he says, if the pact is to the effect that if the price is not paid the thing sold "shall be restored," or "shall revert," or "the parties shall withdraw from the contract," then there is no *vindicatio*, but only the *actio ex emto*. So that if it is clear from this authority in *Voet* that Keyter would not be entitled to the *vindicatio*, but that he would only have the personal action *ex emto*, it would be on the ground that the property had passed to the purchaser. If that be correct, the property in the goods having passed to Meiring, the Sheriff was justified in seizing them. The rule *nisi* must therefore be discharged with costs.

FITZPATRICK, J., and DWYER, J., concurred.

Application dismissed accordingly, with costs.

[Applicant's Attorneys, TREDGOLD & HULL.
Respondent's Attorneys, FAIRBRIDGE, ARDERNE, & SCANLEN.]

TRUSTEES OF DE WET *vs.* KRYNAUW & CO.

Insolvency.—Ord. No. 6, 1843, *sec.* 84.—*Contemplation of Sequestration.*

A mortgage bond given to secure an overdue debt, passed at a time when insolvency was impending, the debtor knowing that sequestration would follow, and that a preference would thereby be given to the creditor, set aside as an undue preference under the 84*th section of the Insolvent Ordinance.*

This was an action brought by the trustees of the insolvent estate of Susanna Marina de Wet, of Worcester, against Krynauw & Co., of Cape Town, to have a mortgage bond passed by Miss de Wet in favour of the defendants on the 1st July, 1878, set aside as an undue preference, under the provisions of the 84th section of the Insolvent Ordinance.

Miss de Wet conducted a small shop at Worcester, and had obtained goods from the defendants and from other merchants in Cape Town. In February, 1878, a bill in favour of the defendants was overdue, and they pressed for payment and threatened legal proceedings. Miss de Wet asked for time, expressing an intention to pay all her liabilities, but com-

1879.
Aug. 19.

Trustees of
De Wet *vs.*
Krynauw & Co.

plaining of the slackness of trade. She owned some immoveable property, which she was endeavouring to sell. In May, 1878, she wrote to defendants offering a bill indorsed by several members of her family as security for defendant's claim. After some correspondence Mr. Krynauw visited Worcester, and agreed to take a second mortgage on her property, and to give time for the payment of the debt. After some demur Miss de Wet signed a power to pass a bond on the 27th June, and on the 1st July the bond now sought to be set aside was registered. After the passing of the bond Miss de Wet continued to endeavour to sell her property, and also carried on her business until the 31st October, 1878, when she surrendered her estate. According to the trustees' report the value of the assets was £1079 3*s.* 3*d.*, against liabilities to the amount of £2024 17*s.* The insolvent in the witness-box stated she knew when she gave defendants the power of attorney to pass the bond that the effect of so doing would be to bring her other creditors down upon her, and that she would be compelled to surrender her estate, and that the defendant would thereby obtain an undue preference. She stated she had told this to Mr. Krynauw, but he positively denied that any such statement had been made to him.

Leonard (with him *Innes*), for the plaintiffs, contended that the transaction came within the provisions of the 84th section. The debt was long overdue when the bond was passed, and the insolvent must be taken to have contemplated sequestration at the time she signed the power, as she stated she knew what the effect of her passing the bond would be.

Buchanan (with him *Jones*) urged that the insolvent was induced to pass the bond by a desire to gain time, and that her subsequent endeavours to sell her property, and her continuing her business for four months afterwards, must be taken to shew that there was no contemplation of sequestration at the time the power of attorney was signed. On the authority of *Stratford's Trustees* vs. *Mosenthal*, Buch. Reports, 1874, p. 65, this could not be considered an undue preference.

Leonard, in reply, said the inevitable result of the insolvent giving a bond was insolvency, and that she knew was giving the defendants an undue preference at the time. She

did not surrender immediately, but she knew that when the first creditor pressed her she must surrender.

DWYER, J., said :—I do not see from the evidence in this case that there has been any undue preference or intention to prefer. The insolvent was induced to give the bond in consequence of the pressure of her creditor, and with an intention to gain time. If the defendant had acted differently, and put in execution, the insolvent would have been driven to surrender much sooner than she did. The defendants were quite willing to give her time, and she might reasonably suppose her other creditors would also give her time. There was no evidence to shew she anticipated that her other creditors would come down upon her at once.

FITZPATRICK, J., said :—The only pressure that the insolvent seems to have yielded to was the pressure of persuasion. I am inclined to think her version of the circumstances is the more correct, and that she told Mr. Krynauw that her giving the bond would bring the other creditors down upon her and force her to surrender. In my judgment this is clearly a case of undue preference.

DE VILLIERS, C.J., said :—The real question is whether the defendants should get a preference in the distribution of the insolvent's assets under the insolvency, or should come in concurrently with the other creditors. There is no claim for forfeiture under the 88th section of the Ordinance. Now the whole policy of the insolvent law is to secure a fair *pro ratâ* distribution of the assets among the creditors. If, however, there has been a vigilant creditor, who has secured himself in the due course of business, without taking an undue advantage of the other creditors, he is protected by the Ordinance. But this is not a case of that kind. If the creditor takes a bond, or receives payment of his claim when the debtor is clearly on the verge of insolvency, and the insolvent contemplates that the giving of the security or the payment will inevitably result in sequestration, as the insolvent distinctly stated to be the case here, then the law steps in and says not that it is necessarily a fraudulent act, but that it is an undue preference. The contemplation of sequestration and the intention to prefer are questions of fact and not of law, and one on which there may be difference of opinion. In this case, if an undue preference has not been

1879.
Aug. 19.

Trustees of De Wet *vs.* Krynauw & Co.

clearly proved, then I do not know any case in which it could be said to have been given. The effect of the act was to give the defendants a preference above the other creditors, and it is quite correct to argue that an insolvent must be taken to contemplate what must be the result of the act done, even though the insolvent may say he had no such intention. But in this case the insolvent states that she knew the result of her act would be to give the defendants a preference in an insolvency that would inevitably occur. A person like the insolvent might very naturally wish to stave off the surrender, and hence the time which elapsed after the passing of the bond, but it was clear it was inevitable from the time the bond was passed. The judgment of the Court must be for the plaintiffs, setting aside the bond, with costs.

Judgment for plaintiffs accordingly, with costs.

[Plaintiffs' Attorneys, REDELINGHUYS & WESSELS.
Defendants' Attorney, PAUL DE VILLIERS.]

QUEEN *vs.* BARNS.

Ordinance No. 92, 1832.—*Ordinance No.* 10, 1846, *sec.* 6.

The exemption granted to a market-master, under Ordinance No. 92, 1832, *to sell by auction without a license articles brought to the market, refers to an auctioneer's license, but it does not exempt him from the necessity of taking out a license for the sale of bread, or for any other article for the sale of which a special license is required.*

1879.
Aug. 14.
„ 21.

Queen *vs.* Barns.

George Barns, the market-master of Burghersdorp, was charged before the Resident Magistrate of the district with contravening the provisions of Act No. 3, 1864, as amended by Act No. 13, 1870, in having, on the public market, sold a certain quantity of bread, he not having a license, as by the said law required, authorizing him to exercise the trade of a baker.

The defendant excepted to the summons on the ground that it disclosed that the act complained of was done by the defendant in his capacity as market-master, and through