

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Webb v. Wright (Appeal No. 3), from the High Court of Griqualand, delivered 4th April 1883.

Present :

LORD BLACKBURN.

SIR BARNES PEACOCK.

SIR ROBERT P. COLLIER.

SIR ARTHUR HOBHOUSE.

This is an appeal by the Plaintiff below against the judgment of the High Court of Griqualand West.

The action in which this judgment was pronounced was commenced by a summons against George Hudson (for whom his successor in office, Henry Boscawen Wright, was afterward substituted), in his capacity as Civil Commissioner for the District of Kimberley, to answer Henry Barlow Webb, in his capacity as the duly authorized Agent and Resident Managing Director of the London and South African Exploration Company, Limited, the Plaintiff in this suit, in an action to compel him, the Defendant, in his aforesaid capacity, to grant and issue to the said Company an indefeasible British title under the seal of this province to the farm "Alexandersfontein," situate in the division of Kimberley, in terms of the judgment of His Honour Andries Stockenstrom, Esq., Judge of the Land Court of this province, provisionally pronounced by him on the 16th day of March 1876, and, in the absence of an appeal, finally confirmed by him on the 16th day of June then following.

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The declaration concludes,—

“Wherefore the Plaintiff in his said capacity prays that this Honourable Court will, by its judgment, order the Defendant in his said capacity forthwith to grant and issue to the said London and South African Exploration Company, Limited, an indefeasible British title under the seal of this province to the farm “Alexandersfontein,” in terms of the judgment of the said Land Court, and on the basis of the said grant of His Honour James Allison, the Acting President of the Free State, whereon such judgment is founded and annexed hereto as aforesaid, and that the Plaintiff, in his said capacity, may have such other and further relief in the premises as to this Honourable Court may seem meet, together with costs of suit.”

It is convenient here to dispose of an objection to this appeal, not raised in the Courts below.

The statutable right which is given to those who have obtained a judgment in the Land Court is “to demand and receive from the Governor of the Province of Griqualand West, “and under the seal of the said province,” a title. It was said that the Civil Commissioner of Kimberley was not the officer on whom this duty was imposed, and that he had not, as far as appears, any control over either the Governor or the seal of the province, nor any authority from those who have such control, to appear on their behalf. In short, not only that there were defects in the declaration which might perhaps be amended, but also that the writ was against the wrong party. Their Lordships do not express any opinion either one way or the other as to the validity of this objection if raised in the Court below either at an earlier stage of the proceedings or a later one, for they think that it cannot prevent the right of the Plaintiff by appeal to try to get rid of the judgment which has been obtained by the Defendant for the benefit of those who have the control of the affairs of the province, who would have been brought before the Court if the writ had been against the right party, whoever that may be. For not only did they appear in the name of the Defendant and defend the action,

but they have supported, and, even after making this objection, continue to support that judgment as a valid judgment against the Plaintiff. And the Plaintiff could not bring any new action whilst the present judgment stands, for, if he did, and this judgment were pleaded against the Plaintiff, it would scarcely lie in his mouth to say that the judgment was void because he had made a mistake as to the mode in which he had commenced the action.

Their Lordships, therefore, proceed to consider the question raised on its merits. It is one of considerable importance, as it appears that much land in Griqualand West is held on similar titles.

The present Plaintiff had, shortly before this action was tried, brought an action against the Civil Commissioner of Kimberley in respect of a farm called Bultfontein. The judgment in that case was not the same as that now appealed against. Against it there was an appeal, which has been, for convenience sake, distinguished as *Webb v. Wright, No. 1*, the appeal in the present case being *Webb v. Wright, No. 3*. (There was another appeal, *Webb v. Wright, No. 2*, which was dismissed by the Privy Council for non-prosecution.) The judgment of this Committee in *Webb v. Wright, No. 1*, throws no light on the point now before their Lordships, but some of the documents, printed at full length in the Record of *Webb v. Wright, No. 1*, are not printed at full length in the Record in *Webb v. Wright, No. 3*; instead of doing so, a reference is made to them as already printed in the Record of *Webb v. Wright, No. 1*.

The evidence in the present case was very meagre. It appears at p. 18 of the Record.

“ 5th September 1879.

“ Mr. Advocate Hoskyns, with him Mr. Advocate Lange, of Counsel for Plaintiff. Attorney General of Counsel for Defendant. Defendant pleads the general issue.

“ William Pepperrell Hutton sworn :—

“ I am Master of the High Court, and also Custodian of Records in the late Land Court. I produce schedule, which was put in in Bultfontein case, marked A.

“ Manuscript judgment delivered by Judge, C, in Bultfontein case. I also produce original judgment paper, A 1. The document B 1 is the Presidential grant, which is referred to in the judgment, and which was filed in the Land Court. A sworn translation of the grant is attached to the summons.

“ No cross-examination.

“ Letter of demand same as in Bultfontein title. Reply 21st October. To be considered as part of record in the case.

“ Plaintiff admits letter from Graham, 29th August 1881, C 1. Reply 30th August, D 1. 5th September. Graham to Plaintiff's attorney, G 1. Attorney General puts in grant E 1, as tendered, also diagram F 1.

“ Attorney General calls no witnesses.—*Cur. adv. vult.*

“ 30th September 1879.

“ Mr. Advocate Hoskyns (with him Mr. Lange) of Counsel for Plaintiff. The Attorney General of Counsel for Defendant.”

Immediately after this statement follows the judgment now appealed against, which is in the following words :—

“ Judgment for Plaintiff.

“ Title tendered to be title to be granted. Defendant to pay all costs incurred by Plaintiff prior to date of tender of title. All costs incurred subsequent to date of tender to be paid by Plaintiff.”

The document marked A was an extract from the Government Gazette, dated Saturday, 4th December 1875, containing a schedule of a very large number of “ claims to land transmitted by “ His Excellency the Governor to the Land Court “ of Griqualand West, in terms of Ordinance “ No. 3, 1875, sect. 15.”

The schedule is divided into eight columns, with headings. The portion which relates to the present question is as follows :—

No.	Name of Claimant.	Division.	Name and Extent of Farm.	Foundation of Claim.	Grantor and Date of Grant.	Grantee.	Seller, Date of Sale, and Purchase Amount.	
345	London and South African Exploration Company.	Kimberley	Alexandersfontein.	Purchase	Orange Free State, 3rd Dec. 1862.	J. J. Coetzee	J. J. Coetzee, 22nd April 1869, to P. R. and W. G. Well. 2. Nell to L. & S. A. Ex. Company, 6th Dec. 1871.	Quit-rent.

The judgment of the Land Court is a very elaborate document, dealing with the claims

which had been transmitted to the Land Court, rather more, apparently, than 1,500 in number, and explaining why some were disallowed, but it contains nothing explanatory of the judgment given as to this claim, which is merely, "Name of claimant, London and South African Exploration Company; name of farm, Alexandersfontein. Allowed, 16th March 1876."

Their Lordships do not doubt that this is a judgment entitling the party in whose favour it was pronounced to demand and receive from the Governor of the Province, and under the seal of the Province, a title to the land. But the judgment of the Land Court does not in any way throw light on the question now in dispute, namely, what should be the effect of that title.

The Presidential grant, or rather the translation from the Dutch, is as follows:—

" A.

" No. 34. Book A, folio 50.

" Jacobsdal. W. C. No. 52, B. F.

" By His Excellency the President of the Orange Free State, in South Africa, in the name and on the behalf of the Government of the said State.

" Hereby is given and granted on perpetual quit-rent to Johannes Cornelius Coetzee certain farm or piece of land named 'Alexandersfontein,' land certificate No. 52, situate in the district of Bloemfontein, Field Cornetcy Onder Modder Rivier, in extent by guess 4,000 morgen, further fixed and bounded, as will appear in the annexed copy of Inspection Report, dated 23rd November 1857 and 6th August 1860, and fifty-nine, and subscribed to by C. A. S. Nanhaus, Ja. A. Serfontyn, P. S. N. Swaart, members of the Land Commission, with sketch annexed.

" This grant is made on condition that all roads passing over this land, or which may hereafter be made upon lawful authority, shall remain free and unhindered; that this land shall be subject to a public outspanning and pasture for the cattle of travellers, under such stipulations thereto as have already or may hereafter be made by the Legislature; that the said land shall be further subject to all duties and regulations as already are or may in future be established concerning land granted upon the like conditions; and finally that the owner shall be bound for the punctual payment of an annual quit-rent of the sum of 3*l.* 10*s.*; three pounds ten shillings, sterling.

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“ Given under my hand and the public seal of the Orange Free State, at Bloemfontein, on the third day of December, in the year of our Lord one thousand eight hundred and sixty-two.

“(Signed) J. ALLISON,
“ Acting President of the Orange Free State.

“ Registered at the office of the Registrar of Deeds, at Bloemfontein, on the third day of December eighteen hundred and sixty-two.

“ WILLIAM COLLINS, Registrar of Deeds,
Orange Free State.”

[*Here follow five endorsements of sales and mortgages.*]

The title tendered, which according to the judgment appealed against the Plaintiffs are to take, is as follows :—

“ In the name and on behalf of Her Majesty Queen Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, and Empress of India.

“ I do hereby grant on perpetual quit-rent unto the London and South African Exploration Company, their administrators or assigns, that certain plot or parcel of land known as ‘Alexandersfontein,’ and situated in Ward No. 1, in the division of Kimberley, being in extent five thousand seven hundred and eighty-eight morgen and square rods, or thereabouts, and bounded north by Bultfontein, south-west by Mauritzfontein, east by Karee Boom and the boundary of the province, and west by Spytfontein, as will more fully appear by the hereunto attached plan framed by the Government land surveyor, upon the following conditions, viz. :—

“ That the said London and South African Exploration Company, their administrators or assigns, shall punctually pay or cause to be paid, on the first day of January in each year, to the Civil Commissioner of the division wherein the said land now is or may herein-after be situated, the sum of five pounds sixteen shillings sterling (5*l.* 16*s.*). This quit-rent being payable from the first day of January 1872, taking a receipt therefor, and paying all stamp duty required by law.

“ That all roads and thoroughfares now existing on the said land shall remain free and uninterrupted, and that the Government reserves the right to make or cause to be made on or across the said land, for the public benefit, such roads, railways, railway stations, paths, aqueducts, dams, drains, reservoirs, watercourses, or other public works, as may be required, as also to conduct telegraphs over the said land, and to establish convenient outspans for the use of travellers.

“ That the Government reserves also the right at all times to enter upon the said land, and to take, excavate, dig, or

quarry all such stones, earth, gravel, or other materials as may be required for any such public works, as in the preceding condition specified, without compensation to the proprietor, provided that compensation shall be made on such portions of said land as have been improved by cultivation, irrigation, or otherwise, and that all public officers employed by Government as surveyors, engineers, or the like shall have the right to travel over and remain upon the said land, with their servants, horses, cattle, and equipages.

“ That the land thus granted shall be brought in such a state of cultivation as it is or may be capable of, and that its owners shall have and keep its beacons, or landmarks and boundaries, properly erected and traced out.

“ That the issue of this title without the express reservation to Government of its rights to all precious stones, gold, or silver found on or under the surface of the said land, shall in no degree prejudice the position of the said Government in regard to the same.

“ And, lastly, that the said lands shall be subject to all such duties, rules, and regulations as either now are or may hereafter be in force with regard to lands granted on similar tenure, and also to any rights acquired by the Government or the public by reason of the creation of mining area or areas on the said land.

“ Given under my hand and the public seal of the province of Griqualand West, at Kimberley, this fifth day of September, in the year of our Lord one thousand eight hundred and seventy-nine.

“ (Signed) CHARLES WARREN,
Acting Administrator.

“ By His Excellency's command.

“ (Signed) FRANCIS H. S. ORPEN,
Surveyor-General.”

It is much to be lamented that the Company did not put on record a draft of the title which they were willing to take. It would then have appeared what was the real question between the parties. Neither the Court below nor this Committee would have raised any objection to what both agreed upon; and possibly the points on which they differed might then have been raised in such a manner as to enable their Lordships to decide them finally. This has not been done; and their Lordships think that the Plaintiff was to blame for this. The substantial question is whether the London and South African Explo-

ration Company Limited are bound to accept a title expressed in such terms as that tendered.

That title in express terms makes some provisions which may or may not be implied on the construction of the grant from the President of the Orange Free State, but are not expressly provided for therein. Their Lordships do not mean to say that it may not be shown that those provisions may not be implied from the nature of the law existing in the Orange Free State at the time the grant was made, or from ordinances made after the grant and before the annexation of the territory by the British. But no such matters are stated. And, in the absence of any explanation, their Lordships think that the Plaintiff Company may reasonably object to the clause "that the issue of this title without the express reservation to Government of its rights to all precious stones, gold, or silver found on or under the surface of the said lands shall in no degree prejudice the position of the said Government in regard to the same," on the ground that it is likely to have some effect in prejudging the case of the London and South African Exploration Company Limited, if hereafter the questions raised, and to some extent at least decided, in *Webb v. Giddy*, 3 Appeal Cases 908, were again brought into litigation between them or their successors and the Government of the province.

Their Lordships think that the existence of one reasonable objection to the title tendered is enough to prevent them from affirming the judgment, whether that was really what the Plaintiff objected to or not. From the reasons of the judge (Record, p. 32), it would seem that he did not understand this to be what the Plaintiff objected to; but, owing to the Plaintiff not having stated what the title was which he was willing to take, their Lordships cannot tell how this was.

Their Lordships have not before them the materials to enable them to frame a deed such that they could say that both parties should take it. That will be better done by the consent of both parties, as far as they can agree, and, in the first instance, by the Courts of the Cape on those points on which the parties cannot agree.

But their Lordships think that they ought to advise Her Majesty to declare,—

1. That upon the passing of the judgment of the Land Court of 16th June 1871, in the pleadings mentioned, the London and South African Exploration Company, Limited, became entitled, and still are entitled to demand and receive from the Governor of the Province of Griqualand West, and under the seal of the said province, an indefeasible title to the lands adjudicated on the above-mentioned judgment.
2. That the title should be by a grant confirming the grant from the Orange Free State of the 3rd December 1862, by which the land shall be subject to all such duties and regulations as have been already established, either by the Orange Free State before the annexation, or by the British authorities since the annexation, or shall in future be established by the British authorities concerning lands granted upon the like conditions.
3. And inasmuch as it appears that the title tendered to the London and South African Exploration Company, Limited, as in the pleadings mentioned, and which, by the judgment appealed against, the Company are required to accept, contains conditions which are not expressed in the said grant of 3rd December 1862, and which have

not been shown to be incidents implied in that grant, nor to be duties or regulations since established concerning land granted upon the like conditions, the judgment above appealed against be reversed, and the cause remitted to the High Court of Griqualand, to do what is just and right in the premises, having regard to the above declarations, all other questions being reserved for the Court below.

Their Lordships will humbly advise Her Majesty accordingly. There should be no costs of this appeal.
