

HON. MR. JUSTICE SUTHERLAND.

JULY 4TH, 1912.

DUBE v. MANN.

3 O. W. N. 1580.

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

Action by plaintiffs for instalments of royalty payable by defendant under an agreement in writing dated April 8th, 1908. Plaintiffs, who were the owners of certain mining claims, had given defendant several options upon them, by agreements, prior in date to that sued on, under which mining experts and engineers, employed by defendant, had inspected the properties in question.

Finally, after considerable negotiation, the agreement sued on was arrived at between the parties, which provided for the sale of the said properties to defendant for \$35,000 and a royalty. The provision as to a royalty was, in part, as follows: "The royalty . . . shall commence immediately upon the expiration of two years from 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 on the 8th day of April in each year. Provided, however, that the purchaser shall have the right at any time to purchase such royalty from the vendors for the sum of \$25,000 cash." . . . Defendant paid the \$35,000 provided for by the agreement and the properties were assigned to him by the plaintiff, but when the first instalment of royalty fell due he refused to pay the same, claiming that thorough investigation had shewn that there were not 65,000 tons of ore commercially procurable upon the whole property. He also counterclaimed in this action for rescission of the agreement and the return of the moneys paid by him on the ground of fraud and misrepresentation.

SUTHERLAND, J., *held*, that there was no evidence of fraud or misrepresentation and the defendant having entered into an unequivocal agreement to pay royalties on a tonnage of 65,000 tons per annum was bound thereby whether so much ore was to be found or not.

Palmer v. Wallbridge, 15 S. C. R. 650, and other cases referred to. Judgment for plaintiff for \$34,750 with interest and costs.

See also *Sundy v. Dominion Natural Gas Co.*, 22 O. W. R. 743; 3 O. W. N. 1575, and cases therein referred to.

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

McKay, K.C., for the plaintiffs.

L. G. McCarthy, K.C., for the defendant.

HON. MR. JUSTICE SUTHERLAND:—In this action the plaintiffs seek a judgment against the defendant for the first