

1902
*Oct. 23,
24, 27.
*Nov. 18.

HIS MAJESTY THE KING (RE- } APPELLANT ;
SPONDENT)..... }

AND

WILLIAM CHAPPELLE (SUPPLI- } RESPONDENT.
ANT)..... }

HIS MAJESTY THE KING (RE- } APPELLANT ;
SPONDENT)..... }

AND

GEORGE W. CARMACK (SUPPLI- } RESPONDENT.
ANT)..... }

HIS MAJESTY THE KING (RE- } APPELLANT ;
SPONDENT)..... }

AND

JAMES TWEED AND CHARLES } RESPONDENTS.
WOOG (SUPPLIANTS)..... }

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Mining law—Royalties—Dominion Lands Act—Publication of regulations
—Renewal of license—Payment of royalties—Voluntary payment—
R. S. C., c. 54, ss. 90, 91.*

The Dominion Government, by regulations made under The Do-
minion Lands Act, may validly reserve a royalty on gold pro-
duced by placer mining in the Yukon though the miner, by his
license, has the exclusive right to all the gold mined. Taschereau
and Sedgwick JJ. dissenting.

The "exclusive right" given by the license is exclusive only against
quartz or hydraulic licensees or owners of surface rights and not
against the Crown. Taschereau and Sedgwick JJ. dissenting.

*PRESENT :—Sir Henry Strong C.J. and Taschereau, Sedgewick,
Girouard and Davies JJ.

The provision in sec. 91 of the Dominion Lands Act that regulations made thereunder shall have effect only after publication for four successive weeks in the Canada Gazette means that the regulations do not come into force on publication in the last of the four successive issues of the Gazette but only on the expiration of one week therefrom. Thus where they were published for the fourth time in the issue of September 4th they were not in force until the 11th and did not affect a license granted on September 9th.

Where regulations provided that failure to pay royalties would forfeit the claim, and a notice to that effect was posted on the claim and served on the licensee, payment by the latter under protest was not a voluntary payment.

One of the regulations of 1889 was that "the entry of every holder of a grant for placer mining had to be renewed and his receipt relinquished and replaced every year."

Held, per Girouard and Davies JJ., Sedgewick J. dissenting, that the new entry and receipt did not entitle the holder to mine on the terms and conditions in his original grant only but he did so subject to the terms of any regulations made since such grant was issued.

The new entry cannot be made and new receipt given until the term of the grant has expired. Therefore, where a grant for one year was issued in December, 1896, and in August, 1897, the renewal license was given to the miner, such renewal only took effect in December, 1897, and was subject to regulations made in September of that year.

Regulations in force when a license issued were shortly after cancelled by new regulations imposing a smaller royalty.

Held, that the new regulations were substituted for the others and applied to said license.

Judgment of the Exchequer Court [(7 Ex. C. R. 414) Reversed in part.*

APPEALS from judgments of the Exchequer Court of Canada (1), in favour of the suppliants.

The respective suppliants by petition of right sought to recover from the Crown the amounts paid under protest for royalties on the products of their placer mining operations in the Yukon Territory. The several grounds on which they claimed that the royalties were illegally exacted were as follows:—

* Leave to appeal to the Privy Council has been granted.

(1) *Chappelle v. The King*, 7 Ex. C. R. 414.

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In Chapelle's case, that the regulations imposing the payment of royalties were not published for four successive weeks in the Canada Gazette.

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In all the cases, that when the royalties were exacted the licenses under which the suppliants operated were renewals of the original grant and not subject to regulations made since said grant issued ; that the licenses gave the miners the exclusive right to all the proceeds realized from their claims and the regulations could not derogate from the grant ; and that while the licenses were in force the regulations governing them (if they did govern them) were cancelled by new regulations which could not apply as they were made subsequent to the grant and the old regulations could not as they did not exist.

In the Exchequer Court judgment was given for each of the suppliants for the amount claimed. The Crown appealed.

The Attorney General for Canada and H. S. Osler, K. C. for the appellant. The publication was complete on insertion in the fourth issue of the Gazette. *Coe v. Township of Pickering* (1).

The payment was voluntary and could not be recovered back. See *Bain v. City of Montreal* (2); *Ex parte Lewin* (3); *Benjamin v. County of Elgin* (4); *Langley v. Van Allen* (5).

As to the regulations that affect a renewal, see *Smylie v. The Queen* (6). And see Dalloz, *vo.* "Mines."

Armour K.C. and *J. Travers Lewis* for the respondents. The license to mine gave the miners the property in the minerals taken out. See *Gowan v. Christie*.

(1) 24 U. C. Q. B. 439. (4) 26 U. C. Q. B. 660.
(2) 8 Can. S. C. R. 252. (5) 32 Can. S. C. R. 174.
(3) 11 Can. S. C. R. 484. (6) 27 Ont. App. R. 172.

(1); *Duke of Sutherland v. Heathcote* (2); *Osborne v. Morgan* (3). Bainbridge on Mines p. 288.

The grant is a lease from year to year and the terms are in force as long as it is renewed. *Bulmer v. The Queen* (4). Preston on Conveyancing, pp. 76-77.

As to the right of the Crown to make regulations taking away the miners' property, see *Les Ecclesiastiques de St. Sulpice v. City of Montreal* (5); and for the primary meaning of "royalty," *Mercer v. Attorney General for Ontario* (6).

The CHIEF JUSTICE.—I am of opinion that the appeal in the case of *The King v. Chappelle* should be allowed and the Petition of Right dismissed as to the sum of \$1,637; that the appeal should be dismissed as to the sum of \$10,429, and that there should be no costs of the principal appeal to either party. Further that the cross-appeal should be allowed with costs.

In the case of *The King v. Carmack*, I am of opinion that the appeal should be allowed and the Petition of Right dismissed with costs, the Crown to have the costs of the appeal.

In the case of *The King v. Tweed and Woog*, I am of opinion that the appeal should be allowed with costs and the Petition of Right dismissed with costs.

TASCHEREAU J. (dissenting).—As I view this case (*The King v. Chappelle*), it is not a complicated one.

By the two licenses of 1897 the Crown, for consideration, granted to the respondent for one year, not only the exclusive right of entry upon the mining claims therein described, but also, in express terms, the *exclusive right to all the proceeds realised therefrom dur-*

(1) L. R. 2 H. L. Sc. 273.

(2) [1892] 1 Ch. 475.

(3) 13 App. Cas. 227.

(4) 23 Can. S. C. R. 488.

(5) 16 Can. S. C. R. 399.

(6) 5 Can. S. C. R. 538.

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ing that year, in accordance with both the regulations of 1889 (sec. 23,) and the regulations of the 21st of May, 1897, (secs, 17 and 23,) then in force.

The Crown now contends that these documents do not mean what they say, and that the respondent was not entitled to the *exclusive* right to *all* the proceeds he realised from the said mining claim, though that was the right granted to him in so many words. That contention is based upon the ground that the grant was made subject to the provisions of the mining regulations, by which regulations, as amended on the 29th of July, 1897, a royalty was imposed upon the proceeds of the said mining claims and was therefore, as it is contended, due by the respondent and rightly collected by the Crown. In my opinion, that contention cannot prevail.

Assuming that the Crown had the right to reserve or impose a royalty in the respondent's said licenses, it did not do so. And I cannot accede to the proposition that, having expressly granted all the proceeds of the mines without restriction, such a wide construction should be given to the words "subject to the mining regulations" as to give to the Crown the right to derogate from that grant or cut it down entirely. What is subject to the mining regulations? The *exclusive* right to *all* and every particle of gold taken from the claim. It cannot be implied, in my opinion, that by reserving the right to regulate the grant to all the gold extracted the Crown, thereby, reserved the right to curtail or diminish the grant itself, nay, to extinguish it in whole or in part.

By section thirty-seven of the regulations of the 18th of January, 1898, a royalty is now specially reserved, and in all licenses issued thereafter the grant is made upon the express condition that the royalty prescribed by the regulations shall be paid, (so by section thirty-

seven of the regulations of March, 1901,) but the respondent's licenses contain no such restriction.

Though, previous to the issue of the respondent's licenses, the said royalty had been imposed, yet the regulation giving all the gold to the licensee without restriction and the form of the license itself to that effect were then left in force. And though it may well be argued that the regulation imposing such royalty should be taken as an amendment to the previously existing ones, yet if the Crown, notwithstanding its right to impose it, contracted with the respondent that it would not do so, but that he would have the *exclusive* right to *all* the gold extracted from his claim, as theretofore, I cannot see upon what ground those contracts can be construed as not granting to the respondent, according to their unambiguous terms, the right to all that gold, exclusive from the grantor; for the word "exclusive" therein must extend to the Crown. The Crown cannot be permitted to contend, it seems to me clear, under the most elementary rules on the construction of contracts, that, as this one reads, the exclusive right of the grantee to the thing granted admits of the right of the grantor to diminish or take away the thing granted. The power to regulate implies the continued existence of that which is to be regulated. *The City of Toronto v. Virgo* (1).

The words "subject to the mining regulations" must be construed as if followed by the words "not inconsistent with the grant of the *exclusive* right to *all* the minerals." A grant implies a contract not to revoke or impair the grant. It is a transfer of all the rights of the grantor implying a covenant by him not to reassert those rights in any shape or form. Any reservation by the grantor to the contrary must appear in clear and unambiguous terms.

(1) [1896] A.C. 88.

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Here the Crown, by claiming the royalty in question, seeks to revoke *pro tanto* the grant to the respondent. Is that regulating it?

It is pleaded for the Crown, in the statement of defence, that if these licenses are to be construed as not imposing this royalty upon the respondent, they have then been issued improvidently and were *ultra vires* of the Gold Commissioner. Now, so to repudiate the Act of the Gold Commissioner, after having acted upon it and treated these grants as in full force till this petition of right was brought in, is, I am sure, a position that will not be insisted upon on the part of the Crown, assuming it to be well founded in law and open to the Crown in this case.

Then, under our statutes, it must not be lost sight of, the rule *respondet superior* applies with as much force almost between subject and the Crown as between subject and subject. It was under these licenses exclusively that the Crown claimed the right to this royalty; it was under these licenses that this royalty was paid and received, and, if they did not entitle the Crown to the said royalty, if it was therefore illegally imposed upon the respondent, the moneys he paid should be refunded to him. The Commissioner had to issue those licenses as they read. The regulations by the Crown obliged him to do so. How then can it be contended that he acted *ultra vires* and that the respondent was a trespasser upon this property and is not entitled to a particle of the gold he extracted therefrom?

It is further contended on the part of the Crown that even if the money has been illegally collected under these licenses, yet the Crown is entitled to keep it because, the respondent being an alien, the grant to him is void. I am not surprised that the Attorney-

General refrained from relying at bar upon that part of the Crown's factum.

As to the contention that the money has been paid voluntarily, I would not interfere with the finding of fact of the Exchequer Court upon this part of the case. The respondent had no option but to pay or be ejected.

I would dismiss the appeal with costs. The cross appeal I would allow with costs. As to the two other cases, I am bound by the judgment of the court in the *Chappelle Case* and do not dissent.

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SEDGEWICK J.—One William Chappelle, one George W. Carmack and James Tweed and Charles Woog, each filed a petition of right in the Exchequer Court to obtain the relief therein asked. These petitions were heard together, and judgment given in the suppliants' favour. The Crown appeals from these judgments.

The importance of the present appeals is enhanced by the fact that there are upwards of 54 other similar Petition-of-Right suits—a number of which have received the fiat and been filed—involving like claims aggregating upwards of \$300,000. The determination of these other cases, for the sake of avoiding multiplicity of suits it has been agreed between the Crown and the several suppliants, shall depend on the final decision in these three cases now in appeal, the documentary evidence being admittedly the same, and the law common to all.

The litigants mentioned are all pioneer miners of 1896—relatively few in number—the gold in the Klondike having been first discovered by the Suppliant Carmack on 17th August, 1896.

There are no disputed facts and hence no conflict of evidence. The Crown called no witnesses, and adduced no documentary evidence in defence, except some title papers produced by the suppliants.

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These cases turn, therefore, principally upon the true construction of the suppliants' grants and upon the proper interpretation of the various mining regulations in force in the Yukon, coupled with the evidence of the suppliants and their witnesses.

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All evidence—oral and documentary—adduced in any of the three cases, was by agreement at the trials made evidence in all.

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The suppliants oppose the Crown's appeal, and cross-appeal against the reference permitted by the judgment of the Exchequer Court—the suppliants contending that they should have judgment absolutely without any reference.

The case of *Chappelle v. The King* is reported in 7 Exchequer Court Reports, at page 414, where some of the arguments in the Court below are shortly stated—the judgment of Mr. Justice Burbridge being printed at pp. 427 *et seq.* of the report.

Part of the judgment of the Exchequer Court, now appealed against by the Crown, is expressed in the head-note of the reported case (1), as follows:—

The Suppliant by right of discovery, under the provisions of *The Dominion Lands Act* and *The Dominion Mining Regulations* of 1889 made thereunder, obtained a grant of a certain gold mining claim in the Yukon district in December, 1896. His grant, *inter alia*, gave him, for the term of one year from its date, the exclusive right to all the proceeds realized therefrom; and the rights which it conferred upon him were, it was declared, those laid down in *The Dominion Mining Regulations*, and no more, and were subject to all the provisions thereof whether the same were expressed in the grant or not. During the currency of the original grant, an order-in-council was passed making grants of gold mining claims in the district generally subject to a royalty. Afterwards, namely, on the 7th December, 1897, the suppliant's grant was renewed in the same terms as those expressed in the original grant.

Held, that the terms of the renewal should be construed by reference to their meaning in the original grant; and that the renewal was not subject to the royalty imposed by the order-in-council.

The operative words of the order-in-council imposing the royalty were "a royalty shall be levied and collected.

Held, that the expression quoted contained apt words for the imposition of a tax, but that such a tax could not be levied without legislative authority therefor.

The evidence showed that the suppliant had paid the amount of the royalty claimed by the Crown under protest, and in the belief that payment was necessary to protect his rights.

Held, that he was entitled to recover it back.

Before the trials in the Exchequer Court, counsel for the Crown and for the suppliant Chappelle agreed upon a chronological statement which will prove useful for reference in considering the following facts.

The material facts in Chappelle's case, and the legislation and documentary evidence upon which it is based, may be stated, in somewhat abridged form, as follows:—

By the British North America Act, 1867, sec. 146, the Queen, with the advice of the Imperial Privy Council, was authorized to admit the North-western Territory into the Canadian Union, on address from both Houses of the Canadian Parliament,

on such terms and conditions as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act.

Accordingly, by Imperial order-in-council of the 23rd June. 1870, it was ordered

that from and after the 15th day of July, 1870, the North-western Territory shall be admitted into and become part of the Dominion of Canada, upon the terms and conditions set forth in the first hereinbefore recited address, and that the Parliament of Canada shall, from the day aforesaid, have full power and authority to legislate for the future welfare and good government of the said Territory.

The joint Address of the Senate and House of Commons of Canada of December, 1867, upon the terms and conditions whereof the North-western Territory was admitted into and became part of Canada is scheduled to this Imperial order-in-council, and recites (amongst other things) that

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the development of the mineral wealth which abounds in the North-west, and the extension of commercial intercourse through the British possessions in America from the Atlantic to the Pacific, are alike dependent on the establishment of a stable government for the maintenance of law and order in the North-western Territories,

and prays Her Majesty

to unite Rupert's Land and the North-western Territory with this Dominion, and to grant to the Parliament of Canada authority to legislate for their future welfare and good government; and we most humbly beg to express to Your Majesty that we are willing to assume the duties and obligations of government and legislation as regards these Territories, (and) that in the event of Your Majesty's Government agreeing to transfer to Canada the jurisdiction and control over the said region, the Government and Parliament of Canada will be ready to provide that the legal rights of any corporation, company, or individual within the same shall be respected, and placed under the protection of courts of competent jurisdiction.

By the Revised Statutes of Canada, ch. 22, sec. 4, it is enacted that

the Minister of the Interior shall have the control and management of all Crown Lands which are the property of Canada.

By sec. 3 of *The Dominion Lands Act*, Revised Statutes of Canada, 1886, ch. 54, the said Act is made applicable

to the public lands included in Manitoba and the several Territories of Canada;

and, by sec. 47, it is enacted that:—

47. Lands containing coal or other minerals, whether in surveyed or unsurveyed territory, shall not be subject to the provisions of this Act respecting sale or homestead entry, but shall be disposed of in such manner and on such terms and conditions as are, from time to time, fixed by the Governor-in-Council, by regulations made in that behalf.

Accordingly, by regulations known as "The Dominion Mining Regulations," approved by order-in-council of 9th November, 1889, it is provided, by sec. 1, that said regulations "shall be applicable to all Dominion lands containing gold, silver, &c.;" while sec. 2 of these regulations of 1889 provides that:—

2. Any person or persons may explore vacant Dominion lands, not appropriated or reserved by the Government for other purposes, and may search therein, either by surface or subterranean prospecting, for mineral deposits, with a view to obtaining under these regulations a mining location for the same; but no mining location, or mining claim, shall be granted until actual discovery has been made of the vein, lode or deposit of mineral or metal within the limits of the location or claim.

Then, by sec. 4 of these regulations of 1889, it is further provided that:—

4. Any person having discovered a mineral deposit may obtain a mining location therefor under these regulations, &c.

After providing, by clause (b) that the miner having marked out on the ground the location he desires, shall within sixty days file a declaration with the Dominion Lands Agent, and pay a fee of \$5.00, sec. 4, s.s. (c), provides as follows:—

(c). The agent, upon such payment being made, shall grant a receipt according to the form B in the schedule to these regulations. This receipt shall authorize the claimant, his legal representatives or assignees, to enter into possession of the location applied for; and subject to its renewal from year to year as hereinafter provided, during the term of five years from its date, to take therefrom and dispose of any mineral deposit contained within its boundaries provided that during each of the said five years after the date of such receipt he or they shall expend in actual mining operations on the claim at least one hundred dollars, &c.

Then, by sec. 17 of these regulations of 1889, it is provided:

17. The regulations hereinbefore laid down in respect of quartz-mining shall be applicable to placer mining, so far as they relate to entries, entry fees, assignments, marking of locations, agents' receipts, and generally where they can be applied, save and except as otherwise herein provided.

The following further sections of the regulations of 1889 are also of importance on this appeal:—

Sec. 19. The forms of application for a grant for placer mining, and the grant of the same, shall be those contained in Forms H and I in the schedule hereto.

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 Sedgewick J. Sec. 25. A claim shall be deemed to be abandoned and open to occupation and entry by any person when the same shall have remained unworked on working days by the grantee thereof for the space of seventy-two hours, unless sickness or other reasonable cause be shown, or unless the grantee is absent on leave.

Sec. 26. A claim granted under these regulations shall be continuously and in good faith worked, except as otherwise provided, by the grantee thereof or by some person on his behalf.

Sec. 77. Any miner or miners shall be entitled to leave of absence for one year from his or their diggings, upon proving to the satisfaction of the Superintendent of Mines, that he or they have expended on such diggings, in cash, labour, or machinery, an amount of not less than \$200 on each of such diggings without any return of gold or other minerals in reasonable quantities for such expenditure.

It will be observed that there is no provision in the Dominion Mining Regulations reserving any royalty whatever. Yet it is noteworthy that the corresponding (but earlier) Mining Regulations governing Indian Lands, dated 15th September, 1888 (printed in Bligh's Orders-in-Council, p, 199), from which these Dominion Mining Regulations of 1889 were otherwise practically copied, do provide for a reservation of a royalty to the Crown of four per cent as follows :

Sec. 81. The patent for a mining or mineral location shall reserve to the Crown, forever, a royalty of four per cent on the sales of the products of all mines therein, in trust for the Indians interested in the lands patented.

But the Dominion Mining Regulations of 1889, now under consideration, omit all reference to a royalty of

any kind, and do not reserve or provide for any such payment.

By Order-in-Council of 24th December, 1894, the length of the creek claims in the Yukon District was increased to 500 feet, and the fee to be charged for an entry for a claim was increased to \$15; and the Dominion Mining Regulations of 9th November, 1889, were thereby made applicable in all other respects to the Yukon District.

As will be seen by reference to Chappelle's own evidence, the suppliant Chappelle went into the Yukon country in the spring of 1896, and ultimately staked Fractional Claim No. 3-A below "Discovery" on Hunker Creek in that year, under the above Dominion Mining Regulations of 1889, made applicable to the Yukon by the above mentioned order-in-council of 24th December, 1894.

Chappelle says that he had to go 75 miles to record this claim at Fort Cudahay, at the Government offices in charge at headquarters of Captain Constantine, of the North-west Mounted Police. Constantine, accordingly, on the 7th December, 1896, issued a grant to Chappelle, in the form of Schedule I to the Dominion Mining Regulations of 1889, for this Fractional Claim on Hunker Creek of 185 feet. This 1896 grant of No. 3-A Lower Hunker is filed as an Exhibit. It read as follows:—

No. 370.

Form I.

GRANT FOR PLACER MINING.

DEPARTMENT OF THE INTERIOR,

DOMINION LANDS OFFICE,

YUKON AGENCY. 7th December, 1896.

In consideration of the payment of five and a-half dollars, being the fee required by the provisions of the *Dominion Mining Regulations*, sections 4 and 20, by William Chappelle, of Dawson, accompanying his application No. 370, dated 7th December, 1896, for a mining claim in the Throldik Mining Division of the Yukon District, more par-

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 CHAPPELLE. The Minister of the Interior hereby grants to the said William Chappelle, for the term of one year from the date hereof *the exclusive right of entry* upon the claim for the miner-like working thereof and the construction of a residence thereon, *and the exclusive right to all the proceeds realized therefrom.*

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 CARMACK. The said William Chappelle shall be entitled to the use of so much of the water naturally flowing through or past his claim, and not already lawfully appropriated, as shall be necessary for the due working thereof, and to drain his claim, free of charge.

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This grant does not convey to the said William Chappelle any surface rights in the said claim, or any right of ownership in the soil covered by the said claim; and the said grant shall lapse and be forfeited unless the claim is continuously and in good faith worked by the said William Chappelle, or *his associates.*

The rights hereby granted are those laid down in the *aforsaid Mining Regulations, and no more*, and are subject to all the provisions of the said regulations, whether the same are expressed herein or not.

C. CONSTANTINE,

Agent of Dominion Lands.

About three months previous to this, one Louis Emkins, on the 9th September, 1896, similarly obtained from Captain Constantine a grant of a claim of 500 feet in length, known as claim No. 7 on Eldorado Creek (in form also as provided by schedule I of the 1889 regulations), which original grant is in precisely the same terms—*mutatis mutandis*—as Chappelle's grant of No. 3-A Lower Hunker, printed above.

Louis Emkins sold an undivided half interest in this claim No. 7 on Eldorado to the suppliant Chappelle and the ten per cent royalty tax was subsequently collected from Chappelle, on 16th July, 1898, in respect of \$104,290 of gold mined in 1897-8 on this claim, as well as on the \$16,370 of gold mined on the claim he had himself staked on Hunker Creek, No. 3-A, Lower Hunker.

In May, 1897, the Governor decided to issue a new set of regulations governing placer mining in the Yukon.

The section of the Dominion Lands Act (Revised Statutes of Canada, ch. 54, above quoted) enabling regulations to be thus made, had been amended in 1892, (1) since the issue of the 1889 regulations, and then read (in 1897) as follows :

Lands containing coal or other minerals * * * shall not be subject to the provisions of this Act respecting sale or homestead entry, but the Governor-General-in-Council may, from time to time, make regulations for the working and development of mines on such lands, and for the sale, leasing, licensing, or other disposal thereof. * * *

Accordingly, new regulations governing placer mining in the Yukon were promulgated, dated 21st May, 1897, the publication of which, under sec. 91 of the Act, was completed on the 9th July, 1897.

These new regulations of 1897 were in terms substituted, so far as placer mining were concerned, for the regulations of 1889 (under which the suppliants had previously obtained grants) but the *form* of the grant (schedule I) was not altered thereby, and (by the last clause of the new regulations of May, 1897) it was expressly provided that

if any cases arise for which no provision is made in these regulations, the provisions of the regulations governing the disposal of mineral lands other than coal lands, approved by His Excellency on the 9th November, 1889, shall apply.

The 1889 regulations were thus kept alive.

No provision was made in these new regulations of 1897 for either the imposition or the reservation of a royalty, and its material sections are practically the same as those relating to Placer Mining in the original regulations of 1889.

As an important example, sec. 8 of the new regulations is identical with sec. 19 of the regulations of 1889, as follows :

8. The forms of application for a grant for placer mining and the grant for the same *shall* be those contained in forms H and I in the schedule hereto.

(1) 55 & 56 Vict. c. 15, s. 5.

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And, again, sec. 14 of the new regulations is likewise identical with sec. 20 of the 1889 regulations, thus:

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14. The entry of every holder of a grant for placer mining *must be renewed* and his receipt relinquished and replaced *every year*, the entry fee being paid each time.

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The new regulations also repeated the provisions of section 23, of the regulations of 1889, by providing in section 17 that;—

Every miner shall, during the *continuance* of his grant, have the exclusive right of entry upon his own claim, for the miner-like working thereof and the construction of a residence thereon, and *shall be entitled exclusively to all the proceeds realized therefrom.*

It will be remembered that the 1896 grant for Claim No. 7 on Eldorado Creek was issued on the 9th September, 1896, and hence had to be renewed on or before 9th September, 1897,—while the other grant in question herein, for Fractional Claim No. 3-A on Lower Hunker, had similarly to be renewed before the 7th December, 1897.

But, before the arrival of these dates, namely, on 29th July, 1897, the Government passed an order-in-council purporting to impose a royalty tax on all gold mined in the Yukon. This order-in-council was framed in apt words for the imposition, levy, and enforced collection of a tax of ten per cent on the gold itself, and, in some circumstances, of twenty per cent; but without any antecedent legislative authority, as is now admitted.

The material clauses of this order-in-council of 29th July, 1897, purporting to impose the tax in question, are as follows:—

That upon all gold mined on claims referred to in the regulations for the governance of placer mining along the Yukon River and its tributaries, a royalty of ten per cent shall be levied and collected by officers to be appointed for the purpose, provided that the amount mined and taken from a single claim does not exceed \$500 per week;

and, in case the amount mined and taken from any single claim exceeds \$500 per week, there shall be levied and collected a royalty of ten per cent upon the amount so taken out up to \$500, and upon the excess or amount taken from any single claim over \$500 per week, there shall be levied and collected a royalty of twenty per cent, such royalty to form part of the consolidated revenue, and to be accounted for by the officers who collected the same in due course ;

That the times and manner in which such royalty shall be collected, and the persons who shall collect the same shall be provided for by regulations to be made by the Gold Commissioner, and that the Gold Commissioner be and he is hereby given authority to make such regulations and rules accordingly ;

That default in payment of such royalty, if continued for ten days after notice posted upon the claim in respect of which it is demanded, or in the vicinity of such claim, by the Gold Commissioner or his agent, shall be followed by cancellation of the claim ;

That any attempt to defraud the Crown by withholding any part of the revenue thus provided for, by making false statements of the amount taken out, may be punished by cancellation of the claim in respect of which fraud or false statements have been committed or made ;

And that in respect of the facts as to such fraud or false statement, or non-payment of royalty, the decision of the Gold Commissioner shall be final.

JOHN J. MCGEE,

Clerk of the Privy Council.

But before the spring wash-up in 1898, the Government decided to *repeal* all existing placer mining regulations (including the order imposing the royalty tax), and to issue a new and amended set of regulations. Accordingly, this was done by order of the 18th January, 1898, which enacted that the placer mining regulations

established by order-in-council, dated 21st May, 1897, and subsequent orders of the Governor-in-Council, shall be and the same are hereby *cancelled*, and the following regulations * * * substituted in lieu thereof.

These new regulations did not become effective by publication until the 11th March, 1898. Their most important provisions, which are relevant or material.

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to the present issues, are that by section 37, the rights of miners under mining grants are modified, by making the same—for the first time—subject to the payment of royalty. Sec. 37, of these new regulations of 1898, reads as follows:—

37. Every free-miner shall, during the continuance of his grant, have the exclusive right of entry upon his own claim for the miner like working thereof, and the construction of a residence thereon, and shall be entitled exclusively to all the proceeds realized therefrom, *upon which however the royalty prescribed by these regulations shall be payable.* (The words in italics are new).

These new 1898 regulations also, for the first time, altered the form of mining grant, to correspond with foregoing sec. 37; and thus for the first time providing *by contract* for payment by the grantee of the royalty.

As already mentioned, these new 1898 regulations in terms repealed the 1897 order purporting to impose the royalty tax; and, by secs. 30 and 31, purported to impose instead a straight tax of 10 per cent on all gold mined, and thus abandoned the more excessive 20 per cent tax provided for in the repealed 1897 order. These new 1898 regulations, secs. 30 and 31 (under which, be it noted, the royalty in question herein was subsequently collected from the suppliant Chappelle and from the other 1896 miners), read as follows:—

(30). A royalty of ten per cent on the gold mined shall be levied and collected on the gross output of each claim. The royalty may be paid at banking offices to be established under the auspices of the Government of Canada, or to the Gold Commissioner, or to any Mining Recorder authorized by him. The sum of \$2,500 shall be deducted from the gross annual output of a claim when estimating the amount upon which royalty is to be calculated, but this exemption shall not be allowed unless the royalty is paid at a banking office or to the Gold Commissioner or Mining Recorder.

When the royalty is paid monthly or at longer periods, the deductions shall be made ratable on the basis of \$2,500 per annum for the claim. If not paid to the bank, Gold Commissioner or Mining Re-

order, it shall be collected by the customs officials or police officers when the miner passes the posts established at the boundary of a district. Such royalty to form part of the consolidated revenue, and to be accounted for by the officers who collect the same in due course. The time and manner in which such royalty shall be collected shall be provided for by regulations to be made by the Gold Commissioner.

(31). Default in payment of such royalty, if continued for ten days after notice has been posted on the claim in respect of which it is demanded, or in the vicinity of such claim by the Gold Commissioner or his agent, shall be followed by cancellation of the claim. Any attempt to defraud the Crown by withholding any part of the revenue thus provided for, by making false statements of the amount taken out, shall be punished by cancellation of the claim in respect of which fraud or false statements have been committed or made. In respect to the facts as to such fraud or false statements or non-payment of royalty, the decision of the Gold Commissioner shall be final.

It will be observed that this new tax of ten per cent was, as formerly, on the gold itself. It might be paid to the bank ; but, if not

it shall be collected by the customs officials or police officers when the miner passes the posts established at the boundary of a district.

The tax thus collected was to form part of the consolidated revenue, and the method of collection was to be provided by regulations to be made by the Gold Commissioner. The consequence of default in payment—after ten days notice of demand had been posted on or in the vicinity of any mining claim by the Gold Commissioner or his agent—was the cancellation or forfeiture of the claim itself—the decision of the Gold Commissioner to be final.

As has been observed, in 1898 there admittedly existed no legislative authority or Act of Parliament which, directly or indirectly, authorized or justified the imposition or collection of such a tax.

It ought to be here added that these new placer mining regulations of 1898 (effective, as we have seen, on 11th March, 1898) also took care to provide, by sec. 40, that :—

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40. If any cases arise for which no provision is made in these regulations, the provisions of the *Regulations governing the disposal of Mineral Lands other than coal lands*, approved by His Excellency the Governor-in-Council on the 9th November, 1889, or such other regulations as may be substituted therefor, shall apply ;

thus perpetuating and keeping alive the old 1889 regulations under which the miners got their original grants.

Yet one important fact admittedly stands out clearly, namely, that the original order purporting to impose the royalty tax in the first instance in September, 1897, was effectively cancelled and repealed by the Order and Regulations of March, 1898, *before* anything was ever done under it. Not a dollar was ever collected under the 1897 order, which was thus repealed in 1898, before the spring wash-up of that year. The collection of the ten per cent royalty tax, complained of in these suits, was in all cases made under and by virtue of secs. 30 and 31 of the 1898 regulations—which could not, by any conceivable construction, be made to apply to the then current renewal grants, issued in 1897.

Meanwhile, during the winter working season of 1897-8, Chappelle had mined a large quantity of gold bearing gravel from both his Eldorado and Hünker Creek claims, which he subsequently sluiced and washed up, in the early summer of 1898, realizing from his Hünker Fraction \$16,370 (in gross), and from the Eldorado Claim \$104,290.

It will be remembered that, up to the spring of 1898, Captain Constantine, of the North-west Mounted Police, had been the chief executive officer of the Government in the Yukon region, and had, with Gold Commissioner Fawcett, administered law and justice throughout the Territory.

During the summer of 1898, however, Major Walsh (who had arrived at Dawson on 21st May, 1898), was appointed by order-in-council as

Chief Executive Officer of the Government of the Yukon Territory, to be known as the Commissioner of the Yukon Territory, "with the fullest authority over all the officials in the various departments of the Government," and "in full command of the North-west Mounted Police Force," with "power to vary, alter, or amend any mining regulations issued under the authority of His Excellency-in-Council governing the granting of mining claims, where such change may, in his opinion, be necessary in the public interest.

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This order appointing Commissioner Walsh also made provision that the Commissioners should make a full report to the Minister; and this Major Walsh did, on the 15th August, 1898.

In this report, Major Walsh mentions that Gold Commissioner Fawcett had reported that little royalty could be collected this year (1898), owing to the best paying claims being renewed under the old regulations, and that the mines which were being worked under the new regulations would be unable to pay royalty, as their expenses would be greater than their output this year. Under these circumstances, Major Walsh continues, it appears to me that my place was at the coast, where so many matters had to be attended to.

Again, the government's chief executive officer reports as follows:

On arrival at Dawson (21st May, 1898), I found a great many questions awaiting solution, which could only be disposed of by the authority of the commissioner. For instance, the question of royalty, over which there had been considerable discussion, appeared to be somewhat mixed. I immediately announced that royalty would be collected on all claims the leases of which were renewed subsequent to the date when the law came into force. Nearly all the leaseholders of the larger prospected claims showed a disposition to respect the collection of royalty. Others, however, were not so tractable; their principal objection being that their leases were granted for one year; and that, once being granted, subsequent restrictions could not be placed upon them. I pointed out to the leaseholders that collection of royalty was necessary for the maintenance of courts of justice, for police protection, mail communication, and other public services.

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While acknowledging the force of these reasons, they submitted that a more thorough examination of the real cost of out-putting the gold would convince the Government that the royalty is a severe tax, and expressed a hope that next year would see it removed. Royalty was not collected from any claim which had not got into good working order, or which could not show a profit after paying royalty, and this would represent a large sum.

Again the Commissioner continues, more than half the leases were exempted from royalty on account of having been renewed previous to the date of the law requiring the payment of royalty coming into force. The collection of royalty will amount to about half a million dollars.

After mentioning that the Canadian Bank of Commerce and the Bank of British North America had opened branches in Dawson City, the Commissioner continues, in his report, as follows :

Officials of any Government entering into a new and isolated district, where the people are not closely restricted by law and are free from taxation, have almost invariably met with just such an experience as we have had. The introduction and enforcement of law and taxation naturally made us unpopular with the older residents, who were unaccustomed to that sort of thing.

Parliament prorogued in 1898 on the 13th June, on which day the new *Yukon Territory Act* (61 Vict. ch. 6) was assented to and became law. It is here worth mentioning that, by section 8 of *The Yukon Territory Act*, empowering the Governor-in-Council to make ordinances for the peace, order, and good government of the Yukon Territory, it is specially provided also that

no ordinance made by the Governor-in-Council or the Commissioner-in-Council shall impose any tax.

Notwithstanding, this, however, the Government officers four days later, on 17th June, 1898, collected \$1,637 for Government royalty from the suppliant Chappelle, for gold mined on his Hunker Creek Fraction, and later, on the 16th July, 1898, in like manner, collected from the suppliant Chappelle \$10,429

government royalty, in respect of gold mined on Claim No. 7 on Eldorado Creek.

It will be remembered that the royalty regulations of 1898 provided that the method and manner of collecting the royalty was to be prescribed by regulations to be made by the Gold Commissioner. It seems, however, that Gold Commissioner Fawcett did not promulgate any formal regulations on the subject, but he made a report thereon to Government which is printed.

Gold Commissioner Fawcett's report must be read in the light of Regulation No. 31 of 1898, which provided that

default in payment of such royalty, if continued for ten days after notice has been posted on the claim in respect of which it is demanded, or in the vicinity of such claim, by the Gold Commissioner or his agent, shall be followed by cancellation of the claim.

Accordingly, Gold Commissioner Fawcett reported that, during the summer of 1898,

notices were posted at intervals all along these creeks, through which claim-owners were informed that the royalty should be paid on the 1st and 15th of each month to the Mining Inspectors at the Forks of Eldorado, or at the Bank of Commerce in Dawson. On Hunker Creek, the miners were notified to report at the Commissioner's office, Dawson, on the 1st of each month. These reports were required, whether royalty was payable or not. On Bonanza and Eldorado, the Mining Inspectors examined the claims to ascertain if all who were working had reported. On Hunker, a policeman was appointed to that duty by Commissioner Walsh.

When a claim was found that was being worked, for which returns had not been made, a notice was posted on the claim allowing the delinquent ten days in which to report, and drawing his attention to the penalty for non-compliance, referred to in sec. 31 of the regulations governing placer mining in the Territory * * * The Commissioner (Commissioner Walsh) himself superintended to a great extent the collection of royalty.

As to valuation, I may say that one-tenth of the dust was taken as royalty. This would be the proper proportion, whatever the gold would assay, and is independent of the valuation. * * * * The

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collection of the royalty this year is in the hands of the North-west Mounted Police, and I think they can be depended upon to see that none are missed.

In spite of the foregoing evidence, and notwithstanding the fact that the tax was thus collected from the miners under the stress and threat of the exercise by the Gold Commissioner of the power of summarily forfeiting to the Crown the mining claims of any delinquent miners—who were without means of redress or relief in the then very remote and isolated region of the Klondike—the Crown has pleaded that Chappelle and his fellow-suppliants paid the royalty tax voluntarily, and hence cannot recover it. And this, in spite of the fact that the Gold Commissioner was not only Tax-Collector-in-Chief, but also himself the sole judicial and executive functionary empowered to cancel placer gold mining grants for non-payment of the said tax, and whose decisions thereon it was expressly provided should be conclusive and final.

The Yukon Territory Act of 1898 was subsequently amended in 1899 (62 & 63 Vict., ch. 11), whereby Parliament again affirmed by section 8 (c), “nor shall any tax be imposed except as in this Act provided,” referring to municipal taxation therein mentioned.

But this was not all. After these petition-of-right suits had been tried in the Exchequer Court and judgment given for the suppliants, Parliament awakened to the necessity of legalizing the future levy of taxation of Yukon gold; and by an Act passed in 1902 (2 Edw. VII., ch. 34, sec. 3) the Yukon Territory Act of 1898 was again amended and the following new clause enacted:—

8. Subject to the provisions of this Act, the Governor-in-Council may make ordinances for the peace, order and good government of the Territory, and of His Majesty's subjects and others therein; but no such ordinance shall—

(a) for the enforcement of any ordinance, impose any penalty exceeding five hundred dollars ;

(b) alter or repeal the punishment provided in any Act of the Parliament of Canada in force in the Territory for any offence ;

(c) appropriate any public land or other property of Canada without authority of Parliament, or impose any duty of customs or any excise ;

Nor shall any tax be imposed by ordinance except as in this Act provided ; Provided always that the Governor-in-Council may make ordinances—

(d) imposing a tax or royalty (not exceeding five per cent thereof) upon gold and silver the output of mines in the Territory, to be levied from and after the date of the ordinance imposing it ;

(e) prescribing and regulating the place and manner of collection of such tax or royalty, and the methods of securing and enforcing the payment thereof ;

(f) providing for the confiscation and forfeiture of gold and silver upon which such tax or royalty has not been duly paid, as well as for the confiscation and forfeiture of any vessel, vehicle, cart, or other receptacle containing it, or used or intended to be used for the transportation thereof ;

(g) giving to any officer of the Crown, in respect of searches, examinations, and other proceedings for the enforcement of the provisions of any such ordinance, all such powers, rights, privileges, and protection as officers of customs have under the provisions of *The Customs Act*.

2. Every ordinance made under the authority of this section shall remain in force until the day immediately succeeding the day of prorogation of the then next session of Parliament, and no longer, unless during such session of Parliament such ordinance is approved by resolution of both Houses of Parliament.

3. Every ordinance made by the Governor-in-Council under the provisions of this Act shall have force and effect only after it has been published for four successive weeks in *The Canada Gazette*; and all such ordinances shall be laid before both houses of Parliament within the first fifteen days of the session next after the date thereof.

Thus, on the 15th May, 1902, or nearly four years after the illegal levy and collection of the royalty tax complained of in this action, Parliament for the first time by statute authorized taxation of this sort *in the future*, but took care also to provide for the present liti-

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1902 grants by enacting, in section 6 of the above Act of
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6. Nothing in this Act or in any ordinance made thereunder shall prejudice or affect or apply to any claim, matter or suit now pending in any court of competent jurisdiction, nor to the claims of any person against the Crown heretofore made by petition of right and lodged for fiat, nor to any claim or cause of action heretofore accrued.

As an immediate result of this Act of 1902, an ordinance was passed by the Governor-in-Council the following week, dated 21st May, 1902, repealing and rescinding the obnoxious regulations in question herein, which purported without legislative authority to impose a royalty or tax on the gold mined, and instead now enacting (under the legislative authority of the 1902 Act) that an *export duty* of $2\frac{1}{2}$ per cent *ad valorem* should be thereafter collected on all gold shipped away from the Yukon—and that

all ordinances or orders-in-council heretofore passed, in so far as they relate to or provide for the collection of any tax or royalty on gold mined in the Yukon Territory, or to be taken or shipped therefrom, are hereby rescinded.

In the foregoing, I have substantially stated what is contained in the suppliant Chappelle's factum, which I found, upon careful examination, contained an accurate statement both of the facts and of the statutes and regulations therein in part recited.

The pivotal fact in this case is that the levy or exaction of the 10 per cent royalty was made under the regulations of 1898, while the grants, or leases, or licenses, or by whatever name they may be called, under which the suppliants held their original title, were made under the regulations of 1889. The instruments of title, called in the regulations of 1898 "grants," partake in part of all these characters. So far as they transfer the property in the gold when mined, they are grants. So far as they give possession or occupation for a specified term, they are in the nature of leases.

And so far as they give right of entry, they are licenses; and, if licenses, irrevocable, since they are coupled with an interest. I shall describe the instrument, pursuant to the term used in the regulations, as a grant.

Now, the contention of the appellant, the Crown, in these appeals is that this grant is but a license for a year, and for one year only; that the grantee has no right to obtain, and that the Crown is under no obligation to give a renewal grant; and that, whether that be so or not, any renewal thereof must be governed, not by the regulations of 1889 under which the original grant was obtained by the miner, but on the contrary by any regulations which were in existence at the time that the renewal grant was issued or obtained.

There is not much difference of opinion as to the nature and extent of the original discovery grants issued in 1896, under the regulations of 1889. The Crown admits that any change in the regulations, made during the currency of the first or original grants, would not in any way affect the rights thereunder of the grantees respectively. One of the main questions in controversy, however, is whether the suppliants' discovery grants of 1896 were renewable grants—whether the suppliants were entitled to renew their original grants. I entertain no doubt as to their right to renew. It is unnecessary here to decide whether their right of renewal extends to five years from the date of the discovery grant, or whether it extends until the mining claim is worked out or exhausted. It must be remembered that the rights of the suppliants in this regard do not depend alone upon the terms of the grant as above set out, being form 1 of the regulations of 1889. That instrument is not the measure of their rights, inasmuch as there must be read into it, so far as necessary, the regulations of 1889

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and the provisions of the parent Act, the Dominion Lands Act, under authority of which the regulations were made.

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The grant, it is true, includes a license for one year, but there is nothing in it to indicate that it may not be renewed. It purports to be issued

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under the regulations of 1889 then subsisting; and, if these regulations provide for a renewal, then the holder is entitled to such renewal. These regulations of 1889, denominated "The Dominion Mining Regulations," were made operative in the Yukon Territory in 1894, and, in the year 1896, when the discovery grants in question herein were issued, contained the whole mining code, both with regard to quartz mining and placer mining. The regulations respecting placer mining were, subsequently, mechanically separated from the Dominion Mining Regulations of 1889, by the issue of the 1897 placer mining regulations (effective 9th July, 1897), which also however, by the concluding clause thereof, expressly kept alive the original 1889 Dominion Mining Regulations.

To my mind, a perusal of the 1889 regulations will clearly indicate the renewable character of the 1896 grants now under consideration. The general policy of the regulations, as indicated by many of their provisions, affords cogent evidence that the grantee was entitled to renew his grant. I will indicate a few of them. Before so doing, it is noteworthy that the Crown, in its defence in the Chappelle case, pleads that Chappelle was entitled to his grant for a further period, in other words, was entitled to a renewal of his 1896 discovery grant. (See also paragraph 7 of the Crown's defence). The law officers of the Crown, when delivering this defence, must then have considered that a right of renewal was part of the suppliant's contract.

To particularize, however, the sections in the 1889 regulations from which a right of renewal of the grant must reasonably be implied :—

(a) Section 20 of the 1889 regulations (as well as section 14 of the 1897 placer regulations), provides that the entry of every holder of a grant for placer mining *must be renewed* every year, the entry fee being paid each time, otherwise the miner would lose his mining claim. The word here used is “must.” It is not “may,” but “must.” The word “may” is facultative and permissive, but “must” is the most uncompromisingly imperative word in our language. “Shall” is even sometimes construed as futuritive only, and hence permissive ; but “must” is dominant and compulsory.

(b) Section 77 of the regulations of 1889 provides that any miner shall be entitled to leave of absence for *one year* from his diggings, on proving an expenditure of \$200 on such diggings. Does not this provision clearly contemplate an interest extending beyond one year ?

(c) Then, the order-in-council of the 24th December, 1894 (making the Regulations of 1889 effective in the Yukon), recites the fact that “it takes *two seasons* to make a start on the work” on placer claims, the length of which is thereby increased to 500 feet. Can it be supposed for a moment that, when the Government made its regulations of 1889 effective in the Yukon in 1894, whereby all persons the world over were invited to come in and explore, and take for their own exclusive benefit, all that they could find in any mining claims discovered by and granted to them, it was intended that all that the discoverers should get was a right to extract the gold from their mining claims for one year only ?

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(d) Section 40 of the Regulations of 1889 enables the Minister of the Interior to grant

exclusive rights of way through and entry upon any mining ground, for any term not exceeding five years

for drainage purposes. Does not this provision necessarily contemplate that the holder is entitled to a renewal of his mining grant for a period at least co-terminous with such drainage grant?

(e) By section 45 of the regulations, the Minister is empowered to "grant to any person, for any term not exceeding five years," the right to divert water and to construct flumes and ditches, and

every such grant shall be deemed to be appurtenant to the mining claim in respect of which it has been obtained.

The expression "claim" is defined in the interpretation clauses of the regulations as the "personal right of property in a placer grant or diggings," as distinguished from the word "location," which is there interpreted as referring only to quartz mining areas. If the Crown's contention be correct, that the regulations do not entitle the miners to a renewal of their grants as a matter of right, subject otherwise to the performance of the conditions under which the grants are held, then the minister can, under this section 45, grant an appurtenance to a placer claim for a period four years longer in duration than the life of the claim itself. The form of this flume grant, set out in the regulations, makes it appurtenant to the mining claim, and provides that the same shall cease and determine, not at the expiry of the first year's holding, but "whenever the *said claim* shall have been worked out."

(f) Section 17 of the 1889 regulations, which as before stated include the whole mining code both for placer and quartz mining, makes the Dominion Mining Regulations of 1889 applicable to placer mining,

so far as they relate to entries, entry fees, assignments, marking of locations, agent's receipts, and generally where they can be applied, except as therein otherwise provided. The word "entries" there includes all those things necessary to be done, both by the discoverer or applicant on the one hand, and by the mining recorder on the other, in order to entitle the applicant to a legal right to his claim. In fact, were it not for that provision, there would be no machinery at all for obtaining an entry for any placer mining claim. Section 4 previously points out how a location may be acquired, by staking (after discovery), and making the necessary affidavit and entry, and paying the fee; and then proceeds to provide that the entry shall be subject to renewal from year to year during the term of five years from its date. It is, in my view, very plain that this provision, giving the right of renewal to the quartz miner, gives the same right of renewal to the placer miner.

(g) Sec. 12 of 1897 placer mining regulations provides that

an entry fee of \$15 shall be charged the first year, and an annual fee of \$100 for each of the *following* years. This provision shall apply to locations for which entries have been already granted.

These 1897 placer mining regulations became effective on the 9th July, 1897, and the concluding words of sec. 23 thereof provide that the 1889 Dominion regulations shall still continue to apply to all cases unprovided for. Thus the 1889 regulations were perpetuated and kept alive.

(h) Sec. 23 of the 1889 regulations, as well as sec. 17 of the 1897 placer regulations, provides that

every miner shall, *during the continuance* of his grant, have the exclusive right of entry upon his own claim for the miner-like working thereof, and shall be entitled exclusively to all the proceeds realized therefrom.

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The miner's exclusive rights, therefore, subsist during the continuance of his grant. The word "continuance" is employed, not "currency" or "term." It imports a prolongation of existence, and implies that the grant might be continued, or in other words "renewed."

(i) Sec. 22 of the 1889 regulations, as also sec. 16 of the placer regulations of 1897, provides that any miner or miners may sell, mortgage, or dispose of his or their claims provided such disposal be registered, &c.

Thus, viewed only as a mere license, it is assignable, and therefore not revocable.

(j) The form of grant for placer mining provides for a term of one year, "subject to all the provisions of the Dominion Mining Regulations," and the rights thus acquired are in terms stated to be "those laid down in the aforesaid mining regulations," which regulations, as I have before stated, must therefore be all read into the form of grant. These regulations include the foregoing provisions, which evidence the right of renewal from year to year, "until the claim shall have been worked out."

For these reasons it appears to me that the 1896 grants must be held to be renewable grants.

Assuming, however, that the miner is entitled to a renewal of his discovery grant, under what terms should he obtain it? It is elementary law that if a lease be renewable from year to year, every subsequent year is part of the same term. Shepherd's Touchstone, 270 n. (c); 3 Preston's Conveyancing, 76, 77; *Legg v. Strudwick* (1); *Harris v. Evans* (2). Then, if a renewable lease is to be renewed, it must be renewed at the former rent, if not otherwise agreed; *Doe d. Bromley v. Bettison* (3), and a reservation of a rent or

(1) 2 Salk. 414.

(2) 1 Wils. 262.

(3) 12 East 305

royalty must be made by the contract at the time of the making of the lease; Bacon's Abridgement, tit. "Rent," D. 1, 141.

But the Crown contends that the suppliant miners' future rights were cut down, during the currency of the 1896 discovery grants held by them, by the passing of the order-in-council imposing a royalty (operative if otherwise valid, on the 11th September, 1897), so as to make any renewal grants claimed by the miners in the autumn of 1896 subject to this new royalty impost. It is upon this contention alone that the Crown seeks to justify the Government in exacting from the miners, in the summer of 1898, ten per cent of the gross proceeds realized from the mining claims, during the working winter season of 1897-98, notwithstanding that, by the express terms of the miners' original and renewal grants, they were to have the exclusive right of entry upon their own claims and also the exclusive right to all the proceeds realized therefrom. In other words, the Crown's position is this: that although the Crown made a contract with a miner, by which it gave to him the exclusive right of entry upon a placer mining claim, and also the exclusive right to all the proceeds realized therefrom, yet, notwithstanding such contractual rights, the Crown is entitled to exact and deduct, *in invitum*, from such proceeds realized therefrom, 10 or 20 per cent thereof; or, in other words, to take possession and convert to the Crown's use whatever percentage of the gross proceeds of such mining claim the Crown may think fit to exact by promulgation of an order-in-council. But this would be equivalent to supporting confiscation or taxation under the guise of regulating the gold fields.

The placer mining regulations of 1897 (in which there is no reference to or provision for payment of

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any royalty) became effective by publication on the 9th July, 1897. As already mentioned, the royalty order-in-council was passed and published subsequently; and became effective, if valid, on the 11th September, 1897. If the placer regulations of 1897 are to govern the conditions upon which the 1896 discovery grants were renewable, then it is significant that these 1897 regulations themselves provided for a form of grant or license in almost exactly the same terms as the form of grant under the regulations of 1889. Hence it is found that every renewal given, after the expiration of the first year, contained in the body of the renewal itself the same specific grant to the miner of the exclusive right of entry and the exclusive right to all the proceeds realized from the claim. Even, therefore, if the renewal of the 1896 discovery grants was not obligatory, the miners at all events did renew them, in the autumn of 1897, in the only form then possible or legal, and by which form of renewal grant no royalty was reserved. Section 8 of the 1897 regulations provides that the form of a grant for placer mining *shall* be that contained in the schedule; thus imperatively prescribing the form of grant to be used, and leaving the Gold Commissioner no discretion in the matter.

The royalty order-in-council of 1897 did not purport to abridge or modify the then subsisting exclusive rights of the miners, by *reserving* a royalty to the Crown as was subsequently done in 1898, both in the regulations of that year and in the form of future grants thereby provided. The Gold Commissioner was thus bound to use the form he did, when renewing the grants in the autumn of 1897, and to do so until the form then prescribed was expressly altered or modified by apt amending regulations, as was subsequently done in 1898. It would have been *ultra*

vires of the Gold Commissioner to have changed the imperatively prescribed form of grant in the autumn of 1897, by making it subject to a royalty, which had not then been in apt terms reserved to the Crown either by regulation or contract.

The subsequent regulations of 1898, which do not govern the renewal grants in question, whereby a royalty was specifically reserved by way of reddendum in the case of future grants, may be *intra vires*; but the royalty thereunder would be payable, not by virtue of any taxing power, but by reason of a contractual relationship existing between the Crown and the miners under such future grants expressly reserving a royalty. But, in so far as the royalty order of 1897 purports to limit or add a term to the original contracts between the parties, the order is *ultra vires* of the authority which purported to pass it, and can have no retroactive operation.

But the Crown contends also that the royalty impost by order-in-council on the 11th September, 1897, affected and attached to the suppliants' renewal grants of 1897, and must be read into the suppliants' renewal grants, because the concluding clause of the grants provides that

the rights hereby granted are those laid down in the aforesaid mining regulations, and no more, and are subject to all the provisions of said regulations, whether the same are expressed herein or not.

It is urged that these last words rendered the 1897 renewal grants subject to the royalty impost, and it is contended that there is thus an implied contract on the part of the suppliants to pay the royalty. But the earlier and operative portion of the 1897 renewals, expressly and for valuable consideration, grants to the miner both exclusive rights of entry and the exclusive right to all the proceeds realized from the mining claim; and this later and repugnant gene-

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ral provision should not be construed to affect or modify the earlier and specific terms of the grant itself. *Generalia specialibus non derogant.* The only effect of the concluding general words above quoted is to incorporate into the grant all of the regulations, consistent with the specific and operative terms of the instrument, "and no more."

Moreover, if the royalty impost of September, 1897, was in form and effect *ultra vires* of the authority which promulgated it, not as a reservation of a royalty but as a species of tax, then no contract on the part of the miner, to be thus implied from the above quoted concluding general words of the 1897 grant, could avail the Crown anything. The miner would only be bound by *intra vires* regulations, in any event; and cannot on such an alleged constructive contract render himself subject to pay royalty imposed by a regulation clearly *ultra vires*; *Waugh v. Morris* (1); *per* Lord Blackburn, at page 208; *Anson on Contracts* (9 ed.) p. 217.

It is further contended, however, on behalf of the Crown, that these amending regulations have legislative force and effect; and that, notwithstanding the prohibition contained in the Yukon Territory Act against imposing any tax by ordinance, the Governor-in-Council had authority under section 47 of the Dominion Lands Act to effectively pass the royalty regulation in question. But that Act does not clothe these regulations with the force or effect of law; and it has been repeatedly held that unless the parent Act states either that regulations thereunder "shall have the force of law," or "shall have force or effect as if they formed part of the Act" (or like expression), such regulations can be judicially called in question, if they plainly transcend the scope of the parent Act, or if they

(1) L. R. 8 Q. B., 202.

are repugnant to the Act itself or the law of the land or if they purport to deal with matters which Parliament has prohibited; *Institute of Patent Agents v. Lockwood* (1); *Hardcastle's Statutory Law* (3 ed.) p. 286. In certain cases (*e. g.*, Orders-in-Council under the Extradition Acts) the statutory power provides that the validity of the statutory orders shall not be questioned in any legal proceedings whatever. But where the statute does not contain this or a similar provision, the court can canvass a regulation, and can determine whether or not it was within the power of those who made it: (*per* Lord Herschel, (1); *Attorney General v. Sillem* (2)).

The Crown cannot, therefore, impose new burdens on current grants, by making or amending regulations which have not any legislative force *per se*. The nature of the royalty regulations of 1897 is essentially derogatory to the grants of 1896, and is not within the original contemplation of the parties. Such a regulation would have to be proved in Court like any other by-law; and it is not entitled, under the parent Act, to judicial cognizance. It is undisputed, in the present case, that the royalty order of 1897 did not even reach the Gold Commissioner at Dawson until the 29th September, 1897, before which date neither the government officers in the Yukon nor the miners themselves had any notice whatever of the passage or existence of such an impost.

Regulations having been made in 1889 under the Act, upon which grants were issued and vested rights had accrued, the Crown ceases to be a legislator *quoad* such grants, and becomes a contractor; and the Crown cannot afterwards purport to legislate by regulation so as to affect such contracts during their continuance,

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(1) [1894] A. C. 347, at 360.

(2) [1864], 10 H.L. 704.

1902 unless such right be expressly reserved: *The City of*
 THE KING *Toronto v. The Canadian Pacific Railway Co.* (1).
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 CHAPPELLE. It is noteworthy that no evidence is to be found in
 THE KING the parent Act that Parliament intended to *reserve* any
 v. royalty on minerals. Section 47 is silent on this point;
 CARMACK. whereas sections 66 and 74, relating to timber berths,
 THE KING specifically provide for and contemplate payment of
 v. royalties, and empower the Governor-in-Council to
 TWEED. make regulations "respecting royalties and other dues
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pressio unius, exclusio alterius. In fact, neither by the
 Act itself, nor by the regulations of 1889 or 1897, is
 there any intention apparent to reserve any royalty
 on minerals. The regulations of 1889 were prac-
 tically copied from the earlier Indian Land Mining
 Regulations of 1888 [Bligh's Orders-in-Council, p. 199],
 which do provide, by section 81, for an express reser-
 vation of a four per cent royalty on sales of the product
 of mines. But this particular reservation was signi-
 ficantly omitted from the Dominion Regulations of
 1889, now under review. Again, in the new quartz
 regulations of 1898, sec. 53 (a) provides for payment
 of a royalty by way of *reddendum*; and, again, the Do-
 minion Mining Regulations of 1889, now under review,
 themselves provide, by section 82, for payment of a five
 per cent royalty on quarried stone. The maxim just
 quoted applies here also, with added force. Further,
 in a license for valuable consideration, imposing mutual
 obligations, a right to revoke or to derogate therefrom
 will not be implied: *Wood v. Leadbitter* (2); *Guyot v.*
Thomson (3), where this whole subject is fully dis-
 cussed.

In Bainbridge on Mines (5 ed.), 282, it is said that

(1) 23 Ont. App. R. 250 at p. 254; (2) 13 M. & W. 838.
 26 Can. S.C.R. 682, at p. 687. (3) 16 Eng. Rul. Cas. 64; [1894]
 3 Ch. 388, at p. 393.

the license to work may be in such a form as effectually to vest in the grantee the sole and exclusive right to the minerals; and, if it appear to be the intention of the deed, whereby the license is granted, that the grantee shall be solely and exclusively entitled to work the minerals, the license will be an exclusive one, and the grantor will be precluded from afterwards abridging or derogating from the grant.

If the grantor intend to reserve any right over the tenement granted, it is his duty to *reserve it expressly in the grant*, founded on a maxim which is as well established by authority as it is consonant to reason and common sense, viz.: that a grantor shall not derogate from his grant: *Wheeldon v. Burrows*, (1) *per* Thesiger, L.J.

As I have already stated, if the Crown could take one-tenth of the gold as a royalty, under a regulation subsequently passed, the Crown could also (by parity of reasoning) pass the title thereto to any one else, or could grant 10 per cent, or any other per cent, of the total proceeds of a mining claim to a third person, notwithstanding that the exclusive right thereto during the continuance of the license had been already granted to the original grantee.

It was urged on behalf of the Crown in argument that these discovery grants were gratuitous and without consideration; but in my opinion the discovery in each case is, not only the root of the title (as held in the analogous case of *Collom v. Mantley*) (2), but also one of the chief considerations for the grant, as indicated in sec. 2. of the 1889 regulations. Again, the discoverer was obliged to pay a \$15 entry fee for the first year, and \$100 "for each of the following years." In addition thereto, the grantee was under obligation subsequently to develop his claim, to constantly and actively occupy it, except when on leave of absence (sec. 25), and to effectively work it, on pain of forfeiture by abandonment (secs. 74 and 86).

It appears clear that the 1897 renewal grants related back to the 1896 discovery grants, thus obtained for valuable considerations. In the three cases before us,

(1) 12 Ch. D. 31, at p. 49.

(2) 32 Can. S.C.R., 371.

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the 1897 renewal grants in terms refer to the miners' applications made in 1896. There were no new applications made in 1897 on the obtaining of the renewals, and no new affidavits were required. The applicants could not purport in 1897 to rediscover their original claims. Again, the size of the original discovery claims of 1896 was 500 feet in length. On the 16th August, 1897, the length of placer claims was reduced to 100 feet by an amendment of the regulations, yet the evidence is that, when the suppliants renewed their 1896 discovery claims in the autumn of 1897, the size of the claims remained the same, viz.: 500 feet, pursuant to their original 1896 discovery grants.

As already mentioned, the first royalty order of 1897 did not purport to reserve a royalty by way of *reddendum*. A regulation thus purporting to impose a new burden, without the consent of the miner, is essentially a tax. In the final repeal of the royalty in 1902, it is called a tax; and up to the time of the commencement or these proceedings it has always been deemed to have been nothing but a tax, so far as I can find. It certainly contains all the characteristics and machinery for the enforced collection of taxes for the benefit of the consolidated revenue.

Adverting to the more general questions above considered, the observation of Lord Watson in *Osborne v. Morgan* (1) may be usefully referred to. The Court was there dealing with the Mining Act and regulations made thereunder in the Colony of Queensland, Australia, the Act in question being very similar to the Act and regulations in question here. At p. 231, Lord Watson says:

The general policy of the Act is to encourage gold mining within the Colony, by giving a *certain fixity of tenure* to all persons who are willing, either by virtue of a "Miner's Right," or under a lease from

(1) 13 App. Cas. 227, at pp. 231, 232.

the Crown, to occupy Crown land for that purpose, and to work efficiently and continuously.

And, at p. 232 :

“Miners’ Rights” are documents in the nature of a license, which are issued by the warden of the goldfield to any person applying for the same, and may be kept in force for ten years by his making an annual payment of the same amount for that period. The effect given to it, by the statute and regulations, is that, when the holder has by virtue of it lawfully occupied and duly worked in quest of gold a certain area of Crown land within the limits of the goldfield (called a “claim”), he thereby acquires a right to remain in undisturbed occupation of the claim, and an absolute proprietary right to all the gold which it contains, these rights being indefeasible, unless forfeited by his contravention of the Act of the statutory regulations.

In *Hollyman v. Noonan* (1) at p. 606, the Privy Council held that

the holder of a miner’s right must, during the *continuance* of such right, be deemed to be the owner of the claim occupied by him, and that all gold in and upon such claim must be deemed to be the absolute property of such owner.

And at p. 610, the court held also that the rights and interests of the parties to that case,

which were created before the making of the rules of 1868, or the rules of 1870, must be determined with reference to the rules of 1866, the only rules which were in force when the claims of both parties were allotted.

Finally, it appears to me that if, for argument’s sake, the 1897 royalty order should nevertheless be now impliedly read into the 1897 renewal grants, yet this will avail nothing, because the original royalty tax was cancelled before any money was or could be collected under it, and also before any right of collection had accrued under it. It was thus cancelled by the order-in-council of the 18th January, 1898, before any gold was, or could have been, severed from the soil by the spring sluicing or wash-up; before it was thus physically possible to put the order into

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operation, and also before a penny was or could be collected under it. The word "cancelled" is even stronger than "repealed," and the rule is that (but for the provisions of the Interpretation Act) a repealed statute is considered as if it had never existed, except as to transactions past and closed. The effect is to obliterate it as completely as if it had never been passed. The general rule, says Lord Campbell, is that a statute, from the time it is repealed, can no longer be acted upon. The effect of the repeal is the same, whether the alterations affect procedure only, or matter which is of more substance; *The Queen v. Denton* (1). See also *Surtees v. Ellison* (2), per Lord Tenterton, at p. 752; *Kay v. Goodwin* (3); *Grisewood and Smith's Case* (4) at p. 557; and *Attorney General v. Lamplough* (5).

But it was contended by the Crown that our Interpretation Act, R. S. C. ch. 1, sec. 7 (52), preserved the right of the Government to levy in 1898, under the cancelled royalty order of 1897. The subsection mentioned reads:

In every Act of the Parliament of Canada, the repeal of an Act, or the revocation of a regulation, at any time, shall not affect any act done or any right or right of action existing, accruing, accrued or established before the time when such repeal or revocation takes effect.

This provision of the Interpretation Act is thus confined to statutes, and their interpretation. It is not made applicable to the repeal or cancellation of a regulation by an order-in-council or by another regulation. In England, since the Interpretation Act of 1889, the law is otherwise, under section 31 of that Act. Repealed regulations have hence to be construed in accordance with the earlier decisions above quoted,

(1) 18 Q. B. 761 at p. 770.

(3) 6 Bing. 576, at p. 582.

(2) 9 B. & C. 750.

(4) 4 DeG. & J. 544.

(5) 3 Ex. D. 214.

unless the repealing regulations expressly preserve the remedy under the old regulations, which was not done in the present instance. The only saving clause contained in the 1898 regulations is section 40, which merely keeps alive the 1889 regulations, the regulations of 1897 being thus completely cancelled and obliterated as if they had never existed, save as to transactions past and closed. In any event, no right to collect the 1897 graded royalty was accruing or accrued in January or March, 1898.

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The Crown's position at bar was that the gold belonged to the Crown until severed from the soil and won by washing in the spring, and that there were no proceeds of the claim which were taxable until after the completion of such severance and sluicing in the summer of 1898. The wash-up did not take place until May and June, 1898, and no attempt was made to collect the 20 per cent graded tax under the abortive order of July, 1897. The royalty actually collected was the 10 per cent 1898 reserved royalty, for which there was no justification. The 1897 impost differed essentially from the reserved royalty of 1898. The former provided for a 20 per cent levy in some cases, and it did not purport to reserve the royalty, as the 1898 regulations subsequently did. Neither was it implemented nor supplemented by apt amendments to the other regulations, so as to abridge and modify the then subsisting exclusive rights of the miners. On the contrary, it called for an unwieldy accounting, respecting the output of the better mining claims, and made provision for its enforced collection as an impost.

For these reasons, I am of opinion that the Crown's appeals should be dismissed.

I have not here discussed, nor do I think it necessary to discuss, the question arising as to the particular claim of Chappelle under his renewal grant

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of 9th September, 1897, because, in the view I have expressed as to the rights of all the suppliants, he is certainly entitled to judgment. Nor do I think it necessary to more than express my opinion that the payments in question here were not voluntary payments. One-tenth of the gold itself was taken under duress, and under police pressure. The whole situation was essentially coercive; and the miners had practically no choice in the matter, directly the notices threatening forfeiture were posted, the miners being without means of redress, and the Gold Commissioner's decision being made final.

For these reasons the appeals should be dismissed with costs. The judgments of the Court below should be varied, in so far as they order references. The gold-dust itself, in specie, was taken from the possession of the suppliants. After severance the gold-dust was a chattel, the possession of which constituted title. According to the tax regulation which afforded the pretext for the levy, the gold-dust itself became, on severance, taxable wheresoever found, and could be taken from the miner's person as he passed the police posts. The Crown did not plead want of title in the suppliants, and the defence cannot set up the *jus tertii*.

The judgments of the Exchequer Court should be varied accordingly, with costs.

GIROUARD J.—The grant issued by the Crown provides that

the rights hereby granted are those laid down in the aforesaid mining regulations and no more and are subject to all the provisions of the said regulations, whether the same are expressed herein or not.

The latter words seem to convey the idea that at least the regulations must be in existence, for, otherwise, they could not be expressed. Regulations here do not and cannot mean future or past regulations in

force when the previous yearly grants were made. They mean regulations in force at the time of the issue of the grant, whether it be the first, second or any other renewal. Therefore, whatever royalty was due under the regulations existing at that time is demandable by the Crown.

For this reason I think that the judgments appealed from should be modified accordingly.

DAVIES J.—These cases come before us on appeal from the Exchequer Court and have been argued together as if practically consolidated. They raise the important questions of the right of the Crown to make the payment of a certain fixed royalty on the gold extracted or mined from placer mining claims in the Yukon Territory a condition of the licenses or grants made to those who, being free miners, legally apply for such grants, and whether or not, assuming the Crown to have any such power, it was legally exercised in the cases now before us. A subsidiary question was raised as to whether or not the royalty or money was paid voluntarily and so could not be recovered back irrespective of whether or not it was lawfully imposed.

With respect to the claim for a return of \$10,429 paid by Chappelle on the 16th July, 1898, as a royalty on the product of claim No. 7 on Eldorado Creek in the Yukon District, a distinct claim not applicable to any of the others is presented and may perhaps be conveniently dealt with at first. Chappelle had on the 9th day of September, 1896, obtained under the Dominion Mining Regulations of 1889, a placer mining grant or license for a year for the claim in question. On the 9th day of September, 1897, he obtained a renewal grant or license for the same claim for another year. The question which arose with respect to the

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royalty of \$10,429 paid by him on the total production of gold obtained from this claim during the year 1897-8, amounting in all to \$104,290, was whether or not the royalty regulations passed by the Governor-in-Council authorising the collection of royalty and which were published in the Canada Gazette of September 4th, 1897, for the fourth consecutive week, applied to his renewal license which was properly issued to him on the 9th September, 1897. The answer to that depends upon the proper construction of the 90th and 91st sections of The Dominion Lands Act, ch. 54 of the Revised Statutes of Canada. Subsection *h* of the 90th section empowers the Governor-in-Council

to make such orders as are deemed necessary from time to time to carry out the provisions of this Act according to their true intent or to meet any cases which arise and for which no provision is made in this Act; and further make and declare any regulations which are considered necessary to give the provisions in this clause contained full effect; and from time to time alter or revoke any orders or any regulations made in respect of the said provisions and make others in their stead.

Section 91 enacts that

Every order or regulation made by the Governor-in-Council in virtue of the provisions of the next preceding clause of this Act shall unless otherwise specially provided in this Act have force and effect only after the same has been *published for four successive weeks* in the *Canada Gazette*.

A previous section of the Act, the 47th, had provided that:

Lands containing coal or other minerals whether in surveyed or unsurveyed territory shall not be subject to the provisions of this Act respecting sale or homestead entry, but shall be disposed of in such manner and on such terms and conditions as are from time to time fixed by the Governor in Council by regulations made in that behalf.

Regulations for the disposal (*inter alia*) of placer mining claims had been made in 1889 by the Governor in Council and it was common ground on both sides of these appeals that the Governor-in-Council under

this section possessed the necessary authority to make regulations respecting the disposal of lands containing the precious minerals of gold and silver. The regulations imposing a "royalty," the application of which to the Eldorado grant or license of the suppliant Chappelle was challenged, were published in Canada Gazette for the fourth successive week on the 4th day of September, 1897, and the question to be determined is whether that was a sufficient and complete publication so as to bring the regulation into force immediately, or whether the full time of four weeks must elapse from its first publication.

If the latter construction is the correct one the regulations would not be in force until the 11th day of September, two days after Chappelle obtained his renewal grant. After a careful examination of the authorities I am of the opinion that the word "for" in the section must be construed as meaning "for the space of" or "during," and that publication was not complete until the 11th of September or until the whole time of four weeks had elapsed. It was the length of time the statute provided for publication and not the number of issues of the Gazette in which the regulations should appear. They could not be said to have been published for four weeks when they had been printed in four issues of the Gazette for three weeks and a day. This conclusion would dispose of the suppliant's case in his favour so far as the claim for the return of the \$10,429 is concerned, but for the question raised that the payment was voluntarily made by him. I have carefully read and examined the evidence on this point and I agree with the learned judge below that the payment was not a voluntary, but a compulsory one. The regulations provided that failure to pay the royalty required would operate as a forfeiture of his entire mining claim. A written notice to that

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1902 effect was posted on the claim and the suppliant was personally notified by the police that he must pay and that if he failed to do so he would forfeit the claim. Looking at the circumstances, and the situation, I do not see what option the man had. The penalty of immediate forfeiture was presented to him if he failed to comply with the demands of the Government, and he practically paid with a pistol at his head. I am therefore of opinion that so far as the claim for this \$10,429 is concerned the appeal should be dismissed and judgment given for the suppliant.

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With respect to all the other claims these questions already discussed do not arise. The licenses or grants were issued after the regulations were in force and the questions for determination are whether or not these regulations applied to renewal grants or licenses of claims, the original grants or licenses of which had been obtained before the regulations came into force; and secondly, assuming they did so apply, does the language used in them justify the collection of the royalty.

Chappelle's grant for placer mining on Hunker Creek known as Fractional Mining Claim No 3 A. below Discovery was as appears first applied for in December of 1896, when the necessary affidavit and entry were made by him and the grant or receipt given to him. In accordance with the regulations then in force, and which in this regard have never been altered, the term for which the grant of license ran, and during which the grantee or licensee had the exclusive claim and the exclusive right to the gold won by him from the claim, *was for one year from its date*. An argument was advanced on the use of the term "exclusive right" as negating any right on the part of the Crown to impose a royalty. But in my opinion this phrase has simply reference to

other persons and does not refer and cannot refer to any reservation which in the same document the Crown may reserve to itself. There was no necessity or sense in using it with respect to the Crown, the licensor, because the grant would, without the words in question, confer on the licensee the right, as against the grantor, but they were used as against other persons holding quartz licenses or hydraulic licenses or surface rights on and over the claim, and to ensure the placer licensee the indisputable right to the gold he won from his claim.

By the 20th section of the regulations of 1889, under which Chappelle's grant or license of 1896 issued, the entry of every holder of a grant for placer mining had to be renewed and his receipt relinquished and replaced every year.

The receipt referred to in the regulation was the license or grant, the form of which was set out in the schedule to the regulations. The miner did not receive any other document but this grant or license or receipt, as it was indifferently called, and his entry had to be renewed and his receipt relinquished and replaced yearly, otherwise his rights would lapse.

In May, 1897, new placer mining regulations were passed by the Governor in Council, so far as "the Yukon River and its tributaries" were concerned, in substitution for those of 1889. No change was made as regards the time for which the grant was issued. The provision requiring a renewal of the miner's entry and the relinquishment and replacement of his receipt was continued and the forms of affidavit and grant or license set out in the schedule were substantially the same. But so far as these regulations for placer mining could be made complete in themselves they were made so, and the General Mining Regulations of 1889 were only thereafter to be appealed to so far as placer mining in the Yukon and its tributaries was concerned

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1902 in special cases arising for which no provision was made in these new regulations. By an amended regulation passed by the Governor in Council and which came into force 11th September, 1897, the form of license which had been adopted from the general regulations of 1889 and set out in the schedule to the new placer mining regulations, was amended so as to show that it was issued under those new regulations and not under the general ones of 1889. The amended form prescribed by the new regulations reads as follows:—

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In consideration of the payment of the fee prescribed by clause 12 of the mining regulations for the Yukon River and its tributaries.

These new regulations, amended as above stated, as also the regulations of the 29th July, 1897, imposing for the first time a royalty

upon all gold mined on claims referred to in the regulations for the governance of placer mining along the Yukon River and its tributaries,

came into force in the month of September, 1897. The precise date when the royalty regulation came into force became important so far as the Eldorado Creek claim of Chappelle was concerned, which I have already disposed of.

But with respect to the Hunker Creek renewal license or grant the original of which only expired on the 9th December, 1897, these regulations were then in force and the question arises: Do they apply to and form part of such renewal? As a matter of convenience the officer in charge had handed the renewal license to Chappelle undated in the month of August, 1897, and some four months before his then existing grant or license expired. But it is in my opinion very clear that no officer or employee of the Government in the Yukon could anticipate the date prescribed by the regulations for the renewal entry by the holder of a

placer mining grant and for the relinquishment and replacement of his receipt. That had to be done by the miner every year. It could not, in my opinion, be legally done until the expiration of the year for which he had already received his license or grant. If any such miner could renew his entry and have his receipt or grant renewed by the officer during the currency of his year's license or grant, it would or might enable such officer to defeat the whole policy of the government as embodied in any new or amended regulations they might pass during the year.

It is plain beyond reasonable controversy that such new grant which was undated although issued for the miner's convenience on August 16th, could only have effect or vitality from and after the 9th December, 1897, when his license or grant of the Hunker Creek claim for the year 1896 expired. And it is further equally plain to my mind and follows as a consequence from what I have already said, that it could only be issued in the form and subject to the regulations at that day existing and in force. If, as is contended by the suppliant, he had an indefeasible right to a renewal of his license on the same terms and conditions and subject only to the regulations in force when the original grant or license was obtained, then it seems to me the express limitation for a year contained in such original grant would not have been inserted in it, or at any rate his right to have it renewed on the same terms as granted originally would have been in express terms stated. This was the case with regard to quartz mining grants or leases and it is singular that so vital and important a provision should have been omitted from the placer mine grants, if it was intended to have been put there. The inference to my mind is very strong that no such intention ever existed and that the grant was intended

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1902 to cover the period for which it was issued and no other or longer period, and that while its renewal was imperative so far as the miner was concerned in order to preserve to him continued rights in the claim, its issue was not imperative on the part of the Crown, but depended altogether upon the regulations which might at any time be in force and in any event would be subject to those regulations. On the day when Chappelle's original license or grant expired, viz., the 9th December, 1897, the regulations imposing a royalty on all gold mined in the Yukon Territory, were admittedly in force and unless therefore, the petitioner Chappelle had a legal right to renew his entry for his Hunker Creek claim and relinquish and have replaced for another year his receipt or grant on the identically same terms and conditions as those on which he obtained his first yearly license or grant in 1896, his renewal grant would be subject to the payment of the royalty imposed.

Now the first thing which strikes one about the petitioner's argument is that if successful it would practically defeat the whole purpose and intent of the statute and the regulations made under it. The 47th section of the Dominion Lands Act under which the regulations were passed and the license or grant to the suppliant issued, I have already set out in full. We start, therefore, with a statutory authority to the Governor in Council to dispose of those lands containing gold in such manner and on such terms and conditions as may from time to time be fixed by regulations made in that behalf. No more effective or comprehensive language could have been used by Parliament than has been used in this section. The very nature of the subject matter to be dealt with required that in the matter of framing regulations the powers of the Government both as to its general policy

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and as to all necessary details should be unrestricted, and the powers given in subsection (h) of sec. 90 to make regulations were as large as could possibly be given. Regulations suitable for conditions existing when the population is sparse and mining is pursued on a very small scale may be found quite inadequate and unsuitable at a time when the mining population becomes congested and operations in the different kinds of mining are followed on a gigantic scale. The Government responsible for the peace, order and good government of a distant, vast and almost inaccessible territory might require to pass the most stringent regulations and as exigencies required from time to time to alter, relax and amend them. Why did Parliament expressly confer the power of making and amending these regulations from "time to time" if it was not to provide in the fullest and amplest way that changing conditions and circumstances could always be adequately provided for? Why did these regulations fix the time for which the license was to issue arbitrarily at one year if it was not to provide that such yearly grants if and when they came to be renewed, should be subject to whatever new or amended regulations it might have been found desirable to pass? To argue as the petitioner has done here, that although the regulations under which he obtained his license or grant expressly restricted his rights under it to one year from its date, he was nevertheless entitled as of right to a renewal of his license every year while he chose to demand it and that on the terms and conditions contained in the regulations existing at the time he obtained his first license or grant, and irrespective of any amendments found to be necessary, appears to me to defeat the object Parliament had in view in conferring the power to pass and amend these regulations from time to time

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and which I think the Governor-in-Council had clearly before them when they inserted the limitation of one year in the placer miner's grant. It is admitted that the regulations do not expressly confer on the miner the right to obtain a renewal, but it is said such right must be inferred from the clause requiring the miner to renew his entry each year and relinquish or replace his receipt or license. But I fail to follow any such reasoning.

Some speculation has been indulged in as to why the Crown should have required a renewal of the placer miner licenses to be taken out every year if it was not intended to give the miner a legal right to obtain such renewal. But all such speculation is calculated to lead us far afield and will be found to be productive of little good. We have to deal with facts as we find them and not with the reasons why those facts exist. We find that the Crown, no doubt for excellent reasons, while giving a comparatively long term to the quartz and hydraulic miner, together with an express right of renewal, has only given to the placer miner a term of one year and has withheld the express right of renewal. It has, by regulation, further required of the placer miner that he shall every year renew his entry and surrender his receipt or license and take out a new one, and it provides expressly that this new license or receipt shall be subject to all the provisions of the placer mining regulations whether expressed therein or not.

To my mind all this can have but one meaning and that meaning is to compel submission to the existing regulations of all placer mining. To say that the regulations to which the license or grant is to be subject are to be those of perhaps one or perhaps five or more years previously, is in my opinion to go directly in the face alike of the spirit and of the language of

the regulations and the license. No injury could possibly accrue to the miner from this construction I have ventured to give of his rights. While his license lasts he has the exclusive right to the products of his claim subject of course to the regulations and when it expires no one could possibly make the necessary affidavit to obtain another grant or license for the same claim over the old licensee's head so long as the latter conformed to the regulations and came forward on the expiration of his license and renewed. If he did not, and suffered in consequence, he would only have himself to blame.

In construing, therefore, the licenses or grants now in controversy, and which were issued expressly subject to "the regulations," I construe these words as meaning the regulations in force on the days the licenses were issued just as much as if these regulations were one and all copied into them. These regulations making the payment of a royalty to the Crown on the gold mined from the claims a condition or term of the license or grant, were admittedly in force when the three licenses or grants in question were issued. But the learned judge of the Exchequer Court concluded that, reading the licenses in the light of the fact that they were renewals of former licenses, he must hold as a matter of construction that the Crown, by the use of the same words in the renewed licenses as it had used in the original license, had intended to incorporate not the existing regulations but the old ones which had been in force when the original license issued in 1896. As I have already said, I cannot concur in such a construction. As a matter of fact the form of license or grant prescribed and in force in December, 1897, recited the "mining regulations for the Yukon River and its tributaries," and not the "Dominion mining regulations" which the learned

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1902 judge held to be those of 1889. These Yukon mining
 THE KING regulations embraced those requiring payment of
 v. royalty and it was not possible or legal for any officer
 CHAPPELLE. by issuing the license six months before the time
 THE KING when it could legally issue or by using a wrong
 v. form and misquoting the title of the regulations to
 CARMACK. alter the legal effect which would properly follow
 THE KING from the proper recital or the legal date of issue. The
 v. whole question turns not upon the meaning alone of
 TWEED. the phraseology used in the form of license actually
 Davies J. issued by the officer but upon the legal rights which
 the licensee had at the time when his renewal license
 could properly be issued to him. If he possessed the
 legal and indefeasible right contended for by the
 suppliants *cadit questio*, the royalty was wrongfully
 exacted. If he did not, but only had, as I hold, a pre-
 ferential claim to a renewal on the terms and con-
 ditions of then existing legal regulations, the money
 sought to be recovered back was legally payable and
 the action must fail.

Another question was raised by the suppliants, as
 to the legality of the exaction of the royalty. It is said
 that even assuming the royalty regulation to have been
 in force and applicable to the licenses when issued,
 yet that these regulations were cancelled and abro-
 gated before the time when the royalty was payable
 and the substituted regulations adopted imposing a
 smaller or reduced royalty could not apply, having
 been passed subsequently to the issuing, but during
 the currency of the renewal licenses. But is this so?
 It is true that by regulations passed by the Governor
 in Council and which came into force on or about the
 12th day of March, 1898, the original regulations of
 September 11th, 1897, under which a royalty was first
 imposed, were abrogated or cancelled, and those of
 March, 1898, substituted for them.

The order-in-council effecting this substitution after reciting that

it was deemed necessary and expedient that certain amendments and additions should be made to the regulations governing placer mining along the Yukon River then existing,

went on to order

that the aforesaid regulations made and established by an order in council dated 21st May, 1897, and subsequent orders (*i.e.* the royalty regulations) should be and the same were thereby cancelled and the following regulations substituted in lieu thereof.

Then follow the amended or modified royalty regulations under which the monies now sought to be recovered back were paid. The cancellation and substitution were simultaneous acts. The new orders in council simply reduced and altered the rate and terms on which the royalty should be paid. They practically substituted a smaller royalty for that at first imposed and simply amended those original regulations. The two regulations could not of course continue in force and the original ones were necessarily cancelled and those of March substituted.

I am therefore of opinion that while other and perhaps apter language might have been used, the intention and object sought to be achieved has been done so successfully, and that the true and proper construction of the regulations requires those of September, 1897, and of March, 1898, to be read together. When they are so read and construed those of March, 1898, are simply an amendment of the ones of 1897. If any reasonable doubt as to this being the proper construction of the two sets of regulations still remained, I think it is fully removed by the provisions of the 49th and 52nd sections of the Interpretation Act which apply expressly to such regulations as these and are

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1902 amply sufficient to determine the very question here

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*Appeal in The King v. Chappelle
allowed in part without costs;
appeals in The King v. Carmack
and The King v. Tweed allowed
with costs.*

Solicitor for the appellant: *E. L. Newcombe.*

Solicitors for the respondents: *Lewis & Smellie.*
