BETWEEN

1908
January 7.

HIS MAJESTY THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA ..... } PLAINTIFF;

AND

THE KLONDIKE GOVERNMENT CONCESSION, LIMITED ..... } DEFENDANTS.

Mines and minerals — Yukon Territory Act — Regulations — Hydraulic lease—Breach of conditions — Deed — Forfeiture—Practice—Application to amend defence—Counter-claim—Fiat—Judgment to facilitate appeal to Supreme Court of Canada.

A statement in defence cannot be so amended so as to set up a counter-claim. A substantive claim such as would form the basis of a proceeding of that kind requires a fiat before it can be presented to the court for hearing and determination.

INFORMATION by His Majesty's Attorney-General for the Dominion of Canada for the annulment of a certain hydraulic mining lease on Hunker Creek, in the Yukon Territory, granted to the defendants on the 12th day of February, 1900. The case was tried by the late Mr. Justice Burbidge at Dawson, Yukon Territory, on the 22nd day of July, 1907.

G. F. Shepley, K.C. and *H. G. Bleecker* appeared for the plaintiff.

J. B. Pattullo, C. W. C. Tabor, and *W. L. Phelps* appeared for the defendants.

Before the evidence was proceeded with, Mr. Pattullo, for the defendants, asked leave to amend the statement of defence by setting up a substantive claim against the Crown.

[BY THE COURT: — Any amendment in the way of counter-claim, I could not possibly allow. If you have

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a claim against the Crown you will have to obtain the Crown's fiat before you can present it.]

The late Mr. Justice Burbidge having fallen ill before his engagements permitted him to deliver a considered judgment in this case, and desiring to put the parties in a position where the questions at issue might be brought before the court of appeal, on the 7th January, 1908, he delivered the following judgment:—

I venture to ask the parties and anyone who reads this short note not to come to the conclusion that the judgment which I am about to enter is given upon due consideration of the merits of the case. At the time when the evidence taken at Dawson was forwarded to the Registrar of the court at Ottawa, and the record thereby completed, and since that time my other engagements were such as prevented me from taking the matter up and dealing with it in an adequate manner. And now the state of my health prevents me from giving the case the consideration which it deserves. However, it does appear to me to be important that the litigation should be advanced another stage, and that it is in the interests of the parties themselves that it be put in a position when the questions in issue may be brought before the Supreme Court of Canada, rather than that there should be a rehearing or a re-argument in this court, and for that I am not without a precedent. For in the case of *The Attorney-General for British Columbia* v. *The Attorney-General for Canada* (1), the decision of the Exchequer Court was taken by consent and without argument in order to facilitate the bringing of the case directly to the Supreme Court. It is true that in this case I have not the consent of the parties, but I think I may take it for granted that they would consent to a course of procedure which appears to me to be so much in their interest. The main question, it seems to

(1) 14 S. C. R. 345.

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me, that I need to decide is as to the party upon whom the burden of bringing the appeal should be thrown, and in this case I think that burden should fall upon the defendants.

There will be judgment for the plaintiff.*

Solicitors for plaintiff: *McDonald, Shepley, Middleton & Donald.*

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

*REPORTER'S NOTE:—Reversed on appeal to Supreme Court of Canada, 40 S. C. R. 294.