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 for the 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.

1880.
March 2.
„ 12.

Kleudgen *vs.* Trustees in Insolvent Estate of Rabie.

Cole, Q.C. (with him *Jones*), for defendants.

Cur. adv. vult.

Postea (March 12th),—

DE VILLIERS, C.J.:—The declaration in this case alleges that in October 1876 the plaintiff and one Rabie made an agreement that Rabie should purchase a certain farm called Sand River, for £1100, on their joint account, and should thereafter re-sell the farm for their mutual benefit, and that, on such re-sale, transfer should be simultaneously passed to Rabie and such new purchaser. Rabie bought the farm for the sum agreed upon, and the plaintiff paid his share of the purchase price, but the farm was not re-sold during Rabie's lifetime, nor was transfer passed in his favour. After his death his wife, as executrix-testamentary of his estate, obtained transfer of the farm and subsequently surrendered the estate as insolvent. The plaintiff claims to have it declared that he is entitled to a half share of the farm, and prays for transfer of such half share into his own name or, in default, for payment to him of the sum of £550, being the value of such half share. The defendants except to the declaration on the ground that, even if the facts therein alleged be true, the plaintiff is merely a concurrent creditor of Rabie's insolvent estate, and must prove his claim in the ordinary way, but that he is not entitled to claim one half of the farm itself, or to rank as a preferent creditor for the said sum of £550. The real question then to be considered is, whether, assuming that Rabie was a mere agent employed by the plaintiff to obtain transfer of the farm in his (Rabie's) name, and simultaneously to effect transfer to a new purchaser, the plaintiff can claim the land wrongfully transferred to Rabie as against the creditors of his insolvent estate. Now it is clear that the exception is a valid one, unless the plaintiff can satisfy the Court either that he has a right to one half share of the property itself as against all the world, in other words that he has a *jus in rem*, or that there were some circumstances attending or preceding the transfer to Rabie which render that transfer null and void in law. As to the plaintiff's right to the farm itself, the *jus in re* is still in the insolvent estate, the farm having been

transferred to Rabie's estate before it was sequestrated as insolvent; and no circumstance is disclosed in the declaration conferring any real right on the plaintiff. The case of *Kotze* vs. *Kotze's Trustees* (2 *Menz.* p. 436) was quoted on behalf of the plaintiff, but in that case the plaintiffs, as fidei commissary legatees of the property in question, were held to be clothed with the *jus dominii* which gave them a valid title, even as against the creditors of the insolvent estate of the fiduciary legatee; the property itself not having yet been transferred out of the insolvent estate. No such *jus dominii* exists in the present case. But the absence of such a right would not, in my opinion, debar the plaintiff from setting aside the transfer of one half of the farm to the insolvent estate, if that transfer itself was clearly vitiated by error or fraud. The case of *Harris* vs. *Buissinné* (2 *Menz.* p. 113), upon which the defendant's counsel entirely relied, was never intended to decide that the insolvency of a transferee of immovable property precludes any enquiry into the validity of his title, or prevents the transfer from being set aside under any circumstances whatever. Let me suppose, for instance, that a conveyancer, being authorized by A to pass transfer in favour of B, by a mistake which is not discovered by the Registrar of Deeds, passes transfer in favour of C. If C were immediately thereafter to surrender his estate, his creditors could not successfully contend that the land forms part of his insolvent estate. The rights of B would remain intact, notwithstanding the erroneous transfer to C. No transfer, however solemn, can pass the *dominium* unless it be accompanied or preceded by some contract or other valid cause for the transfer of ownership. Let me next suppose that A authorizes his agent B to purchase a farm from C. The purchase price is handed over to B by A upon the distinct understanding that transfer is to be made in A's favour. B buys the farm but obtains transfer in his own favour. A would have a good action against B to have the farm transferred from the name of B to that of A, but it is by no means clear to me that the transfer would be void. As between C the transferor and B the transferee there existed a valid cause for the transfer; that is, a purchase by B in his own name. In the present case the agreement was, not that transfer should be passed in favour of the plaintiff, but that it should be

1880.
March 2.
„ 12.

Kleudgen *vs.* Trustees in Insolvent Estate of Rabie.

passed in favour of Rabie upon his re-selling the farm. There exists, therefore, far less reason for holding the transfer to be void than in the case last supposed. As between the vendor and Rabie there existed a valid legal cause for the transfer to Rabie, and even as between Rabie and the plaintiff a transfer to Rabie was not contrary to the provisions of their agreement. The vendor might have compelled Rabie to take transfer at any time after payment of the purchase price, and the fact that Rabie had not yet found a purchaser would be no defence against the vendor. That the executrix of Rabie took transfer without being compelled to do so, and before a new purchaser had been found, is surely no ground for holding that, as between the plaintiff and the executrix, the transfer was fraudulent and void. But, if the transfer hold good, the trustees of Rabie's estate remain the owners of the farm for the benefit of all the creditors. The plaintiff, as one of the creditors, has a valid claim against the estate, but that claim ought to have been made by proof of debt, and not by means of the present action. The exception must be allowed with costs.

[Plaintiffs' Attorneys, J. & H. REID & NEPHEW.
Defendants' Attorneys, FAIRBRIDGE, ARDERNE & SCANLEN.]

SMITH AND OTHERS *vs.* EXECUTORS TESTAMENTARY OF SAYERS.

Community of property.—Mutual will of husband and wife.—Subsequent will by surviving spouse, how far valid.—Ord. 104, §§ 14 *and* 15.

In 1851 *one S. and his wife, married in community of property, by a joint notarial will appointed as their heirs the survivor of them jointly with the child of the testatrix by a former marriage and with the children of their existing marriage. The survivor was to keep the whole of the joint estate under his or her sole direction and administration and to remain in the enjoyment of the usufruct of the joint estate during his or her natural life, and was nominated executor of the will and guardian of the minor heirs. The executor and guardian was not to be required*