*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Commissioners of French Hoek* v. *Hugo, from the Supreme Court of the Cape of Good Hope; delivered 17th March* 1885.

---

Present:

LORD BLACKBURN.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

This is an appeal by the Plaintiffs below against a judgement of the Supreme Court of Good Hope by which "the Court doth "grant judgement for the Defendant upon the "prayer for a declaration of rights in the claim "on convention, and absolution from the instance "upon the remainder of the declaration, also "absolution from the instance upon the claim "in reconvention."

There is no appeal on the part of the Defendant.

The Plaintiffs, in their declaration by the third paragraph, allege that the Government of this colony, on the 28th November 1881, vested in the Plaintiffs the sole right to use the water of two springs which arise in the French Hoek mountains on Crown lands adjoining certain municipal lands (that is, the springs marked on a plan, used at the trial and printed at page 24 of the Record, by the letters M and N), and to

lead the said water over and from the said Crown lands (referring for their title to a document No. 4 in the Record), and the Plaintiffs are solely entitled to use and lead the said water of the said springs.

The Court in the colony did not think it necessary to decide whether, even on the supposition that the Government of the colony had the power to vest such a right in the Plaintiffs, they had effectually done so by the document, and their Lordships do not inquire how this was. It is probable that if the case had been decided in favour of the Defendant on such a ground, the result would be that the Government would have made a formal grant, and the whole question would have had to be raised on a future occasion.

By the fourth and fifth paragraphs it is alleged that the Plaintiffs had led the said water of the said springs on and into the said village by means of certain watercourses; and that the Defendant has, at various times between November and December 1882, broken and injured the said watercourses, and diverted the said watercourses for his use, and claims a right so to do.

And they claim damages, a declaration of right, and an injunction.

The Defendant pleads four pleas. The first plea is as follows:—

"1. He admits the allegations in the 1st paragraph. He admits that the water in question does rise on Crown lands, but he denies all the other allegations contained in the 2nd, 3rd, 4th, 5th, and 6th paragraphs of the declaration.

"2. The water in dispute, which rests upon the said Crown lands in the French Hoek mountains, is a perennial stream, and, previous to the year 1820, the said water flowed, in a natural and defined channel, from the said Crown lands on to and over certain farms, now called "Modder Vallei" and "Amandel Rivier," and thence into the "Rivier Zonder End," and had so flowed from time immemorial.

"3. By a resolution of the Court of Landdrost and Heemraden, dated the 7th August 1820, the right was given to one Daniel Hugo, the father of the Defendant, and the then owner

of the portion of the farm 'Cabriere' now owned by the Defendant, and also the then owner of the farm 'Modder Vallei' aforesaid, to divert the said water from its natural channel, and to lead it on to his said farm 'Cabriere' for purposes of irrigation and otherwise, a copy of which resolution is to the said pleas annexed, marked A.

"4. The said Daniel Hugo did thereafter divert the said place of diversion, for a distance of about five miles, over a high ridge in the mountains, and thence over Crown lands and over a piece of land which the said Daniel Hugo was compelled to purchase from one Lotter, in order to convey the said water across it and thence on to the said farm 'Cabriere.'

"5. The said water thereupon flowed in the new channel so constructed, and the whole of the said water was uninterruptedly used and enjoyed by the said Daniel Hugo and by his son, the present Defendant, when he became owner of the farm 'Cabriere,' for a period longer than the period of prescription."

It is not necessary to read the second plea. The third plea is as follows:—

"1. He begs leave to refer this Honourable Court to the allegations contained in the 2nd, 3rd, and 4th paragraphs of his first plea.

"2. The water now in dispute has continued to run in the said new channel ever since the construction of the said channel by the said Daniel Hugo in the year 1820.

"3. The said channel has become the natural watercourse of a public perennial stream.

"4. The Defendant is a riparian owner of land through which the said stream has flowed since the date aforesaid.

"5. The Defendant has not, between the months of November and December 1882, used more than a reasonable quantity of the water of the said stream, and is entitled, by virtue of the premises, to use a reasonable quantity thereof."

It is not necessary to read the fourth plea.

For a claim in reconvention; the Plaintiff in reconvention (Defendant in convention) says as follows:—

'1. To avoid prolixity, he asks leave to refer this Honourable Court to all the matters and things in his several pleas set forth.

"2. By virtue of the said matters he is entitled to a reasonable share of the said water flowing in the said new channel across the municipal lands, and across the piece of ground formerly owned by one Lotter, and bought by the said Daniel Hugo, as in the 4th paragraph of the first plea stated, and which land is now owned by the Defendant, and thence on to the said farm 'Cabriere.'

" 3. At divers times during the months of November and December 1881 and the months of January and February 1882, and also during the months of November and December 1882, the Defendants in reconvention (Plaintiffs in convention) by themselves, their servants or agents, wrongfully appropriated the whole of the said water for municipal purposes and otherwise, and deprived him of a reasonable share or any share of the said water, and diverted the said water from its channel and allowed it to run to waste.

" The Plaintiff in reconvention claims :—

" *a*. The sum of 200*l*. as damages for the said wrongful acts of the Defendants.

" *b*. An interdict restraining the Defendants in reconvention, in their said capacity, from again interfering with or depriving the Plaintiff of the use of a reasonable share of the said water.

" *c*. The costs in reconvention."

The Chief Justice of the colony says quite accurately, "There is no evidence on behalf of " the Plaintiffs to show that they have any rights " whatever in respect of the Churchwardens' " furrow, or even that they have a bare posses- " sion of or control over the same," so that the averment in the 3rd paragraph of the declaration on which the claim for damages rests is not proved. " And," he proceeds, " on the other hand, " there is no evidence on behalf of the Defendant " to show that the Plaintiffs did at any time " appropriate any portion of the water in dispute " to Municipal purposes," so that the Defendant has failed on the averment on which he based his claim in reconvention. Against this the Defendant has not appealed.

But this leaves the substantial question ; whether the Plaintiffs have shown an exclusive right in the Crown or their grantees, to the whole water of those springs against the Defendants, undisposed of ?

It is convenient now to state the facts appearing on the evidence and documents.

The French Hoek mountains form a watershed from which several small but perennial streams of water flow to the north-east and south-west.

At the foot of these mountains, on the south-west side, lies the Field-cornetcy of French Hoek. The farms "Cabriere" and "La Cotte" are situated within the Field-cornetcy of French Hoek on the south-west of the mountains. In the year 1819 the farm "Cabriere" belonged to one P. le Roux, and the farm "La Cotte" to one P. du Toit. Disputes having arisen between them as to their respective rights to some of the streams of water flowing from the French Hoek Mountains over the farm "La Cotte" on to "Cabriere," an action to try their rights was brought before the Board of Landdrost and Heemraden of Stellenbosch in 1819, with the result, amongst others, that upon the Report of a Committee of two of their number, C. J. Briers and F. R. L. Neethling, the watercourse known as the "private stream" was allotted to the owner of "Cabriere," certain other water was allotted to the owner of "La Cotte," and the latter was ordered to pay the costs of suit.

In 1820, Daniel Hugo, now deceased (who was the father of the now Defendant, though the relationship seems immaterial), became the owner of Cabriere. Subsequently this farm was divided into three portions. One portion became the property of Johannes Stephanus Hugo in 1846.

Another, it does not clearly appear when, but before 1855, was bought by Stephanus Hauman (a witness called for the Plaintiff), and by him sold in erven or village allotments, which now constitute the greater portion of the adjoining villages of French Hoek and Roubaix. The third portion was retained by Daniel Hugo, and was purchased by the now Defendant. It is, in respect of this last portion of Cabriere, that the prescriptive right to the springs M and N is pleaded in the first plea.

On the division of the farm each portion, when

severed from the rest, acquired a right to a portion of the water which naturally flowed down the private stream, which, in 1819, had been allotted to Cabriere. Daniel Hugo retained a portion of that water in respect of that portion of Cabriere which he retained, and that has passed to the Defendant as the purchaser of that last portion.

There is not any question raised in this cause as to those facts, nor as to what the proportions are in which this natural water has to be divided amongst these different parties.

The action is in respect of the water of two springs, which on the plan are marked M and N. Those springs rise in Crown land, which is not within the municipal boundary of the municipality since created.

In 1820, the water of those springs flowed in what appears to have been its natural course down on the eastern side of French Hoek mountains. It is perfectly clear that at that time the proprietor of Cabriere, on the western side of the mountains had not, as such, any right to the water of these two streams. Nor any right to cut a course in land, whether belonging to the Crown or to subjects, not belonging to him. But there was nothing to prevent his acquiring a right so to do, either by a title actually created by those who had the right, or by user, as of right, *nec clam nec vi nec precario*, for a period longer than the period of prescription.

A question of considerable general importance was discussed at the bar as to who the persons were who had in 1820 the right to the water.

In Miner *v.* Gilmour, 12 Moore, Privy Council 131, this Board had to decide as to the Canadian law, which is founded on the old French law, not on that law as altered by the Code Napoleon, and Lord Kingsdown, in de-

livering the judgement, used at p. 156 expressions which have been often cited, and always with approval. He said :—

"It did not appear that, for the purposes of this case, any material distinction exists between the French and the English law.

"By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land ; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury."

If the rule of Dutch Roman law which governs the Cape was the same as the rule thus laid down, Daniel Hugo could not lawfully divert the water of those two springs if any riparian proprietor on the eastern side of the mountains would sustain a sensible injury from his so doing. That is to say, that riparian proprietor would have had a right to bring an action against him for so doing, and make him cease to do it. Mr. Mackarness, in an argument which showed great research on his part, contended that, by the Dutch Roman law the owner of the land in which a fountain arises has the absolute right to dispose of the water in what way he pleases, and that though there is an obligation on the owner of the land below to receive the water which in the course of nature flows down upon him, though it may be a nuisance to him, there is no corresponding right on his side to insist on its continuing to flow down to him if it is a benefit, and that the owner of the land in which the fountain arises may, if

it suits his purposes, and if there is no physical obstacle to his doing so, send the water away in another direction, though he thereby leaves the lower riparian proprietor's land below to perish of thirst, unless something has occurred either by actual grant or by prescription to create a servitude in favour of that riparian owner against the owner of the land in which the fountain rises.

In Van Breda *v.* Silberbauer, L.R. 3., P. C. p. 99, it is said by Sir James Colvile, in delivering the judgement of this Board,

"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 Dutch-Roman law, as by the law of England, the rights of the lower proprietor would not attach upon water which had once flowed beyond the Appellant's land in a known or definite channel, even though it had its source within that land."

This does not, as was truly said, amount to a decision, for the case was decided on other grounds, but it does amount to an expression of a very grave doubt, whether that which was alleged to be the Dutch Roman law could be so, the English law as laid down by Lord Kingsdown being so much more convenient. In this doubt, their Lordships in the present case participate.

Mr. Mackarness cited texts from the civil law and from commentators which, if the question was now material, their Lordships would have to consider, and would at least probably have requested the Respondent's Counsel to argue upon them before deciding the point; but their Lordships do not think the point arises. If the riparian owners on the eastern side of the mountains never had any right in the water of those springs, there is no need to consider them at all. If they had any right in 1820, it is undisputed that after the diversion made as is truly stated in

the fourth paragraph, of the first plea, which was more than sixty years since they have been out of possession; they cannot set up any claim now after sixty years and upwards of possession adverse to them at all events. Moreover, whatever may be the extent of dominion over the water which the Dutch Roman law attributes to the owners of the sources, it is not disputed that they are subject to rights acquired by prescription; and if such rights have been acquired by the Defendant the exact nature of the servient tenement need not be discussed.

Their Lordships do not therefore consider it necessary to hear any further argument on this point.

Daniel Hugo wished to increase the quantity of water in the private stream, which was appropriated in favour of his farm in 1819. He thought, and was right in thinking, that there was no insuperable difficulty in diverting the water of the two springs, so as to make it cease to flow to the east, and cause it to flow to the west, and into the private stream at a point marked X on the plan; but he could not do this without entering upon and cutting up Crown land. And before doing that, he thought it prudent, at least, to apply to the Landdrost and Heemraden to allow him so to do.

A translation into English of the Dutch minutes of the Landdrost and Heemraden forms the document No. 6, which it is convenient now to read, as a good deal of argument was used as to its terms:—

"Extract from the Minutes of Landdrost and Heemraden at Stellenbosch, held on Monday, the 7th August 1820.

"Ordinary Meeting.

"Present, in the morning, the Landdrost Daniel Johannes van Ryneveld, President, and all the Members, &c.

"No. 10. A letter was read from the Field Cornet D. Hugo, acting as such in the Frenchhoek, dated 15th July last, praying that two small watercourses, rising in the Frenchhoek moun-

tains, and which at present discharge themselves into the 'Wit Elzeboom's Rivier,' may be conducted to his farm, the letter being as follows:—

"To D. J. van Ryneveld, Esq., President, and the Gentlemen Heemraden, of the District of Stellenbosch.

"Hon. Sir and Sirs,—Having observed that two small watercourses, rising in the Frenchhoek mountains, and which at present discharge themselves into the Wit Elzebooms Rivier, may be diverted and employed for useful purposes, with that object I approach you, praying that it may please your Honours to allow me to divert this water, to be used on my farm, situate in the Frenchhoek.

"I have the honour to subscribe myself with due respect,

"Your obedient servant,

"1820, the 15th July. D. Hugo.

"The members, C. F. Briers and Fred. Ryk L. Neethling, stated that they had examined into the present prayer last year at the time when the Frenchhoek road was inspected, and found that it was practicable.

"Having deliberated thereon,

"It was resolved to grant the prayer of the Field-Cornet Hugo, praying that he may be allowed to lead the two small watercourses to his farm, as it is hereby granted, subject, however to the following condition:—

"That, by this diversion, no injury is done to the properties or lands of others, or to the public roads, or anything else; otherwise, in that case, this favourable decision shall immediately cease.

"Extract hereof to be granted to the Field-Cornet Hugo, for his information and guidance.

"Done in the meeting of Landdrost and Heemraden, at Stellenbosch, *die et anno ut supra*."

There seems to be great doubt as to what was the capacity in which the Landdrost and Heemraden were acting.

They had some judicial functions, but it seems impossible to suppose that they could be acting judicially on this occasion. They had also under the Ordinance of 1805 very ill-defined powers, and directions to act as a kind of paternal government over the district, and one would say if Daniel Hugo had, without any previous leave, asked, entered on and cut up the Crown lands, it probably would have been right in the Landdrost to ascertain whether what was done was such that the Government ought to take steps to

protect its rights. Whether the Landdrost could take steps himself to do so is, perhaps, more doubtful. But there certainly does not appear to be anything in the Ordinance of 1805 to give the Landdrost and Heemraden any power to make grants of the Crown property. And if in 1827, when the Landdrost and Heemraden were abolished, the Government of the colony had sought to resume possession of the land in which Daniel Hugo had cut the watercourse, and to prevent the water from flowing down it any longer, there seems great difficulty in seeing what legal defence Daniel Hugo could then have made. He would have had a grievance in having been allowed to spend money in making the course, and in having been allowed for seven years to lay out his farm of Cabriere in the supposition that he had this addition to the waters of the private stream. This would not amount to a legal answer when the user had been for only seven years. But if the user in this way was for the period of prescription, which at that time was a third part of a century, and those who owned Cabriere, whether Daniel Hugo or those who obtained portions of it from him, had during that time been using the water of these springs, as being as much as theirs as the natural waters of the private stream with which they were mingled, the case is quite altered. Unless there is enough to show that the user was in its inception *precario*, that which was at first a defeasible enjoyment would by lapse of time acquire the same effect as if it had originally been granted as a servitude by those who had the right so to grant.

This renders it of great importance to ascertain what was the user and enjoyment.

On that there does not seem to their Lordships to be much ground for doubt.

Soon after the 7th August 1820, Daniel Hugo did, as is alleged in the first plea, paragraph 4,

make the watercourse, and caused the water of the two springs to flow through that course to a point marked X on the plan. There he allowed the water to flow into the private stream, and mingle with the natural waters of that stream, and he used the whole for the benefit of his farm. Whether the circumstances under which he made this course were such as to prevent the user of the water in this way being such as to be capable of, after a lapse of sufficient time, maturing into a prescriptive right to continue to use it is a question on which something must be said hereafter ; but it does not seem to admit of controversy that the water of the springs was then brought into that watercourse, and flowed and from that time down to the present has flowed down to the point X.

It has not, however, continued down to the present time to flow into the private stream at that point, and there mingle with the natural waters of that private stream.

In 1869 a shoot was made over the private stream, and the water of the two springs, or a great part of it, was carried on that shoot across the private stream and into a furrow made by the churchwardens down to a point marked Y. There, by another shoot, it was carried across the private stream and down to two dams.

The Defendant, as the Chief Justice observes, clearly never, in or after 1869, surrendered his right (whatever it was) to the use of part of that water, if he had acquired a right, nor conveyed it to the churchwardens, and there has not been since 1869 such a lapse of time as would give the churchwardens any prescriptive right to have the water flow in their furrow.

In 1841, whilst Daniel Hugo was still owner of the whole of Cabriere, he recovered, in an action against Abraham Le Roux for breaking a dam which he, Hugo, had made, and depriving

him of the use of the stream. No distinction was made, or attempted to be made, between the natural waters of that stream and the waters which at X were mingled with it. The inference seems irresistible that the whole was then used in the same way.

In 1846 John Stephanus Hugo, who was also called as a witness for Plaintiffs, bought half of Cabriere, and as purchaser of that half got a right to a portion of the water in the private stream. There is no indication of any distinction having been made between the natural water and the water which flowed into and mingled with it at X.

Some time after that, Hauman, who was called as a witness for the Plaintiffs, bought a portion of Cabriere and sold it in erven, with that sale a right to use a portion of the water of the private stream would also pass. There is no indication of any distinction being made between the natural waters and the waters which then mingled with them at X, and so long as the waters were mingled together, that is till 1869, it would be very difficult to make any distinction.

In 1854 the period of a third of a century from 1820 had elapsed. The now Defendant purchased from his father, Daniel Hugo, the remaining portion of Cabriere. It was not actually transferred to him till 1858, but on the 22nd July 1855 it appears that he had bought it.

On that date the following memorial was sent to the Government:—

"To His Excellency Sir George Grey, K.C.B., Governor and Commander-in-Chief of the Colony of the Cape of Good Hope.

"The Memorial of Jacobus Johannes Hugo, of Frenchhoek.

"Humbly sheweth,

"That memorialist has become the proprietor of certain farm situated at Frenchhoek, in the district of the Paarl, called 'Cabriere,' formerly the property of Mr. Daniel Hugo.

"That, on the 7th August 1820, the then Landdrost and Heemraden of Stellenbosch granted to the then proprietor, Daniel Hugo, at his request, permission to lead out two small watercourses, arising in the Frenchhoek mountains, and, before that, discharging themselves in the 'Wit Elzebooms river,' to his said farm, subject to the condition of not in any way thereby damaging the property or lands of other parties, or public roads, or otherwise, according to an Extract Resolution of the Court of the said Landdrost and Heemraden, which memorialist has annexed to this his memorial.

"That memorialist is anxious of having the same privilege extended to him under the like conditions, as being of the greatest importance to the said farm. And therefore prays that it may please Your Excellency to grant him the like permission of leading out the said two watercourses.

"And your memorialist, as in duty bound, will ever pray.

"Cape Town, 22nd June 1855.

"G. J. DE KORTE,
"Attorney for J. J. Hugo.

"Referred to the Civil Commissioner, Paarl, for report.

"Colonial Office. 6th December 1856."

The following reply (no doubt delayed for the report) was sent.

"J. J. Hugo, Esq., Frenchhoek. Colonial Office,
"Sir, 31st December 1857.

"In reply to your memorial of the 22nd June 1855, praying for the permission to lead out to yonr farm two watercourses, rising in the Frenchoek mountains, which was enjoyed by the previous proprietor, I have to acquaint you that His Excellency has been pleased to comply with your request, subject to the conditions that this privilege may be revoked at any time by Government, that private properties or public interests will receive no damage, and that the parsonage and village of Frenchhoek will be allowed a sufficient supply of water from those streams.

"I have, &c.,
"RAWSON W. RAWSON."

It is very possible that the Defendant, who it appears was a speaker of Dutch, did not understand the documents, which were in English. And even if they had been in Dutch, it is very likely he would not understand them; but their Lordships agree with what is said by the Chief Justice that, "be this as it may, the acts of his "attorney must be taken to be his." And consequently no additional force to the prescriptive title set up against the Government in the pleas

can be gained by the user by the Defendant himself after 1857; it was *precario* within the definition given in the Digest Book, 43, Title 26. De Precario, Law, 1, "Precarium est quod pre- "cibus petenti utendum conceditur tamdiu "is, qui concessit, patitur." But if a prescriptive right had, as is the opinion of the Chief Justice, been already acquired by Daniel Hugo from whom the Defendant purchased, as early as on the lapse of a third of a century after the water begun to flow to X, which was, apparently, at the end of 1820, or at latest in the beginning of 1821, their Lordships agree with him that the subsequent act of the Defendant (unless it amounted to a surrender) could not undo it. Nor is there any ground on which it can be said to estop the Defendant from now claiming, as against the Government or the Government's grantee, the right which his predecessor in title had acquired.

It is, however, true that the act of the Defendant is evidence, as against him, that the user could not have been such as to confer that title, but their Lordships cannot think it of much weight, especially as (if he had got, *de novo*, the permission his attorney asked for, in the terms in which he asked for it) it would have enabled him to appropriate the whole of this water, to the exclusion of the owner of the parts of Cabriere previously sold by Daniel Hugo.

The question seems, therefore, reduced to this, whether the circumstances under which Daniel originally made the watercourse to X were such as to prevent a prescriptive title from beginning to run against the Government as owners of the land in which the fountains arise, or as owners of the part of the land in which the watercourse was made. It is not necessary to inquire whether the first plea which claims the pre-

scription for the Defendant as owner of the portion of Cabriere, or the third plea which puts the prescription as having the effect of putting the stream, which for this period has flowed to X, in the same legal position as if it had always naturally flowed to X, truly represents the law, or whether both may stand as in no way inconsistent. It is enough to support the judgement appealed against if the Plaintiffs have failed to make out a right in either the Government or themselves as grantees of the Government to the whole of the water to the exclusion of the Defendant.

It was argued that Daniel Hugo was not in what he did acting as owner of the farm of Cabriere, but only in his personal capacity. To this it seems a sufficient answer to say that all that he asked for in his petition to the Landdrost and all that they assented to was for the use of his farm. It was argued that, assuming the Landdrost and Heemradden to represent the Government as owners of the land, it must be understood, though not expressly said, that it was all revocable at pleasure, and that, therefore, the enjoyment was from the beginning precarious.

A passage from Van Leeuwen's Commentaries, 2nd Book, chap. 19, sect. 5, was cited to the effect that all licenses given on request were *primâ facie* to be considered as revocable at pleasure. Their Lordships, however, think that this must be a question of the construction of the document, and that, in this case, looking at the nature of the request and the express conditions, none of which are alleged to have been infringed, it is impossible to suppose that either Daniel Hugo or the Landdrost and Heemradden supposed that, after the diversion was made, Daniel Hugo could be ejected at

the pleasure of either the Landdrost and Heemradden or their principals, if they were agents for the Government as owners of the land. Daniel Hugo thought he was to have a permanent use of the water for his farm, not a precarious user for his farm, still less a mere personal privilege, and whether the Landdrost and Heemradden were acting *ultra vires* or not the prescription would begin to run as soon as he began to use the water in that way.

This was the opinion of all the Judges in the colony except Dwyer, J., who does not give in any detail his reasons.

Their Lordships will, therefore, humbly advise Her Majesty to dismiss the appeal. The Appellants must pay the costs.