Executors of Meyer *vs.* Gericke.

Actio Injuriam.—Death of Party to Action.—Litis Contestatio.

G. issued summons and declaration in the Supreme Court against M.: the case was then removed to a Circuit Court, the date for the sitting of which was fixed for October 12*th,* 1878. *On September* 26*th,* 1878, *M.'s attorney brought to the Magistrate's Clerk a document containing M.'s exceptions and pleas, for the purpose of entering it on the roll. On account of the absence of the original summons the document was taken away again by the attorney after the Clerk's endorsement had been made on it that it had been filed on September* 26*th. The document was not entered with or noted by the Clerk, nor did he cause a written notice thereof to be served on the opposite party as required by Rule of Court* 173. *On October* 1*st M. died. On October* 10*th the attorney who had acted for M., without receiving any fresh power from M.'s executors or heirs, brought back the document to the Magistrate's office and filed it, the date of filing being altered by the Clerk's consent from September* 26*th to October* 10*th.* The Court *granted an application by M.'s executor's to have it declared that the action could not be proceeded with against M.'s estate.*

Held, *that* actio injuriarum *cannot be proceeded with after the decease of either party to it, unless the case has reached the stage of* litis contestatio *before such decease.*

Litis contestatio *takes effect when the case is ripe for hearing, or, when defendant is in default, as soon as he is debarred by law from defending the action: the present case was not ripe for hearing at M.'s death, and therefore G. was not entitled to continue the action against M.'s estate.*

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This was an application by the executors of one Meyer to have it declared that an action of damages for defamation of character which had been commenced by Gericke the respondent against Meyer, and was still pending at the time of Meyer's death, could not be proceeded with against Meyer's estate.

The facts were as follows:—Summons had been issued and declaration filed in the Supreme Court, but the case was then removed to the Riversdale Circuit Court, the date for the sitting of which was fixed for October 12th, 1878. On September 26th a document containing the defendant's exceptions and pleas was brought by his attorney to the Magistrate's Clerk at Riversdale in order that they might be entered on the roll. On account, however, of the absence of the summons from the R. M.'s office the document was taken away again by the attorney after an endorsement had been made on it by the Clerk that it had been filed on September 26th, 1878. The document was not entered with or noted by the Clerk, nor did he cause a written notice thereof to be served on the opposite party as required by Rule of Court 173. On October 1st the defendant Meyer died, and on October 10th the attorney who had been acting for deceased, and who had received no fresh power from Meyer's executors or heirs, brought back the document to the R. M.'s office, where it was duly filed, and the date of filing was altered by the Clerk's consent from September 26th to October 10th. The case came before FITZPATRICK, J., as Circuit Judge, who removed it to the Supreme Court, reserving to Meyer's executors the right of showing cause why the case should not be proceeded with against Meyer's estate.

Leonard, for applicants, maintained that an *actio injuriarum* abated by the death of the defendant before *litis contestatio*; and urged that as no pleas had been filed until after the death of Meyer, no *plena litis contestatio* had taken place in this case.

Jones, for respondent, admitted that the death of the defendant before *litis contestatio* would have put an end to the action, but held that *litis contestatio* had taken place before Meyer's death.

Cur. adv. vult.

Postea (February 2nd),—

DE VILLIERS, C. J.:—This case raises for the first time so far as reported cases go, the important question, at what

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stage of an action for defamation or other personal injury the death of one of the parties puts an end to the action. It is admitted on both sides that such an action cannot be instituted after the death of the person who was guilty of the defamation or other injury, or after the death of the person defamed or injured. It is further admitted that such an action, even if instituted during the lifetime of both parties, cannot be continued after the death of either party unless the stage known as the *litis contestatio* has been reached. The authorities fully support these admissions. It would indeed appear from a passage in *Grotius* (Introduction, 3, 35, 5) that that eminent writer was of opinion that the heirs of the party committing an injury are only liable in case sentence has been pronounced against the party in his lifetime, but *Groenewegen,* in his note to that passage, enlarges the liability of the heirs, by extending it to those cases in which, as he expresses it in the vernacular, "*de zake voldongen is.*" This expression appears to be the Dutch equivalent for the *litis contestatio* of the Romans, for *Groenewegen* quotes a case decided in the Supreme Court of Friesland on the 22nd of May, 1604, where it was held that no action for personal injury can be brought against the heirs of the guilty party unless the *litis contestatio* had taken place in his lifetime. This decision has been held binding by all subsequent writers on the subject, including *Christinæus* (ad Leg. Mechlin. 2, 4, 23), and *Voet* (Comm. 47, 10, 22). The question which the Court has to consider is, therefore, further narrowed to this single point: at what stage of the action does the *litis contestatio* take effect? Broadly stated, the answer must be that it takes effect as soon as the case is ripe for hearing, or, if the defendant is in default, as soon as he is debarred by law from defending the action. Allowing for differences in the system of pleading, this answer will apply equally to the Roman Law, the Dutch Law, and the law of this Colony. In regard to the Roman system of civil process it is well known that the mode of procedure underwent great changes from the early times of Rome to the time of Justinian. Throughout these changes, however, it was always considered necessary that the time when a contested right was to be considered as really made the subject of litigation should be carefully marked. In the time of Justinian an action was begun with

the *denunciatio actionis*, by which the plaintiff announced to a magistrate that he wished to bring an action, and furnished a short statement of his case. This statement might be oral or in writing, and was sent by the Magistrate, through a bailiff of the Court, to the defendant. The parties or their procurators appeared before the Magistrate, and he then and there decided the case. The defendant's plea, which was termed *exceptio*, might be oral or in writing, but of course was generally in writing. The *litis contestatio* took place directly the Magistrate began to hear the cause. "*Lis enim tunc contestata videtur quum judex per enarrationem negotii causam audire cœperit*" (Cod. 3, 9, 1). In Holland the mode of procedure was far more cumbrous, and the difficulty of marking the exact time when the *litis contestatio* took place was proportionately greater than under the Roman system. In summary causes (such as actions for a decree of civil imprisonment, or for a decree of perpetual silence) there was not much difficulty, for as soon as the defendant had objected to the plaintiff's claim, the *litis contestatio* was held to have taken effect (*Matthæus*, de Auct. 1, 12, 4; *Voet*, 5, 1, 147), for the Court might then hear and decide the case without further pleadings. Again, a kind of fictitious *litis contestatio* was, according to *Voet*, admitted when a defendant remained in default after three edictal citations had been issued against him (Comm. 5, 1, 145, and 47, 10, 22), for the effect of his default was that he was thereafter debarred from defending the action, unless leave was given to him by the opposite party, or by the Court, to purge his default. In ordinary defended cases, however, the rule was that the *litis contestatio* was not complete until after *duplicatio* was pleaded (*Groenewegen*, ad Cod. 3, 9, 1; *Voet*, Comm. 5, 1, 144). Now the *duplicatio* or *duplique* of the Dutch law corresponds with the rejoinder of our law, but there is this important difference between the two systems of pleading: under the Dutch system the plaintiff was bound, after the defendant had pleaded, to insist upon his demand by way of *replique* or replication, and the defendant was bound, after the plaintiff had replied, to insist upon his defence, by way of *duplique*, and upon this issue was joined as a matter of course, whereas, under our practice, issue may be joined at any stage of the pleadings after the declaration, and pleadings are allowed to extend beyond the rejoinder. Until the

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recent alteration in the Rules of Court, either party who conceived the record to be complete in an action in the Supreme Court, might compel the immediate closing of the pleadings, and under the rules as recently altered, the pleadings are deemed to be closed as soon as either party has joined issue upon any pleading of the opposite party without adding any further or other pleading thereto. In the Supreme Court, therefore, the *litis contestatio* in an ordinary defended suit may be considered to take place as soon as the pleadings are closed. In the Circuit Court it frequently happens that the record is not complete until the case actually comes into Court, but it is quite clear from the 176th Rule of Court, that the case cannot be heard or determined until the record is completed by the joinder of issue between the parties. As soon as this is done the *litis contestatio* takes effect. Now, the case before the Court was an action for damages for defamation brought in the Supreme Court, but removed to the Circuit Court for Riversdale, after the declaration had been filed. The date of the Circuit Court was fixed for the 12th of October, 1878. On the 26th of September the then defendant's local attorney at Riversdale brought a document containing defendant's exceptions and pleas to the Resident Magistrate's Clerk at Riversdale, for the purpose of being entered on the roll kept by him. But in consequence of the absence of the original summons from the office, the document was taken away again by the attorney after the Magistrate's Clerk had signed an endorsement thereon, to the effect that it had been filed on the 26th of September, 1878. The document was not entered with or noted by the Clerk, nor did he cause a written notice thereof to be served on the opposite party in terms of the 173rd Rule of Court. On the 1st of October the defendant died. On the 10th of October the attorney, whose power had come to an end owing to the defendant's death, and who had received no fresh power from the defendant's executors or heirs, brought back the document to the Magistrate's office, where it was duly filed, and the date of filing was altered by the attorney with the Clerk's consent, from the 26th of September to the 10th of October. The object of the present application is virtually to have it declared in terms of a right reserved to the defendant by the Circuit Court—that the plaintiff is not entitled to proceed with this

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action as against the late defendant's estate. It is quite clear that at the time of the defendant's death the record was quite incomplete, and the case was not ripe for trial. The defendant's death before his contestation put an end to the plaintiff's right of action, and therefore the application must be granted with costs.

DWYER and STOCKENSTRÖM, JJ., concurred.

[Applicants' Attorneys, TREDGOLD & HULL.
Respondent's Attorney, H. P. DU PREEZ.]

TRUSTEES IN INSOLVENT ESTATE OF SMITH *vs.* SMITH.

Insolvency.—Fradulent alienation by insolvent.—Ord. 6, *of* 1843.—*Common law as to insolvency how far abolished.*

The Insolvent Ordinance does not supersede the common law on the subject, except so far as it expressly supersedes it.

It is competent in an action by reason of fradulent alienation by the insolvent to proceed, not merely under the Insolvent Ordinance, but also under the provisions of the common law.

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This was an argument upon exceptions. The insolvent had sold a certain farm to his brother the defendant, and it was sought to upset this sale.

The first part of the declaration claimed that the sale was void under the 83rd section of the Insolvent Ordinance, inasmuch as it was made at a time when the liabilities of the insolvent fairly calculated exceeded his assets fairly valued, and was not made *bonâ fide*, and upon just and valuable consideration. The latter part of the declaration contained a claim based upon the common law, and was in substance as follows:—

5. That the said sale and transfer are not merely null and void under the 83rd section of the Insolvent Ordinance, but were made when insolvent was in insolvent circumstances and with intent to benefit defendant, or himself, or both of them, at the expense of his creditors, and are therefore void as being in fraud of creditors.