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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.

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6. That at and before the sale and transfer, defendant was privy to the facts that the liabilities of the insolvent fairly calculated exceeded his assets fairly valued, and that the sale and transfer, if made, would be in fraud of creditors.

7. Plaintiffs pray that the transfer may be declared null and void, and cancelled, and that defendant may be declared not entitled to receive from the said plaintiffs such amount as he may prove that he actually paid in terms of the sale, and not entitled to prove as a creditor upon the insolvent's estate for such amount.

Defendant excepted to this part of the declaration on the grounds:—

1. That it disclosed no cause of action.

2. That, regard being had to the allegations in the declaration set forth, it was not competent to plaintiffs to insert in the declaration the prayer that defendant should not be permitted to recover what he had paid in terms of the sale, or to prove on insolvent's estate for such amount.

3. That the declaration was drawn so as to embarrass the defendant, and contained irrelevant matter, and was otherwise vague, informal, and bad in law.

Leonard, for defendant. The claim in the second part of the declaration is based on the *cessio bonorum*. *Van der Keessel* (Thes. 199, 200; Voet 42–3); *Maasdorp's Grotius* (Book 2, cap. 5, § 4). But the *cessio bonorum* has been abolished by the Insolvent Ordinance, and therefore this remedy has also been done away with.

Upington, A.G., for plaintiffs. The form of declaration is by no means bad. *Trustees of Montgomery* vs. *Montgomery* (Buch. Preced. of Pleading, p. 125); Ord. 6, of 1843 (§ 74); *Pollock on Contracts* (p. 242).

Leonard, in reply. The exceptions to the declaration are good. *Howden* vs. *Haigh* (11 A. & E., p. 1033); *Thurburn* vs. *Steward* (3 L. R., P. C. App., p. 478).

Cur. adv. vult.

Postea (Feb. 10),—

De Villiers, C.J.:—This is an argument upon exceptions pleaded by defendant to plaintiff's declaration. The

exception amounts to this, that it is not competent to the plaintiff to insert a count under the common law as well as under the "*Insolvent Ordinance*"; and it has been further argued that under the count at common law the plaintiff is not entitled to succeed, inasmuch as the remedy which he relies upon has been abolished with the *cessio bonorum*. In regard to the common law relating to insolvency having been entirely superseded by Ordinance 6, of 1843, we have the decision of the Privy Council in the case of *Thurburn* vs. *Steward*, the judgment of Lord Cairns being clear. From that judgment we may take it that, in his opinion, the intention of the framers of the Ordinance was not entirely to supersede the common law. I can find nothing in the Ordinance from which it would appear that it was intended to deprive creditors or trustees of any right they might have under the common law consistently with the provisions of the Ordinance. I think the declaration would have been better drawn if a prayer had been attached to each count, but I do not think there is sufficient informality to justify the Court in upholding the exceptions, which must be overruled, with costs.

[Plaintiffs' Attorneys, FAIRBRIDGE, ARDERNE & SCANLEN.
Defendant's Attorneys, J. & H. REID & NEPHEW.]

THE TOWN COUNCIL OF CAPE TOWN *vs.* THE COMMISSIONER OF CROWN LANDS AND PUBLIC WORKS, AND THE RAILWAY ENGINEER OF THE COLONY.

Act 1 *of* 1861, § 75.—*Act* 19 *of* 1874, § 3.—*Act* 9 *of* 1858, §§ 11, 12, 13.—*Public Roads.—Right of Crown to expropriate lands for purpose of making such roads.—Rule as to municipal lands.*

The Railway Department of the Colony required a portion of the Cape Town Parade for railway purposes. The Governor in terms of Act 1 *of* 1861, *gave the Council leave to alienate. The department could not come to terms with the Town Council and appropriated the land in question under the provisions of Act* 19 *of* 1874, *and*