Judgment of the Lords of the Judicial Committee of the Privy Council on the two Appeals of Webb v. *Giddy and Giddy* v. *Webb, from the High Court of Griqualand West, South Africa; delivered July* 12, 1878.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

THE action which gives rise to these Cross Appeals was brought in the High Court of Griqualand West by Webb, representing the London and South African Exploration Company, against Giddy, as Civil Commissioner for the District of Kimberley, in the Province of Griqualand West, for an account and payment of moneys in respect of licences to diggers for diamonds upon an estate of the Company called Dorstfontein, otherwise Du Toit's Pan, and for which, it is alleged, the Civil Commissioner is accountable by virtue of Proclamation No. 71 of 1871, issued by Sir Henry Barkly, the Governor of the above province. The Defendant denied the claim of the Company, and by a claim in reconvention sought to recover back moneys paid to the Company in respect of licences.

The Province of Griqualand West, in which the farm of Dorstfontein is situate, was formerly part of a large territory situate between the Orange and Vaal Rivers, called Griqualand, governed by Griqua Chiefs. In the year 1848 a large number of Boers, who were British subjects, having occupied

this territory, the sovereignty of it was assumed on behalf of Her Majesty. In the Proclamation of Sir Henry Smith, the Governor of the Cape Colony, (dated 3rd February, 1848) by which the sovereignty was assumed, it was declared that the territory should be governed by the laws of that Colony. In the year 1854 the British Crown relinquished its sovereignty of this territory. Thereupon parts of it fell under the dominion of Griqua Chiefs, and other parts under that of the Boers, who claimed to be citizens of a Republic which had been formed under the name of the Orange Free State. Numerous disputes occurred between these Chiefs and the Orange State regarding the occupation and boundaries of the lands which they respectively claimed, but it is not necessary to go into them, as the grant under which the Company holds the farm of Dorstfontein was made by the President of the Orange Free State, and it is not disputed that a good title to it has been derived from the Government of that State. In 1871 the sovereignty of Griqualand West was resumed on behalf of the British Crown by Sir Henry Barkly, acting under Letters Patent of the Queen of the 17th May, 1871, which empowered him to annex certain districts north of the Orange River (with the consent of the native Chiefs and tribes) to the dominion of the Crown.

It appears from the extracts of the written Constitution of the Orange State set out in the Record (pp. 131 and 132), and in the Judgment of the learned Recorder (p. 173), that the legislative authority of the State was vested in the Volksraad. It also appears that it was declared that "the Roman Dutch law should be the common law of the State, where no other law has been made, by the Volksraad."

The original grant from the President of the Orange State bears date the 4th April, 1860. The material part is the following :—

"I hereby grant on perpetual quitrent, to Abraham Pauls. du Toit, certain farm or piece of ground named Dorstfontein, situate in the district of Bloemfontein, field cornetcy of 'Onder,' Modder River, in extent according to guess 2,580 morgen.

"This grant is made upon condition that all roads running over this land, or which hereafter, upon lawful authority, shall be made thereover, shall moreover remain free and unmolested,

that this land will be subject to a public outspanning and grazing of the cattle of travellers under such conditions as are already or hereafter shall be made by law.

"That the said land will further be subject to all conditions and regulations as are already, or may in future, be fixed, referring to lands granted on the same conditions; and, lastly, that the owner shall be bound to the prompt payment of a yearly quitrent of the sum of 1*l.* 10*s.* sterling."

On the 12th May, 1862, by a deed duly registered, the farm was transferred to one Geyer for the price of 525*l.*; on the 6th January, 1869, it was transferred to one Van Wyk for 870*l.*; and on the 24th April, 1871, Van Wyk sold and transferred it to the Company for 2,600*l.*

Diamonds were discovered in Griqualand in 1867 and upon the farm of Dorstfontein during the ownership of Van Wyk, who granted licences to diggers, which obtained the name of "Old Briefjes." It was no doubt owing to this discovery that he obtained a largely enhanced price for the estate from the Company.

It is contended on the part of the Crown that under the grant in question, which is on perpetual quitrent ("voordurende erfpacht"), a tenure well known to the Roman Dutch law, being in all respects similar to the emphyteusis of the Roman law, the grantee has the usufruct only, and may not take any part of the land itself.

The Plaintiff does not deny that the Roman Dutch law was the ordinary law of the Orange State, nor that a pure grant in "erfpacht" has under that law the above effect; but he contends that this grant has not, and was not intended to have, this limited operation, but gave the full ownership of the land to the grantee. He refers, in support of this contention, to the special terms of the grant itself, and relies upon certain Ordinances of the Orange State, and the Proclamations issued on behalf of Her Majesty.

It will be convenient to state some further facts before considering the effect of these Ordinances and Proclamations.

It does not appear that any claim was made by the Government of the Free State to the moneys received from the diggers under the licences granted by Van Wyk.

When the Company took possession of the farm,

notices were issued by their agents to the diggers that no new licences would be issued, but that the holders of "Old Briefjes" might remain until the 15th May, 1871. The diggers determined to set these notices at defiance, and to continue their workings on the farm. It appears that the Company applied to the Orange State for assistance to protect the farm, but, not receiving it, and being unable to expel the intruders, a Treaty was entered into between its agents and the diggers, who were represented by a "Diggers' Committee," which was embodied in a document of the date of the 15th May, 1871, headed, "Rules and Regulations of the Dorstfontein Diggings." These Rules provided that after the 15th May, 1871, a fee of 10*s.* 6*d.* per month should be payable in advance by each digger to the proprietors, except those diggers who held briefs prior to the 15th April, 1871 ("Old Briefjes"). The Rules also contained a Code of Laws for the good government of the diggers.

Such was the state of things in the particular farm when the Orange Free State passed an important Ordinance, No. 3, 1871, relating generally to diamond-bearing farms. The title and preamble of the Ordinance are as follows:—

"Ordinance prescribing how farms, or ground situated within the boundaries of the Orange Free State, wherein precious stones and precious metals may be discovered, shall be dealt with for the future.

"Whereas precious stones have been discovered from time to time within the territory of the Orange Free State:

"And whereas there are reasons for believing that precious stones and metals will hereafter be discovered in this State on farms or grounds wherein they have not hitherto been found, and that large quantities will be discovered on farms where they have already been found:

"And whereas imperative necessity exists, in order to the prevention of irregularities and violence, for framing regulations in regard to such farms or grounds situated within the limits of the Orange Free State, where precious stones or metals have already been or shall hereafter be found as above mentioned."

The material Articles are the following:—

"Art. 1. That the owner or occupier of a farm or piece of ground on which precious stones or metals may be discovered, in case such owner desires to open diggings on his farm, shall immediately make known such discovery to the landrost of the district within whose jurisdiction the farm is situated."

The State President was thereupon to send a suitable person to report upon the facts.

"Art. 4. His Honour the State President is empowered, after the receipt of such report, to determine whether the interests of the country require that the land or fixed property on which precious stones or metals shall be found as aforesaid shall be, on payment of the value, provided the owner consents thereto, taken over by purchase, or whether the Government of the Orange Free State shall merely assume the superintendence over the diggings to be established there. The value of the land in question shall be fixed at 1*l.* sterling per morgen or more for the mere ground, that is, exclusive of improvements made thereon, which latter shall be appraised by three valuators.

"Art. 5. In the event of the State President and Executive Council resolving, by virtue of the foregoing Article, to buy in from the owner on account of the Government the ground in question, the owner shall, on payment of its value, transfer the same to the Government of the Orange Free State, and the same shall then be proclaimed in the Government Gazette by the State President as the property of Government.

"Art. 6. His Honour the State President, with the Executive Council, is hereby empowered on behalf of Government to open to the public for digging such land as shall have been taken over by purchase for Government as aforesaid, as well as such land as the owner by Article 4 may have refused to sell under such regulations as by this Ordinance are made or hereafter may be made, and the State President shall give notice thereof by proclamation.

"Art. 7. In the event of the State President and Executive Council resolving to open any property for digging a Government functionary shall immediately be placed there to be styled the 'Government Inspector,' on whom shall be conferred the authority of a justice of the peace by virtue of this Ordinance, as defined by Ordinance No. 2 of 1870.

"The Government Inspector shall keep the general control over such property, and shall, in the name of the Government, and by authority of his Honour the President and Executive Council, in the leasing out of digging claims, each claim not to exceed 30 feet square, at a monthly licence of 10*s.* or more, and under the following conditions, among which are:—

"A. That the person or persons making application to the Government Inspector for permission to dig, if not an inhabitant of the Orange Free State, shall sign a written promise, in presence of the Government Inspector, to obey the laws of the country, before being allowed to search for precious stones or precious metals.

"B. That the licenc s shall be paid monthly in advance to the Government Inspector on behalf of Government.

"C. That no digging claim shall be made over by one digger to another without the permission of the Government Inspector.

"Art. 9. On every farm where diggings are opened a Committee of Management shall be appointed, consisting of six members, of which the Government Inspector or his substitute shall be the *ex-officio* Chairman; the members of the Committee

of Management shall be chosen from and by the diggers on the spot.

"Art. 10. The Committee of Management shall have power to frame such regulations as may be found necessary for the good order, local requirements, and social management of the diggings, but will be required to give immediate notice thereof to the State President, and they shall be subject to the approval of the Executive Council.

"Art. 16. In the event of his Honour the State President and the Executive Council deciding, by virtue of Article 4 of this Ordinance, that the Government will not take over by compensation the farms where precious stones and precious metals are discovered, the Government shall still permit digging on such farms under Government superintendence, and further, under such regulations as already have been or hereafter may be made regarding farms taken over by Government by compensation.

"Art. 17. On farms on which diggings are established, and coming under the head of those mentioned in the preceding Article, the Government Inspector shall pay over the half of the pecuniary proceeds of all licences for claims to the owners of those farms or their lawful agents on their giving receipt, and the other half shall by those officers be accounted for as prescribed by Article 14 of this Ordinance, in order to defray the expenses of Government connected with keeping up an oversight over the diggings."

A doubt might arise upon the language of this Ordinance whether it applied to farms on which diggings had been already opened. But the inference from Article 20, which is in these terms: "Article 1 of this Ordinance shall not apply to farms on which diggings have already been opened," clearly is that so much of the rest of the Ordinance as can be made applicable to them should apply to such farms. Such, it appears, was the contemporaneous exposition given to it by the Government of the Orange State, for under its provisions a Government Inspector took charge of the diggings at Dorstfontein, and his appointment was notified to the proprietors in a letter from the Government Secretary, which, after stating that the State President had, in terms of Article 16 of the Ordinance, determined to throw open for digging the farms of Bloemfontein and Du Toit's Pan, and appointed Mr. Finlason as Government Inspector, contains the following passages: "You will notice that according to the Ordinance the half of licence money for 'claims' belongs to the owners of the farms. I have also been instructed to request you to inform me whether the owners of Bloemfontein and

Du Toit's Pan would be inclined to sell those farms, and at what price."

This Ordinance is strongly relied on by the Company as an acknowledgment and declaration by the State Legislature that the diamonds belonged to the proprietors of the farms, whilst on the part of the Crown it is contended that its provisions are consistent with the State having the right to them. In support of the latter view it was pointed out that the licences were to be granted by the Government Inspector, and the licence moneys, in the first instance at least, received by him; and it was submitted that the payment of the half of these moneys to the owners of the farms may have been intended to compensate them for surface or other damage done to the farms.

These considerations are not without force; but their Lordships think that there are considerations still stronger which point to an opposite conclusion. The case on the part of the Crown is that the original grant was in "erfpacht," a pure emphyteutic tenure, under which the owners of the farm would have no right whatever to the diamonds. The Ordinance does not apparently deal with a tenure of this nature. If such a tenure had been in the contemplation of the Legislature some express assertion of the right of the State would probably have been found in the Ordinance. Not only is no such assertion to be found in it; but the provision in Article 1 which provides that the owner of a farm on which precious stones or metals may be discovered, "in case such owner desires to open diggings on his farm," shall make known such discovery to the landrost, appears to assume that such owner has the right to open them. It is true that this Article refers to future discoveries only; but there is evidence, which is not controverted, that all the grants made by the Free State were in the form of that now in question, and the operation of all grants in that form would presumably be the same.

What the State mainly provides for in this Ordinance is the superintendence of the diggings by its own officers. It is true that it takes powers to purchase farms on which diamonds shall be found, but only with the consent of the owners, and the State President is to determine whether the interests

of the country require that a particular estate should be so purchased, or whether the Government should "merely assume the superintendence over the diggings to be established there." (Article 4.) Then in cases where this superintendence is exercised, the Government Inspector is to pay over half of the pecuniary proceeds of all licences for claims to the owners of the farms and to account for the other half to the State "in order to defray the expenses of the Government connected with keeping up an oversight over the diggings." Thus whilst the owner of the estate gets a clear half of the proceeds, the State takes the other half only for the purpose of defraying the expenses of its superintendence, which, whilst necessary for preserving public order, is perhaps more necessary for the protection of the interests of the owners of the farms. The State apparently asserts no right to these proceeds as being the owner of the minerals, and the Ordinance appears to be based throughout on the assumption that no such ownership existed.

On the 10th July, 1871, by virtue of Article 10 of the above Ordinance, Regulations were drawn up by the Committee of Management constituted by Article 9, and were approved by the Free State Government. These Regulations appear to have taken the place of those of the 15th May, 1871, already referred to. The same amount of licence fee, viz., 10*s*. 6*d*. per month, with the exception of "old briefjes," was payable under both sets of Regulations. It appears that the Plaintiff, as the agent of the Company, received these licence fees from the diggers, and paid over one-half of the amount to Mr. Finlason, the Government Inspector.

Witnesses were called on both sides to show what had been done under similar grants, and it certainly appears that the holders of them had cut wood, and taken coal, gravel, and other minerals without any interference by the State. The Recorder has correctly said that evidence of this kind would not be admissible to expound the Roman Dutch law, but it appears to their Lordships that it would be admissible to show that, as a fact, this law had not been adopted in its integrity by the Orange State in making these grants. The evidence, however, is

of little weight, compared with the documents in the case, and the authentic proof of the action of the State in dealing with the diamond fields.

Such was the existing state of things when the sovereignty of Griqualand West was resumed by the British Crown. On that occasion a series of Proclamations was issued by Sir Henry Barkly, Governor of the Cape Colony, all bearing the date of the 27th October, 1871. By one (No. 67) Griqualand was declared to be British territory; and by another (No. 68) the laws and usages of the Cape Colony were declared to be the laws of the territory "so far as the same shall not be inapplicable thereto." Nos. 71 and 72 touch more directly the questions in controversy in the present suit. The Preamble of No. 72 explains its object. It recites that doubts may be entertained by the inhabitants of the territory, especially those occupying lands in the portions thereof the sovereignty over which has heretofore been in dispute between the Chief Waterboer and the Governments of the Orange Free State and South African Republic, as to the intention of Her Majesty in extending her sovereignty over the territory with respect to the titles of the inhabitants to the lands held by them, and that it was resolved to quiet such apprehensions. The Proclamation then declares that Her Majesty had no intention "to invalidate or prejudicially to affect or injure in any way" rights or titles of private persons to lands; and that all such titles would be respected and considered valid and confirmed by Her Majesty, as would under the laws of the State and Government under which such persons were living *de facto* have been considered valid by such State or Government.

No. 71 deals with diamond diggings. The Preamble of this Proclamation states that "it is expedient that certain rules and regulations should be established under which the search or digging for diamonds shall be carried on within the territory of Griqualand West;" and its provisions are made applicable "whenever diamond diggings shall have been already opened, or shall be opened within the territory." The Proclamation divides the lands on which diggings are opened into three classes:—

I. Crown lands. (Art. 1,)

II. Lands "the property of any private person, the title to which lands is or shall be subject, in the original grant thereof, to a reservation of the right to precious stones or minerals." (Art. 23.)

III. "Lands the property of any private person, the title to which lands is not subject to any reservation of precious stones or minerals." (Art. 29.)

It provides for the appointment of a Government Inspector, Committees of Diggers, and for the manner in which rules and regulations for the management of the diggings shall be framed.

With regard to Crown lands it provides that the licence money or royalty in respect of each claim shall be 5*s*. per month, where the claim is worked by not more than three persons, and higher proportionate rates where worked by more persons.

With regard to Class II the licence money or royalty is to go to the Crown, as in the case of Crown lands, but the private owner is to be paid reasonable compensation for all injury done "to the surface and soil of the lands" by the diggings.

With respect to Class III the provisions are of a different nature, and as the Plaintiff claims under this class, and his action is founded on the provisions relating to it, it will be necessary to refer to them to see (1) whether his case does fall within this class, or, as the Crown contends, within Class II, and (2) whether they will sustain the claims made in the action.

These provisions are found in Article 29, which, in substance, declares that whenever diamond diggings are opened in lands in Class III, and the private owner "shall desire to establish diamond diggings on the property," and shall have granted licences to the defined number of diggers, the land shall be deemed a "public diamond field," and may be proclaimed as such, as if it were Crown land. When so declared the Regulation with respect to the Inspector, and other Regulations, are to be applicable as in Crown lands, with the following important variations:—

"Save that the amount of licence money, rent, or royalty to be paid for each claim shall be fixed by the owner of such property as aforesaid whereon such diamond field shall be situate, not being less upon each claim of 900 square feet, or, in proportion

to the superficial extent of the claim, not being less than would be leviable on the same extent if each claim were 900 square feet in dimension than the amount of monthly licence duty, royalty, or rent hereinbefore provided in respect of claims upon Crown lands; and the licence moneys, royalties, or rents payable by the miners or diggers entitled to work any claim therein shall be accounted for monthly by the Civil Commissioner of the division to the owner of the property whereon such diamond field is situate; and the balance of such licence moneys, royalties, or rents, after deducting therefrom the proportion of 10*l*. for every 100*l*. thereof, or in the like proportion at the least, and such further sum, if any, as may be necessary to defray the public expenditure in respect of the establishment necessary for the maintenance of order and good government at such diamond field, shall be paid to such owner of such property as aforesaid, whereon such diamond field shall be situate. Provided, also, that no rules or regulations passed or made, or to be passed or made, by any such public meeting of miners, as aforesaid, shall be valid, which shall affect the rights of such proprietor or define the compensation which shall be made to him for interference with any of his rights as such proprietor, without his express concurrence in such rules, either in person or through his lawful attorney thereto authorized."

It was contended for the Plaintiff that "the reservations" mentioned in defining Classes II and III, referred to express reservations in the original grant, and forms of Government grants upon quit rents having such express reservations were shown to be in use in certain cases in the Cape Colony. If this contention were successful, the Plaintiff's title would clearly fall within Class III, but their Lordships are not prepared to decide the case simply upon this construction. They are, however, of opinion upon the whole case that the title of the Plaintiff does fall within Class III.

It is to be observed that private owners in Class III are dealt with in the 29th Article of the Proclamation much in the same manner as owners of lands are dealt with by Ordinance 3, 1871, of the Orange Free State.

The Proclamation by adopting, in Article 29, these provisions of the Ordinance, seems to assume that the grants in Class III would include those to which the Ordinance referred; and throughout this Article there are indications that the Government had in view the grants of the Orange State under which the lands dealt with by Ordinance 3, 1871, were held. Thus the Ordinance required private owners to give notice to the State, "in case such owner desires to open diggings on his farm," upon which the State was to assume the superintendence

of them. In like manner Article 29 of the Proclamation provides that when a private owner "shall desire to establish diamond diggings on such property," and shall have granted a given number of licences over a given quantity of land, that place "shall be deemed to be a public diamond field, and proclaimed as such," and is then to be subject to Government control.

The analogy between the Ordinance and the 29th Article of the Proclamation in the manner of dealing with the licence money is still more important. By the Ordinance one half of the licence money was to be paid to the private owners, and the other half to the State, to defray the expenses of its "oversight over the diggings." By Article 29 of the Proclamation the whole of the licence moneys, after deducting 10 per cent., and such further sum as may be necessary for defraying the public expenditure for maintaining order, is to be paid to the private owners. The principle in both cases is the same, viz., the State takes what is necessary for defraying the expences of maintaining order, which by the Ordinance are assumed to amount to one-half of the licence money, whilst by the Proclamation the actual expences, whatever the amount may be, are to be deducted.

Again, the distinction with regard to licence moneys between Classes II and III, the owners in the former Class receiving no part of them, but only compensation for surface and other damage, shows that it could not have been intended to include in Class II the grants of the Orange State dealt with by the Ordinance under which the owners received one clear half of these moneys, whilst, by following the provisions of the Ordinance in the respects above adverted to in dealing with Class III, an intention is indicated to include those grants within that class.

In fact the Government so understood its own Proclamation. Three Commissioners having been appointed by Sir H. Barkly to act for him in administering the affairs of the Province, two of them issued the following Proclamation (dated 17th November, 1871) proclaiming a certain area of Plaintiff's farm to be diamond fields:—

"Whereas diamonds have been discovered upon a certain farm or portion of land, in extent about five thousand morgen, more or

less, commonly called Dorstfontein or Du Toit's Pan, being private property within the territory of Griqualand West, as defined by the Proclamation of his Excellency Sir Henry Barkly, Governor of the Cape of Good Hope, of the twenty-seventh day of October, eighteen hundred and seventy-one, No. 67, the title to which is not subject to any reservation of precious stones or minerals. And whereas, in the vicinity of certain claims or licenses now being worked upon the said property, a population is now settled for the time being of more than one hundred persons. Now, therefore, we, the undersigned Commissioners, appointed by and under the Proclamation of his Excellency Sir Henry Barkly, Governor of the Cape of Good Hope, of the twenty-seventh day of October eighteen hundred and seventy-one, No. 73, do, by virtue of the power thereby conferred on us, proclaim a certain area, being portion of the said farm Dorstfontein or Du Toit's Pan, being the place where such claims or licences are now being worked or lying to be worked as aforesaid, to be public diamond fields, under and by virtue of the Government Proclamation of October the twenty-seventh, eighteen hundred and seventy-one, No. 71."

This Proclamation not only affirms Dorstfontein to be within Class III, but proclaims a portion of it to be diamond fields in pursuance of Article 29.

For three years the Government acted on the footing of this Proclamation, and paid over large sums on account of licence moneys to the agents of the Company.

In the year 1874, for the first time, the Government of the Province, contending that the grant in question fell within Class II, denied the right of the Company to the minerals, and thereupon the present action was brought.

The whole case of the Crown rests upon the form of the original grant, and upon the assumption that it created an emphyteutic tenure only. There is no doubt that by Roman Dutch law a grant on perpetual quit rent is understood to be a grant in emphyteusis, and that under it the grantee has the usufruct only, and not the right to minerals. This tenure and its incidents are clearly explained in the passage from Voet 6, 3, 11, cited in the Judgment of the learned Recorder, and by the passages from the "Introduction to Dutch Jurisprudence," by Grotius, cited by the learned Counsel for the Crown from "Herbert's Translation," c. 40. A succinct definition of the tenure is also given by Van Leeuwen (Censura Forensis, lib. 11, c. 16): "Emphyteusis est jus hæreditarium prædio alieno

utendi vel fruendi, sub onere meliorationis, et præstandi annui Canonis in recognitionem directi dominii."

The "onus meliorationis" is not mentioned by Grotius as a condition of the tenure, and in the passage from Voet, above alluded to, it is stated that the tenant accepts the land either on condition of improving it, or at least "secundum mores hodiernos" of not deteriorating it.

Now the grant from the Orange State is a grant on perpetual quit rent, and the rent is reserved by the word "recognitie" (a Dutch word), which is said to mean "recognitio directi dominii." (See Van Leeuwen's definition.)

But though this be so, the grant is not confined to this simple form, leaving only the ordinary incidents of an emphyteutic tenure to attach to it, but is made subject to provisions as to public roads; the "outspanning and grazing" of the cattle of strangers; and is also upon condition "that the land will further be subject to all conditions and regulations which are already, or may in future be, fixed, referring to land granted on the same conditions." Undoubtedly new incidents may be attached to an emphyteutic grant, which would not affect the nature of the tenure, and the provisions as to public roads and grazing may be of this kind; but the last condition indicates that it was not supposed or intended that the grant conferred a simple emphyteusis. It is indeed a special grant, making the land subject to the conditions imposed or to be imposed by the State. Now the State, as we have already seen, did impose conditions upon the working of diamonds, under which the State took one-half of the licence moneys for defraying the expenses of its superintendence of the diggings, but paying the other half to the owner of the farm, apparently on the assumption, as before pointed out, that the tenure was not an emphyteusis, but one which gave the owner a beneficial right to the minerals. This special grant may, in their Lordships' view, be properly construed by the light of the Ordinance No. 3, 1871, which may be considered to be, as already stated, a legislative declaration by the Volksraad of its effect.

It is to be observed that the Roman Dutch law was declared to be the common law of the Orange

State only "where no other law has been made by the Volksraad." It may well be that the Boers who formed the people of this State intended, in making these grants, to confer full proprietary rights on the grantees, and that, whilst adopting in some respects the emphyteutic form of grant, it was not intended to confer upon the grantees usufructuary interests only.

Their Lordships are therefore brought to the conclusion that the Orange State could not have lawfully claimed the property of the minerals on this farm, and if so, the Crown cannot claim them, and is bound by the terms of the before-mentioned Proclamation for quieting titles acquired prior to its resumption of Sovereignty over this territory.

The Proclamation relating to Dorstfontein itself, and the action of the British authorities already commented upon, may not alone be conclusive as to the title of the Plaintiff to the minerals, if mistake could be shown; but they afford conclusive evidence that such a title was in fact recognized and allowed by the authorities as that which had been acquired under the Orange State. After this solemn recognition of the Plaintiff's title to the minerals, it is too late for the Crown, without any evidence that its Officers acted from mistake, and in opposition not only to its own action, but to that of the Orange State, to impeach the title of the Company upon a presumption derived only from the form of the grant.

Their Lordships are therefore of opinion that the Plaintiff is entitled to maintain this action under Article 29 of Proclamation No. 71.

This decision disposes of the main question in the Appeal of the Crown, and also as a consequence of it, of the claim in reconvention.

There remains to be considered in the Appeal of the Plaintiff his claim, which was disallowed by the learned Recorder, for an account and payment of licence moneys upon a higher rate than the Crown has accounted for. It appears that the Company, acting under the power assumed to be given to owners under Article 29 of No. 71, raised the amount of licence money from 10*s*. 6*d*. per month, at which sum it had long stood, and fixed it "at 50*s*. per claim per month." Formal notices thereof

were given to the Government on the 11th August, 1873, and also to some of the diggers. The officers of the Government have not received these increased rates, nor, indeed, have the diggers assented to them. Their Lordships intimated in the course of the argument that under these circumstances the claim to an account and payment of licence money on the footing of these notices could not be sustained, and they understood the counsel for the Plaintiff to acquiesce in that intimation. Any complaint the Plaintiff may have (if he has any) against the Government for not acting on the above notice must be pursued in some other form.

The Plaintiff's counsel strongly urged their Lordships to advise Her Majesty to declare that the Company was entitled to alter and fix the licence moneys or rents at its discretion, month by month. They do not, however, feel justified in complying with this request. It is sufficient to say that the present suit is not framed to obtain a Declaration of this kind. Their Lordships, therefore, need not consider, as they would have been compelled to do if the question had properly come before them, whether the diggers ought to be made parties to a suit for such a purpose. Their Lordships, however, desire to say that they are not to be understood to affirm the principle on which the learned Recorder based his Judgment in dealing with the question of the power to raise the licence rents, viz.:—"That 10*s.* 6*d.* having been fixed by compact between the diggers and the Plaintiffs, and that compact having been embodied in the rules of 10th July, 1871, and afterwards perpetuated by the Government notice, dated 30th December, 1871, the Plaintiffs cannot now arbitrarily raise the licences." The question of increasing the rents was not, as already stated, properly raised in the present suit, and must be considered as open for decision in any suit in which it may hereafter arise.

In the result their Lordships will humbly advise Her Majesty to affirm the Judgment appealed from. Both Appeals having failed, there will be no order as to costs.

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