

1915. September 6. CURLEWIS and GREGOROWSKE, JJ.

Mines and minerals.—Gold Law.—Stands outside townships.—Letting to coloured persons.—Act 35 of 1908, secs. 77, 130 and 131.

Section 77 of Act 35 of 1908 provides that the rights and obligations attaching at the commencement of that Act to a stand outside a township and acquired under previous Gold Laws shall remain in force as if that Act had not been passed. *Held*, that such a stand could be let to and occupied by coloured persons for residential purposes and that the restrictions in sec. 130 and 131 of that Act did not apply to such a stand.

R. v. Tamblin, (1911, T. P. D. 772) applied.

Appeal against a conviction by the magistrate of Krugersdorp at Roodepoort.

The accused was charged with having contravened sec. 131 (1) of Act 35 of 1908 in that from 21st September, 1912, to 21st June, 1915, being a coloured person he did wrongfully and unlawfully reside on proclaimed land in a district in Class A, viz., on Mining Stand No. 566 on the proclaimed farm Roodepoort No. 43, the said stand not being in a bazaar, location, mining compound, or other place permitted by the Mining Commissioner. Evidence was given that the accused hired the premises from the owner, one Fincham, in August, 1908, and occupied them for approximately a year, when he was given notice to quit. He returned in 1912 and occupied the premises on a two years' lease from 21st September, 1912, renewed for a further period of two years in 1914. He was found guilty and sentenced to a fine of £1 or four days' imprisonment, against which sentence he now appealed.

G. A. Mulligan, for the appellant: Appellant was lawfully in possession on 1st January, 1909, when Act 35 of 1908 came into operation: he is therefore protected by sec. 131 (3) of that Act. For the interpretation of the Act see *R. v. Tamblin* (1911, T.P.D. 772). Sec. 131 (1) does not apply to these premises, which are on a stand governed by sec. 77 (1) of the Act. The owner's admitted right under sec. 77 (1) to let to a coloured person implies a correlative right of the coloured person to occupy. The magistrate's decision is in conflict with *R. v. Tamblin* (*supra*). See Pothier, *Louage* (Art. 3, sec. 24) as to legality of purpose of hiring.

I. P. van Heerden, for the Crown: Sec. 131 (1) merely allows existing contracts to continue: it does not sanction the conclusion.

of new contracts such as this tenancy from 21st September, 1912. *R. v. Tamblin (supra)*, only decides that, under sec. 77 of the Act an owner may let to a coloured person who may trade there. Residence of a coloured person is, however, forbidden by sec. 131.

Mulligan was not called upon to reply.

CURLEWIS, J.: The accused was charged with having contravened sec. 131 (1) of Act 35 of 1908, in that, on or about the 21st of September, 1912, to the 21st June, 1915, he, being a coloured person, did wrongfully and unlawfully reside on proclaimed land in a district in Class A, to wit, a mining stand, No. 566, on the proclaimed farm Roodepoort, No. 43, the said stand not being a bazaar, location, mining compound, or other place permitted by the Mining Commissioner.

The facts are not in dispute in this case; the only question is one of law. The accused had been in occupation of this stand at the time when the Act of 1908 came into force; he was away for several years, and he came into occupation subsequently on a fresh lease from the owner. It was sought to differentiate this case from that of *R. v. Tamblin* (1911, T.P.D. 772), on the ground that the right reserved to a coloured person under sub-sec. (3) of sec. 131 had been lost when he gave up his occupation. As far as I understand that case, it seems to me there is no distinction drawn there between letting to a coloured person who was in occupation when the Act of 1908 came into force, and letting to any other person. Mr. *van Heerden* asks us to make this distinction, that sec. 131 (1) makes it illegal, not to trade, but to reside on proclaimed land, and he says *Tamblin's* case did not lay down that an owner of a stand could let to a coloured person for the purpose of residence. But, on reference to the decision in the case itself, I find that the appellant in that case had been charged with having wrongfully and unlawfully sub-let to certain coloured persons and permitting such coloured persons, not being servants, to reside on or occupy the stand. I see nothing in the judgment which would lead me to conclude that the Court wished to distinguish between the right which an owner of a stand had to let it for trading purposes, as distinct from the right to let it for residential or occupation purposes. *Tamblin* was charged with having allowed coloured persons to reside on or occupy certain ground. The Court held that, under sec. 77 of the Act, the right which the owner previously had to let the ground to coloured persons had been preserved to him, and

that therefore he was entitled to let the ground to coloured persons, not only, I take it, to trade on but also to reside on. There was no question in that case that the persons were only trading there; the charge was allowing persons to reside on or occupy the stand; therefore I cannot see any justification for the distinction which Mr. *van Heerden* asks us to make—to differentiate between the case of letting for trading or for residential purposes. The decision in that case is very wide, and once it is admitted, as Mr. *van Heerden* does admit, that, previous to the law of 1908, the owner of a stand had the right to let to coloured persons, both for trading and residential purposes, I do not see how we can come to any other conclusion but that the decision in *Tamblin's* case governs this case. If Tamblin had the right to let to the accused it would be idle to contend that the accused had not the right to make use of that lease. If it were illegal for the accused to make use of that lease it would be illegal for Tamblin to let it. The Court has laid down that the owner of a stand may let it to a coloured person; therefore, in other words, that the letting to a coloured person is not an illegal act, that the lease is not for a wrongful or illegal object. It must follow, therefore, that if the owner is entitled to let it to the accused, the accused must be entitled to occupy it. I do not see how we can come to any other conclusion. The appeal must be allowed and the conviction and sentence set aside.

GREGOROWSKI, J.: I am of the same opinion. I do not think it is necessary to say anything with regard to the first argument which was urged by the appellant, namely, that he was in lawful occupation of the premises on the day when the Act came into force and that therefore he had a kind of personal right in perpetuity, so that he could go backwards and forwards and settle on this property even although there should be an interruption in his original holding. I would not like to say anything about the scope of sec. 131 (3) except after examination of all the cases which have been decided under this sub-section. I think this case is really concluded by the decision of the Court in *Tamblin's* case. It was there held that, under section 77, in the case of a stand outside a township which had been created by a prior Gold Law, the rights and obligations attaching at the commencement of the Act to such a stand remain in force as if Act 35 of 1908 had not been passed. In *Tamblin's* case it was held that sec. 77 applied not only to rights created by the previous statutes, but to all the common law

rights which the owner of such a stand had as regards letting the property, and therefore secs. 130 and 131 of Act 35 of 1908 did not affect a stand outside a township, which had been created by a prior Gold Law. Under such circumstances the owner could let freely to a coloured person, and of course the coloured person could occupy. It would be absurd to say that the owner had a right to let to a coloured person, but if the coloured person went on to the premises which the owner had a right to let, the coloured person was to be subjected to all these penalties.

Then Mr. *van Heerden* tried to make a distinction between residing and trading. I really could not follow that argument at all, because I do not know on what it was based. There are certain laws which have been interpreted to mean that an Asiatic may not reside at a certain place but that the prohibition does not affect his trading at the place. But I do not see how the interpretation would apply to the provisions of the Gold Law so as to permit an Asiatic to trade on proclaimed ground but not to reside on it. As far as *Tamblin's* case is concerned, I see no distinction between a coloured person residing and a coloured person trading. I think the appeal must be allowed.

Appellant's Attorney: *H. H. Jordan.*

[A. D.]

SANDENBERGH v. MOGALE, N.O.

1915. August 5, 6, 10; September 10. DE VILLIERS, J.P., and CURLEWIS, J.

*Natives.—Contract for lease of land.—Approval of Executive.—Ignorance of all the facts.—Validity.—*Law 3 of 1898, sec. 3.*

The Chief of the Bapo tribe of natives entered into a contract under which he let a portion of the farm K to the plaintiff. The site so leased proved to be a portion of the farm K belonging to the Bakwena tribe, but there was nothing in the lease to show this. The Executive Council acting under sec. 3 of Law 3 of 1898 formally approved of the said contract, but the said approval was given in ignorance of the fact that the site leased was not on Bapo ground, *Held*, that sec. 3 of Law 3 of 1898 contemplated an approval by the Executive.

* Sec. 3 of Law 3 of 1898, reads:—"No obligation or contract . . . entered into by coloured persons or their chiefs, shall be valid unless approved of by the Executive Council, acting in consultation with the Superintendent of Native Affairs."