

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Honourable Dirk Gysbert van Breda v. Johan Conrad Silberbauer, from the Cape of Good Hope; delivered 18th of December, 1869.*

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Present:

LORD CHELMSFORD.

SIR JAMES W. COLVILLE.

SIR JOSEPH NAPIER.

THE Appellant in this case is the owner of an estate situate in the Table Valley, near Cape Town, called Oranjezicht. It consists of various parcels of land, which were granted to his ancestor, whilst the Colony still belonged to the Dutch, by several instruments, of which the most modern, as well as the one most material to the present controversy, is that of the 22nd of August, 1769.

The Respondent is the owner of a water-mill, lower down the Table Valley, called Gort Molen, which is worked by means of a stream, or water-course, known as the Platteklip.

The substance of the complaint of the Respondent, who was Plaintiff in the Suit against the Appellant, is that the Appellant has diverted the waters of certain streams, which would naturally flow, and of right ought to flow, into the bed of the Platteklip, and, from the point of junction with the latter stream, run down and turn the wheel of the Respondent's mill.

The streams so alleged to have been diverted are the "Lemmetjes Stream," "the Verlatenbosch," which joins the Lemmetjes, and several streams, which, for the purposes of this Appeal, it will be sufficient to treat as comprehended in the descrip-

tion of "the stream flowing from the Vineyard Spring."

The Declaration stated that some of these streams take their rise from certain springs situate in the Appellant's lands, and that others of them, though not originally rising upon such lands, flowed and ran over the same.

It rested the title of the Respondent to the use of these waters—first, upon certain Regulations of the Governor and Court of Policy of the Colony, dated the 1st of March, 1774; the 3rd of April, 1787; and the 20th of November, 1787: the effect of which was, as the Respondent alleged, to bind the owners of the Appellant's lands, after making a certain prescribed use of the water rising in or out of the said lands, or running over them, to allow the remainder, being a principal part thereof, to run down to the mill; and, secondly, upon a right of servitude by prescription.

It set up a further title to the waters of the stream flowing from the Vineyard Spring under a Judgment pronounced in a Suit wherein a firm of Prince, Collinson, and Company, the former proprietors of the mill, were Plaintiffs, and the Appellant and his co-Defendants were Defendants. Whereby it was ordered and decreed that the said Plaintiffs were entitled to receive, and that they should accordingly receive, a supply of 30,000 gallons of water per diem, throughout all the periods of the year, to be conveyed by means of an adequate conduit-pipe, at the expense of the Defendants, from the main reservoir on Oranjezicht to the junction of the Platteklip ravine, and the cross cut below the vineyard of the said Appellant, whence the said water might flow down the said ravine to the mill of the said Respondent.

The Declaration further stated that the Appellant had entered into some arrangement with the Commissioners of the Municipality of Cape Town, who were also made Defendants to the suit, whereunder, by means of pipes and other contrivances, they had diverted from the bed of the Platteklip and the mill aforesaid a large portion of the water which had run and proceeded from the various springs and streams aforesaid to the mill aforesaid; and in particular that the water arising from the spring called the Lemmetjes Spring had, since the 1st of May 1855,

been altogether turned away from the bed of the Platteklip and the mill.

It further stated that, since the 1st of May, 1865, the Defendants had wrongfully and unlawfully kept back and prevented the Respondent's mill from receiving the 30,000 gallons of water which, by the previous Decree, they were ordered to allow to pass daily to the mill.

It insisted that even if the Appellant was entitled to use for his own lands so much of the waters of the said springs and streams as the irrigation thereof might require (which the Respondent did not admit), he was not entitled to sell, as he had done, the same for purposes unconnected with the irrigation or other benefit of his own lands.

And in respect of the wrongs complained of, the Respondent claimed damages; and a perpetual interdict restraining the Defendants from diverting the water of the several streams, and an Order condemning them to restore the several streams to their original and accustomed channels.

The Commissioners for the Municipality of Cape Town, though Defendants in the Court below, have not joined in this Appeal.

The Defendants put in issue every allegation of fact and conclusion of law contained in the Declaration.

Several Orders have been made by the Court in the Suit. By the first, which bears date the 2nd of March, 1866, it was ordered that the water-course of the Verlatenbosch and Lemmetjes streams be reasonably cleared of obstructions, and the water be allowed to flow every Saturday from 6 o'clock in the evening till 6 o'clock on Sunday evening, and on every other day from sunrise to sunset for a fortnight in order to test whether, if so allowed to flow, the water of these streams would reach the Platteklip water-course.

On the 8th of September, 1866, the Court gave judgment for the Respondent for the sum of 50*l.* as damages with costs of Suit, reserving certain points as to the quantities of water to come down, to be thereafter adjudged by the Court; and on the 15th day of November, 1866, it further ordered, adjudged, and decreed that the Appellant should thenceforth allow the water in the Regulations of the 3rd of April, 1787, called the water coming down through the land granted to Pieter Van Breda in 1769, and also

called the river water, being the water now known by the name of the Lemmetjes Kloof stream, with which the stream now called the Verlatenbosch stream also flows, to flow down without obstruction through the ancient course to the Platteklip water course, during every night, from sunset to sunrise, and on every Saturday, from 6 o'clock P.M. to 6 o'clock P.M. on the next day, being Sunday, according to the true intent and meaning of the Regulations of the Governor and Court of Policy of the 3rd of April, 1787, modified by the offer contained in the Petition of the Lieutenant Van Breda in 1787, and the acceptance of such offer by the said Court of Policy.

The present Appeal, if in terms it originally covered more, has, in the argument at the Bar, been limited to the last-stated Order. The first Order was merely an interlocutory proceeding for the purpose of ascertaining the flow of the Lemmetjes and Vertatenbosch streams, if after their junction they were allowed to flow towards the Platteklip. And no question is here raised as to the propriety of what has been decided by the second Order which relates exclusively to the stream flowing from the Vineyard, to the Respondent's rights in respect of that stream as they were defined by the former Decree, and to the damages recoverable for the breach of that Decree.

It is obvious that the third Order which is now the sole subject of appeal, is based upon two assumptions: first,—that the Regulations of the Governors and Court of Policy in the matter of this water have the force of law in the Colony; and secondly—that upon the true construction of the particular Regulations referred to, the Appellant is under an obligation, enforceable at the suit of any person aggrieved by the non-performance of it, to allow the water in question to flow in the manner prescribed by the Order.

The first of these propositions has hardly been contested. Under the Dutch Government the Governor and the Court of Policy were the sole legislative power in the Colony. That their ordinances, including these very water regulations, however inartistically framed, do, unless modified or repealed by subsequent legislation, still form part of the *lex scripta* of the Colony, appears from

the volume of the Statute Law recently published by the Cape Government. It appears from the Regulations printed in the Record, that in the exercise of their legislative power the Governor and Court of Policy did, at least from 1861, by positive ordinance regulate the use of the streams watering the Table valley, whether arising in that valley or descending from the Table mountain. Their object seems to have been to give to the upper riparian proprietors the fullest use of these streams for irrigation which was compatible with the rights and interests of those below, and in particular with the due supply of water to what is designated the Honourable Company's mill, being a mill on the Platteklip, above the site on which the Respondent's mill now stands. In doing this they may sometimes have restricted, and sometimes have extended the rights which, apart from special ordinance, those proprietors would have had under the general law. Whether their power to do this was specially reserved to them by the clause touching "impositien en geregtigheden" which appear to have been ordinarily inserted in their grants of land is not a material question, for if the ordinance have, as they are admitted to have, the force of law, they must be obeyed, though they may have derogated from the rights of individuals.

The legislation touching the particular streams which are now in question was, so far as it need be stated, as follows:—By the Regulation of the 1st of March, 1774, made pursuant to the report of certain Members of the Council, it was ordered that "The Water issuing from the Table mountains, and running down through the land granted in freehold to Van Breda in 1769, might be led out of its course, or otherwise impeded for the gardens of the said Breda, himself, but also never otherwise than in the morning and evening, from 4 to 9 o'clock, and that he (Breda) should be obliged during the summer season to let the said river water run first along, and then downwards, with an angle, through his gardens, into the common ditch (admitted to be the Platteklip) to the mill.

In April 1787 it was resolved, upon a further report of persons deputed to inquire into the whole subject of the water-courses in the Table valley, to withdraw the order of the 1st March, 1774, in

respect of the regulated use of the water for the gardens situate in the Table valley, and to substitute other provisions.

The provision relating to the waters in question was as follows :—

“The water coming down through the land granted to Pieter van Breda in the year 1769, for the garden of the said Breda to be made use of daily, but for not longer than from 4 in the morning until 12 o'clock at noon; whilst the said Breda shall be obliged as heretofore, to let the river water run during the dry season, first along and then downwards with an angle, through his garden to the mill.”

On the 20th November 1787, the Lieutenant P. van Breda, the ancestor of the Appellant, then in possession of Oranjezicht, presented a Petition to the Governor and Court of Policy praying for relief against the provisions of the last stated Ordinance. The Petition, after stating certain representations made by the petitioner's father against the Ordinance of 1774, and that in consequence of such representations that Ordinance had never been enforced against him; and complaining of the probable effect of the Ordinance of the 3rd of April, 1787, upon his garden, contains the following passages:—

“That memorialist feels himself thus compelled to bring his grievances again under the consideration of your Honour and Worships, in the full confidence that you will, as memorialist humbly requests, pay a favourable regard to the same, and, acquiescing in the justice of the complaint, release him from the obligation of complying with that part of the regulation of 3rd April last, which deprives him of the free use of the river-water arising in his own freehold.

“That memorialist, on the other hand, having no desire or intention to avoid the obligation of every member of society to contribute his part towards the prosperity of his fellow-men and citizens, but, on the contrary, convinced that the above river-water, after having been used by him, should necessarily answer other purposes besides his private ones, is fully ready and prepared to comply therewith, in such a manner as may be done without detriment to his lawful rights, and he hereby offers to allow the said river-water, during the dry season, to flow without obstruction freely through his garden to the main ditch, not only from Saturday afternoon till the Sunday afternoon, for the refreshment of the canals of Cape Town, but also to allow the same during every night, that it may be disposed of for general use, *except* when the petitioner shall be compelled, in particular cases, in order to prevent considerable loss, to make use thereof for himself.

"The memorialist, trusting that this offer will be considered sufficient to allow a proper use of the said river-water to others, remains in the certain expectation that it will meet the approbation of your Honour and Worships, and that the said offer, saving his own lawful right, may be a means by which the petitioner may be properly released from the altered regulations respecting the water made by the aforesaid resolution of 3rd April of this year."

The Ordinance of November 1787 states this Petition *in extenso*, and then proceeds as follows:—

"Whereupon it was taken into consideration that the arrangements enacted by the resolution of 3rd April of this year, regarding the use of the water for the gardens in this Table Valley, and in particular that by which the regulation for the garden of the said Breda is made, as merely founded on the former arrangements of 1774, apparently without considering at that time that the river-water, in regard to which the said regulation for the garden of Lieutenant Breda was then made, had its source in a piece of land which was granted in freehold, in the year 1769, to the former proprietor of that garden, late ex-Burgherraad Michiel van Breda, and which grant was made principally as a compensation for the service which the said Burgherraad Breda had done shortly before to the Company and the Colony, by allowing that a very abundant and pure spring of water arising in his old land should be built on and let out for the purposes of public use, in such manner as takes place at the present time, and as it is still maintained and kept in repair: so that, because the said Breda had thereby been deprived of the use of the said fountain-water, the use of which he might have retained to himself, as formerly, it must also be supposed that, in the grant of the new land in 1769, it was purposely that no condition or exception was made regarding the water rising in that new land, in order that the water might supply the loss suffered by the proprietor of that garden by the leading out of the water of the other fountain.

"And whereas, it would be contrary to fairness that the aforesaid Breda should be deprived of the lawful use of the above-mentioned river-water arising in his new ground, which belongs to him in the first place, it has been resolved unanimously to release him from the obligation to obey the regulations respecting that water, made on 3rd April of this year, and, on the contrary, considered that the offer made by him in the latter part of his Petition may be accepted, trusting that, considering the inconvenience which otherwise might arise in the dry season from the absence of that water, he will carefully comply with his above offers.

"Resolved, consequently, to place an extract hereof in the hands of the Commissioners of the Court of Justice, in order to guide in the observance of the arrangement about the aforesaid water."

The question upon this part of the case is whether, as the Respondents contend, this last stated

document was in the nature of a law imposing upon Van Breda and his successors the legal obligation to allow the water to flow in the manner stated in his offer; or whether, as the Appellant contends, it simply relieved him from the obligation to obey the Regulations of the 3rd April, 1787, leaving him free to comply with his offer or not, as he might see fit.

The question is not free from difficulty; but their Lordships have come to the conclusion that the former is the true and reasonable construction of the document under consideration. Nothing can be more informal than the mode in which, as the other regulations show, the Governor and Court of Policy exercised their legislative power. Their Lordships must look to the substance of the transaction. Here was a man subject to a written law, who came forward to complain of its provisions by petition to the Legislature; and offering to do certain things "as the means whereby he may be released" from those provisions. The Legislature accepts his offer, and resolves to release him from the obligation to obey the regulation of which he complains, trusting that he will comply with his offer. Now the Legislature could only modify an existing law by passing a new law, and therefore the document, whatever be the true construction of its terms, must be treated as an Ordinance having the force of law. And the reasonable construction of it seems to their Lordships to be that it substitutes for the obligations which the former law had imposed upon Van Breda for the benefit of the public—the obligation to do that for the benefit of the public which was expressed in his offer. It may be that if he failed to perform this obligation he would not incur the penalties which were imposed on those who disobeyed the general regulations; but the obligation was nevertheless one which any person aggrieved by its non-performance could sue to enforce. Their Lordships are fortified in this construction by the final clause, wherein it is resolved to place an extract of the proceedings "in the hands of the Commissioners of the Court of Justice, in order to guide in the observance of the arrangement about the aforesaid water."

This being their Lordships' view they deem it unnecessary to consider the various other questions raised in the argument before them. If the last regulation had not incorporated, so to speak, th

offer, and thereby defined the legal obligations of Van Breda—if it had merely released him from the obligations of the first Regulation of 1787 and left him to his rights over the water, under the general law it could hardly be contended that it conferred upon him affirmatively the right to divert the water for purposes other than that of irrigation, or to sell it in violation of the rights which the lower riparian proprietors might have under the general law. The question would then arise what the latter rights are? And this is a question for the satisfactory decision whereof the record, as sent home, does not afford the requisite materials.

In the first place, there is not a sufficient *constat* whether as a matter of fact the Lemmetjes and Verlatenbosch do or do not rise on the Appellant's land. The balance of the evidence given in the cause seems to be in favour of the conclusion that they do so rise; and this is in some measure confirmed by the last Regulation of 1787. But two of the learned Judges below dispute this: founding their conclusions, somewhat irregularly as it appears to their Lordships, upon their personal knowledge, derived either from a personal view of the locality, had in the former Suit, or from a recollection of the evidence taken in that Suit. Again, their Lordships have not before them the particular texts in Voet upon which all the Judges seem to concur in holding that, if the streams do rise in the Appellant's land, he is by the law of the Colony entitled to do what he pleases with their waters. Their Lordships are not satisfied that this proposition is true without qualification; or that by the Roman Dutch Law as by the Law of England the rights of the lower proprietors would not attach upon water which had once flowed beyond the Appellant's land in a known and definite channel, even though it had its source within that land. Another issue of fact, disputed at their Lordships' bar, would have arisen on this point.

Their Lordships, however, are relieved from the necessity of considering these questions, since the consequence of their construction of the regulations is that they must humbly recommend Her Majesty to affirm the Decree under appeal with a slight modification to be now stated. That modification consists in the insertion of the words "during the dry season"

between the words "henceforth" and "allow." The addition of these words will make the Order literally comply with the terms of Van Breda's offer in November 1787.

The Order will then leave the Appellant free to make what use he pleases of the water (and the use actually made of it is apparently one for the benefit of the public) at seasons when it cannot be required to swell the waters of the Platteklip. Their Lordships, however, are of opinion that this slight variation in the form of the Decree which is probably not inconsistent with the intention of the Court below, ought not to relieve the Appellant from paying the costs of this Appeal.