Pledge.—Parate execution.—Principal and agent.—Purchase by agent of principal's goods.—Public auction.—"Publica auctio." *Executors and tutors.—Acquiescence. Ratification.*

In order to establish acquiescence or ratification on the part of the plaintiff, it must be shown that he has, either by word or deed, and with full knowledge of the circumstances abandoned his right

An agreement for the sale by means of parate execution of movables, delivered to a creditor by his debtor, is valid It is however open to the debtor to seek the protection of the Court if, upon any just ground, he can show that in carrying out the agreement and effecting the sale, the creditor acted in a manner which prejudiced his rights

An agent employed to sell goods cannot himself purchase such goods at a sale by public auction.

The plaintiff delivered feathers to the defendant for sale on plaintiff's behalf and received from defendant an advance on the purchase price It was agreed *inter alia* that if after the lapse of a certain period the feathers had not been sold, the defendant after giving plaintiff notice would have the right to sell the feathers on plaintiff's behalf The feathers not having been sold within the period agreed upon, the defendant after giving plaintiff due notice caused the feathers to be sold at a municipal auction sale and himself purchased the feathers and thereafter re-sold them at a profit

In an action by the plaintiff to set aside the sale and for an account of the proceeds realised by any subsequent sale of the feathers

Held, (1) that the agreement that the defendant should have the right to sell the feathers on plaintiff's behalf was valid; (2) that the purchase by defendant of the feathers was invalid; and (3) that the purchase must be set aside, that the defendant must account to plaintiff for his dealings with the feathers, and that the plaintiff was entitled to receive the purchase price obtained by the defendant on the re sale less the amount of his indebtedness to the latter

Action for money due. The facts appear in the judgment.

F. W. Beyers, K.C. (with him *R. P. B. Davis*), for the plaintiff: An agent cannot purchase his principal's goods. See Story on *Agency* (secs. 210-211); *Hargreaves* v. *Anderson* (1915, A.D. 519); *Voet* (14.3.4); *Forbes, Still & Co.* v. *Sutherland* (2 S. 231); *Louw* v. *Hofmeyr and Others* (1869, Buch. 290). A *pactum commissorium* is illegal. See *Mapenduka* v. *Ashington* (1919, A.D. 343); Mackeurtan on *Sale* (pp. 92-5, 313-314); *Digest* (26.8.5.1-6); *Ex parte Mabuya* (20 S.C. 164); Matthaeus *de Auct.* (17.1 and 1.3.2); Pothier on *Sale* (sec. 13). As to the purchase by an executor or trustee of estate property, see Howard on *Estates*

(p. 158); *Baxter* v. *Beningfield* (4 N.L.R. 143); *Parks* v. *Bester* (23 N.L.R. 162); *Landsell's Trustee* v. *Poynton* (25 N.L.R. 342); Wille on *Mortgage* (p. 176); *John* v. *Trimble and Others* (1902, T.H. 146); *Wilson* v. *Shaw* (1 C.T.R. 299). There was no waiver or acquiescence in the purchase by the defendants. *De Bussche* v. *Alt* (38 L.T.N.S. 370). See *Watson* v. *Burchell* (9 S.C. 2); *Wepener* v. *Estate Henning* (1921, J.D.R. 555); *Van Reenen* v. *Republic G.M. Syndicate, Ltd.* (2 S.A.R. 236). Further on the facts.

R. W. Close. K.C. (with him *M. Bisset, K.C.*), for the defendants: An agent can buy his principal's goods at a public auction. The sale is then *palam et bona fide*. See *Digest* (18.1.34); Burge, *Colonial Law* (vol. 2, pp. 463-5); *Voet* (18.5.16 and 18.1.9); *Ex parte van Niekerk and Another* (1918, C.P.D. 108); Brunneman, *ad. Cod.* (4.38.5); Pothier, *Pandect.* (18.1.22 and 26.8.13); *Baxter* v. *Beningfield* (12 A.C. 167); *Vermaak* v. *Birkenstock* (33 N.L.R. 510); *Norden* v. *Bonins' Trustees* (2 M. 124); *In re Estate Hough* (1919, C.P.D. 160); *In re insolvent estate Phillips* (1869, Buch. 321); *Steytler* v. *Cannon's Trustee and Others* (1896, Buch. 322); *Ex parte Kotzé and Another* (12 C.T.R. 718). A person in a fiduciary capacity can purchase estate property at a sale by public auction. A tutor can buy his ward's property from a co-tutor. Further on the facts.

Beyers, K.C., in reply.

Cur. adv. vult.

Postea (September 29).

KOTZÉ, J.P.: The plaintiff, who is an ostrich feather merchant at Oudtshoorn, on or about the 15th of December, 1915, delivered to the defendants, who are general merchants and produce brokers at Port Elizabeth, a parcel of 549 lbs. of ostrich feathers for sale on account of the plaintiff, on which parcel of feathers the defendants advanced the plaintiff the sum of £2,500. This parcel included 286 lbs. of feathers known as *whites*, and 211 lbs. of feathers known as *feminas*. The whites are described as lot 12, and the feminas as lot 13. Both these lots are alleged by the plaintiff to have consisted of feathers described as "picked primes." The terms of the agreement between the parties are set out in a letter of the 15th December, 1915, and will be specifically referred to later on. The period mentioned in this letter, within which the feathers were to be sold by the defendants was six months, but they were not sold. On 5th June, 1916, the defendants offered by letter to retain the feathers for a longer period, without selling them, upon certain terms and conditions, and subsequently, on the 17th July, 1916, the parties entered into a written agreement, to be presently more fully mentioned, in regard to the said feathers for a period of 9 months, and also in regard to a further parcel of feathers. In pursuance of this agreement a further parcel of feathers—870 lbs.—was, on 21st July, 1916, delivered by the plaintiff to the defendants, who advanced him a sum of £1,918 18s. 6d. on this second parcel. The defendants subsequently, by letter of the 17th April, 1917, notified the plaintiff, in terms of the agreement of 17th July, 1916, that they would sell all the said feathers at any time that they might consider suitable after 17th July, 1917. The declaration sets out that thereafter, on or about 2nd October, 1917, the defendants purported to have sold certain of the said feathers, including the lots 12 and 13 already mentioned, on the public feather market at Port Elizabeth for the sums of £843 14s. and £440 15s., respectively. It is of this sale of lots 12 and 13 that the plaintiff complains. His case is that in truth and in fact the defendants did not sell these two lots of feathers, but that the real transaction was that they wrongfully and in breach of their duty as the plaintiff's agents took over and retained the said two lots of feathers without the plaintiff's knowledge or consent, and credited the plaintiff's account with the two above respective sums, as if these amounts had been realized at a *bona fide* and legal sale of the two lots of feathers. The remainder of the feathers were sold on the 27th November, 1918, and 27th April, 1919; and the defendants rendered the plaintiff, in May, 1919, an account thereof, showing the sum of £680 8s. 4d. to be due to the plaintiff, after giving him credit for the two amounts of £843 14s. and £440 15s. The plaintiff maintains that by reason of the alleged wrongful conduct of the defendants in taking over the lots 12 and 13 of "picked prime" feathers, he is entitled to claim from them redelivery of these feathers and damages in the sum of £3,750, being the difference in the market price of the said feathers between May, 1919, and the price at the time of summons, or alternatively damages in the amount of £7,500, being the highest price of the two lots between the date on which the defendants purported to

sell these feathers and the date of the issue of summons. The declaration also avers that on or about the 7th January, 1920, the plaintiff tendered and again tenders to pay the defendants the said sums of £843 14s. and £440 15s. with interest at 8 per cent., and likewise £680 8s. 4d. with interest at 8 per cent., against the delivery of the feathers. The plaintiff accordingly claims an order directing the defendants to return the two lots of feathers to him, and judgment for £3,750 by way of damages, or alternatively payment of the sum of £7,500, less the respective sums as already mentioned. There is a further alternative prayer for an order directing the defendants to render an account of their dealings with the said two lots of feathers and, in the event of their having been sold, judgment for the amount realized by such sale less the amounts tendered by the plaintiff, together with interest *a tempore morae*.

In their plea to the declaration the defendants admit that the feathers contained in lots 12 and 13 were by them submitted for sale at public auction on the 2nd October, 1917, on the Municipal Feather Market, and that after fair and open competition they purchased the said two lots of feathers at such market. The price of the said feathers was duly placed by them to the credit of the plaintiff, to whom they rendered account sales in due course. The tender alleged to have been made is also admitted. They deny that they have acted wrongfully, and that they are liable in any damages to the plaintiff, and submit that they have rendered to the plaintiff all accounts to which he is by law entitled of the sale of the said feathers. The defendants have also filed a further special plea to the effect that the plaintiff, with full knowledge, ratified and acquiesced in the disposal of lots 12 and 13, and of their purchase by the defendants, and that on the 8th August, 1918, the plaintiff, being well aware of the circumstances set forth, verbally agreed with one Alexander Yule, a director of the defendant company, to pay the sum of £300 in cash and give them a promissory note for £500 in consideration of the defendants releasing for sale at £1,450 the only remaining parcel of his feathers held by them, and in further consideration of the defendants giving the plaintiff a complete discharge of all his indebtedness to them. The defendants accordingly plead that the plaintiff confirmed and acquiesced in the disposal of the parcels of feathers in issue and the purchase thereof at public auction, in so far as any confirmation or acquiescence may be necessary, which,

as a matter of law, however, the defendants maintain was not at all necessary; and that owing to the plaintiff's failure to make the said payment, he did not carry out this alleged agreement. The defendants have also instituted a claim in reconvention for payment to them of £680 8s. 4d. with interest at 8 per cent. from 15th May, 1919, being the balance due to them in respect of advances made to the plaintiff, Osry (defendant in reconvention), against his feathers.

In the replication to the plea the plaintiff admits that in August, 1918, he agreed to compromise the outstanding claims between himself and the defendants by paying £1,750 in cash and giving them a promissory note for £500, in return for which the defendants were to release and hand over the feathers then remaining in their possession. The plaintiff avers that this proposal of a compromise was no ratification of or acquiescence in the defendants' wrongful acts in regard to the sale and purchase of lots 12 and 13; it being moreover agreed between the plaintiff and the said Yule that if the compromise fell through the parties would revert to their former legal rights. The plaintiff further alleges that, without any fault on his part, the said compromise was not carried out, the defendants having, by telegram of 11th November, 1918, notified the plaintiff that they withdrew from the said compromise. As to the claim in reconvention, the plaintiff denies that any sum is owing by him to the defendants, save the amounts tendered in the declaration against the delivery to him of the said feathers.

The letter of the 15th December, signed by the plaintiff, and addressed to the defendants, reads as follows:

" Messrs. Hirsch Loubser and Co., Ltd ,

" Dear Sirs,

I beg to acknowledge receipt of the sum of Two Thousand Five Hundred Pounds, Sterling (£2,500 0s. 0d.) as an advance against a parcel of ostrich feathers weighing about 549 lbs., handed to you this day for sale on my account.

" I agree to pay you commission on this advance at 2½ per cent , and also interest at the rate of 8 per cent. per annum, and the usual selling commission of 1½ per cent., whether sold by us or not; also the cost of fire insurance for £3,000.

" You agree to hold the parcel for six months if necessary either here or in London; if shipped all charges to be for my account.

" The above commission to cover the term of six months only;

any extension of that term to be at your option and on such terms as may be arranged.

"If the parcel should not realize nett the amount of this advance with interest I undertake to pay to you on demand the amount of any such deficit."

On the 5th June, 1916, the Defendants wrote to the Plaintiff, reminding him that the six months arranged for their advance of £2,500 0s. 0d. on the ostrich feathers, held by them would expire on the 15th June, and in this letter they informed him that if he wished to continue the advance they were prepared to allow the amount to remain on the same terms as before. Thereupon the parties on the 17th July, 1916, entered into the following agreement:—

"1. The existing advance made on the 15th December last for £2,500 0s. 0d., to be continued for a term not exceeding nine months from date.

"2. H. Osry to forward at once to Hirsh Loubser and Company, Limited a further parcel of 900 lbs. weight of Primes, which he has on hand, and to buy and forward a further 600 lbs. weight, more or less, of superior primes.

"3. Hirsch Loubser and Company, Ltd. will, if satisfied with the value of the whole parcel of ostrich feathers, make a further advance to H. Osry of Three Thousand Pounds sterling (£3,000 0s. 0d.).

"4. H. Osry will pay to Hirsch Loubser and Company, Limited commission on the total advance of £5,500 0s. 0d. at the rate of ½ per cent., and interest 8 per cent. per annum from the dates of the advances.

"5. Hirsch Loubser and Company, Limited agree to store the feathers for a term not exceeding nine months from date, and will exercise usual care, but are not responsible for their condition, or for losses by theft or other causes beyond their control.

"6. Hirsch Loubser and Company, Limited to be entitled to the usual charges for handling, and for fire insurance at ½ per cent. every three months, and to a commission at the rate of 2½ per cent. on the gross value whether sold or not.

"7. Should the feathers be unsold at the end of the term of nine months, Hirsch Loubser and Company, Limited should have the right, on giving three months' notice to H. Osry of their intention, to sell the feathers for his account, and H. Osry agrees to pay on demand any shortfall including all charges resulting from such sale, or for any previous sale.

"9. The feathers to remain in the custody of, and at the actual disposal of Hirsch Loubser and Company, Limited until sold, or until H. Osry pays to them the amount of any advance plus all charges and commission. If shipped to London, all charges to be for account of H. Osry."

Such is a statement of the case, as presented by the pleadings and admissions.

It will be convenient if I first deal with the special plea which sets out that the plaintiff ratified and acquiesced in the purchase by the defendants of the feathers in October, 1917. If this plea is made good, there will be an end to the case, for there will no longer exist any just ground of complaint on the part of the plaintiff. It is plain that, in order to establish acquiescence or ratification, there must be satisfactory evidence pointing to that conclusion. It must be shown that the plaintiff has either by word or deed and with full knowledge of all the circumstances abandoned his right, and consented to the sale and purchase by the defendants of his ostrich feathers. This is a well established rule of law and needs no authority in its support; but, if any authority for it be required, it will be found in the decision of Vice-Chancellor HALL, and of the Court of Appeal in *De Bussche v. Alt* (1878, 38 L.T.N.S. 370), to which reference was made by counsel. In that case THESIGER, L.J., delivering the judgment of the Court, observed "It appears to us that, looking to the damages which would arise from any relaxation of the rules by which in agency matters the interests of principals are protected, the evidence by which in a particular case it is sought to prove that the principal has waived the protection afforded by those rules should be clear and cogent". In the present instance reliance is placed on what occurred at an interview between the plaintiff and Mr. Yule, a director of Hirsch, Loubser & Company, Limited, on the 8th August, 1918. The plaintiff indeed, was at that time aware that the defendants had purchased his feathers, and he endeavoured to get out of his indebtedness to the defendants through a compromise with them. He made Mr. Yule an offer with that view, an offer which the latter was prepared to accept. This offer was contingent on the plaintiff getting a purchaser for, or an advance on, a parcel of feathers still in the hands of the defendants. It will be as well to bear in mind what

actually took place, and the nature of the offer which, according to Mr. Yule, the plaintiff made to him at their interview. The plaintiff discussed his financial position with Mr. Yule, and gave him certain information in connection with his assets and liabilities, which Mr. Yule wrote down on a sheet of paper. On being requested to sign this paper the plaintiff declined to do so. The plaintiff had also previously handed to the defendants a second lot of feathers about 868 lbs. upon which they had set a value of £900 according to their books. The plaintiff was evidently of opinion that the feathers were worth more than that, and he proposed that he should sell these to a Mr. Simpson or to anyone who would buy them at a higher price. He had reason to think Simpson would give him £1,450 for these feathers, and he accordingly offered to pay the defendants the sum of £1,450 which he expected to get for these feathers in the possession of the defendants, and in addition to pay them £300 in cash and give them a promissory note for £800 payable on demand. In consideration of this the defendants were to write off the plaintiff's indebtedness to them, and release the feathers. Mr. Simpson, with a view of a possible purchase or advance, inspected the plaintiff's feathers in the possession of the defendants, but did not come to terms with the plaintiff. The plaintiff was then allowed further time by the defendants to see if he could obtain another person either to purchase or make an advance on the feathers and so carry out his proposal. In this he did not succeed, whereupon the defendants on 11th November, 1918, informed the plaintiff that they no longer considered the offer open, and would sell the feathers on the public market in the next week. Nothing, therefore, came of this interview, and the proposal of the plaintiff not having been accepted or acted on by the defendants, it is difficult to see how it can be said that there was any acquiescence or ratification on the part of the plaintiff. Mr. Yule, it is true, says that, at the interview between himself and the plaintiff, he did not discuss the question of the sale and purchase by the defendants of the parcels or lots Nos. 12 and 13 of the plaintiff's feathers with him, for he (Mr. Yule) looked upon that as a matter of history; and Mr. Macintosh has likewise stated that he would not discuss the sale and purchase of these two lots of the plaintiff's feathers, as he regarded this transaction as closed; but the plaintiff, apparently, did not so regard it. Now, it is argued that the proposal by the plaintiff to come to a compromise and settlement with

the defendants in August, 1918, in respect of his indebtedness to them, without any protest or objection on his part as to the sale and purchase by them of the lots 12 and 13 on October 2nd, 1917, in itself amounts to an acquiescence and ratification of such sale and purchase. Is this a sound contention? I do not think so. It seems to me that the correct view to take of what happened is that, as the proposal made by the plaintiff fell through, he is in exactly the same position in which he was or would have been, if he had made no attempt at a settlement at all. His willingness or preparedness to arrive at a final arrangement, and thereby to wipe out his indebtedness to the defendants on certain terms, cannot, on the proposal failing and being rejected by the defendants, be considered as amounting to a ratification, acquiescence, or an abandonment of his right, if any, to question and dispute the validity of the sale and purchase of his two previous parcels of feathers described as lots 12 and 13. Mr. Yule, himself, in answer to the Court frankly admitted that, if the plaintiff proved unsuccessful in getting the money, either by means of an advance or purchase, in order to release the 686 lbs. of feathers and the arrangement fell through, the parties would revert to the position as it stood before the interview of 8th August. It cannot, with reason, be said that by being ready or agreeing to compromise on certain terms, which were not carried out, the plaintiff either acquiesced in or ratified the prevous transaction, or that he has thereby waived or abandoned any previously existing right which he may have possessed to impugn such transaction. In regard to this, the remarks of Lord COTTENHAM, L.C., in *Duke of Leeds* v. *Earl of Amherst*, (2 Phil. at page 123) appears to me to be in point. "The defence, therefore, which is really intended to be set up, is not acquiescence, but release or abandonment of the party's right. For that purpose it is not only necessary to show that the plaintiff knew of the acts of waste having been committed, but that he knew of the rights which they gave him against his father, and that, having such knowledge, he did some act amounting to a release of that right. But the only evidence of knowledge on the part of the Duke, that he had a claim of a pecuniary nature against his father in respect of these acts, is what took place during the negotiation between them for a settlement of their disputes. And, if that negotiation had been carried to a conclusion, and there had been any arrangement of property consequent upon it, the circumstance of the plaintiff's concluding

that arrangement without bringing forward a claim which he knew to be outstanding against his father, might have been urged as a release of it. But the negotiation, in fact, ended in nothing; no arrangement of property was made as the result of it, and, therefore, the evidence only shows that at that time this claim was known to exist as one which the present Duke might make against the property of his father. That cannot be said to amount to an abandonment or release of a previously existing equitable right." In the absence then of any clear and satisfactory evidence of acquiescence or ratification on the part of the plaintiff, the special plea relied on by the defendants must be held not to have been established.

In the written contract of 17th July, 1916, the plaintiff agreed that, should the feathers he had delivered for sale be unsold at the end of nine months, the defendants should have the right, on giving three months' notice, to sell the feathers for and on account of the plaintiff. The feathers were not sold during the specified nine months, and the defendants gave the plaintiff due and proper notice that they would proceed to a sale in terms of the agreement. The plaintiff, however, appears to have been anxious that the feathers should not be sold at a loss, and although he did not lodge any formal protest against their being put up for sale, he was desirous that the feathers should not be sacrificed owing to the fluctuating and uncertain state of the feather market in consequence of the War. On the 29th September, 1917, the plaintiff sent a telegram to the defendants in which he asked them not to sell the feathers. The defendants, however, acting on the authority given them by the written document, proceeded to sell the feathers on the 2nd October, 1917, by auction, at the usual Municipal Feather Market at Port Elizabeth. The defendants duly notified the plaintiff that his feathers had been sold, but did not inform him that they themselves were the purchasers. The defendant discovered this subsequently, when on a visit to Port Elizabeth. Their case, as put by Mr. Macintosh, the managing director of the defendant company, is that under the agreement they had the power to sell the feathers; they were at liberty to buy at auction in the open market; and that they were under no duty to inform the plaintiff that they had purchased the feathers for themselves. The defendants, therefore, rest their position on the terms of the document. Now the relationship existing between the plaintiff and the defendants was a two-fold one. He

obtained an advance from the defendants on the feathers which he delivered to them, and he also employed them as his agents or brokers to sell the feathers for his benefit and account. The defendants, therefore, were both creditors and agents of the plaintiff.

I propose to deal first of all with the position of the defendants as creditors of the plaintiff. In connection with this the question as to the validity of the stipulation, contained in clause 7 of the agreement of the 17th July, 1916, giving the defendants authority to sell the feathers, has been raised. It has been argued, with great ability by Mr. *Beyers* that this amounts to a condition giving the creditor power to sell the subject of the pledge, and that such a stipulation for parate execution is not permissible in our law. On the other hand Mr. *Close* has, with equal ability, contended that a pact by a creditor that, on non-payment of the debt, he shall have the right to sell the articles delivered to him in pledge, in other words a stipulation of parate execution, constitutes a valid and binding agreement. It will be necessary to enter somewhat fully into the question.

Van Leeuwen (*Roman-Dutch Law*, 5.8.3) lays down that in Holland a creditor cannot stipulate for the right of selling a thing pledged to him, but the pledge must be sold in execution after a judicial decree or sentence has been obtained against the debtor. A two-fold reason is generally assigned for the introduction of this rule in Dutch practice. It is said to have been introduced in order to protect debtors and to prevent creditors taking undue advantage of the impecunious position of their debtors. An additional reason is sometimes also given for not recognizing a stipulation in favour of parate execution, inasmuch as we are told that such a right cannot be acquired and exercised by a creditor, for that will be tantamount to his taking the law into his own hands, which no one is permitted to do. We need not, however, attach any importance to this latter objection. A pressing creditor, who for instance obtains from his debtor the right to take a horse or cow from his field in order to sell it to the best advantage in settlement of the debt due, and to hand over any balance of the proceeds to the debtor, is in no different position from one who has stipulated for parate execution, and yet he is at full liberty to sell the horse or cow and give legal title to the purchaser. In neither case can it with reason be said that the creditor is taking the law into his own hands, for in both instances

he is acting with the full consent of the debtor and owner. There is more weight in the first ground advanced in support of the rule. A careful consideration, however, of what has been said and written on the subject shows that the practice in Holland was apparently not uniform, for there existed a difference of opinion among the Dutch jurists of the seventeenth century, and those of the eighteenth century in regard to the observance of the correct rule.

The majority of the older writers favour the view expressed by *Van Leeuwen* in the passage of his text to which I have referred. Thus *Merula* states that "according to our practice the custom of binding oneself by a stipulation for *parate execution* cannot take place, having been abrogated by placaats and ordinances of the Sovereign. If anyone has so bound himself it will not be effectual according to the opinion of most practitioners." (*Manier van Procederen*, Lib. 4, tit. 100, cap. 1, n. 10, published in 1592); Neostad (*supr. Cur. Decis.* 89); *Grotius* (2.48.41); Van Alphen (*Papegay*, vol. 1, p. 507 ff); Groenewegen (*De Leg. Abr. Instit.* 2.8.1); Vromans (*De Foro Compt.*, lib. 1, cap. 1, p. 7); *Voet* (20.5.6 and 42.1.48); are all to the like effect. While Van Zuphen in his *Neerl Pract.*, p. 596, n. 5, lays down that *parate execution* may take place in practice. Of the jurists, who wrote in the same century in the Dutch Provinces other than that of Holland. we find, for instance *Matthaeus* of Utrecht (*de Auct.*, lib. 1, cap. 3, n. 11, in fine, and cap. 16, n. 14-15), holding against the practice of recognizing *parate execution*, and *Huber* of Friesland, on the other hand, entertaining no objection in principle to its recognition. This acute jurist writes as follows: "Execution can take place where there is a special agreement to that effect, for although some are of opinion that, notwithstanding such a stipulation, the forms of the law are not to be departed from, it is more correct that people are at liberty to bind themselves and their property as they please, and also in such a way that one may give another special power to apprehend and sell his property directly without previous judicial sanction, though it would be safer to do so with the authority of the judge or court." (*Heed. Regts.*, bk. 5, ch. 40, sec. 46). There is also an express decision of the Court of Friesland mentioned by *Sande* (3.12.20) recognizing the validity of an agreement for parate execution; and Van der Keessel (*Dict. ad Grot.* 2.48.41) speaks of this sentence as having been pronounced *optimo jure.*

Reference is generally made by the earlier authorities to the decision in Neostadius (*Supr. Cur. Decis* 89). There the facts were these:—"C. had promised his surety to hold him harmless, and, in the event of the surety suffering loss, C. hypothecated certain land to him with the right to sell this land privately without any judicial intervention, and to recoup himself for any loss out of the price realized. The surety, having sustained a loss, had the land sold by means of the judge (*per Judicem distrahi*), and himself became the purchaser, retaining the price by way of damages for his loss. C. then appealed against this sale of the pledge. The Court of Holland, having taken cognizance of the matter, declared the sale void, which judgment the Supreme Court approved. For, just as pledges cannot be forfeited on non-payment of the money due, since in the matter of pledges the *lex Commissoria* has no place (*Cod.* 8.35.3), so the manner of selling pledges as prescribed by law cannot be departed from by means of private pacts between the parties. Whence the land in question could not have been sold except by way of sentence of the judge after preceding notices and other solemnities, and the proceeds paid over to the surety in proportion of the debt, unless, perchance, there be other creditors having prior claims to the pledge." It will be observed that Neostad. writes that the sale took place with judicial intervention. It was nevertheless set aside on appeal. We must, therefore, infer that the prescribed rules dealing with the sale in execution of pledged property had not been followed, and, as they were evidently regarded as being *publici juris*, they could not be departed from *per pactis privatorum* (*cf.* Voet, 20.5.6). The case deals, moreover, with the hypothecation of land, which remained in the possession of the debtor (C). It was not (as Van der Keessel—*Dictata ad Grot.* 2.48.41 points out), a pledge of movables delivered to the creditor and pledgee, with power to sell on non-payment of the debt.

The above was the state of the law as reflected in the writings of the Dutch jurists up to the commencement of the eighteenth century, when, soon after that, Bynkershoek appeared upon the scene. In his *Quaest. Jur. Priv. lib.* 2, cap. 13, he disputes the correctness of Merula's statement to which we have referred above, and says that he is not aware of any laws, as asserted by Merula, which prohibit an agreement of *parate execution*. Bynkershoek then proceeds to deal with the alleged practice which it is said discountenances *parate execution*, and pertinently remarks that he

would like to be informed upon what ground it can satisfactorily be argued that an agreement to give a creditor the right of *parate executiun* is unlawful. He considers that neither law nor reason forbids an agreement of this nature, and is of opinion that there is no substantial difference between an agreement by a debtor to submit to willing condemnation and one of *parate execution*. This, he adds, even Van Leeuwen is disposed to admit in sec. 3 of his Commentaries already cited. According to Bynkershoek then, as an owner can dispose of his property as he pleases, a debtor is at full liberty to agree to a stipulation by his creditor for *parate execution*, in the same way as he is free to consent to a clause providing for willing condemnation, for he has the same protection in the one case as in the other. The jurists D. Lulius and Van der Linden, in the note to their edition of Merula's *Manier van Procederen*, published in 1783, agree with Bynkershoek, and consider that he has satisfactorily refuted *Merula*. So, Decker, in his note to the *Commentaries* of van Leeuwen, Bk. 4, Ch. 12, sec. 4, Note (*c*) *ad fin.* when enumerating the various kinds of pacts, which in practice take place in regard to mortgages or pledges, includes as one of these the agreement that the thing pledged may, on non-payment of the debt, be freely sold by the creditor. Again in Note (*h*) to Bk. 5, Ch. 26, sec. 19, Decker points out that according to the *Manier van Procederen voor den Hove*, sec. 6, a debtor, against whom *parate execution* has proceeded, possesses (as in the case of *willing condemnation*) a remedy against it under certain circumstances, as where he desires to prove payment of the debt or some other just ground. Van der Keessel clearly lays it down that there is nothing to prevent a creditor lawfully selling a pledge delivered to him, where the debtor has agreed that he may do so (Th. 439, Th. 480). He has an interesting commentary in his *Dictata ad Grot.* (2.48.41), and holds with Bynkershoek that an agreement for *parate execution* is not contrary to the principle of the Common Law, *i.e.*, the Roman Law, nor of the Law of Holland; and considers that in effect such an agreement amounts to an irrevocable mandate founded on a legal ground (*justa causa*). He adds that it is a common practice to insert in *Beleeningen*, that is cautions or written acknowledgments of debt, a clause that the creditor may sell the pledge, either publicly or privately, through a broker without any judicial decree. Similarly Van der Linden (*Laws of Holland*, Bk. 1, Ch. 12, sec. 5), points out that, while in the case of a mortgage of immovable property the creditor cannot, on non-payment of the debt, proceed to execution against the property without having first obtained a judgment to that effect, creditors are generally accustomed to stipulate in the mortgage bond that on non-payment they shall be authorized to proceed to a sale of the thing pledged. He adds that, although a stipulation of this nature is *valid in law*, we will in such event act more safely in requesting the authority of the judge before proceeding to a sale. As the pact or stipulation is, according to Van der Linden *valid in law*, the reason for first obtaining judicial approbation before proceeding to a sale of the subject of the pledge, can only be to serve as a precaution against the debtor and pledgor subsequently questioning the sale on some other ground. In a note to his translation of Pothier on *Obligations*, Vol. 1, sec. 156, Van der Linden is quite clear as to the legality of a stipulation of parate execution, for he there writes "And *parate execution* may also be stipulated for by agreement, the validity of which has been demonstrated by Bynkershoek." In his *Merkwaardige Gewysden* (Celebrated Cases) Van der Linden mentions a decision of the year 1777 (casus 23), in which the facts were these: A debtor had by notarial deed and procuration *in rem suam* given to his creditor the right to have certain securities, pledged and delivered to him, valued and to take them over at the price of valuation or have them sold, and to pay himself out of the proceeds, handing any balance over to the pledgor. The debtor became insolvent, whereupon the curators of his bankrupt estate claimed that the securities pledged and delivered to the creditor should be handed up by him to them in order to deal therewith according to law in the distribution of the assets of the estate. The creditor set up the above notarial agreement perfected by delivery of the securities. The curators did not dispute the validity in law of this agreement, but contended that as the ownership in the securities pledged was at the time of the bankruptcy vested in the debtor and pledgor, these, like everything else so vested, fell under their control as curators of the estate, and, as this was a rule *publici juris*, it could not be varied by a private pact, like the above agreement, between a creditor and his debtor. The court approved this contention, and accordingly held that the securities must be handed up to the curators (see p. 161, ff. in the notes to the report). It appears from the record of this case that it could not very well have been a generally accepted rule of practice that an

agreement stipulating for *parate execution* is invalid, for otherwise the case would at once have been decided and disposed of on that ground. The case on the contrary, rather shows that the practice was the other way. Lybrecht, writing in the year 1741, adopts the rule as laid down in the earlier authorities (Ked. Practyeq., Vol. 1, p. 76, ff.). and relies mainly on Grotius and Noestad. Decis 89.

We gather from the above summary that the majority of the writers of the seventeenth century support the principle that a stipulation in an agreement for *parate execution* could not be enforced, while the later Jurists, from Bynkershoek onwards, treating of the law of the Province of Holland, appear to favour the validity of its practice. The Dutch Law would seem to have undergone a change more in keeping with the requirements of modern commercial dealings. The rule of the Roman Law was, according to Voet (*20.1.21*), and Van der Keessel (*supra*) that an agreement for the sale by a creditor of the thing pledged to him, is valid; and as there is moreover no sound reason as Huber, Bynkershoek, and the later Jurists hold, for thinking otherwise as regards the Dutch Law, it would seem to follow, in the absence of any clear statutory provision or custom to the contrary, that the practice of parate execution in the case of movables delivered in pledge to the creditor was the rule of the Roman Dutch Law at the close of the eighteenth century. The later authorities and usage of that century recognize the validity of *parate execution*.

The decisions in South Africa have apparently not sufficiently appreciated the tendency of the later Roman Dutch Law after Bynkershoek wrote his chapter on the subject, to which we have already referred, and seem to have attached rather too much importance to the older writers. The spirit of modern Jurisprudence is in favour of the liberty of contract, and there is practical wisdom in the observation of DE VILLIERS, C. J., in *Henderson* v. *Hanekom* (20 S.C., at page 519): "All modern commercial dealings proceed upon the assumption that binding contracts will be enforced by law. However anxious the Court may be to maintain the Roman Dutch Law in all its integrity, there must, in the ordinary course, be a progressive development of the law, keeping pace with modern requirements". Judge MORICE, in his interesting book, *Comparison of English and Roman Dutch Law*, is inclined to think that the Dutch rule in regard to *parate execution* has become obsolete, for he writes, " It is the common practice, for instance, when share

certificates are pledged to a bank, to give an express power of sale, and in the Transvaal this right of sale has been recognised." The learned Judge had doubtless in mind the decision in *Adler* v. *Solomon and Duff* (1892, 15th January, not reported); in that case shares were handed over by a debtor to his creditor as security for the debt, with a power *in rem suam* to sell the shares on non-payment of the debt. Held by the full Court that the agreement was valid, and that the creditor could sell without having first obtained judgment against the debtor. (Cf. Van der Linden, *casus* 23 *supra*). And in *Van Wyk's Executors* v. *Joubert* (1897. 4 Off. Rep. p. 360.) the same principle was acted on. In the Eastern Districts Court of the Cape Province the decision in *Van Wyk's Executors* v. *Joubert* was approved and adopted: (1912, E.D.L.D. *Ranuga* v. *Love and Hobson*, p. 144.). In Natal the decisions appear to be not quite uniform. *In Evan's Estate* v. *S.A. Breweries* (1901, 22 N.L.R. at page 126), and in *Trustee Insolvent Estate Lansdell* v. *Poynton* (1904, 25 N.L.R. 342), the practice of parate execution was recognized; while in *Gundelfinger* v. *Drake and Company* (1906, 27 N.L.R. p. 610) it was not. There are several cases in other South African Courts in which an agreement of parate execution has not been ratified. But, as already pointed out, in most, if not in all of these decisions, too much weight has been attached to the older Dutch Authorities, and sufficient attention has not been paid to Bynkershoek's Chapter on the subject of *parate execution* and the support given to his reasoning by the later jurists. It can serve no good purpose to refer to these decisions in detail. A summary of them is to be found in a learned article on the subject by Mr. Stapleton, in the *South African Law Journal*, Vol. 32 (1915), at page 144 ff., who holds that the trend of the later decisions is in favour of Bynkershoek's view; and in Professor Wille's useful and well written book on " Mortgage and Pledge in South Africa."

The conclusion at which I have arrived is that an agreement for the sale, by means of *parate execution*, of movables delivered to a creditor by his debtor is valid in law. It is, however, open to the debtor to seek the protection of the Court if, upon any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights.

Coming next to the relationship of principal and agent between the parties, a very learned argument by Counsel was addressed to

the Court in regard to the question of a purchase by an agent of property entrusted to him for sale by his principal. Mr. *Beyers* contended that if the sale takes place by the agent, or upon his instructions, he is not at liberty to purchase, and, if he does become the purchaser, the principal can challenge the transaction and have the sale set aside. Mr. *Close*, however, maintained that an agent is at liberty to purchase property sent to him for sale, provided he buys it *palam et bona fide*; and that a purchase by the agent at a public auction falls within these terms. Copious reference was made to the Roman Law and the Commentators thereon, to the Roman Dutch Jurists, and to modern writers and decided cases, in support of these conflicting views. It will accordingly be desirable that I should carefully consider, by a reference to general principle and authority, what has been advanced on both sides of the question.

Dealing first of all with the Roman Law, the passage generally relied on in support of the rule that an agent, instructed to sell the property of his principal, cannot himself become the purchaser thereof, is to be found in *Digest*, 18. 1. 34. 7, where the Jurist *Paulus* observes: " A tutor is not able to buy the property of his pupil. The same principle should also be extended to similar instances, that is to say to curators, procurators, and those who administer the affairs of others." (*Tutor rem pupilli emere non potest: Idemque porrigendum est ad similia, id est, curatores, procuratores, et qui negotia aliena gerunt.*) With this Lex, however, should be read other passages in the sources, and especially *Digest*, 26, 8, 5, 2 and 3, where Ulpian states that, although a tutor cannot, as such, be seller and purchaser at the same time, he may in good faith purchase the pupil's property with the consent of his co-tutor. But, if he does so through the medium of a third person (*Per interpositam personam*) the purchase will be of no effect (*nullius momenti*), for this will be regarded as *mala fides*. And, in *lex* 5, *eod. Ulpian* adds that, if a creditor sells the pupil's property, the tutor can equally in good faith become a purchaser. Again in *Code*, 4.38.5, the Emperors Diocletian and Maximian write, " Since a tutor is not prevented from buying the property of his pupil, when put up for sale, openly and in good faith, so much the more can his wife do so." (*Cum ipse tutor nihil ex bonis pupilli, quae distrahi possunt, comparare palam, et bona fide prohibetur; multo magis uxor ejus hoc facere potest.*) It is in connection with this lex occurring in the *Code* that an ingenious argument was addressed to

the Court by Mr. *Close*. His contention is that, while the *Pandects* prohibit a tutor from purchasing the property of his pupil, the subsequent *Code* has here altered the former rule, and allows a tutor to purchase the pupil's property, provided the purchase takes place openly and in good faith (*palam et bona fide*). In considering this question we must bear in mind the injunction by Paulus (*Dig. 18, 1, 34, 7,*) that curators, procurators, and all others who administer the affairs of another should be placed upon the same footing as tutors. Consequently as a tutor cannot buy his pupil's property, so curators, procurators, and agents generally are similarly prohibited from purchasing. The reason for this is obvious. The law will not countenance or recognize a transaction where interest and duty conflict. But, as it is laid down that the principle applicable to a purchase by a tutor is likewise to be applied to others in a fiduciary position, it is essential that we should entertain a correct notion of the reasons for the rule prohibiting a tutor from purchasing his pupil's property, and for the exceptions to this rule, which is similarly to extend to all others, besides a tutor, acting in an analagous capacity.

The passage in the *Code* (4.38.5), which says that a tutor is not prohibited from purchasing the pupil's property, when being sold, *palam et bona fide*, has reference to a sale held not by the tutor himself or by his authority, but to one which takes place with the consent of the co-tutor, or to a sale in execution, that is a sale by public authority. In either of these two instances the tutor is at liberty to buy his pupil's property. Such is the interpretation put upon this *lex* by our most approved civilians. Thus Dionysius Gothofredus, in his note to this passage of the Code so interprets it, for his comment is *alterius tutoris authoritate, causa cognita, et judicis decreto interveniente.* The reason for this is plainly to be gathered from the observation of Ulpian (*Dig.* 26.8. 1), that in his own matter, that is one in which the tutor has a personal concern and interest, he cannot legally give or supply his *auctoritas.* (*Auctor in rem suam tutor non esse potest*). This is, however, not the case where the tutor buys with the authority of his co-tutor or in consequence of a judicial sentence. Cujacius, our foremost expounder of the *Corpus Juris*, has several passages relating to the rule now under consideration. He deals with *lex* 5 of the *Code* (4.38), not by itself but in connection with the various *leges* in the *Pandects* bearing on the subject. In his *Commentary* on the title *De Contrah. Empt.* (*Dig.* 18.1), he dis-

cusses *lex* 34, sec. 7, cited above, which, as we have seen, lays down that a tutor cannot purchase his pupil's property, and that this principle should be extended to curators, agents, and others in a like position, and this is what he writes: "The reason for this is to prevent fraud being practised on the pupil; and because a tutor cannot be *auctor in rem suam* (Dig. 26.8.1); nor can the same person act in the capacity of both buyer and seller. But such will be the case if the tutor should purchase his pupil's property. The *lex* 5, Code 4.38, may seem opposed to this, but the answer is that these two passages from the Digest can be reconciled with *lex* 5 of the *Code*. In the latter it is laid down that a tutor is not prohibited from buying his pupil's property *palam et bona fide;* but if he buys it *per interpositam personam* the sale will be void. In the same manner it is responded in *Dig.* 26.7.56. This appears plainly from that *Lex*, and this solution is confirmed by *Digest*, 26.8.5.2." (Cujac. *Opera*, Vol. 7, page 1125: The Prato edn. of 1836-43). Again in expounding *lex* 12 of *Digest* 1.3 (*de Legibus*), Cujacius points out that "where the meaning of a *law* or a *senatusconsultum* is clear the judge should extend it to analogous cases," and he illustrates this by the very passage from Paulus in *Dig.* 18.1.34.7, that, "when it is laid down by the jus civile that a tutor cannot buy the property of his pupil, we must understand that this means that where the tutor sells such property he cannot himself purchase it, for no man can sell to himself but to another. Hence the same person cannot act in the double capacity of buyer and seller at the same time (*Dig.* 26.8.5. 2). And, similarly, the same rule should be applied to a curator, procurator, *negotiorum gestor*, etc.; for, although no specific *lex* or *senatusconsultum* exists in regard to them, we should act in the manner indicated by Paulus. The meaning or sense of the enactment rather than its mere words should be regarded." (Vol. 3, p. 251). In a third passage *Cujacius* is equally clear. Treating of *Dig.* 18.1.34.7 (*De Contrah. Empt.*), he writes that this *lex* is to be thus understood: "Where the tutor himself sells the thing of his pupil, or where the pupil sells with the authority of the tutor, the latter cannot purchase such thing, for reason does not permit that the same person should be both buyer and seller. But, if his co-tutor sells or gives him authority, a tutor can rightly purchase his pupil's property, provided he does so in good faith (*bona fide*). So a tutor can validly purchase the property of his pupil at a public auction (*ex auctione publica*). In like manner

the custodian of the patrimony or private affairs of the Emperor, the chamberlain or the advocate of the Fiscus, who cannot buy the property of the Fiscus, may nevertheless purchase the same at a sale held by the Fiscus, as if he were a stranger (*extraneus*). And it is so specially laid down in the Greek Constitution (of the Emperor Zeno) *de Jure hastae fiscalis. Code* 10.3.7" (Cujac, *Opera*, Vol. 5, p. 820).

Donellus has dealt with the question, as a whole, in a clear and comprehensive chapter, when commenting on the Code *4.38.5*. He states the matter in brief as follows: "A tutor cannot purchase his pupil's property except in certain cases. Some doubt has arisen with regard to the person who can buy the property of pupils and minors, on account of a dissenting passage in *Dig. 18. 1. 34. 7.*, in reference to what is said here in *lex* 5 of the *Code*, that a tutor can purchase his pupil's property *palam et bona fide*. It must be observed that, as a general rule, a tutor can not buy his pupil's property, nevertheless he may do so as a stranger (*extraneus*), provided he purchases openly and in good faith. If a tutor buys, he purchases either from himself or from his pupil, with his own *auctoritas*. But this he is not permitted to do, for a two-fold reason. He cannot act in his own person both as vendor and purchaser; nor can he give his *auctoritas* as tutor to a transaction in which he is interested (*in rem suam auctor fieri non potest*), although it may have been open and in good faith (*palam et bona fide*). But a tutor may purchase, where he is a stranger (*extraneus*), openly and in good faith. Now when is he to be regarded as a stranger? The answer is if he buys a thing from some one other than his pupil, who has the right to sell, and consequently he can purchase from his co-tutor. If a creditor sells the tutor can rightly purchase from him. So, as a Magistrate has the power to sell, the tutor can validly buy what is sold in pursuance of a judicial decree. In these instances a tutor justly purchases as a stranger, if he does so openly and in good faith, as here in this *lex* 5 of the *Code*. By openly (*palam*) is to be understood not at the sale (*auctione*) as some have interpreted it, but so that he openly declares that he is buying from his co-tutor (*ut tutor ipse profiteatur se emere a contutore*), which in itself is tantamount to purchasing *bona fide*. This clearly appears from *Dig.* 26.7.54. *Palam* is the opposite to acting *mala fide*, and it is possible for a tutor to purchase *mala fide* from a co-tutor, a creditor or a judge, as for instance where the tutor does so

per interpositam personam. So, a tutor may also purchase as *extraneus* things of his pupil, which he has sold to an independent buyer, where the latter has become insolvent and failed to pay the purchase price. There the tutor may retain the things for the same price, and in this particular instance the tutor will be considered to have bought *palam et bona fide.* (*Dig. 26. 7. 56.*) The conclusion is that, except in the instances specially mentioned where the tutor is regarded as a stranger (*extraneus*), he cannot purchase the property of his pupil. The same principle is to be applied *ad similia, i.e.* to curators, agents, and the like." (*Donellus. Opera* Vol. 8, pp. 747-50. *Florent. edn.* 1840-47.) If we turn to Perezius *ad Cod l.c.* we find that, in his concise and pertinent commentary, he places the same construction on the words *palam et bona fide*, occurring in *lex 5.* He observes " A tutor cannot buy from his pupil, nor can a curator from his ward, but they are free to purchase from someone other than the pupil or ward, where they are in the position of a stranger (*extraneus*) as in the case here put in *lex 5;* for a purchase can be made from a co-tutor openly and in good faith, and even from the pupil himself with the authority of the co-tutor, since the tutor who buys is not himself able to give his *auctoritas* to a matter in which he is personally concerned." (Perez. *ad Cod. 4. 38. 5.*).

From what is laid down in the sources and expounded by these eminent interpreters of the civil law, the following conclusions can, with safety, be drawn. Firstly, the reason for the rule that a tutor cannot purchase the property of his pupil is twofold. It is founded on the principle *auctor in rem suam tutor non esse potest*, and no one can be both seller and buyer of a thing at the same time. Secondly, a tutor is, however, at liberty to purchase his pupil's property, where the reason for the rule does not apply; that is to say, where he is in the position of a stranger (*extraneus.*) Thus, where the sale to him takes place by or with the *auctoritas* of another entitled to exercise this authority, a tutor can buy his pupil's property; for instance from or with the consent of his co-tutor, having knowledge of the circumstances, or under a judicial decree.

Whatever doubt to the contrary may have existed, Cujacius and Donellus have rightly pointed out that the passage occurring in *Code* 4.38.5 is easily reconcilable, as they have demonstrated, with the rule formulated by Paulus in *Digest* 18.1.34.7, and with other *leges* occurring in the *Pandects.* I venture to think that

a careful and critical examination of *lex* 5 of the *Code* makes this quite plain. When the Emperors there state that " since a tutor can buy openly and in good faith the property of his pupil, so much the more can his wife do so," they introduced no new law. They merely applied existing law to the case submitted to them for decision. They had evidently been approached on the point of a purchase of a pupil's property by the wife of his tutor, and they gave an affirmative answer to the question submitted for their determination. The Imperial reply then introduces nothing new, for it is quite clear that, at the time when the Emperors pronounced this decision and for some period before that, a tutor could buy his pupil's property from his co-tutor *palam et bona fide*, and so he could likewise purchase such property when sold under a judicial decree, as in those instances the purchasing tutor would be in the position of a stranger. He would not be supplying *auctoritatem in rem suam.* Such appears to me to be the true exposition of what is said in *lex* 5 of the *Code*, and it is in keeping with the view expressed by our two leading interpreters of the *Corpus Juris*, to whom I have already referred.

I find that Merenda places the same interpretation on *lex* 5 of the Code. In his *Controvers. Jur.* (Vol. 1, lib. 2, cap. 36) he deals fully with the controversy, and at the head of the chapter puts the question " Whether a tutor can be *Auctor* in his own matter where he acts openly and *bona fide* "? This question is based by him on what is laid down by Ulpian in *Dig.* 26.8.7. Merenda observes that some maintain the affirmative, an others the negative, and adds that he agrees with the latter opinon. In regard to *lex* 5 of the *Code*, he states in n. 9 that Faber considers that this text has reference to an execution sale (*sub hasta facta*) which, adds Merenda, is probable. Faber (*Cod.* 5, tit. 35, def. 2) is in agreement with what has already been said in regard to the general rule that a tutor cannot purchase his pupil's property, except from a co-tutor, or under a judicial decree. Fachinaeus (*Controv. Jur.* lib. 2, cap. 45, p. 542, Cologne Edn. 1626). Heineccius *ad Pand.* (26.8, sec. 338, page 442, Vol. 5, of the Geneva Edn. 1748) and others are to the like effect. And so is Brunnemann (*ad Cod.* 4.38.5) who has, however, been cited by counsel for the defendants in support of the contention that an agent is at liberty to purchase his pupil's property *palam et bona fide.* But I do not think that this is the unqualified meaning of Brunnemann's text, for the following is what he has written on the subject. "A tutor

(so much the more his wife) can purchase from his pupil, provided he does so openly, in good faith, and with the consent of his co-tutor, having knowledge of the circumstances and giving his *auctoritas* (*lex* 5, sec. 2, *Dig.* 26.8, 54, *Dig.* 26.7), or also with the sanction of the judge, for the sanction of a judge is equivalent to the authority of a tutor. And a tutor then is prohibited when he acts as tutor (*ut tutor*), either secretly, or through the interposition of a third person, but not when he acts openly, in good faith and as a stranger (*ut quilibet ex populo*)." This learned commentator, like the other jurists already mentioned, here recognizes the general rule that a tutor cannot be *auctor* in his own matter, and says that he can only be a purchaser of his pupil's property, where he buys *palam et bona fide* from his co-tutor, or in consequence of a judicial sentence. Such is the interpretation which Brunnemann has put upon *lex* 5, of the *Code*. His meaning is obviously that no tutor can buy *palam et bona fide*, where the sale takes place by, or upon the instruction of, the tutor himself. Voet (18.1.9) has concisely summed up the matter, and is in agreement with what has already been said. But as he likewise was cited in support of the defendant's case it will be necessary to refer to the passage in Voet a little more specifically.

In the text of Voet, which I have mentioned, the learned author writes as follows:—"In regard to a tutor he can buy the property of his pupil openly at a public auction (*palam et auctione publica*), and likewise from his co-tutor, if the transaction take place in good faith." Voet cites Matthaeus and Groenewegen, as well as the sources including *Code* 4.38.5, in support of his statement. Mr. *Close* referred to Voet and Matthaeus in order to establish the argument that in Roman-Dutch Law a tutor is free to purchase his pupil's property at a public auction, where he acts openly and in good faith. He contended that whatever the original meaning of the words "public auction" may have been in the Roman Law, they are used by the Roman-Dutch writers in their modern meaning, denoting a sale by means of bidding open to all, and where the property or things sold are knocked down to the highest bidder.

The material point is not the meaning of the term *auctio*, but in what sense do the jurists understand the expression *publica auctio*. After having defined *auctio* (in his Book *De Auctionibus*, Lib. 1, chap. 2), as a sale in which the thing to be sold is openly knocked down by the crier to the highest bidder, Matthaeus, in

chap. 3, n. 2, divides auctions into *public* and *private*. "By the former, he says, is to be understood a sale where the fiscus or the magistrate, on behalf of the State, proclaims certain goods for sale, or where by authority of the judge the property of a judgment debtor or of a debtor in hiding is sold; and by the latter whenever private persons voluntarily hold a sale, whether it be through bankers at their banking tables, or without them in open places and streets. In this distinction between the two, not the place but the person is regarded. For if we pay attention to the place, then every auction will be public, since it is held in the market place, at the bankers' tables, or even at a house, a place nevertheless open to anyone." According to Matthaeus then *publica auctio* does not denote a sale by bidding held in a public place, or to which anyone has access, but a sale held by public authority. When therefore at the commencement of chapter 10, Matthaeus states that "it is handed down by the jurists as a rule that he, who is otherwise prohibited from buying, can nevertheless purchase, if a thing is being sold by *public auction*," his meaning is that the sale by auction takes place by public authority. Thus he observes a patron of the fiscus, or the custodian of the private property of the prince cannot buy the property of the fiscus or the private patrimony of the sovereign, but they may purchase in good faith at an auction held on behalf of the State. So a tutor is not able to buy from his pupil, nevertheless, if property of his pupil is put up to auction, he will also be allowed to take part in the bidding. Matthaeus refers to the Code 10.3.7, *Dig.* 18.1.24.2, and *Dig.* 26.8.5.2, and to Cujacius *ad Cod.* 10.3.7, in support of his text. Regard being had to the already mentioned exposition by Cujacius of this passage of the *Code* and of the passages from the *Digest*, which Cujacius has explained, and seeing that Matthaeus quotes him in support of his own statement, we may reasonably infer that, when Matthaeus says that the tutor will also be allowed to bid at an auction of the pupil's property, he means a public auction, that is one held by public authority. Nor can he be supposed to have intended to convey anything contrary to what is laid down in the sources on which he himself relies. But such would be the case if we adopt the contention of the learned counsel for the defendants.

Bearing the above in mind, and the distinction drawn by Matthaeus between a *public* and a *private* auction in law, we should attach the same meaning to Voet's language, when in 18.1.9 he

tells us that a tutor can buy his pupil's property *palam in auctione publica*, especially as Voet cites Matthaeus *de Auct* 1.10.1. The words there used by the latter are *si res publica per auctionem veneat*, which is equivalent to the *auctio publica* of Voet and of Groenewegen *ad Cod.* 4.38.5, who is likewise referred to by Voet. I may also add Groenewegen *ad Dig.* 42.5, *lex* 16, where he uses *in publicis auctionibus aut subhastionibus* as denoting a sale in execution of immovable property. And here it may be noted, as Glück points out (vol. 16. sec. 974, *in fin.*), that *subhastatio* is the proper term employed in law to indicate a public sale in execution of a *res immobilis* (cf Voet, 18.3.23). *Publice venire aut emere* denotes in law a sale by public authority, as we may also gather from Gaius *Com.* 4.146, who mentions the purchase of property belonging to the State (*sectorium*), and tells us that those persons are called *sectores*, who buy things under authority of the State or the people (*qui publice bona mercantur*). Such, I venture to think, is the correct meaning of Gaius' text, as translated by Tomkins and Lemon in their English edition of the Commentaries of this jurist. If we turn again, for a moment, to Dion. Gothofred, we observe that in his note 28, *ad Dig.* 18.1.34.7, he states that a tutor can purchase his pupil's property in *auctione publica et palam*, and so can his wife. He cites *lex* 5 of the *Code* 4.38, and on this *lex*, as we have seen, he says in a note that a tutor can buy the pupil's property, *alterius tutoris auctoritate, causa cognita, et judicis decreto interveniente.* It seems, therefore, clear that Gothofredus uses *publica auctio* in the sense of a sale by public authority, such as, for instance, one held *decreto judicis.* So Wissenbach, who was Professor at the University of Franeker in Friesland, and a contemporary of Van Leeuwen, leaves us in no doubt on the subject. What he has written shows not merely the true meaning of the words *publica auctio*, in Roman-Dutch Law, but also fully establishes, like the commentaries of his predecessors, who have already been mentioned, the true position of the tutor in regard to a purchase of his pupil's property. In his comment on *Code* 4.38.5, he writes, "*Tutor rem pupilli emere non potest. Dig.* 18.1.34.7. *Obstare videtur lex* 5. *Tutor nihil ex bonis pupilli, quod distrahi potest, comparare prohibetur. Resp. Tutor, ut tutor,* i.e., *a se ipso, vel a pupillo, se auctore, rem pupilli emere non potest. Dig.* 26.8.5.2. *Dig. d.l.* 34. *Tutor vero ut extraneus quilibet potest; nempe, si res pupilli palam bona fide, publicaque auctione distrahatur sub hasta, tutor ad licitandum admittitur. Dig.* 41.4.2.8; *Dig.* 26.8.5.4." *Voet* indeed in one passage (18.5.16), uses the words *publica auctio* in a double sense, to denote first of all, a sale in execution, which is a proper application of the terms; and lower down, in the same paragraph, he extends *publica auctio* to the case of a sale of property held at the instance of its private owner. But this is an exceptional use of those words. Both Berwick, in his translation of Voet's *Commentary*, and Mr. MacKeurtan, in his ably written Book on *The Sale of Goods*, have very properly given the reader a warning not to identify the words *publica auctio*, occurring in Roman and Roman-Dutch Law, with the ordinary modern acceptation of those terms. It appears, therefore, from what has been premised, that Matthaeus is correct when he writes that the distinction between a *public* and a *private* auction relates not to the place where, but to the authority by which, the sale by bidding (*auctio*) is held. The conclusion, therefore, is that, when the jurists state that a tutor can buy his pupil's property at a *public auction* they have in view a sale by means of bidding held by authority of the State or Government, under which is included the decree or sentence of a judge, acting in his official and public capacity. It also follows that, if a tutor sells the things of his pupil at an ordinary auction sale, he cannot buy any of these things *palam et bona fide*, for the simple reason that the auction is held by his own authority as tutor, and, as already shown, a tutor cannot be *auctor in rem suam.* The mere employment by him of an auctioneer or crier does not in any way alter the legal character of the sale—it would remain a *private* and not a *public* auction in the sense of the law.

Reference was also made to Pothier, but the passages cited, namely, 18.1.22, and 26.8.13 and 14, merely collate the various *leges*, and take the matter no further than has already been demonstrated. And in his treatise on the *Contract of Sale*, sec. 13, he lays down the general rule that "we are not at liberty, either by ourselves or by the interposition of other persons, to buy those things, which we hold in trust." He illustrates this by reference to the position of a tutor who cannot purchase the property of his pupil, nor can an administrator buy the goods of which he has the administration. Like *Cujacius, Pothier* observes that the rule is introduced for the purpose of preventing fraud on the part of the tutor, and when the reason for it ceases, as where the pupil's property is seized and

sold by a creditor, the tutor can become the purchaser. There is, accordingly, nothing in Pothier, to whom I have been referred, which supports the contention on behalf of the defendants. On the contrary, this great jurist writes in maintenance of the principle that persons in a fiduciary capacity cannot deal with the property entrusted to their care in a manner detrimental to their trust, and in furtherance of their own interests. This is not merely the rule of the Roman Law and of those legal systems which are based upon the civil law; it is a rule of general application founded on sound and just principles, as rightly remarked by Story (on *Agency*, sec. 210).

I have gone, at somewhat unusual length, into the question of the purchase by a tutor of his pupil's property, and the reasons in support of the principle, which does not permit him, *qua* tutor, to buy such property, inasmuch as the same rule, laid down in the sources and by the jurists as applicable to a tutor, likewise extends to agents, executors and all others placed in an analogous position (*Dig.* 18.1.34.7). Hence the importance, I may say the necessity, of carefully tracing and ascertaining the law in regard to a purchase by a tutor of his pupil's property. Consequently an agent cannot in Roman and Roman-Dutch law purchase property entrusted to him for sale by his principal. (*Voet* 14.3.4 and 18. 1.9; *Holl. Consult.*, vol. 3, Amst. cons. 145 n. 7). At the end of this consultation the jurisconsult, however, states that where a factor, on the receipt of goods for sale from his principal, has promptly taken them over and at once, in good faith, credited his principal with the price, at the ruling market rate, and has in turn sold the goods to third parties, such a transaction should be allowed to stand in a statement of account between the factor and the principal, unless the latter can satisfactorily show that he has been prejudiced thereby; for it speaks for itself that one cannot act both as seller and buyer. The reason suggested for allowing such a transaction appears to be, according to *Voet*, who cites this consultation, that it can make no difference whether the principal obtains the true market value from the factor or from a third party. But, as pointed out by JUTA, J.P., in *Anderson* v. *Hargreaves* (1914, C.P.D. 1031), such a proceeding is open to objection, and, moreover, as the jurisconsult admits that it speaks for itself that one cannot be both purchaser and seller in one and the same matter, the *onus* should be thrown on the factor to prove the *bona fides* and the validity of the transaction, and not upon the

principal to establish the existence of prejudice or loss. But, be that as it may, this special instance, mentioned in the opinion at the end of the Dutch Consultation, is different in its circumstances from the facts now before the Court in the present case. The rule of practice, however, as laid down in this Consultation (n. 7), is that " no factor can sell to himself the goods of his principal and retain them as his own, for it is obvious that to establish the sale of a thing two persons are required, a vendor and a purchaser. Nor can the factor do so through the interposition of another person, to whom, he might, for his own benefit, fictitiously sell the goods." This principle, which, as I have already shown, is founded on *Dig.* 18.1.34.7, and other passages in the Corpus Juris, was adopted and enforced by BELL and WATERMEYER, JJ., in *Forbes Still & Co. v. Sutherland* (2 Searle, 231). The decision in that case was approved in *Hargreaves* v. *Anderson* (1915, Ap. Div. 519). In both these cases agents appointed to sell property became the joint-buyers thereof together with others, and the Court held that they were not entitled to become purchasers of such property. The sale in each instance was one out of hand and not by auction; and hence SOLOMON, J.A., in *Hargreaves* case (at p. 523), observed " It is true that in the case of a tutor, an exception was admitted in Roman-Dutch Law, where the purchase was made by him openly at public auction (*Voet* 18.1.9), and the exception was recognised as law in the case of *Louw* v. *Hofmeyr and Others* (B. 1869, p. 295). Whether a similar qualification should be allowed in the case of an agent is a question with which we are not concerned in the present case, in as much as this was not a sale by public auction ". If the report of this case is correct, then there appears to be some misconception as to the facts in the case of *Louw* v. *Hofmeyr*. The instance put by *Voet*, to which the learned Judge has here referred, relates to a purchase by a tutor of his pupil's property at a *public* auction; whereas the sale to Hoymeyr was made to him by his co-executors out of hand, after the property had been put up at an ordinary auction and no sufficient bid had been obtained. This sale to Hofmeyr was challenged by Louw, one of the heirs, but the Court held, upon the evidence that the sale was a *bona fide* one and that the price paid was the full market value. What is, however, important is that the Appellate Division came to no decision as to the question of an agent's ability to purchase at an auction property entrusted to him for

sale. It left that entirely an open matter; nor did it express an opinion as to the meaning of the terms *public auction*. The true import of these words has already been explained. They denote in law, unless the contrary appears from the context, an auction sale held by public authority, whereas an ordinary auction sale, to which those members of the public who care to attend have free access, is held to be a private auction. Nor is what was said by INNES, C.J., in *Ex Parte Eckhard* (1902, T.S. 169) in any way opposed to this view. That was an application by an executor for confirmation of the sale of an immovable belonging to the estate out of hand, the heir, moreover, in the estate being a minor. The Court confirmed the sale, and laid down the principle that sales of immovable property by executors should, as a general rule, be held by public auction. We must take it, that what is here meant by the Court is an ordinary auction sale, one held by the private authority or instruction of the executor. And such is likewise the meaning of *Matthaeus* (*De Auct.*, 1.3.12), who does not state, as submitted by counsel in *Eckhard's* case, that an executor must sell by *public* auction, for that would be inconsistent with what *Matthaeus* has laid down in the previous sec. 2 of the same chapter, since *public auction*, according to him, denotes an auction held by *public authority; Matthaeus*, therefore, in sec. 12 simply, and correctly, says that sales of property conducted by executors of last wills should, according to the commentators take place by *auction*, and that they in support of this view adduce as reason that executors both of judicial sentences and of last wills are on a par. But, adds *Matthaeus*, this supposed analogy lacks the authority of any law to that effect; although he does not dispute that it seems reasonable that the sale should take place by *auction*, that is by means of bidding, and not by private treaty out of hand. Thus understood, and I think this is the sense of what he has said, there does not appear to be anything in the text of *Matthaeus* inconsistent with what is laid down in *Eckhard's* case. *Matthaeus* does not lay down that where, in a given instance, it appears to be for the advantage of the estate to sell a thing out of hand, such cannot be done by the executor, especially with the leave of the Court.

Much stress was laid on the circumstance that in our law an executor can purchase from his co-executor, and that he can also buy property belonging to the estate of which he is an executor

and put up by him for sale by auction, if he does so *palam et bona fide*. The practice, it was argued, of moving for the confirmation by the Court of such a purchase by an executor, is simply a precautionary measure. Motions of this kind are merely made by executors to prevent any questioning of a purchase, effected by them of property in the estate, by the Master, to whom executors have to submit their accounts, or by the Registrar of Deeds, on the passing of transfer of the property purchased. As a matter of strict law, however, no confirmation by the Court is necessary. And it was, consequently, contended that an agent is in the same position as an executor, and can purchase property of his principal at an auction sale *palam et bona fide*. Now, it has, no doubt, been recognized and adopted that an executor in an estate can purchase property belonging to the estate of which he is executor, but, unless confirmation by the Court of such a purchase be obtained, the transaction can be impeached by anyone interested in the estate, and very properly so. In principle a purchase of this kind is open to serious objection. It does not appear from the Reports when precisely the first application was made to the Court by an executor for confirmation of a purchase by him of property belonging to the estate under his administration. The practice has existed for some considerable time, and, to my personal knowledge, it is at least half a century old. As to the reason for approaching the Court by an executor, in order to obtain its sanction to a purchase by him of property belonging to the estate, I do not think it is to be sought in the circumstances suggested by counsel. I rather conceive that it is traceable to other causes. It probably owes its origin to what we find laid down, for instance by Brunnemann, *ad Cod.* (4.38.5), already mentioned, where he writes that the sanction of the judge is equivalent to the *auctoritas* of the tutor. Hence a purchase by an executor without such sanction is liable to be set aside at the instance of any interested party. In addition to this, it often happens that there are minors, who are heirs in the estate, and it follows that the purchase of property by an executor in which they have an interest would require judicial confirmation. It is in this way that the practice very likely came into existence. If a tutor can purchase his pupil's property with the authority of a co-tutor, he can purchase likewise with the authority of the Court. But the Court will carefully deal with each application made for its approval and sanction. Confirmation will only be granted after

full enquiry into the circumstances connected with the purchase by the executor (*causa cognita*), and after the Court has satisfied itself of the *bona fides* of the transaction, and that it is for the benefit of those interested in the estate that the sale and purchase should be confirmed. The practice is, however, not to be extended, and its impropriety has often been pointed out. There are, for instance, the pertinent remarks of Mr. Justice STORY in his *Equity Jurisprudence* (secs. 321-2), and in his book on *Agency* (sec. 210); and our own judges have also animadverted on the subject. Thus BELL, C.J., said that the principle of allowing an executor to purchase property belonging to the estate under his administration "may by some be regarded as a vicious law" (*Louw* v. *Hofmeyer*, Buch., 1869, 294); and more recently, JUTA, J.P., remarked: "It is certainly a very bad principle that a person in a position of trust, whose duty it is to sell a thing at the highest price, should be allowed to buy that thing, which he naturally desires to obtain as cheaply as possible. It should not be extended beyond the strict allowance of the law." (*Ex parte Van Niekerk*, 1918, C.P.D. 109.)

There are some early cases in the Cape Supreme Court dealing with a purchase by persons in a fiduciary capacity. Thus in 1845 a sale by auction by a trustee, who also acted as the auctioneer, to a third person in trust for the minor children of the trustee, was set aside (*In re Insolvent Estate of Edward Philips*, Buch. 1869, 321.) And again in 1853, the purchase by a trustee of an insolvent estate, at an auction sale, for the benefit of his minor children was similarly set aside (*Steytler* v. *Canon's Trustee*, Buch. 1869, 322). In the still earlier case of *Norden* v. *Still and De Villiers* (2 Menz. 38) it appears that a trustee had for thirteen years been cognisant of and acquiesced in a purchase made in the insolvent estate by the auctioneer employed to sell the assets of the estate. The Court ruled that under the circumstances the trustee could not refuse to pass transfer to the purchaser. It was also held that a purchase by an auctioneer is not void *ab initio*, but voidable according to the circumstances, which must be specially pleaded. The *ratio decidendi* of this case is apparently that the long silence of the trustee amounted to a tacit consent to the purchase by the auctioneer.

I was also referred to several cases in the Province of Natal. In *Baxter* v. *Benningfield* (4 N.L.R. 143), property belonging to a certain firm was sold at an ordinary auction. The property was

bought by E. qq. for himself and one Benningfield, the defendant, who was executor of one of the deceased partners of the firm, and who also acted as the auctioneer at the sale. The Court held that: "Trustees and guardians cannot purchase the trust property, except from co-trustees and co-guardians, or at a public auction *palam et bona fide*." And, as the property had been purchased through the intervention of a third person—*per interpositam personam*—the purchase did not take place *palam*, and was therefore bad. It is, however, not explained what is to be understood by "public auction." If these words are here used in their ordinary modern signification then the proposition laid down by the Court is open to objection for the reasons already stated. CONNOR, C.J., referred to Pothier's *Pandects* (18.1.22), where that eminent jurist observes that a tutor is free to purchase his pupil's property at a public auction (*auctione publica*). The learned judge also remarked that while Wissenbach *ad Cod.* 4.38.5 speaks of a public auction *sub hasta*, these two last words are not to be found in the *leges* cited by him. That is so, and I may add that neither do the words *auctio publica* appear in these *leges;* yet Pothier by employing the words *auctione publica* wishes us to understand that a tutor can purchase his pupil's property at such an auction, *i.e.*, one held by public authority, as, for instance, an execution sale held in consequence of a judicial sentence. The Court, therefore, I speak with every respect, appears to have misconceived the meaning of *publica auctio* as used by Wissenbach and Pothier. What is, however, of importance is that all three members of the Court were agreed that the principle of our Common Law must govern the case, and on appeal to the Privy Council, Their Lordships upheld the doctrine of our law that a purchase by a person in a fiduciary position, such as a trustee, a tutor, or an executor, is either void or voidable. (*Benningfield* v. *Baxter*, 12 A.C. at page 179). In the subsequent case of *Mayer* v. *Natal Central Sugar Co.* (5 N.L.R. 323) the position is, however, made a little more clear. There it was held that a purchase by a company at a judicial sale by auction where a director of the company was the auctioneer, falls within the general rule of a purchase by trustees of trust property. CONNOR, C.J., observed "The whole question raised on this argument on exception is whether judicial sales are excepted from the general rule laid down in *Baxter* v. *Benningfield*? The authorities cited show that the principles of that case extend to judicial sales, and I, therefore, think the exception

must fail. There is no ground for saying the rule only applies to such sales where there is fraud. The rule is a general one, and was enacted on account of the dangerous consequences to be feared, whether they happen or not. What the declaration states is that, though the auctioneer was appointed by the Court, yet that this prevented his company from buying; and the only ground of exception raised is that a judicial sale is not within the general rule; but the authorities are otherwise." And, similarly, in the later case of *Parks* v. *Bester*, (1902, 23 N.L.R. 162), where an auctioneer sold by auction, under an order of Court, certain property and knocked it down to the highest bidder, a syndicate of which he was a member, the consent of the owner not having been obtained, the Court ruled that the sale should be set aside.

Now in regard to the contention that an agent is exactly in the same category with an executor, I do not think that the two cases are precisely analogous. The executor has to liquidate the estate, the agent is merely appointed to sell property entrusted to him. But while the scope of their duties varies, they are both in a position of trust and are bound to promote the interests entrusted to their keeping. They cannot take any advantage to themselves out of the business for which they have been appointed, nor derive any benefit therefrom, beyond such commission and charges as the law allows in the particular instance. The purchase, moreover, by an executor of property belonging to the estate of which he is executor is itself an anomaly, and an exception to the general rule, and is not to be extended. It would indeed be a very objectionable and even dangerous thing in its consequences, if the law were otherwise, as the circumstances connected with the sale of the ostrich feathers in the case now before the Court clearly show. Taking it that when the defendants put up the feathers for sale on the 2nd October, 1917, they had a right to sell under the written agreement with the plaintiff, they were nevertheless, although creditors, bound to act in the interests of the debtor and endeavour to obtain the best price for the feathers—such is a creditor's duty in dealing with the subject of a pledge, or of property delivered to him by his debtor upon which the creditor has made an advance. There is evidence, for instance, that of Mr. Rosenbaum, an experienced feather buyer and an independent witness, that it was not a good time for the sale of a large parcel of prime feathers. It is also clear to me, for the reasons given by Mr. *Beyers* in argument, that, upon the evidence, feathers of

good and prime quality will fetch higher prices if put up in smaller parcels. We have also the evidence of Mr. A. D. Myers, who was very anxious to buy these feathers. When Mr. Claude Meyer, the representative of the defendants, as selling brokers, who had placed these feathers on the auction tables for sale, took part in the bidding, he refrained from further bidding. He gave as his reason for this that no sensible man will bid simply against the selling broker. He also told the Court that he thought that the feathers were bought in by the selling brokers on behalf of their principal, and so did Mr. Brewer, a witness for the defence. Mr. Henderson, who was likewise desirous of purchasing these feathers, which were certainly of prime and superior quality as admitted also in the plea, and was a witness called by the defendants, stated that the fact of the selling broker taking part in the bidding may have a depressing effect on the sale. And there cannot be much doubt about the effect that would be produced on buyers when the seller is also a bidder at the auction. It would simply, as observed by BEIL, C.J., in LOUW v. HOFMEYER (*supra*) be calculated to prevent others from coming forward to buy, and thus spoil or stop the sale. In addition to this the defendants had advertised themselves generally as selling brokers only; and hence it can easily be understood that Mr. A. D. Myers and others, as well as the plaintiff subsequently, was brought under the impression that the feathers were bought in for account of the principal. It was urged by Mr. *Close* that the sale took place on the public market, conducted by a public official under municipal authority, derived from the Crown through statutory provision. With this I cannot agree. The sale was in every sense one held by private authority of the defendants themselves. They, and not the market master controlled the sale. The municipal market master simply sells the various lots of feathers laid on the table for sale. His only concern is to sell and earn the commission of 1 per cent. on each sale. Whether the feathers are genuinely sold or bought-in makes no difference, in each case 1 per cent will be due and payable. If, however, the feathers are withdrawn then simply ½ per cent will be due and payable. The evidence of Mr. McIntosh, and of Mr. Claude Meyer, shows that when the feathers were put up the intention was to buy them in any case, and Mr. Claude Meyer admitted that there was not any prospect whatever that the feathers would reach 90s. Nor did the defendants disclose to the plaintiff, when tendering him their

account-sales of the 2nd October, 1917, that they themselves had purchased the feathers. At this sale then, under the sole direction and control of the defendants, they bought the feathers for the sum of £1,284 9s. and subsequently resold the feathers, it was stated, at £4,268 5s. for their own account at a considerable profit. I do not think that under the circumstances the purchase by the defendants can possibly stand, and the plaintiff will be entitled to whatever profits the defendants have made on the resale of his feathers. Such is the natural consequence where a person in a fiduciary capacity obtains any benefit or advantage for himself out of the property committed to his keeping and administration. That this is in accordance with the sources of our law and the exposition of the Jurists thereon and of the decisions of our Courts has been already demonstrated. In the most recent and authoritative case on the subject INNES, C.J., observed "The doctrine is to be found in the Civil Law, and must of necessity form part of every civilized system of Jurisprudence. It prevents an agent from properly entering into any transaction, which would cause his interests and his duty to clash. If employed to buy, he cannot sell his own property; if employed to sell, he cannot buy his own property; nor can he make any profit from his agency save the agreed remuneration; all such profit belongs not to him, but to his principal." *Robinson* v. *Randfontein G.M. Co.* (1921, A.D. at p. 178). In the present instance the defendants may have considered that they were proceeding within their rights in acting as they did; but in doing so they acted in a manner which the law does not permit.

As the plaintiff stated in court that he does not dispute the mere figures given in the account sales sent him by the defendants in October, 1917, the judgment of the Court will be that the purchase by the defendants of lots 12 and 13 of the plaintiffs feathers is set aside and that the defendants are ordered to render the plaintiff an account of their dealings with the plaintiff's feathers described as lots 12 and 13, and to state therein the amounts which these two lots realized on their subsequent resale by the defendants. The plaintiff is declared entitled to the purchase price with interest at 6 per cent. obtained by the defendants on the said resale, less the amount of his indebtedness to the defendants. The plaintiff is also entitled to the costs of suit. The defendants are entitled to the amount of £680 8s. 4d. claimed in reconvention in the account with plaintiff less commission and compound

interest. In regard to what was urged by Mr. *Beyers* that the defendants are not entitled to charge commision on the sale and purchase by themselves as agent; nor for storage of the feathers, I would, so far as the charge for commission is concerned, draw attention to what was said by SOLOMON, J., in *Hargreaves* v. *Anderson* (*supra*). And as to the storage of the feathers, I think that after the expiration of the nine months, as mentioned in the written agreement, the defendants would be entitled to a reasonable charge for storage, as to which the parties may probably come to some mutual arrangement. These observations do not form part of the Judgment of the Court, and I merely make them in order to simplify matters. Nor can compound interest be allowed the defendants.

Plaintiff's Attorneys: *C. & A. Friedlander;* Defendant's Attorneys: *Van Zyl & Buissinne.*

VAN NIEKERK v. PHILIPSTOWN SCHOOL BOARD.

1922. *May* 22, *July* 14. GARDINER, A.J.P. and WATERMEYER, J.

School.—Farm school teacher.—Dismissal by farm manager.—Liability of school board, sec. 92, *Ordinance No.* 5, 1921.

In a magistrate's court a farm school teacher claimed damages against a school board for wrongful dismissal. It was proved that the manager of the farm school had dismissed plaintiff but it was not shown that in doing so she had acted as the duly authorised agent of the board or that the board had made itself a party to the action of the manager. The magistrate having granted absolution from the instance,

Held, that the appeal should be dismissed.

Appeal against a decision in the court of the magistrate at Philipstown. The facts appear from the reasons for the judgment.

W. H. Mars, for the appellant.

C. N. Thompson, for the respondent: See *East London Municipality* v. *Legate* (1915, A.D. 313).

Mars in reply.

Cur. adv. vult.