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himself. (*Cf. Pocock's Trustee* vs. *Pocock's Executors, Buchanan* 1869, p. 153; *cf.* § 46 of the Insolvency Law.) The date of the provisional sequestration was October 28th, 1889. The transfer to Wood shews that it was passed on October 17th, 1889, eleven days before the insolvency, although it was only registered four days after the sequestration. The legal capacity of any man to give transfer must be decided as upon the date of passing transfer, and not as at the time of registration, whenever it may happen that the Registrar chooses to register.

Curlewis, in reply: The case of *Pocock's Trustee* has nothing to do with this case; nor is the case of *Biden's Trustee* applicable. Biden was merely a broker. *Harris* vs. *Buissinne* is clearly applicable.

KOTZÉ, C.J.: The Court is of opinion that as Du Preez has sold his share in the syndicate to Wood before his sequestration, but the transfer was not registered until after the sequestration, the case of *Harris* vs. *Buissinne's Trustee* in 2 *Menzies' Reports* is applicable. Consequently the transfer must be set aside, with costs.

AMESHOFF and MORICE, JJ., concurred.

JONES, N.O. *vs.* THE EXECUTORS OF JONES.

Querela de inofficioso testamento.—Does not pass to Executors.

Where J. W. J. died, appointing his widow universal heiress of all his property, but leaving it vested in his executors, who were to pay the profits to his widow, and eighteen months afterwards his father died, leaving a will in which D. J. (J. W. J.'s brother) was appointed his executor, and thereafter D. J. sued J. W. J.'s executors for the legitimate portion which shoula have come to his father, the Court held *that the* querela de inofficioso testamento *did not pass to the executor, as the father during his lifetime had done nothing to reduce his rights into possession.*

The facts of this case appear sufficiently from the judgment.

Cloete, with him *Esser*, for the Executors of Jones, quoted *Van Leeuwen Rooms. Holl. Recht* 3. 5. 7 ; *Grotius*, 2, 18. § 6. and 2. 24. § 21 ; *Huber*, 2, 21. 24 (*Hedend. Rechts.*) ; *Voet*, 5. 2. 43. ; *Cod.*, 3. 28. *l.* 34 : *Windscheid*, vol. 3, § 575 *et seq.* § 585.

Morice, with him *Curlewis*, for Jones, N.O. : In the will of J. W. Jones only a usufruct of his immovable property is granted to the testator's widow. After her death the property or its proceeds goes to the testator's heirs. No legitimate portion was left to his father. This is not allowable (*cf. Van Leeuwen*, 3. 5. 8.). We have not been passed over. Our rights are only postponed till after the widow's death. We are entitled to the *actio suppletoria*, which is the action heirs are entitled to bring.

Cloete, in reply : The summons alleges that plaintiff has been disinherited, and now he says he is only postponed. He cannot be heard to go behind his summons.

Cur. adv. vult.

Posteà, February 23rd, 1891.

KOTZÉ, C.J. : This is an action for payment of legitimate portion under the following circumstances : The summons states that James Wright Jones died without children in October, 1886, leaving a widow who was appointed by will universal heir of all the testator's movable goods, and further the testator declares that all his immovable property shall remain vested in his executors who shall pay the profits thereof to the testator's widow. The testator reserved to himself the right to make an arrangement subsequently with regard to his immovable property in case of the prior decease of his wife. At the time of the testator's death he had a father, James Jones, and a brother, David Jones, living in England. James Jones, the father, died in England in April, 1888, leaving a will in which David Jones was appointed executor. Now the said David Jones sues as executor of his father's estate for the legitimate portion which he alleges to be due from the estate of James Wright Jones to the father, James

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Jones. The action is thus practically a *querela de inofficioso testamento*. As the testator's father, who died eighteen months after the death of his son—the testator—had not initiated or taken any steps to obtain his legitimate portion from the estate of his son (James Wright Jones), and the summons does not contain any allegation to that effect, his executor and heir, David Jones, cannot now initiate the *querela de inofficioso testamento*. This appears clearly from the authorities (*cf. Grot.* 2. 18. § 17, *in fin.*; *Grot.* 2. 24, § 21; *Van Leeuwen, Cens. For.* pt. 1. bk. 3. ch. 4. § 27 and 28; *Roman-Dutch Law* (*Kotzé's Ed.*) p. 358, § 7; *Voet*, 5, 2. 43). Consequently the claim in the summons must be disallowed, with costs.

DE KORTE, J., concurred.

ROTHMAN *vs.* THE STATE.

§ 7, *Law* 5, 1887.—*Contravention of.—Presumption of being in service of licence-holder.*

Where, in an appeal against a conviction for selling liquor to a native without a permit, it was proved that the money paid by the native was found in the till of accused, the Court held *that this laid upon accused the burden of proving that the barmaid who sold the liquor was not in his service, and, in the absence of such proof, upheld the conviction.*

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This was an appeal from the judgment of the Landdrost at Johannesburg, under the following circumstances: Liquor was sold to a native without a permit, and upon entry into the bar the money paid by the native to a girl serving at the bar was found in the till. There was no proof that Rothman or any person in his employ had sold the liquor. The Landdrost found Rothman guilty of contravening § 7 of Law 5, 1887. Appeal was now lodged on the ground that there was nothing to connect Rothman, who held the