The law of cession*"2nd ed. 1991 Juta 239.
[490] *Ibid*.
[491] *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) para 22; S Scott "*The law of cession*" 2nd ed.1991 Juta 239.
[492] *Ibid*.
[493] See 5.2.1 above.
[494] *Ibid*.
[495] S Scott "*Scott on cession*, *A Treatise on the law in South Africa*" 1st ed. 2018 Juta 445.
[496] *Ibid*.
[497] *National Bank of South Africa v Cohen's Trustee* 1911 AD 242; *Grobler v Oosthuizen* 2009 (5) 500 (SCA) para 17; *Bank of Lisbon and SA v The Master* 1987 1 SA 276 (A) 294.
[498] *Grobler v Oosthuizen* 2009 (5) 500 (SCA) para 21 and 22; *Moola v Estate Moola* 1957 (2) SA 463 (N) 464; *Standard Bank of SA v Neetling* NO 1958 (2) SA 25 (C) at 30A-D as cited in the *Grobler* case; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 447; R Brits "*Real Security Law*" 2016 Juta 339.
[499] *Ibid*.

of *dominium* by pledgor has important legal consequences. In insolvency his creditors will benefit from the proceeds of the personal right.[500] Another important legal consequence is that the pledgor is able to make a further cession to other cessionaries.[501] But here the prior-in-time principle will operate.[502] The pledgor of shares can still exercise his right to vote but cannot change or rectify the right without the permission of the pledgee.[503]

On the position of the pledgee, his legal position will be determined pre-maturity and post-maturity of the debt.[504] Maturity of the debt refers to the time when the principal debt becomes due and payable.[505] Before maturity of the debt, the pledgee is only holding the personal right as security for the proper performance by the pledgor.[506] But under certain circumstances he can use the proceeds to discharge the debt.[507] Before maturity, he cannot claim the proceeds of the personal right.[508] During the cession, the pledgor also cannot sue the original debtor.[509] In certain circumstances, the debt of the third party debtor may become due and payable, and the debtor wants to effect payments.[510] In this situation, this will depend on whether the third party debtor has knowledge of the cession.[511] If the third party debtor was not notified of the cession and continues to make payments to pledgor in ignorance of the cession, he is absolved from making payments to the pledgee.[512] This will results in a breach of contract between the pledgor and the pledgee, who can use remedies

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[500] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 447; R Brits "*Real Security Law*" 2016 Juta 342; *National Bank of South Africa v Cohen's Trustee* 1911 AD 242; *Bank of Lisbon and SA v The Master* 1987 1 SA 276 (A) 294.
[501] S Scott "*The law of cession*" 2nd ed. 1991 Juta 241.
[502] *Ibid*.
[503] *Ibid*.
[504] S Scott "*The law of cession*" 2nd ed. 1991 Juta 241; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 445.
[505] *Ibid*.
[506] *National Bank of South Africa v Cohen's Trustee* 1911 AD 242; *Barclays Bank (D,C & O) and Another v Riverside Dried Fruit Co. (Pty) Ltd* (1949) 2 All SA 165 (C) 172; *Frankfurt v Rand Tea Rooms, Ltd, and Sheffield* 1924 WLD 256; R Brits "*Real Security Law*" 2016 Juta 329; S Scott "*Scott on cession*, *A Treatise on the law in South Africa*" 1st ed. 2018 Juta 449; S Scott "*The law of cession*" 2nd ed.1991 Juta 241.
[507] S Scott "*The law of cession*" 2nd ed. 1991 Juta 242; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 451; R Brits "*Real Security Law*" 2016 Juta 329.
[508] *Ibid*.
[509] R Brits "*Real Security Law*" 2016 Juta 328; *Barclays Bank (D, C & O) and Another v Riverside Dried Fruit Co.(Pty)Ltd* (1949) 2 All SA 165 (C)173; S Scott " *Scott on cession, A Treatise on the law in South Africa*"1st ed.2018 Juta 447; S Scott "*The law of cession*" 2nd ed. 1991 Juta 240.
[510] R Brits "*Real Security Law*" 2016 Juta 329; S Scott "*The law of cession*" 2nd ed. 1991 Juta 243.
[511] *Ibid*.
[512] *Ibid*.

suitable for breach of contract.[513] If the third party debtor has knowledge of the cession, there are two options that the parties may choose from.[514] The first option is where the parties agree that the third party debtor make payments to the pledgee as payment of the principal debt.[515] The second option is where the parties agree to invest the proceeds of the personal right, and this investment becomes security for the principal debt.[516]

If it happens that the pledgor defaults on his payments of the principal debt and the debt becomes due and payable, the pledgee is able to utilise his security.[517] If the pledgor and pledgee had agreed on *parate executie*, the pledgee may sell the personal right without an execution order from the court.[518] But if there is no such agreement, the pledgee can only do that through the machinery of the law.[519] Through the judicial process, the pledgee can sell the property and recover the amount due to him, and any excess from the proceeds of the pledged object can be claimed by the pledgor with an action *pignoraticia directa*.[520] Unlike the German law where the pledgee is permitted to claim from the personal right only the amount equal to the principal debt, South African law provides that a pledgee can claim the full amount of the personal right and if the proceeds of the right exceed the amount payable, the pledgee must account to the pledgor for the excess.[521] A *pactum commissorium* is invalid in South African law.[522] It is a clause in the deed of cession that the pledgee may keep the object of security if pledgor fails to pay.[523] A clause in a deed of cession that provides that the pledgee may keep the thing as payment of the debt or may buy the thing at a specific price or reasonable price determined by a third party is valid.[524] The pledgee must finally deal with the right as a *bonus paterfamilias*.[525]

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[513] *Ibid*.
[514] *Ibid*.
[515] *Ibid*.
[516] *Ibid*.
[517] S Scott "*The law of cession*" 2nd ed. 1991 Juta 243; R Brits "*Real Security Law*" 2016 Juta 329; S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 438.
[518] *Ibid*.
[519] *Ibid*.
[520] S Scott "*The law of cession*" 2nd ed. 1991 Juta 244.
[521] *Ibid*.
[522] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 441; R Brits "*Real Security Law*" 2016 Juta 331.
[523] *Ibid*.
[524] *Supra* 442.
[525] S Scott "*The law of cession*" 2nd ed. 1991 Juta 245.

5.2.6 Extinction of the pledge

The repayment of the principal debt automatically extinguishes the pledge because a pledge is accessory to the principal debt.[526] When the principal debt is null and void *ab initio*, the pledge automatically extinguishes, and the personal right reverts to the pledgor automatically.[527]

5.3 Out-and-out cession

Proponents of this theory favour it because of its dogmatic soundness.[528] Pahl, De Wet and Van Wyk can be regarded as advocates of this theory.[529] In jurisdictions where the pledge of claims has been codified and accepted as the only way in which personal rights may be used as security for a debt, notification to the debtor is regarded as a requirement for the constitution of a valid pledge.[530] To avoid notifying the third party debtor about their personal affairs, creditors and debtors opt for a fiduciary security cession as the personal right is completely transferred to the cessionary without notification to the third party debtor and at times even against his will.[531] The fiduciary security cession is also mostly appropriate where revolving security transactions like book debts are used.[532] Extinguished book debts are replaced by new ones, as long as the debtor performs and the principal debt is not yet due.[533] When the cedent defaults on his payment, the cessionary will notify the third party debtor as the true creditor and start claiming directly from him.[534] The cedent also prefers this option because it does not affect the day to day activities of his business because he can continue claiming from it, as long as he is making proper performance to the principal debtor. In constituting this form of cession of personal rights, the deed of security as a whole should reflect the intention of the parties to effect a security by

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[526] *Ibid*; see also S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 464; R Brits "*Real Security Law*" 2016 Juta 344.
[527] *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) para 17.
[528] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 465; *Lief NO v Dettmann* 1964 (2) SA 252 (A) 271; *Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd* 1968 (3) SA 166 (A) 173.
[529] See JC de Wet & AH van Wyk "*Die Suid-Afrkaanse kontraktereg en handelsreg*" 5th ed. (1992) 415-417.
[530] S Scott "*The law of cession*" 2nd ed. 1991 Juta 246.
[531] *Ibid*.
[532] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 479.
[533] *Ibid*.
[534] *Ibid*.

means of claims in the form of an out-and-out cession.[535] If the court, on adjudication of an action related to a cession in *securitatem debiti*, has doubts regarding the appropriate security form constituted, the court as a result of *Grobler v Oosthuizen* will hold the transaction as a pledge of claims.[536]

Principles of the out-and-out security cession are in all respect similar to the ordinary cession, whereby the cedent divests himself of the right, and vest it in the cessionary.[537] The personal right is ceded completely to the cessionary.[538] No *dominium* or interest is retained by the cedent.[539] The cedent will only rely on the *pactum fiduciae*, an agreement that after payment of the principal debt, the personal right will be re-ceded to the cedent.[540] The cedent only acquires a personal right against the cedent, not against the personal right.[541]

The relationship between the cedent and cessionary is regulated by the deed of cession.[542] The parties normally restrict the rights of the cessionary, but that must be included in the deed of cession.[543] Even when they have decided to make their transaction confidential, this must be clear from the deed of cession.[544] They can agree that the cessionary will immediately start to collect from the book debts and keep the proceeds for himself.[545] After payment of the principal debt, in terms of the *pactum fiduciae*, the cedent has to claim the ceded right back.[546] On insolvency of the cessionary, the creditors of the cessionary will benefit from the proceeds of the personal right because the personal right was completely transferred to him and it remains the property of his estate.[547]

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[535] *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) para 24.
[536] 2009 (5) SA 500 (SCA) para 17.
[537] R Brits "*Real Security Law*" 2016 Juta 345.
[538] *Ibid*.
[539] *Ibid*.
[540] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 476.
[541] *Ibid*.
[542] *Ibid*.
[543] R Brits "*Real Security Law*" 2016 Juta 346.
[544] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 479.
[545] *Ibid*.
[546] R Brits "*Real Security Law*" 2016 Juta 346.
[547] *Supra* 347.

Chapter 6:
Conclusion

The law of security by means of personal right has come a long way. Even before 1911, there were divergent decisions made in respective to this law. This created uncertainty in the commercial world. Over a period of 98 years, the pledge construction had stood the test of time. This is because South African law has accepted this construction on pragmatic grounds as it does not result in inequity between the parties during insolvency and attachments.[548] There is a need for the development of fiduciary security cession as a form of security by means of personal rights because in the past, academics like De Wet had introduced the concept of fiduciary security cession in his textbook without discussing its complex nature.[549] He realised the negative aspect of this fiduciary security cessions on insolvency, but offered no solution.[550] The suggestion is made that section 95 of the Insolvency Act 24 of 1936 should be amended to make provision for fiduciary security cessions.

I support the argument made by Scott that South African law must accept the existence of the two forms of security by means of personal rights, and they must exist parallel to each other and not opposing one another.[551] Parties who want to secure their debt by means of personal rights will be able to make an appropriate choice that will meet their needs. There are certain security transactions like revolving security cessions that requires fiduciary security cessions, and therefore its principles and requirements must be simplified.[552] The concept of the "intention of the parties" must be clarified and must strictly require specific terminology or concepts to each form of cession in *securitatem debiti* to avoid ambiguous and vague language in the construction of deed of cession of security by means of personal rights.

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[548] S Scott "*Scott on cession, A Treatise on the law in South Africa*" 1st ed. 2018 Juta 415.
[549] *Supra* 421.
[550] *Supra* 422.
[551] *Supra* 417.
[552] *Supra* 479.

Bibliography

Books

R Brits "*Real Security Law*" 2016 Juta

Hutchison et al "*The Law of Contract"* 2nd ed. 2012 Oxford

Van Huyssteen et al "*General principles of Contract"* 5th ed. 2016 Juta

AJ van Walt & GJ Pienaar "*Introduction to the law of property"* 6th ed. 2009 Juta

Reinecke et al "*South African Insurance law*" 2013 LexisNexis

S Scott "*Law of Cession*" 2nd ed. 1991 Juta

S Scott "Scott on cession, A Treatise on the law in South Africa" 1st ed. 2018 Juta

Case law

Bank of Lisbon and South Africa Ltd v The Master and Other (1987) 1 All SA 286 (A)

Barclays Bank (D,C & O) and Another v Riverside Dried fruit & Co.(Pty) Ltd (1949) 2 All SA 165 (C)

Frankfurt v Rand Tea Room, Ltd and Sheffield 1924 WLD 253

Grobler v Oosthuizen 2009 (5) SA 500 (SCA)

Italtrafo Spa v Electricity Supply Commission (1978) 3 All SA 24 (W)

Lief NO v Dettmann 1964 (2) SA 252

Moola v Estate Moola 1957 (2) SA 463 (N) 464

National Bank of South Africa v Cohen's Trustee 1911 AD 235

Springtex Ltd v Spencer Steward & Co 1990-11-16 case no 6135/88 unreported 840

Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd 1968 (3) SA 166 (A)

Van Zyl NO v Good clothing CC 1996 (3) SA (SE)

Van Zyl v Strandfontein Namagualand Estates (Pty)Ltd 1930 CPD 270

Journal articles

Domanski A "Cession in Securitatem Debiti: *National Bank v Cohen's Trustee* reconsidered " *SALJ* 427 (1995)

Harker JR "Cession in Securitatem debit" 98 *SALJ* 56 (1981)

Macaulay A "Cessions of reversionary rights in book debts" *De Rebus* 526 (1983)

Niebaber JBP "Some problems involving security cession of Life Insurance policies" *SALJ* 83 2004

Nienaber MP “Cession” LAWSA 2nd ed. Vol. 2 Part 2 2003 LexisNexis

Scott S “Security Cessions and Beneficiary appointments : A belated but necessary footnote to Nienaber analysis” *SA Merc LJ* 323-337 (2012)

Scott S “Evaluation of Security by Means of Claims: Problems and Possible Solutions: Section B: Possible Solutions” 60 *THRHR* 434 (1997)

Scott S “Evaluation of Security by Means of Claims: Problems and Possible Solutions: Section A: Problems” 60 *THRHR* 179 (1997)

Scott S “The evergreen topic of *locus standi* and security cessions: Thekwni properties (Pty) Ltd v Picardi Hotels Ltd and Picardi Hotels Ltd v Thekweni Properties (Pty) Ltd.” *SA Merc LJ* 405-418 (2009)

Scott S “The Question of *Locus Standi* in Revolving Security Cessions” *THRHR* 837 1991 (54)

Scott S “One Hundred Years of Security Cession” *SA Merc LJ* 25 (2013)

Legislation

Insolvency Act 24of 1936

Deeds Registries Act 47 of 1937

Security by Means of Movable Property Act 57 of 1993