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cases for the first day upon which the appeal has been placed upon the roll, and if the hearing is postponed to a subsequent term, then for the first day that the appeal was placed upon the roll in such term, and further for the actual day or days on which the appeal is heard. There will be no order with reference to the costs of this application.

DE KORTE and AMESHOFF, JJ., concurred.

S. SYNDICATE *vs.* JOHN BALLOTT GOLD MINING CO.

Claim licences.—Misdescription of claims.—Pegging of claims by person knowing circumstances.

The farm Elandsfontein was divided into two portions, viz., "S and J" and "G." The plaintiffs' predecessor took out licences to peg claims on the S and J portion of the farm, but, not knowing exactly where the boundary line was, pegged the claims on the G portion. Licences were regularly paid on these claims, which were also duly amalgamated. Subsequently Ballott became aware of the irregularity, and pegged off the claims knowing that they belonged to the plaintiffs. The Court held *that a person who, knowing better and being fully acquainted with the circumstances, disturbs another person in his possession of claims simply because of an informality or misdescription in the licences, cannot be allowed to take advantage of such informality or misdescription, where it appears that the person in possession has acted* bonâ fide, *and consequently awarded the claims to the plaintiffs.*

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The farm Elandsfontein was divided into two portions by a line which ran down a spruit or natural watercourse. Elandsfontein I. was known as the Simmer and Jack portion, and Elandsfontein II. was known as Beckett's and subsequently Geldenhuys' portion. In the beginning of January, 1889, 214 licences were taken out in the name of Benjamin to peg upon Elandsfontein I., *i.e.*, the Simmer and Jack portion. Between January 14th and 26th these claims were pegged

under the instructions of G. R. Grey, an engineer and surveyor, who acted for Benjamin. Grey instructed a certain Popkisch to supervise the pegging. Harry Smith, prospector, was overseer and another prospector, Donelly, was also employed. On January 28th the claims were amalgamated in blocks and registered. It subsequently appeared that 40 of these claims were upon the Geldenhuys portion.

The 214 claims were transferred to the "S." Syndicate, who paid licences and claimed to have remained in possession up to the date of the action. It was proved also that the Government paid that proportion of the licences, which was due to the owners, to the owners of the Simmer and Jack portion upon all the 214 claims.

On or about February 8th, 1889, a certain Blackbourne discovered that some of the claims pegged by Grey upon licences for the Simmer and Jack were upon the Geldenhuys portion. He obtained 40 licences and pegged over the ground claimed by Benjamin upon the Geldenhuys portion. He employed a certain Saunders to peg 16 claims and Baillie to peg 24. He afterwards amalgamated these claims in blocks 562 and 563 (24 claims) and 632 and 633 (16 claims). These claims were then transferred to the John Ballott G. M. Coy. The whole farm Elandsfontein had been proclaimed and set open for pegging under the law. With regard to the 24 claims the evidence as to priority of pegging was conflicting. The evidence of Grey, Popkisch, Harry Smith, and Donelly went to shew that the 24 claims were duly pegged before January 26th. On the other hand, the evidence of Baillie. Blackbourne, and Joubert went to shew that when they came upon the ground on February 8th it was unpegged. In this conflict of testimony the Court preferred to believe the evidence of Joubert, who was Claim Inspector at the time, and had no interest in the case. He came on the ground at the request of Blackbourne on February 8th, and swore that at that time the ground was open and peggable.

The evidence of Saunders, who pegged amalgamation blocks 632 and 633 (16 claims) was not forthcoming at the trial. There was no question that these claims had been pegged for Blackbourne, but there was no evidence to shew on the part of the defendants that the ground was open when pegged.

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Morice, with him *Curlewis*, for plaintiffs: As far as the evidence goes the dispute is only about the twenty-four claims. Our licences are prior in date, viz., January 28th, for sixty claims in five blocks, and these were amalgamated on February 1st, 1889. Grey, Donelly, and Smith prove that the twenty-four claims were subsequently jumped by defendants' predecessor in title, Blackbourne. With regard to the sixteen claims it is admitted that we were in possession, but it is said that because our licences were only for the Simmer and Jack's portion of Elandsfontein it follows those sixteen claims were open ground, for they always were and still are on the Geldenhuys portion of Elandsfontein. (*Cf. Cohen* vs. *The Johannesburg Pioneer Gold Mining Co.* (decided in this Court November 15th, 1889), and the *Madeline Reef Syndicate* vs. *Coetzee* (decided in this Court in January, 1888); *Broom's Legal Maxims, Falsa demonstratio non nocet.*)

Hollard, with him *Dickson*, for defendants: The defendants are in any case entitled to final judgment for the twenty-four claims. They (the plaintiffs) have not proved who did as a matter of fact peg on their behalf. Grey's evidence is very unsatisfactory, and so is Smith's. Their evidence is untrustworthy. They broke down in cross-examination. Compare their evidence with Ballott's evidence taken on commission. Defendants have the evidence of Baillie and Nicholls to rely on, and they are corroborated by Blackbourne and Joubert, at that time Claim Inspector, who has no interest whatever in the result of this case. As far as the sixteen claims are concerned, *Cohen* vs. *The Johannesburg Pioneer Co.* is not against defendants. The mistake or misdescription in the licences was in that case always about the same portion of the farm. But in the present case it is different. Elandsfontein was divided into two portions, and plaintiffs only originally took out licences for the Simmer and Jack portion of the farm, and acting under these licences they went and pegged on the other portion of the farm. Grey's evidence shows that plaintiffs acted recklessly and carelessly. They did not care where they pegged under their licences, so long as they got claims. The book put in by Grey shows that he knew very well that the farm was divided into two portions, and thus knew when he proceeded to peg that he could, under those particular licences, only peg upon the

Simmer and Jack portion. In the case of *Cohen* vs. *The Pioneer Co.* the claim was first pegged, and then came the line of division and threw the claim out; but in the present case the line of division had been established long before the pegging. The line was generally known. In Cohen's case the clerk in the office made a mistake, but in this case the plaintiffs originally took out the licences for the Simmer and Jack portion. One can only prospect or peg upon a prospecting licence on ground which has been properly described in the prospecting licence. See the difference in form between diggers' and prospectors' licences in the Law. A licence must be according to the law, and if one does not proceed in the way a licence prescribes one is acting in conflict with the law. Plaintiffs must show a better title before they can drive the defendants from the ground.

Morice, in reply: The principle of the case of *Cohen* vs. *The Pioneer Co.* ought to be extended to this case, and ought to be decisive with regard to the sixteen claims.

Cur. adv. vult.

Posteà, January 15th, 1891.

KOTZÉ, C.J.: I regret that the Court has not been able to give judgment in this case at an earlier date. It is an action in which the plaintiffs complain that they are the owners of certain six amalgamated blocks of prospecting claims, Nos. 146–150, situated on the proclaimed farm Elandsfontein No. 1. The plaintiffs state further that the defendants are trespassing on the said claims, that they allege that they are the owners thereof, and have wrongfully had the said claims amalgamated and registered as blocks Nos. 562, 563, 632, and 633. For these reasons the plaintiffs ask that the defendants may be ordered by this Court to vacate the said blocks of claims belonging to the plaintiffs, and that the claims may be declared to be the property and in the lawful possession of the plaintiffs, and that the defendants may also be condemned to pay the sum of £100 as and for damages suffered by the plaintiffs.

It is common cause between the parties that the Court must decide, firstly, with regard to certain twenty-four claims which constitute blocks 563 and 562 on the diagram

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Q 1, which is admitted by both parties, and, secondly, with regard to certain sixteen claims constituting blocks 632 and 633 on the said diagram Q 1.

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Now, as regards the twenty-four claims, I have come to the conclusion, after carefully considering the evidence, that the plaintiffs have failed to prove sufficiently that they had already pegged off the ground before the predecessor of the defendants did so. The evidence is contradictory on this point, but the statement of J. S. Joubert, the claim inspector, who has absolutely no interest in the case, is, in my opinion, decisive. He declares positively that on February 8th, 1889, when he went on to the ground, at the request of Saunders, who wanted to peg on behalf of Blackbourne (the predecessor of Ballott), there were absolutely no pegs or amalgamation boards to be seen, and that the ground was open ground when Saunders pegged. The plaintiffs' claim, as far as these twenty-four claims are concerned, must, therefore, be dismissed. The sixteen claims, however, stand on a separate footing, and it will be necessary shortly to state the facts with regard thereto. Under prospecting licences which were taken out to peg off claims on the farm "*Elandsfontein, Simmer and Jack's portion*," these claims were pegged off either in January or February, 1889, on behalf of the plaintiffs' predecessor. When the licences were taken out the farm Elandsfontein was divided into two portions, one portion being known as the portion of Simmer and Jack and the other as Geldenhuys' portion. This seems to have been generally known at the time, but the persons who pegged on behalf of the plaintiffs' predecessor did not know exactly where the boundary line between the two portions of the farm Elandsfontein was situated. It has now been proved that instead of pegging on Simmer and Jack's portion of Elandsfontein, the original peggers went over the boundary line, and as a matter of fact pegged off the sixteen claims on what is known as Geldenhuys' portion of the farm.

After the pegging the claims were amalgamated in two blocks and the amalgamation boards were duly put up, and the peggers remained in possession under the aforesaid licences. Afterwards, about September, 1889, Ballott found out that there was a misdescription in the licences of the plaintiff, or rather that whereas the licences of the plaintiff represented the claims to be on Simmer and Jack's portion

of Elandsfontein, the claims are in fact situated on Geldenhuys' portion. He then bought first eight and afterwards five claims, and subsequently in November, 1889, he took out three licences and pegged off three claims thereon, well knowing when he pegged off that these three claims had already been pegged off and were in the plaintiffs' possession. He then had all these claims (16 in number) amalgamated and registered, and maintains that he is the lawful owner thereof. I cannot, however, agree in this view. In the case of the *Madeline Reef Syndicate* vs. *Coetzee*, decided in January, 1888,* by this Court, it was held that a mistake merely in amalgamation, *i.e.*, an error *bonâ fide* made on the advice of the Gold Commissioner in amalgamating 36 claims in three blocks of twelve each, for which the same twelve names were used in each case, whereas the necessary 36 powers of attorney actually existed, could not deprive the syndicate of its rights; and in the later case of *Cohen* vs. *The Johannesburg Pioneer Company* (November 15th, 1889) the Court was of opinion, in circumstances almost similar to those in the present case, that no advantage could be derived from an incorrect description in the licence, where there was clear proof of the identity of the claim, and the intention to acquire and hold it under the Gold Law always existed. Although in some respects the present case may differ from that of Cohen, it is clear that both cases cited by me show that the Court will not allow a person who, knowing better and with full knowledge of the circumstances, disturbs another in his occupation or possession of a claim or block of claims simply and solely because there appears to be an informality or incorrect description in the licences, to derive any advantage from such informality, where it appears that the person in possession or occupation acted *bonâ fide*. This seems to me to be a most equitable view of the case, whereas the contention of the defendants might lead to the greatest injustice, especially where a person has been in possession for a considerable time, has erected machinery, and regularly obtains a considerable amount of gold from the claims.

I am therefore of opinion that as regards the sixteen claims the Court must order the defendants to vacate them, and to cancel the amalgamation and registration thereof in

* See Kotzé and Barber's Reports, 1885–1888, p. 206.

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their name. As no damage has been proved, and during the argument nothing was said about it, the Court will assume that the claim for damages has been waived. The defendants are, however, ordered to pay the costs of the action.

DE KORTE and AMESHOFF, JJ., concurred.

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

Refusal.—Infringement of contract.—Emphyteusis cannot be constituted where there is restraint upon alienation.

Where, in a suit by S. for a declaration that a certain contract whereby G. ceded to F. all his proprietary rights on a certain farm in consideration of a certain annual payment, and which had no definite term so long as the rent was paid, constituted an infringement upon a previous contract whereby G. granted to S. a refusal of the same farm, an exception was taken that the summons disclosed no ground of action, as the contract with F. was a lease, and did not infringe the contract with S., the Court held, *that the rights granted to F. virtually amounted to an emphyteusis, and that no emphyteusis could be constituted where there was any restraint upon alienation, and disallowed the exception, with costs.*

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

This was an argument upon exceptions to the summons in the case of the Transvaal Silver Mines Co. *vs.* Le Grange, Jacobs and Fox. The facts of the case are sufficiently stated in the judgment. The first exception was that the summons was irregular because the deed of cession whereon plaintiffs found their rights was not attached to the summons, or that if it was verbal, that it is not stated that it was verbal.

To this the plaintiffs offered, and were allowed, to amend their summons. The second exception was that the summons disclosed no ground of action, as the contract between