Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Vilander Concessions Syndicate v. *The Government of the Colony of the Cape of Good Hope, from the Supreme Court of the Colony of the Cape of Good Hope; delivered the 7th February* 1907.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD ATKINSON.

[*Delivered by Lord Robertson.*]

The question in this Appeal is of the present effect, in relation to the Government of the Cape Colony, of a certain concession of minerals obtained by one Adolph Heinrich Carstensen from a native chief in Bechuanaland in 1889 and 1890. The Appellants are admittedly vested in all the rights of Carstensen.

At the time of those concessions, there was only a Protectorate of the territory in question, Her late Majesty's sovereignty not having been proclaimed until 1891. Accordingly it is assumed that, in those days, David Vilander, the chief who granted the concession, was competent to deal with those minerals. The immediate question is rather of the effect of the decision on the concession of a Court styled "The British "Bechuanaland Concession Court," which was constituted in 1893, and authorised to inquire into and decide upon the validity and scope of all such concessions from native chiefs made

prior to 1891. Postponing, in the meantime, any examination of the terms of the Proclamation of 1st February 1893, establishing this Court, it is convenient now to say that the Appellants submitted their claim under Carstensen's concession to this Court, and the Court inquired into and decided upon it, their Judgment being entered under the head "'A' claims allowed," "A. H. Carstensen, mineral rights over the whole "of Vilander's country.

"The entire claim as proved granted, subject "to all laws and regulations of British Bechu- "analand relating to mines and minerals, and "otherwise in force in the said territory."

The whole controversy in the present Appeal turns on the qualification or condition introduced into this decision by the word "subject," and neither party has pointed to any other law or regulation as bearing on the question than a Proclamation dated 25th April 1889. The contention of the Respondent is that, in so far as the precious minerals are concerned, the privileges conferred by Vilander on Carstensen have, by this decision, been restricted to the rights allowed to subjects by the Proclamation of 1889. It is not necessary, in detail, to compare or contrast the rights purported to be conferred on Carstensen by Vilander with the rights allowed by the Proclamation. It is still less necessary to contrast the latter with the claim of exclusive right which is, for the first time, advanced in express terms in the Appellants' case. Suffice it to say that the difference, in either view, is so great, that, if the Proclamation be the true measure of the Appellants' rights in the precious minerals, they rightly failed in the Courts of the Colony.

In the Colony the litigation between the parties was commenced by summons dated 1st June 1904, by which the Appellants claimed a declaration;

but it was agreed that the question should be tried on a Special Case, and the contention of the parties, the Appellants (as Plaintiffs) and the Respondent (as Defendant), were stated in the following (very general) terms :—

" The Plaintiffs contend that the concession " and further concession are and have been of " full force and effect and binding upon the " Government, and that they are entitled to have " their rights in, arising out of, and under the " said concession and further concession, declared " accordingly by this Honourable Court, and to " obtain an order declaring that as to all grants " already issued with such reservations the " Colonial Government is bound to recognise the " said reservations as made for and on behalf of " the Plaintiffs, and directing the Government " as to any further grants of land in the said " territory to include a condition subjecting such " grants to the rights of the Plaintiffs and their " successors or assignees under the aforesaid " concessions."

The Defendant contended—

" That the Plaintiffs are not entitled in the " premises to the relief claimed."

The Chief Justice on 7th March 1905, granted judgment in favour of the Defendant's contention, " this Judgment to have effect only " of absolution from the instance." On appeal, this Judgment was affirmed by the Supreme Court, sitting as a Court of Appeal, on 19th June 1905. The present Appeal was then brought.

Reverting now to the concession of Vilander, it is to be observed (1) that it does not purport to make the right conferred an " exclusive right " to search for and win minerals in the territory " in question "; and (2) that it is not confined to the precious minerals but applies to all minerals. It gives to the grantee a mining concession to search for and win precious

stones, gold, silver, platinum and other minerals over and in one or more area or areas not to exceed in the aggregate 20 miles square or 400 square miles, to be chosen by the grantee. Then, as soon as the grantee has selected the area, he is, in consideration of a stipulated rent and royalty, to "be entitled to convert to his "own use all precious stones and all minerals "whatsoever found within the limits of this "concession or demise." The concession was to last so long as the stipulated rent and royalty were punctually paid.

Now it should seem the just result of these provisions that assuming the grantee, once he has selected and marked off his area, to have an exclusive right to the minerals found in that area, his antecedent right to prospect within the territory of Vilander was not exclusive and could effectively be exercised although not exclusive.

Considering, however, apart altogether from this question of exclusiveness, the effect of the qualification or condition imposed by the Concession Court in 1893 on the Appellants' claim on Carstensen's concession, it is to be observed that that qualification operated solely on the right to precious minerals and did not touch the right to other minerals, which, as has been seen, was conferred on Carstensen. Accordingly it is not the case, as was maintained by the Appellants, that the Judgment of the Concession Court, on the theory of the Respondent, extinguishes, while it purports only to qualify, the rights conferred by the concession. If the concessionaire had an exclusive right to prospect for the baser minerals, that right is untouched by the qualification in the Judgment and he has it still. If, on the other hand, the right to prospect for the baser minerals be not exclusive, again, it exists *tantum et tale* as in the concession. What the qualification does modify is the right to the precious

minerals. And their Lordships have not heard any argument which gives any effect at all to the words of the qualifying part of the Judgment and at the same time supports the Appellants' claim. Such argument as has been advanced does not offer a competing construction of the qualification (and indeed none is possible), but goes to establish a repugnancy between that part of the Judgment which sustains the claim and that part which subjects it to the rules and regulations. The Appellants have indeed assumed that, if there be a repugnancy, they are entitled to solve the difficulty by ignoring the condition imposed by the Court to which they submitted their claim. But it was unquestionably competent for that Court to hold the concession to have been honestly obtained, and at the same time to "modify the terms, conditions, and scope" of the concession, or to "impose equitable limita-"tions, restrictions, or conditions upon" its exercise. (Section 23 of the Proclamation of 1st February 1893.) And it is wholly intelligible that, in the present instance, the Court should allow the concession full scope as regards the baser metals, in which region the rights conferred were not in excess of existing rules, while, as to the precious metals, the concessionaires were made subject to the ordinary rules.

This is the view which their Lordships take, and they will therefore humbly advise His Majesty that the Appeal ought to be dismissed. The Appellants will pay the costs of the Appeal.