

# Indian Opinion

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## EFFECTS OF TRANSVAAL ASIATIC LAND TENURE BILL AN EXPERT OPINION

THE following is an opinion of a well-known advocate on the various sections of the Transvaal Asiatic Land Tenure Bill. To make it easy for the reader it is given in the form of questions and answers:—

**1. QUESTION:** In the case of a private limited liability company formed after May, 1930, having acquired fixed property subsequent to its formation is there any protection under the law as affected by the proposed Bill of the shares of such company?

**ANSWER:** A company registered after the 1st May, 1930, can obviously be in no better position than a company in existence at that date. If such a company, whether public or private, is an Asiatic company, (i.e. a company in which a controlling interest as defined is held by an Asiatic) any land acquired after the 1st May, 1930, becomes the property of the state. Further in the case of a private company (whether controlled by Asiatics or not) which holds fixed property, any shares held by or pledged to an Asiatic or an Asiatic company or any person on behalf of an Asiatic or an Asiatic company becomes forfeited to the state, unless such share was held on the 1st May, 1930 and the company has not since that date acquired any fixed property. Thus if an Asiatic held a share in a private company prior to the 1st May, 1930 and the company acquired fixed property after that date, the share is forfeited.

**2. QUESTION:** In similar circumstances to the above, would either a European or non-European be protected in respect of any interest he had acquired in the shares of any shareholder in such company, e.g. for money lent as against the pledge of such shares or credit given as against the pledge of such shares?

**ANSWER:** This point is not specifically dealt with. It is probable that the Courts would hold the State's ownership of the shares to be subject to the pledge, where the pledge is not of the persons mentioned in section 3 (1).

**3. QUESTION:** In the case of a company formed after 1919 and before May 1930 in which a European shareholder was the registered holder of a majority of shares, would such European be entitled to transfer his shares to another European, the wouldbe transferor being merely a nominal shareholder without having given value for his shares?

**ANSWER:** The transferor is a person hit by section 3 (1) (iii). If the transferee is not such a person (i.e. is a *bona fide* purchaser of the shares) and the transfer takes place before the Act comes into force, the transferee will be protected. Not so if the transferee is himself a nominee of an Asiatic.

**4. QUESTION:** A shareholder in a private company owning fixed property has incurred liability and his shares have been attached under execution by his creditors, either Europeans or Indians after May, 1930. The constitution of the company precludes transfer of shares to a non-subscriber.

**ANSWER:** The Bill does not, in my opinion, hit shares which prior to its coming into force are under attachment to satisfy the judgment of a Court.

**5. QUESTION:** A private company is formed prior to May 1919 and shares therein have been transferred after May 1st 1930 to another Asiatic, what would be the position?

**ANSWER:** Section 4 clearly indicates that no Asiatic is to have a share transferred to him after the 1st May 1930 in a private company which holds land. It is immaterial when the company was formed.

**6. QUESTION:** Has the Government taken away any existing right by section 6 (a) i.e. the right of occupying or residing in the same townships which were protected by the 1919 Act?

**ANSWER:** I presume Section 6 (b) (2) is meant. This takes away the right of occupying further ground in the same township in accordance with the decision in Krugersdorp Municipality vs. Dadoo Ltd. (1920 T.P.D.38). Section 6 (b) (3) shows that the whole section is intended to be retrospective in operation.

**7. QUESTION:** Will an Asiatic be allowed to occupy or reside on freehold property if he was residing on it prior to the 1st of May 1930, if he applies between the 1st of September, 1932 and 30th April 1935?

**ANSWER:** Yes, provided there is no objection to occupation or residence other than flowing from section 130 and 131 of Act 35 of 1908.

**8. QUESTION:** (a) Can the Minister include in areas set aside under Section 131A stands (whether in Government or semi-Government Township or elsewhere) that contained an Asiatic Clause in their title deeds (i.e. converted into freehold stands?) (b) If such stands can be included, will the occupation or residence of an Asiatic have protection against other standholders to enforce the provisions of this title deed?

**ANSWER:** In my opinion the proposed section 131A enables the Minister to withdraw land only from the operations of sections 130 and 131A of Act 35 of 1908. If there are restrictions to township titles, whether under Act 34 of 1908 or arising out of private contract, the Minister cannot relieve against these. It is not intended to interfere with the rights of those now entitled to enforce such restrictions in titles.

**9. QUESTION:** Will the Minister allow a person to reside on and occupy a place in semi-Government or a private township if he resided on or occupied such place prior to 1st of May 1930 and applied between 1st of September, 1930 and 30th April 1935?

**ANSWER:** Section 6 (b) (3) providing for continued residence and occupation which are illegal under Section 130 and 131 of Act 35 of 1908. If it is desired to extend the protection so as to cover occupation and residence which are illegal for other reasons (e.g. a township title) the Bill must be amended.

**10. QUESTION:** What is the position of Indians residing on or occupying a place on proclaimed land after the 1st of May 1930? Have they to apply before 1st of September 1932?

**ANSWER:** Persons going into illegal occupation

after the 1st of May 1930 get no protection at all Section 6 (b) (3) applies only to persons who on the 1st May 1930 were residing or occupying.

11. QUESTION: (a) Section 7 of sub-section (1) what is the position in regard to a lease?

ANSWER: Mortgage bonds, to the extent that they were lawful under Act 37 of 1919, remain lawful if registered on the 1st May 1930. Similarly, leases for longer than ten years which were registered on the 1st May 1930 must be in security of a *bona fide* loan granted in the ordinary course of business for an amount which either alone or together with any other bond having priority over it does not exceed one-half the value of the property as at the time of registration of the bond. No lease, not registered in the Deeds office, on the 1st May 1930, is valid, if for a period of ten years or longer or containing a right to the lessee to renew for any period or periods which, together with the period of the original lease, equals or exceeds a period of ten years. This follows the Transfer Duty Proclamation and the decisions thereon are well known. Bonds and leases which offend against this section are forfeited to the State.

12. QUESTION: (a) Section 7 of sub-section 4. Can any person agree to hold property for an Asiatic after the 15th May 1930? Can a substitute of a European for a trustee of a European hold that property?

ANSWER: (a) A person who held fixed property for an Asiatic immediately prior to the 15th May 1930, may continue to do so.

(b) The exemption is confined to the property held in trust on the 15th May 1930. It is not quite clear whether such property may be passed on to a new trustee. I am inclined to the opinion that it can be.

13. QUESTION: Section 7 of sub-section 5. To whom does this apply?

ANSWER: This applies to all persons other than the officials named, who knowingly bring about or assist in bringing about a prohibited registration. It would include the Asiatics concerned and the conveyancer if party to a scheme to evade the section.

14. QUESTION: If an Asiatic transfers such property to a lawful person entitled to hold property, will the State keep the money derived from such transfer for a year? What is the right of the State after that year?

ANSWER: The proviso to the new section 2 (5) of Act 37 of 1919 is obscurely worded. I think the meaning is that the State may follow up the property in the hands of the transferee, but not after the expiration of a year from the date of registration. This refers to property which is forfeited to the State as having been transferred to an Asiatic company after the 1st of May 1930. This is the State's property and the State is given the right (limited to a year) to recover it from third persons.

15. QUESTION: Section 6. By this Section does it mean all the conditions inserted after 15th May 1930, empowering Asiatics to exercise any influence upon the transfer of fixed property as void?

ANSWER: It is only the condition or provision mentioned which is void. The rest of the document remains unaffected.

16. QUESTION: Section 3 (1) If an Asiatic is holding any share in a private company, will the share be forfeited to the State, what is the position of companies in which Europeans hold 51 shares and Indians 49?

ANSWER: If there is a private company which holds land every share held by an Asiatic is forfeited. It is immaterial whether he is in a majority or a minority or holds only one share. A company in which a European genuinely holds 51 per cent. of the shares is not an Asiatic company and therefore may hold land. But if it is a private company an Asiatic may not hold shares in it—all his shares are

forfeited. This is, of course, subject to the exceptions having reference to the 1st May 1930.

17. QUESTION: Sections 2 and 3. Do these Sections apply to the duties of Secretary and Director of a company?

ANSWER: Yes. The sections are perfectly clear.

18. QUESTION: (a) If an Asiatic is holding a share (prior to 1st May 1930) in a private company holding fixed property, is the share protected? (b) If he transfers the share after 1st of May 1930 to an Indian, what is the position? (c) If an Indian is holding a share in a company holding fixed property prior to 1st May 1919 and he transfers the share after 1st of May 1930 to another Indian, what is the position? (d) what is the position of property bought by a company after 1st of May 1930? (e) If the company was formed prior to 1st May 1919, and if the company purchased a fixed property before 1st of May 1919 and after the 1st May 1930, does the property bought before 1919 become the property of the State or only the property purchased after 1930?

ANSWER: (a) He is protected if the company has not acquired fixed property after the 1st May 1930.

(b) The share is forfeited in the hands of the Asiatic who acquired it after the 1st May 1930, otherwise than by inheritance from an Asiatic who lawfully held it.

(c) The transferee is not protected.

(d) The property is forfeited to the State.

(e) Only the property purchased after the 1st May 1930 is forfeited to the State. But if it is a private company all the shares held by Asiatics will be forfeited by reason of the acquisition by the company of property after the 1st May 1930.

19. QUESTION: Section 6 deals with the onus of proof. If in a civil or criminal action it is ascertained that an Indian holds a share in a private company, what is the position of such share and the fixed property? Will the property be confiscated and/or such share forfeited?

ANSWER: The law will operate as explained above, no matter how the facts are ascertained. But Section 6 only applies to proceedings under this Act. It is a special rule of evidences for cases, whether civil or criminal, arising under the Act.

20. QUESTION: Section 9, sub-section (1) what proofs have to be produced by an Asiatic before taking out a licence?

ANSWER: Proof is required that the Asiatic is entitled, in terms of any law, to occupy the land. If there is a law or a title barring Asiatic occupation, the applicant must prove that he is exempted; e.g. that he is exempted by the Gold Law itself or by Act 37 of 1919 as amended by reason of facts peculiar to himself and/or to the ground to be occupied.

(To be continued)

We have to express our regret to our readers for the non-publication of our last week's issue. Malaria is ravaging throughout our district and we have not been left untouched by it. Every individual of our staff is laid up and it was with some difficulty that we were able to publish the **INDIAN OPINION** for the last four weeks. Last week, however, it had become quite impossible.

THE many friends of Mr. A. I. Kajeé, Jr. secretary of the Natal Indian Congress will deeply regret to learn of the death of his beloved father which took place in India last week. The late Mr. Ismail Kajeé Bhattacharya was an old resident of Natal and after several years stay in India had returned to Natal about a year ago. He had the good fortune at his old age to celebrate the marriage of his two grand daughters and failing in health he returned to the mother land about six months ago, where he succumbed to a serious operation. We extend to Mr. Kajeé and the bereaved family our deepest sympathy in the great loss sustained by them.

## "FIND FULL REWARD OF FIGHT, IN DOING RIGHT"

(By L. W. RUFOR)

**T**HE every-day man is largely, if not entirely, the slave of his environment, conditioned by the circumstances, and reflecting the fashion of his hour in outlook and conduct. Except in regard to the life of the personality—self—the "I" of ambitions and desires—very little real thinking, but scant initiative, is found. While there is no paucity of thought-energy developed and expended on the feeding of appetites; the satisfying of sensation; on self-aggrandisement, we find in matters outside and beyond the narrow personality-life, the average man is content to be one of a crowd, to have his opinions moulded for him, to adopt as right and sufficient the conventional standards of his time, and, generally, to have his thinking done, vicariously. He does not initiate or create; he reacts. Psychologically, he reflects or mirrors the consciousness of the herd to which he belongs; is subject to the waves of passion, anger, fear, hope, sympathy, antipathy etc. that swept through it from time to time. In similar circumstances the conduct of the man-mob differs but little from that of the animal mob. It constitutes a blind un-reasoning mass-movement; the sweep of a wave that finally breaks and dissipates.

Now, truly concerted action differs essentially and radically from such mere mass-movement. It is action that is intelligently conceived, governed, directed, controlled. It is action that is literally co-operative; action to which each co-operator is, himself, inspired and urged by conviction. In such action, the movement made is the outcome of the resolve by each individual to pursue that particular course; the resolve, itself, being the natural consequence of the inner conviction arrived at and making the impulse to that action imperative and irresistible.

The important distinction between the man whose conduct is motivated by conviction, and the other who but shares the crowd-mentality is, that while the latter does this or that as integer of the crowd—because the crowd does it—the former acts independently of what others may do, moved by his sense of righteousness and unaffected by opinions favourable or unfavourable. He may, of course, find himself one of a number

who are similarly inspired, similarly moved, in which case truly concerted action becomes possible and may be very potent. But, from his point of view, the co-operation or non-co-operation of others is relatively unimportant and wholly unessential. Though he walks alone, he must go where his convictions, his conscience directs be the consequences what they may. For,

"There lives a Master in the hearts of Men  
"Maketh their deeds by subtle pulling-strings  
"Dance to what tune He will.

## THE COMING CONFERENCE

**T**HE South African Indian Congress will sit in its recess during the week-end in Durban. It will be an important Conference for grave issues affecting the future of Indians in the Transvaal in particular and in the Union in general will come before it to be decided. It is hoped, therefore, that all the Provinces will be fully represented. One of the important matters to be discussed will be the renewal of the Agreement between the Governments of the Union and India. The terms of the Agreement, as has been reported, are practically the same as the old Agreement with only one exception, viz. the change in the Assisted Emigration Scheme. Both the Governments have come to the conclusion that the scheme has worked itself out and that no good purpose will be served by having it still embodied in the Agreement and that new avenues for the reduction of the Indian population from the Union should be explored. It is, therefore, suggested that representatives both of the Government of India and of the Union should explore the possibilities of a colonisation scheme for settling Indians and that the Indian community be invited to participate in it. The discussion on the Agreement will, therefore, naturally lead to the discussion on this exploration scheme. The Transvaal Land Tenure Bill which has been introduced into Parliament in a modified form and which the Government has steam-rolled during the present session will also be one of the vital matters to come for discussion before the Conference.

On the exploration scheme a heated discussion took place between the Government of India Delegation and the representatives of the South African Indian Congress during the Round Table Conference. The Union Government refused to come to an agreement unless the Government of India showed an effective way whereby the present Indian population of the Union could be substantially reduced and the assisted emigration scheme having proved not sufficiently fruitful a suggestion to explore other avenues was thrown out and the representatives of the Congress were asked to swallow it. The Congress representatives were not lured by this new scheme for it appeared, if anything, a little worse than the former one, in that while under the former scheme our brethren were at least sent to their Motherland under the latter they would be thrown into an unknown land. They, however, decided after much

deliberation, that provided other things in the Agreement and arising out of the Agreement were satisfactory the Congress would not oppose the exploration scheme agreed upon by both the Governments.

The first thing the Conference will have to consider is whether the Agreement is in other respects satisfactory. According to reports other items of the Agreement remain unaltered. It can therefore be considered satisfactory, but in the letter only. In spirit we have experienced the working of it during the past five years and our experience has been none too good. In the Transvaal Land Tenure Bill we see a direct breach of the spirit of the Agreement. It is argued that the modifications in the Bill render it acceptable in the light of the Agreement. We are laymen. We might not be intelligent enough to understand the merits or demerits of the Bill. But we reproduce elsewhere in this issue an expert opinion on the Bill which speaks for itself. The object of the Bill is no other than (1) to deprive us of the last vestige of our rights in the Transvaal to own landed property and to trade and (2) to segregate us; and the so-called exemptions will be in the shape of dog-tickets which Indians will have to choose to accept if they are after material gain only. The Congress was fully aware of the evils of the Bill and at the last emergency conference held in Johannesburg prior to the sitting of the Round Table Conference the President did not mince matters when he denounced the Bill and declared it wholly unacceptable. We would suggest that the Bill is no better with its modifications. It is worse because the evil is now disguised.

In view of these facts we are of opinion that when it has been possible to introduce such a Bill as the Transvaal Land Tenure Bill in the face of the Agreement arrived at between the Governments of the Union and India the Agreement cannot be called satisfactory, and since the Agreement is not satisfactory the decision of the Congress representatives not to oppose the Government's exploration scheme is not binding on them. But supposing the Congress did decide not to oppose the scheme it may not actively participate in it for that would amount to endorsing the principle of the scheme.

The Conference will then have to decide what action to take if the Transvaal Land Tenure Bill passes into law. As we have pointed out in our previous issues it is no use our indulging in tall talk about fighting if we have no strength, no manly courage in us to stake all for the sake of a principle. We can only suggest that when all constitutional means of getting redress are exhausted the only remedy left for us is passive resistance. That weapon is the gift of Mahatma Gandhi to the Indian community of South Africa. He has taught us the use of it. The courage to use it must come from within. May Providence guide the Conference to do the right thing.

MR. S. B. Mehd, secretary of Transvaal Indian Congress who was here for the last fortnight smiled for India by the *s.s. Karanya*. He will represent the case of the Transvaal Indians to the Government and the leaders of India,

## Roodepoort Indians In A Sad Plight

### Supreme Court Judgment

TOWN COUNCIL OF ROODEPOORT-MARAISBURG vs. EASTERN PROPERTIES (PROPRIETARY) LIMITED

The following is the text of a judgment delivered by Mr. Justice Greenberg in the Supreme Court of South Africa (Witwatersrand Local Division) in the case of Town Council of Roodepoort vs. Eastern Properties (Pty) Limited:—

Petitioner prays for an order (a) directing respondent to forthwith eject and cause to be removed from the Stands Nos. 577, 1039, 1163, 1164, 254 and 309 Roodepoort the persons mentioned in paragraphs 13, 14, 15 and 18 of the petition and (b) Interdicting respondent from at any time hereafter leasing the said Stands No. 577, 1039, 1163, 1164, 254 and 308 Roodepoort, to Asiatics or coloured persons, save and except as the *bona fide* servants of the registered owner of the said properties to reside on or occupy the said stands.

The petition alleges that respondent as owner of the premises on the stands mentioned is permitting their occupation by coloured persons in breach of the provisions of sections 130/1 of Act 35 of 1908. The occupation by coloured persons is admitted but respondent resists the granting of any order on a number of grounds. Petitioner is the Municipal Council vested with the control of the Roodepoort and Maraisburg townships. Roodepoort Township is situate in the Mining District of Johannesburg on a portion of the farm Roodepoort No. 43. The farm was proclaimed a public digging by Proclamation dated 8th September 1896. In 1896 a survey of the claims on the farm was made and the survey diagram was confirmed and is filed in the office of the Registrar of Mining Titles in Johannesburg. The Township of Roodepoort was established under an agreement between the owners of the farm and the Government of the South African Republic dated 18th December 1897. According to the general plan of the township it originally comprised 1555 stands with streets and open spaces. The general plan also shows 108 excluded figures within the boundaries of the township. These figures did not originally form part of the township but represented stands granted in terms of section 92 of Law 15 of 1898; they have been dealt with by section 13 (2) of Act 34 of 1908, and the township now includes these stands. Respondent owns stands 577, 1039, 1163 and 1164 which are included in the 108 figures referred to above. None of the title deeds made in favour of respondent contain any restriction relating to occupation by coloured persons. Petitioner is the registered owner of about 35 stands in the township.

The first ground of opposition is that petitioner has no *locus standi in judicio*. On the facts alleged in the petition and supplementary affidavits filed by petitioner, it claims to have a *locus standi* on three grounds, (a) that it is an owner of stands within the township (b) that it is an owner of stands which has suffered damage as a result of respondent's unlawful acts. (c) that as local authority it is the supervisor of health and sanitation and is the representative and guardian of the interests of the township. The second ground rests on facts which are in dispute and Mr. Barry who appeared for applicant, admitted that if his other grounds failed, respondent was entitled to have the petition dismissed with costs.

The question of *locus standi* in similar circumstances was dealt with by the Transvaal Provincial Division in the case of Krugersdorp Municipal Council

vs. Dadoo Ltd. and others (4th December, 1919); a report of the judgment appears in the case on appeal (Dadoo Ltd. and others vs. Krugersdorp Municipal Council; 1920, A.D. 530). Three questions were argued before me viz: whether this decision covered the present case, whether it was binding on this Court and whether it was correct. It was a decision on an application for an order setting aside as illegal the transfer to a company, Dadoo Limited, of Stands 171 and 340 Krugersdorp. The illegality relied on was that the transfers were in fraud of Section 2 of Law 3 of 1885 and section 130 of Act 35 of 1908. The company resisted the application, denying both the Council's *locus standi* and the illegality. The case was heard by a Court of two judges (Wessels and Curlewis J.J.) who decided both points against the Company and granted the application. On appeal a majority of the Appellate Division held in favour of the company on the second point and expressed no opinion on the question of *locus standi*. De Villiers J.A. in a dissenting judgment agreed with the Court *a quo* on both points. In my opinion the decision of the Transvaal Provincial Division on the question of *locus standi* is binding on this Court. It was a decision on a point directly in issue, which the Appellate Division has not reversed and I have been referred to no authority for the view that it is not binding on this Court. The only other question to be decided is whether it covers the present case. I should mention that I have referred to the original records and it appears that Curlewis J. gave no separate judgment. It is clear from the records and the judgment of Innes C. J. (at page 540) that the title-deed of stand 171 embodied a condition which prohibited the owner from transferring or subletting the land to any coloured person, but that the title-deed of stand 340 contained no restrictive conditions. Wessels J. in his reasons (with the exception of the last sentence dealt only with stand 171 and Mr. Millin on behalf of respondent, contended that the judgment referred only to a case where under a general scheme each plot-owner is burdened with a restriction in his title which is made in favour of all the other owners; under such a scheme of course, it was clear that each owner had the right to enforce the restriction against any offending fellow-owner, but that this did not necessarily apply where the restriction was to be found in a legislative enactment as in the present case. But although the learned judge in his reasons dealt only with stand 171, he specifically granted an order also in respect of 340 and I am forced to the conclusion that the restriction in the title-deed of stand 171 was not essential to his decision. Indeed at page 532 he refers to the condition in the title-deed of Stand 171 and says "This was a condition intended to be for the reciprocal benefit of all owners of states. It makes no difference whether the restriction is derived from the Gold Law or whether its origin lay elsewhere." It is true that this may mean that it makes no difference whence the restriction in the title-deed comes, but it may also mean that it makes no difference whether the restriction is contained in the title-deed or in the Gold Law or elsewhere, and in view of the order in relation to stand 340, I think he meant the latter. On the question of *locus standi* the position in relation to stand 340 is exactly similar to the stands owned by the respondent in this case; I think I am bound by the decision and must hold that the petitioner has a *locus standi in judicio*.

The next question is whether in respect of stands 254 and 308, section 77 of Act 35 of 1908 affords respondent any protection. This depends on whether the words in the section "a stand outside township"

refer to a stand which physically lies outside the boundaries of the township, or whether they refer to the class of title and mean a stand granted under section 92, or possibly section 91 of Law 15 of 1898. In *Rex vs. Tamblin*, 1911 T.P.D. 772, and *Rex vs. Chong Sam*, 1915, T.P.D. 396, it was held that section 77 of Act 35 of 1908 exempts stands referred to in the section from the restrictions contained in section 130 of the Act. It was common cause between counsel that in these two cases the stands physically were outside the township, and that they did not decide the present question. If the words quoted from section 77 refer to the class of title and not to the locality, respondent must succeed on this point; *aliter* if they refer to locality because physically they are inside the township.

Under Law 15 of 1898 stands were granted under section 91, 92 and 93. I do not think section 91, which deals with stands granted on claims, need be considered. Section 92 provides for the grant of stands on proclaimed land to white persons for residential and business purposes and is the section under which stands 254 and 308 were granted. Section 93 deals with the creation of Stand townships on private proclaimed and unproclaimed land and on Government land.

I think it is probable, that with the exception of the excluded figures referred to in the present case, stands which were granted under section 92 did not lie within the boundaries of stand townships. I base this view on the fact that the legislature, in section 13 (2) of Act 34 of 1908, made provision only for these stands; had this been a feature which occurred elsewhere also, one would have expected a similar provision to be made, although it is of course possible that the circumstances were different in such other cases, if they existed, and did not call for similar treatment. If this conjecture is correct, it may be that the legislature when enacting section 77, thought that there were no other stands granted under section 92 which lay within township boundaries and that section 13 (2) of Act 34 of 1908 took the excluded figures in this case out of the provisions of section 77.

*Prima facie* the words "outside a township" constitute a description of locality and I have not been referred to anything which shows that these words were in fact in common use in any other meaning. Mr. Millin for respondent, drew attention to Annexure J. to the petition; this is the transfer deed in respect of Stand 524, and on the outer cover and in the heading the words "Deed of Transfer of Stands outside Townships" appear. It may well be that these words appealed to the conveyances or the registering official as an apt description of stands of this class, but this does not aid in the interpretation of the section. The later provision in chapter 10 of Act 35 of 1908 point rather to the construction of the words as a description of locality. The authority granted to the Mining Commissioner and the Board in these provisions would be exercised more conveniently in outside areas than within the limits of a township; moreover, if one can credit the legislature with actually having section 130 in mind when section 77 was drafted (see *Tamblin's case*, supra) then it seems more likely that the liberty to let to coloured persons would be granted to the owner of a stand in an outside area than of a stand geographically within a township. There is also some substance in the contention that if the legislature in section 77 had merely intended to indicate the origin of the acquisition of the stand, it would have done so by reference to the relevant section. On the other hand, the phraseology of section 13 (2) of Act 34 is not entirely irrelevant. There is no

doubt that Acts 34 and 35 are closely connected (see e.g. definitions of "mining district" and "proclaimed land" in section 1 and section 73 of Act 34) and for purposes of comparison of phraseology may be considered as one enactment. The use of words "within the boundaries of the township" in section 13 (2) of Act 34 suggest that if this had been meant in section 77, similar words would have been used. Furthermore, in section 99 of Act 35 the words "stand outside a township" are used. This section deals with the Government's rights on non-payment of licences and *prima facie* I think that a provision of this kind would be based on a question of title rather than of locality. But I shall refer to section 99 again when discussing as I now propose to do, the general intention of section 77.

Act 34 dealt with stands in a township under section 93 of Law 15 of 1898; it made provision for their conversion into freehold under grants which presumably would incorporate the conditions of title, and it seems probable that section 77 was intended to deal with stands which were left untouched by Act 34. In *Tamblyn's case* (supra) de Villiers J.P. said "That Act, i.e. Act 34, was an amendment of the previous year's Townships Act, but it also dealt specifically with that portion of the Gold Law which dealt with stands in a township; stands outside townships had not been dealt with in the earlier Act, and those stands were dealt with in the Precious and Base Metals Act." In this connection, by section 3 of Act 34, the rights of forfeiture or sale under section 94 of Law 15 of 1898 were preserved pending the grant of freehold title, and it seems clear that section 99 of Act 35 was not intended to deal with the same subject as section 3, but like section 77, was intended to deal only with stands not touched by Act 34. Consequently section 99 could not be invoked in relation to stands such as 254 and 208, because by virtue of section 13 (2) of Act 34, these stands were dealt with by Act 34; it is clear for example that section 99 could not be applied to these stands after they had been converted into freehold and during the interim. Section 3 of Act 34 and section 94 of Law 15 would be more applicable. I think therefore that the words "stand outside a township" in section 99 do not apply to these stands and if this is right, it lends colour to the view that a similar interpretation should be given to the words in section 77. Whether the close connection between Acts 34 and 35 would justify the extension of, for the purpose of this Act, in section 13 (2) of Act 34 to Act 35 is a matter on which I do not wish to express an opinion. In my view the provisions of section 77 were not intended to apply to stands which were dealt with by Act 34. In proclamation 35 of 1902 "Township is defined as a piece of land divided into stands or lots described and shown on one general plan or diagram, and in view of the considerations I have dealt with, I think that in section 77 a stand outside a township means a stand which physically is outside this piece of land. Proclamation 35 of 1902 was repealed by Act 29 of 1908, which was assented and came into operation simultaneously with Acts 34 and 35. Notwithstanding this repeal I think the definition of "township" (which is not defined in Act 35) is one which is accurate enough as a general definition and can be applied to the word used in section 77. The section therefore does not apply to stands 254 and 308 and is no ground of defence to respondent.

Respondent's next contention is that applicant is not entitled to the relief which it claims (a) because it has waived its right (b) because of laches on its part (c)

there has been such a change in the character of the locality that no benefit will accrue to applicant by the enforcement of the stipulation in the present case. The facts on which this contention is based are contained in section 4 of the affidavit dated 11th February 1932 by Mahomed Sahib Ally and the supporting affidavits of Mrs. Pitt and Mr. Schwartz. These affidavits show that over a long period of years the applicant through its councillors and officials has been aware of the fact that these stands have been occupied by coloured persons and not only has not objected but through its officials has passed the plan of buildings which these officials knew were intended for such occupation. In an affidavit replying to these allegations made by Mr. Gowling, the Town Clerk on the 18th February 1932 he states:

"3. As regards the respondents various allegations of acquiescence, concurrence and waiver by the applicant, the applicant denies that it at any time agreed to waive its rights, or that it acquiesced in the occupation of stands and buildings by coloured persons and Asiatics in Roodepoort. The applicant admits that for some years past certain stands in Roodepoort have been occupied to the knowledge of applicant by coloured persons and Asiatics and until recently no action was taken by the applicant to secure the ejectment of such coloured persons and Asiatics; the reason being that applicant was under the impression that occupation by coloured persons and Asiatics was not illegal excepting on freehold stands, in that only the title deeds of such freehold stands contains a specific prohibition against occupation by coloured persons and Asiatics. During August and September 1931 applicant for the first time took legal opinion and was advised of its rights to make this application.

4. As regards the various allegations by respondents with reference to the building plans submitted to the applicant for approval, I say that such plans are passed and approved of in conformity with the applicant's Public Health and Building Bye Laws, and the occupation of the buildings by any particular individual is not relevant in an application for the approval of such plans.

5. As regards the third and fourth paragraphs at page 7 of respondent's first replying affidavit with reference to the quarter of Roodepoort in which the cottages are situated I say that same is occupied mainly by coloured persons and Asiatics and has been so gradually occupied since about the year 1922 when the Roodepoort United Main Reef Gold Mining Company Limited closed down. Prior to that date the quarter of Roodepoort was predominantly European. I deny the statement in paragraph 4 of the affidavit of Mark Schwartz that this quarter of Roodepoort has been solely occupied by coloured persons since 1905. If coloured persons and Asiatics are ejected from this quarter of Roodepoort the stands would be suitable for occupation by Europeans. The quarter of Roodepoort referred to is in close proximity to the Urban-Roodepoort Deep Mine which presently employs a large number of Europeans.

I was informed by Mr. Barry that the date "1922" in section 5 is an error and should be "1917" and argument was addressed to me on this basis.

The first question to be decided is whether in these circumstances the applicant can be held to have waived its rights under sections 130/1 of Act 34 of 1908. In Halsbury's Laws of England, volume 13, section 198, it is stated that for a waiver to be effectual it is essential that the person granting it should be fully informed as to his rights. It is true that applicant in this case knew the facts on which its right to claim ejectment was based, but I do not think that this means that it waived its rights. There may be a presumption of knowledge of law and in *Stafford v. Stafford* (1 de G. and G. at page 202) Knight Bruce L.J. said that generally when the facts are known from which a right arises, the right

is presumed to be known. But waiver is a form of contract and it is necessary that there should be an intention to waive; it would seem therefore that before the applicant can be held to have intended to surrender its right it must know its right. (see *Umhlebi vs. Umhlebi*, 19 E.D.C. at page 246). This view is also supported by a passage from a judgment by the Master of the Rolls in *Cockerell v. Cholmeley* (1 Russ. & M. 418, at page 425) in which he says "In equity it is considered, as good sense requires it should be, that no man can be held by any act of his to confirm a title, unless he was fully aware at the time, not only of the fact upon which the defect of title depends, but of the consequences in point of law." In the present case Mr. Gowing states that applicant did not know of its rights until August or September 1931, and this statement is not denied although a later affidavit was filed by respondent. I realise that it may be impossible for respondent to deny this statement but it might have challenged its correctness otherwise than by a denial. Mr. Millin in argument said that this question of knowledge was one that respondent was entitled to investigate by *viva voce* examination after full discovery of documents but I have nothing before me to warrant the belief that this statement by Mr. Gowing is in fact challenged or that any grounds exist on which it can be challenged. I do not therefore think that I would be entitled on this ground to refuse applicant relief to which it would otherwise be entitled. It was also contended that even if applicant did not know that it was entitled to take proceedings for the relief now claimed (I should mention that in order to impute this knowledge to applicant I must hold that applicant knew that the very forceful argument addressed to me by Mr. Millin on the question of *locus standi* is without substance), nevertheless it must have known that it could invoke the penal provisions of sections 130/1 either by public or private prosecution. Assuming that applicant knew of these provisions, there is nothing to show that it has suffered actual injury and it would therefore not be entitled to prosecute privately (Section 14 of Act 31 of 1917; *Millins and Mayer vs. Pearlman*, 1917; T.B.D. at page 645). With regard to a public prosecution, the applicant has no rights at all except the right of every individual to lay an information before the police and I know of no authority for the view that failure to exercise such a right has any bearing on the applicant's right to civil redress. For the reasons I have given I think this defence fails.

The defence of laches is based on the delay by applicant since 1917 or an earlier date in taking steps to have the coloured occupants evicted. This doctrine was referred to by Solomon A. C.J. in *Sackville West vs. Nourse* (1925, A.D. at page 525) and by Stratford J.A. in *Pathscope of South Africa Limited v Nallinick* (1927, A.D. 292, at page 305). It appears from a passage in Halsbury, volume 13, section 205 that the chief element in laches is acquiescence, which implies the person acquiescing is aware of his rights. In discussing the question of waiver, I dealt with this point and what I said applies equally to the question of laches. Indeed the authorities to which I referred are quoted in relation to this passage from Halsbury. Moreover, the prejudice to the other party through the delay appears to be a relevant matter in the question of laches and I doubt whether it can be said that the delay in enforcing the right has prejudiced the respondent. Had steps been taken initially to restrain respondent from allowing occupation by coloured persons, it may be that it would not have incurred the expense of erecting or altering the buildings but the result of the delay since then has been to allow respondent to use the premises in a way it was not entitled to do. I think this defence fails.

The remaining contention under this head is that the character of the locality has been changed by occupation by coloured persons and that the Court should there-


fore not grant relief. The rule on this point is that he who seeks to enforce a covenant of this kind (i.e. a covenant creating a general scheme of occupation) must suffer no such breach of the stipulation as will frustrate all the benefit that would otherwise accrue to the other parties to the agreement (*Peck v Matthews*, 3 L.R. Eq. Cases, page 515). I think this means that a person who has entered into agreements with a number of persons under a scheme of this description is not entitled to agree with some of these persons that they may disregard the terms of the agreement with the result that the covenant is no longer capable of attaining the object for which it was imposed, and at the same time to insist that another of these persons should abide by the agreement and conform to the scheme. But it does not mean because a large number of the contracting parties have in fact broken the agreement that others cannot insist on its performance by them, unless the complaining parties have precluded themselves either by agreement or waiver or laches or some similar bar from insisting on performance to such an extent that the covenant is no longer capable of attaining the object for which it was imposed, they are entitled to their rights. In the present case there is nothing to show that applicant has so precluded itself in relation to other owners who are allowing occupation by coloured persons, and I think that this contention also fails.

In dealing with the question of waiver and acquiescence, I have not considered Mr. Barry's argument, based on the case of *Birkdale District Electric Supply Company, Limited and Corporation of Southport* (1927, A.C. 355, at page 364) that applicant, as a representative of the rights of others, cannot waive rights with which it is entrusted for the public benefit, but have based my decision on applicant's rights as a private owner. I have approached the question on this basis because it is not perfectly clear to me that the Transvaal Provincial Division in *Dadoo's case* (spura) intended to hold that a local authority, apart from its rights as an owner of stands, is entitled to enforce this restrictive condition. It is true that on page 533 of the report the learned Judge refers to the rights of the Municipality as representative and guardian of the inhabitants, but in giving his reasons for his view he relies on the position of the Municipality as an owner of land.

The last question is whether the provisions of section 1 of Act 37 of 1919 afford any relief to respondent. This refers only to one half of stand 1039, and the persons who reside thereon who are mentioned in section 14 (b) of the petition viz:—*Kamalooden Ally, Mahomed Sahib Ally, Mahomed Hassem and Abdool Kadar*. Mr. Barry admitted that this defence was well-founded and that he was not entitled to an order in respect of these persons.

No objection was raised to the form of order asked for; there will therefore be an order in terms of sections (a) and (b) of the prayer except in so far as the above-mentioned persons, referred to in section 14 (b) of the petition are concerned. Respondent must pay the costs.

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