Privy Council Appeal No. 100 of 1913.

The Copthall Stores, Limited, - - - *Appellants,*

v.

Willoughby's Consolidated Company, Limited *Respondents.*

FROM

THE SUPREME COURT OF SOUTH AFRICA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JULY 1915.

Present at the Hearing:

VISCOUNT HALDANE. LORD SHAW.
LORD DUNEDIN. LORD PARKER OF WADDINGTON.
LORD SUMNER.

[*Delivered by* LORD DUNEDIN.]

The plaintiffs are owners of certain lands in Southern Rhodesia with clear registered title. The action is for (1) a declaration that the defendents are not entitled to occupy by themselves or their tenants any portion of the plaintiffs' lands; (2) ejectment from whatever portions of the plaintiffs' lands are presently in the occupation of the defendants or their tenants; and (3) further relief which need not be mentioned.

The defendants originally based their defence on agreements of 1895 and 1910, but the case so far as based on the agreement of 1910 is now abandoned. The agreement of 1895 was made between a company called Dawson's Stores, the predecessors in title of the defendants, and the Matabele Company, the predecessors in title of plaintiffs.

[44.] J. 448. 90.—8/1915. E. & S.

The defence as lodged amounted to what was substantially a counter-claim for a declaration that in virtue of the agreement of 1895, which it was alleged was duly transferred to the defendants and binding on the plaintiffs, the defendants are entitled to (1) the exclusive right of trading over the whole properties belonging to the plaintiffs detailed in a Schedule A annexed, and (2) for purposes of the said trade to take and occupy in perpetuity such store sites as were necessary. It followed that if sustained, head (2) was a complete answer to the claim for ejectment. The defence in both its heads was maintained by the Judge of First Instance, but on appeal it was repelled and judgment pronounced as claimed by the plaintiffs.

Their Lordships have no doubt as to the soundness of the result at which the Judges of the Court of Appeal arrived on the case as pled before them.

Before their Lordships, however, the appellants made a complete change of front. Their Counsel frankly abandoned all claim to what has above been described as a counter declaration, and pled only for maintenance in possession of the sites already occupied by themselves and their tenants in defence to eviction. The pleadings as they stand are not in a form properly to raise this defence. The argument which the learned Counsel for the defence put forward was this. He said that in virtue of the agreement of 1895 the Matabele Company had handed over to Dawson's Stores certain store sites, that thereafter the defendant Company, to whom the rights of Dawson's Stores had been transferred, occupied these sites and other sites, which in presence of the agreement they had selected, and that they had expended large sums of money in buildings upon these sites, and let them to tenants. He argued that according to the law of

Rhodesia the agreement followed by possession constituted a real right of the nature of servitude. He further said that the plaintiffs, when they acquired the property of the Matabele Company, had notice of the existence of the agreement, and of the fact that the defendants were possessing these stores in virtue of it. And he argued that the result in law was that the plaintiff Company was bound by the agreement even though the agreement was admittedly not registered against the land. In support of this proposition he particularly relied on the judgment in *Judd* v. *Fourie* (2 Buchanan p. 41). To found such an argument it is obvious that the pleadings ought to have specified the particular portions of land occupied, given particulars of the date of occupation and set forth the expenditure of money upon them. Not only is all this not done, but from the form of the pleadings and the arguments in the Court below their Lordships have not had the assistance of the opinions of the learned Judges in the Court below on the case as now wished to be raised. It is clear that the argument now put forward raises questions of law of great importance which would be apt to be applied to the cases of other holdings of a similar character, held by persons who are not parties to this case; and in particular it raises a very serious question of law as to the necessity of the registration of such rights, as to which it is apparent from the opinions in *Judd* v. *Fourie* that there has not been unanimity among the learned Judges in South Africa.

Their Lordships are, therefore, unwilling simply to dismiss the appeal without giving the appellants an opportunity of raising the true case. But the whole procedure, in which the appellants have been held to be wrong, is thrown away. The appellants must, therefore, pay the entire costs up to date, or the appeal will fall to

be dismissed. If the costs as taxed are paid their Lordships will humbly advise His Majesty to recall the judgments appealed from *hoc statu*, and remit the case with a declaration that the defendants be allowed to amend their pleadings, and the plaintiffs to put in answers to such amendments. The learned Judges will fix a proper time within which this must be done under sanction of the former judgment being repeated. If this is done there will fall to be made an alteration as to the date from which the rents and profits belong to the respondents, as the respondents' counsel admitted that the present date of 1st January 1911 could not be supported. They will also fix whether, upon the amended pleadings and answers, any further enquiry is necessary, and thereafter dispose of the case in such a manner as shall seem to them to be just.

It was agreed that the date from which the mesne profits were directed to run, namely the 1st January 1911, could not be supported. When the action is finally disposed of, this date must be corrected, either in the Supreme Court or, if the appellants elect to proceed no further with the action, then they should be at liberty to apply to His Majesty in Council to put the matter right.

Their Lordships look upon the general questions as so important that they desire that the opinion of the whole members of the Court of Appeal be taken and their attention especially directed to the following questions :—

(1.) If an agreement by which the owner of land in Southern Rhodesia gives another person a right to trade over such land, and in pursuance of such trading to take and occupy suitable sites for stores, is followed by the taking and occupation of such sites and by the expenditure of money thereon, is there constituted as between

grantor and grantee a servitude which will enable the grantee to maintain possession of the sites as against the grantor ?

(2.) If the answer to question 1 is in the affirmative, is such servitude *ipsa natura* intransmissible, and, therefore, brought to an end by the death or extinction of the natural or legal person in whose favour it was constituted ; or is the transmissibility a quality to be judged of according to the construction of the particular agreement and the whole circumstances of the case ?

(3.) How far is the transmissibility, if any, affected by registration or want of registration ?

(4.) If the servitude is valid then, if it is not registered as against the servient tenement, is a purchaser of the servient tenement for valuable consideration, who has notice of the claim to the servitude at the time of purchase, bound to recognise it ; and in particular is the opinion of Buchanan, J., or of Sheppard, J., in the case of *Judd* v. *Fourie* (2 Buchanan p. 41) to be preferred ?

(5.) What is the application of the law laid down in the answers to the foregoing queries to :—

(*a*) the agreement of 1895 in this case,

(*b*) the notice as to the right which the plaintiffs are shown to have had ?

In the Privy Council.

THE COPTHALL STORES, LIMITED,

v.

WILLOUGHBY'S CONSOLIDATED COMPANY, LIMITED.

DELIVERED BY LORD DUNEDIN.

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