

HON. MR. JUSTICE RIDDELL.

OCTOBER 29TH, 1912.

TORONTO NON-JURY.

KENNEDY v. HARRIS.

4 O. W. N. 183.

Mines and Minerals — Interest in Option for Purchase of Mining Claims — Release — Partnership — Right of Action — Time of Accrual — Money Payment — Penalty.

Action by a mining prospector to recover \$5,000 and interest due under a contract entered into with defendant by the terms of which he was to receive a half interest in all profits to be made under an option for the purchase of a certain mining claim of which option defendant was the grantee, in consideration of his releasing a certain claim he had to the ownership of the property in question. One of the terms of the contract provided that in case the option should not be taken up plaintiff was to receive \$5,000 from defendant. The option was not taken up and this action was brought. Defendant urged that the \$5,000 was not recoverable as it was in the nature of a penalty and the plaintiff had suffered no damages.

RIDDELL, J., *held*, that the \$5,000 was not a penalty.

McManus v. Rothschild, 25 O. L. R. 138, followed.

Judgment for plaintiff for \$5,000 and costs.

N. W. Tilley, for the plaintiff.

J. E. Day, for the defendant.

HON. MR. JUSTICE RIDDELL:—The plaintiff had set up a claim in good faith to a certain mining property, and had commenced and was prosecuting an action to enforce it. The land was also claimed by a company. On the 30th March, 1911, the company and the defendant entered into an agreement, which provided for the defendant obtaining a release of the plaintiff's claim and a discharge of his action—and the company in consideration thereof gave the defendant an option for \$14,000 worth of work to be done on the property and \$50,000 cash as well as paid-up stock to the amount of \$300,000 in a company to be formed by the defendant, with a capitalization of not more than \$2,000,000. The defendant was to spend \$2,000 on development work, etc., before June 30th, and \$2,000 in each of the months of July, August, September, October, November, and December—or he might pay in cash to the company \$500 for each of the months of June and July. The cash \$50,000 was to be paid on or before January 1st, 1912, and the stock not later than February 1st. Time was made of the essence of the contract—and the defendant was given also an option to purchase for money payable in stated instalments.