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NORMAN McLEAN (SUPPLIANT) . . . . . APPELLANT;

\*Mar. 11, 12.

\*May 7.

AND

HIS MAJESTY THE KING (RE- }  
 SPONDENT) . . . . . } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Subaqueous mining—Crown grants—Dredging lease—Breach of contract—Subsequent issue of placer mining licenses—Damages—Pleading and practice—Statement of claim—Demurrer—Cause of action.*

A statement of claim which alleges that the Crown, after granting a lease of areas for subaqueous mining and while that lease was in force, in derogation of the rights of the lessee to peaceable enjoyment thereof, interfered with the rights vested in him by transferring the leased area to placer miners who were put in possession of them by the Crown to his detriment, discloses a sufficient cause of action in support of a petition of right for the recovery of damages claimed in consequence of such subsequent grants.

Judgment appealed from (10 Ex. C.R. 390) reversed, Davies and Idington JJ. dissenting.

Davies J. dissented on the ground that there was no sufficient allegation in the petition either of interference with the submerged beds or bars of the stream, which alone were included in the dredging lease, or of such active interference by the Crown as would justify an action.

**APPEAL** from the judgment of the Exchequer Court of Canada(1) which maintained a demurrer to the suppliant's petition of right.

The circumstances of the case, material to this appeal, are stated in the judgments now reported.

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\*PRESENT:—Fitzpatrick C.J. and Girouard, Davies, Idington and Duff JJ.

*Shepley K.C.* for the appellant.

*Chrysler K.C.* for the respondent.

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THE CHIEF JUSTICE.—This is an appeal from a judgment of the Exchequer Court maintaining a demurrer to a petition of right in which the petitioner (now appellant) alleges that:

1st. By indenture made in duplicate 23rd March, 1898, at Ottawa, Her late Majesty did grant, demise and lease unto the petitioner (now appellant) for a period of twenty years, the *exclusive* right and privilege of taking and extracting by *subaqueous* mining and dredging all royal and base metals other than coal to be found within a certain defined area on Dominion Creek in the Yukon Territory.

2ndly. The grant was made subject to the mining regulations of January 18th, 1898, which are incorporated in it; and also provides that if that portion of the creek covered by the lease is subsequently found to have been granted to another then there shall be priority according to the record. There is also exclusion of warranty as to sufficiency of water, and there is to be no claim for compensation if it is found impossible for that or any other reason to carry on operations under the lease which is declared to be taken entirely at the lessee's risk.

After setting out the lease and regulations in full the petitioner alleges:

*That subsequent to the granting of the said lease, and while the same was in full force, the Crown, through the Gold Commissioner at Dawson, granted to free miners the said area covered by said suppliant's lease as placer mining claims and had placed in possession of the same the said placer miners.*

The petitioner further alleges that, having paid

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the stipulated rental, Her Majesty refused his demand to give him possession of the areas granted.

To this petition the respondent chose to plead by way of demurrer.

By the judgment of the Exchequer Court the demurrer was allowed and the petition dismissed with costs. In effect the judgment appealed from decides that:

The mining regulations incorporated in the lease permitted a grant to be made to placer miners of the areas covered by the lease, and if the result of the alleged grant to the placer miners was to prevent the suppliant from carrying on his operations, the petitioner had no right to any compensation under the final paragraph of the lease which provides that:

Her Majesty does not in any way warrant that there shall be a sufficient quantity of water in the said portion of the said river to admit of operations under this lease, and that the lessee, his executors, administrators and assigns shall have no right to compensation should it be found impossible *for that or for any other reason* to carry on such operations, it being hereby declared and agreed that this lease is taken by the lessee entirely at his own risk.

With this judgment I cannot agree.

The demurrer assumes and is predicated upon the assumption that all the facts alleged in the petition are true. It cannot, therefore, be argued in this proceeding that the act of the Gold Commissioner was the unauthorized act of a public servant for the consequences of which the Crown is not responsible. The fact which must for the purposes of this appeal be taken to be as stated by the appellant is, that the Crown, through the Gold Commissioner, granted the areas in question to free miners and maintained them in possession. By the pleading the action of the Gold Commissioner in the premises is not repudiated, it is,

on the contrary, adopted by the Crown. In my opinion it is equally impossible to hold, with the judge of the Exchequer Court, that a conflicting subsequent grant would be a reason *ejusdem generis* with insufficiency of water sufficient to defeat the suppliant's claim under the last paragraph of the lease.

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What is the true effect of the document declared upon, whether it be called a lease, a grant or a license? Considered in its entirety it is in my opinion clearly an exclusive grant made for good and valid consideration of all the royal and base metals except coal which the grantee might extract during twenty years by *sub-aqueous* mining and dredging from the submerged beds or bars in the river below low water-mark with a license to go upon the premises for that purpose, and also to cut such ungranted timber belonging to the Crown as was necessary to carry on his operations.

The complaint is that the Crown in derogation of the right of peaceable enjoyment, during the continuance of the agreement, interfered with rights vested in the suppliant by transferring the areas granted to placer miners who were put in possession of them by the Crown, the grantor, to the detriment of the suppliant, the grantee.

On the issues raised by this demurrer, and these are the only issues before us, we are not called upon to consider whether or not it was as a fact possible to carry on dredging operations because of the insufficiency of the water.

The suppliant's complaint—that the Crown has disposed of the area embraced within his lease in the manner described—does not, I think, involve an allegation that the area has been granted to free miners under the regulations relating to placer mining or by the Gold Commissioner professing to act under

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them. It is, therefore, unnecessary to consider how far the suppliant's rights under this lease are subject to those of free miners holding placer mining claims under those regulations.

The general policy of the Act of Parliament and regulations is to encourage gold mining by giving a certain fixity of tenure to all persons who are willing under a lease to occupy Crown lands for that purpose, and to carry on their operations efficiently and continuously, and this policy would obviously be defeated if the exclusive rights granted to the suppliant for a valuable consideration, payment of rent and royalty, might be revoked or impaired at any time during the continuance of the grant at the will of the minister.

In the *Windsor & Annapolis Railway Company v. The Queen and the Western Counties Ry. Co.* (1), at page 366, Chief Justice Ritchie said:

I think the true construction of this agreement or grant is, and the clear intention of the parties as indicated thereby was, that the suppliants should have the full, beneficial and continuous enjoyment of the privileges thereby granted for a continuous period of twenty-one years, and that they should not be disturbed by the Crown in such enjoyment, and as a consequence, to enable the agreement to operate according to the intention of the parties, there is an implied undertaking on the part of the Crown not to do anything to derogate from its grant so to enjoy, the Crown, in my opinion, being no more entitled to act in derogation of its grant or to defeat its own act and not to be liable for a breach of its agreement, expressed or implied, than a subject.

I am of opinion that the appeal should be allowed with costs.

GIROUARD J. agreed with the Chief Justice.

DAVIES J. (dissenting).—The regulations under which the lease in question in this action was expressly issued provide that it

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was subject to such regulations and should be deemed to contain all such stipulations, provisoes and conditions on the part of Her Majesty and the lessee and all such exceptions and restrictions as are provided and contemplated by such regulations.

One of these stipulations and restrictions provides that the rights granted by the lease extend “only to the submerged beds or bars below low water-mark” within the area generally described in the lease.

The petition does not allege that there were any such submerged beds or bars within the leased area, or that, if there were, that the placer miners’ grants complained of covered them or parts of them. I think, under any circumstances, the absence of such an allegation would be fatal.

But, apart from that altogether, I think the appeal must fail and the judgment of the Exchequer Court be confirmed, because of the absence of any allegation of active interference by or on the part of the Crown or with its authority in the doing of the acts complained of by the suppliant.

He took the lease expressly, as it says, at his own risk. It covered an area or disconnected areas which might or might not be capable of being operated. In my opinion the Crown would not be liable in damages because some placer miners’ licenses granted subsequently to such a lease as that of the suppliant overlapped or impinged upon some or more of the areas which suppliant might be entitled to the exclusive right of dredging in. The suppliant had his remedy against such placer miners if they interfered with his prior rights of exclusive dredging in any such

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areas leased to him. The Crown did not remove suppliant from or interfere with his possession of the areas demised by the lease. It would be a novel and dangerous doctrine to lay down that the mere giving of a subsequent lease or license to a placer miner under cover of which the subsequent licensee might occasion prejudice to a prior grantee entitled the latter to sue the Crown for all damages he might suffer. The result in all cases of overlapping, if such a doctrine was upheld, would be, I venture to think, without precedent and productive of the greatest and gravest injustice. The lessee would probably conclude that an action for damages against the Crown in any such case for alleged damages would be much more profitable than carrying on the operation of dredging the river.

The Crown acts and must necessarily act through its officers. For their personal wrongdoing it is not responsible, and I do not see how we could, consistently with the uniform jurisprudence of this court, hold the Crown responsible in damages if the officials authorized to act within the law and the regulations, by error, inadvertence or sheer negligence in violation of the regulations gave a second lease or license to a miner the boundaries of which overlapped a prior license, without any further act or interference by the Crown.

The remedy of the holder of a legal license against a trespasser or wrongdoer or subsequent lessee of the lands leased to him is plain. But his rights do not embrace a right of action for damages against the Crown simply and merely because one of its officials wrongfully or inadvertently granted licenses to miners containing descriptions of areas in whole or in part already granted. Such subsequent licenses to the extent

that they infringe upon prior legal ones and as against them are simply inoperative and of no legal force.

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In this case it is not alleged that the Crown actively or directly interfered with any rights the suppliant had under his grant. It is not alleged that the Crown gave any special or other authority to the Gold Commissioner in the Yukon to give placer mining leases of any part of the area of the river or stream granted to the suppliant. If it had done so a question of its liability would of course have at once arisen, as it did arise in the case of the *Windsor and Annapolis Railway Co.*(1). But no allegation of the kind is alleged in suppliant's claim demurred to. The Gold Commissioner who is alleged to have granted the placer mining leases complained of must be held to have done so by virtue of his general powers and subject to the regulations by which he was bound. The petition does not contain any statement of any special action, authority given or interference by the Crown in the matter. If the Gold Commissioner acting under his general powers and subject to the regulations inadvertently or negligently violated these regulations and gave placer mining licenses on areas previously granted for *subaqueous* mining, that would not make the Crown in any way liable. It would simply be the tortious act of the Crown's officer for which the Crown would not be liable.

In the *Windsor and Annapolis Railway Case*(1), which I venture to think has no application at all to this case before us, Lord Watson delivering the judgment of the Privy Council, at page 615, after reciting the facts shewing that the forcible taking of possession of the road was not simply the tortious act

(1) 11 App. Cas. 607.



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of Mr. Brydges alone, as contended for by the Crown, said:

*It is plain, therefore, that Mr. Brydges acted with the full authority of the Government and merely carried out their instructions which were issued in the belief that it was within their legal right to put an end to their agreement with the appellant company.*

It is not possible, in my opinion, on the statements made in the suppliant's petition, to make any such contention with regard to the Gold Commissioner in this case, and I, therefore, am of opinion that the appeal should be dismissed and the judgment below confirmed.

IDINGTON J. (dissenting).—This is an appeal from the Exchequer Court against a judgment maintaining a demurrer to a petition of right.

The petition set forth at length a lease made by Her late Majesty granting, demising and leasing to the petitioner

the exclusive right and privilege of taking and extracting by subaqueous mining and dredging all royal and base metals, other than coal from the land covered by water \* \* \* commencing at a stake planted at the mouth of Sulphur Creek, where it empties into Dominion Creek, thence down stream five miles.

This grant and demise was made "subject to the rents, stipulations, provisos and conditions" therein after "reserved and contained," and was to be held for twenty years from 23rd March, A.D. 1898.

The instrument in the very first sentence of it, states that it is made

under and by virtue of the regulations of January 18th, 1898, governing the issue of leases to dredge for minerals in the beds of rivers in the provisional district of Yukon.

And immediately following the *habendum* and *redendum* clauses were the following provisos:

Provided always that this demise is subject to all and every the provisions of the said regulation of January 18th, 1898, a copy of which is hereinunder appended and shall be deemed to contain all such stipulations, provisos and conditions on the part of Her Majesty and the lessee, and all such exceptions and restrictions as it is provided or contemplated by the last mentioned regulations, that leases issued thereunder shall contain which regulations for this purpose shall be read so that the word "lessee" therein shall be taken to include the executors, administrators and assigns of the lessee.

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Provided further that if in consequence of any cause whatsoever a lease is found to comprise a portion of a river included in another lease the lessee whose application was first recorded in the Department of the Interior shall take priority. Provided further that Her Majesty does not in any way warrant that there shall be a sufficient quantity of water in the said portion of the said river to admit of operations under this lease, and that the lessee, his executors, administrators and assigns shall have no right to compensation should it be found impossible for that or for any other reason to carry on such operations, it being hereby declared and agreed that this lease is taken by the lessee entirely at his own risk.

The regulations thus above referred to and incorporated into the lease are set out in the petition.

Nos. 3 and 4 of the said regulations have an important bearing on the questions raised herein. They are as follows:

3. The lessee's right of mining and dredging shall be confined to the submerged beds or bars in the river below low water mark, that boundary to be fixed by its position on the first day of August in the year of the date of the lease.

4. The lease shall be subject to the rights of all persons who have received or who may receive entries for claims under the placer mining regulations.

The second and third paragraphs of the petition contain the suppliant's grievances, and are as follows:

2. That subsequent to the granting of the said lease, and while the same was in full force, the Crown, through the Gold Commissioner at Dawson, granted to free miners the said area covered by said suppliant's lease as placer mining claims and had placed in possession of same the said placer miners.

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3. Although your suppliant paid a yearly rental as mentioned in the said lease, at the dates and times mentioned and has demanded possession of said areas mentioned in said lease, and was entitled to the same, yet Her Majesty, represented by the Minister of the Interior of Canada, refused to give up the same to your suppliant, whereby your suppliant was deprived of the same by granting of the same to placer miners and has sustained damages thereby.

The prayer is

that he recover such damages as were sustained by reason of the *lands mentioned in the said lease being granted to free miners as above mentioned.*

A careful consideration leads me to conclude that the lease gives only that which cannot be granted by law to others under the placer mining regulations.

I have set forth above the material parts of lease, regulations and pleading that I think justify my coming to that conclusion.

To discourse upon these extracts to one reading them with the eyes of a lawyer would seem a waste of time.

If my conclusion is the result of an erroneous reading I cannot cure it—by more words.

That brings us, however, only part of the way.

The question then arises, do the paragraphs, Nos. 2 and 3 of the petition mean in law more than that grants to free miners have been made since the lease was given to the suppliant?

The presumption is in favour of the Gold Commissioner having acted legally. If anything further occurred to rebut this, it should be set forth so that the court, asked to pass upon this pleading, might understand wherein the officer of the Crown had erred, and how the Crown might be held responsible for such error. Much stress has been laid upon the words “the said area covered by said suppliant’s lease.”

It may, for aught set forth in the pleading, have been found out on the 1st of August, 1898, when the five miles of the river came to be delimited as provided by the regulation No. 3, that there was then no river; or at all events, no "*submerged beds or bars below low-water-mark*," in that part of the river now in question.

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The beds in the river may have become subjects of operation for a placer miner.

How are we to interpret this pleading? Must it not be against the pleader? If the systems that the names of Stephen and Mitford respectively stand for are inapplicable, and ancient rigidity is not to be applied, surely the pleader must yet set forth his claim with a reasonable degree of certainty.

If we use the words "area covered by the suppliant's lease" in the popular sense, it might fairly be read as that area which, at the execution of the lease, was covered by a large stream and was supposed by all parties concerned as likely to have on the first of the then ensuing August a volume of water wherein dredges might move or be moved about and usefully operate.

If that is to be taken as the area, meant in the pleading, as it reasonably may be in the plain ordinary meaning, then it may in the legal result have vanished and given legal place to another use and right that could legally be created over the same supposed area.

The taking possession, even physical possession, of the same area might be in such case justifiable. But the word "possession" does not always in law mean physical possession.

If we are to read the words "granting" and "granted" in their original strict legal meaning together with the meaning that the word "possession" in

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such a connection bore, then it meant anything but land in possession. It was some incorporeal hereditament that lay in grant. A reversion for example, might lie in grant.

Such I take it, is all the appellant is strictly entitled to claim as the meaning here of the words "granted \* \* \* possession" in this paragraph 2.

The meaning of the word "possession" being thus properly restricted, when we are asked, without any facts set forth in the pleadings to justify us in doing so, to impute to the officer or officers of the Crown an improper and illegal course of conduct, the appellant must fail to derive any benefit from the word "possession" used in this paragraph.

He fails, if the popular meaning is given some of the words relied on, and fails when the strictly legal meaning is given others. And if he can claim throughout a popular meaning for all he still fails.

Again, paragraph 2 may be fairly read as counsel for the appellant seemed willing to concede, as if the word "thereby" had been inserted in the third line before the words "had placed in possession." The prayer being only for damages by reason of the lands \* \* \* being granted \* \* \* as above mentioned, seems to make this clearly so.

Assuming that to be the correct reading, I cannot find any claim for damages that can be founded on issuing such a license as a placer miner is entitled to get—even if over the same area. It would only operate therein when the appellant's rights, if any, ceased, and so far as they ceased.

It would be just what the 4th Regulation incorporated into the lease allowed the Crown to do. The 2nd proviso above quoted covers what this 4th Regulation may not in this regard.

The line of cases cited by appellant's counsel seem distinguishable, if not quite inapplicable to such a grant, as this so called lease more aptly described I venture to think as a license, implies; unaccompanied by any actual physical possession, taken by anybody or if supposed to have been taken, yet not shewn to have been either directed by or adopted by the Crown in derogation of the appellant's rights.

Paragraph 3, I think, must fail with paragraph two for the essential part of it relies on paragraph two in using the words

whereby your suppliant *was deprived of the same by the granting of the same to placer miners, etc.*

It is useless unless rested upon paragraph two, or shewn that the Crown was bound to put appellant in possession. No authority was cited for binding the Crown, merely by the force of the grant or demise, to free land granted or demised from mere trespassers.

I would, however, if I found *Coe v. Clay*, (1), followed by *Jinks v. Edwards* (2) (cited for this purpose and pressed upon us), at all applicable to this case and this instrument (even if treated as far as possible as a demise) with the implied covenant that word carries with it in a lease, have to consider the force and binding effect of these cases in relation to such an interest as created here.

The express language of the first proviso above quoted, relieves me from all such necessities and considerations. It plainly says that the regulations

shall be deemed to contain all such stipulations \* \* \* on the part of Her Majesty \* \* \* as it is \* \* \* contemplated \* \* \* that leases issued thereunder shall contain.

(1) 5 Bing. 440.

(2) 11 Ex. 775.

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If it be said that this is reading these words, quoted thus, from the proviso in too literal and narrow a sense, I say, read them as speaking as part of what the whole scope and purpose of the instrument expresses, and we are brought back to the regulations as a whole as expressing what is intended or can be intended by any instrument made, as I have shewn this to be, pursuant thereto.

I cannot find in these regulations anything warranting the proposition that the Crown ever undertook to put the appellant in the physical possession of anything.

I cannot help saying that the omission in the 3rd paragraph of a date or anything to indicate at what stage in the order of events the alleged demand was made, is unsatisfactory and the frame of both paragraphs 2 and 3, generally embarrassing.

I think the appeal should be dismissed with costs.

DUFF J. concurred with the Chief Justice.

*Appeal allowed with costs.*

Solicitor for the appellant: *D. Donaghy.*

Solicitors for the respondent: *Chrysler, Bethune & Larmonth.*