DE VILLIERS v. PARYS TOWN COUNCIL.

1910. *July* 8, 9. MAASDORP, C.J., and FAWKES and WARD, JJ.

Purchase and sale.—Land sold in lots.—Mistake of purchaser.—Auction sale.—Sec. 49 *of Ordinance* 12 *of* 1906.

Where V, at an auction sale of land belonging to P Town Council, had purchased certain lots of land marked and numbered on a general plan, having previously availed himself of an opportunity of seeing the plan at the town clerk's office and at the sale, and had refused payment after the sale on the ground that he believed that he was purchasing certain other lots, *Held*, that V's mistake was not a *justus error*, and did not entitle him to rescission of the sale.

Sec. 49 of Ordinance 12 of 1906, requiring contracts of sales of fixed property to be in writing, does not apply to auction sales.

The plaintiff in this case brought an action for the rescission of a sale of two plots of land at Parys, for the return of £60, the portion of the purchase-price paid, and of a promissory note for £61, 16s. made by him in favour of the defendants in part payment, and for £25 damages. The action was based on a mistake as to the identity of the plots purchased, and in the alternative on the fact that the contract of sale was not in writing. There was a claim in reconvention for payment of the amount of the promissory note with interest *a tempore morae.*

The defendants had advertised an auction sale of certain erven in Parys for the 11th September, 1909. The plaintiff prior to the sale had been to the town clerk's office and had been shown the plan of the erven to be sold, each erf being numbered on the plan. He had requested to be furnished with a copy of the plan with a view to studying it and thus identifying the erven he wished to buy, but he had been informed that there were no other copies available. It appeared that Vos, the auctioneer, had started the sale by following the erven in order according to the plan and had stood on each erf as he put it up. By reason, however, of his failure to obtain bids high enough to

reach the reserve price of £50, he had asked the public attending the sale to mention any plots any one of them might wish to have put up. There was a conflict of evidence as to what happened after that. The plaintiff said he had pointed to an erf and asked Vos what the number was, and that Vos had told him it was No. 786 on the plan. The plaintiff, after asking him if he was sure, had told him to put that number up, and plaintiff had purchased it for £150. He had then pointed out the next number on the plan (No. 787), and had eventually purchased that for £156. Vos in his evidence, which was corroborated by one George de Villiers, who stated he was holding the plan when the sale took place, said the plaintiff had himself pointed to both the numbers on the plan and had told Vos to put them up. The distance between the spot where the sale took place and the site of the erven sold was put at about 200 yards by the plaintiff and 400 or 500 yards by Vos. The only marks indicating the plots were surveyors' pegs and, according to the plaintiff's evidence, a furrow. The size of the plots varied between two and six morgen. Plaintiff discovered his mistake in December, 1909, refused to pay the balance of the purchase-price, and asked for a cancellation of the sale.

Rorich, for the plaintiff: This is a case of *justus error*. The onus was on the plaintiff to make reasonable inquiry, and he did so. The purchaser had to rely on the word of the auctioneer as to what he was buying. See *Logan* v. *Beit* (7 S.C. 197) and *Merrington* v. *Davidson and Others* (22 S.C. 148).

[MAASDORP, C.J.: Is it likely that Vos would have taken the responsibility ?]

The handbill advertising the sale referred the public to the town clerk of Parys for further particulars and the undersigned —Vos.

[FAWKES, J.: How do you distinguish the case of *Merrington* v. *Davidson ?*]

In that case there was nothing before the court to show that any precautions had been taken by the purchaser. If there is a plan the purchaser must examine it. The test is—Is the mistake reasonable? The plaintiff took every reasonable precaution.

The contract should have been in writing. See sec. 49 of Ordinance 12 of 1906.

[WARD, J.: See secs. 41 and 42.]

Auction sales are specially exempted in sec. 47, but not in sec. 49.

[FAWKES, J.: Then has a purchaser at an auction sale *locus poenitentiae* till the contract is put in writing?]

Yes. I can find no authority on this point except *Schuurman* v. *Davey* ([1908] T.S. 664), where the point was not very fully argued. In the Transvaal the law requiring sales of fixed property to be in writing is identical with ours, and it has been most strictly interpreted. See *Raywood* v. *Short* ([1904] T.H. 218) and *Auret* v. *Kernick* ([1903] T.H. 445).

[WARD, J.: It is of no use quoting one Transvaal case in your favour and asking us to overrule another.]

Blaine, K.C., for the defendants, was not called upon.

MAASDORP, C.J.: The Court has a great deal of sympathy with the plaintiff, but that must not mislead us into laying down bad law. It appears at any rate that the plaintiff in his own mind made a *bonâ fide* mistake, which led to the action. We are prepared to accept the evidence of Mr. Vos and Mr. George de Villiers as to what took place at the sale as correct. It seems more reasonable than the plaintiff's version. Vos said that at a certain stage of the proceedings he had said to the public attending the sale, "Now name your numbers and I will put them up." "Numbers" was the word he used. He knew nothing about the ground, and it seems impossible that he would have taken upon himself to localise the plots. Vos said that when he had made this general request the plaintiff had come up, having been urged thereto by De Villiers (as the latter said), and, the plan being open, had said: "Put up these two plots," putting his finger on Nos. 786 and 787. Vos is supported by George de Villiers. It seems impossible to conceive that Vos could have attached any importance to the suggestion plaintiff said he had made. Even if it were true that he had made it, how could plaintiff, by pointing in a certain direction enable Vos to localise the plot he wanted? The plan would have been useless. Vos

would have got himself into trouble by adopting such a course. His evidence is in accordance with the ordinary business rules and rules of auctioneers' work, and the plaintiff's evidence is most improbable. We do not say that plaintiff did not point, but Vos did not see what he was doing and it did not influence him, and the rest of the evidence of the plaintiff, to the effect that he had said, "Are you sure that is the number?" does not seem reasonable. He pointed out these numbers, and the rest of his evidence must be a statement of what took place in his own mind; he imagined that what he stated had taken place. That being so, the case of *Merrington* v. *Davidson* does not apply. It was not a mistake on the part of the auctioneer, but on the part of the plaintiff in localising the numbers on the ground. If there was any negligence it was on the part of plaintiff.

As to the alternative ground of claim under sec. 49 of the Transfer Duty Ordinance, that section does not apply to auction sales. Auctions are regulated by secs. 41 and 42, which clearly recognise a sale by auction as a contract differing from an ordinary contract of sale under the general law. In the case of auctions a sale is effected before any document passes; as soon as the bidding closes there is a sale which can be enforced by law. When there is an express provision in a statute, that will override the general law. Where, however, an express provision of the law recognises the existence of an auction sale the sections referred to cannot be held to refer to all sales, but only to sales other than sales by auction. Judgment must therefore be given for the defendants in convention and for the plaintiffs in reconvention for £61, 16s. on the promissory note, with interest *a tempore morae*, and with costs for the defendants in convention and for the plaintiffs in reconvention.

FAWKES and WARD, JJ., concurred.

Plaintiff's Attorneys: *Fraser & Scott;* Defendants' Attorney: *G. A. Hill.*