1880.
March 3.
„ 12.

Smith & Others *vs.* Exors. of Sayers.

after the death of the predeceasing spouse. Strangely enough, neither of these sections was quoted, nor even referred to by counsel on either side. Independently of these sections, it appears to me that the omission of such an inventory by the survivor, throws upon his executors the burden of proving that any portion of his estate was acquired after his wife's death. In the absence of such proof, the whole estate under their administration must be presumed to have formed part of the joint estate. One half and a child's portion belong to the testator's estate, and the remaining portion must follow the provisions of the joint will. The costs of this action must be borne by the joint estate.

[Plaintiffs' Attorney, W. E MOORE.
Defendants' Attorneys, C. & J. BUISSINNÉ.]

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## MEURANT *vs.* THE TRUSTEE IN THE INSOLVENT ESTATE OF SMIT.

*Costs in an unsuccessful action brought by the trustee in an insolvent estate against one of the creditors of the estate declared payable out of the estate.*

*M. held a general mortgage bond over the property of S, an insolvent. At a general meeting of the creditors of S., his trustee was instructed to take action to have the bond set aside. M. protested against this being done, but the action was brought. Judgment was given against the trustee, with costs. In framing the Liquidation and Distribution Account of S.'s estate, the trustee charged the costs of the action against the estate.* Held, *on motion by M. to have the estate declared not liable for these costs, that the trustee was entitled to charge them against the estate, he having acted* bonâ fide *under instructions from the meeting of creditors.*

1880.
May 15.

Meurant *vs.* Trustee in Insolvent Estate of Smit.

This was a motion for the amendment of the Liquidation and Distribution Account in the insolvent estate of one N. J. Smit, junior.

The facts of the case were the following:—

The applicant was a creditor in the above insolvent estate

by virtue of a general mortgage bond passed in his favour as security for the loan of £200 made to insolvent and his father. At a meeting of insolvent's creditors, it was resolved that the trustee of his estate should take action to have the said bond set aside as being an undue preference. Applicant lodged with the trustee a written protest against the adoption of such a course. The action was, however, brought in the Supreme Court, and judgment was given against the trustee, with costs. Applicant (then defendant) protested, when judgment was being given, against the costs of the action being charged against the insolvent estate, and claimed costs against the plaintiff (now respondent) personally. The Court informed him that, if it were thought that plaintiff ought to pay the costs out of his own pocket, a special application to that effect might subsequently be made. In framing the Liquidation and Distribution Account of the insolvent estate, respondent charged against the estate all the costs incurred in the above action. These costs swallowed up all the assets, and left applicant without any dividend upon his bond. Applicant now moved the Court for a declaration that the estate was not liable for the costs of the said action.

*Leonard* (with him *Innes*), for applicant. In this matter the question as to whether there was *mala fides* on the part of respondent does not arise. The creditors, who authorized the action, ought to pay the costs of it. This question has been raised before, and it was understood that it might be raised again.

*Upington, A.G.* (with him *Maasdorp*), for respondent. On the previous occasion costs were specially claimed against respondent personally. I objected, and the Court refused to entertain the application.

DE VILLIERS, C.J.:—I do not think it was the intention of the framers of the Insolvent Ordinance to confer special privileges upon general mortgage bond holders. Certainly, unless I am compelled by the law, I am not inclined to strain the rights of general mortgage bond holders, for they stand upon an entirely different footing from special mortgage bond holders. The rights of the latter are protected by the 8th section of the Insolvent Ordinance; and in this case, if the applicant had held a special mortgage bond on property

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belonging to the insolvent, the proceeds of such property, if not more than sufficient to satisfy the secured debt, would not have been liable to contribute towards the costs of the action against the applicant. (See *S. A. Association* vs. *Van der Spuy's Trustee*, Buch. Rep. 1870, p. 49.)

The 8th section of the Insolvent Ordinance does not, therefore, assist the applicant in any way. The 56th section of the Insolvent Ordinance has been quoted, but I do not think it has much bearing upon the case. It has been said, that it is against all right and justice, that the applicant should be called upon to pay his own costs, but I do not think this is quite clear. It so happens that, because of the action brought against applicant, the assets are less than they otherwise would have been. But the action might have been brought against somebody else; and would the applicant say that he would not have been bound to pay any share of these costs? The mere fact that he has been successful in the case in question, unless there has been some *mala fides* or impropriety on the part of the trustee or the creditors, is not sufficient. In reference to the action which has given rise to the present dispute, I may say that, if it had been brought before the case of *Paterson*, in the Privy Council (7 P. C. N. S., p. 333), the judgment of the Court would probably have gone against the applicant. But since that time the Court has required very much stronger proof of intention to prefer, and contemplation of sequestration, than they did before. Under the circumstances, it not having been shown that there has been any *mala fides* on the part of the creditors or the trustee, I think judgment should be given for the respondent with costs.

SMITH, J.:—I am entirely of the same opinion, and I think the Court is not bound to strain, in any way, the rights of holders of general mortgage bonds.

[Applicant's Attorney, W. BUCHANAN, JNR.
Respondent's Attorney, C. C. DE VILLIERS.]