BRISTOWE, J. (In Chambers). Nov. 3rd, 1911. } ROCHER *vs.* REGISTRAR OF DEEDS.

Mines and Minerals.—"Stand" and "Claim Licenses." —Nature of.—Act 35 *of* 1908.—*Servitude.—Registration.—Non-existing Servitude.*

Stand and Claim Licenses are not sources of revenue attached to mineral rights.

The Registrar of Deeds is entitled to refuse to register a deed which contains the reservation of a servitude which does not exist.

A deed of partition contained a reservation of a servitude of "mineral rights and all sources of revenue attached thereto." Prior thereto all the mineral rights over the property concerned had been sold to third persons:—Held, *that even though the owners were entitled to the claim and stand licenses, these licenses were not sources of revenue attached to the mineral rights and, as the said servitude did not exist, the said reservation was not registrable.*

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Application for an order directing the Registrar of Deeds to register a certain notarial deed constituting a servitude of "mineral rights and all sources of revenue attached thereto," against the title deeds of the owners of the farm Cypherfontein, No. 250, District Potchefstroom. The Registrar of Deeds refused to register the said deed on the ground that all the mineral rights had been sold to other parties by a notarial contract dated 15th November, 1889, and registered in 1890. The further facts appear from the judgment.

R. Gregorowski, for the applicant: The mere fact that there has been a previous sale of mineral rights does not have the effect of making the matter *res judicata* as far as any further cession of mineral rights is concerned; see *Kraft* vs. *Bok, N.O.* (2 S.A.R. 168); *Van Vuren* vs. *Registrar of Deeds* (1907, T.S. 289, at p. 297). This servitude refers to "all mineral rights and all sources of

revenue attached thereto." The claim and stand licenses are attached to the mineral rights according to *Kraft* vs. *Bok, N.O.* (*loc. cit.*). He also referred to sec. 42, Act 35 of 1908 and sec. 30 of Act 25 of 1909. The only ancillary rights mentioned in sec. 30 of Act 25 of 1909 are those in sec. 42 of Act 35 of 1908. We are, therefore, entitled to have this servitude registered.

N. J. de Wet, for the respondent: The servitude is meaningless, and the Registrar of Deeds desires the property to be transferred without reference to this meaningless servitude. Under sec. 20 of Act 35 of 1908, the mynpacht is given to the holder of the mineral rights, not the owner of the property. In sec. 3 of Act 35 of 1908 a clear distinction is drawn between the holder of the mineral rights and the owner of the property. The old law drew the same distinction—sec. 28 of Law 15 of 1898. Claim and stand licenses are not sources of revenue connected with mineral rights. The document is at present meaningless, but if registered it becomes of commercial value. No certificate has been taken out under sec. 30 of Act 25 of 1909.

R. Gregorowski replied.

BRISTOWE, J.: It appears that in April, 1898, a partition was made of the farm Cypherfontein, and half of three portions of it (known as portions C. D. and E.) were vested in the applicant. Each partition deed was expressed to be subject to a servitude that all mineral rights, together with any sources of revenue attaching thereto, should remain undivided and belong to the owners jointly in proportion to their holdings; and also subject to a certain notarial contract with reference to mineral rights, dated 15th November, 1889, and registered under No. 370/1890. In August, 1908, Rocher agreed to sell his share in the three portions of the farm, and in due course a formal transfer was lodged with the Registrar of Deeds. The Registrar raised objection to the transfer, which was the subject of an application to the Court last April (*supra,* p. 311), when the objection was upheld; the objection being, shortly, that ser-

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vitudes of mineral rights had to be ceded by notarial deed. In consequence of this decision two fresh deeds were prepared. When they were handed to the Registrar for registration, he raised a further point (which appears previously to have escaped the notice of the parties), namely, that the servitude of mineral rights in the partition deed was void because all the mineral rights had previously been sold to other parties by the deed of 1889, referred to in the partition deed. It is clear (indeed it is not disputed) that the deed of 1889 did convey away all the mineral rights in or on the farm Cypherfontein. So that the partition deed, it seems to me, plainly purported to deal with something which did not belong to the parties who were making the partition—namely, the mineral rights, which had been previously vested in other persons. So far as this point goes, there is no answer to the objection made by the Registrar of Deeds, and I do not think Mr. *Gregorowski* has really attempted to answer it. But he contends that the reservation in the partition deed applies not only to mineral rights but also to any source of revenue connected therewith; and he says that any source of revenue connected therewith, that is, connected with the mineral rights (because the words cannot be interpreted in any other way) include stand licenses, claim licenses, mynpachts, and, under the old Gold Law, possibly *vergunning* claims. The mynpachts and vergunning claims are admittedly not material now; therefore, the only matters to be taken into consideration are claim licenses and stand licenses. The Registrar of Deeds contends that claim licenses and stand licenses could not validly be made the subject of a servitude. It is not necessary to decide this point, because, as Mr. *de Wet* points out, whether they could or could not be, no servitude has been created in the present case. To find whether a servitude of that kind had been created you have to look at the partition deed and ascertain whether it can be said that claim licenses and stand licenses are sources of revenue connected with the mineral rights. I do not think they are. You can no more say that they are sources of revenue connected with the mineral rights, than that

the purchase money for a thing is connected with the thing that is sold. Claim license and stand license monies, so far as they go to the owner of the surface, are in the same position as purchase money. Whether it is purchase money for the right to extract the minerals, or for the right to use the surface, or to exclude the owner of the surface from the user of the surface, does not much matter. Whatever rights the claimholder gets in return for the claim and stand license monies, it seems to me that they are really in the nature of purchase money. They are consideration for the rights obtained by the claim or stand holder. I think "sources of revenue connected with mineral rights" means sources of revenue which go with mineral rights, which are attached to them, and which the owner of the mineral rights can get in by virtue of the mineral rights, and not monies paid for the right to use such rights. I do not think such monies can properly be described as sources of revenue attached to mineral rights. That being so, I think the objection taken by the Registrar of Deeds is a sound one. I do not think he can be compelled to register a deed which contains a reservation of a servitude which does not in fact exist. That being so, the application must be dismissed.

[Attorneys for Applicant, DE VILLIERS & DE KOCK.
Attorneys for Respondent, MACINTOSH & KENNERLEY.]

[Reported by ADOLF DAVIS, Esq., Advocate]

BRISTOWE, J. (In Chambers). 3rd Nov., 1911.

Ex parte THE MASTER.—*In re* PEACOCK'S INSOLVENT ESTATE.

Insolvency.—Trustee.—Security.—Dealing with Estate without giving Security.—Remedy.

Semble *if a trustee accepts the trust and intermeddles with the estate, he is bound to furnish security; and if he does not he may be proceeded against by way of contempt of court or in any other suitable way.*

BRISTOWE, J.: No one appears in this matter, but I wish to make one or two observations about it. It is a case in which the estate of a gentleman named Peacock was sequestrated, and one Percy Hohne was appointed