

payment of the sum of \$35,000 paid by him to the plaintiffs, and an order declaring that the true intent and meaning of the parties to the agreement was as set out in paragraph 4 of the statement of defence, and that, if the Court should deem necessary, it should order the agreement to be rectified so as to make it embody the real intention of the parties.

In view of the fact that, in place of providing for a small down-payment, as is usual in the case of an option, and as had been the case in the agreements in the form of options which had previously been entered into between the parties, the contract in question provided for a cash payment of \$20,000 and the payment of the two remaining cash instalments within one year, and that the purchaser assumed to go into possession and continued in possession until after all the purchase-money was paid, and thereupon received from the vendors written documents transferring all their right, title, and interest in the respective unpatented mining claims in question, and in view of the form of the agreement itself, which provided that the vendors were to sell and the purchaser to purchase all the right, title, and interest of the vendors in each of the mining claims, I have come to the conclusion that the document must be considered and treated as a sale and purchase, and not as a mere option.

On the purchaser obtaining the documents transferring the title of the vendors to him, he became and was the owner of the claims, subject to the payment of the royalty as mentioned in the agreement in question, and which was also referred to in the documents of transfer as follows: "The royalty hereinbefore referred to as being hereby expressly reserved and excepted from this transfer is the royalty agreed upon in the agreement dated the 8th day of April, A.D. 1908 . . . which royalty is to be paid on 65,000 such tons per annum at least from the said group and on more if more be removed, but the royalty is subject to be purchased by the owners of the properties at any time as to payments not overdue at the time of such purchase, for the sum of \$25,000 cash."

The covenant on the part of the defendant is a definite and certain one, viz., that "the amount to be removed from the locations in each year" is "to be not less than 65,000 of such long tons, and the said royalty of 15 cents per long ton shall be paid on 65,000 long tons per annum at least, whether that amount shall be actually removed or not, and such royalty shall be paid annually on the 8th day of April in each year."

The purchaser also provided for his own protection, by the alteration made by his own solicitor in the contract as originally