

1879.
May 15.
In re Brown.

perative ; but this was a case, if there was any, in which the strictness of the rule ought to be relaxed. It was hard to make the clerk suffer for what was admitted to be the fault of the attorney.

DE VILLIERS, C.J., said :—I regret we cannot help the petitioner. We should be acting in direct opposition to the rule if we made the order asked for.

DWYER, J., said :—It would be well if an Act of Parliament was obtained giving the Judges discretionary powers, both retrospectively and in future cases.

Application refused.

[Applicant's Attorneys, REID & NEPHEW.]

THE MISSION TRADING CO. vs. HESSEL.

Hawker.

A Hawker who had sold goods for some months from his wagon on a public roadway crossing a farm held not liable in an action of damages brought by a shopkeeper, the lessee of the property over which the said public road ran.

1879.
May 16.
The Mission
Trading Co. vs.
Hessel.

Louis Hessel was summoned in the Court of the Resident Magistrate for Namaqualand, on the 17th March, by the Mission Trading Company of O'okiep for £20 damages sustained by reason of his having, from the 1st January to date of suit, "wrongfully and unlawfully carried on, in the public road at O'okiep, in a certain wagon fixed there for the purpose, the trade or business of a retail shopkeeper, in selling and disposing of wares, groceries, and other articles under and by virtue of a retail shop license, or under and by virtue of a hawker's license, or one or other or both of such licenses, to the damage and prejudice of the plaintiffs." To this summons the defendant pleaded the general issue. Evidence was taken to shew that the plaintiffs, by a contract with the Cape Copper Mining Company, obtained, together with Messrs. Webster & Co., the exclusive right of trading at the mines situated on properties leased or owned by the said company, of which properties O'okiep was one. The defendant had established himself in the public road running over the place O'okiep, near one of the plaintiffs' shops,

and had for months sold goods from his wagon, and had thereby interfered with the plaintiffs' business. After certain proceedings which had been taken against another trader the defendant had been in the habit every evening of removing his wagon about 200 yards from the stand taken up by him, and returning in the morning. On these facts the Magistrate gave judgment for the plaintiffs for £20 damages as prayed, with costs. The defendant now appealed.

Stockenström, for the appellant, submitted that the plaint in the Court below set forth no cause of action.

Buchanan, for the respondents, urged that as the plaintiffs were lessees of the property they could prevent others trading thereon. The defendant might have the right of using the public road, but he was not justified, simply because he held a hawker's license, to take up his stand for months at one spot.

DE VILLIERS, C.J., said:—This is one of the most extraordinary judgments that has ever come before this Court for review. This action was not in the nature of a criminal prosecution for selling without a license, but it was a civil suit for damages for having sold goods under a hawker's license in the public road, and thereby interfering with the monopoly the plaintiffs enjoyed as lessees of the Copper Mining Company. Assuming that the plaintiffs had all the rights and powers of the company as owners of the land, still they would have no right to prevent the defendant from carrying on his business as a hawker in the public road.

DWYER, J., said:—It is possible, if the right of road over the farm was a mere easement, the defendant might be prosecuted for obstructing a public thoroughfare, or he might be liable in an action for trespass, but the very form of this case puts it out of Court.

Appeal allowed accordingly, and the judgment of the Court below reversed, with costs.

[Appellant's Attorney, VAN ZYL.
Respondents' Attorneys, REID & NEPHEW.]

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