CASES DECIDED

IN THE

WITWATERSRAND LOCAL DIVISION.

S.A. LAW REPORTS (1914).

W.L.D. PART II.

POWER v. ESTATE HORWITZ AND ESTATE HORWITZ.

1914. *March* 19; *April* 2. WARD, J.

Insolvency.—Law 13 *of* 1895, *sec.* 101.—*Election by trustee.*

Where a trustee of an insolvent estate was unable to decide whether he would elect, in terms of sec. 101 of the Insolvency Law, to perform a contract or not, he was held not to have neglected to make such election.

Action for the sum of £643 10s., being the balance of the purchase price of a certain stand, together with interest. The defendants were the executor dative of the estate of the late Zadick Horwitz, and the trustee in the insolvent estate of Morice M. Horwitz, who were sued jointly and severally. The facts appear from the judgment.

H. Hosken, for the plaintiff.

S. S. Taylor, for the trustee.

The executor, in person.

Cur. adv. vult.

Postea (April 2).

WARD, J.: In this case the plaintiff sues Clarence Vivian Becker in his capacity as the executor dative of the estate of the

late Zadick Horwitz, and William Thomas Hall in his capacity as trustee in the insolvent estate of Morice M. Horwitz jointly and severally for provisional sentence for the balance of the purchase price under a deed of purchase and sale whereby the said Zadick Horwitz, and Morice Horwitz, trading as Z. Horwitz & Son, purchased certain property from the plaintiff.

The defence of the first defendant is a plea of *plene administravit.* He says he has paid out all the assets of the estate and the accounts have been filed. This is not denied. The claim against him as executor must fail.

The defence of the second defendant is that he is the trustee of the insolvent estate and that under sec. 101 of the Insolvent Ordinance he is entitled to elect whether he will perform the contract of sale or not. That owing to negotiations between the creditors and the insolvent as to a compromise he has hitherto been unable to decide whether he will elect to perform the contract or not.

The plaintiff says that he has delayed too long in making his election, and that she is now entitled to sue. It is not alleged that his conduct has amounted to an election to abide by the contract. In these circumstances, in my opinion, the claim must fail.

If the trustee delays his election, or refuses to elect, the vendor may apply by motion to the court, which may thereupon order the trustee to abandon the contract, or make such other order as it shall think expedient.

By bringing the matter before the Court in the present form, the Court can only give relief to the plaintiff by holding either that the trustee has made an election, or by ordering him to elect to be bound by the contract *nunc pro tunc,* such election to date from the date of the summons or prior thereto; because it is clear to me that no right of action on the agreement can accrue against the trustee until he has made his election. This seems to fetter the discretion of the Court.

In my opinion it was not the intention of the Legislature to allow the vendor any other remedy than that provided by sub-sec. 3, sec. 101 of the Insolvency Law. There seems to me no reason why that procedure should not be followed in this case.

The claim therefore fails, and must be refused, with costs. It is not necessary to discuss the further question raised as to whether

the liability of the defendants under the contract is joint or several.

Plaintiff's Attorneys: *Hayman & Godfrey*; Trustee's Attorneys: *Lance & Hoyle.*

[G. W.]

LONGE v. LAGESON.

1914. *April* 14. WARD, J.

Practice.—Commission de bene esse.—*Plaintiff.—Convenience.*

Application to have the evidence of the plaintiff, who was in England, taken on commission, on the ground that he would be inconvenienced in coming here for the trial, refused, as his evidence was material and he was a man of means.

Application to have the evidence of the applicant taken on commission in England. The applicant was plaintiff in an action against the respondent pending in this Court, and alleged that it would be very inconvenient for him to come to Johannesburg to give evidence at the trial; he was a man of means.

B. Auret, for the applicant, moved.

R. Feetham, for the respondent: I oppose on the ground that the plaintiff is a very material witness and it is highly desirable that he should be before the court to give his evidence. The case turns on conversations which took place between the plaintiff and the defendant.

Auret, in reply: The plaintiff is domiciled in England, and it would be very inconvenient as well as expensive for him to come to South Africa in order to give evidence. Further, he will be the sufferer by not coming to this Court.

[WARD, J.: I have known cases where the plaintiff has been shrewd in not coming before the court.]

Auret: The authorities are not of very much assistance, but the rule of court leaves it entirely within the discretion of the Court whether a commission should be granted or not. I submit the balance of convenience is in favour of the commission being granted.