

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Mayor and Councillors of the Borough of Pietermaritzburg v. The Natal Land and Colonization Company, Limited, and Cross Appeal from the Supreme Court of the Colony of Natal ; delivered 10th March 1888.*

---

Present :

LORD WATSON.

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

*[Delivered by Lord Macnaghten.]*

The parties to the litigation which has led to these appeals are the Corporation of Pietermaritzburg and the Natal Land and Colonization Company, Limited. The Company are the owners of two houses in Pietermaritzburg, fronting Church Street. The front walls of these houses project some inches beyond the line which must be taken to be the true boundary line of the street. Both houses have verandahs supported by posts which project still further into the street. In August 1882 the Corporation brought an action against the Company, and by their Declaration they asked for an order compelling the Company to remove the projections, as being encroachments on the public highway. To this Declaration the Company delivered exceptions suggesting that the action was not maintainable, on the ground that the Corporation ought to have proceeded under a

52726. 100.—3/88.

A

private law passed by the Legislative Council of the Colony, and dated the 3rd of August 1866. On the 22nd of November 1882 these exceptions were overruled. The Company then pleaded to the Declaration. In their plea they made averments to the effect that, before the passing of the law of 1866, the ground on which the alleged encroachments stood formed no part of the street, but was their own freehold property. And they repeated their objection to the jurisdiction of the Supreme Court.

On the 13th of January 1883 the Corporation delivered exceptions to this plea. On the 20th of March 1883 the exceptions were allowed.

On the 3rd of January 1884 the Company delivered a counter claim, claiming compensation in respect of the loss they would sustain by the removal of their buildings.

On the 24th of January 1884 the action came on to be tried. The Corporation relied on a plan of the city prepared by a Mr. Moodie in accordance with the law of 1866, and thereby made conclusive as to the boundaries of the streets in the city of Pietermaritzburg. The Company offered evidence with a view of proving that, apart from the law of 1866, their title to the ground upon which the alleged encroachments stood would be unimpeachable. The Court, however, declined to admit the evidence, and in the result the following judgment was given on the 11th of March 1884:—

“It is declared that the erections in question are encroachments and should be removed. But such erections are not to be removed until application for compensation has been made to the Court or Board established under the Act of 1866, and the amount of compensation has been fixed by that Court or Board. Costs to be mentioned after the said Board shall have decided.”

Recourse was then had to the Court or Board

established under the law of 1866, which is generally known as the Board of Assessors. Before the Board it was stated, on behalf of the Corporation, that they had no wish to have the front walls of the houses removed, and that, having obtained a judgment that those walls were encroachments, they would be prepared to let them remain on payment of a nominal rent for such reasonable period as might be limited by the Board. But they asked the Board to fix compensation for the removal of the verandah posts, offering, at their own cost, to secure the verandahs by brackets. The Company objected to the Board proceeding on that footing, upon the ground that it was not the question referred to them by the Supreme Court. The Board disallowed the objection. The representative of the Company then withdrew, and the Board passed a resolution fixing a nominal rent in respect of the front walls of the houses, which they decided were not to be rebuilt or permanently repaired, and they also decided that the verandahs ought to be removed without compensation.

The Corporation then applied to the Supreme Court for confirmation of the decision of the Board. On the 6th of September 1884 the Court refused the application with costs, and remitted the case to the Board for rehearing.

The Board met again in March 1885 to consider the question. The Company were willing that the Board should act, if they confined themselves to acting as referees under the order of the Supreme Court. The Corporation contended that the functions of the Board were not to be so limited. After some discussion, the Board passed a resolution expressing their opinion that they could not be called upon to give an award without going fully into the details of the case brought before them, and that

they could not be called upon by the Supreme Court to fix the amount of compensation in any particular case, when perhaps they might arrive at the opinion that no claim for compensation was established. Thereupon the Corporation applied to the Supreme Court for a ruling upon this resolution, or, in the alternative, for a judgement that the previous decision of the Board might be confirmed. This application was refused with costs on the 31st of March 1885.

In May 1885 the Company applied to the Supreme Court, asking that a notice by the Corporation calling a meeting of the Board might be cancelled, and that the Supreme Court would themselves proceed to assess compensation. This application was also refused with costs.

On the 1st of June 1885 the Board again met to consider the question, but on the objection of the Company they again declined to proceed with the case.

Matters having thus come to a dead lock, the Corporation applied for and obtained special leave to appeal to Her Majesty. They appealed against the latter part of the judgment of the Supreme Court of the 11th of March 1884, and also against the orders of the 6th of September 1884 and the 31st of March 1885.

Thereupon the Company also applied for special leave to appeal, and they have appealed, against the first part of the judgment of the 11th of March 1884 and against the interlocutory orders of the 22nd of November 1882 and the 20th of March 1883.

The principal question argued before their Lordships was whether the Corporation were bound to proceed under the law of 1866 in respect of the alleged encroachments. That question must be determined by a consideration of the language of the statute and of the in-

tention of the Legislature to be collected from the statute itself.

The law of 1866 states in the preamble at some length the circumstances which led to its being passed, and the object of the Legislature in passing it. It recites that much confusion and uncertainty had arisen with reference to the true boundaries and extents of various blocks and other plots of lands or subdivisions thereof within the city of Pietermaritzburg, in consequence of erroneous or conflicting surveys of the same, and from the absence of duly marked and legally appointed beacons, and from various encroachments on some of the streets, roads, and public ways, and on the blocks, lots, erven, or other subdivisions thereof, and that it had, therefore, become necessary to provide measures for remedying the same. It then states that, with a view to such object, the Council of the Corporation had recently caused a general re-survey to be made by Government Surveyor Moodie, assisted by Government Surveyor Mair, and that the Council thereupon caused to be prepared a general plan of the city, which was filed in the office of the Town Clerk, and a copy of which was also filed in the office of the Surveyor General of Natal, and that it was desirable that such plan should for the purposes aforesaid be established as the recognized general plan of the city.

The preamble then proceeds as follows :—

“ And whereas from such above referred to causes various blocks, lots, or erven, and other existing divisions of said lands have been found on such re-survey to be incorrect and erroneous, and in many instances to exceed the extent of land specified in the diagrams and titles thereof, and in other instances the assumed boundaries of such blocks or divisions are found to overlap each other or encroach on the streets or public ways of the said city.

“ And whereas much injury and inconvenience have been occasioned and probable litigation is likely to arise if these excesses of extent or area and irregularities or defects and

such uncertainty of boundaries and other evils are not satisfactorily and summarily dealt with and remedied, and it hath therefore become expedient to confer upon the said Council, assisted by other qualified assessors or other legally constituted authorities, certain powers and jurisdiction for the arbitration and adjudication of, and for the purpose of determining and settling, all questions respecting any such boundaries of the said streets or other public ways and blocks and other divisions aforesaid, and to provide, if occasion shall arise, for the awarding a fair compensation in regard thereto."

So far, the intention of the Act is plain. There had been much confusion of boundaries. In some cases, at any rate, the confusion had arisen, not from any fault of the owners or occupiers, but from the inaccuracy of official surveys and Government grants. The Corporation had caused a general re-survey to be made. There is no suggestion on the face of the Act that in making the re-survey there had been any investigation of private titles. An investigation of that sort would have been beyond the power of the Corporation. To publish the re-survey, unless it were made binding and conclusive, would only add to the confusion. To make it binding and conclusive, without providing some equitable means of dealing with the questions it would necessarily provoke, would be unjust and arbitrary in the highest degree. In some cases it might be sheer confiscation. The preamble points out that the matter was one which must be "satisfactorily and summarily" dealt with. And so it declares it to be expedient to appoint a Court of Arbitration for the purpose of settling "all questions"—not merely questions between adjoining owners—but all questions respecting boundaries of streets and public ways as well as respecting boundaries of blocks and other divisions of land. The proposed Court was to be the Council of the Corporation, assisted by duly qualified assessors, and it was to have the power of awarding compensation if occasion should require it.

The Act then proceeds to carry out its declared purpose. Moodie's plan is declared to be the recognized and established general plan of the city, S. 1. The blocks and other divisions of land marked on the plan and ascertained by the re-survey are to be deemed the correct and true sites of the blocks and other divisions of the city lands, S. 2. Two Members of the Council to be elected by the Council annually in conjunction with the Mayor, and three assessors appointed by the Governor are to form a Court "for the equitable adjustment, determination, "and decision of all disputes and differences "between the proprietors and owners and purchasers and lessees of any such blocks, lots, "erven, or other subdivisions of the said lands "in regard to the true and proper boundaries, "extent, or area thereof," S. 4.

The Court is empowered to entertain and arbitrate upon all disputes and differences relating to the matters aforesaid that may be submitted to it for decision, S. 5. Evidence is to be taken in writing, and all witnesses and holders of documents are to be examined on oath in accordance with the law of evidence in the Colony, S. 8. In all cases in which it adjudicates the Court is to have power, where buildings are already erroneously or wrongfully erected according to the re-survey, to adjudge the land on which the buildings stand to the owner of the buildings in fee or for a term at a fair value or rent for the extent of land occupied thereby, and the award of the assessors may be confirmed and performance thereof decreed by the Supreme Court on the application of any of the parties, S. 9. If the Supreme Court does not think fit to confirm the award it may remit it to the Court of Assessors for reconsideration and amendment, or for such other order as the circumstances of the case may warrant, S. 11. No



suit or action is to be maintainable by any owner or lessee on the ground of alleged trespass by any owner or lessee of any adjoining lot or for subdivision until the first-mentioned owner or lessee has referred the matter to the Court of Assessors, and the Court has decided as provided by the Act, S. 14.

All these provisions relate to disputes and differences between adjoining owners and lessees. The only section which relates to encroachments on the public streets and highways of the city is Section 13, which is in the following terms :—

“ In all cases of encroachment of buildings on the streets or public ways of the said city or borough by projections on the true lines thereof (not dealt with by the Corporate Council under the provisions of Section 58 of the Corporate Law, No. 21, 1862), it shall be competent for the said Council to have the same dealt with and adjudicated under this law as and when the said Council may think fit, upon due notice, in accordance with the provisions of the preceding clause, of any such intent given to the owner, or claimant, or proprietor thereof.”

The first question seems to be what is the meaning of the parenthesis, “ not dealt with by “ the Corporate Council under the provisions of “ Section No. 58 of the Corporate Law, No. 21, “ of 1862.” Now the Law of 1866 was not intended to provide for future encroachments. It deals once and for all with a state of circumstances called into existence by the application of Moodie’s plan to the blocks and divisions of land as they were actually enjoyed, and to the streets and highways as they were actually used at the time of the passing of the Law. It seems, therefore, that the expression, “ not dealt with ” must likewise refer to a state of things existing at the time of the passing of the Law, and must mean “ not already dealt with.” On turning to Section 58 of the Law of 1862, which is now represented by Sections 60 and 64 of the Municipal Corporations Law, 1872, it will be found



that it relates to two matters, (1) the prevention and abatement of nuisances, (2) the regulation of buildings, to which there is incident a power "to define and lay down the face lines of "streets." In the catalogue of nuisances, "the "obstruction of any highway" is mentioned. But, having regard to the subjects with which it is associated, which are matters, speaking generally, of police regulation, the expression refers, apparently, to obstructions of a temporary character. It seems to their Lordships that the object of the parenthesis was merely to exclude from the consideration of the Board of Assessors those cases in which, at the time of the passing of the Law of 1866, there were encroachments on the face lines of streets, as laid down by the Council under the powers of Section 58. Their Lordships cannot agree with Mr. Justice Williams in his judgement of the 20th March 1883, where he observes that the meaning is that the power of adjudication conferred on the Board of Assessors "may only be exercised when the "Council does not elect to proceed under its "own powers."

On the main question, it was urged on behalf of the Corporation that the Law of 1866 makes Moodie's plan conclusive for all purposes, that Section 13 gives them the option of applying to the Board of Assessors, but that there is nothing in the Law of 1866 to oust the jurisdiction of the Supreme Court. On the other side it was contended that under the circumstances it was incumbent upon the Corporation to proceed under the Law of 1866.

Their Lordships think that the contention on the part of the Company is well founded. The meaning of the Legislature, as declared in the preamble of the Law, is clear beyond dispute. All questions arising out of the resurvey were to be referred to a Court of Arbitration

armed with equitable jurisdiction. It was said by the Appellants, and it was scarcely disputed by the Respondents, that the ordinary Courts of the Colony being bound by Moodie's plan have no power to award compensation. In these circumstances, to give the Corporation the right to select their tribunal would in effect be a warning against arbitration. Why should they take a course which must, or may, throw a charge on the rates? But how does the matter stand from the point of view of an owner of buildings intersected by the line of a street as laid down on Moodie's plan? If the view of the Appellants be correct the rightful owner of yesterday becomes a trespasser and a wrongdoer on the passing of the Act. He is at the mercy of the Corporation. He is at the mercy of any private individual who may be entitled to complain of his building as an obstruction to the highway. In his case the solemn appointment of a Court of Arbitration which the Council of the Corporation are free to accept or to decline seems to be nothing short of a mockery, and not the less so because the Council were themselves the promoters of the Law of 1866, and the language of the preamble, with its promise of satisfactory settlement and fair compensation, is their language. Moreover, if the view of the Appellants be correct the Supreme Court itself is placed in a singular position. Applied to directly to give effect to Moodie's plan they have no discretion. They cannot listen to equitable considerations. They cannot award compensation. They have nothing to do but to condemn a building which transgresses the prescribed line. Applied to in the case of the very same building to give effect to Moodie's plan by confirming the award of the Board of Assessors, they have a discretion as wide as that of the Board, and complete control over the proceedings of that

tribunal. It is true that the right to have an obstruction in a public highway removed is not a new right. Yet in a sense, and in a very substantial sense, the rights given by the Law of 1866 are new. By that Law the Legislature provided a framework on which the extent and area of all blocks and divisions of private property, and the lines of all streets within its ambit, were to be measured and tested. To this measure and test private owners must submit and conform "as and when the said Council may think fit." The right to use an instrument, so simple and at the same time so potent, sweeping away at one stroke defences otherwise unassailable, may properly be regarded as a new right. It seems to follow from these considerations that if this new right is to be enforced the special and appropriate remedy provided by the Legislature must be pursued.

The form of expression used in authorizing the Council of the Corporation to resort to the Board of Assessors, "it shall be competent for the said Council," is probably due to the circumstance that the Council are themselves represented on that tribunal. Without statutory authority it would not be competent for them to act as judges in their own cause. The language which authorizes them to apply to the Board seems to point also to the removal of a disqualification on the part of the tribunal.

Their Lordships do not intend to depart from the rule that, in the construction of a statute, the ordinary meaning of the words used must be adhered to unless that meaning is at variance with the intention of the Legislature to be collected from the statute itself, or leads to some absurdity or repugnance. In this case they think that the manifest intention of the law of 1866, as collected from the statute itself, does,

by necessary implication, exclude the right of resort to the ordinary courts of justice in the Colony.

Their Lordships will humbly advise Her Majesty that the exceptions overruled by the order of the 22nd of November 1882 ought to be allowed, and the action dismissed, and that the Corporation should pay the costs of the Company in the Court below up to and including the hearing of the action. Their Lordships will not recommend Her Majesty to interfere with the costs of the proceedings in the Colony subsequent to the hearing. The sum of 300*l.* deposited by the Company as security for costs should be repaid to them. The Corporation must pay the costs of these appeals, except so far as they may have been increased by the Supplemental Case lodged by the Corporation.

---