

A. M. MORRISON AND ANOTHER } APPELLANTS;
 (DEFENDANTS) }
 AND
 EAST KOOTENAY RUBY CO. LTD. } RESPONDENT.
 (PLAINTIFF) }

1933
 *Oct. 4.
 *Dec. 22.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Statute—Interpretation—Mining—Forfeiture of leases—Sections 110 and 114 of the Placer-mining Act, R.S.B.C., 1924, c. 169—Whether irreconcilable.

Sections 110 and 114 of the *Placer-mining Act*, R.S.B.C., 1924, c. 169, are not irreconcilable and there is no conflict between them. Each one of these sections has its respective application according to the circumstances of each case. Section 110 imparts a statutory declaration of forfeiture in certain well defined cases of breach therein specified; while section 114 covers all other cases of non-performance or non-observance. In cases of forfeiture specifically mentioned in section 110, the lease is *ipso facto* void: the necessity of a declaration by the Gold Commissioner approved by the Minister of Mines is excluded, as absolute forfeiture operates automatically.

APPEAL from the decision of the Court of Appeal for British Columbia, affirming on an equal division the judgment of the Supreme Court, D. A. Macdonald J. (1) and maintaining the respondent's action.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

H. A. Beckwith for the appellant.

Geo. F. Henderson K.C. for the respondent.

The judgment of the Court was delivered by

RINFRET J.—This action was tried upon a special case stated by the parties.

The main point involved is whether the respondent, who holds by assignment a placer lease in the mining division of Atlin Lake, has forfeited its rights under the lease, so that the ground became open to re-location by the appellants.

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith and Crocket JJ.

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The trial judge in the Supreme Court held that there was no forfeiture (1). In the Court of Appeal, his decision stood affirmed on an equal division of the judges.

The lease was made on the 30th day of September, 1922, by the Gold Commissioner for the Atlin Lake Mining Division as lessor. It provided that the lessee should pay a yearly rent in advance to the Mining Recorder; that he would

observe, make, and keep all and singular the provisions, payments, conditions, and stipulations of the said *Placer-mining Act* and amending Acts, and other the laws for the time being in force in the province in relation to mining.

It was granted upon the express condition that the lessee would work and mine for the precious metals upon the premises demised and would expend two hundred and fifty dollars at least in each and every year during the continuance of the term, and further would

satisfy the Mining Recorder that such development-work has been done by the affidavit of the lessee or his agent setting out a detailed statement of the work done, and shall obtain from the said Mining Recorder a certificate of such work having been done, and shall record the same before the expiration of each and every year of the term hereby demised.

The respondent did not pay any rent, did not expend the sum of two hundred and fifty dollars, or any sum, in the development-work, and consequently did not satisfy the Mining Recorder that the development-work had been done, as required by the lease, did not obtain from the Mining Recorder any certificate of work and did not have any recorded.

As a result, on the 1st of October, 1930, the Gold Commissioner issued a certificate that the lessee was in default; and thereupon the Mining Recorder cancelled the record of the lease and noted the cancellation on the copy of the said lease on file. After the cancellation, the lessee made several attempts to pay the rent; but the Mining Recorder, the Gold Commissioner and the Minister of Mines in turn refused to accept it, on the ground that it had not been paid in time. The Minister of Mines has not formally declared the lease forfeited or approved any forfeiture thereof; but he has, at all times adopted the attitude that, by reason of the lessee's default, the lease automatically became forfeited and void, and the Minister had no power to act in the matter. The question for the opinion of the

(1) [1933] 1 W.W.R. 460.

court is whether the lease has been forfeited under the circumstances.

The decision turns upon the interpretation of subsection 5 of section 110 of the *Placer-mining Act* (R.S.B.C., 1924, c. 169), which reads as follows:

(5) If the development-work required by this section is not done in any year, or if the lessee fails to obtain or record the certificate required in any year, or if the annual rental payable under the lease or any part thereof remains unpaid after the day on which it becomes payable, the lease shall be deemed forfeited and the demised premises shall be deemed vacant and abandoned without any re-entry, declaration or forfeiture, or other act on the part of the lessor, Gold Commissioner, or otherwise, any rule of law or equity to the contrary notwithstanding. Upon receipt of a certificate from the Gold Commissioner that the lessee is in default in respect of the doing or recording of development-work in respect of the lease, or that the annual rental in respect of the lease is in default, the Mining Recorder, in whose office a copy of the lease is filed shall cancel the record of the lease and note the cancellation on the copy of the lease on file.

It is clear that the parties intended the lease to be entered into under the authority of that section. The material provisions of the section are reproduced verbatim in the lease of which they are made an express condition.

It is to be noted that, by force of the statute, in the event of certain specified defaults, "the lease shall be deemed forfeited," "the demised premises shall be deemed vacant and abandoned," "without any re-entry," without "any declaration of forfeiture," without any "other act on the part of the lessor * * * or otherwise," "any rule of law or equity to the contrary notwithstanding."

In our view, the enactment so worded provides for an absolute forfeiture operating automatically. Immediately upon the happening of any of the specified breaches, the lease is *ipso facto* void, without any necessity for a declaration or for any further act to be done by anybody. The words used by the legislature show, we think, the clear intention to exclude the rule laid down in *Davenport v. The Queen* (1).

The lessee is not left without means of relief or of reinstatement, but the manner in which relief may be granted or reinstatement may be obtained is specifically dealt with in other sections of the statute. It is not apparent that power is given to grant it otherwise. Suffice it to say that,

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in the premises, the lessee has not brought himself within the conditions essentially required to obtain reinstatement and we are not dealing with an application for relief.

In this case, we may go further and we may say that there were, on behalf of the lessor, unequivocal acts evincing his intention to avoid the lease (*Roberts v. Davey*) (1). The Gold Commissioner (who was actually the lessor) issued his certificate that the lessee was in default. The Mining Recorder thereupon cancelled the record and noted the cancellation on the copy of the lease on file. The Mining Recorder promptly returned to the lessee the money remitted for rental, as not having been paid on time. From then on, the lessee was explicitly notified of the stand taken by the lessor. Later, the money for rental was tendered to the Minister of Mines, who received it subject to the acceptance of the Gold Commissioner. The Gold Commissioner ruled that the same was not paid in time and that the lease had, by reason of the lessee's delay, lapsed and become void. The tendered money was thereupon returned to the lessee. It is conceded that the Minister

has at all times adopted the attitude that, by reason of plaintiff's default, the said lease automatically became forfeited and void and that the Minister had no power to act in the matter.

Should it be held that the respondent's default did not absolutely determine the lease, and only made it voidable at the election of the landlord, yet we would think that by the acts just enumerated the landlord has unequivocally indicated his intention and he has exercised his option.

It remains to consider the effect of subsection 1 of section 114 of the *Placer-mining Act* reading as follows:

114. (1) Subject to the provisions of subsection (2), on the non-performance or non-observance of any covenant or condition in any lease, the lease shall be declared forfeited by the Gold Commissioner, subject to the approval of the Minister of Mines, unless good cause is shown to the contrary. After any such declaration of forfeiture, the mining ground shall be open for location by any free miner. No lease shall be declared forfeited, except in accordance with this section.

It was argued that this is a case to which this subsection applies and, if so, that the Minister of Mines has not given his approval.

We are unable to accede to the argument.

Subsection 1 of section 114 provides generally for all cases of

non-performance or non-observance of any covenant or condition in any lease.

It enacts that, in all such cases, there must be a declaration of forfeiture, "subject to the approval of the Minister of Mines." Only after such declaration, shall the mining ground "be open for location by any free miner."

Subsection 5 of section 110 is restricted to forfeitures arising out of the particular breaches of covenant therein specified. It deals explicitly with the question of declaration and it says that, in the cases specifically mentioned, no declaration of forfeiture shall be required. It operates therefore as an exception. And it must be so or else—if subsection 1 of section 114 was held to be an absolute rule applying in every case—subsection 5 of section 110 would never come into operation. We do not find any conflict between the two sections. Section 110 imparts a statutory declaration of forfeiture in certain well defined cases of breach. Section 114 covers all other cases of non-performance or non-observance. In the latter cases, there must be "a declaration by the Gold Commissioner, subject to the approval of the Minister of Mines." And the enactment says that wherever a declaration of forfeiture is required, that declaration must be "in accordance with this section." But, in the particular cases provided for by subsection 5 of section 110, the necessity for a declaration is excluded. It says there is to be a forfeiture without declaration.

It may be further pointed out that, in the terms of the statute, the provisions of section 110 apply only to "leases issued on or after the first day of July, 1920, pursuant to" the *Placer-mining Act*. (R.S.B.C., 1924, c. 169.)

Our conclusion is that the appeal ought to be allowed and that the question must be answered in the affirmative. Accordingly judgment shall be entered for the defendants dismissing the plaintiff's action, with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *H. A. Beckwith.*

Solicitors for the respondent: *Crease & Crease.*

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