

**REPORTS OF CASES. DECIDED IN
THE EASTERN DISTRICT COURT OF
THE COLONY OF THE CAPE OF
GOOD HOPE. VOL. X. PART I-IV**

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Vol. X. Part I-IV by Robert M. King

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ROBERT M. KING

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GOOD HOPE. VOL. X. PART I-IV**

VOI. XI

(PART IV.)

REPORTS OF CASES

DECIDED IN

THE EASTERN DISTRICT COURT

OF THE COLONY OF THE

CAPE OF GOOD HOPE, *Court of the*
Eastern District,

Cape Colony and Reports &c

REPORTED BY

ROBERT M. KING,

OF THE KING'S INN, DUBLIN, BARRISTER-AT-LAW.



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EASTERN DISTRICTS' COURT REPORTS.

VOL. X.

PART I.

DIVISIONAL COUNCIL OF ALBANY vs. LOMBARD AND OTHERS.

Outspan—Servitude—Proprietor—Grant.

Where a grant of land contains a clause providing "that all roads and thoroughfares running over the land shall remain free and uninterrupted, as well as the outspan place laid down on the diagram," this merely reserves a servitude of outspan in favour of the travelling public, and does not vest the ownership of the outspan in the Government or their successors, the Divisional Council. The owner of property who has granted a servitude of outspan of this description on it retains the right of grazing his own stock, or stock in his lawful custody or possession, on the outspan at all times, provided he leaves sufficient pasturage for the use of the person or persons in whose favour the servitude is granted.

This was an action for a declaration of rights, brought by the Divisional Council of Albany against Jacobus Fredrik Lombard, Hermannus S. Lombard, and William P. Botha, the registered owners of the farm Wentzel Koester.

The plaintiffs' declaration stated that this farm, Wentzel Koester, was granted to the defendants' predecessor in title,

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Abraham Jacobus Espach, on the 1st November, 1833; that previous to this grant Espach, being in possession of this farm, petitioned the Crown for the grant of a piece of land as an equivalent for the land used, and afterwards, in the deed of grant of Wentzel Koester, set aside as an outspan, and that in 1851 the Crown granted to Jacobus Fredrik Lombard, a successor in title to the said Espach, a piece of land measuring 507 morgen in consideration of the outspan place allowed on the said farm; by the aforesaid deed of grant the said outspan place was to be free and uninterrupted, and in consequence of the foregoing the plaintiffs claimed that they were the occupiers of the outspan, with the right to prevent defendants' cattle and live-stock from coming on the butspan, except when defendants were *bonâ fide* travellers, and also with the right to let portions of it according to law; further, that immemorably for more than fifty years the Crown, and after it the plaintiff Council, as successors in that behalf, have continuously, and as against defendants and their predecessors in title, claimed and used the said outspan as a public outspan with a right of letting portion of it; the defendants, nevertheless, since the year 1890, have claimed, and still claim, a right in themselves to use the said outspan when not travelling, and have driven large herds of cattle and live-stock upon the said outspan to graze thereon, and have thereby destroyed and greatly diminished the pasturage thereon, to the great detriment of the public, and contrary to the true intent and meaning of the aforesaid grants. The plaintiffs claimed a declaration of rights, and a perpetual interdict against the defendants and their successors in title, restraining them from destroying the pasturage upon the said outspan, and from driving or grazing cattle and stock thereon when not *bonâ fide* using the said outspan place as such.

The defendants pleaded that the farm Wentzel Koester was granted to A. J. Espach, and afterwards in 1884, by an amended title (under Act 9 of 1879), to J. F. Lombard, both predecessors in title of defendants, and that both grants were made subject to the servitude or condition that all roads and thoroughfares running over the land should remain free and uninterrupted as well as the outspan place laid down on the diagram; that defendants have at all times

granted to plaintiffs and the general public the free use of the outspan in terms of this servitude, and have never objected to the plaintiffs letting a limited portion of the ground, together with a limited right of grazing for the purposes of a house of accommodation; but notwithstanding this the defendants have at all times exercised their common law rights over the said outspan as being their property, but subject to the said public right of outspan. The other allegations in the declaration were denied.

From the evidence led by plaintiff it appeared that on the 1st November, 1833, the farm Wentzel Koester, containing (according to the grant) 3000 morgen, was granted to Abraham Jacobus Espach on condition, *inter alia*, that all roads and thoroughfares running over the land should be free and uninterrupted, as well as the outspan place laid down on the diagram. In 1851 the Crown granted to Jacobus Fredrik Lombard (successor in title to Espach) 507 morgen of land in the same division "in consideration of an outspan place having been allowed on the farm Wentzel Koester, now the property of grantee."

[At this stage plaintiffs' counsel wished to put in a petition from Abraham Espach to the Crown dated 1831, and subsequent correspondence, to show on what terms the outspan was given over, quoting *Van Breda vs. Cape Town Council*, 9 Jut. 415; but this evidence was disallowed on the ground that there was no ambiguity in the grant requiring explanation.]

In 1884 an amended title of the farm was granted to Lombard's successor in title under the provisions of Act 9 of 1879, subject to the same condition. The farm had since been divided between the three defendants, Lombard being allotted the portion adjoining the outspan; the outspan itself was not included in the division, but was registered in the name of the three defendants. About 1843 Government leased a portion of the outspan to one Simpson, now deceased, for the purpose of keeping a house of accommodation, allowing him to run a limited quantity of stock on the outspan. He continued there till 1850, when his lease was taken over by William Kemp. Kemp deposed that when he went there Mr. Lombard, father of the defendant Lombard, and then sole owner of Wentzel Koester, came and asked him if he would live on the same friendly terms that

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 " 22.
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Simpson had lived on with him, namely, that he should not impound Lombard's cattle when trespassing on the outspan, and that Lombard should not impound the outspan cattle when trespassing on his land; this was agreed to. Kemp continued in occupation till 1856, and was succeeded by one Thomas; and again in 1866 the Colonial Government leased the house of accommodation to John O'Grady, with limited rights of grazing on the whole outspan. His occupation lasted till about 1880, when the place was disused as a house of accommodation, and was afterwards made use of as a police camp. There was evidence that while the police were in occupation Lombard's cattle were occasionally impounded when trespassing on the outspan, especially after 1885, when more stringent orders were given to the police, but only three definite acts of impounding were proved, and the pound-book from 1886 to 1891 only showed one instance of Lombard's stock being impounded. There was also evidence that at night large quantities of sheep and cattle belonging to Lombard used to be driven on the outspan and taken away early in the morning, so as to escape the notice of the police, and that the grass on the outspan used consequently to be eaten up and destroyed.

[*Maasdorp, S.A.* (with him *Hutton*), for defendants, asked for absolution from the instance; this was refused, but the Court, after hearing counsel for plaintiffs, intimated that no rebutting evidence on the question of prescription need be called.]

For the defence evidence was led showing that the use of the outspan by Lombard's cattle was reasonable and consistent with the use of the public, that the outspan was not much used, and that there was always sufficient pasture on it for the travelling public, except in times of drought, and that then it was in no worse condition than the surrounding farms.

Sampson (with him *King*), for plaintiff: The grant provides that the servitude shall be free and uninterrupted; this means that the public are to have the entire use of it, and that the Divisional Council, as representing the public, can restrain the defendants' cattle from trespassing on it. When a specific piece of ground is set apart and dedicated to the use of the public, it is more than a mere servitude in

their favour, even if the *dominium* has not absolutely vested in the Divisional Council. In any case defendants' user of it has been unreasonable and detrimental to the interests of the public.

Maasdorp, S.A. (with him *Hutton*), for defendants: The grant merely creates a servitude, and our common law rights remain as a matter of course. Act 11 of 1893 merely gives a further confirmation to them. There is no evidence of unreasonable user.

Our. adv. vult.

Postea (August 22).

BABY, J.P.: The farm Wentzel Koester was originally a request place and was on the 1st November, 1833, granted to A. J. Espach, the deed of grant providing "that all roads and thoroughfares running over this land shall remain free and uninterrupted as well as the outspan place laid down on the diagram." This diagram annexed to the grant represents the area exclusive of the outspan to be 2700 morgen, and the outspan marked and drawn upon it to be 300 morgen. Of this farm the defendants are the proprietors. The declaration states that previous to the issue of the grant, Espach, then in possession of the farm, petitioned the Crown for a grant of a piece of land as an equivalent for the land set aside as an outspan. Whether this be true or not it is certain that on the 1st July, 1851, the Crown granted to J. F. Lombard, now dead, and Espach's successor in title, a piece of land measuring 507 morgen adjoining the farm Wentzel Koester "in consideration of an outspan place having been allowed on the place Wentzel Koester, now the property of the grantee." On the 12th November, 1884, a new title, under the Land Beacons Amendment and Extension Act of 1879, was granted to the legal representative of the then deceased J. F. Lombard, showing the true area of the farm to be 3807 morgen; this included the outspan which is laid out on the diagram annexed to the new title with the following N.B.: "There is a servitude for an outspan on this portion which contains 471 morgen." The declaration states that from 1833 up to the present time, the Crown first and then its successor, the plaintiff

1896.
Aug. 2.
" 22.
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Divisional
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