

BETWEEN:

THE KING, on the information of the Attorney-
General of Canada,

1916
March 13.

PLAINTIFF;

AND

JAMES WILLIAM MURPHY and ROBERT
SEDGWICK GOULD,

DEFENDANTS.

Yukon Placer Mining Acts—6 Edw. VII. c. 39—7 & 8 Edw. VII. c. 77—Construction of Statutes—Gold Commissioner acting as Mining Recorder—Grant of Water Rights—Validity.

By sec. 3 of the statute 7 & 8 Edw. VII. c. 77 it is provided that "mining recorders" shall be appointed by the Commissioner of the Yukon Territory, such appointment being subject to the approval of the Governor in Council. By sec. 5 of the last-mentioned enactment it was provided that an officer, called the "Gold Commissioner" should have jurisdiction within such mining districts as the Commissioner directed, and within such districts should possess also the power and authority of a mining recorder or mining inspector. By sec. 9 it is enacted that no person shall be granted or acquire a claim or any right therein, or carry on placer mining, except in accordance with the provisions of the Act.

On the 8th day of October, 1909, a certain grant of water rights was issued to the defendants. Although the grant purported to be regularly signed by the Mining Recorder of the Yukon Territory, it was admitted on behalf of the defendants that it was signed by him upon the order and direction of the Gold Commissioner of the said Territory without any adjudication thereon by the said mining recorder.

Held, that a mining recorder could only be appointed in the manner and by the authority mentioned in the Act referred to, and that as the grant in question was signed by a person who was neither *de facto* nor *de jure* a mining recorder, the grant was void.

2. In such a case the Crown is entitled to take proceedings to avoid the grant in order that the public property may not be wrongfully alienated.

THIS was an information by the Attorney-General for the Dominion of Canada, seeking the cancellation

1916
 THE KING
 v.
 MURPHY.
 Argument
 of Counsel.

of a water grant for mining purposes in the Yukon Territory.

The facts are stated in the reasons for judgment.

December 15th, 1915.

The case was now heard at Ottawa before Mr. Justice CASSELS.

W. D. Hogg, K.C., for the plaintiff, contended, that the grant was issued improvidently and inadvertently, because the adjudication which is required under the *Yukon Placer Mining Act* was not complied with. Sections 54 to 58 of the *Yukon Placer Mining Act* deal with the question of water rights. A report or recommendation is made by the Recorder, which is placed before the Commissioner and he approves or disapproves. The judgment of the Recorder does not become final until it is approved by the Commissioner.

The judgment or recommendation or report of the Mining Recorder, is submitted to the Commissioner with the grant, and the Commissioner of the Yukon Territory then approves or disapproves as the case may be, it being stated in the evidence that they had no knowledge of any grant having ever been disapproved.

He submitted that the adjudication here, according to the evidence was taken before the Gold Commissioner who has, under the Statute, a number of special jurisdictions entirely apart and separate from the work set out in those several sections from 54 to 58. That the Gold Commissioner has a very large jurisdiction under this Act, but he was in reality usurping the jurisdiction of the Mining Recorder when he sat as a judge upon a water grant.

On the 1st of August, 1906, a new state of things arose. Prior to that time the Gold Commissioner and the Mining Recorder were acting upon orders in council and regulations that were made, but he submitted they were all put an end to by the Statute that was passed in 1906, by the *Yukon Placer Mining Act*.

1916
THE KING
v.
MURPHY.
Argument
of Counsel.

He was not a Gold Commissioner for a particular district. If the Statute gave him jurisdiction in other matters as Gold Commissioner that is one thing, but he was never directed to act in this particular district which is the Dawson District, and therefore, he had not the power of a Mining Recorder. Now, the Order in Council of the 7th of July, 1898, gave the officers different offices of jurisdiction in the matter they were to attend to. The Gold Commissioner sat in what is known as the Gold Commissioner's Court, and protests or objections were lodged before him and decided by him. By the Act of 1906, that was abolished and a new code was established, a new method of dealing with claims.

F. T. Congdon, K.C., on behalf of the defendants, contended that until the coming into force of the *Yukon Placer Mining Act*, on the 1st of August, 1906, they had, with respect to mining matters, which include water rights, a system of administration and a system of judicature. He submitted that the old system was not wiped out but it was continued and only slightly varied by the new Act. The Act expressly refrained from making any repeal.

If it was a fact that there were none of these *officers de jure*, they existed *de facto*, and that is just as good as though they were *de jure*. Their acts as *de facto* officers were as valid as though they had been *de jure* officers.

1916
THE KING
v.
MURPHY.
Argument
of Counsel.

He submitted that the Order in Council of the 7th of July, 1898, provided that the Gold Commissioner shall be the Mining Recorder at the Headquarters of the Government of the Territory and shall appoint such officials or Mining Recorders as may be necessary. That Order in Council was in force up to the time of the passing of the Act in 1906, and under that he had the power and was required to act as Mining Recorder at the headquarters of the Government, Dawson. Section 5 was not intended to confer jurisdiction but to distribute jurisdiction. Up to August 6th, 1906, there was but one Gold Commissioner for the Yukon Territory. The design of this act was the appointment of a number of Gold Commissioners as shown in section 3. The object of section 5 was to confer on the Commissioner of the Territory the ability to distribute between these various Commissioners the jurisdiction to act as Gold Commissioner and as Mining Recorder. It was never intended that where a Gold Commissioner acting as Gold Commissioner, was appointed as Gold Commissioner for the whole Territory, that the Gold Commissioner who was that official, appointed for a specific purpose by the Governor in Council, should not act within the jurisdiction given him by the Governor in Council until the Commissioner said he could not.

[BY THE COURT.—You could say his powers were unlimited until they were limited by the proceedings of this Act.]

Supposing there had been three Gold Commissioners appointed within the authority under this Act, then we could have distributed between them the territory assigned to them.

[BY THE COURT.—And that would limit the power of the Gold Commissioner as it existed up to that time. That is your contention.]

Yes; territorially limited his jurisdiction and his right to act as Mining Recorder.

[BY THE COURT.—But it was never intended to take away the jurisdiction of the Gold Commissioner until appointments were made under the Statute?

Yes. And under this Act under the proceedings of Section 4, the Commissioner may divide the Territory. The Commissioner never divided the Territory after the Act came into force. It was divided before, and I am submitting that it was never done up to the time of this Grant. We have but one Gold Commissioner, as in 1896.

[BY THE COURT.—You contend, if in point of fact the Gold Commissioner does not continue Gold Commissioner, all these provisions requiring the consent of the Gold Commissioner would be null and void, and the Statute would be unworkable?]

And everything in the Territory would be wrong since 1906, because the Gold Commissioner has gone on as though he had authority whereas he had not, until a very recent time when Mr. Black (The Commissioner of the Yukon) did give direction. The Commissioner could not give direction until he divided the territory under section 4.

He submitted that the evidence showed in this very case shows that all these applications were heard by the Gold Commissioner who exercised his jurisdiction, and who sent his memorandum with regard to his adjudication on them to the Commissioner of the Territory. In this case that was approved and afterwards the Grant was issued in accordance with the approved recommendations, and the Commissioner approved of that.

1916
THE KING
v.
MURPHY.
Argument
of Counsel.

1916
 THE KING
 v.
 MURPHY.
 Argument
 of Counsel.

At all events, it is amply sufficient if not to make the act of the Gold Commissioner *de jure* correct, to make him in the exercise of the office of Mining Recorder a good *de facto* officer.

[BY THE COURT.—Was this adjudication by the Gold Commissioner or the Mining Recorder?]

By the Gold Commissioner acting as Mining Recorder.

[BY THE COURT.—What you say is that the office of Gold Commissioner was not done away with by this Statute, and that until he chose to define the jurisdiction and appoint others he still continued to act. That so long as he acted as Gold Commissioner he had equal powers with the Recorder, and had the same power to try cases as the Recorder would have, and that his judgment has been approved by the Commissioner.]

That is the fact.

The office was there and the only officer filling it was the officer who acted in this case, who was, if not *de jure*, *de facto*.

A *de facto* officer is:

“One who has the reputation of being the officer
 “he assumes to be, and yet is not a good officer in
 “point of law.”

That is Lord Ellenborough’s definition of an officer *de facto* given in *Rex v. Bedford Level*.(1)

Colour of title implies an election or an appointment which is at least colourable.

An officer may be one *de facto*, even while there is an officer *de jure*.(2)

The title of a *de facto* judicial officer is not collaterally assailable. (3)

(1) 6 East 356 at p. 368. See also *Throop on Public Officers* at par. 625 and 628, 625, 627 and 628.

(2) *Constantineau’s De Facto Doctrine*, p. 113.

(3) *Constantineau*, pp. 552, 565, 566. *State v. Carroll*, 38 Conn. 449; 9 Am. Rep., 409; *Adams v. Mississippi State Bank*, 75 Miss., 701; and *Throop*, 622 and 649.

Mr. *Hogg* in reply submitted that his contention was that the Act of 1906 was a new beginning of all matters, and that it must be strictly observed is more than corroborated by section 90. There were Mining Recorders all along appointed after the Act.

Cites *British Wagon Company v. Grey* (1); *The Queen v. Shopshire County Court Judge*, (2) *Hal-sbury's Laws of England* (3); *Penn v. Baltimore*. (4)

1916
THE KING
v.
MURPHY.
Reasons for
Judgment.

CASSELS, J., now (March 13th, 1916) delivered of judgment.

This is an information exhibited on behalf of His Majesty the King by the Attorney-General of Canada. The information alleges as follows:—

“1. That on, to wit, the 8th day of October, 1909, “a grant to divert and take for mining purposes one “hundred inches of water from Independence Creek “in the Yukon Territory was issued by the Mining “Recorder of the Dawson Mining District in the “Yukon Territory to the defendants, the said grant “to take effect on the 3rd day of August, 1915, and to “continue for a period of ten years from the said “date in priority after the said date to all other grants “of water rights from the said Creek.

“2. The said water grant although signed by the “Mining Recorder of the said Dawson Mining District “was so signed by him upon the order and direction “of the Gold Commissioner of the said Territory “without any adjudication thereon by the said Mining “Recorder, contrary to the provisions and require- “ments of the *Yukon Placer Mining Act*, Revised “Statutes of Canada, Chapter 64 and amendments, “and the said grant was made and issued through

(1) (1896), 1 Q.B. 35.

(2) 20 Q.B.D., 242-248.

(3) Vol. IX., p. 13.

(4) 1 Ves. Sr. 446.

1916
 THE KING
 v.
 MURPHY.

Reasons for
 Judgment.

“improvidence, inadvertence and error, and should
 “be cancelled and set aside.”

In answer to the allegations in the information the
 defendants plead as follows:—

“3. The Defendants say that the said Gold Com-
 “missioner at the time said Grant was applied for,
 “and also when it was issued, and for many years
 “previous to such issue, had and exercised jurisdiction
 “as such Gold Commissioner throughout the whole
 “of the Yukon Territory, and as such Gold Com-
 “missioner possessed, and openly and notoriously
 “exercised the powers and authority of Mining
 “Recorder to the exclusion of any and all other
 “Mining Recorders, and he so acted under the direction
 “and with the knowledge and consent of the Com-
 “missioner of said Territory, and of the Minister
 “of the Interior of Canada, and of the Government
 “of Canada, and his acts and decisions as such Com-
 “missioner exercising such powers and authority
 “in relation to applications for water grants, were
 “from time to time approved by the said Commissioner
 “of said Territory, and the application of defendants
 “for said water grant was adjudicated upon by the
 “Gold Commissioner exercising such powers and
 “authority as aforesaid after hearing the applicants
 “for such Grant and all parties interested in opposing
 “such application, and all such parties submitted
 “to the jurisdiction of the Gold Commissioner exer-
 “cising such powers and authority, and acquiesced
 “in the same, and the decision of the Gold Com-
 “missioner upon such application was approved by
 “the Commissioner of the Territory and the said
 “Grant was issued by the Mining Recorder as a
 “ministerial officer subordinate to the said Gold
 “Commissioner, and its issue was approved by the

“Administrator of the Territory, acting between
 “the resignation of one Commissioner and the appoint-
 “ment of his successor.

1916
 THE KING
 v.
 MURPHY.
 ———
 Reasons for
 Judgment. ✓

“4. The application for said Grant was made to
 “the Mining Recorder and was heard and adjudicated
 “upon by the said Gold Commissioner exercising such
 “powers and authority as aforesaid without any
 “choice on the part of the defendants as to whether
 “such application should be heard and adjudicated
 “upon by the said Gold Commissioner, exercising
 “such powers and authority aforesaid, or by the
 “Mining Recorder, and the said application was
 “heard and adjudicated upon in the usual way adopted
 “and in force in the Yukon Territory from the begin-
 “ning of its Government to the present time.”

The evidence was taken under a Commission, and the case argued before me at Ottawa.

There is no dispute as to the facts. The determination of the rights of the parties depends on the true construction of the *Yukon Placer Mining Act* and amendments and whether the Gold Commissioner had the powers claimed for him by the defendants.

Before considering in detail the statutes governing the determination of the case it may be well to refer to certain facts. *The Yukon Placer Mining Act* was assented to on the 13th July, 1906, and came into force on the 1st August, 1906. It is to be found in the Revised Statutes of Canada, 1906, cap. 64. Amendments were enacted by the Parliament of Canada as follows: 6 & 7 Edw. VII. cap. 54 (27th April, 1907); 7 & 8 Edw. VII., cap. 77 (20th July, 1908); 2 Geo. V., cap. 57 (1st April, 1912). This latter subsequent to the grant impeached. The grant

1916
 THE KING
 v.
 MURPHY.

Reasons for
 Judgment.

impeached is dated 8th October, 1909. (Exhibit No. 32 attached to the Commission).

This grant is signed by G. P. McKenzie, Mining-Recorder. There is nothing on its face to indicate that the Mining Recorder had not adjudicated on the questions involved. It is admitted, however, that the Gold Commissioner adjudicated on the questions in dispute and that the Mining Recorder merely signed his name on the direction of the Gold Commissioner and had no part in the adjudication on the merits.

The grant as alleged in the information among other rights granted the defendants the right from the 3rd August, 1915, for a period of 10 years from that date to divert and take for mining purposes one hundred (100) inches of water from Independence Creek, in priority to all other grants of water rights from the said Creek.

The information was filed on the 9th January, 1915. On the 28th May, 1907, by order of the Governor General in Council, F. X. Gosselin was appointed Gold Commissioner. On the 1st February, 1912, Geo. Black was appointed Commissioner of the Yukon, and on 1st April, 1912, he appointed the Gold Commissioner a Recorder for the Dawson District. This is the earliest date since the enactment of the *Yukon Placer Mining Act* that the Gold Commissioner was appointed a Mining Recorder. Previously, and on the 27th June, 1909, the then Commissioner Alex. Henderson appointed George Patton McKenzie, Mining Recorder for the Dawson District, and he was such Mining Recorder at the time of the application for the grant and adjudication. His appointment was approved of by the Governor in Council (Exhibit 62).

After a careful consideration of the statutes and the arguments of counsel, I am of opinion that the Gold Commissioner had no authority in the premises. He was not a Mining Recorder as contemplated by the statute and had no status as such to allow the grant in question. I will subsequently deal with Mr. Congdon's argument that he was acting *de facto* as Recorder and that his decision cannot be questioned.

Turning to the statutes: For convenience, I have been furnished with a copy of the *Yukon Placer Mining Act* as consolidated with the amending Acts. Section 90 of 6 Edw. VII. cap 39 (cap. 64 of R.S.C., 1906) enacts as follows: "No person shall be granted or acquire a claim or any right therein, or carry on placer mining in the Territory except in accordance with the provisions of this Act.

By the interpretation of the statute sec. 2, sub-sec. (h), it is provided as follows: " 'mining' or 'placer mining,' includes every mode and method of working whatsoever whereby earth, soil, gravel or cement may be removed, washed, shifted or refined or otherwise dealt with, for the purpose of obtaining gold or such other minerals or stones, but does not include the working of rock in situ."

Sub-section (a) of section 2 is as follows: 'claim' means any parcel of land located or granted for placer mining, and 'mining property' includes, besides claims, any ditches or water rights used for mining thereon, and all other things belonging thereto or used in the working thereof for mining purposes."

Sub-section (e) of section 2 is as follows: 'gold commissioner,' 'mining recorder' and 'mining inspector' mean, each of them, the officer so named,

1916
THE KING
v.
MURPHY.
Reasons for
Judgment.

1916
 THE KING
 v.
 MURPHY.
 Reasons for
 Judgment.

“appointed under this Act and acting within the limits
 “of his jurisdiction.”

I am of opinion that since this enactment came into force its provisions govern and that the Gold Commissioner appointed as such cannot under earlier statutes, if any such exist, confer upon himself jurisdiction not conferred by this statute. By section 3 of the Statute (1908) Mining Recorders shall be appointed by the Commissioner subject to the approval of the Governor in Council. As stated, George Patton McKenzie was appointed Recorder on the 27th January, 1909.

Section 5 of the statute is as follows: “The Gold
 “Commissioner shall have jurisdiction within such
 “mining districts as the Commissioner directs, and
 “within such districts shall possess also the powers and
 “authority of a mining recorder or mining inspector.”
 This was part of the original statute 6 Edw. VII.
 As stated, the Gold Commissioner was not appointed
 Mining Recorder until the 1st April, 1912.

An analysis of the statute shows that the Gold Commissioner had certain duties to perform as Gold Commissioner, but was not clothed with the powers of a Mining Recorder until appointed by the Commissioner. Under the statutes and the authority conferred upon him he had power to enter into and upon and examine any claim or mine (Sec. 16).

Where a survey is protested (sec. 39), and in 1908 an appeal was given from his decision (sec. 39 s.s. 6) an appeal is given to the Gold Commissioner from the action of the Mining Inspector (sec. 59 s.s. 2). Under section 61, an appeal lies to the Gold Commissioner. An appeal also lies to the Gold Commissioner from the decision of the Mining Recorder under section 66. Section 74 was enacted in 1912. Under section 88 an appeal is given.

When the application is for a water grant, under sections 54 and following sections, the Recorder (with the approval of the Commissioner) has to pass upon the question. *Commissioner*, by the Interpretation Act, is to have the same meaning as it has in the Yukon Act. The Yukon Act, cap 63, R.S.C., 1906, defines Commissioner as follows: "The Commissioner of the Yukon Territory"—and see sec. 4 of cap. 63.

1916
THE KING
v.
MURPHY.
Reasons for
Judgment.

It was strenuously argued by Mr. Congdon that the Gold Commissioner having acted *de facto* as Mining Recorder, his action cannot be questioned by third parties. I have read the various citations referred to, but do not agree with the contention. The Crown, in the present case, is not a third party—within the meaning of any of the cases cited. It is primarily interested in protecting public property from being through error wrongfully alienated.—Moreover there was a *de jure* Mining Recorder; and a *de facto* and a *de jure* Mining Recorder can hardly exist together.

The contention that the action of officers of the Crown in acquiescing in the assumption of powers by the Gold Commissioner cannot prevail as against the statute. See *Booth v. The King* (1), and authorities cited. Laches form no defence. *Ontario Mining Co. v. Seybold* (2). *Black v. The Queen* (3).

I am of opinion that the grant in question was issued in error and improvidently and should be declared null and void. See *King v. Powell* (4); *Attorney General v. Contois* (6); *Attorney General v. Garbutt* (6); *Attorney General v. McNulty* (7), and *Fonseca v. Attorney General* (8).

(1) 14 Ex. C.R. 146; 51 S.C.R. 20.

(4) 13 Ex. C. R. 300.

(2) 31 O.R. 386; L.R. (1903) App.

(5) 25 Gr. Ch. 346.

Cas. 83-84.

(6) 5 Gr. Ch. 181.

(3) 29 S.C.R. 699.

(7) 11 Gr. Ch. 281.

(8) 17 S.C.R. 612, at 650.

1916
THE KING

v.

MURPHY.
Reasons for
Judgment.

The defendants must pay the costs of the action.

Solicitors for the plaintiff: *Messrs. Hogg & Hogg.*

Solicitor for the defendant: *F. T. Congdon.*
