LANGE AND OTHERS *vs.* LIESCHING AND OTHERS.

Alienation of Property by Fiduciary.—Trustee in Insolvency.—Remedy of Fidei Commissaries.—Rei vindicatio.—Restitutio in integrum.—Sale ex decreto judicis.

Where a trustee in insolvency sold to a stranger, by public auction after due notice, a piece of land registered as the property of the insolvent, but of which he was only fiduciary proprietor, as by the mutual will of his parents, the land could only be alienated to one or more of the children, grandchildren, or lawful descendants of the said testator or testatrix; and the fidei commissaries, though of full age and aware of the sale, did not protest against it at the time, but subsequently brought an action for the recovery of the land against the purchaser, who had bought it in ignorance of the fidei commissum. Held, *that they could not so recover it, and that the purchaser's title to it was good.*

If the fidei commissaries had not been of full age or had not been aware of the sale, their relief, if any, would not have been by way of rei vindicatio, *but by way of* restitutio in integrum.

A public sale of insolvent's property by his trustee is a sale authorized ex decreto judicis.

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This was an appeal from a judgment delivered by SMITH, J., in the Eastern Districts' Court. It appeared that I. L. Rautenbach and his wife, M. D. Rautenbach, had made on the 10th December, 1850, a mutual will, whereby they devised to their son, I. L. Rautenbach, jnr., the north-west side of their farm, Elands River, in the division of Uitenhage. The said son was in consideration of this to pay a sum of two thousand rix dollars to his sisters collectively six months after the decease of the surviving testator or testatrix, and was therefore not to be entitled to the said portion of the farm before the decease of the survivor. The bequest was subject to the *fidei commissum* that the said portion of Elands River should not be sold, alienated, given in exchange, or disposed of out of hand to any strange

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person or persons save only to one or more of the children, grandchildren, or lawful descendants of the said testator or testatrix, and then only to be valued for and at the sum of 9000 rix dollars, payment in addition to the said value to be made for improvements, whether buildings, lands, gardens, &c., which such child might have made on the same after a valuation should have been arrived at by impartial persons. The testator died in 1857, without having revoked the will in question, and leaving his wife his son, and five daughters, one of whom was married to A. P. Lange, surviving.

In September 1865 the above-mentioned portion of Elands River was made over to I. L. Rautenbach, jnr., by the executors under the will, and the surviving testatrix, the latter giving up all her right and interest in it to her said son. In January 1867 Rautenbach passed, in consideration of an advance of £700 made to him, a mortgage bond over the said portion in favour of F. Liesching, one of the defendants in this suit. Rautenbach's estate was duly sequestrated as insolvent in July 1870, and H. N. Chase was appointed the trustee. In October 1870 part of the land in question was after due notice publicly sold by Chase to the defendant Liesching, who received transfer of it. The fidei commissaries, though all of age at the time of the sale, and aware of it, did not then protest, but subsequently brought action to have the sale and transfer declared void. The case was argued before Mr. Justice SMITH in the Eastern Districts' Court, and defendants were granted absolution from the instance. Plaintiffs appealed to the Supreme Court.

Jones, for appellants. There has been no waiver of their rights by the fiduciary heirs. That appellants are entitled to succeed is shown by the following authorities: *Van der Linden* (Inst. cap. 9, § 8); *Sande* (de Prohibit. Al., pars 3, c. 4, §§ 3–11); *Van der Keessel* (Thes. 318); *Groenewegen* de Leg. Abrog., ad Cod. lib 4, tit. 6); *Grotius* (Int. lib. 2, cap. 20, § 12); *In re Lutgens* (2 Menzies, p. 330).

Upington, A.G. (with him *Cole*), for respondents.

Cur. adv. vult.

Postea (March 12th),—

DE VILLIERS, C.J.:—This is an appeal from a judgment of the Eastern Districts' Court. The facts of the case have been so clearly and fully stated in the judgment of Mr. Justice SMITH that it is unnecessary to recapitulate them. That learned judge has correctly observed that the present case differs most materially from the case of *Lange* vs. *Scheepers*, which was decided in the Supreme Court in August 1878. There the action for cancellation of transfer was brought against Scheepers, who, as one of the executors of the last will of the testator, was held to have been aware of the provisions of the will. The sale to him of part of the farm Elands River was a private one made by the fiduciary legatee, Ignatius Rautenbach, to whom absolute transfer of the property had been passed by the executors, and the transfer to Scheepers was set aside mainly on the ground that the absolute transfer to the fiduciary legatee, and the subsequent private sale made by him to Scheepers could not be sustained in the face of Scheepers' knowledge of the existence of the *fidei commissum* before he was a party to the transfer to Rautenbach, and therefore also before he became the purchaser of the property. The question whether the plaintiffs other than J. H. Lange had parted with their rights by cession to him, or whether, if they had so parted with their rights, the subsequent cession to them by Lange's trustee was a valid one, was not raised by the pleadings, and did not enter into the grounds of decision. The question appears, however, to have been raised by the learned judge in the Court below in the present case, but in the view which this Court takes of the case it will not be necessary to decide the point, or even to refer to it again. Part of the purchase price of the land sold to Scheepers was applied towards the reduction of a debt due by Rautenbach to Liesching, the defendant in this case, by virtue of a then existing mortgage bond on the farm. After the sale to Scheepers, Rautenbach surrendered his estate as insolvent, and the trustee of his insolvent estate, in due course, and after proper notification to the public, sold the remaining portion of the farm registered in the name of the insolvent, by public auction. Liesching, the mortgagee, became the purchaser. Mr. Justice SMITH held that Liesching purchased the farm without any knowledge of the *fidei commissum* existing in favour of the plaintiffs, and I see no

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sufficient reason for differing from this view. It would have been quite competent to the plaintiffs to have their title to a fidei commissary interest in the farm recorded in the Deeds Registry Office, and this they might have done under *Act No.* 15 *of* 1855 (Schedule No. 1, section K) without the payment of any duty. Having neglected to adopt this obvious course for fixing any purchaser with notice of their rights, they cannot complain if the loose testimony of knowledge on Liesching's part is not accepted by the Court as proof positive of notice to him. In the absence, then, of such proof, what are the plaintiffs' rights under the will in respect of the land transferred to Liesching? The threefold remedy which the law affords to legatees, whether fidei commissary or direct, is well known, and has of late been fully discussed in this Court. There is no question here as to one of the remedies, namely, a personal action against the heirs or executors, under the will. As to the remedy of hypothecary action, it is admitted on behalf of the plaintiffs that, if it once be established that Liesching was a *bonâ fide* purchaser for valuable consideration this remedy also must fail. The *9th section* of *Act No.* 5 *of* 1861 expressly enacts that no fixed property shall, after transfer thereof to a purchaser who purchased the same by a true and *bonâ fide* bargain for valuable consideration, be subject to any tacit hypothecation to which it might have been subject in the hands of some former owner of the said property. The same section contains a proviso that no mortgagee shall, for the purpose of this section, be deemed a purchaser. This proviso may have an important bearing upon the question whether the plaintiffs if they had filed a proper proof of debt would not have been entitled, in the distribution of Rautenbach's insolvent estate, to a preference over Liesching's bond, but it cannot affect the question whether Liesching can now be ousted of the estate vested in him by the transfer. That transfer was made to him, not as the mortgagee, but as a purchaser at a public sale in insolvency, and the plaintiffs can only succeed in claiming the property as their own if they can satisfy the Court that the third remedy competent to fidei commissaries is still open to them. That remedy consists in the *rei vindicatio*, by which the property subject to the *fidei commissum* may be followed into the hands of any possessor whatever. That this right

existed under the Roman-Dutch law does not admit of any doubt. Whether this right has been curtailed by Colonial practice or legislation is a more doubtful question. Mr. Justice SMITH in his judgment says that the provisions of the 9*th section* of *Act No.* 5 *of* 1861 (which I have already quoted) indicate "a principle which, in the absence of direct authority, may be applied to similar questions," from which remark I infer that, in his opinion, the Act in question was intended to deprive fidei commissaries of the *rei vindicatio* as well as of the hypothecary action in the case of *bonâ fide* purchases for valuable consideration. To me it appears by no means improbable that such was the intention of the Legislature, but, if it was, the Act fails altogether in giving effect to that intention. There is, however, considerable force in the learned judge's remarks regarding the legal effects of a transfer *coram legi loci*, and duly registered in the Deeds Office. I quite agree with him in thinking that it is competent for the Registrar of Deeds, before enregistering any deed of transfer tendered to him on behalf of executors, to demand the production of a certified copy of the will under which they act, in order to satisfy himself that the proposed transfer does not contravene the provisions of the will. If the sale and transfer are not warranted by the terms of the will, the Registrar would be justified in refusing to allow transfer to be passed, or at all events in requiring that the provisions of the will, so far as they relate to the property, should be registered with the transfer, unless the executors satisfy him that the sale was necessary to enable them to pay the debts of the deceased. But what are the rights of the fidei commissaries when once transfer has been passed? Considering the large powers vested by our law in executors, the judicial nature of the act of transfer, and the facilities afforded to fidei commissaries to have their limited interests in land recorded in the Deeds Registry Office, I incline to the opinion that an absolute transfer to a *bonâ fide* purchaser from the executors, or from the transferee of the executors, ought to debar any legatee or fidei commissary heir of the deceased from thereafter claiming the property thus transferred as his own. But the case may be decided upon another ground. According to *Voet*, movable property sold by judicial sale cannot be reclaimed by the true owner, who was ignorant of the sale,

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nor even immovable property transferred in due and customary form, if the sale took place by virtue of a judicial decree, and was not objected to by the owner. "*Plane si res mobilis ignorante domino vendita fuerit auctione publicâ, et judicis decreto ad petitionem creditorum, vix est ut hodierni mores rerum ita venditarum vindicationem paterentur; cum ne immobilia quidem ex decreto judicis vendita et, præmissis solennibus denuntiationibus, legitime tradita, domino non mature intercedente et se opponente vindicari queant*" (*Voet*, 6, 1, 13). It will be observed that *Voet* refers to this rule as a modern one; the expression "*Hodierni mores*" being always used by him to distinguish the law existing in his time from the ancient civil law. That the rule was not anciently recognised to its full extent, at least as applied to fidei commissary rights, is clear from the following opinion of *Papinian* as recorded in *Digest* 31, 1, 69, § 1:—"*Prædium quod nomine familiæ relinquitur si non voluntaria facta sit alienatio, sed bona heredis veneant, tamdiu emptor retinere debet, quamdiu debitor haberet bonis non venditis, post mortem ejus non habiturus quod exter heres præstare cogeretur.*" From this passage *Sande* (*De Prohibit. Rerum Al.* 3, 8, 13) deduces the proposition that the life interest of an heir or legatee who takes property subject to a *fidei commissum* in favour of the testator's family, may be compulsorily alienated for the payment of the debts of such heir or legatee, but that any alienation beyond such life interest cannot affect the rights of the fidei commissaries. In implicitly following the ancient civil law, *Sande* seems to have lost sight of the more modern rule which deprived owners as well as legatees and fidei commissaries of their rights in respect of property sold in execution and by public auction if they do not raise their objection in the proper form. This mistake is avoided by *Matthæus* in his valuable work on sales by auction (1, 11, 33). He is clearly of opinion that if the creditors of the heir sell his goods, the *fidei commissaries* are bound to protest in order to preserve their rights. "*Quod si creditores heredis distrahant bona heredis, fideicommissarius similiter intercedere debet, ne privetur jure suo.*" Now, in the present case there can be no doubt that due public notice was given of the intended sale of the farm, that the sale took place by public auction, that its proceeds were applied towards the payment of the debts of the fiduciary, and that no protest or

other objection was raised at the sale on behalf of the fidei commissaries. All the requisites mentioned by *Matthæus* were present, and the only point upon which there may at first sight be some doubt is whether the sale was authorized, in the words of *Voet*, "*ex decreto judicis.*" Upon a closer examination of the subject this doubt also vanishes. A sale in insolvency is the necessary result of an order of the Court placing the estate of the insolvent under sequestration in the hands of the Master of the Supreme Court. One of the first acts of the Master under the 13th section of the *Insolvent Ordinance* is to enter and lay an attachment on the estate under inventory thereof. In due course the appointment of a trustee is confirmed by a decree of the Court. The effect of such a decree is to divest the Master of the assets of the insolvent estate, and to vest them in the trustee, who thereafter administers the estate under the direction and control of the Court. Among the statutory duties imposed upon him is that of making sale of all the property of the estate, movable as well as immovable, giving due notice thereof in the *Government Gazette* (sect. 98). The sale takes place under such conditions as may have been determined upon by the creditors, but any such conditions are subject to the approval or disapproval of the Court, on the application, not only of those interested in the due administration, but also of those interested in the reversion of the estate under sequestration. The 74*th section* of the former *Insolvent Ordinance* (*No.* 64), contained the proviso that all public sales of immovable property shall take place before the Master of the Court, or before a Commissioner of the Court, under his directions, and that such public sales shall be conducted under the same rules and regulations as regulate the sale of immovable property attached by process of the Court. This proviso was omitted in the 98*th section* of the existing *Ordinance*. The object of this omission was, not to curtail the jurisdiction of the Court, but to give the creditors a wider discretion in the mode of realising the immovable property of the insolvent estate, and to simplify the machinery employed in such realisation. If the creditors decide to sell otherwise than by public auction, it is still competent for the Court to prevent such a sale; but if the Court does not interfere, and a private sale is effected, it may be that the sale would not have the effect

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of divesting those entitled to the *rei vindicatio* of their rights. But if, as in the present case, the sale in insolvency is regulated by those general principles which regulate all other judicial sales, the owner, legatee, or fidei commissary is, in my opinion, deprived of the right of claiming the property as his own. I am not aware that the important question as to the effect of a public sale in insolvency upon the *dominium* of property not belonging to the insolvent has ever formed the subject of any decision of this Court. The effect of such a sale made by an assignee to whom a debtor has assigned his estate for the payment of his debts upon a third person's right to the roof of a cottage standing on land belonging to the debtor, appears to have been recently considered by the Judges of the Eastern Districts' Court in the case of *McNally* vs. *Smith*. They held that the property in the materials forming the roof did not pass to the purchaser, but they differed in their reasons for this judgment. The JUDGE PRESIDENT appears to have held that the roof of the cottage, being part of the cottage, and therefore of the land itself, was not subject to the law of market overt. Mr. Justice SMITH was of opinion that the roof was not a fixture, but placed loosely on the cottage. Mr. Justice JACOBS founded his judgment on the fact that public notice was given at the sale, in the hearing of the purchaser, that the materials of the roof did not belong to the debtor, but to a third party. Of course a sale at the instance of an assignee stands on a very different footing from a sale by the trustee of an insolvent estate. There is nothing in law to distinguish the former from a public sale directed by the debtor himself. No order of Court is necessary for the validity of the assignment, and no control is exercised by the Court over the sale. But a public sale in insolvency is to all intents and purposes a judicial sale, and necessitates a compliance with all the essential requisites of a sale in execution. When such immovable property thus sold has been transferred in customary form *coram lege loci* from the name of the insolvent into the name of a *bonâ fide* purchaser no secret title of any then existing legatee or fidei commissary remainderman can in my opinion be set up against the title of the transferee. The future title of fidei commissaries who are not yet in existence need not be here discussed. The plaintiffs were all in existence at the time

of the sale to Liesching, and, if I mistake not, they were all of age and were aware of the sale. But even if they had not been of age, or had been ignorant of the sale, their relief, if any, would not be by way of *rei vindicatio* but by way of *in integrum restitutio*. To obtain the latter relief they would have to make out a very different case from that which has been disclosed in this action. But the plaintiffs as well as their heirs, are in the opinion of this Court debarred from now claiming the property itself which has been transferred to Liesching. The judgment of the Court below, giving absolution from the instance, must therefore be affirmed, and this appeal must be dismissed, with costs.

[Appellants' Attorneys, H P. DU PREEZ; J. & H. REID & NEPHEW.
Attorney for Respondent, Snyman, J. C. DE KORK.
Attorneys for other Respondents, FAIRBRIDGE, ARDERNE & SCANLEN.]

KLEUDGEN & CO. *vs.* TRUSTEES IN INSOLVENT ESTATE OF RABIE.

Insolvency.—Preference.—Jus in rem.

K. and R. agreed that R. should purchase a farm on their joint account, and should thereafter sell it for their mutual benefit, transfer to be passed on such re-sale simultaneously to R. and the new purchaser. R. bought the farm, and K. paid his share of the purchase money, but the farm was not re-sold during R.'s lifetime, nor was transfer passed in his favour. After his death his executrix obtained transfer and subsequently surrendered his estate as insolvent. K. claimed a half share of the farm, and sued for transfer of such half share, or, in default, for payment to him of half the purchase price. Held, *that K. had not acquired a* jus in rem *over the half share, that the transfer to R.'s executrix was valid, and that therefore K.'s only remedy was to prove as a concurrent creditor on R.'s estate value of half the farm.*

This was an argument on exceptions. The facts of the case are sufficiently set forth in the judgment of the

CHIEF JUSTICE.

Upington, A.G. (with him *Gregorowski*), for plaintiffs.