

possession to the plaintiff of the land called "Saltpeter-laagte," 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.

1880.
June 25,
July 12.
De Jager vs.
Scheepers &
Others.

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

BEYERS vs. MCKENZIE.

Effect of fraud upon transfer of dominium.

H. by fraudulently 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.

1880.
August 12.
" 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

1880.
August 12.
" 13.
Beyers vs.
McKenzie.

defendant two of the said horses. Plaintiff now claimed them from defendant on the ground that plaintiff had not parted with his property in them to Holmes, who therefore was incapable of making defendant the owner of them. Defendant refused to give the horses up.

Leonard (with him *Upington, A.-G.*), for plaintiff. Holmes obtained the horses by false pretences. No credit was given by plaintiff to Holmes, and therefore since the purchase price was not paid the *dominium* in the horses never passed to Holmes, and thus could not be transferred by Holmes to defendant. *Voet* (19, 1, 11); *Van der Keessel* (Thes. 203); *Voet* (6, 1, 14, and 4, 3, 3,); 1, *Hollandsche Consultation en Advysen* (Con. 245); *Van Leeuwen* (Censura Forensis, 1, 4, 19, and 20). The rule of the Roman-Dutch law differs from the English rule that fraud cannot affect the rights of third parties without notice.

Jones (with him *Innes*), for defendant. The goods were placed in possession of Holmes. *Van der Linden* (Chapter 15, § 9). Holmes was treated as the purchaser throughout. The horses were sold upon credit to Holmes, and the *dominium* in them passed to him. *Byles on Bills* (p. 333, 11th edition).

Innes, on the same side. A fraud which is a mere incident of a contract has not the same effect in making it void as one which is of the essence of the contract. *Voet* (19, 1, 11, and 4, 3, 4,); *Pollock on Contracts* (p. 429, 2nd edition).

Cur. adv. vult.

Postea (August 13),—

DE VILLIERS, C.J.:—This case must be decided upon grounds rather different from those which have been urged on the Court in the course of the argument. The counsel for the plaintiff has argued that in the first place the sale by Beyers to Holmes was a sale for cash, and that inasmuch as the money had not been paid, the property in the horses did not pass to Holmes, and that he could not therefore transfer the property to the defendant in this case. The answer to this argument is, that the sale was not for cash.

1880.
August 12.
" 13.
Beyers vs.
McKenzie.

This appears from the fact that Holmes was allowed to take the horses to Cape Town, and was allowed time to enable the Government to send a cheque in payment. If time be given as indulgence to a purchaser, it is not a sale for cash. Then the second argument on the plaintiff's behalf was, that inasmuch as the fraud of Holmes, the purchaser, was the cause of this contract being entered into by Beyers, the contract itself was void; but the answer to this is, that there was no contract at all between the parties. But if there was no contract between the plaintiff and Holmes the mere delivery of the horses could not transfer the property to Holmes. One fact has been established to my satisfaction, and I believe to the satisfaction of the Court; and it is this, that Holmes did represent to Beyers that he was the purchaser of the horses on behalf of the Government, and that the Government would be responsible for the purchase. The plaintiff, in fact, believed that he was dealing with the Government and never consented to a contract with Holmes. Then we have the further fact that at the last criminal sessions the jury found that the horses were obtained under false pretences, the false pretences being that Holmes was purchasing on behalf of Government and not on behalf of himself. There was consequently no contract of sale. There was no contract with the Government, because the Government did not authorize Holmes to purchase; and there was no contract with Holmes himself, because he did not purport to buy for himself, but on behalf of the Government. There was a delivery to Holmes, but bare delivery, as was pointed out in the case of *Kleudgen vs. Rabie's Trustees*,* decided in March last, is not sufficient to pass the property. There must be some valid cause, such as donation, sale or other contract, to make the delivery an effectual transfer of the property; and, in the present case, there being no such contract, the property never passed to Holmes, who could not therefore give a good title to the defendant. It is satisfactory to know that the English law is substantially the same, as will appear from three English cases which I have found. The first is that of *Higsons vs. Burton* (26 L. J. Exch.), where it was held that if a person has obtained goods by means of false pretences without any contract of sale to

* See this volume, p. 63.

1880.
August 12.
" 13.
Beyers vs.
McKenzie.

himself, as when he falsely and fraudulently represents that another person has authorized him to purchase the goods, the true owner can recover the goods from a party to whom they have been sold or pledged by the person who fraudulently obtained them. In the case of *Hardman vs. Booth* (1 H. & C. 803)-it appeared that the plaintiff being led by one Edward Gandell to believe that he was a member of the firm of Gandell & Co., sold and delivered certain goods to him as the supposed representative of the firm. Edward Gandell in fact carried on business with one Todd, and pledged the goods with the defendant for advances *bonâ fide* made to Gandell and Todd. It was held that there was no contract of sale, inasmuch as the plaintiff believed that he was contracting with Gandell and Co., and not with Edward Gandell personally, and Gandell & Co. never authorised Edward Gandell to contract for them; consequently no property passed and the defendant was held liable. Both these cases were approved of by the House of Lords in the case of *Cundy vs. Lindsay* (L. R. 3 App. Ca. 459), where it was held that if B, a person of no credit, gets goods from A by trading under a name and address closely resembling those of C, who is known to A as a respectable trader, A was entitled to recover the value of the goods from a person who had *bonâ fide* purchased them from B, on the ground that as A believed he was dealing with C, there was no contract with B, and that therefore not even a temporary property in the goods passed to B which he could pass to a purchaser. In the present case the plaintiff was fraudulently led to believe that he was dealing with the Government, the delivery of the horses did not pass the property to Holmes, and the plaintiff is entitled to recover the horses from the defendant or their value, which we find to be £70. Judgment must be for the plaintiff for the delivery of the horses to him or their value, or, in default, for the sum of £70 with costs.

DWYER and SMITH, JJ., concurred.

[Plaintiff's Attorneys, C. C. DE VILLIERS.]
[Defendant's Attorney, W. E. MOORE.]
