

*Jones* (with him *Giddy*), for defendant. Under the circumstances defendant is not liable (*58th Rule of Resident Magistrates' Courts*; *Churchill's "Sheriff Law,"* p. 253, 2nd edition; *Dean vs. Whittaker and Another*, 1 Carrington and Payne, p. 347; *Ward vs. Macauley and Another*, 4 Durnford and East, p. 489; *Ord. 37 of 1828*, § 8; *Tancred vs. Allgood*, 4 Hurlstone and Norman, p. 438).

1880.  
June 23.  
Olivier vs.  
Keating.

DE VILLIERS, C.J.:—The Sheriff is empowered only to take into his charge so much of the movable property of the debtor as will be sufficient to satisfy the claim. The question is whether the plaintiff is to have any remedy whatever. The debtor informed the Messenger—who is in the same position as a Sheriff—that certain oxen belonged to the plaintiff, and if the Messenger thereafter seized and sold those oxen he did so at his own peril. It is clear that the defendant is liable to pay the damages. Judgment has been given in the Court below for £50, and for that amount judgment must stand.

DWYER, J., concurred.

SMITH, J.:—I am of the same opinion. I am afraid that the result may be to open the door to fraud, but it is for the legislature to interfere.

[Attorneys for Plaintiff, TREGOLD & HULL.]  
[Attorney for Defendant, C. H. VAN ZYL.]

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BLAND vs. THE TRUSTEES IN THE INSOLVENT ESTATE  
OF H. J. EKSTEEN.

*Remuneration of Trustees in Insolvent Estates.*

*A trustee in an insolvent estate must, in the absence of a resolution of the creditors to the contrary, be contented with the commission allowed to him by law, and cannot make any other profit out of his position as trustee.*

*Where a trustee in an insolvent estate, who lived at H., charged in his liquidation account the sum of £3, which he had*

*expended on cart hire to R. to attend the third meeting of creditors there; Held, that this charge should be allowed under the peculiar circumstances.*

1880.  
June 30.

Bland vs.  
Trustees in  
Insolvent  
Estate of  
Eksteen.

This was an application by Susanna Maria Bland and Daniel Bland, creditors in the insolvent estate of H. J. Eksteen, to have an account filed by the trustees of the said insolvent estate amended on the ground that certain excessive charges had been made. It appeared that one David Pieter Marais, one of the trustees in the said insolvent estate, was an auctioneer, and held a sale of the assets of the estate without being authorised so to do by the creditors, charging for his services as auctioneer 5 per cent. commission on the proceeds of the sale, such commission amounting to the sum of £29 1s. The applicants objected to this charge on the ground that the trustee was bound to content himself with the commission allowed him by law as trustee, and could not make any other profit out of the estate. A charge of £6 15s. for advertising, binding, and confirmation of account was also objected to on the ground that it was in excess of the amount usually allowed by the Master. The third charge objected to was one of £3 for cart hire to attend third meeting of the creditors. The petitioners maintained that such charge was improper, the trustees being remunerated for all their services by the commission allowed to them. Applicants also pointed out an error in addition in the account amounting to the sum of £1.

Respondent in an affidavit stated that he and his co-trustee were the only auctioneers at Heidelberg, that if they had employed an auctioneer from elsewhere the charges under the heading "auction charges" would have been considerably increased, and that he had only charged a 5 per cent. commission instead of the usual commission of 6 per cent. He further stated that the item £6 15s. included agency in Cape Town, in respect of advertising, binding, and confirming the account, and that as both he and his co-trustee lived at Heidelberg, and the third meeting of creditors was held at Riversdale, a distance of eighteen miles, he was obliged to hire a cart to convey him to Riversdale, the charge of £3 for such cart being a fair and reasonable one.

*Jones*, for applicants. A trustee is not entitled to profit by

his trust. Hence the items objected to must be disallowed. (In re *de Kock's Estate*, Buch. Rep., 1868, p. 252; In re *C. A. J. du Plessis*, Roscoe, 1865, p. 326; In re *Bartlett*, 1862; *Robinson vs. Pett*, 2 White and Tudor, p. 238; *Kirkman vs. Booth*, 11 Beavan, p. 273; *Davies vs. Thwaites*, 1872.) In England he would not be entitled to make such charges. (*White and Tudor*, 4th ed., p. 240, Notes to *Robinson vs. Pett*.)

*Leonard, contra.* Under the circumstances the trustee is entitled to the remuneration which he has claimed.

DE VILLIERS, C.J.:—It may no doubt be hard upon the trustee, who was employed as auctioneer, that he should not be entitled to his commission as auctioneer, but he had the remedy in his own hands. If he found there was no auctioneer at hand, he could apply to the creditors for authority to make the charges. In the absence of a resolution of the creditors, I am of opinion that the trustee is not entitled to profit by his capacity, or by the fact that he acted as auctioneer. The charge of £29 1s. for commission must therefore be struck out. There are two items of £1 and £1 10s. which must also be omitted. Then there is a third item of £3. The trustee lives at Heidelberg, and in order to attend the third meeting of creditors, he incurred an expenditure of £3 for cart hire. The Court is of opinion that this item should, under the peculiar circumstances, be allowed. The trustee has acted *bonâ fide*, and the question being a very important one to raise, the costs must come out of the estate.

DWYER and SMITH, JJ., concurred.

Account amended by omission of the items—£29 1s., 5 per cent. auctioneers' commission; £1 error in addition; £1 10s. difference between amount charged for advertising, &c., and the amount usually allowed by the Master.

[Applicants' Attorneys, FAIRBRIDGE, ARDERNE & SCANLEN.]

1880.  
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