

IN THE MATTER of the Petition of Right of

1906
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 Oct. 1.
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NORMAN McLEAN.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Lease of Mining rights—Subaqueous mining—Grant of same area for Placer Mining—Damages—Liability of Crown.

The suppliant claimed damages against the Crown, alleging that while on the 23rd day of March, 1898, he had been granted, by indenture of lease, the exclusive right and privilege of taking and extracting by subaqueous mining and dredging all royal and base metals, other than coal, from certain lands covered with water in the Provisional District of Yukon and mentioned and described in the said lease, he had been unable to obtain possession thereof because the Crown subsequent to the said lease had granted to certain free miners the area covered by the suppliant's said lease as placer mining claims and had placed the said miners in possession thereof.

Held, dismissing the petition on demurrer, that inasmuch as under the Regulations of 18th January, 1898, in force at the time the said lease to the suppliant was made, and which were appended to and formed part of the said lease, it was provided that such leases should be subject to the rights of all persons who had received or who might receive entries for claims under the Placer Mining Regulations, the suppliant had no right of action upon the facts alleged.

DEMURRER to a petition of right claiming damages against the Crown for breach of a lease of subaqueous mining rights in the Provincial District of Yukon.

The grounds of the demurrer are set out in the reasons for judgment.

June 11th, 1906.

C. J. R. Bethune, in support of the demurrer, contended that upon the face of the lease the answer to the suppliants' petition was plainly to be found. The demise was expressly upon the condition that placer mining rights might be subsequently granted in the same area.

F. R. Latchford, K.C., contra, contended that the fact of the breach of the covenant for peaceable enjoyment, implied in the lease, was admitted by the demurrer. The Crown upon its defence shows that it was impossible, through the acts of the Crown, for the suppliant to obtain possession.

1906
 MCLEAN
 v.
 THE KING
 Argument
 of Counsel.

Mr. *Bethune*, in reply, cited *Brigham v. The Queen* (1).

THE JUDGE OF THE EXCHEQUER COURT now (October 1st, 1906) delivered judgment.

This case comes before the court on a demurrer to the petition of right, the ground of demurrer alleged being that the petition does not disclose any cause of action against the respondent.

The petition sets out a lease made on the 23rd day of March, 1898, by Her late Majesty Queen Victoria, as represented by the Minister of the Interior, whereby Her Majesty, subject to certain rents and conditions, granted, demised and leased to the suppliant for a term of twenty years the exclusive right and privilege of taking and extracting by subaqueous mining and dredging all royal and base metals, other than coal, from certain lands covered by water therein mentioned. The demise was made subject to the regulations of the 18th day of January, 1898, respecting the issue of leases for minerals in the beds of rivers in the Provisional District of Yukon, a copy of which was appended to the lease, and the terms of which are set out in the petition of right filed. From these it appears, among other things, that the lease in question was granted subject to the rights of all persons who had received or who might receive entries for claims under the Placer Mining Regulations. The suppliant's complaint is that he has never been put in possession of the lands leased to him, and this complaint he states in this way:—

(1) 6 Ex. C. R. 414.

1906
 McLEAN
 v.
 THE KING
 ———
 Reasons for
 Judgment.
 ———

“ 2. That subsequent to the granting of the said lease, and while the same was in full force, the Crown, through the Gold Commissioner at Dawson, granted to free miners the said area covered by said suppliant’s lease as placer mining claims, and had placed in possession of same the said placer miners.

“ 3. Although your suppliant paid a yearly rental as mentioned in the said lease, at the dates and times mentioned, and has demanded possession of said areas mentioned in the said lease, and was entitled to the same, yet Her Majesty, represented by the Minister of the Interior of Canada, refused to give up the same to your suppliant, whereby your suppliant was deprived of the same by the granting of the same to placer miners and has sustained damages thereby.”

And then the petition concludes with a prayer that the suppliant “recover such damages as were sustained by reason of the lands mentioned in the said lease being granted to free miners as above mentioned.”

The substance of the complaint, as I understand it, is that the suppliant has been unable to get possession of the lands in question because entries for claims therefor have been allowed to be made under the Placer Mining Regulations. But that, as has been seen, was provided for in the lease and one of the conditions on which it was granted. Therefore it seems to me that the demurrer to the petition should be sustained. In that view of the case it is unnecessary to consider the further question as to whether the petition could have been maintained if there had been no express stipulation that the lease was to be subject to the rights of persons who might thereafter receive entries for claims under the Placer Mining Regulations.

There is another provision of the lease to which reference ought perhaps to be made, by which it was provided as follows:—

“Her Majesty does not in any way warrant that there shall be a sufficient quantity of water in the said portion of the said river to admit of operations under this lease, and that the lessee, his executors, administrators and assigns shall have no right to compensation should it be found impossible for that or for any other reason to carry on such operations, it being hereby declared and agreed that this lease is taken by the lessee entirely at his own risk.”

1906
 MCLEAN
 v.
 THE KING.
 —
 Reasons for
 Judgment.
 —

The petition shows that the reason the suppliant did not get possession of the lands leased to him, and in consequence was prevented from carrying on operations under the lease, was that the areas covered thereby were granted to placer miners under the Placer Mining Regulations. But that contingency was provided for by the express terms of the lease, and having happened the suppliant is not entitled to any compensation by reason thereof.

There will be judgment for the respondent upon the demurrer to the petition of right, and the costs will follow the event.

Mr. Latchford asked that in case the demurrer was sustained the suppliant should have leave to amend his petition of right, and such leave is given upon the usual terms.

Judgment accordingly.

Solicitors for suppliant: *Latchford & Daly.*

Solicitors for respondent: *Chrysler, Bethune & Larmonth.*