1890. June 30. July 1. 1891. Jan. 15.

S. Syndicate *vs.* John Ballott Gold Mining Co.

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.*

1890. Nov 20. ,, 21. 1891. Jan. 21.

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

Fox and the first defendants did not infringe plaintiffs' rights.

Curlewis, with him *De Villiers*, for defendants Le Grange and Jacobs: Clause 12 of the first agreement only speaks of a preference to buy, while the contract with Fox is a lease, and does not infringe the contract between plaintiff and the first defendants. In the second agreement there is no fixed price, and thus there cannot be any contract of sale. A proprietary right is mentioned in order to give the lessee the right of mining. But Fox has no right to ask for transfer. The first contract is also for an unlimited period, as there is a right of indefinite renewal. (*Voet* xviii. 1. 2.)

Esser, for defendant Fox: Our first exception to the amended summons is virtually the same as that of the other defendants, viz., that the lease to Fox conferred no ground of action. The lease to Fox is practically for one year. Our other exception is that the cession mentioned in §6 has not been attached.

Leonard, with him *Wessels* and *Esselen*, for plaintiffs: With regard to the exception that the cession has not been attached, it is not necessary to attach it. It is not as if the exception were that the summons is vague. With regard to the other exception, *cf. The Treasurer-General* vs. *Lippert*, ii. *Juta*, p. 291. In this case there has been a fraud upon plaintiffs' rights. "*Plus valet quod agitur, quam quod simulate concipitur.*" The so-called lessee has all the rights, and is subject to all the obligations of a buyer. Look at art. 9 of the first contract. The second contract is not a contract of lease. No period of time is fixed, and all proprietary rights are transferred. The words "cede and transfer" are actually used. With regard to § 7 of the second contract, there would be no privity of contract between Fox and plaintiffs to enable them to protect their rights. The price is £150 in perpetuity.

Curlewis, in reply: There is a great difference between this case and that of *The Treasurer-General* vs. *Lippert*. In that case there was a definite sale. There is no distinction between the expression "cede the proprietary right" in the second contract, and "may exercise all rights of property" as appears in the first contract.

Esser, in reply: The words of the contract are clear, and

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do not favour any interpretation which will read fraud in them. The lessor cedes to the lessee the mere right of exercising his rights.

Cur. adv. vult.

Posteà, January 21st, 1891.

DE KORTE, J.: In this case defendants are sued for the setting aside of a certain contract which plaintiffs allege clashes with a previous contract entered into with the first two defendants. Plaintiffs on January 11th, 1888, became the assignees of a certain agreement of lease of a portion of the farm Dwarsfontein, No. 145, situated in the District of Pretoria. The period of the lease is for seven years on payment of £100 per annum, with the right of renewal on payment of a premium of £250. The lessees have the right under the contract to exercise all the rights of the owners, including the right of working all mines or minerals on the ground leased. The lessors bind themselves to give the lessees the preference on equal terms with others to further reefs or mines which may be discovered on the farm Dwarsfontein. Section 12 says that "if it should happen that the lessors should wish to sell the farm Dwarsfontein they shall be bound to offer it first to the lessees, and to give them the refusal to buy."

On April 29th, 1890, the two first defendants entered into a contract which the plaintiffs allege clashes with their rights obtained on January 11th, 1888. By a contract dated April 28th, 1890, the two first defendants ceded and transferred all their rights accruing to them as owners on a certain portion of the farm Dwarsfontein, No 175, to the third defendant. The period of the lease is not specified, but the third defendant remains lessee as long as he pays £125 per annum, payable in advance, and a premium every five years. In art. 6 the contract says that among the proprietary rights ceded and transferred is included the free and unrestrained use of certain water. The plaintiffs now sue for the setting aside of this contract on the ground that all the defendants were aware of the obligations due to plaintiffs under their contract, and that the contract between defendants was made fraudulently and infringes their rights. The third defendant takes an exception that the transaction was

virtually a sale, as the first defendants by the contract grant, cede, and transfer all their rights as owners to the third defendant, and that also in section 6 of the agreement the proprietary right is spoken of which the first defendants transfer to the third defendant, and thus that the property was sold without first giving them the first option of buying. To this the defendants answer that it is not a sale, as no definite price was fixed, but it is merely a lease for a year, with the right to renew.

I cannot agree with the defendants' contention, and although I should not go so far as to say that it is a sale, still I am of opinion that the contract of the 28th April, 1890, did infringe plaintiffs' rights. The Court has to examine what the contract actually was, rather than what it was described to be. ("*Plus valere quod agitur quam quod simulate concipitur, et in contractibus rei veritas potius quam scriptura perspici debet.*" *Codex Lib.* iv., tit. 22.) Plaintiffs' agreement is a contract of lease, with a provision restraining all alienation of the property to third parties, without giving plaintiff the option to buy. The agreement between the defendants is certainly by our law not an ordinary contract of lease, as a lease must be for a fixed and definite period of time. (*Cf. Grotius*, B. 3, 19, 8.) The agreement is more of the nature of an emphyteusis, for as long as the rent is paid annually the lease continues. And although the *dominium directum* may still remain with the first defendant, the *dominium utile* is with the third defendant. Now, where there is any restraint upon alienation no tenure by emphyteusis can be granted, nor can any long lease be granted. (*Cf. Voet*, 19, 2, 1; *Sande de Prohibita Rerum alienatione*, 1, 1, 44 and 45; *Utrechts. Consult.*, vol. 2, *Cons.* 75, p. 338.) The contract, then, between defendants infringes the plaintiffs' rights granted by § 9, where they get the preference over all other parties to further reefs or mines which may be found upon the farm Dwarsfontein. This right they cannot exercise if this agreement between the defendants remains in force. I am thus of opinion that the exception must be disallowed, with costs. The summons says that the agreement between defendants was made fraudulently. Upon this point there is no proof before the Court.

MORICE, J., concurred.