WARD, J.: It has been urged that the applicant will be put to great expense and inconvenience if this commission is not granted. I do not know the nature of the loss and inconvenience which would be suffered by him, but there is no doubt that the respondent would be similarly prejudiced if he were put to the necessity of going to England in order to be present at the cross-examination of the applicant. It is clear that the action depends upon certain conversations which took place between the parties, and therefore it would be most convenient for the Court if the applicant came here to give his evidence. The applicant is, moreover a man of means, and, in all the circumstances, I think the application for a commission must be refused.

Auret: I submit that costs should be costs in the cause.

WARD, J.: I do not think so. If you had succeeded costs would have been costs in the cause; as it is, you must pay them.

Applicant's Attorney: *B. H. Davis*; Respondent's Attorneys: *Steytler, Grimmer & Murray*.

[G. W.]

ROSE v. KEMP.

1914. *March* 25; *April* 9. WARD, J.

Insolvency.—Discharge of provisional order of sequestration.—Agreement thereon to transfer assets from insolvent to a creditor. — Construction. — Cession. — Provisional trustee. — Measure of remuneration.—Law 13 *of* 1895, *sec.* 105.

An insolvent, under a provisional order of sequestration, agreed with plaintiff (a preferent creditor) with his concurrent creditors, and with defendant, his provisional trustee, that for certain considerations the provisional order should be discharged, and that thereon the insolvent should transfer to plaintiff his business and assets, to the possession of which plaintiff was then to be entitled, and that plaintiff should pay the costs of the sequestration, of the discharge thereof and the remuneration of the trustee. Defendant signed the agreement "merely as consenting thereto in his capacity as provisional trustee," and all the parties bound themselves for the due performance of the agreement. The provisional order was discharged, and the unrealised assets (the whole of which were movables) were handed over to plaintiff by defendant, with the exception

of a sum of £227 which defendant, in his administration account, claimed to retain as remuneration, being five per cent. of the total value of the assets. The Master had not taxed the account on the ground that, by the supersession of the provisional order, he was *functus officio*.

Plaintiff claimed that defendant was not entitled to more than £27, being five per cent. of the assets actually realised by defendant, and sued for the balance.

Held, that as, on discharge of the provisional order, the insolvent's assets, together with the right to an account from the trustee and to any balance shewn, revested in the insolvent, the agreement operated *ipso jure* as a transfer and cession of the said assets and rights to the plaintiff. *Held*, further, that in face of the agreement the insolvent's assent to the defendant's claim could not bind the plaintiff.

Held, further, that a charge on a percentage basis of the value of assets that were once in the trustee's hands was no measure of what was a reasonable remuneration, that the true measure was the work actually done by him, and that in the circumstances fifty guineas over and above out-of-pocket expenses (which included a manager's services) was fair and reasonable.

Quaere, whether as to taxing the account the Master was *functus officio* by the supersession of the provisional order.

Action for payment of a sum of £200 10s. 7d., moneys belonging to plaintiff, received by defendant and wrongfully and unlawfully retained by him.

The declaration alleged that on the 25th September, 1913, the estate of Louis Rose, was upon plaintiff's application, placed under provisional sequestration and the defendant appointed provisional trustee.

That on the 22nd October, 1913, an agreement in writing was entered into between the insolvent of the first part, plaintiff of the second part, the remaining creditors of the third part and defendant, in his capacity as provisional trustee of the fourth part, whereby for certain considerations it was agreed that the provisional order should be discharged, that immediately thereafter the insolvent should transfer to plaintiff the whole of his business and assets, and that plaintiff should be entitled there and then to take possession thereof, and that plaintiff was to pay the costs of transfer, the costs of the sequestration and its supersession, and the trustee's remuneration. (All the parties bound themselves for the due performance of the agreement.)

The declaration went on to allege that on the 23rd October the provisional order was discharged and that immediately thereafter "the business and assets of Louis Rose and all his rights in respect thereof were transferred and ceded by him to plaintiff. The said business and assets save and except certain moneys in the hands

of the defendant, were delivered to plaintiff by defendant on the said day, and the defendant agreed and undertook to account to plaintiff for the moneys so retained by him.

It was further alleged that on or before the said day Louis Rose instructed defendant to duly account to plaintiff for all moneys received by him in his capacity as provisional trustee, which defendant agreed to do, and thereafter it became defendant's duty to so account; further, that on the said day plaintiff entered into possession of the business, and took delivery of the assets, subject to the rendering of a due account to him by defendant, and to due and proper payment by plaintiff to defendant of his remuneration; and that on the 4th November defendant rendered a liquidation account in which he claimed to charge the estate with the sum of £227 3s. 6d., being trustee's fees by way of commission at the rate of five per cent. on the total value of the assets.

Plaintiff claimed that defendant was not entitled to more than £26 12s. 11d., being five per cent. on the value of the assets actually realised by defendant as provisional trustee and now sued for the balance.

Alternatively plaintiff claimed, that defendant was not entitled to make any deductions by way of commission or remuneration from the assets in his possession as provisional trustee until such remuneration had been fixed by the Master in accordance with sec. 105 of Law 13 of 1895; and that the remuneration claimed by defendant had not been so fixed.

Defendant admitted the agreement of the 22nd October, but denied any agreement to account to plaintiff or any instructions from Louis Rose to so account. He pleaded it was his duty to account to Louis Rose, to whom he did account, and from whom he received his acquittance and discharge. He denied there was any cession of Louis Rose's rights to plaintiff, and pleaded that he as trustee had realised assets of the value of £4,543 12s. 3d., on which five per cent, or £227 3s. 6d., was a reasonable and lawful remuneration; alternatively that plaintiff had purchased assets of that value from the insolvent estate, and that therefore he (defendant) as trustee, was entitled to that remuneration by way of commission; or alternatively that, as it was through his agency or instrumentality that assets to the value aforesaid were sold to plaintiff, he was entitled to a reasonable remuneration at the rate of five per cent.

The whole of the assets were movables.

J. Stratford, K.C. (with him *G. Hartog*), for the plaintiff, after calling plaintiff to put in the agreement and to testify that defendant had undertaken to account to plaintiff, closed his case.

L. Greenberg, for the defendant, asked for absolution from the instance: On discharge of the provisional order the *dominium* revested in Louis Rose, and defendant merely became his agent. The undertaking to deliver was Louis Rose's, and any action for failure to duly deliver must be against him. Defendant's signature of the agreement cast no duty upon him to deliver: see Halsbury, *Laws of England*, vol. 1, sec. 469. A mere direction to pay over is not a contract. Defendant's whole duty was to account to Louis Rose. The fact that defendant knew of the sale to plaintiff established no contract or duty: see *Grobbelaar* v. *Van Heerden* (1906, E.D.C. 239); *Van Zijl* v. *Engelbrecht* (16 S.C. 209); *Cohen* v. *Shires and Others* (1 S.A.R. 41).

Stratford, K.C.: The cases quoted would be apposite if defendant were not a party to the agreement. The agreement is clearly a cession of all Louis Rose's right *in personam*, including his right of action against defendant on failure to duly account. The defendant was fixed with notice, and the facts show a recognition of a duty to account to plaintiff.

Greenberg, in reply: The agreement cast no obligation upon defendant. Sale is not a cession: see *Sephton* v. *Uyapi* (11 S.C. 337).

The Court decided to reserve the point until conclusion of the evidence. Thereafter,

Stratford, K.C.: The agreement means "I hereby cede and transfer . . . . and will transfer on discharge of the provisional order"; an agreement to cede is contained in the undertaking to transfer. That has been interpreted as a cession. In *Sephton's* case (*supra*) there was no cession of the rents as between the parties. Here there was an assignment of which defendant had notice: see Halsbury (*supra*), p. 224. Defendant did in fact account to plaintiff, and took receipts from him.

On the question of remuneration, there is no evidence that the percentage basis is a reasonable remuneration. It has been discarded as a basis in our courts: see *Lubke* v. *Kegel* (1913, W.L. 91); *De Zwaan* v. *Nourse* (1903, T.S. 814).

In any event remuneration must be fixed by the Master: see sec. 105 of Law 13 of 1895; *Natal Bank* v. *Kuranda's Trustee* (1904, T.S. 586); *Standard Bank* v. *Biden's Trustee* (2 H.C.G. 222); *In re Keefer's Estate* (1 H.C.G. 128).

Greenberg: There must be evidence of cession; an agreement to cede is not a cession: see *Botha* v. *Ewan* (1906, E.D.C. 68).

As to remuneration, customary commission and reasonable commission are the same thing. What is customary is reasonable. The architects' cases quoted above simply decide that a professional tariff cannot bind third parties: see *In re C. Denison* (B. 1868, p. 5). On the declaration there has been a waiver of the right to taxation. In *Kuranda's* case the trustee did nothing. Lastly, sec. 105 is not applicable where the sequestration ends at a provisional order. In any case the Master refused to tax on the ground that by supersession of the order he was *functus officio*.

Cur. adv. vult.

Postea (April 9).

WARD, J.: In this case the plaintiff is the brother of Louis Rose. The estate of Louis Rose was on the 25th September, 1913, provisionally sequestrated on the application of the plaintiff, and the defendant was appointed the provisional trustee, with power to carry on the business of the insolvent.

The plaintiff was a creditor in the amount of £3,966 11s. in the estate for which he held as a security a general bond over all the assets.

On the 21st and 22nd October, 1913, an agreement was entered into between Louis Rose of the one part, the plaintiff of the second part, the creditors of the said estate of the third part, and the defendant of the fourth part, whereby it was agreed:

(*a*) That the provisional order of sequestration should be discharged;

(*b*) The insolvent should transfer the business and assets belonging to him to the plaintiff;

(*c*) The insolvent bound himself to transfer the business and not trade in a similar business or under the same name, and to procure the transfer of a store in Fordsburg to the plaintiff;

(*d*) That the plaintiff should be entitled to take possession of the business and assets immediately after the discharge of the provisional order.

(*e*) In the event of the business and assets being transferred to the plaintiff he undertook to pay all the creditors a dividend of two shillings and sixpence in the pound.

(*f*) The insolvent undertook to give promissory notes to his creditors for seven shillings and sixpence in the pound.

(*g*) The creditors agreed to release the insolvent.

(*h*) The plaintiff had to bear the costs of transfer of the business and the costs of the provisional order of sequestration, the discharge thereof, and the remuneration of the provisional trustee (the defendant).

(*i*) The defendant signed the agreement merely as consenting thereto in his capacity as provisional trustee, all the parties bound and obliged themselves for the due performance of the agreement.

All the creditors signed the agreement, the provisional order of sequestration was superseded, and the agreement duly came into force on the 23rd October, 1913.

The same day the business was handed over to the plaintiff by the defendant.

The plaintiff says he asked the defendant or his clerk Barnaschone for an account, but this is denied by the defendant, who says that the plaintiff merely consulted him as to a receipt he should give to Barnaschone in taking over the business. At the request of a clerk in the office of the plaintiff's solicitor the defendant sent in an account of his dealing with the estate.

This shows an account of his dealing with the business and assets, all of which have been handed over to the plaintiff by the defendant, with the exception of a sum of £227 3s. 6d., which he claims to retain as commission as provisional trustee.

This amount the plaintiff now claims save a sum of £26 12s. 11d., which he allows the defendant as a reasonable charge for his services.

The defence raised to the action is:

(1) That the plaintiff has no right to sue in that the assets belonged to the insolvent, and the plaintiff is not entitled to an account, or to the property without obtaining a cession of action from the insolvent.

(2) That the defendant was entitled to retain the amount claimed as reasonable remuneration.

(3) That the insolvent has agreed to his retaining that amount as remuneration.

The first defence is a purely technical defence, but it goes to the root of the action. If this is to be regarded as a claim in the nature of a *rei vindicatio*, and if the subject of the action is held to be vested in the insolvent, then the plaintiff cannot sue without a cession of rights from the insolvent.

In order to solve this question it is necessary to enquire into the nature of the claim.

The claim is not for certain specific articles in the possession of the defendant. The defendant while he was trustee had conferred upon him powers which entitled him to deal with the property of the insolvent. He did deal with the property, and it became his duty to account for the proceeds to the Master as representing the body of creditors.

If the order for provisional sequestration is superseded in the ordinary way without further agreement it becomes his duty *ipso jure* to account to the insolvent, and the property of the insolvent which was vested in him during the insolvency becomes *ipso jure* vested in the late insolvent. The sum of £200 for which the present claim is, does not become vested in the insolvent, but there arises a right in the insolvent to claim an account and the amount due. This would be the effect of a supersession of an order of insolvency in the ordinary course without any agreement between the parties.

But in this case there is an agreement. There is an agreement between all the parties, the plaintiff, the insolvent, the creditors, and the defendant in his capacity as provisional trustee.

And one of the terms of that agreement is that the plaintiff shall be entitled to take possession of the said business and assets immediately after the discharge of the provisional order.

He was therefore entitled upon the discharge to take possession of all the assets, including a right to claim an account from the trustee of his dealing with the estate and the balance shown.

The defendant delivered all the tangible assets, *i.e.*, the business and the stock in trade. He rendered an account, but he says the plaintiff is not entitled to claim the balance shown to be due.

I think this contention fails; it may be viewed in several ways. One is that the agreement operates as a cession of the insolvent's rights against the trustee. It was urged that when the agreement was signed these rights were not actually in existence. Assuming this to be so, the agreement did not come into existence until the order was discharged; and at the same moment, under this assumption, the insolvent's rights to claim this account and balance arose, and in my opinion the right is *ipso facto* transferred or ceded by the agreement to the plaintiff. It is not necessary to enquire into what would happen in the case of immovable property where specific transfer is necessary to pass the property; or the case of a

right of action where the delivery of an instrument of title is necessary. The right in the present case is ceded by the mere agreement, and the present agreement in my opinion is sufficient in the present case.

This sum of money may also be viewed as money which has been allowed to remain in the hands of the defendant by the insolvent to be paid to the plaintiff, and both the plaintiff and defendant have assented to that course by the agreement of the 21st and 22nd October, 1913. In that case according to the authorities cited the plaintiff is entitled to sue.

The plaintiff agrees to pay the remuneration of the defendant as provisional trustee, and as the agreement gives the defendant the right to sue for that remuneration, equally in my opinion does it give the plaintiff the right to have an account as to how it is made up.

This, in my judgment, disposes of the first defence, and also of the third. The third defence is that the insolvent agreed to this amount of remuneration. Now, even if the facts as told by Mr. Douglas Wilson (whose evidence I accept), amounted to an agreement by the insolvent to the amount of remuneration charged he had no power to bind the plaintiff. The plaintiff was the person to pay this amount, it was no longer a liability on the insolvent and the plaintiff was the only person to be consulted as to what this amount should be. The plaintiff was not therefore bound by what occurred between the insolvent and the defendant.

We now come to the second defence that this is a reasonable remuneration. The law allows the provisional trustee reasonable remuneration to be fixed by the Master, whose decision is subject to appeal to the court.

The Master has not taxed the present account, because he alleges he is *functus officio*, as there is no longer any insolvency, and the defendant is no longer a provisional trustee. This may be correct, I wish to express no opinion on that point. But I have now to decide what is a fair and reasonable remuneration to allow. It is said that the Master always allows five *per cent.* on the amount realised as a reasonable remuneration. This may or may not be so. Five *per cent.* may be a reasonable remuneration in some cases, but not because it is five *per cent.* No one came before me and said five *per cent.* in the present case is a reasonable remuneration, they said it is what they would expect to get and what they would expect the Master to allow.

The Master has not come before me and said it would have been allowed, or that he would consider it reasonable in the present case. If he had come and told the Court what he considered a reasonable amount, I would have listened with care and respect to his opinion and to his reasons for coming to that conclusion; and unless I had grave reason to differ from him I should probably have adopted his view. But that would be because in the exercise of my judgment I saw no grave reason to differ from him.

As it is I have to form my opinion unaided, because I cannot see how, and no one has explained to me how, the mere taking of five *per cent.* of the value of the property that was once in the trustee's hands can be any measure of what is a reasonable remuneration for his labour and trouble.

The sum so found may coincide with a sum which is a reasonable remuneration, but it cannot, so far as I have been informed by the witnesses, be a measure of that sum.

Now I may say at once even if one were to adopt the simple method of taking five *per cent.* of the value of the property realised as a measure of the value of the labour and time expended by the trustee I am not prepared to agree that he is entitled to take this value at the sum he did, namely £4,543.

I am not prepared to hold that he effected or that he was instrumental in effecting the compromise by which the assets passed into the hands of the plaintiff. I do not think that he did even a considerable amount of work to bring this about. I am further not prepared to value the property at the figure at which it has been valued. At knock-down prices it is admitted the value is far less and if it had been sold piecemeal the amount realised would have been small, and though the defendant's work and trouble and anxiety would have been much greater, the remuneration he would have claimed would have been smaller. By means of the compromise the plaintiff obtained more than he would have if it had been sold out of hand. So much more that he could afford to pay the costs of the insolvency, and two shillings and sixpence in the pound to the other creditors; but it does not follow that the property was worth the amount of his bond.

I am not going to express an opinion as to what value one should attach to this property.

The defendant had some trouble and some responsibility in carrying on the business; in this he had the assistance of a fully qualified assistant for whose services he charged £45. The amount

he had to pay this assistant was £40. If I assume the assistant gave no other assistance to the defendant in his business, even then there was a charge of £5 too much. This charge was sought to be justified by the plea that the defendant annually gives his clerk a bonus; if that is so the amount of such bonus should have been carefully worked out and allocated to his work done on this particular business.

The defendant also had some trouble in connection with the compromise effected, though in my opinion very little. With the meagre details before me as to how his time was actually occupied I am not prepared to allow him more than a fee of fifty guineas over and above the charge he has made in his account for out-of-pocket expenses, including Mr. Barnaschone's fee of £45.

The plaintiff is entitled to the balance, and judgment will be for £227 3s. 6d., less £52 10s., amounting to £174 13s. 6d., and costs.

Plaintiff's Attorneys: *Hutchinson & Bowen*; Defendant's Attorney: *P. C. Chivers.*

[G.H.]

HUSSEN v. RECEIVER OF REVENUE, JOHANNESBURG.

1914. *March* 26; *April* 16. WARD, J.

Gold Law.—Act 35 *of* 1908, *secs.* 106, 107, 114.—*Law* 18 *of* 1913, *secs.* 3, 4.—*Jeweller's licence.—Coloured person.*

Sec. 107 (1) of Act 35 of 1908, as amended by section 4 of Law 18 of 1913, authorising the Receiver of Revenue in any district to issue a licence to a white person to carry on the business of a jeweller, precludes him from issuing such licence to a coloured person.

A coloured person is not entitled to be in possession of any articles containing precious metal made up, smelted or manufactured in the Union of South Africa, unless he has a licence to carry on the business of a jeweller.

Application by a Hindu, a man of colour, for an order directing the respondent to grant him a jeweller's permit, referred to in secs. 3 and 4 of the regulations annexed to Proc. 18 of 1914, upon payment of the fees due.