Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Webb v. *Wright from the High Court of Griqualand West, South Africa, delivered 9th July* 1881.

Present :

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

This is an appeal from a judgment of the High Court of Griqualand West, pronounced by the Recorder, in an action brought by the Appellant, representing the London and South African Exploration Company, against the Civil Commissioner of the District of Kimberley.

The prayer in the action was that the Defendant be ordered to grant and issue to the Company an indefeasible British title under the seal of the Province to the farm "Bultfontein," in terms of a judgment of the Land Court, and on the basis of a grant of the President of the Orange Free State. This prayer was founded on an allegation in the declaration that the Company by the final and absolute decree of the Land Court became entitled to demand and receive from the Governor of the Province, on terms of the 10th section of the Land Court

Q 4738. 100.—7/81. A

Ordinance, an indefeasible British title to the farm on the basis of the Free State grant.

The answer of the Defendant, contained a general denial of the allegations contained in the declaration, and the trial proceeded upon this general issue. Two special pleas, pleaded with this general plea, were overruled, and need not now be considered.

It appeared in the evidence that a grant had been tendered on the part of the Government to the Company which did not recognize the Free State grant, and which was refused by the Company, on the alleged ground that it contained onerous conditions not warranted by the terms of that grant.

The judgment of the High Court appears in the following Minute which is set out in the Record, viz. :—

"That title, as tendered, be issued to Plaintiff, that such title do contain the grant from Major Warden, dated the 16th day of December 1848, and an enumeration of the consecutive sales and purchases of the farm in question from that date to the date upon which the Plaintiff became the purchaser of the farm in question."

This is, in effect, a judgment that the Company was not entitled to have an indefeasible British title on the basis of the Free State grant, as the Company had alleged and prayed; but instead of dismissing the suit, the Judge of the High Court awarded a title founded on the basis of a grant from Major Warden, made at a time when the Province was under British dominion, although it is to be observed there is no finding by him that upon the true construction of the judgment of the Land Court, it had been adjudged that the Company was entitled to demand a grant on that basis.

The Appellant Company rejects the title awarded by the High Court, and in the reasons

to its case on appeal, asserts that by virtue of the judgment of the Land Court the Company is entitled to an indefeasible title on the basis of the Free State grant, and secondly, that if this be not so, the High Court dealt with questions which were not raised by the pleadings and issues before it, "and that the said judgment "was in consequence bad in form and sub-"stance."

The history of the Province of Griqualand West will be found in the judgment of this Board in Webb *v.* Giddy (L. R., 3 App. Cases, 908), and for the decision of the present case it will only be necessary shortly to refer to it. In 1848 the sovereignty of the district was assumed by the British Crown. It was relinquished in 1854, and resumed by the British Crown in 1871. In the interval between these years parts of the district fell under the rule of native Griqua Chiefs, and other parts under the dominion of the Orange Free State; and during this interval the Orange Free State title relied on by the Company, viz., the grant of 1st March 1864, was issued. An earlier British grant, from Major Warden, was made shortly after the first assumption of dominion by the British Crown, viz., on the 16th December 1848.

Major Warden's grant was not given in evidence in the High Court, nor are its precise nature and terms stated in the record. Major Warden was the Administrator of the Queen's Government in the Province, and what we know of the grant is found in the Schedule of Claims sent by the Governor to the Land Court for adjudication, which, so far as it related to Bultfontein, was founded on the claim made by the Company.

In this Schedule the claims were classified under two heads, one "British Land Certificates,"

the other, "Orange Free State Titles." The entry of the claim to Bultfontein appears under the first of these heads, and is as follows:—

No.	Names of Claimants.	Division.	Name and Extent of Farm.	Foundation of Claim.	Grantor and Date of Grant.	Grantee.	Seller, Date of Sale, and Purchase Amount.]	Tenure.
363	Hope Town Diamond Company.	Kimberley.	Bultfontein.	Purchase, and British Land Certificate No. 45.	Major Warden, 16th December 1848.	J. F. Otto	1. J. F. Otto to J. C. Coetzee, 17th October 1849. 2. Estate of J. C. Coetzee to C. G. Coetzee, 3rd December 1858. 3. C. G. Coetzee to W. G. Holtshausen, 18th April 1860. One part to D. A. and J. M. de Beer (Voornitzig), 18th April 1860. 4. Holtshausen to Du Plovy, 27th April 1860, 1,050*l*. 5. Du Plovy to Lilienfeld and Webb, 16th November 1869.	Quit-rent £2 2 0

It should be stated that the Hope Town Diamond Company, the original claimants, afterwards transferred the farm to the Appellant Company.

The grant from the President of the Orange Free State, dated the 1st March 1864, is set out at length in the Record. It is a grant "on perpetual quit-rent" to one Holsthausen, and is in the same form as the grant which was under consideration by this Board in Webb *v.* Giddy. It was acknowledged at the bar that the conditions of Major Warden's grant and of that of the Free State differ in essential particulars, especially as regards minerals, but the precise nature of these differences does not appear.

On the resumption of sovereignty by the Crown various proclamations were issued by Sir Henry Barkly, the Governor of the Cape Colony (all of the date of the 27th October 1871), and No. 72 contained the following declarations:—

"I hereby make known that it is my desire that all persons claiming title or right of possession, or any other right in any land within the said territory, should, as soon as may be, send to the Civil Commissioner of the district in which such lands may be situate a statement in writing of the particulars of his said claim, and the nature of the right claimed by him, and under what title such claim is made, in order to the grant and confirmation by formal and authentic documentary evidence under the sanction of Her Majesty's Government of such title and rights of possession as may now be vested in such inhabitants respectively, according to the jurisdiction under which the same are, or may be, or may have been, now or heretofore held respectively.

"And I do further proclaim, declare, and make known that all such existing rights and titles of private persons to land within the said territory of Griqualand West will be duly respected and confirmed by Her Majesty's Government as would, under the laws of the State under which the said private persons might heretofore have been living *de facto*, have been considered valid by such State or Government."

In compliance with this Proclamation the Appellant Company sent in a claim to Bultfontein, in the name of the Hope Town Diamond Company, founded on a British title.

It will now be convenient to turn to the Ordinance, No. 5, of 1875, establishing the Land Court, on whose jurisdiction and proceedings the questions to be decided mainly turn.

The following provisions are material :—

"5. The said Court shall have jurisdiction in all cases of claims to land within the said Province.

"9. The said Court shall hear and summarily decide all claims to land as aforesaid.

"10. All judgments or decrees of the said Land Court whereby the right of any claimant or claimants to land within the said Province shall be adjudicated on shall be provisional in the first instance for the space of three months from the date of such judgment or decree, and during such three months any party or parties feeling aggrieved thereby may note an appeal to the High Court of Griqualand, whose decision shall be final, subject, nevertheless, to such further right of appeal as is provided by the Proclamation of His Excellency Sir Henry Barkly, K.C.B., No. 70, dated the 27th October 1871, and in the event of no appeal being noted within such three months as aforesaid, or in the event of such appeal being withdrawn or lapsing by default, then, and in every such case, all judgments or decrees of the said Land Court shall, on motion to that effect before the said Land Court, be made absolute, and shall thereupon entitle the party or parties in whose favour

such judgment or decree may be pronounced 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 land so adjudicated on, in accordance with the terms of such judgment or decree as aforesaid. Provided, nevertheless, that every such final judgment or decree as aforesaid shall not only entitle such claimant as aforesaid to demand and receive such indefeasible title as aforesaid, but shall also empower the said Governor to cause titles to be prepared and registered in the land register of the said Province, in accordance with such final judgment or decree as aforesaid.

"15. The Governor shall from time to time transmit to the said Court all claims to land filed either with the Government of the Province or with any duly appointed Board or Commission empowered to receive claims to land within the Province, and all documents filed in support of such claims, and such claims shall be accompanied by a schedule thereof setting forth in every case the name of the claimant, the name of any of the property claimed, with its extent if known, the ground on which the claim is based, the names of the grantor and grantee, if any, and of the sellers and purchasers, if any, together with such other particulars as can be conveniently stated.

"16. The said Court shall, on receiving any claims as aforesaid, accompanied by any such schedule as aforesaid, fix a day not less than thirty days from the date of the receipt by such Court of such claims, and such schedule, on which the said Court will proceed, to hear and determine the claim in the said schedule set forth, and the Court shall thereupon cause the said schedule to be published in the Government Gazette of the Province, with a notice by the Registrar of the said Court, calling upon all persons interested in the said claims to attend the said Court upon the said day, and such notice so issued and published as aforesaid shall be, and be taken to be, a sufficient notice to all claimants and other persons interested to attend the said Court, and shall serve and be regarded as and instead of any summons, citation, or other process.

"18. Every final order or decree in favour of title being issued to any applicant, whether issued by the said Land Court or by any Court of Appellate Jurisdiction, shall be written upon or covered by a stamp of the value of 10*l.* sterling."

The Governor in pursuance of this Ordinance transmitted numerous claims to land, including that of the Appellants, to the Land Court, and the schedule of them was published in the "Gazette," as required by the Ordinance.

The evidence given in the Land Court does not appear, but there can be little doubt, as the learned Judge of the High Court supposes, that

at the hearing before the Land Court, the Company produced the grant of the President of the Free State.

The Judge of the Land Court gave a general judgment with reference to all the claims before him, to which he annexed several schedules, No. 1 being headed "Claims to Land based on "British Certificates allowed," No. 2 being headed "Claims under Orange Free State Titles allowed." He placed Bultfontein in Schedule No. 2 as follows:—

No. 303 -	L. S. A. Exploration Company	Bultfontein.

Bultfontein is not mentioned by name in this general judgment, nor is it stated in that judgment on what grounds the Appellant's claim, which was made upon a British title, was scheduled as a claim upon a Free State title. The Judge, in a general reference to his distribution of claims, says:—"The Free State titles, which I uphold "are enumerated in Schedule 2 hereunto an-"nexed, and claims under British certificates "allowed are set forth in Schedule 1."

It will be seen that the 18th section of the Ordinance establishing the Land Court imposes a stamp duty of 10*l.* upon every final order or decree in favour of title issued to any applicant by the Land Court. It appears that after the above-mentioned general judgment was given, short judgment papers were issued to the individual applicants, upon which the stamp was impressed. The paper delivered to the Appellant Company is as follows:—

"Land Court of Griqualand West.

"Judgment Paper No. 363.

"Name of claimant, Hope Town Diamond Company.

"Name of farm, Bultfontein.

"Judgment allowed.

"(Signed) A. STOCKENSTROOM.

"Judgment absolute.

"(Signed) A. STOCKENSTROOM."

The signature is that of the Judge of the Land Court.

At the trial before the High Court both these judgments were given in evidence.

It was contended at the bar, on the part of the Appellant, that the general judgment and the particular judgment paper are to be read together, and that, so reading them, it becomes clear that the title adjudged to the Company by the Land Court was upon the basis of the Free State grant. The contention on the part of the Crown was that the judgment paper alone is to be regarded as the final judgment of the Court, and that, coupling this with the claim to which on its face it refers, it is apparent that the title adjudged to the Company was a British title, and therefore, that the decision of the High Court is substantially correct.

The two documents undoubtedly do not agree, and on the contrary there is an obvious inconsistency in them. The short judgment paper contains no more than the number of the claim, "No. 363," the name of the claimant, "Hope "Town Diamond Company," and the single word "allowed." Now, the claim thus referred to as "allowed" was a claim founded on the British land certificate and Major Warden's grant; whereas the general judgment, though it refers to the claim by the same number, No. 363, gives the name of the claimants as "London and South African Exploration Company," and the claim is apparently there allowed as upon an Orange Free State title. Thus, whilst in this general judgment the claim is allowed in the name of the London and South African Exploration Company, to whom the interest of the Hope Town Diamond Company had been transferred, in the judgment paper, though issued at a later date, the name of the latter Company is entered as the

claimant. No satisfactory explanation appears to account for this obvious inconsistency, and consequently, if both documents are looked at, uncertainty arises as to the real nature of the final judgment of the Court.

Their Lordships are, however, unable to agree with the contention on the part of the Crown, that the short judgment paper is to be regarded as alone containing the adjudication of title by the Court. The general judgment is obviously a record of the decision of the Court, and the separate judgment was presumably founded upon it. The separate judgment papers were no doubt issued because it was necessary and convenient, for the purposes of stamp duty and of evidence, that each of the claimants should possess a separate document of title. There is no evidence that the Judge ever exercised his judgment afresh after his general decision was pronounced. It is, of course, possible that he may have reconsidered his decision in this particular case, but, apart from any inference arising from the terms of the judgment paper, there is no evidence that he did.

Their Lordships, therefore, think that the general judgment may be looked at to elucidate the judgment paper, and consequently that the contention of the Crown that the judgment is to be found in the latter paper alone cannot be sustained. But when this is done, it by no means follows that the latter can be amended and rectified by the former. The uncertainty introduced into the case by looking at both documents is so great that it may well be doubted whether the judgment of the Land Court can properly be the foundation of a decree for specific performance, and whether the Government ought to be ordered to grant to the Appellant Company an indefeasible title upon the basis of the Orange Free State grant. A further

difficulty remains; for, if the judgment of the Land Court be construed as adjudging to the Company a title on this basis, the question arises as to the competency of that Court, having reference to the foundation of title on which the claim was made and rested, to give such a judgment.

The Land Court is a Court having special and limited jurisdiction. The end to be obtained by claimants in it is a judgment enabling them to demand from the Crown an indefeasible title, binding on all persons; the nature and incidents of which are to depend on the origin and character of the title previously held by such claimants. It was, therefore, to be expected that a course of procedure should be prescribed, for ascertaining the nature of the previous title, and to prevent injustice being done to the rights of third persons. Accordingly, by the 13th section of the Ordinance (above set out), it is provided that the Governor shall transmit to the Court all claims to land, accompanied by a schedule thereof, setting forth in every case, amongst other things, "the ground on which the "claim is based, and the powers of the grantor "and grantee, if any." The 16th section requires the Court on receiving the claims and schedule to fix a day on which it will proceed "to hear and determine the claims in the "schedule set forth;" and the Court is to cause the schedule to be published in the Gazette, with a notice by the Registrar calling upon all persons "interested in the said claims" to attend the Court; the section also providing that such notice shall be taken to be "a sufficient notice to "all claimants and persons interested to attend "the Court, and shall serve to be regarded as "and instead of any summons, citation, or other "process."

The notice published in the Gazette was of

a claim in the terms already set forth, which stated the Hope Town Diamond Company to be the claimant, the foundation of claim to be "British Land Certificate, No. 45," the grantor, "Major Warden," the date of the grant, "16th December 1848," and the grantee, "J. T. Otto." The transfers set out are apparently of the title thus stated. There is no allusion whatever in this schedule to any Free State grant, nor any reference or statement from which the existence of such a grant could be inferred. The claim is placed under the head of "British Land "Certificates," and not under the head of "Orange Free State titles." Persons who might have had objections to a claim based on the latter title, but none to one founded on a British grant, might well refrain, upon reading the above-mentioned notice, from opposing the claim as thus set forth. It is not necessary to consider the objections which might have been made to the one or the other of these titles. It is sufficient to say that the British and Free State titles not only differ in character, but are in fact considered to possess different incidents, for, if this were not so, the present litigation would be an idle contest. It was stated at the bar, and it may well be, that since the construction given to the Orange Free State grants by this Board in Webb *v.* Giddy, some of the public, especially the diamond diggers, might desire to oppose a claim of title based on such a grant.

The judgment of the Land Court, as construed by the Appellant, in effect rejects the claim, as made and notified, and adjudges a title upon a claim which was neither made nor notified. And this appears upon the face of the proceedings, for the Appellant cannot rest his case on the judgment paper B, which, on its face, is fatal to his claim in the present action, and is himself compelled to resort to the other proceedings in

the Land Court to explain this judgment paper, and to give it the construction for which he now contends.

It was urged at the bar, on the part of the Appellant, that every intendment ought to be made in favour of the judgment of the Land Court, but none was pointed out that, if made, would help it. It was suggested that the Orange Free State grant must have been proved in the Land Court, and that thereupon the claim may have been amended. There is no trace in the proceedings that any amendment was ever made in the claim, even if it were competent for the Judge to make it; on the contrary, the reference in the judgment paper B to the number of the original claim, and to the name of the original claimant, negatives any intendment of this kind. There can be no doubt of the power of the Land Court to make an adjudication of title which would fall within the limits of the claim; but their Lordships, with reference to the considerations above adverted to, cannot think that it was competent for that Court, in effect, to substitute for the claim made and referred to it a new claim, based on another and wholly different title, which had neither been made nor referred.

It was urged that the objection ought to have been taken by an appeal from the judgment of the Land Court. It is to be observed that persons who did not appear in the Land Court to oppose a title to which, as notified, they might have had no objection, would have no means of knowing that the adjudication had proceeded upon another title. But the answer to the contention is that objections to the judgment, founded on its uncertainty, and the want of competency in the Court to adjudicate upon a claim not properly brought to its cognizance, may be taken in the present action, which is

brought to give effect to the judgment, notwithstanding there was no appeal.

It was pointed out during the argument that four claims, besides those of the Appellant Company, which appeared in the published schedule under the head of "British Certificates," were allowed by the Land Court as Orange Free State titles. On looking at the schedule, however, it appears in each of these cases that, in addition to the statement of British grants, a grant from the Orange Free State, with its date, was set forth. It may, therefore, be that these claims were properly regarded as claims under both titles, so that the Court had power to deal with both or either of them. In the case of the claim in question, there is, as already observed, no reference whatever to any grant or title from the Free State.

The learned Judge of the High Court has found that the Company had throughout, and even at the hearing in the Land Court, based its claim upon Major Warden's grant; but he supposes that during the hearing, the Company produced the Free State grant. The learned Judge expressed his own opinion to be that the Company is not entitled to a grant from the Crown based on that title, but is entitled to one based on Major Warden's grant, and gave judgment accordingly; but it is not clear whether in coming to this conclusion he holds that the proper construction of the judgment of the Land Court is consistent with his own opinion, or whether he pronounces an original judgment of his own. If the former be the ground of the decision of the learned Judge, their Lordships cannot agree with his construction of the Land Court's judgment; and if the latter, then he would seem to have assumed the functions of the Land Court. In either view, therefore, the judgment under appeal cannot be sustained. Nor can their Lordships,

for the reasons already given, consider the judgment of the Land Court to be of such a certain and conclusive character that they ought to advise Her Majesty to give effect to it as prayed in this suit. The result is that the judgment under appeal ought to be reversed, and the suit dismissed, but without prejudice to any right or title the Appellant Company may have in the farm of Bultfontein, or to any claim that the Company may be advised to make and prosecute in the Land Court, or otherwise; and they will humbly advise Her Majesty accordingly.

In the peculiar circumstances of this appeal no order for costs will be made.