CULLINAN v. PISTORIUS.

1903. *August* 21. MAASDORP, C.J., and FAWKES, J.

Mines and minerals.—Prospecting contract.—Praedium rusticum.—Notice of cession.—Delegation.—Cession of action.—Proclamation No. 13 *of* 1901.

Notice of cession of a prospecting contract, provided that the cession itself is valid, is not necessary to the grantor of prospecting rights.

Personal rights or rights of action may be ceded by grantee without notice to grantor.

The principle of delegation does not apply in case of cession of a right, but would apply in the case of release from an obligation.

The right of cession of an action is subject to the consent of the grantor when right to be ceded is of such a personal nature that obligor or grantor can be said to have a *delectus personae.*

This was an action to have a certain contract entered into between defendant and one C. F. Hazebroek on the 10th March, 1899, declared of full force and effect.

On the 10th March, 1899, defendant entered into a prospecting contract with C. F. Hazebroek. This contract gave Hazebroek prospecting rights over the farms Berlijn, Goudvlakte, and Parma, in the district of Vredefort, for eighteen months, on payment of £50 for the first six months, £75 for the second six months, and £100 for the last six months, payable in advance, and the option of purchase for £12,000. On the 29th March, 1899, Hazebroek ceded all his rights under the above-mentioned contract to the plaintiff. The first instalment was paid in May, 1899. Before the second instalment was due, viz., the 10th November, 1899, war broke out between Great Britain and the South African Republic and Orange Free State. In February, 1902, the defendant granted the prospecting rights over the same farms to one Evans, and in May, 1902, the defendant was informed that the plaintiff wished to resume prospecting and to pay the second instalment under the contract of the 10th March, 1899. The plaintiff now tendered the second and third instalments, and

asked for an order allowing him to prospect for such time as the Court would deem meet.

Barclay Lloyd, for plaintiff.

A. Fischer (with him *Hill*), for defendant, excepted to plaintiff's declaration because (1) the contract, being a lease of rural property, could not be ceded by the said Hazebroek to the plaintiff without defendant's consent, and because the declaration did not allege that such consent had been obtained; (2) because no notification of the alleged cession by Hazebroek to the plaintiff was alleged in the declaration to have been made to the defendant, and therefore no privity of contract between plaintiff and defendant existed.

Reading the contract suggested a lease between defendant and Hazebroek, with option to purchase. It was a personal right, and the question arose, Could Hazebroek cede such a right? It was a *praedium rusticum*, and Hazebroek could not cede without notice to defendant. See *de Vries* v. *Alexander* (Foord, 1880, pp. 43, 46). There was a decision to the contrary in the Transvaal (*Eckhart* v. *Nolte*, 3 C.L.J. 43), but counsel referred the Court to a discussion of this decision in 3 C.L.J. 165; he also quoted *Swarts* v. *Landmark* (2 S.C. 5) in connection with *Nieuwoudt* v. *Slavin* (13 S.C. 58).

The right being a personal right Hazebroek could not cede, because that would have broken the contract. He quoted *Imroth* v. *Ward* (8 S.C. 257), contending that if a grantee had no right to cede a portion of a right of prospecting he would not have the right to cede the whole prospecting right, and also referred to *Visser* v. *London and Jagersfontein Diamond Mining Co.* (1 Gregorowski, 1883–85, 80); *Green* v. *Griffiths* (4 S.C. 346); *Paterson's Executors* v. *Webster, Steel & Co.* (1 S.C. 350–355); Pothier on *Obligations*, vol. 2, van der Linden's Translation, sec. 600.

[*Per curiam:* May not the contract be regarded as the grant of a part of the *usus* which cannot be ceded?]

There ought to have been notification of the cession to the defendant, and until there was such notice there would be no privity of contract between plaintiff and defendant (3 Burge's *Colonial Law*, 551).

Barclay Lloyd: No notice of cession to the owner was necessary; see *Eastern Rand Exploration Co.* v. *Nel* ([1903] T.S. 42). The contract was not a lease of land.

On the question whether a prospecting contract was a lease, see *Carlis* v. *Registrar of Deeds* ([1903] T.S. 1); Voet, 19, 2, 5, and 19, 2, 3; *Swarts* v. *Landmark* (2 S.C. 5).

A right of option to purchase could be ceded without the consent of the grantor; see *Bal* v. *van Staden* ([1903] T.S. 70). The option to purchase could be separated from the contract to prospect; see *Eastern Rand Exploration Co.* v. *Nel* ([1903] T.S. 42). The question was whether the contract was so personal in its character that it could not be ceded without consent of the owner.

[As to the grant of a personal right of water the Court referred to *Dreyer* v. *Ireland* (Buch. 1874, p. 193).]

Cur. adv. vult.

Postea (August 27):—

MAASDORP, C.J.: The declaration in this case sets forth that on the 10th March, 1899, the defendant entered into a contract with one Hazebroek, whereby he granted to the latter for valuable consideration the right to prospect for minerals on certain farms belonging to him for a certain period, with the option to purchase the mineral rights on the said farms in the event of payable minerals being discovered during the currency of the said period; that on the 29th March, 1899, the said Hazebroek ceded all his rights under the said contract to the plaintiff, who is now entitled to all the prospecting rights and option to purchase under the said contract; that before the expiration of the said contract the defendant informed the plaintiff that he had

already made over the prospecting rights to a third party, though the plaintiff had already tendered the amounts to which he was liable under the contract; wherefore the plaintiff prays a declaration that the contract is still of full force and effect, and that the plaintiff is entitled to the full benefit and advantage thereof.

To this the defendant excepts that the plaintiff is not qualified to institute this action:—

(1) Because the contract, being a lease of rural property, could not be ceded by the said Hazebroek to the plaintiff without the defendant's consent, and because the declaration does not allege that such consent was obtained.

(2) Because no notification of the alleged cession by Hazebroek to the plaintiff is alleged in the declaration to have been made to the defendant, and therefore there is no privity of contract between plaintiff and defendant.

In order to admit of the exceptions being fully argued, the contract has, by consent of parties, been annexed to the declaration, and taken as forming part of the same. The wording of this contract, omitting the parts which have no bearing upon the exceptions, is as follows: "I, F. C. Pistorius, hereby grant to Mr. S. Hazebroek the options to prospect on the farms Berlijn, Goudvlakte, and Parma. . . . In the event of payable minerals being discovered on the said farms, the purchase-price for the mineral rights only of the said farms shall be £12,000." In support of the first exception Mr. *Fischer* referred the Court to the cases of *de Vries* v. *Alexander* (Foord, 43); *Swarts* v. *Landmark* (2 S.C. 5); *Nieuwoudt* v. *Slavin* (13 S.C. 58); and to an article written by myself many years ago in the *Cape Law Journal*, in support of the proposition that a lessee of a *praedium rusticum* is not entitled to sub-let such lands or make over his lease to a third party without the consent of the lessor. This proposition cannot, of course, be contested, and if the present were a case of a lease of a rural tenement, or *praedium rusticum*, the Court would have no other alternative but to uphold the first exception. But the question is, Is the contract a lease of land at all? By the contract the defendant merely grants to Hazebroek what is rendered in the sworn translation as "the option" to prospect,

but what appears in the original as *de voorkeurrecht*, that is, "the preferent right" to prospect on the said farms for a certain period. Under these terms it is clear that, subject to the right of prospecting, all the other rights of ownership, including, amongst others, the right of occupation, and of usufruct and enjoyment, are retained by the owner (the defendant), and that there is no lease of any portion of these farms to Hazebroek. There can here, therefore, be no question of any cession of the lease of a rural tenement, or of any lease at all. All that Hazebroek was entitled to under his contract was a personal right to go on to the farms for prospecting purposes and to purchase the mineral rights of the said farms in the event of his finding payable minerals.

Now it is a clear rule of our law that, as a general rule, a personal right, or right of action, may be freely ceded by the grantee of the same without the consent of the grantor. This was laid down, amongst others, in the case of *Paterson's Executors* v. *Webster, Steel & Co.* (1 S.C. 355), referred to by Mr. *Fischer*, and requires no further authority. Mr. *Fischer* tried to bring to bear the principle of *delegatio;* but that principle is not applicable, for we are dealing here not with the delegation of an obligation, but with the cession of a right. "*Delegatio*," according to Pothier, sec. 600, "is a sort of novation whereby the original debtor, in order to release himself from his creditor, gives him a third person who in his stead binds himself towards such creditor." And he very rightly adds that for such a release of the original debtor the consent of three persons is essential, namely, (1) that of the original debtor or *delegator;* (2) that of the proposed new or delegated debtor, who is to give his consent to become such debtor; (3) that of the creditor, who is to consent to release the original debtor and to accept the new one in his stead.

If the question were raised in this case whether Hazebroek could, by the cession of the contract, release himself from the obligation to make the six-monthly payments or any other obligations he might be liable to under the contract, the principle of *delegatio* would apply, but not when it is a question merely of the cession of his rights under the contract.

There is one limitation, however, to the right of cession of action, namely, whenever the right to be ceded is of such a nature that the obligor or grantor of the right can be said to have a *delectus personae* as regards the grantee. Such a *delectus personae*, according to Sir HENRY DE VILLIERS, exists in the case of the lease of a rural tenement (*Green* v. *Griffiths*, 4 S.C. 346). But there are others, such as the contract of service, for instance; and the test of the right of the grantee to cede without the consent of the grantor must in every case be, as is stated by Sir JAMES ROSE INNES in the case of *Eastern Rand Exploration Co.* v. *Nel* ([1903] T.S. 42), whether or not the contract is so personal in its character that it can make any reasonable or substantial difference to the other party whether the cedent or the cessionary is entitled to enforce it.

Applying this test to the present case, it has been suggested that it would make the greatest difference to the defendant whether Hazebroek or a third party has the right to prospect, inasmuch as the cessionary might be a person or a syndicate with much larger resources than Hazebroek, who might dig up the whole of defendant's farm within the period of eighteen months allowed by the contract, and leave it in such a condition as to be worthless for the future for all farming purposes. To this it may be replied that the law will be a sufficient protection to the defendant if his property is dealt with in a manner not contemplated by the contract, and the question, therefore, still remains, What may be reasonably regarded as having been contemplated by the parties, and especially by defendant, when he entered into the contract? From this point of view it is surely not unreasonable to hold that the defendant, when he made up his mind to have the farms prospected, contemplated that they should be thoroughly prospected in a reasonable manner, according to the methods in ordinary use, and that not necessarily with Hazebroek's own means, but with any financial assistance he might get from elsewhere; not necessarily, nor even probably, by Hazebroek personally, but by persons whom he might employ for that purpose, and that it did not matter much to the defendant who had the right of prospecting, provided that Hazebroek continued liable under the contract.

This being so, we are of opinion that the contract is not of such a personal nature that it can make any reasonable difference to the defendant whether Hazebroek or the plaintiff exercises the right under it, and we must therefore overrule the first exception.

The second exception is that defendant was entitled to notice of the cession of the contract to plaintiff, and that, such notice not being alleged in the declaration, the declaration discloses no cause of action as between the plaintiff and defendant. On this part of the case Mr. *Lloyd* has referred us to the judgment in the case of the *Eastern Rand Exploration Co.* v. *Nel,* where it is laid down that if a cession is valid without the express consent of the owner of land, no notice of such cession is necessary. The same principle was applied in the case of *Barry* v. *Barnes and Needham* (3 Menzies, 473) and in that of *Jacobsohn's Trustees* v. *Standard Bank* (16 S.C. 203), and there are numbers of cases in which, as between the parties, a cession has been held valid in itself, without any further solemnity or formality.

The second exception must, therefore, also be disallowed.

FAWKES, J., concurred.

Plaintiff's Attorney: *J. G. Fraser;* Defendant's Attorney: *G. A. Hill.*