Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Tati Concessions, Limited, v. *Hepple, from the Court of the Resident Commissioner for the Bechuanaland Protectorate; delivered the 8th February* 1905.

Present at the Hearing:

LORD MACNAGHTEN.
LORD LINDLEY.
SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

The Tati Concessions, Limited, an English company limited by shares, having its registered office in London, holds under Government a concession of the District of the Tati lying within the Bechuanaland Protectorate.

On the 21st of April 1902 the Respondent Hepple, under and in accordance with the published rules and regulations of the Company, applied for and obtained a certificate of Preliminary Registration in respect of a "block" of 10 contiguous reef claims of the prescribed dimensions situated in a mining "location" or "defined area of ground" within the District of the Tati and now known as "Little Eva."

Under and subject to the rules and regulations of the Company every holder of a block of reef claims possesses, together with certain other privileges, the exclusive right of mining all reefs comprised within the area of such block vertically downwards. There is no difference between the rights conferred by Preliminary Registration and those acquired by Complete Registration.

34540. 100.—2/1905. [1] A

The distinction between the two forms of registration is that Preliminary Registration is only good for a year. Before the expiration of the year application must be made for Complete Registration, which is granted on payment of the prescribed fees, after survey by the Company's surveyors.

Hepple's certificate of the 21st of April 1902 was in the prescribed form scheduled to the Company's rules and regulations. It was expressed to be issued "under and subject to the "mining rules and regulations of the Company." It bore on the face of it a statement that rent "payable in advance" was "1*l.* 5*s.* per calendar "month for first six months, 2*l.* 10*s.* for each "next 12 months, and 5*l.* per month thereafter." The rules and regulations of the Company provide in express terms that from the date of the issue of a Certificate of Preliminary or Complete Registration the rents payable to the Company "shall be payable monthly in advance," and that "in relation to the payment of all rents * * * "time shall be of the essence of the contract."

Hepple made default in payment of rent for May, and also for June.

On the 18th of June 1902 the Resident General Manager, under instructions from the Board in London, declared Hepple's 10 claims forfeited.

Hepple was not in actual occupation of the ground at the time. As soon as he heard of the forfeiture he tendered a sum to cover the rent in arrear and demanded to be restored. His application was rejected. Then he brought this action, claiming restitution with compensation for disturbance, or in the alternative 5,000*l.* damages. The case was tried before the Assistant Commissioner for the Bechuanaland Protectorate. Judgment was given in favour of Hepple with costs, ordering restitution with payment of the sum of 250*l.*, and awarding in

the alternative 1,800*l.* damages. The Resident Commissioner on Appeal affirmed the Judgment, but reduced the damages awarded in lieu of restitution to 1,500*l.*

The principal question on the Appeal to this Board was whether the published rules and regulations of the Company confer upon the Company the right to forfeit a Certificate of Registration on default in payment of rent. Assuming such right to exist under the rules and regulations of the Company, it was contended on behalf of the Respondent (1) that the mining rights and privileges attached to the possession of a Certificate of Registration were equivalent to a lease of the ground, and that consequently in accordance with Roman Dutch Law forfeiture could not be enforced until after a period of two years' default, or, at any rate, until after judgment in a Court of Law, and (2) that the conduct of the Company under the circumstances had been such as to preclude them from enforcing any right of forfeiture under their published rules and regulations.

Before dealing with the main question it will be convenient to dispose of these two contentions.

It appears to their Lordships that Hepple's holding under his Certificate of Registration was not equivalent to a lease of the block referred to in the certificate. The mining rights and privileges conferred by a Certificate of Registration do not, in their Lordships' opinion, fall under any head or category known to the Roman Dutch Law. The authorities that were cited at the Bar satisfy their Lordships that the rights of the parties under a Certificate of Registration depend upon contract only, and must be governed by the special stipulations to which the parties have agreed.

It cannot be denied that in Hepple's case the Company acted with unusual promptitude,

not to say with exceptional harshness. There were many other holders of reef claims in arrear for rent at the time. Their mining claims, in the view of the Company, were equally liable to forfeiture. But Hepple was the only one against whom the Company chose to enforce extreme rights. His claims appear to have been forfeited because the Directors of the Company wanted to get the whole of the location of which Hepple's block formed part into their own hands, with some view of disposing of it to advantage on the London market. Still, however unusual or unexpected the action of the Company may have been, it is difficult to see how indulgence to other certificate holders can, of itself and apart from other circumstances, raise an equity in favour of Hepple. Inequality in the treatment of persons all in the same position naturally gives rise to a sense of injustice. But the Company did Hepple no wrong. He would have been no better off if the other defaulters had suffered with him.

Then it was said that something occurred that may have had the effect of leading Hepple to think that though he was in default there was no danger of forfeiture. It seems that a day or two before the forfeiture was declared Hepple's agent, or partner, one Ryan, called at the Secretary's offices on some other business. As he was going away he observed that he would call again in two or three days and pay the rent for Little Eva. On this, it is said, the Secretary replied, "All right." The Secretary declares that he "said nothing to lead Ryan to suppose "that he had any extension of time in which to "pay his rent for claims." In fact, the Secretary has no recollection of any conversation with Ryan about the Little Eva block. But, supposing he did make the remark which is attributed

to him, it seems rather a slender foundation for a grave argument to the effect that the officials of the Company gave Hepple to understand that the Directors of the Company had no intention of enforcing their strict rights, especially when it is plain from the rules and regulations of the Company that no one but the Resident General Manager has power to condone a forfeiture. It is not pretended that the Secretary had anything to do with a matter of that sort.

The whole question then depends upon the true construction of the published rules and regulations of the Company. The general scheme is simple enough. In every case everything begins with a "prospecting licence." On payment of a fee of 1*s.* the Resident General Manager may grant to any person of full age and appearing personally at the offices of the Company a licence to prospect and search for any of the minerals to which the rules and regulations of the Company apply. Before the issue of the licence the applicant is required to sign an undertaking to comply with all the mining rules and regulations of the Company. Rule 8 provides that any person failing to observe the conditions of such undertaking "shall be liable to forfeiture of his pros-"pecting licence and any privileges acquired "thereunder."

The holder of a prospecting licence who may discover an ore-bearing reef may post in a conspicuous place within 50 feet of the point where the reef has been discovered, a notice termed a "Discovery Notice." Then he has the exclusive privilege of prospecting for a period of 40 days within an area of 1,000 feet from the discovery point. Within the 40 days he may peg off a block of 10 claims, which is the normal size of a "block," and post a notice on the block styled the "Registration Notice." He has then seven

days within which he may obtain a Certificate of Preliminary Registration. From the issue of the Certificate rent at the prescribed rate, 2*s.* 6*d.* for a reef claim for each of the first six months, becomes payable monthly in advance, and, as already stated, in regard to payment of rent, time is declared to be of the essence of the contract.

It was said, and said truly, that there is no provision in the rules and regulations declaring in express terms and in so many words that claims are liable to be forfeited in the event of any failure to pay rent. But that condition is necessarily implied. Without some provision of the sort, summary in character, automatic in action, and easy of application, it would be utterly impossible for the Company to secure payment of small rents payable at short intervals by adventurers without fixed property, many of whom may be camping in places difficult of access. To any person reading the rules and regulations fairly, it must be plain that liability to forfeiture runs through the whole set, and is the groundwork on which the Company must rely for the maintenance of its revenue. It is the ultimate and the only sanction of all the provisions and reservations in favour of the Company.

It was contended by the learned Counsel for the Respondent, who argued the case with great care and ability, that liability to forfeiture under Rule 8 terminated with the termination of the prospecting licence which comes to an end when application is made for a Certificate of Preliminary Registration. To that argument there are two answers. In the first place it would be a very narrow construction of Rule 8. All mining rights and privileges are consequent upon, and so are acquired under, the prospecting licence. They all flow from that licence, which

is the first step in each and every case. The point however is made perfectly clear by Rule 51, which provides that "at any time prior to "forfeiture or after forfeiture and prior to "re-grant by the Company the Resident General "Manager may take into consideration the "death of the holder of a mining location, or "other special circumstances, and may, if "satisfied that such special circumstances suffi-"ciently account for failure to pay rents, dues, "fees, or fines condone or revoke the forfeiture "on payment of all rents, dues, fees, and fines "then due." Now it is plain on the face of the rules that under a Prospecting Licence no rent is payable. On the other hand it is clear from Rule 51 that failure to pay rent does create forfeiture.

Their Lordships, in the result, are of opinion that the Judgments of the Assistant Commissioner and the Resident Commissioner cannot be supported. The action ought to have been and should be dismissed, but without costs. The Judgment of the Resident Commissioner, except as to the claim in reconvention and the Order for the Respondent to pay the costs of the Appeal, should be discharged, and any damages paid under that Judgment returned. The Order of the 3rd of October 1903 should not be disturbed. Their Lordships will humbly advise His Majesty accordingly.

The Respondent must pay the costs of the Appeal.