GUINSBERG v. SCHOLTZ, ROBERTSHAW, AND KELLY.

1903. *June* 18, 19, and *November* 10. INNES, C.J., and MASON and BRISTOWE, J.J.

Mines and minerals.—Gold Law.—Gold licences on coal claims.—Statute.—Repeal.—Vested right.—Privilege.—Law No. 17 *of* 1895, *secs.* 5 *and* 15.—*Law No.* 14 *of* 1897, *secs.* 5 *and* 16.

Certain coal licences were held under Law No. 17 of 1895, which conferred upon the holder thereof a preferent right to gold licences in respect of such claims for a period extending to three months after the discovery of gold thereon. No such discovery was made, and no gold licences were taken out under Law No. 17 of 1895. Thereafter the said Law was repealed by Law No. 14 of 1897, which made no provision for such preferent right, nor any provision for the future issue or renewal of licences under the repealed statute. After the date of repeal the ground held under the coal licences was pegged for gold by third parties. *Held*, that the peggers were entitled to gold licences, as the preferent right of exploiting coal claims for gold must be regarded as dependent upon the continued existence of a coal licence under the Law of 1895, and not as having become absolutely vested in the holders of the coal licences at the date of repeal; that it was therefore abrogated by the repealing statute, at any rate as from the expiry of the current term of the licences taken out under the Law of 1895.

Nel and Henry v. *Scholtz, Robertshaw, and Kelly* (High Court, S.A.R. June, 1899) not followed.

This was an action for a declaration of rights with reference to certain twenty-three claims situated on the Government farm Benoni. district of Boksburg.

The declaration set out that on the 11th July, 1892, the plaintiff pegged off certain twenty-three coal claims on the Government farm Benoni, since which date plaintiff had duly paid the licences for such claims and was the owner thereof. Under the provisions of Law No. 17 of 1895 plaintiff was entitled to the preferent right to take out licences to dig for precious metals and stones for three months after such precious

metals and stones were discovered on the said claims. Previous to the 11th October, 1898, no precious metals or stones had been discovered on these claims; but on the said date the defendants pegged the said twenty-three claims as gold claims under prospecting licences issued under the Gold Law. Such pegging was wrongful, and the defendants wrongfully alleged and contended that they were entitled to peg the said twenty-three claims, and to hold them under the Gold Law. On the 18th October, 1898, the plaintiff exercised, as he was entitled to do, his preferent right to take out licences under the Gold Law for the claims, and the plaintiff protested to the Mining Commissioner of Boksburg against the pegging of the claims by the defendants, and tendered to the Mining Commissioner the necessary licence-moneys to hold the said claims under the Gold Law. The Mining Commissioner wrongfully and unlawfully refused to issue such licences under the Gold Law to the plaintiff, and the defendants wrongfully and unlawfully denied the plaintiff's right to obtain such licences. The plaintiff continued to tender the necessary licence-moneys until on the outbreak of the war he was compelled as a British subject to leave the country. On the 5th September, 1902, and thereafter the plaintiff duly tendered licence-moneys for the said claims under the Gold Law, but the Registrar of Mining Rights at Johannesburg wrongfully refused to accept such moneys. The plaintiff therefore claimed that he, and not the defendants, was entitled to hold the said claims under the Gold Law.

The defendants admitted the pegging of 11th October, 1898, and pleaded that Scholtz (since deceased) had acted as agent for and on behalf of the other defendants, and had acquired no rights for himself by virtue of such pegging. Further, they pleaded that more than three months previous to the 11th October, 1898, the existence of gold on the said claims was generally known and ascertained and could be scientifically demonstrated, and was or ought to have been known to the plaintiff; but that the plaintiff, notwithstanding such knowledge, chose not to take out licences under the Gold Law for the said claims. They denied that the plaintiff was entitled to claim or could exercise any preferent right as alleged. The defendants

in reconvention claimed a declaration that as against the plaintiff they were entitled to hold the said claims under licences under the Gold Law.

Evidence was led by both parties as to the probability of gold existing on the claims in dispute. It was common cause, however, that no gold had as yet been actually discovered on the claims, no shaft for that purpose having been sunk.

Gregorowski (with him *Esselen* and *Curlewis*), for the plaintiff: The first provision as to licences for mining base metals was the Government circular of the 10th May, 1889, issued by virtue of Volksraad's Resolution of the 10th November, 1884, art. 1273. That circular was provisional, and holders of licences did not know what their rights were till the promulgation of Law No. 17 of 1895, which gave them certain definite rights. The Government was the owner of the ground, and made certain definite promises. In the addenda to the Gold Laws of 1891 and 1892 the Government does not profess to have any right to dispose of the base metals on private ground. The intention of the legislature, as appears from sec. 5 of Law No. 17 of 1895, was that the same person should hold the same claims under the Gold Law and the Base Metal Law. In 1897 this provision was altered by Law No. 14 of 1897, but the words used are very peculiar, and clearly show that the legislature never intended to interfere with vested rights. Probably the right given under the Law of 1895 had been abused, and it was intended to stop this, but certainly not to interfere with rights already accrued or vested. Sec. 15 of Law No. 17 of 1895 shows more clearly still the intention of the legislature. The Interpretation Proclamation (No. 15 of 1902) is merely a statement of the common law; see sec. 7 (2). When a right has once been acquired it is not taken away by a subsequent statute unless *nominatim*; see also *Colonial Government* v. *Standard Bank* (9 S.C. 253, at p. 258). The plaintiff acquired his rights under the circular, which contemplated a subsequent Law, and that Law was No. 17 of 1895. Plaintiff obtained rights under that Law, and those rights have never been taken away. A claim is not taken away as long as the licences are paid. It is true that nothing can bind the legislature, but it is not presumed to

interfere with vested rights. The whole question is discussed by Savigny in *Systeem des Hentige Romische Recht*, vol. 8 (see secs. 385 and 386), and the same doctrines are laid down in Beal's *Cardinal Rules of Legal Interpretation*, pp. 159, 191: see also *Parsons* v. *The State*, decided 21st March, 1898.

Esselen, on the same side: The whole question is, Does the repeal of Law No. 17 of 1895 by Law No. 14 of 1897 permit any one to peg off for gold claims pegged for coal under or previous to the Law of 1895, with or without the discovery of gold? Previous to the Law of 1895 there was no provision against such pegging; but the whole position was altered by the Law of 1895, and by that law every holder of a coal claim got a certain definite right, which was not affected by the repeal of that Law. There is a previous judicial decision to that effect—*Nel and Henry* v. *Scholtz, Robertshaw, and Kelly*, decided on the 26th June, 1899. That decision is binding, and the Court will not overrule it except on very strong grounds. The late Mr. *Coster* argued in that case for the same defendants as in the present case, that the plaintiffs had a mere *spes*; but there is both a *spes* and a right. The *spes* is the discovery of gold; the right is the right to take out gold licences.

[INNES, C.J.: Is the right not dependent on the *spes?*]

It may be dependent on the *spes*, but the right is there all the same. The Government had its own staff of officials to report as to whether these claims were gold bearing or not, and at any time the plaintiff could have been warned to take out gold licences. If gold had been discovered just before the repeal of Law No. 17 of 1895, the repeal coming before the plaintiff had taken out his licences for gold, surely he would have been entitled to his preferent right for the full period of three months. Sec. 15 of Law No. 17 of 1895 says that the rights under that Law shall not be taken away by subsequent legislation. I admit that a subsequent Volksraad could take away these rights, but Law No. 14 of 1897 shows that the Volksraad did not intend taking away these rights: see secs. 4 and 13. Besides, sec. 5 of Law No. 14 of 1897 says that only claims pegged under that Law could be pegged off as gold claims, and it cannot be contended that "pegged under" simply means "held under."

Smuts (with him *de Wet*), for the defendants: The defence raises an issue of fact and an issue of law. The issue of fact is whether gold was discovered in terms of sec. 5 of Law No. 17 of 1895 on these claims prior to October, 1898. If that section be strictly interpreted, and it is held that there must be an actual physical discovery of gold on these claims, then there has not yet been a discovery. Such a discovery is a condition precedent to the vesting of the plaintiff's preferent right, and the action is premature. Assuming the plaintiff still to have his preferent right, he is not prejudiced by defendants holding the claims under gold licences, for at any time within three months after gold is actually found he can turn defendants out. If, however, a wider interpretation is adopted, and it is held that discovery is proof of the existence of gold, then I submit that the presence of gold was scientifically proved and was generally known long before October, 1898. Certainty is only the highest probability. The legislature intended not actual finding, but scientific discovery. Discovery means scientific demonstration.

On the question of law the defendants are confronted with the decision of the majority of the late High Court in *Nel and Henry's* case; but with the highest respect for that Court, I submit that the Court did not grasp the case. I admit that Law No. 14 of 1897 is not retrospective, and did not affect vested rights, and I also admit that the defendants did not peg under Law No. 14 of 1897. They pegged under the Gold Law, and rely on the provisions of the Gold Law. Benoni is a proclaimed gold-field, open ground under the Gold Law, and any one complying with the Gold Law can peg on it. If plaintiff disputes the defendants' right to peg, he must show why they cannot do so. The Gold Law contains provisions against pegging on a large number of places, but nowhere prohibits the pegging of base metal claims. The plaintiff must thus show that he has a better right to peg these claims for gold than the defendants. He must prove that he holds these claims under Law No. 17 of 1895, and, secondly, that the preferent right on which he relies is a vested right unaffected by the repeal of Law No. 17 of 1895. The plaintiff does not hold these claims under the Law of 1895. He pegged the claims under the circular of May, 1889. If any

rights on the claims vested at any time, they vested at the time of pegging and under this circular. The new Laws referred to in the circular were the addenda to the Gold Laws of 1891 and 1892, which referred the matter back to the Government. There is no evidence that the plaintiff ever held under Law No. 17 of 1895. His licences refer to Law No. 8 of 1885 (and till very recently the Gold Law was always called the "amended Law 8 of 1885") and later to Law No. 14 of 1897. Even admitting that these claims were held under Law No. 17 of 1895, this preferent right was never a vested right, and whatever chance of obtaining it the plaintiff ever had disappeared when Law No. 17 of 1895 was specifically repealed. Plaintiff may have had a vested right to the coal claims, though even that was very precarious, as "it is renewable only in so far as the Government has not granted other rights on it" (sec. 4 of Law No. 17 of 1895). The plaintiff had a mere prospect of getting a gold licence. There is a clear distinction between a vested and a contingent right. A right becomes vested only where all the acts have been done and all the events have happened which were necessary to give the right. If the right has not vested it is a mere expectation, and the authorities are clear that all such expectations vanish on repeal of the Law giving them; see Windscheid, vol. 1, sec. 32; Vangerow, vol. 1, sec. 26; Dalloz, *Repertoire,* vol. 30, pp. 97 *et seqq.*, sec. 205. The law there laid down by the German and French authorities is quite in accord with the principles of the English law, and has been followed by the Privy Council: see *Abbot* v. *Minister of Lands* ([1895] A.C. 425; 72 L.T. Rep. 402), and *Reynolds* v. *Attorney-General of Nova Scotia* ([1896] A.C. 240; 74 L.T. Rep. 108). The last case is very much in point, deciding as it does that the right to renew a coal licence is a mere privilege, and falls away by the repeal of the statute granting it. The successive Gold Laws do not affect vested rights, but do affect the concomitants and appendages of such rights. Although Law No. 14 of 1897 is not retrospective, it repealed Law No. 17 of 1895, and did away with all prospective rights and privileges accruing from that Law.

Gregorowski, in reply: Sec. 5 of Law No. 14 of 1897 shows

under what circumstances base metal claims can be pegged for gold, viz., only base metal claims pegged under that Law for *expressio unius exclusio alterius*. No gold was found on these claims before October, 1898. A borehole must be put down. The Law does not speak of *vermoed*, but *gevonden*. There is nothing to prevent the plaintiff exercising his preferent right even before gold is found. He may exercise it at any time. The section was introduced for the protection of the coal claim-holder and of the Government or owner. If once in possession the claim-holder will not be disturbed; see *Witwatersrand G. M. Co.* v. *Young* (10 C.L.J. 76); *van Ryn G. M. Co.* v. *New Chimes G. M. Co.* (1 O.R. pt. 4, p. 38). Savigny clearly defines what rights are vested. Here we have an existing status. The right is a right attached to the claims and not to a person. The plaintiff is in possession of the claims, and no one else can come and work them without interfering with his rights. The cases in the Privy Council cited depend altogether on the construction of the statutes concerned, and do not affect this case.

Cur. adv. vult.

Postea (November 10):—

INNES, C.J.: The dispute in this case concerns the right to obtain gold licences in respect of certain twenty-three claims originally pegged as coal claims by the plaintiff in the action. They are situated upon the farm Benoni, in the district of Boksburg, which is a Government farm, and is, and always has been, so far as any date relevant to this inquiry is concerned, portion of a duly proclaimed mining area. Some of these claims were pegged in July, 1892; the remainder in February, 1894; and from those dates until October, 1898, they were held by the plaintiff under coal licences without any complication arising. During that month, however, the late J. D. E. Scholtz, whose executors are formal defendants in this action, took out licences to prospect for gold, and under those licences he pegged the claims in dispute as gold claims; his prospecting licences were thereafter renewed, and he appears to have paid the licence-moneys at any rate up to the end of August, 1899. After the conclusion of the war he tendered to

pay for further renewals; but the authorities declined to accept his money or to grant such renewals, presumably on account of the fact that the ownership of the claims was in dispute.

The plaintiff, when Scholtz's action was brought to his notice, caused a letter of protest to be addressed to the Mining Commissioner; but he did not in that letter apply for the issue of gold licences to himself: he was content with asserting that he had a preferent right to such licences. In his evidence, however Guinsberg states that he verbally offered to take out gold licences, but was informed by a clerk at the office that he could not have them. He made no further move in the matter until June, 1899; on the 30th of that month he applied for and obtained a prospecting licence for precious stones and metals in regard to these claims for the period ending 30th July, 1899. In the interval between October, 1898, and June, 1899, the case of *Nel and Henry* against the present defendants had been decided by the late High Court. The issue raised in that action was precisely similar to the one now under consideration, and the fact that judgment was then given in favour of the plaintiffs doubtless accounts for the steps somewhat tardily taken by Guinsberg in June, 1899. But though he obtained an original prospecting licence for precious metals, the plaintiff never succeeded in having that licence renewed. His application to that effect in July was refused by the Mining Commissioner, though his formal tender of licence-moneys to the end of August was duly noted. But he has continued to pay for and renew the coal licences in respect of the claims.

The position then is this: the claims in dispute stand registered in the name of the plaintiff as coal claims; neither party is in possession of gold licences covering them, though both have in the past held such prospecting licences; both are anxious to renew their licences, and have tendered to pay the necessary money to the Mining Department; and the judgment of the Court is now asked as to whether the plaintiff has, or the defendants have, a better right to demand gold licences for these claims.

The plaintiff's case depends entirely upon the provisions of a section of the Base Metal Law (No. 17 of 1895), which gave to

the owner of coal claims held under that Law a right of priority, in respect of the issue of gold licences for such claims, for a period of three months after the discovery of gold in them. This statute, however, was repealed by Law No. 14 of 1897. And the defendants contend, as a matter of law, that the effect of such repeal was to deprive the plaintiff of any claim to priority; and as a matter of fact, that even if the right to this priority of choice continued to exist subsequent to 1897, the plaintiff allowed more than three months to elapse after gold had been discovered in the claims in question without applying for gold licences; from which it would follow that he cannot now claim the benefits of the section.

The matter is one of considerable intricacy and importance, and it will be desirable to examine,

First.—The legal position of the plaintiff as regards the right to obtain gold licences for his coal claims before 1895.

Second.—His legal position regarded from the same standpoint after the passing of the Law No. 17 of 1895.

It will then be easier to determine,

Third.—His legal position in regard to the same question after the promulgation of Law No. 14 of 1897.

Dealing with the first of these points: Guinsberg obtained his coal claims by virtue of certain powers conferred upon the Government by Volksraad Resolution, art. 1273, of the 10th November, 1884. That Resolution authorised the Executive to issue licences to mine for coal upon Government ground—the amount of the licence and the size of the claims to be fixed by the Government. Acting under these powers the Executive caused a circular to be sent out in 1889 instructing all mining officials to issue coal licences on Government property, the claims to be of the same extent as those granted for precious metals, and licences to be paid at the same rate. It was expressly stated in the circular that the arrangement was to be regarded as merely provisional, and that licensees under the circular would be bound by all regulations made or to be made in the future with regard to mining for coal.

The issue of coal licences upon proclaimed private ground was dealt with by the appendices to the Gold Laws of 1891 and

1892; but these statutes made no change in the tenure by which coal licences on Government ground were held. Immediately prior to the promulgation of Law No. 17 of 1895, therefore, the rights of the plaintiff and of the public with regard to mining and prospecting for gold upon his coal claims were regulated entirely by the provisions of the Gold Law then in force (No. 14 of 1894).

Under that Law, as I read it, gold claims could be pegged upon any land included within a duly proclaimed gold-field, unless the statute contained some express provision to the contrary. The 21st section forbade prospecting or mining in towns, villages, streets, or squares; also on stands, burial-places, and various other localities; and by the 87th section it was made a criminal offence wilfully to peg gold claims already belonging to another licence-holder. But I can find nothing in the Law which made it unlawful to peg for gold ground already held under a coal licence; and I therefore come to the conclusion that it was open to any member of the public, duly armed with a prospecting licence, to peg coal claims for gold; though possibly the courts would have prevented such a prospector from doing anything which unduly hampered the original licence-holder in his operations of prospecting or mining for coal. Prior to the Law of 1895, therefore, the position was this: the plaintiff himself could have taken out a gold licence for his coal claims and could have prospected or mined under it, and any member of the public could have done the same. He had, in regard to the right to obtain a gold licence, no preference over any other person.

Such was the tenure under which the plaintiff originally held. Turning now to the second head of the inquiry, it is clear that the provisions of Law No. 17 of 1895 very materially altered the legal position of the holders of coal licences. It dealt almost entirely with the right of prospecting and mining for coal upon Government land. After providing that, for the above purposes, licences would be granted at a very low rate and for claims considerably larger in area than ordinary coal claims, it went on by its 5th section to enact as follows:—

"Should one of the precious metals . . . be found on the said claims [that is, claims on Government ground in respect of which base

metal licences had been taken out under the statute], then the holder of the first licence . . . shall be entitled during three months to the preference for obtaining a licence to dig for such precious metal . . . under the provisions of the amended Law No. 8 of 1885. . . . Should the holder of the first licence not desire to make any use of this right of preference, then the proper officials shall be at liberty to issue such a licence to any other applicant."

I think there can be no doubt that the plaintiff was entitled, in respect of his twenty-three coal claims, to enjoy the benefits of the above section. True, those claims had been originally obtained under the Volksraad Resolution and not under the statute; but the *besluit* was a mere temporary measure, and licensees holding under it were expressly warned that they would be liable to the burden of any regulation dealing with coal mines which might be subsequently passed. And if they were subject to the burdens of fresh legislation, they were certainly entitled to claim the advantage of any benefits which such legislation might confer.

What, then, was the extent and nature of the privilege which the Law of 1895 conferred upon the plaintiff in regard to the issue of gold licences over his coal claims? In direct language the 5th section gave him a right of preference for a period of three months, dating from the discovery of gold in the claims. But the logical result of the terms of the section was to prevent other people from pegging the claims for gold, even though there had been no discovery and the three months' period had not commenced to run. The last clause authorised the proper officials to issue a gold licence to outside applicants, only if, and when, the first holder desired not to avail himself of his right of preference. The inference is obvious, that the legislature intended that no gold licences should issue in respect of base metal claims to any person other than the original licensee, until, gold having been discovered therein, such licensee had decided not to exercise his rights of priority.

The legal position, then, of the plaintiff after the promulgation of Law No. 17 of 1895 was this: he could at any time take out gold licences for his coal claims, because the prohibition contained in the last paragraph of sec. 5 did not affect him; but no

other person could do so until gold had been discovered and he (the plaintiff), within a period of three months thereafter, had not himself applied for such licences. This privilege was one which came into existence so soon as the Law of 1895 was passed, and of which only two occurrences could dispossess the plaintiff: the withdrawal of it by the legislature, and non-exercise of it during a period of three months after the discovery of gold in the claims. With regard to the latter of these points, I may say at once that up to the date of the commencement of this action there had in my opinion been no such discovery as was contemplated by the statute. The section requires that precious metal must have been "found" (*gevonden*) in the claim—that is to say, that its presence must have been physically proved and ascertained—before the holder can be called upon to make his choice. Much evidence was led to the effect that, in the opinion of men qualified to judge, it was highly probable, indeed almost certain, that gold reefs did underlie the coal formation running through the plaintiff's claims. But apart from the fact that other experts held a different view, it seems to me clear that mere probability of the existence of gold, however great, could never be considered equivalent to its actual discovery.

That being so, the only question that remains is whether the privilege granted to the plaintiff by the Law of 1895 has been withdrawn by the legislature. That is really the third of the points previously referred to, namely, the legal position of the plaintiff after the Law of 1895 had been repealed by Law No. 14 of 1897. The repealing statute contains no provision directly dealing with the right of priority enjoyed by the holders of base metal claims under the Law of 1895. Under these circumstances the general rule is applicable, that in the absence of an express intention to the contrary on the part of the law-giver, laws only affect subsequent transactions, and have no application to acts already concluded, and that therefore they do not interfere with rights vested before their promulgation. This rule is founded upon a passage in the Code (1, 14, sec. 7), and the principle which it embodies is recognised by the law of England as well as by our own, and has been repeatedly applied. The difficulty which

most commonly presents itself in regard to the application of the doctrine is the difficulty of deciding whether or not a particular right is vested (that is to say, whether it is a right properly so called), or whether it is contingent (that is to say, not a right at all, but a mere expectation or chance). Much learned investigation has been given to the matter by commentators upon the civil law; but I do not think it is necessary, for reasons which will presently appear, to examine with any particularity into their arguments.

The point is whether the privilege which the Law of 1895 conferred upon the plaintiff, as the holder of these coal claims, amounted to such a vested right as a repealing statute would be presumed not to have been intended to interfere with.

At one stage of the consideration of this matter I was impressed by the existence of certain circumstances in connection with this privilege, from which arguments might be drawn in favour of the conclusion that the privilege really amounted in law to a vested right. As already pointed out, the effect of the statute of 1895 was to prevent any person other than the plaintiff from obtaining gold licences for these claims until (*a*) gold had been discovered in them, and (*b*) the plaintiff had decided not to take out licences himself. This privilege accrued so soon as the Law was passed; it needed no act on the plaintiff's part to complete his title to it; and it was defeasible only if, after the discovery of gold, he neglected timeously to exercise it. These circumstances seem at first sight to point to the existence of a vested right, but closer investigation shows that the preferent rights of exploiting these coal claims for gold must be regarded as dependent upon the continued existence of a coal licence under the Law of 1895, and that it can only be said to be vested in the licensee so long as he retains his licence. It is therefore not vested in him absolutely and in all events, but only during the currency of a coal licence regulated as to the incidents of its tenure by the Law of 1895. That being so, the right cannot be considered to have been so vested in the plaintiff in 1897 that, in the absence of special provisions to preserve it, it would remain intact even after the repeal of the Law of 1895, and of all machinery for renewing licences originally issued under that

statute. This conclusion is strongly supported by the decision of the Privy Council in *Reynolds* v. *Attorney-General of Nova Scotia* ([1896] A.C. 240); indeed any different view would be inconsistent with the law as laid down in that case. Because, if the right of priority given by the Law of 1895 were a right vested absolutely and in all events, then *à fortiori* the right to claim a renewal of a coal licence under that statute, notwithstanding its repeal, would be a vested right; the former right is only a result of the latter. And yet the Privy Council held under circumstances almost exactly similar that the holder of a coal licence renewable under a statute at the option of the licensee possessed no acquired right to renew, and that he could not claim a renewed licence after the repeal of the statute under which the original had been taken out. That decision is of course binding upon this Court, and it is really conclusive upon the point under consideration. If the plaintiff after the repeal of the Law of 1895 could claim no renewal under that Law, but was obliged to take out his licences under the new statute of 1897, then the privilege, which was dependent for its existence on the expired licences, perished with them.

I do not propose to endeavour to ascertain the exact degree to which English courts have extended the doctrine of the retroactive operation of laws (as probably they have done) beyond the limits within which the civil commentators would confine it. Because the Privy Council broadly applied a doctrine common to both systems of law, and the fact that the right here is one which depends upon the existence of a licence the machinery for the renewal of which has been destroyed, differentiates this case from the cases discussed by the civilian writers.

The only statute under which coal licences on Government ground can now be renewed is the Law No. 14 of 1897, and licences accepted under that Law would be held subject to its provisions. As a matter of fact the plaintiff did on one occasion at least accept renewals purporting upon the face of them to be issued by virtue of Law No. 14 of 1897, and the evidence is to the effect that that would have been the proper official practice. At any rate there is no means by which a licence

held under the repealed Law of 1895 could be renewed after the date of the repeal of that Law, any more than there would be a mode of renewing gold licences if the legislature were to abolish the existing Gold Law and substitute nothing in its place.

I have not overlooked the terms of sec. 5 of Law No. 14 of 1897, which enacts that "one or more claims pegged off under the provisions of this Law . . . may at any time be pegged off by another person, and worked for precious metals under the provisions and stipulations of the Gold Law." It is certainly significant that in dealing with the exploitation of base metal claims for gold mining purposes no reference should have been made to claims pegged before 1897. If, however, that can be taken as some evidence of the desire of the legislature not to interfere with the rights of priority granted to licence-holders under the Law of 1895, it is neutralised by the significant omission to provide any machinery by which the licences on which these rights depended could be renewed and kept alive. And it must also be borne in mind that the mere repeal of the statute of 1895, if the rights of priority conferred by it were not vested rights, would render all old claims liable to be pegged under the ordinary provisions of the Gold Law, at any rate after the expiry of the term of the licences taken out under the Law of 1895.

Under these circumstances I come to the conclusion that the plaintiff cannot succeed; that the privilege of pegging his coal claims for gold in priority to third persons had ceased to exist before October, 1898; and that therefore he cannot override the legal effect of the defendants pegging at that date.

I regret the necessity of differing from the judgment of the majority of the late High Court in *Nel and Henry's* case, which raised a precisely similar point, and in regard to claims pegged at the same date and by the same defendants; it is certainly unfortunate that two conflicting decisions should be pronounced by the two Courts in regard to matters so closely connected and so practically identical. But had the High Court been bound by the decisions of the Privy Council, which it was not, and had *Reynolds'* case been quoted to it, possibly the decision might have been different. However that may be, the defendants are

in my opinion entitled to a declaration of rights as asked for by them in reconvention; but upon the frame of the pleadings, and in view of the fact that the Registrar of Mining Rights is no party to this action, the Court cannot settle the question of the amount of licence-money to be paid by the defendants.

Judgment will be for the defendants in convention and for the plaintiffs in reconvention, the Court declaring on the claim in reconvention that as between the parties to the action the plaintiffs in reconvention are entitled to hold the claims in question under licences under the Gold Law. The plaintiff in convention must pay the costs.

MASON, J.: It is not necessary for me to recapitulate the facts in this case which have been detailed by the CHIEF JUSTICE, nor to refer to the contention of the defendants that gold has been discovered on the claims in question—a contention which we intimated during the argument to be untenable.

The sole question for decision is whether the preferential right of the plaintiff to take out a gold licence for the coal claims, which he pegged under Law No. 17 of 1895, continued to exist after the repeal of that statute by Law No. 14 of 1897.

The plaintiff contended that under the Gold Laws generally the ground covered by coal claims was not open to pegging, and that as the only right to peg them out as gold claims existed under sec. 5 of Law No. 14 of 1897, which authorises pegging out of gold claims only upon coal claims pegged out under that Law, and that as his claims were not pegged out under that Law, the ground in question was not open to the defendants.

The farm Benoni is a proclaimed Government farm, and an examination of the various Gold Laws, beginning with that of 1885 and continuing to the one in force in October, 1898, shows that specific provision was made as to the portions of the field which were closed to peggers and reserved from the operation of diggers. The ground in question does not come within any of these restrictions, and therefore *primâ facie* is open to pegging for gold claims, and this view is fully confirmed by the appendices to Laws Nos. 10 of 1891 and 18 of 1892 and the provisions of No. 17 of 1895, sec. 5, which all contemplate specifically the pegging out of coal claims under other licences, though a

preference is conferred upon the holder of the original coal licence.

I am therefore of opinion that, subject to any rights which the plaintiff may have acquired under Law No. 17 of 1895, this ground was open to pegging, and this construction of the Law is a somewhat important one in considering the right of preference which the Law conferred.

The plaintiff, as holder of the coal licences, was entitled under the general law to peg out these claims as gold claims. Sec. 5 of this Law No. 17 of 1895 gave him a right of preference, if gold was discovered, for three months, and if he did not wish to exercise this right the proper officials might issue a licence to any other applicant. The result is that persons other than the holder of the coal licence could not prospect or dig except after the lapse of three months from the date of the discovery of gold. In my judgment Mr. *Gregorowski* was right in his contention that in substance this Law conferred a preferent right on the holder of the coal licences to take out a gold licence during the whole of his tenure, but terminable three months after the discovery of gold. The preferent right he has is not in reality, having regard to the existing state of the law, in my opinion, a contingent right, but an absolute right, terminable in the event of a certain occurrence, though of course dependent on the renewal of the licence.

If Law No. 17 of 1895 had enacted that no coal claims could be pegged out for gold unless gold were discovered, and that only then should the coal licensee have a right of preference, then the right would be merely contingent. It is true that sec. 4 of the Law states that these licences are only renewable in so far as the Government has not granted other rights thereon, but I think it is doubtful whether this saving clause refers to more than the powers which the Government has under the Gold Law of making roads and granting other rights over the surface of claims.

Sec. 15 of this Law of 1895 enacts that the rights on claims obtained under the Law by the holders of licences should not be taken away from them by subsequent legislation, and then follows a provision for expropriation for public purposes upon payment of compensation.

The legislature in 1897 by Law No. 14 expressly repealed Law No. 17 of 1895, and though the main provisions of that Law were re-enacted there are certain important differences.

Sec. 4 authorises the issue of licences only upon proclaimed Government ground, while the prior Law includes unproclaimed ground also. The section of the prior Law conferring a right of preference disappears, and in place thereof is a provision that any claims pegged under the Law of 1897 on proclaimed Government ground may at any time be pegged off by any other person for precious metals under the Gold Law. The later Law re-enacts the provisions with reference to expropriation, but omits the words professing to bind the power of the legislature in the future.

It therefore becomes necessary to decide what effect the repealing clause of Law No. 14 of 1897 had upon the plaintiff's tenure of his coal claims. Under English law, which also prevails in the United States, the effect of repealing a statute is to obliterate it as completely from the records of the legislature as if it had never been passed, with a qualification as to transactions or proceedings already concluded, which will be referred to later on. Accordingly it has been there held that where a statute creating an offence or inflicting a punishment has been repealed, the offender cannot afterwards be proceeded against for an offence committed while the Act was in operation, even if the repealing Act re-enacts the penal clause or substitutes some other punishment, and this doctrine has been applied in England even in cases where an indictment was actually pending, and in the United States in Admiralty cases where an appeal was proceeding.

It is doubtful whether repeal has in Roman-Dutch Law quite such a sweeping effect, and the law with reference to prior offences seems to be different.

The general rule derived from the Code (1, 14, 7) may be expressed in the formula of Savigny, that new laws ought to have no retrospective effect so as to infringe upon acquired rights. Although various jurisprudences have arrived at somewhat different conclusions as to what are acquired rights and what would amount to an infringement, and although, in par-

ticular, English law seems to give a somewhat more stringent effect to repeals, the general principles of all systems are substantially identical, and all courts endeavour, so far as is consistent with the proper construction of the legislation to be administered, to avoid disturbing existing rights or obligations. It will therefore be convenient to determine, in the first place, whether the right which the plaintiff had is an acquired right in terms of these authorities.

If the owner of land were to give a tenant the right to mine base metals under a lease for one year, renewable after the first year every month in perpetuity on prepayment of a definite sum, and if the owner were also to bind himself to give a lease of the right to precious metals if they should be discovered on the land renewable in the same manner and for a like term, there can, I think, be no doubt that the Court would enforce against the owner the right of the lessee to the precious metals, and would prevent him from alienating to another person that right even though the precious metals had not yet been discovered.

There can, I think, in this case also be no doubt that the right to a lease of the precious metals, even though they have not been found and may perhaps never be found, is an acquired right.

Now under the Law of 1895 the holder of Government licences was entitled to renew his licence indefinitely, and, in case gold was found, to a priority of three months in obtaining a gold licence. The right of priority was in my opinion a right which the claim-holder had at the time he pegged out his claim, and renewed with every renewal of his licence. Therefore a law abolishing the right of priority is retrospective in just the same way as a law repealing, for instance, the Gold Law without any reservation.

The construction which has been placed upon the words "an accrued right" in English cases differs in part from that which some of our jurists seem to have placed upon the term "acquired right."

The case of *Reynolds* v. *Attorney-General of Nova Scotia* decides that the right to renew a lease which was authorised by

statute repealed before the renewal was not an accrued right; but though I have come to the conclusion that to construe the statute of 1897 so as to deprive the plaintiff of his right of preference would be to give to that statute a retrospective effect, yet that does not conclude the question in his favour. This Court held (*Neebe* v. *Registrar of Mining Rights*, [1902] T.S. 65) that a claim licence is not a lease or emphyteusis, but a statutory tenure or privilege *sui generis*, and these coal-claim licences stand on the same footing. It is clear they are not contracts in the ordinary meaning of the word, but are dependent for their creation and for their effective existence upon legislation.

Savigny in dealing with retrospectivity divides laws into two classes, viz., those which deal with the acquisition of rights and those dealing with their existence. The former he considers are not retrospective; the latter are, and thus laws which entirely abolish the existence of a right or essentially modify its nature are retrospective. It is true that most of the examples that he gives deal with political institutions and are determined by political considerations; but he includes a class of what he calls judicial institutions which are retrospectively affected by repealing laws, and mentions amongst them the law abolishing double ownership in the time of Justinian, the French law abolishing the vindication of a movable which has been sold, and laws establishing or abolishing legal servitudes; and though he considers that in cases of this kind it would be right for the State to make compensation, he nevertheless concludes that such laws are retrospective. Dalloz (pars. 199 and 200) states that where the legislature has conferred powers upon any class of persons that that is a permission, not a contract binding the State, and that rights held solely under the law are therefore governed by new legislation, and Merlin uses similar language (sec. 3, par. 3). In the case of a will or a contract the death of the testator or the making of the agreement determines, so he says, from that time forth the rights of the parties (sec. 6, par. 4); but where rights are held under a law, which the legislature, its author, is always capable of revoking, that revocation will have a retrospective effect in respect of all rights which have not actually passed into possession.

Now the Law of 1897 repealed expressly the whole of the Law of 1895. The renewal of licences under a Law which was absolutely repealed, and for which renewal no provision was made, would in my opinion be an invalid act. To continue the full effect of the Law of 1895 after the Law of 1897 had come into operation would appear to practically override the repealing clause of the later Law, because the later Law, without any repealing clause, would only affect future licences.

I do not omit from consideration the language of sec. 5 of Law No. 14 of 1897, which it was contended distinguished claims pegged under that Law from claims pegged, and therefore by inference still held, under the Law of 1895; to my mind it is probable, taking the whole Law into consideration, that it was intended either to distinguish claims pegged under the Law of 1897 from those pegged under any other existing Law, or to identify the claims referred to with those referred to in secs. 4 and 7. It seems also strange if the legislature had intended to retain the old Law for all claims which were entitled to its benefits, and which would include gold as well as coal claims, that an obscure inference and not definite language should be employed.

The late High Court decided in an exactly similar case to this that the construction contended for by the plaintiff was correct (*Nel and Henry* v. *Scholtz, Robertshaw, and Kelly*, June, 1899); but the decision is not one of a series settling the law, and it was therefore necessary for us, more particularly in view of the Nova Scotia case, to examine the matter afresh.

The principle of non-retrospectivity would protect every one in possession of the base metal claims which had been acquired under the then existing Law, and probably protect them in the possession of claims the renewal of which had already been paid for until the expiration of the renewal; but to extend that principle so as to preserve for all time claims taken out under the old Law, with every right attached to them by that Law, appears to me unjustifiable.

In the case of *Reynolds* v. *Attorney-General of Nova Scotia* ([1896] A.C. 240), where a Government Commissioner was authorised to grant leases with a right of renewal to which the lessee was declared entitled, the repealing of the Law was

held to abolish the right of the Commissioner to renew apart from the question of accrued rights; and there have been numerous decisions that where a jurisdiction or authority to make grants is dependent on a statute, the repeal of the statute destroys the jurisdiction or authority, even in respect of matters which had accrued prior to the repeal, and which would have authorised their exercise if they had been invoked in time.

In my opinion, therefore, the plaintiff's right of priority ceased when his right of renewal under the Law of 1895 was abolished by the Law of 1897, and the defendants are entitled to succeed on the claim in convention, and as against the plaintiff also on the claim in reconvention, with costs.

BRISTOWE, J.: The plaintiff pegged out his coal claims and obtained the original licences in respect of them in the year 1892. The claims were situate on the Government farm Benoni at Boksburg, which was a proclaimed gold-field. The original licences were granted by the Government under the authority of a Volksraad Resolution of the 10th November, 1884, and on the terms of a circular issued by the Government to the Mining Commissioners and responsible clerks on the 10th May, 1889. The licences appear to have been in the first instance for a month, and to have been from time to time renewed under the powers of the Resolution and circular up to the passing of the Base Metal Law of 1895.

I agree with the CHIEF JUSTICE in thinking that the circular of the 10th May, 1889, was of a purely provisional character. It only authorised the granting of coal licences "until new Laws can be laid before the Volksraad," and it provided (clause 3) "that the holders of licences shall be subject to all regulations made or to be made with reference to the digging of coal"

Moreover, I do not think that under that circular licence-holders became entitled to any right of renewal, and it seems to me that every so-called renewal under the powers of the Resolution and circular was in fact a new licence. I think, further (indeed it was not disputed in argument), that previously to the passing of the Base Metal Law of 1895 coal claims licensed under the circular might at any time have been pegged out as gold claims by the plaintiff or any other person.

Sec. 4 of the Base Metal Law of 1895 provided the mode by which as from that date licences "to prospect and mine" for base metals and coal on "Government ground which is proclaimed as a public digging or unproclaimed, which is open for prospectors" (which included land in respect of which coal licences had been granted under the Resolution and circular), should be obtainable. The provisions were that licences might be obtained for an area of twelve claims 150 ft. by 400 ft., each on payment of ten shillings per block of twelve claims for the first year, "after which the licences can be renewed on payment of five shillings per month per block of twelve claims in so far as no other rights have been granted thereon by the Government."

On the passing of this Law the plaintiff took out licences under it for his existing coal claims. The first licences were for a year, the licence-money being at the rate of ten shillings per block of twelve claims; and these licences were afterwards renewed periodically on payment of the renewal fees provided by the section.

Now the Law of 1895 gave to coal licensees under it, and therefore to the plaintiff, very important gold mining rights. These rights are contained in sec. 5, which is as follows:—

"Should one of the precious metals or precious stones mentioned in art. 2 of the amended Law No. 8 of 1885 or the chapter 'Silver' be found (*gevonden*) on the same claims, then the holder of the first licence or permission shall be entitled during three months to the preference for obtaining a licence to dig for these precious metals or precious stones under the provisions of the amended Law No. 8 of 1885. . . . Should the holder of the first licence wish to make no use of this preferential right, then the proper officials shall be at liberty to issue such a licence to any other applicant."

I am not sure that it is material, having regard to the view which the Court takes of this case, to determine what was the exact nature of the rights conferred by this section. I agree, however, in thinking that it not only gave the coal licensee for the time being the right for a period of three months after gold or precious stones had been discovered in his claims to obtain a gold licence in priority to all other persons, but that it also had the effect during the intervening period of excluding all other

persons from exercising the right of pegging the same claims for gold which they would otherwise have had under the Gold Law. This seems to me to be the result by implication of the last clause of sec. 5.

The Base Metal Law of 1895 was expressly repealed by the Base Metal Law of 1897, which came into force upon its publication in the *Staatscourant* in October or November, 1897.

Sec. 4 of the new Law re-enacted sec. 4 of the repealed Law, except as to its application to unproclaimed ground (a difference which does not affect the present case). It did not re-enact sec. 5 of the old Law, but on the contrary provided (sec. 5) that "one or more claims pegged off under the provisions of this Law on proclaimed Government ground may at any time be pegged off by another person and worked for precious metals under the provisions and stipulations of the Gold Law." After the passing of this Law the plaintiff continued to renew his licences periodically as he had done before, and he never applied for or was apparently asked to apply for original licences under this Law.

In the present action the plaintiff contends that the renewals after the passing of the Law of 1897 carried with them the rights granted by sec. 5 of the Law of 1895. These rights were, of course, only conferred upon licence-holders under that Law, for although they were expressed to continue for three months after the discovery of gold, such continuance was subject to the licences themselves being duly renewed. If licences under the Law of 1895 continued to be renewable under that Law after its repeal, there would be little difficulty in holding that the renewals carried with them all rights which that Law attached to them. But if they ceased to be renewable on the repeal of that Law, then all licences or so-called renewals of licences afterwards granted must either have been void altogether or have been granted under the Law of 1897; in neither of which cases would they have involved any rights annexed to licences under the Law of 1895.

The real question is, therefore, whether the right of renewal under the Law of 1895 continued to exist after the repeal of that Law. And this depends on what is the effect of the repeal of the Law of 1895 by the Law of 1897. It is clear that under the

English law the right of renewal in question would not have been preserved from the effect of the repealing Law unless it were a vested right, or (to speak more accurately) a right as distinguished from an expectation; and it is also clear that under the Roman-Dutch law as much as under the English law it would (in the absence of any indication of a contrary intention in the repealing Law) be preserved from repeal if it were a vested right.

Now the case of *Reynolds* v. *Attorney-General of Nova Scotia* ([1896] A.C. 240), to which Mr. *Smuts* in the course of his extremely able and interesting argument referred us, seems to me to be a conclusive authority that the right of renewal in question was not a vested right. In that case, which was an appeal from the Supreme Court of Nova Scotia, a licence to work a coal area was on the 23rd August, 1887, granted to the appellants under chap. 7 of the revised Statutes of Nova Scotia, 5th series. By sec. 95 of that law it was enacted that "any licence to work shall be for a term of two years from the date of application, and shall be extended to three years upon the additional payment by the holder of the licence of one-half of the amount originally paid for such licence." In April, 1889, this section was repealed, and in the following August the appellants applied under it for, and obtained, a renewal of their licence for the further term of one year. It was held by MEAGHER, J., and by the Supreme Court of Nova Scotia, that the renewal of the licence was invalid, because at the date at which it was granted the power to grant it had been repealed. On appeal to the Privy Council this decision was upheld, and Lord MORRIS, in delivering the judgment of the Court, said (p. 244): "In the present case the only existing licence the appellants had when the amending statute was passed was for two years, expiring in August, 1889. They had a privilege to get an extension for one year under sec. 95, but had no accrued right, and the object of the legislation of 1889 was to get rid of licences and substitute leases."

Unless, therefore, the Roman-Dutch law goes beyond the English law, the right to renew licences under the Law of 1895 did not survive the repeal of that Law. Mr. *Gregorowski*, however, contended that the Roman-Dutch law is wider than the

English law, and in support of this view he cited Savigny's *Treatise on the Conflict of Laws*, where the writer says (at p. 340 of the 2nd ed. of Guthrie's translation) that the principle that no retroactive force is to be attributed to a new law "absolutely denies the influence of the new law on the consequences of past facts, and that in every conceivable degree."

Whatever may be the exact meaning of the somewhat vague expression "the consequences of past facts," it seems to me that it is straining language to say that it includes a mere expectation which will only ripen into a right in certain contingencies which may or may not occur. But a careful perusal of the passage referred to shows that Savigny did not intend his words to bear this wide interpretation. He lays down two formulae with regard to the retrospective effect (*primâ facie*) of new laws. The first is that no retroactive force is to be attributed to a new law, and it is with reference to this that he makes the observation upon which Mr. *Gregorowski* relies. The second is that new laws leave vested or acquired rights unimpaired. He, however, goes on to say (p. 341) that "there is in both formulae only one and the same principle contemplated and described from different sides," and in commenting on the second formula he observes that it is to be understood subject to certain qualifications, which he states as follows (pp. 341, 342): "The formula concerning the maintenance of vested rights needs more accurate definition on two sides in order to guard against very hazardous mistakes. First, by vested rights which ought to be maintained according to this formula we are to understand only the legal relations of a determinate person, and therefore the constituent parts of a sphere within which the individual will has independent sway, not the abstract faculties or qualities of all men or of whole classes of men. . . . In the second place, vested rights are not to be confounded with mere expectations which were founded by the former law and are destroyed by the new law. This result is by no means excluded by the principle which maintains acquired rights. . . . On the contrary, it would be wrong to rank among mere expectations rights which cannot yet be exercised because they are coupled with a condition or a term. These are really rights, since even in the case of a condition the fulfilment

is drawn back. The difference is that in a mere expectation the result depends entirely on the free-will of a stranger, which is not the case with the *conditio* and the *dies*."

Seeing, then, that Savigny considers the two formulae to mean the same thing, and that he expressly excepts expectations from the immunity from a repealing act which he attributes to vested rights, it seems obvious that he cannot have included expectations among the consequences of past facts which he excludes from the operation of a new law. In my opinion, therefore, Savigny is not an authority for the position which he has been cited to support.

The rule of the Roman-Dutch law is stated by the CHIEF JUSTICE of the Cape Colony in *Colonial Government* v. *Standard Bank* (9 S.C. 258) as follows: "According to Voet (1, 3, 17) things validly done under any law retain their validity notwithstanding the subsequent repeal of such law. This is but a consequence of the well-known rule of the civil law (*Code*, 1, 14, 7): *Leges et constitutiones futuris certum est dare formam negotiis non ad facta praeteritu revocari.* This rule is also the foundation of the English law on the same subject, and it would be strange indeed if the logical deductions from that principle were different under one system of law from what they are under the other." The truth seems to me to be that on this subject the Roman-Dutch law and the English law are the same. A vested right is a *factum praeteritum.* An expectation or chance of a future right is not a *factum praeteritum*, nor is it in any true sense a consequence of a *factum praeteritum.*

I therefore come to the conclusion that the plaintiff's right to have his coal licences renewed under the Base Metal Law of 1895, together with all the consequences which would have attended such renewal, passed out of existence with the Law which created it. If this is so, then it follows that the defendants were within their rights in pegging out these claims for gold in October, 1898; and it is immaterial whether they did so under the general law, or whether the case falls within the express provisions of sec. 5 of Law No. 14 of 1897.

The conclusion to which I have come renders it unnecessary

to consider the other point which was argued, namely, whether gold was "found" (within the meaning of that word in sec. 5 of Law No. 17 of 1895) on the plaintiff's claims before October, 1898. But I may say that I agree with the CHIEF JUSTICE in thinking that "found" means actually found, that is, seen or brought to light by workings; and that it is not sufficient that the presence of precious metals may be inferred (with however close an approach to certainty) from observations and workings on other land, however near.

The result is that in my opinion the plaintiff's claim fails, and the defendants' claim in reconvention succeeds.

Plaintiff's Attorneys: *Rooth & Wessels;* Defendants' Attorneys: *Steymann, Esselen & Roos.*

BLAKE v. GOLDMAN AND OTHERS.

1903. *September* 25, *November* 10. INNES, C.J., and MASON, J.

Prescription.—Government land.—Outspans.—Volksraad Resolution.—Publication.

Prescription runs against the Government in respect of lands which can be alienated. As under Volksraad Resolutions of 1866 and 1868 the alienation of outspans on Government ground was prohibited, prescription could not run in respect of such outspans.

Publication in the minutes of the Volksraad appearing in the *Staatscourant* is a sufficient promulgation of Volksraad Resolutions of the years 1866 and 1868.

This was an action for declaration of rights. The plaintiff alleged that he was the registered owner of the farm Uitspanning, No. 389, situated on the Wonderfontein stream, in the district of Potchefstroom. The first two defendants, Goldman