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*Nov. 8.

*Nov. 17.

G. N. HARTLEY AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

C. A. MATSON AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE TERRITORIAL COURT OF THE YUKON TERRITORY.

Mines and minerals—Placer mining — Hydraulic concessions—Staking claims—Annulment of prior lease—Right of action—Status of adverse claimants—Trespass.

In an action by free-miners, who had "staked" placer mining claims within the limits of a concession granted for purposes of hydraulic mining, to set aside the hydraulic mining lease on the ground that it had been illegally issued and was null and of no effect;

Held, that where there was a hydraulic lease of mineral lands in existence, the mere fact of free-miners "staking" on the lands included within the leased limits did not give them any right or interest in the lands nor did they thereby acquire such status in respect thereto as could entitle them to obtain a judicial declaration in an action for the annulment of the lease.

* PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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APPEAL from the judgment of the Territorial Court of the Yukon Territory sitting as the Court of Appeal constituted by the Ordinance of the Governor-General-in-Council of the 18th of March, 1901, respecting the hearing and decision of disputes in relation to mining lands in the Yukon Territory, which affirmed the decision of the Gold Commissioner dismissing the plaintiffs' action with costs.

In this case the respondents' motion to quash the appeal on the ground of want of jurisdiction was dismissed (1), and the questions in issue on the merits are stated in the judgment of His Lordship Mr. Justice Davies now reported.

Peters K.C. for the appellants.

Latchford K.C. and *J. Lorne McDougall* for the respondents.

TASCHEREAU J.—I entirely agree with Mr. Justice Davies in his conclusions and the reasoning upon which he has reached those conclusions.

SEDGEWICK and GIROUARD JJ. concurred in the judgment dismissing the appeal with costs for the reasons stated in the judgment of His Lordship Mr. Justice Davies.

DAVIES J.—This is an action instituted by the appellants in the Gold Commissioner's Court of the Yukon Territory for the purpose of obtaining a judicial declaration that certain placer mining claims alleged to have been staked by them were not within the boundaries of the defendants' hydraulic mining lease, and that such lease was "null and void," and should be cancelled. This latter is the leading conclusion of the

(1) 32 Can. S. C. R. 575.

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plaintiffs' claim, their other claims being consequential merely and depending upon their right to have the lease cancelled.

The only question argued before us, and on which this appeal must be determined, was whether the plaintiffs had any status entitling them to have such declaration made in this action, or whether they were mere volunteers without interest. This case came before the Territorial Court of Appeal and comes before us practically as if on demurrer, and the appellants have a right to have the statements of fact alleged in their statement of claim assumed as true.

The claim of the plaintiffs, about sixty in number, is based upon the statement, which must be assumed as true, that they are free miners, and that, in 1901, they duly staked certain placer mining claims on the left limit of Bonanza Creek and duly applied at the Gold Commissioner's Office for grants of the same. There is no statement that any such grants were given but on the argument it was common ground on both sides that their applications had all been rejected because of the existence of the respondents' lease. The Gold Commissioner has full jurisdiction under the regulations to

> hear and determine judicially all matters in difference in regard to entries for mining claims under the regulations,

and power to adjudge any patent or lease from the Crown of any mining property void on the ground that it was issued in error or through improvidence or had been obtained by fraud. He has also special power given to him to "grant an order in the nature of mandamus" and generally is invested, so far as such matters are concerned, with all the powers of a territorial judge. In the case at Bar, no application was made for a mandamus to compel the mining recorder or other proper officer to issue to the appellants the

placer mining grants for which they had applied, nor is that officer made a party to this suit. The appellants come into court simply as free miners who had staked out certain claims which were either within or without the boundaries of a certain hydraulic mining lease from the Crown, and for which placer mining claims they had not obtained any grant or license. Their only excuse for bringing the defendants into court at all was that the placer claims they had located were within, or claimed as being within, the boundaries of the defendants' lease which they desired to have cancelled.

If their claims were outside of this lease they could not possibly be entitled to any such declaration as that sought by them. As free miners not having or claiming any grant or claim *within* the boundaries of lands included in a hydraulic mining lease they would not have a vestige of right to attack that lease or ask the court to make any declaration concerning it.

On the other hand it they fell back on their alternative position and claimed that their placer locations were *within* the bounds of the defendants' prior lease and asked for a declaration from the court to have it declared null and void, they surely were bound to allege and prove that they were entitled to some interest legal or equitable in the lands.

I agree substantially with the judgment of the Gold Commissioner, Mr. Senkler. I do not think that the mere fact of the appellants, as free miners, entering upon lands already leased by the Crown and professing to locate claims there gave them any right or interest in the lands, or any status to come into court and ask for any declaration with respect to the validity of a prior lease from the Crown of those very lands.

To attain such a status mere "staking" is not sufficient. They must go further and obtain from

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the mining recorder their placer grants. If for any reasons he refuses to issue such grants then their remedy is by way of mandamus to compel him to do his duty. Until they have obtained such grants they are not in a position to attack the defendants' lease. They have neither title nor colour of title and have no interest legal or equitable in the lands, such as is necessary to enable them to maintain this action. If having obtained their grants they desire to have defendants' lease declared void it was open to them to take the necessary steps.

It was contended on the part of the respondents, that to any such proceedings the Attorney General should be made a party. But it is not necessary for us to determine this point in the view we take of this appeal and we do not therefore express any opinion upon it.

Mr. Peters raised the question as to the power of the Crown to grant hydraulic leases, under the fourth article of the regulations of 1898, until after the lands had been withdrawn from placer mining under the thirteenth article of the same regulations.

It does not appear to me that this article or section bears the construction he sought to have put upon it. The power of the minister to grant leases and the limits, conditions and terms under which he may grant them are defined and complete in the first three sections of the regulations. The thirteenth section has no reference to the granting of such leases and was never intended to create an antecedent condition to their being granted. It had reference to a different thing altogether, namely, the policy of proclaiming or setting apart a large area of country which would not be open to placer mining. Such proclaimed area might, as a matter of policy, be leased afterwards or not, as circumstances determined, or it might after-

wards be thrown open to placer mining. But the proclamation withdrew it from placer mining in the meantime until it was determined whether hydraulic leases should be given or not.

However a lease granted either under the third or fourth section is not effected, in my opinion, by the fact that the lands leased had not been previously withdrawn from placer mining. Placer miners who had properly located claims before the lease are of course not affected by it.

But whether I am right or not in my construction of these regulations cannot affect the conclusion I have reached that the plaintiffs (appellants) not having obtained their placer grants have no status to enable them to attack an existing Crown lease.

The appeal should be dismissed with costs.

MILLS J.—I have had the perusal of the judgment of my brother Davies in this case. In that judgment I entirely concur. As the law in the case is effectually settled by the decision of their Lordships of the Judicial Committee of the Privy Council in *Osborne* v. *Morgan* (1), I do not feel that I can usefully add anything.

Appeal dismissed with costs.

Solicitors for the appellants: *Woodworth & Black.*

Solicitors for the respondents: *Pattullo & Ridley.*

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(1) 13 App. Cas. 227, at pp. 234, 235.