

FAUSTMANN v. SHADRICK AND
SAMARTHA.

1910. May 2. WARD, J.

Provisional sentence.—Mortgage bond.—Cancellation of transfer deed.

Where B had successfully sued A in a previous action for rescission of a contract and cancellation of the transfer of the farm C on the ground of duress, and a clean title had been issued to B, and the bond which had been passed in the name of F after transfer to A and prior to the action referred to remained uncanceled on the Land Register in A's name, on a provisional claim brought by F against A and B, provisional sentence was granted against A, and the property specially hypothecated declared executable, execution not to issue until the 15th July, 1910, so as to enable B to bring her action to have the bond set aside, the said action to be brought to trial during the next term, with costs against A, the costs of B to be costs in the cause if the case went to trial. If no further proceedings were taken by B, F ordered to pay costs of the day, on the ground that B should not have been sued provisionally.

The plaintiff asked for provisional sentence against the two defendants on a mortgage bond (No. 6605) for £150 over the farm Balaclava, district Thaba'Nchu. The second defendant had obtained a decree of divorce against the first defendant on the 12th December, 1902, and under a written contract dated the 9th July, 1903, part of the joint property of the spouses (including the farm Balaclava) was to become the property of the first defendant. In a subsequent action on the 27th and 29th November, 1909, the second defendant had successfully sued the first defendant for the rescission of this contract and cancellation of the transfer of the farm on the ground of duress. The bond had been registered in the plaintiff's name after the transfer to the first defendant and before the action for cancellation. The Registrar of Deeds subsequently issued a clean title to the second defendant on the judgment, but the bond still remained uncanceled against the name of the first defendant in the Land Register. The plaintiff sued the first defend-

ant and joined the second defendant with a view to having the property declared executable.

The following certificate signed by the Registrar of Deeds was filed at the suggestion of the Court:—

I, the undersigned, do hereby certify that mortgage bond No. 6605, dated 15th December, 1904, by Shadrick Mokgothi in favour of John Henry Faustmann, whereby the farm Balaclava, district Thaba'Nchu, was hypothecated under second mortgage, remains registered in the books of this office at the date hereof exactly in all respects as originally registered on the 15th December, 1904. The said mortgage bond has not yet been cancelled nor in any respect indorsed on account of any proceedings taken against the said Shadrick Mokgothi or otherwise.

(Sgd.) HENRY B. AUSTIN,

Registrar of Deeds, O.R.C.

BLOEMFONTEIN, 2nd May, 1910.

Rorich, for the plaintiff: The money was advanced to the first defendant without knowledge of the duress. See Voet, 20, 4, 2.

Fichardt, for the defendants: The transfer of the farm was declared void by this Court, and hence the bond is void and is therefore no longer a liquid document. The position is exactly the same as if the bond had been obtained by means of a forgery. The plaintiff has knowledge of these facts.

WARD, J.: Provisional sentence must be granted against the first defendant, and the property specially hypothecated declared executable, execution against the farm Balaclava not to issue until the 15th July, 1910, so as to enable the second defendant to bring her action to have the bond set aside, the said action to be brought to trial during the next term. Costs must be given against the first defendant, the costs of the second defendant to be costs in the cause if the case goes to trial. If no further proceedings are taken by the second defendant, plaintiff must pay her costs of this day.

Plaintiff's Attorneys: *Fraser & Scott*; Defendants' Attorneys: *Gordon Fraser & McHardy*.