1908
*Oct. 6, 7.
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*Feb. 12.

LEONARD VAUGHAN AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

THE EASTERN TOWNSHIPS BANK AND WILLIAM H. COVERT (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Irrigation—Rivers and streams—B.C. "Land Act, 1884" *and amendments—Pre-emption of agricultural lands—Water records—Appurtenances—Abandonment of pre-emption—Lapse of water record.*

Where holders of separate pre-emptions of agricultural lands, under the provisions of the "Land Act, 1884," 47 Vict. ch. 16 (B.C.), and the amendment thereof, 49 Vict. ch. 10 (B.C.), with the object of vesting their respective pre-emptions in themselves as partners, surrendered the separate pre-emptions to the Crown, and, on the same day, re-located the same areas as partners, obtaining a pre-emption record thereof in their joint names, the joint water record previously granted to them, as partners, in connection with their separate pre-emptions, cannot be considered to have been abandoned. The effect of the transaction caused the areas to become unoccupied lands of the Crown, within the meaning of the statute, and, upon their re-location, the water record in connection therewith continued to subsist as a right appurtenant to the joint pre-emption.

Judgment appealed from (13 B.C. Rep. 77) reversed, the Chief Justice and Duff J. dissenting.

APPEAL from the judgment of the Supreme Court of British Columbia(1), reversing the judgment of Morrison J. at the trial.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

(1) 13 B.C. Rep. 77.

The defendants, Vaughan and McInnes, held separate pre-emption records, and, as partners, a joint water record, dated 20th January, 1888. On 28th October, 1889, they recorded what was styled an abandonment of their respective pre-emptions, relocated the same areas as partners, and, on the same day, applied for and recorded these areas as a new pre-emption in their joint names, in partnership, under the provisions of the "Land Act, 1884"(1), and the Act amending that statute(2). Nothing was done in respect to the water record which was allowed to stand, as previously, in their joint names, "Vaughan and McInnes." At the same time the pre-emptors swore to an affidavit, in the form required by the statute, stating that the areas were "unoccupied and unreserved Crown lands, within the meaning of the statute * * * staked off and marked * * * in accordance with the provisions of the 'Land Act.'"

The grant of water to Vaughan and McInnes was for 99 years from the 20th of January, 1888. On 25th March, 1899, the respondent Covert obtained a grant and record of the same water rights for an indefinite period, and, some time before the commencement of the action, transferred his lands, adjoining those of Vaughan and McInnes, and his water record to the other respondent, the Eastern Townships Bank. The bank subdivided the lands into small fruit farms and constructed an irrigation system for the use of these plots of land. Covert's water record was indorsed by the recording officer with a memorandum, as follows: "Error in not making out application on the 18th October, 1887," and the bank, claiming that this had the effect of antedating their water record to the 18th

(1) 47 Vict. ch. 16 (B.C.). (2) 49 Vict. ch. 10 (B.C.).

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of October, 1887, and giving it priority over the appellants' record, brought the action to restrain them from using the water in priority of the respondents and also attacking the validity of the appellants' record. The trial judge, Morrison J., dismissed the action and, on appeal, his decision was reversed by the judgment from which the present appeal is asserted.

J. A. Macdonald K.C. for the appellants.

S. S. Taylor K.C. and *H. C. Hamilton* for the respondents.

THE CHIEF JUSTICE (dissenting).—I dissent from the judgment allowing this appeal for the reasons stated by Mr. Justice Duff.

DAVIES J.—I concur generally with my brother Maclennan in his conclusion to allow this appeal and to restore the judgment of the trial judge dismissing the action, but I desire to add some words of my own.

The ground upon which the Supreme Court of British Columbia rested their judgment was that the appellants, Vaughan and McInnes, had abandoned their separate pre-emptions at the time they took out their joint pre-emption and that their water record which had been obtained in connection with the pre-emption consequently lapsed.

A number of other points were raised by the respondents either as invalidating the appellants' record or as giving priority to that of the respondents. I do not intend dealing with these at any length: I think the want of certainty alleged in the defendants, (appellants') record from the absence in it of the name

of the creek sufficiently covered by their application for the record which application is identified in the record itself by its official number and contains the clerk's name.

I agree for the reasons stated by my brother Maclennan that it would be impossible under the facts to make the respondent Covert's record relate back from the 25th March, 1889, to the 18th October, 1887, as contended for.

The substantial point on which the judgment of the court below proceeds was that there was such an abandonment by the appellants of the land of which they had severally pre-empted 340 acres and of their "lawful occupation and *bonâ fide* cultivation" of the same as necessarily destroyed or forfeited their water record and caused it to lapse.

I am unable to reach the conclusion of the court below that there was any such abandonment.

I agree that in order to obtain and retain a water record under this statute several things must exist and concur. The applicant or applicants must (*a*) be entitled to hold land and (*b*) must also be "lawfully occupying and *bonâ fide* cultivating lands" in connection with which and as appurtenant to which he may record and divert so much water from the natural channel of any stream, lake or river adjacent to or passing through such land as may be reasonably necessary for agricultural or other purposes, and the commissioner for the district may allow. The 43rd section of the statute of 1884, as cited by my brother Maclennan, is the governing section.

In the case of the respondents these conditions existed at the time they obtained their water record. The fact that they obtained a joint water record while their pre-emptive rights were several in the land does

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not appear to me by any means to be fatal. Though they had each separate pre-emptive rights in 320 acres they worked all the lands in partnership and their occupation and cultivation of the lands were joint. The statute in its 19th section expressly contemplates the case of several persons uniting in partnership for the purpose of pre-empting, holding and working land and expressly declared such persons to be eligible to pre-empt as a firm an area of land to the extent to each partner of 320 acres in that part of British Columbia. But there is nothing in the statute which in my opinion prevents separate pre-emptors whose lands were so relatively situated that one water record in their joint names would enable them more satisfactorily to obtain the supply of water required for irrigation or other agricultural purposes from making an application in their joint names and obtaining a joint water record to be utilized for their several farms or holdings.

I have not heard any satisfactory reason advanced why that should not be so. The statute certainly does not expressly prohibit such a course being taken, and I can easily conceive of situations existing which would makes such a course very desirable, if not necessary, as well from a pecuniary standpoint as from the physical situation of the lands relatively to the water sought to be obtained.

The defendants then having separate pre-emptive rights in the 640 acres which they worked in partnership, obtained their joint water record, necessitating the construction of one ditch only to carry the water to their lands. In this I think they were not acting outside of either the letter or the spirit of the statute.

Afterwards, deeming it desirable to consolidate their separate pre-emptive rights in one joint pre-emp-

tion and finding the statute prohibited any transfer of any pre-empted land until after the issue of a Crown grant of the same, they went to the proper officer to effect their purpose by surrendering up their separate pre-emptions and taking out a joint pre-emption. As Vaughan in his evidence says:

> I told him (the officer) to put the lots in partnership; I turned over the old records and he made new ones.

The necessary formal application to record in their joint names as pre-emptors the 640 acres and also the statutory declaration to accompany it were duly made.

This it is which is said to amount to an abandonment and to work a forfeiture of their water record. But an abandonment of what? Not of the lands, certainly. These continued in the possession and occupation of Vaughan and McInnes as they had been all along, and continued to be cultivated in partnership as they had been. No other person was or could be in such occupation or cultivation while the defendants remained in them. No suggestion ever was made of any intention to abandon the lands or their possession or occupation. No evidence of such intention was or could be given because it would be contrary to the fact. As a fact there was no abandonment and no intention to abandon, but on the contrary a clear undoubted intention to continue in the joint occupation and cultivation of the 640 acres.

The pre-emptors continued on without a break in their *bonâ fide* occupation and cultivation of the pre-empted lands, the sole and only change being that the separate pre-emptions were changed into a joint one. But this mere change in the title would not alone, in my judgment, operate to work a forfeiture of the water record which was appurtenant to their lands. The

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change was doubtless made in order that their water record being joint, their pre-emptive rights might agree with it. But the conditions necessary, in my opinion, under the statute to obtain a water record or right and to retain such right, namely, the existence of a person or persons entitled to hold lands and their "lawful occupation and cultivation" by such persons continued in the case of defendants, appellants, and their lands, and the mere change in the manner in which the title to the lands was held was not in itself fatal to their water rights. Looking at the substance of the transaction it cannot in my opinion be fairly said that there was any such abandonment as that contended for or any abandonment of the lands at all, or of the manner in which they had all along been occupied and cultivated. The most that can be said is that as they desired to change the tenure or title by which they held the lands from separate pre-emptions of moieties to a joint pre-emption of the whole and that as the statute prevented the accomplishment of their purpose by the customary methods of transfer until the Crown grant issued, they were compelled to resort to the method they adopted of surrendering their several pre-emptions and taking out instead a joint pre-emption. But such mere change in the manner of holding their title did not in any way affect their occupation and cultivation of the land or the necessity which presumably existed for the water their record entitled them to divert. The object of the prohibition of transfer until after Crown grant was issued I take it was to insure as far as might be possible that only *bonâ fide* occupiers and cultivators should hold and enjoy pre-emptive rights. It was to prevent the speculator and the many outside parties not being *bonâ fide* occupiers or cultivators from becoming the owners by purchase of these rights. Such

prohibition never was nor could be intended to prevent several *bonâ fide* occupiers and cultivators who had taken separate pre-emptions from surrendering their several and separate rights and changing them into joint ones, if they desired to work their holdings in partnership, or on the other hand prevent those who had made their pre-emptions joint under the statute from surrendering and changing their interests to several ones. To say that they could only do so under penalty of forfeiture of their water rights which presumably were essential to the profitable enjoyment of their holdings is to import into the statute an object which I am satisfied was not that of the legislature, and to put a construction upon its sections which they will not fairly bear.

A statutory water right appurtenant to a piece of land for the purposes of its proper and profitable occupation and cultivation might properly be forfeited and lost by its owner abandoning his holding. But in every case I take it whether there has been an abandonment or not must be a question of fact. In the circumstances of the case before us I find not an abandonment of the lands for the proper cultivation of which the water record was granted, but a mere change in the title, of the holders or occupants from several pre-emptions to a joint pre-emption so as to enable them more effectively in their opinion at any rate to cultivate and develop their holdings.

Then it is said that in order to obtain the joint pre-emption they were obliged to make and did make a false declaration in stating the lands to be

> unoccupied and unreserved Crown lands within the meaning of the "Crown Land Act."

I do not agree to that. Whether the affidavit was false or true depends upon the construction of the

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statute. The statement that the land was unoccupied Crown land does not mean that *the applicant* was not in its occupation. What I take it to mean is that no other or third person occupied it. In the very nature of things the plaintiff must have been an occupier when he made his application because the statute in its 5th section expressly requires any intending pre-emptor to go upon the lands he intends pre-empting, and if the lands be unsurveyed first place at each of its angles or corners a stake or post, and further requires him to fix upon each post a notice in the following form:

A. B.'s land N.E. post:—A. B.'s land N.W. post, and so on as the case may be.

It is only after the intending pre-emptor has complied with these statutory requirements that he can make his application and if he obtains his record without having so staked and marked his land the statute goes on to say "he shall have no right at law or in equity therein."

These essential pre-requisites go to shew that when he makes the declaration that the lands are unoccupied the meaning is unoccupied by any person other than the applicant. It would seem absurd that an intending pre-emptor staking out his land and complying with the statutory requirements of proclaiming by notice on the four corners of the land, that the land was his should, if he left his wife and children in a camp upon the land while he journeyed perhaps hundreds of miles to the proper officer to complete his pre-emption, be guilty of perjury if in his declaration he called the land unoccupied. It would be in my opinion unoccupied Crown lands within the meaning of the statute it after having been surveyed, staked and proclaimed as his by the applicant, he, in order to prevent it being

"jumped," or for any other reason, left his wife or agent in possession while he himself travelled away to complete his title.

For these reasons I am of the opinion that the appeal should be allowed with costs and the judgment of the trial judge restored.

IDINGTON J.—The questions raised by this appeal turn upon the correct interpretation of the provisions of the "Land Act, 1884," providing by said statute and also some amendments thereto for the diversion of water from the streams in British Columbia.

The legislation in question is a clear invasion of the ordinary common law rights of riparian proprietors and others whose properties may become subservient to the rights given to affect the purposes of the Act.

To carry out the provisions of the Act, officers of the Crown are entrusted with the duties of receiving applications from those desiring to avail themselves of the provisions of the Act to acquire such rights of diversion as the Act enables to be given.

It is part of the duties of these officers receiving such an application to see that all the conditions preliminary to such acquisition have been complied with and when complied with, to make a record of the grant which is made when he finds these conditions to have been complied with.

Hence the rights thus acquired are called water records.

The same officers who discharge these duties also have charge of the selling or entering and granting applications for the purchase of Crown lands in the district for which they are appointed. When granted and recorded this right of purchase is spoken of as a pre-emption right or record.

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Each of the appellants, Vaughan and McInnes, acquired as results of such applications for purchase a pre-emption right to certain lands that adjoined each other and could be usefully served by the same ditches or water system conveying water from a creek known as "fourth of July" creek.

They occupied these lands over which they had thus respectively acquired such rights of pre-emption.

Though each thus had his separate title by way of pre-emption they carried on the business of farming these lands in partnership.

Their occupation was joint, but the root of each title to occupation was several, and when each occupant entered on or was in occupation of the land pre-empted by the other he was dependent on the will of that other or the contract he had with that other to maintain his right to such occupancy.

That occupancy might be jointly with or in substitution of the other as agreed, provided always such substitution was not entire or in conflict with the conditions imposed "of continuous settlement."

It is necessary to understand these elementary propositions clearly in order that we can see if such persons fall within section 39 of the Act in question which reads as follows:

> 39. Every person lawfully entitled to hold land under this Act, or under any former Act, and lawfully occupying and *bonâ fide* cultivating lands, may record and divert so much and no more of any unrecorded and unappropriated water from the natural channel of any stream, lake, or river *adjacent to* or passing through such land, for agricultural or other purposes, as may be reasonably necessary for such purposes, upon obtaining the written authority of the commissioner of the district to that effect, and a record of the same shall be made with him, after due notice as herein mentioned, specifying the name of the applicant, the quantity sought to be diverted, the place of diversion, the object thereof, and all such other particulars as such commissioner may require. For every such record the commissioner shall charge a fee of two dollars;

and no such person shall have any exclusive right to the use of such water, whether the same flow naturally through or over his land, except such record shall have been made and such fee paid.

The statute does not define what is necessary to constitute a person lawfully entitled to hold land under this or any former Act. This Act excludes by implication, aliens, unless complying with the terms laid down promising to become British subjects. Another Act, 47 Vict. ch. 2, expressly excludes Chinese.

Each of these appellants who obtained the water record seems to have been qualified. No contention was made to the contrary in this regard. I therefore assume them qualified.

Each of these appellants under the relations formed towards each other and these lands were lawfully occupying and *bonâ fide* cultivating the lands in question.

When we have regard to the purview of the Act we must surely conclude that it is the "lawfully occupying and *bonâ fide* cultivating" that is desired to be served by this allotment of water.

This phrase appears in more than one place in the Act. As a test of the meaning of the Act that is in a measure of some value.

But beyond all that what could be the purpose of such legislation invading, as already said, what was ordinarily looked upon not only as an incident of the ownership of real property, but so much part and parcel thereof as to seem almost inseparable therefrom if it were not to be the means of supplying water to the cultivator?

What we have to find under this section is a personal status for which the applicant or applicants must be qualified, first, by a general capacity to hold

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real estate; and, secondly, that he or they occupy and cultivate land.

No other condition or requirement of any kind is named in the statute or is referred to in the application for a water record, or in the water record itself.

Why should we seek to import one? How can we if we so sought to do?

The language used does not warrant our doing so. It is so clear and so express on this point as, I submit, to forbid us doing so.

Now let us see if the appellants have that required personal status. Each was when the water record was applied for and got, in lawful occupation of and *bonâ fide* cultivating land which needed the use of water.

Nay, more, it is proven that together they lawfully occupied and cultivated as partners each with the other that other's land, and thereby were fully qualified even if some specific land must be also had in view unless the ordinary rights of land owners to so assemble their rights of occupation and cultivation are to be denied them.

There is in this last regard I submit no colour of reason for such a suggestion unless it is found in the prohibition of section 24:

> 24. No transfer of any surveyed or unsurveyed land pre-empted under this Act shall be valid after a Crown grant of the same shall have been issued.

This section has been considered by the courts of British Columbia in two cases, *Turner* v. *Curran*(1), where an agreement to sell outright a pre-emption claim was held void, and *Hjorth* v. *Smith*(2), where a deed having been executed before patent of a pre-empted lot of land purported to convey it, but was only intended to operate after the patent was issued and to

(1) 2 B.C. Rep. 51. (2) 5 B.C. Rep. 369.

effect that purpose it was delivered as an escrow and after the issue of the patent was held valid.

This latter judgment proceeded on the ground that the instrument did not come within the express terms of the prohibiting a transfer of the land so pre-empted. See also *Meek* v. *Parsons*(1).

In like manner I fail to see how the agreement between the defendants to work the lands each was entitled to in partnership could come within the prohibition. It does not seem to me that such an agreement or acting upon it could offend against or come within the evil at which the section aimed.

It is, however, contended further that the grant of a water record must be held as intended to have been appurtenant to some specific land. Why so? The statute does not in terms or by any reasonable implication thereof make it so.

Let us test it by what would be the result of a conveyance of the land.

Bouvier's Dictionary (vol. 1, p. 158) defines "appurtenances" as follows:

> Things belonging to another thing as principal, and which pass as incident to the principal thing.

Burton on Real Property (8th ed.), p. 353, par. 1145, repeating Coke on Littleton, says:

> In general everything which is appendant or appurtenant to land will pass by any conveyance of the land itself, without being specified, and even without the use of the ordinary form "with the appurtenances" at the end of the description.

Then we find the interpretation given by authorities cited in Gould on Waters (3 ed.), p. 465, dealing with similar legislation is stated as follows:

> The ditch when completed is not a mere easement or appurtenance.

(1) 31 O.R. 529.

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I do not find the cases he refers to in the foot note to the text bear directly on the point, but the cases of *Strickler* v. *City of Colorado Springs*(1), and *Bloom* v. *West*(2), are well worth looking at and held as just quoted.

The greater part of the land might be granted, one part to one, another to another, or for some other purpose to which this never could be supposed to be appurtenant.

Or as intensive farming progressed a few acres of a whole section might require all the water so granted. Yet if anything in the theory that it was appurtenant a man may have after spending large sums of money on such improvements his whole property tied up in an undesirable way.

It would, I submit, be the part of wisdom to proceed slowly before grafting on to any statutory right, though having in some respects some relation to the use of or use for land, the intricate technical character of real property rights at common law or derived from ancient statutes; especially when the statutory right under consideration shews as clearly as this one does that it had not had that consideration given to it that would render the grafting process a success. Moreover, the statute does not imply any permanency of title as needed to entitle one to apply or receive a grant so long as there exists land lawfully occupied and cultivated and the party is not a mere trespasser.

The legal right given by this statute is, I think, analogous to that given householders in cities to be supplied by municipal or other corporations with light or water.

The right often, if not always, exists in the house-

(1) 16 Col. 61.

(2) 3 Col. App. Rep. 212.

holder on the line to insist on a supply of light or water because he therein fulfils the primary condition entitling to such supply.

But who ever heard of such a right as so appurtenant to the land that a purchaser and grantee thereof could insist on the actual fulfilment of the personal contract which the vendor may have had, for years yet to run, at the time of sale?

In actual practice the term of ninety-nine or eighty years now in question may not seem to have much relation to the not uncommon term of a few years.

But in what essential is there any difference in legal principle?

The radical error in the judgment appealed from is that it assumes as necessary to the grant or holding it that there must be unity of title in the privilege or franchise given by the statute and in the property which it is used to benefit or improve whilst the statute clearly neither expresses any such thing nor implies it as necessary in any way, but plainly expresses merely the lawful occupation and cultivation.

Nay, more, to insist upon this unity of title in such a statute as before us where so many contingencies, qualifications and conditions are left unprovided for would be to defeat the purpose of the Act.

The whole chapter of Gould on Waters devoted to this branch of law is replete with such material as to suggest many reasons for holding this statutory right as it existed under the Act now in question and before later developments did not proceed upon any such theory as the water record becoming appurtenant to any land.

It could not in case of a sale of part perhaps even of the greater part of the land be conceivable as appurtenant to that sold. It is not severable in that way.

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It requires a special bargain in such case and does not pass.

Indeed it might well be designed that part should pass and remainder be left without water.

All this remained unsettled, unprovided for, when this water record in question was granted. The statute as amended alters much of this, but cannot bear on this case.

I do not urge that the water records could not be made appurtenant by contract. Nor do I say that a statute might not be framed to have the same effect or pass any opinion on the statute as now amended.

I merely desire to enforce the argument that this statute had not made the water record appurtenant when first creating it and, hence, neither being so necessarily nor made so by express terms is not appurtenant.

The statute as amended in 1886 provided that transfers, etc.,

> shall be construed to have conveyed and transferred, etc., * * * any and all recorded water privileges in any manner attached to *or used* in the working of the land pre-empted or conveyed, etc., etc.

How far does that carry us? It simply provided for giving *primâ facie* effect to the probable intention of parties making and receiving such transfers and recognizes a right not hitherto existing to transfer a water record.

It would seem quite clear, apart from any inference drawn from the existence and frame of this amendment, that the water record had not up to that time been assignable.

It was necessary to confer and define the extent of the power to assign, and in doing it this very class of cases was omitted for the section carefully restricts its operation to the transfers

of any pre-emption right where the same are or were permitted by law.

Any argument to be derived from it seems to me distinctly against such a position as taken here by respondents, that inherently these water records had been appurtenant to any land. It does not matter if in a dozen other classes of cases the right has become appurtenant so long as it has not so become in this.

It helps, moreover, appellants' case, when we have to consider the question upon which the whole case turned in the court below, to keep in view this obvious exclusion of this very case inherent in the amendment. Even if the right were appurtenant I think, for reasons I am about to state, it had not been forfeited.

Let us consider then, what is relied on to forfeit appellants' rights.

What happened was this. These appellants, Vaughan and McInnes, desired to extend their relations as partners to a joint interest or ownership of pre-emption in the lands hitherto held separately.

They presented their wishes on the 28th October, 1889, to the commissioner and on that day with his sanction and approval (as attested both by his swearing them to the affidavit taken, and the evidence of Vaughan, as well as what I infer from the date and form of the application on his printed form possibly written in if not by himself by his express directions, and from his writing across the face of their pre-emption certificates the alleged abandonment thereof) signed an application for a pre-emption of the combined properties of both and made the usual affidavit therefor.

Section 24 prohibited a transfer from one to the other and this mode was adopted of bringing about the desired result.

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What legal effect had this proceeding? Most obviously it was either effective or a nullity.

The latter was entirely contrary to the intention of the parties, yet if illegal it must be held to have been and to be null.

In either alternative it cannot help the respondent.

If it effected nothing the so-called surrender was null.

The rights of the parties could not be so destroyed. They remained in lawful occupation throughout and continued cultivating jointly their lands.

It is treated in the judgment appealed from as effective to terminate the right of appellants.

In this I cannot agree. The Crown alone had the right to affirm this alleged termination of these pre-emptive rights.

If anything flowed therefrom, let us suppose, if we can venture so to suppose, the Crown had instituted proceedings to have it declared that the pre-emption had ended, because one of the officers of the Crown had in course of this written across one corner of the certificate the words, "abandoned 28th October, '89, W.D., Assistant Commissioner of L. & W.," and set thereto his own initials. Can any one say such a claim would in any court of justice have been maintained? See the case of *Lytle* v. *State of Arkansas*(1), at p. 333.

It is said there must be a time during which the appellants' rights were suspended, yet they were in occupation.

Then they must have been on this theory of suspension and surrender trespassers during that time. Could the Crown have maintained a suit for trespass done during that time? The answer would be that, until something more was done by the Crown, they were

(1) 9 How. 314.

tenants at will or on sufferance and, thus, in the lawful occupation and cultivation which alone can be urged when assuming it must continue as the basis of right to hold the water record.

Again, the surrender relied on is a myth. The applicants signed nothing and did nothing but hand conditionally their certificates of pre-emption to the officer. His act in writing thereon was unauthorized unless he had power to do effectively what they desired and trusted to have done. Meantime the water record was not touched in any way. How then can it be held to be affected? Whilst the statute requires at its granting a personal status in him applying for it there is no provision for the qualification continuing.

The legislature seemed to assume that such a thing as a desire to hold when no longer useful was not likely to arise.

At all events no such case was specially provided for.

I do not doubt that in law it was provided for by the implied consideration for and thus become virtually a condition inherent in the grant that it should be made useful.

But in that case it would not end as a matter of course.

It would require something done at the instance of the Crown by a proceeding in a court in a proper way shewing that in fact the consideration for the grant had failed.

The right would not terminate automatically, as it were. No statute or law had said so and this mode of relief was not one the respondents could insist upon.

This is entirely another consideration from that other argument used that the water would revert to the Crown, in which, I think, there is much to be considered.

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But if what I have said be not effective in maintaining my argument I doubt if it would gain any added strength from this other.

What I have set forth as above seems to me clearly to establish by a strict adherence to elementary principles and the language of the statute that the appellants are entitled to succeed.

The numerous points taken and arguments adduced on either side beyond those directly or incidentally implied in the foregoing have received due consideration, but need not be dwelt upon at great length.

The date of the notice founding the appellants' application I think erroneous. We must now at this time assume the assistant commissioner adjudicated properly on so very obvious a matter. Besides there is the view taken in this court in the case of *Martley* v. *Carson* (1).

As to the alleged priority of the respondents' claim it is not supported by such evidence as at this distance of time should be called for in light of nearly twenty years of acquiescence in a condition of things that it would be most unjust for that reason alone now to disturb. It has to stand or fall by its own strength and adds nothing to anything else in the case on which the respondents might rely.

The ground taken by respondents that the water record of appellants does not designate the purpose for which the water is to be used on the creek in respect of which the water record is granted supported by a reference to sections 43 and 44 is deserving of notice, not from any strength to be found in it, but as one of those assumptions of law and fact that I respectfully submit have wrought so much confusion in this case.

The Act does not by these sections or anywhere

(1) 20 Can. S.C.R. 634.

expressly require that the exact purpose for which the water is to be diverted should be stated in the application or defined in the record of grant. There are certain things pretty evidently required by these sections. They are the personal status or qualification of the applicant already dwelt upon, that the water shall be for agricultural or other purposes, that the quantity be specified, and the object. Now surely what has been adjudged by the commissioner and done in pursuance thereof must be taken at this late date in light of the evidence before us to have got itself defined to the satisfaction of him in whom was reposed the judicial power to determine. More than that due consideration of the whole involved in this minor inquiry drives me to conclude that the adjudication must have proceeded upon a consideration of what quantity of *cultivatable land* was within a reasonable time likely to be in need of water and that the extent of land already cultivated would be some index thereof and that it was not the irreclaimable rocks which for aught we know may have formed nine-tenths of the entire land in question that would or could be considered by the commissioner.

All these and like considerations, as well as extent of supply, and possible needs of others, were entrusted to the commissioner to pass upon before he sanctioned priority.

Time has settled the boundaries of what he assigned and tells us thus what he did. But at no time does it seem that he or any one else had ever to consider to what land or part of land this grant so recorded should become appurtenant as one would expect to have found if the legislature had felt concerned in that sort of question instead of leaving it to be held in gross to become if need be appurtenant to

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what events might prove it fitting it should be, and the proprietor determine.

That brings me to suggest that the judicial nature of the inquiry entrusted to the commissioner was of such a character that unless he was clearly without any jurisdiction to pass upon appellants' first application for water in the way and to award as he did we have no right to disturb his decision which has remained unchallenged for nearly twenty years, nor has the respondent any right now when he failed to shew cause at the proper time before the commissioner as against appellants' application made, as it was always known to be, jointly.

This same judicial character of the functions the assistant commissioner had to discharge renders it quite needless to notice at length the rather absurd sort of proceeding relied upon as having the effect of ante-dating respondents' grant to the detriment of the appellants without ever calling upon them to shew cause.

Taking into account the various considerations above as well as others not adverted to and section 3 of the amendment of 1886 and some other sections and having regard to the principles upon which the case of *Osborne* v. *Morgan*(1) proceeds, though possibly distinguishable from this case, there may be grave reason to doubt the status of the respondent herein.

It has become unnecessary in my view to pass upon the same. Being so, it is also undesirable to do so, as it might involve considerations detrimental to the rights of the respondent which in no way affect, or, in my view, now concern the appellants herein.

I think the appeal should be allowed with costs

(1) 13 App. Cas. 227.

here and in the court below and the judgment of the trial judge be restored.

MACLENNAN J.—The first question in this appeal is the date of the respective water records of the parties.

The Vaughan and McInnes application for a record was on the 15th November, 1884, and the Covert application on the 18th September, 1887. Both applications are in the same form; they are in reality not applications, but notices of *intention* to apply under section 43 of the "Land Act, 1884," for permission to divert 300 inches of water from the Fourth of July Creek.

That section authorizes persons lawfully occupying and cultivating land to divert water for agricultural purposes

upon obtaining the written authority of the land commissioner to that effect.

The section also requires that a record be made of the same with him, specifying certain particulars. A fee of $2 is required to be paid, and the section declares that no person shall have a right to use such water without such record having been made, and fee paid. The Vaughan and McInnes record, hereinafter called the Vaughan record, was made on the 28th January, 1888, and is expressed to be made under the said section 43; while the Covert record is dated the 25th March, 1889. That is its form and date, and if there was nothing more in the case, there would be a clear and undoubted priority of the Vaughan record of more than a year.

It is sought, however, to make the Covert record relate back to the 18th of October, 1887, by evidence that Covert, not having received his record for a long

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time, made application to the commissioner, and obtained it in the form and on the date above mentioned, but with a memorandum written across it and signed by the commissioner in these words:

Error in not making out application on the 18th October, 1887.

A receipt is also produced, dated on the 25th March, 1889, for $2, the fee required by the statute to be paid for such records. On this receipt also is indorsed a similar memorandum to that upon the record, except that it says

error in not making out *record* instead of *application.*

Mr. Covert in his evidence said he had sent a sufficient sum with his notice of application to cover the $2 required to be paid for the record. The commissioner evidently did not acknowledge that he had received the fee with the application, but required and received it at the date of the record, and the only receipt which he gave was of the same date as the record.

Assuming that Covert did with his application enclose money enough for the record fee, I think it is impossible to hold that his record can relate back to the 18th October, 1887.

Section 46 of the Act declares that priority of right to water privileges, in case of dispute, shall depend on priority of record, and there was no record made for Covert until the later date. There had only been a *notice* of *intention* to *apply* for one, and when Randall, his agent, went for the record he saw the notice still sticking up in the office. It is beyond all possible controversy that there was no *written authority,* and no *record* made by or with the commissioner, such as the statute requires, until the 25th March, 1889.

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The record of the appellants, therefore, assuming it still to exist, has clearly priority over that of the respondents.

It is contended, however, that the Vaughan record lapsed and came to an end on the 28th of October, 1889, when Vaughan and McInnes surrendered to the commissioner their individual pre-emptions and obtained a joint pre-emption instead.

Previous to that date Vaughan and McInnes had separate pre-emptions of adjoining parcels of land each containing 320 acres, but had been occupying and cultivating them jointly, in partnership.

On that day they applied to the commissioner to change their several pre-emptions into a joint pre-emption of both parcels, a kind of holding and enjoyment authorized by section 19 of the Act.

The statute, however, section 24, presented a difficulty. That section prohibits transfers of pre-emptions until after a Crown grant has been issued. But for that prohibition all they would have had to do was for each of them to make a transfer of his pre-emption to some third person, who should then transfer both pre-emptions to the two, to be held in partnership.

Although they could not transfer to a subject, they could transfer to the Crown, the Crown not being bound by the statute.

This they did: they surrendered to the Crown. It is immaterial whether the act was called a surrender or an abandonment. That is merely a question of words. They did not abandon, and did not intend to abandon. They remained in possession as before. They revested the title in the Crown and the commissioner immediately granted them a pre-emption in partnership, a perfectly regular and legal transaction.

The question then arises: What effect had this

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transaction with the Crown upon the joint water record? They did not expressly include that in the surrender. That was not necessary, for it was already held in the very way they wished to hold it. But, I think, it was not necessary for another reason. I think that, being appurtenant to the pre-emption, it was surrendered with them because vested in the Crown along with them, and was re-vested in the pre-emptors as appurtenant to the land.

The contention of the respondents on the other hand is that when the pre-emptions were surrendered, or abandoned, to the Crown, the water record came to an end, being severed from the pre-emptions to which it belonged, and ceased to have any further validity.

In my opinion when a water record has been obtained for a pre-emption, and has been acted upon by the making of the necessary ditch, and the enjoyment of the water for the purposes of the land, the water record or right thereby becomes appurtenant to the pre-empted land. That being so when the pre-emption was surrendered to the Crown the water right passed with it without any express act or mention; see Williams on Real Property (ed. 1892), p. 391, and authorities there cited. And for the same reason when the pre-emption was granted again the water right passed with it to the grantees. By section 25 of the Act it is provided that on the death of a pre-emptor his representatives must prove title and enter into possession within one year; otherwise the pre-emption with all improvements shall be forfeited to the Crown. There is no mention of water records, that being regarded, as I think it is in law and in fact, one of the improvements, and a most important improvement of the land, and appurtenant thereto.

Suppose the case of a pre-emptor with a water

record dying without heirs, could it be supposed for a moment either that the water right lapsed and did not pass to the Crown with the land or that the Crown had lost its priority? Or suppose that a pre-emptor with a water right in operation, and, having made improvements, abandoned possession, whereby his pre-emption became forfeited and vested in the Crown, would the water right not also vest in the Crown, as an appurtenance to the land, the same as all other improvements?

Besides all this, the amending Act of 1886, ch. 10, sec. 1, expressly provides that all assignments and transfers of any pre-emption right when permitted by law shall be construed to convey and transfer any and all recorded water privileges in any manner attached to or used in the working of the pre-empted land. Can it be said that what was called a surrender or abandonment was not an assignment or transfer?

It is further objected that Vaughan and McInnes made false statements in their joint affidavit in support of their joint application. The statements referred to are (1) that the land was unoccupied and unreserved Crown land within the meaning of the "Land Act," and (2) that they had staked off and marked the land in accordance with the provisions of the "Land Act, 1884." It must be admitted that these statements were not strictly accurate. In making affidavits they followed the statutory form in such cases, but the statements were not intended to mislead the commissioner and did not and could not mislead him, for he knew all the facts. In a certain sense also the statements were true. The lands were in fact unreserved and they had been unoccupied by any one except the applicants, and they had also been staked

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off and marked by them, in order to obtain their previous pre-emptions.

I think there is nothing in this objection.

It is also objected that when Vaughan and McInnes on the 15th November, 1884, made application for their joint record, they were not qualified to do so, as required by section 43 of the Act, inasmuch as they were not then lawfully occupying and *bonâ fide* cultivating lands. The section, however, does not say that the application may not be made before occupation or cultivation. It is at the time of the record that there must be occupation and cultivation, and it is not disputed that there were both occupation and cultivation at the date of the record. But if there had been any irregularity in obtaining the record it would seem to be cured by section 3 of the amending Act.

Upon the whole I am for these reasons of opinion that the record of Vaughan and McInnes was not invalid or lost for any of the reasons alleged, and that the appeal should be allowed with costs both here and below, and that the judgment at the trial should be restored.

DUFF J. (dissenting).—The controversy in this appeal concerns the rights claimed by the appellants and respondents respectively under two water records purporting to be granted under the British Columbia "Land Act" of 1884, as amended by ch. 10 of the Act of 1886. The record, under which the appellant's claim, is dated the 20th of January, 1888, that under which the respondents claim, the 25th of March, 1889. Two questions are raised by the contentions of the parties which are pure questions of law and may, I think, at the outset be conveniently considered as such without reference to the facts of the case. The first of these ques-

tions is whether or not a record authorizing the diversion of water (under section 43 of the Act of 1884), for use in the cultivation of a pre-emption creates a right which is defeasible upon the cancellation or abandonment of the pre-emption.

The second question is whether or not under the Act, such a record can be validly granted to two persons jointly each of whom is the holder of a several pre-emption, authorizing the diversion of water for use indifferently in the cultivation of the land embraced within the two pre-emptions.

The statutory provisions material to the consideration of these questions may be most conveniently referred to in the consolidation of 1888, where they appear as sections 39 to 50 of chapter 66. The first and leading provision (section 43 of the Act of 1884, section 39 in the consolidation) is in these words:

> 39. Every person lawfully entitled to hold land under this Act, or under any former Act and *lawfully occupying and bonâ fide cultivating lands*, may record and divert so much and no more of any unrecorded and unappropriated water from the natural channel of any stream, lake or river adjacent to or passing through such land, for agricultural or other purposes, *as may be reasonably necessary for such purpose, upon obtaining the written authority of the commissioner* of the district to that effect, and a record of the same shall be made with him, after due notice, as herein mentioned, specifying the name of the applicant, the quantity sought to be diverted, the place of diversion, the object thereof, and all such other particulars as such commissioner may require. For every such record the commissioner shall charge a fee of two dollars; and no such person shall have any exclusive right to the use of such water, whether the same flow naturally through or over his land, except such record shall have been made and such fee paid.

Of this enactment it is first to be observed that it requires in express terms the application to "agricultural or other purposes" of the water which the grantee of a record acquires (under his record) the right to divert; but that it does not expressly provide

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that the water so diverted shall be used in the cultivation of any specific land. Nevertheless I think this latter requirement is plainly implied; and that the observance of it is one of the conditions of the grant. The section stipulates as a condition upon which alone the applicant may obtain a record that he shall be "lawfully occuping and *bonâ fide* cultivating lands." It provides, moreover, that he shall be entitled to

> record * * * so much and no more of any unrecorded and unappropriated water * * * for agricultural or other purposes as may be reasonably necessary for such purposes.

Unless at the time of the application the land is identified, in respect of which the water is to be used, how is the commissioner to measure the applicant's needs; how, in other words, to apply the standard prescribed by the statute? This measuring of the applicant's requirements for the purpose of determining the extent of the grant is obviously the function which above all others it is needful the commissioner should exercise wisely. The broad purpose which the legislature manifestly had before it in enacting these provisons was to secure the fair distribution of the waters of natural rivers and lakes throughout the districts in which they could be made available for the cultivation of land and in operations connected with such cultivation. Therefore the successful applicant is to obtain a record of so much as shall be reasonably necessary for his purposes, but of no more. Observe, however, that, once the question of his requirements has been passed upon by the commissioner and a record has been granted and a ditch constructed with a capacity sufficient to convey the quantity authorized by the record, that quantity is thenceforward, while the record remains in force, withdrawn from the disposi-

tion of the commissioner. The water so diverted is appropriated to the purposes nominated by the record and however improvident the grant there is no power to recall it or without the consent of the grantee to devote the water to the benefit of other parts of the district. It was, therefore, of the first importance, it is not too much to say it was vital, to the proper administration of the system that in passing upon any application the commissioner should (in order to determine the reasonable requirements of the applicant) consider his needs in relation to the supply of water available and in comparison with the needs of the locality as a whole. It is hardly necessary to observe that to reach an intelligent judgment upon these points the commissioner must know at the time of the application what was the area and the character of it, in the cultivation of which the water applied for was to be employed.

There are other sections of the statute which presuppose the designation by the applicant of some specific land but I will not enter into a particular consideration of them. It seems to me that looking at these provisions as a whole the purpose of the legislature, as I have indicated it, is manifested on the face of them with quite sufficient clearness; and that a construction of them which would authorize the grant of a right to divert water to be applied to agricultural purposes and yet to be held in gross, that is to say, unfettered by any condition requiring the use of it for the benefit of specified land, would very plainly defeat that purpose. That I think—since no difficulty arises from the words the legislature has employed—is a sufficient ground for implying the condition.

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The second observation upon the provisions in question is that the applicant obtains his record in his character of a person "lawfully occupying" land. It would, I think, be trifling with this most necessary stipulation to hold that these words are words of description merely. They import this, that the right to appropriate conferred by the record, while it is a right which is to be used for the benefit of a specific tract, is at the same time vested in the holder of the record not personally, but in his character of lawful occupant of that tract; and I think the provisions of the statute leave no room for doubt that where land is held as a pre-emption then a record granted for use in connection with that land becomes annexed to the pre-emption and where the land is held under a Crown grant the record becomes annexed to the fee. That seems to me to appear sufficiently from section 49 (which was section 1 of the Act of 1886, and is quoted in the margin) as it stands:

> 49. All assignments, transfers, or conveyances of any pre-emption right, where the same are or were permitted by law, and all conveyances of land in fee, whether such assignments, transfers or conveyances were or shall be made before or after the passing of this Act, shall be construed to have conveyed and transferred, and to convey and transfer, any and *all recorded water privileges in any manner attached to or used in the working of the land pre-empted or conveyed;* and any person entitled by devise or descent to any pre-emption right or land to which any recorded water privilege was attached or enjoyed by the person or persons *last possessed* or seized, shall also be entitled to such water privileges in connection with the land.

But the point is perhaps plainer when the history of that enactment is considered. So far as it touches pre-emptions the section first appeared as section 36 of the Act of 1870 in these words:

> 36. All assignments, transfers, or conveyances of any pre-emption right, heretofore or hereafter acquired, *shall be construed to have conveyed and transferred, and to convey and transfer, any and*

all recorded water privileges in any manner attached to or used in the working of the land pre-empted.

By the law as declared in that Act the holder of a pre-emption might after the issue of the certificate of improvements transfer his pre-emption by having the transferee entered as the holder of it, the old record being cancelled, and a fresh record being issued in the name of the transferee. In 1875, the Act of 1870 was repealed and a new Act substituted. The new Act prohibited the transfer of pre-empted land before the issue of the Crown grant. The legislature—thinking apparently that in consequence of this change section 36 had become obsolete—eliminated that section; and thus the statute stood until 1886. In August, 1885, the well-known case of *Carson* v. *Martley*(1) was argued before the full court, at Victoria; and, in consequence of the discussion which occurred in that case, the section we are now considering was passed. At the trial Begbie C.J. had expressed the opinion that a water record could not be held in gross. In the full court this opinion does not appear to have been questioned, but it seems to have been thought that a water record held by a pre-emptor who had transferred his pre-emption after the passing of the Act of 1875—that is to say, after the express repeal of section 36 (above quoted) of the "Land Act of 1870"—would not, because of the repeal of that section, pass to the transferee under such a transfer; and McCreight J., in delivering the judgment of the court(1), said:

> It becomes unnecessary, therefore, to inquire into the nature of a water privilege under the "Land Acts," and whether it amounts to more than a license or personal privilege incapable of transfer.

(1) 1 B.C. Rep. 281, at p. 286.

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At the next session of the legislature, the section in question (section 1 of chapter 10 of 1886, section 49 of the consolidation) was enacted; and it bears unmistakable marks of its origin. For the most part it is declaratory and retrospective; and in so far as it is otherwise (as in dealing with the rights of persons entitled by descent or devise) it will be seen that the enactment is merely the concrete logical result of the theory upon which the legislative declarations are based. What is this theory—this view of the legislature respecting the state of the existing law? Is it not obviously that the right to divert water for use upon a specified tract of land when conferred by the grant of a record under the "Land Act" is and has always been a right appurtenant to the pre-emption when the land is held under pre-emption and appurtenant to the fee where the land is held in fee simple? In *Martley* v. *Carson*(1) the question had just been raised: Is a record a non-assignable personal right or does it pass with a transfer of the land in connection with which it is held or used? And the answer was a legislative affirmation that it did so pass and always had so passed.

The opposite view advanced by Mr. MacDonald and rejected by the court below—that the right conferred by a record may be a right in gross a right that is to say unfettered by any term requiring the application to any specified land of the water appropriated under it—is a view not only incompatible with the legislation to which I have just referred, but which, moreover, is out of harmony with the general course of legislation in British Columbia upon the subject of water rights. The legislation with which we are here particularly concerned relates to the appropriation of

(1) 1 B.C. Rep. 281.

water in natural streams to the purposes of agriculture; but the parallel legislation relating to the use of water for mining purposes (which specifically deals with the questions arising in this action) marks even more unequivocally perhaps the trend of legislative policy as touching this aspect of such rights. The "Mineral Act" at an early date declared that a record authorizing the diversion of water for use in mining should be a record appurtenant to a particular claim (or claims grouped under the special provisions of the mining law) and provided that upon the abandonment of a claim the appurtenant water record should lapse with it. Indeed the essential principle which from the beginning characterized these statutory rights whatever the purpose for which they were to be exercised is, I think, accurately embodied in the Act of 1897. That Act, while reproducing the provision of the "Mineral Act" just mentioned, applies the same principle to records held or used in connection with the pre-emptions; and declares in express terms that such records shall cease upon the cancellation or abandonment of the pre-emptions to which they are appurtenant; and this as I have already said seems to have been the principle upon which the legislation of 1870 proceeded.

It is perhaps worth while observing that while the policy of enabling persons other than riparian owners to acquire rights in the waters of natural streams was probably suggested by the example of the Pacific states yet the development of legislation in British Columbia in respect of such rights has not been at all along lines parallel to those upon which the law has proceeded in most of the states referred to. Speaking broadly, in the American states the law on the subject

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started from the principle that water in natural streams is *publici juris* and early recognized a right of appropriation by virtue of which the first comer might acquire an exclusive right to a reasonable portion of such water (so far as it should not be in use for a beneficial purpose) by the simple process of diverting it and applying it himself to any such purpose. In some states this right is recognized to the exclusion of riparian rights, in others both classes of rights exist side by side; but in all the states I think the appropriation of such water by the simple application of it to a beneficial use for purposes not directly relating to or connected with the occupation of specific land (*e.g.*, supplying the inhabitants of a town) was for a long period and in many of them still is sanctioned and protected by law; and consequently the dependency of such rights upon a specific interest in land is not in those states a characteristic of them. It appears accordingly that usually the right to divert water is not, in the states referred to, held as an easement appurtenant to land; and one even finds it held in a series of decisions in Colorado that such a right is incapable of being made appurtenant to land and that this view is professedly based upon the principles of the common law; one must here observe, however, that both the right to divert water from a stream and the right to take and carry water from and over the land of another are well-known easements which are commonly and quite validly granted at common law as appurtenant to a dominant tenement.

From the beginning on the other hand the British Columbia legislature has been at pains to declare in unmistakable language (and doubtless not without a view of emphasizing the difference between the two

systems) that the exclusive right to the use of water in natural streams and lakes could be acquired only in the statutory mode and for the statutable purposes; the statutable purposes were, prior to the year 1892 (if we except those sanctioned by certain statutes having a private or local application only), the purposes described by the words "agriculture and other purposes" and "mining and other purposes." These words taken by themselves are no doubt sufficiently comprehensive to embrace any lawful purpose; but it is quite obvious that speaking generally a grant of water rights could have no practical effect which should not authorize the interference to some extent at least with riparian rights; and when we look at the form of land grant prescribed by the "Land Act" from the earliest times we find that while it contains a reservation which constitutes a license to the Crown to create "water privileges" to the prejudice of the grantee's riparian rights we find at the same time that this license extends to such privileges only as should be used for the two purposes of mining and agriculture.

The particular effect of these provisions, therefore, was that the appropriation of the waters of natural streams by private persons under general statutory authority before 1892 was limited by the purposes (mining and agriculture) for which such waters could be diverted without regard to the rights of riparian owners; purposes involving the occupation and working of specific areas of land. And in practice before the year mentioned persons under the necessity of using such waters for other purposes in derogation of riparian rights invariably, I think, resorted to the legislature for special authority. There

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is, therefore, some danger that error may arise from reading particular legislative enactments of British Columbia touching the subject of water rights in the light of American decisions; a much safer guide to the meaning of the legislature is the general trend of provincial legislation as shewn by the enactments relating to different branches of that subject and the course of administrative practice under them.

From these views it follows that the right conferred by a record granted or used in connection with a pre-emption is defeasible on the abandonment or cancellation of the pre-emption, unless it can be maintained that such a right is annexed to the absolute allodial title vested in the Crown for the benefit of such persons as may acquire rights in it whether in succession to the pre-emptor or (after the lapse of the pre-emption) direct from the Crown. This would be to say, of course, that a record attached to an abandoned pre-emption may lie dormant for years and then suddenly spring into life and assume priority over and destroy the value of rights which had all the while been in active operation. Such a construction of these provisions if adopted would tend rather to embarrass and retard than to foster the conservation and useful application of the natural water supply which these enactments were undoubtedly intended to promote. I am disposed to think it is too late after a period of forty years to give effect to a view of them which is out of harmony with the object for which they were devised, which I do not think has ever before been suggested and would almost certainly in the case of many of the older records of hitherto unquestioned priority affect that priority with doubt and suspicion and establish a basis for adverse attacks

which under the accepted view of the statute there could have been no ground to apprehend.

From all I have said it results that the first of the questions above stated should be answered in the affirmative; and I think the same considerations lead to the conclusion that the second question should be answered in the negative.

As I have observed, in 1870 the legislature by a declaratory enactment established the principle that water privileges attached to or used in connection with the working of pre-empted land should be deemed to have passed and to pass by any transfer of such land under the "Land Act"; in 1886, this declaratory enactment was re-enacted by the legislature with a further provision that any such record should pass to any person or persons who should become entitled to the pre-emption by descent or devise; and I have also indicated that, in my view, the Act of 1897 merely expressed the effect of the law as it stood before that Act in providing that on the cancellation or abandonment of a pre-emption any record appurtenant thereto should be deemed to be at an end. These provisions do not seem easily reconcilable with the view that a single record can be made appurtenant to two several pre-emptions held under distinct titles. That view as Drake J. pointed out in *Centre Star Mining Co.* v. *British Columbia Southern Railway Co.*(1) would, if put into practice, lead to much confusion and many inconveniences; and I do not think it correctly represents the law of British Columbia.

From these views of the law it follows I think that this appeal should be dismissed on both the grounds upon which Mr. Taylor supported the judg-

(1) 8 B.C. Rep. 214.

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ment below: 1st. that the record in question if not void *ab initio* had lapsed by reason of the cancellation or abandonment of the pre-emptions in respect of which it was originally granted; and 2ndly. that it was void *ab initio* as having been granted in respect of two several pre-emptions held by two several pre-emptors.

The facts in evidence I think establish the cancellation of the pre-emptions.

It is admitted that Vaughan and McInnes, each of whom was the separate holder of one of two adjoining pre-emptions, wished to unite these pre-emptions and hold the land in a single block. The law required that each must by himself or an agent continuously reside upon his own pre-emption, and they each should do upon this pre-emption, improvements of a value prescribed by the statute. The statute, however, contained provisions by which two persons in partnership might take up, in one area, a quantity of land equal in extent to two pre-emptions and as partners reside upon any part or improve any part for the behoof of the whole. Vaughan and McInnes wished to get the benefit of this provision and transform their separate holdings into a single partnership holding. There was, under the statute, one, and only one, way in which this could be done; and the evidence is, to my thinking, too clear to admit of dispute that the appellants took that way. They could abandon or procure the cancellation of the existing pre-emptions and take up the same land in partnership as a single pre-emption under the provisions mentioned; and this, I say, it seems to me clear they did. The undisputed facts (of the persons concerned one only, the appellant Vaughan, could be called as a witness) are that the appellants having in

view the purpose I have mentioned, went to the office of the commissioner, and that, on the 28th October, the commissioner wrote upon the existing pre-emption records "abandoned," with the date and his initials; that the appellants made the statutory affidavit required to enable them to obtain a record of the same land as a partnership pre-emption in accordance with their plan, in which they stated under oath that the land was "vacant and unoccupied," and that the record was accordingly made. The appellants obtained a Crown grant based upon this record, having occupied the lands as a partnership pre-emption.

These facts are, I think, quite sufficient to support the inference which the court below drew from them, viz., that the appellants before obtaining their partnership record had abandoned the pre-emptions held by them separately.

The oral evidence of the appellant Vaughan helps the appellants very little; but it makes clear beyond all question that, for the purpose mentioned, the appellants assented that their individual pre-emptions should be treated as abandoned and cancelled and on the faith of that assent the commissioner issued a partnership pre-emption under which they thenceforward occupied the land and upon the basis of which they obtained a grant of it from the Crown. When one considers the character of the functions performed by the commissioner under the "Land Act," it seems almost too clear for argument that it is not now open to the appellants in such circumstances to contend that notwithstanding the record of the partnership pre-emption the individual pre-emptions were in force when the application for the partnership record was made. Mr. Macdonald quite frankly

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admitted that there must have been at least a *punctum temporis* when the appellants had no right or interest in the land; and that seems to be so plain a result of the facts that I will not dwell upon the point. On what ground then can it be supposed that during this interregnum the appellants had in the lands any right of occupation which the law can recognize? The fundamental condition of the change of tenure which they sought and which they obtained was their affirmation that there had been such an abandonment of all right of occupation and of all occupation in fact as brought the lands within the category of lands subject to be taken up under section 3 of the "Land Act," that is to say, "unoccupied and unreserved" Crown lands.

It is a principle of some importance that where the legislature has confided to a special tribunal the determination of a question or a class of questions the decision of that tribunal within the scope of its duty is (in the absence of fraud or of mistake of law apparent on the face of the proceedings) conclusive. The decision of the commissioner upon an application to him for the cancellation of a pre-emption record under the "Land Act" is, I think, within the rule; from it there is, by the statute, an appeal to the Supreme Court of British Columbia, but (subject to the exceptions mentioned) it is I think final in default of such appeal. By it, moreover, the status of the land with reference to the operation of the provisions of the "Land Act" as Crown land or as occupied land is fixed. By the act of the commissioner the land in question became unoccupied Crown land within the meaning of the "Land Act"; and, if the view I have already expressed (touching the dependency of the

record upon the existing pre-emptions) be correct, any right acquired by the appellants under that record then ceased.

As to the second ground it is admitted that at the time of the grant of the record the appellants occupied their land in two several pre-emptions; but it is suggested that it was within the province of the commissioner to determine whether their interest in this land was such as to entitle them to a record in respect of it and that, this having been determined, his decision cannot now be reviewed. I do not think this quite meets the point. Speaking broadly, the decision, as I have already said, of the commissioner upon any matter within his province is (subject to the exceptions indicated) not reviewable except through the means provided by the statute; but, if the commissioner profess to do that which the statute does not authorize him to do, he could not validate his unauthorized act by putting an erroneous construction upon the statute from which his powers are derived. Now the record granted to the appellants does not on its face indicate any particular land in respect of which the water appropriated under it was to be used; and if that land could not be identified so that the record must be read as a grant in gross, then, in the view I have taken of the statute, it is obvious the record must be void as a grant not authorized by the statute. I do not think it is on this ground void because upon the undisputed facts there is no difficulty in identifying the land; but among the facts which it is necessary to take note of in order to identify the land is the fact that appellants were holding and occupying a certain area under two several pre-emptions and it is to this area that we must, in order to meet the objection just

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indicated, attribute the record. In other words (if it is to be treated as a record not invalid as a grant in gross), it is on its face a record appurtenant to two several pre-emptions held under distinct titles, or one which, in my view of the statute, the commissioner had no power to grant.

For these reasons I think the appeal fails. A good deal has been said about the hardship inflicted upon the appellants by the decision below. Hardship is not necessarily attended by injustice; the truth is, that a failure to comply with the statutory conditions of statutory rights often results as do other kinds of improvidence in individual loss; but when such lapses give rise to litigation (and they are a considerable source of the litigation arising out of the administration of the laws governing the acquisition of rights of various kinds in the public lands) judicial efforts to mitigate the seeming hardship of particular cases by departing from settled paths rarely fails to lead to general confusion and in the end I think not seldom to injustice.

Appeal allowed with costs.

Solicitor for the appellants: *D. Whiteside.*

Solicitor for the respondents: *H. C. Hannington.*