## De Jager *vs.* Scheepers and Others.

Fidei commissum.—*Alienation by Fiduciary.—Prescription.*

*Prescription does not run in respect of fidei commissary property which has been alienated by the burdened person, pending the fulfilment of the condition upon which the property is to be restored.*

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This was an action for ejectment. The following were the facts of the case. In 1822 one C. De Jager and his wife executed a codicil to their joint will, by which they left their farm "Buffelsdrift" to their two sons, J. S. De Jager and G. De Jager :—"In the first place for both of them, and secondly the eldest sons of our grandchildren shall always have the same rights thereto." The testatrix died in 1825, having apparently survived her husband, and the two sons obtained transfer of the farm. In 1847 G. de Jager sold to one J. H. Schoeman a portion, called "Saltpeterlaagte," of the farm "Buffelsdrift." Schoeman obtained possession of "Saltpeterlaagte," but did not receive transfer of it. In 1861, G. de Jager having died, his brother J. S. de Jager, father of the present plaintiff, brought an action against Schoeman in the Circuit Court at George for the purpose of ousting him from "Saltpeterlaagte." No judgment was given in the case. Schoeman and his lessees the defendants were continuously in occupation of "Saltpeterlaagte" from 1847 till the commencement of the present suit. In 1875 it was decided by the Supreme Court in the case of *De Jager* vs. *Scheepers* (Buch. Rep. for 1875, p. 86), that the above-mentioned codicil entitled each of the sons named in it to a half share of the said farm during his life, such half share to go to his eldest son on his decease. In the same year J. S. de Jager died, and in 1877 his son C. J. de Jager, the present plaintiff, obtained transfer of his father's half share of "Buffelsdrift," and purchased and obtained transfer of the other half share, thus becoming the owner of the whole. Plaintiff then brought the present action against the defendants for the recovery of "Saltpeterlaagte." The main defence relied upon was that J. H. Schoeman had acquired the ownership of "Saltpeterlaagte" by prescription. Defendants also made a claim in reconvention for the value of

certain improvements which they had made on "Saltpeterlaagte." The case was commenced at the Circuit Court for Oudtshoorn, but was, after the evidence had been taken, removed to the Supreme Court.

*Upington, A.-G.* (with him *Giddy*), for plaintiff. The main point is, has there been prescription or not? It appears that there has not (see *Burge*, Vol. 3, pp. 9 and 99).

*Jones* (with him *Gregorowski*), for defendants Schoeman. It is clear that defendants Schoeman must be held to have been in possession from the year 1847. The old Roman law doctrine of prescription does not hold good in Roman-Dutch law. *Voet* (44, 3, 9,) lays it down that long possession is sufficient to create prescription. It has been suggested that in 1861 there may have been an interpellation. But an interruption to be one good at law must be made by the true owner; an interpellation to be effectual must be one by a person capable of pursuing an action. The prescription should therefore be held to begin from 1847 (*Code Napoleon*, bk. 3, tit. 20; *Code of the Netherlands*, bk. 4, § 2018; *Voet*, 44, 3, 11; *Schorer's* note to *Grotius*, book 2, cap. 7, § 9; *Van der Keessel*, Thes. 209).

*Gregorowski*, on the same side. The action of 1861 did not amount to an interpellation (*Voet*, 41, 3, 20).

*Solomon*, for the defendant Scheepers. The defendant Scheepers is in almost the same position as the other defendants. At any rate defendants are entitled to compensation.

*Cur. adv. vult.*

*Posteà* (July 12th),—

DE VILLIERS, C.J.:—The plaintiff in this case is the registered owner of a farm called "Buffelsdrift," in the Oudtshoorn division, and the defendants are the occupiers of a plot of land called "Saltpeterlaagte," situated within the limits of the farm "Buffelsdrift." The main object of the action is to eject the defendants from "Saltpeterlaagte," and the main ground of defence is that the defendants occupy the land with the consent of one J. H. Schoeman, who, they allege, has obtained the ownership by prescription. The defendants further aver that they have made certain

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provements by which the value of the land in dispute has been enhanced; and by their claim in reconvention, they claim the value of these improvements. The farm "Buffelsdrift" itself has more than once been the subject of litigation. As far back as 1822, it was bequeathed by its then owners, Carel and Susanna de Jager, by codicil to their two sons, Gideon and Johannes, for life, with certain remainders over. After the death of the testators, viz., in 1847, their son Gideon, who had only a life interest in one-half of the farm, sold the plot called "Saltpeterlaagte," to J. H. Schoeman, who immediately entered into occupation, but never received transfer of the land. Shortly after the death of Gideon de Jager, which is admitted to have occurred in 1861, his brother Johannes brought an action of ejectment against J. H. Schoeman, but for some unexplained reason the action was not proceeded with. In reference to this action J. H. Schoeman says in his evidence:—"My idea was that the wrong man brought the action. I bought from Gideon de Jager, and Johannes brought the action against me. I thought the son of Gideon should have brought the action. I should have been bound to listen to him. I knew of the codicil." J. H. Schoeman accordingly remained in possession of the land in dispute, and in several ways improved its value. He afterwards allowed the present defendants to occupy the land, and they also made some permanent improvements, which the learned judge before whom the evidence was taken estimates at £60 as the share of the two defendants Schoeman, and £25 as the share of the defendant Scheepers. In 1875 an action was brought by Johannes de Jager against the executor and sons of Gideon for a declaration of rights under the codicil already mentioned, and the Court decided in substance that Johannes and Gideon had each only a life interest in his share of the farm, and that upon the death of Gideon, Johannes did not obtain a life interest in the whole of the farm, but that the eldest son of Gideon became entitled to half of the farm, Johannes retaining his life interest in the other half with remainder to his eldest son. Johannes died in 1875, and in 1877 the plaintiff, as his eldest son, received transfer of his half of "Buffelsdrift." In 1877 the plaintiff received transfer of the other half by virtue of a purchase—the validity of which is not in dispute—from Carolus, eldest son

of Gideon de Jager. Now, it is clear that the plaintiff, as registered owner of "Buffelsdrift," is entitled to recover from the defendants the land called "Saltpeterlaagte" (which is a portion of "Buffelsdrift"), unless they can establish a better title of their own. To establish such a title they rely upon the purchase made by Schoeman (under whom they claim) in the year 1847, and the subsequent continuous occupation of "Saltpeterlaagte" by J. H. Schoeman and the defendants. Now, it is clear that if the judgment of this Court in 1875 was correct—and its correctness is not impugned—Gideon de Jager had no more than a life interest in one-half of the farm, and could not effect a valid sale of more than his life interest in any portion of the farm. The sale in 1847 could not, therefore, give to J. H. Schoeman the right of occupying "Saltpeterlaagte" after the death of Gideon de Jager, and the defendants, in order to succeed in this action, are bound to prove a peaceable, continuous and uninterrupted adverse possession as against persons legally competent to assert their rights for the full period of thirty years before action was brought. The law bearing upon this part of the case is stated very clearly and concisely in the *Code* (6, 43, 3, § 2). "If, however," says Justinian in substance, "a legacy or *fidei commissum* be left to any one with a condition of substitution or restitution, either in an uncertain event or in a certain event, but at an indefinite time, he will do better if in these cases he refrains from selling or mortgaging the property, lest he should expose himself to still greater burdens under a claim of eviction. But if in his lust for wealth he should hastily proceed to a sale or mortgage in the hope that the conditions will not take effect: let him know that, upon the fulfilment of the condition, the transaction will be treated as of no effect from the beginning, so much that prescription will not run against the legatee or fidei commissary. And this rule will, in our opinion, equally obtain, whether the legacy has been left unconditionally or conditionally to take effect at some certain or uncertain future time, or in an uncertain event. But in all these cases let the fullest liberty be given to the legatee or fidei commissary to claim the property as his own, and let no obstacle be placed in his way by those who detain the property." *Voet* in his *Commentaries* (41, 3, 12,) quotes this passage in support of the view that prescription does

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not run in respect of fidei commissary property which has been alienated by the burdened person pending the fulfilment of the conditions upon which the property is to be restored. And *Burge* in the following passage (vol. 3, p. 26) adopts the same view and gives what appears to me to be the true reason of the law:—"This prescription does not run against minors, insane persons, who are *sub curia*, nor those who are absent in war, or in the service of the State, nor against those who are precluded from acting. It does not therefore run against creditors during the period of making the inventory, because during that period the law restrains them from disturbing the heir, nor is the fiduciary prejudiced by alienation made by the fidei commissary heir *pendente conditione fidei commissi*." It is clear, in this last passage, that a mistake has been made by transposing the words *fiduciary* and *fidei commissary*, but with this correction the passage is fully borne out by the authorities whom *Burge* quotes. On behalf of the defendants a passage from *Pothier's* "*Obligations*" (§ 656) has been quoted as being opposed to *Voet's* views. Now, without discussing whether the whole of this passage is supported by the authorities relied upon by *Pothier*, it is sufficient to say that he himself admits that the first taker (under a condition of restitution) "could not *faciendo*, by disposing of, transferring, or hypothecating the claim, prejudice the right of the substitute, because he could only transfer it such as it was, and consequently *cum causâ fidei commissi*, with the charge of restitution." It seems clear to me that prescription did not run in respect of the land now in dispute until after the death of Gideon de Jager, the fiduciary who purported to sell it to J. H. Schoeman, and that, as thirty years had not elapsed between the time of his death and the institution of this suit, the defence of prescription must fail. My opinion upon this part of the case being clear, it becomes unnecessary to consider another question which was raised during the argument, whether the action brought by Johannes de Jager against J. H. Schoeman, in 1861, constituted a sufficient interruption of the time of prescriptions. Indeed, it would have been difficult for the Court to attach any weight to the evidence bearing upon that point, considering that the best evidence of such an action, that is, the record itself, was not forthcoming. The defendants must be ordered to give up

possession to the plaintiff of the land called "Saltpeterlaagte," but as there is no proof of *mala fides* on their part, the order will be subject to the payment by the plaintiff to the defendant Schoeman of the sum of £60, and to the defendant Scheepers of the sum of £25. The plaintiff not having tendered these amounts, or indeed any amount whatever, to the defendants, and the defendants not having tendered to quit possession of the land upon such payment being made to them, it appears to me that the fairest course will be to make each party bear his own costs.

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[Attorney for Plaintiff, H. P. DU PREEZ.
Attorney for Defendant Schoeman, C. H. VAN ZYL.
Attorneys for Defendant Scheepers, TREDGOLD & HULL.]

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BEYERS *vs.* MCKENZIE.

*Effect of fraud upon transfer of dominium.*

*H. by fraudently representing himself as buying for Government obtained certain horses from B. without paying for them, B. expecting to be paid by Government, which he considered the purchaser. Subsequently H. sold two of the horses to M. B. claimed them from M. on the ground that B. had not parted with his property in them to H.* Held, *that B's claim was well-founded.*

This was an action brought by Christian Frederick Beyers, the plaintiff, against the defendant Andrew Richie McKenzie for the recovery of the possession of two horses alleged to be wrongfully detained by the defendant, and of damages for their wrongful detention.

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" 13.

Beyers *vs.*
McKenzie.

It appeared that one Holmes had fraudulently represented himself to plaintiff as being commissioned to buy horses on behalf of the Cape Government. He ostensibly bought for the said Government nine of plaintiff's horses, which he obtained possession of, but did not pay for, alleging that on his return to Cape Town with the horses the Government would send plaintiff a cheque for the price. Holmes was subsequently prosecuted for the fraudulent transaction and found guilty. Before his prosecution he had sold to