1880.
Feb. 28.
March 1.

De Vries *vs.* Alexander.

and the judgment of the Court must be for the plaintiff, with costs.

DWYER and STOCKENSTRÖM, JJ., concurred.

Judgment for plaintiff with costs, but the right was reserved to the defendant of entering upon the land for the purpose of removing his crops.

[Plaintiff's Attorneys, C. & J. BUISSINNÉ.
Defendant's Attorney, C. H. VAN ZYL.]

BOOYSEN *vs.* THE TRUSTEES OF THE COLONIAL ORPHAN CHAMBER, AND OTHERS.

Community of Property.—Mutual Will.—Fidei commissum.—Rights of fidei commissary legatees.

B. and his wife (married in community of property) made under the reservatory clause of their joint will a codicil by which they left certain farms to their children and step-children jointly, who were however to have no claim to them before the death of the survivor. The wife died first. Before her death B. had not received transfer of the farms, though he had occupied them. Subsequently B. became the registered owner of both farms, and mortgaged them to the Orphan Chamber. Provisional sentence was afterwards granted against B., and the farms were sold in execution. B. subsequently died. Held, *in an action brought by the legatees to restrain the transfer of the farms to the purchasers, that, since they had never vested in the testatrix, the plaintiffs, as fidei commissary legatees, had acquired no such real rights as to enable them to follow the farms into the hands of* bonâ fide *alienees without notice of the* fidei commissum, *and that therefore judgment must be for defendants.*

1880.
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March 1.

Booysen & Another *vs.* Colonial Orphan Chamber & Trust Co., & Others.

This was an action brought by Bootje, Jan, Pieter and Willem Adriaan Booysen, legatees under a codicil to the mutual will of their late father and mother, against the Colonial Orphan Chamber and Trust Co., the Master of the Supreme Court, Ludwig Henry Goldschmidt, and Carel Aaron van der Merwe to prevent the transfer of the farms

Vlakfontein and Vliegekraal in the district of Calvinia, on the ground that their late father had no right to alienate or encumber the said farms, under the terms of the above-mentioned codicil. The judgment of the CHIEF JUSTICE sufficiently sets forth the facts of the case.

Leonard (with him *Innes*), for plaintiffs.

Upington A.G. (with him *Jones*), for Colonial Orphan Chamber and Trust Co.

Cole, Q.C. (with him *Tennant*), for Carel van der Merwe.

Cur. adv. vult.

Postea (March 1st),—

DE VILLIERS, C.J.:—The facts of this case are extremely simple, but the issues involved are peculiar, and in some respects important. On the 25th of September, 1835, Jan Louis Booysen and his wife, who were married in community of property, made a joint will whereby the testatrix nominated as her heirs her husband and two of her children, and directed that her husband should remain in possession of the shares of the children during their minority; and both testators appointed the survivor of them as executor, and tutor of the minor heirs. On the 26th of May, 1836, the testators made a codicil to their will in the following terms:—"We, the undersigned testators, having more fully conferred together, have thought fit by virtue of the reservatory clause to bequeath our farm named Vlakfontein, and our farm named Vliegekraal, to our step-children and our children jointly" (here follow the names of ten children, including the plaintiffs) "for the sum of 12,000 guilders, with this understanding, however, that they shall have no claim to it before the death of the survivor of us." The testatrix died on the 6th of February, 1837. On the 4th of August following, the surviving husband framed an inventory of the joint estate, on which the following memorandum appears:—"The two farms Vliegekraal and Vlakfontein are bequeathed to the eleven children jointly per will, for the sum of 12,000 guilders." The testator, as executor and tutor, appears to have received letters of administration and confirmation, and on the 27th of September, 1837, he filed in the Master's Office an account, by which the net assets of the joint estate,

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as previously appeared, were proposed to be distributed by awarding one-half of the joint estate to the testator, and the other half to the children of the testatrix. The two farms are not mentioned in this account, and in fact the testator had not up to this time received transfer of either. The farm Vlakfontein was transferred to him by one Van Zyl, on the 2nd of October, 1838, and the farm Vliegekraal was granted to him by the Governor, on the 12th of May, 1863. There can be no doubt that he occupied both farms long before his wife's death, and continued to occupy them until his own death, which took place in 1879, but the evidence is silent as to the tenure under which he occupied before he became the owner, and as to the rights by virtue of which he subsequently acquired the ownership. The testator, after becoming the registered owner of the farms, dealt with them as his own absolute property, without any objection on the part of the legatees under the will, and no steps were taken by any of them to have their title to an interest in the farms recorded in the Deeds Registry Office. On the 13th of February, 1874, the testator mortgaged the farms to the Colonial Orphan Chamber (the chief defendants in this suit), in security of a loan of £1000. Having made default in the payment of the money thus secured, he was sued for the payment of the capital sum and interest, and on the 20th of November, 1877, this Court granted provisional sentence against him, and declared the property mortgaged, executable for payment of such capital, interest and costs. The farm Vlakfontein was sold in execution to the defendant Goldschmidt for the sum of £1162, and the farm Vliegekraal to the defendant C. A. van der Merwe, for the sum of £506, but no transfer has yet been passed in their favour. The objects of the present action are to interdict such transfer, and to have it declared that the mortgage bond and judgment are null and void in so far as they affect or prejudice the plaintiffs' interest in the farms. One of the grounds of defence is that the testator never adiated the inheritance, but on the contrary, repudiated all benefits under the will, and that he is therefore not bound to give effect to the provisions of the codicil. This plea could of course only affect the legatees' right to one half of the farms, but in the view which I take of the case, it is unnecessary to decide whether there has been any adiation or not. The main ground of

defence is that, inasmuch as the farms never were vested in the testatrix before her death, the plaintiffs, as fidei commissary legatees, have acquired no such real rights as to entitle them to follow the farms into the hands of *bonâ fide* alienees without notice of the *fidei commissum*, and upon this ground the defendants must, in my opinion, succeed. It is no doubt quite true that besides the personal action which a legatee has under the will against the heir or executor, he also possesses certain real rights by virtue of which he may either bring an action *in rem* to recover the subject of the legacy itself, or may institute an hypothecary action in respect of property belonging to the estate of his testator. But there is not, so far as I am aware, any authority for holding that these real rights can be claimed in respect of property which never belonged to the testator or his estate. A testator may certainly bequeath to a legatee property belonging to a third person, and may by so doing place the heir or executor under the obligation of acquiring such property on behalf of the legatee, or (if he cannot acquire it at a reasonable price) to pay the value to the legatee; but whether the property be thus acquired or not, the rights of the legatee in regard to it are rights *in personam* and not *in rem*. That he would not be entitled to the *rei vindicatio* is clear from the reasoning of *Voet* in book 30, secs. 26 and 39. That he would have no hypothecary action is clear from the well-known rule of law that the goods and effects of the deceased (*bona defuncti*) and not of the heir or fiduciary legatee, are subject to the tacit hypothecation in favour of the legatees or fidei-commissary remaindermen (*Voet*, 20, 2, 21). There remains therefore to the plaintiffs only a personal right of action against the representatives of their deceased father, but as those representatives have not been substituted as parties in lieu of the late Jan Louis Booysen, the Court can now make no order to their prejudice. As between the surviving parties to this suit the judgment of the Court must be for the defendants, with costs, but without prejudice to any right the plaintiffs may have to recover the full or half value of their share of the legacy, and their costs in this action from the executors of the late Jan Louis Booysen.

[Plaintiffs' Attorney, J. C. DE KORTÉ.
Attorneys for Goldschmidt, & Colonial Orphan Chamber, FAIRBRIDGE, ARDERNE, & SCANLEN.
Attorney for Van der Merwe, J. I. DE VILLIERS.