

TRUSTEES OF INSOLVENT ESTATE OF SMITH *vs.* SMITH.

Ord. 6, 1843, § 83.—Fraudulent Alienation by Insolvent.

H. S., a trader, at a period when his affairs were insolvent sold to J. S., his brother, a certain farm for the sum of £1400. Evidence was given in an action brought by the trustees in the insolvent estate of H. S. to procure the setting aside of the sale, to the effect that in the opinion of experts the farm was worth more than £2000, but it was found by the Court that the defendant paid a fair price and made the purchase bonâ fide. Held, that the sale could not be set aside.

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This was an action instituted by the trustees of the insolvent estate of Henry J. Smith, against his brother John Smith, to procure the setting aside of the sale and transfer of a farm situate in the Division of Graaf Reinnet. The declaration claimed that the sale was void under the 83rd section of the Insolvent Ordinance, inasmuch as it was made at a time when the liabilities of the insolvent fairly calculated exceeded his assets fairly valued, and was not made *bonâ fide* and upon just and valuable consideration. There was also a count based on the Common Law, by which it was claimed that the sale was void because it was made when the insolvent was unable to satisfy large debts due by him, and when he was in insolvent circumstances, and with intent to benefit the defendant or himself or both himself and the defendant at the expense of his creditors, and was made wrongfully and unlawfully and in fraud of the creditors of the insolvent, defendant being aware of the fact that the liabilities of the insolvent exceeded his assets, and that the sale and transfer were in fraud of creditors. Insolvent commenced business at Graaf Reinnet in the year 1875. In April, 1878, he was in a condition of insolvency. On the 27th of that month he sold a certain farm for the sum of £1400 to his brother, the defendant, who was a clerk residing at Graaf Reinnet, and whose yearly income at the time of the sale did not amount to more than £250. On the 17th of May, 1878, transfer of the farm was passed. Defendant, in consideration of this sale, took up for the insolvent certain bills signed by the Widow Smith and David Smith, another brother of the insolvent, in favour of the insolvent. It was

stated, but not proved, that the only actual consideration given by defendant for the farm was the taking up of these bills, and that defendant was aware of the condition of his brother's affairs when he made the purchase, and acted in collusion with him. Evidence was also given on behalf of plaintiff that the farm was worth over £2000. On behalf of defendant, it was proved that he had borrowed large sums of money from one Neser, with which to pay for the farm.

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

Leonard (with him *Giddy*), for defendant.

Cur. adv. vult.

Postea (July 12th),—

DE VILLIERS, C.J.:—This is an action brought by the trustee of the insolvent estate of H. J. Smith against the brother of the insolvent under the 83rd section of the Insolvent Ordinance. There is a Common Law count, and with regard to this I am satisfied that the plaintiff has not made out his case. It clearly lies upon the plaintiff to show the fraud stated in the declaration before he can succeed in his action. The 83rd section of the Insolvent Ordinance has been frequently commented upon in this Court. It provided that every alienation, transfer, &c., made by any insolvent at a time when his liabilities fairly calculated exceeded his assets fairly valued, shall, unless made *bonâ fide* and upon just and valuable consideration, be null and void. The question in this case is whether the defendant has shown both his *bona fides* and a just and valuable consideration. The sum of £1400 appears to me, on the whole, not to be an unfair price for the farm. It is quite true that some witnesses, amongst them Mr. Te Water, said that the value of the farm was £2000. I have no doubt that Mr. Te Water has a fair knowledge of the value of property in the Division of Graaf Reinet; but it does not follow that because the insolvent sold the farm for £1400 there was necessarily any *mala fides*. One of the witnesses has sworn that the farm was worth only about £1400 or £1500, and it appears to me that if the sale was actually effected for £1400, the discrepancy between that price and the true value is not so great as to lead the Court to the conclusion that there is any

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want of just and valuable consideration. Then comes the question whether a *bonâ fide* price was paid by the brother of the insolvent. It seems to me that the defendant has proved that he actually paid the price, which was a fair one, and has thus established his *bona fides* and valuable consideration. Judgment must therefore be given in favour of the defendant, with costs.

DWYER, J.:—This is a case as to which I have had very great difficulty. I do not think it has been shown that there has been an undue preference, and judgment ought to be for the defendant, the plaintiff not having succeeded in making out his case.

SMITH, J.:—It appears to me that there has been a good deal of shuffling of the cards in this case. I think, however, it is one of those cases in which I ought to defer to the opinion of my brother Judges.

[Attorneys for Plaintiffs, FAIRBRIDGE, ARDERNE & SCANLEN.]
[Attorneys for Defendant, J. & H. REID & NEPHEW.]

TRUSTEES IN INSOLVENT ESTATE OF SMITH *vs.* JOHNSTONE McCAIG.

Insolvent Ordinance, §§ 83, 84, 88.—Undue Preference.

H. S. knowing his affairs to be in an unsound condition, sold to one J. M., who was his creditor in respect of two promissory notes, seven ostriches, J. M. engaging to meet the notes in consideration of this sale. H. S. shortly after became insolvent. Held, on action for the rescission of the sale being brought by his trustees against J. M., that the sale was not void under § 83 of the Insolvent Ordinance, but was an undue preference under § 84. J. M. was however declared entitled to prove his claim in respect of the promissory notes, on the insolvent estate.

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This was an action brought by the trustees in the insolvent estate of Henry J. Smith against one Johnstone McCaig, who had bought certain seven ostriches of the insolvent, to procure the setting aside of the sale on the