RADLOFF v. HEIDENREICH AND KENNARD.

1910. *November* 29, 30, and *December* 1. MAASDORP, C.J., and FAWKES and WARD, JJ.

Evidence.—Parol evidence explanatory of apparent fraud against third party in document.

When the only inference to be drawn from a document implies fraud practised by the parties thereto on a third party, evidence is admissible to explain the document and to show that the intention of the parties was not fraudulent.

The plaintiff sued the two defendants for transfer of the farm Witnek, district Bethlehem, tendering payment of £532 or £2, 2s. 6d. a morgen, on the ground that the first defendant had acted fraudulently, and that the second defendant, in whose name the farm was registered, had worked in collusion with the first defendant in obtaining transfer.

The plaintiff had purchased a portion of the original farm, which he called Witnek Heights, and had had the following condition indorsed on the deed of transfer:—

It is further mutually agreed between the said P. R. Heidenreich and C. G. Radloff, Jr., that in case the said P. R. Heidenreich should wish to dispose of the said farm Witnek [*i.e.* the farm in dispute] the said C. G. Radloff, Jr., to have the preference, and in case the said C. G. Radloff should wish to dispose of the herein-mentioned portion of Witnek cut off under the name of Witnek Heights, the preference of buying same to be given to the said P. R. Heidenreich.

The first defendant on the 1st July, 1908, informed the plaintiff that he had received an offer of £3, 10s. a morgen for the farm in dispute. Plaintiff considered the offer ridiculous, and refused to buy at the price, being sceptical as to the genuineness of the offer. An affidavit had been voluntarily made by the first defendant on the 23rd June, 1910, in the presence of the plaintiff, to the effect that the farm had been sold by first defendant for £532, that that was the price actually paid, and that the pur-

chase-price of £3, 10s. a morgen or £875 had only been offered by second defendant for the purpose of getting rid of plaintiff's right of pre-emption.

The fraud referred to was effected by means of a written lease dated the 3rd July, 1908, and signed by first and second defendants, which plaintiff did not see till after the affidavit had been made. The two clauses of the lease which affected the case read as follows :—

(5) It is further mutually understood and agreed by and between the contracting parties that at the last day of the term of this lease the lessee shall have the right to purchase the whole of the said leased property subject to the conditions hereunder stipulated, for a purchase amount of five hundred and thirty-two pounds sterling (£532) payable in cash.

(6) It is further mutually understood and agreed between the said contracting parties that should the said lessee, the said Philip Rudolf Heidenreich, purchase the said leased property for the sum fixed at the end of the term of the lease, he will grant unto the said Vincent Johnson Kennard the sole option and refusal of repurchasing the farm Witnek, the whole thereof at any time thereafter for the sum of five hundred and thirty-two pounds sterling (£532).

The terms of these two clauses were not referred to in the deed of transfer, which was drawn up after the lease.

Second defendant applied for leave to lead evidence explaining the clauses of the lease and showing that the parties had had no fraudulent intention.

Blaine, K.C. (with him *Streeten*), for the plaintiff: Parol evidence is inadmissible to explain a document which is not ambiguous.

Fichardt (with him *Brebner*), for the second defendant: The rule of law which prohibits parol evidence in explanation of a written contract does not apply in this case, as the second defendant is meeting a charge of fraud. He is entitled to prove by evidence of the circumstances connected with the execution of the document that it was not tainted with fraud. Plaintiff was not a party to the document, and consequently the rule of law excluding parol evidence does not apply.

Rorich, for the first defendant.

[MAASDORP, C.J.: The general rule is that, as between the parties to a document, parol evidence is inadmissible to explain the terms of such document, so long as these are in themselves unambiguous. But the question is whether this rule can be relied upon and enforced by a third person who was not a party to the contract, and who is attempting to use the document as the basis of an inference of fraud practised by the parties thereto upon himself. In such a case is there anything to prevent the parties to the document from showing that a mistake was made in the drafting of the same, and that the real contract was something different and would not justify the inference sought to be drawn from the document? In the present case the plaintiff has put in the document not for the purpose of enforcing its terms, but in order to draw an inference of fraud therefrom. The defendants wish to meet this inference of fraud by showing that the contract was different from what appears in the document. Cannot they go behind this document?]

Blaine, K.C., in reply: We say that it is a genuine document, and it is therefore the only admissible evidence of its contents.

[FAWKES, J.: Supposing a third party was defrauded by a written contract entered into between two parties, could he not prove the fraud by parol evidence?]

Yes, because the third party would allege that the document was void. We do not suggest this document is void. Either of the defendants would have been entitled to ask for rectification of the contract on the ground of a genuine mistake. See *Van der Byl and Others* v. *Van der Byl & Co.* (16 S.C. 348). They have not applied for rectification, and consequently the terms cannot be altered.

The Court admitted the evidence, holding that the rule as to the inadmissibility of parol evidence in explanation of a written document applies only as between the parties to the same.

Judgment was eventually given for plaintiff.

Plaintiff's Attorney: *C. J. Reitz;* First Defendant's Attorney: *De Villiers* (of Bethlehem); Second Defendant's Attorneys: *Marais & De Villiers.*