 No. 35 of 1949.

In the Privy Council.

ON APPEAL.

FROM THE SUPREME COURT OF THE BAHAMA ISLANDS.

BETWEEN

THE ABACO LUMBER COMPANY LIMITED (Plaintiffs) - - *Appellants*

and

THE BAHAMAS CUBAN COMPANY LIMITED (Defendants) - - *Respondents.*

Case for the Respondents.

1. This is an Appeal by special leave of the Judicial Committee of the Privy Council granted the 28th July 1949 against a Judgment of the Chief Justice of the Supreme Court of the Bahama Islands given on the 11th November 1948 in favour of the Respondents in proceedings commenced by an Originating Summons in which the Appellants were Plaintiffs and the Respondents were Defendants.

2. The question for determination in this Appeal concerns the extent of the liability of the Appellants to pay royalties to the Respondents in respect of timber or lumber cut from vacant Crown land on the Island of Grand Bahama. The question depends on the true construction (first) of an Indenture (hereinafter called " the 1941 Deed ") dated the 17th March 1941 and made between the Respondents of the one part and the Appellants of the other part, and (secondly) by reason of certain references to it in the 1941 Deed, of an earlier Agreement under seal (hereinafter called " the 1906 Deed ") dated the 1st January 1906 and made between the then Governor and Commander-in-Chief of the Bahama Islands acting on behalf of His Majesty of the one part and Elijah Hallenbeck and William O'Brien of the other part. The question also depends on how far (if at all) the original liability of the Appellants under the 1941 Deed to pay such royalties was affected by Agreement under Seal (hereinafter called " the 1948 Deed ") dated the 8th day of July 1948 and made between the Governor and Commander-in-Chief of the Bahama Islands acting on behalf of His Majesty of the one part and the Appellants of the other part.

3. By the 1906 Deed it was agreed (by Clause 1) that the said Elijah Hallenbeck and William O'Brien (who were therein and are hereinafter called " the licensees ") should have the sole right to cut down remove

manufacture and export all pine timber growing on the vacant Crown land at Grand Bahama and also to extract turpentine and rosin therefrom: (by Clause 3) that subject to the right of renewal contained in Clause 16, the licence thereby granted should last for ten years: (by Clauses 7 and 9) that the licensees should keep accounts showing the quantities of lumber timber rosin and other merchantable products and should render half-yearly returns to the Surveyor-General showing the quantities thereof: (by Clause 16) that subject to the provisions therein mentioned the rights and privileges of the licensees should be extended for successive periods of ten years at a time up to a total period of 100 years: and (by Clause 18) that in the construction of the 1906 Deed "Vacant Crown Land" should mean all land not already sold or leased by the Crown to private persons and that "timber" should mean all growing pine trees of and exceeding six inches in diameter at a height of three feet from the base, and that a "railway tie" should mean a piece of timber six inches to twelve inches on face seven inches thick and not exceeeding eight feet long.

4. As to royalties, Clauses 10 and 11 of the 1906 Deed provided as follows:—

> "10. The following royalties shall be payable in accordance "with and at the time of rendering the said return by the licensees" (that is the return of quantities mentioned in Clause 9):
>
> "(A) In respect of all lumber in the form of railway ties "at the rate of $5.00 per 1,000 of such railway ties and on all "other lumber at the rate of 37½ cents per 1,000 superficial feet "board measurements undressed.
>
> "(B) In respect of all turpentine and rosin at the rate of "one cent per gallon for turpentine and ten cents per barrel not "exceeding 500 lbs. in weight for rosin, but any turpentine and "rosin royalty so paid shall be deducted from any lumber royalty "ultimately payable in respect of the trees on which royalty "has been paid under this sub-article.
>
> "(C) In respect of all other merchantable trimmings or "products obtained by the licensees under this Licence a special "royalty not exceeding the royalty on lumber (the amount of "which shall be arranged with the Surveyor-General).
>
> "11. The amount of royalty payable under this licence shall "in no year be less than $250.00 (American Gold) whether or not "any lumber be cut or any turpentine or rosin be extracted under "this licence."

5. The rights conferred by the 1906 Deed upon the licensees were renewed from time to time for successive periods of 10 years in accordance with Clause 16 thereof. The last of such renewals was effected by a Deed dated 11th December 1945 and was for a period of ten years from the 1st January 1946. The said rights were transferred, with the consent of the Crown, first under an Indenture dated the 21st May 1906, to the Bahamas Timber Company Limited, and secondly under an Indenture dated the 14th October 1920, to the Respondents.

6. By the 1941 Deed the Respondents assigned and transferred to the Appellants the sole right of cutting down removing manufacturing and exporting timber growing on the Crown land in the said Island of Grand Bahama in respect of which the said Licence had been granted by the 1906 Deed and of extracting turpentine and rosin from the said timber and the Appellants incurred an obligation to pay royalties to the Respondents. The Deed contains no express covenant by the Appellants for the payment of such royalties, but it contains a recital that the Respondents had agreed with the Appellants to assign and transfer to the Appellants the sole and exclusive right aforesaid " upon payment to the Respondents by "the Appellants of the sum of $2.00 United States currency in respect of "every 1,000 feet of timber or lumber cut from the said land" [that is the vacant Crown land mentioned in the 1906 Deed] " which is saleable and "on which royalties are payable by" the Respondents to the Crown under the 1906 Deed. There is no dispute that the Appellants are under an obligation to pay royalties to the Respondents in accordance with the terms of the agreement recited therein. The only issue is as to the extent of this obligation particularly in view of the 1948 Deed referred to later in this Case.

7. By the operative part of the 1941 Deed the Respondents " in pursuance of the said Agreement " (that is the Agreement mentioned in the recital) " and for the consideration aforesaid " (that is, as the Respondents contend, the payment of the said royalty) assigned and transferred to the Appellants the sole right aforesaid as set out in the preceding paragraph hereof and the Appellants agreed to pay to the Crown all royalties in respect of any timber or lumber cut from the said land.

It was further agreed that the said right to cut timber or lumber and to remove manufacture and export the same and to extract turpentine and rosin therefrom should continue as long as the Respondents held a licence from the Crown for this purpose and no default was made by the Appellants in payment of the said sum of $2.00 in respect of every 1,000 feet of timber or lumber which was cut from the said land and in payment of the said royalties to the Crown, and that if the said sum of $2.00 in respect of every 1,000 feet of timber or lumber should be unpaid for 90 days after becoming payable, or if the Appellants failed to pay to the Crown all royalties due to the Crown in respect of any timber or lumber cut from the said land for 30 days after the same became due it should be lawful for the Respondents at any time thereafter to re-enter upon the said land or any part thereof in the name of the whole and thereupon the 1941 Deed should absolutely determine.

8. The 1948 Deed recites the original licence to the licensees by the 1906 Deed. It also recites the 1941 Deed and states (inaccurately, as the Respondents submit) that thereby " the Respondents assigned the rights " conferred by the 1906 Deed to the Appellants in consideration of the "payments to be made thereunder" and that the Appellants had requested the Crown to approve of the assignment effected by the 1941 Deed. It goes on to recite that the Appellants were desirous of utilising and marketing the lop top and other merchantable trimmings from the pine trees at

Grand Bahama then sawn into lumber (which lop top and other merchantable trimmings were not then utilised but were left to rot on the ground) for the purpose of producing timber in rounded form for sale as pit props for utility wires firewood wood pulp and other purposes not involving the sawing of the timber thus obtained into lumber. It further recites that under the provisions of Clause 18 of the 1906 Deed timber was defined as all growing pine trees of and exceeding six inches in diameter at a height of three feet from the base and that the Appellants had found it uneconomic to produce lumber from trees smaller than 9 inches in diameter at a height of three feet from the base. It also recites the desire of the Appellants to expand their production of timber to approximately ten million superficial feet board measurement undressed per annum and that in order to produce this quantity of lumber at a profit the Appellants desired to utilise the aforesaid lop top and other merchantable trimmings not then utilised and the pine trees of and exceeding six inches in diameter at a height of three feet from the base which were not economic for the production of lumber for the purpose of extracting saleable timber in rounded form therefrom.

9. It also recites the provisions of paragraph 10 (c) of the 1906 Deed which makes provision for "a special royalty not exceeding the royalty "on lumber in respect of all other merchantable trimmings or products" the amount of which was to be arranged with the Surveyor-General, and that the Appellants had requested the Crown to consider what royalty if any should be payable under the terms of the said paragraph 10 (c) "in "respect of the aforesaid lop top and other merchantable trimmings and the "aforesaid other merchantable products to be obtained from the licensees "in utilising pine trees of and exceeding six inches in diameter at a height "of three feet from the base which are not economic for the production of "lumber for the purpose of extracting saleable timber in rounded form "therefrom." It also recites that the Crown being satisfied that the production and sale of timber in rounded form by the Appellants would enable the Appellants to substantially increase the production of lumber thus increasing the amount of royalty payable to the Crown and would also establish the business of the Appellants on a sounder economic basis and provide additional employment within the Colony had agreed that no royalty should be payable by the Appellants in respect of the said lop top and other merchantable trimmings and on the pine trees of and exceeding six inches in diameter at a height of three feet from the base which the Appellants determine are not economic for the production of lumber and are used by the Appellants for the purpose of extracting saleable timber in rounded form therefrom.

10. By the operative part of the 1948 Deed it was provided that so long as the Appellants are the assignees of the rights conferred by the 1906 Deed but not exceeding a period of 30 years from the date of the 1948 Deed no royalty should be payable by the Appellants to the Crown on the said lop top and other merchantable trimmings and on other merchantable products to be obtained by the Appellants in utilising pine trees of and exceeding six inches in diameter at a height of three feet from the base which the Appellants determine are not economic for the production

of lumber for the following purposes (which are hereinafter called " the specified purposes ") only namely—

(i) pit props ;

(ii) poles for utility wire ;

(iii) firewood ;

(iv) wood pulp ;

(v) wood chips for mixing with cement for building purposes ;

and

(vi) any other purpose not involving the sawing of timber in rounded form thus obtained into lumber which are specified by the Appellants and approved of in writing by the Crown.

It was also provided that the Crown approved of the assignment effected by the 1941 Deed.

11. The Appellants contend (and the Respondents deny) that since the execution of the 1948 Deed they are no longer liable under the Agreement mentioned in the 1941 Deed to pay royalties to the Respondents on timber or lumber cut from the said land at the rate of 2 dollars (United States currency) for every 1,000 feet (or indeed at any rate) so far as such timber or lumber is made into products for the specified purposes and is accordingly exempt from royalty under the provisions of the 1948 Deed. The Appellants accordingly commenced proceedings against the Respondents by Originating Summons dated the 27th July 1948 in the Supreme Court of the Bahama Islands, Equity Side, claiming a Declaration as to the rights of the parties under the 1941 Deed.

12. In his Judgment, given on the 11th November 1948, the learned Chief Justice stated, first, that the question at issue between the parties should be framed as follows : " Notwithstanding the terms of the agreement " of the 8th July, 1948, and the relief thereby granted and in view of the " fact that the amount of the royalty was not fixed by the Crown in the " agreement of the 1st January, 1906, on merchantable trimmings, is the " Defendant not entitled to demand and to receive from the Plaintiff " the sum of two dollars per one thousand feet on pit props, poles for " utility wires, firewood, wood pulp, wood chips for mixing with cement for " building purposes produced from such merchantable trimmings ? "

13. Having considered the relevant Deeds the learned Chief Justice decided this question in favour of the Respondents, holding that the words " the sum of two dollars . . . in respect of every 1,000 feet . . . " on which royalties are payable by the Assignors " (that is the Respondents) " to the Crown " which appear in the 1941 Deed were such as to require this sum to be paid on timber and lumber which was subject to a royalty at the date of that Deed, and that the relief granted by the Crown to the Appellants could not avoid payment due or to become due by the Appellants as between the Appellants and the Respondents, and could not affect

the consideration for the execution of an assignment prior to the granting of the relief. He pointed out that the Appellants based their argument on the fact that no royalty had ever been arranged with the Surveyor-General under Clause 10 (c) of the 1906 Deed and that accordingly none was " payable " thereunder for the purpose of the Agreement mentioned in the 1941 Deed. He rejected this argument and expressed the view that royalty was " payable " under Clause 10 (c) although the amount had not been fixed.

14. It is humbly submitted that the learned Chief Justice was right in so holding for the reasons he gave and for the other reasons hereinafter mentioned. The 1906 Deed clearly provided for the payment of royalties under Clause 10 (c) in respect of all other merchantable trimmings or products; and, as to the amount of the royalty, the Clause provided (1) that it should not exceed the royalty on lumber; and (2) that it should be arranged with the Surveyor-General. It is submitted that, if the Surveyor-General had been asked to arrange a lower figure than the royalty on lumber and had refused, the licensees would have to pay under Clause 10 (c) the same royalty as on lumber. Royalties have therefore at all times been payable under Clause 10 (c) in the sense that they have been recoverable at law thereunder from the licensees or their successors in title in respect of all other merchantable trimmings and products, including products for the specified purposes.

15. But even if this be wrong, and even if on the true construction of Clause 10 (c) of the 1906 Deed no royalties have ever been legally recoverable thereunder owing to the absence of any arrangement with the Surveyor-General this fact would not, it is humbly submitted, entitle the Appellants to the relief which they claim. Clause 10 refers to six different classes of products from the timber cut down under the licence conferred by the 1906 Deed: namely (i) lumber in the form of railway ties; (ii) all other lumber; (iii) all turpentine; (iv) all rosin; (v) all other merchantable trimmings and (vi) all other merchantable products. Products for the specified purposes come under class (vi). Clause 10 expressly provides that royalties " shall be payable " in respect of each of these classes of product. The reference in the Agreement recited in the 1941 Deed to " timber . . . cut from the said land . . . on which royalties are " payable " under the 1906 Deed cannot be read quite literally because royalties were payable under the 1906 Deed not on timber cut from the land, but on timber products belonging to one or other of the six classes mentioned above. It is submitted that, on its true construction, the reference should be read as relating to timber cut from the land from which products are made that belong to one or other of the classes. In other words, the question whether timber cut from the land bears the royalty provided for by the Agreement must be tested by reference to the nature of the product made from the timber. It is irrelevant to consider whether in the events which have happened a royalty under the 1906 Deed is legally exigible in respect of product.

16. It is further humbly submitted that in any event the reference in the Agreement recited in the 1941 Deed to timber or lumber on which

royalties are payable under the 1906 Deed should not be construed as a reference to such royalties as are from time to time so payable. So to construe the reference would be to place the Respondents entirely at the mercy of the Appellants ; inasmuch as the Appellants could by making some entirely new arrangement with the Crown (for example an arrangement under which they compounded the royalties payable under the 1906 Deed for payment of a lump sum) relieve themselves altogether from the obligation to pay royalties under the said Agreement. The reference should be read as relating to timber or lumber on which royalties were in fact being paid at the date of the 1941 Deed. It appears from the notes taken by the learned Chief Justice of the arguments at the hearing in the Court below (and it is the fact) that at all material times down to the date of such hearing all trees exceeding six inches in diameter at a height of three feet from the base had been sent for lumber, and none had been converted into other products. No doubt it was for this reason that no rate was ever fixed under paragraph 10 (C). At the time of the 1941 Deed, therefore, the parties must, it is submitted, have contemplated that all such trees would continue to go for lumber, and would bear royalty as such under paragraph 10 (A). It is stated in the recitals to the 1948 Deed that the Appellants have found it uneconomic to produce lumber from trees smaller than nine inches in diameter at a height of three feet from the base ; and one of the concessions obtained by the Appellants from the Crown under the 1948 Deed was liberty to utilise trees exceeding six inches (but not exceeding nine inches) in diameter at a height of three feet from the base for the purpose of extracting saleable timber in rounded form therefrom without paying any royalty under the 1906 Deed in respect of the products for the specified purposes made from such timber in rounded form. The Respondents respectfully contend that it would be contrary to the intention of the parties to the 1941 Deed, and it would be unjust and inequitable if they were to be deprived of their royalty in respect of these trees by the operation of the 1948 Deed which was, so far as they are concerned, res inter alios acta.

17. It is submitted that the Judgment of the Learned Chief Justice should be affirmed and the Appeal of the Appellants dismissed for, among others, the following

REASONS

(1) BECAUSE at all material times royalties have been payable under Clause 10 (C) of the 1906 Deed on all merchantable products (including products for the specified purposes) obtained under the 1906 Deed, in the sense that such royalties have been legally recoverable thereunder from the licensees or their successors in title.

(2) BECAUSE on the true construction of the Agreement mentioned in the 1941 Deed royalties are payable thereunder in respect of timber or lumber cut from the land provided such timber or lumber goes to make products

of the kind in respect of which royalties are expressed to be "payable" under the 1906 Deed and because products for the specified purposes are of this kind.

(3) BECAUSE (contrary to the contention of the Appellants) the reference in the said Agreement mentioned in the 1941 Deed to royalties payable under the 1906 Deed is not, on its true construction, a reference to such royalties as may from time to time be payable in accordance with any arrangement come to between the Crown and the Appellants and for the time being in operation.

(4) BECAUSE the judgment of the learned Chief Justice was correct and ought to be affirmed.

S. PASCOE HAYWARD,
Lincoln's Inn.

GILBERT DARE,
Temple, E.C.4.

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Case for the Respondents

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