

Privy Council Appeal No. 66 of 1913.

The Wassaw Exploring Syndicate, Limited - *Appellants.*

v.

The African Rubber Company, Limited - *Respondents.*

FROM

THE SUPREME COURT OF THE GOLD COAST COLONY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 29TH APRIL 1914.

Present at the Hearing :

LORD ATKINSON.

LORD MOULTON.

LORD SHAW.

LORD SUMNER.

[*Delivered by* LORD SHAW.]

This is an appeal from a judgment of the Full Court of the Supreme Court of the Gold Coast, which affirmed a judgment of the Concessions Division of that Colony.

There is in operation in the Colony the Concessions Ordinance of the year 1900, as amended by subsequent ordinances of the years 1901, 1902, 1903 and 1905. The ordinance in question in the present case is No. 14 of the year 1900. Under that ordinance a Divisional Court of the Supreme Court has jurisdiction to inquire into and certify as valid or invalid any concession, and by Section 8 it is provided that "no proceedings shall, without the leave of the Court, be taken to give effect to any concession unless such concession has been certified as valid by the Court." The question before their Lordships arises out of a decision by this Concessions Court.

Generally speaking, one may say that the object of this legislation is for the protection of the natives and the native chiefs, for the validation at the sight of the Court of concessions granted of mining rights, rights of cutting trees, &c., and for the regularising of the rights of competing concessionaires by establishing priority among them *inter se*. On this last point Section 23 provides that "a certificate of validity shall be good and valid from the date of such certificate as against any person claiming adversely thereto."

In 1906 the respondents, the African Rubber Company, obtained a concession by agreement between Chief Cudjoe Sah of Arkwasu, on behalf of himself his heirs and successors, and his tribe, by which the lessors granted, let, and demised to the respondents a parcel of land containing an area of five square miles "and all rubber, vines, fruits, trees, root and grass rubber, timber of all description, and surface rights and property in the said surface land and premises." Full and exclusive powers and liberty were granted to the respondents and their assigns to collect rubber, make clearings, construct farms, and to grow rubber or any other produce. The letting and demise also included all mines, mineral substances, precious stones, and gave power to erect buildings, roads, and the like, and to divert watercourses, "and to do all acts matters and things so absolutely and effectively" as if the respondents and their assigns were for the term thereby "intended to be demised absolute owner of the fee simple." With regard to timber the grant was expressed thus: "with liberty to cut remove and fell, and carry away all trees timber shrubs and plants either for the purpose of carrying on the works of the lessees or for the purpose of sale."

As stated, this agreement was made in 1906. An application was made in the end of 1909 for a certificate validating this concession. This was opposed by the appellants, the Wassaw Company, and on the 29th July 1912, the judgment appealed from, disallowing the Wassaw Company's opposition, was pronounced.

The *locus standi* of the Wassaw Company, the appellants, was this: In 1909 they had obtained a concession from the succeeding Chief of certain territory, part of which was the same as that contained in the concession granted to the respondents three years before. But the appellants promptly, that is to say, in the beginning of January 1910, obtained and applied for a certificate of validity. So far as the dates go, accordingly, the appellants' certificate, which was recorded on the 4th January 1910, has priority to that of the respondents.

The Wassaw Company now pleads its right, under the demise to it, altogether to exclude the African Rubber Company from the overlapping portion of the territory, to prevent it from either planting or cutting trees thereon, and in short to treat it in going upon the land for any purpose as a trespasser. This was the argument presented to their Lordships.

The Wassaw Company's lease is printed. It is true that it bears to be "a demise and grant" of a certain parcel of land, together with all the mines and minerals therein. The period of the grant is for ninety-nine years. There then follow clauses beginning: "It is hereby agreed and declared that during the continuance of this demise the Company shall have full free and exclusive liberty" to sink and make pits erect bridges use ground as timber-ground take and carry away minerals make tram-roads "and also to cut hew down and fell and take away any timber or trees on the said lands for the use of

“ the steam engines and machinery used in the
 “ said mines and for the erection and main-
 “ tenance of any buildings works and contri-
 “ vances thereon.” It is upon the earlier portion
 of this clause as a comprehensively exclusive
 demise, that the appellants take their stand.

Their lease further proceeds to give power
 to divert and turn water and water-courses “ for
 “ the purpose of more effectually exercising and
 “ enjoying the liberties and privileges and ease-
 “ ments hereby granted,” and also to do all
 necessary acts or use all necessary devices “ for
 “ the efficient working of the mines and premises
 “ hereby demised.” The demise concludes by
 giving to the Company peaceable possession in
 these terms, which their Lordships think are
 important, viz. : That they shall “ peaceably and
 “ quietly possess and enjoy the mines and premises
 “ hereby demised and exercise the rights and
 “ privileges hereby conferred without any inter-
 “ ruption by the Chief,” &c.

The appellants in certain portions of their
 written grounds of opposition appear to concede
 the practical limits of the rights thus conferred
 upon them. They confine their position to that
 of mining lessees, and they claim “ the right to
 “ such timber as may be required for purposes
 “ ancillary to such mining, with the usual inci-
 “ dental powers and rights necessary for the
 “ beneficial enjoyment of such concession.”
 Standing their priority on the concession record,
 this appears to their Lordships to be a correct
 statement of the measure of their rights. This
 the respondents, the African Rubber Company,
 have never disputed. And it ought to be further
 added, in fairness to the Courts below, that in
 these Courts this measure was never questioned
 or denied. Nor do their Lordships see any
 occasion to doubt that, suppose the proceed-
 ings had gone to the further stage of granting

to the respondents a certificate of their, the respondents' title, that certificate would have been so worded as amply to protect any prior mining rights and all rights ancillary thereto which had been created in the appellants by their first validity concession.

It is now maintained, however, by the appellants and it appears also to have been so argued in the Courts below that the terms employed in their lease, are of such a character as to give them a demise of the land itself with the exclusive possession for ninety-nine years thereof and of all the timber thereon, and with a right also to prevent trespass on any part of the area in question. Their Lordships cannot so construe the rights of the appellants.

In the first place, it has to be observed that a right of exclusion of this character as arising out of the agreement of lease if treated as a demise of land does not appear to be within the definition of "concession" or to be the subject of validation by the Concessions Court, or to gain any priority thereby. By the Ordinance "concession" means "any writing whereby any right " interest or property in or over land with " respect to minerals precious stones timber " rubber or other products of the soil " purports to be granted by a native. This definition does not extend to a demise of the surface of the land, nor does it extend to a sale or lease of the land itself. Even if the lease were construed as a demise of the land it is something which is not a concession and to which priority under the Concessions Ordinance has no application.

In so far, moreover, as the lease bears this character it cannot be pleaded in a question with the respondents, the African Rubber Company, who three years before had in fact obtained a title of a similar or rather of a much broader character and not confined to mining purposes

or purposes ancillary thereto. What is being done, as their Lordships understand, is that the respondent Company, under their lease of 1906, are cutting certain rubber trees and planting others, and developing the property in an agricultural and arboricultural sense. All this—subject to the appellants' mining needs—appears to be within the respondents' just rights.

The next point, however, is the general one and is of importance. The appellants, having got first on the Concessions Record with their mining lease, propose to prevent these operations of the respondents upon the area in question because of the use of the word "exclusive" in that lease. They admit that they could not develop this territory themselves, indeed that they could not cut a tree upon it, except for their mining purposes. But they construe their rights as if the lease entitled them to prevent any development of this large tract of land by anyone else. Their plea is that it can never be known, if, say, trees were cut down, whether in the course of a century they, the Wassaw Company, or their successors might not come to require those trees. In their Lordships' opinion this plea is not well founded. Although the term "exclusive" is employed it has to be admitted that this term must be taken along with one specific and particular purpose and the strictly limited nature of the rights of mining which are the subject of the grant. Accordingly the word cannot be comprehensively interpreted. For the result, upon such an interpretation, would produce a quite impracticable situation.

The Concessions Ordinance entirely covers such a case. It is provided under Section 13 that "it shall be lawful for the Court in its discretion to make such modifications in the terms of any concession and to impose such conditions with respect to the issue of any

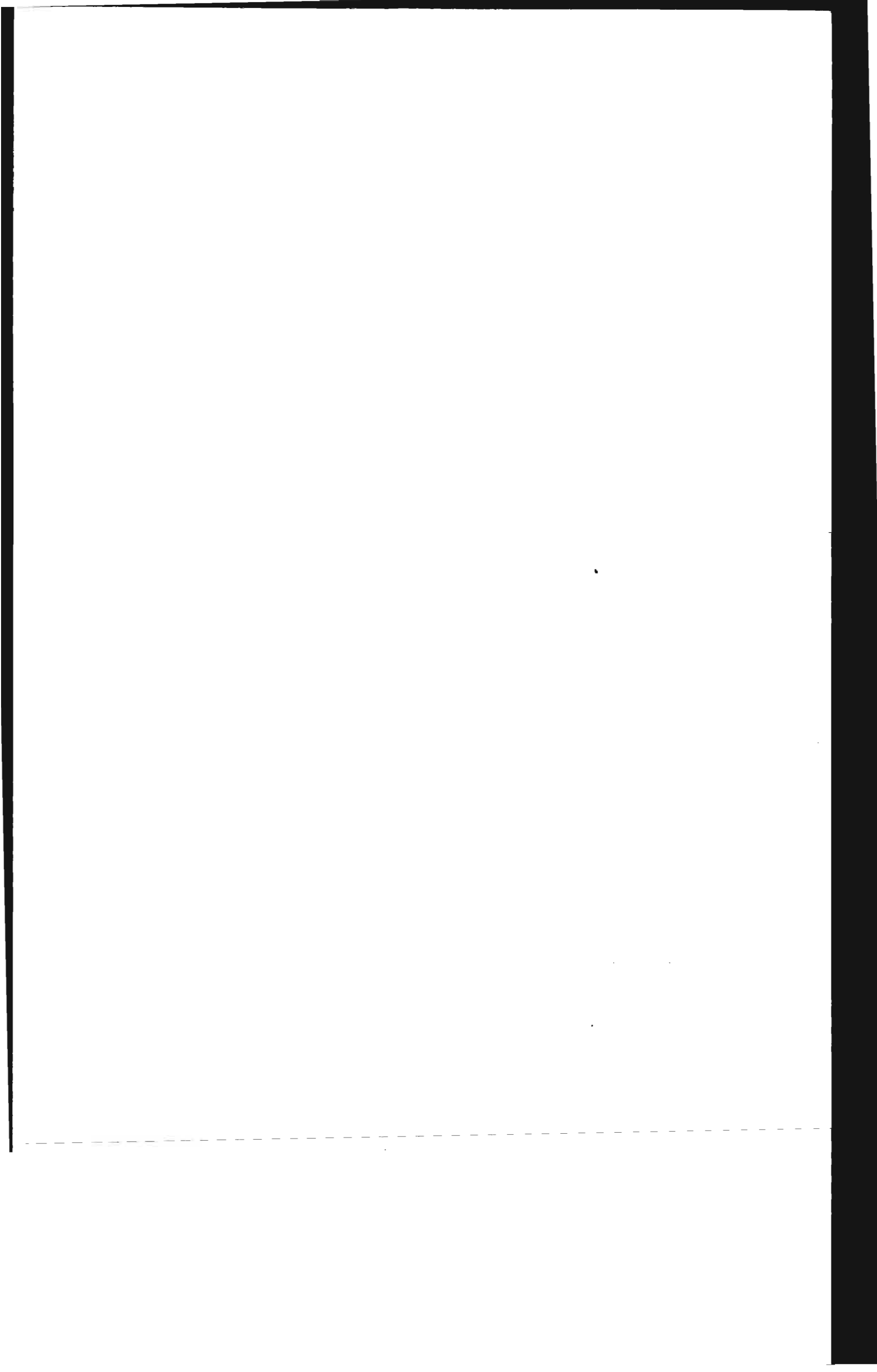
“ certificate of validity as to the Court shall seem “ just.” It is then provided by Section 16 that the certificate of validity shall *inter alia* contain a statement “ of any limitations, modifications “ and conditions imposed by the Court.” Nothing could more clearly indicate that in the case of rival claims to, or overlapping rights in, any area which is the subject of a concession, the Court can adjust the rights of parties by exercising their discretion and having the practical regulation of these rights determined on the spot.

Their Lordships accordingly must repel the plea put forward by the appellants in this case in so far as it is a claim for exclusive possession of land, or for a right to exclude the respondents from it, or from exercising upon it all such rights of cutting and planting timber and the like as do not in point of fact invade the rights of the appellant Company as mining lessees.

It is with regret, however, that their Lordships have to observe that the actual order made in this case, in so far as it dismissed the opposition of the appellants at a stage prior to the actual terms of the certificate to be proposed being announced, was premature. The judgment referred to is that of the 24th February 1913. The Court, says that judgment, “ is of opinion “ that the grantor retained the right to grant “ concessions subject to the prior rights of the “ opposer under their certificate of validity.” This opinion, their Lordships think, was correct. But when the order proceeded, “ The Court is “ therefore of opinion that the Court of First “ Instance was justified in dismissing an “ opposition which appears to be based entirely “ upon hypothetical grounds,” their Lordships unfortunately cannot agree. The appellants hold a title by their prior certificate to what was to some extent a competing right in regard to the same

area of ground, and in these circumstances they think that the appellants had a right to remain in Court until the terms of the certificate came to be adjusted. Their Lordships do not doubt that now that the claim of the appellants on the arguments submitted has been settled in the negative, the certificate of validity of the concession to the respondents will be dealt with by making such limitations, modifications, and conditions as will conserve the mining rights of the appellants and those rights of cutting timber which are ancillary thereto.

In the circumstances the orders for costs in the Courts below will not be disturbed, but their Lordships will humbly advise His Majesty to allow the appeal, and to remit the case to the Supreme Court, so that the proper steps may be taken for issuing to the respondents a certificate with the requisite limitations, modifications, and conditions, the respondents having leave to object thereto if so advised. Their Lordships are not inclined to think that the appellants would have been prejudiced by allowing the case to go forward to a certificate, the views of the Court in the direction of protecting their, the appellants', rights having been made plain. There will be no costs of the present appeal.



In the Privy Council.

THE WASSAW EXPLORING SYNDICATE,
LIMITED,

o.

THE AFRICAN RUBBER COMPANY,
LIMITED.

DELIVERED BY LORD SHAW.

LONDON:

PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1914.