Per IRVING, J., the calling of the enactment in question a rule or regulation cannot affect its constitutionality, nor can the enactment derive any greater validity by reason of its insertion in the middle of a rule which in other respects may be intra vires.

Wilson, A.-G., and *A. E. McPhillips*, K.C., for the Crown. No one contra.

Full Court.] April 18.

BYRON N. WHITE CO. *v.* SANDON WATER WORKS CO.

Sandon Water Works Act, B.C. Stat. 1896, c. 62—Permission to divert water—Condition precedent— Trespass—Laches—Acquiescence—Costs —Appeal successful on point of law not taken below.

Appeal from judgment of IRVING, J., dismissing an action for a mandatory injunction to compel defendants to remove from plaintiffs' lands a water tank, flume, etc.

By s. 9 of the Sandon Water Works & Light Company Act (B.C. Stat. 1896, c. 62) the company was authorized to divert water from certain creeks and to use so much of the water of the creeks as the Lieutenant-Governor in Council might allow with power to construct such works as might be necessary for making the water power available, but the powers were not to be exercised until the plans and sites of the works had been approved by the Lieutenant-Governor in Council. The company got their plans and sites approved and proceeded with the construction of a tank and flume on plaintiffs' lands for the purpose of diverting water:

Held, that the authority of the Lieutenant-Governor in Council to divert was a condition precedent to the company's right to interfere with the plaintiffs' soil, and that plaintiffs were entitled to damages and a mandatory injunction.

Mere submission to an injury, such as the erection of a building by another on one's land, for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right; to amount to laches raising equities against the person on whose land the erection was placed there must have been some equivocal conduct on his part including the expenditure by the person erecting it.

Where an appeal is allowed on a point of law not taken at the trial or in the notice of appeal, but open on the pleadings, it is not in strictness successful and no costs of the appeal will be allowed, but as the appellant should have succeeded at the trial he will be allow the costs of it.

Judgment of IRVING, J., reported ante p. 163, set aside.

E. V. Bodwell, K.C., and *R. S. Lennie*, for appellants. *S. S. Taylor*, K.C., for respondents.