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April 21.

IN THE MATTER OF THE PETITION OF RIGHT OF

WILLIAM CHAPELLE.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Gold mining in Yukon District—R. S. C. c. 54, sec. 91—Interpretation—61 Vict. c. 6—62-63 Vict. c. 11—Royalty—Imposition of tax—Powers of Governor in Council.

The provisions of section 91 of *The Dominion Lands Act* (R. S. C. c. 54) requiring that all orders or regulations made under the Act by the Governor in Council shall be laid before Houses of Parliament within the first fifteen days of the session next after the date thereof, is directory only, and the failure to comply with such provision does not invalidate any such order or regulation.

2. The effect of the provision of the said section requiring that any order or regulation made under the Act shall, unless otherwise specially provided in the Act, have force and effect only after the same has been published for four successive weeks in the *Canada Gazette*, is that such order or regulation does not come into force until one week after the fourth publication of the same.

3. There is no authority to be found in *The Yukon Territory Act* (61 Vict. c. 6, as amended by 62-63 Vict. c. 11) enabling the Governor in Council to change or alter the date upon which an order or regulation made, under the provisions of *The Dominion Lands Act*, shall come into force.

4. The suppliant by right of discovery, under the provisions of *The Dominion Lands Act* and *The Dominion Mining Regulations* of 1889 made thereunder, obtained a grant of a certain gold mining claim in the Yukon District in December, 1896. His grant, *inter alia*, gave him, for the term of one year from its date, the exclusive right to all the proceeds realized therefrom; and the rights which it conferred upon him were, it was declared, those laid down in the *Dominion Mining Regulations*, and no more, and were subject to all the provisions thereof whether the same were expressed in the grant or not. During the currency of the original grant an order in council was passed making grants of gold mining claims in the district generally subject to a royalty. Afterwards,

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namely, on the 7th December, 1897, the suppliants grant was renewed in the same terms as those expressed in the original grant.

Held, that the terms of the renewal should be construed by reference to their meaning in the original grant; and that the renewal was not subject to the royalty imposed by the order in council.

5. The operative words of the order in council imposing the royalty were "a royalty shall be levied and collected."

Held, that the expression quoted contained apt words for the imposition of a tax, but that such a tax could not be levied without legislative authority therefor.

6 The evidence showed that the suppliant had paid the amount of the royalty claimed by the Crown under protest, and in the belief that payment was necessary to protect his rights.

Held, that he was entitled to recover it back.

PETITION OF RIGHT for the recovery of the amount of certain royalties, alleged to have been illegally exacted from the suppliant as grantee of certain gold mining claims in the Yukon Territory of Canada.

The facts are stated in the reasons for judgment.

January 31st, February 1st, 2nd, 3rd and 4th, 1902.

The case now came on for trial at Ottawa.

E. D. Armour, K. C., for the suppliants:

Whatever may be said of the character of the instrument under which we claim title, whether it be regarded as a grant of the minerals, or a sale of the minerals, or whether it is a lease or a license, in every view it leads to the same conclusion, viz., that where rights have been acquired by discovering the claim, staking it, and performing those conditions which the Crown regulations require, such rights could not by any subsequent regulation by the Crown be derogated from or injuriously affected.

Take the interpretation put upon the instrument by the Crown itself:—"The interest of a free miner in "his mineral claim shall, save as to claims held as "real estate, be deemed to be a chattel interest, equiva-

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" lent to a lease for one year ; and thence from year to " year, subject to the performance and observance of all " the terms and conditions of these Regulations (1)." I would adopt that, for the sake of argument, not as a legislative declaration of what the prior interests were, but as a view that the Crown has chosen to take of the transaction between the parties here. Arguing it, then, upon that hypothesis what I submit is that having acquired these claims in 1896 or 1897, whichever may be decided to be the the exact date, the suppliants became entitled to a chattel interest, to the possession of the land, the right to build upon it for mining purposes, and the right to all the minerals that they discovered during the continuance of their grant. Then, looking at it in view of the interpretation put upon the instrument by the Crown, let us consider the incidents of a lease from year to year. How long does it continue? When does it begin? When does it end? If in each year of the tenancy it is a new grant, if the parties are at large and open to contract again, then the Crown might very well undertake to impose new terms ; but if, on the contrary, it is a mere extension or renewal of the original lease, then all the rights arising thereunder continue in full force and effect until the lease is put an end to either by a forfeiture, surrender, or notice to quit. (*Sherlock* v. *Milloy* (2) ; *Preston on Conveyancing* (3). The original contract is not only for the first year, but for the first, second and third and every year until determined by operation of law. (*McKay* v. *Mackreth* (4) ; *Oxley* v. *James* (5).

There is another view of these matters taken in England, and that is that a grant of the minerals, or the right to work the minerals in a certain piece of

(1) Vide *The Dominion Mining Regulations* of 1889.
(2) 13 C. L. T. 370.
(3) Vol. 3, pp. 76, 77.
(4) 4 Doug. 213.
(5) 13 M. & W. 209.

land is a sale of the minerals. (*Gowan* v. *Christie* (1). But there can be no doubt under the authorities that the grant remained just exactly the same under the extension as it did under the original period for which it was made.

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Now possibly there is a difference between our law and the civil law with respect to the formality necessary to protect the rights of the parties upon the expiry of a lease which is sought to be renewed. It may be that under the civil law the original grant would altogether cease to exist, but surely in a country in which the common law was in force, if there had been any intention of making a man surrender the original and take a new grant, it would have been easy to express it. The regulations of 1889 provide that all the grantee has to do is to relinquish his old receipt and take a new one, but there is no new contract. The provisions of section 77 of the regulations of 1889 imply that the original rights of the grantee would extend beyond the first year. They are: "Any miner, or miners, shall be entitled to leave of absence for one year from his or their diggings, upon proving to the satisfaction of the superintendent of mines that he or they have expended on such diggings in cash, labour or machinery, an amount not less than $200 on each of such diggings, without any return of gold or other minerals in reasonable quantities for such expenditure." Thus during the continuance of the grant a man may be absent for a year. If the contention is to prevail that the rights only continue for a year then such a provision as the one quoted would be ridiculously inconsistent.

Furthermore, there is no provision in the suppliant's grant reserving the right to the Crown to change the terms thereof. Then, again, what inference is to be

(1) L. R. 2 Sc. App. 273.

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drawn from the provision in section 4 of the regulations of 1889 that the claimant's legal representatives and his assignee get the same rights as he himself has? A mere license is generally personal and ends with the death of the licensee; it is not assignable except upon specific provision therefor. None of the reservations made by the Crown include any right paramount to that of the suppliant which would enable the Crown to alter the contract or grant at will. Therefore any attempt to deal with it in this way is invalid. (*Bainbridge on Mines* (1); *Lord Hatherton* v. *Bradburne* (2); *Taylor* v. *Evans* (3).

Now a timber-license is an entirely different thing from a license or grant to take minerals For instance, by section 2 of chap. 32 of the *Revised Statutes of Ontario*, the Commissioner of Crown Lands is authorized to grant timber-licenses subject to such conditions and regulations and instructions as may from time to time be established by the Lieutenant-Governor in Council, thus clearly reserving the right to allow the contract by subsequent regulations. That is a very different state of things to that which exists with reference to mining rights granted under the provisions of *The Dominion Lands Act* (4). In section 68 thereof it is expressly provided that leases of timber-berths shall not extend beyond the term of one year; but when we come to the provisions regulating mining rights in Dominion lands we do not find any such restriction; and if Parliament had intended that a mining licensee or lessee should have an equal right only with the lessee of timber, it is almost impossible to come to any other conclusion than that Parliament would have repeated the limitation in section 68, so

(1) 5th Ed. pp. 282, 283, 288, 289.
(2) 13 Sim. 599.
(3) 1 H. & N. 101.
(4) R. S. C. c. 54.

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that the lessee of mining rights should not have any interest extending beyond a year, (*Burns* v. *Nowell* (1).

The Crown occupies in respect of the miners, and of the claims set apart for mining, two positions (*a*) the position of a contractor, grantor or lessor; and (*b*) the position of a legislator It may pass laws, that is to say, it may make regulations, which we will assume, for the sake of argument, have the force of law. It is authorized to make contracts with the miners for the passing of interests in the lands set apart for mining. But I contend that where the Crown occupies a dual position like this, it is utterly impossible for it to do something in one capacity which it may afterwards render nugatory by the exercise of powers proper to the other capacity. It cannot enter into a contract and then legislate it out of existence. It may legislate for the future, but not in respect of existing rights. (*Re Canadian Pacific Railway Company and the City of Toronto* (2).

Possibly the most complete answer to anything the Crown might say with regard to the right to exact these royalties from the suppliant is that there never was any intention whatever of reserving a royalty under either the regulations of 1889 or those of 1897, because no such thing was then in existence, or contemplated.

Again, if the order in council of the 16th August, 1897, did not come into force until after the renewal of the grant, then there is no room for argument; but if it is contended that our grant ran from a later date and subsequent to the coming into force of the order in council of 1897, then we say it was merely a renewal of the original grant and was not affected by the royalty. The regulations could not be construed

(1) 5 Q. B. D. at pp. 453, 454. (2) 23 Ont. A. R. at p. 254; 26 S. C. R. at p. 688.

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to be retroactive unless they were authorized to be so made by Parliament. Parliament, of course, has the power to legislate retrospectively, but there is no such inherent power in the Governor in Council The proper rule of interpretation as applied to this case is that the regulations look to the future. (*Hollyman* v. *Noonan* (1).

With regard to claim No. 7 above Discovery that was renewed after the order in council of 29th September, 1897, came into force, and as to that the suppliant relies upon the grounds that the order in council was invalid, that it was abandoned and the regulations of 1888 substituted therefor, those being prospective only and not retrospective. The suppliant further contends in this behalf that, at the time of the renewal, the Crown had not changed the contract, and that the Gold Commissioner, at Dawson, had no authority to give him any other contract than the one which gave him the exclusive right to all the proceeds realized from the claim. He had no power to make any new reservation from the grant.

J. Travers Lewis followed for the suppliant:

The regulations for 1897 were required to be published for four successive weeks in the *Canada Gazette* before they came into force. The earliest possible date that they could do so would be the 11th September, 1897. Bearing this in mind, Chappelle's grant issued on the 9th September. It cannot, therefore, be seriously argued that these regulations affect us. (*In re Coe and Pickering* (2); *In re Miles and the Township of Richmond* (3); *In re Brophy and Gananoque* (4).

The amount of the royalty was exacted from us; it was made of necessity and by compulsion to protect our rights. It was in no sense a voluntary payment.

(1) 1 App. Cas. 595 at p. 606.
(2) 24 U. C. Q. B. 439.
(3) 23 U. C. Q. B. 333.
(4) 26 U. C. C. P. 290.

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We are therefore not precluded from recovering it back. Clearly the suppliant, having paid the royalty, is the proper party to recover it. (*Green* v. *Duckett* (1); *Great Western Railway Co.* v. *Sutton* (2); *Mayor of New Windsor* v. *Taylor* (3); *Greene* v. *Smith* (4); *Adams* v. *Irving National Bank* (5); *Tripler* v. *Mayor of New York* (6); *Radich* v. *Hutchins* (7); *Swift Company* v. *United States* (8); *Oceanic* v. *Tappan* (9); *Preston* v. *City of Boston* (10); *Brisbane* v. *Dacres* (11); *Astley* v. *Reynolds* (12); *Little* v. *Bowers* (13); *Boston and Sandwich Glass Co.* v. *City of Boston* (14); *Amesbury Woollen and Cotton Manufacturing Co.* v. *Inhabitants of Amesbury* (15); *Healey* v. *United States* (16); *United States* v. *Ellsworth* (17).

The Solicitor-General of Canada:

The lands that are dealt with by what have been called "grants" in these cases are part of the Crown domain. As such they could not be dealt with by the Governor in Council without the authority of Parliament. But it is not necessary to argue that when Parliament delegates its authority to the Crown, and that authority is exercised by the Governor in Council and sub-delegated to another person, it can only be exercised by the person to whom it is delegated, subject to any restriction imposed by the delegating authority. It is analogous to mandate in the Civil Law; that is to say that the mandatory has the power to do certain things only within the limits fixed by

(1) 11 Q. B. D. 275 at p. 281.
(2) L. R. 4 H. L. 226.
(3) [1899] A. C. 41; and [1898] 1 Q. B. 186.
(4) 13 N. Y. App. Div. 459.
(5) 116 N. Y. at p. 611.
(6) 125 N. Y. at p. 625.
(7) 95 U. S. 210.
(8) 111 U. S. 22.
(9) 16 Blatch. 296.
(10) 12 Pick. 7.
(11) 5 Taunt. 143.
(12) 2 Str. 916.
(13) 134 U. S. 547.
(14) 4 Metc. 181.
(15) 17 Mass. 461.
(16) 29 Ct. of Clms. 115.
(17) 101 U. S. 170.

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the authority of the mandate. Nothing more has been done here than that.

The position here is simply this, that what is argued by the suppliant to be a reissue or renewal of an old grant is in law and fact a new and substantive grant. The dealings between the suppliant and the Commissioner on the 16th August, 1897, merely amounted to an application by the suppliant for a new grant to be issued to him on the 7th December, 1897. At that time the land was not in the power of the Crown to grant, there was the previous grant outstanding which did not expire until the 7th December.

[BY THE COURT.—Might the grantee not surrender, and take a new grant?]

I am not prepared to admit that he could under the regulations. Of course, as a general rule, a man who benefits by a grant may abandon it; but when you have something which you receive as the bounty of the Crown, that which is given you subject to certain conditions, I am doubtful whether such could be surrendered. But be that as it may, I submit with confidence that it is not a necessary inference that if a man relinquishes his title and that title is replaced by another, the new title is of the same character as the former. Having, as we think, established that there was a new grant on the 7th December to the suppliant, we further contend that it ought to be construed by reading into it the regulations in force at that time, viz., those of 21st of May, 1897, as amended by the order in council of July and August, 1897. By the order in council of 29th July, 1897, the royalty objected to is provided for, and the effect of that order in council is to be read into the grant of 7th December, 1897. The gold mines in the Yukon are the property of the Sovereign. Not only was the gold in these locations the property of the Sovereign, but the loca-

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tions themselves, the surface rights were also the property of the Sovereign. Therefore, this grant was properly made to Chapelle, the suppliant, subject to the payment of royalty on the output of the claim so granted to him. It is a pure question of contract, not the question of a tax or impost upon the subject. The matter having been in existence at the time the contract was entered into, no question as to whether the contract having been made, it could be altered by subsequent regulations, arises in this case. It is not a question, either, of a tax or impost. Here is the exact position between the parties. The Crown says: "I am possessed of this property within the limits of which there are to be found certain precious metals. I give you the right to take them during a prescribed time, subject to the obligation to yield and pay over to me a certain proportion of the precious metals extracted from the property." Surely, it cannot be disputed that this is a proper contract. Therefore, we are not concerned with the abstract question as to whether the Governor in Council can impose a tax.

The whole controversy may be stated in this form: First, is this new grant to be read as dated the 7th December, 1897? Secondly, if it is to be read as of that date, are you to read into it these regulations which provide for the royalty? Thirdly, if you so read them into the grant, are they not an integral part of the contract between the Crown and the subject? I submit that these questions must be answered in the affirmative and in the interests of the Crown.

E. L. Newcombe, K.C., followed for the respondent;

I submit that under the *Dominion Mining Regulations* it was incompetent for the gold commissioner in 1897 to have issued the grant in the form the suppliant alleges. It was either a new grant with a reservation of the royalty, or it was *ultra vires*.

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With regard to cases cited by counsel for the suppliant as to the construction of the words "four consecutive weeks," they at best express the opinion of judges upon the meaning of language used by the legislature in particular cases. A judge is in no better position to interpret words of that sort than any other man possessing the same grammatical knowledge. But beyond all this I desire to remind the court that these regulations are auxillary to an Act of Parliament; in fact, it is a case where Parliament delegates legislative powers to the Governor in Council, and so the enactment (sec. 91 of *The Dominion Lands Act*) ought to receive a liberal construction.

There is another point in favour of the Crown, and that is that these grants are open to the construction that the regulations mentioned in them are the regulations governing from time to time, and not the regulations which happen to be in force at the time the grant is made. Now when the original grant was made, when the contract was first entered into, we find *The Dominion Mining Regulations* mentioned there, and it must be presumed that the parties were aware that these were subject to be varied from time to time.

The order in council of 21st May, 1897, is sufficient, without having to read into it any of the later regulations, to reserve the royalty. In a way it may be said that the grants issued in 1896 were "renewed" in 1897; that is, the grants of 1897 were similar as to the claim, the grantees, and the length of the term; but they are not, and never were renewals so far as containing any rights derived under the original grants are concerned. The receipt, grant, or whatever you may call it, is to be relinquished at the end of the term, and we contend that the grant is utterly exhausted and vacant at the end of the term. It is a distinct grant for the period of one year; and neither

in the instrument itself, nor in the regulations, is there any provision for the right of renewal conferred on the grantee.

Furthermore, this is a case of voluntary concession by the Crown, for which there is no valuable consideration; and the grant, or whatever the instrument may be called must be construed favourably to the Crown. Where there is any doubt as to how far the Crown has parted with its interest, there the Crown does not part with its interest *quoad hoc*. That which the Crown has not granted by express, clear and unambiguous terms, the subject has no right to claim under a grant or charter. (*Broom's Legal Maxims* (1); *Chitty's Prerogatives of the Crown* (2); *The King* v. *Mayor of London* (3); *Eastern Archipelago* v. *The Queen* (4); *Feather* v. *The Queen* 5).

The regulations are binding to the same extent as an Act of Parliament, because they are made under a power delegated by Parliament to the Governor in Council. When the condition prescribed for bringing them into force has been fulfilled, they are exactly in the same position as any part of the statute law. Everybody is presumed to know their provisions within the territorial jurisdiction of Parliament. The law does not yield to considerations of hardship.

With regard to the argument that the royalty is a tax or impost and that being such it was *ultra vires* of the Governor in Council, I do not propose to answer it. The suppliant has set up that argument only for the purpose of knocking it down. If he has not succeeded in doing so, it is for the court to deal with the question. But what we say is that the reservation of the royalty is a matter of contract and agreement

(1) 7th ed. p. 451.
(2) P. 393; 1 C. Rob. 230.
(3) 1 Cr. M. & R. at pp. 12, 13.
(4) 2 El. & Bl. at pp. 906, 907.
(5) 6 B. & S. at p. 283.

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between the parties under the grant which existed in 1898.

Upon the question of the voluntary payment of the royalty, I submit that the mere fact that money is paid under protest does not entitle the party to receive it back. There must be duress in order to entitle the party to succeed in his action. There was no duress in the circumstances under which this money was paid. (*Leake on Contracts* (1); *Chitty on Contracts* (2); *Railroad Company* v. *Commissioners* (3); *Phelan* v. *San Francisco* (4); *Brown* v. *McKinally* (5).

E. D. Armour, K.C., replied: The property having passed by the original grant, the cancellation of the instrument itself would have no effect in re-vesting the property in the Crown and requiring us to take a new grant. *Ward* v. *Lumley* (6); *Ontario Industrial Loan Co.* v. *Odea* (7).

Section 91 of *The Dominion Lands Act* does not give regulations made under the Act the force of law. (*Institute of Patent Agents* v. *Lockwood* (8).

I desire to particularly refer to the phrase "There shall be levied and collected a royalty," &c., in the order in council of 29th July, 1897, in view of the opinion expressed by Strong C.J. in *Les Ecclésiastiques de St. Sulpice* v. *Montreal.* "Every contribution to a public purpose imposed by superior authority is a tax and nothing less (9)."

As to the question of voluntary payment of the royalty, surely the facts amount to duress, the suppliant is told that if he does not pay his claim will be cancelled The police are there. He is not in a position to reply if they forcibly take it, for there is no

(1) 3rd ed. p. 82 and cases cited.
(2) 13th ed. at p. 83.
(3) 98 U. S. 541.
(4) 120 Cal. at p. 5.
(5) 1 Esp. 279.
(6) 5 H. & N. 856.
(7) 22 Ont. A. R. 349.
(8) [1894] A. C. 347.
(9) 16 S. C. R. at p. 403.

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court or judge there, and the decision of the gold commissioner is final. Beyond all that, the regulations themselves provide that any breach thereof operates as a forfeiture of the claim. Surely, then, the payment was anything but voluntary. The royalty is a penalty which the suppliant did not contract to submit himself to, and the court will protect him against it. (*Sprigg* v. *Sigeau* (1).

THE JUDGE OF THE EXCHEQUER COURT now (April 21st, 1902), delivered judgment.

The petition is brought to recover from the Crown the sum of twelve thousand and sixty-six dollars, with interest. Of that amount the sum of one thousand six hundred and thirty-seven dollars was paid by the suppliant on the 17th of June, 1898, as a royalty on the product of claim numbered 3 A below Discovery on Hunker Creek, in the Throndiuck (Klondike) mining division of the Yukon district; and the sum of ten thousand four hundred and twenty-nine dollars was paid on the 16th July, 1898, as a royalty on the product of claim numbered 7, on Eldorado Creek, in the said mining division. The total production of gold on which royalty was paid at the dates mentioned was on Claim 3 A below Discovery on Hunker Creek, sixteen thousand three hundred and seventy dollars; and on Claim numbered 7, on Eldorado Creek, one hundred and four thousand two hundred and ninety dollars. The questions to be determined are: (1) whether the royalty was lawfully collected; and (2) if not, whether it was paid voluntarily and cannot now be recovered back.

It will, I think, be found convenient, in the first place, to confine one's attention to the case presented in respect of the royalty paid on the gold won from

(1) [1897] V. C. at p. 246.

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Claim numbered 3 A below Discovery on Hunker Creek. The suppliant in right of discovery and in accordance with *The Dominion Mining Regulations* then in force came into possession of this claim in December, 1896. These regulations and others which will be referred to were made under *The Dominion Lands Act* (1). By the 47th section of that Act, it is provided that lands containing coal or other minerals, whether in surveyed or unsurveyed territory, shall be disposed of in such manner and on such terms and conditions as are from time to time fixed by the Governor in Council by regulations made in that behalf. By the 90th section of the Act, the Governor in Council is given authority to make orders and regulations with reference to certain specified subjects, and generally for carrying out the provisions of the Act, and from time to time to alter or revoke any such orders or regulations and to make others in lieu thereof. By the 91st section of the Act, it is provided that every order or regulation made thereunder by the Governor in Council shall, unless otherwise specially provided in the Act, have force and effect only after the same has been published for four successive weeks in the *Canada Gazette*, and it is directed that all such orders and regulations shall be laid before both Houses of Parliament within the first fifteen days of the session next after the date thereof.

The first section of the regulations of 1889, to which reference has been made, provided that they might be cited as *The Dominion Mining Regulations*. By the second section it was provided that any person might explore vacant Dominion lands not appropriated or reserved by Government for other purposes, and might search therein, either by surface or subterranean prospecting, for mineral deposits, with a view to obtain-

(1) R. S. C. c. 54.

ing under the regulations a mining location for the same; but no mining location or mining claim was to be granted until actual discovery had been made of the vein, lode or deposit of mineral or metal within the limits of the location or claim. Sections three to sixteen, both inclusive, had reference to quartz mining. Then by the seventeenth section it was provided that the regulations laid down in respect of quartz mining should, in certain particulars and where not otherwise provided, apply to placer mining. Section eighteen dealt with the nature and size of placer mining claims. Section nineteen prescribed the form in which an application for a grant for placer mining was to be made, and also the form of a grant. And here perhaps it is convenient to state that, without attempting to define it, I use the word "grant" herein as meaning the instrument to which that term is applied in these regulations. Section twenty provided that the entry of every holder of a grant for placer mining should be renewed and his receipt relinquished and replaced every year, the entry fee being paid each time. By the twenty-second section provision was made for the sale, mortgage, or disposal of claims. By the twenty-third section it was provided that every miner should during the continuance of his grant have the exclusive right of entry upon his own claim, for the miner-like working thereof, and the construction of a residence thereon, and should be entitled exclusively to all the proceeds realized therefrom, but he should have no surface rights therein, and the Superintendent of Mines might grant to the holders of adjacent claims such right of entry thereon as might be absolutely necessary for the working of their claims, upon such terms as to him seemed reasonable. By the form of application given (Form H.) the applicant had, among other things, to declare under oath that to the best of his knowledge

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and belief he was the first discoverer of the deposit of minerals in the claim, or that it had been abandoned. The prescribed form of grant was as follows:

"FORM I.

"GRANT FOR PLACER MINING.

"No.... .

"DEPARTMENT OF THE INTERIOR,

"Dominion Lands Office,

"Agency, 1 .

"In consideration of the payment of five dollars being "the fee required by the provisions of the Dominion "Mining Regulations, sections 4 and 20, by (A.B.) of " , accompanying his (or their) application No. , "dated 1 , for a mining claim in (here insert "description of locality.)

"The Minister of the Interior hereby grants to the "said (A.B.) , for the term of one year "from the date hereof, the exclusive right of entry "upon the claim.

"(here describe in detail the claim granted)

"for the miner-like working thereof and the construc- "tion of a residence thereon, and the exclusive right "to all the proceeds realized therefrom.

"The said (A.B.) shall be entitled to "the use of so much of the water naturally flowing "through or past his (or their) claim, and not already "lawfully appropriated, as shall be necessary for the "due working thereof, and to drain his (or their) claim "free of charge.

"This grant does not convey to the said (A.B.) "any surface rights in the said claim, or any right of "ownership in the soil covered by the said claim; and "the said grant shall lapse and be forfeited unless the "claim is continuously and in good faith worked by "the said (A.B.) or his (or their) "associates.

"The rights hereby granted are those laid down in "the aforesaid mining regulations, and no more, and "are subject to all the provisions of the said regula- "tions, whether the same are expressed herein or not

"*Agent of Dominion Lands.*"

By an order in council of the 24th of December, 1894, these regulations were amended with respect to the size of the claims in the Yukon District. And so the matter stood in December, 1896, when the suppliant first became possessed of mining claim numbered 3A below Discovery on Hunker Creek.

On the 21st day of May, 1897, His Excellency the Governor General in Council, after reciting that it was found necessary and expedient that certain amendments and additions should be made to the regulations governing "placer mining" established by order in council of the 9th of November, 1889, was pleased to order that for the latter certain regulations specified should be substituted for the governance of placer mining along the Yukon River and its tributaries. But so far as respects anything in issue here no change was made. By the fourteenth clause of these regulations it was provided, as by the 20th section of the regulations of 1889 it had been provided, that the entry of every holder of a grant for placer mining should be renewed and his receipt relinquished and replaced every year, the entry fee being paid each time. Clause seventeen which dealt with the rights of the miner under his grant, was in the same terms as those used in the twenty-third section of the regulations of 1889, with the substitution of the words "Gold Commissioner" for the words "Superintendent of Mines," and the addition of a provision giving the Gold Commissioner authority to grant permits to miners to cut timber on a claim for their own use upon payment of the prescribed dues. And the prescribed

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form for a grant for placer mining (1) was the same as that given in the earlier regulations, with the exception that it was to be issued by the Gold Commissioner and not by the agent of Dominion Lands. Except perhaps to mention that it was provided that in cases wherein no provision was made by these regulations, those of 1889 should apply, it is not necessary to refer at any greater length to the regulations, or to the amendments thereof made by the orders in council of the 15th of July, 1897, and the 16th of August, 1897. By the terms of these regulations and the grant in the form prescribed by the Governor in Council the miner was entitled exclusively to all the proceeds realized from his claim.

The first provision as to the collection of a royalty on gold mined in the Yukon district occurs in the order in council of the 29th of July, 1897, which because of its importance in the proper determination of the questions in controversy should, I think, be given in full in its own terms. They were as follows:

"His Excellency, by and with the advice of the "Queen's Privy Council for Canada, is pleased to order "as follows:

"That the regulations governing the disposal of "placer mining claims along the Yukon River and its "tributaries in the North-west Territories, established "by order in council, be amended by providing that "entry can only be granted for alternate claims, known "as creek claims, bench claims, bar diggings and dry "diggings, and that the other alternate claims be "reserved for the Crown, to be disposed of by public "auction or in such manner as may be decided by the "Minister of the Interior; that the penalty for trespas- "sing upon a claim reserved for the Crown be the "immediate cancellation, by the Gold Commissioner,

(1) See Form 1, *ante* p. 430.

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"of any entry or entries which the person trespassing "may have obtained whether by original entry or pur- "chase for a mining claim, and the refusal by the "Gold Commissioner of the acceptance of an appli- "cation, which the person trespassing may at any time "make for a claim, and that in addition to such "penalty the Mounted Police *upon a requisition from* "the Gold Commissioner to that effect, may take the "necessary steps to eject the trespasser.

"That upon all gold mined on claims referred to in "the regulations for the governance of placer mining "along the Yukon River and its tributaries, a royalty "of ten per cent. shall be levied and collected by "officers to be appointed for the purpose, provided "that the amount mined and taken from a single "claim does not exceed five hundred dollars per week, "and in case the amount mined and taken from any "single claim exceeds five hundred dollars per week, "there shall be levied and collected a royalty of ten "per cent. upon the amount so taken out up to five "hundred dollars, and upon the excess or amount "taken from any single claim, over five hundred dollars "per week, there shall be levied and collected a royalty "of twenty per cent., such royalty to form part of the "consolidated revenue, and to be accounted for by the "officers who collected the same in due course; that "the times and manner in which such royalty shall "be collected, and the persons who shall collect the "same shall be provided for by regulations to be made "by the Gold Commissioner, and that the Gold Com- "missioner be and he is hereby given authority to "make such regulations and rules accordingly; that "default in payment of such royalty, if continued for "ten days after notice posted upon the claim in respect "of which it is demanded, or in the vicinity of such "claim by the Gold Commissioner or his agent, shall

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" be followed by cancellation of the claim; that any " attempt to defraud the Crown, by withholding any " part of the revenue thus provided for, by making " false statements of the amount taken out, may be " punished by cancellation of the claim in respect of " which fraud or false statements have been committed " or made; and that in respect of the facts, as to such " fraud, or false statement, or non-payment of royalty, " the decision of the Gold Commisioner shall be final."

By an order in council of the 18th of January, 1898, the regulations of May 21st, 1897, and subsequent orders in council governing placer mining along the Yukon River and its tributaries, were cancelled and other regulations substituted therefor. By the thirteenth section of the regulations then made it was provided that a royalty of ten per cent. on the gold mined should be levied and collected on the excess of the gross output of each claim over $2,500, where the royalty was paid at certain banking offices or to the Gold Commissioner or a Mining Recorder, and where paid otherwise on such gross output. By the thirty-first section provision was made for the cancellation of the claim in case of default in payment of the royalty, if continued after ten days' notice posted on the claim or in its vicinity, or for any attempt to defraud the Crown by withholding any part of the royalty or for making false statements as to the amount of gold taken out. By the provisions of section thirty-seven, and of the grant for placer mining (Form I) the terms of which were in that respect changed, the miner or grantee was entitled exclusively to all the proceeds realized from his claim, upon which, however, the royalty prescribed by the regulations was to be paid. By section forty the regulations of 1889, or such other regulations as might be substituted therefor, were to apply in cases for which no provision was made, in these regulations.

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The suppliant's grant of the mining claim numbered 3 A below Discovery on Hunker Creek bore date of the 7th of December, 1896. It was in the prescribed form, and among other things, gave him for the term of one year from its date the exclusive right to all the proceeds realized therefrom, and the rights which it conferred upon him were, it was declared, those laid down in *The Dominion Mining Regulations*, and no more, and were subject to all the provisions of the said regulations whether the same were expressed in the grant or not. On the 16th of August, 1897, there was issued to him a grant of the same claim and in the same form, for the succeeding year. It was issued at this time for his convenience. On this grant appears the impression of the stamp of the Department of the Interior, Yukon district, of that date, but otherwise the instrument is not dated. It was, however, the intention of the parties, at the time the grant was issued, that it should have effect and be in force for one year from the 7th of December, 1897, and for the purposes of this case it must, I think, be taken to have been issued on that date, and not in August of that year.

The suppliant continued in possession of his claim, and during the winter of 1897-1898 took therefrom the gold on which the royalty of one thousand six hundred and thirty-seven dollars mentioned was paid. That, I understand, to be the amount of the royalty collected on the excess of the proceeds realized over the sum of two thousand five hundred dollars, which sum, when this royalty was paid in the prescribed way, was to be deducted from the gross output. But nothing turns upon that. The important consideration is that the royalty was collected under and in accordance with the provisions of the regulations of January 18th, 1898; and it is conceded that it could not be lawfully

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collected thereunder unless the gold mined during the winter of 1897 and 1898 was liable to the exaction of the larger royalty prescribed by the order in council of the 29th of July, 1897. To that extent the parties are agreed, but the suppliant does not concede that the royalty could be lawfully collected under the regulations of January, 1898, even if the claim were held to be liable to the royalty prescribed by the earlier order in council. His contention as to that is that the order in council of July, 1897 having been cancelled no right to royalty accrued thereunder, and none could be collected thereunder or under the regulations of January, 1898. I mention that in passing, though in the view I take of the case it is not necessary to determine the question. It is clear as stated, that if no right to royalty had, by virtue of the order in council of the 29th of July, 1897, accrued in respect of the gold taken and to be taken from the claim in question during the year from December 7th, 1897, the royalty collected in respect thereof was not lawfully collected and should be returned to the suppliant.

That brings us to a consideration of the order in council mentioned, and of the question as to whether or not the mining claim now under consideration was at any time subject to its provisions. And first it will be convenient to consider some questions that were discussed as to the date when it came into force, although that is a matter of more importance in disposing of another branch of the case than in dealing with that now under discussion.

This order in council was published for the fourth consecutive week in the *Canada Gazette* of the 4th of September, 1897. It was received by the Gold Commissioner at Dawson on the 29th of September, 1897. The session of the Parliament of Canada next after the date thereof opened on the 3rd day of Febru-

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ary, 1898. It was laid before the Senate on the 17th of that month, and before the House of Commons on the 7th of March following. By an order in council of the 30th March, 1899, it was provided that certain regulations, of which this order in council may be taken to be one, should be held to have come into force upon the date when they were received by the Gold Commissioner. Then by another order in council, passed on the 30th of January, 1901, it was ordered and declared that the order in council of March 30th, 1899, did not refer to the order in council of July 29th, 1897, by which a royalty was imposed upon the output of mining claims in the Yukon Territory, and that the order in council last mentioned should be held to have come into effect upon the day upon which it was for the fourth time published in the *Canada Gazette*, namely, the 4th day of September, 1897. For the suppliant it was, among other things, contended that no effect should be given to the order in council of July 29th, 1897, because it was not laid before the House of Commons within the first fifteen days of the session of 1898 in accordance with section 91 of *The Dominion Lands Act*. But that contention cannot be supported as the provision referred to is directory only, and the failure to comply with it did not destroy or affect the order in council. It seems to be clear also that if, by virtue of the statute under which the order in council was passed, it came into force on a given date, that date could not without express legislative authority be changed or altered by an order in council passed subsequent thereto. It is suggested that such legislative authority is to be found in *The Yukon Territory Act* (1); but that Act does not, it seems to me, afford support either to the order in council of March 30th, 1899, or to that of January 13th,

(1) 61 Vict. ch. 6, amended 62-63 Vict. ch. 11.

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1900, neither of which are, or purport to be, ordinances made thereunder for the peace, order and good government of the Yukon Territory. The most that can, I think, be said is, that the former order in council might in certain cases be relied upon as a waiver by the Crown of some right that otherwise it would have acquired or been entitled to retain; and that by the latter order in council the Crown has declared, so far as it could then so declare, that such waiver should not extend to the order in council of July 29th, 1897, the date of the coming into force of which must be determined by reference to the 91st section of *The Dominion Lands Act*. By that section it is, as we have seen, provided that any order or regulation made under the Act shall, unless otherwise specially provided in the Act, have force and effect only after the same has been published for four successive weeks in the *Canada Gazette*. For the respondent it is argued that the order or regulation, in such a case, comes into force upon its fourth publication, although only three weeks intervene between the first publication and the fourth. For the suppliant, on the other hand, it is contended that the order or regulation does not come into force in the case mentioned until the end of the fourth week, that is, until one week after the fourth publication of the order or regulation; and that anything short of this is not a publication for four successive weeks. In support of that contention reliance is placed upon the cases of *In re Coe and Pickering* (1); *In re Miles and Richmond* (2); and *In re Brophy and Gananoque* (3). In my opinion the view for which the suppliant contends should prevail, and that so far as anything depends upon the date on which the order in council of July 29th, 1897, came into force, that date should

(1) 24 U. C. Q. B. 439. (2) 28 U. C. Q. B. 333.
(3) 26 U. C. C. P. 290.

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be taken to be the 11th, and not the 4th of September, 1897.

Coming then to the order in council itself there are, it seems clear, only four grounds on which its provisions could be held to apply to the gold mined in the winter of 1897-1898 from the suppliant's claim numbered 3 A below Discovery on Hunker Creek: (1) That the royalty leviable thereunder was lawfully imposed as a tax or impost on all gold mined on claims on the Yukon River and its tributaries; or (2) That such royalty was imposed by virtue of some power or authority, so to impose it, in some way reserved to the Governor in Council at the time the grant was first made or issued; or (3) That the suppliant accepted the grant of 1897 knowing and intending that the gold mined thereunder should be subject to the payment of such royalty; or (4) That the suppliant must be taken to have accepted the grant of 1897 on condition that such royalty should be paid.

The fourth ground is that on which, in the main, the Crown rested this branch of its case. Of the other grounds, the first and second will be found to be the important ones, when the question of the collection of royalty on claim No. 7 on Eldorado Creek is under consideration.

If one examines the provisions of the order in council, he will see that, omitting the first paragraph, the language used is that which one would expect to find in a regulation to impose a tax or to levy an impost. The operative words are "a royalty shall be levied and collected" and these are apt words for the imposition of a tax. But such a tax could not be levied without legislative authority to support the order in council, and no attempt is made to sustain it on that ground. It is equally clear, I think, that when the grant was first made no authority or power was in any way

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reserved to the Governor in Council to derogate from the grant, or during its continuance to subject the gold mined thereunder to the royalty in question. And, on the facts as they appear in evidence, there does not seem to be any ground for finding that the suppliant accepted the grant of 1897, knowing and intending that the gold mined thereunder should be subject to the payment of the royalty mentioned. The grant was expressed in the same terms substantially as those used in the grant of 1896. It is true that in October or November of 1897 the suppliant, knew of the order in council imposing the royalty, but he did not, he says, think it applied to his claim, of which he was then in possession. It was not until March or April, 1898, that he learned of the contention that all claims, no matter when granted, were liable to the royalty, and at that date the regulations of January 18th, 1898, were in force, and the order in council of July 29th had been cancelled. The royalty was then being claimed under the later regulations, and this claim the suppliant resisted, so far as he was in a position to do so.

The questions arising upon the fourth ground mentioned are more difficult of solution. In considering them it will be necessary to refer to some matters already alluded to, and they cannot, I think, be properly determined without reference to *The Dominion Mining Regulations* of 1889, and to the grant issued thereunder to the suppliant on the 7th of December, 1896.

By the terms of the grant of December 7th, 1897, the suppliant was, as we have seen, entitled, among other things, to the exclusive right to all proceeds to be realized from the claim for the term of one year from the date thereof; but that right was in the last paragraph of the grant limited by reference to *The*

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Dominion Mining Regulations. The rights granted, so it was declared, were those laid down in the aforesaid mining regulations, and no more, and were subject to all the provisions of the said regulations whether the same were expressed in the grant or not. What then is to be understood by the expression "Dominion Mining Regulations"? No doubt when the form of grant, which we have in this case, was first used that expression meant the mining regulations of November 9th, 1889, and nothing more. But I am not prepared to say that afterwards, and when these regulations had been amended, or additions had been made to them, the same expression, occurring in the same form, would not come to have a wider and larger meaning that would include the provisions of the amending or added regulation. Not that the meaning of the expression "Dominion Mining Regulations" occurring in the grant would during the year for which it was given be changed or affected to the prejudice of the grantee, by any amendment or new regulation made during that year; but I do not see why the expression might not in one grant have one meaning and in another a different and larger or more restricted meaning. That view seems to present some difficulty; but the difficulty is not, I think, a real one. In each case one would be giving to the expression the meaning which the parties must be taken to have intended it to have at the time when the grant was issued. It is only saying that the same expression may at different times and by different persons be used in a different sense. And so if there was nothing more in the case than that, I should not see any great difficulty in coming to the conclusion that the words "Dominion Mining Regulations"; occurring in the suppliant's grant of December 7th, 1897, included the provisions of the order in

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council of July 29th, 1897. But we cannot, I think, get away from the fact that the grant of December 7th, 1897, was a renewal of the grant of December 7th, 1896, in which the expression mentioned meant primarily the regulations of November, 9th, 1889, and in the widest sense to be attributed to it, these regulations as amended by the order in council of December 24th, 1894. It is true that the grant of December 7th, 1896, was in terms limited to one year from that date. But one cannot read the regulations without seeing that it was in the contemplation of both parties to the grant that it might be renewed. Among other things supporting that view, it is, as we have seen, provided by the twentieth section of the regulations that the entry of every holder of a grant for placer mining must be renewed and his receipt relinquished and replaced every year, the entry fee being paid each time. In practice the instrument described in the regulations as a grant is renewed, while by the regulations it is the entry that is to be renewed, and the receipt that is to be relinquished and replaced. But the meaning probably is the same. The miner's claim to a renewal, if not his absolute right thereto, on some terms, is recognized. It is not necessary to support the petition in this case to hold that he has a claim or right to renewal upon the same terms as those upon which the original grant was issued. On the contrary it may be, as appears to have happened in 1898, that the Crown might impose other terms, and grant the renewal on condition only that the grantee or miner acceded to such terms. I express no opinion as to that. But when it comes to deciding what the contract between the parties is (and in this aspect of the case it is to be considered as a matter of contract only) and it appears that an existing contract is renewed in the same terms, the inference that the

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same expression occurring both in the contract and in the renewal is used in both in the same sense, is, it seems to me, a very strong one. The onus of showing that the parties have used that expression in a different sense in the original grant and in the renewal is strongly upon the party that sets up that contention. It is very certain that the suppliant held this claim from September 11th, 1897, when the order in council imposing the royalty came into force, until the 7th of December, 1897, free from the obligation to pay the royalty; and the renewal having been granted to him in the same terms as the original grant, and without any agreement or understanding to the contrary, the renewal also should, I think, be held not to be subject to any such obligation. In my opinion the same meaning should be attributed to the words "DominionMining Regulations" in the first grant and in the renewal. That view gives, it seems to me, a proper and legitimate construction to the order in council of July 29th, 1897, as a regulation prescribing the terms and conditions upon which the mineral claims therein mentioned should thereafter be disposed of; but without any retroactive effect upon claims then already disposed of; except so far as might be agreed or assented to on the renewal of the grants therefor.

It is, however, argued for the Crown that in December, 1897, the Gold Commissioner had no authority to issue the grant in question without a stipulation that the gold mined thereunder should be liable to the royalty mentioned; and that if he issued it on any other terms or conditions his act was *ultra vires*, and the grant should now be set aside as having been issued improvidently. But is that really so? The grant was issued in the form at the time prescribed by the regulations then in force. In issuing it in that form the Gold Commissioner would not, in December,

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1897, have exceeded his authority. What the effect of a grant in that form would be, and whether the claim would under any circumstances be liable to the royalty are different questions. It may be, though it is not necessary now to decide that matter, that in December, 1897, the Gold Commissioner might have refused to issue the grant of the mining claim in question, unless the suppliant would agree to pay the royalty prescribed; or having issued the grant in August, he might perhaps have recalled it or taken steps to have it cancelled or set aside, unless the suppliant would so agree. But there is nothing of that kind in the case, and nothing is to be gained by considering what the rights of the parties would have been had that course been adopted.

With reference to the contention that the royalty was paid voluntarily and under such circumstances as to preclude the suppliant from recovering it back, it seems to me that it was not so paid, and that the suppliant is not precluded. The consequences of a refusal on his part to comply with the demands made upon him to pay the royalty would have been so disastrous, and any remedy that he might have had so uncertain and inadequate, that he had practically no choice in the matter. There was really nothing else to do.

For these reasons, I am of opinion that the suppliant is entitled to relief and judgment in respect of the sum of one thousand six hundred and thirty-seven dollars, paid for royalty on the gold taken in the winter of 1897-1898 from claim 3A below Discovery on Hunker Creek.

If the view already expressed as to the date when the order in council of July 29th, 1897, came into force, is a correct view, the claim set up for the recovery of the royalty paid on the gold mined from

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claim numbered 7 on Eldorado Creek stands in a stronger position than that which has been under consideration. The grant of that claim is to be taken to have been renewed or issued on the 9th of September, 1897, and the order in council did not come into effect until the 11th of that month. There are, therefore, no grounds except the first and second discussed in connection with the other branch of the case and disposed of in the suppliant's favour, for holding the gold mined under this grant to be liable to the royalty collected. But it appears that other parties may be interested in such royalty. And if that is the case, the suppliant is not entitled to recover back the full amount, without something being arranged or done to protect the Crown with respect to such interests. There, may, therefore, be a reference to the Registrar of the court to inquire and report as to what the suppliant's interests in the royalty so paid in respect of gold mined under claim numbered 7 on Eldorado Creek was, and whether any other person or persons has or have any, and if any, what interest therein.

The question of interest on the amount to which the suppliant may be found entitled is reserved pending the decision of a similar question now depending in the Supreme Court on appeal from this court.

The suppliant will be allowed the costs of his petition.

Judgment accordingly.

Solicitors for suppliant: *Lewis & Smellie.*

Solicitor for respondent: *E. L. Newcombe.*