

The learned Referee found the plaintiff to be entitled; (1) in respect of certain items not disputed, to \$3,000; (2) 637,867 shares at 5 cents, to \$31,893.35; (3) 362,133 shares at 10 cents, to \$36,213.30: in all, \$71,106.65, less down payment of \$5,000, making \$66,106.65, and interest on this sum at 5 per cent. from the 27th August, 1908.

It appears that, at the date of the contract, the plaintiff held 362,132 shares in his own right, and had an option . . . upon 637,867 shares, making together the 1,000,000 shares which he contracted to sell to the defendants. The price fixed in the option was 10 cents per share, and it expired on the 1st July, 1907, but was extended upon very special terms, in consideration of \$2,000, which the plaintiff paid in order to be prepared to deliver the stock, if demanded as the result of his action, in which, as before mentioned, he had asked for specific performance.

The defendants' appeals from the judgment delayed proceedings until October, 1910. In the meantime, namely, in the month of September, 1909, the plaintiff and those interested with him, after many and complicated negotiations, disposed of their belongings in Cobalt Merger stock by trading it for stock in another company . . . and . . . \$5,500 in cash, out of which had to come certain disbursements. This, again, was in part used in trade for real estate in the cities of Ottawa and Montreal—some, if not all, of it subject to mortgages—and in part is still retained by the plaintiff. And the defendants' contention is, that they are entitled to the benefit of these transactions, subsequent to the judgment, by which, as they further contend, the plaintiff has been fully recouped. And, in support of this rather singular proposition, their counsel cites the recent cases before the Privy Council, *Wertheimer v. Chicoutimi Co.*, [1911] A.C. 301, and *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A.C. 105.

I have looked at these cases with care, and I am quite unable to see that they assist the defendants' contention. Neither of them lays down or professes to lay down any new rule for the assessment of damages. . . .

The difficulty does not lie in any obscurity concerning the law, but in the application of the law to the facts in each particular case. And the real difficulty here seems to me to be in the assertion that the plaintiff has been actually recouped at all. Mining stocks are, as appears by the evidence, a somewhat unstable commodity. So is city real estate covered by mortgages. At the time of the breach, the Cobalt Merger shares had no