

deemed in constructive occupation of all of it. In *Davis vs. C. P. R.*, 12 Ont. Rep. 724, it was held that "occupied lands" under the Railway Act, 46 Vic., Ch. 24 (D), denote lands adjoining a railway and actually or constructively occupied up to the line of the railway by reason of actual occupation of some part of the section or lot by the person who owns it or is entitled to the possession of the whole. In other words, actual occupation of a part is deemed to be actual occupation of the whole. In *Little vs. McGinnes*, 7 Maine, 176, cited with approval in *Harris vs. Mudie*, 7 Ont., App. Rep. 429, the court remarks: "The deed may not convey the legal estate. Still the possession of a part of 'the land described in it . . . may be considered as a possession of the whole, and as a disseisin of the true owner, and equivalent to an actual and exclusive possession of the whole tract, unless controlled by other possession." In *Robertson vs. Daley*, 11 Ont. Rep. 352 P., the owner of certain land in 1811, sold it to D., who went into possession and occupied until 1827 or 1828, when he was turned out by the sheriff under legal proceedings taken by Dufait, who was put in possession and so remained until 1854, when he conveyed to O., through whom the plaintiff claimed. D's actual possession had been only of about 10 acres. Held that D's possession was of the whole land, and that he could not be treated as a squatter so as to enable him to acquire a title to the 10 acres actually occupied. In *Hereron vs. Christian*, 4 B. C. Rep. 246, I upheld the same principle.

It follows, therefore, that the plaintiffs on and after the construction of their railway and station, lawfully occupied block 12 for other than mining purposes, and, such being the case, a mineral claim could be acquired thereon only under Section 10 of the Act which provides that whilst the miner may enter upon all lands, the right whereon to so enter, prospect and mine shall have been reserved to the Crown and its licensees, (and such right is reserved in respect of the Nelson and Fort Sheppard grant by section 8 of 55 Vict., chap. 38), yet in making entry upon lands already lawfully occupied for other than mining purposes, the free miner, previous to

entry, shall give adequate security to the satisfaction of the Gold Commissioner for loss or damage, and after entry shall make compensation to the owner or occupant. Compliance with these conditions is, I think, imperative upon the miner seeking to locate a mineral claim upon land occupied for other than mining purposes, as I have held Block 12 to have been and that failure to observe them vitiates the location.

By section 34 of the act the interest of a free miner in his claim is to be deemed a chattel interest, equivalent to a lease for a year, and so on, "subject to the performance and observance of all the terms and conditions of this act." In Maxwell on Statutes, 3rd edition, page 521, the distinction is drawn, as demonstrated by numerous authorities, between cases where the prescriptions of an act affect the performance of a duty and where they relate to a privilege or power: "Where powers or rights are granted with a direction that certain regulations or formalities shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred." I think there can be no question that the rights and privileges conferred upon free miners in this province come under this head, and that, as remarked in Maxwell, at page 521, "the regulations, forms and conditions prescribed"—for the acquisition of the miners' rights and privileges—"are imperative in the sense that the non-observance of any of them is fatal." See also *Corporation of Parkdale vs. West*, L. R. 12 App. Cas., 613. In *Belk vs. Meagher*, 104 U. S., 284, Chief Justice Waite remarks: "The right of location upon the mineral lands of the United States is a privilege granted by congress, but it can only be exercised within the limits prescribed by the grant." Upon the ground, therefore, of failure to observe the conditions of section 10, I am of opinion that the defendant's title fails.

I am also of opinion that the plaintiff's title must prevail upon the further ground that no vein or lode of mineral had been discovered, and that no mineral in place had been discovered to justify the location.