Privy Council Appeal No. 48 of 1921.

Alarie Joseph Seguin - - - - - - *Appellant*

v.

Anna Theresa Boyle - - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD MARCH, 1922.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT CAVE.
LORD DUNEDIN.
LORD SHAW.
LORD PHILLIMORE.

[*Delivered by* LORD SHAW.]

This is an appeal from a judgment of the Court of Appeal of British Columbia. It was dated the 1st March, 1921, and it affirmed a judgment of the Territorial Court of the Yukon Territory (Macaulay J.) dated the 11th May, 1920, whereby it was ordered that a writ of mandamus should issue commanding the appellant, as Mining Recorder for the Dawson Mining District, to accept the application of the respondent in this appeal for "a grant of Creek Placer Mining Claim No. 3 on Crofton Gulch, in the said Dawson Mining District, Yukon Territory, and on payment of the proper fees in that behalf to issue to the said Anna Theresa Boyle a grant of said Creek Placer Mining Claim No. 3 on Crofton Gulch in accordance with the provisions of the Yukon Placer Mining Act."

The Recorder had refused the application. The question of substance in this appeal is whether that refusal was right.

A further question—one of procedure—has also been argued, namely, whether a writ of mandamus as sought was a competent and correct mode of seeking relief.

The respondent purported to act under the Yukon Placer Mining Act (R.S.C. 1906, c. 64). In the year 1920 she staked out a claim 500 feet long on a certain piece of ground which in fact comprised the area covered by two grants—No. 3 Crofton Gulch,

250 feet long, which had been issued to one Patten on the 17th February, 1899, and another grant of No. 4 Crofton Gulch, 250 feet long, which had been issued three days thereafter to one Putzy.

The history of the ground is important. The grant of the first portion issued to Patten in 1899 was duly renewed and was "kept in good standing" until the 17th February, 1902. The grant of the second portion to Putzy in 1899 was duly renewed and "kept in good standing" until the 20th February, 1901. On those respective dates, accordingly, namely, the 20th February, 1901, and the 17th February, 1902, the Putzy and Patten claims completely lapsed.

On the 5th November, 1900, that is to say, during the standing of the two placer claims, which shortly after that date lapsed, a hydraulic lease, after discussed, was granted, after due procedure of the Government, to J. W. Boyle. The hydraulic lease included within its geographical bounds these claims, but was made subject to the rights of the holders of placer claimants. The effect of this lease with this reservation will be hereafter discussed.

Until the 9th March, 1920, when the respondent's claim was put forward, the ground was possessed under the lease for a period of over eighteen years, that is to say, from the lapsing of the Patten and Putzy leases in 1902.

It should further be explained that on the 10th March, 1902, application had been made by W. Shaw for a grant of Claim No. 3, and on the 3rd May, 1913, a similar application by C. W. MacPherson had been made. But both of these applications were refused on the same ground, namely, that the right to the block of ground had reverted to the holder of the hydraulic lease.

When in March, 1920, the claim by the respondent was put forward, the appellant's action as Mining Recorder for the Dawson Mining District is stated in his own words in his affidavit thus :—

"I refused to issue the said grant for the reason that the said Crofton Gulch is within the limits of hydraulic lease No. 18, and was for that reason on land lawfully occupied for placer mining purposes, as described in Section 17 of the Yukon Placer Mining Act."

Were this action and reason correct ? After very full consideration of the arguments and of the judgment of the learned Judges in the Court below, the Board is of opinion that they were.

It is expedient now to consider the nature and provisions of the hydraulic lease. As mentioned, it was granted on the 5th November, 1900, in favour of one Joseph Whiteside Boyle. (On the 26th June, 1913, it was assigned to the Canadian Klondyke Company, Limited.) The preamble to the lease narrates the application to the Minister "for the exclusive right and privilege of taking and extracting by hydraulic or other mining process, all royal or precious metals or minerals from, in, under or upon that certain tract of lands . . . particularly mentioned and described." The preamble further narrates that it is desirable to introduce hydraulic mining into the Yukon Territory. It

recognizes that large expenditure might be necessary, and in view thereof that the lessee is "entitled to have secured to him, his executors, administrators and assigns, the exclusive right of extracting and taking for his own use and benefit, all royal or precious metals from, in, under or upon the said tract of lands." It is important to add with regard to the preamble that the lease of these particular lands was expressly authorised by an Order of the Governor-General in Council of the 3rd December, 1898. The operative grant and demise is in these terms :—

> "Now This Indenture Witnesseth that in pursuance of the premises and in consideration of and subject to the rent, covenants, provisons, exceptions, restrictions and conditions hereinafter reserved and contained, and by the lessee to be paid, observed and performed, Her Majesty doth grant, demise and lease unto the lessee the said tract of lands and the exclusive right and privilege of extracting and taking therefrom, by hydraulic or other mining process, all royal or precious metals, or minerals, from, in, under or upon the tract of lands hereby demised and leased with regard to which the said rights and privileges are hereby granted."

There follow a description of the tract in some detail and a reference to a plan or survey thereof. The rental payable was $1,008 per annum, and in addition to the rent a certain royalty upon the output. Furthermore, the lessee becomes obliged, under pain of complete forfeiture of the lease, to have sufficient hydraulic or other machinery in operation on the demised premises within one year, and to expend during every year of the term the sum of $6,000 " in mining operations or in, about or upon the mining rights and privileges."

There are two broad, admitted, facts in the case : In the first place, that the rent has been regularly paid, and, in the second place, that the obligation as to annual expenditure in operations has been amply fulfilled. It is not, in short, denied that the lessee and his assigns fully entered into and have continued in possession of the lands demised, a possession which by the terms of the contract was to be exclusive. A third admission, however, is of equally great importance, and it is that geographically these lands do embrace the tract of five hundred yards claimed by the respondent ; and the case, therefore, is one in which the respondent, in face of an exclusive title in favour of the Klondyke Company, sets up, not a mere competing, but an over-riding right as a Placer Miner.

She bases the application upon the important foundation of Placer claimants' rights, namely, Section 17 of the Yukon Placer Mining Act (6 Ed. VII. c. 39). That section is in the following terms :—

> "Any person over, but not under, eighteen years of age may enter for mining purposes, locate, prospect and mine for gold and other precious minerals or stones upon any lands in the Territory, whether vested in the Crown or otherwise, except lands within the boundaries of a city, town or village, as defined by any ordinance of the Commissioner in Council, or lands occupied by a building or within the curtilage of a dwelling-house, or lawfully occupied for placer mining purposes, or which form part of an Indian Reserve."

In addition to the admission of the geographical inclusion of the tract claimed by the respondent within the land granted

to Boyle, it is not denied that that lease, although named a hydraulic lease, is also a lease for other mining purposes, and that in fact the Klondyke Company, Boyle's successor, have placer mining rights upon all the land which their lease contains.

The consequences in ejectment or otherwise so as to enable the affirmation of the respondent's right to become effective are sufficiently obvious, and, other things being equal, it lies upon the respondent, who presents a competitive title later in date by twenty years than the lease, to establish her right,.

In discharging this burden it is, of course, clear, however, that it is within the rights of the respondent to challenge the title of the Klondyke Company and to examine the Boyle lease so as to verify that challenge. But in connection with this topic it has to be kept prominently in view that the respondent has shrunk from attacking and expressly declines to attack the lease as such. The argument, however, is that although the lease may be valid, yet it proves by its terms that the block which the respondent now claims was excluded from its ambit. Reason " c " in the Case for the respondent before the Board is explicit. It is in the following terms :—

> " The respondent is not attacking the Hydraulic Mining Lease No. 18 as such, but she disputes the appellant's ruling to the effect that the Patten and Putzy placer mining areas fell into that lease upon the lapsing of those placer mining claims."

The case is accordingly in a somewhat singular position. It is not asked that the lease as a whole be declared void, nor does the respondent maintain its voidability as such.

It may well be that the respondent is content simply to demand that this lease does not include and cannot by law include the Patten and Putzy tract. Upon examination, however, of the argument upon which this demand is based, it becomes plain that that argument involves putting upon the lease and Regulations, taken together, a construction under which the reference by the former to the latter would destroy the lease altogether, the lease would by its own terms have written away its own validity. This point is of importance to the province, and has received the careful examination of the Board.

The respondent particularly refers to the third clause of the lease and also to the provisoes contained in clause 18 thereof. The third clause is as follows :—

> " 3. That the said lease or demise shall be subject to the rights or claims, but to such rights or claims only, of all persons who may have acquired the same under the Regulations of any Order of the Governor-General in Council up to the date of these presents."

It is to be noted that this is not a reservation from the lease of any particular land as such, and it would be inapt for such a purpose. On the contrary, it is an implied affirmance that the land itself is in fact within the ambit of the lease, but that that land, so included, is nevertheless subject to certain rights or claims. In the second place, the nature of these rights and claims was, as was most natural, determined as at the date of the lease, as

then belonging to persons who had already acquired the same under the Regulations, and prior to the lease. Those persons—and the clause says those persons only—are referred to in the exception. In short, the lease is in accordance with the policy of the statutes, that is to say, it is a lease guaranteeing non-disturbance of existing claimants who are in point of fact conforming with the terms of their holding by accepting the yearly renewals thereof demanded by law, and by working on their claims. If, however, the persons then working placer claims cease to work them, and if renewals are neither granted nor asked for, then those rights and claims lapse and lapse entirely. Those persons no longer have any right as against the lessee; and the exception to which the lease was made subject has disappeared.

Had there been no lease the land as lapsed land would have reverted to the Crown. But there being a lease, the land as lapsed land as to which the exception of rights has passed off, falls under the lease. It does not appear to their Lordships to be reasonable to construe the exception in any broader sense. It certainly did not, as will be noted afterwards by a reference to a correspondence which took place at the time, appear to the Government or officials of the day that there was any exception of the lands themselves from the scope of the lease granted in 1900, and it does not so appear to the Board. The other view would imply that there was, so to speak, by the mere incident of certain lands being, at the date of the lease, worked as placer claims, an enfranchisement in perpetuity of such lands and a permanent exclusion thereof from the lease which geographically covered them.

The policy of the statutes and regulations was manifestly, on the one hand, to promote the development of the mineral resources of the province, and, on the other, to prevent overlapping of rights and the confusion that would thereby ensue. While it is plain that the view last mentioned would be out of accord with this policy, it is sufficient to say that, in their Lordships' opinion, the view is unsound as a construction of Section 3.

A more difficult question, however, arises in the construction of the Regulations themselves. The important clause is the last one of Section 18 of the lease, which is in these terms:—

> "Provided also, that this demise is subject to all other regulations contained and set forth in the said Order in Council of the third day of December, A.D. 1898, 'as amended by subsequent Orders in Council' as fully and effectually to all intents and purposes as if they were set forth in these presents."

Section 3 of the Regulations of the 3rd December, 1898, is very important. It is in these terms:—

> "3. To any person who files an application in the Department of the Interior at Ottawa for a location previously prospected by him, or his authorized agent at the time the location was prospected, a lease will be issued provided he is the first qualified applicant therefor. Before the issue of any such lease there shall be filed in the Department of the Interior

at Ottawa a report from the Gold Commissioner to the effect that it has been proved to his satisfaction that the applicant himself, or a person acting for him, was upon and actually prospected prior to the date of the application the ground included in the location, and that the ground included in the location is not being worked and is not suitable to be worked under the Regulations governing placer mining.

"No application for a lease for hydraulic mining purposes, however, shall be entertained *for any tract which includes within its boundaries any placer, quartz or other mining claim* acquired under the Regulations in that behalf, *or in the immediate vicinity of which placer, quartz or other mining claims have been discovered and are being profitably operated*, and also that the Gold Commissioner shall, in addition to furnishing the reports above referred to, be required to furnish a certificate that the location applied for does not contain any such placer, quartz or other mining claim, nor have any such claims been granted in the immediate vicinity of such location." . . .

(The words are italicized in order to be noted.)

In an able argument for the respondent Mr. Barton maintained that this clause was a definite pronouncement incorporated in the lease to the effect that no application for a lease in the year 1900 by Boyle should or could be entertained in respect of any tract which included within its boundaries the land at its date occupied by Patten and Putzy. The argument, logically considered, would destroy the lease altogether. For the contention cannot be confined to these two plots, seeing that the scope of the proviso is that the whole tract of land under lease must be included: and the argument would mean that no lease of such a tract of land could be entertained or could be granted if *de facto* any portion of the land embraced in it was, at the particular moment of time when the lease was granted, occupied by a placer miner with a claim in good standing. The result as mentioned would amount to a declaration of the incompetency of the Crown ever to bind itself by granting any lease which included any plot however small, and however transitorily occupied for placer mining at its date. In the view of the Board the Regulations cannot be so construed.

Their Lordships have no hesitation in treating these Regulations as primarily directory to all parties, and particularly to the officials of the Government in carrying out the mining policy of the province. Several of the Regulations—they need not be entered upon in detail—are plainly of that character, and among them is Regulation 18.

Furthermore, attention should be paid to Section 13, which makes careful provision for the action of the Gold Commissioner and the giving of notice to all persons concerned by any right or semblance of right. It is in these terms:—

"When it is decided to hold any ground for the purpose of the same being included in locations under these Regulations the Gold Commissioner shall cause a notice to that effect to be posted in a prominent and conspicuous place in the office of the Mining Recorder of the district in which the ground is situate: and after the posting of such notice no occupation or right under the Regulations governing placer mining shall be recognized on any ground so held; but any *bonâ fide* occupation or right acquired under such

> Regulations prior to the posting of such notice shall be recognized and the Gold Commissioner shall make provision for the miner who has acquired such occupation or right being protected in the same."

This is a very plain declaration that the same policy, upon the one hand of encouraging development and upon the other of preventing overlapping, is to be administratively carried out with consideration for the interests of possessors for the time being. These, if any, are concerned at the time, and, their rights being adjusted, the lease goes forward.

Upon the whole, their Lordships have come to the conclusion that Section 3 of the lease itself is the governing and over-riding provision, and that Section 18 does not have the effect of turning a directory section of the regulations into a section restricting the ambit of the lease. The exception governed by Section 3 is of "such rights or claims only of all persons who may have acquired the same under the Regulations,"—pointing, as has been said, to the protection of individual persons and of existing rights and claims only, and to those sets of persons who had actually anterior to the date of the lease acquired particular blocks. Interpreted in the concrete, that meant Patten and Putzy; it did not mean that the lands themselves (their right in and occupancy of which had lapsed) were excluded from the lease. If it were so, the result would be peculiar. The lands would presumably revert to the Crown in such a manner as to lay it open for placer claimants who might in future years repeat the former experiment and also disappear. Fluctuating series of invaders would arrive asserting placer claims upon blocks of land geographically under the lease. This would be a mere confusion.

Reference has been made to the disclaimer of attack upon the lease as a whole, but in their Lordships' opinion the argument logically stated can result in nothing less than such an attack. And it is now necessary to examine whether any such right of challenge lay in the respondent. This lease, according to the argument, was void, or was voidable, and voidable at the instance of the newly arrived claimant, the respondent, in the year 1920. In the opinion of the Board the respondent has no such right. But their Lordships need not discuss the principle in any detail, because in truth the point has been settled with complete clearness in the case of *Osborne* v. *Morgan* ((1888), 13, A.C. 227).

That was a case occurring under the Queensland Goldfields Act, 1874, and regulations made thereunder, and the action was at the instance of holders of "miners' right," its object being to set aside mining leases granted to the defendants. There were two grounds of action: first, that the leases had been granted contrary to a provision of the Act of Parliament, namely, within two years from the proclamation of the Goldfield; and secondly, that the applicants for the leases had not complied with the regulations in force.

As will be seen, the circumstances were not unlike those of the present case, and they raised precisely the same questions. In the first place, is the lease void or is it merely voidable? And

did a title to challenge rest in the holder, in the Australian case, of a miner's licence ; and in the present case does it rest in a placer claimant ? Upon the first question, the opinion of the Board, as expressed by Lord Watson, was clear. Said he :—

> " The right to interfere with the possession of a tenant under a formal lease, independently of the lessor, and in derogation of his rights, is not one of the natural incidents of a mere licence, which carries no legal or equitable interest in the soil. An *ex facie* regular lease, followed by posession, and impeachable only upon such extrinsic grounds as are alleged in the appellant's declaration, is, as between the parties to it, not void but voidable ; and, the lessees being willing to continue in possession and to comply with its stipulations, it is the privilege of the lessor to determine whether they shall be permitted to do so or not."

As in the Australian case, so here, the lessor is the Crown acting through the government of the day and its officers. This pronouncement seems to conclude both questions. It is in the first place clear that the Klondyke Company's lease was not void.

When, however, a lease is merely voidable, then the principle of law to be applied is that the title of the person seeking to avoid it is not a general one in the public, and such a title is not in fact extended to anyone except to (1) those who are in contract relations ; or (2) those who have, by convention between those who are so, a title to challenge ; or (3) those upon whom by statute a right of challenge is conferred. The two first examples do not occur in the present case ; but it may be added upon the question of voidability that the present would be a singularly clear case in which such voidability would not even be open to the Crown itself. *Res non sunt integrae.* It seems perfectly plain that, the lease not being itself void, but voidable on just cause shown by the lessor, any attempt by the Crown brought to declare it void, and brought twenty years after possession had been taken, after payment of rent and royalties had been made, and after great expenditure upon the subject of the lease by the lessee, such an attempt could not be successfully maintained.

It further turns out that at the time of the lease a fair and frank correspondence took place between the Government itself and the lessee, Mr. Boyle. They negotiated upon this very subject of difficulty, namely, the occupancy at that time of certain plots of the leased ground by working placer miners. The letters are as follows :—

" Ottawa,
Canada.
22*nd November*, 1900.

"To the Honourable
the Minister of the Interior,
Ottawa, Ont.

" Sir,

" Regarding any placer mining claims existing within the limits of the area leased for hydraulic mining purposes, on record in the Timber and Mines Branch of the Interior Department as Lease No. 18 File No. 55,466, I beg to state that while the intention is clearly apparent that when abandoned these claims are to revert to and become a part of the leasehold, it appears to be necessary that the lessee should have a letter

from your Department to this effect. Will you kindly look into this matter at your earliest convenience and have a letter issued to me covering this point.

"I have the honour to be,
Sir,
Your obedient Servant,
H. B. McGIVERIN."

"File 55,466, T. & M.,
Department of the Interior,
Ottawa, 12th December, 1900.

"SIR,

I beg to acknowledge the receipt of your letter of the 22nd ultimor addressed to the Minister of the Interior, with respect to Hydraulic Mining Lease No. 18, issued in favour of Mr. Joseph Boyle, of Dawson, of a tract of land situated on the Klondyke River, in the Yukon Territory, and in reply to inform you that all placer mining claims within the boundaries of the above leasehold for which entry was in force at the date of the lease, but which may be abandoned or forfeited for any cause, will at any time during the currency of the lease revert to the lessee.

"Your obedient Servant,
P. G. KEYES,
Secretary.

H. B. McGIVERIN, Esq.,
Barrister, etc.,
Ottawa, Ont."

It is manifest that in face of such correspondence a challenge by the Crown would be in bad faith and could not succeed, and their Lordships are not surprised to find that the government of the province takes up no such attitude and is in no way concerned with the challenge made by the respondent.

It would be a curious circumstance if, the lessee having thus against the Crown an indefeasible right, his right could nevertheless be challenged by another party who was no party to the contract but a late arrival on the ground, and the only result of whose challenge would be, when given ultimate effect, to accomplish that dispossession of the appellant which even the Crown itself could not legally achieve.

It is, moreover, very clear that no such result and no material step leading to it should be taken by a Court unless the contracting parties are convened before it; and in the present case a mandamus is asked and the case has proceeded to judgment granting it without either the lessee, the Canadian Klondyke Company, or the lessor, the Crown, having been made parties to these proceedings. It is in any view plain to the Board that no final judgment should have been reached without all parties having been called.

This appears to follow, and very properly so, from the decision in *Osborne* v. *Morgan* already referred to; and another passage clearly elucidating the point, from the judgment read by Lord Watson, may be here given. It is as follows:—

"But the appellants assert their right to terminate the leases, and to dispossess the lessees, not only without the aid, but against the wish of the

Crown. They concede that no decree which they can obtain in this action could operate as *res judicata* between the lessees and the Crown; and it is obvious that their contention, if well founded, will be productive of very singular results. On that supposition, the lessees may have so conducted themselves that they cannot withdraw from their contract obligations: and the Crown may have so ratified the contract that it cannot disturb the possession of its lessees; yet any one or more persons holding a miner's right may avail themselves of an original flaw in the lease at any time during its currency. They may delay their challenge until the lessees have, on the faith of the lease, spent large sums of money in preparing the land for mining operations, and may then intervene and appropriate the whole benefit of such expenditure, without the lessees being entitled either to repetition of the rents which they have paid, or to compensation for their beneficial outlay. That may be a necessary, but it can hardly be described as a just, consequence of the statutory privileges implied in a miner's right."

In conclusion, and upon the merits of the contention as to the application of the Regulations to the lease, the opinion of the Board is definite that the proviso to Section 18 of the lease—that the demise is subject to the Regulations—*ex necessitate* incorporates only such Regulations as are consistent with the existence of the lease itself and applicable thereto. It is impossible to conclude that when Reglations are imported by reference into the lease itself they should be imported for the purpose and with the result—the parties knowing what they did as is proved by the correspondence cited—of destroying altogether the demise and of rendering it void. Upon the construction contended for, this lease thus contained on its face a declaration of its own non-validity. This is necessarily the result of the argument submitted, and it need hardly be observed that a suicidal interpretation of the sort must be the last resort of construction. *A fortiori*—if in the circumstances an *a fortiori* is possible—such a construction should not be adopted at the instance of an applicant who was no party to the contract in issue.

Their Lordships have felt constrained to enter fully into a discussion of this fundamental question on account of the difficulty in which it is manifest the learned Judges of the Court of British Columbia felt themselves to be placed by reason of the judgment in *The Canadian Klondyke Mining Company* v. *Smith*, reported first in 16 W.L.R. 1910, p. 196, and on appeal in 19 W.L.R. 1911, p. 1. The judgments of the Court of Appeal do not appear to have been reported officially, but the parties have been good enough to incorporate in the record in the present case a full report thereof.

On a perusal of the case of *The Canadian Klondyke Mining Company* v. *Smith* it appears *primâ facie* peculiar that it should have been reckoned as a precedent of authoritative bearing upon the subject of the present appeal. The difference on the facts between the two cases is outstanding. The present is a case where it is claimed that the respondent has the right to set up a mining claim on ground which is unoccupied land, and to set

it up by a proceeding twenty years in date subsequent to the lease which geographically embraces it and upon which the appellant takes his stand as a title. In *Smith's* case the respondent's claim was located on the 2nd November, 1899, and was recorded on the 3rd November, and a record was issued therefor as provided by the regulations for the disposal of quartz mining claims. It was an admission in the stated case that the respondent's claim "is still, by virtue of such compliance with the requirements of the Act and Regulations, on foot," It was not until more than a year thereafter, namely, the 5th November, 1900, that a Hydraulic Lease (the same lease as is in issue in the present case) was made by the Crown to Boyle. The analogy between that case and the present accordingly fails at the outset. Boyle as lessee was preferring against the quartz miner a right under a lease subsequent to the miner's record. This was clearly an illegal attempt to dispossess one in actual occupancy. As Mr. Justice Idington says :—

> "The actual operations conceivable under each of these alleged rights would seem to me so clearly conflicting that they could not advantageously be operated together on the same land, and I do not think ever were intended to be so. The two claims are mutually destructive of each other. . . . The respondent's rights were acquired earlier, and therefore in such view must stand and appellant's contention fail."

The other learned Judges accept the same position, and the answer to the case as a precedent ruling the present is simply that the lessee's right was put forward for the purpose of dispossession of a quartz miner who was, to use the familiar language, actually "in full standing" at the time when the action was brought, and had been so at the date of the lease.

But in the course of these judgments certain expressions were used which have undoubtedly embarrassed the Judges in the present case, because they lend colour to the idea that in addition to protecting the right of a prior placer holder in full standing the actual land of the claim itself becomes for ever excluded from the possible ambit of the lease. It may quite possibly be supposed that it did not cross the minds of the learned Judges in the *Smith* case that it would ever be maintained as here, that in the case of land the claims upon which had lapsed, although they were in standing at the date of a lease, such land became itself enfranchised, excluded from the lease, and open to be left waste or to be claimed for by others as placer claimants in the course of future years. Accordingly, the learned Judges, dealing with a case in full standing and with nothing else, have used language of a breadth which is now cited as a precedent in the present case. Their Lordships note with satisfaction and with agreement that Mr. Justice Anglin inclines to hold :—

> "*that the lease was issued subject to these regulations* rather than that the Minister acted in contravention of them."

and the same holds of that part of the judgment of Duff, J., which says :—

> " The last provision of Clause 18 of the lease in question introduces the Regulation of the 25th of August, 1900, in so far at least as the application of the regulation is not inconsistent with the validity of the lease itself."

Nor do they differ from the concluding passage in Mr. Justice Idington's judgment dealing with the Regulations, to the effect that they form a code—

> " which may and must get a rational interpretation and one that will, however the words looking to futurity may be capable of being read, be so read that everybody's rights will if possible be preserved, even including those of the appellant " (that is, a claimant in full standing and occupancy) " if and so far as founded on these Regulations."

When, however, the learned Judges express their view, as does Mr. Justice Anglin :—

> " that by the very terms of their contract they should therefore be deemed to have excluded from the demised premises the territory covered by the quartz mining claim of the plaintiff."

and when Duff, J. construes the effect of the Regulation to be—

> " to prohibit the leasing for hydraulic mining of any area embraced within the boundaries of a quartz claim ; and the incorporation of the Regulation in the lease in question consequently excluded all such areas from the limits of the land demised."

their Lordships are of opinion that these views were not necessary for the decision of the case and were as stated unsound. As mentioned, the expressions were used in a case affecting and affecting only land under quartz miners " in full standing." They, however, are apparently capable of construction as applicable to land itself and even to land which was worked on by a claimant under a claim which has entirely lapsed. But the policy of these Regulations would be impeded, in so far as development of the colonial mining industry is concerned, by such a construction, and their Lordships do not see their way to adopt it. In these circumstances their Lordships agree with the conclusion come to by the learned Judge McPhillips, J.A., rather than with that arrived at by the other learned Judges who deferred to the dicta in the case of *Smith* already dealt with.

The merits of the application having been fully investigated and determined, no occasion accordingly arises for dealing with the argument upon procedure, including the question of the competency of a writ of mandamus.

Their Lordships will humbly advise His Majesty that the appeal should be sustained, that the judgments of the Court below should be recalled, and that the application of the respondent should be refused and the appellant found entitled to costs here and in the Courts below.

In the Privy Council.

ALARIE JOSEPH SEGUIN

v.

ANNA THERESA BOYLE.

DELIVERED BY LORD SHAW.

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