

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

A. G. Slaght, for the appellant.

R. S. Robertson, for Watson, the respondent.

RIDDELL, J., read a judgment in which, after stating the facts, he said that it was objected by the respondent that the exercise by the Mining Commissioner of the power given by sec. 85 was not the subject of an appeal under sec. 151. This objection could not be sustained. Section 151 gives an appeal against any decision of the Commissioner. The Commissioner was called upon to exercise not an arbitrary but a judicial discretion on the application before him, and his determination was a "decision."

It was argued for the appellant that the Commissioner had no power, in the circumstances of this case, to grant the application of the respondent. Under sec. 85 (as enacted by the amending Act 4 Geo. V. ch. 14, sec. 4), the Commissioner has power only when compliance with the statute is prevented (1) by pending proceedings or (2) by incapacity from illness of the holder or (3) by other good cause shewn. Nothing of the kind appeared here—the holder was not prevented from doing the work at all; on his own story, he misunderstood the Act, and, while he did not intend to let his claim go, he did not intend or try to do the necessary second year's work at the proper time. As he was not prevented from doing the work, the jurisdiction of the Commissioner did not attach.

There was nothing to prevent the respondent from applying to the Lieutenant-Governor under sec. 86; nor to prevent his asserting that his understanding of the Act was the true construction, and so disputing the validity of the appellant's claim.

The order of the Commissioner should be set aside, with costs here and below.

The other members of the Court agreed that the appeal should be allowed; MEREDITH, C.J.C.P., and ROSE, J., giving reasons in writing.

*Appeal allowed with costs.*