

*Privy Council Appeal No. 101 of 1918.*

Quesnel Forks Gold Mining Company, Limited - - - *Appellants*

*v.*

Robert T. Ward and others - - - - - *Respondents*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 21ST OCTOBER, 1919.

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*Present at the Hearing :*

VISCOUNT HALDANE.

LORD BUCKMASTER.

LORD DUNEDIN.

MR. JUSTICE DUFF.

[*Delivered by* LORD BUCKMASTER.]

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The question in this case is whether certain leases, granted by the Government of the Province of British Columbia to the Cariboo Hydraulic Mining Co., are valid and subsisting leases ; or whether, as the appellants contend, the terms for which they were granted have come to an end.

It is not suggested that the terms have expired by reason of effluxion of time, but upon the ground that first, the respondents, who are entitled to the benefit of such leases if subsisting, have failed to take out a free miner's certificate as required by the Placer Mining Act (c. 165, S.B.C. 1911) ; and secondly, that the conditions upon which the leases were granted have not been satisfied and that they have consequently become void.

The appellants' position in the dispute is due to the fact that they are entitled to the benefit of seven placer mining leases granted on the 13th January, 1916, by the Gold Commissioner for the Quesnel Mining Division of the Province of British Columbia, pursuant to the powers vested in him under the Placer Mining Act already mentioned. These leases cover the same

ground as the leases under which the respondents claim and if these latter leases are for any reason no longer subsisting, there is no question as to the appellants' title.

Before examining the provisions of the Placer Mining Act, it is desirable to consider the circumstances in which the leases for which the respondents are entitled were originally granted. Before 1894 the land in question was held under placer mining leases issued, under a statute similar to that of 1911 (Chapter 165) to a company known as the Cariboo Hydraulic Mining Company, Limited, through which company the respondents claim. In April, 1894, this Company presented a petition asking for an Act confirming them in the property already acquired by them, and in the words of the petition "consolidating the several placer mining claims and other properties now held by them into one, with a more lasting and secure title thereto than they now have"; and, accordingly, a statute was passed by the Legislative Assembly of the Province of British Columbia in 1894, which declared that it should be lawful for the Lieutenant-Governor in Council to demise to the Company and their assigns for twenty-five years the properties which were described in the schedule, with power to work, extract, remove and retain to their own use all mines and minerals, including the precious metals therein contained at a yearly rental of 300 dollars per annum, and also granting the privilege of renewal at a rental to be agreed or fixed by arbitration.

It was provided that the lease to be granted under this statute should contain a covenant that the Company should spend a sum not less than 500,000 dollars a year in developing, and also that they would not employ a Chinese or Japanese person in or about the property and the works connected therewith, and by secs. 3 and 4 power was also conferred to demise lands immediately adjoining those in the principal lease, not exceeding 250 acres for a term of twenty-five years, and also so much of the waters of Six-Mile Creek and Morehead Lake, not exceeding in the aggregate 3,000 miner's inches, as defined by the Placer Mining Act, 1891, as might be necessary for any purposes connected with the undertaking.

A mining lease was granted consequent upon this statute, dated 16th May, 1894, but it did not comply in exact terms with the conditions above referred to, and in particular it modified the provisions with regard to the employment of Chinese or Japanese.

Without further legislation, therefore, this lease would have been outside the powers conferred by the statute; and, in order that the position might be validated, a further Act was passed in 1895, containing extended terms with regard to the water rights and the construction of dams, and providing by section 5 that the lease granted on the 16th May, 1894, "a copy of which is contained in the schedule of this Act, be, and the same is hereby declared to be, valid and binding."

This lease granted the full right to take all mines and minerals including precious metals, excepting such as were held by free

miners on the date of the lease, and it contained the provisions as to avoidance of the lease in certain events, in the following terms.

“ Provided, always, that if the said lessee or its assigns shall cease for the space of two years to carry on mining operations upon such premises or to do any work which shall conduce to the facility of carrying on such mining operations as aforesaid or shall completely abandon the said premises for the space of one year then this demise shall become absolutely forfeited and these presents and the term hereby created, and all rights, privileges and authorities hereby granted and conferred or intended so to be, shall, *ipso facto*, at the expiration of the times aforesaid cease and be void as if these presents had not been made.”

It is the failure to comply with the conditions of this proviso, that is one of the reasons why it is alleged that the lease has come to an end.

Leases were also granted pursuant to the powers in secs. 3 and 4, dated respectively the 3rd March, 1896, and the 31st October, 1896, but these leases did not repeat the provisions as to cesser contained in the lease of the 16th May, 1894, already referred to. The respondents or their predecessors took out free mining certificates up to the 31st May, 1912; but they then ceased to renew them, and contend that, for the purpose of working the mines under the rights conferred by the lease of the 16th May, 1894, such renewal was unnecessary.

With regard to the failure to comply with the proviso as to working, Mr. Justice MacDonald, before whom the case was heard, held that there had been no complete abandonment; but, on the other hand, he decided that mining operations of any kind ceased for a much longer period than the two years, and that there were no mining operations carried on at the time when the staking took place by the parties who obtained the leases under which the appellants now claim.

For this reason, and also because he regarded the possession of a free mining certificate as essential for the preservation of the right conferred by the leases he decided in favour of the appellants; but his judgment was overruled by the unanimous judgment of the Court of Appeal of British Columbia and from their judgment this appeal has been brought.

The point as to forfeiture of the lease by breach of the proviso may be conveniently dealt with first. In order for the appellants to succeed upon this point, it is necessary for them to show that the failure to work rendered the lease void, without any option on the part of the lessor. According to their contention, therefore, upon the expiration of the period during which no work had taken place, the lease must automatically have ended, and if any indulgence had been shown by the Crown it must have been in the form of a new lease and not by continuation of the old. If the covenant does not effect this, then, although the words used are void, the meaning is void at the option of the lessor, or in other words voidable.

Their Lordships have no hesitation in saying that that is the true meaning of the covenant. Substantial obligations are imposed upon the lessee under the terms of the lease; and it would

not be consistent with the ordinary rules of construction applicable to such a document to hold that these obligations could be completely avoided by the lessee omitting to perform any work. It is of course possible so to frame a lease that this must be the effect, and it would result that the term was then a term which ended on the happening of a condition solely in the power of a lessee. This, however, is not the language used in the lease. The words are that the demise should become "absolutely forfeited" and upon this follow the provisions that the term shall *ipso facto* cease and be void as if these presents had not been made; but these latter words only give emphasis to the phrase as to forfeiture and this is the forfeiture of a right held by the lessee back to the lessor.

In their Lordships' opinion this clause, though strongly expressed, is nothing but a condition of forfeiture of which the lessor is not bound to take advantage, and they think that the learned Judges of the Court of Appeal were quite right in the expression of their opinion that in the circumstances of this case no act was done by the Crown to establish the forfeiture, and that, until such an act took place, the term was not ended. In addition to the authority of *Davenport v. The Queen*, 1877, 3 App. Cas. 115, the more recent case of *The New Zealand Shipping Co., Ltd., v. Société des Ateliers et Chantiers de France*, L.J., Vol. LXXXVII, K.B. 746 shows that this decision is in agreement with well-known rules of construction.

With regard to the omission to obtain a free mining certificate, after the very full and careful judgment of the learned Judges of the Court of Appeal, their Lordships think that there is but little that can be profitably added. It will be sufficient if they indicate what appears to them to be a conclusive argument in favour of the view at which these learned Judges had arrived. The Placer Mining Act refers to a special form of mining. The lease in question does not purport to be made under this or any corresponding Act; it places no limitation on the character of the mining or on the minerals to be won, and contains no reference to the statute from beginning to end, except the reference to the computation of water rights and the exception of rights held by free miners at the date of the grants. As pointed out by Mr. Justice Martin, there are a number of fundamental differences between this lease and the rights that would have been conferred under a placer mining lease. Further, as again pointed out by the learned Judge, the lease in question embraces four distinct classes of mining property, some of which are quite outside the statute and the leases of the adjoining lands, so that the lease cannot be related to the power conferred by the Placer Mining Act, which covers only a part of the thing demised. Indeed, the first statute recited the petition asking that all the different rights and privileges might be consolidated with a more lasting and secure title, upon such terms as may seem just; those terms were the ones that were defined in the statute and ultimately incorporated in the lease, and were not the terms under the Placer Mining Act.

The section of the Placer Mining Act which imposes the penalty for omission to take out the certificate is in these terms :

“ No person or joint stock company shall be recognised as having any interest in or to any placer claim mining lease, &c. . . . or in or to any water right mining ditch &c. . . . unless he or it shall have a free miner's certificate.”

The mining lease there referred to is, in their Lordships' opinion, a mining lease under the statute and not any mining lease, however granted. They do not think that in this connection they could do better than sum up the position in the words used by Mr. Justice Martin :—

“ The truth is, and the situation becomes perfectly clear when it is thoroughly studied, that this whole undertaking and the statute which authorised and assisted it must be taken, construed and given effect to as a thing complete in itself, and which it is impossible to work out in connection with any one or all of the said three mining statutes without dismembering it and defeating the whole scheme. After a most careful examination of it I do not hesitate to affirm that there is not one section in the whole *Placer Mining Act* of 1891 which applies to the situation created by the said special Act, and it can only properly be worked out by entirely disregarding the same.”

This statement, with which their Lordships are in entire agreement, disposes of the whole question.

For these reasons they think that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

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In the Privy Council.

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QUESNEL FORKS GOLD MINING COMPANY,  
LIMITED

vs.

ROBERT T. WARD AND OTHERS.

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ADVISED BY LORD BUCKMASTER.

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