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34254 No. 35 of 1949.

In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF THE BAHAMA ISLANDS.

UNIVERSITY OF LONDON

17 JUL 1953

INSTITUTE OF ADVANCED LEGAL STUDIES

BETWEEN

INSTITUTE OF ADVANCED LEGAL STUDIES

THE TABACO LUMBER COMPANY LIMITED

Appellants

25, RUSSELL SQUARE,

AND

LONDON, W.C.1.

THE BAHAMAS CUBAN COMPANY LIMITED - Respondents.

Case for the Appellants.

RECORD.

10 1. This is an appeal by special leave from a judgment of the Supreme Court of the Bahama Islands, Equity Side, delivered on the 11th November 1948.

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2. The facts out of which this appeal arises are shortly as follows.

3. By Articles of Agreement (hereinafter called "the Principal Agreement") made the 1st January 1906 between Sir William Grey-Wilson, K.C.M.G., Governor of the Bahama Islands acting on behalf of His Majesty (thereinafter called "the Licensors") of the one part and Elijah Hallenbeck and William O'Brien (thereinafter called "the Licensees" which expression included their assigns) of the other part and it was agreed (*inter alia*) as follows:—

p. 24.

(i) By Clause 1 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 and also to extract turpentine and rosin therefrom for a period of ten years from the date thereof.

ib., l. 17.

(ii) By Clause 10 that the following royalties should be payable by the Licensees:—

p. 25, l. 15.

30 (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 37.5 cents per 100 [*sic*] superficial feet board measurement 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 should be deducted from any lumber royalty ultimately paid in respect of the trees on which royalty had been paid under this sub-article.

(c) In respect of all other merchantable trimmings or products obtained by the Licensees under the Licence a special royalty not exceeding the royalty on lumber (the amount of which should be arranged with the Surveyor General).

ib., l. 31.

(iii) By Clause 11 that the amount of the royalty payable thereunder should in no year be less than \$250.00 (American Gold). 10

p. 26, l. 5.

(iv) By Clause 16 that provided that the Licensees should have observed and performed during the aforesaid period of ten years all the conditions thereinbefore mentioned they should have the same rights and privileges for a further period of ten years and if during such second period of ten years they should have observed and performed such conditions then they should have a further extension as aforesaid for a third period of ten years and in like manner up to the period of one hundred years provided that the Licensors might subject as therein mentioned at the end of the first ten years withhold the renewal of so much of the said agreement as related to the right to extract turpentine and rosin. 20

p. 27, l. 21.

(v) By Clause 17 that disputes between the Licensors and the Licensees as to the construction or effect of the said agreement should be referred to arbitration as therein mentioned.

p. 24.

pp. 33, 48, 51.

pp. 28, 31, 36, 41.

p. 55.

4. The rights conferred by the Principal Agreement which were renewed from time to time as therein provided were transferred by divers mesne assignments with the consent of the Crown and ultimately by an Indenture of Assignment dated the 17th March 1941 and made between the Respondents of the one part and the Appellants of the other part the Respondents in consideration of the payment to them by the Appellants of the sum of two dollars United States currency for every one thousand feet of timber or lumber cut from the land comprised in the Principal Agreement which was saleable and on which royalties were payable by the Respondents to the Crown under the Principal Agreement assigned to the Appellants the rights conferred by the Principal Agreement and agreed to apply for the renewal thereof from time to time and the Appellants agreed to pay to the Crown all royalties due in respect of timber or lumber cut from the said land and it was further provided that the Appellants should have the right to cut timber or lumber as aforesaid so long as the Respondents held a licence for such purposes and the Appellants duly paid the sum of two dollars as aforesaid and the said royalties due to the Crown under the Principal Agreement. 30 40

p. 59.

5. By Articles of Agreement dated the 11th December 1945 and made between Sir William Lindsay Murphy, K.C.M.G., Governor of the Bahama Islands acting on behalf of the Crown of the one part and the Respondents of the other part all the rights conferred by the Principal Agreement were renewed in favour of the Respondents for a period of ten years from the 1st January 1946.

6. By an Agreement dated the 8th July 1948 and made between the said Sir William Lindsay Murphy, K.C.M.G., acting on behalf of the Crown of the one part and the Appellants of the other part it was agreed (*inter alia*) as follows :—

10 (A) By Clause 1 that for so long as the Appellants were the assignees of the rights conferred by the Principal Agreement but not exceeding a period of thirty years from the date thereof no royalty should be payable by the Appellants 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 Appellants in utilizing pine trees of and exceeding six inches in diameter at a height of three feet from the base which the Appellants determined were 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
- 20 (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 Your Petitioners and approved of in writing by the Crown.

(B) By Clause 2 that the Crown thereby approved of the said assignment dated the 17th March 1941 from the Respondents to the Appellants.

7. On the 27th July 1948 an originating Summons was issued in the Supreme Court of the Bahama Islands (Equity Side) on the application of the Appellants for the determination of the following question and for a declaration of the rights of the Appellants and the Respondents respectively, namely whether in view of the said Agreement dated the 8th July 1948 and upon the true construction of the said Indenture of Assignment dated the 17th March 1941 the Respondents were entitled to the sum of two dollars United States currency on every one thousand feet in respect of the products specified in Clause 1 (i-vi) of the said Agreement dated the 8th July 1948 cut from the Crown Land referred to in the Principal Agreement which were saleable but in respect of which the Appellants paid no royalty to the Crown.

8. The said summons came on for hearing before His Honour the Chief Justice of the Bahama Islands sitting in Chambers on the 29th and 30th September 1948 and on the 11th November 1948 the Chief Justice gave judgment to the effect that the Respondents were entitled to the sum of two dollars United States currency per thousand feet in respect of the said products and ordered that each party should pay their own costs.

9. In his said judgment the learned Chief Justice stated that in his opinion a royalty was payable to the Crown by virtue of Clause 10 of the

p. 25, l. 15. Principal Agreement in respect of all other merchantable trimmings and products and that the release by the Crown set out in paragraph 6 hereof could not affect the rights of the Appellants and the Respondents under p. 55. the said Assignment dated the 17th March 1941.

p. 10. 10. On the 3rd December 1948 Notice of Motion for leave to appeal to His Majesty in Council against the said Judgment was filed in the Registry of the Supreme Court and served on the Respondents on the p. 8. 6th December 1948.

11. The said Notice of Motion was heard on the 7th December 1948 when the Respondents took the preliminary objection that the said 10 Notice of Motion was out of time. The learned Chief Justice after stating that he wished to allow an appeal adjourned the hearing for further argument of the preliminary objection.

p. 11. 12. On the 15th December 1948 the said adjourned hearing was resumed and the learned Chief Justice after hearing further argument upheld the preliminary objection and dismissed the said motion with costs. The reasons given by the learned Chief Justice for his decision were that under the Rules made by Order in Council dated the 11th October 1912 applications for leave to appeal must be made within 21 days from the date of the judgment to be appealed from and that the 20 Rules of the Bahama Practice giving the Supreme Court power to extend the time appointed for taking proceedings did not apply to appeals from the Supreme Court to Your Majesty in Council, and that therefore he had no power to grant leave to appeal.

13. The Appellants petitioned Your Majesty in Council for special leave to appeal against the said judgment of the learned Chief Justice dated the 11th November 1948.

p. 21, l. 27. 14. The said Petition was heard on the 28th July 1949 and by an Order of His Majesty in Council dated the 29th September 1949 the Appellants were granted special leave to appeal. 30

p. 8. 15. From the said judgment dated the 11th November 1948 this appeal has now been preferred to His Majesty in Council by the Appellants who humbly submit that the same should be allowed with costs for the following among other

REASONS

- p. 25, l. 27. (1) BECAUSE sub-clause (c) of Clause 10 of the Principal Agreement was incapable of imposing any legal obligation of any kind in as much as it was in effect an agreement to make an agreement.
- (2) BECAUSE there had been no arrangement with the 40 Surveyor General in respect of any royalty as therein mentioned and therefore no liability to pay any royalty could ever arise under Clause 10 (c).

- (3) BECAUSE no royalty being payable to the Crown under the Principal Agreement on the lop top and other merchantable trimmings referred to in Clause 1 of the said Agreement dated the 8th July 1948 no royalty in respect thereof was payable by the Appellants to the Respondents under the said Assignment dated the 17th March 1941.

p. 64, l. 29.

p. 55.

MILNER HOLLAND.

GEORGE HESKETH.

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COMPANY LIMITED**

Appellants

AND

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Respondents.

Case for the Appellants.

AMPHLETT & CO.,

6 Wine Office Court,

Fleet Street, E.C.4.