Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Horne and another v. *Struben and another; from the Supreme Court of the Cape of Good Hope; delivered the* 18*th June* 1902.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.
SIR FORD NORTH.
SIR ARTHUR WILSON.

[*Delivered by Lord Robertson.*]

This is an Appeal against a Judgment of the Supreme Court of the Cape of Good Hope declaring the boundary of the Respondents' farm; and the controversy relates to two parts only of the boundary declared. The lands adjoining the farm in question are Crown lands and the Appellants represent the Crown.

The Respondents purchased the farm in 1899 and they are now in right of the original grant on perpetual quitrent which was made in 1843. Prior to 1843 the farm had been held on loan lease; and the grant on quitrent was made under the system established by the Proclamation of 6th August 1813, entitled "Conversion of Loan "Places to Perpetual Quitrent." The description of the farm in the grant is as follows "a piece "of land containing 2,520 morgen, situated in the "division of Stellenbosch Field Cornetcy of "Hottentots Holland, being the loan place "'Kogel Baay' or 'Langgezocht' extending "west to the seashore, south, south-east and "east to the mountains and north to the Steen-"brazem River, as will further appear by the "diagram framed by the surveyor."

21933. 100.—6/1902. [31] A

On acquiring the farm, the Respondents had it surveyed by one Charles Marais, and made application to the Appellant, the Surveyor-General, for an amended title and diagram in accordance with the diagram which embodied Mr. Marais's survey. This application was made under the Act No. 9 of 1879 and the competency and appropriateness of this application and of the subsequent judicial procedure are unquestioned. The Surveyor-General objected to Mr. Marais's line at certain points but those objections ultimately resolved themselves into two. The matter came into Court by summons on 28th April 1900, the Respondents claiming an order declaring the boundary in accordance with the line marked on the plan annexed to their declaration and an order for an amended title showing the boundary accordingly. The Defendants appeared and in their plea stated their points of challenge; issue was joined and evidence led, with the result that the Court, by the judgment appealed against, decided both the controverted points in the Respondents' favour and (with an omission which does not touch that controversy) granted judgment in the terms of the prayer.

Before stating the two points of controversy between the parties it is convenient to mention one matter which bears equally upon both and tells in favour of the Respondents. The farm according to the title contains 2,520 morgen. If the boundary line proposed by the Respondents be accepted, so far from exceeding this amount they will have considerably less. On the other hand if the Appellants' theory be adopted in whole, the farm will be less by about 10 per cent. than it is stated to be in the title,—the two disputed points contributing nearly equally to this further deficiency.

1. The farm in dispute, according to the title above set forth is situated between the sea-shore

and the mountains, those forming respectively its western and eastern boundaries, while its northern boundary is the Steenbrazem River.

Now the first of the two disputed points is the whole of the western boundary; and the Respondents' line is drawn at high-water mark, or rather, as it sometimes is on the top of rocks, never nearer the sea than high-water mark. There is therefore no claim to foreshore, and, *primâ facie*, the Respondents' claim would seem to be in exact accordance with the words of the grant "extending west to the seashore."

On the other hand the contention of the Appellants is much less simple. It was thus stated in their plea, "The Defendants deny that "the western boundary of the said farm extends "to high-water mark. They contend that the "true boundary is as shown on the diagram "referred to in paragraph 2 hereof" (*i.e.*, the diagram referred to in the title of 1843 sought to be amended) "a distance of 200 feet inland from "such high-water mark." And the Assistant Surveyor-General, in his evidence, thus stated the view of the Crown. "The words 'to the "'sea shore' do not mean the sea shore but ought "to be 200 feet."

It is difficult to comprehend on what theory this contention for 200 feet was rested or how the figure was reached, for the statute under which the Crown is now disabled from making grants within 200 feet of the sea was not passed until long after 1843. Again, while it is true that on the diagram of 1843 a line is drawn some distance within high-water mark, which seems intended to delimit the farm, and to separate it from the sea shore, the distance is not uniform but quite irregular; and at their Lordships' Bar the theory of 200 feet was abandoned in favour of an absolute adherence to the line laid down in the diagram of 1843. The Appellants' contention therefore rests solely on the diagram, and the question is

thus raised what is the degree of authority of that diagram in relation to the text of the grant in which it is mentioned. This discussion necessarily and very directly affects the other disputed piece of boundary, but it may conveniently be taken primarily in regard to that now under review, viz., the seashore.

Their Lordships consider that assuming, as appears to be the case in regard to the western boundary, that the diagram contradicts the unambiguous text of the title, it must give way to the text. The words in the grant which introduce the diagram are "as will further "appear by the diagram framed by the sur- "veyor." Now, as matter of construction, this is merely an appeal to the diagram for further elucidation of the text and not a subordination of the text to the diagram. If in a matter not requiring elucidation the diagram is repugnant to the text this merely shows (what in the present instance is abundantly proved by other circumstances), that the diagram is not exact and affords only a rough delineation of the farm. Of the circumstances referred to what is perhaps the most palpable and the most relevant to the present dispute may be mentioned. The northern boundary is said in the title to be the Steenbrazem River, a perfectly unmistakable boundary; but the diagram, ignoring the somewhat tortuous course of the river, makes the northern boundary a straight line inland from a rock on the sea shore considerably to the south of the mouth of the river, which as well as the rock is depicted on the diagram.

In face of facts like these, it would be impossible to override the clear verbal description of the western boundary as the sea shore merely out of respect to a diagram which, as regards the northern boundary, fails to depict the equally certain expression of the title, viz., the river, an arbitrary line being in each case substituted.

But from the evidence and also from the opinion of the Chief Justice it appears that these old plans are "usually inaccurate and afford only "an approximate idea of the land to be "conveyed."

It was argued however on the part of the Appellants that the Proclamation only authorises grants of the land which had been previously held on loan and that to diagrams there was assigned by the Proclamation a higher importance than belongs to a plan referred to in a title, for they were made the basis of all quit rent grants. Those two points are separate and may easily be disposed of. First, it is quite true that the grant on quit rent must not exceed in extent the loan place; but as in the present case there is no evidence (apart from the grant of 1843 and the diagram) of the actual possession under the loan lease, the diagram must stand or fall on its merits where it differs from the words of the title. Second, if the Proclamation be examined, it will be found to give no support to the theory that it subordinates the words of the grant to the diagram or gives to the diagram any exceptional authority. It is true that, under Articles 8 and 13 of the Proclamation, before a title can be granted there must be a diagram, in order that the Government may be fully certified before granting the title as to the land proposed to be granted complying with the requirements of the Proclamation. But, this condition having been fulfilled, the right of the grantee is to be expressed in his title, and it does not appear from the Proclamation that the title need even refer to the diagram or have it attached. In short, the Proclamation gives to the diagram no independent authority as limiting the terms of the grant.

Their Lordships are clearly of opinion that the objection of the Crown on the western boundary entirely fails.

2. The other question is about the north-eastern boundary and involves a triangular piece of ground enclosed on plan A by the letters Y B C. The true question however is simply whether the northern boundary of the farm ends at B, as the Court has held, or at Y, as the Appellants contend.

Here the case for the Crown rests solely upon the diagram being exactly and minutely accurate on a point on which it makes hardly a pretence of accuracy and is demonstrably inaccurate. As has already been seen, the northern boundary, as laid down on the diagram, is a straight line drawn with complete disregard to the course of the river. Now the point Y which is said to be the eastern end of that line is reached simply by measuring on the ground the length of this arbitrary line, and stopping where it stops. This is frankly explained in evidence by the surveyor employed by the Appellants to survey the farm. It so happened that this measurement landed them at a place about which it is almost incredible that it should be the salient point of a boundary, for it is almost inaccessible and invisible from the surrounding country. But further, owing to the nature of the gorge through which the Steenbrazem River runs, it would result from the adoption of Y as the eastern point at which the Respondents' farm abuts on the river that they would have for practical purposes no access to the river. The Appellants have therefore neither authority nor probability to support their contention. On the other hand the point B has at least three substantial recommendations. Physically its situation stands out as a suitable

boundary. It has in fact been the site of a beacon erected in 1863 by a former proprietor to mark the boundary and observed as doing so ; and this, although not giving any prescriptive right, is yet evidence, as far as it goes, of boundary. The probability of this being the true boundary is increased by the fact that it admits of the farm being profitably occupied so far as access to water is concerned.

In these circumstances their Lordships consider that the Appeal entirely fails on this point also. They are fully satisfied with the Judgment of the learned Judges of the Supreme Court and will humbly advise His Majesty that the Appeal should be dismissed. The Appellants will pay the costs of the Appeal.