Privy Council Appeal No. 35 *of* 1949

The Abaco Lumber Company Limited - - - - - - *Appellants*

v.

The Bahamas Cuban Company Limited - - - - - - *Respondents*

FROM

THE SUPREME COURT OF THE BAHAMA ISLANDS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH JANUARY, 1951

Present at the Hearing:

LORD PORTER
LORD REID
LORD RADCLIFFE
SIR JOHN BEAUMONT

[*Delivered by* LORD REID]

This is an appeal from a judgment of the Supreme Court of the Bahama Islands delivered on 11th November, 1948, by which the respondents in this appeal, then the defendants, were found entitled to receive certain payments from the appellants and plaintiffs in respect of certain timber products.

By Articles of Agreement dated 1st January, 1906, made between the Governor of the Bahama Islands acting on behalf of His Majesty and two lumber merchants, therein referred to as the licensees, it was agreed that 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 subject to certain terms which their Lordships must later examine. This agreement was for a period of 10 years with provisions entitling the licensees to renewals of their rights under it for further periods of 10 years up to a period of 100 years. Certain assignments of the licensees' rights were made and renewals were regularly granted. In 1925 the Governor of the Bahama Islands consented to a transfer of the right of the licensees under the original license of 1906 to the present respondents and in 1935 a renewal of this license was granted to the respondents for a further period of 10 years.

On 17th March, 1941, the respondents entered into an agreement with the appellants by which they agreed to assign and transfer to the appellants the sole right of cutting down removing manufacturing and exporting timber under the original license of 1906 and further agreed to apply for a renewal of that license as long as the right to renew should continue. The appellants agreed to pay to the Crown all royalties due to the Crown and also agreed to make certain payments to the respondents. The present action has been brought to determine the extent of that obligation in the circumstances which now exist.

The original license provided that a return should be made every half year by the licensees to the Surveyor-General of the Colony showing the quantities of timber turpentine rosin and other merchantable products derived from each section of the land: and it then provided:—

"10. The following royalties shall be payable in accordance with and at the time of rendering the said return by the licensees:

(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 license 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."

It would appear that from 1906 to 1941 royalties were paid on railway ties and on lumber (which their Lordships understand to mean sawn timber). It does not appear whether any turpentine or rosin was produced or any royalty paid under para. 10 (B): but neither party sought to rely on this paragraph. In their Lordships' opinion no assistance can be got from it in considering the question now at issue and it need not be further considered. The important paragraph for the purpose of this case is 10 (C). It would seem that there was no occasion before 1941 to operate this paragraph because the only trimmings or products not covered by the preceding paragraphs which were produced before 1941 were unsaleable. But whether that be so or not it is admitted that no special royalty under paragraph 10 (C) was arranged or fixed and that no attempt had been made before 1941 to do this.

In 1945 the respondents obtained a further renewal of the original license of 1906 for a period of 10 years. The agreement granting this renewal made no reference to the position of the appellants. But on 8th July, 1948, the Governor of the Colony made an agreement with the appellants to which the respondents were not parties. This agreement narrated that the appellants had found it uneconomic to produce lumber from the smaller trees which they were entitled to cut, that they desired to produce more lumber from the larger trees and that they desired to use the lop top and trimmings from these trees and also the smaller trees to produce products which would fall under paragraph 10 (C) of the original license of 1906. It further narrated that the appellants had requested the Crown to consider what royalty if any should be payable under paragraph 10 (C) and that, in respect of certain advantages to the Colony which were referred to, the Crown had agreed that no royalty should be payable by the appellants in respect of these products. The first paragraph of the agreement was as follows: —

"For so long as the licensees are the assignees of the said license but not exceeding a period thirty years from the date of these presents the Crown agrees that no royalty shall be payable by the licensees on the lop top and other merchantable trimmings from the pine trees at Grand Bahama sawn into lumber and other merchantable products to be obtained by the licensees in utilizing pine trees of and exceeding six inches in diameter at a height of three feet from the base which the licensees determine are not economic for the production of lumber for the following purposes only, namely: —

(i) Pit props.
(ii) Poles for utility wires.
(iii) Firewood.
(iv) Wood Pulp.

(v) Wood chips for mixing with cement for building purposes, and

(vi) Any other purposes not involving the sawing of timber in rounded form thus obtained into lumber which were specified by the licensees and approved of in writing by the Crown."

On obtaining this agreement the appellants commenced the present action on 27th July, 1948, by originating Summons. Stated shortly the question for determination was whether the respondents are entitled to payments from the appellants in respect of those products for which under their agreement with the Crown the appellants pay no royalty to the Crown. The appellants' obligation to make payments to the respondents is contained in their agreement of 17th March, 1941, and is in these terms:— "Whereas the assignors (the respondents) have agreed with the assignees (the appellants) to assign and transfer to the assignees the sole and exclusive right of cutting down removing manufacturing and exporting the said timber and of extracting turpentine and rosin therefrom upon payment to the asignors by the assignees of the sum of two dollars United States currency in respect of every one thousand feet of timber or lumber cut from the said land which is saleable and on which royalties are payable by the assignors to the Crown under the assignors' license ". The question in this case turns on the meaning of the phrase in this agreement "on which royalties are payable by the assignors to the Crown". The appellants admit that they are bound to make payments to the respondents in respect of all lumber and other products which fall within the scope of paragraph 10 (A) and 10 (B) of the original license: but they deny liability to make such payments in respect of any product which only falls within the scope of paragraph 10 (C) and in particular they deny such liability as regards those products covered by their agreement with the Crown of 8th July, 1948.

The respondents rightly maintain that the construction of their agreement of 1941 cannot be affected by the agreement of 1948 to which they were not parties. But they further maintain that in 1941 royalties were "payable" by them to the Crown not only under paragraphs 10 (A) and 10 (B) but also under paragraph 10 (C) in respect of any product which might come within its scope. They maintain that, although in 1941 no royalty had been arranged or fixed under paragraph 10 (C), yet if the need arose at any time to fix such a royalty this could be done with, or if necessary without, the consent of the licensees; and that the fact that the Crown could compel the fixing of a rate of royalty for a particular product and thereafter recover royalty at that rate is sufficient to make royalty on that product "payable" within the meaning of the agreement of 1941. It was denied by the appellants that the Crown could compel the fixing of a royalty without the consent of the licensees but on this point their Lordships are prepared to assume in the respondents' favour that this could be done. But they are unable to accept the view that royalty can properly be said to be "payable" before the rate at which it is to be charged has been fixed or any step has been taken to have that rate fixed. Accordingly their Lordships hold that no royalty under paragraph 10 (C) was payable in 1941 within the meaning of the parties' agreement of that date.

But that does not end the matter. A royalty might be arranged under paragraph 10 (C) after 1941 but during the currency of the 1941 agreement. It was argued for the appellants that that would not affect their liability under the 1941 agreement, because that agreement only refers to royalties which were payable in that year. Their Lordships do not so read the agreement. Payment under it is to be made in respect of a product which "is saleable" and on which royalties "are payable." "Saleable" in this context cannot mean saleable in 1941: it must mean saleable at the period for which payment is being made. So it would be natural for "payable" to have a similar meaning and to mean, not payable in 1941, but payable at the time in question. Moreover this is

in their Lordships' view the more reasonable meaning. The license might be continued for a very long period and changing conditions might lead to the larger part of the licensees' output or even the whole of it being some new product with regard to which no royalty previously fixed applied. It would not be reasonable in such a case that nothing should be payable under the 1941 agreement. In their Lordships' judgment the meaning of the 1941 agreement is that if at any time the appellants produce a saleable product and a royalty is fixed in respect of it so that the amount of the royalty due to the Crown is ascertainable then the appellants must pay royalty to the respondents in terms of the 1941 agreement in respect of that product.

It is necessary to add some observations on the agreement of 1948 between the Crown and the appellants. The respondents, not being parties to it, are not directly affected by it, and, as it does not make any royalty payable, it cannot avail the respondents to enable them to recover more from the appellants than they could have done in its absence. But there remains the possibility that the Crown, not having come to any arrangement with the respondents about royalty in respect of the products referred to in the 1948 agreement, might seek to have such a royalty fixed with them. As the Crown is not a party to this litigation it would not be proper for their Lordships to express any opinion whether this is a real possibility, but, for the protection of the respondents, account must be taken of it in the decision of this case. It follows from the opinion which their Lordships have already expressed that if the Crown should ever succeed in compelling the respondents to pay a royalty in respect of any of the products mentioned in the 1948 agreement that would bring the agreement of 1941 into operation so that the respondents would then be entitled to recover from the appellants royalty under that agreement for such products.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the order of the Supreme Court of the Bahama Islands dated 11th November, 1948, set aside except in so far as it directs that each party will pay their own costs; and that a declaration should be made that, upon the true construction of the agreement of 17th March, 1941, mentioned in the originating Summons herein, the sum of two dollars United States currency in respect of every 1,000 feet of timber or lumber cut is not payable in respect of any of the merchantable trimmings or products referred to in Clause 10 (c) of the licence of 1st January, 1906, made between Sir William Grey Wilson of the one part and Elijah Hallenbeck and William O'Brien of the other part unless the merchantable trimming or product in question is saleable and a special royalty has been arranged in respect of it in pursuance of the said license: provided that this declaration is without prejudice to the right of the respondents to receive the sum of two dollars United States currency in respect of every 1,000 feet of timber or lumber cut (other than such merchantable trimmings or products as have been mentioned above) under and in accordance with the provisions of the said agreement of the 17th March, 1941. The respondents will pay the costs of the appellants in this appeal.

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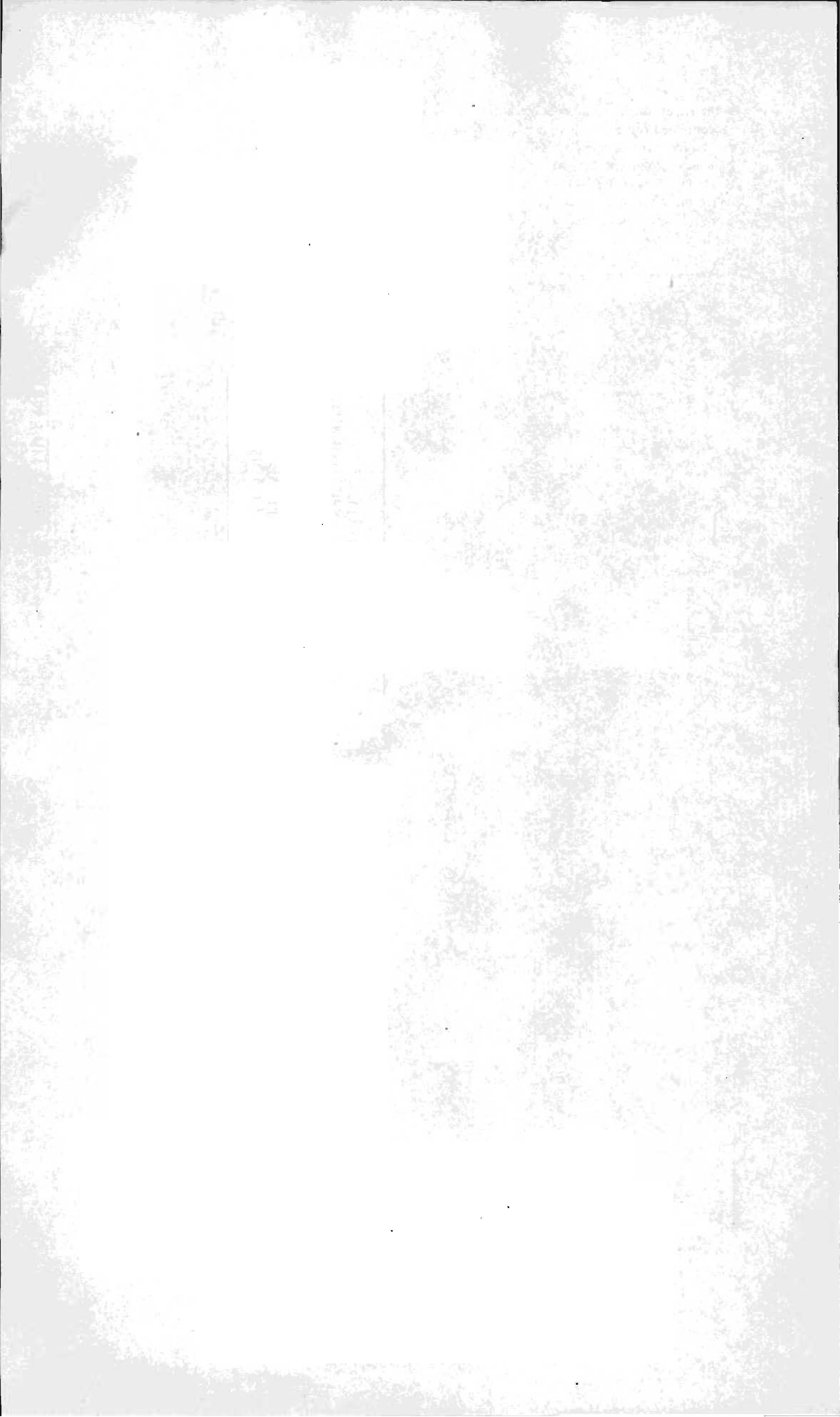

In the Privy Council

THE ABACO LUMBER COMPANY LIMITED

v.

THE BAHAMAS CUBAN COMPANY LIMITED

DELIVERED BY LORD REID

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DRURY LANE, W.C.2.

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