judgment recovered in Vancouver setting aside said bill of sale from Gilbert to E. M. Pellent before he recorded that bill of sale.

Other points were raised, but it seems unnecessary to go into them. I find that the plaintiff company has failed to establish its title and the issue is hereby determined in favour of the defendants.

Victoria, B. C., March 18, 1904.

The Centre Star Mining Co., Ltd., v. The Rossland Kootenay Mining Co., Ltd.

(Judgment of the Honourable Mr. Justice Martin.)

It is alleged in the statement of claim, first, that the defendant company, the owner of the Nickel Plate and Ore-or-No-Go mineral claims, trespassed upon the Centre Star mineral claim, the property of the plaintiff company, and took certain ore therefrom, or, alternatively, that if the defendant company did not do so, its predecessor in title (The Rossland Great Western Mines, Ltd.) did. The evidence shows that it was the latter company and not the defendant that took the ore, but it is sought to make the defendant liable for the trespass on the ground that the effect of the agreement made between said latter company and Mitchell, dated 2nd May, 1902, before the defendant was in existence, and the confirmatory agreement between it and Mitchell of the one part, and the defendant on the other part, dated 28th May, 1902, is to create a partnership between these two companies under the name of the defendant; and the license issued to the defendant on the 2nd August, 1902, is relied upon in support of this view. On this point it is sufficient to say that after considering the additional authorities cited by leave, I see no reason to alter my opinion formed at the trial, which is, that the license being permissive in its nature cannot be regarded in the same light as an Act of Parliament expressly creating a statutory obligation, and that there is no privity of contract between the plaintiff and defendant companies, nor can they be regarded as partners in the proper sense of that term. It is to be observed that clause 1 of the agreement of the 28th May, says in effect that the prior agreement of the 2nd of May is to be read as though the defendant company had been a party thereto instead of Mitchell. Now even if that agreement had originally been so entered into between these two companies it is apparent, to me at least, that the present plaintiff would have no cause of action against the defendant for torts committed by the Rossland Great Western Mines, Ltd. The case of the Natal Land Co. v. Pauline Colliery Syndicate (1904) As. 120, supports in general the foregoing views.

Secondly, it is alleged that in any event the defendant is liable for conversion of the ore, estimated at 2,011 tons, now lying on its property on the Nickel Plate dump, which was admittedly wrongfully taken by its said predecessor from the Centre Star claim.

For the present consideration of the point, I shall momentarily accede to the contention of plaintiff's counsel that when the defendant on the 16th August, 1902, took possession of the Nickel Plate and Ore-or-No-Go claims, it became affected with notice of the fact that this ore had secretly come from the Centre Star mine, and was the property of the plaintiff, and that it did not convey that information to the plaintiff till the middle of March, 1903, which was the first knowledge the plaintiff had thereof: since that time the plaintiff has been at liberty to remove the said ore from said dump without any interference by the defendant, but it has not seen fit to do so. It cannot, properly speaking, be said that the defendant wrongfully, if at all, took possession of the property, because it had been where it was long before the defendant began to exist in British Columbia on the 2nd of August (the date it received its licence) nor, as Thompson says, did it begin to do business till the 16th of that month, when it took possession of the claims and plant aforesaid. It did not in any way attempt to deal or interfere with the ore or exercise over it any rights whatever, but simply left it lying where it was. It is, I think, fair to say in the circumstances, that the defendant may be considered to be in a state of innocence as regards this ore till the last-mentioned date at least.

Despite these facts, the plaintiff contends that the defendant should be held accountable therefore to the same extent as the original trespasser, but cites no authority in support of such an extreme view. I quite agree that one who trespasses upon anothers mining ground and clandestinely abstracts ore therefrom, should be held strictly accountable for his fraudulent acts, and everything in doubt should be presumed against him as the result of his dishonest conduct, but I fail to see that the defendant can in any way be regarded as occupying that position. The situation is similar to a case where a man buys a field from A, knowing that A has left on it some sacks of potatoes, which are the property of B, though unknown to B, and simply says and does nothing, but lets them lie there till they rot away. In such circumstances is the purchaser liable to B, and if so, for what, and on what principle? In my opinion he is clearly not liable at all, though it would have been a neighbourly and friendly act to have notified B. And the principle does not differ because the chattels happen to be imperishable, like ore, instead of perishable like potatoes. To my mind there is no element of conversion in such a state of affairs, because to constitute this injury there must be some act of the defendant repudiating the owner's right, or some exercise of dominion inconsistent with it, while here there was nothing of the kind, nor was even formal possession ever attempted to be taken. Mere passivity is all that the defendant can be accused of, but there must be more than that before conversion can be established. As was said by Mr. Baron Parke in Simmons v. Lillystone, (1853) 8 Ex., 431:

"In order to constitute a conversion there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it."

And see also Lethbridge v. Phillips (1819) 2 Stark. 544; Thorogood v. Robinson (1845) 6 Q.B., 769; Foulds v. Willoughby (1841) 8 M. & W., 540; and Hollins v. Fowler (1874) 7 H. L., 757; wherein it is also shown that even where there is possession, if of lawful origin, there must be a demand and refusal before an action for conversion will lie, and there has been no demand here. The result of the cases is concisely summed up in Addison on Torts (7th Ed.) 804, as follows:

"A man cannot be made a bailee of goods against his will; and, therefore, if things are left at his house, or upon his land, without any consent or agreement on his part to take charge of them, he is not thereby made a bailee of them; and if the goods are demanded of him, and he says he will have nothing whatever to do with the goods, such a declaration, in answer to a demand of the goods, is no evidence of a conversion of them."

In arriving at the foregoing conclusion I have also assumed that the property alleged to have been converted is of any commercial or market value, for if it is not, the defendant's case is not only greatly strengthened as to the conversion itself, but there would be no damages in such circumstances as exist here.

Now the proper measure of damages, if any, is the amount of pecuniary loss the plaintiff has sustained by the conversion of the chattel, i.e., what it was worth at the time of the conversion, and if he does not receive it back he is entitled to its full market value. The question then arises what is the fair market value of the ore in question? According to Thompson it was simply waste material on the dump, and taken on the average would not run more than $3.00 to the ton, total value. James Cram, a witness for the plaintiff company, places it at $3.60 to $4.60, but though the onus is on the plaintiff to establish the market value, no evidence at all is adduced to show that ore of so low a grade has any market value whatever; it certainly is not shipping ore. Simply because there is a certain amount of precious metal in ore, that does not mean that it has any market value, because, for example, ore which carries $5.00 worth of gold per ton, but requires an expenditure of $6.00 to extract it, is worth just $1.00 less than nothing, and is not only useless to its owners, but an encumbrance about their mine.

On the evidence, which is all I am entitled to consider, I am forced to the conclusion that since the time the plaintiff became aware that the ore was lying as waste on the Nickel Plate dump it knew it was valueless to it or anyone else in that position, and therefore has suffered no damage by any act of the defendant in regard thereto.

In the third place it is alleged that the defendant company unlawfully permitted and permits a large body of water to accumulate in its mine whereby is caused an undue flow of water into the plaintiff's mine.

This raises a difficult question of fact which must be determined before the cases cited can properly be considered. The difficulty in arriving at a satisfactory conclusion is,