23rd January, 1920.

HANNAH MAXWELL & LUCY CATHERINE GIBSON - - - - - - - - *Appellants.*

v.

THE LEGAL ADVISER OF THE COLONY OF THE GAMBIA - - - - - - *Respondent.*

Validity of Crown Grant of 1865—*Power of Governor to grant Crown Lands, subject to provisions in Royal Instructions—Duty of Governor under Royal Instructions to protect native inhabitants in the free enjoyment of their possessions.*

A Crown Grant of 117 acres near the town of Wasloonga in Combo in the Gambia was executed in 1865 in favour of the predecessors in title of the Appellants. There was no evidence as to whether natives were dispossessed of any of this land, formerly used by them for farming, or whether, if such were so dispossessed, that when they were expropriated in favour of the grantee, no adequate compensation was paid to them.

Held that in the absence of such evidence the Crown Grant could not be set aside and declared invalid on the ground that the grant was in conflict with the instructions to the Governor to protect the native inhabitants in the free enjoyment of their possessions, and by all lawful means to prevent and restrain all violence and injustice which might in any manner be practised or attempted against them. Declaration of the Supreme Court of the Colony of the Gambia declaring the grant void, and vesting the land absolutely in His Majesty under the Vacant Lands (Ascertainment of Title) Ordinance, 1903, set aside and Crown Grant declared to be good and valid.

Appeal from a judgment of Van der Meulen, J., in the Supreme Court of the Colony of the Gambia.

Wright for the Appellants cites:—

Cooper *v.* Stuart, L.R., 14 A.C., at p. 288.

McDonnell, Acting A.G., for the Respondent cites:—

Jenkyns' British Rule and Jurisdiction beyond the Seas, p. 104.

Reg. *v.* Clark, 7 Moore, P.C.C., p. 77.

Attorney General *v.* Parmeter, 10 Price, p. 378.

Reg. *v.* Hughes and Stirling (1866), L.J., P.C., Vol. 35, p. 23.

PENINGTON, J.

On the 1st of April, 1919, judgment was given in the Court of the Gambia declaring that certain Crown Grants of land in

that Colony were void and vested absolutely in His Majesty, as being lands unoccupied, or without any known or certain owner within the meaning of the Vacant Lands (Ascertainment of Title Ordinance, 1903). Against this decision the Defendants appealed. Before this appeal came on for hearing, Hannah Maxwell, one of the Defendants, died, and so far no personal representative has been appointed. There were two pieces of land in dispute, one called Brown's Farm, in respect of which Lucy Catherine Gibson was the Defendant, the other called Saint Joseph's Farm, in respect of which Hannah Maxwell, deceased, had been Defendant. As regards Saint Joseph's Farm, if there had been any defendant before the Court below, I would, in this Court, have made a declaration in accordance with that of the Court below, adding as an additional reason, that the grant had not been proved to have been executed at all. The unsigned copy, which was in evidence, is dated 1865, but was found inserted in the Crown Grant Book of 1890.

As regards Brown's Farm, the learned Judge based his decision on the Letters Patent and the Royal Instructions, which contain the following passages:—

> " And we do hereby give, and grant, to the Governor " of our said settlements, and of their dependencies, for the " time being, full power and authority, in our name, and " on our behalf, but subject nevertheless, to such pro- " visions, as be in that respect contained in any instruc- " tions, which may, from time to time, be addressed to " him by us for that purpose, to make and execute in our " name, and on our behalf, under the public seal of our said " settlements, grants of land to us belonging within the " same to private persons for their own use and benefit, or " to any persons, bodies politic or corporate, in trust for " the public uses of our subjects there resident, or any of " them."

Paragraph 41 of the Royal Instructions referred to is as follows:—

> " And it is our further will and pleasure, that you do, " to the utmost of your power, promote religion and educa- " tion among the native inhabitants of our said settlements " and their dependencies, or of the lands and islands thereto " adjoining, and that you do especially take care to protect " them in their persons, and in the free enjoyment of their " possessions, and that you do, by all lawful means, prevent " and restrain all violence and injustice which may, in any

" manner, be practised or attempted against them, and that " you take such measures as may appear to you to be neces- " sary for their conversion to the Christian Faith, and for " their advancement and civilisation."

On the ground that these two passages should be read together, and that by the latter passage, a duty was laid upon the Governor of " protecting the natives in the free enjoyment of their possessions " the Court, at the suit of the Crown, declared that the land called Brown's Farm vested absolutely in the Crown. In other words, assuming that the Governor's action was against the Royal Instructions, the Crown was allowed, at its own suit, to derogate from its own grant, and resume possession of this land. The learned Judge said:— " I am of opinion that . . . the grant of this large area of " 117 acres of land in close proximity to a native town, and which " the native inhabitants had been in the habit of cultivating, " without let or hindrance, presumably from time immemorial, " a grant which was made without securing any corresponding " benefit of any kind, either to such natives or to the com- " munity as a whole, was contrary to the spirit and intention " of the Royal Instructions to which I have already referred, " and subject to which I am clear it could only be made."

Now let us examine this passage carefully: what evidence is there that the natives had occupied, or were in the habit of cultivating this land, from time immemorial at the date of this grant upon which such a presumption could be founded? Surely the native system of cultivation with long fallows is not sufficient. There are many thousands of square miles of land in West Africa which have never been cultivated at all, and many, many thousands of square miles which are covered with a secondary forest growth. Every native has, no doubt, a right to land for cultivation for the support of himself and his family in the place which I may call his domicile, but the whole of the land would only be cultivated when the population became big enough to demand it, and it is still a long, long way to that time.

Again, what evidence is there that if natives were dispossessed they were not properly compensated for the loss of their right of cultivation? None at all. It is impossible to presume such a dreadful act of oppression against the Crown Officer without a shadow of evidence on which to base it. If the Government has any reason to think that natives were dispossessed and not compensated, it is not too late for it to

search diligently out for them, or their representatives, and, if found, compensate them adequately, nay, even generously for the wrong done in 1865.

If the learned Judge's contention is correct, every holder of a Crown Grant must be prepared to defend his grant at the suit of the Crown on the ground that the original grant, maybe 60 to 70 years old, was against, not any definite instruction to the Governor by the Crown, but against the spirit and intention of an instruction. Truly a parlous position for the holders of Crown Grants which, I think, have heretofore been considered as the very best possible root of a title—I do not think that such a position would be to the benefit of the community as a whole.

The claim that, by common law, all grants of land must be made with the same intent and same spirit is, in my opinion, equally bad. I think that the judgment of the Court below, as regards Brown's Farm, should be reversed, and the Crown Grant declared to be good and valid.

As regards Saint Joseph's Farm, in the circumstances, it is impossible to make any declaration, and the Court below should not have made any declaration at all, as there was no Defendant to make it against, or in favour of.

Costs to follow the event in this Court and the Court below.

PARODI, J.

I concur.

PURCELL, C.J.

I concur.