21*l.* was entered into after a certain amount had already been paid off and the *dominium* had passed. There was a tacit waiver of the resolutory condition.

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MEISTER
v.
PERKINS.

The Court allowed the appeal with costs, so far as the exception was concerned, and referred the case back to the Special Judicial Commissioner, on the ground that the contract was one of hire, and even if it were a contract of sale the defendant would still be bound by it.

Attorneys for the appellant: *Stegmann* and *Esselen*.

RAUBENHEIMER AND BLORE *v.* OSMOND.

Coram:
AMES-
HOFF, J.
MORICE, J.
ESSER, J.

BILL OF COSTS—TAXATION OF.

1897
9 *Jan.*
15 ,,

Law No. 14 *of* 1895, *regarding bills of costs in legal matters, only refers to such matters as have been before a Court.—An attorney's bill of costs ought only to be taxed if it relates to a case which has been before the Court.*

THIS was an appeal from the judgment of the First Judicial Commissioner of Johannesburg.

The plaintiff (respondent) claimed from the appellants the sum of 10*l.*, or otherwise a statement and account of this amount under the following circumstances: The plaintiff was in partnership with a certain W. Keith, but wished to liquidate this partnership and to have an application made to the Court for the purpose. Both partners thereupon signed a power of attorney in favour of the appellants (attorneys at Johannesburg) to make this application, and the plaintiff handed them 10*l.* as his preliminary half-share of the costs. The application, which had been prepared at the special desire of the plaintiff, never came before the Court, as counsel at Pretoria had advised the appellants that such an application was unnecessary. From the evidence given before the Judicial Commissioner, it appeared that Mr. Blore thereupon acted as attorney for a private liquidation, and that after a deed of this had been drawn up and Mr. Edwards appointed as liquidator, the appellants ceased to act and sent in an account amounting to 24*l.* 9*s.* 3*d.* In his summons the plaintiff alleged that the 10*l.*

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were given to make an application to the Court, that the defendants had accordingly not executed their mandate, nor had they given a statement and account thereof, and that the plaintiff had never derived any benefit from the mandate. The defendants admitted the receipt of the 10*l.*, but claimed 24*l.* 9*s.* 3*d.* in reconvention for the work done in connection with the application and the private liquidation. The plaintiff's attorney objected to this claim in reconvention in the Court below, on the ground that the bill of costs had not been taxed. To this it was replied that the application had never been before the Court, and therefore the bill could not be taxed.

The Judicial Commissioner held that the application and the further work done by defendants originated from the power of attorney, and therefore dismissed the claim in convention, and so far as the claim in reconvention was concerned, he saw no difficulty in allowing the bill of costs, for the items were not disputed and the bill could not be taxed as the case had never been before the Court, while the rules of Court did not in such an instance provide any definite instructions. As, however, the plaintiffs in reconvention (defendants) had placed the plaintiff in convention in a false position through not having furnished a statement and account of the 10*l.*, and through the bringing of the full claim for 24*l.* 9*s.* 3*d.*, the Judicial Commissioner was not disposed to give costs. The judgment, therefore, was as follows:—Judgment for the plaintiff in reconvention for 12*l.* 4*s.* 7½*d.* less 10*l.*, being 2*l.* 4*s.* 7½*d.* without costs, and absolution from the instance for the balance of the claim.

From this decision both parties appealed.

Wessels, for Osmond: So far as the claim in convention is concerned the question is whether an attorney, who has to make an application and, owing to circumstances, this is not done, must have his bill of costs taxed or not.

Esselen, contrà: The rule of Court must be interpreted as relating to cases which were before the Court. My further contention is that as the claim in reconvention was allowed costs should likewise have been awarded.

Wessels: No more can be charged, because the case was settled. The counterclaim must be against the same person; an action

cannot be brought against one of the partners. Osmond and Keith were not the plaintiffs.

Esselen: This point was not raised in the Court below.

Wessels: The Judicial Commissioner cannot fix the proportion which Osmond has to pay.

Esselen: On the point of taxation, see *Byrne* v. *Cooper*, Buch. E. D. C. 2, p. 375.

Cur. ad. vult.

Postea. 15th June, 1897.

MORICE, J., pronounced the following judgment: With regard to the different points raised in this appeal, I am of opinion (1) that the objection that the bill of costs tendered by Raubenheimer and Blore was not taxed is untenable, as an attorney's bill of costs must only be taxed in a matter which has been before the Court; (2) that the objection that the firm of Osmond & Co., and not Osmond, was liable on the bill of costs is likewise untenable, for it appears from the power that Osmond & Co. have not as a firm employed the attorney, but as individuals, who formerly having had different attorneys agreed to employ one attorney whose costs were to be divided. Moreover, this point was not taken in the Court below. (3) That the Judicial Commissioner acted unreasonably in not allowing the costs of the plaintiffs in reconvention (Raubenheimer and Blore). He gives as a reason that the plaintiffs in reconvention neglected to account for the 10*l.* But it appears that long before the action the plaintiffs in reconvention had handed in their counterclaim, a bill of costs, to the plaintiff Osmond, which in reality constitutes an account of the 10*l.* according to the record of the evidence. That Raubenheimer and Blore have demanded payment of the whole and not merely of the half from the plaintiff (Osmond) is no reason why they should not get their costs, for Osmond has not made a tender of the half.

The appeal must, therefore, be allowed with costs, and the sentence of the Court below altered to one in favour of plaintiff in reconvention for 2*l.* 4*s.* 7½*d.* with costs. The cross appeal of Osmond must be dismissed.

Attorneys for appellants: *Stegmann* and *Esselen*.

Attorneys for respondent: *Rooth* and *Wessels*.

Coram:
ESSER, J.

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16 *June.*

BALLOT N.O.

v.

TRUSTEE OF THE INSOLVENT ESTATE OF J. H. STROBEL.

COSTS OF SEQUESTRATION—SECTS. 113 AND 10 OF THE INSOLVENCY LAW, 1895 (*a*).

If it does not appear that opposition to an application for the sequestration of a person's estate is malâ fide, *the costs of such opposition will be considered as forming part of the costs of sequestration.*

AN order for the provisional sequestration of the estate of J. H. Strobel was obtained from the Court by B. Gundelfinger. On the return day to have the sequestration declared final Strobel appeared to oppose, but the Court decided the estate should be finally sequestrated.

The attorney of the defendant at Johannesburg subsequently sent in the taxed bill of costs incurred by the opposition to the trustee of the estate, who refused to admit the bill of costs even as a concurrent claim. Strobel's attorney at Pretoria, Mr. Ballot, thereupon applied to the Court to direct the trustee to rank the bill of costs, amounting to 40*l.* 1*s.* 8*d.*, as a preferential claim.

Curlewis, for the trustee: It follows clearly, from sects. 113 and 10 of the Insolvency Ordinance, that the legislature did not intend that costs of opposition should be considered as preferent.

Jacobs, for the appellant: The Court must presume that the insolvent appears *bonâ fide* in the interests of his creditors and of himself. If an attorney is not certain of the costs of opposition, then defendants in applications for sequestration will not be able ever to obtain an attorney.

ESSER, J.: The Court is of opinion that the *mala fides* of an opposition must be proved, and this has not been done. The application must, therefore, be allowed with costs against the estate, for the trustee must be considered to have now appeared in the interest of the estate.

Attorneys for applicant: *Roux* and *Ballot*.

Attorneys for respondent: *Rooth* and *Wessels*.

(*a*) Law No. 13, 1895.—TR.