

SUTHERLAND, J.

JULY 4TH, 1912.

DUBÉ v. MANN.

Contract—Sale and Purchase of Mining Claims—Completed Contract—Fraud and Misrepresentation—Failure to Establish—Royalty—Covenant to Pay—Claim for Reformation—Ore not Found in Paying Quantities—Lump Sum in Lieu of Royalty—Payment into Court.

Action for the first instalment of a royalty, \$9,750, under an agreement in writing dated the 8th April, 1908.

By the agreement, the plaintiffs agreed to sell to the defendant, and the defendant to purchase from the plaintiffs, all their right, title, and interest in certain mining claims, in consideration of the payment of a royalty and \$35,000 in cash.

The provision as to the royalty was in part as follows: "The royalty . . . shall commence immediately upon the expiration of two years from the day of the date hereof, and shall be at the rate of 15 cents for each long ton (2,240 lbs.) of ore removed from the said locations, the amount to be removed from the locations in each year 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 payable annually on the 8th day of April, in each year.

The \$35,000 was paid by the defendant, and the claims were transferred to him.

The first instalment of royalty, \$9,750, being 15 cents per ton on 65,000 tons, came due, as the plaintiff alleged, on the 8th April, 1911, and was not paid by the defendants.

This action was begun on the 29th May, 1911. Under an order made by CLUTE, J., in the course of the action, upon consent, the sum of \$34,750 was paid into Court by the defendant. The order provided that this sum should, upon the termination of the litigation, be paid out, with accrued interest thereon, to the successful party or parties, and thereupon all parties should be discharged and released from all the terms and conditions of the agreement of the 8th April, 1908.

R. McKay, K.C., for the plaintiffs.

Leighton McCarthy, K.C., for the defendant.

SUTHERLAND, J. (after setting out the agreement and stating the facts at length and quoting portions of the evidence):—In his statement of defence, the defendant avers that he was induced to