

A claim in respect of this discovery the respondent Wright was unable to record in due time, owing to the refusal of the Mining Recorder to receive it, because of a claim already recorded on behalf of the respondent Agnes Columbus, which, in his view, prevented the recording of any other claim in respect of the same property: a view which in *Munro v. Smith*, 8 O. W. R. 452, 10 O. W. R. 97, was held to be erroneous.

Being met with this difficulty, the respondent Wright adopted the plan of periodically re-staking his claim, and succeeded finally in having it recorded on the 15th September, 1906, after his last re-staking, which took place on the 3rd of that month.

It has been decided by the Divisional Court and by the Court of Appeal that such a re-staking does not work an abandonment of the discovery in respect of which it is made, and it follows from this that the claim of the respondent Wright may properly be rested on the original discovery and the staking of the 3rd September, 1906, as, I should be prepared to hold on principle and apart from authority, it well may.

What I have just said is subject to the observation that the failure to record his claim in due time after staking of it out may leave the original discoverer open to have his right to a claim cut out by a person who subsequently makes a bona fide discovery and stakes out and records a claim in respect of it.

Upon what I have said is practically the only question to be determined, the facts are not in dispute, and in his reasons for his judgment these are stated by the Mining Commissioner, as well as the grounds upon which he came to the conclusion that the appellants are not entitled to claim the benefit of the discovery of the respondent Wright.

The finding of the Commissioner is that, before the partnership between the respondent Wright and the respondent Sharpe was entered into, and before the employment of Hebner to assist in prospecting on its behalf, the appellants had ceased to prospect on the lot on which the discovery of Wright was made, and had withdrawn their workmen from it.

That being the case, the fact that the respondent Sharpe was still in the employment of the appellants when discovery was made, does not, we think, entitle the appellants to claim the benefit of that discovery, nor did the mere fact of Sharpe being an employee of the appellants disentitle him, either alone or in partnership with Wright, to engage in the work of prospecting on his own account or that of the partnership, especially if, as the Commissioner finds, his employers' time was not made use of in that work.