COMMISSIONER OF MINES v. HERSH.

1905. *April* 6, 7. INNES, C.J., and SOLOMON and WESSELS, J.J.

Mines and minerals.—Gold Law.—Law 15 *of* 1898, *secs.* 13, 90 *and* 91.—*Public and private proclaimed farms.—Buildings for trading purposes on gold claims.—Right of the Commissioner of Mines to sue for ejectment.—Surface rights.—Compensation.*

Buildings for trading purposes had been erected upon certain gold claims in contravention of the provisions of the Gold Law of 1898. *Held*, that the Commissioner of Mines had a *locus standi* to sue for the removal of such buildings.

Where permission for the erection of such buildings had been given to the owner of the stands by the Government of the late South African Republic, *Held*, that before the owner could be ejected and the buildings removed, compensation should be paid to the owner.

The plaintiff alleged that the defendant was the registered owner of claim 8602 and a portion of claim 8429, both of which were held under prospecting licenses on the proclaimed farm Driefontein, No. 148, in the mining district of Boksburg. In May, 1904, the defendant wrongfully commenced to erect on these claims buildings for trading purposes, notwithstanding that he was warned by the Registrar of Mining Rights at Boksburg that the erection of such buildings was unlawful and would not be sanctioned by the Government. The buildings were completed, and at the date of the action were still being used for trading purposes by the lessees of the defendant. The plaintiff claimed: (*a*) Removal of all buildings so erected; (*b*) an interdict to restrain defendant from erecting any further buildings on these claims.

The defendant first pleaded that the claims were situated on a private proclaimed farm, and that the Commissioner of Mines had no *locus standi* in the action. To the merits he pleaded that in 1897 the then Government granted him a license to trade on claim 8429, and gave him permission to erect a building thereon for that purpose. In virtue of such permission a building was

erected on that claim in 1897, and used for trading purposes. The defendant's trading license with respect to this building was renewed from time to time by the late Government, and had also been renewed by the present Government, and was still in force.

In January, 1904, the building originally erected was destroyed by fire, and the defendant caused it to be rebuilt in June of that year. With respect to the building on claim 8602, it was erected in the year 1895 under conditions similar to those above mentioned; but, though it had never been destroyed by fire, various repairs and alterations had been made to it in 1904.

Esselen (with him *Gregorowski*), for the defendant: The Government has no *locus standi* in this matter. Whatever claim the Government may have to be joined as co-plaintiff with the owner of a private proclaimed farm, the Commissioner of Mines alone has no right or title to sue. Sec. 1 of the Gold Law does not deprive the owner of such farm of the surface rights. Sec. 90 lays down that the possession of a claim license shall not include the right to dispose of the surface rights, which the Government reserves to itself; but the question arises, How far has the Government a right to object to these buildings if the private owner does not object? The whole matter rests on the general proposition that no one but the owner can prevent or grant the right of *superficies*. Neither sec. 92 nor sec. 93 by their terms prohibit the owner from granting the right of *superficies* to another person. But if the Law ascribes this power to the Government, then the Government is virtually the full owner, which is not in fact the case. The legislature intended to draw a distinction between Government proclaimed ground and private proclaimed ground.

Burns-Begg (with him *Matthews*), for the plaintiff: With regard to the defendant's preliminary plea, the Government holds the right of *superficies* in every proclaimed gold farm as trustee for the public and in the public interest. It is true that in the case of a private proclaimed farm the proprietor is not deprived of his proprietary rights, but the Law has placed very stringent limitations on these rights. The principle laid down in sec. 35 of the Gold Law is that the Government makes no

distinction between public and private proclaimed goldfields with regard to administration. The whole tenor of the Law is to give the Government complete control over the goldfields. Paragraph 3 of sec. 13 of the Gold Law entirely covers the present case. These buildings were erected by the defendant on the claims in question after permission to do so had been refused by the Commissioner of Mines. They were put up in spite of clear official intimation to the defendant that his intended action was illegal.

Gregorowski: Some two years ago the Government allowed the defendant to put up buildings on these claims. For the past two years the Government has also, through its revenue department, issued licenses to all the various trading establishments on this property.

[INNES, C.J.: That may be so, but we find on the only trading licenses produced in evidence the following indorsement in red ink: "Will not be renewed after June, 1905." Such indorsement surely means that the tenants' rights were held *precario.*]

Burns-Begg in reply.

INNES, C.J.: This action is brought for the removal of certain buildings stated to have been illegally erected upon claim property. The defendant is the holder of two prospecting claims, and it is common cause that he has erected buildings upon those claims which have been, and are still being, used for trading purposes, and apparently have never been used for any other purpose. The plaintiff maintains that, as these buildings are there in contravention of the Gold Law, they should be removed. The first point which arises is with regard to the *locus standi* of the plaintiff. It is contended that the surface rights of the claims belong to the owner of the farm, except in so far as they have been taken away by the Gold Law; that the person to sue, therefore, is the owner himself; that the Commissioner of Mines at any rate can only sue, if at all, by joining the owner with him in the action.

It is true that the surface rights under the common law belong to the owner of the land; but it is also clear that the Gold Law has in a great measure interfered with those rights. It is unnecessary for the purposes of this case, and therefore

inadvisable, to decide what the rights of the owner are to the surface of proclaimed land which has never been pegged, because the ground with which we have to do here is claim property. Even the surface rights of the owner of the soil on claim property are not in dispute in this action. The defendant does not set up the license of the owner of the land to build upon these claims. So that the point before us is merely whether under the Gold Law the Commissioner of Mines has a *locus standi* to intervene under the circumstances of this case.

Sec. 13 provides that the Commissioner shall have the general supervision of, and shall regulate and manage, all matters relating to a public digging in accordance with the Law. He is to determine the places where digging and prospecting are to be forbidden, to regulate the issue of stand licenses, and to point out the places where building may or may not take place. By other sections special power is given to him to exercise supervision over claim building, and with regard to the use of the surface of claims. Sec. 90 says that the possession of a claim license does not include the right of disposal of the surface of the ground, which right the Government reserves to itself for the purpose of defining roads and other works without obstructing the working of the claim. If the Government is entitled to reserve to itself the disposal of the surface of a claim even for a limited purpose, it is clear that it must have some right to say whether buildings may be erected upon that claim, and where they shall be put. And the only person who can represent the Government in the exercise of that right is the Commissioner of Mines.

Sec. 91 provides that "every licensed digger or prospector shall be entitled to a stand for his dwelling upon his claims, for which stand he need not pay any license-moneys, and on which stand no license to trade or carry on business may be granted or renewed." That gives the digger or prospector a right to claim a stand for his own dwelling on his claims; but it assumes that the stand must be marked out, and the only person to decide where the stand is to be located on the claim is the Commissioner of Mines, who regulates all these matters. It is unnecessary to read all the sections which refer to claims or to the position of the Commissioner of Mines; but we find that throughout the Law

that official has the control of claim property. He regulates the allocation of claims, has something to say with regard to their pegging and their working, and with regard to the use of the surface, and with regard to the buildings which may be placed upon them. That being so, it appears to me that he has a *locus standi* to come to Court when the provisions of the Law, whose administration is expressly placed in his charge, are in his opinion contravened. It is not necessary to say what rights the owner of the farm may or may not have with regard to the use of claim property; it is sufficient to say that, in view of the sections to which I have referred, and of the general scope of the Law, the Commissioner of Mines has a *locus standi* to sue in a case of this nature.

That disposes of the first part of the case. If the plaintiff has that right, then all we have to consider is whether he has made out his case. Claim property is of course widely different from stand property, and claims cannot be turned into stands. Only certain buildings may be erected on claim property. Sec. 91 entitles every claim-owner to a stand on his claim for his own house. The Law of 1898 enacts that no trading shall be allowed on such a stand. But even apart from that provision, it seems to me that the very fact of saying that the house upon a claim shall be for the claim-owner's own dwelling implies that it shall not be used for any other purpose. It is common cause that these buildings were not erected as dwellings; they were built for trading purposes, and upon the face of it they are wrongfully there. To that extent the plaintiff has made out a *primâ facie* case. But defendant maintains that they have a right to be there, because the late Government, through its duly qualified officials, gave him permission to build them. I must say that I consider the evidence upon that part of the case not at all satisfactory. It was given in very general terms and without any details. Unfortunately one official concerned is dead, and the other is out of the country. It would have been very important to hear their version of the terms in which the verbal application made by Hersh was couched, and what they understood by the permission which they gave. But as the case stands, the only evidence on this point is that produced by the plaintiff; and for the purpose

of this judgment I propose to assume that there was permission given to Hersh, by the officials of the late Government, to erect these buildings. It does not alter the legal position. I take first the store upon claim 8429. Whatever may have been the position of the original store which stood there, it is clear that at the end of 1903 that store disappeared; it was entirely burnt down. The ground became vacant, and remained vacant for some months; then the defendant commenced to erect the present new store. He ked for permission—showing that he knew the law. By this time the Law of 1898 was in operation, and it appears to me that the right to erect the new building which took the place of the one which had been destroyed must be governed by the terms of the Law of 1898. Inasmuch as it was built without permission having been obtained, and not for a dwelling, but for tra ling purposes, it was unlawfully erected. And in regard to the store, the plaintiff is entitled to the remedy which he seeks.

Then I come to consider the buildings upon claim 8602—the buildings upon stand 39 are not in dispute in this case. So far as the butcher's shop is concerned, it is clear that no permission was given, and it was built after the provisions of the Law of 1898 came into operation. That shop was therefore illegally placed there, and in regard to it the relief which is claimed ought to be granted. Then as to the other buildings—the barber's shop and Watson's shop. There is some evidence that permission was given by the late Government to erect a building of wood and iron, and that one was put up before 1898. I do not think that the Law of 1896 upon the point under consideration was very different from the Law of 1898. The latter Law was stronger than the former one, and more clearly expressed; but I think that the terms of the Law of 1896 also contemplated that the buildings to be erected upon claims should be only used by the claim-owners for dwellings. This permission therefore ought not to have been granted by the late Government. It was probably given *per incuriam*, or because the meaning of the section was not clear to the person who gave it. But it was given; and licenses were issued in respect of it, though in guarded terms. The facts, I think, entitle the defendant to claim compensation in respect of hose buildings before he can be ejected from them.

And as the plaintiff has come into Court without tendering compensation, I think absolution should be given upon the claims which affect the barber's shop and Watson's shop. It is unnecessary to lay down the basis on which compensation should be calculated. I would venture to say, however, in a case of this kind that the Government should not scrutinise too narrowly the exact value to be compensated for; but clearly the amount ought to be assessed with reference to the building for which permission was originally given. No permission was obtained to substitute brick for wood and iron. Beyond saying that, I make no further remarks about compensation. It only remains to say that I do not think the fact that license-moneys were received prevents the plaintiff from claiming the relief which he seeks. License-moneys were only taken by the Government after it had guarded itself by the terms of the Government Notice; and the receipt of the money did not constitute any admission of the rights of the licensee, or confer any rights upon him. I think with regard to the store and with regard to the butcher's shop, they should only be removed after such licenses as may be in existence have expired. Subject to that I think the relief prayed for should be granted, and the defendant must pay the costs.

SOLOMON, J.: I entirely agree with the judgment which has been delivered, and I desire to make only a few observations on the preliminary point which has been raised in this case. The issue raised by this preliminary plea is really a very narrow one. The action is brought by the Commissioner of Mines to compel the defendant to remove certain buildings which have been erected upon claim property, on the ground that those buildings have been illegally erected upon the property. The claims are upon a private farm which has been proclaimed, and the point which was made in the preliminary plea is that, inasmuch as this is a private farm, the Commissioner of Mines has no *locus standi* to bring this action for the removal of those buildings. Now, in considering that question of course we must assume that the buildings have been illegally erected. I have myself no doubt upon that point, but it is unnecessary to discuss that question, for as far as the preliminary plea is concerned that must be

taken for granted. If these buildings then have been illegally erected, has the Commissioner of Mines no *locus standi* to compel the defendant to remove those buildings? In the course of the argument a number of questions were discussed which it is not only unnecessary, but inadvisable, to express an opinion upon. Questions were raised as to the rights of the owner of a private farm not only over claim property, but over mining property which has not been pegged out, and also questions discussed as to the general rights of control of the Commissioner of Mines over the mining area. I do not propose to express any opinion whatsoever on these general questions which have been raised in the course of the argument. I think it is sufficient for the determination of this case to say that one thing is perfectly clear, and that is that as far as the erection of buildings on claims is concerned the Commissioner of Mines has absolute control over those erections. I do not care whether you refer to the Law of 1892, 1895 or 1898, the Commissioner of Mines is the only person who can give permission to a claimholder to erect buildings on his claim. That that is so is quite clear if we look at the Law of 1898, from the provisions amongst others of sec. 13 and sec. 91. Then if the Commissioner of Mines is the only person who can give permission to a claimholder to erect buildings upon his claim, surely it follows as a matter of course that he is the person to come to the Court and to complain if buildings are erected without his permission. It surely cannot be argued that if his permission is required, and if a claimholder, without obtaining his permission and in prohibition of his orders, erects buildings on a claim, that the Commissioner of Mines is powerless, and has to stand by and do nothing. It seems to me to be an unarguable contention. I gather, however, from Mr. *Gregorowski's* argument that he contends that in such circumstances the owner of the farm ought to be joined in the action. That is not quite the point taken by Mr. *Esselen* yesterday. Mr. *Esselen's* point was that the Commissioner of Mines had no *locus standi* whatsoever, and that the owner of the farm was the only person who could bring the action. Mr. *Gregorowski*, however, I understand, argues that the Commissioner of Mines properly brings the action, but that the owner of the farm ought to be joined.

Now it is difficult for me to understand why the owner of the farm should be joined. It is not an action for declaration of the rights of the owner of the farm with regard to the surface of a mining area. It is not an action to declare what the respective surface rights are of the owner of the farm and of the Commissioner of Mines or the Government. The action is simply brought by the Commissioner of Mines to compel the removal of these buildings; and seeing that, even if the owner of the farm had consented to the erection of these buildings the permission of the Commissioner of Mines would have been required, I entirely fail to see what necessity there can be for joining the owner of the farm in an action of this kind. I do not say if the owner of the farm chose to join that he cannot be a party to the action, but to say that it is necessary that he should be a party seems to me to be almost unarguable. As far as the preliminary point of law is concerned it is clear that it must fail. I concur in the judgment.

WESSELS, J., concurred.

Plaintiff's Attorneys: *Findlay, MacRobert & Niemeyer;* Defendant's Attorney: *C. F. Beyers.*

MASTER OF THE SUPREME COURT v. REDLICH'S TRUSTEE.

1905. *April* 7. CURLEWIS, J.

Insolvency.—Trustee.—Neglect to file account.—Law 13 *of* 1895, *sec.* 114.

A trustee in insolvency had neglected to file an account of his administration, though repeatedly requested to do so by the Master of the Supreme Court. The six months allowed by sec. 114 of Law 13 of 1895 had elapsed, and no extension had been applied for. At the instance of the Master, on notice to the trustee, the Court ordered the latter to file a liquidation and distribution account within a specified time, and to pay the costs *de bonis propriis.*