RETURN

To an Order of the House for a Return of a copy of the opinion of the Hon. Edward Blake, with reference to a proposed appeal to the Privy Council in *re* "Koksilah Quarry Company *versus* The Queen."

D. M. EBERTS,
Attorney-General.

Attorney-General's Office,
28th March, 1898.

Letter, Hon. Edward Blake to the Attorney-General, dated 21st December, 1897.

KOKSILAH V. THE QUEEN.

I have delayed longer than you might have expected in sending you my opinion. Various circumstances have concurred with the complexity of the case, and the fact that I was to have the advantage of consultations with Mr. Hunter to produce this delay. I now enclose my opinion.

I observe that I have not specifically dealt with the suggestion as to the operation of the "Crown Procedure Act" as combined with section 21 of the "Supreme Court Amendment Act, 1896," but you will see that by paragraph 3 I have disposed of it. I am not in favour of the view that these enactments altered the position of the Crown; but if they did, it seems to me that this question was open on the appeal under the Act of 1896, and is not open upon any issue which can be now presented.

I enclose a memorandum of my fees, which please remit at your convenience to my firm for my account.

I am leaving for England in a few days. I therefore think it, on the whole, most convenient to leave the manuscript papers which have been submitted to me here with my firm. The prints I take across with me. In case you go on, please write my firm, directing them to transmit the manuscript papers either to yourself or to me, as you think most useful.

P. S.—I need not say that if you go on, the manuscript papers will be very useful to me in settling the case for the Appellant, and in preparing for the argument.

TORONTO, December 21st, 1897.

KOKSILAH AND THE QUEEN.

1. I am asked to advise upon the following questions :—

I.

If the present appeal to the Judicial Committee is proceeded with, is there a reasonable probability that the decision would be reversed?

II.

Having regard to the fact that if this decision were reversed the merits would not be determined, but the case would simply be remitted to the Full Court, and having regard also to the fact that the reasons for judgment of the Trial Judge show, as it is submitted, error on their face, would not the best course to pursue be to apply for special leave to appeal from the original judgment, and in this way have the merits finally and speedily determined?

III.

Assuming that special leave can be obtained, is there a reasonable probability that the original judgment would be reversed or materially reduced?

2. I have carefully considered the case, which presents a complication unequalled in my experience in the proceedings since the decision of the Trial Judge; and I have had the advantage of two long consultations with Mr. Gordon Hunter on the matter.

I.

3. It is not necessary to reach conclusions as to the soundness of the decisions arrived at in the earlier stages of this complication. For the present purpose it must be assumed that the time for appealing to the Supreme Court under the existing law had expired before the notice of appeal of 1896, and the whole question therefore hangs upon the effect of the "Supreme Court Amendment Act of 1897."

4. After the passing of the Act of 1897, and on the 15th of June in that year, within six months from the date of the decision, the Crown gave notice of appeal to the Supreme Court. Thereupon the Respondent gave notice of Motion to quash the appeal; and thereafter the Crown gave notice that at the hearing of the motion to quash, a motion would be made that the notices of February and June, or one of them, should be allowed to stand as good notice of appeal, and the appeal be admitted to be heard.

5. I observe that in the judgments of the Judges this latter notice is treated as a notice of motion to extend the time for appealing; and I assume, therefore, that if this branch of the matter could be brought before the Privy Council, that tribunal would probably so treat the notice.

6. But so far as I can gather, no order has been drawn up refusing the motion for extension. I can find none such in the papers transmitted to me, and I see that the order for leave to appeal to the Privy Council is "from the judgment of this Court pronounced this day, "quashing with costs the appeal of Her Majesty from Walkem, J." I see also that the notice of appeal of 13th August is from the judgment quashing the appeal; and, lastly, that the Order of 13th August is an Order admitting an appeal to the Judicial Committee from the judgment quashing the appeal. It seems plain, therefore, that there is at present no Order for an appeal from the decision refusing an extension of time, and that the Crown is, as things stands, limited to the question whether the Order to quash was right or not.

7. On the subject of the motion for extension, I may observe that even if an Order refusing that motion had been taken out, and an appeal from it had been admitted, it would be impossible to sustain any such appeal in so far as it might be based upon the exercise of a discretion conferred upon the Court below. But, if, as seems probable, it can be successfully argued that the exercise of that discretion was, upon the face of the judgments, based upon an error of law, then I can conceive that an appeal might lie in order to the correction of that error and the determination of the question of discretion upon a sound legal basis.

8. I now come to deal with that which is the single subject of the appeal at present admitted, namely, the Order to quash. I think the Judicial Committee will approach the subject with some degree of reluctance, and of indisposition to interfere, nor does it seem to me to be a clear case; but I own I am unfavourably impressed with the judgments below.

9. I think it is fairly arguable that the Act of 1897 has a retrospective operation. A right of appeal was provided by the British Columbia law; a time was limited for the exercise of that right, and a provision for extension of that time by leave of the Court also existed. The enlargement of the Statutory time seems to me to be a matter of procedure, and the rule as to retrospective application should, I think, be read upon that basis. I think it pretty clear that the Act would apply to a case in which the previously existing limit of time had not expired at the time the Act passed. But this interpretation does give the Act a certain retrospective application; and I am inclined to the view that this application should extend also to cases in which the enlarged time given by the new Act had not expired at the date of the notice given under it.

10. It seems to me the better opinion that, if the above view be sound, no adverse change has been produced by the circumstance that a notice of appeal, too late under the then existing law, was given before the passage of the Act. It was too late, and was therefore a nullity. Nor do I think that the fact that the Court held that it was too late, and consequently quashed

the appeal, ought to make the difference which the Judges import into the case. It does not seem to me, on principle, to be any stronger than if there had been no abortive attempt at all to appeal after due time. All that has happened in the interim has been the abortive attempt, and the determination that it was abortive. This does not seem to me properly to amount to a hearing of the appeal so as to import the doctrine of *res judicata*. The appeal was never heard; on the contrary, the Court refused to hear it on the ground that it had no jurisdiction.

11. The propositions I have above stated, while commending themselves to my judgment, are highly arguable, and I can say no more than that I think there is reasonable ground for the conclusion at which I have arrived, namely, that it was an error to quash the appeal. But I feel it impossible to anticipate with any degree of confidence the decision of the Judicial Committee.

II.

12. On the second point, I feel very strongly the unfortunate condition which seems to point to an appeal to the Judicial Committee, under which the merits cannot be determined; but I see no ground for hoping that the Crown could obtain a special leave to appeal. The various misfortunes which have befallen the Crown in the course of this case would not, in my opinion, be regarded by the Judicial Committee as reasons for departing from the general principle and rule, or for giving an appeal *per saltum* when the rule prescribes an appeal only from the Supreme Court.

III.

13. I am asked to consider the third question only on the assumption that special leave could be obtained; and, consequently, my opinion being adverse on that point, I have not given to this branch of the case the same full consideration which might have been otherwise proper. But I will state the impressions which I have formed, as they may be of some service in deciding the course of action of the Crown:

(*a.*) On the question of fact as to the stone being within the contract, and the reasons for its rejection, one must assume a concurrence of the Supreme Court in the adverse judgment of the Trial Judge; and I think it would be almost impossible to reverse a judgment so concurred in.

(*b.*) On the question whether there was a concluded contract with somebody, I think there would be considerable difficulty in establishing, in face of all the facts, that there was no concluded contract with anybody. I cite as examples the correspondence and action as to the cheque and the bond, and the orders for delivery of the stone. But I think it much more arguable that the contract (if any) was with the Contractor for the building, and not with the Crown; but upon this there is much to be said on both sides, and the result is doubtful.

(*c.*) As to the quantum, I have a strong opinion that the judgment is erroneous in calculating the damages upon more than 30,000 cubic feet of stone, and that it ought, at any rate, to be reduced by the difference flowing from a reduction of the basis to 30,000 feet.

(Signed) EDWARD BLAKE.

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