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Pretorius *vs.* The State.

Curlewis, for the appellant: The accused might be seriously prejudiced by the omission to state in whose presence the words were used.

Cloete, for the State: The allegation is sufficient. Suppose the Public Prosecutor does not know the names of the persons in whose presence the slander was uttered, can it be said that no proceedings can then be taken?

KOTZÉ, C.J.: The names of the persons in whose presence the slander was spoken should be stated. If the names are unknown, it ought to be so alleged in the summons or indictment. The appeal must be allowed and the conviction set aside.

DE KORTE and JORISSEN, JJ., concurred.

TRANSVAAL SILVER MINES *vs.* JACOBS, LE GRANGE AND FOX.

Pre-emption.—Prior contract.—Refusal.

Where, in a suit for cancellation of a contract of lease of a farm in perpetuo *on the ground of the existence of a prior contract giving plaintiffs the first refusal in the event of sale, it was contended that the right of retraction or pre-emption had lapsed because no offer had been made by plaintiffs to take over the second contract, the Court* held *that, as the second contract had been made by defendant F. with defendants J. and L., with full knowledge of the first contract, plaintiffs had a right of pre-emption or retraction, and were entitled to have F.'s contract of perpetual lease cancelled, with costs.*

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Transvaal Silver Mines *vs.* Jacobs, Le Grange & Fox.

This was a suit for cancellation of a certain contract entered into between Hattingh for the widow Jacobs and one Le Grange with Fox, with reference to a portion of the farm Dwarsfontein, on the ground that it infringed a prior contract between Jacobs and a certain Sonnenberg, to whose rights the Transvaal Silver Mines Co. had succeeded. This latter contract contained a clause to the effect that in

case the land—*i.e.*, the rest of the farm—came to be sold, it had first to be offered at the same price to Sonnenberg—*i.e.*, the Transvaal Silver Mines. Hattingh's evidence was that he came to Pretoria with Le Grange to meet Fox. Together they went to the office of Attorney Hollard. Hattingh had brought with him a copy of the contract with the Transvaal Silver Mines. Hollard assured him there would be no danger in signing a contract with Fox. Fox was present at this interview. The same day (Saturday, April 26th, 1890) the contract with Fox was drawn up. The contract was one of lease for ninety years at £1,000 per annum, with right to Fox to renounce. On Monday, April 28th, in consequence of a letter which they had received from Ueckermann, attorney of the Transvaal Silver Mines, they went to his office. They met there Parker, Farrer, and Lithauer on behalf of the Transvaal Silver Mines Co. The latter protested against the new contract with Fox as infringing their rights. Hollard was then called, and he explained that he did not consider the rights of the Transvaal Silver Mines were infringed. Section 12 of their contract gave them the refusal of the ground if it came to be sold. Fox's contract was not, however, a contract of sale, but only of lease, and was registered on April 28th, 1890. This closed the evidence for the plaintiffs. Defendants now asked for absolution from the instance.

Hollard, with him *Cloete*, for Fox : We ask for absolution from the instance. In this a wrong action has been brought. As no contract of sale was closed between Hattingh and Le Grange and plaintiffs, but only a preference, they were at liberty to enter into a contract with Fox. Plaintiffs have thus merely a right to compensation *id quod interest* against Hattingh and Le Grange, and it makes no difference if Fox had notice or not. We will admit that Fox had notice. In this case there is only a personal right of action. The contract gave no right to the property itself, *cf. Voet* 18. 1. § 2. (*Wilson's trans.* p. 4). The contract or rather clause § 12 (dated January 24th, 1884) affords no ground for this action against Fox. It may give a right to damages against Le Grange and Hattingh N.O., but nothing further. It is a bare indefinite right of pre-emption or preference. If there had been an out-and-out sale and purchase, then notice to

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Fox would bind him. Then the case of *Cohen* vs. *Shires* decided in this Court in 1882 would be applicable (*cf. Lœnius Decis Cas.* 80).

[MORICE, J., referred to the case of *Beckett and Co.* vs. *Brooks*, decided in this Court.]

In that case there was an out-and-out sale, and the price was fixed in the contract. (*Cf. Kersteman, Supplement R.W. B.* 771–2; *Huber Hedend. Rechtsgel*, p. 377, Bk. 3. ch. 6. v. 19–20; *Joseph's Exors.* vs. *Peacock, Buch.* 1868, p. 247.) Again in Fox's contract, Fox took over the rights of the original owner, with all the obligations as well as rights which the original owners of the farm Dwarsfontein had. He now stands in the position of the original owner.

Curlewis, for Jacobs and Le Grange: We also ask for absolution from the instance. The contract between Fox, Le Grange, and Jacobs does not infringe the rights under § 12 of the contract with the Transvaal Silver Mines Company. It merely amounts to this, that Fox got a lease *in perpetuo*. But supposing that a contract of sale was entered into with Fox, and although Fox had notice of the contract with the Transvaal Silver Mines, still the company is not entitled to have the contract entered into with Fox cancelled. *Richards* vs. *Nash*, 1 *Juta* 312, is not applicable here. In that case it was not mere knowledge of a fact, but there was a servitude attaching to the erf.

Leonard, with him *Auret* and *Esselen*, for the plaintiffs: (*Cf. Story Equity Jurisprudence*, § 395, 439.) There is no difference in principle between a sale and a right of pre-emption. Thus notice to Fox, which has been admitted, justifies us in bringing this action. The ground of action is fraud, to our prejudice, and that cannot be upheld. (*Cf. dictum per* Lord Hardwicke in *Le Neve* vs. *Le Neve*. *Cf. Marshall and Maclaren* vs. *Du Preez, Rhodes, Rudd, and Caldecott*, decided in this Court. *Cf. Voet*, 18. 3. 10. *Van Leeuwen*, vol. 2, p. 149 *in notis; Van der Keessel, Theses.* 666.)

Hollard, in reply: There is no proof of fraud. Fox must be understood to have acted *bonâ fide*. We submit he has acted within the Law, and within his right. No Roman-Dutch writer has been cited. *Story* is of great authority, but he is only a good authority where our own writers are silent. *Marshall and Maclaren* vs. *Rhodes and Caldecott* is

not applicable in this case. There a definite price was fixed, and there were further specific stipulations.

KOTZÉ, C.J. : We would like to hear the evidence of the defendant Fox before coming to any decision.

The defendant Fox stated in evidence that he had duly paid his last instalment of rent. He knew that a contract existed between the owners of Dwarsfontein and the Transvaal Silver Mines, giving the latter a right of retraction or pre-emption over Dwarsfontein. He was ready to carry out the pre-emption clause. The Transvaal Silver Mines had never asked him to be allowed to take over his contract. He made the contract although he knew of the right of pre-emption, because he understood that the Transvaal Silver Mines were practically bankrupt, and he thought it was safe to assume that they would not take over his contract. He had been present with Hattingh and Le Grange in Ueckermann's office on Saturday, April 26th, 1890, but nobody offered to take over his contract.

Hollard, with him *Cloete*, for Fox : There is proof that the company did not mind the ground being made over to other people. They parted with their right of pre-emption. Two of the directors declared to the manager that they did not want the ground. On Saturday morning, April 26th, the representatives of the company were not at Ueckermann's office. Any doubt upon this point ought to be given in defendant's favour.

Curlewis, for Jacobs and Le Grange.

Leonard, with him *Auret* and *Esselen*, for plaintiffs, were not called on.

Posteà, July 4th.

The COURT (KOTZÉ, C.J., DE KORTE and MORICE, JJ.) was of opinion that in terms of the contract put in, § 12, on which plaintiffs relied, the plaintiffs had the right of pre-emption, *i.e.*, a species of *retractus* ; that Fox knew of the contract between Jacobs and Le Grange and plaintiffs, and the subsequent contract with Fox was thus made in conflict with the rights of plaintiffs, and Fox could therefore derive no advantage thereby, and the plaintiffs were entitled to ask for

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cancellation of that contract. (*Voet.* 19. 3. 10, and 23. : *Van Zutphen Nederl. Practyck ; Story Equity Jurisprudence*, § 395, § 439 ; *Cohen vs. Shires and McHattie*, decided by this Court in November, 1882.) Judgment in favour of plaintiffs. The contract between Fox and Jacobs and Le Grange cancelled, with costs.

DOUGLAS *vs.* ROBINSON.

Revision of Taxation.

Where, in a suit pro Deo *in which defendant had consented to judgment, it appeared that the plaintiff had employed two advocates, and the Taxing Master had refused to allow costs for more than one advocate, the Court* held *that as defendant had agreed to pay costs not only as between party and party, but also as between attorney and client, the fee for the second advocate should be allowed.*

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Douglas *vs.* Robinson

This was an application in connection with a case in which Douglas had proceeded *pro Deo*, and had employed two advocates. He won his case. On the day of hearing Robinson consented to judgment, and agreed to pay all costs including costs between attorney and client : The Taxing Master refused to allow costs for more than one counsel.

Curlewis, for appellant.
Burgers, for respondent.

KOTZÉ, C.J. : The Court is of opinion that as the respondent has undertaken to pay costs not only as between party and party, but also between attorney and client, the costs for the second advocate must be allowed. The application is granted, with costs.

DE KORTE and JORISSEN, JJ.. concurred.
