THE BONANZA CREEK HYDRAULIC CONCESSION (DEFENDANTS). } APPELLANTS;

AND

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY GENERAL OF CANADA (PLAINTIFF) ..... } RESPONDENT.

1908
*May 7, 8.
*May 29.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Mining regulations—Hydraulic lease—Breach of conditions—Construction of deed—Forfeiture—Right of lessees—Procedure on inquiry—Judicial duties of arbiter.

Under a condition for defeasance in a lease of a mining location, made by the Crown in virtue of the hydraulic mining regulations of 3rd December, 1898, a provision that the Minister of the Interior is to be the "sole and final judge" of the fact of default by the lessee does not entitle the Crown to cancel the lease and re-enter until the fact of such default has been determined by the Minister in the exercise of the functions vested in him after an inquiry of a judicial nature in which an opportunity has been afforded to all parties interested of knowing and being heard in respect to the matters alleged against them in such investigation.

Quœre, per Idington J.—Was there not sufficient evidence in the case to shew that there had been no such breach of the conditions as could work a forfeiture of the lease?

APPEAL from the judgment (dated 7th January, 1908), of Burbidge J., in the Exchequer Court of Canada, maintaining the plaintiff's action with costs.

In the judgment appealed from, His Lordship said:—

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

1908

BONANZA CREEK HYDRAULIC CONCESSION v. THE KING.

"I venture to ask the parties and any one who reads this short note not to come to the conclusion that the judgment which I am about to enter is given upon due consideration of the merits of the case. At the time when the evidence taken at Dawson was forwarded to the registrar of the court at Ottawa and the record thereby completed and since that time my other engagements were such as prevented me from taking the matter up and dealing with it in an adequate manner. And now the state of my health prevents me from giving the case the consideration which it deserves. However it does appear to me to be important that the litigation should be advanced another stage and that it is in the interests of the parties themselves that it be put in a position where the questions in issue may be brought before the Supreme Court of Canada rather than that there should be a rehearing and a re-argument in this court. And for that I am not without a precedent. For in the case of *The Attorney General for British Columbia* v. *The Attorney General for Canada*(1), the decision of the Exchequer Court was taken by consent and without argument in order to facilitate the bringing of the case directly to the Supreme Court. It is true that in this case I have not the consent of the parties, but I think I may take it for granted that they would consent to a course of procedure which appears to me to be so much in their interests. The main question it seems to me that I need to decide is as to the party upon whom the burden of bringing the appeal should be thrown, and in this case I think that burden should fall upon the defendants.

"There will be judgment for the plaintiff."

(1) 14 Can. S.C.R. 346.

The circumstances of the case material to this appeal are stated in the judgments now reported. The clauses of the regulations and in the lease calling for construction are as follows:—

"REGULATIONS"

"For the disposal of Mining Locations in the Yukon Territory to be worked by hydraulic or other mining process, approved by order in council, dated 3rd December, 1898."

"12. In case any lessee shall at any time make default in the payment of the rental or the royalty payable under these regulations, or shall make default in the performance of the conditions imposed by these regulations or by the lease, the Gold Commissioner may post a notice in a conspicuous place upon the location in connection with which such default has been made, and may mail a copy of such notice to the last address of the lessee known to the Commissioner, requiring such default to be remedied, and in case such default is not remedied within three months of the date of the posting of the notice upon the location all the rights of the lessee under the lease and under these regulations shall be and become *ipso facto* null and void."

EXTRACTS FROM LEASE,
Dated 3rd November, 1899:

"4. That the said lessee shall have sufficient hydraulic or other machinery in operation on the said demised premises within one year from the date hereof to permit of his beginning active operations for the efficient working of the rights and privileges hereby granted, which active operations he shall begin within the said period; and that if during any year of the said term hereby granted the lessee shall fail to ex-

1908

BONANZA CREEK HYDRAULIC CONCESSION v. THE KING.

pend in such mining operations in, about or upon the said mining rights and privileges hereby granted the sum of five thousand dollars—of the fact of which failure the Minister shall be the sole and final judge —this lease or demise and the remainder of the term hereby granted, and all benefits, rights, and privileges hereby granted to the lessee shall become and be utterly and absolutely null and void, unless the Minister shall otherwise decide, and that in the event of such predetermination of this lease or demise and of the term hereby granted, or the remainder thereof, Her Majesty, her successors or assigns, may thereupon reenter upon the said demised premises, and have, hold, use, occupy, possess and enjoy the same and every part thereof, as if these presents had never been executed, and without any compensation or payment of any kind to the lessee for any work done or improvements made thereon; but nothing herein contained shall in anywise affect the right of Her Majesty or her successors or assigns to all arrears of rent or royalty to be paid as hereinbefore provided, or to any remedy for the recovery of such arrears of rent or royalty."

"10. That if the lessee shall at any time during the said term fail to pay the rent or royalty hereby reserved or any part thereof within sixty days after the same, respectively, shall have become due or if he shall commit any breach or default in the observance of the above conditions or of any of them other than that referred to in the clause numbered "4" of these presents, then, and in every such case the Gold Commissioner may post a notice in a conspicuous place upon the said demised premises and may mail a copy of such notice to the last address of the lessee known to the Commissioner requiring such de-

fault to be remedied and in case such default is not remedied within three months of the date of the posting of the notice upon the location all the rights of the lessee under the said lease and under the said regulations of the Order in Council of the third day of December, A.D. 1898, shall be and become *ipso facto* null and void provided that the claim of Her Majesty or Her successors or assigns for any rent or royalty then due or accruing due, or any remedy for the recovery thereof shall be in no wise affected by such cancellation."

Belcourt K.C. and *J. A. Ritchie* for the appellants.

Shepley K.C. for the respondent.

GIROUARD J.—I agree that this appeal should be allowed for the reasons stated by Mr. Justice Duff.

DAVIES J.—I agree in the opinion stated by Mr. Justice Duff.

IDINGTON J.—I agree in the conclusion reached by my brother Duff as to the necessity for a hearing of judicial nature before declaring the lease forfeited. Any right to determine without such a hearing must, if intended, be so clearly expressed as to exclude the reasonable expectation of a hearing.

The ordinary case of the builder or contractor, from long usage, from the nature of the matters to be determined, and generally incident to the possession of some expert knowledge or personal supervision in him given the power to determine, and for most part the necessities of the case, lead possibly to a different expectation in any one signing a building contract.

1908

BONANZA CREEK HYDRAULIC CONCESSION v. THE KING.

Idington J.

The reasons I have assigned in the case of *Klondike Government Concession* v. *The King*(1), are also applicable here if it in fact was intended to assert the same wide power as I inferred and found asserted there. The inference of that fact is not so clear here as there. The margin of expenditure over the $5,000 limit in this case is so narrow the minister may have found reasons for discrediting some trifling item and proceeding merely on a correct appreciation of the amount expended.

MACLENNAN J.—I do not think it necessary to express any opinion upon the various matters which were discussed before us in this case on the question whether the appellants had or had not been guilty of such violations of the conditions and stipulations of their lease as to entitle the Crown to terminate it, being of opinion that the Minister could not do so without acting judicially and giving the appellants an opportunity of being heard.

DUFF J.—Under clause 4 of the appellant's lease, the determination by the Minister of the Interior of the fact of the lessees having failed in making the expenditure required is I think a condition of the exercise of the right of re-entry vested in the Crown. Nobody would contemplate the possibility of a re-entry on the ground of such a failure, until the fact that it had occurred should have been ascertained; and it is I think to the determination of the existence of that fact—as a step preliminary to the exercise of the right—that the provision making his finding conclusive and final applies.

(1) 40 Can. S.C.R. 294.

Is then the function of the Minister in arriving at a decision upon that question of fact—as distinct from his function in declaring a forfeiture—a function of a judicial nature? Or is his power to decide the question an absolute power which—so long only as he acts in good faith—it is permissible to exercise without regard to the principles governing judicial or quasi-judicial inquiries?

I think it belongs to the former class. The stipulation imports inquiry, and a determination as the result of inquiry. It is not one of those cases in which a question is committed to the decision of an expert, who is, solely or primarily, to use Lord Esher's phrase, "to employ his own eyes, knowledge and skill." It would be ridiculous to suppose either party to have contemplated that the minister should ascertain, from his own personal inspection of the ground and by use of his own knowledge and skill, whether a given amount had been expended by the lessees in a given year in the efficient working of their location. It must have been assumed that he would rely upon knowledge obtained at second hand—not by any means necessarily through evidence of such a character as would be admissible in a court of law—but by possessing himself of the results of the observation, knowledge, and investigations of others. Having then an inquiry of such a character provided for in an instrument *inter partes*—an inquiry which might, in the result, lead to the forfeiture of the rights of one of the parties—the proper view I think of the function of the person appointed to conduct it, there being nothing in the instrument to manifest a contrary intention, is that in the course of it he is bound to observe the requirements of substantial justice; and those requirements are not observed, if he reaches a decision adverse to the party

1908

BONANZA CREEK HYDRAULIC CONCESSION v. THE KING.

Duff J.

whose rights may be thus affected, without first giving that party an opportunity both to know what is alleged against him, and to meet it.

It would seem that, in the case now under consideration, since the person charged with the investigation is also the person invested with authority to make the election whether or not a forfeiture is to be declared, the propriety of this view is even the less open to dispute.

The principle above indicated has been acted upon by the courts in a great variety of cases. In *Wood* v. *Woad*(1), at page 196, speaking of the expulsion of a partner under a power contained in the partnership articles which authorized also the appropriation by the remaining partners of the share of the partner expelled, Kelly, C.B. (in the course of a passage which was in *Russell* v. *Russell*(2), at page 478, adopted by Sir George Jessel as an accurate statement of the law, and has since been quoted with approval, by Lord Macnaghten speaking for the Judicial Committee in *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montréal*(3) at pages 539 and 540), said:—

> Was the alleged act of expulsion void? It is contended for the plaintiff that the language of the rules gives an unconditional and absolute power to the committee to expel a member from the society, and I agree that if the committee in fact exercised their power under the rules, their decision could not be questioned; however unfounded the reasons for it may have been, it would have been final and could not be reviewed by any court. But they are bound in the exercise of their functions by the rule expressed in the maxim *audi alteram partem*, that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body

(1) L.R. 9 Ex. 190. (2) 14 Ch.D. 471.
(3) [1906] A.C. 535.

of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.

In *Edwards* v. *Aberayron Mutual Ship Ins. Society* (1), at page 579, Amphlett B. thus applied the same principle to an adjudication by the directors of a Mutual Ins. Society upon a question of the Society's liability to one of its members:—

> It is beyond doubt, however, that, when they undertook the delicate task of adjudicating between their own society and a member, their functions, if not strictly the same, were analogous to those of an arbitrator, and they were bound to act judicially and with perfect fairness and impartiality between the parties: *McIntosh* v. *Great Western Ry. Co.* (2). To come to a decision under these circumstances in favour of their own society, and against the plaintiff, without hearing him or giving him an opportunity of being heard, was contrary to every principle of justice, and ought not, I think, to be held by any court of law or equity to be binding upon him.

In *Armstrong* v. *South London Tramway Co.* (3), the Court of Appeal had to determine the validity of a certificate of the manager of the defendant company in these circumstances; an agreement between the plaintiff (a tram-conductor) and the company provided that a breach of the company's rules should render the plaintiff liable to dismissal and to the forfeiture of any unpaid wages already earned and that the certificate of the manager—who was to be "the sole and final judge" upon the question whether a breach had in fact occurred—should be conclusive evidence of that fact in any court. The manager without hearing the plaintiff in his own defence, gave a certificate to the effect that a breach of the rules had been committed by the

(1) 1 Q.B.D. 563. (2) 2 DeG. & Sm. 758, 769.
(3) 7 Times L.R. 123.

1908

BONANZA CREEK HYDRAULIC CONCESSION v. THE KING.

Duff J.

plaintiff. The court held that the certificate was invalid. Lord Esher said:—

> A party could not be deprived of wages already earned without a hearing. It was a necessary implication that the party should be heard, and it would be monstrous to suppose otherwise.

The reported decisions afford also many examples of the application of the principle to the conduct of public officials invested by statute with authority to decide upon the existence of facts necessary to justify the exercise of a power to expel from an office, or to deprive of a benefice, or to invade private rights of property. Many such cases are referred to in the judgment of Sir Robert Collier in *Smith* v. *The Queen* (1). In that case the Judicial Committee of the Privy Council had to consider the legal validity of a proclamation of the Governor of Queensland declaring the forfeiture of a lease granted under the Crown's Land Alienation Act. The proclamation professed to be in pursuance of a section of that statute under which

> if at any time during the currency of a lease it shall be proved to the satisfaction of the Commissioners

that the lessee had abandoned his selection, it was made lawful for the Governor to declare a forfeiture of the lease. The Judicial Committee held it to be essential that a proclamation under this enactment be preceded by a decision of the Commissioners, which, to satisfy the statute, could only be arrived at after an inquiry conducted in conformity with the principles governing inquiries of a judicial nature; and that as a fair opportunity had not been given the lessee to meet the case against him, the decision of the Commissioners and the proclamation of forfeiture must be pronounced to be alike nullities.

(1) 3 App. Cas. 614.

An analogous rule was applied in the Province of Quebec in *Richelieu and Ontario Navigation Co.* v. *Commercial Union Assurance Co.*(1).

It is undisputed that in this case the act of the minister in professing to declare a forfeiture was not preceded by any inquiry which can be said upon the above principles to satisfy the requirements of the law as regards inquiries of a judicial or quasi-judicial character, and it follows that this act was inoperative.

A further contention by Mr. Shepley remains. It is said that the stipulations contained in the earlier part of the 4th clause of the lease—requiring the lessees to have upon their location within the first year of the term machinery of a character indicated in that clause, and within that year to commence active operations in working their location—are conditions subsequent; and that failure on the part of the lessees to comply with either of these stipulations having been proved the Crown is entitled to judgment declaring the forfeiture of the term.

It is not, I think, necessary to pronounce upon the question whether, on a fair reading of the lease as a whole, these stipulations are or are not justly to be regarded as conditions, or upon the question whether, assuming them to be such, a breach of either of them has been established. Conceding both of these points to the Crown still I think the claim in this action fails.

It is well settled that the effect of a condition subsequent in a lease (whether a right of re-entry be or be not expressly vested in the lessor) is not to render the lease void on a failure on the part of the lessee to observe the condition but voidable at the option of the lessor or the person entitled to the reversion; *Daven-*

(1) Q.R. 3 Q.B. 410.

1908

BONANZA CREEK HYDRAULIC CONCESSION v. THE KING.

Duff J.

port v. *The Queen* (1); and some act on the part of the person entitled to exercise the option, definitely indicating his intention to do so, is necessary to effect the determination of the lease.

Now I think that in this lease the mode in which, upon a breach of the stipulations last mentioned, that intention is to be signified is expressly prescribed; and that to enable the Crown to take advantage of such a breach it is necessary that the course which the instrument itself marks out should be pursued.

By the 18th clause of the lease the demise is made expressly subject to the hydraulic regulations of the 3rd December, 1898; and by the 12th section of those regulations it is provided:—

> 12. In case any lessee shall at any time make default in the payment of the rental or the royalty payable under these regulations, or shall make default in the performance of the conditions imposed by these regulations or by the lease, the Gold Commissioner may post a notice in a conspicuous place upon the location in connection with which such default has been made, and may mail a copy of such notice to the last address of the lessee known to the Commissioner, requiring such default to be remedied, and in case such default is not remedied within three months of the date of the posting of the notice upon the location all the rights of the lessee under the lease and under these regulations shall be and become *ipso facto* null and void.

Moreover by the 10th clause of the instrument itself the parties have in substance contracted to the same effect:—

> That if the lessee shall at any time during the said term fail to pay the rent or royalty hereby reserved or any part thereof within sixty days after the same, respectively, shall have become due or if he shall commit any breach or default in the observance of the above conditions or of any of them other than that referred to in the clause numbered "4" of these presents, then, and in every such case the Gold Commissioner may post a notice in a conspicuous place upon the said demised premises and may mail a copy

(1) 3 App. Cas. 115.

of such notice to the last address of the lessee known to the Commissioner requiring such default to be remedied and in case such default is not remedied within three months of the date of the posting of the notice upon the location all the rights of the lessee under the said lease and under the said regulations of the order in council of the 3rd day of December, A.D. 1898, shall be and become *ipso facto* null and void provided that the claim of Her Majesty or her successors or assigns for any rent or royalty then due or accruing due, or any remedy for the recovery thereof shall be in no wise affected by such cancellation.

I have no doubt that the "condition" described as "that referred to in clause numbered 4," to which the clause I have quoted is not to apply, is the condition which I have already considered at some length and in respect of which a right of re-entry is expressly given; that, namely, which requires the lessees to expend annually a specified amount in working their location. As regards the other stipulations in that clause (numbered 4) they must, I think, in their character of conditions be read as if the provisions of clause 10 of the lease and clause 12 of the regulations were incorporated with them.

It is conceded that the course appointed by these provisions has not been taken and consequently the option to forfeit the term must be held not to have been validly exercised.

This appears to be sufficient to dispose of the action, and the appeal should be allowed and the action dismissed with costs.

*Appeal allowed with costs.**

Solicitors for the appellants; *Belcourt & Ritchie.*

Solicitors for the respondent; *Macdonald, Shepley, Middleton & Donald.*

*Leave to appeal to the Privy Council was refused on 18th July, 1908.