THE KLONDYKE GOVERNMENT CONCESSION (DEFENDANT) ..... APPELLANT;

AND

ALEXANDER McDONALD (PLAINTIFF) ..... RESPONDENT.

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*Oct 31; Nov. 2.
*Dec. 11.

ON APPEAL FROM THE TERRITORIAL COURT OF THE YUKON TERRITORY.

Dominion mining regulations—Hydraulic mining—Placer mining—Lease — Water-grant — Conditions of grant — User of flowing waters—Diversion of watercourse—Dams and flumes—Construction of deed—Riparian rights—Priority of right—Injunction.

An hydraulic mining lease, granted in 1900, under the Dominion Mining Regulations, for a location extending along both banks of Hunker Creek, in the Yukon Territory, included a point at which, in 1904, the plaintiff acquired the right to divert a portion of the waters of the creek, subject to then existing rights, for working his placer mining claims adjacent thereto.

Held, that, under a proper construction of the tenth clause of the hydraulic mining regulations, waters flowing through or past the location were subject to be dealt with under the regulations of August, 1898; that the hydraulic grant conferred no prior privileges or paramount riparian rights upon the lessee, and that the grant to the plaintiff was of a substantial user of the waters which was not subject to the common law rights of riparian owners and entitled him, by all reasonable means necessary for the purpose of working his placer claims, to divert the portion of the flowing waters so acquired by him without interference on the part of the lessee of the hydraulic privileges.

APPEAL from the Territorial Court of the Yukon Territory, affirming the decision of the Gold Commissioner of the Yukon Territory, which maintained the plaintiff's action with costs.

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

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The circumstances in which the action was instituted and the questions at issue on the present appeal are stated in the judgments now reported.

The judgment of the Gold Commissioner. which was affirmed by the judgment appealed from, ordered and adjudged that the plaintiff, McDonald, was entitled to the first 200 inches of water flowing into Hunker Creek, at the point in dispute, under his grant of 9th August, 1904, and that the defendant had no standing to raise the question whether or not the plaintiff was wasting water until the said defendant became the holder of a water-grant; that the defendant's counterclaim asking for an injunction enjoining the plaintiff from maintaining a dam on the land of the defendant and penning back the waters of Hunker Creek, and from maintaining a power-house and other buildings and a flume on said lands should be dismissed; that the defendant, its servants and agents should be restrained from diverting and conveying below the plaintiff's said dam the first two hundred inches of water from Hunker Creek at any place above or up-stream from the point at which the plaintiff is entitled to divert water and from interfering in any way with the plaintiff's right in virtue of his grant to divert water; that the defendant should permit at least two hundred inches of the said water of Hunker Creek to flow uninterruptedly to the point at which the plaintiff is entitled to divert such water, and that the defendant, its servants, workingmen and agents, should be and were thereby restrained from destroying the dam used by the plaintiff under his grant and from interfering with his flume.

Ewart K.C. and *Chrysler K.C.* for the appellant. There is no question that the defendant was entitled

to the water under the first lease. That lease has never been surrendered, except so far as a surrender is implied by the acceptance of the second lease, as the acceptance of a new lease is a surrender of a former lease of the same property, but if a lease covers two properties, acceptance of a new lease of one of them is not a surrender of the lease of the other. So here an acceptance of a new lease of the land is not a surrender of the right of the defendant to the water which is held under the first lease, unless by the second lease the water is re-granted to the defendant. *Lyon* v. *Reed*(1); *Baynton* v. *Morgan*(2); the cases cited in a foot note to *Beach* v. *The King*(3), at page 324; 12 Encyc. Laws of England, 56.

By the second lease the defendant has a right to use the water on or flowing over the land covered by the lease. There is in such lease no reservation of the water, although it has a provision by which the things demised are to be held subject to certain regulations. If the water is not granted by the second lease, then the defendant falls back upon the first lease and submits that his rights under it to the water have never been surrendered and that, as to the water, the first lease is still in force. In any case, the plaintiff has no right to build a dam on the defendant's land, and thereby to pen back and spread the water of the stream over the defendant's land.

We refer to the following authorities, in addition to those quoted by Mr. Justice Craig: Blackstone's Commentaries at p. 18; *Liggins* v. *Inge*(4), at page 692, *per* Tindal C.J.; *Mason* v. *Hill*(5), *per* Denman

(1) 13 M. & W. 285.
(2) 22 Q.B.D. 74.
(3) 9 Ex. C.R. 287.
(4) 7 Bing. 682.
(5) 5 B. & Ad. 1.

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C.J.; *Embrey* v. *Owen*(1); *Orr-Ewing* v. *Colquhoun* (2); *Bradford* v. *Ferrand*(3), *per* Farwell J. as to flow of stream; *Baily & Co.* v. *Clark, Son & Morland* (4); *Earl of Sandwich* v. *Great Northern Ry. Co.*(5); *Miner* v. *Gilmour*(6), *per* Kingsdown L.J., at p. 156.

A. Noel for the respondent.

THE CHIEF JUSTICE and DAVIES J. concurred in the reasons stated by Duff J.

IDINGTON J.—The appellants accepted, on 12th February, 1900, from the Crown, a lease of mining lands in the Yukon, in substitution for another lease of which they were then the assignees. I think they thereby surrendered the latter lease.

The lease of the 12th February, 1900, in its operative part, reads as follows:—

> Now this indenture witnesseth that in pursuance of the premises and in consideration of and subject to the rents, covenants, *provisoes, exceptions, restrictions* and conditions hereinafter reserved and contained, and by the lessee to be paid, observed and performed, Her Majesty doth grant, demise and lease unto the lessee the said tract of lands and the exclusive right and privilege of extracting and taking therefrom, by hydraulic or other mining process, all royal or precious metals or minerals from, in, under or upon the tract of lands hereby demised and leased, with regard to which the said rights and privileges are hereby granted, which said tract is described as follows; that is to say: * * * .

Then follows a description of the land thus demised and the usual habendum and redendum clauses.

Many provisions follow next after this redendum, but none of them, save that I am about to quote, need,

(1) 6 Ex. 353.
(2) 2 App. Cas. 839.
(3) [1902] 2 Ch. 655.
(4) [1902] 1 Ch. 649.
(5) 10 Ch. D. 707.
(6) 12 Moo. P.C. 131.

I think, be noticed, though touched upon in the argument. The one I refer to is the following:

> Provided, also, that this demise is subject to all other regulations contained and set forth in the said order in council of the third day of December, A.D. 1898, as fully and effectually to all intents and purposes as if they were set forth in these presents.

Amongst those regulations of the 3rd day of December, 1898, thus explicitly incorporated into this document is one which reads as follows:

> 10. The lessee's right to water on his location or to the diversion of water in connection with his operations thereon shall be subject to the regulations approved by order in council of the 3rd August, 1898.

Let us now read this demise (with the restrictive and excepting words), which are part of the sentence constituting it, together with this clear and explicit regulation, as if inserted next after the redendum.

Can we do so and find any difficulty in this case? The questions raised anent the ordinary presumptions in favour of a lessee or grantee of land upon or over which is running water, can have little or no existence or effect in such a document as this reading presents. These presumptions are, at any time, but *primâ facie* evidence of the meaning of the contract.

When the question raised is whether or not the water on the land demised went by virtue of such a restricted demise as this with the land as against all persons who might, by license from the Crown, procure under the water regulations then and there in force, the right to use the same, let us ascertain what water is referred to in the regulation just quoted. Can it, when forming part of this document, refer to water elsewhere than on the land described in the document of which it forms a part?

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Why should any one concerned in such a lease provide for anything as to water elsewhere than on the land the lease covered?

If private waters were to be found elsewhere by these lessees, and brought on to this land, the Crown could have nothing to say to that.

And, if the waters of the Crown, to be got elsewhere, were intended to be referred to, we may ask;—Why should *they* be referred to? The waters of the Crown were the subject of acquisition only by and through the law of the land. It was entirely unnecessary to refer to such waters beyond the land in question.

It is clearly *because the waters on this land* so demised and no others are meant, that there is need to refer to them and thus lay down the rule that is to govern their use in relation to this contract and make clear that the usual presumptions relative thereto in an unrestricted demise must not arise.

Reading this exception in this way, and I think it can be read in no other way, the water that is thus to be applied for is not given without a further application in which the lessees, just as any other person concerned, must define what quantity they desire to use.

In the light of the clear restrictions put in this lease and probably all such leases in the Yukon, and of the nature of the general regulations of December, and the water regulations of August, which together constitute, in that regard, the law of the land there, no difficulty or misapprehension can arise.

In view of these considerations there is no injustice done the appellants by the Crown, though a serious loss to the appellants may arise from the granting of the water in question to their neighbour. The appel-

lants have only themselves to blame. They knew of the applications that have resulted so injuriously for them. The only step pretended to have been taken by the appellants for their protection is denied by the officer on whom blame was attempted to be put.

In none of the cases referred to on the question of presumptions were the operative part of the grant or demise restricted as here. In the case of *Lord* v. *The Commissioners for the City of Sydney*(1), there is a very instructive branch of it that deals with rights springing out of a Crown grant where the Crown had reserved, for specific purposes, and limited time, the right to use or apply the use of a part of the water that would have passed to the grantee but for the reservation. It was held this had the effect of preventing the grantee from claiming any compensation therefor though getting allowed compensation for riparian rights held by the same grantee by virtue of an unrestricted grant further down the same stream.

The case exemplifies both phases of such rights and also at page 497 lays down the rule to guide us in the interpretation of such grants, that intention should be the supreme rule.

Having no doubt of the intention in this case, I think the appeal should be dismissed with costs.

MACLENNAN J.—I am of opinion that this appeal should be dismissed with costs.

DUFF J.—The plaintiff is the holder of five hillside claims on Hunker Creek in the Yukon Territory, located under the regulations relating to placer min-

(1) 12 Moore P.C. 473.

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ing. For the purpose of mining these claims he acquired on the 9th August, 1904, under the law in force in the Territory (embodied in the regulations passed 3rd August, 1898) a grant of the right to divert, at a point named in the grant, 200 miner's inches of the waters of the creek. The defendant is the lessee of a location for hydraulic mining extending two and a half miles along the valley of the same creek, including both of its banks, and embracing the point of diversion referred to, under a lease dated the 12th February, 1900, issued pursuant to the regulations governing the leasing of such locations, passed in December, 1896. The plaintiff, having constructed a dam and other works and machinery to divert the waters of the creek and convey them to the place of his mining operations, the defendant's manager, at a point above the point of diversion (but within the defendant's location), was proceeding to divert the creek from its natural course in such a way as to prevent it flowing into the plaintiff's flume when this action was commenced and an injunction was granted by the Gold Commissioner of the Territory restraining the defendant from effecting the threatened diversion.

The principal question in controversy between the parties is, whether or not the plaintiff's grant confers upon him the right, as against the defendant, to divert the waters of Hunker Creek at the place referred to for use in mining his hill-side claims. That he has such a right is undisputed, unless by virtue of its lease the defendant has a better right.

The defendant's lease provides:

> that this demise is subject to all other regulations contained and set forth in the said order in council of the third of December, A.D. 1898, as fully and effectually to all intents and purposes as if they were set forth in these presents.

By the regulations referred to it is enacted that leases granted under them may be in such form and contain such conditions, not inconsistent with them, as may be approved of by the Minister of the Interior.

It is not necessary to decide whether this clause authorizes the Minister of the Interior, by any such lease, to grant any right in respect of the Crown lands within the limit of the location demised regarding which the regulations themselves are silent. This much, I think, is clear, viz.: that where a particular subject matter is dealt with by the regulations, the rights of the lessee, as regards that subject matter, are governed by the provisions respecting it contained in the regulations.

The tenth clause of the regulations is as follows:

> 10. The lessee's right to water on his location or to the diversion of water in connection with his operations thereon shall be subject to the regulations approved by order in council of the 3rd August, 1898.

If, therefore, this clause applies to water flowing through or past an hydraulic location, it is to the regulations referred to in it that we must have recourse to ascertain the conditions to which the defendant is subject in diverting the waters of Hunker Creek for use in working its property and particularly for the purpose of determining the relative priorities of the defendant's rights under its lease and the rights of the plaintiff in respect of those waters under his grant.

It is argued on behalf of the defendant that the clause applies only to water brought upon the location from outside sources; and has no application to water flowing through or past it. It is sufficient to say, I think, with regard to this contention that all such flowing water is plainly within the language used, and

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no satisfactory reason has been suggested for restricting its natural import in the manner proposed.

The view of Craig J., who delivered a dissenting judgment in the court below, requires a fuller examination. The law-making authority could not, the learned judge thinks, have intended to deprive the lessee of an hydraulic location of the right to divert and use such water for the purposes of mining his location; and must, therefore, in the absence of express reservation, be held to have left him the rights of a riparian proprietor in respect of such water subject to any rights granted under the regulations referred to in clause 10.

Turning then to the grant on which the plaintiff rests his right to divert the water in question here—(which, following the form prescribed by the regulations, contains the proviso,

> it is expressly the condition of this water right that the same is issued subject entirely to all rights subsisting at this date to the water in respect to which this right is issued,)

the learned judge concludes that, since the defendant's riparian rights were in existence at the date of the plaintiff's grant, the riparian rights are, by virtue of the proviso quoted, paramount.

This view, I think, proceeds upon an inadequate appreciation of the scope and object of the last mentioned regulations.

At the time these regulations came into force, the law provided for the acquisition by free miners of rights to mine, by various methods, the Crown lands in the Yukon Territory. One set of regulations (providing for the acquisition of "mineral claims"), conferred upon holders of such claims the right to mine

them for mineral in place, and the exclusive right of entry upon them for the purpose of such mining. A second set of regulations relating to placer mining, conferred the right upon holders of claims located under them, to mine alluvial deposits for the precious metals within the limits of their claims. A third set of regulations authorized the leasing of beds of creeks and rivers; and conferred upon the lessees the right to mine the alluvial deposits in such beds, by the process of dredging, for the precious metals. And a fourth set, those relating to the grant of the leases of locations for hydraulic mining, already referred to, became law a few months later.

The efficient exercise of any of these rights of mining would depend, in almost any given case, upon the existence of an available supply of water; and it was to secure the application of the water found in natural streams and lakes to practical use in mining and in the treatment of the products of mining, as well as its equitable distribution among those engaged in that industry, that the regulations of the 3rd of August, 1898, were passed. From that date those regulations, I think, constituted a code, subject to the exception presently to be mentioned, governing the acquisition of the right to divert and use such water for the purposes mentioned.

One exception is recognized. By the regulations relating to placer mining, the holder of a placer claim was given the right to use so much of the water flowing through or past his claim as the mining recorder should think necessary to enable him to work his claims. These provisions the regulations of August 3rd do not displace, and the rights of the grantee of a water privilege are by them expressly made subject

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to the rights of placer miners working on occupied creeks above or below the point of diversion at the date of his grant.

But I do not agree that the language of the regulations justifies the view that grants made under them were intended to be subject to the common law rights of riparian owners respecting the flow of the waters to which such grants should apply.

The learned judge bases his view upon the proviso which I have already quoted from the form of grant prescribed by the regulations. This proviso has not, I think, any application to the rights of riparian proprietors as such.

> The natural rights of a riparian proprietor as such are not primarily rights of user (says Cotton L.J. in *Kensit* v. *Great Eastern Ry. Co.* (1), at page 133), but rights incidental to the ownership of property;

and such rights are not, I think, aptly described by the words of the proviso.

Moreover, the language of clause 5 of the regulations indicates, I think, that, both in the proviso and in the clause, the law-making authority was dealing with substantive rights of user and not such rights in respect of the flow of a stream as are merely incidental to a riparian proprietorship.

Substantive rights of user of the waters of particular streams may well have been vested in individuals at the time the regulations came into force. The regulations relating to quartz mining, for example,—the provisions of which in this respect were displaced by the last mentioned regulations—provided for the acquisition of such rights in connection with the working of quartz claims or operations incidental thereto.

(1) 27 Ch. D. 122.

And there may have been other cases. Such vested rights—at least so long as they are in exercise for a beneficial purpose—are protected. And, of course, prior grants under the regulations themselves are within the clause and the proviso.

The language of the provisions in question may, therefore, be given its full effect without extending it to embrace riparian rights—a class of rights, as I have said, to which it does not fitly apply.

It must be apparent, moreover, that if the rights of grantees of water privileges under the regulations are in every case subordinate to the existing common law rights of riparian owners the purpose of the regulations must in the practical administration of them be largely, if not wholly, frustrated. We ought not, unless compelled by intractable language, to attribute to the legislative authority an intention to promulgate a scheme so obviously futile, and a construction leading to that result must, I think, be rejected. See *Salmon* v. *Duncombe*(1), and *Martly* v. *Carson*(2), at page 658.

In this view of the regulations, on which the plaintiff's grant is based, no difficulty, I think, arises in the construction or application of clause 10 of the regulations respecting the leasing of hydraulic locations; that clause can only be read as a recognition that, notwithstanding the provisions of any lease of an hydraulic location, the natural waters on or flowing through or past such a location are subject to be dealt with under the regulations of August, 1898, relating to the diversion and use of water; and consequently that the rights conferred by such lessees are

(1) 11 App. Cas. 627. (2) 20 Can. S.C.R. 634.

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subject to rights in respect of such waters granted under the last mentioned regulations.

A minor question arises upon the defendant's counterclaim, that is to say: Whether or not the defendant is entitled to an injunction compelling the plaintiff to remove his dam, flume and certain building and machinery he has erected within the limits of the defendant's location?

As to the buildings, the plaintiff alleges they were erected with the consent of the defendant's manager, and although upon this there is some conflict of evidence, there is, I think, so much in the circumstances pointing to acquiescence on the part of the defendant that we should not, as against the view of the two courts below, be justified in granting a mandatory injunction to compel the plaintiff to remove them. As to the flume, the construction of it appears to be expressly authorized by the plaintiff's grant.

The penning back of the water of the creek presents a case not quite so obvious. If it clearly appeared that, in constructing the dam, the plaintiff was exceeding the rights conferred by his grant, and there had been no other answer to the defendant's claim under this head, it might have been necessary to consider the question whether the defendant, by its lease, acquired any rights of occupation other than those defined by clause 9 of the regulations, and whether so long as its mining operations are not interfered with it has any rights of which the erection of such a structure would be an invasion. That question is, however, in my opinion, not presented by this appeal. The grant of the right to divert the waters of the stream at a place within the defendant's location, as well as a right to convey the water so diverted,

by flume through that location, would seem to involve the grant of the subsidiary right to use such reasonable means as may be necessary to turn the water from the bed of the creek into the plaintiff's flume. It is quite clear that the dam complained of does not affect the defendant's mining operations; and I am not satisfied that the plaintiff has done more than is necessary to enable him to take the benefit of his rights under his grant. In these circumstances the Gold Commissioner acted rightly in refusing the relief asked.

Appeal dismissed with costs.

Solicitor for the appellant: *C. W. C. Tabor.*

Solicitors for the respondent: *Noel, Noel & Cormack.*