

Simpson and yourself, it became so apparent that, of the annoyance and interruptions that the Lucky Jack M. C. owners must undergo owing to the Shamrock Placer Claim crossing their lead and overhanging the Big Showing, as must cause a constant source of danger to the mineral claim employees to such an extent that I have not the slightest hesitation in following up my powers and duties as Gold Commissioner in that protection due the quartz owner from the annoyance of the placer man under the circumstances of the present case.

"Obediently yours,

"FRED. FRASER,

"Gold Commissioner."

Now, the effect of this "order" was to change the whole of the plaintiff's location so that, as altered, it did not include one square inch of ground which had been within its former boundaries, in other words, under the guise of moving posts an entirely new location was sought to be created and bestowed upon the plaintiff in substitution for his original claim. It is sufficient to say that, as might be expected, there is nothing in the Act with confers upon a Gold Commissioner or any one else, powers so extraordinary; and it is difficult to imagine how that officer, who must be presumed to be a practical mining man, was induced to believe he had such an autocratic jurisdiction. His real powers are, in my opinion, quite large enough already. The sub-section here relied upon is a useful one in some cases, particularly under Section 24, whereby if a claim owner removes of his own motion one of his posts for an unlawful purpose, his claim thereby becomes forfeited, and it is very proper that when it becomes necessary in the course of surveying, mining, or other operations, to remove posts that the Gold Commissioner should order it to be done. But that is something radically different from what he purported to do here; nor was his action justified by sub-Sec. (c), for that relates to extending, not curtailing, the limits of a claim; nor by sub-Section (f), for this is not a case of disputed boundaries; nor by the general Section 130, because what he did was not in any way "necessary or expedient for the carrying out of the provisions of" the Act.

The so-called order, therefore, may be disregarded because it was made wholly without jurisdiction, and is absolutely null and void, and the record stands freed from any limitations sought to be imposed thereby. The minute of the order indorsed upon the record and entered in the books of the Mining Recorder should be cancelled; it presumably has been recorded under Sec. 13 of the Placer Mining Act Amendment Act of 1901.

In the statement of claim a charge of lack of good faith is brought against the Gold Commissioner (par. 7), and it is doubtless on that account that he is made a party defendant to the action, though no specific relief is prayed against him. While this defendant lent a too willing ear to the representations of the owners of the Lucky Jack, identifying himself too closely with their interests, and acted without due discretion and to a certain extent laid himself open to the animadversions of counsel, yet I hardly feel justified in going to the length of finding that he acted in bad faith between the parties. At the same time his course of conduct was undoubtedly such as to place the plaintiff in a very ambiguous and embarrassing position, whereby he was prejudiced and delayed in the exercise of his rights, and was almost forced to make Fraser a party to this action. In such circumstances, while the plaintiff is not successful, and the defendant Fraser is entitled to have the action dismissed against him, which is hereby ordered, yet his conduct, taken as a whole, has been such that I do not feel called upon to make an order for costs in his favour.

But though the plaintiff was entitled to have his location recorded as aforesaid, yet the validity thereof is attacked on the ground that in truth it is not a placer claim at all, though so styled, and that nothing was found on the claim to warrant the statement in the affidavit, par. 2:

"That from indications I have observed on the claim applied for, I have reason to believe that there is therein a deposit of placer gold."

The first thing that strikes the inquirer into the Placer Act is the very indefinite nature of the affidavit on which a record is obtained. This is in marked contrast to the Mineral Act wherein the discovery of mineral in place must be sworn to (Form S. 6.) and the locator cannot even invoke the remedial and curative Section 16, s. s. (g), unless

he can prove that he has "actually discovered mineral in place on said location." But in placer claims, all that he is required to pledge his oath to is that "from indications I have observed on the claim applied for, I have reason to believe that there is therein a deposit of placer gold." In the one case the fact of mineral in place must be established—(Manley v. Collom (1901-2) 1 M.M.C., 487—but in the other the existence of "a reason to believe," however wildly erroneous, is sufficient. This introduces an element of great uncertainty into the record, for the more ignorant and credulous a prospector is the more may he have "reason to believe" that he has found a placer claim. It is well nigh impossible to probe into a man's mind and arrive at a satisfactory conclusion regarding his reason for belief in the "indications" he has observed in his claim; there is practically no means of weighing or determining such a vague issue; I have been unable to think of any method, nor have counsel been able to suggest one. It is urged that the defendant has established that this is not a placer claim at all, because there is no placer ground in it, and that any prospector or miner of the most elementary knowledge could in a very short time satisfy himself of this fact beyond peradventure. Assuming all this to be the case, we get very little further, for it does not touch the one necessary element, i.e., the belief. It is further argued that in the circumstances no sensible man could have thought that the claim was placer ground, and therefore it must be assumed that the act of the plaintiff was fraudulent, and that he had not the requisite belief, but simply aimed at appropriating some rich ground from a lode claim and blackmailing the owner thereof. But the difficulty is that the belief required is not that of a sensible or an honest man; the insane delusion of a criminal under the Placer Act is just as efficacious, and it would require very strong evidence, stronger than has been adduced here, to justify the Court in coming to the conclusion that the belief was entirely absent, even in the case of a locator who has acted in such a suspicious and dubious manner as has the plaintiff. The fact that under colour of a location which he thought he was entitled to to some extent, he intended to harass and obstruct the defendant by setting up extravagant claims, with the idea of being bought out, would not detract from the effect of his entertaining a belief that he had placer rights, however small or valueless, in a mining sense they might be. That this was the case here I have little doubt.

This branch of the case is thus left in a manner far from satisfactory to my mind, but on all the facts I have decided to give the plaintiff the benefit of the doubt, and hold that the existence of the statutory belief as sworn to, has not been disproved, the onus of doing which is upon the defendant, and it follows therefore, that the Shamrock placer claim must be taken to be a valid location.

I turn now to the claim of the plaintiff against the defendant Morgan for the alleged wrongful conversion of gold from the plaintiff's claim.

It appears that on the Lucky Jack there was at the time of the location of the Shamrock placer claim (Sept. 7th) and within the boundaries of the Shamrock, an exposed free milling white quartz ledge, about three feet in width, of remarkable appearance, and running up the steep and rocky mountain side, called the "Big Showing," and depicted on the photograph, Exhibit T. 12, and in the plan prepared by order of this Court by Henry B. Smith, P.L.S., dated December 28th, 1903. On portions of this ledge, when located, gold was exposed prominently and the ore was in places so valuable and easily detachable that it was necessary to keep a guard over it. The plaintiff does not claim any of such ore that was "in place," but when the Lucky Jack was located (July 9th, 1903) there were also at the side and within a few feet of and below the ledge, and particularly where it is badly faulted beneath the "Big Showing," (as shown by the blue line on Exhibit T. 12) detached pieces of quartz containing appreciable values in gold to a greater or less degree; and a number of these pieces also lay on top of the faulted portion which widened out to about 6 feet; they lay, before being disturbed by man in the position where they had been dislodged from the ledge by the course of nature, and the configuration of the ground is such that they must be deemed to have fallen from that ledge and none other.

The plaintiff claims these loose fragments because he alleges they are "float" and not "rock in place," and therefore, not the property of the lode owner, but that of the placer owner.

In answer to this contention the defendant says: