Mining Commissioner's Cases

ONTARIO

1906–1910

WITH

Annotated Act and Notes

AND

INTRODUCTORY CHAPTER
upon the Ontario Law

BY

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PREFACE.

This volume has mainly to do with the acquisition of mining title to Crown lands and with rights and interests in mining claims before patent. Though Ontario now leads the provinces in total value of annual mineral production, and yields half the metallic products of Canada, it has hitherto had no publication offering any special assistance upon these very important phases of mining law; nor, with the exception of Mr. Justice Martin's excellent "Mining Cases" of British Columbia, has there been any in Canada. Until 1906, there was, in fact, owing to the state of the law and to the practice of disposing of claims and disputes in the ordinary course of departmental administration, little or no available precedent in the Province upon these matters. In that year a new Act was passed, and the office of Mining Commissioner was established and an appeal given, in important cases, to the ordinary Courts. Since then the period has been a very active one in mining development; many cases of importance and involving great values have been dealt with, and some 400 written decisions have been rendered by the Commissioner and the appellate Courts. From these the cases herein reported have been selected.

The cases have been chosen with a view chiefly to their bearing upon the present Ontario law; but they involve many points common to all mining laws, and references to the laws and cases of other jurisdictions are frequent, especially to those of British Columbia and the United States.

Notes have been added—some of them of considerable length—to many of the cases, and in them important points are discussed, cross references and comparisons with other laws and cases given, and comments freely made.

The Act (with amendments down to 1910, and an index) has been included, and for convenience annotations have

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been inserted giving references to the cases and notes in which the sections have been interpreted or considered. The origin of each section has been indicated, and in many instances references to corresponding statutes of other jurisdictions have been given. A table of the important parallel sections of the former and the present Ontario Act is also appended.

The introductory chapter, containing in a few pages the general history of the Act, a synopsis of its more important features, and a detailed review of the practice and procedure in disputes and proceedings, with forms and schedule of fees appended, is intended especially for the assistance of practitioners who may desire to acquire with as little expenditure of time as possible a working knowledge of our present law.

Special care has been taken in the preparation of the headnotes, and by extensive indexing it has been sought to make the contents of the volume readily accessible. Though a consolidated index might save some inconvenience, it has been thought better, as avoiding confusion, that the Index to the Act (which immediately follows the Act) the Index-Digest of the Cases (which is next to last in the book) and the Index to the Notes and Introduction (which is last in the book and in different type) should be kept separate.

I have given to the work all the time my other duties would permit; but I cannot hope to have escaped errors, and in matters of form, if not of substance, I fear they may be numerous. It has not, indeed, been without some misgiving that I ventured at all upon a publication for most of the contents of which I must in a double sense be held responsible; but mining law seemed deserving of much greater attention than it has heretofore received, no one else had so readily at hand the means of preparing a volume of the kind, and I felt that whatever its defects it could not fail to serve a useful purpose.

I am much indebted to the practitioners whose names most frequently appear in the reports of cases for assistance rendered in reaching decisions upon new and difficult points, in what was essentially a new field of law. In a branch of legal practice especially calling for integrity and devotion to the interests of their clients, their course, I think, has been exceedingly creditable and in keeping with the best traditions of the profession. To them and to the mining community generally my acknowledgments are due for the courtesy I have received at their hands, and for the general tendency to accept in good part and as at least well-meant the disposition made of the cases in which they were concerned.

SAMUEL PRICE.

ST. THOMAS,
20th August, 1910.

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INTRODUCTION.

History of Present Law.

Prior to 1906 the statutes and regulations governing the disposition of mining lands in Ontario were not uniform for the Province, and were very incomplete and indefinite in their provisions—especially as to lands outside the small areas then within mining divisions—and claims and disputes arising under them were dealt with by the Department in the ordinary course of administration without resort to a special judicial officer or to the Courts.

The great activity that followed the opening up of the Cobalt silver region, and the plentiful crop of disputes that resulted and congested the Department, led, in 1906, in conformity with resolutions passed by a convention of the mining community held in Toronto the previous December, to the passing of a new mining Act, making one law for the whole Province, defining with a good deal of detail the requirements for taking up and obtaining title to mining claims, and providing for the establishment of local recording offices and Recorders in all mineral districts, and for the appointment of a judicial officer to be known as the Mining Commissioner. The Commissioner was empowered, either in the first instance or by way of appeal from the Recorders, to settle all questions and disputes arising under the Act; and in important cases an appeal was given from his decision to a Divisional Court. The Act, known as The Mines Act, 1906, became law on 14th May, 1906.

This Act, in addition to containing much that was new, adopted a large part of the law and regulations that previously related only to mining divisions, and it borrowed to some extent from the law of British Columbia. The provisions respecting the powers and duties of the Mining Commissioner were modelled after those relating to the Ontario Drainage Referee, and have a close analogy to them.

While its purpose and intent as a whole, and the various improvements it brought about, were good, the Act of 1906 had many defects—the hurry with which it was prepared and put through, in the desire to have it ready for the active

season which was then about to open, being no doubt largely responsible for its lack of systematic arrangement and other shortcomings.

Rather extensive amendments and alterations were made in 1907, and in 1908 a complete revision was made by the Statute Revision Commission (composed chiefly of a committee of Judges), assisted by the officers of the Department, and the title was changed to "The Mining Act of Ontario." Slight amendments have been made each year since for the better carrying out of the purposes intended.

Chief Features of the Act.

The present Ontario Act, like the prevailing law of this Continent, makes discovery of valuable mineral the foundation of the right to take up mining claims, and makes development the condition upon which they may be held until the time within which a patent must be applied for has elapsed, absolute title being given after the prescribed development has been done.

Discovery must be followed promptly by the planting of posts and marking out of the claim, and the claim must be recorded within a specified time. Thirty days development work must be done within 3 months after recording, and 60 days more not later than the first year, 60 days more not later than the second year and 90 days more not later than the third year after the expiration of such 3 months, verified reports of its performance being required to be filed not later than 10 days after the expiration of each period; when, on making application, not later than 3½ years after recording, a patent may be obtained by paying $3 an acre in surveyed and $2.50 an acre in unsurveyed territory.

Each claim, except in special divisions, where only half the usual size is allowed, must in unsurveyed territory be a square of 40 acres with boundaries running north and south and east and west, or as near to that size and form as reasonably can be; and in surveyed territory it must consist of the aliquot part of a township lot or section specified in the Act. The boundaries go down vertically on all sides, and the claim-holder gets all the minerals within the boundaries, and also all surface rights, except pine timber, unless these have been previously disposed of; where the surface rights have been previously disposed of he gets only the minerals, paying only

half the usual price per acre, and must compensate the holder of the surface rights for injury done thereto. Subject to these exceptions, and to a reservation for roads in certain cases, the patent is in fee simple, except in Crown forest reserves where only leases for 10 year periods can be obtained. A survey of the claim is required in all unsurveyed territory.

No more than three mining claims in each mining division can be taken up by one licensee during a license year, but these may be staked either personally or by an agent who is a licensee. There is no limit to the number of claims that may be acquired by purchase and transfer.

No one can validly prospect for minerals, or stake out, record or acquire an unpatented mining claim, or acquire any right or interest therein, unless he holds a miner's license, and the license must be renewed yearly so long as the claim remains unpatented. In a Crown forest reserve, a forest reserve permit is also required for prospecting or staking out claims, and permission of the Minister is necessary for working or carrying on mining operations.

Almost all lands in Ontario of which the minerals are vested in the Crown, are open for prospecting and mining. Much of the length of the Act, and of what is sometimes regarded as complication in its provisions, is attributable to the existence of valuable timber and other interests in territory thrown open to prospectors, and to the desire to give the miner as wide a field of operations as possible. It would have been simpler, for instance, to withhold prospecting and mining privileges in forest reserves and on settlers' lands than to grant them with the restrictions and conditions necessary to prevent destruction of the other co-existing interests. The Ontario Act, too, includes in the one Statute the different kinds of mining and the rules for the operation of mines, while in most jurisdictions separate Acts or sets of regulations are provided for each.

The Act aims at the discouragement of blanketing, or illegal tying up of territory without discovery of valuable mineral; but it seeks on the other hand to give security to a *bona fide* claim after a reasonable time for investigation and for entry of dispute has elapsed. The validity of a mining claim is open to question upon any ground for 60 days after the claim has been recorded. Any licensee, whether he claims the land himself or not, has the right to enter a dispute

against a claim if he specifies the grounds of invalidity and verifies them by affidavit. But if no dispute is entered within the 60 days, or if the dispute has been determined in the holder's favor, the holder of a claim is at the end of that time, if there is nothing making it improper to issue it, entitled to obtain what is called a Certificate of Record, which, in the absence of fraud or mistake, is conclusive evidence of the performance of all the requirements of the Act except working conditions up to the date of the Certificate.

The holder of a claim may transfer or agree to transfer the claim, or any share or interest in it, to another licensee. The transfer or agreement, if it complies with the requirements to be presently mentioned, may, and for the protection of the licensee claiming under it should, be recorded. The recording office is, in respect to unpatented mining claims, analogous to a registry office as regards title; unrecorded instruments being void as against a subsequent recorded purchaser or transferee for valuable consideration without actual notice; the recording of an instrument constituting notice to all persons claiming subsequent to such recording; and priority of recording prevailing in the absence of actual notice of the prior instrument.

Except disputes filed within the time allowed; wage-earners' liens as provided for by the Act; and orders, decisions and certificates in proceedings under the Act, and other official entries of the Recorder—no instrument is permitted to be recorded against a claim unless it is signed by the recorded holder of the claim or interest affected, or by his agent authorized by recorded instrument, and the signature verified by affidavit. Describing the holder of a claim as trustee, even of a named person, imposes no duty upon any one dealing with the holder, and notices of trust are not permitted to be received by the Recorder or entered on the record.

Rights or interests in mining claims staked out or recorded in the name of another person, to be enforceable, must, if contracted for or acquired before the staking out, be made to appear by writing signed by the holder of the claim or by the person by whom or in whose name the staking or recording was done, or the evidence of the claimant must be corroborated by other material evidence, and if so made to appear the Statute of Frauds does not apply. Contracts for interests, made after the staking out, must comply with the requirements of sec. 4 of the Statute of Frauds.

Disputes and Proceedings.

All questions and disputes arising before patent as to the validity or subsistence of an unpatented mining claim, or as to its transfer or ownership, or as to any other unpatented right, privilege or interest conferred by the Act, are to be determined by the Commissioner or the Recorder, subject to appeal as provided in the Act. (*Ss. 123, 130*).

The powers of the Commissioner and of the Recorder as to these matters are, subject to the exceptions to be presently mentioned, concurrent; either may deal with them in the first instance, but where the Recorder does so an appeal will lie to the Commissioner.

The exceptions to the general rule that either the Commissioner or the Recorder may deal judicially with disputes and applications under the Act may, for convenience of reference, be tabulated under three headings, as follows:—

1. *Matters which must in the first instance be dealt with by the Recorder:*

(a). Any question as to compliance with the provisions of the Act regarding a mining claim arising prior to the issue of a Certificate of Record, unless with the Commissioner's consent the Recorder transfers it to the Commissioner, or unless the Commissioner orders that it be otherwise dealt with. (*S. 130 (2)*).

(b). Extending the time for performance of working conditions in cases where the default in performance is by reason of pending proceedings or of the death or incapacity from illness of the holder of the claim. (*S. 80*).

(c). Granting Certificates of Record and Certificates of Performance of Work. (*Ss. 64, 78 (4)*).

(d). Relieving a licensee from disqualification caused by previous staking. (*S. 57*).

2. *Matters which can be dealt with by the Commissioner and not by the Recorder:*

(a) Revoking a Certificate of Record or a Certificate of Performance of Work. (*Ss. 66, 78 (4)*).

(b). Excusing failure to have endorsement of the recording of a mining claim made on the back of the applicant's license. (*S. 60*).

(c) Relieving from forfeiture of a claim, within 3 months after default, in cases not reasonably within the control of the holder. (*S. 85 (2)*).

(d) Permitting entry of a dispute of the validity of a claim after its validity has before been adjudicated upon or after the claim has been on record 60 days and has already had a dispute entered against it. (*S. 63 (4)*).

(e). Permitting a question of forfeiture to be raised by a person not interested in the property and not an officer of the Department. (*S. 84 (2)*).

(f) Vesting in the other co-holders the interest of a co-holder of a claim who fails to perform his proportion of work. (*S. 81*).

(g). Vesting the claim of a deceased staker or holder in his representatives. (*S. 88*).

(h). Vacating a certificate of proceedings filed against a claim under sec. 77. (*S. 77 (4)*).

(i). Settling questions of compensation for surface rights. (*S. 104*).

(j). Settling questions respecting party walls. (*S. 167*).

(k). Restraining the doing of any act in matters or proceedings which may come before him. (*S. 126*).

(l). Dealing with trespasses on public lands under the "Act to prevent Trespasses on Public Lands." (*S. 127*).

3. *Matters which are to be dealt with by a tribunal other than the Recorder or the Commissioner:*

(a). The license of a licensee who is guilty of wilful contravention of the Act may be revoked by the Minister upon recommendation of the Commissioner. (*S. 33*).

(b). The interest of a joint holder of a claim which has ceased by reason of the expiration of his license, may be vested in the other holders by the Minister. (*S. 87*).

(c). Relief from forfeiture in cases of hardship may be granted by the Lieutenant-Governor in Council upon the recommendation of the Minister. (*S. 86*).

(d). Liens for wages filed in accordance with the Mining Act must be dealt with by the ordinary Courts, or its officials, as under "The Mechanics' and Wage-Earners' Lien Act." (*Ss. 182, 183*).

Hearings before Recorder.

The Act provides that the Recorder may give directions for the conduct of proceedings before him, and that he shall adopt the cheapest and most simple methods and machinery for disposing of matters. Where no such directions are given the procedure prescribed for matters before the Commissioner is to be adopted as far as applicable.

The Recorder has the same authority to summon witnesses and require production of documents as Commissioners under the "Act respecting Inquiries concerning Public Matters."

He has no power to award costs, but may direct payment of the fees and conduct money of witnesses, which are to be upon the County Court scale.

He is required to enter forthwith in the books of his office a full note of every decision made by him, and to notify every person affected thereby by registered letter mailed not later than the next day after the making of such entry. This provision and the very full right of appeal given by the Act afford ample facility for correcting any erroneous act or decision of the Recorder.

Appeals from Recorder.

An appeal lies from the Recorder to the Commissioner in respect of every decision and every act or thing, ministerial or judicial, done or refused or neglected to be done by the Recorder, but the decision of the Recorder is final and binding unless appealed as provided in the Act.

Notice of the appeal (Form 37) must be filed in the office of the Recorder and served upon all parties adversely interested, within 15 days from the entry of the decision in the Recorder's books, or within such further time, not exceeding 15 days, as the Commissioner may allow; but where notice is filed within the said time and the Commissioner is satisfied that it is a proper case for appeal, and that after reasonable effort any of the parties entitled to notice could not be served within that time, the Commissioner may extend the time and make such order for substitutional or other service as he may deem just; and where a person affected has not been notified of the decision by registered letter, mailed not later than the next day after entry of the decision in the Recorder's books (as the Act requires he shall be), and appears to have suf-

fered substantial injustice and has not been guilty of undue delay, the Commissioner may allow such person to appeal.

The Commissioner may on the appeal admit new or additional evidence or re-try the matter. In practice, the latter is usually done, by reason of the fact that the evidence before the Recorder is not usually taken in shorthand or fully noted. Disputes involving the taking of a large amount of evidence are in fact rarely dealt with by the Recorder, but are transferred by him to the Commissioner, and double trial thus avoided.

Hearings before Commissioner.

Any matter cognizable by the Commissioner may be brought before him by making written or verbal application to him for an appointment for hearing. In practice such applications are usually made by post, as are also most other *ex parte* and interlocutory applications.

In matters affecting claims for which a Certificate of Record has been issued, the Commissioner may, before issuing the appointment, require the applicant to satisfy him that there is reasonable ground for the proceeding, or may in such cases, or in cases where leave to take the proceeding is necessary (viz., questions of forfeiture raised by persons not interested in the property, and disputes against the validity of claims after the usual time has elapsed), impose such terms, as to security for costs or otherwise, as may seem just.

The appointment must be served upon all parties concerned. In appeals from the Recorder and disputes filed with the Recorder against the validity of mining claims, nothing further is necessary unless specially ordered, as copies of such appeals and disputes are required under the Act to have been already served upon or transmitted to the adverse parties: but in all other cases there must be served in addition to the copy of the appointment a notice of claim (Form 38), stating shortly the nature and particulars of the right, question or dispute sought to be adjudicated.

The service must as a rule be personal service, but in a proper case substituted or other service may be ordered or allowed. Disputes against the validity of mining claims and appeals from the Recorder are required to contain an address for service not more than 5 miles from the recording office, and as to them good service may be made by leaving the

papers to be served with any grown-up person at such place, or, if no such person can there be found, by mailing them by registered post, addressed to the disputant or appellant at the post office at or nearest to such place; and in default of such address being given, by posting them up in the Recorder's office. Persons not resident in Ontario are required to give in their applications, transfers, etc., the name and address of a person in Ontario upon whom service may be made.

The Commissioner may in any case order delivery of particulars or answers, or production of documents, or give such other directions for the hearing as he deems proper. He may make proceedings returnable forthwith, or at such time as he may deem proper, or otherwise provide for having the matter disposed of without unnecessary formality. He is given, generally, in all matters cognizable by him all the authority and power conferred upon an official referee by the Judicature Act or by the Arbitration Act.

Where the proceeding is for the purpose of establishing a right or interest in a mining claim standing in the name of another person, and it is desired to guard against its possible defeat by transfer of the claim or interest to an innocent purchaser, a certificate (Form 13) may be obtained from the Commissioner or the Recorder and filed with the Recorder, who must note it upon the record of the claim. This operates as actual notice to all persons of the proceeding. It, however, ceases to be effective at the end of 10 days from its filing unless within that time an order is obtained from the Commissioner or the Recorder continuing it; and it may be vacated at any time by the Commissioner on application of any one interested.

Where a proceeding is deemed vexatious, or is brought by a person residing out of Ontario, security for costs may be ordered, and it may be ordered that in default of such security or of speedy prosecution, the proceeding be dismissed.

The hearing must be proceeded with as promptly as possible, having regard to the interests of the parties. It must be held at the place deemed most convenient for the parties in the district or county where the lands affected are situate, unless it seems desirable to hold it elsewhere; but the Commissioner may take or order the taking of the evidence of any witness at any place within or without Ontario.

Subpœnas for attendance of witnesses may be issued out of the High Court or any County or District Court, or witnesses may be summoned or production of documents procured by the Commissioner in the manner provided by the "Act respecting Inquiries concerning Public Matters." Subpœnas to Recorders or other officers of the Department or for the production of documents in their official custody cannot issue without a direction of the Commissioner. Certified copies of entries in the Recorder's books and of documents filed in his office are receivable as evidence.

Provision is made for reporting the evidence in shorthand, copies of evidence being furnished upon the same terms as in the High Court. The Commissioner may require other evidence than that adduced by the parties (this being sometimes necessary for the protection of the Crown or the public interests), and he may in any case obtain the assistance of experts and order an inspection of the property, or may himself view and examine the property, and with the consent in writing of the parties he may proceed wholly upon a view.

An order may be made restraining any party from doing any act which in the Commissioner's opinion ought not to be done, or ought not to be done pending the final determination of any question involved in the proceeding.

The Act provides that the Commissioner shall give his decision upon the real merits and substantial justice of the case. He must enter in his books a full note of every decision given by him, and when the decision finally disposes of the matter so far as he is concerned, he must notify the parties by registered post of the purport of the decision.

He may award costs, taxation of which is to be on the High or the County Court scale, according to the value of the property in question, or he may fix the amount at a lump sum. Counsel fees may also be fixed by the Commissioner. The fees and conduct money of witnesses are upon the County Court scale.

Decisions of the Commissioner (together with the exhibits and other papers) are filed in the office of the Recorder, or at the Bureau of Mines, as directed by the Commissioner. Where the filing is not with the Recorder of the division in which the property affected is situate, a duplicate of the decision must be sent by the Commissioner to such Recorder. The officer with whom the decision and papers are filed is

required forthwith to give notice of the filing by registered post to the solicitors of the parties who appear by solicitor, and to any parties not appearing by solicitor.

Appeals from Commissioner.

An appeal lies to a Divisional Court from every decision of the Commissioner *except*:—

(1). Where the decision is in respect of a ministerial duty of the Recorder, in which case an appeal lies to the Minister. (*S. 134*).

(2). Where the decision does not involve the final determination of the matter or proceeding. (*S. 137 (5)*).

(3). Where by consent in writing of the parties the Commissioner proceeds wholly upon a view. (*S. 139 (3)*).

(4). Where the decision is in respect of a working permit or application therefor. (*S. 103*).

(5). In proceedings in respect of compensation for surface rights where the amount awarded does not exceed $1,000. (*S. 104*).

(6). Upon questions of the due performance of working conditions. (*S. 78 (4)*).

The appeal from the Commissioner to the Divisional Court must be taken within 15 days after the filing of the decision or within such further period, not exceeding 15 days, as the Commissioner or a Judge of the Supreme Court may allow. In default of appeal the decision is final and conclusive.

Notice of appeal must be filed with the Recorder of the division in which the property in question is situate within the said time, and the appeal must be set down for hearing and a certificate of the setting down lodged with the Recorder within 5 days from the expiration of that time, otherwise the appeal is deemed to be abandoned.

The appeal may be made direct to the Court of Appeal by consent of the parties or by leave of that Court or a Judge thereof.

If the Divisional Court reverses or varies the decision of the Commissioner, any person affected may within 30 days from the date of the Divisional Court decision, by leave of the

Court of Appeal or a Judge thereof if the Court is not sitting, appeal to the Court of Appeal, and there is no further or other appeal.

The practice and procedure on appeals to the Divisional Court and to the Court of Appeal is the same as in ordinary cases under the Judicature Act, except that it is not necessary to print the appeal book unless so directed.

General Provisions.

Proceedings before the Commissioner or Recorder are not invalidated by reason of any defect in form or substance or failure to comply with the provisions of the Act where no substantial wrong or injustice has resulted, and are not removable into any Court by *certiorari* or otherwise.

Courts and Judges may refer actions and questions to the Commissioner as an Official Referee, and may transfer to him proceedings which should have been taken before him.

A duplicate of any order made by the Commissioner or by a Recorder may be filed in the office of the Clerk of Records and Writs or of the Local Registrar or Deputy Clerk of the Crown of the High Court of Justice or in the office of the Clerk of the County or District Court of the County in which the lands lie, and becomes thereupon an order of the Court in which it is filed and enforceable as such; but the Court or a Judge may stay proceedings thereon if an appeal is taken from the order.

Forms.

For convenience the forms of the Act relating to disputes and proceedings are appended to this chapter, together with a form of appointment showing the heading or style of cause usually adopted in proceedings under the Act.

The part of the schedule of fees relating to disputes and proceedings is also appended.

FORMS.

THE MINING ACT OF ONTARIO.

Form 8. (See sec. 63 (1).)

DISPUTE AGAINST A RECORDED CLAIM.

To the Mining Recorder of Mining Division:—

I, holder of Miner's License No. , hereby dispute Mining Claim No. , recorded in the name of , upon the lands known and described as

1. The said claim is illegal or invalid because (*state fully how and why illegal or invalid*).

2. (*If it is claimed that the disputant or another licensee in whose behalf he is acting is entitled to be recorded for or is entitled to any right or interest in the lands or mining rights, or any part thereof, a statement to that effect must here be inserted, giving particulars*).

I reside at , and my post office address is

Dated this day of , 19 .

Signature of disputant .....
Address for service .....
(*This must be a place within 5 miles of the Recorder's office.*)

THE MINING ACT OF ONTARIO.

Form 9. See sec. 63 (1).)

AFFIDAVIT VERIFYING DISPUTE.

County (*or* District) of
To Wit:

I, of the of in the of , holder of Miner's License No. , make oath and say:—

1. I am the licensee signing the dispute attached hereto.

2. I have personal knowledge of the matters in said dispute mentioned, and I swear that the statements therein set forth are true and correct in substance and in fact.

3. The said dispute is, as I verily believe, one that is justified according to *The Mining Act of Ontario*, and the said dispute is not made for any improper purpose.

Sworn before me at
in the
of this
day of
A.D. 19 .

Mining Recorder of Mining Division.

THE MINING ACT OF ONTARIO.

Form 13. (See sec. 77 (2).)

CERTIFICATE THAT INTEREST IN CLAIM IN QUESTION.

I certify that in a proceeding commenced by , who resides at , and whose post office address is , an interest is called in question in Mining Claim (*or as the case may be*) No. , recorded in Mining Division in the name of upon the following lands:

The nature of the proceeding is

Dated this day of , 19 .

Mining Commissioner or Mining Recorder.

THE MINING ACT OF ONTARIO.

Form 37. (See sec. 133 (3).)

NOTICE OF APPEAL TO THE MINING COMMISSIONER.

In the Matter of Mining Claim No. (*or as the case may be*) Lot in the Concession, in the Township of (*or as the case may be*) Mining Division.

Take notice that (I) holder of Miner's License No. , hereby appeal to the Mining Commissioner from the decision (*or* act *or* refusal) of the Mining Recorder given (*or* done) on the day of 19 , wherein (*or* by which) he (*state briefly what is appealed against.*)

The grounds of objection to said decision (*or* act *or* refusal) are (*state briefly in what respect and why the decision* (*or* act *or* refusal) *is claimed to be wrong*).

I reside at , and my post office address is

Dated this day of , 19 .

Name of Appellant .....

Address for Service .....

(*This must be a place within 5 miles from the Recorder's Office.*)

To the Mining Recorder of Mining Division.

And to (*names of adverse parties, if any*).

THE MINING ACT OF ONTARIO.

Form 38. (See sec. 136 (4).)

NOTICE OF CLAIM OR DISPUTE.

Take notice that I claim (*or* dispute) (*state the nature of the claim or dispute*) and that the grounds of my claim (*or* dispute)

are the following (*state briefly but clearly the grounds of the claim or dispute*).

I reside at the , and my post office address is

Dated at the day of 19 .

To *C. D.*

A. B.

Note.—If the person giving the notice is not a resident of Ontario, the name, residence and address of some person resident in Ontario, upon whom service may be made, must be given as follows:—

Service may be made upon , who resides at in Ontario, and whose post office address is

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FORM OF APPOINTMENT.

THE MINING ACT OF ONTARIO.

IN THE MATTER OF

Mining Claim (*give number or description of claim or claims involved*).

AND IN THE MATTER OF

The dispute (*or appeal, claim or application, describing it*).

Between:

.....,

Disputant (*or appellant, claimant or applicant*).

and

.....

Respondent.

I HEREBY APPOINT day the day of , 19 , at the hour of o'clock in the noon, at , in the of , in the District (*or* County) of , to hear and determine the above-mentioned matter.

AND ALL PERSONS INTERESTED in the said matter are hereby notified that they are required to be in attendance at the said time and place (either personally or by solicitor) and then and there produce such witnesses and evidence as they may have or desire to present, otherwise my decision may be given in their absence or upon their opponent's own showing.

DATED this day of , 19 .

Mining Commissioner (*or Recorder*).

SCHEDULE OF FEES

(Items of Schedule of Act Relating to Disputes and Proceedings.)

15.	For recording a dispute (See sec. 63)	$10.00
18.	On filing appeal from Recorder's decision. (See sec 133)	10.00
19.	On filing appeal from Commissioner's decision. (See sec. 151)	20.00
27.	For recording an order or judgment of the Mining Commissioner or made on appeal from him. (See sec. 77 (1)	1.00
28.	For recording a certificate that interest in claim or other recorded right or interest is called in question. (See sec. 77 (2))	10.00
35.	For copies or certified copies of any document, paper or record obtained from any officer, per folio	.10
13.	For examining Claim Record Book, per claim. See sec. 8)	.10
14.	For inspecting any document filed with a Mining Recorder. (See sec. 9)	.10

Mining Commissioner's Cases.

(THE COMMISSIONER.)

RE BOYLE AND YOUNG.

License—Priority—Evidence—Forest Reserve.

A mining claim based upon discovery and staking of a person not holding a miner's license is invalid; a Forest Reserve permit does not dispense with the necessity for a license.

Priority among mining claims depends upon priority of discovery and staking, the date of filing being immaterial if all are within the limit allowed by the Act.

In determining the sufficiency of a discovery, inspection by a competent independent person is a safer reliance than evidence of interested parties, or of ordinary expert or opinion witnesses.

Appeal from the Bureau of Mines, acting as Mining Recorder, under The Mines Act, 1906.

A. G. Slaght, for appellant Boyle.

J. M. McNamara, for respondent Young.

1st Sept., 1906.

THE COMMISSIONER.—This is a dispute regarding a piece of property in the Temagami Forest Reserve.

The respondent James E. Young filed application for a mining claim on 22nd June claiming a discovery of valuable mineral to have been made on the property in his behalf on 19th June, 1906, at 3.45 p.m., and claiming that the property was staked and the lines cut and blazed on 20th June. The appellant John J. Boyle filed application on 25th June, claiming discovery on 19th June, 1906, at 3.15 p.m., and claiming that the property had been staked and the lines cut and blazed on 20th June. It will thus appear that both discoveries are claimed to have been made on the same day, that of the appellant however being half an hour prior, and also that the staking and blazing was done by both parties on the same day, the application of the respondent, however, being first filed or deposited with the Bureau of Mines in Toronto, the proper office in that behalf.

Murphy, who claims to have made the discovery and done the staking upon which the application of the respondent

rests, and who also made the affidavit of discovery filed therewith, had a forest reserve permit at the time of such discovery and staking, but did not obtain a miner's license until the day the application was filed and had none at the time of discovery and staking.

As to the discovery, it is vital to each case to determine whether what is claimed to be valuable mineral really meets the requirements of the Act; and there is no question in connection with mining disputes upon which it is more notoriously unsafe to rely upon the statements or opinions of the parties interested or of the ordinary expert or opinion witnesses called in their behalf. Some men fancy a wealth of gold or silver in almost every strange stone or rock they meet; others are careless or reckless in their examination or expressions of opinion and take for granted that what interested parties tell them is true; while, unfortunately, there is no escape from the conclusion that rather a large class deliberately state what they know to be false. With the means available to test the truth as to the real nature of the discovery by view and inspection, and an assay, if necessary, by a competent independent person, I think this is a precaution that should not be omitted in difficult or doubtful cases. (After reviewing the evidence and the report of Inspector Mickle, the decision proceeds.)

Upon the question of discovery the appellant must succeed both as to his discovery being sufficient and as to the repondent's being no discovery of valuable mineral within the meaning of the Act.

But even if both discoveries had been found to be good the appellant would still be entitled to succeed on the ground of priority of discovery, certainly so when his staking was as early as or earlier than the respondent's. I attach no importance to the respondent's priority over the appellant in filing of application—so far at least as mere priority is concerned—both being within the limit allowed by the Act; but applicants are wise always to file promptly after discovery, as undue delay, in addition to leaving opportunity for complications at the recording office by other applications being put in first, may in litigated cases tend to cast doubt upon the alleged date of discovery or upon the bona fides of the claim.

I have come to the conclusion also, after careful consideration, that the fact that Murphy had no miner's license

when he claims to have made the discovery and when he staked the property would in view of secs. 3, 102, 104 and 131 and 132 of the Act, be fatal to the respondent's claim, even if Murphy had really made a discovery answering the requirements of the Statute. I do not think there can be any serious contention that Murphy came within the exception provided by sec. 95.

While I am very fully impressed with the desirability of giving effect to the fullest extent possible to the principles laid down by Mr. Justice Maclennan in the case of *Clark* v. *Docksteader*, 36 S. C. R. at p. 637, that the object of the mining Acts being to promote the discovery of minerals by rewarding the discoverer with the right to become owner of what he discovers, "every reasonable intendment ought to be made to uphold the validity of a claim where there has been actual discovery and an honest attempt to comply with the directions of the Legislature," and while I am loath to allow anything that can be considered a mere technicality to prevail against a claim, I think the sections of the Act above mentioned are absolute in requiring the discoverer to have a miner's license at the time of discovery and staking. Without a miner's license there is under the Act no right to stake or file, for it is only for discoveries and stakings that are made by licensees that this right is given. Furthermore unless the whole licensing system is to be allowed to become a dead letter so far as prospectors and stakers of claims are concerned, these provisions must be strictly enforced. If it were to be declared that a license is not really necessary very few licenses would be taken out or license fees paid.

Some other objections also have been urged against the respondent's claim, but in view of my decision upon the points mentioned it is unnecessary to consider them.

NOTE 1.—In 1906 a Miner's License, previously required in Mining Divisions, was made necessary throughout the Province for prospecting, staking out, acquiring or holding unpatented mining lands. Cf. the very similar requirement of a "Free Miner's Certificate" in British Columbia, and a "Miner's Right" in Australia.

NOTE 2.—In 1907, by c. 13, s. 36, enacting substituted ss. 134 and 135, corresponding to present ss. 55 and 56 (Act of 1908), the law as to the rights and privileges of respective discoverers, and what a discoverer must do to protect his rights, was more definitely fixed. See also cases under "Priority" in Index Digest.

(THE COMMISSIONER.)

RE McDERMOTT AND DREANY.

Discovery—Staking—Staking Promptly—Priority — Abandonment—Appropriating Abandoned Discovery—Evidence.

A mining claim staked out without a discovery of valuable mineral as defined by the Act is invalid.

A discoverer who fails to stake out his claim within proper time, in at least substantial conformity with the Act, abandons or forfeits his rights where another discoverer intervenes with a valid discovery and completes staking before him.

A licensee may probably appropriate to himself a discovery laid open but abandoned by another, but his rights under it must date from the time he sees and appropriates it.

A claimant's unsupported story of discovery need not necessarily be accepted merely because there is no direct evidence to contradict it.

Appeal from the Bureau of Mines, acting as Mining Recorder, under The Mines Act, 1906.

McEwen & Morgan, for appellant.

T. H. Lennox, for respondent.

1st Sept., 1906.

THE COMMISSIONER.—This is a case involving the ownership of the mining rights in a piece of land in the Temagami Forest Reserve known as T. R. 12, containing about 32 acres.

Application for a mining claim was made by the respondent Henry Dreany, on June 15th, 1906, and by the appellant Peter McDermott on June 22nd, 1906.

The Bureau of Mines decided in favor of Mr. Dreany, and from this decision Mr. McDermott now appeals.

The hearing of the appeal, as has been the usual custom in all such mining disputes, was in the nature of a new trial, evidence being adduced *viva voce* and the whole matter investigated as if no former decision had been made.

A considerable mass of evidence was put in by each side, the different stories, in many respects, being exceedingly contradictory, and irreconcilable. Though it would be hard to find a satisfactory explanation for the extraordinary conduct of some of the persons involved, or to feel entire certainty as to where the truth lies regarding all the details of the case, I have no difficulty in reaching a conclusion upon all the essential points, or the points upon which I conceive the decision should rest. . . . .

Of the following facts I have no doubt. First, that Bessey and Russell, on behalf of Dreany, discovered valuable

mineral as they say they did on the 8th of June; that they completed their staking and blazing, in at least substantial compliance with the law, on the 9th; that McDermott planted two incorrectly marked corner posts and blazed a small part of the lines on the 9th, having done nothing in the way of staking or marking, except perhaps to plant a discovery post, before that day; that the Morrisons who claim to have made a discovery on the 6th and whose rights McDermott claims to have acquired, never did anything in the way of staking or blazing for themselves beyond planting a discovery post as they say on the 7th, which upon McDermott's representation that he had a prior right was pulled down and replaced by one for McDermott on the 11th; that the Bessey-Dreany discovery is a sufficient and valid discovery of valuable mineral within the meaning of the Act, being in fact an unusually good one; that the Morrison discovery, so far as the mineral thereat is concerned, is also a discovery of valuable mineral within the meaning of the Act, but that the Morrisons have abandoned any right they might have had to the property, making no transfer to any one else; that both the spot claimed by Bessey to have been the location of McDermott's original discovery and the spot claimed by McDermott to have been its location, are worthless and are not discoveries of valuable mineral within the meaning of the Act; that McDermott pulled down his first discovery post, and by this act and by his application and by his statement at the trial deliberately chose to rely upon the Morrison discovery, which he had not seen or planted any post upon until June 11th, though he marked upon the post that he had discovered it on June 5th; that his statement in his application that he staked and blazed the claim on the 8th and 7th is quite untrue; that no line was ever marked or blazed as required by the Act, from the north-east corner or any other corner of the property to any of McDermott's alleged discoveries, except the Morrison one. I also find from my own examination of the McDermott post at the south-west corner that it had on it in his handwriting the two dates June 9th and June 5th in such a way as to lead me to believe that the date June 5th had been put on it after the other date had been written, though possibly June 9th might be intended to represent the date of the planting of that post and not the date of his discovery.

Upon these facts, without more, I cannot but decide against the appeal, and in favor of allowing the claim to

Dreany. Without mentioning all the matters that might be considered fatal to the appellant's case, I prefer to put the decision shortly upon the following grounds: First, that the appellant altogether failed to satisfy me that he ever, apart from the Morrison discovery, made a discovery of valuable mineral within the meaning of the Act; in fact I am convinced he did not. This of itself, under sec. 117, would be fatal. Secondly, that even if he had made a valid discovery on the 5th of June, as he claims he did, he abandoned or forfeited it by failing within proper time, or in fact at any time, to stake and blaze in substantial conformity with the requirements of the Act, for he did no staking at all of the boundaries until the 9th and no proper staking of them until the 11th, after Dreany had intervened with a proper discovery and staking, and he never at any time blazed or attempted to blaze a line from the corner of the property to this alleged discovery, and in fact filed his application upon another discovery point altogether, and removed the post from this one. The lack of any post and the lack of any blazed line to it, as well as the same general failure to stake the property with reasonable promptness, before any other claimant intervened with a valid discovery and staking, must be fatal to his resting any claim upon a real or alleged discovery of molybdenite made by him on the 7th of June. As to the discovery which he induced the Morrisons to abandon on the 11th, it may be, if they did as they say discover it on the 6th and plant their discovery post on the 7th, that they had by their delay to do anything further until the 11th already forfeited to the intervening valid Bessey-Dreany discovery and staking any rights they may have had; but even if not, they on the 11th abandoned their claim, the post claiming discovery by them, giving place to one claiming discovery by McDermott. Whatever right McDermott took in it he took only as a new discovery made as far as he was concerned on that date—too late, for Bessey had already discovered and staked on behalf of Dreany.

I do not hold that a duly licensed prospector may not appropriate to himself a discovery laid open but abandoned by another. There is at least United States authority for the proposition that he can. But it must date from the time the new discoverer sees and appropriates it.

It was urged by the appellant's counsel that the direct evidence was all in favor of McDermott and that no one was able to swear positively that he did not go on the pro-

perty and make a discovery as he says. Though I think even with such a discovery he would still fail by reason of abandoning it or not following it up as required by the Act, I may say that I cannot accede to the doctrine thus suggested that one man should be able to come forward with a claim to another man's mining property and by swearing to a little earlier discovery thus by mechanical rule dispossess the other merely because no one could directly contradict his story. Such a doctrine would be a very alarming one to any one familiar with the conditions prevailing in these mining regions; nor is much experience required to learn that it is extremely unsafe in these matters to accept a claimant's own description or estimate of his discovery without verification.

Judgment will be ordered dismissing the appeal with costs.

NOTE.—As to the chief points involved in this case see other cases under "Discovery," "Staking," &c., in the Index Digest.

(THE COMMISSIONER.)

RE McDONALD AND THE BEAVER S. C. M. CO.

Discovery—Valuable Mineral—"Probable" — "Workable"—Expert Opinion—Evidence—Reason for Requiring Discovery.

The requirement of "valuable mineral" as defined by s. 2 (22) of The Mines Act, 1906, is not answered by a "moderate" calcite vein having a little copper pyrite, galena, sulphide of iron and zinc blend" disseminated through it, and assaying an oz. of silver, but lacking the metals and indications which usually accompanied silver veins in the district, workable veins there being the exception and not the rule, and the best opinion being that it was most improbable that this vein was capable of being developed into a workable mine. "Probable" in the definition means more likely than not; and "workable" means workable at a profit, and it seems that the discovery should be judged as it stood at the time it is claimed to have been made, with the conditions and surroundings and probabilities as they then were.

Appeal from disallowance and cancellation of a mining claim by the Recorder of the Coleman and Temiskaming Mining Divisions for lack of discovery of valuable mineral.

A. W. Ballantyne, for appellant.

George Ross, for respondents.

15th Sept., 1906.

THE COMMISSIONER.—The case turns upon the question of discovery—whether the appellant really had, as the basis of his application and claim, a discovery of valuable mineral, as is required by secs. 117 and 132 of The Mines Act, 1906.

Valuable mineral is defined by sec. 2 (22) of the Act to mean "a vein, lode or other deposit of mineral or minerals in place, containing such quantities of mineral or minerals . . . as to make it probable that the said vein, lode or deposit is capable of being developed into a workable mine."

Though I am of opinion that the discovery should be judged as it stood on the date on which it is claimed to have been made, or at least as it was up to 31st May when a very valuable discovery by another licensee appears to have intervened—with all the conditions, surroundings and probabilities as they then existed—there is I think no need in this case to distinguish what was to be seen at the shaft at the different dates, as I would reach the conclusion I have come to regarding the merits of the discovery no matter what part of the shaft is considered.

The points especially urged on behalf of the appellant were that he had a vein of very good width for the district; that it was mineralized, having small quantities of copper and galena and a small assay of silver; that calcite, some of which was found in the vein, is the filling most commonly found in this district in rich veins of ore; that it is impossible to tell with any degree of certainty what may be found in other parts of the vein; and that though the assay of silver—probably less than an ounce to the ton—is so trifling as to be wholly worthless for economic purposes, there are instances in this mining camp where a vein almost barren or very poor in silver at one point has shown phenomenally rich silver values in other parts not far distant. These facts he sought to supplement with expert opinion of the probability of finding something good in this vein or the justifiability of a miner spending money upon it.

Against these contentions is the fact, admitted by some of the appellant's witnesses and well known to everyone who has been over the mining properties or has any knowledge of the district, that not every calcite vein that is found, but only a small proportion of them, contains anything of value

as a mining proposition; that the vein in question in this case is not as a vein a strong one, two witnesses saying that they would not call it a vein at all, and Inspector Mickle calling it a moderate one; that as to filling it was only partly calcite and the calcite was broken and mixed up and showed indications of pinching out, and that except the very small assay of silver it had nothing in it to recommend it; that though instances have occurred where a calcite vein has suddenly changed from comparatively small silver values to enormously large ones, these are the exception and not at all the rule, and that in veins where this exception occurred, smaltite, the usual associate and indicator of silver in this region, continued to be present in the poor parts of the vein, though the rich silver values were lacking. In addition to these facts there is the opinion evidence of the respondent's experts and of Professor Mickle, the Official Inspector of discoveries, that it is not probable that the discovery in question is capable of being developed into a workable mine, all of them in substance declaring that such a thing is most improbable.

In regard to expert evidence generally, as I have before had occasion to remark, the ordinary expert opinion produced in the interest of one or the other of the parties to a dispute of this kind is of all expert or opinion testimony probably the least to be relied on. Even in accepting statements of fact regarding the description or character of a discovery extreme caution is necessary, as too many investors in worthless mining propositions, as well as adjudicators of mining claims, have good reason to know. This case has the usual contradictions. But at best the opinion evidence submitted on behalf of the appellant, even as it stands, is far from being strong. Some of the witnesses stated that they considered it a valuable discovery or thought there was a probability or more than an even chance of finding pay ore, but seemed unable to give any satisfactory ground for such an opinion, but on the contrary showed by their admissions in other parts of their evidence that experience was against it. The most that could fairly be drawn from their evidence was that they would be willing to expend some money to see if there was anything there—Mr. Gillespie, the appellant's partner admitting that he would not be disposed to spend a great amount of money on it. Mr. Magee who seemed a candid and careful witness said

that it would be only a chance that it would get richer further down. Even upon the evidence of the appellant's witnesses alone I think it would be hard to hold that there is a discovery within the requirements of the Act.

Some doubt was expressed by one or two of the witnesses as to their ability to understand the meaning of the definition of "valuable mineral" contained in the statute, sec. 2 (22) which I have already quoted. The question of valuable discovery has under most jurisdictions been a very difficult one to deal with where properties are valuable by reason of their mere proximity to rich mines or by reason of a valuable discovery, as in this case, having been made by some one else on the same claim. Enforcement of the principle of valuable discovery, however, seems necessary if the blanketing of rich areas is to be avoided; and though it is usual to give the benefit of the doubt to the prospector, some reasonably stringent requirement must be adopted if the policy of the Act is to be carried out and the honest and deserving prospector protected. A perfect or entirely satisfactory description of what should be accepted as a discovery of valuable mineral is hard or impossible to frame; but I think the meaning of the present definition is reasonably clear, particularly if the object and design of the Act in exacting discovery as the condition upon which a mining claim can be acquired, be borne in mind. It is the object and policy of the Act to encourage the opening up and development of our mineral resources by reserving for the *bona fide* discoverer of valuable mineral, as the reward of his labors, the right to acquire mining claims in the property upon which he makes the discovery. And it should be remembered that it is for use in working as a mine, and not for the purpose of gold-bricking a confiding public who may be induced to invest in a useless hole, that mining claims are granted at all; and the claimant's discovery on a piece of land is supposed to be the evidence of the fitness or probable fitness or usefulness of that piece of land for mining purposes.

A vein, lode or other deposit "capable of being developed into a workable mine," then, must be one, upon which, by reason of the kind, quantity and form of occurrence of the ore or minerals which it contains, mining could be commenced and carried on at a profit,—something which, after

development or testing, will be found to be good enough and extensive enough to work as a paying mine.

I do not mean for a moment to say that to constitute a discovery ore or mineral of such a description must be in actual view, nor indeed that it must be in actual existence in the vein or deposit. All that the Act asks is that there must be enough in sight to make it probable that there is ore or mineral of such a description there. More likely that it is there than that it is not, will meet the requirements of the statute; more than an even chance, as one of the witnesses put it, of developing something good enough to work as a business proposition, I think, would do, if the opinion of more than an even chance were well grounded. Not only certainty that it is there, but any shade of probability between certainty and an even chance, I take it, would be sufficient.

Submitting the appellant's alleged discovery to this test, it is to be noted first, that there is no pretence that in this district anything but silver could at all be hoped for in paying quantities in such a vein. There is nothing in the evidence to show that the small amounts of copper pyrite and galena or the little sulphide of iron or zinc blende found disseminated through it are any indication of finding richness in silver,—as a fact the evidence, especially that of Professor Mickle, is quite to the contrary. The silver shown in the assays is too trifling to be of any material significance, a couple of ounces to the ton being admitted to be quite common here in unworked veins. Only a small proportion of the veins in the region are valuable enough to work. The facts proved regarding this one quite fail to take it out of the ordinary class or show any probability of value in it.

Amongst the witnesses who expressed opinions formed from their personal examination of the alleged discovery, I was favorably impressed with Mr. Tretheway and Mr. Evans, who have expressed themselves decidedly against the probability of there being anything of value; and the estimate of Professor Mickle, who made three different examinations of the discovery, that it is most improbable that it is capable of being developed into a workable mine, coming from a perfectly independent and exceedingly competent authority, could not fail to have great weight, if I had considered the matter doubtful upon the other evidence, which I do not.

I think the discovery claimed falls distinctly short of what is required by the Act.

As to the smaltite that was found some 92 feet westerly from the discovery post, I think that should not be considered in the case. No claim is made upon it in the appellant's application, and it was not found until another valuable discovery had intervened, and I am satisfied also from the evidence that it was not in the McDonald vein, but in a cross-vein connected with the other discoverer's workings.

Some objections were taken to the appellant's staking and it was pointed out that the date of staking was not filled in in his application, but as the question of discovery is conclusive, these points need not now be considered.

NOTE.—The definition of valuable mineral (now s. 2 (x) Act of 1908) was amended in 1907, making it more clear that the discovery is to be judged as it appeared at the time it is claimed to have been made, and adopting "workable at a profit" as the interpretation of "workable" though moderating it perhaps a little by prefixing to it the words "likely to be."

The definition may be regarded as a stringent one, but it is believed that too loose a definition practically nullifies or destroys the benefit of the requirement of discovery. The Act gives a prospector the right, while following up "indications," to protect a limited area by prospecting pickets (s. 56 Act of 1908), and where expensive explorations are necessary resort may be had to a Working Permit (s. 94, Act of 1908).

A discussion of the question of discovery and a comparison of our present law with our former law and with the law of British Columbia and the United States will be found in the following extract from one of the writer's reports as Special Commissioner on mining disputes in 1905:—

"To determine theoretically what constitutes a "discovery of valuable ore or mineral" within the meaning of this provision (R. S. O. 1897, c. 36, s. 28) is a matter of some difficulty.

There is little authority to be found in our Ontario, or in Canadian or English Courts. British Columbia, which has been the most fruitful field of mining controversy in Canada, has had the words "valuable deposit of mineral" considered in its Courts. One Judge thought the word "valuable" in that phrase meant "little more than capable of being valued," and not the same as "costly," while Mr. Justice Drake interpreted it to mean "of sufficient value to induce the miner to expend capital and labor in development" (1 Martin's Mining Cases, 184-190). The Legislature of that province shortly afterwards enacted a statutory definition defining "valuable deposit of mineral" to mean "mineral in place in appreciable quantity having a present or prospective value sufficient to justify exploration."

The United States reports and text books, unlike our own, furnish abundance of authority and discussion upon the question of "discovery." The United States Statutes however do not use the expression "discovery of valuable ore or mineral." After declaring that valuable mineral deposits in lands belonging to the United States shall be open to location, their Act goes on to specify the size and form of the location, and provides that no location of a mining claim shall be made until "discovery of a vein or lode." The word "valuable" is thus not used in the same direct and immediate connection and relation with the words "discovery of mineral" that it is in our Act, and the word "ore" is not used in their Statute in that connection at all. Unfortunately, too, United States decisions and opinions sometimes vary widely, as they themselves confess. (*See Clark, Helt-*

man and Consaul's Mineral Law Digest, 474.) But much instructive discussion and suggestion can be found in United States mining authorities, and upon many of the most important principles of mining law they are all practically in accord. Reference might be made to *Lindley on Mines* (2nd ed.), ss. 335 and 336; *Morrison's Mining Rights* (11th ed.), 33 and 194; *Mineral Law Digest—Clark, Heltman and Consaul*, 9, 11 and 12, 32, 33, and 410; Judge De Witte's summing up of judicial opinion upon the word "valuable," 28 Pac. Rep., 319, 334; and *Words and Phrases Judicially Defined* (U.S. 1904), 2094.

I quote from these what appear to me to be some of the most useful principles and suggestions they afford:—

"The object of the law is manifestly to encourage the exploration of the public domain and stimulate the development of its mineral resources, reserving the reward of enjoyment to him who first makes a bona fide discovery; the tendency of the United States Courts is toward a liberal construction, as best effectuating this object.

"The provision that no location shall be made until after the discovery of a vein or deposit is evidently intended to prevent the appropriation of presumed mineral ground for speculative purposes to the exclusion of bona fide prospectors, before sufficient work has been done to determine whether a vein or deposit really exists.

"Pay ore need not necessarily be exposed; but mineral must actually be discovered, and the evidence must show that a person of ordinary prudence would be justified in a further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

"The law will not distinguish between different kinds or classes of ore if they have appreciable value in the metal for which the location was made.

"The Statute is satisfied by the discovery of mineral deposits of such value as to at least justify the exploration of the lode in expectation of finding ore sufficiently valuable to work.

"But the liberality of construction must be exercised within reasonable and common sense limits. A mere guess or conjecture or even a hope of finding something valuable is not sufficient; an expectation is something more than a hope.

"The question can not be left to the arbitrary will of the locator. The merits of the discovery must be judged by the standard of men who have knowledge and experience in such matters.

"Land should not be allowed to be taken up because mineral of trifling account is found, the real value of the land being on account of its proximity to other lands valuable for mineral.

"Each case must be judged upon its own merits, nature and surroundings, and with special reference to the formation and peculiar characteristics of the particular district in which the discovery is found.

"While the Court may be unable to define with sufficient accuracy for all purposes what is necessary to constitute a discovery it may have no difficulty in discriminating between the genuine and the counterfeit, the real and the sham."

There are two extremes which it is desirable if possible to avoid, too strict a rule on the one hand which would discourage or rather fail to encourage prospecting and development of our mineral resources, and too loose a rule, on the other, which would enable the land to be tied up by speculators who desire to possess it not because of any value in the alleged discovery, or because anyone would be likely to work or develop it at that point, but merely by reason that its proximity to valuable mines gives it a present or prospective value which they hope to turn to account.

"Having financial worth" seems to me to be the meaning which is appropriate and applicable to the phrase "valuable ore or mineral" as used in our statute.

If the word "valuable" is to be given its proper force and effect, the kind and quantity—the preciousness and extensiveness—of the ore or mineral that is found or that may reasonably be expected to be led to from what is found, and also the state in which it occurs or

may be expected to occur, must be pertinent to the question of discovery of valuable ore or mineral, as all these are elements or factors going to constitute the value of what is found. A little iron scattered through a rock or vein is of no financial worth, while the same amount of gold or a larger mass of the iron might be valuable. Ore or mineral, or the valuable element of it, may be so sparsely disseminated through other material or so mixed or combined with other matter that the substance discovered is of no value. Common clay, or granite, or ordinary sea water, is not a discovery of valuable metal merely because aluminum or sodium is contained in it and may, at large cost, be extracted from it. It is the crude material that is the discovery, not the extracted product. That it contains an ingredient of a valuable kind is not enough, unless the substance as a whole is valuable because of containing it. The considerations mentioned are vital to the merits of the discovery from a miner's point of view, and it is from the standpoint of a practical miner that the matter should be regarded. Traces or scattered particles of what would, if available in sufficient quantity, be valuable ore or mineral, are of general occurrence through large tracts of country, and exist and may be in sight in vast numbers of places where no sensible miner would dream of establishing a mine. It is for mining that the land is intended, and the discovery is expected to show its usefulness for this purpose, as well as being something worthy of reward to the discoverer.

Though ore or mineral that can be mined at a profit need not be in view, the discovery must be such that a man of knowledge and experience would reasonably expect to find something there good enough to work."

(THE COMMISSIONER.)

RE MCBEAN AND GREEN.

Working Permit—Time—Imperative or Directory.

Section 141 (13) of the Mines Act, 1906, requiring an applicant for a Working Permit to procure it within 70 days after the staking out is imperative and not merely directory, and unless complied with strictly, so far at least as the things required to be done by the applicant are concerned, the application would be void.

Appeal from refusal of Recorder to cancel or dismiss application for Working Permit.

H. D. Graham, for appellant.

George Ross, for respondent.

27th Oct., 1906.

THE COMMISSIONER:—The appellant McBean is the owner of the surface rights in the property in question, the mining rights of which are reserved to and still in the Crown.

The respondent Green is an applicant under sec. 141 of The Mines Act, 1906, for what is called a Working Permit or in other words the exclusive possession of the property

for the purpose of prospecting it with a view to discovering valuable mineral. Mr. Green filed his application with the Mining Recorder on 2nd June, 1906, and appears to have properly staked the land and complied with all the provisions of the Act prescribed in respect of such applications except as to the two matters which I am about to mention.

Section 142 of the Act provides that: "Where the surface rights of any land have been patented, sold, leased or located, and the mines, minerals or mining rights thereof have been reserved to the Crown, no working permit shall be issued unless and until the applicant therefor has filed evidence to the satisfaction of the Mining Recorder that he has arranged with the owner of the surface rights for compensation for injury or damage thereto, or, failing such arrangement, that such compensation has been ascertained and paid or secured in manner provided in section 119 hereof," and sub-sec. 13 of sec. 141 lays down as part of the proceeding by which the applicant may obtain the exclusive possession above-mentioned the following: "By procuring from the said Mining Recorder after 60 days from the staking out of the area and within 70 days therefrom a working permit in form number 8 in the Appendix hereto."

Green failed to get the compensation arranged and consequently failed to procure the working permit within the 70 days.

It was argued on his behalf that the 70 day limit in sub-sec. 13 above quoted is only directory and not imperative, but I do not see how I can accede to this contention without in affect repealing the provision or reading the words "within 70 days" entirely out of the Act. The 70 day limit was doubtless prescribed for the purpose of preventing the indefinite keeping afoot of such applications. If an applicant desires the exclusive privileges of a Working Permit he ought to proceed promptly. Seventy days should be ample time within which to arrange or obtain determination of the amount of compensation to be paid the surface owner. The applicant in this case delayed for two months longer.

I think the provision of sub-sec. 13 must be complied with strictly, so far at least as is within the control of the applicant or as the things required to be done by him are concerned, and at all events two months is an entirely unreasonable delay.

The application for Working Permit has lapsed and become void and should be cancelled.

NOTE.—Amendment excusing delay in certain specified cases was made in 1907, and is now embodied in s. 94 (2) of the Act of 1908.

(THE COMMISSIONER.)

RE WOODWARD AND CARLETON.

Appeal from Recorder—Service of Notice—Registered Letter—Proof of Service.

A post office certificate of registration of a letter to respondent, assumed to contain notice of an appeal from the Recorder, which the respondent denied he received is not sufficient to establish service of such notice under sec. 75 of The Mines Act, 1906.

Appeal from Recorder. Objection that appeal not validly launched.

H. D. Graham, for appellant.

J. D. McMurrich, for respondent.

The respondent by affidavit denied receiving any notice of the appeal, and counsel for appellant admitted that the only service made was by registered letter and the only proof of service he had was a post office certificate of registration of letter.

31st Oct., 1906.

THE COMMISSIONER:—Upon this matter coming before me several objections were taken against the appeal, among them the objection that the respondent was not duly served with notice of the appeal pursuant to sec. 75 of The Mines Act, 1906. The only proof of service was the production of a post office certificate of registration of a letter (assumed to contain the notice) addressed to the respondent at Kenora, Ontario, which the respondent denied he ever received. In the absence of an order for substitutional service I think the above is not sufficient service under the section. It is therefore unnecessary to consider other objections to the appeal and there will be an order for dismissal.

(THE COMMISSIONER.)

RE CONNELL AND WELLS.

Agreement for Sale—Time—Statute of Frauds—Tender of Conveyance—Time of Essence.

Failure to specify a time for completion is not fatal to a written agreement for sale of an interest in a mining claim, a reasonable time being in that case inferred.

Where there is absolute refusal to carry out a contract of sale tender of conveyance is excused.

Proceedings under sec. 9 (d) of The Mines Act, 1906, to enforce an agreement for sale of an interest in an unpatented mining claim.

W. A. Sadler, for plaintiff.

H. D. Graham, for defendant.

22nd Nov., 1906.

THE COMMISSIONER:—This is a suit for specific performance brought upon an agreement signed by the defendant in the following words:—

"Cobalt, May 30, 1906.

"Received from F. M. Connell of Spencerville the sum of one hundred and twenty-five dollars ($125.00) by check on Union Bank of Haileybury, being part payment (full payment $450.00) for one-tenth interest or share in the mining claim situate northeast ¼ of north half of lot 5, concession 6, Township of Harris, Nipissing district.

"I hereby guarantee proper title to the one-tenth interest in the property above mentioned.

J. WALTER WELLS."

The agreement specifies no time for completion of the contract or payment of the balance of the money. The $125 mentioned in the agreement was actually paid, the defendant receiving the money by cashing the cheque.

The plaintiff and the defendant differ in their evidence as to what was said as to the time for payment of the rest of the purchase money; the plaintiff saying that he told the defendant he would have it for him about the 1st of August and that he might pay him some of it sooner; the defendant saying he told the plaintiff that he wanted the cash and that he gave the plaintiff a week to pay the balance.

If it could be definitely found upon the evidence that the parties did actually agree upon a specified time for completion, this not being put in the writing, objection might be taken that the Statute of Frauds would prevent enforcement as the writing would not in that case represent the actual contract, that is to say, the agreement would not really be in writing as required by the statute: *Green* v. *Stevenson*, 9 O. L. R. 671.

I do not gather from the evidence, however, that any agreement as to time was really entered into or intended to be entered into verbally, but rather that the writing as it stands represents the entire actual bargain of the parties, whatever may have been the negotiations before the delivery of the writing and handing over of the cheque or whatever may have been the remarks made subsequently as to completing payment.

Taking the writing then as it stands as being all the agreement that was really entered into, the first question is, is it defective or non-enforceable by reason of not specifying a time for completion? The authorities seem to be clear to the contrary. They hold that such an agreement must be interpreted to mean a reasonable time, that is, reasonable in the particular circumstances of the case (*Dart on Vendors and Purchasers* (7th Ed.), 500; *Simpson* v. *Hughes* (1897), L. J. Ch. 334; *Gray* v. *Smith* (1889), 43 Ch. D. 208, 214, 215).

That being the legal position of the parties on the handing over of the cheque and the delivery of the receipt agreement, how does their subsequent conduct affect the situation?

Again they differ in their statement of what occurred. Both admit, however, that they met on the train on 18th June (being a little less than 3 weeks after the agreement was made) and that conversation took place between them about the title or boundaries of the property, and about making payment on the purchase money. Defendant says he asked for the whole balance, and when plaintiff could not or would not give it to him he told him the contract was off. Plaintiff says defendant merely asked him for money and that he was going to give him some, but they had not time to get off the train to get it, and that defendant did not on this occasion declare the deal off.

They met again on 18th or 20th July. There was talk then about payment of the balance, but it is admitted by both parties that defendant then refused to carry out the bargain. The plaintiff and his solicitor (who was present on that occasion) swear they offered him, or told him he could have, the rest of the money at once. The defendant swears the plaintiff wanted to give him a note or other security or promise to pay it. I think the true explanation probably is that both these things happened and that when the first offer was unavailing the plaintiff then said he would give the cash. The defendant at all events absolutely refused to complete the deal.

On 2nd August an actual legal tender of the balance was made to the defendant and by him flatly refused, no conveyance, however, being tendered or spoken of. The present suit was then commenced.

The two questions that remain to be considered are: was the defendant by the above events discharged from performance of the contract, and was the failure of the plaintiff and his solicitor to tender a conveyance before the suit was commenced fatal to his right to succeed in the suit.

Though the contract is of a kind, being in regard to property of a speculative or uncertain nature, where time if fixed might, and I think should be considered of the essence of the agreement, and though great care should assuredly be exercised that in such a contract the purchaser is not allowed at his caprice to carry out or not carry out the purchase according as it might develop into a profitable or unprofitable bargain (see *Smith* v. *Hughes,* 5 O. L. R. 238), I think considering everything the circumstances here are not such as to dissolve the contract or forfeit the plaintiff's right to enforcement. The reasonable time must, indeed, have been pretty well exhausted when the parties broke off friendly intercourse, but the defendant has never, as I think he should in the circumstances have done, given the plaintiff explicit notice that if the latter did not pay the balance and complete the bargain by a certain future day named (being of course a reasonable length of notice, but in this case certainly not necessarily a very long one) the defendant would hold the contract entirely dissolved and the plaintiff's rights forfeited; *Dart on Vendors and Purchasers,* (7th Ed.), 502, (citing *Taylor* v. *Brown,* 2 Beav. 180, *Wood* v. *Machu,* 5 Hare 158); *O'Keefe* v. *Taylor,* 2 Gr. 95. Had a specific day

for completion been named the case might be different. Furthermore the defendant has kept and not paid back the deposit, though he says he does not claim to be entitled to keep it and that the defendant could have had it if he had asked for it.

As to the non-tender of conveyance, no doubt it is the duty of the purchaser to prepare, and generally speaking, to tender it for execution before action; otherwise a plea of defence that the defendant has always been ready and willing to convey but no conveyance was tendered for execution, would be a good plea: *Bullen & Leake Precedents of Pleading* (6th Ed.) 283, 770; (noting *Poole* v. *Hill*, 6 M. & W. 835; *Stephens* v. *De Medina*, 4 Q. B. 422); *Mooney* v. *Prevost*, 20 Gr. 418; *Armour on Titles* (3rd Ed.), 28. Here there is no plea that the defendant was ready and willing to convey, but on the contrary there is throughout a flat-footed repudiation of all liability on the contract and of all obligation to convey. The tender of a conveyance in this case (though no doubt it would have been wiser upon the part of the solicitor to have actually tendered one) would have been useless as the defendant utterly repudiated the contract; in effect refusing execution when he refused the money, and I think tender of a conveyance was excused. It would be a very narrow and technical ground of decision to hold otherwise, and I do not think on the authorities I am bound to do so or would be justified in doing so: *McDougall* v. *Hall*, 13 O. R. 166; *Hunter* v. *Daniel*, 4 Hare 420, 433; *Am. & Eng. Encyc.*, vol. 26, 117.

I think, therefore, there should be the usual judgment for specific performance, declaring that the plaintiff is entitled to the one tenth interest claimed, and ordering that the defendant do convey upon payment of the balance of the purchase money less costs, or that in default the plaintiff may at his option have a vesting order.

NOTE.—The form of procedure for cases of this kind has been remodelled. See ss. 123, 136 of the Act of 1908.

(THE COMMISSIONER.)

RE McBEAN AND SALMON.

Compensation for Surface Rights.

Compensation for injury to surface rights under sec. 119 of The Mines Act, 1906, should be reasonably liberal.

Application under sec. 119 of the Mines Act, 1906, to fix compensation for injury or damages to the surface rights of S.E. ¼ of S. ½, lot 7, concession 6, in the township of Bucke, containing 40 acres.

A. G. Slaght, for McBean (holder of mining claim).

H. D. Graham, for Salmon (locatee of surface rights).

8th Dec., 1906.

THE COMMISSIONER.—This is an application made to me under sec. 119 of The Mines Act, 1906, to fix the amount of compensation which should be paid to the locatee of the surface rights for injury or damage to the surface rights caused or which may be caused by the applicant and his assigns in the exercise of the mining rights in the forty acre piece of land for which the applicant is applying for a patent, it being necessary to settle with the owner or locatee of the surface rights before the patent of the mining rights will be granted.

I think in such cases the compensation to be allowed should be a reasonably liberal one, giving the surface owner the benefit of the doubt, on principles somewhat analogous to those laid down as the guide in cases of expropriation of lands for railway or other purposes, care being taken, however, to protect the miner from exorbitant or extortionate demands.

Upon the evidence and circumstances presented in this case, I think $500 would be a proper compensation, and I fix the amount at that sum, the same to be paid in cash prior to the issue of patent of the mining rights.

NOTE.—The principle of the decision would apply to the present Act (1908), s. 104, though the section has been amended in some other respects.

Beyond providing (ss. 34, 35 of 1908) that the miner may prospect for minerals and stake out, acquire and work mining claims upon lands of which the surface rights have been acquired by other persons, but the ores, mines and minerals (or "mining rights" as they are called) reserved to the Crown, and providing (s. 104) that the miner must compensate the owner (etc.), of the surface rights for

"all injury or damage" that may result, our statute does not define the respective rights of miner and surface owner in such cases. It was probably contemplated that the miner should have a pretty free hand to carry on all reasonable mining operations, and that the surface owner should get pretty full compensation for the injury he may sustain thereby, but the principles of the general law applicable to such cases of co-existing rights must probably be resorted to. See *Conlagas Mines, Ltd.*, v. *Town of Cobalt*, 13 O. W. R. 333, 1 O. W. N. 625, 15 O. W. R. 761; *Bainbridge on Mines* (5th ed.), 360, 396.

For other questions arising under s. 119 see notes to *Re Francey & McBean* and *Re Dodge & Darke, post.*

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

13 O. L. R. 650; 9 O. W. R. 367.

RE PETRAKOS.

Appeal from Recorder—Notice of—"Adversely Interested"—Subsequent Applicant.

In an appeal from cancellation of a mining claim by the Recorder a subsequent applicant for the same property is a party "adversely interested" under sec. 75 of The Mines Act, 1906, and if not duly served with notice of the appeal the appeal must be dismissed.

Appeal from Recorder's cancellation of appellant's mining claim for lack of discovery of valuable mineral.

F. A. Day, for appellant Petrakos.

J. McKay, for the Coleman Development Co., Ltd., and *A. G. Slaght*, for Burdick, take objection to appeal on the ground that their clients who had subsequent applications for mining claims upon the property and who therefore, as they claimed, were parties adversely interested, had not been served with notice of the appeal as required by sec. 75 of The Mines Act, 1906. The section in question is quoted in the judgment of Mr. Justice Britton, *infra*.

12th Dec., 1906.

THE COMMISSIONER.—It appears from admissions of counsel and the evidence adduced that the appellant Samuel Petrakos filed his application at the Haileybury recording office on 11th June, 1906. The Coleman Development Company, Limited, filed a subsequent application on 20th June, 1906. The inspector, upon inspecting the two alleged discoveries, found and reported the Coleman Development Company, Limited, as having a *bona fide* discovery within the

Act, but reported that Petrakos had not a *bona fide* discovery within the Act. Upon the report being made to the Recorder, he cancelled the Petrakos claim, recording the cancellation in his books on 22nd October, 1906. About 1st October a branch office for the Coleman Division was established at Cobalt, and the cancellation seems also to have been entered on the Cobalt record book as of the same date. A Certificate of Record was issued to the said company on 25th October, 1906, and on November 26th a ruling was made by the department in their favour for the issue of a patent.

Petrakos on 5th November filed a notice of appeal at the Haileybury recording office and mailed a registered letter to the Assistant Recorder who had charge of the Cobalt recording office, containing a copy of the notice of appeal, which reached the Cobalt office 8th November. No notice of appeal was served upon the company. The only thing in the nature of service at all that was made upon them was the dispatch of my appointment for hearing to them by registered letter on 4th December.

Counsel for the company and for the assignee object that the filing of the appeal at the Cobalt office was too late, and also that failure to serve the company within the 15 days or at all was fatal to the appeal.

Mr. Day contends that the company, though they have an application filed and would apparently be entitled to the property upon the failure of the Petrakos claim, are nevertheless not adverse parties within the meaning of sec. 75 of the Act, and contends further that sec. 75 does not require service to be made upon adverse parties within 15 days, but that the 15 day limit applies only to filing the appeal with the Recorder.

I think service must be made within 15 days on other applicants who have applied for the same property and I think failure to do that, or obtain extension of time, is fatal to the appeal. It does not seem to me reasonable to go on with proceedings and try a case like this involving the ownership of the claim and not notify the other parties who would own the property but for the appeal. It does not seem fair or just that that should be done, and I do not think the Act contemplated such a thing. The appeal must be ruled out on the ground stated. No costs, objection to the appeal not having been taken till the parties were in attendance with their witnesses.

From this decision Petrakos appealed to the Divisional Court. The appeal was argued 21st February, and judgment delivered 28th February, 1907.

J. M. Ferguson, for the appellant.

J. M. Douglas, K.C., for the Coleman Development Co.

F. McCarthy, for F. M. Burdock.

BRITTON, J.—I agree that this appeal must be dismissed.

Under sec. 75 of The Mines Act, 1906, 6 Edw. VII. ch. 11 (O.), "no appeal . . . from the decision of a Mining Recorder, to the Mining Commissioner, shall be allowed after the expiration of 15 days from the record of such decision by a Mining Recorder in the books of his office, unless within that time the time for appeal is extended by the Mining Commissioner, and thereafter not after the time limited by the Mining Commissioner therefor. . . Notice of appeal shall be given by filing a copy thereof in the office of the Mining Recorder and serving a copy thereof upon all parties adversely interested."

The Coleman Development Co. and F. M. Burdock were persons adversely interested within the meaning of that section.

They were not served with a copy of the notice of appeal within the time prescribed, so the decision of the Mining Commissioner disallowing the appeal to him was warranted by and was within the express wording of the section cited.

It appears that these persons interested adversely to the appellant were represented by counsel at the time appointed for hearing of the appeal, and took the objection that no notice had been served within the time prescribed.

It would, in my opinion, be a very reasonable thing to give to the Mining Commissioner, in cases where notice of appeal has been given by filing within the time mentioned, power to extend the time for service upon persons adversely interested. Cases may arise—possibly the one in hand is such a case—where the power, if it existed, might be wisely exercised, so that a decision of a Mining Recorder could be reviewed on its merits by the Mining Commissioner.

FALCONBRIDGE, C.J., concurred.

RIDDELL, J.—The appellant, Petrakos, alleges that on 28th May, 1906, he discovered valuable mineral upon cer-

tain property staked on 9th June, and filed his application 11th June, 1906; the Coleman Development Co. allege a discovery on 13th June, 1906, staked on the 16th June, and filed application 20th June.

The Mining Recorder decided against Petrakos' application, and he, being minded to appeal to the Mining Commissioner, filed a notice of appeal under secs. 74 and 75 of The Mines Act, 1906, in the office of the Mining Recorder, but omitted to serve the Coleman Development Co. or Burdock (who claims by way of assignment from that company).

The Mining Commissioner held that the appeal was not properly launched by reason of the failure to serve these; and Petrakos now appeals to the Divisional Court under the provisions of sec. 30 of The Mines Act, 1906.

Before the Mining Commissioner there seem to have been two points urged by Petrakos: (1) that there is no necessity for serving notice of appeal upon parties adversely interested within 15 days; and (2) that the Coleman Development Co. and Burdock are not "parties adversely interested."

The first was not urged before us, as indeed it could not well be in view of the express words of sec. 75 and of the cases. *Christopher* v. *Croil*, 16 Q. B. D. 66; *Re Shaw & St. Thomas*, 18 P. R. 454.

But it was argued that persons who have filed an application upon the same property as the applicant are not "parties adversely interested," although it is admitted that if the application of the appellant should be allowed, that of the other parties filing applications must necessarily be disallowed, while if the application of the appellant be disallowed, the application of one or other of these will probably be allowed. I am unable to conceive of parties more vitally interested than persons in the position of filing applications, only one of which can be allowed, and counsel before us was not able to give instances of any person to whom the description "party adversely interested," would apply against whom the same arguments would not be effective as against the parties here.

I think the Commissioner was entirely right and that the appeal should be dismissed with costs.

NOTE.—This decision will apply to present s. 133 (Act of 1908), but by amendment made in 1907, as Mr. Justice Britton suggested the Commissioner now has further power of extending the time in certain cases.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

10 O. W. R. 31.

RE ISA MINING CO. AND FRANCEY.

Working Permit—Application for—Lands Open—Adverse Claim.

A Working Permit application based on staking done while stakings and applications for mining claims and another staking and application for a Working Permit existed upon the property—the applicant being by reason of these unable to show by affidavit as required by the Act that he had no knowledge of any adverse claim, the affidavit in fact showing that he had such knowledge though it stated that in his belief the adverse claimants had no bona fide discovery of valuable mineral—was held invalid, under s. 141 of The Mines Act, 1906.

Proceedings to have an application of the Isa Mining Co. for a working permit declared invalid and cancelled, the complainant, W. B. Francey, having a staking and application for a mining claim upon the same lands.

F. A. Day, for Francey.

J. Lorn McDougall, for the Isa Mining Co.

Evidence upon the merits was put in by both parties. The facts are stated in the decision.

18th Dec., 1906.

THE COMMISSIONER.—The matter in question is the validity of an application for Working Permit filed on behalf of the Isa Mining Company, Limited, on the 5th day of October, 1906.

At the time the Working Permit application was staked for and filed, there were standing upon the same property a mining claim application filed by one Dow, another mining claim application filed by the present complainant, William B. Francey, and an application for Working Permit filed by Kyle A. White. There is no evidence of the validity or invalidity of the said two mining claims. The complainant contends that by reason of these prior claims and applications, as well as by reason of a number of other objections urged, that the Isa Mining Company application for Working Permit is invalid and should be so declared and that it should be cancelled and removed from the files.

The affidavit of the company's agent made pursuant to sub-sec. 11 of sec. 141 of The Mines Act, 1906, which accompanies the Working Permit application in question, contains the following exception from the statement that the applicant had no knowledge of any adverse claim, namely, "except certain adverse claimants including White application for Working Permit, who in my belief have no *bona fide* discovery of mineral thereon." Said sub-sec. 11 and Form 6 referred to therein provide for no exceptions. I think, therefore, that it was not intended by the Act that property should be staked or filed upon for Working Permit while other claims exist upon it, and I think that the application in question must, therefore, be declared invalid. It will be unnecessary to consider the other objections made by the complainant, of which there are a large number. It may be pointed out, however, that the affidavit does not show that the land at the time of its being staked out was not in occupation or possession of or being prospected for minerals by any other licensee, and strange to say, Form 6 provided in the Act makes no reference to these matters.

In the argument of counsel upon the case, objection was taken on behalf of the company that no appeal from the Mining Recorder lay to me in the matter by reason of sec 149 of the Act, and by reason of the fact that the Recorder had at the expiration of the 60 days filled out and signed a form of Working Permit upon the application in question. The Recorder gave evidence, and stated that he had not granted the permit, that he had made it out and signed it, but did not intend to grant or deliver it for the reason that there were some adverse claims, and he was not clear as to whether the applicant was entitled to the permit, these being in fact the very adverse claims above referred to, and he being in doubt evidently upon the very matters of objection to the permit which are raised in the present proceedings before me. The Recorder stated further that the reason he made the permit out was, as he explained to the company's agent, that the company might not be shut out by the seventy day limit in case it should be decided that they were otherwise entitled to the permit. I think, therefore, that the company can not be considered the holder of a working permit within the meaning of sec. 149. Objection was also taken by the company that no appeal lay to me because the Recorder had merely given a verbal refusal to cancel the

permit, and that he had no formal hearing of the dispute. It seems clear, however, that he did this that the matter might be brought before me to be fully dealt with on such evidence as might be presented; and at all events sec. 52 seems to me wide enough to permit me to deal with the case directly, and if any amendment of the form of proceedings should be necessary I allow such amendment.

Order made declaring that the working permit application of the Isa Mining Co. is invalid and should be cancelled, with costs fixed at $20.

From this decision and order the company appealed to the Divisional Court.

G. T. Blackstock, K.C., and *G. H. Sedgewick*, for the Isa Mining Company.

J. M. Ferguson, for W. B. Francey.

The judgment of the Court (MEREDITH, C.J., MAGEE, J., CLUTE, J.), was delivered on 20th May, 1907.

MEREDITH, C.J.—I agree with the Mining Commissioner that the conditions prescribed by sec. 141 (11) of The Mines Act were not complied with by the company, and that their application was therefore, invalid, and should not have been received by the Mining Recorder. Clause 11 requires that the application shall be supported by evidence that the applicant has no knowledge and had never heard of any adverse claim by reason of prior discovery or otherwise. This evidence is to be furnished by the affidavit of the applicant: Form 6.

The affidavit which accompanied the application was not in accordance with the requirements of the enactment, and not only did not negative the matters required to be negatived, but showed that there were adverse claims, and the knowledge of the applicant of the existence of them.

I am of opinion, however, that the Mining Commissioner had not jurisdiction to make the order complained of. I do not find such a jurisdiction conferred on him by any provision of the Act. Sec. 52, upon which the Commissioner relies, has, in my opinion, no application, because the appellate jurisdiction conferred by the section is with refer-

ence to a matter upon which the Mining Recorder has adjudicated, and there was no adjudication by him as to the validity of the application, even if the Recorder had had any judicial function to perform in reference to the filing of the application or its remaining on the files, which I think he had not.

I would allow the appeal and reverse the order appealed from, but would not give costs to either party.

NOTE 1.—Though s. 141, now s. 94 (Act of 1908), has been recast and considerably altered, the principle of this decision would appear still to be applicable in so far at least that no exception can be permitted from what the Act requires to be sworn to, and to exist, as to the lands being open. The Act has been changed much in wording and somewhat in substance, the requirements as to working permits and as to mining claims being now similar to each other. The Act of 1906, as to mining claims, besides being different from the present law both in substance and in wording was different from it also in that its form of affidavit allowed exceptions—or, in other words, only required the applicant to mention all the adverse claims of which he was aware. For a consideration of the provisions of the Act of 1906, as to mining claim applications, see *Munro* v. *Smith*, 8 O. W. R. 452; 10 O. W. R., 97, especially at 102.

For the present law on the subject generally see ss. 34, 35, 59 (3), 94 (1) (b), and cases under "*Lands Open*" in Index Digest.

NOTE 2.—As to jurisdiction or powers of the Commissioner, the Act has been entirely recast, present s. 123 (b) of the Act of 1908 now leaving no room for doubt. With much deference it is submitted, however, that the ruling of the Divisional Court upon the point is a highly technical if not an erroneous one. Section 52 provided that "Every Mining Recorder as to the Mining Division for which he is appointed and the Mining Commissioner shall have power . . . . . to settle all difficulties, matters or questions between licensees which may arise under this Act." It did not, as the ruling assumed it did, confer any appellate jurisdiction at all (the latter was conferred by s. 74), and so far as the Act gave direct or original jurisdiction or power to anyone to deal with the matter in question in this case it gave it both to the Commissioner and to the Recorder by the words quoted, and these words seem to cover just such a matter. If the ground of the ruling is that the proceeding was launched as, and called an appeal, it is to be pointed out that the hearing proceeded, evidence by both parties was adduced, and the matter dealt with throughout upon the merits, and ss. 9, 11, 21 and 35 gave the Commissioner very wide powers of regulating, amending and expediting proceedings "so as to do complete justice between the parties," and the decision affirms that justice was done.

On this phase of the case see now s. 155 of the present Act (1908), providing that proceedings before the Commissioner or a Recorder are not to be invalidated for defects where no substantial wrong or injustice has been done.

(THE COMMISSIONER.)

RE FRANCEY AND McBEAN.

Compensation for Surface Rights—Application to Fix—Negotiation First—Land not Defined.

Under ss. 119 and 142 of The Mines Act, 1906, which provided that "failing arrangement" between the miner and the surface owner as to compensation for injury to the surface rights, or in case they "are unable to agree" upon the amount or the manner of paying or securing it, application might be made to the Commissioner, it was held that a bona fide and reasonable approach of the other party for a settlement must be made before the matter can be dealt with by the Commissioner, though no very formal or exhaustive negotiations would be necessary.

Application by W. B. Francey, applicant for a Working Permit, to have compensation for injury and damages to surface rights fixed pursuant to secs. 142 and 119 of The Mines Act, 1906.

F. A. Day, for Francey.

A. G. Slaght, for D. D. McBean, and the Argentite Cobalt Co., owners of the surface rights, objects that no attempt has been made to reach an agreement, and that there is uncertainty as to the land involved.

18th Dec., 1906.

THE COMMISSIONER.—Objection was taken at the outset of the proceedings that the matter was not ripe for this proceeding, and that it was not properly before me because no attempt had been made to reach an arrangement, and it therefore could not be said that the parties had failed to make an arrangement or that they were unable to agree as mentioned in secs. 142 and 119 of the Act, and that in fact the parcel of land really to be taken was not identified or defined, the forty acre parcel mentioned in the application including as well as the railway right of way and public road, land occupied by a dwelling house, stable, store, wharf and other particulars of property which it is admitted were not open to prospecting or mining operations under the Act or permitted to be taken for a working permit, and that therefore there could not possibly have been any proper attempt at an arrangement, and that there could not in any event be any proper proceedings to fix compensation until

that for which the compensation was to be allowed was ascertained and defined.

Evidence was submitted by the appellant that at a time some months prior to his staking and filing for the present working permit a letter was written to the surface rights owner regarding compensation for operations under another claim owned by Kyle A. White, now acting as agent for the present appellant in regard to the same property, and that the surface owner had demanded an extortionate amount for past damages as the condition of his negotiating upon the matter of compensation at all.

I think the Act clearly contemplates that some attempt at an amicable arrangement of the question of compensation shall be made before either party resorts to the compulsory proceedings provided for by sec. 119, and though the letter written by the surface owner to the other mining claimant must be characterized as a very unreasonable one, and a very insulting and improper letter, sufficient, no doubt, to induce the belief in anyone seeing it that a settlement with such a man would be hard to make, I think, nevertheless, that this applicant, when his claim arose some months later, was under obligation as provided in secs. 142 and 119 to approach the owner of the surface rights and see if there was any hope of reaching an agreement; the owner had never refused the present applicant an arrangement, and a change might well have taken place in his attitude since the former letter was written. No very formal or exhaustive efforts at negotiations are, I apprehend, necessary, but a *bona fide* and reasonable approach of the other party for a settlement should, I think, be made.

As this burden was not met in the present case, and as the land for which compensation was desired to be fixed was not defined, I hold that I can not proceed to make any determination on the question of compensation as asked by the applicant.

NOTE.—See *Bassett* v. *Clarke Standard M. & D. Co.*, 18 O. L. R. at 40, 45, 48, in effect supporting this decision.

The wording of the section, now s. 104, (Act of 1908), has been changed, "are unable to agree" being replaced by "in default of agreement," which seems to make the burden of the applicant lighter.

(THE COMMISSIONER.)

RE HAIGHT & THOMPSON AND HARRISON.

Discovery—License—Lands Open—Staking—Mistake—Substantial Compliance.

Discovery of valuable mineral must precede staking out of a mining claim, or the claim will be invalid.
The discovery must be made by a licensee.
While an unexpired and unabandoned valid staking out of a mining claim exists upon a piece of land no right can be acquired thereon by another licensee staking out another claim.
Putting a wrong license number on the posts by mistake will not invalidate the staking out of a mining claim.

Appeal from Recorder.

F. A. Day, for appellants, Haight and Thompson.

F. G. Evans, for respondent, Harrison.

The facts are stated in the decision.

19th Dec., 1906.

THE COMMISSIONER.—The question in issue is the validity of the staking and recording of mining claim number 2318 by the respondent Thomas W. Harrison. The appellants, Haight and Thompson, ask to have the application and record of said claim declared void and cancelled.

The property is situated in unsurveyed territory on the shore of Larder Lake, in the District of Nipissing, being reached by a journey of some 20 miles from the railway station at Hyslop.

The Harrison application is dated and filed 13th November, 1906, claiming discovery to have been made by Harrison at 3 p.m. 6th November, 1906, and staking to have been done 7th November, 1906. The witnesses however give the date of staking as 6th November.

The same property was staked by the appellant Thompson on or about 4th October, with the assistance of Haight and one Watts who had no license, a discovery according to the evidence having first been made by them. Thompson came to the Recorder at Haileybury to have the claim filed, but for some reason the application was not completed. He left it with Haight to file but Haight was unable to get it recorded by reason of its not having been properly signed

and sworn by Thompson. Meanwhile the time for recording was elapsing, and Haight went up again to the property and restaked it on 21st October. Returning to Haileybury, another attempt was made to file, but there was difficulty about the license number, Mr. Thompson having, contrary to the provisions of the Act, taken out a second license in the same year, and it was this license number that had been used in the staking. The result was that the Recorder objected to recording with this erroneous license number.

On 13th November Harrison filed his application—there being then no other application on record—claiming to have staked on 6th or 7th November. Haight and Thompson, having heard of the Harrison application, and being in doubt as to whether Harrison had really been up to the property or staked it at all as alleged, again visited the property on 20th November, and Haight and his associates, failing as they say to find any sign of staking by Harrison or any other staking except their own, again restaked, and on their return presented an application to the Recorder which he refused to file by reason of the Harrison application being then upon record. The present proceedings were thereupon instituted for the purpose of having the Harrison claim removed and declared invalid.

Nearly two days were consumed in taking the evidence, the examinations and cross-examinations of some of the witnesses proceeding to great length in an endeavor to show that Harrison and Diggle, who claim to have made the trip together and to have been on the property on the 6th or 7th November, were not really there at all at that time, or at all events that no staking of the property was ever done by them and Watts, as they claim. (The evidence is here reviewed.)

If driven to make a finding of fact regarding the staking I would have to find against the respondent. A man who admittedly swore to one discovery and staking in which he took no part has himself to blame if he is not believed when he swears to another.

But as I view it there are other matters which render such a finding unnecessary. According to the evidence of Harrison and Diggle it clearly appears that at the time they staked, or allege they staked, the claim in question, they had made no discovery on the property but commenced their

operations by proceeding to fix the corner stakes and run the boundary lines, and after this had been done and only then did they look for a discovery. It is true, of course, that the Thompson discovery was already in existence, but they did not plant their post upon this or endeavor to appropriate it, even if they had the right to do so, but planted their discovery post at another point some ten chains distant. Watts, of course, had assisted in making the Thompson discovery and claims also to have before seen or visited the place where the Harrison discovery post is alleged to have been planted, but Watts was not a licensee and no claim whatever can in any way be derived from any knowledge he may have had or any discovery he may have made, at least not unless and until it had been discovered as seen by a licensee entitled to appropriate it. The provisions of sec. 132 of the Mines Act are to my mind absolutely conclusive that no right or title could be acquired by Harrison in the way he declares he proceeded to take up this claim. Discovery must first be made upon the property before there is any right to plant a single post or run a single line for the staking out of a mining claim.

I feel compelled to find also upon the evidence that on 6th and 7th November there existed a valid staking on behalf of Thompson and Haight, made on 21st October, which at the time of the alleged Harrison staking had not lapsed or been in any way abandoned, twenty days being the time allowed by the Act for recording a claim situated at the distance from the Recorder's office that this claim is, and the twenty days being on the 6th and 7th November still unexpired. The only defect of the 21st October staking was that Thompson's second license number instead of his first license number had been put upon the posts, and that is a defect which in the circumstances of this case I think may well be considered cured by the saving clause of sec. 137 of the Act. While there existed unexpired and unabandoned a valid staking based upon a *bona fide* discovery of valuable mineral no right could be acquired by any other licensee staking the same property.

There will therefore be judgment declaring the respondent's application and staking invalid, and that the record of his claim should be cancelled, with costs to the appellants.

An appeal from this decision to the Divisional Court was heard, Meredith, C.J., McMahon, J., and Anglin, J., and dismissed 11th March, 1907. Not reported.

NOTE.—This case arose under The Mines Act, 1906, but the decision is equally applicable to the present Act.

(THE COMMISSIONER.)

RE THOMPSON AND HARRISON.

Application for Mining Claim—Mistake in Date.

An application for a mining claim is not invalidated by a mistake in giving the date of discovery and staking, at least where the mistake is explained by the circumstances and no one is misled or prejudiced thereby.

Appeal from Recorder.

F. A. Day, for appellant Thompson.

F. G. Evans, for respondents Harrison and Watts.

19th Dec., 1906.

THE COMMISSIONER.—This is a matter connected with and involving largely the same questions as the appeal against the Harrison claim in which I have just given judgment. The additional points arising herein are merely such as go to the status and form of the Thompson application.

Objections were taken by respondent's counsel to the dates of discovery and restaking mentioned in the application and to the discrepancy between the application and the affidavit as to the date of discovery, but I do not think that these objections are vital, and they are explained by the circumstances. The dates 12th and 13th October mentioned in the application appear to be a mistake but from 4th October forward a discovery to the benefit of which Thompson was entitled existed and no person else could acquire any rights in the property or be prejudiced by the mistake, and at all events the statement that the property was restaked on 20th November, and the affidavit stating the correct date of rediscovery sufficiently correct any misapprehension that might otherwise arise.

The discovery was first made at Mr. Thompson's expense and unless there is reason to the contrary he should be allowed the claim. I see no sufficient reason to deprive him of it and there will therefore be judgment in his favour accordingly.

(THE COMMISSIONER.)

RE BAMBERGER AND SINCLAIR ET AL.

Adjournment—Delay.

Proceedings in mining cases should be promptly disposed of, and where the appellant had sufficient notice and could have been ready, adjournment was refused and the appeal dismissed.

Appeal from Recorder.

A. G. Slaght, for appellant, Bamberger.

George Ross, for respondents, Sinclair and others.

Upon the matter coming on for hearing pursuant to appointment the appellant was not ready with his evidence and asked an adjournment. The respondents objected, their Counsel stating that they had sold the property and had proceedings in progress to enforce the sale. It was decided to take the evidence of the respondents' witnesses who were present. This was done and on appellant's request an adjournment was made until the next afternoon, when upon the matter again coming up evidence of the appellant's agent was put in and the appellant asked a further adjournment. The respondents objected even upon terms of payment of costs.

Adjournment was refused and the appeal was dismissed with costs on the evidence already in, the Commissioner stating his reasons for refusal as follows:

25th Feb., 1907.

THE COMMISSIONER.—I refuse any further adjournment. The solicitors who filed the appeal received my letter with an appointment to them some three weeks prior to the date fixed for the hearing, and it appears that even from the time Mr. Klingensmith, who claims to have acted through-

out as agent for the appellant in the matter, received notice, as he says, of the date, there was sufficient time to obtain an examination of the alleged discovery and have evidence of its merits presented at the adjourned hearing, had the appellant or his agent or solicitors chosen to have this done. There is also a further consideration which is always to be borne in mind in such cases, that appeals of this kind are frequently kept on foot by appellants, merely for the purpose of delay, or in the hope of obtaining settlement or payment of money from the other side as the price of withdrawal of the appeal. The appellant in this case has shown no disposition to bring the appeal to a hearing and I think was not entitled even to the adjournment that has already been granted to him.

NOTE.—See present s. 137 (3) of the Act (1908). Cf. British Columbia cases: "Speedy finality of litigation and quieting of title with all due celerity are the dominant policy of the Mineral Act": *In re American Boy Mineral Claim*: 1 Martin's M. C. 304, 7 B. C. 268. "The rules as to time governing ordinary cases are to be more stringently applied in mining cases"; *Kilbourne* v. *McGuigan*, 1 Martin's M. C. 142: 5 B. C. 233. "It is to the interest of the litigants and the public that mining cases should be quickly determined." *Kinney* v. *Harris*, 1 Martin's M. C. 137: 5 B. C. 229.

(THE COMMISSIONER.)

HUNTER ET AL. v. BUCKNALL ET AL.

Agreement for Sale—Option—Duplicates Different—Misunderstanding Hardship—Time of Essence—Uncertainty—Statute of Frauds—Estoppel—Specific Performance—Damages.

Where an agreement or option for sale of two mining claims differed from what the defendants understood and intended, and had interlined in it a vital alteration which was not in the supposed duplicate furnished by the plaintiffs and which would make the bargain a very unfair and improvident one, specific performance was refused.

Held also that as the real terms of the contract in other respects were not in writing the Statute of Frauds would apply, and even if part performance would take it out of the statute as regards a claim for specific performance it would not do so as regards a claim for damages.

In agreements for sale of mining property time is of the essence of the contract.

Action to enforce an agreement or option for sale of mining claims, transferred from the High Court to the Commissioner. The facts are stated in the decision.

T. H. Lennox and W. A. Sadler, for plaintiffs.

W. D. McPherson, for defendants Bucknalls.

H. D. Graham and A. Mills, for defendant Mitchell.

1st April, 1907.

THE COMMISSIONER.—This is an action in the High Court of Justice transferred to me by order of the Master in Chambers upon consent of the parties, for trial and disposition under the terms of The Mines Act, 1906.

The plaintiffs' claim is for specific performance of an agreement between themselves and the defendants, the Bucknalls, regarding two mining claims subsequently sold by the Bucknalls to the defendant Mitchell; and the plaintiffs also ask damages and other incidental relief for breach of the agreement and interference with their rights thereunder.

The defendants claim that the agreement in question was merely an option that had expired, and the defendant Mitchell further sets up that at the time of his purchase he was unaware of any rights of the plaintiffs. . . .

The agreement was drawn up by Mr. White, acting, he says, as solicitor for all parties. It was read over to, or gone over with, the parties, and it would appear that a number of interlineations were then made. It was getting late at night, the Bucknalls insisted on driving home (some 11 miles) and it was arranged that all parties should sign the one copy of the agreement that was prepared, and that Mr. White should make out a duplicate and have the plaintiffs sign it later and would forward it to the Bucknalls next day. This was accordingly done.

The Bucknalls a few days afterwards received by mail what purported to be a duplicate of the agreement, signed by the plaintiffs, (Exhibit 7). This bears evidence of having been carefully and deliberately written out. The original or first copy signed by all the parties (Exhibit 2) bears evidence of being more roughly done, having been prepared more or less hurriedly, and has a number of corrections or interlineations, among them one upon which a great part of the contention in the case turned, namely, the interlineation of the words "or such successful development" in clause 5 after the words "within 90 days from the date hereof," which specify the time within which the right of purchase may be exercised. The words "or such successful development" do not appear at all in Exhibit 7. . . . .

The two copies of the agreement are, as to the contents of them, identical except as to the words in question. After reciting that the parties of the First Part (the Bucknalls)

are owners of or entitled to the mining claims mentioned, that they claim to have discovered valuable minerals thereon, and that they require capital to develop and operate the same, and that the parties of the Second Part (Marsh and Hunter) have agreed to supply such capital, the agreement states that the parties thereto mutually covenant and agree with each other as follows:—

"1st. The parties of the second part agree to supply all the funds necessary to develop and operate the mines above mentioned, and to commence work thereon within 30 days of the date hereof."

"2nd. The parties of the first part agree to give their time to such work of development, and to commence work within 30 days at the agreed wages of $2.00 per day, each."

"3rd. The parties of the second part agree to furnish the necessary or required amount of explosives and other tools, over and above what the parties of the first part now have, in the working of the mines."

"4th. The said Marsh will direct and have control of the said work, and of the expenditures necessary to a full and complete trial of development of the said mines, and of the amount necessary to be expended in that behalf."

"5th. That in the event of the mine developing successfully and in paying quantities, the said parties of the second part may, within 90 days from the date hereof *(or such successful development)*, purchase the same for the sum of $25,000 in cash, to be paid in sums and in the time then to be agreed on, and if they retain the said mines then they shall give to the said parties of the first part $25,000 in stock in the company to be formed, or in the event of a sale prior thereto they may pay for the said stock in cash at par, namely, $25,000.

"6th. That the said parties of the second part shall have the authority to sell the said mines, and in such event the parties of the first part shall transfer and give title to the purchaser or purchasers upon paying the sums above provided for."

"In witness, etc."

The Bucknalls say that the words "or such successful development" were not read over to them, and that had they at all understood that the agreement was to be as the plaintiffs now claim it to be they would never have signed or entered into it. They say also that they did not understand that the plaintiffs were to have any right to purchase the $25,000 stock at par, but that the plaintiffs represented to them that this stock would be worth perhaps 3 or 4 times its par value and that in that way they would probably receive the $100,000 that they had been asking for the property.

The Bucknalls, pursuant to the agreement, under the directions of the plaintiffs commenced development work on the property in the latter part of March and worked more

or less continuously until 23rd July, reporting, it seems, to the plaintiffs from time to time, the plaintiffs making at least a few visits to the property during this time. There was already upon the property when they entered into the agreement on March 2nd what might be considered a very good showing of cobalt ore, which besides being itself of value, if in sufficient quantities, is in the region regarded as probably the best indicator of the likelihood of finding good silver values. The cobalt showing appears to have somewhat increased in the development work, but no silver values of any consequence appear to have been found. On the 5th of June, a few days after the 90 day option, if it be an option, would have expired, Mr. White and the plaintiff Marsh paid a visit to the Bucknalls. The parties differ as to the conversation that occurred, but at all events at that visit an extension of time for 60 days from 5th June was endorsed on the duplicate agreement (Exhibit 7) and signed by the Bucknalls. Bucknalls say Marsh and White requested the extension and wanted it for 90 days, but that they wanted the plaintiffs to at once take over the property, and that it was finally agreed to extend the option for 60 days. Marsh and White, however, say that it was the Bucknalls who desired the extension, and that Mr. White told them that an extension was unnecessary, and Mr. White says he merely wrote the extension to humor the whim of the old man Bucknall. It does not seem clear whether Mr. White got another copy of the extension signed or took away a copy with him. He, however, on his return to Cobalt made an entry in his diary under the date June 5th of "drawing amendments to Bucknall agreement re extension, etc."

Again on the 29th July, shortly before the 60 day extension would expire, Mr. White and the plaintiff Hunter were at the Bucknalls' place (this time, according to the statements of Mr. White and Mr. Hunter, on a pleasure trip) and before leaving, the question of extension was again discussed between the parties, and again they disagree as to the substance of what occurred. It is undisputed, however, that Mr. White did write out another extension upon a piece of paper, and that the Bucknalls did not sign it. Something was said about having it signed and mailed to Mr. White, the Bucknalls saying Mr. White and the plaintiff requested them to do so, and the latter saying the extension was again

written out to please the Bucknalls, but it was never signed or mailed.

On 10th August—the Bucknalls in the meantime having taken legal advice as to the effect of the agreement—notice was given to the plaintiffs on behalf of the Bucknalls by their solicitor that the agreement was at an end.

Meantime negotiations sprang up between the Bucknalls and the defendant Mitchell, which resulted on 25th August in the making of an agreement between them for an outright sale and purchase for $60,000 cash and $60,000 in stock of a company to be capitalized at $1,000,000—the payments, however, to be spread over a considerable time and to be small at first.

Exhibit 2 was not up to that time but was subsequently put upon record. Exhibit 7 was produced to Mitchell by the Bucknalls and that was all that he had reason to know or suspect to be against the property. If the case turned upon the question, I think the plaintiffs should now be estopped from setting up as against Mitchell that the agreement was something different from what Exhibit 7 contains.

Turning to the other issues. While I find it difficult to satisfy myself as to the exact facts regarding certain details of the case, I feel no hesitation upon consideration of the whole evidence and in the light of undisputed facts and circumstances, in reaching the conclusion that the Bucknalls never understood or intended that under the agreement of 2nd March the plaintiffs should have any right in the property for longer than 90 days from that date, and I am satisfied that they would never have entered into or signed an agreement of the kind the plaintiffs are now contending for had they known it. Giving the plaintiffs without any cash payment such extensive control for an indefinite time over property with mining prospects as promising as those of the property in question (or in fact of any mining claim with a discovery of valuable mineral which had been passed by the Government Inspector, upon it, as was the case with this one) and tying it up as the plaintiffs contend this property was tied up—leaving it to the pleasure or caprice of the plaintiffs for an indefinite time and 90 days after to say whether they would take the property at all—one side being bound and the other not (for neither Exhibit 2 or Exhibit 7 at all binds the plaintiffs to take it in any contingency unless

they see fit)—I consider a very one-sided, unfair and improvident agreement, and one such as I think no sensible owner would feel disposed to make. I think a solicitor really having in his care the protection of his client's interests would not have allowed the Bucknalls to sign such a document as Exhibit 2, certainly not without very explicit warning, if its contents were and are as contended for by the plaintiffs. The way in which the unusual and extraordinary nature of the interlined clause (designed to tie up the property to the plaintiffs for 90 days after "successful development") strikes anyone familiar with these matters is well illustrated by the circumstance that it aroused the Mining Recorder's attention and surprise as he tells us in his evidence, when he was looking over the copy of Exhibit 2 which had been filed in his office. The circumstance that the plaintiffs may upon a liberal construction of the document be considered to be bound to expend a not inconsiderable sum of money in testing or developing the property cannot in a case of this kind be regarded as of very material moment as the amount is really insignificant compared with the value of the property and the possibilities of profit involved. Few operators or investors in the Cobalt region have ever had an opportunity to explore under such favorable conditions.

It is clear to me also that it was not agreed between the Bucknalls and the plaintiffs that the latter were to be entitled if they chose, to take over the $25,000 stock at par. And generally I may say that the Bucknalls' version of the facts of the case, especially if the surrounding circumstances are considered, struck me as being in the main the more correct and probable of the two sides.

As to the construction of the agreement, and the effect of the interlined words, and as to its defects and the objections to its enforcement, very full argument was submitted by counsel. Long lists of authorities were cited which I have examined, but it would I think serve no useful purpose to discuss these in detail. The findings which I have above set forth are sufficient I think upon which to determine the case. I think the plaintiffs are not entitled to specific performance, nor as I view it are they entitled in any way to damages.

I think any agreement that was really entered into ended absolutely with the expiry of the 60 days' extension

signed on the 5th of June. If there was any doubt about this the failure to proceed promptly after receiving the notice of 10th August would dispose of it. In any agreement of the kind relating to mining property of such a nature, time must be regarded as of the essence of the contract; and even if it were not I think the plaintiffs' laches would disentitle them to specific performance.

It was also pointed out that there is uncertainty in the price (no capitalization of the proposed company having been fixed) and of time (no time for the payment of the $25,000 being provided by the agreement, the agreement stating that the time was to be agreed upon, which it has not been) and that the agreement is incomplete, and that to enforce it would be a hardship. And finding, as I do, that the writing does not really represent the agreement of the parties, I think it follows that there is no writing to satisfy the Statute of Frauds, and even if part performance would take the case out of the Statute as regards a claim for specific performance it would not do so as regards a claim for damages.

The action will therefore be dismised and the defendants should be paid their costs of the proceedings.

Application to the Divisional Court for leave to appeal was refused (FALCONBRIDGE, C.J., RIDDELL, J., ANGLIN, J.); May 30, 1907.

NOTE.—As to transfers of actions or proceedings from the High Court to the Commissioner, see now ss. 128, 129 of the Act of 1908.

(THE COMMISSIONER.)

RE DODGE AND DARKE.

Compensation for Surface Rights.

In fixing compensation under the Act for injury to surface rights by reason of a mining claim upon the same lands, any enhanced or prospective value the property has because of its being likely to come into demand for building purposes, should be considered.
The surface owner should be given the benefit of the doubt as to the extent to which mining operations will likely interfere with the surface.
The compensation must be fixed once for all.

Proceedings to fix compensation for injury and damages to surface rights by reason of a mining claim upon the same lands.

George Ross, for the miner Henry A. Dodge.

J. Lorn McDougall, for the surface owner John C. Darke.

3rd April, 1907.

THE COMMISSIONER.—Evidence was submitted on behalf of each party which differed widely in estimate of the amount of damages and compensation which should be allowed.

The land consists of a 40 acre block or thereabout, through which run diagonally the T. & N. O. Railway and the Government road between Haileybury and Cobalt. The amount of land left after deducting that taken by the roads is approximately 34 acres. It is situated about 1¼ miles north of Cobalt station and about ½ mile from the north limit of Cobalt town site.

Mr. Darke's whole farm or block consists of about 170 acres, the clearing and buildings being on the opposite side from the piece in question.

It is clear from the evidence that the bulk of this 34 acres is pretty good, some of it excellent, land for farming or garden purposes. This part, however, is not yet cleared but is said to have some fairly valuable timber on it.

There is also running through about the centre of the block in question an excellent spring, and it is admitted

and is beyond question, that part at least of the land that is under consideration has a value for building purposes by reason of its surroundings, and by reason of its proximity to Cobalt.

Estimates as to what this building value is vary all the way from $100 for the whole 34 acres as stated by one of the witnesses for Dodge, up to $100 an acre, or over, as stated by two of the witnesses for Mr. Darke. The truth is no doubt that it is a matter which no one can estimate with any degree of accuracy; but the fact to my mind is beyond all doubt that such a building value exists, and that Mr. Darke must be allowed a substantial sum in consideration of it. I have no question that the value of the property is much larger now than it would have been a year ago.

Only one witness, Mr. Shaw, a Surveyor, would undertake to place a value upon the property on behalf of Mr. Dodge. Mr. Whitely, Mr. Dodge's other witness, who was assessor for the Township of Bucke in 1906, said he could not undertake to value the property now. On the other hand, Mr. Ernest P. Rowell, Real Estate Agent, of Cobalt, and Mr. Robert H. Brown, of Cobalt, say that the value is not less than $100 an acre, and that the existence of mining rights on it would practically destroy the whole value for building purposes, as the chief attraction for persons likely to desire to purchase it would be to have it free from the annoyance of mining rights which they say is coming to be recognized as a great nuisance at Cobalt. And it seems that this is the nearest block of land to Cobalt where the title to the surface rights could be obtained.

The question as to what amount to fix compensation at, therefore is an extremely difficult one. Mr. Darke is doubtless entitled to any enhanced or prospective value the land may have by reason of the demand for it for building purposes. It was sworn by himself, and by another witness that he had been offered about a year ago, $11,000 for the whole farm, but the agreement was cancelled and probably too much weight should not be attached to this offer.

Just what damage the exercise of the mining rights may do is also problematical, but no doubt the miner will practically have the right to destroy almost the whole surface should the property develop great richness. And while it is extremely improbable that anything like that will happen,

still I think the owner in all cases of such a kind should, according to the usual principle of law, be given the benefit of the doubt.

It seems really unfortunate that the miner should have to pay a sum as large as I think compensation in this case should be, if he never does more than investigate the property and perhaps work two or three years in one or two parts of it. If it were of any benefit to the miner in this case I think the proper course would be to fix a sum which he should pay now for all damages prior to the issue of the patent, and a further sum which he should pay at the issue of the patent. But the miner evidently desires to get the patent at once and there seems no other course but to fix a lump sum once for all for whatever the full damages may be estimated to be.

If the land were only to be regarded as useful for agricultural purposes, I would estimate the damage at about $15 an acre, but I am satisfied there is a building value for which the owner should be allowed. No one can say what this may be, but nevertheless the owner is entitled to have it allowed for at such a figure as seems reasonable. $100 as estimated by one of Mr. Dodge's witnesses is altogether too inconsiderable. The other witnesses would make it something over $3,000.

I think upon what appeared before me I could not put the total amount which should be allowed Mr. Darke at less than $2,000 and I accordingly fix and award that sum.

NOTE.—There would seem to be no difference as to the principles upon which the amount of compensation should be fixed, between R. S. O. 1897, c. 36, s. 42, The Mines Act, 1906, s. 119, and the present Mining Act of Ontario (1908), s. 104. In 1907, and again in 1908, amendments were made, however, with a view to the better enforcing of payment of the compensation by making it a lien upon the mining rights and by giving the Commissioner power to prohibit operations until payment was made or security given, and it was also provided by the Act of 1907, that a prospector should be liable for material injury done by him though no claim was staked out; and by the Act of 1908, that any licensee, though not the staker of a claim, who carries on mining operations upon the land, should be liable for injury or damage caused thereby. The latter amendment met, in part at least, the defect afterwards shown by *Bassett* v. *Clarke Standard M. & D. Co.*, 18 O. L. R. 38, to exist in the Act of 1906. In that case it was held that it was against the licensee who staked out the claim and not against any transferee that compensation was claimable.

The importance of the question of compensation and of the question of conflict of surface and mining rights generally is growing less in Ontario by reason of the amendments (8 Edw. VII., cc. 16 & 17) made in 1908, to The Public Lands Act and The Free Grants and Homesteads Act, by which (among other things) all reservations of

minerals, the property of the Crown, in lands theretofore patented under those Acts were, except where such minerals had been staked out, recorded, leased or granted under any Mining Act or regulation, rescinded and made void and the minerals vested in the surface owner. This and the other provisions of these amendments show a general policy of in future avoiding as far as possible conflict between surface and mining rights in the same lands.

(THE COMMISSIONER.)

DARBY ET AL. V. MACGREGOR.

Sale and Purchase—Title to Mining Claims—Doubtful or Defective Title—Waiver—Tendering Payment.

The ordinary principles of law regarding the matter of title should be applied as far as possible to the sale and purchase of unpatented mining claims, but the purchaser must be taken to know that the title is not absolute until the issue of a patent and that there can be no assurance, especially before issue of Certificate of Record, that adverse claims may not be set up.

The mere fact that a claim has been put forward by a third party, or that notice of such a claim has been sent to the Recorder, is not a valid objection to the title, in the absence of anything to show that what was threatened was more than idle litigation.

It requires clear proof to establish waiver by a purchaser of the right to object to the title.

Though the purchaser might by his conduct have been estopped from objecting to the title, negotiations with him by the vendor afterwards looking to the removal of objections will reopen the question.

Producing the amount of a payment to the trustee holding the transfers in escrow, with a demand that the title be fixed up, where there was failure to respond to a request for unconditional payment or to show continued readiness and willingness to pay, cannot be relied upon as a good tender of the purchase money.

Proceedings upon a contract for sale and purchase of mining claims, the purchaser resisting enforcement of the contract on the ground of defective or doubtful title. The facts are stated in the decision.

W. D. McPherson and Mahaffy for the plaintiffs, Henry F. Darby and William Darby.

W. M. Douglas, K.C., for defendant, James Patrick MacGregor.

3rd July, 1907.

THE COMMISSIONER.—The plaintiffs' claim is upon a contract for the sale and purchase of three unpatented mining claims and a three-fourths interest in four other unpatented mining claims, all in the Temagami Forest Reserve.

The original agreement was entered into under seal at Cobalt on 19th November, 1906. After reciting that the vendors are the registered owners of the three mining claims and of a three-fourths interest in each of the other four mining claims thereinafter mentioned and that the vendors had agreed to sell and the vendee had agreed to purchase the same for the price and upon the terms thereinafter set forth, the agreement witnesses that each party covenants and agrees with the other as follows:

1. That the vendee agrees to purchase the said mining claims and pay therefor the sum of $60,000, payable $2,500 on the signing of the agreement, $7,500 on the signing of transfers, and the balance of $50,000, in equal sums in two, four and six months.

2. That the vendors agree to execute forthwith proper transfers of the said mining claims to some Trust Company at Toronto to be agreed on, who will hold the same in trust to be delivered to the vendee as soon as all the payments above provided for are fully completed.

The vendor was to be entitled to take possession of and operate the said mines until default in payment; and time was to be understood to be of the essence of the agreement.

There is no express provision of any kind regarding title.

Two days after the execution of the above-mentioned agreement another document, also under seal, dated November 21st, was executed by the parties at the office of the vendee and his law partners in Toronto. By this supplementary agreement it was acknowledged that the sum of $6,000 in all had then been paid upon the purchase under the former agreement, and it was provided that $4,000 more should be paid as soon as one of the purchased claims (known as the niccolite claim) the staking or recording of which appears to have been in some way defective, should be properly recorded, "and upon proper transfers of title to the Trusts and Guarantee Company, Limited, of the City of Toronto, of the three claims, H.F. 24, H.F. 25 and T.R. 188, and of a three-quarter interest in the other four mining locations described in the agreement dated 19th November, 1906, in trust to be conveyed by the said Trust Company to the said James Patrick MacGregor (the defendant) as soon as all the payments under the said agreement dated 19th November, 1906, are fully completed." And it was thereby further agreed that the balance of $50,000 over and above the sum of $4,000 should be paid in two equal sums of $25,000 each on the 1st day of April and the 1st

day of June, 1907, instead of in three equal sums in two, four and six months, as provided in the agreement of 19th November, 1906.

About two weeks later, namely, on 4th December, proper transfers in duplicate of all the three claims and of the three-quarter interest in the four other claims as set forth in the agreements, were prepared by the vendee's solicitors and partners and executed in their office by the plaintiffs and by Frank Darby, who was a consenting party to the original agreement; and on the same day the vendees and the Darbys attended at the office of the Trusts and Guarantee Company and left with the Company the seven transfers together with a written memorandum signed by the vendee directing the Company to hold these transfers as trustee, subject to the condition that he pay to the Company for the Messrs. Darby $25,000 on 1st April, 1907, and that on his paying a second $25,000 on 1st June, 1907, for the Messrs. Darby, the transfers were to be delivered to him. The memorandum also stated that it was understood between the Messrs. Darby and himself that the transfers might be delivered to him at an earlier date by his completing the said payments amounting to $50,000. At the bottom of this memorandum were added the words "The above is correct," and to it were subscribed the signatures of H. F. Darby and Frank Darby.

The evidence does not make it clear to what extent the vendee availed himself of the permission given him by the agreement of entering into possession of and working the properties, the only reference to this in the evidence being his own statement that he had obtained a strike on one of the properties but that it had later "petered out."

Everything required of the vendors was duly performed and no complaint or objection of any kind is raised by the vendee except in regard to a certain alleged defect in or cloud or encumbrance upon the title referred to in the evidence and in some of the letters and papers as the Morin or Dunkin and Bradley claim. Dunkin and Bradley being, or being supposed to be, the holders of the other quarter interest in the above-mentioned four claims of which the Darbys agreed to sell only a three-quarter interest. Dunkin and Bradley and their solicitor, Mr. Davis, set up the claim

that they as assignees of Morin were entitled to more than a quarter interest in the said four claims and to an interest also in the other three claims sold, though Morin himself so far as appears, never made or suggested making such a claim. The particulars as to this claim I will refer to more particularly later.

The evidence as to the part the Dunkin and Bradley claim played in the interviews and negotiations between the plaintiffs and the defendant at the time of making the agreement is contradictory. That the vendee knew that some trouble was threatened by Dunkin and Bradley and that he said he would go through with the contract of purchase notwithstanding it is clear. Darbys had told him Dunkin and Bradley were trying to make trouble as they were displeased because the Darbys did not sell the claims to the proposed purchaser whom they had in view. The evidence of Mr. White, in whose office the agreement was executed, would indicate that the defendant was told that Dunkin and Bradley were claiming more than a quarter interest. The evidence of the plaintiff H. F. Darby is not very clear as to just what he told the defendant regarding the nature of the Dunkin and Bradley claim, leaving it in doubt whether the trouble threatened was merely by reason of liability under prior negotiations for sale to the Dunkin and Bradley purchaser or whether it was by reason of their making a claim for more than a quarter interest in the properties. The defendant says he was not told and did not know until after the contract was executed, that Dunkin and Bradley were claiming more than a quarter interest in the four claims and that it was a couple of weeks later that he first learned this by perusing at the Department of Lands, Forests and Mines the notice sent by Dunkin and Bradley to the Department, and through a letter sent by Mr. Davis to defendant's firm notifying them that Morin's assignees were claiming a one-third interest in all the Darby claims, though strangely enough Dunkin and Bradley's name, though appearing in the notice of claim sent to the Department, is not mentioned in this letter. Though the subsequent facts, particularly the indifference with which the defendant, himself a lawyer, treated the notice of this claim after he admits he did receive it—doing nothing formally, as he admits, regarding it until 30th March just before the instalment of $25,000 was falling due, but only at most merely mentioning

it casually to Frank Darby once in a letter, and to the plaintiff H. F. Darby when he met the latter in February—would rather support the view that the defendant knew about and agreed to take the risk of the Dunkin and Bradley claim for more than a quarter interest, yet on the whole evidence I think I would not be justified in finding that the defendant knew and undertook the risk of this alleged defect or accepted the title as regards it. Proof of waiver by a purchaser of the right to object to the title should be clear; *Armour on Titles* (3rd Ed.), 7, 8, 23. Though it is plain that the Darbys desired to make him fully aware of the Dunkin and Bradley matter, and though I think it was his own fault that he did not get more accurate information regarding it, I am not satisfied that the defendant did really know of and intend to waive objection to this defect, if it be a defect, of title. I think it is more probable that the witnesses misunderstood each other in the conversation to which they refer.

The effect of the defendant's actions and conduct subsequent to the making of the agreement is, I think, a more serious ground against the defendant upon the question of waiver of his right to object to the title. He prepared and procured the execution of the conveyances or transfers as already mentioned, and had them deposited with the Trust Company upon his own express instructions that they should be held by the company and handed to himself upon the condition only that he should complete the payments of the purchase money. He procured from the department on the 18th of March Certificates of Record for all the properties in question, and otherwise continued to act in every way, so far as appears, as though there was no difficulty or question in the way of carrying out the agreement. And though he admittedly had explicit notice of the real nature of the Dunkin and Bradley claim about the middle of December it was not until between three and four months later that he took any definite steps in the way of raising objection to the title or making requisition for the removal of the alleged defect. It was only on 30th March that he wrote two letters, one to Mr. Ellis, who appears to have been acting as solicitor for the Darbys, and the other to the Trusts and Guarantee Company, stating in each that he has been notified (this notice having been received about the middle of December) that the Morin interest was a one-third interest instead of a

one-quarter, and giving notice that he required the Morin claim to be released. There is also evidence that there was an attempt or at least proposals by the defendant to resell the property. Were it not for the subsequent negotiations of the plaintiffs and their solicitors looking to a removal of the alleged defect it would appear to me that the defendant's conduct would have estopped him from objecting to the title, but authorities seem to be clear that such negotiations will reopen the question, and I think there can be no denial that such negotiations took place: *Dart on Vendor and Purchaser* (7th Ed.), 508 *et seq.*; *Armour on Titles* (3rd Ed.), 25, 28, 30.

The 1st of April, upon which day the $25,000 instalment was to be paid being Easter Monday, the defendant on the 2nd of April attended at the office of the Trusts and Guarantee Company, taking with him Frank Darby (who appears to have come to Toronto to take back the money) and made to the manager of the company a tender, or alleged tender, of $25,000. He had with him the requisite amount in bank bills, and so stated to the manager. He told the manager that he wanted to tender the money and that he wanted the title fixed up, handing him a letter signed by himself which stated that he therewith tendered the company $25,000 under the agreement with Messrs. Darby, and that he demanded from the company a release of the claim of John Morin and his assigns. The manager told him the company could not undertake anything about the title and could not accept the money subject to any condition, whereupon the defendant took the money away. The manager, in order that there might be no misunderstanding about the company's attitude (having told the defendant at the interview that he would do so) wrote a letter to the defendant, acknowledging the latter's letters of March 30th and April 2nd, in which release of the Morin claim was demanded from the company, and stated to the defendant that the company was merely trustee to hold the transfers and receive the payments, and that it could not give any undertaking regarding the title, but that it was quite ready to receive the money if paid unconditionally in conformity with the original written instructions under which the company received the transfers. This letter was despatched by two special messengers from the company, who were given authority, as stated in the letter, to receive from the defendant payment of the $25,000.

The messengers not finding the defendant at his office, left the letter with his law partner, the defendant receiving it the same evening after banking hours. The defendant made no response or reply of any kind to this letter. In his evidence he admits that he declined to pay over the money because he received no assurance that the title would be fixed up.

In the statement of defence the defendant, in addition to denying that the money was due and payable and setting up that there was a cloud or encumbrance on the title, pleads that he had made a good and sufficient tender of the monies as and when the same became payable, and that the same was refused. In the circumstances, and as there is no payment into court or submission of continued readiness or willingness to pay, the question of the validity or nature of this alleged tender cannot probably be material. But assuming that the defendant was under obligation to make the payment, I think the tender was conditional and not a good tender, and I think the defendant's failure to respond to the personal message subsequently despatched to him offering to receive the money is a sufficient answer to the plea of tender, even if the tender made on 2nd April be considered good: *Leake on Contracts* (4th Ed.), 608-613; *Stroud's Judicial Dictionary* and *Wharton's Law Lexicon* under the title "*Tender*;" and *Am. and Eng. Encyc.*, vol. 28, pp. 31, 33, 34 and 41.

But what is really the chief issue between the parties remains still to be dealt with, namely, the validity of the objection to the title. As I have before stated, the objection is narrowed to one point—the Morin or Dunkin and Bradley claim. The statement of defence does not in explicit terms (as I think it should have) specify this claim, but merely states that a claim exists, which creates a cloud or encumbrance upon the title, of which the plaintiffs were notified and which they promised but neglected to remove. No suggestion of any other objection is offered either in the pleadings or in the evidence, nor does there appear any ground for any, even if the defendant were not precluded, as I think he is, from raising any other objection.

The question then appears to be whether by reason of the Morin or Dunkin and Bradley matter, the title is defective or so doubtful that it should not be forced upon a resisting purchaser. Though recorded applications for mining claims,

which were really all that were the subject matter of the present sale and purchase, cannot, in a strict sense, be regarded as titles to the land, I think the ordinary principles of law regarding the matter of title should, as far as possible, be held to apply between vendor and purchaser, but the purchaser must be taken to know from the nature of the case that the title is not absolute until the issue of a patent, and until the issue of that there can be no assurance, especially before issue of a Certificate of Record, that adverse claims may not be set up which even though groundless may cause trouble. I do not think the mere fact that a claim has been put forward by a third party can be considered a valid objection to a title in any case, and especially not in the case of a mining claim, as to which it is well known claims are often made without any substantial foundation, but merely for the purpose of extorting money for a settlement.

A clear definition of what is to be considered a doubtful title seems never to have been settled by authority, and opinions regarding it have varied from time to time: *Armour on Titles* (3rd Ed.), 273, 289; but as regards threatened litigation it seems to be well settled that the danger to be feared must be from something more than mere idle litigation: *Armour on Titles*, 281. And upon this question of threatened litigation in the present case it may be pointed out that a long time has passed since Dunkin and Bradley first set up their claim, but no active steps have been taken by them to enforce it; and their right, or their quarter interest at least, has since been acquired by the defendant's associates with whom the defendant admits he is interested. I think the danger of litigation is so small as to be entirely negligible. And though I think the purchaser should be given the benefit of all reasonable doubt, I am convinced beyond question that there is nothing substantial in the Morin or Dunkin and Bradley claim.

It might have been more satisfactory if Dunkin and Bradley or their representatives were parties to the investigation. Neither the plaintiffs nor the defendants, however, took any steps to bring them in, and both entered into evidence regarding the merits of their claim. A suggestion from me at the close of the case that an arrangement might be made to deposit the money pending the issue of the patents to the claims or other absolute determination of the title

met with no response, and I think I could not reasonably do otherwise than determine the question as I do upon what is before me.

All the claims in question are recorded in the name of the Darbys. Any right or encumbrance there may be must arise either by way of transfer from them or be in the nature of a lien or trust fastened upon their title or holding. They acknowledged by instrument which may be regarded as in effect a transfer, and the Bureau of Mines has recognized that Dunkin and Bradley are each entitled to a one-eighth interest in the four claims. This document is dated 2nd November, 1906, and was filed in the department, and was produced to the defendant at the time of making the present purchase. It is signed by Dunkin and Bradley as well as by the Darbys. After reciting the existence of an agreement dated 15th May, 1906, between the Darbys and Morin, and the fact that Morin had assigned his right to Dunkin, and that Dunkin had assigned one-half his interest to Bradley, it proceeds to state that it is mutually agreed by and between the Darbys and Dunkin and Bradley that Dunkin and Bradley are entitled to an undivided one-quarter interest in the four claims already referred to, and that the Darbys are entitled to the other three-quarter interest therein. The department issued the Certificates of Record according to the terms of this document. This, I think, would put an end to Dunkin and Bradley's pretentions to any greater interest in these four claims; and the evidence before me shows, moreover, that this one-quarter interest in the four claims as provided in this agreement was the settlement that had been made between Morin and the Darbys as to the division of the results of their mining ventures.

The agreement or assignment between Morin and Dunkin, which was also deposited with the department, and which is dated 27th October, 1906, also recites that Morin was to be entitled to a one-quarter interest of the mining interests under said original agreement of 15th May. The agreement of 15th May between Morin and the Darbys is what is commonly known as a grub-staking agreement, under which Morin was to engage in prospecting, the Darbys paying all expenses, Morin to be entitled to a one-quarter interest and they to a three-quarter interest in all the claims located by him. This agreement has in it a very peculiar clause providing that in case the parties should disagree among them-

selves over any clause of the agreement or any other cause, then the agreement should be null and void and an equal division should be made of all interests acquired "as per the terms of this agreement," and it is upon this peculiar clause that Dunkin and Bradley have made their claim, and under it the defendant is objecting to Darby's title. This Morin agreement mentions no specific property—it could not, of course, in the circumstances do so—neither does the assignment from Morin to Dunkin, and therefore neither of these documents could be recorded against any mining claim as a transfer of any interest therein. The only copy of the Morin agreement of 15th May produced to me was one deposited with the department by the plaintiffs on the 18th of April, to which were attached statutory declarations by Morin negativing any disagreements between him and the Darbys, and alleging that he never had made and never thought of making claim to any more than a one-quarter interest in the four claims. These declarations I rejected at the trial as not being admissible evidence.

The plaintiff, H. F. Darby, however, swore that there had been no disagreement with Morin, and that though Morin had really discovered only three claims they had settled with him by giving him a one-quarter interest in the four, which one-quarter the Darbys, by the document of 2nd November before mentioned, transferred or confirmed to Dunkin and Bradley as the assignees of Morin. No evidence to the contrary was submitted, and I think the burden was upon the defendant to at least show something which would indicate that there was some substantial basis to the Dunkin and Bradley claim afterwards put forward, which, as regards the four claims mentioned, is in direct conflict with the document signed by Dunkin and Bradley, contrary to the recital in the Morin-Dunkin assignment, and contrary to the terms of the Certificates of Record issued by the department, which I think must be taken to be conclusive as to the state of the record existing at the department.

As to the claim put forth by Dunkin and Bradley to an interest in the other three claims, there seems to me to be no foundation whatever in any of the documents produced for such a claim; the defendant offers no suggestion as to how such a claim could have arisen; it could not, I think, have any origin under the above-mentioned peculiar clause in the Darby-Morin agreement, and H. F. Darby's evidence, the

only evidence submitted on the point, is emphatic that Morin had nothing to do with these three claims. And, in any event, as I have before stated, the document signed with the Darbys by Dunkin and Bradley in pursuance of the settlement of interests between Darbys and Morin, I think absolutely concludes the matter.

Much was endeavoured to be made by the defendant of the fact that Dunkin and Bradley, through their solicitors, had sent to the Bureau of Mines a notice of their claim of a one-third interest in all the properties, the defendants contending that this was a document on file with the department which encumbered the title and which would have to be removed. I do not at all agree with that contention. Sec. 159 of the Act, I think, is explicit that no such document should be recorded or received. From the facts I have above recited that document can be nothing more than a notice of trust, which is forbidden to be recorded with a Mining Recorder or received by him. If adjudication by the Deputy Minister, acting therein as Recorder, pursuant to sec. 66 of the Act, were necessary, the Deputy Minister must be taken to have decided finally against the Dunkin and Bradley claim to a one-third interest when he issued the Certificates of Record giving them only a one-quarter interest in the four claims and giving the Darbys the whole interest in the other three claims. As a fact also, the Deputy Minister by letter of January 10th to Mr. Davis, Bradley and Dunkin's solicitor, rejected the Bradley and Dunkin notice of claim, telling Mr. Davis that unless he filed a transfer from the parties who staked the claim no action could be taken in the matter of the notice. The question as to whether and how far, if at all, the purchaser of a mining claim from the recorded holder is affected by any unrecorded trust or lien or interest is one, I think, of a good deal of difficulty and has been the subject of much litigation in British Columbia under an Act there very similar as to this point to our own. But this question need not in the present case be pursued further.

For the reasons stated I find that the Darby title is good and sufficient in conformity with their contract of sale, and such a title as should be accepted by the purchaser.

NOTE.—Sections 74, 75 and 76 of the present Act (of 1908) make the Recorder's office the repository of title for unpatented mining claims, and adopt the provisions of the Registry Act regarding unrecorded instruments, notice, and priority. Sec. 159 referred to in the decision, now s. 70, prohibiting the recording of notice of trust is borrowed from the Land Titles Act, R. S. O. 1897, c. 138, s. 103.

(THE COMMISSIONER.)

RE WELLINGTON AND RICKETTS.

Staking—Posts too Small—Lack of Markings—Insufficient Cutting and Blazing of Lines—Lot not marked on Posts—Substantial Compliance—Form of Claims—Uncertainty as to Size of Township Lot—License—Claiming Over Prior Discoverer—Strict Compliance.

Staking out a mining claim with pegs or short pickets instead of posts 4 feet high and 4 inches square as required by the Act, the posts also lacking the requisite markings and the boundary lines not being properly cut out and blazed, is not substantial compliance with the Act and is invalid.

So also a staking (in surveyed territory) without marking the number or portion of the lot on any of the posts and without properly blazing marking or cutting out boundary lines, the application being also defective in describing property different from that staked out.

Where a claim is being set up against a prior discoverer perhaps a rather strict compliance with the law should be exacted.

Where the size of the Township lot is uncertain, there being contradictory surveys and it was difficult to determine how the Act required the mining claim to be laid out, substantial compliance as nearly as the circumstances reasonably permitted should be accepted.

This was a case of conflicting mining claims upon the same property, the land in question being part of lot 17, in the 11th concession of the Township of Lake, in the County of Hastings.

The stakings for both claims were done in April, 1907. Ricketts, after having made several prior applications which were rejected by the Department because of non-compliance with the Act, staked the property again in the early part of April. Wellington's claim was staked on 15th April.

The case turned chiefly upon the sufficiency of the stakings, but a question was also raised in regard to the form in which the Act in the circumstances required the claims to be laid out, this difficulty being caused by uncertainty as to the size of the township lot, it being irregular in form and size—the original survey of 1822, representing it as 42.30 chains deep, while a subsequent survey obtained by the Department in 1870, gave the depth as 86.27 chains.

W. Cross, for Wellington.

W. B. Northrup, for Ricketts.

12th August, 1907.

THE COMMISSIONER. — (After reviewing the circumstances) I find as follows:

That Mr. Ricketts did not at any time properly or in substantial compliance with the Act, or as nearly as circumstances would reasonably permit, stake out the property in dispute. The stakes he planted were little more than pegs or short pickets, not at all such as the Mining Act (s. 2(20)) requires nor such as a person passing through the bush would take to be stakes belonging to a mining claim, and furthermore, he did not put the requisite markings either on his No. 1 post or his discovery post, nor did he cut and blaze out his boundary lines at all sufficiently. In addition to this Mr. Ricketts' license expired on 31st March and was not renewed until 9th May, 1907. (See secs. 84 and 168 of The Mines Act, 1906).

That Mr. Wellington's staking, though more nearly in conformity with the provisions of the Act than Mr. Ricketts', was also defective, no reference to the number or portion of the lot having been put on any of the posts as required by secs. 133 and 135 of the Act, and the lines not having been properly or sufficiently blazed or marked nor the underbrush along the boundary lines cut as required by sec. 135 of the Act. Mr. Wellington's application was also defective in that the property particularly described in it was not the property which he really staked, nor was the property so described such a fractional portion of the lot as under the Act he was entitled to stake and record.

It follows from these findings that Mr. Ricketts' claims are clearly invalid, and I think the record of them should be cancelled.

And I think I must hold also that Mr. Wellington's claim was not staked in substantial compliance with the Act as nearly as the circumstances reasonably permitted. The proper staking and marking of a mining claim might seem at first view to be a rather technical and not a very important matter, but the circumstances of the present case well illustrate the purpose and the necessity of having the boundaries of a claim very plainly blazed and marked and having proper posts planted and marked with the particulars as required by the Statute. Had Mr. Ricketts (who so far as appears

from the evidence was really entitled to stake as a first discoverer) properly run his lines and planted his posts and put the proper markings thereon so that all could be unmistakably seen by anyone coming upon the property, the present litigation would probably have been avoided. As it was, persons who came upon the land subsequently seem not to have seen his staking. On the other hand, Mr. Ricketts (who is claiming other parts of the lot) and other licensed prospectors are entitled to know with certainty, either from a view of the markings on the property or from an examination of the application filed, just what land Mr. Wellington is claiming. Mr. Wellington has not done what the Act requires to make this clear. So far as appears from the evidence Mr. Wellington also seems to have made a sufficient discovery. Had he fully complied with the Act I think he would be entitled to be recorded upon the property. Where claim is being made over a prior discoverer perhaps a rather strict compliance with the law should be exacted, but in any view I think his staking and application were insufficient and that his claim must also be declared invalid, and his complaint against the refusal to record the tendered application dismissed.

I may say that I would not, in the circumstances, if there were no other objections, hold either claim invalid by reason of staking in forty-acre pieces, as both parties in the first instance did. Sec. 116 is perhaps not as clearly worded as it might be, but I think this mode of staking would be in compliance with it. Even if there were any doubt about the meaning of this section, the uncertainty as to the size of the lot would, I think, be a sufficient reason for holding that staking out in forty-acre pieces was substantial compliance with the Act as nearly as circumstances reasonably permitted (See sec. 137).

It is to be regretted where, as in this case, both parties really appear to have a discovery, that some reasonable compromise could not have been effected between them, as I suggested at the trial. As this has not been done and the parties are standing upon their strict rights, I have no recourse but to find that under the law both claims are invalid, and I think I should make no order for costs.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

10 O. W. R. 671.

RE RODD.

Discovery—Valuable Mineral—Evidence—Inspection—Assay.

Iron stained cracks in Keewatin rock impregnated in places with a little iron pyrites and perhaps pyrrhotite, were held not to be a discovery of valuable mineral within the meaning of the Act.

Where the *ex parte* evidence before the Commissioner in support of an appeal from cancellation of a claim for lack of discovery was not satisfactory, he ordered a reinspection and the report of this being against the discovery, dismissed the appeal.

Appeal to Divisional Court dismissed.

The appellant had under the Mines Act, 1906, staked out and made application for a mining claim on the E. ½ of the S.W. ¼ of the S. ½ of lot 8, in the 5th Concession of Coleman. Coleman was a special mining division, and under the rules in force when the matter was dealt with official inspection of all mining claims therein, to ensure that they were based upon *bona fide* discovery of valuable mineral, was required.

The Inspector reported that the appellant had no *bona fide* discovery, and the Recorder cancelled the claim, whereupon appeal was made to the Commissioner.

J. H. Rodd, for appellant.

12th August, 1907.

THE COMMISSIONER.—This is an appeal from the decision of the Mining Recorder cancelling the appellant's mining claim for lack of discovery, inspection having been made of the discovery by Inspector Mickle and a report having been made by him to the Recorder reporting no *bona fide* discovery.

After several adjournments the appeal was heard by me at Haileybury on 3rd July, 1907. *Viva voce* evidence was adduced in support of the discovery on behalf of Mr. Rodd, no one appearing to oppose it, Mr. Enright, who had another claim filed upon the same property, not appearing though duly notified. Mr. Enright's claim, however, has since been also cancelled for lack of discovery.

After hearing the evidence adduced by the appellant and deeming the same unsatisfactory as regards the merits of the discovery, and the circumstances disclosed regarding the nature of the samples upon assay of which, as containing silver and nickel, the plaintiff largely grounded his appeal, being such as to lead me to believe that when they reached the assayer they were not samples which had wholly been found in place upon the claim, and there being in fact nothing else whatever shown in connection with the discovery which anyone having the least experience in such cases could think of accepting as to any extent establishing a discovery—I directed that a re-inspection should be made by an other Government Inspector.

The report of re-inspection made by Mr. A. H. A. Robinson, which has now come to hand, finds the alleged discovery to consist of nothing but tight iron-stained cracks in a somewhat decomposed Keewatin rock, the rock being in places impregnated with a little iron pyrites and perhaps pyrrhotite An assay of samples showed no trace of gold or silver, and Mr. Robinson states that as good or a better showing could probably be found on almost any area of 100 feet square in the Keewatin rock in Coleman township.

The appeal will have to be dismissed.

From this decision appeal was taken to the Divisional Court.

L. G. McCarthy, K.C., for appellant.

J. R. Cartwright, K.C., for the Commissioner.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), was delivered by RIDDELL, J.

29th October, 1907.

RIDDELL, J.—The learned Commissioner in his written reasons for judgment says that, after hearing the evidence adduced and deeming it unsatisfactory as regards the merits of the discovery, and the circumstances disclosed regarding the nature of the samples being such as to lead him to believe that they were not samples which had been wholly

found upon the claim, "and there being in fact nothing else whatever shown in connection with the discovery which any one having the least experience in such cases could think of accepting as to any extent establishing a discovery," he directed a re-inspection by another government inspector. He then goes on to say that the report of this inspector shews the alleged discovery to be worthless.

Mr. McCarthy, for the appellant, pressed us with an argument that it was contrary to natural justice to allow the report of an inspector who was not subjected to cross-examination to determine the judgment of the Mining Commissioner; and he offered to pay the expense of a further inspection, if the Court would direct that the matter should go back for further evidence or a new trial.

Without deciding how the case would stand had it been that the decision of the Commissioner was in reality based upon evidence which had not been sifted by cross-examination, and without deciding whether we have the power to do more than allow or dismiss an appeal, it seems to me that in this case the appellant must fail.

The Commissioner has in substance said "I do not believe the evidence adduced by the applicant; he failed to satisfy my mind that he was entitled, and had there been nothing more he could not succeed. But, lest there might be something on the ground not brought to my notice, to avoid doing an injustice to the applicant, I ordered a government inspector to re-inspect. He reports nothing to change my mind, but the contrary." I think this is an adjudication upon the evidence already adduced, and not upon the inspector's report. . . .

Appeal dismissed without costs.

NOTE.—Sections 138 and 139 of the present Act (1908) give the Commissioner power to obtain the assistance of experts and to order an examination or inspection of the property, and to give such weight as he deems proper to the opinion or report so obtained.

(THE COMMISSIONER.)

RE SMITH ET AL. AND COBALT DEVELOPMENT CO. LTD.

Lands Open—Staking Lands Already Staked—Restraining Interference with Claim—Discovery—Inspection—License—Merits—Finality of Recorder's Decision—Filing without recording.

Under the Act as amended in 1907, only one staking and record for a mining claim is permitted on the same land at one time, and until it has ceased to exist as provided in the Act other licensees are not entitled to prospect, work upon or occupy any part of the claim.

Where an applicant had no merits because he had no discovery of valuable mineral upon his mining claim an order or decision in his favor was refused.

Where an application for mining claim is presented which the Recorder does not think proper to be recorded, he should nevertheless, if desired, receive and file it.

Where evidence in regard to the merits of the discoveries was inconclusive, official inspection was ordered.

Proceedings to restrain the defendants the Cobalt Development Co., Ltd., from prospecting, working, entering or remaining on the S.E. ¼ of the S. ½ of lot 7, in the 1st concession of Bucke, which the plaintiffs, Smith, Nelson and Fortune, had staked out and applied for as a mining claim; and to have it declared that the plaintiffs were entitled to exclusive possession of the said lands.

The company on its part had a dispute filed against the validity of the plaintiffs' claim, and claimed to be itself entitled to the property, and all matters came on for hearing together.

A. G. Slaght, for Smith, Nelson and Fortune.

J. W. Bain and *R. E. Reid,* for The Cobalt Development Co. Ltd.

14th August, 1907.

THE COMMISSIONER.—A very considerable amount of evidence, oral and documentary, has been put in by each party, upon which I find the facts to be as follows:

Nelson, through whom the other plaintiffs Smith and Fortune claim their partial interests, staked the property for a mining claim on 27th November, 1906, claiming discovery the same day, and on the next day recorded the claim in his own name as number 2369.

This was the same property upon which an application for a mining claim filed by one William H. Fairburn on 24th November, 1905, as claim number 489, and by him transferred to one Potts on 11th January, 1906, and by Potts transferred to the Cobalt Development Company, Limited, on 25th January, 1906, had been cancelled for lack of discovery on 28th July, 1906. . . .

The company's license (No. 1155) expired 24th January, 1907, and as no new license was taken out till 13th March, 1907, the company was without a license between those two dates.

As to the company's position in regard to the original Fairburn claim 489, which they had purchased from Potts, I have no hesitation in holding that that claim was entirely out of existence at the time Nelson staked the property in November, 1906, and even if it had not been so at that time it would certainly have ceased to exist on 25th January, when the company's license was allowed to expire without renewal (see secs. 167 and 168 of the Act). The company had explicit and legal notice on 30th July, 1906, of the Mining Recorder's decision cancelling their claim. Sec. 52 makes the Recorder's decision final unless appealed within 15 days from the date of the decision, and sec. 75 provides that no appeal from the decision of a Mining Recorder shall be allowed after the expiration of 15 days from the record of such decision, which in this case was 28th July, 1906. See *Re Petrakos*, 9 O. W. R. 367. And this I think would be the result whether or not the notice of inspection had been legally or sufficiently given. I think, however, in this case the notice of inspection was sufficiently given. But if not, and if nothing else had happened to bring the company's claim to an end and the case were depending wholly upon the matter of notice of inspection, I would, under the authority of amended sec. 74, sub-sec. 2, refuse to make a decision in favour of the company because the evidence has proved conclusively that there are no merits in the company's claim and that the claim was in fact invalid for lack of discovery of valuable mineral.

As to the validity of the Nelson claim number 2369, though it was sought on behalf of the company to impeach it for lack of formality and compliance with the provisions of the Act in staking it out, I am unable to find, apart from

the question of discovery of valuable mineral, which I will deal with presently, that there was any substantial defect in Nelson's staking, and I find as a fact that there was not.

Under the Act as amended at the last session of the Legislature, the amendment coming into effect 20th April, 1907, I think there can be no question only one staking and record is to be allowed upon the same piece of property at the same time, and other prospectors are not entitled to prospect, work upon or occupy any part of a claim at the time staked or recorded in the name of another person: see secs. 131 and 132. To this extent, therefore, I think the company was wrong in persisting in working upon the property after 20th April. If they believed the Nelson claim was invalid their remedy was to attack it by filing a dispute asking to have it so declared, as they subsequently did on 7th May.

Reverting to the question of the Nelson discovery, the evidence upon this point, as I remarked during the hearing, was not sufficient to enable me satisfactorily to determine the question. I think the burden was upon the disputant to give some evidence at least of lack of discovery of valuable mineral at the discovery post, as claimed by Nelson. All that the disputant really did in this regard was to prove circumstances connected with Nelson's staking and discovery tending to show that it was not probable that Nelson did really make a discovery. It was shown that the ground at the time was covered with about a foot and a half of snow and that Nelson spent, according to his own statement, only some twenty minutes in finding the alleged valuable mineral, and that he seemed not to have shown the discovery to his assistant who was with him at the staking—in short, that Nelson's selection of a discovery point was only a perfunctory act to which little or no importance appears, at the time to have been attached by himself or his partner. In view of these circumstances I finally determined to order an inspection of the discovery by one of the official inspectors, and the inspector's report has now been received by me declaring that Nelson had no discovery of valuable mineral, and upon this report and upon the evidence in general I so find.

It remains to mention two other alleged discoveries on the property, one claimed to have been made on behalf of the company on 15th April and one claimed to have been made on behalf of Nelson on 2nd April, 1907. The company's

alleged discovery of 15th April is claimed to have been staked 15th April and application to record the same was made to the Mining Recorder the same day, but was refused on the ground of the applicant not having with him the company's license as required by the Act, though it seems clear that the Recorder, would in any event have refused to file it. This application was tendered again on 22nd April, the applicant then having with him the license, and the Mining Recorder then finally refused to record it. The difference in these two dates of tender is important only by reason of the fact that on 20th April the amending Act became law, providing that only one claim is to be on record on the same property at one time, and providing also a form of affidavit different from the old form. If proper tender of the application was made before the 20th and the Recorder refused to record it, I think he was wrong in so doing; if after the 20th, I think he was right in refusing to record; first, because as before stated, only one claim is now allowed to be recorded on a property at a time, and secondly, because the affidavit in the application presented did not comply with the requirements of the amended Act. The applicant might, however, if he chose, have required the application to be put on file though not recorded. I think it will have to be held that no legal tender of the application for record was made until 22nd April, and record was then properly refused. It may also be pointed out that no appeal from the Recorder's refusal was made within the time specified by the Act. See secs. 158a, 52 (3).

I thought it well, however, to have all these alleged discoveries (including that of Nelson of 2nd April, 1907, and that of the company of 15th April, 1907) inspected, and these were included in my order for inspection, together with the old Nelson alleged discovery of November, 1906. The Inspector has reported to me that there is no discovery of valuable mineral at any of these alleged discoveries, which report I have no hesitation in adopting as correct, and I would therefore in any case, under the above mentioned sec. 74 (3), refuse to make any decision in favour of these later applications or alleged discoveries, as there can be no merit in any application or claim not grounded upon a discovery of valuable mineral as required by the Act.

It follows that none of the parties has any valid claim, application, or staking upon the property, but I think the plaintiffs were justified, at least after 20th April, 1907, in

seeking to protect their claim and discovery from the operations of the company's servants and agents until at all events it was inspected or some proper proceedings were taken to determine its validity. For this reason, and the company having, as I think, acted most unreasonably in connection with the matter, and having caused the greater part of the expenses of the litigation in an attempt to establish for themselves an untenable claim, I think I should make no order for costs.

NOTE.—The question of the right to stake out or locate lands already under existing staking or location has been rather a vexed and unsettled one in most jurisdictions.

It is pretty uniformly held that while ground is covered by a valid and existing claim, no other valid staking or location can be made upon it: see (for British Columbia) *Cranston* v. *English & Can. Co.*, 1 Martin's M. C. 394; *Rammelmeyer* v. *Curtis*, 1 Martin's M. C. 401; (for the United States), *Lindley on Mines* (2nd Ed.), ss. 363, 218; 27 Cyc. 578, 580; and (for Australia), *Armstrong's Law of Gold Mining* (2nd Ed.), 41, 147.

But there is wide divergence as to whether and in what circumstances ground covered by an invalid though subsisting staking or location may be invaded for the purpose of staking out or locating a new claim upon it.

And there is divergence also as to whether staking or location done upon ground at the time covered by a valid and existing claim, or done upon lands which for any reason are not at the time open for acquisition, will be rendered good by a subsequent abandonment, lapse or forfeiture of the senior claim.

The Ontario law as now fixed (under the Act of 1908) negatives the acquisition by a subsequent staker of any right or standing in any of the circumstances above stated. Until the existing claim, whether valid or invalid, has lapsed, or been abandoned, cancelled or forfeited, within the meaning of the Act, no other licensee has a right to stake out or record a claim upon it: s. 34; *Re Smith and Hill, post;* but the abandonment which will leave the land open may be merely a constructive one, resulting from non-compliance with the requirements of the Act as to the time and manner of staking out and recording the claim; s. 83; *Re McNeil and Plotke, post;* though such an abandonment will not now, and it is submitted with deference never did, result from insufficient discovery. And where any such lapse, abandonment, cancellation or forfeiture has in fact taken place a licensee is not, under the Ontario Act, required to obtain or wait for an adjudication, entry or act of any official, but may proceed at once if he makes a discovery upon the ground to stake out and file a claim upon it (taking proceedings afterwards, if necessary, to establish his right): but the right so to stake is subject, it is submitted, to the condition (in accordance with the well settled principles of general law) that there must be no forcible entry or breach of the peace in doing the staking, and that if there is no right will accrue from a staking accomplished by means of it.

The law of Ontario has not always been as above described. Under the Act of 1906, until the amendment of 1907, it was held that applicants for mining claims were entitled to have their stakings and applications put on record although the land was at the time covered by prior stakings and applications; *Munro* v. *Smith, et al.*, 8 O. W. R. 452, 542; 10 O. W. R. 97; though this it seems was not the intention of the framers of the Act or the practice desired by the Department, a deputation to the Government having in fact requested the one-application-at-a-time rule. Prior to 1906, the practice was to allow subsequent stakings and applications and award the property

to whichever of the applicants had made the first discovery of valuable mineral.

This latter is in effect the law of the United States. There an invalid location or one not supported by a discovery will not prevent a peaceable entry and location of the same ground by another, but a locator is allowed, (illogical and contrary to the Federal Statute, though it seems), to make good a location originally invalid for lack of discovery, by afterwards making a discovery, provided he does so before any other locator has made one; see *Morrison's Mining Rights* (11th Ed.), 316, 32; 27 Cyc. 559, 556; *Lindley on Mines* (2nd Ed.), s. 335.

In British Columbia in addition to its being held that location over a valid existing location is invalid and that on the lapse of the senior location the land reverts to the Crown and not to the junior locator (see British Columbia cases above cited), it has also been held that mining ground actually occupied and actively worked as a mineral claim is not open to location; *Waterhouse* v. *Liftchild*, 1 Martin's M. C. 153, and see ss. 12 and 16 (c) of The Mineral Act, of B. C.

The Yukon case of *St. Laurent* v. *Mercier*, 33 Can. S. C. R. 314, cited as authority for the proposition that the abandonment, lapse or forfeiture of the senior location will render the junior location good, seems not really to go further than to hold that certain markings used for a prior application on ground then not open might be adopted and utilized, without actual physical renewal, for a new application made after the land had become open by the lapse of the original claim.

In Australia, where the basis of title to a claim is possession, initiated by marking out the ground in the prescribed manner, no discovery being required, (*Armstrong on Gold Mining* (2nd Ed.), 62, 40), the doctrine of the much cited case of *Critchley* v. *Graham*, 2 W & W. (L), 211, is a leading principle. Under this a miner is not allowed to avail himself of a forfeiture or constructive abandonment of a claim in actual possession of another until adjudication by the warden has been obtained on the subject. But this doctrine does not apply to claims actually or intentionally abandoned, nor where a lease has expired by effluxion of time, nor where default has been made in the application for a lease. Where, however, a miner institutes proceedings and succeeds in obtaining an adjudication of forfeiture he is entitled to be put into possession of the property to the exclusion of other miners, that he may have an opportunity to acquire title to it. *Armstrong on Gold Mining* (2nd Ed.), 41, 42, 132, 133.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

10 O. W. R. 658 (in part).

RE CASHMAN AND THE COBALT AND JAMES MINES, LTD.

Abandonment—Lands Open—Staking—Substantial Compliance—Discovery Line—Wrong Lot on Post—Discovery Post Outside Staking—Only Part of Claim Staked—Working Permit—Appeal.

L., on 26th February, 1907, staked out 17 acres of the prescribed 40 acre portion of the lot which he applied for, placing his discovery post in the unstaked part, marking it for another portion of the lot, and failing to connect it by a blazed line with his No. 1 post, and as a fact had no real discovery of valuable mineral at the post or on the claim. C., on 21st June, 1907, discovered valuable mineral on the unstaked part of the claim and staked out and applied for the 40 acres.

Held by the Commissioner that L.'s claim was invalid, and that as it was not staked out as provided by the Act nor in substantial compliance therewith, it must be deemed to be abandoned under s. 166, and that the lands were therefore, notwithstanding that it was upon record, open within the meaning of s. 131, as amended in 1907, to be staked out by another licensee, and that C. was entitled to stake out the property as he did and that his claim was valid and should be recorded.

An appeal to the Divisional Court was dismissed.

Held, per the court, that as the appellant company had no right in the property it was not competent for it to attack the claim of C., when if successful the only result would be to throw the land open to the public. (Overruled by *Re Smith and Hill, post.*)

Held per Britton, J., that the claim of L. was not an abandoned claim within the meaning of the statute. (Overruled by *Re McNeil and Plotke, post,* and *Re Milne and Gamble, post.*)

One Landrus staked out on 26th February and recorded on 14th March, 1907, a mining claim on the N.E. ¼ of N. ½, lot 3, in the 5th concession of the Township of James, the staking however being defective and not based upon a discovery of valuable mineral; he afterwards transferred his claim to the Cobalt and James Mines, Ltd.

Cashman made a discovery and staked out a mining claim covering the same property on 21st June, 1907, and filed an application thereon which the Recorder by reason of the Landrus claim being upon record refused to record.

Cashman entered a dispute against the Landrus claim and also appealed to the Commissioner from the Recorder's refusal to record his own claim. The dispute was transferred to the Commissioner for adjudication, and the appeal and dispute were heard by him together.

George Ross, for Cashman.

J. E. Day, for The Cobalt and James Mines, Ltd.

30th August, 1907.

THE COMMISSIONER. — This is a dispute between two claimants as to their rights in the north-east quarter of the north half of lot three, in the fifth concession of the township of James, in the Temiskaming Mining Division, coming before me, by way of appeal and dispute filed with the Mining Recorder pursuant to sec. 158a of the Act, the dispute having been transferred to me under sec. 52 (2) by the Mining Recorder for trial and adjudication.

On the day first fixed for hearing the parties appeared before me, and with their consent I made an order that the claim should be inspected by one of the Mining Inspectors and that the respective discoveries and stakings should be reported upon to me. The inspection was made in the presence of both parties and a very careful special report was put in by Inspector Murray, which is now a part of the records in the case.

Copies of the Inspector's report were mailed to the solicitors for the parties, and upon request of both parties I issued an appointment for the further hearing and final disposition of the case.

Considerable evidence was put in by both sides and very full argument submitted by the respective counsel.

The Cobalt & James Mines, Ltd., claim the property through a transfer from George W. Landrus, in whose name a claim was filed on 14th March, 1907, upon a discovery claimed to have been made by John L. Landrus on 26th February, 1907, at 4 p.m., and said to have been staked the same day.

Cashman claims under discovery claimed to have been made by himself on 21st June, 1907, and under staking of that date.

The Inspector's report, which I find after hearing the evidence to be an exceedingly accurate and reliable statement of the situation, finds that Mr. Landrus and the Cobalt & James Mines, Limited, have no *bona fide* discovery of valuable mineral as defined by the Mines Act; and further, that the alleged discovery which they claim as their original discovery is not within the boundaries of the property staked by them, but some little distance south of their south boundary. He further reports that Cashman has a *bona fide* dis-

covery of valuable mineral within the property staked by him, his discovery being south of the property staked by Landrus. The Inspector reports further that there was no blazed line between Landrus' alleged original discovery and his number one post, which fact I find clearly confirmed by the evidence. He also finds that the Landrus post at this alleged discovery is marked "South-east Quarter of the North Half" instead of "North-east Quarter of the North Half" of the lot, and that it is dated 2 p.m. He finds that there is another Landrus discovery post which is within the block of land staked by Landrus and which has running from it a blazed line in an indirect course to the Landrus No. 1 post. This latter discovery post has the correct part of the lot namely, "North-east Quarter of North-Half," marked upon it, and is dated the same day, 26th February, 1907, as the other Landrus discovery post, but is marked 4 p.m. instead of 2 p.m. At the hearing Landrus and his assistant, Charland, repudiated this latter as the discovery upon which they staked, but Landrus admitted that the writing on both these discovery posts was the same and that it had been done by one Decow, who was said to have been present with them at the staking but who was not called at the trial. The secondly mentioned discovery post, that is the one at the end of the indirect blazed line, was planted on an outcropping of barren diabase rock which no sensible miner or prospector could pretend to believe was valuable mineral. The first mentioned Landrus discovery (outside of the land staked by him) is described as a tight crack in the diabase rock with an occasional splash of calcite, but no valuable mineral showing. This latter could scarcely have been believed, either, to be a *bona fide* discovery of valuable mineral within the meaning of the Act.

The fact is that the Landrus staking was done upon snow shoes, when it is admitted the ground was covered with two or three feet of snow, and it is extremely improbable that a valuable discovery would have been made in such circumstances. It would only be by the rarest good fortune that anyone could have expected at that time to make one.

The proper size of a mining claim in this territory is 40 acres, 20 chains to a side. I find upon the evidence that Landrus' staking and blazing, such as he did, took in less than half this quantity, extending only about 8½ chains from the north boundary instead of 20, and leaving some 23 acres of the 40 unstaked. I find also, as already stated,

that the alleged discovery which Landrus and his assistant Charland swear was his original discovery was outside of the property he staked and that there was no blazed line whatever from it to his No. 1 post. The discovery post was also, as before mentioned, marked with the wrong part of the lot, being "south-east quarter" instead of "north-east quarter." If I were to draw conclusions from the circumstances shown, especially the fact that the application filed by Landrus claims discovery at 4 p.m., I could not but be disposed to think that the discovery post marked 4 p.m. planted on the barren rock at the end of the indirect blazed line was the discovery post really planted by Landrus for the property he was purporting to stake. Both Landrus and his assistant, however, swear emphatically that it is not and that the other one firstly mentioned was the original discovery on which they staked, and Charland distinctly swears that the latter is now at the same point and same showing of mineral where they planted their original discovery post for the property in question, though he contended that it was not south of their south line, which in the face of the inspector's report and all the other evidence I have no hesitation in finding it was.

As regards the Landrus claim, it only remains to mention that months after his original staking and some weeks after Cashman's discovery, in fact just a day or a few days before the inspector visited the property, Landrus or some representatives of the Cobalt & James Mines, Ltd., planted another discovery post on an extension of Cashman's vein which they uncovered where there was a showing of calcite and cobalt bloom. I quite agree with the inspector in rejecting any pretence of claim under such a proceeding.

As to the first point involved in the dispute, namely, the validity of the claim of Landrus and the Cobalt & James Mines, Ltd., there is no difficulty. The claim is not only invalid but is as gross a violation of the requirements and intent of the Act as could well be conceived. The purpose of the staking seems plainly to have been merely to blanket the property and hold it in such a way as to keep other prospectors off while the staker prospected it at leisure or waited the development of surrounding properties, which is the very thing the law of discovery and the provisions of the Act are designed to prevent. If a licensee desires to obtain exclusive possession of a piece of property for the purpose of prospecting it, which, of course, is proper enough in a case where

mineral cannot be hoped to be discovered without extensive working, for instance where there is no exposure of rock, he may do so by following the provisions of the Act relating to working permits, which require 60 days' notice of his application, allowing all prospectors equal chances of making a discovery during the 60 days, when, if none is made, the working permit may be granted, but there must be no staking for a mining claim until a discovery of valuable mineral has actually been made. Landrus had no pretence of discovery on the property he staked, as required by secs. 117 and 132 of the Act. The place where he planted his discovery post, if we are to believe the evidence of himself and his assistant, was outside the limits of his staking. No line was blazed from it to No. 1 post as required by sec. 133 (d). Less than half the property which he was required under sec. 112 to apply for and which his application and record of claim represented, was really included within his staking. In addition to not having a *bona fide* discovery of valuable mineral as required by sec. 132 at the time of staking, I have no hesitation in finding that he did not stake the property in anything like substantial compliance, as nearly as the circumstances reasonably permitted, with the provisions of the Act.

I therefore find that the Landrus claim is invalid, and that it should be cancelled.

Secondly, as to Cashman's rights in the property. This is a point of considerably greater difficulty than the question of Landrus' rights. In addition to the facts already stated, I find that Cashman proceeded to the property on or about 7th June and commenced prospecting south of the Landrus staking, but within the 40-acre piece which Landrus' application applied for. No one else was then in occupation of or working upon any part of the property, and Cashman claims that from this fact and from the nature of the Landrus staking and the lack of any reasonable showing of discovery at the Landrus discovery post, he assumed that the property was open for prospecting. Confining his work, however, to the territory outside of the Landrus lines, he, after working for some little time, opened up a promising calcite vein upon which he placed prospecting pickets and in which he afterwards, namely, on 21st June, discovered native silver. He planted a discovery post, proceeding the same day, June 21st, to stake the claim. His staking included the whole 40 acres, that is to say, the 17 acres or so formerly staked by

Landrus as well as the other 23 acres of the north-east quarter of the north half of the lot not included in the Landrus staking. Shortly after he proceeded to the recording office and filed his application, together with the dispute and appeal already mentioned, the Recorder not being able to record it by reason of the prior record of the Landrus application.

The question, I think, turns upon the meaning of secs. 131 and 166 of the Act. If the lands were at the time of Cashman's discovery and staking open to prospecting within the meaning of sec. 131, then, having made a discovery of valuable mineral, Cashman would under sec. 132 have a right to stake and of course a right to record a claim. No doubt it was the intention of the amendments of the last session of the Legislature that where one licensee has regularly staked and recorded a claim another licensee shall not be allowed to stake and record until the application of the first has been disposed of. This principle, however, cannot be extended further than the fair interpretation of the sections mentioned will warrant. Sec. 131 allows an "abandoned" claim to be staked and recorded by another licensee. Sec. 165 provides for express abandonment in writing, and sec. 166 declares that "non-compliance by or on behalf of the licensee of (with?) any provision of this Act relating to the staking out and recording of a mining claim, working permit or boring permit, including the blazing or otherwise marking all lines by the Act required . . . shall be deemed to be an abandonment." This latter may be described as a constructive abandonment, and where such constructive abandonment has happened I think the lands involved must be held to be open to prospecting and staking, under secs. 131 and 132. The point to be determined is whether there was such a constructive abandonment of the claim by Landrus by reason of his failing to comply with the provisions of the Act relating to the staking out of a claim including the blazing or marking of the lines required by the Act. As already pointed out, Landrus' departure from the provisions of the Act regarding his staking was not merely slight or technical, but substantial and material. He included less than half the claim; he planted his discovery post outside the boundaries of what he staked; and he blazed no line from number 1 post to his discovery. I think sec. 166 should not be extended beyond what it clearly and fairly includes, and I think it must be

held to be qualified by the provisions of sec. 137, but if it is to have any application at all I think it must cover just such a case as the present. No doubt the purpose of the section was to enforce compliance or reasonably substantial compliance with the requirements of the Act regarding the physical staking and marking of the property, making it a penalty, so to speak, upon the delinquent that the property may be taken up by another licensee. To prevent misappretension perhaps I should say that I do not think the mere invalidity of a claim by reason for instance for lack of such a discovery of valuable mineral as would be necessary to pass the claim, would come within the meaning of sec. 166 so as to leave the claim open to be staked by another licensee. Sec. 166 seems to me to relate to the physical staking and marking out of the claim and blazing of the lines. Making discovery is something apart from and which should be antecedent to the staking and marking, and does not seem to be within the express wording of sec. 166. This, however, it is not necessary to determine in the present case.

Viewing the matter in the light I do and feeling, as expressed by Mr. Justice McLennan in the case of *Clark* v. *Docksteader*, 36 S. C. R. 622, that where a prospector has really made a *bona fide* discovery of valuable mineral every reasonable intendment should be made in favour of his right to the enjoyment of what he has found. In the present case if the claim were to be thrown open it could only result in a rush for the property, with little hope that the person who had made the discovery would be able to acquire the claim, but rather with the likelihood that someone having no moral right to it would stake and file upon it.

I therefore think Mr. Cashman is entitled to the property, and that his application should be recorded, and I think he should have his costs of the trial.

From this decision the Cobalt & James Mines, Ltd., appealed to the Divisional Court, the appeal being heard by FALCONBRIDGE, C.J., BRITTON, J. and RIDDELL, J.

J. E. Day, for appellants.

George Ross, for Cashman, the respondent.

28th Oct., 1907.

BRITTON, J.—I think the appeal of the Cobalt Company from the decision of the Mining Commissioner upon the complaint of Cashman must be dismissed.

There is no escape from the conclusion upon the evidence that Landrus, under whom the company claims, did not make any *bona fide* discovery of valuable mineral as defined by the Mines Act, upon Claim No. 5326, being the N.E. ¼ of the N. ½ of lot 3, in the 5th concession of the township of James—and also that the so-called discovery, that which Landrus claimed as his original discovery, was not upon but south of the property and outside the limits of the staking.

These are wholly questions of fact. The evidence was satisfactory to the Commissioner, and the evidence was confirmed by the inspection of one of the mining inspectors sent on with the consent of the parties to this litigation. I see no reason why the findings of fact should be interfered with.

That disposes of the claim of the company.

Can the company, upon its claim being disallowed, be a party to the attack upon another, not for the purpose of settling a dispute between them as to the ownership of any mining rights, but merely to oust the other and to throw open the claim, which as the Commissioner says, "could only result in a rush for the property with little hope that the person who has made the discovery would be able to acquire the claim, but rather in the likelihood that someone having no moral right to it would stake and file upon it." I think not. It may be a hardship that a person who has done some work upon a mining location, but who has not been so successful as to make a discovery, should not be allowed to attack even the man who is commonly known as a "claim jumper," but that, as I view the matter at present, is for the Legislature.

To avoid any misapprehension I add that I do not agree with the learned Commissioner as to this being an "abandoned claim" within the meaning of the statute, but if the company is not in a position to complain any more than any of the general public, the matter cannot be further dealt with here.

The appeals must be dismissed with costs.

RIDDELL, J.—One Landrus, to whose rights the appellants have succeeded, claimed to have made a valuable discovery, and alleges that he staked the claim as required by the Act. Cashman also claimed to have a right to the property in question. The claims were adjudicated upon by the Mining Commissioner, who decided in favour of Cashman. It is admitted that if the claim of the appellants were valid, it has precedence over that of Cashman; and therefore the first question is whether the appeal of the company against the decision of the Commissioner disallowing their claim is well founded.

The Mining Commissioner had before him the witnesses, and he has found as a fact that Landrus made no discovery of valuable mineral within the Act, and further that the alleged discovery is not within the boundaries of the property staked by them, but some little distance south of their south boundary. It is admitted that if either finding be sustained, this part of the appeal must fail.

There is abundant evidence upon which the Commissioner might find as he has, and unless we are prepared to reverse our own recent decision in *Bishop* v. *Bishop*, 10 O. W. R. 177, and a long line of cases which are followed therein, we cannot give effect to the contention of the appellants.

This being the case, I do not think that the appellants can be heard as against the claim of Cashman. Section 52 (3) gives "any licensee or person feeling aggrieved by any decision," the right to appeal; but sec. 75 makes it clear that what is meant is, any licensee feeling aggrieved, and not generally that it is any licensee whatsoever, who is given the right to appeal. The notice is to be served "upon all parties adversely interested"—unless an intending appellant has himself some interest or claims some interest in the property, there can be no "parties adversely interested." If the appeal against the allowance of the claim of Cashman were to succeed, the company would receive no benefit greater or other than any other person. In the absence of express legislation giving such an extraordinary right, the claim of an intending appellant to appeal under such circumstances cannot be sustained.

Both appeals should be dismissed with costs.

FALCONBRIDGE, C.J., concurred.

NOTE.—Neither the holding of the Divisional Court as to the appellant's lack of status to attack the respondent's claim, nor that of

Mr. Justice Britton as to there being no abandonment within the meaning of the statute, is now good law. The former, after several unsuccessful attempts to give it a reasonable interpretation, was finally overruled by the Court of Appeal in *Re Smith and Hill, post;* and the latter was overruled by the same Divisional Court in *Re McNeil and Plotke, post* (going, however, as elsewhere submitted, too far in the opposite direction), and again by the same court in *Re Milne and Gamble, post.*

As to the question of status to attack, it would seem that the learned judges may have been under a misapprehension as to the circumstances of the case before them. Sections 52 (3) and 75, quoted in the judgment, could have no relation to the matter in hand as these sections dealt with appeals from the Recorder to the Commissioner, and the company had not in any way appealed nor did it seek to appeal from the Recorder; its appeal was from the Commissioner who heard the dispute in the first instance; and it was s. 43 (practically identical as to the point involved with present s. 151) that governed appeals from the Commissioner to the Divisional Court. Application of the doctrine enunciated by the Divisional Court would seem to reverse the rule that the position of the defendant is the stronger, and give all the advantage to the attacking party. The question, however, is not without its difficulties; see in British Columbia *Clark* v. *Yancy*, 1 Martin's M. C. 281; *Caldwell* v. *Davys, Ib.*, 387; and s. 131 of the Mineral Act, R. S. B. C., c. 135, and s. 11 of amendment of 1898, by which each party, in adverse proceedings, is required to give affirmative evidence of his title, and if not established the judge must so find.

(THE COMMISSIONER.)

RE MCCRIMMON AND MILLER.

Discovery—Lands Open—Abandonment—Subsequent Staking—Affidavit of Discovery.

A mining claim is invalid if discovery of valuable mineral is not made before staking, and subsequent discovery will not cure the invalidity.

But a claim invalid for lack of sufficient discovery is not an abandoned one within the meaning of ss. 166 and 131 (1907), and does not until disposed of leave the lands open to a subsequent staking.

The facts are fully stated in the decision.

J. Lorn McDougall, for appellant and disputant, McCrimmon.

J. W. Mahon, for respondent, Miller.

30th August, 1907.

THE COMMISSIONER.—This matter comes before me by way of appeal from the decision of the Mining Recorder in refusing to record the application of the appellant McCrimmon, and by way of dispute filed by McCrimmon with

the Mining Recorder, claiming that the application and staking and record of the respondent Miller is invalid and that he, McCrimmon, is entitled to be recorded for the property. The dispute was referred to me by the Mining Recorder under sec. 52 (?) for trial and adjudication, and both the appeal and dispute came before me and have been tried and dealt with together.

From the evidence and the Inspector's reports I find the facts to be as follows: Miller staked the property on 15th April, 1907, claiming discovery the same day, and duly recorded his claim with the Mining Recorder. A former staking, or partial staking by one Sheehan, appears to have been made of the property, but the evidence does not show that this was in existence at the time of Miller's staking. McCrimmon staked the property on 7th June, 1907, claiming discovery on the same date, and presented his application to the Mining Recorder, who refused to record it by reason of the prior Miller claim, but the application was filed with the Recorder and a dispute made out claiming that McCrimmon was entitled to be recorded, and that the Miller claim was invalid under the Act.

At the trial a good deal of evidence was directed towards the question of the north boundary of the claim, the appellant contending that Miller's discovery post was really planted outside the claim. I am not able, however, to find, on the the evidence, that this contention is substantiated. An opportunity was afforded the parties to have a survey, which would definitely settle the question, but neither party availed himself of it.

Upon the evidence, however, it is clear to my mind, and in fact it was not on the argument seriously contested, that Miller had no discovery of valuable mineral within the meaning of the Act at the time he staked his claim. Subsequently to the staking, however, at exactly what period the evidence does not disclose, he did make a *bona fide* discovery of valuable mineral on the property, this discovery being located some three chains from the point at which he originally claimed discovery and at which he planted his discovery post. Two discovery posts have been spoken of in the evidence, but it is clear that both of these were near the north boundary line and neither identical with the discovery which is pronounced by the Inspector to be a *bona fide* discovery.

Dealing first with the branch of the case relating to McCrimmon's claim upon the property and his right to stake it, I think the property was not open to staking at the time he claims to have made his discovery and staking. Argument was presented to the effect that, under sec. 166, the Miller claim was abandoned, and that therefore, under sec. 131, the property would be open to prospecting and to staking. Without deciding as to what would be the effect if the Miller discovery post had really been outside the claim as contended, which, as I have already stated, was not established by the evidence, I think it is clear that sec. 166 is not wide enough to cover a case where invalidity is claimed by reason of lack of sufficient discovery, that not being, as I take it, within the fair reading of sec. 166. It is really, however, unnecessary to determine this question as to whether or not the property was open to prospecting or staking at the time of the McCrimmon staking, as from the evidence and from the Inspector's report it is absolutely clear that McCrimmon had no *bona fide* discovery of valuable mineral.

The McCrimmon staking and application was therefore clearly invalid, and the appeal and dispute, so far as they ask for the recording of his claim, must be dismissed.

Upon the remaining branch, namely, as to the validity of the Miller staking and claim, one must always feel great hesitation in throwing out a claim when the claimant really has a *bona fide* discovery of valuable mineral, even though such a discovery had not been made at the time of staking and recording the property. It seems to me, however, that the Act allows me no discretion in the matter, and I think it is perfectly clear that the discovery of valuable mineral must be made before the licensee can make a valid staking of the property. Section 132 makes discovery by the licensee the basis of the right to stake. As the claimant can only get his right under the Statute and under this section, which is the only one authorizing the staking of a mining claim, he must bring himself within the requirements of the section, and discovery must, as I have held in *Haight* v. *Harrison*, *ante*, and in a number of other cases in which the matter has come up, precede the staking. Sections 136 and 209 (6) of the Act might also be referred to in this connection. Section 157 (form 14) requires the staker to make affidavit that he has in fact discovered valuable mineral, and requires that he must state the day and hour of such discovery, and this

affidavit must be true: see *Attorney-General of Ontario* v. *Hargrave*, 8 O. W. R. 127, confirmed by the Court of Appeal, 10 O. W. R. 319; *Collom* v. *Manley*, 32 S. C. R. at 378 (a British Columbia case in which it was held that the claimant must have a discovery in fact before he was entitled to locate a claim; belief of the staker in the existence of discovery is not sufficient).

The policy of the Act is to prevent one licensee taking exclusive possession of a piece of land prior to discovery, as all licensees are to be entitled to equal rights until discovery is made, except only where the licensee avails himself of the working permit provisions of the Act under which, after notice of application is posted for 60 days, if no discovery is made by another licensee within that time, he may thereafter obtain exclusive possession for 6 or 12 months, it being deemed that the land must then be of such a character, being covered with soil for instance, that more extensive operations are required for discovery than the ordinary prospector is able to use or would care to use without protection for the results of his labour. Particularly would it be mischievous under the Act as amended during the last session of the Legislature, to allow staking without discovery, as the amendments protect the first staker in his possession until his claim has been disposed of.

This, I think, is the first case which has come before me in which a valuable discovery has been made where I have not been enabled to decide in favor of the discoverer. But, for the reasons I have given, I see no recourse but to hold the staking and record of the Miller claim invalid.

NOTE.—Section 166 (now s. 83 of the Act of 1908) was amended in 1909, by c. 26, s. 31, making it clear that the abandonment worked by the section is confined to cases of noncompliance with the Act as to the time and manner of staking out and recording—not including a case of insufficient discovery—which it is submitted with deference was always its meaning.

(THE COMMISSIONER.)

RE MACKAY AND BOYER.

Staking Promptly—Delay After Discovery—Intervening Discovery and Staking—Evidence—Stories of Prior Discovery and Staking Assays—Appeal as well as Dispute—Necessity for—Res Judicata —Appeal after Time.

Staking out of a mining claim must be proceeded with promptly after discovery else the discoverer's rights will be lost to a subsequent discoverer who completes staking first.

Delay from the morning of one day till the afternoon of the next when the staking might readily have been completed the same afternoon or the next morning is quite beyond the limit allowed.

Stories of alleged prior discovery and planting of posts, no trace of which can afterwards be found, should be received with a good deal of caution.

Where a claimant, who has filed an application for a mining claim which the Recorder refused to record by reason of there being a prior application upon the same property, enters a dispute against the prior application and therein claims to be entitled to the property, an appeal against such refusal is not necessary.

This was a case of conflicting applications for mining claims upon the same property. The facts are fully stated in the decision.

George Ross, for MacKay, disputant and appellant.

A. G. Slaght, for Boyer, respondent.

31st August, 1907.

THE COMMISSIONER.—The dispute in this matter was transferred to me by the Mining Recorder under sec. 52 (2), for trial and adjudication, and appointments duly taken out for the hearing of the dispute and appeal at the same time.

Formal objection was taken on behalf of the respondent that the appeal herein was not lodged and served in proper time, and that the appellant was concluded by an appeal of an earlier date. The facts are that on 17th May the appellant filed an appeal and dispute against a former recorded applicant named Martin, whose claim, it is admitted by counsel, had some time previously lapsed, but was not formally cancelled on the Recorder's books till 21st May. Some time after the cancellation of the Martin record of claim, the Recorder then having both the respondent's and the appellant's applications on file, recorded the respondent's application, that being the first one filed with him. This was

merely a ministerial act and did not at all involve any consideration of or decision upon the merits of the applicants' claims. The appellant and disputant then, on 6th June, filed another dispute and appeal against the respondent's recorded application. I think, under sec. 158a, the filing of this dispute, which asked to have the respondent's claim declared invalid and cancelled and his own put upon record, was sufficient to put the matters in issue and have them tried out between the parties without more, and I am entirely satisfied that there was nothing whatever done in what hitherto occurred to preclude the disputant from this course. He seems to have filed his appeal for greater caution. If it were really necessary to file the appeal I think there was nothing either by way of *res judicata* or by lapse of time to preclude him. But if it were necessary and if there were any doubt about the lapse of time, the appellant not having been notified pursuant to sec. 62, I would, under sec. 52 (3), allow the appeal to be made.

Dealing with the matter upon its merits. The lands being at the time, as it is admitted by counsel, open to prospecting and staking, the respondent Boyer claims that on 6th May, about eight or nine o'clock in the morning, he proceeded to the property and made a discovery of valuable mineral and planted thereon a discovery post. Without completing the staking he returned to Haileybury, and in the afternoon of the same day went again with a companion to the property and looked over it, when he says he found that his discovery post had disappeared. Without replacing it or doing anything more with the property, he again returned to Haileybury and that evening took legal advice upon the question as to whether the lands were really open to be staked. Next afternoon he went again to the property with an assistant and at about three o'clock in the afternoon put up his discovery post again, as he says, and proceeded to complete the staking of the claim.

Meanwhile, however, on the morning of this last mentioned day (7th May) the disputant MacKay, through his agent Hunt, had made a discovery and completed the staking of the property. No Boyer posts were there when Hunt and his assistant were doing their staking, and they knew nothing of any Boyer discovery. It is admitted that when Boyer was doing his staking in the afternoon of the same day he and his assistant saw the MacKay-Hunt staking, which had then already been completed.

The planting or alleged planting of the Boyer discovery post on the morning of 6th June rests upon Boyer's own uncorroborated evidence. Strange to say, in his affidavit he claims to have made his discovery at three p.m. of 6th June instead of in the morning of that day. It is not claimed by him in his evidence that he made any discovery in the afternoon of the 6th or planted any discovery post at that time.

For the security of honest prospectors I think it is necessary to receive with a good deal of caution statements of alleged prior discoveries and planting of posts, no trace of which can afterwards be found, when it is sought thereby to antedate a claimant who has admittedly, at a certain day and time, duly made a discovery and planted his posts. The evidence regarding such secret discoveries and mysterious disappearance of posts, which nobody but the alleged planter has ever seen, I think should be very satisfactory to be accepted. I think, however, under sec. 134 of the Act, that even if Boyer did plant his discovery post on the morning of 6th June as he claims, he forfeited his right by failure to complete his staking as quickly as in the circumstances was reasonably possible. He might have staked the claim, if not that same morning, at least that afternoon, or certainly the forenoon of the next day. It seems to me that, in leaving it to the afternoon of the 7th, he was quite outside the time limit allowed by sec. 134, and that the property was consequently open to Hunt to stake and complete his staking first, as he did on the morning of the 7th.

With consent of the parties an order was made for inspection of the alleged discoveries by the Mining Inspector. The Inspector reports that Boyer has no discovery of valuable mineral within the meaning of the Act, but that MacKay has a discovery, and upon the evidence and the Inspector's report I so find. I may say that I do not at all, in the absence of the assayer and of strict proof as to the *bona fides* of the samples assayed, accept the reported assay of large silver values from the Boyer discovery.

For the reasons stated, and as the Hunt-MacKay staking seems to be regular and valid, I think the dispute should be allowed, and that the Boyer claim should be cancelled and the MacKay application recorded upon the property.

(THE COMMISSIONER.)

RE WATERMAN AND MADDEN.

Working Conditions—Kind of Work—Non-performance—Excuse for—Discovery—Evidence—Diamond Drill—Working Permit.

Where the holder of a mining claim claimed to have made discovery of valuable mineral by means of a diamond drill, obtaining as he claimed small assays from the borings, but had done nothing to open up the alleged finds or show their extent or character,—it being in the district at that time necessary to have every discovery pass inspection—proof of discovery was held unsatisfactory.

Held also that—whether or not the diamond drilling was work within the meaning of s. 160—as enough had not been done since staking, the claim had become forfeited, and after more than a year of inactivity, the only excuse being negotiations with officers of the Department, the forfeiture must be considered final.

It was pointed out that the proper course in the circumstances would have been to procure a working permit upon the property.

Dispute against respondent's mining claim.

J. Lorn McDougall, for disputant Willis E. Waterman.

S. D. Madden, the respondent, in person.

25th September, 1907.

THE COMMISSIONER.—This is a matter transferred to me by the Mining Recorder, pursuant to sec. 52 (2), for trial and adjudication. The complaint is that the mining claim recorded by the respondent is invalid by reason of lack of discovery of valuable mineral and by reason of the non-performance of the working conditions required by The Mines Act and failure to file proof of performance of the working conditions within the time required by the Act.

I find as a fact that the working conditions were not performed, nor was any proof filed within the time limited by the Act.

The evidence as to discovery is not very complete, but I am satisfied from what was disclosed that nothing was discovered which it would be possible, so far as operations went, to declare to be a discovery of valuable mineral within the meaning of the Act. The facts are, that Mr. Madden went upon the property, it would appear, while there was still an existing uncancelled claim upon it, and operated with a diamond drill, sinking small holes in two or three places. He claims to have got assays of silver from some of the

borings but none of the alleged finds were tested as to extent or character by opening up or further borings in the vicinity and no mineral whatever could be seen in place at any of Mr. Madden's workings. Shortly after staking the claim and recording it Mr. Madden ceased operations, and nothing further has been done with the property. Though in the first part of the hearing before me Mr. Madden contended that there was sufficient of this drilling done subsequent to the staking to constitute thirty days' work, later in the proceedings, after looking into the matter, he admitted that this was not the case, but pleaded as excuse for lack of performance of work that negotiations with the Inspector and with the Department as to how the discovery was to be tested were in progress, and pending those he did not recommence operations.

Without making any decision as to whether such drilling could be considered actual mining operations within the meaning of sec. 160, it is sufficient to point out that even if it could be so considered there was not enough done after the staking of the property to comply with the Act, and the excuse alleged I think is altogether insufficient, especially in view of the fact that more than a year elapsed from the date of the performance of the last of the work before the present dispute was filed against the claim. Had Mr. Madden anything like the confidence in his alleged discovery which he should have had before staking and filing his claim, I cannot conceive of his allowing the property to rest for so long a period without pursuing active operations to open up the mineral which he claimed he had found.

I might point out that the proper course for Mr. Madden to have pursued, if he desired to carry on extensive operations with a diamond drill in such a way that he would be protected from interference by other parties and secured in the results of his work in case he disclosed valuable mineral, would have been to procure a working permit upon the property as provided by the Act. It is for just such cases, where mineral cannot be found upon the surface and extensive operations are required to disclose it, that the working permit procedure is intended.

Property should not, however, be tied up by mining claims without actual discovery of valuable mineral or without performance of the prescribed working conditions and filing of proof thereof as the law requires.

(THE COMMISSIONER.)

RE REICHEN AND THOMPSON.

Staking—Adopting Former Markings—Substantial Compliance—Overlooking Irregularities—Staking Promptly — Priority — Discovery must be Appropriated—False Affidavit—Slight Defects or Inaccuracies in Application—Moral Claim—Retroactive Statute—Other Laws as to Marking Out of Claims Discussed.

Where in staking out a mining claim new or newly marked posts are planted, existing marking of lines, which the staker assisted in making, may be adopted, thus making substantial compliance with the Act, but it is safer to mark all lines anew.

Unless a discovery is appropriated by at once planting a discovery post upon it and proceeding as quickly as reasonably possible to complete the staking out of a mining claim the discoverer's rights may be lost or postponed.

Procuring the recording of a claim by a false affidavit will invalidate the claim.

Slight unintentional defects or inaccuracies in an application will not invalidate a claim.

It seems that where there has been actual discovery and an honest attempt to comply with the law the tendency should be to overlook irregularities in staking, so far as the Act will permit.

This was a dispute transferred by the Recorder for adjudication. Both parties claimed the same property. The disputant Reichen was the first to discover and stake, but objections were raised to the sufficiency of his staking and to some defects and inaccuracies in his application. The respondent Thompson staked the following morning, but was first to get his application on file. His claim was attacked on the ground that it was subsequent to the disputant's and staked when the land was not open, and that the recording of it was procured by a false affidavit. The facts are fully set forth in the decision.

A. G. Slaght, for disputant.

F. L. Smiley, for respondent.

12th October, 1907.

THE COMMISSIONER.—I find the facts to be that the disputant Reichen, with his employee Perkins, at 3.30 p.m., 21st June, 1907, planted a discovery post upon what is not disputed to be a showing of valuable mineral within the meaning of the Act, the property then having no unexpired or unlapsed staking or record upon it. He proceeded forthwith to mark his name and the date of the discovery upon the discovery post and upon No. 1 post, using the same posts that he

had a few months previously used for a staking of the property which was never recorded. He cut or shaved off from these old posts the old markings or such of them as were inappropriate for his present staking and made them in every respect, so far as appears, conform to the requirements of the Act. The discovery post, it may be mentioned, was not planted at the point where it had previously been, but was removed about 100 feet to a discovery made by Perkins on the 7th and 8th of June, upon which no post had ever been before planted, and from which, according to the evidence, Perkins had taken away samples for assay and had, just a few days before the present staking, obtained returns of an assay showing silver. After planting and marking the discovery and No. 1 posts Reichen proceeded around the boundaries of the claim seeing that each of his former corner posts was in place and freshening up the old markings upon them. The boundary lines had already been blazed by him on former stakings, and no new blazing of the boundaries was done at this time. This completed the operations for that day, and he arranged with Perkins that the latter should come back next morning and complete the blazing. Just what it was intended he should do for this purpose does not appear, but Perkins did as a fact go to the claim early the following morning and blaze out the line from the No. 1 to the discovery post, or rather continued the blazing of the old line (which was in the same direction) over the additional 100 feet or so toward the south-west, that the discovery post had been removed from the former point of discovery. Though some of the old blazing and marking may not have been as distinct as it might be, I must find upon the evidence that it was in substantial compliance with the Act, and was quite sufficient to clearly identify and mark out the property which was intended to comprise the claim. In a surveyed township, as this claim was, there could of course really be no question about the identity of the property intended to be taken for the description of the fractional part of the lot which is required to be marked upon the No. 1 post identifies it.

At nine o'clock on the morning of 22nd June, being the next day after Reichen had planted his discovery post, and apparently less than an hour after Perkins had completed his blazing, the respondent Thompson, having been informed by one of his employees, Jones, of the Reichen staking and the suggestion apparently having been made to him by Jones

that the staking or marking and blazing of Reichen was not properly or sufficiently done, proceeded with his assistants to the property and after examining the Reichen discovery post and his other posts, and seeing Reichen's name and markings with the date of discovery upon them, proceeded to plant his discovery post immediately beside Reichen's, and, as I find, upon exactly the same discovery and vein. He completed the planting of his other posts, putting the necessary markings upon them, and blazed out the lines in accordance with the requirements of the Act.

I may here mention that the discovery upon which both Reichen's and Thompson's discovery posts were planted is claimed on behalf of the disputant Reichen to have been made by Perkins on the 7th and 8th of June, and is claimed by the respondent Thompson to have been made by his nephew Fred Thompson at the same time. Neither Perkins nor Fred. Thompson, however, is personally claiming any right in the property, nor could they or anyone through them as I think under the Act claim any right until the planting of a discovery post. Section 134 of the Act is clear that any discoverer desiring to be protected in his discovery must at once plant his discovery post, and the reason for this rule is obvious; if stories of alleged secret discovery set up in opposition to the claim of a licensee who has planted his discovery post and taken the steps prescribed by law to appropriate the discovery and claim, were to be listened to and accepted, a miner's title would be precarious indeed. . . . Upon the whole evidence I am convinced that Perkins and not Thompson is the man who really made the discovery in question, though, as I have before stated, I think this question is not material, for, as a matter of law, the rights of the parties must commence and date from the appropriation of the discovery by the planting of the discovery post.

On the completion of their staking both parties proceeded, with what in a good cause would be considered at least very commendable promptness, to the Recorder's office to file their respective claims, Thompson showing superior speed and alertness and managing by leaving the claim forthwith after staking, walking 10 miles and paddling 27 miles the same day, to reach the Recorder's office first on Monday morning and get his application upon file first. When Reichen's application was presented the same day the property had already been recorded in the name of Thompson, and Reichen was therefore driven to file a dispute and launch

the present proceedings to establish his claim as prior staker and discoverer of mineral on the property. The affidavit of Thompson, made for the purpose of recording his claim, alleges discovery of copper, gold and silver, and also deposes that at the time of his staking there was nothing on the lands to indicate that they were not open to be staked out as a mining claim under the Act. I think he was not justified in making affidavit to either of these statements, certainly not as to the discovery of gold and silver upon the property, which statement I find, upon his own evidence, he had no justification whatever for making. As to the second statement as to there being nothing on the lands to indicate that they were not open, he admits that he saw Reichen's posts before planting his own, but claims that the Reichen staking was so far short of the requirements of the Act as to leave the lands open. Though if no mis-statement had been made by the respondent as to any other matter in the case he might be credited with good faith in this one, yet I think he should have disclosed in his affidavit the real facts as to the Reichen staking, and if the Recorder refused to record his claim he would, if he really believed the Reichen staking bad, have his recourse and an opportunity to show his confidence in his opinion after the Reichen application was put on record (as he undoubtedly expected it would be if his did not get on first) by filing a dispute and establishing the invalidity in the proper way. His assertion in his evidence that there were really two discoveries on two leads about two feet apart, and his assertion that he understood that Perkins was going up to the property for him and not for Reichen on the 7th of June, absolutely contradicted as these statements are by his own witnesses and by the circumstances of the case, do not tend to establish confidence in his care or *bona fides* regarding what he swears to.

The dispute to be determined involves two questions, first, whether the Thompson claim which is on record is invalid and should be cancelled, and secondly, if so, whether the Reichen claim is valid and should be recorded.

Both applications being presented within the time allowed by sec. 156 of the Act, nothing turns upon the priority of recording. The Thompson claim is attacked upon the ground, first, that his discovery and staking were subsequent to the discovery and staking of Reichen, and that his claim by reason thereof not only postponed to that of Reichen but in fact, under sec. 131 and other provisions of the Act, wholly

invalid because of being staked upon lands not open to staking; secondly, that it is invalid by reason of the false affidavit upon which it was filed; and lastly, that it was invalid because, even if the Reichen staking was so incomplete as to be deemed an abandonment under sec. 166, Thompson came upon the property and proceeded to stake and interfere with the claim before the reasonable time allowed to Reichen by sec. 134 to complete his staking had expired.

Dealing with these three objections in reverse order; I think as to the last that while the case is probably very near the line as to the time laid down in sec. 134—Reichen having planted his discovery post at 3.30 in the evening, and Thompson coming on next morning at 9 o'clock, I should hardly hold the Thompson staking invalid on this account, particularly in view of the fact that Reichen and his assistant were not on the property when Thompson came on it, and had then in fact completed all they were going to do regarding the staking and marking.

As to the second objection: I think I would, under the authorities, have to hold the Thompson application invalid by reason of the incorrect and misleading affidavit by which he procured the recording of his claim.

The first and chief ground of attack upon the Thompson claim—that at the time it was staked out Reichen had a prior effective staking upon the land—really goes to the root of both branches of the dispute involving the validity of the Reichen as well as of the Thompson claim. The question is, was the Reichen staking sufficient or was it so far defective as to work an abandonment under sec. 166?

The point involved is an important one turning upon the interpretation of secs. 133 and 137 of the Act, and particularly upon the question whether a staker, who is otherwise proceeding in accordance with the law, is entitled to adopt and appropriate as part of the markings for his claim the posts and markings of an extinct claim which he finds upon the property—posts and markings which, in this case, had been placed there by himself in a former staking for another person with whom, however, he was to be jointly interested in the claim. It is important because undoubtedly very many mining titles in the Province depend upon the same question though it has never previously come before me as the exclusive test of a claimant's right.

After a careful consideration of the various sections of the Act having to do with the matter, and a somewhat extended search of authorities, I have reached the conclusion that, upon the facts of this case, the disputant Reichen was entitled to adopt the posts and markings which were upon the property on the 21st of June, and that the staking and marking performed by himself and Perkins on the 21st and 22nd June in conjunction with what already existed on the property and was adopted by him was a sufficient and valid staking and marking under the provisions of the Act.

Section 132 provides that a licensee who discovers valuable mineral in place upon lands open to prospecting shall have the right to stake or to have staked out for him a mining claim thereon.

Section 133 provides that the manner of staking out a mining claim shall be as therein set forth, namely, by planting a discovery post upon an outcropping or showing of mineral and marking it with the name of the licensee, the date and hour of discovery and the other particulars as therein set forth, and by planting four corner posts and marking them as therein specified, and by plainly blazing the trees and cutting the underbrush along the boundary lines of the claim and plainly blazing a line from the No. 1 post to the discovery post.

Section 137 provides that substantial compliance, as nearly as circumstances will reasonably permit, with the provisions of the Act regarding the staking out of mining claims shall satisfy the requirements of the Act.

Section 166 provides that non-compliance by or on behalf of the licensee to (with) any provision of the Act relating to the staking out and recording of a mining claim, including the blazing or otherwise marking of all lines required by the Act, shall be deemed an abandonment.

Section 117 provides that no licensee shall be deemed to have acquired any right to a mining claim unless a discovery of valuable mineral has been made thereon by him or on his behalf.

Under secs. 135 and 134 all licensees (save only in the case of prospecting pickets or working permits, which are not involved in the present dispute) are to have equal rights upon lands open to prospecting until some other licensee discovers valuable mineral and plants a discovery post upon

it; and a licensee who has actually made a discovery but failed to plant his discovery post upon it at once and to complete his staking with reasonable speed, is liable to lose his right in case another licensee makes a discovery of valuable mineral upon the property and completes the staking before him.

The foundation of mining title under our law therefore, and undoubtedly the most important requisite to be performed in order to obtain a mining claim, is the discovery of valuable mineral; but this must be followed up by appropriation of it and by marking out of the claim in the manner provided in the Act, else even the *bona fide* discoverer may find himself postponed to the claim of some other licensee. Though a safe and impartial administration of the law will in the end be best secured by uniform enforcement of the statutory requirements as they stand without regard to hardship in special cases, I think in the interpretation of these provisions their object and purpose should not be lost sight of. They are undoubtedly intended to secure the claim to the first discoverer who plants his post and marks off his claim in such a way as to make known to other prospectors that he has found valuable mineral upon the property and has set it apart for himself. The manner of so appropriating the claim and notifying others that he has done so cannot in the abstract signify so long as it is done effectively; nevertheless, when a method is laid down in the Act prospectors have a right to expect that it will be done in that way and to insist that the provisions of the Act shall be reasonably carried out. But when the purpose of the provisions has been accomplished and there has been substantial compliance with the Act, I do not think that a claim should be held bad on a merely technical or trifling and unimportant detail. The more important and meritorious act of discovery should not be overshadowed by non-substantial formality and detail in the marking out, provided of course that the marking out is reasonably sufficient and in substantial compliance with the Act.

This I take to be the intention of our present Act, as well as the best opinion of authorities in other mining jurisdictions, especially those of more recent date, as to what the interpretation of such laws should be.

In the case of *Clark* v. *Docksteader*, a British Columbia case, 36 S. C. R. at 637, Mr. Justice Maclennan says:—

"The object of the mining Acts is to promote the discovery of minerals in the lands of the Crown, and an inducement is held out to persons to search for them by enabling them to secure the exclusive

possession of ground or rock in which they have found minerals and to take the minerals for their own use. The essential thing to secure the privilege is the discovery of minerals, and the Act contains certain directions to enable the discoverer to describe and to secure his location, and to obtain the reward offered by the Legislature for his industry.

"Such being the object and purpose of the Act, I think in construing it every reasonable intendment ought to be made to uphold the validity of the claim where there has been actual discovery and an honest attempt to comply with the directions of the Legislature in staking and describing the location of the discovery."

Martin, J., in another British Columbia case, *Sandberg* v. *Ferguson*, 2 Martin's Mining Cases, 172, his decision being afterwards confirmed in 35 S. C. R. 476, says:—

"The marked tendency of late years has been to remedy defects and irregularities in locations."

To the same effect are the remarks of Lindley, upon the United States law, who says, in sec. 374 of his work on mines:—

"While the requirements of these several laws (regarding staking out and marking) should be fulfilled to a reasonable degree a substantial compliance, where the good faith of the locator is manifest, would undoubtedly be held sufficient. Such Statutes are as a rule liberally construed. Slight variations should not be permitted to invalidate a location otherwise valid."

Had the claim of the disputant Reichen not had the boundaries marked or blazed at all, I think it could not be contended that he had substantially or sufficiently complied with the provisions of the Act. The sufficiency of the staking and marking must therefore depend upon his right to appropriate and take the benefit of the old posts and markings which he found upon the property. This, I think in the circumstances, he was and is entitled to do.

I have not been able to find any very conclusive authority of our own Courts upon this point, but from a reasonable construction of the Act upon the principles already mentioned I think it should be so held. The point has arisen in other jurisdictions, but the decisions therein are of little value without an understanding of the Acts upon which they are based and a comparison of them with our own.

One United States case, *Conway* v. *Hart*, 129 Cal. 480, 21 Morrison's Mining Reports 20, cited in the Am. & Eng. Encyc. of Law, vol. 20, 714 (note), is directly in point, the head note reading as follows:—"Where the locators find the claim marked by stakes used on a former location of the same claim, which former location has become extinct, they

have a right to adopt such marking as their own." The California law is based, like our own, upon the principle of discovery, but it is unlike ours in that it does not specify in detail the character of the marking, the California law being identical with the Federal law of the United States in merely providing that "the location must be distinctly marked on the ground so that its boundaries can be readily traced." This variation in the requirements for marking would not appear to make any difference in the point decided, the point of decision being merely the right to adopt existing markings without regard to the nature or character of the markings required.

To the same effect is the Colorado case of *Miller* v. *Taylor*, 6 Colo. 41, 9 Morrison's Mining Reports 547; also cited in the Am. & Eng. Encyc., vol. 20, 715 (note).

On the other hand in an Australian case, *Barrington* v. *Willox*, 4 V. L. R. 2 (1878), it was held, under the Victoria Statute, that a licensee who had planted the four corner pegs for a mining claim before he was entitled to do so, could not, after becoming so entitled, make a proper staking by removing two of the pegs and retaining the other two as previously planted. This decision, however, apparently turned upon the particular wording of the Victoria Statute or by-law, which provided that "All claims shall be marked out *at the time of taking possession* thereof by substantial pegs erected at each angle of the claim." The acquisition of mining claims under the Victoria law did not depend upon discovery, but merely upon the taking of possession and proceeding otherwise as in the Act provided, the planting of the pegs constituting the taking of possession and being under the Act the commencement of title.

The nearest approach in our own Courts to a decision upon the point is in the case of *St. Laurent* v. *Mercier*, 33 S. C. R. 314, a case under the Yukon Regulations in which it was held that where a claimant staked out and obtained grant of a mining claim for a piece of land, part of which overlapped another valid claim and which part was therefore void, and after the overlapped claim became extinct again applied for and obtained a grant of all the land originally staked without re-planting any posts but adopting his former posts and markings, it was held by a majority of the Supreme Court of Canada that his claim was not void by reason of failure to re-stake. The Yukon Regulations in force at this

time required the marking out of the claim by the planting of stakes before making application for the claim, and as to this feature of the case I can see no distinction between that and the present case, but the decision appears to be to some extent at least based upon or influenced by the fact that the applicant had had possession for some time of the whole claim applied for. The remarks of Mills, J., at page 318, are as follows:—

> "It has been argued before us that, if Mercier desired to renew his application when there was no longer any impediment in his way, he ought to have re-staked his claim, although the stakes which he had previously placed were still standing, and the limits which he had on the first occasion marked out, while Waite's claim stood in the way of his obtaining a valid entry of a part of what he claimed. I do not think this is so. I think the limits of the grounds which he required being well known from what he had done, that his making application for a renewal of what he had then staked out was sufficient, as there was at the time this entry was made, no legal impediment in the way of his getting that part of the area which he had marked out and of which he desired to obtain a valid entrance. I do not think it was necessary that he should have gone upon the ground a second time, pulled up the stakes which he had previously planted and put them again in the same places in order to obtain a proper entry for his claim in the Gold Commissioner's office. I think this would have been, under the circumstances, an altogether unnecessary proceeding and I think that the Gold Commissioner was right in recognizing the claim which Mercier had made as a valid one. He had been in possession; he had done work on the ground; he had obtained a renewal of his original claim, and there was no power in any one to make a second valid entry."

Holding, as I have already intimated that I think I should, that the disputant Reichen had a right to adopt, and that he should be given the benefit of the existing stakes and markings that were on the property when he staked on 21st June, and that his compliance with the staking provisions of the Act was therefore sufficient, it follows that Thompson had no right to stake the property on the 22nd, and that his staking and claim must be held invalid; see secs. 131, 132, and 157; and even if not invalid, his discovery and staking being subsequent in date to Reichen's, must give way to the latter. Upon this as well as upon the ground of the incorrect and misleading affidavit already dealt with, the Thompson claim must be thrown out.

Mr. Reichen's claim, so far as the staking is concerned, must be declared valid, but some other objections raised against it remain to be dealt with. It was pointed out that the sketch accompanying the Reichen application did not have the word "discovery" written over or connected with the dot on the map intended to indicate the discovery point, and did

not have the length of the line connecting the discovery point with No. 1 post marked, and that in the application that distance was erroneously given as 483 feet instead of 387 feet, 387 feet being the correct distance, and being what was marked on the posts. In the absence of any suggestion of bad faith, or of any probability that any one could be misled or prejudiced by these things, I cannot, in my view of the principles which should govern such matters, hold these discrepancies, which are apparently merely clerical slips, fatal to the validity of the claim.

It was also urged against the Reichen claim that Reichen having, as was admitted, staked out the same property before, namely, on 25th March, 1907, and not having recorded it, was disqualified under section 136 from afterwards restaking or acquiring any interest in the property. Sec. 136, however, is an amendment made to the Act last session, and did not become law until 20th April, 1907. It is not in terms retroactive, and upon the principles which I understand to be applicable to the interpretation of statutes in such cases, it would have to be held not to apply to this case.

Much was attempted to be made at the trial out of a so-called moral claim of the respondent Thompson to the property. Though this, if it existed, could not be allowed to override any rights properly acquired under the Statute, it may be well to say that I am convinced that if anything of the nature of a moral right existed in either of the parties, it was rather with the disputant than with the respondent. . . .

There is nothing, therefore, on the side of the respondent to bespeak any leniency toward him in viewing the legal requirements regarding his claim, or to call for any stringency in applying the law to the claim of his opponent—if in any case there should be any difference made. The merits from the point of view of moral right are, as I think, really the other way.

In finding for the disputant upon the legal rights, however, I think I should say by way of warning, that if this decision is not the utmost limit of liberality which the law allows, it is at least as near the border line as it is comfortable for any litigant to have it, and in the future if the disputant undertakes to stake and record a mining claim which he regards as valuable, and if he desires to avoid litigation, he will do well to be careful and accurate in the work to make sure that there can be no room for doubt as to the sufficiency of

his proceedings. While I think it permissible and sufficient in law to make use of old posts and adopt the old markings and blazings on a claim so far as they are appropriate, it would no doubt be safer and wiser for a licensee who desires to avoid trouble to do all anew.

As the chief questions raised in the case are questions of law not before decided, and, perhaps, to some extent doubtful, and as the disputant by his manner of staking the claim and making out his application may in some degree be deemed to have invited litigation, I will, though allowing his dispute and finding that he and not the respondent is entitled to be recorded for the property, allow him no costs.

(THE COMMISSIONER.)

RE SMITH AND McHALE.

Disqualification by Prior Staking — Unauthorized Staking—Adopting Existing Discovery—License—Moral Claim.

Where a licensee procured a non-licensee to stake out a mining claim, the licensee not being himself present at the staking, and the staking was not and could not legally be recorded, and was not in fact founded upon a discovery of valuable mineral, the licensee was held under s. 136 (1907) to be disqualified from restaking the property without a certificate from the Recorder as in that section provided, and a restaking done by him without having procured such a certificate was declared invalid.

It seems that a licensee who, on lands open to prospecting, finds valuable mineral which has been exposed but not appropriated by another may adopt or appropriate it as a discovery. (But see note to this case.)

This was a dispute over lands in the township of Lyndoch. Both parties had filed applications for mining claims, but at the hearing the disputant renounced any right under his own applications, and sought only to have the respondent's claims declared invalid.

The respondent, who held a miner's license, procured one McCann, who had no license, to stake out the property on 10th July, 1907, the respondent himself not being present at the staking. Finding this was invalid, he went to the property with McCann, and on 16th July again staked it out, and upon this staking filed the applications which were the subject of the dispute.

T. W. McGarry, K.C., for the disputant, Smith.

W. R. White, K.C., for the respondent, McHale.

15th Oct., 1907.

THE COMMISSIONER.—The question at issue has devolved into whether or not the stakings and applications of McHale are valid and ought to be recorded, Mr. McGarry, during the course of the hearing, having abandoned all claim to validity of his own client's staking. . . .

There are really two claims in issue, adjoining each other, but as both depend upon the same questions, it is not necessary to distinguish between them. The fact may be mentioned, however, that as to lot one, it is clear the McHale discovery posts were planted upon an exposure of mineral that had been made by Smith, while as to lot two it is not clear that this was the case; though I think this fact can make no difference, as, if the land is open within the meaning of sec. 131 of the Act, it seems clear that any licensee finding any valuable mineral that has not been appropriated by another licensee (even though exposed and brought to light by the operations of some person other than himself) has legally the right to appropriate it, whatever may be the moral quality of such an act. I have, however, gone into this question more fully in other cases, and it is not, I think, in any event necessary to decide it here.

The whole question in the present case, as I view it, turns upon the effect or application of sec. 136 of the Act. Sub-sec. 1 of this section provides that—

> "Any licensee who, no matter with what purpose or intent, plants or places any stakes, posts or markings not authorized by this Act upon any lands described in section 131 of this Act as being open to prospecting, or causes or procures the same to be done; and any person who stakes out or partially stakes out, whether authorized by this Act or not, any such lands, or causes or procures the same to be done, and fails to record the same, or to complete and record the same, with the Mining Recorder, as and within the time by this Act provided, shall not subject to the next subsection, thereafter be entitled to again stake out the said lands or any part thereof or to record a claim thereon, or in any way to acquire any right or interest therein."

The proviso of sub-sec. 2 permits a licensee who has done such staking or marking in good faith and for no improper purpose to remove the disqualification mentioned in sub-sec. 1 by notifying the Mining Recorder and satisfying him of such good faith and paying a fee of $20 and procuring a certificate of relief, which I think must be done before any new staking of the same property is entered upon. This McHale did not do.

It was contended on behalf of Mr. McHale that his connection with the staking of July 10th does not come within

the above section, but after carefully considering the matter I am satisfied that it does. This section was intended to meet what in rich mining districts especially had become a great and very general abuse. A person in his desire to obtain exclusive possession of a piece of property before he had complied with the law requiring him first to make a discovery of valuable mineral upon it, would stake out a claim and put his markings upon it without having made discovery and perhaps without the slightest pretense of a discovery. He might, if reckless or unscrupulous enough, make affidavit of discovery and file his claim, but if more cautious or more far seeing he would simply hold the property during the fifteen days (or more if it was farther than ten miles from the recording office) allowed for recording a claim, and then instead of recording the claim, which of course he could only do by swearing an affidavit of discovery, he would simply pull down his first staking and stake the property over again in the same way; which process might be kept up indefinitely without the making of any real discovery and without making any application for it, other prospectors meanwhile, and especially the better class of them, being by reason of their natural disinclination to interfere with property already staked, and now also by virtue of sec. 131 of the Act, thus prevented from prospecting, staking out or working upon the property, and the whole purpose and intention of the Act in requiring discovery of valuable mineral as the basis for staking a mining claim being thus nullified. It was to meet this condition of things and to protect the more honest and deserving prospector that sec. 136 was designed. Though being in a sense a penal provision, and one which as such should not be extended beyond the fair import of the words used, I think unless the usefulness of a very beneficial and important provision of the Act is to be lost, the appellant McHale must on the facts of this case be held to have brought himself within the disqualification mentioned in the section under consideration, and that he was not until he had complied with the relieving provision of sub-sec. 2, entitled to again stake out or apply for the lands in question.

The staking of 10th July was unauthorized in that the persons performing it had no license, and that it was not founded upon a discovery of valuable mineral made by any licensee (see secs. 84, 132 and 157); and it was a staking, whether authorized or not, that was not recorded with the Mining Recorder, no attempt in fact having been made to record it; and I think Mr. McHale's connection with this

staking clearly amounted to a causing or procuring of it in the proper and ordinary meaning of that expression. Whoever may have first suggested the staking he arranged and agreed that McCann, whom he knew to have no license, should go out and stake in his name and on his license. He furnished the license to McCann for the purpose, or furnished the number of it, without which the necessary markings could not have been put upon the posts. McCann says he was acting for McHale in doing the staking, and McHale admits that the staking was done through an error of his own. Though the work was actually performed by McCann it was McHale's conduct that led to and occasioned and brought about what was done. But for what he did his name would never have been put upon the property nor would the staking that was done on 10th July ever have been done. The exact details of what occurred between McHale and McCann are not disclosed, but I think enough appears to compel me to find as I do.

Though it should not I think influence the decision of the case, it may be pointed out that the applicant whose stakings are being rejected for lack of compliance with a provision of the law of which he appears to have been ignorant, cannot claim to be entitled to very much sympathy when it is remembered that one at least of his discovery posts was planted upon mineral that had been disclosed by another man's labour and the sample which he forwarded to the department as a proof or indication of the nature of his discovery was a piece of mineral that had been taken out by someone else.

Stakings of McHale declared invalid.

NOTE.—The opinion expressed in this case, but not made a ground of the decision, that a licensee may, on lands open to prospecting, appropriate valuable mineral which he finds opened up but not appropriated by another person, is at least shaken by the decisions of the Divisional Court in *Re McCully and Plotke*, *post*, and the Court of Appeal in *Re Smith and Hill*, *post*. It is however well settled law in the United States: *Morrison's Mining Rights* (11th Ed.), 31; *Lindley on Mines* (2nd Ed.), s. 335; 27 Cyc. 556; *Book* v. *Justice Co.*, 58 Federal, 106; 17 Morrison's M. R. 617; *Hayes* v. *Lavagnino*, 17 Utah, 185, 53 Pac. 1029, 19 Morrison's M. R. 485.

The same has also been held in British Columbia, even where the words of the Statute were "has actually discovered mineral:" *Richards* v. *Price*, 1 Martin's M. C. 156; 5 B. C. 362.

It must be taken at least that there can be no valid adoption of a discovery while it is under appropriation by the first licensee; at all events where that appropriation is valid. Distinction however might be made, and in fact seems to be suggested in *Re Smith and Hill* (above), where there has been actual, voluntary or intentional abandonment by the first discoverer. Cases of constructive abandonment, or invalid, or ineffectual appropriation or possession, present more difficulty.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

12 O. W. R. 248.

(THE COURT OF APPEAL.)

13 O. W. R. 900.

RE WRIGHT AND THE COLEMAN DEVELOPMENT CO.

Abandonment—Subsequent Applications—Employee—Moral or Equitable Right—Parties.

C. staked out a mining claim 1st June and recorded it 15th June, 1906; W. made a discovery upon the same lands 16th July but the Recorder would not receive his application because C.'s was on record; W. had formed a partnership with S. who was a foreman of the C. D. Co. which had had men prospecting on the lot; on 9th Aug. the Co. staked on W.'s discovery but its application was also rejected. On 14th Sept. W., by giving C. a half interest got C.'s claim abandoned and his own on record. The Co. staked again on 6th Oct. and 21st November, 1906, and 17th January, 1907, on an alleged discovery of 29th June which was not in reality a discovery within the meaning of the Act making successive applications which the Recorder rejected at the time but which were afterwards recorded under mandamus.

Held by the Commissioner, following Australian and United States authorities, that the Co.'s subsequent stakings and applications on a different discovery worked an abandonment of its first staking and application and that as the subsequent ones were admittedly not founded upon a real discovery all its applications were invalid; and he declined to deal with its equitable claim to the W. discovery and application until S. should be made a party and proceedings taken in the form prescribed by the Act.

Held by the Divisional Court that the subsequent applications did not work on abandonment, and (Riddell, J., dissenting), that the whole claim should be awarded to the Co.

Held by the Court of Appeal that an abandonment should not be construed from the making of the subsequent stakings and applications but that Sharpe must be made a party and the matter remitted to the Commissioner for determination of the rights of all concerned.

Application by Tiberius J. Wright and Agnes Columbus to have 4 mining claim applications of the Coleman Development Co., Ltd., declared invalid.

H. D. Graham, for the applicants.

A. G. Slaght, for the company.

29th Nov., 1907.

THE COMMISSIONER.—This is a matter brought before me in a summary way under the provisions of sec. 52 of the Act, the Mining Recorder having transferred to me for trial and adjudication all questions involved herein which might

otherwise be of a nature requiring to be dealt with in the first instance by himself.

The applicants, Tiberius J. Wright and Agnes Columbus, who are the holders of a recorded application for a mining claim upon the west half of the north-west quarter of the north half of lot two, in the third concession of the township of Coleman, containing 20 acres more or less, are asking to have it determined that the four applications of the Coleman Development Company, Ltd., now recorded upon the same property under various dates, are invalid, that the applicants' title may thus be established, or cleared of adverse claims.

The facts concerning the various discoveries, stakings, and applications, are as follows:—The property was originally staked on behalf of Agnes Columbus on 4th June, 1906, on discovery claimed to have been made 1st June, 1906, the application being recorded 15th June, 1906. This application was abandoned 14th September, 1906, having been transferred to the applicant Wright apparently pursuant to an agreement or compromise between them under which the applicant Columbus received from Wright a half interest in the latter's application upon the same property to be presently mentioned.

On 17th July, 1906, Wright staked the property upon discovery made 16th July, but by reason of Columbus' application then existing upon the property he was unable to record the staking—the Mining Recorder then following the practice of refusing to receive more than one application at a time upon any property. He restaked on 3rd September, 1906, and on 15th September, after abandonment of the Columbus claim as above mentioned, recorded his application. His discovery was inspected by the official Claim Inspector, and passed and allowed as a *bona fide* discovery of valuable mineral within the meaning of the Act. The merits of this discovery are not disputed. It is no doubt the richness of this discovery which has raised so keen a contest over the ownership of the property.

On 9th August, 1906, the property was staked by Mr. James F. Gillies on behalf of the Coleman Development Company, Limited, claiming discovery on 30th July. Application was made out on 10th August, 1906, but the Mining Recorder would not receive it by reason of the Columbus application being recorded upon the property.

It does not appear from the evidence that Wright ever actually prepared or tendered an application to the Recorder upon his discovery of 16th July prior to the preparation and tender of the one recorded by him on 15th September; nor is there any evidence in this proceeding that the application of the Coleman Development Company dated 10th August was tendered to the Recorder on that date or at any time prior to 14th November, 1906, though the mandamus order of the High Court, made in a proceeding, however, to which Wright and Columbus were not parties, directed the application to be recorded as of 10th August, 1906, proof doubtless having been put in in that proceeding to the effect that the said application was tendered on that date.

It may here be mentioned that the Gillies discovery or alleged discovery of 30th July is identical with the Wright discovery of 16th July, the Company claiming, however, that the Wright discovery was made or assisted to be made by or through its employees.

On 6th October, 1906, the Coleman Development Company, Limited, made another staking of the property on discovery claimed to have been made by its employee, William Gavin, on 29th June, and application dater 10th October upon this staking was made out and tendered to the Recorder on 20th October, 1906.

On 21st November, 1906, the Company again staked the property on discovery of 21st November, previously discovered 29th June, 1906, and on 22nd November tendered application thereon to the Recorder.

On 17th January, 1907, the Company once more staked, claiming discovery 17th January, previously discovered on 29th June, and tendered application upon this staking to the Recorder on 17th January, 1907.

Under the mandamus order of the High Court already mentioned, these four applications of the company were ordered to be recorded as of the dates indicated as the dates of their original tender to the Recorder, and this was accordingly done, and it is these four applications that it is the object of the present proceedings to have declared invalid or cleared off from being encumbrances to the applicants' title under the Wright application of 15th September.

I think it must first be determined what are the nominal or legal rights of the parties to the property under the Act, for it can only be under the provisions of the Act that any applicant can acquire a mining claim. The equitable or

beneficial interest contended for by the Company's counsel, if any exists, must, I think, be for after-consideration.

Dealing then with the six applications above mentioned, the last three may first be eliminated, as, upon the evidence and upon the Inspector's report (made after inspection of the discoveries for the purpose of this trial) I find they were not founded upon any discovery of valuable mineral. The first-mentioned application, that of Columbus, was abandoned and there therefore remain to be considered only the Wright application and the first application of the company

Apart from any question of the company's right to appropriate the Wright discovery, and even assuming that it had that right, I think it must be held that the company, by its three subsequent stakings and applications, which are based upon an alleged discovery quite distinct from that upon which its application of 10th August is based, and all of which the company has recorded with the Mining Recorder has as a matter of law abandoned its first staking and application of 9th and 10th August, 1906. This on principle, I think, must be deemed to be the result, and it is the law which is clearly established and in force in Australia and in the United States, which, in the absence of other authority, may well be followed here unless contrary to our law or to the spirit or intent of our Act.

The Australian law on this point is clearly laid down by Armstrong in his treatise on the Law of Gold Mining in Australia and New Zealand, 2nd ed. at pages 64 and 68, as follows:—

"Pegging out a claim afresh is an abandonment of title acquired by a previous marking out; a claimholder cannot hold under two titles, and it will be assumed that by a second marking he is not satisfied with the regularity of the first marking, and so voluntarily abandons it. *Barker's G. M. Company* v. *Keating*, 1 V. R. 18."

"It sometimes happens, however, that a claimholder deeming his title unsound re-marks and re-registers his claim, without regard to the effect of such a proceeding. A claim may be lost by excess of caution. Thus, Clarke on April 28, 1868, pegged out and registered under the Beechworth by-laws an ordinary quartz claim. On May 18, and again on May 26, he registered a quartz tunnelling claim, the boundaries of which included the quartz claim originally marked out by him. There was no provision in the by-laws for taking up and registering a quartz tunnelling claim, *eo nomine*. On discovery of this, and deeming his title insecure Clarke re-pegged the original quartz claim on Sept. 9, but failed to follow up his pegging by registration. On Sept. 25th Clarke applied for a lease of the whole ground, and on November 5th O'Sullivan summoned Clarke before the Warden, seeking a declaration of forfeiture and an order for possession of the claim. On special case, the Chief Judge held that each successive registration by Clarke constituted an abandonment of his previous title."

O'Sullivan v. *Clarke*, Ch. Ct. of Mines, Dec. 1, 1868; *Argus*, Dec. 2, 1868; and see *Brooks* v. *Jeffery*, 15 N. Z. L. R., 727 (1897); *Parker* v. *Brooks*, 16 N. Z. L. R., 276 (1897).

Under the Australian law it seems, however, that remarking without registration has no effect on the title and will not amount to an abandonment of previous title within the meaning of Barker's G. M. Co. v. Keating, as it is under the Australian law a nullity; but it is held that if a claim-holder re-registers his claim, either with or without remarking, such registration will be an abandonment of his previous title: *Armstrong* 78, 79.

The United States law on the point, though somewhat obscured in the text books and cases by reason of the fact that there are in the United States, or in most of them, statutory provisions expressly allowing re-location without causing an abandonment of a prior location, is, I think, equally clear that (in the absence of such special statutory provision) a new staking, at all events if recorded on a new discovery, works an abandonment of the original location; see *Morrison's Mining Rights*, 11th ed. 34; *Beals* v. *Cone* (a recent case in the Supreme Court of Colorado) 20 *Morrison's Mining Reports* at 612. In the latter place the law is thus laid down:

> "This was a new location under a new and distinct discovery and the act of filing a new certificate under this state of facts was a complete abandonment of all rights which might have attached to the steps taken under the original location."

All the applications of the Coleman Development Company, Limited, must therefore, I think, be found to be invalid, and it remains only to consider the standing and validity of the Wright application, if indeed in view of the ruling of the Divisional Court in *Re Cashman and The Cobalt & James Mines, Limited*, 10 O. W. R. 658 (*ante*), the status of this latter application should at all in this proceeding be inquired into. The discovery upon which this application is based is, as already mentioned, undoubtedly a valuable discovery, and upon the principles I have always tried to follow where no other valid claim exists upon the property, I think the reason should be conclusive which would justify a declaration of invalidity against such an application. No reason is urged in the present case except the contention that the company has on the facts a better right to the property, and the latter matter having been disposed of so far at least as the nominal rights are concerned, I see no good reason from any point of view for impeaching the validity of the Wright

application. That application is, as I view the matter, now the only application that has any legal standing or existence upon the property under the Act. It must, as I think, be through it and not in opposition to it that the company can have any chance of obtaining any interest in the property. To demolish the Wright application would be to destroy the only possibility the company has of acquiring an interest, so far as all claims up to the present are concerned. If that application is not valid then I think no one has any right or claim to the property under the Act.

Turning to the contention of the company that the circumstances disclosed regarding the making of the Wright discovery show that the company is morally and equitably entitled to the discovery and to the mining claim founded upon it, or at least to the portion thereof which their foreman Thomas Sharpe is to receive from Wright, namely a quarter interest, I am, I think, unable to deal with this contention in the present proceedings. These proceedings involve only the validity of the respective applications under the Act. I think I should not, in a summary application of the present nature, deal with the contention mentioned, and there is at all events a lack of necessary parties, Sharpe not being a party to the present proceedings. I think the company must seek its remedy, if any exists, in a separate proceeding to have it declared that Sharpe and the present recorded holders of the Wright claim, or some of them, hold their shares or interests in trust for or are liable in respect thereof to the company. Whether or not the company can succeed in such a proceeding I indicate no opinion, but I cannot but remark that the circumstances disclosed in the evidence show that the conduct of Sharpe in entering into a partnership with Wright in reference to this property while he was still in the employ of the company and foreman of its men who had been working upon this very property, was, to say the least, highly improper.

That the company may not be deprived of the opportunity to test its contention in the way I have indicated, should it be so advised, I make my disposition of the present proceedings (in order to avoid doubt) expressly without prejudice to that contention, and I will make an order that all proceedings in the present matter be stayed for twenty days and that the present holders of the Wright application and claim be restrained for that period from in any way transferring or dealing with their rights or interests in the said

claim; and owing to the circumstances I have above indicated I will allow no costs of the present proceedings.

From this decision the company appealed to the Divisional Court, BOYD, C., RIDDELL, J., LATCHFORD, J.

W. M. Douglas, K.C., for the Coleman D. Co.
H. E. Rose, K.C., for Wright, et al., the respondents.

2nd June, 1908.

BOYD, C.—Under sec. 156 of the Mining Act, 6 Edw. VII. ch. 11, the staking out of a mining claim must be prosecuted within 15 days by an application under oath to have it recorded in manner and form prescribed by the Act—failing which proceeding the non-compliance works an abandonment under sec. 166 of the Act. That was the situation in fact of the Wright claim under the staking of his discovery on 17th July, 1906. Even after a proper application for a record of the staking out of a mining claim, no right is conferred upon the licensee until it has been recorded with and certified by the Recorder, under sec. 140. The Wright claim, even if regarded as resuscitated by the subsequent recording of it on 16th September, was inoperative, and had lapsed, at the time when the Coleman Co.'s application to be recorded was made on 10th August, 1906, upon a discovery of 30th July. This application was not entertained or received by the Recorder on account of a prior Columbus application then existing, which was afterwards abandoned on 14th September, 1906. It appears from the evidence that it was 500 feet distant, and they did not think it worth while to prosecute the application, as it did not amount to a discovery.

However, as held by the High Court upon application for mandamus, it appears that the Recorder was in error in not then recording the Coleman claims. And by the direction of the High Court this claim is to be treated and dealt with as if it had been recorded as of 10th August, 1906. This record, thus completed, gives it standing and priority over the Wright claim recorded as of 16th September.

But the learned Commissioner has held that the Coleman claim has been extinguished or abandoned by operation of law—for this reason, that the Coleman Co., to fortify

their position, made 3 subsequent applications for the record of discovery on the same vein and near the same locality claimed to be made on 29th June, 1906.

By Reference to Australian and United States practice, the Commissioner holds that re-marking or restaking or relocation works *ipso facto* an abandonment of an earlier location or a previous title. It is a matter of doubtful advantage, as well as of intrinsic difficulty, to seek to apply provisions of foreign law in matters of mining procedure to the new situation created by our mining legislation. The Australian rule that no one has a right to hold simultaneously two claims on the same space under distinct titles and terms as expressed by Molesworth, J., in *United Co.* v. *Tennant*, 3 W. W. & A. B. Mg. 53, is intelligible when its origin is understood. The reference is to block claims and frontage claims, each of which confers different rights. The occupant of a frontage claim has the right till the lead or gutter has been found to search for it within his parallels, but after the lead is discovered his boundaries are circumscribed and reduced to an area sufficient to mine along the length of the gutter allowed to him. The holder of a block claim is entitled to mine for gold within an area set out by metes and bounds, and there is the right to all found within that area, and he is not limited to one particular lead. This is fully explained by the full Court in *McCafferty* v. *Cumming*, 5 W. W. & A. B. 73 (1868), and the result was said to be that taking possession of the block affords evidence of abandonment of the frontage included in the block. When that doctrine comes to be expanded, as it was by Molesworth, J., to the arbitrary rule that pegging out afresh is an abandonment of title acquired a previous marking out, because a claim-holder cannot hold under two titles, and it will be assumed that by a second marking out he is not satisfied with the regularity of the first marking out, and so voluntarily abandons it (*Barker* v. *Keating*, 1 V. R. (M.) 21), the result is not so obvious or so satisfactory as applied to the Ontario system. This rule does not appear to have been adopted by any higher Court than the one of first instance, and I think it has been practically discountenanced by the Privy Council in an analogous case, in which Mr. Justice Molesworth took part. Something more is needed to display the intention of the claimant in what he does, and it is not a case in which *res ipsa loquitur*. As said by James, L.J., in giving the judgment of the Privy Council in *Walhalla* v.

Mulcahy, 40 L. J. P. C. 43, 44: "The claim-owner is possessor for an estate determinable only by voluntary abandonment *de facto*, or by those breaches of conditions which amount to a constructive abandonment or forfeiture." Then he proceeds: "The Court in the Colony appears to have overlooked that intentional abandonment is only to be proved by cogent evidence of express declaration or unambiguous acts or conduct, and that, on the other hand, the very smallest act *animo possidendi* is sufficient to negative such intention."

The Australian rule appears, according to the textbooks, to be pressed so far that a good claim has been held to be lost or abandoned by excess of caution in re-staking on the same site: Armstrong on Gold Mining, 2nd ed., p. 68. I am not prepared so to pervert or misconstrue a proceeding done *ex abundanti cautela*. A preferable practice applicable to a new and unsurveyed country is that enunciated by the Chief Justice of Nevada in *Weill* v. *Lucerne Mining Co.*, 11 Nev. 213 (1876): "A second location, made for the purpose of protecting the original location, of itself constitutes no evidence of abandonment of the first." No proof of intention to abandon was given in this case—the whole effort of the claimant was to fortify himself against the underhand dealing and claim of his opponent, and the arbitrary doctrine of Australia has no application to such a case. The difference in result may arise in this way: that possession seems to be the all-important matter in Australia; in Ontario the essential starting point is a sufficient discovery of mineral; the proper location of it follows.

The 3 later applications have been disallowed on the merits because of there being no sufficient discovery on 29th June. These applications are in every sense nullities, and it would seem a novel proposition to invest them with such substance as to work annihilation upon a subsequent good find, properly prosecuted.

The ruling of the Commissioner that the Coleman Co.'s claim has been abandoned should be vacated, and that claim re-established as subsisting.

Thus far I have dealt only with the ground of the Commissioner's ruling, leaving untouched the real merits. The contest should not be left thus superficially disposed of.

The radical difficulty underlies; the real crux is whether Wright can hold this discovery for the benefit of the partnership (himself and Sharpe) or whether it must not enure to the advantage of the Coleman Co.

The Commissioner appeared to be of opinion that it was not competent to deal with this aspect—but the reading of the whole Act would seem to lead to the conclusion that while the application is still incomplete—that is, till the final certificate has been issued and delivered (sec. 140), there are large powers exerciseable by the Commissioner and by the Court in appeal sufficient to cover the controversy. True it is that, as expressed in the marginal note of sec. 199, the Mining Recorder is not to enter any claim "in trust," but it does not follow that the trustee relationship, if in dispute at the outset, may not be cleared before the claim has left the hands of the Commissioner. The fair intendment of sec. 71 is that before the final act as to the certificate "fraud" on the part of the licensee may have a disentitling or destructive effect. Turning to other parts of the Act, sec. 52 gives power to the Commissioner to settle summarily all disputes between licensees as to the existence or forfeiture of claims . . . and generally to settle all difficulties, matters, or questions between licensees which may arise under this Act. There is, besides the very sweeping section which precedes this, sec. 9, where the jurisdiction is as ample as that of a Judge of the High Court as to many equitable matters, such as specific performance, injunction, etc., with full power of investigation by means of oral evidence from witnesses, the aid of experts, the inspection of the premises, and the assistance of a jury, and all this so as to do complete justice between the parties: sub-sec. (a).

So that the outcome, to my mind, is this: will it be a just thing to let the foreman and trusted supervisor of the prospecting work for the Coleman Co. combine with a friend, using the money and supplies and labour of the company, to secure a private benefit out of the work to which he was allocated? The question suggests its own answer.

I do not think we need discriminate with nicety as to the extent of material help which Sharpe drew from the resources of the company. This is information which has to be picked out of the mouths of reluctant and hostile witnesses: see per Lord Eldon in *Ex p. Bennet*, 10 Ves. 400; but enough appears to shew how substantially the partnership was forwarded through the medium of the Coleman Co. That company had been doing prospecting work with a gang of men on that very lot and the next one, under Sharpe as foreman, since the spring of the year (April, 1906). There had been a good deal of branching done within say 50 feet

of the particular discovery now in hand, and Sharpe expected that a good find would be presently made (that was on the last day of June, Saturday). He gave directions to Gavin to put in the anticipated discovery post, and prepared the inscription to be put on it, but Gavin quitted work at 6 o'clock without coming on the desired place. Gavin was removed to another lot on Monday 2nd July, and work on this place was entered upon by Wright and Helmer on the same day. This new arrangement was talked about and over between Sharpe and Wright on 28th June. Wright was to put in his work, and Helmer was employed by Sharpe to put in work, instead of Sharpe personally, and the supplies were to be furnished by Sharpe. Money and provisions and mining supplies and workmen were drawn from the Coleman Co. by Sharpe, and so the opposition prospecting was carried on. Sharpe and Wright thought it wise to keep any knowledge of the scheme from the company, but they do not otherwise seem to be impressed with any sense of wrongdoing. The terms of the partnership were afterwards embodied in a writing of 7th July, which refers to this location as an asset of the partnership. Money was drawn from the Coleman Co. for wages of the Coleman men who worked for the partnership and also the food, supplies, etc. All that Wright gave was his day's work, and without Sharpe's knowledge and intervention and backing as foreman of the Coleman Co. he could have worked alone to little purpose. By these agencies the discovery was made on 16th July by Wright and Helmer on the same vein or lead as where Gavin was working on 29th June, and within 50 feet of that working. This position on the ground was verified by Gillies on 30th July, when he put in his discovery stakes and staked for the company. Upon the company getting knowledge of the fraud of Sharpe he was dismissed by the company in the beginning of August.

If the company are entitled to claim the benefit of the Wright discovery, in these circumstances, they have formally established their status by the staking on the ground on 30th July and the application afterwards recorded as of 10th August. It appears to me to be a just result to hold the company to be so entitled, and in that view to declare that the discovery was made on behalf of the company. This is the result of agency or trusteeship induced by tort or fraud, whereby one may become an involuntary trustee. As in other cases where the tort is waived and the benefit accepted,

the company, taking the discovery of the partnership as their own, will have to compensate Wright for his labour and outlay (whatever it be) incurred in that behalf. *Lockhart* v. *Rollins*, 16 Morrison's Mining Reports, 16, 21 Pac. 413; *Fero* v. *Hall*, 1 Martin's Mining Cases, 238, 6 B. C. 421; *Dalton* v. *Widmer*, 52 N. Y. 319.

This case is only another example of the conflicts which arise in all spheres between interest and duty, and there is no reason why the elementary principles of fair dealing and honesty should not leaven the dealings of mining camps and prospectors. See per Lord Herschell in *Bray* v. *Ford* (1896), A. C. p. 51; and per Lord Kingsdown in *Smith* v. *Kay*, 7 H. L. C. at p. 779.

Wright was well aware of the position and control of Sharpe in the company's service, and what his duties and responsibilities were, and he, with this knowledge, was willing to join in the scheme to make profit at the expense of the company. He cannot expect to fare better than his fellow-adventurer and conspirator, and should rest in the same condemnation.

Columbus does not appear to be entitled to any special regard. His claim was shadowy—not enforceable because of there being no discovery, and he was dealing with the others on the footing of a mere venture—there being no title whatever till the certificate issued to the licensee. But the real discovery and the rights of the Coleman Co. therein existed before he came on the scene (in September).

The Commissioner has passed and allowed the Wright application as based on a good discovery, and this enures to sustain the Gillies discovery, either as an independent one or as adopting the work done by the partnership. There appears to be, therefore, no obstacle to making a final determination that the only valid and subsisting claim on this site is that of the Coleman Co.

Costs follow result.

LATCHFORD, J., concurred.

RIDDELL, J., agreed with the other members of the Court upon the question of abandonment but thought the matter should be remitted to the Commissioner to deal with the merits in accordance with sec. 74 (2), remarking that by that section it seemed to him the Mining Commissioner

should pass upon the "real merits and substantial justice of the case" and that he had not done so in the direction indicated by the majority of the Court.

From the decision of the Divisional Court appeal was taken by Wright and Columbus to the Court of Appeal.

The appeal was heard by Moss, C.J.O., Osler, Garrow, Maclaren, Meredith, JJ.A.

J. Shilton, for the appellants.

W. M. Douglas, K.C., and *A. G. Slaght*, for the Coleman D. Co.

5th April, 1909.

Moss, C.J.O. — This is an appeal, pursuant to leave granted, from a judgment or order of a Divisional Court pronounced on an appeal by the Coleman Development Co. from an order of the Mining Commissioner.

The matter concerns a mining claim described as the west half of the north-east quarter of the south half of lot No. 2, in the 3rd concession of the township of Coleman.

The order of the Mining Commissioner declared that the stakings and applications of the Coleman Development Co. upon the property, and being applications numbered 1771½, 48½, 90½, and 194½, respectively, were invalid, and that the record of them in the books of the Mining Recorder should be cancelled, and that the application of Tiberius J. Wright was the only valid and subsisting application upon the property.

The Divisional Court reversed this order, and in substance declared that the Coleman Development Co. were the owners of and entitled to the only valid and subsisting claim in respect of the property, but one member of the Court was of opinion that the case ought not to have been finally disposed of by the Court, but that it should be remitted to the Mining Commissioner for adjudication by him upon the real merits and substantial justice of the case.

The Mining Commissioner had dealt with the matter in one aspect only, viz., whether in law the Coleman Development Co.'s claims were invalidated by reason of certain proceedings taken on the property by them or on their behalf.

The Mining Commissioner decided that their claim was extinguished or abandoned by operation of law relying for this position upon Australian and United States decisions.

The Divisional Court was unanimous in holding that the case could not be made to turn upon that question. It was held, and we agree, that there was no abandonment, and that the rights of the Coleman Development Co. were not to be finally disposed of on that ground.

The Court then entered upon the merits, which had not been dealt with by the Mining Commissioner. There seem to be some weighty objections to the adoption of this course, which might well have led to the acceptance of the suggestion made by Riddell, J., that the case be remitted to the Mining Commissioner.

Apart from the consideration that there were no findings on the evidence, and that the case was hardly ripe for an appeal, there was the objection that Sharpe, who was shown to be interested with Wright, was not a party. No doubt, in making the application to the Mining Recorder, Wright was representing Sharpe as well as himself, but when the matter assumed the shape in the Divisional Court of substantially an action to declare Wright a trustee for the Coleman Development Co. of the whole claim, that issue should not be determined in Sharpe's absence.

As we have come to the conclusion that the proper course is to remit the case to the Mining Commissioner for trial, it is not in accordance with our practice to discuss the evidence so far as it was developed. But it is proper to draw attention to the effect attributed by the Chancellor to the recording of the Coleman claim of 10th August, 1906, as of that date, under an order made upon an application for a mandamus. The learned Chancellor says that this recording gives the claim standing and priority over the Wright claim recorded as of 16th September. It must be remembered, however, that the order for mandamus was applied for and granted without any notice to Wright or Sharpe or any person having an interest to oppose it.

The question of its effect, if any, upon the rights of the parties, is, therefore open, if, in the course of the contest, it should appear to be important.

The order now made is that the orders of the Mining Commissioner and of the Divisional Court be vacated and the matter remitted for trial by the Mining Commissioner, who is to add Sharpe as a party and proceed to determine all

claims, questions, and disputes in respect of the mining claim in question, and the rights, title and interest therein of the parties or any of them.

The costs of the proceedings up to the present including the costs of the appeals to the Divisional Court and this Court, will be disposed of by the Mining Commissioner.

MEREDITH, J.A.:—This case has not been fully dealt with, and should, in my opinion, go back to the Mining Recorder, or Commissioner, in order that all the material questions arising in it may be dealt with in the manner contemplated by, and provided for, in the Mining enactments.

The single question considered by the Mining Commissioner was whether there had been an abandonment of the company's claims; and there is obviously a good deal to be said in support of the view of the law, upon that question, which was adopted and given effect to by the Commissioner. When a first discovery only can have a valid claim the making of a second one by the same person which can only be given effect to if the first be invalid or withdrawn, has at least a great resemblance to a substitution of the second for the first; but, having regard to all the provisions of the enactments in this province relating to mines, the conclusion of the Divisional Court that the later claims did not in this case operate as an abandonment of the earlier ones, was in my opinion right. An applicant is not required, either in his application or in the affidavit which must accompany it, to show that he is the first discoverer, or that he knows of no other discovery, but only to disclose adverse claims of which he has had knowledge; and a mode of expressly abandoning a claim is provided; and express provision is made that non-compliance with the provisions of the Act in certain respects shall be deemed to be an abandonment.

If that which is said to have been the practice in the Recorders' offices, approved by the Crown officers, namely, that no other application should be recorded until the earlier one had been disposed of, the question could hardly arise; the same person making a second application would be obliged to abandon the first, or wait until it had been disposed of. Whether that was a proper rule or not does not seem to have been considered in this case. An order, made by the Chief Justice of the King's Bench Division, affecting these lands, but upon an application to which the

appellants were not parties, indicates that in his opinion it was not; bu 'he subject is one which will stand consideration, when properly raised in this case, in which one of the parties has an interest in upholding the rule; a rule which at first sight may seem an unreasonable one, though when it is remembered that a licensee, who makes a discovery, has the right to work the same and to transfer his interest therein to another licensee, and that no one has a right to prospect on land already staked out and occupied as a mining claim, as well as that no rights are to be deemed to be conferred until the claim has been recorded, it is plain that there may be something to be said in its favor; whether enough to support it or not is of course another question.

It may possibly turn out, upon enquiry, that none of the claimants have any right to the land in question, that their claims have been abandoned or forfeited for non-compliance with the provisions of the Act; and so it may be that the Crown ought to be represented before all questions necessary to be determined are further considered.

I am also of opinion—in that agreeing with the Mining Commissioner—that Sharpe is a necessary party to these proceedings before the questions dealt with by the Divisional Court can properly be considered. His one-quarter interest in the land in question should not be taken from him, nor should it be determined that he has no such interest, behind his back. To find him guilty of a gross fraud and to deprive him of all his right to the land in question, without first giving him the opportunity of being heard in his own behalf, seems to me to have been an oversight.

So too as to Mrs. Columbus and her half interest. It is said "but she abandoned her claims" and that is true, but it is equally true that she abandoned upon the condition that she should have an undisputed one-half interest in the land, and for the sole purpose of obtaining that interest by enabling the ostensible owner of the subsequent right of discovery to record his claim and obtain the patent; and that she would not have abandoned, except for that purpose; so that it was a case of relative dependent abandonment the same in character as a relative dependent revocation of a will; and as the respondents are not standing upon their own strict statutable rights, but only upon their equity against Sharpe, may it not very well be that they must do equity by carrying out Sharpe's bargain with the woman, or by putting her in the same position as if their agent had not acquired from her

any of her rights, rights they seek now to acquire from Sharpe through the Courts. Anything so unequitable can hardly be equity, and the respondents have no statutable rights except in Sharpe's place.

The question whether the Mining Recorder or Mining Commissioner has power to consider the equities between the parties to this case is not an easy one; but, having regard to all the provisions of the Acts now in force, in my opinion, he has. The general purpose of the Act is to make these local officers familiar with the mining laws and with the character of the mining country and many surrounding circumstances and whose offices are in the mining districts, near to the litigants, the judges, in the first instance, of claims before patent, in all such cases as this. Whether a Divisional Court has or has not power to treat an appeal from the Commissioner as a rehearing, and to try and determine questions of fact not dealt with by him need not be now considered; in any case I would not have dealt with the questions of fact in the absence of any findings by the local officer in a case in which the advantages of seeing and hearing the witnesses must be very great.

I would allow the appeal to the extent of referring the whole case back to the proper local officer.

OSLER, GARROW and MACLAREN, JJ.A., concurred.

NOTE.—Under the Act as since amended a similar complication of successive stakings and applications, all claiming validity, can hardly occur; see present ss. 34, 35, 57, 59 (3), 62 (Act of 1908), and see *Re Smith and the Cobalt D. Co., ante.*

Ss. 9 and 10 of the Act of 1906, as amended by s. 6 of c. 13, 1907, (since repealed) prescribing a more formal procedure for enforcing an interest in a claim seem to have been overlooked in some of the appeal judgments.

For report of re-trial see *post*, the Commissioner taking a very different view of the facts from the Chancellor.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

11 O. W. R. 323.

(THE COURT OF APPEAL.)

12 O. W. R. 986.

RE BLYE AND DOWNEY.

Discovery—Valuable Mineral—Evidence—Assays—Staking—Discovery not at Post—Appeal from Recorder—Time—Findings of Fact.

M. and L. on 27th Feb., 1907, staked out a mining claim for B. The claim after inspection was cancelled by the Recorder for lack of discovery, entry thereof being made on the record on the evening of 20th August after the office was closed to the public; notice was given next day,—the Act requiring it to be given not later than the day after cancellation; appeal to the Commissioner was filed by B. on 5th September, the Act requiring appeal to be taken within 15 days from the record of the decision.

The evidence before the Commissioner showed that M. and L. in staking had used a standing tree cut off as the Act required for their discovery post, it being within 3 feet of a crack or small vein into which they had picked and put some shots on the day of staking exposing a little iron pyrite; it was claimed that they had also found, and intended the post to apply to, another vein 15 or 20 feet from the post, which was afterwards opened up and found to be more promising.

Held by the Commissioner that the appeal filed on the 16th day after entry of cancellation was too late and must be dismissed upon that ground, but that on the merits it would also have to be dismissed as the crack near the post was out of the question as a discovery, and he was not satisfied on the evidence that M. and L. had discovered the second vein when they staked, and that at all events it was not until sinking had been done that anything valuable was disclosed there, the rich silver discovery of the respondent D., who staked the property on 22nd August, having meanwhile intervened.

Held by the Divisional Court that the appeal was not too late and that there was a sufficient discovery and that the appeal should be allowed, Anglin, J., however, holding that the staking was not sufficient and that the appeal should be dismissed upon that ground.

Held by the Court of Appeal that the appeal was too late and that there was no sufficient discovery, also that the burden of proof was on the appellant and that the findings of the Commissioner who heard the evidence should not be interfered with unless for plain and weighty reasons.

Appeal from the Recorder to the Commissioner from cancellation of a mining claim, upon report of inspection, for lack of discovery of valuable mineral.

J. P. MacGregor, for appellant, H. C. Blye.

J. Lorn McDougall, for respondent, Larry Downey.

30th November, 1907.

THE COMMISSIONER. — The first question to be determined is whether or not the appeal has been taken in time.

The report of inspection was received by the Mining Recorder on August 20th, 1907, and the appellant's claim was cancelled on that date. The appellant claims that the entry of cancellation in the books of the Recorder was not made until after 4 o'clock on the 20th, being, as he puts it after office hours.

Leave was reserved to the appellant to put in affidavit evidence, if it could be had, that the entry of cancellation was not made until after 4 o'clock, but after waiting three weeks nothing has been heard from the appellant, and at all events in the view I take of the matter no useful purpose could be served by such evidence, as I think the result must be the same whether the cancellation was made after or before 4 o'clock on the 20th. The appeal was not filed with the Mining Recorder until 5th September, and was therefore, I think, one day late, the statute requiring it to be filed within 15 days from the entry of cancellation in the Recorder's book.

Though it could not affect the result, I may point out that the appellant can complain of no hardship in this case, for it was wholly the fault of his agent whom he had entrusted with full charge of his mining affairs in this District that the appeal was not lodged in time. The Act requires that the Recorder shall, not later than the next day not a holiday, after the receipt of the Inspector's report and the entry of cancellation, send notice thereof by registered letter to the holder of the claim. There is no pretense that this was not done. Mr. Caverhill admits that he received the notice and discussed the matter with his solicitor while there was yet ample time for filing the appeal but for some reason Mr. Caverhill seems to have thought proper to first go to New York to consult with his principal before entering the appeal. When instructions were finally received by the solicitor the time had gone by.

I think, therefore, that the appeal was too late and must on that ground be dismissed.

On the merits, however, the result would be the same, as the appellant has quite failed to satisfy me that the Inspector was wrong in disallowing the discovery. In the circumstances it is perhaps unnecessary to review the evidence at length, but I may indicate briefly how matters impressed me. The appellant's staking was done on the 27th of February, 1907, by his employees Lovell and Munroe.

Only two small patches or bluffs of rock appear to have been then visible on the claim through the snow, and at one of these they fashioned a discovery post out of a standing tree, leaving it rooted in its original position. Within two or three feet of this post was a crack in the rock in which, according to the evidence of Lovell and Munroe, they did some picking with their picks and exploded a shot or two. Munroe says he found some iron pyrites in this crack. Both are very hazy and unsatisfactory as to what else they saw. The evidence is abundantly conclusive that this crack is utterly out of the question as a discovery of valuable mineral under the Act. The appellant, however, claims that another crack or vein some 15 or 20 feet from the first was a part of the discovery, and an attempt was made to show that this had been seen and examined at the time of the discovery, but upon the evidence I cannot find that this was the fact. When the staker of a claim comes forward with an allegation of discovery at some point other than where he has planted his post the burden I think is heavy upon him to prove beyond reasonable question that he really discovered this at the time and that it was not found at some later date. That burden the appellant here, I think, has quite failed to meet.

Munroe, about the time of the respondent Downey's discovery of a rich silver vein upon another part of the property planted a new discovery post at this second vein and considerable work has since been done there, a shaft having been sunk some 8 or 10 feet in depth. Samples from this shaft are claimed to have yielded assays of silver, one as high as in the proportion of 59 ounces to the ton. The respondent's counsel objected to this evidence on the ground that these samples came from subsequent workings and that they were not in view or found at the time of the staking, even if this second vein were to be considered as a part of the discovery, and these objections I think are well taken. The respondent also objects to the way in which the samples were procured and handled, it being as he alleges done in a way that no reputable Mining Engineer desiring to make a satisfactory and reliable report upon the matter would adopt, being in fact such a test as no one of any mining experience would rely upon. In this also I quite concur. If the merits of the discovery appearing in the shaft were material to the present case, which as I have above stated I do not think they are, I could not accept the results of the assays put

in as a true or satisfactory indication of the mineral really in place at that shaft, but would have to direct that an independent inspection and selection of samples, which would be beyond question, should be made. Without imputing to Mr. Caverhill himself any untruthfulness or even bad faith in the matter, the ways are not wanting, as anyone experienced in these matters well knows, in which it might come about that the samples which reached the assayer were not true samples of what was in place at the alleged discovery. Where, as in this case, a discovery of an exceedingly valuable deposit of mineral in another part of the property by another claimant intervenes before the special activity of the present appellant commenced in regard to the claim, even more than usual caution should be exercised if the honest and deserving prospector is to be protected from imposition. It is the value of the respondent's discovery and not of the appellant's which, as Mr. Caverhill admits, aroused the appellant's special interest in this property. Even if entitled to rely upon them the assays of the samples above mentioned, most of them being very small and obtained from subsequent workings, would at most be only slight evidence that a valuable discovery had been made at the date of the staking, and it is certain that without these assays there could be no possible pretention of a discovery of valuable mineral anywhere in or in the vicinity of the shaft or second vein.

The appellant's counsel urged that the appellant should at least be exempted from the usual liability for costs. I see no reason why this should be done. To do so would only be to encourage litigation, which, I think, in the case of this appeal has no reasonable justification.

From this decision Blye appealed to the Divisional Court.

The appeal was heard by Boyd, C., Anglin, J., Mabee, J.

W. M. Douglas, K.C., and *J. P. MacGregor*, for Blye.

J. Lorn MacDougall, for Downey.

30th January, 1908.

Boyd, C.—Applying the principles laid down by the Supreme Court in these mining cases, I entirely concur in the

conclusions of my brother Mabee. Let me advert to these. The object of the Acts is to promote the discovery of minerals and inducements are held out in order to stimulate the search, i.e., securing exclusive possession, etc. The essential thing is to see that there has been actual discovery. Every reasonable intendment should be made to uphold the validity of a claim where there has been actual discovery and an honest attempt made to comply with the directions as to staking and describing the location of the discovery. Where the stake is so placed on or in the vicinity of the valuable mineral discovered as to give plain indications of the site and is not of a character calculated to mislead others desiring to locate, the evidence of identification required by the Statute should not be so stringently applied as to disappoint the honest actual discoverer. These positions seem to be quite justified by what is said in *Clark* v. *Docksteader*, 36 S. C. R. 622. I would allow the appeal with all costs.

ANGLIN, J.—I concur in the view of my brother Mabee that this appeal was taken within the period of 15 days allowed by the statute.

Though loath to disturb the finding of the Commissioner on a question of fact, I must also agree with the opinion of my learned brother that upon the evidence it should be held that a discovery was made by Lovell for the appellant Blye on the 27th of February, 1906, upon the vein situated 15 feet from the tree used as a discovery post. The fact that in the affidavit filed upon recording the appellant's claim, the discovery is stated to have been of copper pyrites, which is found in the vein 15 feet distant from the discovery post and not in the crack 3 feet distant convinces me that Lovell did in fact discover the vein for which claim is now made.

But I am, with great respect, unable to concur in the opinion of my Lord the Chancellor and my brother Mabee that this discovery post was, as to the vein now claimed, sufficient to meet the requirements of The Mines Act, 6 Edw. VII. c. 11.

Section 133 requires that a discovery post of wood or iron shall be planted "upon an outcropping or showing of ore or mineral in place." Section 2 (20) permits the use of a stump or tree cut off for this purpose.

Section 137 provides that "substantial compliance, as nearly as circumstances will reasonably permit with the pro-

visions of this Act regarding the staking out of mining claims, shall satisfy the requirements of this Act."

Section 166 enacts that "non-compliance by or on behalf of the licensee of (*sic*) any provisions of this Act relating to the staking out and recording of the mining claim . . . shall be deemed to be an abandonment."

It is to me obvious that the requirements of the statute in regard to staking out were intended to be more than merely directory. They prescribed conditions upon which the statute confers important and valuable rights on the miner. Reasonably strict compliance with these prescribed conditions must be exacted if they are at all to serve the purpose for which they have been imposed. Lindley on Mines, sec. 371; Snyder on Mines, sec. 384; vol. 20 Am. & Eng. Encyc. (2nd ed.), p. 713.

Notwithstanding a very liberal clause in the British Columbia Mineral Acts of 1896 and 1897, sec. 16 (d), relaxing the requirements of the statutes in regard to location in favour of the actual discoverer, there are several British Columbia decisions indicating that substantial compliance as nearly as practicable with the directions as to staking must be exacted. I refer to the following cases in vol. 1 of Martin's Mining Cases: *Richards* v. *Price*, p. 156; *Callanan* v. *George*, p. 242, and *Clark* v. *Haney*, p. 281. See also *Collom* v. *Manley*, 32 S. C. R. 371.

It is scarcely necessary to point out how much broader is the language of the British Columbia curative provision (applied in *Clark* v. *Docksteader*, 36 S. C. R. 622), which purports to excuse non-compliance with the requirements as to staking and running lines if an actual discovery has been established and the locator has made a *bona fide* attempt to comply with the requirements of the statute, and the non-observance of the formalities is not calculated to mislead, than is that of our section which requires "substantial compliance as nearly as the circumstances will reasonably permit." Compare B. C. Act of 1891, 54 Vic. ch. 25, sec. 17.

The miner, though an honest discoverer, has no reason to complain of stringency in enforcing these provisions. They are intended as a safeguard for the honest discoverer and as a check upon fictitious and fraudulent claimants. If, with the idea of encouraging and protecting a discoverer, the honesty of whose claim is established by other evidence, the statutory officials or the Courts should excuse non-compliance

with these provisions of the statute, or should, where there would be no serious difficulty in an exact or approximate compliance with the very specific directions as to staking, accept as sufficient any loose and indifferent marking in lieu of what the statute prescribes, the intention of the legislature would, in my opinion, be frustrated. It is quite true that the legislature has manifested its intention and desire to encourage prospecting and the discovery of valuable minerals by holding out to the prospector strong inducements to engage in such work. But it is equally true that in these matters, in which it is obvious that it must often be quite unsafe to depend upon the parol testimony of transient witnesses, the policy of our mining legislation clearly is to require that the discoverer, if he would reap the benefits and advantages conferred upon him by this legislation must, as far as possible, provide other and more tangible evidence of his discovery than is afforded by the uncertain recollection of witnesses and the statements, though sworn, of prospectors, too many of whom are, it is to be feared, not sufficiently influenced or controlled by the sanction and solemnity of an oath. It is, I think, of the utmost importance to the honest discoverer that reasonably strict compliance with the requirements of the statute as to staking out should be enforced; the only real safeguard for the miner and for the Government against fraudulent and dishonest claims, supported by perjured testimony, is to enforce compliance with these provisions, failure to observe which the legislature has declared shall be deemed an abandonment of the claim.

In the present case the appellant alleges two discoveries. For both he relies upon a single discovery post standing 3 feet from one alleged discovery, which inspection has proven to be worthless, and 15 feet from the other alleged discovery, which subsequent work has shewn to contain valuable mineral. The only reason suggested for non-compliance with the requirements of the statute, that a discovery post should be planted upon the actual "outcropping or shewing of ore or mineral in place" is that the crack and vein are said to have been upon the side of a small bluff or hill. No witness says that the slope was so steep that it would be impracticable to plant a post on the vein itself or immediately adjacent to it. Except a statement of one witness that there was some frost in the ground, there is not a hint of any difficulty in placing the stake at the point where the vein on the face of the bluff or hill reaches the level ground or on the level ground opposite

to and quite near to the vein. It cannot be contended upon the evidence that the stake could not have been planted much nearer to this vein than was the tree used as a discovery post. In fact the tree seems to have been taken because Lovell and Munroe were too lazy or too indifferent to cut and plant a stake on or near the vein. As Munroe says, it was "a nice straight tree and the best one near the discovery and I made a post out of it." Mr. Caverhill, the appellant's agent, says he took this tree 15 feet away to be the same thing as a post at the point of discovery. He would deem such a post sufficient for "any place that you can distinctly see from the discovery post;" and he says a place so visible "would appear to be a discovery."

For the defence, several mining engineers and practical men were called as witnesses. Mr. Darragh, a practical prospector, says that when he saw this discovery post he naturally took the crack in the rock three feet away as the discovery indicated.

Ronald H. McDonald, a mining engineer with 12 years' experience, says: "The post would indicate the crack, it would just be as if you staked out that crack."

William E. McCredie, a student of mining engineering, who has had four years' practical work, says that he has never seen a discovery post away from the discovery—away from the vein; and that unless there was trenching visible in the neighborhood (which there was not) he would not have regarded this post as having any connection at all with the vein.

Burnett C. Lamble, a graduate of the London South-Western Polytechnic School, with 2½ years' practical experience in the Cobalt district, says that as a practical man he would not regard this discovery post as put up to indicate the vein now claimed; that it would certainly not be reasonable for a man to place one post to cover both the crack and the vein, and that he certainly would not stake both with one post.

There were no expert witnesses called to contradict this evidence, which would seem to establish that practical men would not regard the tree chosen by Lovell and Munroe as a sufficient post to indicate a discovery on the vein which they now claim.

While in the present case the testimony seems to put it beyond doubt, apart entirely from any evidence afforded by

this discovery post, that the appellant did actually make a discovery on the vein which he claims, it would, in my opinion, be entirely too dangerous—it would be almost tantamount to placing a premium on the making of false claims; it would certainly encourage prospectors to be careless and indifferent in regard to the provisions of the statute as to staking out; were the Court to recognize this discovery post as sufficient.

The post is certainly not upon an outcropping of mineral. There is, in my view, no evidence that it was not practical to plant a post upon the vein itself. But if that was not reasonably practical this tree was not, I think, a post in "substantial compliance as nearly as the circumstances reasonably permitted" with the requirements as to the planting of the discovery post. There is no evidence that the post could not not have been planted quite as near to the vein now claimed as the tree stood to the crack to which the practical men thought it was intended to point as the place of discovery.

The absence of any provision in regard to the discovery post similar to that contained in sec. 184 in regard to corner posts affords another argument in support of the view that a strict compliance with the requirements as to the location of the discovery post is expected.

Upon the ground that the discovery post is insufficient to cover the claim for a discovery upon the vein in question, and that the appellant has therefore failed to show that he has performed a statutory condition essential to the validity of his claim, I would dismiss his appeal from the order of the Commissioner.

MABEE, J.—The first point involved is whether the appeal from the Recorder to the Commissioner was taken within the time prescribed by the Act.

The cancellation was made under the authority of 7 Edw. VII. ch. 13, sec. 21 (2), which provides that "if the said Mining Recorder deems, upon the said report, that the said claim should be cancelled, he shall mark such record 'cancelled.'" The report referred to is that of the inspector. Sub-section 3 gives the holder of the cancelled claim a right to appeal to the Commissioner "within the time and in the manner provided by sec. 75 of this Act." This last mentioned section provides that no appeal shall be taken "after the expiration of 15 days from the record of such decision by the Mining Recorder in the books of his office." The report of

the inspector, upon which the claim was cancelled, was dated 17th August, and the Recorder, on 20th August, marked the cancellation of the claim upon the books of the office, but the affidavit shows that this was not done until after office hours upon that day, and that the notice of such cancellation was not posted up in his office, as required by sub-sec. 4 of the above sec. 21, until the day following, namely, 21st August, and that it was also on the 21st that he mailed the notice of cancellation.

The question is, whether the 15 days within which the appeal must be made ran from the 20th or 21st. I think the cancellation did not take place till the 21st. The affidavit of the Recorder states that the entry of the cancellation was not made by him until after the office had been closed and locked to the public on the 20th; so it is obvious that the owner, even had he been upon the spot, could not have known of the cancellation until the 21st. Section 56 of 6 Edw. VII. ch. 11, gives the right of inspecting documents in the Recorder's office "during office hours." It is clear the time for appeal ran only from the 21st, and so it was in time.

The alleged discovery that is in dispute involves a consideration of two matters, first, whether "valuable mineral," as defined by 6 Edw. VII. ch. 11, was found, and second, whether the discovery post was planted as prescribed by the Act.

The Commissioner came to the conclusion that no discovery had been made, but did not deal with the second question above indicated. . . .

It appears, quite apart from the result of the re-inspection referred to of the Munroe claim, that the evidence given before the Commissioner entirely preponderated in favor of the contention of the appellant that Lovell had made a valuable discovery within the Act as it stood in 1906. No attack was made upon the *bona fides* of Lovell and Munroe, supported as it was by the evidence of Caverhill as to what took place long before it was known for certain that this was a very valuable property. All three swore they discovered and intended to stake the vein, it carried copper, the affidavit describes the discovery as of copper, at least three of the witnesses for the respondent say the vein can clearly be seen from the stake. So it seems beyond reasonable question that the vein was discovered by Lovell; that it was intended to be staked by

him for the appellant; that the vein carries valuable mineral in place, and has been allowed as a discovery under the Act.

It was strongly urged upon this appeal by the respondent that the discovery post was not placed as required by the Act. Section 133 of the Act of 1906 provides that the discovery post shall be planted "upon an outcropping or showing of ore or mineral in place." Now this outcropping was on the face of this cliff, and it was impossible to place the post upon the outcropping of ore or mineral unless the post was in some way affixed to the vein. Then the evidence shows that this was the nearest and only tree in that vicinity. Under sub-sec. 20 of sec. 2 a stump or tree may be used for the post provided it is cut off to not less than 4 feet above the ground and squared or faced on four sides for at least one foot from the top. Section 137 provides that substantial compliance, "as nearly as circumstances will reasonably permit" with the provisions as to staking out mining claims, shall satisfy the requirements of the Act. I am clearly of the opinion that the location of the stake or post in question here was a substantial compliance with the Act. No one could possibly be misled. The post clearly indicated what it was intended to indicate, namely, the vein in the face of the rock; and I think a reasonable and fair construction of the Act requires the allowance of what was done as a proper planting of the discovery post. The appeal before the Commissioner was entirely directed to the question as to whether a discovery within the Act has been made, and it seems to have been taken for granted there that there was no difficulty as to this post. The first witness was being asked about the size of this tree when the Commissioner said, "Oh, there is no question about the validity of the post, is there?" and counsel replied, "Well, the only point is as to the position of the post. I understand this was one of two trees that were standing near that would make a discovery post, and the rest would not. That accounts for why one post was nearer one crack than the other," and further on the Commissioner said, "The discovery is more important than the post."

It seems to me entirely inequitable and contrary to all fairness that the rights that Blye acquired under this discovery and staking should be swept aside in favor of the respondent Downey. The affidavit of the latter states that he made a valuable discovery upon another part of the lot on August 20th. How he knew of the cancellation in the books after the office had been closed and locked on the 20th or

whether he knew at all does not appear, but as the matter stands as between the appellant and respondent the latter acquired the claim upon a discovery alleged to have been made on the 20th which was in fact before the appellant's application had actually been cancelled.

I think the appeal should be allowed with costs here and before the Commissioner and the cancellation vacated.

Downey then appealed to the Court of Appeal, the appeal being heard by Moss, C.J.O., Osler, Garrow, Maclaren, Meredith, JJ.A.

G. F. Shepley, K.C., and *J. Lorn McDougall*, for Downey.
W. M. Douglas, K.C., and *J. P. MacGregor*, for Blye.

Moss, C.J.O.—An application dated 5th March, 1907, was made to the Mining Recorder of the Montreal River Mining division to record the staking out of a mining claim now known as mining claim No. T. R. 446. The application was on behalf of the now respondent, H. C. Blye, and was based on an affidavit of one Lovell, the holder of a miner's license, stating that on 27th February, 1907, at the hour of 10 o'clock a.m., he discovered valuable mineral or ore in place upon the lands described or shown in the application, and such discovery consisted of copper in diabase rock, and that the application was made by him on behalf of Blye. The affidavit also stated, as required by The Mines Act, 1906, that at the time of staking out the claim there was nothing to indicate that the lands were not open to be staked out as a mining claim under the Mines Act, 1906, and amendment thereto, and that an annexed sketch was correct, and showed the location of the discovery post and of the other posts to be shown thereon, and correctly stated the distances, as accurately as he could reasonably ascertain the same. The Mining Recorder received and entered the particulars of the application on 8th March, 1907, and the claim stood subject to inspection. On 17th August, 1907, Inspector Murray, after having duly notified Blye's agent of the time appointed, inspected the claim, and made his report in writing to the Recorder, stating that he had inspected the claim and had found thereon no *bona fide* discovery of valuable mineral, as defined by The Mines Act, 1906, and further that he found that the

boundaries of the claim were marked, staked, and blazed, and the corner posts and discovery post thereof were planted, in accordance with the Act.

The report having been filed in the Mining Recorder's office, that official entered it upon the record of the claim; and upon 20th August, 1907, deeming upon the report that the claim should be cancelled, he marked the record "cancelled," and on the next day he posted up in his office a notice of such cancellation, and notified Blye's agent by registered letter, in accordance with the direction of sec. 62 of the Act, as amended by the Act 7 Edw. VII. ch. 13.

On 23rd August application was made to the Mining Recorder to record a claim of the now appellant, Downey, in respect of a discovery of valuable mineral on another part of the parcel of land comprised in Blye's claim. On 1st September, 1907, one John D. Munroe tendered an application in respect of a discovery of valuable mineral alleged to be made on 22nd August, 1907, on the same parcel.

On 5th September, 1907, a notice of appeal from the Mining Recorder's decision was filed and served on Downey. This notice was on behalf of Blye, and is expressed to be of an "appeal to the Mining Commissioner from the decision of the Mining Recorder given on 20th August, 1907, wherein he cancelled my application for this claim." The only ground of objection to the decision set forth is that all the discovery made on Blye's behalf was not inspected by the inspector, as required by The Mines Act, 1906, and amendments thereto, and that, consequently, there should have been no cancellation of the claim, and that the report of inspection was invalid.

When the appeal came on for hearing before the Mining Commissioner, it was objected, on behalf of Downey, that it was too late, more than 15 days having elapsed between the date of the record of the decision of the Mining Recorder, on 20th August, and the giving of the notice of appeal; and, subject to this objection, the hearing was proceeded with. Witnesses were called on behalf of both parties, but the inspector was not called or his testimony procured.

The Mining Commissioner decided that the appeal was too late, but he dealt also with the merits. He found that there had been no discovery of valuable mineral on 27th February covered by the discovery post planted by Lovell, and he upheld the Mining Recorder's decision. His decision

was reversed by the Divisional Court. All the members of the Court agreed that the appeal was brought in time, and that a valuable discovery had been made, but Anglin, J., was of the opinion that there was not a compliance with the provision of the Act with regard to planting a discovery post, and that on that ground the appeal from the Mining Commissioner failed. These 3 questions are the subject of the present appeal.

It is, of course, unquestionable that upon the appeal to the Mining Commissioner the onus of demonstrating that the report of the inspector and the cancellation of the claim were wrong, lay upon the then appellant, Blye. In the face of the report and record of cancellation, it was incumbent upon him to show that on 27th February, 1907, a discovery of "valuable mineral in place," falling within the definition given of these words by sub-secs. 4 and 22 of sec. 2 of The Mines Act, 1906, was made on his behalf, and that it was properly and legally marked and staked, with the discovery post and corner posts planted, as required by that Act.

In the interim between the alleged discovery and the inspection, certain amendments made to The Mines Act, 1906, by the Act 7 Edw. VII. ch. 13, came into force. But in regard to these questions resort must be had to the Act as it stood prior to the amendments.

On the argument of this appeal it was contended by counsel for Blye that Inspector Murray in making his inspection has proceeded under the impression that he was governed by the amendments, which, it was said, create a more stringent rule with regard to the tests of a discovery of valuable mineral in place. But, as already said, the inspector was not called as a witness. And his report is that he found no *bona fide* discovery of valuable mineral, as defined by The Mines Act, 1906. There is, therefore, no proof that he exceeded or mistook his duty in making the inspection.

On the day of the alleged discovery Lovell, accompanied by John D. Munroe, was, as he says, prospecting for mines or minerals. There was a considerable depth of snow on the level surface, but there was a rocky bluff or prominence "off the trail" exposed and bare of snow. Lovell says he went along the bluff and up on the hill, and there he saw "two veins." It seems singular that, considering that he was the person by whom the alleged discovery was made, he should not have been able, or, if he was able, should not have been

asked, to give a description of them as they appeared to him at the time. He was either unable or unwilling to deal in more than vague generalities. Asked by counsel who examined him in chief to tell what he saw at the time he staked the lot and what made him think that was a discovery, he answered, "Well, I saw copper pyrites and iron pyrites in the vein. Q. It was a vein? A. I thought it was a vein. Q. What made you think so? A. I saw where the smooth rocks came together."

Here he confined himself to one vein, and evidently, as appears farther on, to the one near where the discovery post stands. This is the only one that any attempt was made to test. Munroe says he knocked away some, and maybe all, of the iron pyrites to be seen on its surface, and Lovell says he put in one or two shots, "sand blasts." The discovery post was made out of a tree in close proximity to it.

It is not pretended that there were not other trees surrounding or near to the other "vein," which, according to the witnesses, is from 15 to 20 feet from the discovery post. The reason alleged by Munroe for choosing the tree he did is that it was a nice straight tree, and the best one near the discovery —but absolute straightness or niceness is not so essential as proximity, and it was in fact only near to the vein which was tested. And when in August, 1907, Munroe made, as he then alleged, the discovery of a second vein, he apparently felt himself able to make oath that he was the discoverer on 22nd August. His testimony, and that of Lovell, are so vague and indefinite as to the second vein as to well justify the conclusion that what they saw on the 27th February, and believed to be their discovery, and intended to mark as their discovery, was the smaller vein, and it was for that purpose they selected a tree close to it and fashioned it into a discovery post. And that was the opinion of the Mining Commissioner, who heard them testify before him, and whose finding upon the evidence should not be interfered with unless for plain and weighty reasons.

The evidence of Caverhill, Blye's agent, who some days later went to the place, does not assist. It does not follow that what Lovell and Munroe saw and intended to claim as the discovery was what Caverhill saw. Neither does the evidence of the experts called on Blye's behalf, for what they saw and examined was the showing of the second vein after it had been opened up and worked down some 8 or 9 feet from the

surface. Their observations did not apply to surface indications. And the same remark may be applied to the assays, even assuming that they were made of untampered-with samples from the Munroe shaft. What the Court must be convinced of is that there was a discovery of valuable mineral in place, that is—as defined by sub-secs. 4 and 22 of sec. 2 of The Mines Act, 1906—a vein, lode, or other deposit of mineral or minerals in the place or position in which the vein, lode or other deposit was originally formed or deposited, appearing at the time, i.e., of the discovery, to be of such a nature and containing in the part thereof then exposed, such kind or kinds and quantity or quantities of mineral or minerals in place other than limestone, etc., as to make it probable that the vein, lode, or deposit, is capable of being developed into a producing mine likely to be workable at a profit.

In *Manley* v. *Collom*, 8 B. C. R. 153, Mr. Justice Drake, whose dissenting judgment was, on appeal, approved by the Supreme Court of Canada, *Collom* v. *Manley*, 32 S. C. R. 371, speaking of a similar provision in the British Columbia Mineral Act, said: "The discovery of mineral in place is the basis of the right of a miner to stake out Crown lands." Further on, after referring to the definition of "rock in place," he said: "This definition clearly excludes the discovery of 'float' spoken of as mineral in place. 'Float,' as it is technically called, is very frequently discovered on the watercourses and loose gravel of the mining district. It is an indication of the deposit of mineral somewhere in the neighborhood; but it is in order to guard against the location of Crown lands on insufficient data that the legislature insists that mineral must be actually discovered in situ before a free miner has a right of entry. . . ." In the Supreme Court Mr. Justice Sedgewick, who delivered the judgment of the Court, said (p. 378): "The Mineral Act requires that no one can locate a claim unless he has actually discovered mineral in place. . . . The statute requires much more than the belief—the 'satisfaction' of the locator; it requires a discovery in fact. The evidence fails to establish that. On this point, as well as on the other, I adopt the dissenting judgment of Mr. Justice Drake in the Court below."

In the case at bar the mining inspector reported that he found no *bona fide* discovery of valuable mineral, as defined by The Mines Act, 1906. And the evidence fails to show that he was wrong in his conclusion.

The Divisional Court seems to have attached considerable weight not only to the developments resulting from Munroe's work on the second vein, but also to certain proceedings before the Mining Recorder with reference to this claim. The judgment to be formed from them would have reference to and be guided by the amendments introduced by the Act 7 Edw. VII. ch. 13, and it may be that, under sec. 3 of that Act, a wider and more liberal definition is given to the words "valuable mineral." But, as far as the evidence which was before the Mining Commissioner in this case shows, the result of the first inspection was adverse to Munroe. It appears that a re-inspection was granted while this case was before the Mining Commissioner. An affidavit was produced before the Divisional Court which appears to have been accepted as proving the result of the re-inspection. But the statement in the affidavit was not proper or sufficient proof of the inspector's finding. The Mines Act requires that the inspector shall report in writing, and, if there was a report in writing, it or a properly verified copy could and should have been produced. It appears that an application on behalf of Downey to be allowed to put in the report or a copy was not entertained by the Divisional Court. Either the original affidavit should have been rejected as proof, or the proper proof admitted. Certainly, if the report be looked at, it cannot be said to assist Blye's contention here. The statement in the original affidavit with reference to the result of the re-inspection ought, therefore, to be disregarded.

It is conceded on all sides that the small vein near to which the discovery post stands cannot be maintained as a discovery, and the whole effort that has been made has been to attach to it the second vein and make it the discovery on which the claim is founded. That failing, for the reasons stated as well as for those stated by the Mining Commissioner, the appeal must be allowed.

This renders unnecessary any prolonged consideration of the grounds on which Anglin, J., dissented in the Divisional Court, but in not dealing with them I do not wish it to be supposed that, as at present advised, I differ from his view.

Though perhaps unnecessary, I may add that upon consideration, I have come to the conclusion that the appeal from the Mining Recorder to the Mining Commissioner was not in time, and that the latter rightly held that the appeal ought to be rejected upon that ground. This branch of the case is affected by the legislation of 1907.

By sec. 75 of The Mines Act, 1906, as amended by 7 Edw. VII. ch. 13, sec. 25, it is enacted that no appeal . . . from the decision of a Mining Recorder to the Mining Commissioner shall be allowed after the expiration of 15 days from the record of such decision by the Mining Recorder in the books of his office, unless the time is extended as provided What is the record of the decision in the case of cancellation of a claim appears from sec. 70, as amended by 7 Edw. VII. ch. 13, secs. 17 and 21. The inspector's report of an inspection shall be made in writing and delivered to the Mining Recorder (sub-sec. 1). The report shall be filed by the Mining Recorder among the papers of his office, and he shall forthwith enter upon the record of the claim in question a note stating in brief the effect of the report, and giving the date of its receipt, and, if he deems upon the report that the claim should be cancelled, he shall mark such record "cancelled" and proceed as further directed (sub-sec. 2). Upon cancellation of any claim, the Mining Recorder shall forthwith post up in his office a notice of such cancellation (sub-sec. 4).

Nobody disputed that as a matter of fact the report in writing was received and filed and the entries made, or that the Mining Recorder marked the record cancelled on 20th August, 1907. But an affidavit was produced, made by the Mining Recorder in which he states that the entry of the cancellation of the recording of the application to record the staking out of Blye's claim in the record book was made by him on 20th August, 1907, and that the entry was made after the office had been closed and locked for the day, and the entry was open to the public, and the notice of the cancellation mailed and posted up in the office, at the beginning of the following day. It elsewhere appears that the time of making the entry of cancellation was about 4.30 o'clock in the afternoon. Sec. 62, as amended by sec. 15 of 7 Edw. VII ch. 13, provides that the Mining Recorder shall enter a record of each decision made by him under the authority of the Act in regard to a mining claim, and likewise notify the license holder of such mining claim for the time being by registered letter not later than the next day.

But the record is complete without the notice being posted in the office, and the letter of notification being sent. These proceedings form no part of the record of the decision referred to in sec. 75.

It is a question of fact as to when the entry directed by sec. 70 to be made on the record is actually made, and that is not affected by the time when the notice was posted up or a letter of notification despatched. And as a matter of fact the record in the present instance was marked "cancelled" on 20th August, and it bears that date.

The notice of cancellation is required to be posted in the office forthwith, that is, within a reasonable time, and it was actually posted at the beginning of 21st August, and the letter notifying Blye or his agent was mailed the same day, that is, not later than the next day after the decision. It does not, of course, affect the substantial point, but it is to be noted that Blye's notice of appeal treated it as a decision made on 20th August, and it was not because of any supposition that the decision was not given until the next day that the service of the notice was delayed until 5th September.

The appeal should be allowed and the decision or order of the Mining Commissioner restored, with costs throughout.

OSLER, J.A.—I agree in the result. I think that the appeal from the Mining Recorder to the Mining Commissioner, was out of time. The former received the report of inspection on the 20th of August, and on the same day recorded his decision thereon that the now respondent's claim should be cancelled. Section 75 of the Mines Act says that no appeal from such a decision shall be allowed after the expiration of fifteen days from the record of such decision unless within that time the time for appeal is extended by the Commissioner, which was not done. The fact of the entry of record and its date being proved, I do not see what authority exists for saying that because it was made after four o'clock and when the office of the Recorder was closed for the day, the time shall not begin to run until the following day, or rather that the following day shall be deemed to be that on which the record was made, or that fifteen days shall mean fifteen days and one day more. Plain language needs no interpretation in its application to undoubted facts; nor can it be said that its application here works any hardships upon the respondent since he had fourteen days during which he might have applied to the Commissioner to extend the time for appealing.

On the merits I also agree with the judgment of the learned Commissioner and his reasons therefor. The appeal should therefore be allowed and his judgment restored.

MEREDITH, J. A., also gave reasons in writing arriving at the same conclusion as the Chief Justice and stating that in his opinion there was no good reason shown for interfering with the findings of the Inspector, the Recorder and the Commissioner upon the initial question of fact.

GARROW and MACLAREN, JJ.A., concurred.

NOTE.—It is submitted that the amendments to s. 2 (22) now 2 (x) (Act of 1908), defining "valuable mineral," made little if any change in the requirements of the Act; they make it clear that the merits of the mineral showing must be judged by appearances and exposure as they are at the time discovery is claimed to have been made, and not as subsequent workings may have disclosed them; but even before amendment ss. 132 and 117 required "discovery" to be made, and a licensee could hardly be said to have "discovered" what he had not seen or known to exist.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

RE GRAY AND BRADSHAW.

Substantial Compliance—Inaccuracy in Measurements—Allegations of "Jumping."

Where in the staking and application for a mining claim the distance of the discovery from the No. 1 post was given as 1,250 feet instead of 910, the difficulty of making an accurate measurement in the circumstances being very great, it was held that this did not invalidate the claim.

It would be a hardship to hold a claim invalid by reason of such inaccuracies, but by them prospectors invite trouble and run serious risk of loss.

Appeal from the decision of the Recorder dismissing the dispute of John Gray against the mining claim of Robert A. Bradshaw, Gray also claiming to be himself entitled to the property.

J. Lorn McDougall, for appellant.

H. D. Graham, for respondent.

19th December, 1907.

THE COMMISSIONER:— Evidence was heard at great length by the Recorder and he personally viewed the property in the presence of the parties before giving his decision. The appellant, however, desired that the witnesses should again be heard before me, and as the former evidence had not been all taken in shorthand and as the Recorder made no specific findings of fact I allowed the appeal to proceed as a rehearing.

The Bradshaw claim, which it was the purpose of these proceedings to have declared invalid, was based upon a discovery alleged to have been made by one Pokorney in behalf of Bradshaw on February 8th, 1907, the discovery being described in the application as being situated 1,250 feet from No. 1 post.

The appellant in addition to attacking the Bradshaw application claims to be himself entitled to the property under discovery alleged to have been made by him on June 25th, 1907, his application describing this discovery as being situated 1,060 feet from his No. 1 post.

The two discoveries are in fact only some 55 feet apart and are undoubtedly upon the same vein, and both are admittedly good discoveries of valuable mineral withi the meaning of the Act.

The contention of the appellant is that the Bradshaw discovery was not made or staked on February 8th, as Pokorney swears, nor at all until after the Gray discovery was made and staked, Bradshaw or those acting for him having as the appellant alleges, traced the vein from the Gray discovery.

The appellant also took some exception to the manner of the Bradshaw staking, and his whole case was very exhaustively and I think very ably presented by his counsel Mr. McDougall.

The issue is practically summed up in one simple question of fact, namely, did Pokorney discover and stake as he alleges. The evidence, except as to points upon which witnesses might be honestly mistaken, is not as flatly contradictory as often occurs in such cases. Though the stories of the two sets of witnesses are quite inconsistent it is still possible that all or most of the witnesses on both sides are speaking what they believe to be the truth. Impro-

bability and circumstances exceedingly difficult to explain exist to some extent on both sides, and it is hard to escape the conclusion that some one must have in some respects deliberately altered the condition of the stakes or markings for the purpose of creating a false impression. The fire that swept that country in June unfortunately lent the opportunity.

After carefully considering the whole evidence I cannot feel that the appellant is entitled to succeed. Though in circumstances such as exist in this case it is impossible ever to be wholly free of doubt I think I must accept the statements of Fenwick Ellis and Pokorney regarding the discovery as being substantially correct. Ellis impressed me as a very reliable witness. He was not present at the time of the discovery on the 8th of February but says he came to the claim with Pokorney a few days later and examined the discovery and assisted Pokorney in planting a discovery post upon it, and he is satisfied it is the same discovery that is now claimed by Bradshaw. He says he also assisted in blazing the line from this discovery to the No. 1 post. Fire ran over the claim about the middle of June and very much altered the appearance of the place, but Mr. Ellis is quite clear that it was substantially at the same spot where the Bradshaw discovery post now stands that Pokorney and he planted the discovery post in February, and he says it was an ordinary post and not a tree that was used for the purpose.

Some witnesses for the appellant claim to have been on the property before the fire and not to have seen the discovery or post, as they say they would have or would have been likely to had the post then been there, and they say that the blazed line which was apparently intended to lead from the No. 1 post to the discovery ended in a blazed tree some 40 or 50 feet south of the vein, this line not passing exactly at the Bradshaw discovery, but some little distance east of it. Another branch of the discovery line did lead to the present Bradshaw discovery post, but this is claimed to have been newly cut while the one to or near the tree is claimed to be old. Though I think some at least of these witnesses were telling what they believed to be the truth, their evidence was not on the whole at all satisfactory. It seems that those who examined the line and tree in a casual way assumed that the purpose of the line was to lead to the tree, at which, however, was no pretense of a

discovery. It may be that this misled them in their examination and prevented their searching for or seeing the Bradshaw discovery or discovery post which was a little down hill from where the Gray discovery was subsequently located. Seeing the tree as they supposed at or near the termination of the line may have prevented further investigation and may account, in the case of some of the witnesses at least, for their not seeing the Bradshaw discovery or discovery post.

Much was made by appellant's counsel of the fact that Pokorney in his application and affidavit of discovery described his discovery as being 1,250 feet from the No. 1 post, the actual distance being, as it seems to be admitted, only about 910 feet. It appears, however, from the evidence, that the country between the discovery and the No. 1 post was exceedingly rough and such as it was impossible, especially in the winter time, to measure with any degree of accuracy, the course being more or less indirect and the applicant having adopted the usual method of measurement merely by pacing, which, with snow on the ground and very rough property could hardly be very accurate. No other post or blazed line is suggested as answering the description. The appellant's own measurement of 1,060 feet from his discovery to his No. 1 post, made in June when the ground was free of snow, would appear also to be much in excess of the correct distance. Inaccuracies in such measurements as well as in the exact dates of staking are not uncommon. It would be a hardship to hold a claim invalid by reason of them; but prospectors should remember that by such carelessness they are inviting trouble and running serious risk of loss.

In addition to the question of making the discovery the appellant's counsel took exception to the respondent's staking on the ground that some of it had been done before the making of the discovery. While Pokorney's preparations to stake and his willingness to have his assistants proceed with the lines and less important posts before he had any assurance of his being able to make a discovery, is open to serious comment, I cannot find as a fact that any of his staking—certainly not any substantial part of it—was done before the making of his discovery.

On the merits, therefore, even if the matter were being heard before me for the first time, I would have to dismiss the case. As there is already an adverse decision against him

by the Mining Recorder, who heard the evidence before and had the advantage of personally viewing the property, the appellant would on principles that ordinarily govern such matters require to make out even a stronger case. I think he comes far short of making out a case sufficient to set aside the former decision. I have no sympathy with reckless snowshoe stakings which are not founded upon a discovery of valuable mineral, nor with the cry of such stakers that someone is "jumping" their claim—such a cry being to me rather a circumstance of suspicion against the person who raises it than otherwise—but there are cases in which good discoveries have been made in the winter time, and the evidence fails to convince me that this is not one.

The Recorder has made no order in the proceedings before him for costs, and not to do so was, I think, quite proper, as the circumstances justified investigation in the first instance. The same consideration, however, does not apply in regard to this appeal and I will therefore dismiss the appeal with costs.

Appeal from this decision was taken to the Divisional Court.

J. Lorn McDougall, for appellant.

H. D. Graham, for respondent.

The Court, BOYD, C., ANGLIN, J., and MABEE, J., dismissed the appeal with costs.

(THE COMMISSIONER.)

RE McNEIL AND PLOTKE.

Recording—Affidavit of Discovery and Staking—False Affidavit—Appeal from Recorder—Status of Appellant—The Cashman Case.

It is only the licensee who was actually on the ground staking out the claim or personally superintending the staking, that is qualified or able properly to make the affidavit required to accompany a mining claim application.

Untruth and deception in an affidavit and application for a mining claim will invalidate the application.

Where there is an application for a mining claim on record another application for the same property should not be recorded until the first has been disposed of.

Held also following *Re Cashman and The Cobalt & James, Ltd.* (*ante*) (since overruled in *Re Smith and Hill, post*) that a licensee who has himself no valid claim to the property has no status to attack a decision of the Recorder awarding the property to another.

Hugh A. McNeil and W. F. M. Plotke had mining claims staked out on the same property. Plotke's application reached the recording office first, and was recorded. McNeil later filed his application and entered a dispute against the Plotke claim. While the dispute was pending Plotke staked again and on the day the Recorder dismissed the dispute filed another application which the Recorder also put upon record.

McNeil appealed against the Recorder's dismissal of the dispute and later, on hearing that Plotke's last application had been recorded, appealed also against that, and both appeals were heard together.

J. Lorn McDougall, for appellant, McNeil.

A. G. Slaght, for respondent, Plotke.

27th December, 1907.

THE COMMISSIONER.—Upon the evidence before me I find the facts to be as follows:—Before the stakings and applications now in question were made both McNeil and Plotke had made prior stakings and applications which were thrown out on inspection for lack of discovery. Plotke was the first to get a new application recorded, which he did on 16th November, claiming discovery and staking in his behalf on 15th November, 1907. This was application number 10263, the one in question in the first-mentioned of the present appeals. McNeil reached the recording office on 18th November with an application claiming discovery

and staking on 14th November, the latter, however, appearing to be a mistake for the 16th, the 16th being the date mentioned in the dispute which he filed with his application on the same date, namely, 18th November, 1907, and this dispute claiming that the Plotke application of 16th November is invalid and claiming that McNeil is entitled to the property under his application of 18th November was adjudicated upon by the Recorder in the decision which it is the object of the first-mentioned appeal to set aside.

I will deal first with the McNeil application. The affidavit of discovery and of staking is made by George Labrick for Hugh A. McNeil. In this affidavit Labrick swears that he discovered valuable mineral upon the claim at 4 o'clock p.m. the 14th of November, and that he staked the claim and cut and blazed the lines thereon on that day. In his evidence before me he explained that 14th was a mistake for 16th, and that the mistake occurred without his knowledge when the application was being written out by Mr. McNeil. Support is lent to this explanation by the fact that the dispute filed the same day and verified by Labrick's affidavit does actually contain the 16th as being the date of discovery and staking. From the evidence, however, and from Labrick's own admission it is absolutely plain that Labrick was not upon the property either upon the 14th or 16th November, and of course did not make any discovery or do any cutting, staking or blazing of lines on either of these dates. What happened appears to be that McNeil's other agents and employees did stake the property on Saturday, the 16th of November, putting, as would appear, all the necessary stakes and markings thereon except the name of the licensee by whom the staking was done, the stakes being marked, however, as being for the appellant Hugh A. McNeil. Donald McNeil and John Kumm, who did the staking, explain that the work was done in this way because it was feared that Donald McNeil, who was intended to go down to record the claim, would not or might not, by reason of weakness or illness, be able to stand the journey, and it was intended to insert in the blank the name of whatever employe it might be found convenient to send down to make the affidavit of discovery and staking for the purpose of getting the claim recorded. The intention was to have some one start for the Recorder's office early next morning, Sunday. Donald McNeil not being able to go on Sunday

morning Labrick was commissioned for the duty, and according to his own evidence he, early Sunday morning, went to the claim and examined the discovery post and posts numbers 3, 2 and 1, saw that they were freshly put up and that there was writing on the discovery post and post No. 1 with a blank left for the name of the licensee by whom the staking was done. He says that the stakers told him they would fill in his name in the blank that Sunday morning after he left. He made no attempt to fill in his name himself and he does not claim to have seen the No. 4 post or to have been along the north or west boundary line, or along the blazed line from No. 1 to the discovery post. He went to the recording office, however, and swore the affidavit as above mentioned.

The Recorder held that an application made in this way could not be sustained, and I am asked to reverse this ruling. I have no hesitation in declining to do so. From a perusal of secs. 84, 132, 133, 156 and 157, and the forms therein referred to, it is very clear that it is only the person who actually stakes the property upon the ground or who at least personally superintends the staking that is intended and authorized or in any way justified in making an affidavit of discovery and staking. From the Act it is clear that the affidavit can be made only by a licensee, and the Act is particular in requiring that where one licensee is staking on behalf of another the names and license numbers of both must be put upon the posts. The public and other prospectors are entitled to know not only upon whose behalf the property is staked but also by whom the actual staking is done. This requirement is obviously for the purpose of preventing fraud and more effectually securing proper enforcement of the provisions of the Act. Apart altogether from the requirements of the Act Labrick was wholly unjustified in swearing to having made a discovery and to the staking of the property on a day when he was never upon it, and even if his story of his Sunday morning visit be accepted as true he was not justified in swearing or qualified to swear this affidavit as to staking and marking at all. The appellant's new staking and application of 6th and 7th December probably worked an abandonment of the claim in question, but I think at all events that the untruth and deception of the affidavit and application are fatal. (See *Attorney-General for Ontario* v. *Hargrave*, 8 O. W. R. 127, confirmed 10 O. W. R. 319.) I need only add that

I think the harm would be incalculable were the swearing of such affidavits to be countenanced or encouraged or were an applicant permitted to acquire any right under such swearing. It follows, therefore, that the appellant has no valid claim upon the property under the above-mentioned staking or application.

What then of the respondent's rights under the two applications appealed against. The Recorder, at the hearing of the dispute, refused to declare the first of them invalid. Can I interfere with this decision? The respondent's counsel referred me to the case of *Re Cashman and The Cobalt and James Mines, Limited,* 10 O. W. R. 658 (*ante*), as authority for the proposition that when the attacking party is shown to have himself no valid claim upon the property and only seeks to throw it open for the benefit of licensees generally no appeal will lie. Though I confess I have some little difficulty in understanding the exact scope and application of that decision I think it must be held to cover the present case. . . .

It follows, therefore, I think, that it is not open to me on this appeal to go into the merits of the respondent Plotke's first application number 10263, which the Mining Recorder, after trial, has refused to disturb. Lest, however. I should be wrong in this view I may state that were I permitted to do so I would without hesitation find as a fact that that application is invalid, that in fact the staking and discovery claimed by the affidavit of Douglas to have been made and done on 15th November, 1907, was never really made or done. From what appeared before me I could not possibly reach any other conclusion.

It remains to deal with the second appeal, namely, that against the respondent's application number 10332½, recorded 6th December, 1907, claiming discovery and staking 5th December, 1907. This appeal is against the recording of that application and asking to have it vacated and declared invalid. Upon the principles I have deduced from the decision in the Cashman case as applied to the provisions of the Act I think as the appellant has been found to have no claim or interest in the property himself he could not be heard by way of appeal against any act or decision relating to another applicant. No doubt it is open to him to file a dispute under sec. 158*a* (3) and have this dispute tried and passed upon by the Recorder or by me in case the Recorder

referred it to me for trial. Here again, as in regard to the first application of the respondent Plotke, I have no hesitation in saying that if I considered the matter open to me to determine upon this appeal I would have no hesitation in finding that application number 10332½ should not have been recorded.

That there may be no misunderstanding of the view I take I will point out again that were the appellant himself entitled to any right or interest in the property under his own application I would hold that it was open to me to deal with the applications appealed against, so far at least as might be necessary to establish the appellant's claim. Perhaps I should add also that it may be doubted whether the principle laid down in the Cashman case, and which I have endeavored to follow in this case, applies to any proceedings other than appeals; its application to other cases is a question that must be dealt with as the cases arise.

In the circumstances of the present case I think I should certainly allow the respondent no costs, and I would suggest that it might be well for the Mining Recorder to direct an inspection of the discoveries claimed in all the applications standing upon the lands in question and in that way procure cancellation of claims that appear clearly to be invalid and made in direct violation and apparently in fraud of the plain provisions of the Act. It may be mentioned that it appeared from the evidence that the appellant also had made a subsequent staking and filed a new application upon the property, so that one party appears to be no better than the other in respect of the matters mentioned. Where no valid discovery could readily be made the proper course for either party to have adopted would have been to stake for a working permit. Had this been done by either party instead of wrongfully staking for a mining claim the working permit would no doubt now have been in existence and all or much of the present trouble and litigation would have been avoided.

I order judgment dismissing both appeals herein without costs.

NOTE.—The Plotke applications were again under review in *Re McNeil & McCully and Plotke, post.*

(THE COMMISSIONER.)

RE McLEOD AND ENRIGHT.

Staking—Staking Promptly after Discovery—Unreasonable Delay—Substantial Compliance—Priority.

A discoverer who fails to plant his discovery post and complete the staking of the claim as quickly as in the circumstances is reasonably possible loses his rights when another licensee makes a discovery of valuable mineral and completes staking before him.

M. made a discovery of valuable mineral in the forenoon of 11th June and did nothing further that day except to put up at the discovery a small post or picket inscribed with his name; E. the same afternoon made another discovery and completed the staking out of his claim; M. the next day, after being told of E.'s claim and seeing his No. 1 post, completed his staking.—Held that E. was entitled to the property.

E.'s mining claim was not invalid by reason of his discovery post, where planting was difficult, having been placed in a slanting position, its point being in the vein and its side resting against and supported by a projecting piece of rock, this being considered in the circumstances substantial compliance with the Act.

It having turned out that M. had never really filed an application and could have no right to the property, every reasonable intendment which the Act permitted should be made in favor of the other discoverer rather than throw the property open.

John S. McLeod and Owen Enright both claimed to be entitled to the property known as M. R. 9, which each had staked out for a mining claim.

J. Lorn McDougall, for McLeod.

A. G. Slaght, for Enright.

16th January, 1908.

THE COMMISSIONER.—This is a matter coming before me by way of appeal from the Mining Recorder of the Montreal River Mining Division and by way of dispute transferred to me by him for trial and adjudication.

The case is indeed a rather difficult and unsatisfactory one to deal with. The evidence of the two parties is conflicting; the conduct of both, even if their own stories be true, is unusual and hard to account for; the procedure of ordering a reinspection when the first report was unfavorable, not often resorted to by a Recorder, was followed in this case; the application of the disputant McLeod, which is said to have been filed with his dispute, cannot be found, and his solicitor who is said to have filed the application and who no doubt could give the facts concerning it was not produced to tell what he knew about it; technical

questions have arisen regarding the cancellation of the Enright claim; and lastly, after the evidence before me was practically closed a notice of appeal filed by Enright, the existence of which appeared until then to have been unknown to the parties, turned up and was put in in the case . . .

Reverting to the commencement of the matter and to what took place upon the ground in dispute before anything appeared in the recording office, I think I must find, though with some misgiving as regards both sides as to the entire candor of the evidence produced, that the respective stories of discovery and staking by each party are substantially true.

I find that McLeod, with his assistants Steele and Kitching, went upon the property in the forenoon of June 11th, there being then no discovery or staking in behalf of Enright and the lands being open for exploration and staking out. He that forenoon made a *bona fide* discovery of valuable mineral, being the same discovery that was afterwards inspected and passed by the Official Inspector. Being as he says unwilling to jump the property if anyone else had a discovery upon it he did not proceed with his staking as the Act (sec. 134) requires, not even on that day going so far as to plant a discovery post in accordance with the Act but putting up as he states a small poplar post or pole merely inscribed with his name. He seems not to have taken the usual course which a prospector would be expected at once to take in order to ascertain what staking or discovery, if any, was already on the claim—namely, going to No. 1 corner, where he would expect to find all the particulars of any former staking, including the name of the staker, the date of the staking and the whereabouts of the discovery, if any prior staking or discovery existed. Instead of this he seems to have wasted his time going around the claim in the other direction and looking for and examining posts which could not be expected to give him any satisfactory information. Finally, however, he examined No. 1, and found some old posts with other names, after which he left the property and did nothing further that day. He returned next day but instead of proceeding at once to stake the claim in proper form he blazed out a small square around his discovery, intended as he says in his evidence to keep other prospectors off this particular part. Just after the completion of the blazing of this square Enright's men came up telling him that they had staked the property the day

before and that they had a discovery. McLeod then proceeded to complete his staking, finding as is admitted by his assistants, Enright's No. 1 post, already planted.

The story of Enright and his assistant Lindsay is that they went upon the property in the afternoon of June 11th and at 3 o'clock made a discovery of valuable mineral and proceeded forthwith to plant a discovery post and complete the staking of the claim in proper form, and that they did complete it that evening. That Enright's staking was done on the evening of 11th June, I think cannot be doubted, for apart from Lindsay's and Enright's own positive evidence, Roger Steele, one of McLeod's witnesses, admits seeing the Enright No. 1 post on the evening of the 11th, though it is clear it was not there in the forenoon of that day. It is admitted by all that the Enright No. 1 post at all events was up before McLeod proceeded to put up his No. 1. The serious question to my mind regarding the Enright claim is whether the discovery that he and Lindsay made on the afternoon of June 11th is really the discovery that he afterwards claimed to have made at that time and which was inspected and passed as such by the Inspector in October. . . . .

Upon the whole evidence, though I cannot be altogether free of doubt upon the point, I think I would not be justified in finding that Enright did not make the discovery that he claims on the evening of the 11th of June.

In the result, therefore, so far as the discoveries and stakings are concerned, Enright would be entitled to the claim, for unquestionably McLeod did not proceed to complete his staking with the diligence and speed required by the Act, nor did he in fact have even a proper discovery post planted until after Enright had completed his staking of the property. Sec. 134 is clear and explicit upon this point, and I have already applied it in the case of *MacKay* v. *Boyer* (*ante* decided 31st August, 1907). McLeod's staking with the assistants he had with him in the forenoon of the 11th of June might readily have all been completed within two or three hours, and had this been done no other prospector would have been likely to enter upon the claim or interfere with the property, and the Enright staking would not have been done, or if it had been done and even if it had also been recorded it could not defeat McLeod's claim. As long as the property was left unstaked other pros-

pectors must be expected to enter and explore and stake upon it. It is always a matter of regret that one who appears to have been the first discoverer does not secure the property, but positive rules as to prompt staking are indispensable for the protection of *bona fide* prospectors who honestly explore and stake out property upon which there is no evidence of prior appropriation. Under no mining law in any country, so far as I am aware, is a miner who comes forward with a claim of having made a prior discovery which he did not follow up within the prescribed time by the acts necessary to appropriate the property, allowed to oust the claim of one who has also made a discovery and has completed all the prescribed acts of appropriation within the prescribed time and before the first-mentioned miner has completed them. If one of two equally deserving discoverers must suffer it must be the one whose default or lack of diligence has led to the existence of the conflicting claims. . .

Judgment, dismissing the disputes and appeals and finding Enright entitled to the property.

From this decision McLeod appealed to the Divisional Court. The Court, MEREDITH, C.J., BRITTON, J., RIDDELL, J., on 1st May, 1908, upon two points not raised at the hearing and upon which sufficient evidence for a finding had not been put in—whether Enright's staking was sufficient, and whether McLeod had ever really filed an application—remitted the case to the Commissioner.

Additional evidence was put in and the Commissioner gave his decision as follows:—

31st July, 1908.

THE COMMISSIONER.—This is a matter referred to me by the Divisional Court for re-trial upon two issues not raised, or at all events not specifically raised or dealt with, at the former hearing, namely:

(*a*) Did the respondent Owen Enright comply with the requirements of The Mines Act, 1906, and amendments thereto, in placing his discovery post recumbent on the vein in question.

(*b*) Was an application for the said mining claim filed by the appellant McLeod or on his behalf, and if so when.

and it was further ordered by the Court that the evidence already in should stand as evidence on such re-trial, and that further evidence might be adduced by either party on the above questions, and that I should give judgment upon the said two questions, and the rights of the parties to the claim, and should direct by whom the costs of the appeal to the Divisional Court and the costs of the re-trial should be paid. And the Court further ordered that on all other questions disposed of by me my previous decision should be affirmed.

Pursuant to this order the matter came before me for rehearing, and evidence was adduced in behalf of both parties.

As upon the former hearing, the evidence before me was again very inconclusive and unsatisfactory, especially on the part of McLeod.

Upon the first question—the planting of the Enright discovery post—Enright himself and one of his former assistants, Armstrong, were called. Enright's statement is that he left the post in a slanting position, its point being in the vein, and its side resting against one of the jaws of the vein or a piece of projecting rock, which he says was some six inches higher upon one side than on the other. He states that the top of the post was about two and a half feet higher than the bottom, and that the top was about a foot and a half above the rock, that is to say, the post and the rock were both slanting, but the post was at a greater angle from the horizontal than the rock. It is quite clear from the other evidence that the rock at this particular point was bare, and though it would have been possible to have erected or propped up the post in a vertical position it would in the circumstances have been a matter of some trouble and difficulty. Armstrong did not see the post until the day after it was planted, and he is very hazy and uncertain as to the real nature of the ground at and surrounding it, being probably confused somewhat between his different visits to the place, but he says he thinks when he first saw it it was slanting at an angle of about sixty degrees, and he differs from Enright in that he says it was resting on or propped up by a loose stone, whereas Enright says that it rested on the upper side against a projection of solid rock. Reverting to the evidence at the former hearing, where the matter was not specifically gone into or followed up, Lindsay states at

page 56, and in other parts of his evidence, in a general way, that he and Enright put up the post, but he gives no details and was not asked as to how they put it up. The Inspector, also, upon his report, after examination of the discovery, finds no fault with the position of the post, though perhaps in view of the fact that this was long after the date of its planting this cannot have much weight.

There must, in all cases where a specific question of this nature is referred for re-trial and where the information is exclusively within the knowledge of the one side, be danger that the party interested may be disposed to color the matter a little for his own purposes, and this consideration was very strongly urged by counsel for McLeod, and Enright's former evidence was referred to as being in conflict with his present story. Upon consideration of the whole evidence, however, and considering Enright's demeanor before me in both instances, and the fact that his habit seems to be not always to think or speak with very great precision unless his attention is specifically directed to the particular point in question, I am satisfied that the post was planted substantially as he has now described it, and I find that in the circumstances of the case this was substantial and sufficient compliance with the provisions of the Act.

Upon the other question—as to whether McLeod filed an application for the claim—the difficulty of making a finding is still greater. . . . .

The case had at the former hearing been adjourned several times in order to clear up more satisfactorily, if possible, questions that were left in doubt upon the evidence, but with no satisfactory result, and the matter, so far as the McLeod application is concerned, is in no more satisfactory position now than it was before. I think, however, that the chief default in producing what might have been produced certainly rests upon McLeod, and I think I must also assume that more might have been shown upon his behalf if, when shown, it would have advanced his case.

As I am compelled to make a finding one way or the other, unsatisfactory though the evidence may be, I must find that no application was ever filed by McLeod for the property in question. If the matter be viewed from the point of view that the burden of proof rests upon McLeod, as I think is really the case, then I would have no hesitation in finding that he has not met that burden.

Much discussion took place upon the argument as to whether the principle of the case of *Re Cashman* v. *The Cobalt & James Mines, Limited*, 10 O. W. R. 658 (*ante*), would apply. In view of my findings above I need not discuss this question, though as I have remarked in the Cashman case, and in a number of other cases before me, once it is established that one of the parties can have no right in the property I think every reasonable intendment should be made, where a proper regard for the provisions of the Act will permit it, to uphold the validity of the other claim where it is based upon substantial merit, and where, if both claims were thrown out the result would only be a rush to the property with small chance that either of the existing claimants would secure any rights upon it.

On the question of costs, though I allowed no costs at the original hearing before me, I think the same consideration will not apply to the extended litigation, of which McLeod has been the cause, and I think he should pay the costs of the appeal to the Divisional Court and the costs of the retrial before me.

Judgment sustaining the Enright claim and finding that McLeod had filed no application, with costs.

(THE COMMISSIONER.)

RE MCGUIRE AND SHAW.

Employer and Employee—Agreement for Interest in Mining Claim—Statute of Frauds—Corroboration—Nature of Interest in Unpatented Mining Claim—Estoppel.

An employee on a prospecting trip for the acquisition of claims should be held to strict probity and good faith toward his employer.

M. made a written agreement with H. to supply all necessaries, pay him a salary and furnish him an assistant for a prospecting trip. M. to have a ¾ and H. a ¼ interest in the claims acquired. S. was hired as assistant and went on the trip knowing M. understood that everything staked was to be for the employer's benefit.

Held that an alleged private agreement between H. and S. that S. might stake some claims for himself could not be given effect to, and that M. was entitled to a ¾ interest in a claim staked out on the trip and recorded by S. in his own name.

Held also that the Statute of Frauds was no bar to enforcing M.'s right against S.

A verbal agreement for an interest in a mining claim entered into before the staking out is valid and enforceable, if there is corroboration as required by the Act (in this case s. 159 (2) as amended in 1907).

Claim by Walter McGuire to establish his right in Mining Claim T. R. 1180, staked out on 6th and recorded on 30th May, 1907, by Edwin Shaw.

J. Lorn McDougall, for plaintiff.

J. S. Davis, for defendant.

22nd January, 1908.

THE COMMISSIONER.—The defendant was employed by the plaintiff through or on the recommendation of the plaintiff's agent Thomas Heaslip to assist Heaslip in prospecting for minerals, and the plaintiff claims that under the terms of the employment everything that the defendant staked while the employment continued was to belong to and does belong to the plaintiff.

The defendant denies that it was agreed or that it was any part of the terms of the employment that everything he discovered or staked should belong to the plaintiff, but on the contrary alleges that it was agreed between himself and Heaslip that he was to be allowed to prospect for himself on Sundays and was to be entitled to stake three claims for his own benefit, and he pleads the Statute of Frauds (sec. 4) and also sec. 159 (2) of The Mines Act as amended in 1907, as a bar to the claim.

Two interesting questions of law are thus raised in the case, which so far as I am aware, have not been previously dealt with in any decision in the province, so far at all events as interests under our present Mines Act are concerned, namely, the application of the Statute of Frauds and the application of sec. 159 (2) to unpatented interests in mining claims. . . .

As to the nature of the interest, right or privilege vested in the holder of a mining claim, no other country, so far as I am aware, has any provision similar to sec. 140 of our Act, so far at least as mining claims prior to the issue of a certificate of record are concerned. The nearest parallel perhaps is to be found in Australia. There it is in some of the statutes provided that the miner's interest is a chattel interest, and this has been held to mean that it is merely personalty and that it does not come within the Statute of Frauds; *Williams* v. *Robinson*, 12 N. S. W. L. R. 34.

The British Columbia Mining Act (s. 34) also provides that the interest of a miner in his mineral claim shall be deemed to be a chattel interest, but goes on to say that it shall be equivalent to a lease for one year and thence from year to year, and it seems generally to have been held in that Province that the miner's interest in the claim is an interest in land within the Statute of Frauds: *Stussi* v. *Brown*, 1 Martin's M. C., 195; *Alexander* v. *Heath*, 1 Martin's M. C 333; *McMeekin* v. *Furry*, 39 S. C. R. 378; though it has been held in that province that where an agreement is entered into before the claim is located that another person is to have an interest in it the locator will be held to be a trustee to the extent of the interest agreed for, and the Statute of Frauds does not apply: *Wells* v. *Petty*, Martin's M. C. 147; *Fero* v. *Hall*, Martin's M. C. 238; though the case of *Sunshine, Ltd.*, v. *Cunningham*, Martin's M. C. 286, seems to hold that writing is necessary to establish a declaration of trust. Another British Columbia case in which the question of the Statute of Frauds was raised is *McNerhanie* v. *Archibald*, which went to the Supreme Court of Canada, 29 S. C. 564, but that seems to throw no light on the case in hand as it merely decided that the existence of the partnership or status from which an interest in mining lands or the proceeds thereof resulted might be proved by parol.

In the United States the interest of the miner in his mining location prior to formal lease or patent is, so far as the

conditions concerning its acquirement are concerned, very similar to those under our own law, but there is nothing in any of the states, so far as I can find, at all similar to sec. 140 of our Act, and the tendency of the United States rulings has been rather to hold that the miner acquires something in the nature of a grant of possession; Lindley on Mines, 2nd ed., s. 539. The general rule in the United States is to hold that any agreement made to convey an unpatented mining claim after the same has been located must be in writing; 27 Cyc. 671. A distinction, however, is drawn between such a contract and an agreement made prior to the location. This distinction is brought out in a very instructive way in the case of *Regan* v. *McKibben*, 19 Morrison's M. R. 557, at 562, in which it was held that "An agreement to locate a mining claim for the benefit of or in trust for others, if made prior to the location, is valid although not in writing. Such an agreement or a declaration of trust not in writing after its location cannot be enforced."

I think there can be no doubt, therefore, that the Statute of Frauds is no bar to the plaintiff's recovery in the present case, if he is otherwise entitled to recover. . . .

I hold also that there is in the documents produced material corroboration of the plaintiff's claim answering sec. 159 (2) of the Act, if the oral evidence is otherwise sufficient to establish his right.

Considering the matter then at large as regards the admission of evidence, it remains to arrive at the facts. The defendant was first brought into connection with the plaintiff by Heaslip. An agreement in writing and under seal was made between the plaintiff and Heaslip on 13th March, 1907, under which Heaslip agreed to prospect for mines and minerals for the plaintiff, who was to pay him at the rate of $50 per month and supply him with all necessaries and pay the wages of one laborer to assist him in the work of prospecting or staking out of claims, and give him a one-quarter interest in all the claims acquired. Heaslip recommended the defendant for assistant, and sent him to get an outfit of supplies from Mr. Foster, who was one of a syndicate who were really the parties interested in the enterprise. Some discussion took place between the defendant and Foster, and the defendant went or was sent to Mr. Hall, one of the members of the syndicate, who was acting as solicitor for them. The plaintiff McGuire was telephoned for and came

over to see the man who was being or who was to be employed to assist Heaslip. During the interview a discussion took place regarding the work to be done, the defendant's version of what happened both here and at the interview with Mr. Foster differing materially from that of McGuire, Hall and Foster. Foster says that in the interview with him that it was mentioned that any work done by the defendant while on the trip was to be for the benefit of his employers. Hall and McGuire say that at the interview in Mr. Hall's office the terms of the employment were mentioned, namely, that everything that was staked was to be for the benefit of the employers, and Mr. Hall says that he asked the defendant if these conditions were satisfactory to him and the defendant replied that they were.

The question is raised as to whether the agreement for the services really took place with Heaslip at Latchford or whether it was incomplete until the meeting with McGuire. I think it must be taken that the defendant was sent by Heaslip to the other parties to see if they would confirm his employment, and that the bargain was not really complete until that interview was over and the defendant received the supplies from Foster (which were delivered to him after the interview) and returned to Latchford. At all events it is plain that the defendant clearly understood that McGuire and his associates were really the parties interested in the enterprise and that they were advancing the money for it, and I think he would at all events be estopped from denying that the terms of his employment were as mentioned at that interview.

The defendant swears that at the interview with Heaslip it was agreed that he was to have Sundays to prospect for himself and that he was entitled to stake or have staked out for himself three claims if he desired. Heaslip denies any mention of the defendant's right to be entitled to any claims for himself, but admits that the defendant was to be entitled to do as he liked on Sundays.

Heaslip and the defendant proceeded to the Montreal River district and to the claims which had already been staked in behalf of the syndicate. The defendant says that a line was blazed around these and that most of their operations while in the region were confined to prospecting these claims, and he says that he did make a number of discoveries on them for the benefit of his employers. He states that

on one or two Sundays he prospected for himself outside the limits of the claims mentioned and that on Sunday the 5th of May he made the discovery upon which the claim in dispute in this action was staked. He informed Heaslip of the discovery and on Monday morning, the 6th of May, they went to it and erected a discovery post and one witness post. Heaslip says he marked the discovery in the name of his employers. The defendant says that Heaslip marked it for him. For some reason at all events the staking of the claim was not completed and the defendant says that on the following Sunday he went back and completed the staking. His explanation of the Monday morning trip is that Heaslip had agreed to show him how to do the difficult part of the staking, and that when this had been accomplished he did not wait to complete the staking as he did not want to trespass further on the time of his employers. Heaslip says that he intended to return and complete the staking of the claim for his employers. The defendant says that it was understood he was to have the claim. On returning to Latchford and Haileybury the claim was recorded by the defendant; the defendant says that Heaslip assisted him in preparing the application; Heaslip denies all knowledge of the application being made.

In his application the defendant gives the date of discovery as the 6th of May, Monday, and the date of his staking as the 10th, which would be Friday, neither date agreeing with his evidence at the hearing, and both dates, if they be correct, being days for which it clearly appears that he was to be paid and was paid by his employers.

The settlement of wages and expenses was made with the defendant after the claim was recorded, the defendant receiving pay for all the week days and also for his expenses and board from the time he reached Latchford until his employment ceased. The defendant says he did not know what he was to receive in the way of expenses until this settlement was made and that he left it to Heaslip to do what was right, and that he received what was given him without question.

The defendant's prospecting permit was obtained and paid for by his employers. He procured and paid for a mining license himself. The prospecting permit would be required for the work of his employers; the mining license would not necessarily be so required unless for the purpose of staking

claims, and Heaslip having a license of course could do the staking wherever the defendant might find discoveries.

As to the question of credibility between Heaslip and the defendant, neither was a very satisfactory witness. The defendant, however, is in direct conflict on material points with a number of other witnesses and I cannot accept his story where it differs materially from theirs. I am satisfied, however, from admissions made by Heaslip and from his conduct in the witness box when questioned upon the point, that something was said between him and the defendant regarding the latter's right to prospect for himself on Sundays and probably as to acquiring an interest for himself. If, however, the defendant in the face of what was said when he met McGuire at Cobalt desired the right to acquire claims for himself or was unwilling to enter the employment upon the terms that were mentioned to him, the burden was clearly upon him at that point to say so and to refuse to enter upon the employment unless he was given this privilege.

A service of such a nature as the defendant was engaged in for his employers offers the widest opportunities for fraud and dishonesty and I think the employment must be held to be one of a nature requiring the utmost probity and good faith on the part of the employee, and one in which his conduct should be somewhat jealously scrutinized.

Upon the best consideration I can give to the whole case I think it must be held that the employers are entitled to the claim in question, but only to the extent that the agreement between Heaslip and McGuire provides, namely, a three-quarter interest, and their right to this three-quarter interest must be subject to the condition that the plaintiff reimburses the defendant on similar terms to those mentioned in the Heaslip agreement for all the time and expense the defendant has been put to in connection with the claim for which he has not already been paid or reimbursed.

In all the circumstances, and especially on the ground that I think Heaslip must have held out some inducements to the defendant in the way of acquiring interests for himself, I will make no order for costs.

NOTE.—Present s. 71 (Act of 1908) now more explicitly states the law as to the requirement of writing in establishing interests in unpatented Mining Claims.

(THE COMMISSIONER.)

RE YOUNG AND SCOTT AND MACGREGOR.

Certificate of Record—Lack of Discovery of Valuable Mineral—Impeaching Claim after Certificate of Record Issued—Working Conditions—Forfeiture—Evidence.

After issue of Certificate of Record a mining claim is not open to attack for lack of discovery of valuable mineral unless the applicant did not *bona fide* believe he had a sufficient discovery and was therefore guilty of fraud.

Proof of facts necessary to establish forfeiture of a claim must be satisfactory.

Proceedings by the claimant Cyril T. Young to have mining claim T. R. 296 declared forfeited. The claim was staked out on 29th November, 1906, by James P. MacGregor in the name of Alexander MacGregor, and afterwards transferred to Charles Duff Scott and James P. MacGregor.

Forfeiture was claimed upon the grounds, among others; that the claim was fraudulently recorded without a *bona fide* discovery of valuable mineral; that the working conditions required by the Act were not duly performed.

A. G. Slaght, for claimant.

J. Lorn McDougall, for respondents.

28th January, 1908.

THE COMMISSIONER.—I think I would not be justified upon the evidence in finding that the claim was fraudulently recorded without there having been previously made a *bona fide* discovery of valuable mineral. The evidence satisfies me that no discovery of valuable mineral was really made up to the time of the recording of the claim, but I cannot find that MacGregor did not believe he had made such a discovery. He was at the time inexperienced in mining matters, the mining excitement was then at its height, and with the prospector, especially the inexperienced one, hope and credulity run high, and I think MacGregor really believed he had a discovery of valuable mineral.

As to the performance of work as required by sec. 160 of the Act and the report thereof required by secs. 161 and 162 as both may be modified by the provisions of sec. 163, I think on the whole I would not be justified in finding against Mr. MacGregor. The evidence was unsatisfactory, but upon the well established principles applicable to such cases, there is

nothing to justify an adverse finding. *Hocking* v. *Wenzel* (Yukon), 6 W. L. R. 658; *Lindley on Mines*, 2nd ed., par. 645; *Bakers Creek Co.* v. *Hack*, 15 N. S. W. L. R. 207.

I find that a certificate of record of the mining claim in question was, within the meaning of sec. 71 of the Act, issued and delivered to Alexander MacGregor on 4th April, 1907. The record book, an extract of which was put in, shows this to be the date of the granting of the certificate, and I think this must be presumed to be correct notwithstanding some uncertainty in the evidence of James P. MacGregor as to the date upon which the certificate of record was received. To resolve any possible doubt I made inquiry at the Bureau of Mines and found that the certificate of record had been forwarded by letter to Mr. MacGregor's solicitors by the Deputy Minister on the 4th of April.

As to the complaint alleged against the MacGregor claim that the claim was recorded fraudulently without the existence of a *bona fide* discovery of valuable mineral, I have negatived the imputation of fraud, and it seemed to be conceded upon the argument that unless fraud could be established this ground of complaint could not prevail. This, I think, is the correct view, though reading sec. 117 with secs. 71 and 140, all as they were before the amendment of the Act in 1907, there might seem to be some little room for doubt. It was, however, clearly the intention of secs. 71 and 140 to give stability and security to the holder's title or right after the issue and delivery of a certificate of record so that where a claim had been in existence without dispute or impeachment up to that time purchasers and transferees might be protected and litigation might, as far as possible, be avoided. Section 117, I think, cannot be taken to override the other two sections. The inconsistency or apparent inconsistency is removed by the amendments of 1907, which expressly make sec. 71 prevail over sec. 117.

I must dismiss the application, but in the circumstances, I think I should certainly make no order for costs.

NOTE.—The provisions of the Act in regard to attacking a claim for forfeiture by reason of improper removal of posts have since been altered and the part of the decision dealing with that matter is omitted from the report.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

RE McDONALD AND HASSETT.

License—Forfeiture—Relief From—Order in Council—Lands Open—Merits.

The leaning is against declaring a forfeiture if it can be avoided, where it would be a hardship and the adverse claimant has no substantial merit.

Proceedings by the appellant Donald G. McDonald to have mining claim No. 432, of the respondent Martin F. Hassett, declared forfeited, in order that his own subsequent claim might be established.

A. G. Slaght, for appellant.

George Mitchell, for respondent.

George Ross, for Schlund, an unrecorded purchaser.

3rd February, 1908.

THE COMMISSIONER.—This is an appeal from the refusal of the Mining Recorder of the Temiskaming Mining Division to cancel the mining claim of the respondent upon the ground that it was forfeited by the respondent's failure to renew his miner's license in accordance with the Act. One J. H. Schlund, to whom Hassett had sold the claim, and from whom he had received $3,000 on account of the purchase money, was also represented in the proceedings before me.

The claim was staked on 9th October and was recorded on 6th November, 1905. The discovery was inspected by the Official Inspector and passed, and a large amount of work appears to have been performed upon the property. All the provisions of the law have been duly observed and carried out by the applicant except the renewal of his miner's license. For failure to renew the license forfeiture is claimed to have taken place under sec. 168 of The Mines Act, 1906.

While the appeal was pending before me an Order-in-Council was passed, upon the recommendation of the Minister of Lands, Forests and Mines, relieving or purporting to relieve the respondent from the forfeiture, if any, which occurred by the lapse of his license. Chapter 114 of the Revised Statutes of Ontario, 1897, was referred to in the argument as authority

for thus remitting the forfeiture, special reference being made to sec. 5.

I think this Order-in-Council must effectually dispose of the case, but it may be well that I should set forth the facts which appeared from the evidence presented.

The Hassett claim was staked and recorded under the law and regulations existing prior to the passing of The Mines Act, 1906.

I find that Hassett's miner's license No. 645 expired on 31st August, 1906, and that it was not renewed until 20th September, 1906, Hassett being during those twenty days without a miner's license

I find, as already mentioned, that Hassett otherwise complied with all the provisions of the law in respect to the mining claim in question.

The appellant seems to have staked the property for himself on 16th February, 1907, and he tendered an application therefor to the Recorder which was recorded, under mandamus order of the High Court, as of the 18th February, 1907. No evidence was presented to me as to the validity of the appellant's claim and there is nothing to show whether or not the appellant duly made a discovery of valuable mineral or complied in other respects with the provisions of the Act.

The question whether or not forfeited lands would be held to be immediately open to restaking before something had been done to declare the forfeiture is one of considerable difficulty. In the present case, however, under sec. 2 (2) of The Mines Act, 1906, reading this with secs. 131 and 132, the appellant would seem to be shut out from any right to stake as the lands never came within the description of "Crown lands" under secs. 131 and 132, the Hassett claim being a claim which was subsequently recognized by the Minister of Lands, Forests and Mines.

Hassett had, as a matter of fact, renewed his license long before the present appellant came upon the property, and the case would be one of great hardship both upon Hassett and upon the purchaser if he were now to be deprived of the claim. The leaning of Courts as well as governments is against forfeiture and toward relief of it where possible. The appellant, in this case, whatever his legal standing, has no substantial merit in his own claim.

For a discussion of the question of forfeiture and of the right to restake before forfeiture has been declared, the following authorities may be consulted: *Lindley on Mines* (2nd ed.), sec. 645; *Morrison's Mining Rights* (11th ed.), 102; *Armstrong's Gold Mining of Australia and New Zealand* (2nd ed.), 120, 122, 131; *Osborne* v. *Morgan*, 13 App. Cas. 227, at 239; *St. Laurent* v. *Mercier*, 33 S. C. 314, at 319; *Grant* v. *Treadgold* (Y.T.), 4 W. L. R. 173; *Hocking* v. *Wenzell* (Y.T.), 6 W. L. R. 658; *Cleary* v. *Boscowitz*, 32 S. C. 417; *Canadian Co.* v. *Grouse Creek Co.*, 1 Martin's M. C. 3; *Windsor* v. *Copp* (B.C.), 3 W. L. R. 294, at 298; *Woodbury Mines, Ltd.*, v. *Poyntz*, 2 Martin's M. C. 76; *Hand* v. *Warren*, 1 Martin's M. C. 376; *Critchley* v. *Graham* (Victoria), 2 W. & W. 211; *Chappel* v. *Samper*, 11 N. S. W. S. C. R. 138; *Baker's Creek Co.* v. *Hack*, 15 N. S. W. L. R. 207; *Mitten* v. *Spargo* (Victoria), 1 A. J. R. 70; 19 Cyc. 1358-1362.

I order judgment dismissing the appeal herein without costs.

From this decision an appeal was taken to the Divisional Court.

T. P. Galt, for appellant.

R. S. Robertson, for respondent.

23rd March, 1908.

The Court, MEREDITH, C.J., MCMAHON, J., CLUTE, J., dismissed the appeal with costs.

NOTE.—The right to restake immediately on forfeiture, without any declaration, act or entry by any tribunal or officer, is now settled by s. 84 (Act of 1908).

Relief by Order-in-Council in case of hardship is now expressly provided for by s. 86 (Act of 1908).

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

RE LAMOTHE.

Discovery—Valuable Mineral—Discovery after Staking—Lands open—Disqualification—License—Working Permit—Prospecting Pickets.

There must be actual discovery of valuable mineral within the definition of the Act at the time of staking out a mining claim; mere belief of it is not sufficient.

A discovery made after the staking out will not validate the claim.

The first staker of a mining claim has an exclusive status and while his claim subsists no other valid staking can be made upon the property.

Ontario and United State laws compared.

Appeal by Archibald Lamothe from cancellation of two mining claim applications on Island 13, Sassaginaga Lake, in the township of Coleman, for lack of discovery, one on a staking by the appellant personally on 3rd October, and the other on a staking in his behalf by one Snoddie on 11th November, 1907.

Prior to these stakings one H. W. Eaton had staked out and applied for the property for a Working Permit.

There were also two still older stakings of the appellant but these had not been recorded and did not enter materially into the case.

S. White, K.C., and *G. A. McGaughey*, for appellant.

J. Lorn McDougall, for H. W. Eaton.

Objection was taken by Mr. McDougall that Eaton had not been served with notice of appeal, but this was not proved, and the appeal was proceeded with on the merits.

20th February, 1908.

THE COMMISSIONER (after reviewing the evidence).—From the evidence given and from my own experience in matters of this kind, extending over nearly all the cases in which disputed questions regarding discovery of valuable mineral have arisen since this mining region was opened up, I can not feel that I would at all be justified in reversing the Inspector's finding in regard to either discovery.

The question as to what is a sufficient discovery of valuable mineral is now settled, so far as our law is concerned by sec. 2 (22) of the Act, which reads as follows:

> "Valuable mineral" shall mean a vein, lode or other deposit of mineral or minerals in place, appearing at the time to be of such a nature, and containing in the part thereof then exposed such kind or kinds and quantity or quantities of mineral or minerals in place, other than limestone, marble, clay marl, peat, or building stone, as to make it probable that the said vein, lode or deposit is capable of being developed into a producing mine likely to be workable at a profit."

Applying this definition to the evidence adduced it is altogether impossible to find that anything that existed anywhere at either the O'Reilly or the Snoddie shaft constituted a discovery of valuable mineral.

Authorities from the United States were invoked by the appellant's counsel upon the question of discovery and it was contended that the requirement of our law should be somewhat relaxed and that the applicant should be permitted to make good his discovery within a reasonable time after his staking even if he had no sufficient discovery at the time he staked and recorded his claim, and it was urged that if the applicant had anything which he really believed might turn out to be valuable and which he was willing to expend his money on that should, in the first instance at least, be accepted as sufficient.

While it is true that there are some United States decisions upholding the doctrine that the applicant may establish the merits of his discovery, so far as the requirements for a mining claim are concerned, by showing his own confidence in it and his willingness to expend money upon it, the great preponderance of what must be regarded as the best United States authorities are distinctly against such a doctrine. They hold that no man can be permitted to be the judge of a matter upon which his own rights depend, and that it is not by the special standard or opinion or temperament of the applicant himself, who may be inexperienced, ignorant or unduly optomistic, but by the general standard and opinion of ordinary men of knowledge and experience in such matters, that the discovery must be weighed. The test contended for, under our law at all events (which differs materially from the United States laws in ways which I will presently point out), would be unworkable and absurd. It would to all intents and purposes wholly destroy the usefulness of the requirement of discovery as a basis for mining title.

The laxity of the United States law regarding the merits of a discovery has, as miners well know, reduced the requirement of discovery to little more than a nullity. Our more stringent requirement was doubtless established with the deliberate purpose of correcting what was regarded as a defect or insufficiency in the United States laws.

The object of requiring a discovery as the basis of mining title is to prevent the blanketing of property for speculative purposes. Lands are frequently taken up merely by reason of their proximity to working mines or to other known deposits of valuable mineral. This is especially to be guarded against in a rich region such as the Cobalt district, in which the claim in question is situated. It is for the value or probable value of the mineral deposit that has been actually discovered and not for the value of the land as adjoining other rich property that the law intends and permits a mining claim to be acquired. The law intends to reserve the land as a reward to the man who actually makes a discovery of mineral, the development of which may be beneficial to the mining interests of the country. It is for mining purposes that the Crown grants the title and the discovery made is the evidence of the fitness of the lands for those purposes. It is not in the public interest that lands should be held by speculators, who acquire them for the purpose of selling them and not for the purpose of conducting mining operations upon them.

It is true, as the appellant's counsel pointed out, that in the United States a locator is permitted to make good his discovery or to make a new discovery at any time before another locator intervenes with a good discovery.Though this may not seem consistent it is undoubtedly the rule that is clearly established by the United States decisions. Just as clearly am I satisfied, however, that such is not the law under our Act.

The question must depend upon the proper construction of our Statute. Under sec. 132 it is only a licensee who has discovered valuable mineral upon the land that is entitled to stake out a mining claim at all. The applicant must, moreover, under our law, swear at the time of filing his application that he has in fact discovered valuable mineral in place upon the claim and must give the exact time and location of the discovery and a description of what it consisted of: sec. 157 and form 14.

After an applicant has so staked and recorded a mining claim no other person is entitled, under our law, to explore or

stake out the same property unless or until the first staking and recording is expired, lapsed, abandoned or cancelled: secs. 131 and 132.

Our statute makes express provision for cases where a licensee cannot readily make a discovery at or near the surface of the ground. It allows him to obtain exclusive possession of an area of land for the purpose of sinking or doing extensive exploration work upon it before he has actually made a discovery of valuable mineral. He may apply, under the provisions of sec. 141, for what is called a Working Permit. This leaves the property open for all licensees to prospect and stake as a mining claim during 60 days after the application if they can make a discovery within that time, but if no discovery and staking takes place within the 60 days then the applicant for the Working Permit may obtain the exclusive right of prospecting and staking thereon for a period of six months or one year, provided he continues his work with the diligence required by the Act. If he discovers valuable mineral he may stake for a mining claim; if he does not the land becomes again open to other licensees.

Our statute, furthermore, provides that a prospector who has found a vein or found what he thinks are favorable indications of valuable mineral, may protect himself while he is following up what he has found by putting up what are called prospecting pickets, which have the effect of reserving to him, while he is diligently working thereon, a block of land 150 by 50 feet, no one else being permitted to prospect or make a discovery upon it.

From this it will be seen that our Act not only expressly requires discovery of valuable mineral to be made before a mining claim can be staked out and to be sworn to before it can be recorded, but also provides a way in which a person desiring to obtain possession of the land for the purpose of making or proving up a discovery may proceed and be protected. But it is wholly opposed both to the letter and the spirit of our law that a prospector should do what the appellant contends he should be allowed to do in the present case. A licensee must not stake or record for a mining claim until his discovery of valuable mineral is actually made.

To permit a claimant who has staked property for a mining claim before he has complied with the necessary requirement of making a discovery and who has thus wrongfully excluded other prospectors from it to hold the claim would be

to put a premium upon wrongdoing and allow the express provisions of the Act to be violated and its plain purpose and intent to be defeated. It would be to legalize blanketing and nullify the requirement of discovery, so far at least as dishonest or ignorant prospectors are concerned. Not only does the Act not permit such a procedure, but it forbids it under a penalty. Section 136 provides that any licensee who, no matter with what purpose or intent, plants or places any stakes, posts or markings, not authorized by the Act, upon any lands open to prospecting forfeits the right to again stake out the property or acquire any interest therein unless he satisfies the Recorder that he acted in good faith and obtains a certificate relieving him from the disability. Section 209 (6) makes it an offence against the Act for any person not authorized by the Act so to do to mark or stake out a mining claim.

That a different rule exists in the United States may perhaps be explained by the fact that their law differs from ours in two important respects. First, the locatee is not required to swear, as he is under our law, that he has actually made a discovery of valuable mineral; he initiates his application by posting and filing merely a notice. Secondly, the first locatee's staking and recording does not preclude other persons from coming upon the property and making a discovery and staking and recording over him even while his claim is still subsisting.

Our law, while it protects the first staker from subsequent interference while his staking and record subsist, thus giving him an exclusive status upon the property, does not permit him lawfully to acquire that status without fulfilling the prescribed requirements, and penalizes him if he acquires that status unlawfully. As to which system is the preferable one there may be room for argument. For the present purposes it is enough to point out that the difference exists.

The questions raised have been little considered in our own Courts, but two cases may be referred to. It was held by the Supreme Court of Canada, in the case of *Collom* v. *Manley*, 32 S. C. R. 378, that under the British Columbia law, by which an affidavit of discovery is required, there must be discovery of mineral *in fact* before a location is made; *belief* of the locator is not sufficient; and where the locator had sworn absolutely to discovery in his affidavit, but in his evidence at the trial could not put the matter higher than belief that it was valuable mineral, the claim was held invalid.

In the *Attorney-General of Ontario* v. *Hargrave*, 8 O. W. R. 127, 10 O. W. R. 319, it was held in a case under the Ontario Mines Act that the affidavit of discovery must be true; and this decision, I think, must be taken also as an authority that subsequent undoubtedly valuable discovery upon the property would not cure the original defect.

It is clear, therefore, that I cannot accede to the propositions contended for by the appellant's counsel. I have already found that neither of the alleged discoveries claimed by the appellant was in fact a discovery of valuable mineral within the meaning of our Act. This would be sufficient to dispose of the case.

There are also, however, other difficulties in the way of the appellant. The provisions and intent of our Act being as I have above pointed out, it follows that the appellant in this case would not be entitled to rely at all upon the Snoddie discovery and staking, even if it had been a sufficient discovery of valuable mineral, this discovery and staking being subsequent to the appellant's sworn discovery and staking of 3rd October. If the Snoddie discovery and the staking of 11th November be regarded as supplementary to the discovery and staking of 3rd October, it will be nugatory so far as giving the appellant any title is concerned. If, on the other hand, the discovery and staking of 11th November is independent of the discovery and staking of 3rd October or intended to supersede it it would be bad for two reasons: first, because the lands were not open to prospecting or staking under secs. 131 and 132, and secondly, because by this unauthorized staking of 3rd October (there being no discovery) the appellant would, under sec. 136, be disqualified from again staking out or acquiring any title in the property.

There is still a further objection to the discovery and staking of 11th November, namely, that Snoddie, who made the discovery, had at the time no miner's license, not becoming possessed of one until 20th November, the day he swore the affidavit of discovery. This would seem, in view of the provisions of secs. 84, 103, 132 and 208 of the Act, to be a serious if not a fatal defect.

The appeal will have to be dismissed.

Exception was taken during the argument to the right of Mr. Eaton, the applicant for a Working Permit, to take part in the hearing of this appeal. His application for Working Permit was made prior to the appellant's applications for a

mining claim which are in question in this appeal. If the present appeal had not been taken, Mr. Eaton, if he had complied with the requirements of the Act in other respects, would have been entitled to his Working Permit, and will be so entitled on the dismissal of this appeal. He is therefore vitally interested in the result.

Judgment dismissing appeal.

The appellant Lamothe appealed from this judgment to the Divisional Court.

G. A. McGaughey, for appellant.

J. Lorn McDougall, for Eaton.

14th March, 1908.

The appeal was heard before BOYD, C., RIDDELL, J., LATCHFORD, J., who dismissed it with costs.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

19 O. L. R. 249; 14 O. W. R. 523.

RE DOWNEY AND MUNRO.

Appeal from Recorder—Extending Time for Service of Notice—Order for Substitutional Service—Ex parte Application—Clerical Error—Correction of.

Where notice of appeal from a Recorder is filed within the time allowed the Commissioner has power, if satisfied that it is a proper case for appeal and that after reasonable efforts an adverse party could not be served, to extend the time for such service and order that the service may be made substitutionally, and this may be done on an *ex parte* application.

It seems a Recorder may correct a mere clerical error made in entering a matter in his books.

Application to the Commissioner, *ex parte*, on behalf of Larry Downey for an order extending the time for serving notice of appeal from the Recorder's decision or act of 10th February, 1908, and for an order for substitutional service upon J. D. Munro.

Affidavit filed showing merits and inability to serve Munro.

A. G. Slaght, for Downey.

28th February, 1908.

Order made by the Commissioner extending the time to 10th March, and ordering that service of the notice of appeal upon Munro by sending a copy thereof and of this order by registered post addressed to him at Elk Lake, Ontario, and by serving a copy of the notice of appeal and of this order upon J. P. MacGregor, solicitor, should be good and sufficient service.

From this order appeal was taken by Munro to the Divisional Court, the appeal being heard and disposed of at the same time as the appeal in *Re Munro and Downey.*

29th July, 1909.

BRITTON, J.—The Mining Recorder of the Montreal River mining division decided that the report of Inspector Burrows respecting the alleged discovery of Munro on M. R. 386 in the Temagami Forest Reserve operated as an allowance of said discovery, as a good and *bona fide* discovery of mineral.

Downey, as the licensee and recorded holder of the said mining claim, desired to appeal against that decision of the Mining Recorder, as he had a right to do, under sec. 74 of The Mines Act, 1906. Such an appeal must be taken within 15 days from the record of such decision in the books of the Recorder's office: sec. 75.

Downey had notice of appeal prepared, dated 22nd February, 1908, and it appears before us as an original document, with the indorsement signed by the Mining Recorder that a copy was filed in his office on 24th February, 1908.

That notice states that the decision of the Mining Recorder was entered in the books of his office on 10th February, 1908.

That notice, coming now from the office of the Mining Recorder, must be taken as a matter of record—that the decision was recorded on 10th February, 1908, and that the notice of appeal was given, to the extent of filing a copy of such notice in the office of the Mining Recorder, on the 24th of the same month.

The notice is required to be served before the appeal would be properly before the Mining Commissioner.

On 28th February, 1908, on the *ex parte* application of Downey, the Mining Commissioner made an order extending

the time for appealing until 10th March, and giving directions for service of a copy of the order and a copy of the notice of appeal.

From this order of the Mining Commissioner of 28th February, 1908, Munro appeals, on the ground that the Mining Commissioner had no jurisdiction to make it; and that if he had jurisdiction, it should not have been exercised upon the *ex parte* application of Downey.

If the Mining Commissioner had jurisdiction to make the order, an appeal cannot succeed merely because he did not hear the person against whom the appeal was taken.

Upon the argument and upon the fair consideration of sub-sec. 2 of sec. 75 of The Mines Act, it was practically conceded that if the decision of the Mining Recorder, which was appealed against, was in fact recorded in the books of the Mining Recorder on the 10th, and if a copy of the notice of appeal was in fact filed with the Mining Recorder on 24th February, 1908, this appeal must fail.

In addition to what appears in the notice of appeal filed as to date of record of decision, the order itself states the date as the 10th February.

In my opinion, we are bound to accept these dates—10th February as to recording the decision and 24th February as to filing copy of notice of appeal. This is now matter of record, incontrovertible for the purpose of this appeal. If the insertion of either date was a mere clerical error, it could be corrected by the Mining Recorder; but it was argued, on behalf of the present appellant, Munro, that 8th February was the true date of recording the decision.

That contention cannot succeed in the face of the record.

Sub-section 2 of sec. 75 seems clear that the Mining Commissioner, when the notice of appeal has been filed with the Mining Recorder within the 15 days from the record of the decision, if "he is satisfied that it is a proper case for appeal, and that after reasonable efforts the adverse parties or any of them could not be served within the time mentioned, may, either before or after the time so limited, make such order as he deems just for substitutional or other service upon such adverse parties."

The appeal was complete as a mere appeal except service, and the order of 28th February may be treated as an order for the service required by sub-sec. 1 of sec. 75.

The appeal should be dismissed with costs.

RIDDELL, J.— . . . It is not disputed that if the notice was in fact filed with the Mining Recorder within the period limited—viz., 15 days from the record of the decision of the Mining Recorder—the order cannot be successfully attacked; but the claim is now made that the record of the decision by the Mining Recorder was in fact on the 8th. The respondent admits that if, as a fact this entry was on the 8th, the order cannot stand.

I do not think we ought to preclude the appellant from showing, if he can, upon the trial of the matter, if there is one, that the entry was in fact upon the 8th. Neither should we, upon a bare suggestion, without anything which can be called proof, set aside this order. The proper order, in my view, to make is to dismiss the appeal with costs—the dismissal to be without prejudice to an application to the Mining Commissioner to set aside his order on the ground that the notice of motion was filed too late.

FALCONBRIDGE, C.J., concurred with BRITTON, J.

NOTE 1.—S. 52 (3), now s. 133 (3) (Act of 1908), giving power to extend the time for appeal where the person desiring to appeal has not been notified by registered post of the Recorder's decision or act, does not seem to have been discussed.

NOTE 2.—As to correction of errors, etc., by the Recorder see also *Re Smith and Pinder, post.* Where a Recorder makes a correction in an entry in his books it would be very desirable that he should initial it and note in the margin the date of the making of the correction, according to the practice followed in registry offices.

(THE COMMISSIONER.)

RE TYRRELL AND O'KEEFE.

Discovery—Valuable Mineral—Inspection—Evidence.

Reasonable probability and not mere possibility that what is found is capable of being developed into a mine likely to be workable at a profit, is required to constitute a discovery of valuable mineral under the Act.

Appeal by Joseph B. Tyrrell from the cancellation of mining claim No. 9149, in the township of Tudhope, for lack of discovery of valuable mineral. O'Keefe was a subsequent staker of the same property.

A. G. Slaght, for appellant.

H. D. Graham, for respondents, O'Keefe and Ellis.

3rd March, 1908.

THE COMMISSIONER.—The discovery in question is one alleged to have been made by one John Gray on behalf of the appellant on 6th July, 1907. Evidence regarding the discovery was given by Gray, by the appellant himself and by the respondents Ellis and O'Keefe. The appellant's counsel, at the close of the case, did not feel justified in asking for more than a reinspection of the alleged discovery. I considered that upon the evidence it would be proper to direct a reinspection and this was accordingly done, and Inspectors Bartlett and Robinson made a joint inspection of the property in January in the presence of all parties, the report of which has just reached me.

Upon the evidence and upon the Inspectors' report I feel that I have no alternative but to disallow the appeal.

The Tyrrell discovery consisted of a small vein from two to two and a half inches wide, narrowing in places to a mere crack, the vein matter being principally calcite containing specular iron and a little chalcopyrite with aplite showing in places along the side. No cobalt bloom was found in it. Gray claims to have seen cobalt bloom, but his evidence did not impress me favorably, especially as regards its accuracy as to the nature and merits of his discovery, and from the other evidence, particularly that of Mr. Tyrrell himself, I am satisfied no bloom was found.

No silver values whatever were obtained from any of the vein matter at the appellant's discovery, and there was clearly no mineral there in sight of such kind or quantity as, considering the nature of the vein could possibly justify anyone in assuming a reasonable probability of the discovery being capable of being developed into a mine likely to be workable at a profit.

The case was somewhat complicated by the fact that the subsequent discovery of the respondents was only a short distance from the Gray discovery, the distance being variously estimated at from 12 to 25 feet. Eighteen feet is the distance given by the Inspectors' report, which I think may be assumed to be correct. The Ellis-O'Keefe vein was a much wider and stronger vein carrying chalcopyrite, azurite, quartz and some calcite with a little cobalt bloom, the main constituent being chalcopyrite. Aplite averaging an inch in

thickness lay along the vein. According to Ellis' evidence there was also native silver in the vein at a point about 30 feet from the discovery post. The witnesses for the appellant claimed that the two veins ran together and might be considered parts of the same vein, while the witnesses for the respondent disputed this and said that this was only at most a matter of conjecture. From the Inspectors' report it would appear that both parties are partly right, for it seems that the Gray vein does not, so far as the vein matter is concerned, continue to the Ellis-O'Keefe vein, but that a barren crack leading from it does meet the Ellis-O'Keefe vein and it seems that there are little stringers or cracks containing some calcite between the two veins which might probably be shown to be connected with the veins.

I have no question but that Mr. Tyrrell believes, as he swears, that according to his opinion of what a discovery should be the discovery made for him by Mr. Gray should be allowed. I must be guided, however, by the definition of discovery of valuable mineral as given in the Statute, and upon this I am fully satisfied that the discovery could not be properly allowed. Upon a careful analysis of Mr. Tyrrell's evidence it will be seen that he does not really measure the merits of his discovery according to the standard laid down in the Act, for he speaks of his vein or discovery as being such a one as should pass because it has, as he puts it, a reasonable "possibility" of developing into a mine. The Statute requires "probability" of being capable of being developed into a mine likely to be workable at a profit. Mr. Gray expresses—and says that he always held—the opinion that his discovery was likely to develop into a workable mine, but in addition to what I have already remarked regarding his evidence it may be pointed out that his actions in expending most of his efforts in an attempt to make a discovery at an entirely different point near the south end of the claim and planting another discovery post there, and doing practically nothing to develop or show up the vein at his original discovery until after the Ellis-O'Keefe discovery had been made in the vicinity, do not show much faith in the opinion which he now pretends to have held.

Appeal dismissed.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

12 O. W. R. 138.

RE SINCLAIR.

Water Claim—Filing—Recording—Lands Open—Overlapping Claim—Discovery—"Shore"—Professional and Confidential Employee—Surveyor—Real Merits and Substantial Justice—Witness Post—Inaccuracies—Costs.

An application for a mining claim should not be rejected because it includes land covered with water.

The Act makes a clear distinction between filing and recording: where the Recorder believes the application is not in accordance with the Act or that it covers or substantially overlaps lands of a subsisting claim, he should not record it but should if desired put it on file.

A mining claim based upon a discovery which is within the boundaries of another existing claim is invalid.

"To shore" when used in reference to non-tidal water carries to the water's edge at low water mark.

A surveyor should not be encouraged to pick flaws in his employer's title, and where he set up a claim in derogation of it which had no substantial merit his claim was dismissed.

Where a party had invited trouble by carelessness and inaccuracy in his staking and application costs were withheld.

This matter first came before the Commissioner upon the *ex parte* appeal of Duncan Sinclair from the refusal of the Recorder to record the mining claim in question.

The claim was staked out and applied for in the appellant's behalf by Nelson Pinder, a student in his office, the appellant being a surveyor. The greater part of its area was covered by the water of Larder Lake, but it included also a strip of land along the shore which the appellant claimed did not belong to the Harris-Maxwell claim. The latter claim had been staked out long prior, and had been surveyed by the appellant's firm under employment of the Harris-Maxwell Co. The survey laid down its north-easterly boundary along the lake shore, at what the appellant called high water mark, the appellant claiming that this was the meaning of the word "shore" used in the original application, though the company contended that their claim not only went to low water mark but in fact extended into the lake far enough to square the corner and complete a rectangle.

The discovery upon which the appellant's claim was based was in this strip of land close to the Harris-Maxwell discovery, the dyke or vein upon which the latter was located running down to the water's edge.

The appellant's claim also included a small block of land at its south-west corner which the appellant contended was not included in any other claim.

The Commissioner, by decision in writing, 4th November, 1907, held:—

(1) That the claim should not be rejected merely because it included what was for the most part a water area—the land under the lakes being vested in the Crown in right of the Province, the terms "Crown lands" as used in the Act being wide enough to comprehend such an area, and the Act being, no doubt, intended to cover the whole field of mining and minerals within the Province, citing *Atty.-Gen.* v. *Perry*, 15 U. C. C. P. 329, at 331, *Re Provincial Fisheries*, 26 S. C. R. at 575; *Warin* v. *London & Canadian Loan Co.*, 14 S. C. R. 232; *Gage* v. *Bates*, 7 U. C. C. P. 116; *Ross* v. *Portsmouth*, 17 C. P. 195; *Wharton's Law Lexicon; Stroud's Judicial Dictionary; R.* v. *Leeds & Liverpool Nav. Co.*, 7 A. & E. 685, 18 Am. & Eng. Ency. 140; *Durrant* v. *Branksome* (1897), 2 Ch. 301, and secs. 2 (2), 3, 107, 131 and 132 of the Act (1907).

(2) That there is a clear distinction between filing and recording an application (s. 158a): that an application should, if desired, be received and filed unless forbidden by the Act, and that the leaning should be in favor of filing, as no one can well be prejudiced thereby, the Act providing that such an application is not to be deemed or dealt with as a dispute against another claim unless a dispute duly verified by affidavit is entered in the form which the Act requires.

(3) That the Recorder was right in refusing to record a claim which seemed to him to overlap existing claims.

And as the questions involved in the appeal concerned the holders of other claims, a direction was made that they must be added as parties.

On the re-hearing before the Commissioner:

F. L. Smiley, appeared for the appellant.
F. E. Hodgins, for the Harris-Maxwell Co.
S. A. Jones, for De La Gardelle et al.

5th March, 1908.

THE COMMISSIONER.—The appellant is asking to be recorded for a claim consisting for the most part of a water

area—land under the waters of Larder Lake—but including in addition a small block of a few acres of what he claims is vacant land at the north end of the De La Gardelle claim known as HF-141, and a strip of land which the appellant calls "shore" along the water on the east side of the Harris-Maxwell claim known as HS-115, and extending similarly for some distance along the water on the east side of claim HS-114. An island surrounded by the appellant's claim is in his application expressly excepted from what he is asking for, so far at least as the part of the island above high water mark is concerned.

The claim which would be most seriously affected by the appellant's application is HS-115 held by the Harris-Maxwell Larder Lake Gold Mining Co., Ltd. The discovery upon this claim consisted of a large deposit, called a dyke, of gold-bearing quartz extending across the land and down into the water of Larder Lake.

HS-115 was staked out by George Harris, assisted by Herbert Warren, on 10th September, 1906, and was the first claim staked in that particular vicinity. The stakers seem not to have had much skill or experience in staking or preparing applications for mining claims, and they had some difficulty when they attended the Mining Recorder's office (then at Haileybury) in getting their claim recorded. They obtained the assistance of a Mr. Brown in preparing the sketch, the Recorder apparently not having been satisfied with the sketch prepared by themselves as it was very rough and probably did not contain sufficient data to identify accurately the location of the claim.

The Recorder seems finally to have been satisfied, and the sketch and application were recorded, but the sketch as now produced does not very distinctly show whether or not it was the intention of the staker to take in as part of the claim any of the adjoining water area. The written description in the application unfortunately is confined, so far as its particulars are concerned, to a reference to the attached plan and to an identification of the position and locality of the claim. The land part of the claim as staked was supposed to contain about 25 acres, but falls very far short of that area. The applicant would, as a matter of fact, have been entitled to take up a square not exceeding 40 acres: secs. 108 and 110. Claims are sometimes made to include adjoining water as part of their area, and sometimes they stop at the water's edge.

The well established practice and rule of the Department is to allow applicants to include the water, in every case, at all events, where it is shown that the mineral deposit extends, as it does in this case, into the water. It might possibly even be held by a close reading of the present Act that an applicant is compelled, in unsurveyed territory, to include sufficient water to square his claim: secs. 108 and 110.

Some months after the Harris claim had been staked out and recorded the holders applied to the surveying firm of Sinclair & Smith to have the claim surveyed. A survey and the preparation of plans and field notes is required before a patent for a mining claim can issue: sec. 176. Nelson Pinder, a student in Messrs. Sinclair & Smith's office, proceeded to the ground and made the survey on 15th February, 1907. the ground then being covered with snow and the shore blocked with ice in such a way that it was impossible, as it is admitted, to exactly locate the water's edge. Pinder made the survey and took down in his books the necessary data, but the plans required for the Department were not made out.

Nothing more was done until June, 1907, when Messrs. Sinclair & Smith conceived the idea, as they say, of acquiring some water claims up in the Larder Lake district. In July Mr. Pinder, their student, and Mr. Smith proceeded to the property in question and staked out the claim, the recording of which is now in question, putting it in the name of Mr. Sinclair, the other partner. They admit that they used for the purpose the information acquired in their professional capacity as employees of the Harris-Maxwell Company in making the survey. Their contention is that what they call the "shore" along Larder Lake on the east side of HS-115 and extending also along part of the east boundary of HS-114, and a little block of land on the north side of HF-141, was, in addition to the water-covered area which they proposed to take up, vacant territory and open to them to discover and stake upon. They planted their discovery post at or near the edge of the water along HS-115 on what they say is a strip of land between high and low water mark.

The evidence shows that at the point where they planted their discovery post, and in fact along the greater part of the shore, the bank is quite steep, and there would therefore be but a very small margin of land between high and low water mark.

If the owners of HS-115 are entitled to have their claim squared out in the water, or if, even though they are not entitled to any of the area permanently covered with water, they are entitled to everything up to that boundary, the Sinclair application must fail, first, because of its including territory included in a prior recorded claim, which would preclude it from being recorded, and secondly, because if its discovery is within the limits of a prior claim, as it certainly would be if HS-115 is squared out in the water and as it probably would be even if HS-115 extends only to low water mark, it would be wholly invalid because of the discovery upon which it is based being included in another claim. And the Sinclair application must equally fail if it includes any substantial portion of any other recorded claim. See secs. 131, 132, 157, 158a and form 14.

Dealing first with the question of encroachment on HS-115. The appellant contends that Mr. Harris' staking and application for and recording of HS-115 made that claim extend only "to the shore" of Larder Lake, which he contends means high water mark. There is evidence that the waters of Larder Lake are lower in the fall than in the spring, the difference between the height in the month of June and the height in the month of August being about 6 inches, though it may here be pointed out that when Mr. Harris staked in September the water must have been about at its lowest, considerably lower at least than when Mr. Pinder staked for the appellant in July.

At what the appellant contends is the north-east corner of HS-115, or where the north boundary meets or crosses the shore of Larder Lake, the ground is somewhat flat. Harris put his post a little distance back from the water. The appellant's boundary post was placed within a foot or so of Harris' post on the water side. The Harris post, however, was a witness post, being marked, as provided by the Act, with the letters W. P. This means, as miners and prospectors well understand, that it does not purport to be at the real corner of the claim. This post, however, did not have marked upon it, as it should have had, the distance and direction of the real corner. The Harris plan filed with the Recorder shows that this No. 1 was a witness post. His No. 2 post was also marked as a witness post, but it is not shown as such on his plan. The Harris plan marks the distance from his north-west corner "to shore" as 175 feet. He marks his western boundary as 10 chains in length, and his southern

boundary, or the part of it extending from his south-west corner "to shore," as 400 feet. It seems that Harris was mixed in his measurements, all his distances appearing to be over estimated. He says he took a chain to be 33 feet instead of 66 feet.

Harris distinctly says, and in this he is corroborated by his assistant Warren, that he intended that the claim should be squared out in the water, and he accounts for the shortness of his north boundary as being the result of his desire to take in just enough land, or rather to place his western boundary just far enough inland that when the claim was squared out in the water the east boundary would be far enough east to take in the most easterly point of the shore, the shore having a south-easterly bearing and its most easterly point being near but not quite at the south limit of the claim.

The Harris plan and the circumstances generally, I think, support what Harris and his assistants say was the intention about taking in the water.

I think, upon a careful consideration of the whole matter, it is not too liberal a construction in the circumstances to put upon the Harris application, to say that he should have the claim squared as he contends. I am satisfied that the Department would be quite justified in granting, and that it would without question, if no one else intervened, grant to the holders of HS-115 a patent of the claim so squared out. The substantial merits of the case are all with the Harris application. Harris was the first discoverer of gold-bearing quartz in that vicinity, and it is surely the intention of the Act that the real discoverer of valuable mineral rather than the discoverer of a little flaw or defect in an application or proceeding shall, where possible, be rewarded by a grant of the land upon which the discovery is located. I think the remarks of Mr. Justice Maclennan in *Clark* v. *Docksteader*, 36 S. C. R., at 637, are appropriate to the circumstances of the present case.

Nor do I think the circumstances under which the present attack is being made upon the Harris claim, or the relationship of the appellant to its holders, should be altogether disregarded. The appellant and his partners were employed by the holders of the claim in a professional, and in what I think must be considered a confidential capacity. The surveyors may, perhaps, also be regarded as in a sense officers of the Crown in making these surveys. In either view, I think it must be regarded as inconsistent with their employment and

against good faith for them to acquire any claim in derogation of their client's interests. There is no doubt, also, that they concealed from their employers the fact that they were endeavoring to acquire such an interest when, even though it were proper to endeavor to acquire it, they should have disclosed what they were doing. Even if the appellant could be held upon a strict technical ruling to be entitled to record his claim, I think I should, under the provisions of sec. 74, refuse to make an order in his favor.

I find, also, however, that the Sinclair claim as staked out on the ground covers at least two acres of the De La Gardelle claim, which was recorded as No. 2279, and afterwards surveyed as HF-141. If the application conforms to the staking, it must also include part of that claim. If it does not conform to the staking, it is not, I think in the circumstances, too strict a ruling to say that it should not be recorded. I think, therefore, that this encroachment upon what is a substantial part of the previously recorded De La Gardelle claim is sufficient ground of itself for refusing to record the Sinclair application.

Much discussion took place in the argument as to the meaning of the word "shore." If I am right in the view I have taken of the other features of the case, this will be immaterial. I may point out, however, as the appellant's counsel has based his argument so largely upon the contention that this word "shore" must have its strict and proper legal meaning, which he contends is high water mark, that in its strict legal signification it really has no application at all in the present case. "Shore" means a space of land which is alternately covered and left dry by the rise and fall of the tide; there is no such thing as "shore" in the strict legal sense where there is no tidal water: *Am. & Eng. Ency.*, Vol 25, 1060; *Worcester's Dictionary*, citing Burrill; *Parker* v. *Elliott*, 1 U. C. C. P., at 490. The strict legal signification of the word shore not being applicable, it may be a fair conclusion to say that the word should be interpreted in the sense in which ordinary persons dealing with the matters concerned would use it. I am satisfied no miner or prospector describing his claim as running to the shore of Larder Lake, would feel that he had left along the water's edge any margin of land which he might have taken up for himself, and I am equally satisfied that no other ordinary miner or prospector would think of attempting to take up such a margin.

There is, however, some authority upon the point. At page 1060, in Vol. 25 of the *Am. & Eng. Ency.*, above referred to, the law is laid down in the text as follows:

"A river in which the tide does not ebb and flow, or other non-tidal water, has no shore in the technical sense of that term. But the expression when applied to such a river or water means those portions of the bank which touch the margin or edge of the stream at *low* water."

The case of *Parker* v. *Elliott*, 1 U. C. C. P., 470, also above referred to, from which the appellant quoted a part of the judgment of Macaulay, C.J., in support of his case, will be found, upon an examination, to be an authority distinctly against the appellant's contention. The other two judges in that case, McLean, J., and Sullivan, J., differed from Macaulay, C.J., upon the very point with which the present case is concerned, as will be seen from the note on page 491 of the report. These two judges expressed the opinion that "a distinction of high or low water could only be drawn where the tide exists, and not in the inland waters of the Province."

At page 490, Sullivan, J., states his views as follows:

"The sea shore, properly so designated, is the space of land between the low and high water of ordinary tides, absolutely exclusive of land which is casually covered with water, by means of storm, or inundation from other causes. The only natural cause, according to the common law, for the creation of a shore is wanting on our waters; and if we were to imagine a shore consisting of a space of land between low and high water—that is to say between the low water of the lake in its tranquil state and its high water when agitated by the winds, we should, in giving that shore the legal attributes of the sea shore, be making that space a shore which is not so on the tide waters of the sea, held to be produced by the same causes; for on the sea coast there is just such a space, much more extensive than on these inland waters, which is above the high water tide mark, and which is covered by water when the sea is agitated, and which yet, according to the English authorities, is no part of the sea shore."

In the case of *Iler* v. *Nolan, et al.*, 21 U. C. Q. B., 309, it was held that a grant of land commencing "in front on Lake Erie, on the south-east corner of the lot," means the south-east corner as it stood at the time of the grant, and not a point shifting with the encroachment of the lake. This case, however, does not give much direct assistance upon the point in question.

The very recent case of *The Keewatin Power Co.* v. *The Town of Kenora*, 11 O. W. R. 266, clearly establishes the English law regarding the rights of riparian owners as being

the law of this Province, and this decision may perhaps raise some interesting questions in cases similar to the present one.

Upon the whole, I am inclined to the veiw that even upon the interpretation of the word "shore," the appellant would fail—that it would have to be held that there existed along HS-115, even if that claim is bounded by the shore, no margin of vacant territory between high and low water mark which the appellant could take up or establish a discovery upon.

I have had some hesitation about the question of costs. In disputes of this nature I have regarded it as generally better that costs should not be allowed to the successful party unless he has been himself reasonably free from default or carelessness leading to the litigation. In this case, the owners of HS-115, and the owner of HF-141, have not marked their boundaries and made their applications with the care and accuracy they should have exercised. The Treasury Island claim was not represented, and the owners of HS-114 appear not to have been really interfered with, or not at all events to any material extent, and they as a fact were only nominally represented at the hearing by counsel for one of the other parties.

I order judgment dismissing this appeal without costs.

From this decision Sinclair appealed to the Divisional Court: BOYD, C., RIDDELL, J., LATCHFORD, J.

H. D. Gamble, K.C., and *C. Swabey*, for appellant Sinclair.

F. E. Hodgins, for Harris-Maxwell Co.

S. A. Jones, for De La Gardelle.

15th May, 1908.

BOYD, C.:—There has been a claim blunderingly, but, in the judgment of the Commissioner, sufficiently, staked by Harris, which goes, upon reasonable construction for the purposes of this appeal, to the shore of Larder Lake. It has been held that such a boundary to the shore of a fresh water and non-tidal lake carries to the edge of the water in its natural condition at low water mark: *Stover* v. *Lavoia*, 8 O. W. R. 399, affirmed on appeal, 9 O. W. R. 117.

This is the generally accepted meaning in the American law of waters: see in *Am. & Eng. Encyc. of Law*, vol. 4, p.

830, tit. "Boundaries"—"'shore' goes to the line of low water." And 5 *Cyc.*, 903: "The edge, bank, or shore of a watercourse, pond, or lake will, as a rule, be construed to limit the grant to the water's edge." Upon this construction of the Harris location, the result follows that the appellant's alleged discovery was upon the property of the respondents, and so fails the appeal.

And, in addition to this, I am not prepared to disagree with the conclusions of the Commissioner in that the status of the appellant is not meritorious and is one in which, upon the facts, he should not be allowed to pick flaws in the title of his former employer with the view of depriving him of the benefits of the location held *de facto* (at least) under the Mining Act. I think, upon the other ground, that Harris holds *de jure* as well.

The appeal should be dismissed with costs.

RIDDELL, J.:—I base my judgment upon sec. 74 (2) of the Mines Act as amended. I do not see that the Mining Commissioner is wrong in considering that to decide in favour of the appellant, would not be a decision "upon the real merits and substantial justice of the case." With this so decided, the present appeal must fail.

I desire to leave open the other matters pressed and argued —the binding nature of the adjudication of the Commissioner in the absence of notice of appeal being served upon the owner of the island claim; the validity or legality of the staking, etc., by the Harris-Maxwell claimants; the possibility of an informal abandonment of the amount staked, but which admittedly encroaches on the De le Gardelle claim, etc.

I agree in the meaning to be given to the word "shore," but I do not decide that had the discovery or staking of the appellant been made by a third party in no way connected with the Harris-Maxwell claimants, the previous acts of discovery, followed by (at best) most irregular staking, would have prevented the later discovery and staking from being effective—nor do I decide that a discovery or staking upon land already staked out validly or invalidly will render him who effects such discovery or staking ineligible, under sec. 136 (1) of the Act, to acquire any right or interest therein.

All such questions should, I think, be left open for decision in cases in which it may be necessary to decide them.

LATCHFORD, J., concurred with BOYD, C.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

RE TROMBLEY AND FERGUSON.

Delay in Completing Staking—Subsequent Discoverer Intervening—Abandonment—Lands Open—Acts of Unlicensed Person—Excuse for Delay—Forest Reserve Permit.

T. made a discovery and planted a discovery post on 10th Sept., doing nothing further till the 24th when he completed the staking out of his claim; F. meanwhile made a discovery and on the same day, 14th Sept., completed the staking of his claim (being as a fact ignorant of T.'s discovery). Held that F. was entitled to the property, T.'s delay working an abandonment and leaving the lands open to F.

It seems doubtful whether anything except inability to complete the actual staking out of a claim will excuse delay.

The acts of an unlicensed person will not be permitted to prejudice or affect the acquisition of title by a licensee.

Appeal from decision of Recorder dismissing the dispute of Thomas Trombley against mining claim M. R. 533 of the respondent Russell A. Ferguson.

F. L. Smiley, for appellant.

H. D. Graham, for respondent.

27th March, 1908.

THE COMMISSIONER.—The facts are briefly that the respondent claims to have made a discovery upon the property on 10th September, and to have then planted a discovery post, but he did nothing further toward completing his staking until 24th September. He completed the staking on 24th September, and made application to record the claim on 25th September, but in the meantime the respondent had, as he claims, made a discovery and completed his staking of the property on 14th September, and had recorded his application on 18th September.

The appellant now asks to have his rights under his staking relate back to 10th September, the day upon which he claims to have made discovery, and to have put up his discovery post. His excuse for his long delay, two weeks, in competing his staking, is that he wished to ascertain whether or not the land was open to prospecting and staking. He says that he asked a friend or partner of his who was going down the river on some other business to enquire at the Recorder's office whether the property was open and let him know. This friend did not return when expected, and after some delay the appellant himself went to the Recorder's office,

and found that the property had been open, but that the respondent had on 18th September got his application recorded upon it. After some delay, the appellant saw a lawyer, who advised to him complete his staking at once and file an application, which he did on 24th and 25th September, as above mentioned.

The evidence on behalf of the respondent is that those who staked the respondent's claim had not up to the time of their staking seen any stakes or discovery of the appellant. There was in fact nothing to see except the discovery and discovery post as the No. 1 post, which prospectors always look to for information regarding any staking of a claim, had not been put up till the 24th of September, nor had any of the appellant's corner posts been put up till that day, nor was there any line blazed or anything to indicate that the appellant had a discovery, except the discovery post which he says he planted. It seems that this post was not very far from the No 1 corner, but the respondent's witnesses say they did not see it, and I am satisfied that they did not. Finding no No. 1 post, a prospector would hardly be expected to examine very closely for discovery posts, nor do I think a claimant is entitled to complain that his discovery post was not seen, when he entirely failed to take the proceedings provided by the Act to notify other prospectors that he is claiming rights in the property, or to notify them that he had a discovery and discovery post upon it. The No. 1 post and the blazed line from it to the discovery, are the source to which prospectors look for this information. A discovery post planted in the woods without any index to its situation or existence might be very difficult to find, and prospectors cannot be expected to occupy their time in searching for secret discoveries or discovery posts, when the person who is claiming under them has entirely failed to take the usual and necessary steps to show that they are in existence.

The decision of the case turns upon the construction and effect of secs. 134 and 166 of the Act. Sec. 134 requires the discoverer of valuable mineral to "at once plant his discovery post and proceed as quickly as is in the circumstances reasonably possible to complete the staking of the claim," and provides that "he shall be liable to lose his rights in case another licensee makes a discovery of valuable mineral upon the property, and completes the staking before him." Sec. 166 provides that "non-compliance by or on behalf of a licensee of (with) any provision of the Act relating to the staking out

and recording of a claim shall be deemed to be an abandonment."

I think it can hardly be reasonably argued that the appellant in this case completed his staking with the promptness required by the Act. There was no reason why he could not have completed it the same day on which he made the discovery, in fact within a few hours. Two weeks, and even from the 10th to the 14th, when the respondent discovered and staked, seems to me to be entirely outside of what the Act allows. I have in a number of cases held that a much shorter delay was fatal. The Statute is explicit, and apart altogether from the Statute, miners and prospectors well understand that after they make a discovery they must proceed forthwith to complete their staking if they wish to protect their rights. Mining laws could never be administered under any other rule as claims of secret discoveries alleged to have been made at some prior time would be continually being put forward, and honest prospectors could never feel sure of their claims.

I think there is much to be said in favor of the proposition that any delay in completion of staking permitted by sec. 134 is limited to causes preventing the actual physical act of completing the staking, and that time spent by the staker in satisfying his mind as to whether or not the property was open, which he should have satisfied himself of before he prospected or planted a discovery post upon the property at all, cannot be taken into account in excusing his delay. It is not, however, necessary to decide this point in the present case, as in any view of the matter, the appellant's delay was beyond all reasonable bounds, and the respondent having intervened with what appears to be a valid discovery and staking, I think I have no alternative but to hold that the appellant had lost any right or status he might have had to stake or apply for the property on his alleged discovery of the 10th, and that he must give way to the rights of the respondent, who had in good faith made a discovery and actually completed the staking before him. Supposing both parties to be equally deserving as regards the nature of their discovery, where both cannot be allowed the property, the one whose default had caused the conflict of claims must, according to all the ordinary rules and principles governing such matters, give way. As I have already pointed out, mining law could not be administered on any other basis.

It would be rather a startling proposition to the miner or prospector to be told that an intending claimant could go on a

piece of property without knowing whether it was open to prospecting or staking, make a discovery and plant a discovery post, and without doing anything further toward completing the staking or marking out of the property, and without in fact doing anything to show what block of property he was intending to take up, could hold the surrounding lands tied up for two weeks, or indefinitely, and thereafter oust the claim of another prospector, who in the meantime had come on without knowledge or notice of what had occurred, and in good faith made a discovery and completed his staking out, and in fact recorded his claim as prescribed by law, all before the first-mentioned prospector has taken any further steps to appropriate the property.

Some question was raised in the argument as to the respondent being actually the original discoverer of the discovery or discoveries upon which he bases his claim. It seems that one Walls, who had neither a miner's license nor a prospector's permit—both being required in the forest reserve, where the lands in question are situate—had actually made the discovery and staked the property. If this were a bar, it would be fatal to the claim of the appellant as well as to the claim of the respondent, but I am satisfied and have decided in a number of cases, that anything done by an unlicensed person cannot prejudice or affect the acquisition of title in the property by any duly authorized licensee, who afterwards seeks to acquire the claim. As I have stated my reasons in other cases, it is not necessary now to go into the grounds for this conclusion. It is sufficient to say that the system of licensing could not long survive if such a theory as that advanced by the appellant were to be entertained.

The appeal must therefore be dismissed, and as the appellant had already had a hearing before the Recorder, and had full knowledge of the facts, which I think did not warrant further litigation, I think he should pay the costs of the present appeal.

From this decision, the appellant appealed to the Divisional Court.

E. F. B. Johnston, K.C., for appellant.

H. E. Rose, K.C., for respondent.

1st June, 1908.

The Court, MULOCK, C.J., ANGLIN, J., CLUTE, J., dismissed the appeal with costs.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

19 O. L. R. 249; 14 O. W. R. 523.

RE MUNRO AND DOWNEY.

Staking Without Recording — Disqualification — Removing Posts—Discovery—Valuable Mineral—How Judged—Inspection—Assays—Staking—Blazing Discovery Line — Abandonment—Delay in Completing Staking — Adopting Former Staking — Substantial Compliance—Merits—Technicality—Status of Appellant—Prospecting Pickets.

M., having no real discovery and not believing he had one, on 21st Aug. staked out a mining claim, omitting a discovery line, his purpose being to hold the land till word came that a former claim had been cancelled; on the morning of the 22nd, no word having been received, he pulled up the posts and planted and marked them afresh for that date, again omitting to blaze a discovery line; word came later in the day that the old claim had been cancelled on the 20th, and M. allowed his staking to stand. S. on behalf of D. made a valuable discovery on the same land at 4.30 p.m. on the 20th, D. seeing it the same evening; they protected it by prospecting pickets until the afternoon of the 21st, when S. planted a discovery post; on the 22nd D. completed his staking; there was evidence that the old claim had lapsed for lack of work on the 16th.

Held by the Commissioner,

That M.'s staking was invalid, because (1) he was disqualified under s. 136 (1907), having previously staked or partially staked without recording; (2) he had no discovery of valuable mineral when he staked; and (3) probably because he did not blaze a discovery line.

That D. was entitled to the property; for even if the lands were not open when his discovery was made on the 20th, which it appeared they were, his visit to and adoption of the discovery and discovery post on the 22nd and completing his staking on that date made his claim good as from that time.

That delay in staking is fatal only where some one else effectively intervenes, and M., being disqualified, could not do so, and could not in any way prevent another claim accruing to the property.

That a discovery must be judged by the appearance and contents of what was in sight at the time of staking and not by what may have been subsequently found deeper down.

That it might not be too strict a ruling in the circumstances to hold that M.'s failure to blaze a discovery line worked abandonment of his stakings.

That as D.'s claim was a very meritorious one it should not be set aside upon any unsubstantial technicality.

On appeal to the Divisional Court,

Held, per the Court, that the Commissioner's findings should not be disturbed: and,

That M. was disqualified and his claim invalid.

Held per Riddell, J., that there was no reason to doubt that D.'s claim was good: and,

That M. had no status to attack D.'s claim (following *Re Cashman and The Cobalt & James Mines, Ltd.* (*ante*), since overruled in *Re Smith and Hill*, *post*).

Appeal dismissed with costs, but (per Falconbridge, C.J., and Britton, J.) without prejudice to any action or proceeding the appellant might take to question the constitutionality of the appointment by the Province of an officer with the powers of the Mining Commissioner. Riddell, J., thinking this point should be disposed of and expressing the opinion that the contention could not be successfully urged.

Dispute by J. D. Munro against mining claim M. R. 386 of Larry Downey, transferred by the Recorder to the Commissioner for adjudication.

J. P. MacGregor, for Munro.

A. G. Slaght, for Downey.

20th April, 1908.

THE COMMISSIONER.—The disputant Munro is asking to displace the respondent Downey as recorded holder of mining claim known as M. R. 386, formerly known as T. R. 446.

The grounds alleged in the dispute are, "That on the date when the said Larry Downey made his alleged discovery, the said claim was staked and recorded and was not open for prospecting, and that I made a discovery and staked said claim before said Downey."

The respective stakings and alleged discoveries in question between the parties in the present dispute all took place within the space of a few days during the month of August, 1907.

It is admitted that the Downey discovery is an exceedingly valuable one, consisting, as he describes it himself, of a handsome vein with native silver. It is situated near the south end of the claim.

The discovery claimed by the disputant Munro is near the north end of the claim close to, or, as they contend, included in the alleged discovery staked by his partner Lovell and himself on behalf of one Blye the previous winter, and upon which the Blye claim, known as T. R. 446, above mentioned, was based.

The Blye claim was recorded on 8th March, 1907, Blye, Munro and Lovell being partners or co-owners in that application, which they are now also in the present Munro application.

No development, or other work as required by the Act, was done upon the property under the Blye application, or in any way by or on behalf of its owners until 19th August, 1907, when Munro, being dissatisfied, as he says, with Blye's failure to develop or do work upon the property, and intending, as is admitted, to acquire the property for himself, commenced to prospect or work in the vicinity of the alleged Blye discovery. He continued his operations on the 20th, and he says that on the evening of the 20th, he had information from Lovell that

the Blye claim would likely be cancelled, as in fact he seems to have quite expected even before that, as the result of the claim inspector's visit, which took place a short time previously, and Lovell told him that this cancellation was likely to happen about the 20th or 21st August.

Munro on the morning of the 21st, about half-past ten o'clock, planted a discovery post claiming discovery where he had been working, and during the day he completed the staking, as he says, in his own name. On the morning of the 22nd, in company with Lovell and James Kilroy, he went again to the property, pulled down his staking of the 21st, and cut off the date and markings from his stakes, and re-erected them with new markings, dating them 22nd August, and marking the time of discovery as 9.20 a.m., 22nd August. Hiram Wall, one of the witnesses in Munro's behalf, who seemed quite reliable, stated that he believed he saw stakes of Munro's on the claim on the evening of the 20th, but Munro denies having planted any stakes that day.

The respondent Downey and his associates also commenced prospecting on the property about the same time as Munro, and on the evening of 20th August one of them, Daniel Shane, made the rich discovery, which is no doubt the cause of the strenuous contest now taking place over the ownership of the claim. Downey saw the discovery the same evening, and put up prospecting pickets and kept Shane working upon it as required by sec. 135 of the Act, in order to protect it until it could be staked. In the afternoon of the 21st Shane, under Downey's instructions, planted a discovery post in Downey's name upon the discovery, giving the date of discovery as 4.30 p.m., 20th August, the time when Shane first found the silver. In the afternoon of the 22nd, Downey and his assistants completed his staking.

On the 22nd, a little before noon, Wall arrived from the Recorder's office, bringing definite information that the Blye application had been cancelled, and this was communicated to Lovell and Munro after Munro had made the new staking, or at least after he had erected the new discovery and new No. 1 posts. The Blye claim as a fact was cancelled by the Recorder on the evening of 20th August after the recording office had been closed to the public, the cancellation being based upon the report of Inspector Murray, dated 17th August, finding that Blye had no *bona fide* discovery.

Downey recorded his application for the claim on 23rd August, giving the date of his discovery as 20th August, and the date of his staking as 22nd August.

Munro filed his application on 28th August, giving the date of both his discovery and his staking as 22nd August. His dispute was not filed until 7th September.

On 9th September, Claim Inspector Irwin inspected the Downey and Munro discoveries, and on 2nd October filed his report with the Recorder, allowing the Downey discovery and rejecting the Munro discovery.

Munro commenced almost immediately to do work upon and alter the nature of his alleged discovery. In September he and Lovell and Blye, the latter being represented throughout by his agent Caverhill, again came to an understanding among themselves, and agreed to unite their interests under both the Munro and Blye stakings, and acting, as Mr. Caverhill says, under advice, they shortly afterwards proceeded to do extensive work upon the discovery, sinking a shaft and blasting out the greater part of the vein matter of which their alleged discovery consisted, this work not being done in the proper and usual manner by leaving the mineral showing comprising the discovery intact as it was at the time the alleged discovery was made, and by sinking, if they wished to sink, close to it, but being done in such a way as to remove what was really the discovery, and making it impossible afterwards to judge of the merits of what was in sight when the discovery post was planted. The greater part of this work was done too after Inspector Irwin had visited and inspected and rejected the alleged Munro discovery, and Mr. Caverhill admits that he knew while it was being done, that the merits of the discovery were in dispute, and that Mr. Downey had warned his men against continuing the work.

Another inspection of the Munro discovery was requested from the Recorder, on the ground that Munro had not received notice of the Irwin inspection. This was granted, apparently in ignorance of the changed condition, and Inspector Burrows visited the claim in November, in company with Mr. Caverhill, and in a special report made in December finds that what he examined about 5 feet from the bottom of a shaft 10 or 12 feet deep, would pass inspection as a discovery under the Act. This report of inspection was not entered or noted by the Recorder until February, when it was noted on the record of the Downey claim as of the day of its date.

Meanwhile Blye had appealed from the cancellation of his claim, and on my dismissal of his appeal, appealed to the Divisional Court, which Court, after admitting new evidence upon the two main points in issue, allowed the appeal.

In these circumstances, the present dispute was heard before me on 13th February, 1908. It might have been better that it should have awaited the final determination of the Blye appeal, which has now gone to the Court of Appeal, but as neither party has requested this, and as there appears to be no indication of an early determination of that appeal, it is perhaps desirable that I should give my decision without further delay.

Whatever may be the final result of the other case, I think the present dispute must be dismissed. Munro cannot possibly, as I view the matter, be entitled to any claim or interest in the property under his present application.

Sec. 136 of the Act provides that:

"Any licensee who, no matter with what purpose or intent, plants or places any stakes, posts or markings, not authorized by this Act, upon any lands open to prospecting . . . . and any person who stakes out or partially stakes out, whether authorized by the Act or not, any such lands . . . . and fails to record the same or to complete and record the same with the Mining Recorder as and within the time by the Act provided, shall not, subject to the next subsection, thereafter be entitled to again stake out the said lands or any part thereof or to record a claim thereon or in any way to acquire any right or interest therein."

Munro by his staking of 21st August on a discovery alleged to have been made by him at half-past ten o'clock that morning, which he never recorded, or attempted to record, but which he pulled down and destroyed on the 22nd, brought himself directly within the above quoted provision, and thereby disqualified himself from recording the claim he is now seeking to record as well as from acquiring any other right or interest in the lands. He might, before restaking, if he had acted in what he did in good faith and for no improper purpose, have notified the Recorder and satisfied him of that fact and obtained from his a certificate relieving him from the disability, as provided in subsec. 2 of sec. 136, but this he did not do, and as I view his conduct could not do.

The section quoted is an exceedingly beneficial and wholesome one in the public interest and in the interest of the honest prospector. It is designed to prevent the blanketing of property by unscrupulous persons who often put up stakes with or without pretense of discovery merely for the purpose

of wrongfully keeping off other prospectors while they prospect at their own leisure or merely hold the lands for their own purposes. Without some such provision such persons might keep lands so tied up by a succession of stakings, without ever even recording a claim upon them, for months or years, by simply renewing or remarking the stakes each time just before the time for recording the staking expired.

Upon the evidence I cannot but find that Munro was in his prior staking of the property acting for an improper purpose and doing the very thing which sec. 136 is intended to prevent.

According to his own admission he was expecting the claim to be thrown open and went up to the property for the purpose of being on hand to restake it. He had information, as he admits, from Lovell that it was likely to be thrown open about the 20th or 21st of August. He staked it at least two mornings in succession, the 21st and the 22nd, and if Wall's recollection is correct, he had it staked also on the 20th. There is no pretense that he had found or thought he had found any new or better discovery in the interval between those stakings. He received definite information before noon on the 22nd from or through Wall that the old claim had, in fact, been cancelled and, after receiving this information, he allowed his then existing staking to stand. The vein upon which he did these stakings was one which he swore was included in the discovery made by Lovell and himself upon which this old claim was based, being the same claim which he and Lovell now admit they were expecting would be thrown open for lack of discovery. These circumstances and the hesitating and evasive way in which Munro gave his evidence and the fact that he is flatly contradicted on a number of points by several witnesses, who I have no doubt are speaking the truth, make it impossible to believe his story regarding his reason for restaking. His manner of giving evidence was in fact so unsatisfactory throughout that I cannot feel justified in attaching any weight to what he says regarding anything where his own interest is to be served. From his demeanor I could reach no other conclusion than that he desired to tell, not the truth, but what he thought would help his case.

I must find also that when Munro staked the claim and filed his application in August, he had not, and did not

believe he had, a discovery of valuable mineral as required by the Act. Whatever may be the fact regarding the sufficiency of what was found deeper down in the shaft after the work already referred to had been done upon the discovery I am satisfied upon the evidence that there was no discovery in sight up to the time of Munro's staking and application.

By sec. 2 (22) of the Act "valuable mineral," the discovery of which is under secs. 117 and 132 a pre-requisite to the right to stake out a mining claim, is defined as

> "A vein, lode or other deposit of mineral or minerals in place, appearing at the time to be of such a nature, and containing in the part thereof then exposed such kind or kinds and quantity or quantities of mineral or minerals in place . . . . . as to make it probable that the said vein, lode or deposit is capable of being developed into a producing mine likely to be workable at a profit."

From this it is clear that it is by the character of what was to be seen at the time of the staking that the merits of the discovery must be judged.

Inspector Irwin examined the Munro discovery in September and found that it did not comply with the Act.

No witness on either side except Mr. Caverhill, Blye's agent, was got to say that Munro had, prior to the alteration of the place by the work that had been done after it was staked, a discovery of valuable mineral answering the requirements of the Act. Mr. Caverhill, however, seems to view things from a very optomistic point of view. A vein which other witnesses describe as a few inches in width is described by him as a foot wide, and vein matter which he describes as a vein of copper pyrite is described by those who worked upon it as merely containing small specks and at best some small nuggets of that mineral, small quantities of which are of very common occurrence even in ordinary rock in mineral districts.

Munro himself speaks of the character of his alleged discovery in a very hesitating way. He says, "of course the vein was kind of lost, it was not really a tight vein, and it was decomposed, caused by the weather and the action of the water and it might have leached out a lot of mineral and I believe on going down it would prove to be all right."

Munro claims to have had a sample taken from it in August assayed by Mr. Johns, an assayer of Haileybury, and Mr. Johns stated that the sample brought him by

Munro contained at the rate of 3.5 ounces of silver to the ton. This, of course, even if a true result of what was in the vein, would not show that the vein was of any commercial value nor would it be sufficient to pass the discovery unless there was probability of great improvement. Other assays of samples or alleged samples taken at a later date after extensive sinking had been done are said to have yielded a somewhat larger assay and one as high as 59 ounces.

Nothing in connection with mining or prospecting is more unreliable than alleged results of assayed samples, especially where the samples are handled or carried by or in company with persons who are interested in making a good showing. No one at all experienced in these matters will accept such results as a basis of judgment of the value of the mineral showing from which they are alleged to have come. In the present case the disputant Munro had to do with the samples in question and I feel on that ground more than usually reluctant to accept the results even if the samples came or were supposed to have come from the part of the vein exposed at the time of the alleged discovery, which, with the exception of the first mentioned sample, they did not. Perhaps I should add that I have many times in my investigation of disputed discoveries where evidence in support of the discovery had been put in claiming good assays had samples taken and assays made by independent persons and in the great majority of these cases the results obtained were altogether inferior to those put forward in the evidence. I could not but regard it as willingly submitting myself to deception were I to accept as correct results of assays of alleged samples handled and dealt with under circumstances which seem open to suspicion and by a person in whose truthfulness or good faith I have no confidence.

Daniel Shane, who saw the Munro discovery on 22nd August, says he would not think it was a valuable discovery or one that would be likely to prove valuable.

Daniel Burns says he saw the alleged discovery on 22nd August and that in his judgment it was not a *bona fide* discovery of mineral.

Gilbert Shane says he examined the discovery with Munro on 22nd August and that he would not "by a long way" regard it then as a *bona fide* discovery of mineral

proper to stake. He says that at the time very little work had been done. He says Munro picked up a sample and asked him if he thought it would carry any values but that the sample was only burnt rock as far as the witness could make out, and not vein matter at all.

Narcisse Connoyer says that during a conversation with Munro at the alleged discovery Munro told him "if we win this lot we will not sink here any more."

Hiram Wall, a witness called on behalf of Munro, said he had been prospecting on the lot on 20th August because he did not regard the Lovell or Blye discovery as a sufficient discovery and expected that the claim would be thrown open. He says as far as he could see there was nothing in the discovery.

Munro in conversation with Downey on 22nd August told him that if he (Downey) had found mineral such as the silver sample Downey produced he guessed the claim was his (Downey's).

From all this I am satisfied not only that Munro when he staked had really no discovery within the meaning of the Act but also that he did not really believe he had such a discovery.

But for the report of Inspector Burrows in December that he found a discovery near the bottom of the Munro shaft at his inspection in November it would hardly have seemed necessary to review the evidence upon the question of discovery. Mr. Burrows gives no particulars as to the results of his assay and does not tell why he thought what he found in the shaft was sufficient for a discovery. Upon the evidence before me, however, it is clear that what he sampled was at least four or five feet below what was exposed on the 22nd of August and was not Munro's discovery or any part of it as then exposed. The conduct of Munro and his associates in what must be regarded as an act of spoilation in destroying the evidence in what they knew was a disputed case and after having been warned not to do so cannot, I think, be allowed to operate in their favour. It is perfectly clear from the definition of valuable mineral already quoted that it is the appearance and contents of the mineral exposed at the time of the staking that must be considered in judging of the sufficiency of the discovery and not what may be found at a subsequent time deeper down. For this reason I could not in any event accept the

Burrows' report as correct and as between that report and the report of Inspector Irwin, who visited the property shortly after the date of alleged discovery and who therefore made his report upon what was really the discovery of Munro, I have no hesitation in accepting the latter.

The Munro claim would therefore, in my opinion, fail for lack of discovery at the time the claim was staked.

I find further that Munro did not on 22nd August blaze his discovery line as required by or in substantial compliance with the Act, nor did he do so until after Downey had completed his staking. By paragraph (d) of sec. 133 the blazing of this line is made a part of the requisites of staking out a mining claim, and it might not, in the circumstances, be too strict an application of sec. 134—which provides that even a *bona fide* discoverer is liable to lose his rights if another licensee intervenes with a discovery and completes a staking before him—or of sec. 166—which provides that non-compliance with any provision of the Act relating to the staking out of a claim shall be deemed to be an abandonment—to hold that the failure to blaze this line was of itself sufficient to postpone or destroy the disputant's claim to the property even had it been otherwise good.

But it seems unnecessary to pursue the matter further, as either of the first two grounds I have mentioned makes it, in my opinion, impossible that the disputant can be recorded for the claim or have any right or interest in the property.

It remains to consider the disputant's request to have the Downey application which is now on record set aside.

The disputant, no matter what may befall the Downey claim, having no right or possibility of right or interest in the property himself, I think upon the principles laid down in *Re Cashman and The Cobalt and James Mines, Limited*, 10 O. W. R. 658, and sec. 74 (2) of the Act, I should, where as in this case the respondent is in possession as recorded holder and has a very meritorious discovery and has acted throughout, as I believe, with entire honesty and in perfect good faith, refuse to make any decision or order against his claim, and certainly no such decision or order should be made upon any unsubstantial technicality.

But if submitted to the test I think upon a reasonable and not too liberal construction of the Act that the Downey claim must be held to be good.

The disputant attacks it, with strange inconsistency, upon the ground that Downey prospected and found his discovery while the lands were still covered by the Blye claim, though the disputant himself was at that very time also prospecting and making what he claims is a discovery upon the lands and though he claims that he should have the property because he made a discovery and staked the claim before Downey.

Though I do not think the validity of the respondent's claim depends upon it I think I must find upon the evidence (though of course this finding cannot bind Blye, as he is not a party to these proceedings) that the Blye claim lapsed on 16th August for want of performance of the requisite working conditions and that the lands thereupon became open to prospecting. It is clear from the evidence that no work was performed and the certified copy of the record relating to that claim shows that no work has ever been recorded. Even though Blye, in the event of his claim ultimately being held to be good (superseding, as in that event it would, both the present claims) may have some right or privilege of obtaining relief from the consequences of his default I do not think that that could affect the rights of the parties in the present dispute.

Assuming then that the lands were on 20th August open to prospecting by reason of the lapse of the Blye claim if not by reason of the cancellation of it which took place that evening, Downey's right or inchoate right would date from the time of his discovery on the evening of the 20th (see sec. 132) subject to his liability to lose that right in the way specified in sec. 134. The contingency specified in sec. 134 is "in case another licensee makes a discovery of valuable mineral upon the property and completes the staking before him." This contingency did not happen—such a discovery was not made by Munro nor did he complete his staking before Downey had completed his, the blazing of the discovery line, which, as I have mentioned is a part of the staking out of a mining claim, being lacking in both Munro's stakings. And even if Munro had made a discovery and had completed his staking first I think Downey's rights would not of necessity be ousted. The section makes the first discoverer merely "liable to lose his rights"; it does not absolutely take the rights away. It seems plain that it is only in favour or for the benefit of the person who intervenes in the way described in the section that this li-

ability exists and that the loss of the rights of the first discoverer would happen. If the person intervening cannot acquire anything I think the first discoverer will not be affected and will be entitled to the claim as though no one had intervened. Any other result would seem unreasonable. Munro, as I have already pointed out, is by his own act disqualified under sec. 136, and I think also under paragraph (b) of sec. 167, and it would seem a very futile interpretation of the law to hold that he can in any way interfere with the acquirement of rights by another.

If the lands were not open to prospecting on 20th August I quite agree with the contention of the disputant's counsel that Downey's rights cannot in any way date from that day. I am satisfied, however, that his visit to and adoption of the discovery and discovery post on the 22nd and his completion of his staking that afternoon when the claim was unquestionably open to him to do so and his setting forth of the true date of discovery and of his staking in his application is substantial and sufficient compliance with the requirements of the Act and in the circumstances, enough to entitle him to the claim.

The principles laid down by Mr. Justice Maclennan in *Clark* v. *Docksteader*, 36 S. C. R. at p. 637, that in construing a Mining Act "every reasonable intendment ought to be made to uphold the validity of a claim where there has been actual discovery and an honest attempt to comply with the directions of the Legislature," seem to me to be very applicable to the present case.

The case also of *St. Laurent* v. *Mercier*, 33 S. C. R. 314, in which under the Yukon law it was held in the circumstances unnecessary to make a formal restaking where some of the posts that had been put up by the applicant were on territory not open when they were put up but which became open before application was made, supports the same view. Mr. Justice Mills, at p. 319, says: "It would be a misfortune to have parties, many of whom are uneducated men, deprived of their claims on some technical ground and in this way pass into the possession of others."

I order judgment dismissing this dispute.

From this decision Munro appealed to the Divisional Court, the appeal being heard by FALCONBRIDGE, C.J.,

BRITTON, J., and RIDDELL, J., on 22nd and 23rd April, 1908.

W. M. Douglas, K. C. and *J. P. MacGregor*, for appellant, Munro.

G. F. Shepley, K.C. and *A. G. Slaght*, for respondent, Downey.

J. R. Cartwright, K.C., for Attorney-General of Ontario.

29th July, 1908.

FALCONBRIDGE, C.J., concurred with BRITTON, J.

BRITTON, J.:—Appeal from the order or judgment of the Mining Commissioner for Ontario, dated 20th April, 1908.

The argument in this case was very careful and complete.

After a perusal of the evidence, specially considering those points of it referred to in a memorandum furnished by counsel, I am unable to say that the learned Mining Commissioner is wrong either in his findings upon questions of fact, or in his construction and application of sec. 136 of the Mining Act.

It is right for me to say that from reading the evidence I would not form so unfavourable an opinion of the truthfulness of Munro as the Commissioner has formed. That may be in part explained by what the Commissioner calls "the hesitating and evasive way in which Munro gave his evidence." The manner of the witness in the box is something which the trial Judge may consider and which the appellate Judge cannot—and so it is always more difficult on that account to interfere.

The appeal should be dismissed with costs, but without prejudice to any action or proceeding that the appellant has taken or may take to question the jurisdiction of the Mining Commissioner or the validity of the Act of the legislature of the Province of Ontario authorising the appointment of an officer with the powers of a Judge.

There should be no costs to the Attorney-General of the present appeal.

RIDDELL, J.:—(After reviewing the facts.) The Mining Commissioner has held that the act of Munro in can-

celling, as he did, all staking based upon the discovery of August 21st, and not proceeding upon this discovery and staking, disqualified him under sec. 136 of the Act. This section, whatever its object may be, is an extraordinarily stringent one, and with the will to decide that Munro has not brought himself under its ban if such a decision were possible, I am unable to see any loophole for him. We must take the words of the Act as they are, and taken as they are it is, I think, clear that Munro is barred. He has failed "to record . . . with the Mining Recorder as and within the time by this Act provided." And accordingly he cannot "in any way . . . acquire any right or interest" in the claim. For this reason he can have no interest in this appeal and the *Cashman Case*, (1907), 10 O. W. R. 658, applies.

The appeal should be dismissed with costs.

I may add that I see no reason for doubting that Downey's claim is perfectly good even if Munro had a status to attack it.

The appellant served notice that he would contend upon the argument that the Mining Commissioner had no jurisdiction in the premises, because the local legislature acted beyond its powers in constituting such an office. This contention was not pressed upon the argument and in my opinion could not be successfully urged. I thought we should dispose of the point, but as the remainder of the Court decided that the matter might be left open, I pay no further attention to it except to say that the Attorney-General having been served with notice and attending to argue, should have his costs: *Attorney-General* v. *Toronto G. T. Co.* (1903), 5 O. L. R. 607; *Rex* v. *Leach* (1908), 17 O. L. R. at pp. 671, 672.

NOTE.—S. 136, now S. 57, (Act of 1908) was somewhat altered in 1908 but not so as to affect its applicability to the facts of this case.

Upon the question of the constitutionality of the powers conferred upon the Commissioner see Clement's Canadian Constitution (2nd Ed.) 296.

The jurisdiction and powers of the Commissioner provided for in the Mines Act, 1906-7, were modelled after those of the Drainage Referee established by the Drainage Trials Act in 1891, and carried with amendments into R. S. O. (1897) c. 226, s. 88 *et seq.* Cf. with the latter s. 8 *et seq.* of The Mines Act, 1906 and 1907. The most important difference between the Drainage Trials Act and the Mines Act provisions is that the latter had to do with the disposition of Crown property, unpatented rights, etc., matters which were not theretofore dealt with by the ordinary Courts, while the former had

to do with ordinary property and rights and claims affecting it, which would in the usual course be cognizable in the ordinary Courts.

The provisions of the Mines Act were almost entirely recast in 1908; see present ss. 123 *et seq.*, being now, it would seem, less open than formerly to suspicion of trespassing upon the prerogative of the Superior Courts or of the Dominion authorities.

There is in regard to the question the consideration that the disposal of Provincial Crown lands is a matter the Province has a right to control, and when its Legislature says as in effect it does in the present Act (ss. 68 and 123 (1)) that it will only dispose of them to persons complying with the provisions of the Act, any attempt to obtain a grant by any other course could not be successful. Though the Act aims at speedy determination of litigation it gives a very full right of appeal to the ordinary Courts, in all important cases, which prior to 1906, did not exist; See ss. 151, 152.

(THE COMMISSIONER.)

RE CRAIG ET AL. AND CLEARY.

Agreement for Interest in Property—Duration of—New Staking by One Party—Corroboration — Statute of Frauds—Signature to Writing—Part Performance—Jurisdiction.

Two licensees entered into an agreement with two others for equal interests in part of a lot they were endeavouring to acquire as a mining claim, no limit of time for operations being mentioned or indicated, and none of the parties having at the time any staking or claim upon the property. Two stakings and considerable work were done in the joint enterprise. One of the stakings had been thrown out and the other was about to be inspected when disagreement arose, and one of the first mentioned licensees quit work because the last mentioned ones refused him payment to which he was entitled. The latter, after the second staking was rejected, staked the property for and acquired on it a working permit, and claimed the right to hold it for themselves.

Held (hesitating) that the working permit came within the intention of the agreement and belonged to the partnership, its acquisition being merely a continuation of the original purpose of acquiring a patent of the property.

The leaning in such a case should be against holding continuance of interest in new stakings.

Such an agreement made before staking out need not be in writing, if there is corroboration as the Act requires.

This was a proceeding by Hugh Craig and Thomas Craig to enforce a claim to a half interest in a Working Permit held by Ernest J. Cleary upon part of lot 17, in the 4th concession of Coleman.

M. J. O'Connor and *George Ross*, for plaintiffs.

McDougall & McNairn-Hall, for defendant.

9th May, 1908.

THE COMMISSIONER:—I think I can only deal with this matter in so far as the parties' rights in or upon the property in question are concerned. The plaintiffs' statement of claim goes further than the endorsement in the writ and I think it goes quite beyond what I have power to deal with.

The relations and agreement between the parties were in some respects rather loose but it is clear, and in fact is not disputed, that they did enter into an agreement by which the plaintiffs Hugh Craig and Thomas Craig on the one side and the defendant Ernest J. Cleary and his father Thomas Cleary on the other were to have equal interests in the mining lands in question, and it was undoubtedly a term of that agreement that the Clearys should develop the claims and pay the expenses—just how far or to what extent this performance of development work and payment of expenses was to extend was not very clearly stated. It is not unusual, however, to find agreements of this nature somewhat indefinite in this particular. The reason is the parties are hopeful of speedy success and large profits and do not turn their minds particularly to the contingency of less satisfactory results than they are hoping for.

The writing between the parties mentions that Thomas Craig and Thomas Cleary are each to have a half interest in the lands. This writing was signed by Ernest Cleary, first in his own name and after striking that out underneath it in the name of his father "Thomas Cleary per E. C." The father and son were both really interested and the writing was intended to bind the interest of both.

An agreement was also made (about the same time as the making of the one regarding the Coleman property) regarding a property in Lorrain held at the time by Thomas Craig, and though that agreement and the one in question in the present proceeding appear to have been independent and distinct their terms seem to be identical except that Hugh Craig subsequently varied his part of the agreement in question in the present proceeding in so far as he agreed to bear his part of the expenses, at least from a certain date.

I think as regards the Coleman property, which is in question in this action, the matter of the agreement was quite open to be proved by parol evidence, for even if the

Working Permit be an interest in lands within the Statute of Frauds (which I do not hold) the agreement was entered into before the property was staked out or acquired and it was partly performed by the parties who entered upon and staked out the land and did extensive work upon it, and the writing which was signed as above mentioned was clearly sufficient corroboration (if any was necessary) under sec. 159 (2) of The Mines Act if not, indeed, also sufficient under the Statute of Frauds. The case of *Burn* v. *Strong*, 14 Grant, 651, seems directly in point as to the part performance, and the recent case of *McMeekin* v. *Furry*, 39 S. C. R. 378, contains a very interesting discussion upon the question of the effect, as answering the requirements of the Statute of Frauds, of a writing signed by a person in a name other than his own.

The Craigs, who had previously been connected with the property, were, under the agreement, to take the Clearys to the property and bring about the staking of it in the Clearys' name. This was accomplished. It is claimed by Clearys that Thomas Craig represented to them that the property was very promising, that he could show them a good discovery, and that very little work would be required. Craig denies that he made such favourable representations. I have no doubt but both parties were honestly hopeful of success and of making profit from the enterprise when they entered upon it. Results, however, did not come in proportion to expectations and disagreement and bickerings arose. Thomas Craig, who had been working upon the property with Clearys' men some two or three months, left in July after one staking had been thrown out for lack of discovery and just before the next staking had been inspected. His leaving was brought about by Clearys' refusal to advance him some money in payment for his work or at least on credit of his interest in the property, as he required it for the support of his family. He claims that he was not under obligation to continue work, which I think must be accepted as true. However, I have no doubt that his leaving or the quarrel that resulted in it was largely the result of impatience at non-success and consequent strained relations between the parties.

On the rejection of the second staking for a mining claim the Clearys determined, upon the advice of their solicitor, to stake the property for a Working Permit. This

of course was and could only be in pursuance of the original object of obtaining mining title to the property. This staking was done in the name of Ernest J. Cleary and the Working Permit was granted to him in September, 1907, and has since been renewed.

It is contended on behalf of the Clearys that the rights of the Craigs did not and do not extend to the Working Permit. Though it is with some hesitation that I do so I think I must hold that it does. No doubt great care should be taken not to extend such agreements too far, and I think the leaning should rather be against holding continuance of interest in new stakings. In this case, however, I think the circumstances and the agreement are sufficient to cover the matter of the Working Permit. At the time the agreement was entered into the present parties had no staking at all upon the property. The arrangement between them was not limited to what might result from one staking, and as a matter of fact they went on with the second staking while both parties were still working upon the property, and the Working Permit application was merely in continuation of the original purpose of acquiring patent to the property. I am satisfied from the evidence that the undertaking contemplated by the agreement in the first place and as subsequently continued by the conduct and actions of the parties was a general purpose and design of obtaining title to the property and securing a patent for it, and I do not think anything happened sufficient to displace this arrangement. The case of *Burn* v. *Strong* already mentioned seems in its circumstances to be one very closely resembling the present case.

I think, therefore, I must hold that the plaintiffs are entitled to a half interest in the Working Permit.

I do not think I can properly go further, at all events as the case now stands. The facts are not sufficiently before me, even if I had jurisdiction, to settle the accounts between the parties. To prevent misunderstanding perhaps I should say that I do not hold that the Clearys are under obligation to continue heavy expenditures upon the property, nor do I deal with the question of how far they are entitled to be reimbursed in case the venture is finally successful and results in returns to those who have embarked in the enterprise. I may point out that to hold that the plaintiffs are entitled to an interest in whatever

rights are acquired in the property is a matter quite distinct from holding that the defendant or his father would be obliged to continue outlays. They may have been entitled long ago to discontinue these outlays, but it would not from that necessarily follow that the plaintiffs would not be entitled to a share of interests acquired by continuing.

I think I should reserve further orders and directions in case any should be required to give effect to my decision or to dispose of any further matter that might properly be disposed of upon application to me.

Judgment that the plaintiffs Hugh Craig and Thomas Craig are entitled to a one-half interest in the Working Permit held by the defendant Ernest J. Cleary.

(THE COMMISSIONER.)

RE DENNIE AND BROUGH ET AL.

Certificate of Record—Attacking Mining Claim — Fraud—License—False Affidavit—Disturbing Title.

A mining claim for which a Certificate of Record has issued cannot, in the absence of fraud, be impeached for any defect or irregularity in its acquisiton. (See note to this case.)

After the 60 days allowed for dispute have elapsed and a Certificate of Record has issued the title should not be lightly interfered with.

An application on a discovery and staking of a non-licensee sworn to by an applicant who was not present at the discovery or staking is fraudulent and void.

The facts of this case appear from the decision.

J. A. Mulligan, for the complainant, Dennie.

K. G. Robertson, for respondents, Brough and Mayhew.

A. G. Slaght, for the respondents, the Haileybury Silver Mining Co., Ltd.

16th May, 1908

THE COMMISSIONER.—The applicant Frank J. Dennie is asking to have the respondents' certificate of record set aside and to have their mining claim cancelled and himself recorded for the property in question.

The particulars of complaint served mention various alleged irregularities regarding the acquisition of the claim,

in addition to containing an allegation of fraud. In view, however, of the provisions of secs. 71, 158a (4) and 140, it is clear and was in fact conceded by the complainant's counsel at the hearing that the existing claim cannot be successfully attacked upon any of the grounds set up unless fraud can be shown. As I intimated during the argument and as was admitted by the complainant's counsel, the complainant's own claim to the property is wholly untenable. The real facts regarding it seem to have been unknown to his solicitors till they were into the midst of the proceedings. Though the complainant swore the usual affidavit accompanying an application for a mining claim stating that he had on the 27th day of September, 1907, discovered valuable mineral upon and staked out the property in accordance with the particulars in his application and sketch or plan the fact is, as he admitted in his evidence, he was not upon the property or near it at that time or any time thereabout but had sent up two men, neither of whom had a miner's license, to stake the claim for him. His excuse for making this affidavit is that he did not fully know what he was swearing to, though he admits he himself gave instructions to his solicitor for its preparation. Apart from the violation of the requirement of a license an application so made cannot for a moment be entertained or countenanced. There can be no pretense of right or title under it.

It is contended, however, that the existing claim of the respondents is also fraudulent and should be set aside. The claim is now held by The Haileybury Silver Mining Co., Ltd., who obtained a transfer of it from Brough, the original staker, on 12th December, 1907, and a certificate of record from the Recorder in the usual way on 27th January, 1908. Mayhew, the other party, at one time held a half interest in the property, transferred to him by Brough. The allegations of fraud are against Brough in the acquisition of the claim.

Brough first staked the claim on 13th September, 1907, and he staked it again on 29th October, 1907, the latter application being received and marked by the Recorder as an amended application upon an additional discovery, according to the Recorder's then usual custom, which, however, I think is not a custom warranted by the Act or one that should be followed. The complainant contends that these two applications were fraudulent, especially the first one. He sought to show in respect to the first application

that the property was not fully staked as required by the Act and that the discovery or alleged discovery was not within the boundaries of the claim.

I am not satisfied upon the very hazy and unsatisfactory evidence adduced in support of the complainant's contentions that either of these allegations is true and at all events I am unable in the circumstances to find fraud in any part of Brough's connection with the property, nor can I find upon the evidence that he has violated sec. 136 of the Act as contended by the complainant, even if the title of the present holders were open to attack upon that ground, which I think in the circumstances it is not.

It was no doubt the intention of the Act that holders of certificates of record of mining claims would not be open to be harrassed indefinitely by attacks upon the regularity of proceedings in the early history of the claim. Ample time is allowed (two months) for filing disputes, and in this case considerably more than the allotted time had elapsed before the certificate of record was granted or any question of the validity of the claim raised. In any case where the limit of time has expired and where a certificate of record has been granted I think title should not be lightly interfered with, and where as in this case a third party has been for many months in possession and use of the property and expending money upon it, and where the complainant has no vestige of legal or moral right in himself nothing short of actual fraud would warrant interference with the established claim. Insecurity of title could not but work serious detriment to the mining interests of the Province.

The complainant has wholly failed to make out a case which could at all, in my view, warrant interference with the present title.

I think I have no power to recommend the penalizing of the complainant for his conduct regarding his claim by recommending revocation of his license, as suggested by the respondent's counsel, as sec. 33 of the new Act providing for this was not in force when the matters happened, though I think I would otherwise feel called upon to do so.

NOTE.—Since this decision "mistake" has been added as a ground for impeachment of a claim for which a Certificate of Record has issued. See present ss. 65 and 66 (Act of 1908), superseding former s. 71.

(THE COMMISSIONER.)

RE HENDERSON AND RICKETTS.

Priority—Form of Claim—Irregular Township Lot—Substantial Compliance—Whether Statute Retroactive—Staking—Blazing Lines—Adopting Previous Markings.

In contests between rival applications for mining claims, priority of recording is immaterial if all are filed within the time limited by the Act.

Where a township lot was irregular and the actual location of its west boundary was in doubt, there being conflicting surveys, laying out a claim in convenient form following the general purpose of the Act to secure compact shape and avoid ill-shaped remnants, is sufficient.

Sec. 136 as enacted in 1907 was held not to cause disqualification for acts done before it was passed.

It seems the sufficiency of a new staking may be assisted by former markings of the same staker, but the principle of allowing adoption of old markings is rather a dangerous one.

Dispute by Christopher Henderson against the mining claim of Thomas Ricketts, on part of lot 17, in the 11th concession of Lake, transferred by the Mining Recorder to the Commissioner for adjudication.

W. Cross, for disputant.

O. A. Roberts, for respondent.

23rd May, 1908.

THE COMMISSIONER.—The disputant in addition to attacking the claims of the respondent is claiming to be himself entitled to be recorded upon the property, or rather upon the part of it included in his application.

The respondent Ricketts claims under staking of 15th August, 1907, and the disputant Henderson under staking of 15th and 16th August, 1907. The existence of valuable mineral upon the property seems to have been known to both parties for a considerable time previously. Ricketts' applications appear to have reached the Department first and were recorded upon the property, but the applications of both parties were prepared and sent in promptly and well within the limit of time allowed for recording. On 13th September, 1907, dispute was filed by Henderson under sec. 158a; hence the present proceedings to determine who is entitled to the property.

It is not questioned that Ricketts was upon the property first on 15th August, having gone with his assistant Lummis

from the latter's home about 4 o'clock in the morning, arriving at the property as he and Lummis say about an hour later. If he staked properly or sufficiently and if his claim is free from valid objection upon any other ground his priority of staking would of course give him prior right. The date of recording, as I view it, is immaterial as both claims were received at the Department in ample time.

In addition to the contention that the Ricketts claims were not properly or sufficiently staked out and marked the disputant raises other legal objections to them.

It is claimed, first, that sec. 113 of the Act was not complied with, Ricketts having laid out his claims in blocks extending from the north boundary to the south boundary of the township lot, a distance of 30 chains, making each claim or block $16\frac{2}{3}$ chains in width, beginning at the east end of the lot, each claim containing approximately 50 acres. The lots in the township of Lake are assumed to contain generally about 200 acres, but lot 17, in the 11th concession, upon which the claims in question are situate, is not of the ordinary size, the original survey making it much less than 200 acres, and a later survey, which appears more likely to be correct, making it very much in excess of 200 acres. Ricketts had at a prior time staked out claims upon the same lot making them squares of 40 acres, but the Surveys Branch of the Department of Lands, Forests and Mines objected to this manner of laying out the lot and recommended to him that he should lay out his claims as he has now done. In the circumstances it would be a hardship if his claims were now to be held bad upon this ground, and, as I intimated in my reasons of decision in the former case, which came before me regarding the same property, I think this objection should not, in the circumstances at all events, be held fatal. Had the lot been of the regular size the objection would have had much more force. As it is I think strictly speaking it is sec. 116, which deals with lots of irregular form and size, and not sec. 133 that governs the case. Section 137, however, provides that substantial compliance with the provisions of the Act shall be sufficient. The policy and purpose of the various directions regarding the size and form of mining claims was undoubtedly to secure the laying out of claims in as convenient a form as possible and to prevent awkward and ill-shaped remnants of lots being left after a number of claims had been staked upon the lot. This policy, the manner of staking recommended by the Department and followed by the

respondent carries out in the present case as far as possible and the plan adopted is no doubt in reality the most satisfactory way practicable of dividing the lot where the actual location of the western boundary and the real area of the lot are in doubt. The disputant upon the other hand laid out his claim by extending it only 15 chains northward from the southern boundary or half the width of the lot, but making it 33¼ chains from east to west, thus taking up what purports to be a quarter of the lot, but it would not appear in reality to be a quarter of the lot. Mr. Ricketts' manner of laying out the claim is at least as nearly a compliance with the Act as Mr. Henderson's, and in the circumstances, as I have stated, I would not hold the claim of either claimant to be invalid upon the objection raised.

Another objection made to the respondent's claim is that as he had staked the property before he was disqualified under sec. 136 from staking it again. Section 136, however, did not come into force until 20th April, 1907, and as the former staking of Ricketts was some time prior to that date, sec. 136 cannot, I think, upon the well established principles of interpretation of statutes, affect the present case: *Craie's Hardcastle Statute Law* (4th ed.), 321. Whether or not the evidence goes far enough to bring the respondent within sec. 136 need not therefore be considered.

Attention was also called to the use of the word "restaked" in Ricketts' application, instead of "staked," but I think no importance can be attached to this.

Coming to what is the real question of difficulty in the case, I have to determine whether or not Ricketts did on 15th August properly or sufficiently stake his claims before Henderson came upon the land and commenced his staking. I think there is no question but that Henderson's staking, so far as its method and details are concerned, was properly and sufficiently done, subject only to the question whether the lands were open to be staked when he came upon the property. The question of Ricketts' staking is therefore the sole issue.

Ricketts and his assistant Lummis say they arrived upon the property a little after 5 o'clock in the morning of the 15th August, and were engaged in staking the claims until between 3 and 4 o'clock the same afternoon. Henderson and his assistant McDonald say they reached the property a little after 5 o'clock that afternoon, and that they proceeded with

their staking, but had only got as far as the planting of their discovery post and their No. 1 and No. 2 posts, when they had to quit by reason of darkness. They admit that they saw at the southeast corner, the only point which, so far as they had gone that evening, coincided with the location of their own posts, a No. 2 post, presumably Ricketts', but which they say was somewhat under the size prescribed by the Act. They say they returned next morning in company with another assistant Wilson, and completed the staking of their claim, and that with the exception of the No. 2 post mentioned, and a stump and a tree and a picket, apparently belonging to Ricketts, they saw nothing to indicate that Ricketts had staked the property, and they say also that there was very slight indication of blazing, and that they could find no discovery line from Ricketts' No. 1 corner to his discovery. Ricketts and Lummis say that they complied fully with the Act, and that they were careful to do so by reason of their former claim having, after investigation and trial and discussion before me of the requisites of staking a mining claim, been thrown out because of insufficient staking. They say that they planted proper posts at each corner, and at the discovery, and they mention the kind of wood of which their posts were made in each case, and give altogether such a description of what they did as to show beyond question, if their statements are to be believed, that they properly and sufficiently staked the property that morning, the only point as to which any doubt could be raised, upon their own statements, being as to the sufficiency of the blazing of the lines. If they did what they say, however, I am quite satisfied that their blazing was sufficient to fulfil the requirements of the Act. They both say that they blazed out all the lines at intervals, not very far apart, and Lummis says that in one case they put up a couple of pickets where blazing could not be done by reason of the line being open. The lines had in fact all been blazed and cut and marked out before and all, with the exception at least of the dividing line between their two claims, very plainly, in Ricketts' prior staking, as well as by the lumbermen who were operating upon the lot. I think even apart from the old blazing and marking, and especially in view of sec. 137, their blazing would have to be accepted as sufficient. It has been held, however, in United States cases, and in the case of *St. Laurent* v. *Mercier* (Yukon), 33 S. C. R., 314, that a staker may adopt his previous marking of boundaries for a subsequent claim. I think the principle of allowing adoption

of old markings is rather a dangerous one, and one that may easily be extended too far, but, as I have said, I think the marking here, if done as Ricketts and Lummis assert, would at all events be sufficient. . . .

In the absence of anything to discredit the testimony of the respondent, and the three other witnesses in his behalf, I cannot but find in favor of the staking. The evidence of Daniel Lummis in particular impressed me as that of an honest witness, and it would be impossible with his experience in the woods that he could be very far mistaken as to the substance of the matters in contest. I think also the weight of evidence and of probability is with the respondent.

The fact that the respondent, in ignorance of the dispute, has done a very considerable amount of work upon the property should not weigh in the case if his claim were really bad, but the fact that the disputant, even by his own admission, knew when he commenced to stake the property, that there was already upon it an existing staking of some kind, and deliberately entered the contest for the property, would, I think, disentitle him to any special consideration in the matter of costs, if any reason existed for it, which I fear there does not.

Dispute dismissed with costs.

(THE COMMISSIONER.)

RE McDONALD AND CASEY.

Agreement for Interest in Mining Claim—Corroboration—Evidence—Accompanying Expedition—Living at Camp—Fraud—Personation—False Affidavit—License—Forest Reserve Permit—Certificate of Record.

A claim to an interest in a mining claim staked out in the name of another person cannot be established by the uncorroborated evidence of the claimant.

Going with the expedition and living at the same camp does not necessarily imply a partnership for acquiring claims.

A claim staked out in the name of a licensee by a non-licensee and non-holder of a forest reserve permit the recording of which was procured by the latter personating the former and swearing the affidavit in his name, cannot stand though a Certificate of Record has been issued for it, and where the facts appeared incidentally in another proceeding to which all persons interested were parties, the claim was declared invalid, and the guilty person reported for prosecution.

This was a proceeding commenced under the Act in force in 1907. The facts are stated in the decision.

A. G. Slaght, for plaintiff, Alex. A. McDonald.

George Mitchell, for defendants, James Casey and John Casey.

27th May, 1908.

THE COMMISSIONER.—The plaintiff McDonald is seeking to enforce a claim for a half interest in mining claims numbers M.R. 370 and M R. 371, in the Montreal River mining division, recorded in the name of the defendant John Casey. The lands are situated in the Temagami Crown Forest Reserve.

The claims were staked out by the defendant James Casey, a brother of the defendant John Casey, with the assistance of one Burk, on 19th August, 1907, and recorded on 21st August, 1907, the applications having been signed and the affidavit of discovery sworn to by James Casey in the name of John Casey. James Casey representing himself to the Recorder as being John Casey. This was done because James Casey had neither a miner's license nor a Forest Reserve permit, and was not entitled under the Act either to prospect, stake out, or make affidavit of discovery, and was in fact liable to a penalty for so doing, and he appears also to be liable under the Criminal Code to prosecution for representing himself to the Recorder

as John Casey and swearing the affidavit to accompany the application which he was fraudulently making.

The plaintiff has no writing answering the requirements of sec. 159 (2) of the Act, nor has he any corroboration in any way of his own contention, which is that he entered into an arrangement with James Casey to go with him to the Reserve and prospect and take up claims together, each to pay half the expenses. McDonald claims he carried out this agreement as far as possible by paying several sums of money to James Casey at different times, for which payment, however, he says he received no receipt. The plaintiff does not pretend that any express agreement was made as to sharing the claims, the arrangement even by his own story being an exceedingly loose and indefinite one, and I think, especially in view of the plaintiff's peculiar description of his own conduct while on the expedition, too vague to found any claim of partnership or joint ownership upon. It is peculiar that if the plaintiff was to have an interest in the claims that he would not have been working along with Casey and Burk when the claims were being staked, or that he would not know more about the claims or say something to Casey at the time about them, or as to whose name they were being staked in. No coherent account of how McDonald put in his time while on the expedition is given by any of the parties, but the most he claims to have done is to have made a few stakes at the request of Casey, and cut a few blazes, and even this Casey and Burk deny. The conduct of the plaintiff upon the expedition instead of supporting his claim to an interest in the property seems to me to be inconsistent with such an intention. The only circumstance that could be urged in his favor was the fact of his having gone up in company with Casey, and lived at his camp during the expedition, which I think does not at all of necessity imply that he was a partner in any mining claims that might be acquired upon the expedition. The only definite fact upon which his claim for an interest could be based is his statement that he, while in the camp, paid Casey his share of the expenses, and afterwards after the claims had been recorded, paid half the recording expenses, and what he says Casey subsequently told him was his share of other expenses. These payments Casey utterly denies, and as to the one made at the camp, where McDonald says Burk was present, he is corroborated by Burk. It seems strange that the plaintiff should have obtained no receipt, and that he should be able to produce no corroboration whatever

of his alleged payment, and his conduct in sending money to Burk subsequently by letter on two different occasions seems a very peculiar proceeding, when it is remembered that he does not claim to have hired Burk, or to have had any direct communication with him previously about hiring. The explanation suggested, and supported by the evidence of Briggs and Steele, that the plaintiff was merely endeavoring by sending this money to Burk to build up a case for himself that would give a foothold for a claim to an interest in the property would seem the most reasonable solution. It seems strange also that the plaintiff, if he was really a partner in the enterprise, should have left the camp before the other parties, and without any definite knowledge or arrangement as to what had been done up to that time in the way of staking claims, or as to what should be done after he left.

If the matter stood alone upon the evidence of James Casey as against the plaintiff, I should have great hesitation in accepting Casey's story, as from his admitted conduct in personating his brother, and swearing an affidavit in his brother's name, as well as from his demeanor when giving evidence before me, I cannot feel justified in putting much confidence in his testimony. The plaintiff, however, though his manner in the witness stand was not open to the same criticism as that of James Casey, was not himself a very satisfactory witness, and in addition to being in conflict with Burk, he is directly contradicted by Briggs and Steele, whose testimony I think is not open to question, upon the substance of the interview with them, and they are both distinct in saying that he offered Briggs an interest in the property if Briggs could give evidence in support of his case, and this happened, as Steele says, after Briggs had already told him he knew nothing about the matter.

Upon the whole evidence, therefore, I would have to hold against the plaintiff's claim to an interest in the property, and I think in any event sec. 159 (2) of the Act would be a bar to the plaintiff's present claim.

The facts disclosed regarding the staking out and recording of the claims in question are such as I cannot ignore. It is very plain, and it is admitted that the staking was done by James Casey (who had neither a miner's license nor a Forest Reserve permit) in flagrant violation of the Act, especially of secs. 84, 102, 103, 104, and 209, and it is equally clear that he procured the recording of the claims in the name of his brother, the present holder, by fraudulently representing

to the Recorder that he was John Casey, and by personating and swearing the affidavit in his brother John's name. Claims so acquired, notwithstanding that a certificate of record has been (very improperly) obtained, cannot give the holder any right, and I think it is incumbent upon me to add to my decision a finding that the claims were obtained by fraud and are invalid. It seems John Casey knew nothing of the staking or intended staking in his name, or of the recording, until after it had all been accomplished, and he seems thereafter, in October, to have re-staked the claims, and filed some kind of amended applications, the exact details of which did not appear before me. I make no finding as to these latter applications, but as to the original applications, the staking for which was done in gross violation of the Act, and the recording of which was procured by fraud and personation, it would be a scandal if these could be allowed to stand. The facts are shown in evidence, and are admitted in the present proceedings, to which all persons interested are parties. I may point out that the certificates of record could not have been issued upon the amended applications filed by John Casey, as these were not filed until 22nd October, 1907, and the certificates of record were issued on 5th November, 1907, which would be very much within the 60 days that must, under sec. 158a (5), elapse after recording before a certificate of record can properly issue. It is clear, therefore, that the certificates of record in the present case were issued upon the original fraudulent claims and are, therefore, affected by the fraud in these applications, for the staking out and recording of a claim is the basis upon which a certificate of record is granted.

I may point out, also, that by reason of sec. 136, the defendant James Casey could in no event be entitled to an interest in the property under any subsequent staking.

I think it is my duty to call attention to the facts disclosed in these proceedings by forwarding a copy of this decision to the Crown Attorney of the district.

Judgment dismissing the action and finding that the claims originally staked out and recorded in the name of John Casey are invalid and fraudulent.

NOTE.—S. 159 (2) as amended, now 71 (1) (Act of 1908), makes *any* material corroboration sufficient as a matter of law, writing being no longer indispensable, where the agreement is entered into before the staking out. Where the agreement is not entered into until after the staking out writing (as under the Statute of Frauds) is necessary; see s. 71 (2). See also note to *Re Greene and Clinton*, *post*.

(THE COMMISSIONER.)

RE GREENE AND CLINTON.

Agreement for Interest in Mining Claim—Evidence—Writing—Statute of Frauds—Grubstaking — Prospecting Partnership—Equal Share Where Share Not Fixed—New Staking by One Party at His Own Expense—Nature of Holder's Interest in Unpatented Mining Claim.

In the absence of statutory provision to the contrary a parol agreement, entered into before the staking out, for an interest in a mining claim is valid and enforceable notwithstanding the Statute of Frauds where it is shown that the person claiming the interest has contributed something toward the acquisition of the claim—a distinction being made between agreements entered into before the staking out and agreements entered into after the staking out.

Where a claim staked out under a prospecting agreement is cancelled for lack of discovery and is afterwards restaked by one of the parties on a new discovery as the result of a subsequent expedition of his own, the other party to the original staking, who stood by and offered no assistance, will not by reason merely that the new staking covers the old ground be entitled to a share in the new claim—the discovery and not the staking being the chief consideration for which the Crown grant is made.

Grubstaking agreements or prospecting partnerships usually terminate with the expedition agreed upon and result merely in a co-ownership of the claims acquired, the presumption being against the existence of a partnership generally or of a partnership for developing or working the claims.

Where the evidence establishes that one person is to share in a mining claim with another and nothing more appears it will be presumed that they are to share equally.

Proceedings by William F. Greene to enforce a claim to an undivided one-eighth interest in five unpatented mining claims in the vicinity of Silver Lake, in the Temagami Forest Reserve.

The claims were recorded in the names of the defendants Charles M. Clinton, John Lamorre and M. F. Steindler.

The plaintiff's claim was based upon a verbal agreement entered into between him and Clinton in January, 1907, under which Greene organized a prospecting expedition, Clinton undertaking to procure the expenses from his associate Steindler. The plaintiff paid some of the expenses out of his own pocket for the time being, but upon receipt of the money from Steindler he was reimbursed.

Six claims were staked out and recorded in February, 1907, as the result of the expedition. Five of them were cancelled in August and September following for lack of discovery, one being found valid. Four of the cancelled ones were restaked at Clinton's own expense. Though Greene was told

by Clinton that money was needed—Steindler refusing to contribute further, the one expedition being all he had agreed to pay for—he took no interest in the matter until some months later when, finding that one of the restaked claims seemed likely to be very valuable, he offered to bear half Clinton's expenses. Clinton made a new agreement with Steindler, and refused to transfer any interest to Greene.

J. W. Mahon, for plaintiff.

S. Johnston, for defendants.

30th May, 1908.

THE COMMISSIONER (after reciting the facts):—The plaintiff's counsel contends that his client is entitled to a direct interest or ownership in the claims under the agreement, or as a member of the partnership, or upon the trust which he contends resulted.

Counsel for the defendants relies upon the defence of the Statute of Frauds and sec. 159 (2) of The Mines Act, and claims that there could in no event be a partnership between Greene and Steindler, who had never seen or communicated with each other in regard to the transaction.

After careful consideration, I am confirmed in the impression that I formed at the hearing, that a distinction must be drawn between claim T. R. 406, which was staked out upon the expedition which was really the subject of the arrangement between Greene and Clinton, and which was staked before the enactment of sec. 159 (2) of The Mines Act, and the other claims which were acquired by the defendants on subsequent expeditions sent out and paid for by Clinton after the passing of that sub-section.

As to claim 406, the fruit of the expedition arranged for, it is abundantly clear upon the evidence of Clinton, as well as upon that of Greene and his witnesses Culbert and Klingensmith, that it was intended Greene was to get something out of it, and the difference in effect between Clinton's version of the matter and that of the other witnesses, seems only to be as to the form in which Greene was to get his share, for, as it was held in the case of *Wells* v. *Petty*, 5 B. C. 353, 1 Martin's M. C. 147, when the evidence establishes that one person is to share in a claim with another, and nothing more appears, it will be presumed that they are to share equally. Clinton's evidence would make Greene entitled to a share in the pro-

ceeds, while the other evidence would give him a direct part ownership in the claim. I think I must find upon the evidence that the latter was what Clinton promised, and this conclusion is somewhat strengthened by the fact that from the letters and telegrams that passed between Clinton and Steindler, and the agreement that was prepared by Steindler, it is clear that the relation between them (Clinton and Steindler) was that of co-owners, and not of partners in the ordinary sense of the term.

I think, also, in the circumstances, there is no bar to the proof of Clinton's interest in this claim, either by reason of the Statute of Frauds or The Mines Act. Sec. 159 (2) of the latter Act came into force 20th April, 1907, and is expressed to apply to claims thereafter staked out, and I think does not affect the case as regards claim 406, which was staked out in February, 1907. And in conformity with what I have already held in other cases, I think the Statute of Frauds is not a bar, at all events as to this claim. The agreement was entered into before the claim was staked out, Greene procured the men who did the staking, and advanced money for the time being for the enterprise. Had his men not gone up on this expedition they would, as Culbert and Greene intimate, have been engaged in a like enterprise for themselves. I think there is not only sufficient consideration for the one-eighth interest which it was agreed Greene was to get, but also that the circumstances are sufficient to constitute in Greene's favor the relation which is ordinarily described as a "grubstaking" agreement.

Mining authorities seem to be in practical accord that in the absence of express statutory provision, writing is not necessary for such an agreement. What principle this rests upon is not much discussed—whether upon the ground that the advance of money for the purchase or acquirement of property transferred to, or put in the name of another, is a circumstance calling for explanation and letting in parol evidence; whether the undertaking is regarded as in the nature of a partnership to the extent of acquiring ownership in the claim, and that such partnership relation may, as in all cases where not intended to extend beyond a year, be proved by parol; or whether it is merely upon the principle that the Statute of Frauds will not be allowed to be made an instrument of fraud and that where, as in the case of *Rochefoucauld* v. *Boustead* (1897), 1 Chy. 196, and *Re Marlborough* (1894), 2 Chy.

133, one person takes or acquires property knowing another is entitled to an interest in it, he will be held to be a trustee in respect of such interest. Such agreements are sometimes known as "prospecting partnerships," or "qualified partnerships." *Lindley on Mines*, 2nd ed., s. 858; *McPherson & Clark*, Law of Mines, 43-44; 27 *Cyc.*, 757-8-9; *Am. & Eng. Ency. of Law*, vol. 29, 899; *Reagan* v. *McKibben*, 19 Morrison's M. R. 557, 562. But even apart from these authorities, which generally hold that an interest in a mining claim is an interest in land within the meaning of the Statute of Frauds, it may be pointed out that sec. 140 of our Act reduces the status of the holder of a mining claim prior to the issue of a certificate of record to that of a mere licensee, and for such an interest it is well settled that no writing is necessary: 6 *Ency. of Laws of Eng.* 267; *Leake on Contracts* (3rd ed.), 212, 213, 215; *Wright* v. *Stavert*, 2 E. & E. 721; *Bainbridge on Mines*, 280, 281; 25 *Cyc.* 640; 27 *Cyc.* 690. In the case of *Reagan* v. *McKibben* (above cited), a distinction is drawn between agreements for interests in claims entered into before the staking out of the claims, and agreements entered into after the staking out, laying down the principle that as to the former writing is not necessary.

As to the objection that there is no privity and no partnership relationship between Greene and Steindler, in whose name the claim was staked, I think this cannot matter as upon the agreement entered into between Steindler and Clinton on 7th October, 1907, Clinton has acquired a specific interest in the claim more than sufficient to answer the obligation of his agreement with Greene, and being now possessed of that interest he will, upon the principle of the recent case of *McMeekin* v. *Furry*, 39 S. C. R. 378, be compellable to carry out his agreement and the interest which he has acquired can be held for that purpose.

Turning now to the claims subsequently acquired by Clinton at his own expense upon the expedition sent out afterwards and which were acquired after the passing of sec. 159 (2) of The Mines Act, I think both upon the facts and upon the law the plaintiff must fail as regards these claims.

Even if sec. 159 (2) of the Act, which, as I have mentioned, is expressly made to apply to claims staked out after 20th April, 1907, did not bar the plaintiff from enforcing an interest in the claim by the present proceedings, I think upon the fair interpretation of what appears in evidence the

plaintiff has no right in these claims. The contention that he was entitled was urged with a great deal of ability by his counsel who appears to have made a careful research of authorities, but while I am not unmindful of the requirement of good faith from any one who is in reality a partner or trustee, and while I recognize that the authorities are strong in holding that where one who is a trustee obtains renewal of a lease or other interest in what had been trust or partnership property he will be held to acquire and to hold it for the benefit of the trust or partnership, I think the circumstances here clearly preclude the plaintiff from any interest in these subsequently acquired claims.

I am satisfied from the evidence and the circumstances, and I think it cannot reasonably be questioned, that the enterprise entered into, in the fruits of which Greene was to have an interest, was limited to the one expedition which Greene assisted in sending up, and I think also the non-assessability of his share, as he and Klingensmith assert was the arrangement, was as clearly limited to that expedition and to the original acquirement of the claims and did not extend to any development work or subsequent expenses of any kind that might be required. His share was not to be liable for anything which the $500 being obtained from Steindler was intended to cover, and what that was intended to cover was the expenses of the expedition in sending the men up and getting the claims recorded. Development work or future restaking or any other outlay whatever was clearly not contemplated. Greene's own belated offer after having seen a rich discovery on one of the properties, to put up his money I think would of itself preclude any other interpretation, and the communications and arrangement at the time between Clinton and Steindler are conclusive against any such liability being upon Steindler, and it is equally clear that Clinton himself had not undertaken to put up any of his own money for any purpose. It is also clear that Steindler when restaking of the claims became necessary refused further money, taking the ground that the enterprise and arrangement was completed and finished with the original expedition. The money for the subsequent expedition and for the prospecting and discovery of mineral which was an essential prerequisite to the restaking was all borne and looked after by Clinton, and the restaked claims were acquired for himself, and it was only by the subsequent agreement with Steindler on 7th October, which was in fact upon

a basis independent of the original arrangement of January, that Stiendler acquired interests in these restaked claims. It would appear to me to be grossly unjust that Greene should stand by and have Clinton undertake all the responsibility and expense of acquiring the claims, and when and only when it was found that the expenditure was successful Greene should come in and promise to pay a part of the outlay. It would be only on the strength of authority to this effect that I would hold him so entitled, and the authorities I think are quite the other way.

The cases are strong in holding that in prospecting enterprises or "grubstaking" agreements such as is here in question, the relationship between the parties so far as operations and outlay are concerned terminates with the expedition agreed upon and results merely in a co-ownership in the claims acquired, the presumption being strongly against the existence of a partnership generally or a partnership for developing or working the claims. *McPherson and Clark*, Law of Mines, 44; *Lindley on Mines* (2nd ed.), s. 858; *Bainbridge on Mines* (5th ed.), 188; 27 *Cyc.* 756, 757; *Armstrong's Gold Mining in Australia and New Zealand* (2nd ed.), 213, 214; *Alexander* v. *Heath*, 8 B. C. 95, 1 Martin's M. C. 333; *Stewart* v. *Nelson* (1895), 15 N. Z. L. R. 637; *Hartney* v. *Gosling*, 10 Wyo. 346, 68 Pac. 118, 22 Morrison's M. R., 239; *Boucher* v. *Mulverhill*, 1 Mont. 306, 12 Morrison's M. R. 350.

It was held in the case of *Page* v. *Summers*, 70 Cal. 121, 12 Pac. 120, 15 Morrison's M. R. 617, that where a prospecting mining partnership has been dissolved by mutual consent there is no implied duty upon any of the partners to complete defective locations, and if they have done so they are not chargeable as trustees of the others. The same principle would, I think, be applicable to the present case, as the partnership between the parties, if there was anything at all that could be called a partnership, was clearly limited to and ended with the expedition sent out in February, and the recording of the claims staked on that expedition. What remained afterwards was not a partnership but merely a co-ownership in the claims which were the result of the expedition.

There is no connection whatever in title between the claims originally staked in February and the claims restaked in August and September. The acquirement of a mining

claim is the reward that the discoverer receives from the Crown for making the discovery of valuable mineral. It is the discovery of mineral and not the staking of the claim which is the meritorious act and the consideration for the Crown grant. Land once staked by a person is, after the claim is thrown out, as open to all other prospectors as to the original staker. The cancellation by which the claim is thrown open is publicly posted in the Recorder's office that all may have the benefit. The original staker has in fact less right or opportunity to restake than others, for sec. 136 precludes him, except in the particular circumstances therein mentioned, from acquiring title in the same land thereafter.

The case of *Perry* v. *Morton*, Argus, November 26, 1868, cited and discussed in *Armstrong's Gold Mining in Australia and New Zealand*, 214, and in *McPherson and Clark's Law of Mines*, 62, seems very much in point. P. was sleeping partner with M. in a block claim, and M. worked it for himself and P. on certain terms as to the division of profits. M., while working, discovered another reef and took out a claim upon it for himself under regulations which provided that any party working in a claim shall be entitled to an area of ground provided such paying reef be not within 40 feet of the gutter. Held, that P. had no interest in the new claim as it was intended to be the reward of labor, and that the new claim had nothing to do with the partnership subsisting in the other claim.

The case of *Burn* v. *Strong*, 14 Grant 651, which is a very instructive one, seems to be in harmony with the principles laid down in the cases I have cited. The decision in that case—holding that three associates, who had agreed to share in the ownership of one claim to the acquisition of which two of them were contributing their labor in work upon the claim and the third money to meet expenses, were similarly interested in another claim to which they had all subsequently transferred their operations and to which they had devoted their labor and money in the same way—proceeds upon the ground that the similar contribution to the new enterprise implied a continuance of the terms as to sharing in its results. In the case before me the element of contribution by Greene of anything of any kind to the new enterprise by which the four claims were acquired by Clinton is entirely lacking.

Upon the facts, therefore, as well as by reason of sec. 159 (2) of the Act, barring the enforcement under the Act

of any interest in mining claims staked out and recorded in the name of another person after that provision came into effect where there is no writing to support the claim for such an interest, I think the plaintiff's action must be dismissed as regards the four claims staked out in August and September.

Judgment finding Greene entitled to 1/8 interest in mining claim T. R. 406, and dismissing his claim to an interest in the other 4 claims.

NOTE.—S. 71 of the Act of 1908 now settles the question of proof required in Ontario to establish an interest in an unpatented mining claim—writing or material corroboration must be had and is sufficient for agreements made before the staking out; the Statute of Frauds must be complied with for agreements made after staking out.

As to retrospectivity of present s. 71 see *Chevrier* v. *Trusts and Guarantee Co.*, 14 O. W. R. 101; Leake on Contracts (4th Ed.) 196; 20 Cyc. 279, 281.

In *Harrison* v. *Mobbs*, 12 O. W. R. 465, Moss, C.J.O., queries whether the doctrine of part performance would apply to s. 71.

As to the Statute of Frauds not being permitted to be made an instrument of fraud, see *McLeod* v. *Lawson*, 8 O. W. R. 213, at 216.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

18 O. L. R. 63; 13 O. W. R. 177.

RE WESTERN & NORTHERN LANDS CORPORATION AND GOODWIN.

Lands Open—Townsite — Leave of Minister — Evidence—Burden of Proof — Attacking Existing Claim — Compensation for Surface Rights.

Under The Mines Act, 1906, subdividing township lots into small lots of the character of town lots and registering the plan in the Land Titles office and advertising and selling a number of the lots as town lots, did not constitute the land a "townsite" so as to preclude the staking out of a mining claim upon it.
(See now sec. 36 of the Mining Act of Ontario (1908)).

The Western and Northern Lands Corporation owned the surface rights of lands of which the minerals were reserved to the Crown and upon which a mining claim had been staked out in November, 1906, by one McLaren, which George Goodwin purchased and was developing.

Goodwin applied to the Commissioner to fix the compensation which the Act (sec. 119) allows in such cases to the surface owner, this being necessary before a patent could be

procured for the mining claim. The company thereupon took proceedings in the High Court to restrain Goodwin from further interfering with the property, on the ground that his mining claim was invalid because of being staked out on a townsite (sec. 109) which could not legally be done except by leave of the Minister.

The Court referred the matter to the Commissioner.

R. McKay, for the company.

A. G. Slaght, for Goodwin.

3rd June, 1908.

THE COMMISSIONER.—The mining claim in question was recorded in the name of Peter McLaren on 21st November, 1906, upon a discovery of valuable mineral alleged to have been made and staked by him on 20th November, 1906. Goodwin purchased the claim from McLaren, and received and recorded a transfer of it dated December 1st, 1906, paying for it as he says $1,500. On 19th December, 1906, he recorded the necessary 30 days work, and on 12th August, 1907, recorded 102 days further work in accordance with the Act. No question as to right to stake and record appears to have been raised until the application to fix compensation for injury to the surface rights was made. Under the Mines Act it is necessary for the holder of a mining claim to have the matter of surface rights adjusted before he can obtain a certificate of record or a patent for the claim.

The contention of the company that there was no right to stake the property for a mining claim and that Goodwin has no rights therein is based upon sec. 109 of the Mines Act, 1906, which provides that

"No mining claim shall be staked out or recorded on any land included in or reserved or set apart as a town site whether the same shall have been subdivided into town lots or not, or upon any station grounds, switching grounds, yard or right of way of any railway, or upon any colonization or other road or road allowance, except by order of the Minister."

It is claimed that when the mining claim was staked out and recorded on 20th and 21st November, 1906, the lands comprised part of a townsite within the meaning of this section.

In support of this contention it was shown in evidence that the Company in the winter or spring of 1906, acquired

the surface rights in some seven or eight hundred acres of land including the lands in question, the mines, minerals and mining rights being, as usual in that part of the Province, reserved to the Crown and open, subject to the provisions of The Mines Act, to be staked out as mining claims. In April and May the lands were surveyed into small lots of the ordinary character of city, town or village lots, with streets or roads provided for in the usual way. The plan of this survey was filed in the Land Titles office for the district in accordance with the provisions of The Land Titles Act, in June, 1906. The plan does not state that the property was intended for a town or village, being merely headed "Plan of Subdivision of Lot 12, Concession 2, Township of Bucke."

There seems to be no official record in any way, unless the filing of the plan as above mentioned could be deemed one, of the establishment of a townsite or of the naming of it as a townsite or as a town, though the place seems to have been known and spoken of by persons referring to it, or by some persons, as North Cobalt.

The Company held at Cobalt in May, 1906, an auction sale of what they called their North Cobalt town lots, and a considerable number of lots were then sold, including 5 lots on the 20 acres now in question. The lots were also advertised for sale in the newspapers and in other ways. In September, 1906, the Company commenced to clear up and open a number of the streets or roads through their property, not very much of this work having been done, however, until after the mining claim in question had been staked out, and none of it having been done upon the 20 acres in question.

No houses or other buildings except the existing houses of former settlers had been built upon any part of the so-called townsite until after the staking of the claim, and up to that time there was no railway station or Post Office at the place.

Evidence was put in subject to objection showing that a station and Post Office named North Cobalt had since been established, that over 60 new buildings had been put up on various parts of the property, and that other extensive clearing and improvements had been done subsequent to the staking out and recording of the mining claim.

Mr. Goodwin says that when he purchased the claim from McLaren he examined the record at the Recorder's office but found nothing and knew nothing about any dispute or question regarding the title.

McLaren, who staked out the claim, was not a witness.

No evidence was given by either party as to whether or not the Minister had made an order as mentioned in sec. 109 permitting the staking out and recording of the property, Counsel for the Company claiming that the onus of proving this was upon Goodwin, and Goodwin's Counsel claiming that the onus of showing that no such order had been made was upon the Company, who were attacking the mining claim which is upon record in the office of the recorder.

The term "townsite" is not defined in the Act. Only in two places, other than sec. 109 of The Mines Act, is the term townsite used in the Ontario Statutes so far as I have been able to discover; First, in Cap. 7 of the Ontario Statutes of 1904, where provision is made (in sec. 3) for the transfer by the Lieutenant-Governor in Council for townsites of portions of the ungranted lands of Ontario along the line of the Temiskaming and Northern Ontario Railway adjacent to stations or proposed stations. It is there provided that the registration of a certified copy of any such Order in Council in the Registry Office or Land Titles Office shall vest in the Railway Commission as trustees for the Province the lands described in any such Order in Council, and it is also provided in the same section that the Railway Commission may for the same purpose acquire other lands so situate by the same means as it is authorized to acquire lands for right of way and station grounds, which lands acquired for townsites are not, however, to exceed one thousand acres for any one site; Secondly, in Cap. 14 of the Ontario Statutes of 1906, which (in sec. 2) gives the Temiskaming and Northern Ontario Railway Commission the right to sell or lease lands, minerals and mining rights of townsites vested in the Commission.

The provisions governing the establishment of towns in the districts of Northern Ontario are contained in cap. 30 of the Ontario Statutes of 1902, and are in brief that upon petition signed by at least 75 male inhabitants of any locality of an area of not more than 750 acres having a population of at least 500 souls the Lieutenant-Governor by Order in

Council may issue a proclamation under the Great Seal of the Province declaring that such inhabitants shall be constituted a body corporate as a town.

There is no pretense that North Cobalt was at the time of the staking out of the mining claim in question or is now a townsite or a town within the meaning of any of the above-mentioned provisions for establishment of a townsite or town.

It is contended, however, that the term townsite must be given a wider meaning—that it is not limited either to the formal establishment by the Lieutenant-Governor in Council of a townsite as technically so-called, or, much less, to a place upon which a town as defined in the Act respecting the establishment of towns in Northern Ontario is actually situate. In short it is contended that the word townsite simply means, as defined in the Standard Dictionary, the location where a town is or is to be built, and that at all events the survey, the registration of a plan of subdivision of township lots and the sale of lots in accordance with the plan, constitute all that is required to make the place in question a town site within the meaning of sec. 109 of The Mines Act; and it is pointed out that on the registration of this plan or rather the filing of it in the Land T les Office, and the sale of lots in accordance with it, the streets or roads laid out upon the plan become public roads and are as such exempt from being staked and recorded for a mining claim.

Counsel for Mr. Goodwin upon the other hand contends that even if the company is entitled to attack the recorded claim at all the term townsite must be confined to its strict meaning as the word townsite or the word town is specifically used and dealt with in our Statutes.

Passing over for the moment the question of the right of the surface owner to attack the miner's title in the present case and leaving out of consideration also for the moment the question of leave or order from the Minister to stake and record the claim, the question at issue is purely one of interpretation of sec. 109, and there seems to be little or nothing in the way of direct authority that is of assistance in arriving at a conclusion.

The word "town" if taken alone has various meanings ranging from the statutory meaning of incorporated town as defined in our Municipal Act or in cap. 30 of the Statutes of 1902, to its widest generic signification of any collection

of houses or inhabitants in close proximity to one another as distinguished from rural places or inhabitants.

The term "site" is defined in the dictionary as a place suitable or used for the permanent location of anything (Webster).

The combination of the wider meaning of the two words would clearly make a meaning entirely too wide and too indefinite to be applicable to the Statute in question. It could never have been intended that the place where a collection of dwellings might be built by reason merely of the suitability of the place for that purpose should be excluded from staking out or recording as mining claims, nor could there ever be any possibility of practically applying such a definition with the certainty necessary in legal matters.

Nor do I think the mere fact of a location or tract of land being spoken of or even advertised as a town site—which any surface rights owner might do with no other intent than to keep prospectors off the property—would bring it within the meaning of sec. 109.

There remains to be considered the matter of survey into small lots of the character of town or village lots and the filing in the Land Titles office of a plan of such subdivision and showing streets or roads upon it.

As to the matter of roads or streets being dedicated by the filing of the plan and sale of lots in accordance with it, I think that even though the roads might thereby be exempted from the mining claim, the mere fact that they were so exempted could not destroy the miner's right to have his claim staked out upon the parts of the property not comprised in the roads. It has as a fact been the common practice to allow mining claims to be taken up and patented in such cases, merely excepting the roads or other exempted land from the patent of the claim.

Though the matter to my mind is not free from doubt, I think I must hold that the filing of the plan even accompanied by the sale of lots and whatever else had been done up to the time of the staking out of the claim, did not bring the ground within the meaning of "townsite" as used in sec. 109. I am inclined to think that as a matter of fact the meaning of that term is confined to townsites properly so-called established by the Lieutenant-Governor in Council under cap. 7 of the Statutes of 1904, or as being land

actually within the limits of a town established either under cap. 30 of the Statutes of 1902, or established under the Municipal Act, though the latter mode of establishment can, of course, have little application in Northern Ontario.

The only judicial definition of the term townsite that I have been able to find is contained in "Words and Phrases Judicially Defined," which has the following:

> "Townsite" as used in the Statutes of Colorado and in the Statutes and Territories of the West generally means that portion of the public domain which is segregated from the great body of government land by the proper authority and procedure as the site for a town, and will not be held to apply to an unincorporated town or city. *Rice* v. *Colorado Smelting Co.*, 66 Pac. 894-5, 28 Color. 519."

A perusal of the case cited in the above definition does not give much light, the quotation being copied from what is apparently merely a dictum or the statement of what is assumed to be a general principle applying in the Western States, where the mining rights and the surface rights are in conflict somewhat in the same manner as in the northern parts of our own province. In Colorado and other western states, it may be mentioned, there is a formal procedure for entering and establishing a tract of territory as a townsite —in other words there is there, as there is in our own province, a specific meaning for the term townsite to which the term may be definitely and accurately applied.

The filing of a plan to my mind does not, and did not as the law existed in November, 1906, establish anything which could be called a town or which could with any proper legal signification be called a townsite. The land remains for all purposes, as before, merely a part of the township of Bucke, and the civil rights, duties and obligations of persons residing upon it are, as before, merely those of ratepayers of the township. Whether a town will ever be built or constituted upon these lands or in their vicinity is even now exceedingly problematical.

If the filing of a plan of a subdivision of a property would constitute the establishment of a town site without any law or declaration providing that it should do so then the question might well be raised whether a survey by a surveyor or a mere subdivision of the land by the owner himself into small pieces for the purpose of making more convenient sale would do the same thing. If the definite meaning attached to the term by Statute and in ordinary legal usage be departed from where can the line be drawn?

I think I must hold that the lands in question were not comprised in a town site within the meaning of sec. 109 when the mining claim now held by Goodwin was staked out and recorded.

Upon the question of whether or not leave had been obtained from the Minister to stake out the claim; after an examination of the authorities I have with some hesitation reached the conclusion that it is upon those who are attacking the claim, which to all appearances has been properly and regularly recorded in the Mining Recorder's office, that the burden of proof, or, as a number of writers more accurately as they say express it, the burden of evidence lies.

Goodwin not only has upon record in his name a mining claim *prima facie* valid and regular but he has also been in possession and use of the claim and working upon it for a very considerable time. I think this record of title and possession and use of the claim must be presumed to be valid until at least some evidence is produced to indicate the contrary, and the Mining Recorder being a public official I think there may well be a presumption in the circumstances that his official acts in recording the claim were properly performed.

In the authorities the principle that a party is not in general required to prove a negative allegation seems somewhat confused with the proposition that a party is not bound to prove facts peculiarly within the knowledge of the other party, but I think it is clear that both propositions, even if accepted as generally true, are subject to very many exceptions, and I think it is quite clear that conditions and presumptions in favor of the resisting party such as I have mentioned will at all events shift the burden. Some authorities seem to go so far as to hold that the party who has the affirmative in substance of the dispute must give some evidence of all facts upon which his contention depends and that the two exceptions above mentioned merely limit the amount of evidence that will be accepted from him as sufficient to shift the burden to the party asserting the negative or the party having peculiar knowledge of the fact. In this case it may be remarked that Goodwin can scarcely be said to be a person having peculiar knowledge as to whether or not the Minister's order was obtained, as it was not he who staked the claim. It may be pointed out also that it would have been easy for the company to have obtained some evidence, for instance from the Recorder or from his office, to

the effect that the Minister made no such order if that contention be true. *Taylor on Evidence* (8th ed.), 343, citing *Williams* v. *East India Co.*, 3 East, 192; *Toleman* v. *Portbury*, 39 L. J. Q. B. 136, and *Doe* v. *Whitehead*, 8 A. & E. 571, and at p. 353, citing *Dickson* v. *Evans*, 6 T. R. 60, and *Elkin* v. *Jansen*, 13 M. & W. 662; *Phipson's Law of Evidence* (4th ed.), 24-28; *Chamberlayne's Best on Evidence*, s. 272 et seq.; 16, *Cyc.* 927, 936, 937, 1076, 1080, *Encyc. Laws of England* (2nd ed.), vol. 2, 471.

I may add that I think attacks of this kind upon the holdings of a miner who has what may be called a title or something akin thereto duly recorded and who has, in apparent accordance with the Act, been working upon the claim and expending money thereon for a considerable time without question by the surface owner, should not be encouraged where the attacking party has no title to the mines or minerals himself and claims no right therein, and I think the benefit of the doubt, where any exists, should be given to the holder of the claim.

Attack on validity of mining claim dismissed and compensation for injury to surface rights of the 20 acres fixed at $1,500.

The Company appealed from this decision to the Divisional Court.

The appeal was heard by MEREDITH, C.J., MCMAHON, J., TEETZEL, J., the judgment of the Court being delivered on 2nd January, 1909, by

MEREDITH, C.J.:— . . . We are of opinion that the view of the Mining Commissioner as to the proper construction of the section was right.

In addition to the reasons given by the Commissioner for reaching his conclusion, which are set out in the award, it is to be remembered that the Act deals primarily and mainly with ungranted lands of the Crown, though it does also deal with mines which have been reserved by the Crown in lands granted by the Crown.

As the Commissioner points out, the expression "townsite" is used only in two enactments of the provincial legislature, the first of these being an Act relating to the Temis-

kaming and Northern Ontario Railway, 4 Edw. VII. ch. 7, by the third section of which the Lieutenant-Governor in Council was authorized to transfer to the Railway Commission for townsites certain ungranted lands along the line of the railway, and to take compulsorily from the owners for the same purposes other land so situate.

This Act and the Mines Act were passed in the same session, and it seems not unreasonable to infer that the townsites mentioned in sec. 109 were the townsites with which the legislature was dealing in the other Act. The proviso to sec. 109 does not, as it appears to me, displace this inference; it was added, no doubt, *ex majori cautela*, and to give legislative sanction to the transfer which before then had been authorized by Order-in-Council only.

The words "reserved or set apart" are more applicable to action taken by the Crown than to that of private persons.

It is also to be borne in mind that it was the practice in earlier times—whether that practice is still followed I do not know—in the original surveys of Crown lands to lay out what were called "town plots," and to reserve lands for town plots. Though the draftsman of the Mines Act does not use that term, he appears to have had in mind the same thing, to which he gave the name of "townsites."

Nowhere in the Surveys Act, R. S. O. 1897 ch. 181, under the authority of the 39th section of which the appellants' subdivision was made, is a townsite spoken of, and in the Registry Act, R. S. O. 1897 ch. 136, sec. 100, which deals with plans of subdivided lands, the provision is, that "where any land is surveyed and subdivided for the purpose of being sold or conveyed by reference to a plan . . . the person making the subdivision. . . ."

To give to sec. 109 the meaning ascribed to it by the appellants would enable the mining districts to be covered with paper towns, the existence of which, though on paper only, would prove a handicap to prospecting and exploring the areas which they embrace, for they could be opened for that purpose only by the order of the Minister, the obtaining of which would involve delay and loss of time—important considerations for the prospector and miner.

That I am not putting it too strongly when I speak of covering the mining districts with paper towns, is shown by the language of the section which exempts the land, whether

divided into town lots or not, and there is besides, no provision that a plan shall have been registered or even made, and none that lots shall have been sold according to a plan.

I am unable to attribute any such intention to the legislature, as it would mean that the owner might exclude the prospector or miner, while holding in his own hands the power at will to wipe out his subdivision, for that he might do though a plan had been registered as to the whole subdivision, if no lots had been sold according to the plan, and as to practically all except the lots which had been sold, had lots been sold.

In my opinion, the appeal fails and should be dismissed with costs.

NOTE.—S. 109 has since been amended. See present s. 36 (Act of 1908).

(THE COMMISSIONER.)

RE CHARTRAND AND LARGE.

Appeal from Recorder—Party "Adversely Interested"—Lack of Service—Discovery—Valuable Mineral.

In an appeal from cancellation of a mining claim staked out while a working permit application was pending, the working permit applicant is a party "adversely interested" within the meaning of the Act, and if he is not served with notice of the appeal the appeal must be dismissed.

Appeal from cancellation by the Recorder of the appellant's mining claim for lack of discovery of valuable mineral.

S. White, K.C., for appellant, H. A. Chartrand.

J. A. Rowland, for respondents, George H. Large and J. E. Murphy.

7th July, 1908.

THE COMMISSIONER.—The appellant staked the property on 6th August, 1907, while it was under staking and application made by Joseph E. Murphy for a Working Permit.

Objection was taken that the appeal was not properly launched, because Murphy was not served with notice of the appeal, as required by sec. 75 of the Act. I think Murphy as the holder of the Working Permit application, was a party

adversely interested within the meaning of that section, and that he should, therefore, have been served with the notice of appeal. The evidence shows that he was not so served.

Though I think on the ground of lack of service the appeal would have to fail, I nevertheless proceeded to hear the evidence of the witnesses present upon the merits. I could not, upon the evidence, even of the appellant, feel justified in allowing the discovery. There was nothing at all approaching what is defined in sub-sec. 22 of sec. 2 of the Act as valuable mineral—nothing that anybody would be justified in saying would probably be capable of being developed into a producing mine likely to be workable at a profit. The evidence of Mr. Rowe, on behalf of the respondents, I think was a very fair and reliable estimate of the nature of the alleged discovery, and I can have no hesitation in finding that the appeal should be dismissed upon the merits.

(THE COMMISSIONER.)

RE SMITH AND PINDER.

Recorder's Decision—Finality of—Recorder cannot Revoke—Distinction between Inferior and Superior Court—Importance of ending Litigation—Meaning of "Final"—Staking—Substantial Compliance — Tree for Post — Posts Under Size — Misleading other Prospectors—Inability to point out Discovery.

A Mining Recorder who has once given his decision upon a dispute and recorded it in his books has no power to rehear the case or alter his decision except, perhaps, to correct an accidental slip or omission.

In mining matters even more than in other cases it is important that litigation should be quickly and definitely disposed of.

Failure to erect a No. 1 post and using instead a tree 10 feet from the corner, the tree not being properly squared and not cut off, nor so fashioned as to be readily taken for a mining claim post, is not a substantial or sufficient compliance with the Act; nor it seems is a staking with the discovery post and the No. 1 post only half the prescribed size and the discovery post only 16 inches high.

This was a case of rival mining claims upon the same property. The facts are stated in the decision.

Mr. Pumaville and *Mr. Neville*, for W. J. Smith.

Mr. White and *Mr. Slaght*, for Nelson Pinder.

21st July, 1908.

THE COMMISSIONER.—Smith claims the property in dispute under alleged discovery and staking of 23rd January,

1907, recorded 11th February, 1907, and Pinder claims under alleged discovery and staking of 24th April, 1907, filed 29th April, 1907.

Each party claims that the claim of the other is invalid and disputes under sec. 158a of the Act were duly entered, and the Recorder, pursuant to sec. 52 (2), has transferred all questions to me for adjudication.

The matter is complicated by the fact that the Recorder had on 10th January, 1908, already adjudicated upon the Smith claim, and on that date entered his judgment or decision in his books in favor of the dispute lodged by Pinder against the Smith claim, and marked the claim cancelled in pursuance of the Act.

On application on behalf of Smith, supported by affidavits filed, but without any notice whatever to Pinder, the Recorder on 21st April, 1908, revoked and set aside, or purported to revoke and set aside, his former decision upon the dispute against the Smith claim in order that a new trial might be had in respect to it, both disputes being, as above mentioned, transferred to me for adjudication, the reference to me being apparently wide enough to cover the matters in question generally.

On the opening of the hearing before me, counsel for Pinder objected to my dealing with the Smith claim, taking the ground that the Recorder had already disposed of this in his decision of January 10th, when he entered his judgment and cancelled the claim, and that he was thereafter *functus officio*, and that his purported revocation and setting aside of his former decision and cancellation was without authority and nugatory. It was also pointed out that the purported revocation was made without any notice whatever to Pinder.

After giving the matter very full consideration, I think I am compelled to hold that this objection must prevail.

Sec. 52 (1) of the Act provides (among other things) that

"The decision of such Mining Recorder in all cases which he is by this Act authorized or empowered to settle or adjudicate upon shall be final except where an appeal is made therefrom to the Mining Commissioner within the time and in the manner by this Act provided."

Sub-sec. 3 of sec. 52 provides that

"Any licensee or person feeling aggrieved by any decision given or by any act or thing done or refused or neglected to be done, whether ministerial or judicial, by a Mining Recorder, may within

the time and in the manner in sec. 75 of this Act specified appeal or apply in respect thereof to the Mining Commissioner, who may hear and determine the matter and may make such order in the premises as may seem just; but in any case where such appellant or applicant has not in the manner specified in sec. 62 of this Act been notified of such decision, act, refusal or neglect of the Mining Recorder the Mining Commissioner may, notwithstanding that the time for appeal may have expired, allow such appeal or application to be made if the appellant or applicant appears to have suffered substantial injustice and has not been guilty of undue delay."

Sec. 75 provides that

"No appeal authorized by this Act from the decision of a Mining Recorder to the Mining Commissioner shall be allowed after the expiration of fifteen days from the record of such decision by a Mining Recorder in the books of his office, unless within that time the time for appeal is extended by the Mining Commissioner, and thereafter not after the time limited by the Mining Commissioner therefor. Notice of appeal shall be given by filing a copy thereof in the office of the Mining Recorder and serving a copy thereof upon all parties adversely interested therein.

(2) Provided that the Mining Commissioner, when the notice of appeal has been filed with the Mining Recorder within the time herein specified, and he is satisfied that it is a proper case for appeal, and that after reasonable efforts the adverse parties or any of them could not be served within the time mentioned, may either before or after the time so limited make such order as he deems just for substitutional or other service upon such adverse parties."

There is no question but that the decision and cancellation of the claim, which latter may in a sense be deemed the execution of the decision, were entered in the Recorder's books on 10th January, 1907, and Smith was, pursuant to sec. 62 of the Act, notified by registered letter of such decision. Smith also as a fact duly received the notice in ample time to put in an appeal, but no appeal was entered or in any way presented until after the time had expired.

The application to the Recorder to reopen the case was plainly an endeavor to repair the effect of Smith's delay in appealing under sub-sec. 3 of sec. 52, and in that way is, of course, an attempt to circumvent the provisions of the Act, and the decision of the Divisional Court in *Re Petrakos*, 13 O. L. R. 650. Smith's excuse for the delay is that he had bargained for a sale of the claim to other persons and was communicating with them as to the question of appeal, and waiting to hear from them.

Upon the ground that it was clearly the intention of the Act that there should be finality in the decision of the Recorder unless that decision is impeached within the time, and in the manner provided in the sections above quoted, and upon the ground that the Recorder being an officer of limited jurisdiction—an inferior Court, so to speak—I think I have

no alternative but to hold that having once made and recorded his decision, and in fact executed it by cancellation of the claim, he had no power to change or alter it, with the exception, perhaps, that he might have the right to correct an error arising from an accidental slip or omission in his decision or order, as to which no question arises in the present case.

The point raised is a very important one in connection with our mining law. There are, of course, two opposite evils, one the uncertainty and dragging out of litigation consequent upon a lack of finality in the Recorder's adjudication, and the other the danger of injustice in individual cases where the time provided in the Act has been allowed to go by without taking action against what the Recorder has done. In mining matters, even much more than in ordinary cases, it is important in the interest of litigants and the public generally, that litigation should be as quickly and definitely disposed of as possible. It is right, on the other hand, that there should, if possible, be protection to every individual from mistake or from any injustice that may have been done him, but I think as a fact the Act in the provisions above quoted gives a pretty ample protection. Everything which the Recorder may do is appealable and in all cases such as the present, the appeal may be carried to the ordinary Courts. The Act provides that the party affected must be notified by registered letter of the decision, and unless this has been done he is never shut out from appeal. I have no doubt that in the interests of miners and others having to do with mining property, it is best that what I think is the clear intention of the Act as to finality in these matters should not be frittered away.

Some controversy perhaps might arise as to the meaning of the word "final" in sec. 52 (1) above quoted, but I think it should be given its ordinary and natural meaning which appears appropriate to the context, namely, "that which absolutely ends or concludes a matter; precluding further controversy of the question passed upon," 19 *Cyc.* 532. As to the different meanings of the word, see *Cushing* v. *Dupuy*, 5 App. Cas. 409, 416; 7 *Ency. Laws of Eng.* (2nd ed.) 530.

It seems further to be well established that an inferior judicial officer, or an inferior Court, has no inherent jurisdiction to set aside his or its own judgment or decision when once entered, though the reverse is the rule in the case of a superior Court or Court of general jurisdiction, subject to the qualification that any Court may probably correct an acciden-

tal slip or omission owing to which the judgment or order does not really express the intention of the Court, and subject to the qualification that in the absence of special rule or statute, a superior Court or Court of general jurisdiction can, when its judgment is finally entered and complete, set it aside only for certain well established causes, such as fraud or collusion. I need not attempt an exhaustive review of authorities, but a few may be referred to.

In *G. N. R'y Co.* v. *Mossop*, 17 C. B. 138, it was held that it is not competent to a County Court Judge, where he has once heard and disposed of an application for a new trial to rehear the case at a subsequent Court. I may quote the following extracts from the judgments:

Gervis, C.J.: "I apprehend it to be plain, as a general rule, that an inferior Court cannot grant new trials. To that there may be exceptions, though even that has been doubted by very competent authorities."

Crowder, J.: "I am also of opinion that this matter was adjudicated upon and determined and the power of a judge exhausted before the second application to him for a new trial. It is of the utmost importance that parties should know when the litigation between them is at an end. . . . It is of the utmost importance that the decisions of all Courts established for the administration of justice should be final and conclusive."

Willes, J.: "The very object of instituting Courts of Justice is that litigation should be decided, and decided finally. This has been felt by all jurists. It is long since a reason has been assigned why judgments should be considered final, and should not be ripped up again. . . . Human life is not long enough to allow of matters once disposed of being brought under discussion again, and for this reason it has always been considered a fundamental rule that when a matter has once become *res judicata* there should be an end of question about it."

In *Irving* v. *Askew*, L. R. 5 Q. B. 208, it was held that a County Court Judge cannot, except by consent or after a new trial, alter a judgment which he has formally given. In this case the County Court Judge refused to certify a case for appeal, desiring to alter his judgment, the defendant objecting to such alteration. It was held by Hannan, J., that he must certify and could not alter the judgment. "If, having given judgment, the judge attempts to rescind it, he subjects

himself to prohibition: *Jones* v. *Jones*, 5 D. & L. 628; the judgment of the County Court Judge being once given he is *functus officio* except in so far as further powers are conferred upon him by the statutes regulating the proceedings of his Court."

In the case of *Preston Banking Co.* v. *Allsup*, 1895, 1 Ch. 141, it was held that "the Court has no jurisdiction to hear or alter an order after it has been passed and entered, provided that it accurately expresses the intention of the Court."

In *The Recepta*, 1893, p. 255, it was held that the County Court Judge had no power to rescind the part of his judgment dealing with costs.

In our own Courts we have the case of *R.* v. *Doty*, 13 U. C. R. 398. This case arose out of a criminal case reserved to set aside a conviction for perjury committed in evidence given at a retrial of a Division Court case, the Division Court Judge at London having made an order setting aside his former judgment, or rather the judgment of a Barrister legally acting for him under the Act. Judgment was delivered by Draper, J., upsetting the conviction for perjury on the ground that the second trial was void, the judge having no power, except as expressly provided in the Act, to grant a new trial.

In the more recent case of *Nilick* v. *Marks*, 31 O. R. 677, Meredith, C.J., held that the Judge of a Division Court has no inherent jurisdiction to set aside his judgment, even for fraud. "The superior Courts have undoubtedly jurisdiction to relieve a party against whom his opponent has by fraud obtained a judgment. That relief is obtained in England by action to set aside the judgment (*Cole* v. *Langford*, 1898, 2 Q. B. 36), and in this Province by petition in the action (Consolidated Rule 642)." This decision was sustained on appeal to the Queen's Bench Division.

It has also been held that where a Judge acts as a *persona designata*, there is no appeal from his decision or award unless expressly given: *Re King*, 18 P. R. 365.

Though it would seem from the decisions that the Recorder would have no power to open up his judgment, even for fraud—or to do so in any case, except, perhaps, where by an accidental slip or omission, the decision or order did not truly represent his intention—I may mention that there is no pretence of fraud and no misconduct in any way on the part

of Pinder in connection with the decision. The only ground which seems to me to have any weight is the somewhat unsatisfactory way in which Smith was notified of the hearing of the dispute, but I am satisfied that he had or would have had every opportunity of presenting his case and putting in his evidence had he used anything like ordinary intelligence and diligence. . . .

Though I think the matter so far as the Smith claim is concerned must be disposed of upon the ground already stated, perhaps in the interest of speedy determination of the matter in case an Appellate Court should take a different view, I should not evade the rather difficult task of making a finding upon the merits of the Smith claim upon the evidence before me.

After a good deal of hesitation, I have reached the conclusion that I must, upon the evidence, find against the validity of the Smith application. To go into all the details would extend my decision to an extraordinary length. I will only say that though I must find upon the evidence that Smith and his associates were upon the property at or about the time they claim to have been, and that he and his assistants went through the form of what they called a staking of it, I find that the staking was not in substantial compliance with the provisions of the Act, nor in substantial compliance therewith as far as the circumstances reasonably permitted. The most vital defect was the failure to erect a No. 1 post, which is much the most important post in connection with the staking. Instead of making or planting a post in accordance with the Act, a tree which stood some ten feet or so from the proper corner was blazed, or partly squared or faced, but upon the side of the tree near the proper location of the corner, was only a slight blaze. The tree was not cut off as expressly required by sec. 2 (20) of the Act, and I find that this tree did not in the circumstances reasonably answer the purpose of a stake. It was not such a thing as the ordinary prospector or miner would take, unless he made a close examination, to be a post of a mining claim. I find also that Pinder, though he saw the tree and a slight blaze on it, did not know that it was a post belonging to a mining claim. I am averse to holding claims invalid for what may be considered technical defects, or for slight deficiencies in the posts, but in the case of No. 1 post, as to which special care should always be exercised, I think this tree falls short of what may upon even a liberal interpretation of the Act, be held to be substantial compliance.

The fact that it was calculated to mislead and that it did mislead, though not in our Act as it is in the British Columbia Act, expressly made a test of validity, must be considered a very vital element, and tested by this the alleged Smith No. 1 post must be found wanting, in fact, it is not a stake or post at all, and is not anything such as a miner, unless he happened to see and read the writing upon the other side of it, would take to be connected with the staking of a mining claim. Other features also in connection with the staking were unsatisfactory. The claimant and his associates are unable to point out where their discovery was. See *Attorney-General of Ontario* v. *Hargrave*, 8 O. W. R. 127. The distance of the discovery from No. 1 post as given in the application, differs from what was afterwards found written upon the tree. It is extraordinary, too, that Smith, if as he says, he measured the lines with a tape, could have been so far astray as he was in his measurement of the boundaries, making the distances in some cases almost double the actual distance. There is upon the whole grave suspicion that things were not done as Smith and his associates contend, though I cannot but believe as I have before stated, that some form of staking was certainly gone through on the day in question, and it is upon the insufficiency of the No. 1 post that I specifically find against the claim. . .

I am afraid, also, though with some hesitation, that I would have to find that Pinder has not substantially complied with the requirements of the Act in regard to his staking, both his No. 1 post and his discovery post being scarcely half the prescribed size, and his other posts also being small. His No. 1 was described as being only about 2 inches square, and his discovery post only 16 inches high. Unless the provisions of the Act regulating the size and character of posts are to be rendered wholly nugatory, some attention must be paid to these matters, and there is no excuse of any kind offered in behalf of Pinder for failure to comply with the Act.

NOTE.—As to correction of errors in entries of Recorder see *Re Downey and Munro*, and note 2 thereto, *ante*.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

RE MILNE AND GAMBLE.

Staking—Substantial Compliance—Meddling with Posts—Lands Open—Abandonment—Parties—Subsequent Claimant.

Failure to go around the claim, omitting the planting of 3 of the corner posts, and the blazing of the lines, and failure properly to mark the discovery post, renders the staking of a mining claim invalid.

Held, also, by the Commissioner following the judgment of Britton, J., in *Re Cashman and the Cobalt & James Mines, Ltd.*—contrary in this respect to his own decision therein—that the existence of a claim which was invalid by reason of insufficient staking prevented until it was disposed of the staking out of a valid claim upon the same lands by another licensee; but held by the Divisional Court, overruling the judgment of Britton, J., and the Commissioner's decision following it, that it did not.

Where a subsequent claim is staked out and recorded after the Recorder has cancelled a former one, the subsequent claimant should be made a party to and notified of the hearing of an appeal from the cancellation.

Appeals from Recorder. The facts are stated in the Commissioner's decision. The lands involved were the N.E. ¼ of N. ½ of lot 5, in the 6th concession of the Township of James.

F. A. Day, for William Milne.

George Mitchell, for J. W. Gamble.

28th July, 1908.

THE COMMISSIONER.—In this matter both parties appealed from the decision of the Mining Recorder, given 25th May, 1908, wherein the Mining Recorder disallowed and cancelled the claim of J. W. Gamble and refused to record the application of William Milne, and instead of recording said application declared the property again open to other prospectors.

Gamble appeals against the disallowance of his claim, and Milne against what was virtually a disallowance of his subsequent application, and a refusal to record it. Since the hearing of the matters before the Recorder, it seems that the property has been staked and recorded by another licensee, but the subsequent staker was not represented before me, nor apparently was he served with any notice of the hearing or of the appeals.

The evidence was taken anew before me and after carefully considering the case, I think I must dismiss Gamble's appeal to have his claim reinstated. Upon the evidence I find that he did not properly nor in substantial compliance with the Act as nearly as the circumstances reasonably permitted stake out the claim. The question is almost entirely one of credibility between Gamble on the one hand and Boyle and Doyle (the latter being a disinterested party) upon the other. It is a case where, perhaps, it is impossible to be entirely free from doubt, but upon the whole evidence and the circumstances shown, I think I cannot but find that Gamble did not go around the property or plant or touch No. 2, No. 3, or No. 4 posts at all, or blaze the lines, nor did he have proper markings upon his discovery post. I find also that where he claims he planted his chief discovery post was upon a showing that had formerly been rejected by the Inspector, and I would hardly be justified in finding upon the evidence that he had a sufficient discovery, though I do not base my decision upon this ground. His remarking in proper form, a few days before the Inspector's visit, of a post near his alleged discovery, which had not before been properly marked, was reprehensible, and I do not accept his statement that he did it for a joke as being a true explanation. It is not the kind of thing that miners ordinarily do in a joking way, and fortunately such meddling with posts is a thing that is rare among them. It is to be observed, also, that the Recorder, upon the evidence before him, has already found against the Gamble staking.

As to the Milne appeal, it does not clearly appear upon what grounds the Recorder rejected the Milne application, which was filed with Milne's dispute sometime after the recording of the Gamble claim. It seems clear, however, that Milne's staking and application were invalid by reason of the staking and record of Gamble existing at the time upon the property. I think secs. 131, 132 and 158a, as amended in 1907, make it clear that it was the intention of the Act that only one claim should be staked or recorded on the same property at the same time, and that while one staking or record exists a licensee has no authority or right to restake. The only doctrine upon which such a restaking could be upheld would be by holding that the failure to complete the staking properly or in substantial compliance with the Act worked a constructive abandonment under sec. 166, and thereby left the property open. This doctrine of constructive abandonment was expressly dissented from by Mr. Justice

Britton in the case of *Re Cashman* v. *The Cobalt & James Mines, Ltd.*, 10 O. W. R. 658 (*ante*), and was rejected by the decision of the Divisional Court in the more recent case of *Re Wright* v. *The Coleman Development Co.*, 12 O. W. R. 248 (*ante*). I think I must therefore, also dismiss the Milne appeal.

I should, perhaps, point out that the licensee now recorded for the claim is not a party to the present proceedings. I think the better practice would be in cases like the present, where another person has intervened after the hearing before the Recorder, to have him made a party and notified of the hearing before me, so that the decision would bind him and thus, as far as possible, terminate the whole litigation. As it is, it would be unfair, had either of the present appeals succeeded, to hold the subsequent applicant, who staked after the property had been thrown open by the Recorder, bound by the decision.

Milne appealed from this decision to the Divisional Court.

17th June, 1909.

The Court, FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J., allowed the appeal in so far as to declare that the staking of the appellant Milne was not invalid by reason of the Gamble staking and recording existing at the time upon the property, and subject to this declaration remitted the matter to the Commissioner.

NOTE.—It must be taken as now well established that insufficient staking works an abandonment and leaves the lands forthwith open to restaking by another licensee. Mr. Justice Britton, who held the contrary in *Re Cashman and The Cobalt and James Mines, Ltd.* (*ante*), joining in the decision in this case For a fuller discussion of the question see notes to *Re Smith et al. and The Cobalt Development Co.* (*ante*).

The association by the Commissioner in this decision of constructive abandonment under s. 166 with the theory that constructive abandonment results from a new staking and filing by the same licensee, is somewhat confusing, though if the theory were correct the two would be alike in that both occur independently of the will of the staker. It is settled however that under our law a new staking and filing does not work a constructive abandonment: see *Re Wright and the Coleman Development Co.*, and notes thereto, (*ante*.)

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

18 O. L. R. 615; 12 O. W. R. 854.

RE LEHIGH COBALT SILVER MINES LTD. AND HECKLER ET AL.

Settlement of Case—Enforcing—Vesting Interest in Claim—Promissory Note—Guaranteeing Payment—Endorsement.

Where in a proceeding before the Commissioner the parties and their counsel had settled the matters in dispute, and had signed and filed minutes of the settlement, but one of the parties afterwards refused to carry it out, an order was made by the Commissioner enforcing the settlement, and providing for the making of a vesting order to transfer the interest in the mining claim agreed to be transferred.

The minutes of settlement provided that promissory notes should be given by S. to H., and that payment of the notes should be guaranteed by K. and G.; H. objected that notes made by S. to H. with K.'s and G.'s signatures on the back under the words "We guarantee payment of the within note," were not a proper fulfilment of the terms of the settlement, but the Commissioner refused to give effect to the objection.

The Divisional Court held that the notes were in compliance with the terms of the settlement, and that K. and G. were in fact liable upon them as endorsers, and affirmed the order of the Commissioner.

This case originated from proceedings taken before the Commissioner by the Lehigh Cobalt Silver Mines, Ltd., against Calvin F. Heckler and Anna E. Heckler, his wife, to enforce transfer of an interest in an unpatented mining claim (known as No. 1877, in the Township of Coleman), which it was alleged belonged to the plaintiffs under an agreement with Heckler, but which he had transferred to his wife.

After the evidence had been partly taken, a settlement was made and minutes were signed by counsel for all parties, and by such of the parties interested as were present, by which it was agreed, among other things, that the defendants should transfer their interest in the claim in question upon the giving of promissory notes by one Shimer to Heckler for the balance of money alleged to be due, payment of the notes to be guaranteed by Kickline and Blake.

The terms were complied with by the other parties, and promissory notes made by Shimer to Heckler, and signed on the back by Kickline and Blake under the words "We guarantee payment of the within note," were tendered as the settlement called for, but Heckler refused to transfer the interest in the mining claim.

An appointment was then taken out by the plaintiffs before the Commissioner to enforce the settlement.

J. M. Glenn, K.C., and *J. Lorn McDougall*, for plantiffs.

A. McCrimmon and *Alfred Hall*, for defendants.

Objection was taken on behalf of the defendants that the promissory notes offered were not proper notes in conformity with the minutes of settlement; that they were not negotiable and that Kickline and Blake were not liable upon them as endorsers, or liable at all under the law of Pennsylvania, where the notes were payable.

The Commissioner refused to give effect to the objection and on 2nd Sept., 1908, ordered that the notes should be accepted in the form tendered and that the settlement should be carried out; and that upon deposit of the amount of the notes that were overdue (less the costs of the proceedings to enforce the settlement) and of the notes for the balance in the form they had been tendered, the plaintiffs should have a vesting order for the transfer of the interest in the mining claim.

From this order Heckler appealed to the Divisional Court.

J. M. Clark, K.C., for appellant.

Grayson Smith, for respondents.

24th October, 1908.

BOYD, C.:—We all agree that the judgment should be affirmed, and with costs. It appears to me that the notes given by Shimer to the order of Heckler, with the signatures of Kickline and Blake on the back, underneath the words "we guarantee payment of the within note," are valid securities. These notes are precisely what was called for in the terms of the settlement. If their engagement amounts to no more than a guarantee, there is sufficient evidence of consideration in the giving of time to bind them as guarantors; but, having regard to the Bills of Exchange Act and the course of decision, I am of opinion that Kickline and Blake would be liable as indorsers. *Lock* v. *Reid*, 6 O. S. 295, can no longer be taken to represent existing law. Reading that case and the case of *Sanger* v. *Elliott*, 4 Times

L. R. 524, and the commentary of Strong, C.J., on that decision and the effect of the statute (now sec. 131 of R. S. C. 1906, ch. 119), in *Robinson* v. *Mann*, 31 S. C. R. 486, I think the fair conclusion is that *Lock* v. *Reid* is no longer law.

MAGEE, J., and LATCHFORD, J., concurred.

(THE COMMISSIONER.)

RE GOSSELIN AND GORDON.

Mistake in Date of Discovery and Staking—Allowance of Discovery—Finality of—Certificate of Record—Finality of—Application for Mining Claim—Form of—Negativing Existence of Other Claims.

A *bona fide* mistake in giving the date of discovery and staking in an application for a mining claim will not invalidate the claim, the correct date having been put upon the posts.

Dispute by Alfred Gosselin against mining claim T. R. 562 of the respondent Alexander Burton Gordon. The facts are stated in the decision.

F. L. Smiley, for disputant.

T. W. McGarry, K.C., and *J. Lorn McDougall*, for respondent.

4th September, 1908.

THE COMMISSIONER.—The disputant is attacking the claim of the respondent under a dispute filed 3rd September, 1907, upon the grounds that the claim was not based upon a *bona fide* discovery of valuable mineral and that it was not staked in accordance with the requirements of the Act.

The respondent's claim had on 17th August, 1907, before the disputant came upon the property at all, been duly inspected and reported upon as having a *bona fide* discovery and as having been properly staked. A certificate of record was issued to the respondent on 12th September, 1907, but it would appear that the Recorder in granting the certificate had overlooked the fact that there was a dispute against the claim or had issued it under a mistake as to his duties in that behalf.

The respondent's counsel at the opening of the hearing took the objection that the disputant was not in the circumstances in a position to attack the respondent's claim upon the grounds mentioned. I, however, directed the case to proceed.

The disputant contends that the respondent when he staked the property had no discovery of valuable mineral and that the discovery upon which the Inspector passed the claim was one made subsequently. . . .

I cannot on the evidence feel justified in finding that this contention is correct, and I must, upon the evidence of Boland and Thomson, find that the discovery inspected and passed by the Inspector was made on 12th February, 1907, and that the discovery line to it was blazed and the claim properly staked on that date, as they allege. Doubt was sought to be cast upon their story by the fact that the application gives the date of discovery and staking as 4th March instead of 12th February, and by the fact that the time of the alleged discovery and staking was in the winter when it would be difficult to make discoveries. Boland and Thomson, however, appear to have spent the greater part of the month of February in the vicinity of the property, staking some eight claims in all, the stakings being done at intervals in most cases of some days apart, and the facts would indicate that these men must have spent some considerable time upon each claim. The probability that they were making discoveries and not merely blanketing the land is increased by the fact that most of their claims stood the test of examination and were passed by the Inspector. The discovery upon the claim in question was at the edge of a crack near a bluff in a place which would be exposed and easy to make a discovery upon notwithstanding that there was snow upon the ground. The error in stating in the application that the discovery and staking were made on the 4th of March is not clearly accounted for, but as the markings upon the posts have the date February 12th, and there was still at the time of making the application plenty of time to record the claim within the limit provided by the Act, I am satisfied from this and from the other circumstances of the case that there was no object or intention of deliberately putting in a wrong date, and I have no doubt that it was merely a slip or mistake in some way on the part of the solicitor or clerk who drew up the application. The mistake was not one that in any way misled or injured the disputant or other prospectors.

The dispute therefore fails upon the merits.

In view of the above finding it is unnecessary to discuss the status of the certificate of record or the status of the claim by reason of the issue of the certificate of record. I find, however, that there was no fraud in any way in connection with the claim or in connection with the obtaining of the certificate of record. Section 70 (5)—the Inspector having passed the discovery, and his report not having been appealed against—if not sec. 71 of the Act (as it stood in 1907) would perhaps have protected the respondent's claim from attack upon the grounds alleged.

The disputant, on 27th August, by reason as he claims of finding that there was no *bona fide* discovery and no discovery post upon the property, proceeded to stake it for himself, and on 3rd September he filed an application together with his dispute. As this was all subsequent to the claim of the respondent and as the attack upon the respondent's claim has failed, the disputant's own application need not be further considered, but it may be pointed out that it was not in the form required by sec. 157 of the Act (1907), by reason that it did not negative the existence of other claims upon the property: (see *Re Isa Mining Co.* v. *Francey*, 10 O. W. R. 31, *ante*), and it would appear therefore that the disputant could not in any event be entitled to the property himself.

Dispute dismissed.

NOTE.—In 1908, "mistake" was added to "fraud" as a ground for setting aside a Certificate of Record and attacking the validity of the staking out and recording of the mining claim for which it has issued. See ss. 66, 65 (Act of 1908).

(THE COMMISSIONER.)

RE ROWLANDSON.

Appeal from Recorder—Service of Notice—Parties "Adversely Interested"—Grounds for Extending Time for Service—Unfair Advantage—Merits.

The Recorder gave his decision in a dispute between R. and McC. on 17th July; M. later the same day staked out and filed application for a mining claim upon the property in dispute. R. filed a notice of appeal from the Recorder's decision on 18th July, but did not serve either McC. or M.

Held, that McC. and M. were parties "adversely interested," within sec. 133 (3) (1908) and that failure to serve them within the time limited by the Act was fatal to the appeal.

Extension of time for service was refused where the appellant failed to show that it was a proper case for appeal, and that after reasonable effort the necessary parties could not be served.

Appeal by John Rowlandson from the decision of the Recorder of the Larder Lake Mining Division, by which the Recorder in a dispute between Rowlandson and one McCullough refused to allow Rowlandson's claim to the property known as L. 398.

The Recorder's decision was given on 17th July, 1908, and appeal was filed with the Recorder on 18th July. One Murphy meanwhile, after the decision had been rendered, on 17th July, staked out and filed application for the property. Neither Murphy nor McCullough was served with the notice of the appeal. Rowlandson took out an appointment before the Commissioner for hearing.

F. L. Smiley, for appellant.

A. G. Slaght, for Murphy and Rowlandson.

5th September, 1908.

THE COMMISSIONER.—At the time appointed for the hearing of this appeal counsel for Alexander McCullough, who was a party to the matter before the Recorder, and for Matthew Murphy, who became a subsequent applicant for the property before the appeal herein was filed, asked leave to appear conditionally to take exception to the status of the appeal upon the ground that it had not been properly launched as required by sec. 133 of the Act, Murphy never having been served either with notice of the appeal or with the appointment for hearing, and McCullough never having

been served with notice of the appeal, though served with the appointment for hearing. Evidence was thereupon taken upon this branch of the case, and upon it I find that the notice of appeal, though filed with the Recorder, was not served upon either McCullough or Murphy, and the appellant has failed to satisfy me that it is a proper case for appeal or that after reasonable effort these parties could not have been served within the time provided by the Act. I think it must be held that McCullough and Murphy were parties adversely interested within the meaning of sec. 133 (3), and that failure to serve them or to make out a case for extension of time for such service is fatal to the appeal: see *Re Petrakos*, 9 O. W. R. 367, 13 O. L. R. 650, (*ante*).

As the witnesses on both sides were present I determined nevertheless, subject to the objection, to hear the case upon the merits.

After doing so I am not convinced that the Recorder's decision was wrong. The evidence of the appellant himself was not satisfactory and was contradicted in some respects by two of his witnesses, and upon the whole case I am satisfied that the appellant was attempting, after the respondent McCullough had endeavored to employ him as an assistant, to take an unfair advantage of McCullough, and that it was that which led him to proceed to the claim at the extraordinary time of 3 o'clock in the morning. He has clearly no real merits upon his side of the case.

I must also find upon the evidence that Rowlandson made no *bona fide* discovery of valuable mineral upon the property.

Appeal dismissed.

(THE COMMISSIONER.)

RE SPRY ET AL. AND LECK ET AL.

Relief from Forfeiture—Working Conditions—Terms of Relief.

The power given by sec. 85 (2) of The Mining Act (1908) to relieve from forfeiture for non-performance of work should be very cautiously and sparingly exercised, but where a strong case was shown an order for relief was made upon terms of liberal compensation to an intervening staker.

Application by John C. Spry and Thomas F. Drew for relief from forfeiture of mining claims 10135, 10137, and 10138, in the Temiskaming Mining Division.

F. Elliott, for Drew.

J. McNairn Hall, for subsequent stakers, George Leck and John Macbeth.

5th September, 1908.

THE COMMISSIONER.—This is an application under sec. 85 (2) of The Mining Act of Ontario to be relieved from forfeiture of the mining claims in question. The necessary work had not been performed within the time provided by the Act.

The circumstances are peculiar. Thomas F. Drew, whose name was added before me at the hearing as an applicant, in October, 1907, entered into an arrangement with George Leck and his associate, or associates, who are still interested in the matter, to show the applicant Thomas F. Drew certain iron deposits for which Drew agreed to pay them $2,400 if the claims were taken up by him. They at first had some difficulty in finding the deposits, and when they were finally able to locate them Drew was not present, but they notwithstanding staked four claims, three in the name of Drew and one in the name of Leck himself. Drew was really depending for his finances upon the applicant John C. Spry, residing in Chicago, and though he apparently made every effort to obtain the money and keep faith with the other parties he was unable to carry out his agreement at the time arranged. Various negotiations continued between the parties till sometime in the month of June, 1908, and Drew, in addition to what Leck and his partners were doing on the property, sent men at different times to perform the necessary working

conditions upon the claims. He was himself ill and unable personally to look after it. These men spent considerable time in cutting and improving the trails from the railway station to the property, but did little or no mining work on the claims. In the meantime Leck and his partner were performing the necessary first three months' work upon what they thought to be Leck's own claim, but which turned out to be one of the claims in question herein. Coming to the recording office and finding that the claims had been transferred by Drew to his financial assistant Spry, Leck and his partner appear to have become alarmed that they might lose the claims altogether, and without saying anything to Drew proceeded to the property and restaked them in the name of Leck and his associate McBeth.

Drew, on the 4th of June, before the time for performance of work had yet expired, wrote the Recorder telling him of his sickness and that he was afraid he would not be able to have the work completed within the time prescribed in the Act, and the Recorder, on the 6th of June, acknowledged the receipt of the letter and stated that the extension of time referred to in Drew's letter would be duly granted.

The claims were notwithstanding cancelled and restaked, as already mentioned, and under these circumstances Drew asks for reinstatement.

Spry, the original applicant, through his solicitors, notified me before the hearing that he did not intend to prosecute the application, but at the hearing, as already mentioned, Drew intervened stating that it was really himself who had instigated the application and that he was the person really interested in the claims. Under contract with Spry he was entitled to an interest in everything acquired by the latter, and he states that he is able to obtain a retransfer of interest from Spry, who apparently had paid nothing for the transfer to him.

Though the power of relieving from forfeiture is one which I think should be very cautiously and sparingly exercised, it seems to me that if such a power is to be exercised at all the present case is one where it might properly be applied, taking care, however, fully to protect the subsequent applicants (who were really interested all the way through), by the terms imposed as a condition of relief.

It is not clear whether Leck and his associates were to be entitled under the original arrangement to take up any of

the property for themselves. Subsequent negotiations and agreements with Drew, no doubt, altered to some extent the original bargain. Leck and his associates have undoubtedly been put to considerable trouble and expense by reason of Drew not being able to carry out the arrangement as originally intended. I am not disposed, in all the circumstances, to make a proportional reduction for the claim not included in the present decision. If Mr. Drew desires the three claims I think he should pay the sum of $2,500, and he should also pay at the rate of $2.50 a day for any mining work in the way of fulfilling working conditions that the respondents Leck and McBeth may have done upon any of the three properties now in question, and which they may file proper proof of with the Recorder, and I think all such work should be allowed as performance of working conditions in favor of the restored claims if the terms imposed are duly fulfilled.

Order accordingly.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

17 O. L. R. 621; 13 O. W. R. 6.

RE MCNEIL AND MCCULLY AND PLOTKE.

Appeal from Recorder—Status of Appellant—The Cashman Case—Finality of Recorder's Decision—Lands Open—Prior Stakings—Abandonment—Disqualification—Form of Affidavit of Discovery—Exception to Statement as to Lands being Open—Substantial Merit—Discovery—Adopting Discovery of Another.

P., McC. and McN. had stakings and applications for mining claims upon the same property in the order named, P.'s claims being recorded; McN. and McC. filed disputes against P., each claiming to be himself entitled to the property; the Recorder dismissed the disputes and upheld P.'s claim.

On appeal to the Commissioner, held by the Commissioner:

That an exception in the McN. affidavit to what the Act required to be sworn to as to the lands being open, and the fact that prior stakings and applications existed at the time McN. staked, invalidated the McN. application (following *Re Isa Mining Co. and Francey, ante*).

That the existence of prior stakings also invalidated McC.'s application, and that at all events as he had made no original discovery but had staked upon discoveries that had been made (and were at the time under staking) by the other parties it could hardly be held under s. 140 (1908), that he had any substantial merit.

That, neither McN. nor McC. having any valid claim to the property, and the Recorder having found in P.'s favor, the Cashman case (*ante*) precluded any further attack upon P.'s claim. (But see now *Re Smith and Hill, post*).

On appeal to the Divisional Court, held by the Court:

That a prior staking which is invalid for lack of a real discovery is deemed to be abandoned within the meaning of the Act, and so does not stand in the way of another staking or prevent the making of the necessary affidavit as to the lands being open.

That McC. having staked upon existing discoveries and made no original discovery of his own, his staking was invalid and not in McN.'s way.

That assuming that P. had no real discovery or real staking his claim must also be deemed to be abandoned and not a bar to McN.

That adding the words "except applications . . . the validity of which I have disputed" to what the Act requires to be sworn to as to lands being open, does not invalidate an application (holding *Re Isa Mining Co. and Francey, ante*, not applicable).

The fact that stakes and markings belonging to previous stakings are found upon the property does not prevent a licensee, who knows that these stakings have lapsed or been abandoned, cancelled or forfeited, from staking out and swearing affidavit for a mining claim upon the same property.

(As to the holding of the Divisional Court as to abandonment see sec. 83 of the Act of 1908, as amended in 1909, by ch. 26, sec. 31 (1), and see notes hereto.)

Appeals by J. J. McNeil and C. C. McCully, from decisions of the Mining Recorder upon disputes filed by them against the mining claim applications of W. F. M. Plotke for

the S. W. ¼ of S. ½ of lot 4, in the 6th concession of the Township of James.

The appellants also had each filed an application for a mining claim upon the same property, each of the three parties claiming to be entitled to the exclusion of the others.

Plotke had two applications—both recorded—the first, No. 10263, having been filed 16th November, on alleged discovery and staking of 15th November, 1907, and the second, No. 10332½, having been filed 6th December, on discovery and staking of 5th December, 1907.

McCully's application was filed 28th December, on alleged discovery and staking of 27th December, 1907.

McNeil's application was filed 14th January, 1908, claiming discovery and staking on 13th January, 1908. The affidavit accompanying the McNeil application (Form 14 under sec. 157 of the Act, 1907), contained at the end of paragraph 2 (which required the applicant to swear that there was at the time of staking nothing on the lands to indicate that they were not open to staking, and that he believed they were so open), the words "except applications 10263 and 10332½, the validity of which I have disputed," and upon this a good deal of controversy subsequently turned.

J. Lorn McDougall, for McNeil.

T. W. McGarry, K.C., and *F. A. Day,* for McCully.

A. G. Slaght, for Plotke.

9th September, 1908.

THE COMMISSIONER.—The appellants McNeil and McCully are appealing against a decision of the Recorder by which the Recorder dismissed their disputes against the applications of Plotke, and confirmed Plotke's claim upon the property in question.

The disputes were entered separately and were tried before the Recorder, his decision being given therein on 28th July, 1908. The appeals from his decision have also been entered separately, but upon the matters coming before me I directed that they should be tried together, as they involve the same questions except that each appellant, in addition to disputing the Plotke claim, is asking to have the property awarded to himself under his own application.

The evidence taken before the Recorder as taken down in the Recorder's notes was used before me, each party being allowed the right to supplement it by such further evidence as he might be advised. Three witnesses were called before me, all of whom had, however, given evidence before the Recorder.

The respondent's counsel took the position, on the authority of *Re Cashman and The Cobalt and James Mines, Ltd.*, 10 O. W. R. 658 (*ante*), that the finding of the Recorder in favor of Plotke was conclusive, and that no appeal would lie unless the appellants could establish their own claims to the property, and this objection, I think, must prevail. I have discussed this point somewhat fully in the former case of *McNeil* v. *Plotke* (*ante*). The Cashman case appears to be a conclusive authority, and the cases of *Hartley* v. *Matson*, 32 S. C. R. 644, *St. Laurent* v. *Mercier*, 33 S. C. R. 314, and *Osborne* v. *Morgan*, 13 A. C. (1888) 227, indicate how averse the Courts are to allowing persons not individually interested to litigate the rights of other claimants to Crown property, or to take proceedings which can only result in throwing the lands open to the public or to licensees generally.

I think I must, therefore, in these appeals, first investigate the rights of the appellants to an interest in the property, and if neither has such an interest I think it is not open to me to reverse the Recorder's decision as to the validity of the Plotke claim.

By the cancellation of former applications the property had been thrown open on 13th November, 1907. One Douglass, on behalf of the respondent Plotke, filed an application on 16th November claiming discovery and staking on the 15th. On 18th November Hugh A. McNeil filed an application claiming discovery and staking on the 16th, and with his application filed a dispute against the Plotke application. On 6th December Douglass, on behalf of Plotke, filed another application claiming discovery and staking on 5th December, the discovery being apparently at the same point as that claimed under the former Plotke application. At this point the Inspector has reported a *bona fide* discovery of valuable mineral, and the sufficiency of the discovery is not disputed. It appears from the evidence that on 6th December the McNeils again staked, the appellant J. J. McNeil and the former staker, Hugh A. McNeil, all really acting, as the evidence shows, in the same interest. On 6th December the

dispute of H. A. McNeil against the first Plotke claim was dismissed by the Recorder, and an appeal made to me from this decision was dismissed (*ante*) on 27th December. On 28th December an application and a dispute were filed on behalf of the appellant C. C. McCully claiming discovery and staking on 25th December, 1907, and on 14th January, 1908, an application and a dispute were filed on behalf of the appellant J. J. McNeil claiming discovery and staking on 13th January, 1908.

The discovery of Plotke, as already mentioned, was undoubtedly a *bona fide* discovery of valuable mineral within the meaning of the Act, and it has been passed by the Inspector. The McNeil discovery does not appear to have been inspected, but from the evidence it would appear that a discovery of valuable mineral really existed at a shaft he had sunk, though the exact date at which the valuable mineral was first disclosed does not appear. No original discovery of any kind appears to have been made by or on behalf of McCully, the licensees who staked on his behalf admittedly having staked the property upon the discoveries already existing when they went upon it.

Taking first the question of McNeil's interest; the only claim which McNeils can now have must be under their staking of 13th January, 1908. At the time they did this staking there existed upon the property the two Plotke applications under alleged stakings of 15th November and 5th December respectively, and the McCully application under staking of 25th December. The McNeil application is not really in the form required by the Act by reason of paragraph 2 of the affidavit containing an exception referring to the prior Plotke applications, and this exception and the fact of these prior applications and stakings existing must, I think, under the principle laid down by the Divisional Court in the case of *Re Isa Mining Co. and Francey*, 10 O. W. R. 31 (*ante*), be held to invalidate the McNeil application. It may further be pointed out that whether or not the McNeils were disqualified by prior stakings, or estopped by the prior decision in the dispute of H. A. McNeil against Plotke, they could not in any event have any claim upon the property under the staking of 13th January, whether the Plotke applications be valid or invalid; for if the Plotke applications are valid, or if either of them is valid, McNeil, being subsequent to them, would be shut out, while even if the Plotke applications are both invalid there is still in his way the

staking of McCully which was done on 25th December, and which was upon file with the Recorder when the McNeil staking of 13th January was done.

Turning to the McCully application; there is really, as I have already indicated, no substantial merit in this application, it being an attempt to take advantage of the discoveries, or alleged discoveries, made by other claimants, though if the property was really open at the time it might be held that McCully would have a legal standing. At the time the McCully staking was done, namely, 25th December, 1907, there were, as already mentioned, the two Plotke applications and stakings upon the property, and there was also then existing at least one staking of McNeil, done on 6th December, and, though it does not appear whether or not that staking was ever filed, the time for recording it had not, on 25th December, yet expired. The contention of McCully's counsel was that the first Plotke application is fraudulent, and that Plotke was, under sec. 136 of the Act, disqualified by the acts of his agents in connection with this staking and by the remarking of posts which was done on or about 25th November, and that his stakings or applications cannot be regarded as valid or as being an incumbrance upon the property or a hindrance to subsequent stakings. While the provisions of sec. 136 are salutary, I think as they are of a penal nature they cannot be extended beyond their fair meaning or be applied to a case not clearly brought within them. Upon the whole evidence I am not satisfied that Plotke was guilty of any conduct or act subjecting him to the disqualification of sec. 136 as it stood when the events in question occurred. This appears also to have been the Recorder's view, though I cannot but have grave suspicion as to fraud having been practiced by Douglass in connection with his staking or alleged staking of 15th November. Even if Plotke were disqualified and his claims null and void there would still be in McCully's way, on 25th December, the McNeil staking of 6th December, if not one also of a subsequent date, and in all the circumstances and considering the nature of the McCully staking and the way in which it was done, I think I could hardly in any event find, under sec. 140 of the Act, that he has any real merit or any substantial justice upon his side of the case.

Neither McNeil nor McCully having any claim to the property, I think, as I have already pointed out, that it is not open to me to investigate the strict legality of the Plotke

claims. Were that question open I am by no means sure that I could agree with the Recorder in upholding their validity. It is, however, to be remarked that Plotke has undoubtedly substantial merit in having apparently the first real discovery as well as the first application now existing upon the property.

Judgment dismissing the appeals of the appellants J. J. McNeil and C. C. McCully without costs.

From this decision both McNeil and McCully appealed to the Divisional Court.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., and RIDDELL, J.

J. Lorn McDougall, for appellant, McNeil.

J. E. Day, for appellant, McCully.

W. M. Douglas, K.C., and *A. G. Slaght*, for respondent, Plotke.

21st December, 1908.

RIDDELL, J.— . . . There were two applications by Plotke under consideration by the Recorder, Nos. 10263 and 10332½; and he found that while some doubt might be entertained about No. 10263, "the application . . . recorded as No. 10332½ upon which a discovery of valuable mineral was reported in favour of the said Plotke . . . should be confirmed, and the disputes of the said C. C. McCully and John J. McNeil dismissed."

Upon the appeal to the Commissioner he thought he was bound by the decision of this Divisional Court in the case of *Re Cashman and Cobalt and James Mines, Limited*, 10 O. W. R. 658 (*ante*), first to investigate the rights of the appellants to an interest in the property; and if neither had such an interest, he thought it was not open to him to reverse the Recorder's decision as to the validity of the Plotke claim. The actual decision in the Cashman case does not go so far; but no fault can be found with the Commissioner's manner of marshalling the questions to be tried. He cannot be said to have been wrong in first determining the status of the appellants.

He finds that neither McNeil nor McCully has any claim to the property by reason of the supposed fact that their stakings, etc., were not in accordance with the Act—in particulars which will require consideration; but he adds: "It it not open to me to investigate the strict legality of the Plotke claims. Were that question open I am by no means sure that I could agree with the Recorder in upholding their validity." The appeals were therefore dismissed and without costs, solely upon the ground of want of status of the two appellants to sustain an appeal from the Recorder to the Commissioner.

Upon the appeal before us, it was agreed by counsel for the appellants that in case the Court were of opinion that the Commissioner was wrong in the ground upon which he rested his judgment, the case might be remitted to him to deal with it upon the merits. The question upon which the Divisional Court divided in *Re Wright and Coleman Development Co.* (1908), 12 O. W. R. 248 (*ante*), now in appeal, therefore, does not arise here.

In order to appreciate the objections to the status of the appellants it will be necessary to go back into the history of this property.

On November 13th, 1907, certain claims made by H. A. McNeil (not the appellant here) and Plotke were cancelled upon the ground that neither had made a discovery of valuable mineral. Some or all of the posts of these former stakings remained upon the property, but it is not clear how many, or which, or how long.

November 15th. Plotke alleges that a discovery was made and staking done by one Douglas for him.

November 16th. Plotke's application for this was recorded as application No. 10263. As to this application, the Commissioner, upon a former proceeding before him, says (judgment (*ante*) December 27th, 1907, after holding that he cannot give effect to the appeal then before him): "Were I permitted to do so, I would, without hesitation, find as a fact that that application is invalid, that in fact the staking and discovery claimed by the affidavit of Douglas to have been made and done on November 15th, 1907, was never really made or done." The Commissioner nowhere retracts this expression of opinion, and the evidence is, I think, overwhelming that he was right in his opinion.

November 16th. H. A. McNeil had a number of men upon this property, and these did some staking, leaving certain blanks, as it was doubtful who would go to the Recorder's office to record the claim. One Lebrick came to the property on the next day, and it was decided that he should record.

November 18th. Lebrick does record the claim for H. A. McNeil; upon the same day McNeil files a dispute of Plotke's application No. 10263.

December 5th. It is alleged that Douglas made a new discovery and staking for Plotke, and this is recorded on December 6th as No. 10332½.

In respect of this claim the Commissioner, in the same judgment (*ante*) (December 27th, 1907), says: "I have no hesitation in saying that if I considered the matter open to me to determine upon this appeal, I would have no hesitation in finding that application No. 10332½ should not have been recorded." It appears, however, that the application in question was afterwards inspected (January 20th, 1908), and valuable mineral found, as appears by the Inspector's report, filed February 10th, 1908.

December 6th. It is said that H. A. McNeil again staked; but this staking was not followed up by any claim, and it does not seem to have been based on any discovery.

December 6th. The Recorder dismissed the dispute of McNeil against claim No. 10263.

December 12th. H. A. McNeil takes an appeal from this decision to the Commissioner.

December 20th. Upon this matter coming before the Commissioner, it came to the notice of H. A. McNeil that the Recorder had recorded application No. 10332½, whereupon he appealed against that act, and the two appeals came on together on December 23rd or 24th. Upon this day the evidence was retaken before the Commissioner, and upon the proceeding it is alleged that the Commissioner said or suggested that neither Plotke or McNeil might be entitled to the property. One Everall, hearing this, it is said, determined to try to procure the property for McCully and others. He went there December 24th, the snow being a foot and a half deep—so deep that it was impossible to make a discovery, perhaps—at all events, he found McNeil's shaft 12 feet deep, found a vein showing at 10 feet from the top, though it is said to have showed at the top also. He claims to have made

four discoveries, but did only one staking. He put down the discovery post at the McNeil shaft, and then he says he put down posts 1, 2, 3 and 4.

In respect of this the Commissioner, in the judgment now under appeal, says: "No original discovery of any kind appears to have been made by or on behalf of McCully, the licensee who staked on his behalf admittedly having staked the discoveries already existing when they went upon it."

December 27th. The Commissioner dismisses the appeals of H. A. McNeil upon the sole ground that he has no *locus standi* to prosecute the appeals. It was in this judgment that the Commissioner made the references to the merits of applications Nos. 10263 and 10332½ already set out.

No appeal was taken from this judgment, and consequently the decisions of the Recorder were absolute. But the Commissioner recommended the Recorder to have an inspection of all the alleged discoveries, in that way to procure cancellation of claims that seemed to be clearly "invalid and made in direct violation and apparently in fraud of the Act." It was, it would seem, upon this recommendation that the inspection of the discovery alleged in 10332½ already referred to was made.

The ground upon which the Commissioner held that H. A. McNeil had no status was that Lebrick had made a false affidavit as to his having been on the ground on December 16th.

December 28th. McCully filed his application and also a dispute against No. 10332½.

January 13th, 1908. John J. McNeil, the present appellant, is alleged to have staked, and upon the next day he filed a dispute against applications Nos. 10263 and 10332½.

March 3rd. The trial of the dispute by John J. McNeil of claims 10263 and 10332½ before the Recorder is had.

March 10th. McCully filed a dispute against 10263, and this is tried on March 28th.

July 28th. The Recorder gave judgment in the disputes and applications of J. J. McNeil and McCully, holding that 10332½ was good, and dismissing the disputes of McNeil and McCully confirming the record of 10332½. Appeals were had by both McNeil and McCully to the Commissioner; and he, on September 9th, gave judgment dismissing the appeals

without costs, on the sole ground already spoken of, *i.e.*, the want of status of the appellants.

The objection to the position of McNeil is very simple. It is said that at the time (13th January, 1908), the discovery and staking were made by him there were the two Plotke applications and the McCully application pending; that the affidavit of discovery (Form 14) contains, added at the end of paragraph 2, the words, "except applications 10263 and 10332½, the validity of which I have disputed."

It is said that the provisions of sec. 157 have not been complied with, and that the affidavit is not sufficient. The case of *Re Isa Mining Co. and Francey*, 10 O. W. R. 31 (*ante*), is relied upon in support of that contention. In that case the appellant was an applicant for a Working Permit; he was by the legislation then in force (1906), 6 Edw. VII. ch. 11, sec. 141 (11), required to swear "that the land at the time of its being staked out was not in occupation or possession of or being prospected for minerals by, any other licensee, and that (he) has no knowledge and had never heard of any adverse claim by reason of prior discovery or otherwise." It was in that state of the law that the affidavit of the applicant was made, and the Court held that the affidavit "not only did not negative the matters required to be negatived, but showed that there were adverse claims and the knowledge of the applicant of the existence of them:" 10 O. W. R. at p. 32 (*ante*). The stringency of the provisions just referred to was much relaxed by the statute of 1907, 7 Edw. VII ch. 13, sec. 39, which was passed a few days before the decision in the Isa case; and even the latter provision is not precisely the same as that for a mining claim.

The former provision for the case of a mining claim was found in sec. 157 of the Act of 1906. The affidavit filed for the applicant must show "that the deponent has no knowledge and has never heard of any adverse claim by reason of prior discovery or otherwise." The Act of 1907 changes this to read: "At the time of staking out . . . there was nothing on the lands to indicate that they were not open to be staked out for a mining claim under this Act, and that the deponent verily believes they were so open, and that the applicant is entitled under the provisions of this Act to be recorded for the claim." The Isa case is not conclusive against McNeil, by reason of the different wording of the sections.

It must, however, I think, be obvious that the mere swearing and filing of an affidavit in the exact words of the section

would not be effective, unless the affidavit itself were substantially true. It never could be that a perjurer would have higher rights than an honest man.

I think it well to consider first—when lands are "open to be staked out for a mining claim under this Act."

Section 132 provides that a licensee who discovers valuable mineral on any lands open to prospecting, as specified in sec. 131, . . . shall have the right to stake out . . . a mining claim thereon." Section 131 specifies lands "not . . . (1) under staking or record as a mining claim . . . not expired, lapsed, abandoned, or cancelled." It seems clear that the fact that a certain property has been staked out as a mining claim will not prevent that being open if such claim be expired, lapsed, abandoned, or cancelled; and the fact that there may be upon the property staking of the most perfect character, or working of any character, will be unimportant if the claim be abandoned, etc. A claim may be abandoned expressly under the provisions of sec. 165, by neglect under 166, and perhaps by implication from conduct. Neither method involves interference with the staking, etc., and consequently a piece of property may be open though staked in the most perfect way. Bearing this in mind, it would be a monstrous result if the licensee entering upon and staking out land upon which he had a perfect right to enter and stake should not be allowed to have some advantage of his staking. Section 157 must then, I think, be read so as to give effect to the work lawfully done.

The section cannot mean that at the time of the staking "there was nothing on the lands to indicate" to a stranger that some person was or might be making a claim to the property. With such an interpretation, the licensee, knowing from actual inspection that a claim had been cancelled or expressly abandoned, would be unable legally to make any claim upon the property if any stakes were left when he made his discovery, etc.

The section must, I think, mean only that the deponent must be able to say: "Knowing what I do, seeing the position and condition of the ground, staking, etc., this is open to my staking. While what I see here might suggest to an outsider that somebody is or may be making a claim, I am in possession of facts which justify me in saying that there is nothing here to indicate to me that I should not stake." The word "indicate" is a very loose one, ranging in its con-

notation from a mere hint or suggestion to a scientific demonstration. The dictionaries say: "give reason to expect, give a knowledge of, show as something existing or taking place" (Standard); "point out, show, suggest, serve as a reason or ground for inferring, expecting, etc." (Century). The word in this statute must be interpreted in view of the subject matter and of the remainder of the affidavit required; and if the deponent is in possession of facts which will entitle him honestly to say that what there is on the land does not indicate to him that the land is not open—that is, "does not serve as a ground for inferring" that the land is not open, I think he may well take the affidavit required. And I do not think that the mere fact that he adds for the greater caution that there are applications the validity of which he is disputing, is fatal. The "except" clause in the present affidavit is not very happily placed or worded. Apparently the only noun which can be qualified by this clause is the word "nothing" in the first line, and in respect of that the applications are not on—*i.e., in situ* upon—the lands at all.

I am of opinion that, as regards the affidavit, the form is not fatal; and that as regards McNeil, the only matter which requires consideration is his right to stake at all.

He asserts that the alleged discovery and staking under claim 10263 are a bare-faced fraud. The Commissioner in his former judgment seems to agree with him. If that be so, no discovery having in fact been made, the provision of sec. 134 that the staking shall be after the discovery (and cf. sec. 132) has not been complied with, and sec. 166 works an abandonment. The claimant McNeil then cannot be barred by this alleged discovery or staking.

Then as to 10332½, he says that this should not have been recorded; there was not a real discovery and a real staking. As we have seen, the Commissioner thought, in his former judgment, that this contention was well founded, that if the appellant in that proceeding, H. A. McNeil, had any *locus standi*, he (the Commissioner) would without hesitation find that this application should not have been recorded. And I must say that the evidence is very strong that the contention of the present appellant McNeil is well founded.

In my view the Commissioner, in investigating the status of McNeil, must, if no other objection appears, determine as a fact whether the staking, etc., of Plotke was in accord-

ance with the Act, both in respect of the manner of staking and in respect of whether the staking was preceded by a genuine discovery. If Plotke is entitled to be held as having in all respects complied with the Act, then clearly McNeil is out, and there will be no necessity of considering his status; if not, the status of McNeil is established unless the McCully staking, etc., stands in the way.

In respect of McCully the Commissioner finds that there was no original discovery of any kind, and that the licensees who staked on his behalf staked upon the discoveries already existing. If this be so, then the staking of McCully was not in accordance with the Act; and therefore cannot stand in the way of McNeil.

McNeil has therefore, it would seem, the right to have investigated the validity of the Plotke applications, and also that of the McCully application, if both the Plotke applications are held to be bad.

It is not conclusive against the McCully claim that H. A. McNeil had already staked on the 6th December; this staking may have been of such a character that under sec. 166 the claim was abandoned, or it may be that there had been to the knowledge of McCully's licensees an abandonment in fact (if there could be such a thing outside of the statutory provisions; this it is not here necessary to decide). And in any case the staking by H. A. McNeil on Dec. 6th cannot interfere with the staking by John J. McNeil on Jan. 13th. There is no evidence of identity between H. A. McNeil and John J. McNeil so as to cause John J. to be bound by any estoppel by record in proceedings at the instance of H. A., if there were any such estoppel against anyone, which I do not decide.

As to the position as appellant of McCully, in view of what I have said, I think he is not of necessity ousted from the status of an appellant by the stakings of Plotke; whether he is so or not by that of the 6th December we are not in possession of sufficient findings to enable us to determine, but I think that the Commissioner is right in finding that there was no discovery on behalf of McCully under sec. 132, and consequently, in my view, the appeal of McCully must be dismissed—and with costs.

In respect of the appeal of McNeil I think there must be a new trial. The method to be pursued upon such new trial I do not think we should prescribe. The costs of the

former proceedings, of this appeal, and of the new trial, should be dealt with by the Commissioner.

I have not considered the effect of sec. 140 of the Act of 1908, differing as it does from the previous legislation.

FALCONBRIDGE, C.J. and BRITTON, J., agreed in the result.

NOTE.—The decision of the Divisional Court in this somewhat confusing case seems to be in many respects open to criticism—the decision being perhaps influenced by a desire to get rid of the hampering effect of *Re Cashman and the Cobalt & James Mines, Ltd., ante*, (since overruled in *Re Smith and Hill, post*), and so prevent what the Court feared might be an injustice. Some of the points involved are very important.

The holding that a mining claim staked out on an insufficient discovery is an abandoned one within the meaning of the Act, and is therefore no bar to a re-staking of the same lands, is not and was not, it is submitted with great deference, good law. The point has now however been put beyond doubt by 9 Edw. VII. ch. 26, sec. 31 (1), amending s. 83 (of 1908). For a general discussion of the effect of prior stakings see note to *Re Smith and the Cobalt Development Co., ante.*

The assumption in the decision that the respondent Plotke had no real discovery in either of his stakings is erroneous. In the previous case of *Re McNeil and Plotke, ante*, the Commissioner (from the facts that a former application of Plotke had been cancelled and that no affirmative evidence was submitted in Plotke's behalf) suspected that Plotke had no *bona fide* discovery, and suggested that the Recorder should direct an inspection of the discoveries. The inspection however showed that Plotke did in fact have a *bona fide* discovery, and the Commissioner in his decision in the present case so finds. There is nothing, either, to justify the assumption that the last Plotke staking was not a real staking, or that it was not done in the form required by the Act. Therefore even upon the holding that lack of sufficient discovery worked an abandonment, there would seem to be no warranty for holding that the last Plotke application was no bar to McNeil's claim. It has been repeatedly recognized by the Commissioner and by the Courts (*Re Smith and Hill, post*, being the most recent example) that since the amendment of the Act in 1907, a second staking or application for a mining claim on the same land cannot be allowed until the first one has lapsed, or been abandoned, cancelled or forfeited.

As to the ascertainment of the facts upon the above and other points upon which the appellants' case depended, the comment suggests itself that the burden of proof was upon the appellants who were the attacking parties (see *Re Smith and Hill, post*). No evidence offered was rejected. The disposition that was made of the case in reopening it for more complete investigation seems, however, to be based upon the consent of the parties.

As to the holding regarding the form of the McNeil affidavit and the exception contained therein; this is intimately connected with the question whether the necessary condition of "openness" of the lands really existed. The Commissioner thought it did not; the Divisional Court—on the assumptions above pointed out—thought it did. But, though the Commissioner did not make the existence of the exception in the affidavit the sole ground of his rejection of the McNeil claim, and though such a ground might seem rather a narrow one if the necessary condition of "openness" did in fact exist, the sufficiency of the affidavit is of itself a matter that might well be separately considered, and it was considered by the Court. That the physical existence upon the property of stakes and markings which the deponent knows (and which any one can ascertain at the

recording office) to belong to stakings of claims that have lapsed or been abandoned, cancelled or forfeited, will not prevent the land from being "open to staking," or prevent the deponent from swearing that he verily believes they are so open, and that there is nothing upon them to indicate the contrary, goes without saying. It goes without saying also that the mere swearing of an affidavit in the form required by the Act can give no valid claim unless the affidavit is true. But if the applicant is unable or unwilling to state what the Act requires to be stated and to be the fact, may he alter or except from it what suits himself and still insist that his claim must be recorded? If he merely for greater caution or by reason of conscientiousness mentions something that he has seen upon or knows to be against the property but states at the same time that he does not believe it prevented the lands from being open to his staking, and if this be in fact something that would not prevent it, it would seem unreasonable and undesirable that the claim should be invalidated or rejected, if otherwise regular. But is a direct exception to what the Act requires to be stated—the exception of two prior applications, accompanied merely with the statement that the deponent has disputed these applications,—not that he believes them to be no bar to his staking, nor even that he believes them to be invalid—an immaterial and harmless deviation from the Act? With great deference it is submitted it is not, and that to hold that it is is to hold that what the Act requires to be stated or shown in order to record a claim need not be stated or shown. So far as the form of affidavit is concerned it seems impossible to distinguish this case, in principle, from *Re Isa Mining Co. and Francey, ante.* It does not seem that the change in the wording or substance of what the Act requires the affidavit to show can make any difference in regard to the insertion of an exception; the question is, may the applicant at his own will except from or qualify the substance of what is required by the Act whatever that may be. The reference in the decision of the Court to the amendment made to the Act in 1907 takes no cognizance of the fact that the form of the affidavit (No. 14) under the Act of 1906, provided for the insertion of exceptions to the statement that the applicant knew of no adverse claims. The words "except as follows" appeared at the end of that paragraph. (This was one of the grounds of the decision in *Munro* v. *Smith*, 8 O. W. R. at 454, in which it was held that the recording of several stakings on the same land at the same time was permissible under the Act of 1906). The amendment of 1907, in addition to changing the statement required, eliminated the excepting words, making the form for a mining claim in this respect similar to the form required for a Working Permit application. See, further, note 1 to *Re Isa Mining Co. and Francey, ante*, and see remarks of Moss, C.J.O., in *Re Smith and Hill, post.*

The doubt raised by the judgment as to whether present s. 140 (Act of 1908), differs in its effect from former s. 74 (2) (as amended in 1907), which it supersedes, has never been resolved. It is believed the revisers of the Act did not intend it to differ. For references to the provision as it formerly stood see *Re Sinclair, ante*, and *Re Wright and the Coleman D. Co., ante;* and see under "Merits" in Index Digest.

After partial re-hearing before the Commissioner an order was made by consent dismissing the McNeil appeal.

(THE COMMISSIONER.)

RE MACCOSHAM AND VANZANT.

Appeal from Recorder—Delay in Prosecuting—Staking—Substantial Compliance.

Proceedings under the Act must be prosecuted promptly, and if an appellant is not present with his evidence at the time appointed for hearing and no explanation is given, the appeal must be dismissed.

Failure to plant a No. 4 post, to blaze a discovery line and boundary lines, and to make a proper discovery post and put the correct license number on the posts, invalidates a mining claim.

Appeal from the decision of the Recorder of the Port Arthur mining division cancelling application for mining claim H.W. 691.

F. H. Keefer, K.C., for appellant E. J. MacCosham.

W. A. Dowler, K.C., for respondent Patrick Vanzant.

31st October, 1908.

THE COMMISSIONER.—At the time appointed for hearing before me counsel appeared for both parties but the appellant's counsel stated that the appellant was not present and that there was no explanation of his absence. After waiting till the next train came in and the appellant being still absent I intimated that as he had failed to prosecute his appeal I would be compelled to dismiss it unless evidence were submitted to me to show that the Recorder's decision was wrong. In these circumstances the appellant's counsel determined to call some of the witnesses of the other side who were present, and the hearing proceeded in that way, the respondent afterwards putting in further evidence upon his side of the case.

It was argued by counsel for the appellant that the papers produced by the Recorder indicated that the appellant had not been properly notified of the hearing before the Recorder. I cannot, however, find that such was the case, and I must assume that the Recorder did not proceed with the hearing without being satisfied that proper service had been made. The appellant's non-appearance before me must also tend to confirm the assumption that he did not intend or desire to appear in the matter. I may mention that while I endeavor to exercise the greatest caution against

disposing of any party's case without giving him the fullest opportunity to be heard I cannot be unmindful of the fact that in these mining matters the launching of proceedings for the mere purpose of delay and to tie up the property without any expectation of successfully prosecuting them is a thing which is not infrequently done and it is in the interest of mining that it should not be encouraged and that any proceeding which is not promptly and diligently prosecuted should, as far as possible, be wiped off the record.

Upon the evidence submitted I can have no hesitation in sustaining the Recorder's decision. Apart from the fact that the appellant apparently endeavored to defeat the respondent of his claim, the respondent being really the first discoverer and staker of the property, the evidence satisfies me beyond question that the appellant did not stake the property in anything like substantial compliance with the Act. He defaced and meddled with the official survey posts, which he had no right to do, he does not appear to have planted any No. 4 post at all nor to have run or blazed any discovery line or boundary line, and his discovery post was not at all of the kind required by the Act. Further, it appears that his proper license number was not marked upon the posts as the Act requires. It would hardly seem possible upon the evidence submitted that MacCosham could really have staked the property, as he swears in his application, on the 30th of June at all. The staking that was done was at all events entirely insufficient and I would be compelled upon that ground alone to hold his application invalid. The appeal must therefore be dismissed.

It is admitted, however, that the respondent, who by reason as he says of what the appellant told him allowed the time for recording to elapse before putting his claim upon record, can now himself have no rights in the property, and the present contest is apparently being conducted rather in the interest of a subsequent staker than in the interest of the respondent. I think, therefore, I cannot make any order in favor of the respondent for costs.

Order dismissing the appeal without costs.

(THE COMMISSIONER.)

RE NEIL ET AL. AND MURPHY.

Co-holders—Working Conditions—Contribution.

Where a co-holder of a mining claim failed to contribute his share to the performance of the working conditions an order was made that unless he made payment of the amount due and costs within a specified time his interest should be vested in the other co-holders.

Application by Lester Neil, A. O. Summers and Jack H. Johnson in respect of mining claims 1990, 1991 and 1992, in the Larder Lake Mining Division, of which the applicants and the defendant were co-holders.

F. L. Smiley, for applicants.

A. G. Slaght, for defendant.

10th November, 1908.

THE COMMISSIONER.—This is an application under sec. 81 of the Act in which the applicants are claiming to have the interest of their co-holder vested in them by reason of the latter's default in contributing his share to the performance of the work required by the Act to be done upon the claims as a condition of their holding.

Claim was first made upon the defendant for his one-fourth share of the $300 expended in performing the first 30 days work required upon each of the claims. The defendant promised on several occasions to pay the $75 but the drafts sent to him in pursuance of the arrangement with him in that behalf were not honored, and finally he gave his note for the amount together with exchange on the drafts but upon maturity failed to pay the note. He now sets up that he has a counterclaim or set-off of expenditures made by him for matters in connection with the claims other than the performance of the working conditions thereon and asks that by reason of this no order should be made against him. The applicants in answer to this counterclaim or set-off claim that they have large claims against the defendant for other matters in connection with the property and also for a further sum of $600 which they expended in performing further working conditions upon the claims.

Upon the evidence I find that it was necessary and reasonable for the applicants to expend this additional $600, as, though the defendant had agreed to contribute his share of the 180 days' work by actually himself procuring performance of the work, he allowed the time to run so near the limit allowed by the Act that the applicants were justified in performing the whole of the work upon the assumption that he did not intend to or would not have his part of this additional work completed within the statutory period allowed therefor.

I find, however, that the defendant did perform 47 days work upon the property, whether exactly within the time required by law does not appear, but at all events this work will stand to the credit of the claims for the future and I think the defendant should in the ultimate summing up of affairs between him and his co-holders be allowed for the 47 days work, amounting at the rate which the other work cost, namely, $3.33 per day, to $156.66, which, after deducting his own one-quarter, leaves $117.50 accruing to the benefit of the applicants' shares; but he should, of course, as against this be charged with his share of the $300 and of the $600 expended by the applicants, namely, $225.

As I do not think it would be fair to make an order in the event of its being shown that the applicants really owed the defendant a sufficient amount in connection with the transaction to equal the contribution which he should have made to the performance of the work I have gone into the accounts between them. . . .

I find that apart from the question of working conditions the accounts between the parties almost exactly balance and that at all events the defendant has no claim in respect thereof against the applicants, and I am therefore free to deal with the matter of working conditions alone.

Upon the working conditions the applicants, as already mentioned, expended in all $900, $225 of which the defendant should have borne. The defendant, however, as against this, is entitled as above to a set-off of $117.50 for work performed by him of which the applicants will in the future derive the benefit upon the claims. This leaves a balance of $107.50 which the defendant should pay the applicants to make matters now straight between them.

The defendant contributed nothing to the first $300 worth of work required to be done on the claims, and while

he did perform his one-quarter and a little more of the last $600 worth of work the applicants were, as I have said justified by the defendant's conduct in assuming that he did not intend to perform it and in themselves getting it done before the claims should be forfeited for default in work, and I am satisfied also that the defendant did not in fact file his share of the work in time to have saved the claims from such forfeiture. While therefore, as I have said, I think the defendant should get credit for what he did as accruing to the benefit of the claims he should certainly upon the other hand contribute to the outlay which the applicants had to make, as well the $600 as the $300. It might in fact be fairly contended that he should not at present get credit for the work he did at all but should be left to claim for that on future adjustment. I think, however, it is more convenient and better that all accounts should be squared to date and that everything done upon the property should stand to the general credit of the claims and not to the credit of any individual owner, and this is the result in the adjustment I am making, as to which certainly the defendant cannot complain.

It is clear that the defendant has been at fault and that the present proceedings were rendered necessary by his conduct and I think he should therefore bear the costs, but as all parties have been negligent and careless in the matter of keeping accounts I will only allow a small amount of costs against him.

Order that unless the defendant Matthew J. Murphy pays to the applicants within 20 days from the date hereof the sum of $107.50 contribution to expenses of performing working conditions and the sum of $40 for costs of these proceedings, being $147.50 in all, the applicants shall be entitled to obtain from me an order vesting in them all the interest of the said defendant in the mining claims in question together with an order for payment by the said Murphy to them of the sum of $50 costs.

(THE COMMISSIONER.)

RE DRUMMOND AND LAVERY ET AL.

Forfeiture—Relief from—Working Conditions—Failure to Perform.

Relief from forfeiture for non-performance of working conditions was refused where no substantial reason was shown for the default and the applicant's case was otherwise not meritorious, and it seemed that it was the subsequent general increase of value of property in the vicinity that prompted the desire to regain the neglected claims.
Remarks on the nature of such forfeiture.

Applications for relief from forfeiture for non-performance of working conditions.

F. Elliott, for applicant, H. A. Drummond.

A. G. Slaght, for respondents, J. J. Lavery and others.

11th November, 1908.

THE COMMISSIONER.—As these three cases are all in their essential circumstances similar for the purposes of the present applications it will be convenient to deal with them together in stating my reasons for decision.

The applicant Mr. Drummond is asking for relief from forfeiture caused by his failure to perform and file proof of the performance of the working conditions required by the statute, and he points to secs. 85 (2) and 80 of the Act as the sections under which he claims the relief. Application had been made to the Recorder under sec. 80 some considerable time previously and before the time for performance of the work had yet expired, but the Recorder refused an extension of time on the ground apparently that the case was not one coming within the provisions of sec. 80 and that there was therefore no authority under that section to grant an extension, and from this decision no appeal was taken. From this, however, it must not be inferred that the Recorder deemed it a meritorious case for extension of time, for the fact appears to be that he did not. I think it is clear that any powers I may have to grant relief must be based upon the provisions of sec. 85.

Passing over the objections raised by the respondents' counsel upon more or less technical grounds as to my right to grant relief and as to the applicant not being entitled to raise any question of forfeiture without leave, as it is in the

view I take of the case unnecessary to deal with these, I will deal simply with the merits.

The ground upon which the applicant seeks to excuse the non-performance of the work is briefly that he was by reason of some of the respondents having gone upon the property and staked and recorded applications upon it unable to dispose of one of the three claims and thus raise money or contract with some one for the performance of the necessary work upon the others. The truth is that by a mistake of the applicant or those who were acting for him in staking and recording the claims the location of the claims was erroneously described—being "tied" to a claim something like a mile and a half distant instead of to a claim which was supposed to be adjoining. Some of the respondents—whether by reason of this mistake or not does not clearly appear—went upon the property and staked and recorded claims as already mentioned. The present applicant, however, in July, 1908, secured certificates of record upon all three claims and no dispute or proceeding of any kind was ever commenced or entered against his record of title though it seems to have been known that the claims subsequently staked did in fact conflict with his claims, though his claims being prior would, of course, if valid, have priority and could not be affected by any subsequent record, and the issue to him of the certificates of record operated by virtue of sec. 63 (4) to preclude the entry of any dispute against the claims. Notwithstanding this, and notwithstanding that the Recorder had refused to grant an extension of time for performing the work, and notwithstanding that after this refusal there was still abundant time and an exceptionally favorable season for performing the work, the applicant altogether neglected to fulfil the working conditions, but now when property in the district has become very much more valuable than it was when he allowed the claims to lapse, he seeks to obtain relief from the effect of his own neglect and desires to displace and dispossess, not only those who staked their claims while his claim was still upon record, but also those who staked and recorded upon the property after his claims had undoubtedly ceased to exist as the result of his default in carrying out what every miner fully understands must be performed as a necessary condition of holding a claim.

While the term forfeiture is used in the Act as a convenient term it is in reality not a very happy or appropriate

expression; for the loss of rights, or rather the failure to develop these rights into a good title, is not a forfeiture in the strict or harsh sense of that term, but is clearly more in the nature of lapse of rights under an option, that is to say, if the terms upon which the Crown offers title to a miner are not performed within the time specified the option, so to speak, lapses and another miner is entitled to step in and proceed to stake out and perfect a new claim upon the property. Nothing is better or more universally understood among miners than the fact that these working conditions must be strictly and promptly complied with or the claim will lapse. That is the law in all mining countries, and in most jurisdictions the provisions for loss of rights upon default are more stringent than those in our own Act. To grant relief except in the most special and clearly meritorious cases would be in effect to repeal the statutory requirements and to destroy what is one of the most necessary and important principles in mining law everywhere, namely, that if a claimant does not work or develop the property which he has taken up he must cease to hold it and must leave it for those who are willing to do so. To weaken this feature of the law would be to do great injury to the mining interests of the country.

I cannot feel that there is any real merit in the present applicant's case or that he has brought himself within the circumstances intended to be covered by sec. 85 (2) or sec. 80. His alleged reasons for not performing the work do not appear to me to have any substance in them, and even after he knew that the Recorder would not grant him an extension of time he had ample time and opportunity to perform what the Act required. I cannot but feel that the subsequent general increase in the value of property in the district furnishes the chief motive for his present belated activity in seeking to make good his title. I think it would be establishing a very mischievous precedent were I to grant him relief in the circumstances shown.

Though not necessary to my decision I may point out that the evidence shows that the present applicant's claims had at their inception, apart altogether from the error in "tying" the claims—which indicated gross carelessness—very little real merit, and I am afraid the circumstances shown would under old sec. 136, now sec. 57 of the Act, disqualify the applicant or rather the recorded stakers.

from whom he acquired title, from acquiring or transmitting any rights in the property in question.

Upon the question of costs, it is admitted as to claim 8622 that the applicant did some work from which the present holder may derive benefit. As to the other two claims, 8619 and 8621 though the first 30 days work has been filed on each, it is alleged, though there is no clear evidence, that little or no work was really done upon them, or at all events none of a beneficial character. I will therefore allow no costs in regard to claim 8,622 and as the matter is a new one in which no precedent had been established I will limit the costs in the other two applications.

NOTE.—In connection with the remarks upon the nature of forfeiture for lack of performance of the working conditions see s. 68 of the Act of 1908.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

RE LEGRIS.

Evidence — Inspection — Identification of Discovery — Discovery Claimed at Different Point.

Where an applicant for a mining claim showed his discovery in his application and sketch as being near the north boundary of the claim where it turned out there was no sufficient discovery, but at the hearing claimed it was near the south-west corner where a discovery had been made by the other parties, and the weight of evidence as to the real location was otherwise against him, the claim was held invalid.

Appeal from cancellation of mining claim M. R. 759 for lack of discovery.

S. White, K.C., for appellant, Catherine Legris.

F. A. Day, for Hugh Logan, a subsequent applicant.

11th November, 1908.

THE COMMISSIONER.— This is an appeal from the decision of the Mining Recorder by which upon the report of the Claim Inspector he cancelled the application of Frederick Legris, of which the appellant claims to be an assignee.

On the hearing a subsequent applicant Hugh Logan was represented and adduced evidence against the appeal and

with Logan was associated Harry W. Evans, who was really the first person to stake the lot, but whose application had before been thrown out for lack of discovery, though it seems that at one of the points which he now claims was one of his points of discovery there is according to the report of the Inspector a sufficient discovery of valuable mineral, had it been filed upon, to pass inspection.

The official Claim Inspector made a very full and exceedingly careful report in regard to all the alleged discoveries and discovery posts which he found on the claim at the time of his inspection. He found in addition to the Evans discovery already mentioned a discovery claimed on behalf of Legris which, so far as mineral was concerned, was sufficient under the Act but at it he found no Legris discovery post, and he found that the location and distance of this alleged discovery from the No. 1 post did not at all correspond with those given by Legris in his application and affidavit of discovery when he filed his claim. This discovery now claimed to have been made by Legris is located some 500 feet or so from the southerly boundary and some 300 feet from the westerly boundary of the claim and is distant nearly 1,500 feet from the No. 1 post, while the application and sketch or plan filed by Legris show the location of his discovery as being only a short distance from the north boundary and only 1,050 feet from the No. 1 post.

Upon this report the Recorder cancelled the Legris application and the appellant claims he should not have done so.

Evidence was adduced before me for and against the appeal, Frederick Legris himself, who staked the claim, being called by the appellant.

Going to the real merits of the case without regard to any moral claim which Evans might seem to have, and not troubling as to the regularity of the appeal or the status of the present appellant, the simple question is whether Legris when he staked the claim had the discovery which is now claimed upon his behalf or whether his only discovery was at a point very far distant from it and located near the north boundary.

Legris swore that he made only one discovery and planted only one discovery post. He says, though he himself drew the sketch or plan which forms part of his application and marked and measured the distance from his

No. 1 post, that he did not truly indicate on his sketch or in his application the position of his discovery and discovery post but that they were very much farther south—in fact, in an altogether different position from that shown. His explanation of how he came to make the alleged mistake is by no means satisfactory. It was sought to strengthen his contention by the evidence of two men who were sent to perform work upon the claim the following spring, these men claiming to have followed a blazed line from No. 1 post (though they admit there were several lines) and to have found what they say was a Legris discovery post at or near the point where Legris' discovery is now claimed. Both these men are illiterate and even if their good faith were to be assumed no great confidence could be placed in their identification of the post, and it is extraordinary that though they claim the post remained there all the time no one else seems to have seen it, and they were unable to show it to the Inspector at the time of his visit.

Upon the other hand Hugh Logan, the subsequent applicant, swears that when he visited the property a few days after the Legris staking he could find no Legris post in the vicinity where the Legris discovery is now claimed, but he did see a Legris discovery post near the north boundary of the claim. Logan's associate Charles E. Pinnelle, who impressed me as a very accurate and reliable witness, was on the claim on 2nd November shortly after the Legris staking and found a freshly cut and newly erected discovery post with Legris' name and the date 2nd November marked upon it within about 15 feet of the north boundary of the claim, and he also states that though he was over the property thoroughly he never found any Legris discovery post upon any other part of the claim. The evidence is beyond question that there was no sufficient discovery where the Legris post was found near the north boundary.

I can therefore have no hesitation in finding that the only discovery or discovery post belonging to Legris was that near the northern boundary of the claim, and I am compelled to find that the claim was invalid and that the Recorder properly cancelled it.

From this decision appeal was taken to the Divisional Court.

S. White, K.C., for appellant.

J. E. Day, for Logan.

2nd February, 1909.

The Court (FALCONBRIDGE, C.J., ANGLIN, J., CLUTE, J.), dismissed the appeal with costs.

(THE COMMISSIONER.)

RE BEAUDRY AND O'KEEFE ET AL.

Employer and Employee—Agreement for Interest in Mining Claim—Default in Carrying out Terms—Failure to Contribute to Performance of Working Conditions—Delay in Enforcing Claim.

O., who was under agreement with B. to give the latter a one-third interest in claims he might acquire, staked a claim under agreement with E. to give E. who had made the only real discovery upon the property a one-half interest. Upon O. explaining the circumstances to B. and asking him for money to record the claim as the agreement provided B. refused to pay anything or to have anything to do with the claim unless he would be given the whole of it and told O. he might take the claim to some one else. B. stood by while O and E. were at much trouble and expense protecting the claim through litigation, and he contributed nothing to the performance of the working conditions, without which the claim would have lapsed.

Held, that a claim subsequently brought by B. to enforce an interest should be dismissed.

Proceeding to enforce a claim to an interest in Mining Claim 9648, in the Township of Tudhope. The facts are stated in the decision.

S. Alfred Jones, K.C., for claimant, David Beaudry.

I. F. Hellmuth, K.C., and *F. A. Day*, for respondents, Edward O'Keefe and Wm. G. Ellis.

12th November, 1908.

THE COMMISSIONER.—The claimant is asking to enforce an interest in mining claim No. 9648 upon the ground that at the time the claim was staked by Edward O'Keefe the latter was in the employ of the claimant.

The circumstances connected with the staking of the claim were rather unusual. The defendant Ellis came upon the property while O'Keefe was in the act of staking. It appears that he had, and O'Keefe had not, made on it a *bona fide* discovery of valuable mineral, and he told O'Keefe of his discovery and pointed out to O'Keefe that the latter's discovery was insufficient and that his staking would in all

probability be disputed and thrown out as invalid, and proposed to O'Keefe that each should take a half interest in the property and complete the staking upon the Ellis discovery. O'Keefe, before consenting, desired to see his associates, one Knox and the defendant Laidley, who had brought him information that the property was open and one of whom had given him some assistance in the staking, before giving Ellis a decided answer. He saw them that evening and after considering the situation concluded that he would accept Ellis' offer as the wisest course for all concerned. He had told Ellis that he was under arrangement with the claimant Beaudry to give the latter one-third of whatever interests he might acquire in claims staked upon his license. The staking was then completed in accordance with Ellis' suggestion, and Ellis in addition the second day after, having made additional valuable discoveries, also staked and filed upon these with a view to further strengthen their title to the claim.

It is not disputed that Beaudry engaged O'Keefe to go up to the Montreal River district to work for him and directed him to go to Beaudry's associate Boyle and to work on a claim already held by Beaudry and Boyle. $12 in cash was paid O'Keefe before leaving towards expenses of the journey and a considerable quantity of supplies was given him at Beaudry's expense to take up to the Boyle camp for the operations. Some 13 days' work was performed by O'Keefe under the direction of Boyle upon the Beaudry-Boyle claim and in connection with the Boyle camp, and Boyle left the camp to come to Haileybury without apparently saying anything to O'Keefe in regard to staking claims. Information of a number of claims being thrown open was obtained by Knox through Boyle and taken to O'Keefe as already mentioned, it being suggested to O'Keefe by Laidley to stake the claim now in question.

O'Keefe and Beaudry both admit that before O'Keefe went up to the district something was said about staking claims in which Beaudry was to have an interest. Beaudry and his wife say that the claims were to be staked by O'Keefe upon Mrs. Beaudry's license while O'Keefe states that nothing was said about staking on Mrs. Beaudry's license and that he never received that license or any information concerning it and that he was to have the right to

stake upon his own license and give Beaudry a one-third interest in what he acquired. O'Keefe impressed me as a very honest and reliable witness and I have no doubt that he acted throughout the whole affair in perfect good faith and with entirely honest intentions, and I can have no hesitation in accepting his version of what occurred as against the stories of the claimant and his wife. Upon returning to Haileybury after staking the claim with Ellis he immediately went to Beaudry and explained the whole matter and asked for money to record the claim, or at least for half the necessary amount, as Ellis had agreed to pay the other half. This Beaudry refused to give him and though O'Keefe offered to give Beaudry a larger share of what he acquired than he says it was arranged to give him Beaudry flatly refused to have anything to do with the matter or to pay O'Keefe for anything he had done unless he could give him the whole claim and exclude Ellis from any share. This O'Keefe could not and would not do and though Beaudry denies it I find as a fact that, as O'Keefe says, Beaudry told him that he had better go to somebody else for the money, which it seems O'Keefe actually did, though unsuccessfully, and when Ellis came down and as he says also interviewed the Beaudrys about the matter, which, however, they deny. Ellis himself put up the necessary money, paying $20 for the double recording of the claim.

O'Keefe's and Ellis' statements are further corroborated by the fact that Beaudry undoubtedly did at this time refuse to stand good any longer for his board at the Dominion hotel, as had before been arranged, and Beaudry has never since paid O'Keefe for the work that he performed and it was only after the commencement of the present proceedings that he paid any part of the cost of O'Keefe's board which he had before authorized, though it seems that Beaudry did at a subsequent time tell O'Keefe that if he would sign over the whole claim he would settle with him. This O'Keefe refused to do as being a breach of faith and a fraud upon Ellis, who had really been the means of securing the claim. O'Keefe's honesty of purpose is further shown in the fact that though not compelled to do so he had, as he considered it a matter of justice, transferred a one-eighth interest to Laidley who had brought him the information that the claim was open and assisted him to some extent in the staking, being to some extent induced to do this by the fact that Laidley was unfortunate in hav-

ing the claim which he had staked beside this one thrown out, as I have no doubt would have been the fate of this claim had Ellis not been the means of acquiring and protecting it. At the time the claim was staked O'Keefe was living not upon Beaudry's supplies but at his own expense, and he has never charged or intended to charge Beaudry for the time occupied in prospecting or staking the claim and never entered this in his book until induced to do so by Beaudry and his associates.

The claim was in fact attacked and Ellis and O'Keefe were at much trouble and expense in maintaining their rights, during all which time Beaudry and his partner were silent, Beaudry, however, saying—the truth of which I very much doubt—that he did not know of the litigation. O'Keefe at each of two different times, for valuable consideration, conveyed a further one-eighth interest to Ellis, leaving Ellis now recorded for six-eighths of the claim, O'Keefe for one-eighth and Laidley for one-eighth.

The claimant Beaudry has also entirely failed and neglected to contribute any share to the performance of the working conditions required by the Act to be performed as a condition of holding the claim.

The evidence before me disclosed the existence of a very extraordinary agreement entered into the day before the hearing between the witnesses Laidley and Knox and Beaudry by which it was agreed that in addition to the one-eighth interest which Laidley now holds and in which it seems Knox is to share, Beaudry if successful in the present proceedings was to pay Laidley and Knox the sum of $1,000 each. In the face of this I would be very reluctant to deprive any one of an interest in a claim upon their evidence even apart from the fact that the demeanor of Laidley and Beaudry in the box was not such as to make me feel much confidence in their evidence. Such an agreement at such a time cannot fail to cast grave suspicion upon the claimant's whole case. . . .

Reviewing the facts, I find that the staking of claims was not the main or any very material part of O'Keefe's employment with Beaudry, but rather a side matter, and that O'Keefe was to have the right to stake upon his own license and was to give Beaudry a one-third interest in what he acquired. I find that it was really through Ellis that the claim in question was secured at all and that the arrangement that O'Keefe made with him was in the cir-

cumstances a wise and reasonable one and one which O'Keefe could not annul or evade. I find that Beaudry refused to furnish any part of the money necessary for recording the claim and that he told O'Keefe that the latter might get some one else to do so, and I find that the money was in fact furnished by Ellis, Beaudry not even up to the present having paid O'Keefe for the latter's other services. I find that in addition to being acquired through Ellis' instrumentality the claim was preserved by him and O'Keefe at much trouble and expense to themselves and without any assistance from the present claimant, attacks having been made upon its validity by other persons, and I find also that without assistance from the claimant they performed the working conditions upon the property without the performance of which the claim would long ago have lapsed.

I do not think in the circumstances that the claimant's case against the original half interest acquired by Ellis is reasonably arguable, and I think that the other two-eighths which Ellis subsequently acquired from O'Keefe are in the circumstances under which he obtained them equally free from attack.

As to the one-eighth interest held by Laidley, the claimant has agreed that this in any event is not to be disturbed.

The remaining one-eighth, which is still held by O'Keefe, might perhaps seem to be a matter of a little more question, but upon all the facts I do not think I can find that the claimant Beaudry is entitled to any share in it.

I think Beaudry has by his conduct renounced and forfeited any right he might otherwise have had to any interest in the claim. His refusal to furnish the money necessary for recording, and telling O'Keefe to take the claim to someone else I think would be sufficient, and even if not, his subsequent neglect to do anything, or even put forward his claim to an interest while the other parties were protecting it through litigation, leave him without any substantial merit, and his entire failure to contribute anything to the necessary working conditions, without which the claim could not be held, would under sec. 81 justify an order vesting all interest in the present recorded holders. It would seem to me to be very unjust, in the circumstances, and especially at this late day, to hold that Beaudry is entitled to any part of the property.

Claim dismissed with costs.

(THE COMMISSIONER.)

RE GREEN.

Survey of Claim—Enlarging Boundaries—Responsibility for Survey—Recording—Claim on Land Wrongly Included in Survey—Water Claim.

A survey of a mining claim which (without authority) enlarges the boundaries beyond the area originally staked out and applied for gives the holder of the claim no right to the added land, and does not prevent the valid staking out and recording of such land by another licensee.

The holder of the claim, who employs the surveyor, must be held responsible for the way the survey is made.

Appeal by John T. Green from the refusal of the Recorder to record a mining claim upon land included in a survey of a prior claim standing in the name of Kate Maloney. The facts are stated in the decision.

J. E. Day, for appellant.

No one appeared for respondent, though duly served.

12th November, 1908.

THE COMMISSIONER.—Evidence was put in upon Mr. Green's behalf upon which I find that the surveyor's plan and field notes made by Homer A. Sutcliffe, O. L. S., and filed by the holder of claim 10292, are not in accordance with the description of the lands applied for in the application for said claim, but include a very much larger area of land and an area much in excess of that allowed by the Act. The surveyor appears to have extended the boundaries both upon the east and upon the south for a very considerable distance beyond the limits shown in the application and sketch or plan. What the explanation of this may be I can in the absence of the respondent only conjecture. It appears from the evidence put in before me that there is a well marked line running southerly from Maloney's No. 1 post meeting an easterly and westerly line at the distance of about 17 chains from that post, but no stake appears to have been found at the intersection of these two lines and a surveyor's post is shown to be planted some considerable distance, 150 feet or thereabouts, easterly from that intersection, though no blazed line appears to have been made from the surveyor's post. It would seem from the evidence of Mr. Routly, another Ontario Land Surveyor, who has had much experience in the district, that the sur-

veyor in making what purports to be the survey of 10292 had taken in a large tract of land to the south which was plotted on a current map as a separate claim (308), though it does not appear ever really to have been applied for. There is evidence that the country has been burnt over and no doubt it was difficult to arrive at the location of the original stakes and markings, but from the records and evidence before me I am satisfied beyond question that the surveyor of the Maloney claim has wrongly included a very large tract of territory both south and east which was not in the original Maloney staking and which should not have been included. As the survey is made upon the instructions of the holder of the claim, or of the holder's agents, the holder of the claim must be held responsible for having the survey made as it is, and in any event the extension of the boundaries in this way without authority from the Recorder or the Department is wholly unwarranted and cannot be permitted to give the holder of the original claim any right or title whatever to the additional land. This is not a case where there is any conflict as to discoveries of valuable mineral as the discovery in claim 10292 is situated toward the western boundary of that claim and the alleged discovery upon the property for which Green is now applying is situated on the extreme east at the lake shore, the vein being claimed to extend down into the waters of Lake Temiskaming.

The applicant John T. Green claims to have made his discovery in the month of July, 1908, and after spending some time in investigating the matter and satisfying himself that the land upon which his alleged discovery is located and which he now asks to be recorded for was not included in the Maloney claim he, in September, 1908, staked out and filed an application for the property. The Recorder, assuming that the survey of 10292 was correct and that therefore the claim applied for by Green overlapped claim 10292, declined to put the application upon record, though receiving it upon file, and the purpose of the present proceedings is to secure the recording of the claim. The evidence which has now been presented to me was of course not before the Recorder, and had it been I have no doubt that he would have recorded Mr. Green's claim. As to whether or not the water area asked for should be included, that, I think, will have to be dealt with by the Department after considering the questions of naviga-

tion and any other questions that may arise in regard to that feature of the matter. I think, however, that the Green application should be recorded and that it should be declared that the survey purporting to be a survey of mining claim 10292, which has been filed, should be declared to be erroneous and that it should not be received or dealt with as a survey of that claim. I think it is unnecessary to interfere with the certificate of record except so far as that certificate might be taken to confirm the survey, which I do not think it does.

I make no finding in any way as to the validity of the Green application or as to whether or not Mr. Green really has a discovery of valuable mineral. All these are questions to be dealt with by the Recorder after the application is put upon record. I may point out, however, that from the evidence before me it appears that there are buildings, or at least a house or shack, and a crib or wharf, upon the property which Mr. Green is applying for, and the existence of these is not disclosed in his application as it should have been. It might be well that the Recorder should direct an inspection of the property; at all events it is for him to deal with the application upon the merits in such way as he deems proper under the provisions of the Act, as I make no finding upon the merits in the present proceedings.

(THE COMMISSIONER.)

RE YOUNG AND WETTLAUFER.

Agreement for Interest in Mining Claim—Clear Evidence Required—Consideration—Statute of Frauds—Sec. 71 (2) of The Mining Act (1908)—Instrument of Fraud.

A claim to an interest in a mining claim under an alleged parol agreement or promise (subsequent to the staking out and recording) where the claimant's connection with the property and acts regarding it are slight and attributable to causes other than the expectation of an interest, requires clear evidence to sustain it—even apart from the lack of tangible consideration and the lack of writing to satisfy the statute.

Sec. 71 (2) of The Mining Act (1908), (the equivalent of the Statute of Frauds) is a bar to a claim to an interest in a mining claim under a parol agreement entered into after the staking out of the claim; but where the claim is one for a share of the proceeds of the property when sold or where the parol evidence is merely in proof of a partnership, the statute appears not to apply.

Limits of the principle that the Statute of Frauds must not be made an instrument of fraud discussed.

Proceedings by Weldon C. Young to establish an interest in mining claims 7601 and 8372, south of Lorrain, held by Conrad E. Wettlaufer.

I. F. Hellmuth, K.C., and *W. A. Gordon*, for claimant.

W. M. Douglas and *A. G. Slaght*, for defendant.

16th November, 1908.

THE COMMISSIONER.—This is a proceeding in which the claimant Weldon C. Young is endeavoring to enforce a claim for a one-third interest in two mining claims known as the Shields claims, situated in the unsurveyed territory south of Lorrain, the claims or one of them being exceedingly valuable.

The agreement set up in the particulars furnished is a verbal one stated to have been entered into in consideration of the claimant giving to the defendant the benefit of the claimant's knowledge and experience as a mining man and doing certain work in reference to the claims in question.

The defendant sets up the Statute of Frauds and sec. 71 (2) of the Mining Act of Ontario, but lest there should be any doubt as to the applicability of these statutes I thought it better to receive all the evidence that seemed

relevant and deal with the case upon the merits, leaving the question of these statutes to be subsequently determined.

The evidence upon both sides was very fully and carefully presented, and very full argument was made upon its conclusion both as to the merits and as to the law.

Dealing first with the case upon its merits as though there were no statutory bar to receiving the parol evidence, I find the facts to be as follows. Early in the month of March, 1908, the defendant Wettlaufer, who had been carrying on mining operations in the Township of Coleman under his foreman, Grover, visited Haileybury and was shown some samples from what is known as the Keely property in the district south of Lorrain, which was then attracting some attention. On meeting his foreman, who was a man of large practical experience in mining matters, he showed him the Keely sample and upon his advice the two made a trip to the south Lorrain district on the 5th and 6th of March. They spent some time in examining the Keely claim and made enquiries from those whom they met there as to what surrounding properties might be open for purchase and in that way learned of the Shields claim which adjoined the Keely. On his return to Haileybury the defendant prosecuted enquiries at the Recorder's office and obtained the address of Shields, with whom he immediately opened up correspondence by letter and telegram.

Meanwhile the defendant's relative and partner Newton, proprietor of the Vendome hotel at Haileybury, had been urging the defendant to take part in a syndicate prospecting enterprise in connection with the claimant Young. Young's own evidence is that his first arrangement was with the Newtons and that when the defendant Wettlaufer came to town Mr. Newton proposed that Wettlaufer should be taken in as a member of the syndicate. On 7th March an agreement was drawn up in which Young agreed to go upon a prospecting trip to the territory south of the Township of Lorrain and stake claims in the vicinity of the Keely property, he to be entitled to a one-third interest in the claims, and Mr. Newton, Mrs. Newton and Mr. Wettlaufer to be entitled to two-ninths each, the latter three parties paying the travelling expenses, recording fees and other incidental expenses in connection with the trip. This agreement was not signed by the defendant but appears to have been signed for him after he had left town by Mr. Newton.

Though it appears that Wettlaufer was not very anxious to enter into the syndicate he accepted the arrangement and does not repudiate Mr. Newton's signing of the agreement in his behalf.

On 19th March the defendant met Shields at Haileybury and succeeded in obtaining from the latter an option to purchase claim 7601 upon certain terms specified in the document executed between them and upon the condition that the defendant would complete, before 1st April, the 14 days work which remained to be performed in order to comply with the Act and continue to hold the claim, and also upon condition that he would settle or get a favorable adjudication of what was known as the Bush dispute, which had been filed against the claim. On 20th March the defendant and his foreman Grover and the claimant Young and some 8 or 10 men started out for the South Lorrain district. Young and the men who went with him were employed by the syndicate to push the operations provided for in the syndicate agreement and do work upon and develop the syndicate properties, a number of which had already been acquired, or at least staked out and recorded. The defendant, after he had obtained the option agreement from Shields in which he had undertaken to complete the necessary work upon that claim, had asked Newton and Young if they would as a matter of accommodation allow the men, while they were down in the vicinity, to perform this 14 days work upon the Shields claim, and Newton and Young had readily assented to do so, the defendant agreeing to pay to the syndicate what it was worth.

From the manner in which the members of the syndicate refer to one another and from the two letters which have been put in it would appear that a somewhat friendly and intimate social relationship existed between them.

Shortly after arriving at South Lorrain the defendant hunted up and interviewed Bush, who had filed the dispute upon the Shields lot, and invited him over to the syndicate tent that evening to discuss the matter of making some arrangement to dispose of the dispute. Bush came to the tent and a somewhat extended interview seems to have ensued in which Young took part, and it was agreed that Bush and the defendant should go to Haileybury where Bush wanted to take some advice and see what could be done toward a settlement. Next morning all hands, in-

cluding the defendant, and Grover, and the claimant Young, and the syndicate men, went out to perform the 14 days work upon the Shields lot, Young apparently, to some extent at least, being in charge of the men. Grover and the defendant remained only part of the day and left with Bush for Haileybury, and the others completed the work finishing the following Monday, it being, of course, with the force of men they had, only a small matter to do what would amount to 14 days work for one man.

The defendant succeeded in closing an agreement for settlement with Bush at Haileybury and on the 23rd of March completed his purchase with Shields, a transfer being executed to him by Shields on that day.

On the same day, at Shields' suggestion, the suggestion having been evidently then for the first time made, the defendant purchased an eleven-twentieths interest in the other Shields lot, 8372, which is situated some little distance from the Keely property, and the purchase was immediately completed by execution of a transfer.

It was a part of the defendant's agreement with Bush that the latter should spend 30 days upon the first Shields claim assisting and superintending further work upon that property, and the defendant in addition to this, after his purchase of the Shields property, did a very considerable amount of work upon it with none of which was the claimant in any way connected except that, following the performance of the original 14 days' work already mentioned, the syndicate men, under Mr. Young, in further pursuance of the defendant's request, assisted in the survey of the two Shields lots. The survey and all other work performed by Young and the other syndicate men was charged up in the books of the syndicate in Young's own handwriting against the defendant Wettlaufer, who paid for it in full.

About the 1st of July, 1908, the defendant's men succeeded in uncovering what appears to be a very rich deposit of mineral upon the first Shields lot, 7601. The syndicate operations upon their properties upon the other hand seem not to have brought very satisfactory results, and Young seems to have ceased operations and receipt of salary in connection therewith about 20th June.

The claimant grounds his claim upon an alleged conversation with the defendant which he says took place in the sleigh on the way to the property, or rather to Ville Marie,

the first stopping place, on 20th March, but he also states that prior to that time, the exact date he says he is unable to fix, he was discussing South Lorrain properties with the defendant at the Vendome hotel and pointed to the Shields lot saying "That is the one for us to go after Connie, if we can get it," and he says that the defendant then told him he would get in touch with that lot at once and find out the status of it. The claimant says that the defendant said to him that day in the sleigh, "Weldie, there is one thing I want to make good in Lorrain for and that is for your sake. I would sooner see you make money in Lorrain than make it myself" and "that he would protect my interest in the Shields lots, if acquired, the same as in the other lots," meaning the syndicate claims, in which claims the claimant was to have a one-third interest according to the written agreement of the 7th of March.

This alleged conversation is the sole basis of the claimant's case, but he seeks to corroborate or support his claim by the evidence of O'Hara and Dufour, who say that when they interviewed the defendant concerning another property which they sold to the syndicate the defendant told them before closing the deal that he would have to consult "his partner Mr. Young;" and by the evidence of McCarthy, who says that he had a conversation with the defendant in the latter's room at the Vendome hotel some time after the 20th of April—not later, as he says, than a month after—and that the defendant in discussing the results of the syndicate venture as not being very remunerative to Young remarked that Young was a partner of his and that he would see that he got his share out of the Shields property.

The defendant denies absolutely any promise to the claimant to protect his interest in the Shields lots, and says that he never in any way agreed or promised to give the claimant any share or interest in them. He also denies that he ever told McCarthy that he was going to give the claimant anything out of the Shields lots, though he admits that he had shown McCarthy a sample from one of the Shields claims and says that he has no doubt that during the course of the conversation there may have been some talk in which Young's name was mentioned. He says also that he did not use the word partner in reference to Young when speaking to O'Hara and Dufour.

Much was endeavored to be made by the claimant's counsel out of the fact that the defendant is in conflict with so

many of the claimant's witnesses. Though I do not think that the case set up by the claimant, even if all he and his witnesses say were assumed to be true—vague and incomplete and with the alleged promise lacking in consideration as it is—could entitle him to succeed, it is due to the defendant to say that there was nothing in the latter's demeanor or evidence to justify an unfavorable impression as to his truthfulness and reliability, but quite the reverse; and the evidence against him should be very satisfactory and conclusive before I could feel justified in finding that his statements should not be accepted.

Upon the other hand I cannot avoid the conviction that McCarthy's evidence was influenced by a strong desire to assist his friend. From his demeanor and the nature and manner of his recital I could not but feel that there was an unreality about what he said, and in some respects his story lacks probability and consistency. He represents himself, for instance, as telling the defendant that the claimant was getting along quite nicely and in a few moments after represents that the defendant was promising to do something for the claimant because he was getting on so badly; and though the basis of the alleged announcement that the claimant was to have a share out of the Shields lots was the fact that these lots were turning out valuable as distinguished from the Forester and other syndicate properties, which were a failure, the fact is, as appears from the other evidence, that the rich find which made the Shields claim valuable was not discovered until about the 1st of July, a month or two after the date of this alleged conversation, nor did the claimant cease operations on the syndicate enterprise until some considerable time after this same conversation is alleged to have occurred and it could therefore hardly be predicated at the date of the conversation that the syndicate venture had resulted in failure.

What the real truth may have been concerning the alleged use of the word partner by the defendant in referring to the claimant in the conversations with O'Hara and Dufour, it is hard to say. So far as the use of the word is concerned the fact is immaterial, for it would not have been inappropriate to have used it as referring to the claimant's connection with the syndicate, in which the defendant and the claimant were undoubtedly partners or associates, and it was with reference to a syndicate property that the conversation with O'Hara and Dufour took place. So far as

the contradiction might have any significance upon the question of credibility, that must depend upon how the matter is viewed. Had the defendant been gauging his evidence with a view only to its best effect on his case he was probably intelligent and farseeing enough to know that it would be unwise to put himself in a conflict with two witnesses upon a fact really immaterial and so obviously susceptible to satisfactory explanation. Whatever the real fact about the use of the word partner may be, I think the defendant at all events spoke what he believed to be the truth when he said he had not used that word in these conversations.

In regard to the conflict of testimony between the defendant and the claimant; in the face of contradictions such as exist in this case, it is hardly possible to be altogether free from doubt, but I think, considering the demeanor of the witnesses, the nature and probabilities of the case, and the fact that the burden of proof must rest upon the claimant, I cannot find that any promise of a share or interest in the Shields properties was ever made by the defendant to the claimant. I am unable to find, either, that any consideration for such a promise existed. The claimant does not in his evidence pretend that he agreed to give the defendant any consideration, and I cannot see that anything which could properly be called consideration was given. It is past question in my mind that the defendant's real arousal of interest in the South Lorrain district came from a source other than the claimant's suggestion. It was from the opinion of his own expert, Grover, upon the Keely sample and by reason of his own and Grover's visit to the district on the 5th of March that the defendant seems to have become possessed of a desire to purchase property in that vicinity. It was on that visit and from the men he found upon the Keely claim that he learned of the Shields property and of its owner; it was he himself who sought out and ascertained Shields' address and opened up communication with him, and finally, on the 19th of March, obtained an option on the property—the claimant in all this taking no part.

On 20th March the claimant and the syndicate men were going down to the district on the syndicate business, and the defendant went with them, but he again took his own expert, and it does not appear that he was at any stage of the matter relying upon or using the information or experience

of the claimant, nor would it appear that the latter had any special qualifications in that respect, while Grover upon the other hand was a man of very extensive practical experience in mining affairs. It was the defendant himself, also, who sought and found Bush, the man who had filed the dispute on the property which had to be removed. Beyond the claimant's accidental presence at the camp when Bush came up in the evening to discuss the situation and his joining in the conversation with Bush, as he might well in the circumstance do without being financially interested, the claimant had no part in any way in getting rid of the Bush protest. True, the claimant did, as had previously been arranged with Newton, put the syndicate men to work on the Shields property in order to complete the necessary 14 days work required by the Act to secure the holding, and he did also have the men assist in surveying the two Shields claims, but for this work the defendant made full payment, and so far as the claimant himself was concerned he did no more in connection with it than any friendly miner, farmer, mechanic, or laborer does for his neighbor, especially in a new country, probably hundreds of times in his life without the slightest thought of pay or profit entering his mind. In regard to the alleged pointing out of the Shields lot upon the map at an earlier stage, the exact date of which the claimant is unable to give, if such a conversation took place at all it must have been of the most casual and ordinary kind, and whatever the conversation was it was apparently in connection with the syndicate's affairs and not with the defendant's private business, and the evidence is clear that at that early stage the defendant was not anxious to enter into the syndicate enterprise. And here it is to be remarked that if the defendant was intending to share the Shields property at all it would be unlikely that he would exclude his own relatives the Newtons from it while including the claimant, but it would be expected that he would have turned it into the syndicate; but the existence of the syndicate account against the defendant entered in the claimant's own handwriting precludes any contention that the syndicate was interested, and the fact that the claimant some time ago conveyed all his interest in the syndicate agreement to his partner Newton would make such a contention unavailing so far as benefit to the claimant is concerned.

I think it is also a matter of comment that the first request or demand of the claimant upon the defendant to

implement the promise which it is now contended the latter made should be the process in the present proceeding.

Upon the facts of the whole case I can feel no hesitation in the disposition which I should make of it. Were a connection with a property so slight and acts so insignificant and so clearly attributable to other causes to be made the ground of a legal claim to a share or interest in a mining property I fear, as the defendant's counsel pointed out, that the mining community would feel that their titles were precarious indeed. I quite agree that it is only upon very clear evidence that such a claim as the present one should be sustained.

Though disposing of the case upon the merits alone, perhaps I should refer briefly to the question of law raised by the defendant's counsel, namely, the bar of the claim by the Statute of Frauds or its equivalent, sec. 71 (2) of the present Mining Act. It was argued by the claimant's counsel that these statutes do not apply, this contention being grounded chiefly upon the principle or dictum that the statute could not be made an instrument of fraud, the cases of *Rochefoucauld* v. *Boustead* (1897), 1 Chy. 196, and In *Re Duke of Marlborough* (1894), 2 Chy. 133, being cited. As pointed out on the other side, there must, however, be some limitation to the principle or dictum referred to, or at least it cannot mean that the mere setting up of the statute against a claim which would otherwise be enforceable constitutes in itself the fraud which will not be permitted, otherwise the effect would be practically to repeal the provisions of the Act. The cases of *Goldstein* v. *Harris*, 12 O. W. R. 797; *Hull* v. *Allen*, 1 O. W. R. 151, 782; *Harrison* v. *Mobbs*, 12 O. W. R. 465; *McLeod* v. *Lawson and Crawford*, 8 O. W. R. at 216; *Caddick* v. *Skidmore*, 2 DeG. & J. 52; and a long list of English cases are referred to by the defendant's counsel in support of the applicability of the statute to the present case, and from these he deduces the proposition that, apart from the cases of partnership and pure agency, the principle of *Rochefoucauld* v. *Boustead* applies only where there has been a pre-existing interest in the person on whose behalf the parol evidence is sought to be given, or, that there must be some fraud in the case other than merely setting up the statute for the purpose of preventing proof of the making of a contract or of the creation of a trust.

I think at all events that unless the whole virtue and effect of these statutory provisions, the usefulness of which is well illustrated in the present case, is to be lost, this case must be held to belong to the class to which the statute applies.

But even if parol evidence be held to be not absolutely barred the present claim will at least come within the class of cases in which it is held that the proof must be clear and satisfactory beyond all reasonable doubt; *Goldstein* v. *Harris*, 12 O. W. R. at 802; *Hull* v. *Allen*, 1 O. W. R. at 783; *Berkinshaw* v. *Henderson*, 12 O. W. R. at 920.

I may point out that were the claim one for a share in the proceeds of the mining property when sold, or one to establish a partnership pure and simple, the statute would appear not to be a bar; *Archibald* v. *McNerhanie*, 29 S. C. R. 564; *Stuart* v. *Mott*, 23 S. C. R. 384. But neither of these is the case here set up, nor would the evidence furnish any ground for either contention. Furthermore, if the claim does not directly involve a share or interest in the claims, but only an interest in the proceeds when sold, I think it would be one which I would probably not have jurisdiction to deal with, and one which I think it was not the intention of the Mining Act to permit to encumber the record of title.

Claim dismissed with costs.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

RE BILSKY AND ROCHE ET AL.

Agreement for Interest in Mining Claim—Employer and Employee—Camping in Common—Costs—Jurisdiction of Commissioner.

A claim to an interest in mining claims staked out and recorded by other licensees cannot be established merely by the fact that the stakers were at times subsequent or previous to the staking in the employ of the claimants, and that the stakers during their operations were staying at a camp put up and maintained jointly by the claimants' foreman and other persons who were friends and relatives of the stakers.

A claim by a syndicate against its manager for damages for negligence or other personal demand cannot be dealt with by the Commissioner.

Proceedings by A. M. Bilsky to enforce a claim of himself and other members of a syndicate to an interest in min-

ing claims staked out and recorded in the names of the defendants, or in which the defendants were alleged to hold interests.

There were in all 7 cases, dealt with by the Commissioner together.

J. Lorn McDougall, for plaintiff, A. M. Bilsky.

George Ross, for defendants Peter J. Roche, M. J. Roche, Andrew Devine, M. J. Devine, and William Costello.

J. P. MacGregor, for defendant Joseph Turcotte.

1st December, 1908.

THE COMMISSIONER.—As the evidence in these seven cases is the same, except that in the case against Andrew Devine and the case against Joseph Turcotte the evidence of one additional witness was put in after the other evidence had been closed, it will be convenient in giving my reasons for decision to deal with the cases all together.

The proceedings were commenced under the Act as it existed in 1907. The plaintiff Alexander M. Bilsky is seeking in the first case to enforce generally his rights and the rights of his co-partners against Andrew Devine in respect of mining claims, or interests in mining claims, acquired by Devine in what is known as the Montreal River district during the spring and summer of 1907, and is seeking in the other six cases to establish specifically an interest in mining claims recorded respectively in the names of Peter J. Roche, Michael J. Roche, Michael J. Devine, William Costello, Patrick J. Devine and Joseph Turcotte.

The defendant Andrew Devine was (by consent) examined at great length under oath for discovery, and the taking of the evidence before me occupied nearly three days. There is in some respects a good deal of contradiction among the witnesses.

The main facts are as follows: The defendant Andrew Devine in the month of February, 1907, had sent his brother Michael J. Devine to the district to stake mining claims for him, and in that and a number of subsequent expeditions, in which others took part, quite a number of claims had been staked. Some of these, at least as early as April, were staked in the names of the plaintiff Bilsky and his associates Davis,

Friedman and Allen. These latter stakings were in pursuance of a verbal arrangement or understanding between Bilsky and Andrew Devine, no written agreement being entered into until 1st May.

On 1st May, 1907, a written agreement was signed between Andrew Devine, Bilsky, Davis, Allen, and Friedman, by which they all agreed to share equally in the expenses and ownership of all claims acquired by them in the Montreal River district.

A considerable force of men had already, about 20th April, been sent up, and work continued on quite an extensive scale until about the end of the first week in July, when quite a number of the men were let go, and on 13th July all the rest ceased to draw pay from the syndicate with the exception of three who continued on until 11st September.

The syndicate about the time of the signing of the agreement paid to Andrew Devine his accounts for expenditures up to that date, amounting to a little more than $3,000, or rather, paid their four-fifths share thereof, Devine himself being liable under the agreement to bear one-fifth. Various sums were subsequently contributed through Bilsky and Devine and the total expenditures of the syndicate amounted in all to about $10,000, for which as a result the syndicate has apparently come out of the venture with only one existing claim, though thirty-nine claims had as a matter of fact been transferred to it, all of them, with the one exception mentioned, having been cancelled by the Mining Inspectors for lack of sufficient discoveries.

No claim remains in the name of Andrew Devine, but the other defendants now hold claims, or interests in claims, in the district, and the plaintiff is seeking to establish his right and the syndicate's right to the latter, setting up the contention that even if the syndicate is not entitled to the interest held by the parties in whose name they were staked, which it is contended as a matter of fact it is, it is at all events entitled to the interest which it is claimed Andrew Devine holds in them, or in some of them.

Mr. Bilsky and Andrew Devine were given the oversight of the operations and it was left to Devine, largely at all events, to look after the field work, Bilsky looking after the financing and no doubt being supposed to be consulted in a general way. Andrew Devine for his services was to re-

ceive $200 per month. He does not appear, however, to have spent any great amount of time in the field, but left the superintendence, so far as there was any, to his brothers, in the first instance to Patrick J. Devine, and after the 23rd of May to Michael J. Devine, the latter continuing in charge until the camp was finally closed in September. The business, and especially the field operations, were conducted in a very loose and inefficient manner. The camp which was occupied by the men, and the provisions which they used, were all used in common with one Thomas Roche and his associates, and the camp was in fact upon property claimed by Roche. It is beyond question, however, that Roche brought in a very large amount of the provisions that were used, and probably contributed to the maintenance of the camp fully in proportion to the share actually used by himself and his associates, and it seems also that both parties contributed to the work of erecting the camp. . . .

It is to be regretted that so large an amount of money was sunk by the syndicate without any results except the ownership of a single claim, and I cannot but feel that Andrew Devine, if not dishonest, was extremely negligent and indifferent, especially in the later stages of the operations, to the interests of the syndicate, who entrusted him with very large powers and apparently reposed in him a good deal of confidence.

As to the ownership of any interest that Andrew Devine himself might have in mining claims in the district, there is really no dispute. It is undeniable that this must, under the agreement, belong to the syndicate, and as to any claim for damages for default or neglect or otherwise that the syndicate or its members may have against Devine personally, that must be dealt with by some other tribunal as I have jurisdiction only to deal with the mining claims. The plaintiff, however, contends that in the circumstances the syndicate is entitled to the claims hereinbefore mentioned either directly or as being owned, or partly owned, by Andrew Devine.

Taking these claims separately, the first in order of date of staking is T. R. 388, staked by Michael J. Devine in his own name on 26th January, 1907. I cannot but find upon the evidence that in this expedition, at the time at all events that it was instituted and carried out, Andrew Devine had no interest. Michael Devine was sent up by

Conrad McGuire, who "grub-staked" him, or paid his expenses, for a half interest. The only question that could arise would be whether anything that subsequently happened would transfer any title to the syndicate or to Andrew Devine Though I cannot in the circumstances, but have some suspicion that there may have been an understanding between Devine and all the other parties connected with the claims that they would do with them what he desired—all of these persons being more or less intimately associated with one another, and most of them being related, and Andrew Devine being apparently a leader among them—yet no transfer or agreement to transfer was shown and I do not think any legal transfer or agreement exists. While the relations of the parties and the manner in which their business was carried on, and the carelessness if not deception of some of them in showing Mr. Bilsky and Mr. Cohen claims that did not belong to the syndicate without apprising them of that fact, must be commented upon and must to some extent raise a suspicion that all may not be as it seems, I cannot, in the face of the undoubted facts established on behalf of the defence, find anything to justify me in holding that the syndicate or Andrew Devine has any interest in the claims in question. The admission or statement of Devine at Temagami that he had these claims for sale, whatever it may amount to against himself, could not warrant me in depriving other defendants of their titles. Claim T. R. 388 was acquired by its present holder some time before either the syndicate's or Andrew Devine's operations in the district commenced, and nothing has been shown to displace the ownership, or vest any title or interest in the syndicate or in Andrew Devine.

Taking the next in order of date, namely, M. R. 199, staked by Michael J. Roche for himself on 15th July, 1907. Michael J. Roche was never in the employ or pay of the syndicate, though he seems at one time to have done some work for Andrew Devine. He was associated with his brother Thomas J. Roche, who also was never in the employ or pay of the syndicate. The claim appears never to have been owned in any way by the syndicate. Michael J. Roche and his brother Thomas J. Roche differ somewhat in their evidence regarding the ownership of the claim, Michael J. Roche saying he staked it for himself and Thomas J. Roche saying he considers himself entitled to a half interest in it, presumably by reason of supplying provisions for and

employing Michael J. Roche at or about the time it was staked. Both, of course, lived at the camp which it is contended was the syndicate camp, but which was beyond question partly put up and partly supplied with provisions by Thomas J. Roche. I think, at all events,, it would be impossible to hold that any one except Michael J. Roche and Thomas J. Roche has any interest in M. R. 199.

Claims M. R. 200 and M. R. 201 were also staked on the 15th of July, 1907. The staking was done by Michael J. Roche in behalf of Patrick J. Devine, and Patrick J. Devine says that Michael J. Roche and Paddy Maley are each entitled to a one-third interest in these claims, though Michael J. Roche does not appear to be claiming any interest in them. It seems that Michael J. Roche also paid for recording them. The staking seems to have been done by Michael J. Roche because Patrick J. Devine had no forest reserve permit. Neither of these claims seems, however, ever to have been owned by the syndicate. M. R. 200 as a matter of fact is only a small claim, commonly spoken of as a fraction, while M. R. 201 seems to be a claim of the usual size adjoining it on the east. The information that these claims were cancelled and open to staking was brought up to the camp by Thomas A. Roche, and it was he also who at the same time brought up the information that the syndicate was letting off all its men except three. On the whole the case of the syndicate is perhaps stronger in regard to these two claims than in regard to any of the others involved in these proceedings. Michael J. Roche, of course, who did the staking, was not connected in any way with the syndicate. Patrick J. Devine, however, was working for the syndicate up to and including Saturday, 13th July, 1907, the claims having been staked on Monday the 15th. Counsel for the plaintiff points to the circumstance that though Patrick J. Devine was still at the joint camp on the 15th and though the book-keeper Peter J. Roche did not get back from Latchford until the following Wednesday, the latter, knowing that Devine had staked claims, put him down on the time book as having ceased from the employ of the syndicate on the 13th. While no doubt this circumstance seems suspicious and while the word brought up by Thomas A. Roche that the syndicate was letting out all these men might not necessarily be taken as an actual dismissal I think upon the whole evidence I must hold that Patrick J. Devine ceased from the employ of the syndicate on the evening of the 13th.

His staking of the claims, or having them staked for him, on Monday seems to have been the result of his dismissal or of the word that Roche brought up regarding the severance of his connection with the syndicate, he then being desirous of acquiring something for himself if he could. The information brought by Thomas A. Roche was specific enough at least to make the men understand that the syndicate was really practically withdrawing from its operations in the district, and I cannot find that there was anything wrong in these men who were being discharged endeavoring thereafter to obtain something for themselves, if they had been loyal to the interests of the syndicate while still in its employ, and I cannot find that there was anything to prevent Devine from himself severing his connection on the 13th and proceeding to stake or acquire a claim on the 15th if he desired. There is nothing to lead to the suspicion that he had prospected or picked out the claims before, and it would appear from the evidence that his alleged discoveries were of little value, probably not sufficient to hold the claims had an inspection of them been made.

M.R. 216 was staked on 19th July, 1907, by Joseph Turcotte in his own behalf. Turcotte never as a fact received any pay from the syndicate, but negotiations were had with him, and apparently an agreement at one time made, that he should go up to the camp to cook. He says they left without him or did not complete the arrangement to take him up, and that subsequently, meeting Thomas A. Roche, who told him things looked promising in the region, he determined to go up on his own account. He at all events went up with Roche and went to the joint camp where he seems to have made himself at home without ceremony, whether as the guest of the syndicate or of Thomas Roche there may perhaps be some question, but upon the evidence I think I must find that Thomas A. Roche was responsible for bringing him there and undoubtedly, as already stated, Roche contributed a liberal share to the maintenance of the camp. Turcotte says he repaid Roche by subsequently working for him. It seems clear at all events that Turcotte was not working for and was not paid by the syndicate. His discovery and staking, it is further to be remarked, took place a considerable time after the syndicate's active operations had ceased and the bulk of their men had been withdrawn. From the facts surrounding the matter there is therefore nothing to justify me in holding that the syndicate could have any in-

terest in the Turcotte claim. I have no doubt, but, as Mr. Torrance swears, Turcotte when present in the Recorder's office last summer with Andrew Devine stated that Andrew Devine had an interest in the claim, though Turcotte says he does not remember having said this and that if he did say it it was not true. Andrew Devine seems upon the same occasion to have made a remark to the effect that he had, or ought to have, an interest in the claim. While this circumstance must raise the suspicion that there may have been some understanding between Devine and Turcotte that Devine was to be given or to have an interest I think it is not sufficient to enable me to declare as a fact that Devine, or the syndicate through him, has really any interest in it, for upon the facts as I have found them there would be no legal right to an interest unless a purchase or transfer had been made subsequently to the staking and recording of the claim in Turcotte's name, which would not be the kind of acquisition the syndicate agreement contemplated or covered. The Turcotte claim, I might add, was not one in which the syndicate had previously any interest, but was a claim which had been staked by one Boucher, whose staking was thrown out prior to the Turcotte staking. One Ed. Quinn, who was not in the employ of the syndicate, assisted Turcotte in the staking.

Claim 246 was a claim staked in January, 1907, by Michael J. Roche for Thomas A. Roche, who "grub-staked" him, and after being thrown out by the Inspector it was restaked on 29th July by Michael J. Roche, Thomas A. Roche having an interest. As already stated neither of these men was at any time in the employ of the syndicate, and the syndicate was not in any way interested in the claim nor is there anything to show that Andrew Devine ever had any interest in it.

M. R. 583 was staked on 5th August, 1907, by Turcotte, on behalf of William Costello. Turcotte, as I have found, was never in the employ of the syndicate, and Costello had not been in their employ since 17th June, and I think the syndicate can have no claim upon this lot. It seems to be a small fraction lying between other claims, though it would appear a discovery of some merit had been made upon it. Samples produced either by Andrew Devine or by Mr. Bilsky to their partners on or before 17th July appear to have been represented as having come from a Costello claim, but whether from this claim or from one of the other three claims

which had previously been staked in Costello's name and actually transferred to the syndicate does not appear, though certainly this claim could not on the 17th July have been properly referred to as the Costello claim as it was not acquired by Costello until 5th August. At all events the facts being as I have stated there is nothing to justify me in finding that Costello is not entitled to the property.

M. R. 733 was staked by Peter J. Roche in his own behalf on 25th October, 1907. He ceased from the employ of the syndicate on 11th September, 1907, and I think it would be impossible to find that the syndicate or Andrew Devine has any interest in the property.

Though dismissing the claims against all the defendants other than Andrew Devine, I cannot but remark upon the very loose and unsatisfactory way in which the joint camp was conducted. The friendly relations between the parties appear to be the chief explanation of their staying together and maintaining the camp in the joint and free and easy way in which they did. Perhaps, also, the greater neighborliness which exists among people generally in an unsettled district where neighborliness is in most cases a necessity, may also be an explanation for the fact of Thomas Roche and the other parties all settling down in the one habitation and using their provisions in common and receiving and maintaining their friends with little thought as to the financial aspect of it. Though the chief responsibility for the looseness and lack of effectiveness in pushing the interests of the syndicate must rest upon Andrew Devine, who for the most part at least, was in charge of the field operations, I think all those who were at the camp and who allowed matters to go on in the loose way they did, must be held to be to some extent to blame for the present litigation, as they might well have foreseen that trouble must result where other persons than themselves and their friends were interested. I will therefore allow no costs to any of the defendants.

As to Andrew Devine, though as far as the evidence discloses there is no interest in the claims mentioned to which he is entitled, or which the syndicate can attach, I will make a general finding or declaration that any interest he may have in any mining claims acquired in what is commonly known as the Montreal River division, is the property of the syndicate.

From this decision the plaintiff appealed to the Divisional Court.

J. Lorn McDougall, for appellant.

George Ross, for respondents other than Turcotte.

C. D. Scott and J. P. MacGregor, for Turcotte.

1st February, 1909.

The Court (FALCONBRIDGE, C.J., ANGLIN, J., and CLUTE, J.), upon conclusion of the argument dismissed the appeals—as to Turcotte with costs, and as to the other respondents without costs.

(THE COMMISSIONER.)

RE SMITH AND KILPATRICK ET AL.

Discovery—Discovery after Staking — Staking — Lack of Discovery Post—False Statements in Application and Affidavit—Blanketing—Lands Open—United States and British Columbia Laws—Staking on Another's Discovery—Merits.

Discovery of valuable mineral must be made before a valid mining claim can be staked out, and where a claim was staked on an insufficient discovery, no real discovery having been made until after the staking had been completed, and no discovery post planted upon it until after the claim had been recorded, the claim was held invalid.

It seems failure to put up a discovery post will invalidate a mining claim.

False and deceptive statements in the application and affidavit, and attempting to blanket the land in disregard of the law, disentitle the applicant to sympathy even where he has a discovery, and may be sufficient to invalidate his claim.

Appeal from cancellation of appellant's mining claim, M. R. 1084, for lack of discovery.

George Ross and *J. P. MacGregor*, for applicant Smith.

T. W. McGarry and *W. A. Gordon*, for respondents H. N. Kilpatrick and Wm. B. Kilpatrick.

24th Dec., 1908.

THE COMMISSIONER.—The respondent H. N. Kilpatrick had filed a dispute against the appellant's application and therein claimed the property for himself upon staking done about the same time as the appellants, the application being

filed subsequently to the appellant's application. The Recorder directed an inspection of the alleged discoveries and stakings of both claimants, and upon receiving the Inspector's report he cancelled both applications. The appellant Smith now appeals from the cancellation of his claim. The respondent H. N. Kilpatrick accepted the result as to his application but his brother, the respondent William B. Kilpatrick, after the cancellation of the other two claims, restaked the property and recorded a new application upon it. The new application is not in question in the present proceeding, the question of its validity not having been gone into, and not having yet been passed upon by the Recorder. If the present appeal were to succeed it will, of course, be unnecessary to deal with the new application, as the appellant, being prior in time, would be entitled to the property.

Evidence in the present case was submitted by both parties at considerable length, and the Inspector, Mr. MacKenzie, who examined and reported upon the original applications, was among the witnesses examined.

I find the facts to be as follows:

On Sunday, the 12th of July, the appellant's party of prospectors, having recently arrived in the district in which the property is situated, proceeded to the work of taking up claims. A number of them started from a point some 75 chains or so north of the property in question, and proceeded to blaze a line from thence southward, chaining and planting posts at intervals of 20 chains, the distance required for laying out mining claims. Evans, another member of the party, who is a civil engineer, was at the same time, as he states, prospecting upon some or all of the claims or property along the above-mentioned line, including the claim now in question, and he says that on that afternoon, among six discoveries in all which he claims to have made that day, he found a quartz vein or stringer on this property at a point about 1,100 feet from the No. 1 corner, this being the point that was subsequently described in the appellant's application as being the location of the discovery upon which his claim is based. Evans marked a tree near this alleged discovery and met his associates, who had been running a line, at or near the No. 1 corner, and with their assistance a No. 1 post was planted, this being upon the line which they were running southerly as already described. From thisNo. 1 post the line was con-

tinued southerly to the shore of a little lake where a No. 2 post, or a witness No. 2 post, was planted, when the party ceased work for the day and went to their camp without doing anything further upon the claim except that they marked a line for a little distance westward from their No. 1 post to show its direction as one witness said, and except that Evans appears to have made some marks with his jack-knife upon the trees from his discovery to the No. 1 post.

Nothing further was done toward acquiring the claim until Thursday, 16th July, when, in the morning Clifford E. Smith and some of his associates, proceeded to the property and completed the staking and blazing of the lines. Evans later came upon the claim and about 3 o'clock in the afternoon made another discovery within about 200 feet of the No. 1 post, which he showed to the appellant Clifford E. Smith after the latter had completed the staking. No discovery post was planted at this time upon this second discovery, but Evans says that with his knife he whittled a tree in the vicinity, and upon it put some markings indicating the discovery. This was not a discovery post within the requirements of the Act, and it was not until the 19th or 20th July, some days after the claim had been recorded, that a proper discovery post was erected at this point. . . .

Upon the evidence, I have no hesitation in confirming the Inspector's finding, that the discovery of the appellant situated some 1,100 feet from the No. 1 post was not a *bona fide* discovery of valuable mineral within the meaning of the Act. No very serious objection was in fact raised to the Inspector's finding upon this point.

I find that Evans did about 3 o'clock in the afternoon of the 16th of July make a discovery about 200 feet from the No. 1 post which, so far as the mineral is concerned, was sufficient to answer the requirements of the Act. I find, however, that this discovery was not made until after the property had been staked upon the alleged discovery located some 1,100 feet from the No. 1 post. I find that no sufficient discovery post, and in fact nothing that could properly be called a discovery post at all, nor anything reasonably answering its purpose, was planted at this second discovery until some days after the claim had been recorded. I find that the applicant Clifford E. Smith had never seen either discovery until 16th July, that he was not on the claim at all on the 13th, and that no discovery of any kind was made by him or his associ-

ates on that day, and that the date 13th was marked upon the posts and inserted in the application for the purpose of avoiding possible illegality by reason of the 12th being Sunday, and the affidavit verifying the statements in the application was untrue to the knowledge of the deponent when he made it and the untrue statement was made to deceive. It seems strange also that the application (verified by affidavit) states that the staking was completed on 15th July, though in the evidence before me the deponent and his associates swore that it was not completed until the 16th. As the application and affidavit are in the handwriting of the deponent, and as the facts were then very fresh in his mind, I cannot but suspect that this was another deliberate misstatement made in order to get the applicant's staking ahead of the Kilpatrick staking, the latter having been, to the deponent's knowledge, at least partly done on the 16th before the completion of the appellant's staking. I find that the appellant's application and the sketch or plan filed therewith refer to his first-mentioned alleged discovery situated some 1,100 feet from the No. 1 post, and have no reference to the second discovery made on the 16th, or to the fact that any second discovery was made. So far as the deponent Clifford E. Smith made any discovery at all, the first discovery, as well as the second, was made by him on the 16th, and the mineral described in the affidavit of discovery is in fact not identical with what is sworn to have been found at either discovery, but includes rather the minerals which are supposed to be usually contained in valuable discoveries in the district. I find also that the applicant proceeded to the staking of the claim in question without any adequate regard to the requirement of the Act that there must be a discovery of valuable mineral made upon the property before a mining claim can be legally staked out. With his actions in regard to other claims, I think I have nothing in the present case to do, but as to this claim, the evidence satisfies me that he intended to stake and blanket the property without waiting to satisfy himself that any sufficient discovery had been made. It may be pointed out, also, that the forms of application and affidavit used by the appellant are not the forms required by the Act in force at the time the application was made.

Upon these facts, I think I must dismiss the appeal. The Act is clear in requiring that a discovery of valuable mineral must be made upon the property before it is staked. In this case, it is true that one appears to have been made very shortly

after the property had been staked upon an insufficient discovery, but upon principle the length of time elapsing cannot affect the legality of the claim, and if a subsequent discovery were to be held to validate a prior staking at all, it would be impossible to make any dividing line as to within what time it should be held good and what time not. The requirement that discovery must first be made is one of the most important features of our mining law, and is in fact the only existing safeguard against the blanketing and tying up of large tracts of Crown property, which it is intended shall remain open for all licensees to prospect upon until one of them has made a sufficient discovery. It may be pointed out that the Ontario Act differs from the law of the United States and of British Columbia in that when once a claim has been staked, no other licensee is allowed to prospect or stake over the existing staking until it has lapsed or has been abandoned, cancelled or forfeited, that is to say, there can be only one staking and record upon the same property at a time, the first staker being given an exclusive status to that extent, while in the United States and in British Columbia if the first staking is invalid it does not, in general, prevent another prospector from coming upon the property and, if he makes a sufficient discovery, staking out a valid claim upon it. It may also be pointed out that provision is made in the Ontario Act for cases where discoveries of valuable mineral cannot readily be made upon the property, and a licensee desires to get exclusive possession of it for the purpose of prospecting upon it upon a more extensive scale than a prospector would usually care to devote to land upon which he had no exclusive right. This is done by proceeding according to the provisions of the Act to obtain what is called a Working Permit.

Upon the ground, therefore, that there was no sufficient discovery made by, or on behalf of, the appellant at the time he staked the property, I think I have no alternative but to hold his claim invalid.

Under the ruling of Mr. Justice Anglin in the case of *Re Blye* v. *Downey*, 11 O. W. R. 323 (*ante*), which the Court of Appeal in passing upon the same case expressly refrained from dissenting from, the failure to plant a proper discovery post, or in fact anything that could be called a discovery post at all, upon the discovery by which it is now sought to uphold the claim, would appear also to be a fatal defect. In this case, in addition to not planting the necessary discovery

post, the applicant failed to mention the discovery in his application at all.

Were it not for the untruthfulness and deception of the statements contained in the application and affidavit accompanying it, and for the evident disregard that the appellant and his associates showed for the requirements of the law in regard to the staking out of mining claims, I would feel a good deal of regret in being compelled to find the claim invalid in a case where a good discovery really seems to have been made, though at a later date, upon the appellant's behalf, but these considerations leave little room for sympathy toward him, if, indeed, they are not sufficient in themselves to invalidate his claim. If, as alleged, the respondent William B. Kilpatrick has staked on the discovery made by the appellant there can be little merit, morally at least, in his subsequent application, and if his application is also invalid proceedings can be taken to have it cancelled, but with that I cannot deal in the present case.

Appeal dismissed with costs.

(THE COMMISSIONER.)

RE CAHILL AND RYAN ET AL.

Sale of Mining Claims—Option or Contract—Time of the Essence—Acceptance of Offer—Conditional Deposit—Counter Offer—Conditional Contract—Statute of Frauds—Signing Contract as Witness — Verbal Acceptance—Notice of Rescission—Holiday—"On or Before."

M. and R. agreed to sell 3 mining claims to C. on condition that $5,000 be deposited in the bank on or before 9th Nov., $45,000 on or before 9th Dec. and the balance of $200,000 in one year thereafter. Owing to 9th Nov. being a bank holiday, the $5,000 was not deposited until 10th Nov., and then only "on condition that payment due 9th Dec. be extended to 1st Feb." M. and R., having been notified of this condition, repudiated the sale and re-sold to other parties.

Held that C. was not entitled to enforce the sale.

An option or offer must be accepted strictly within the time limited.

Attaching a condition to an acceptance is in effect a counter offer and a rejection of the offer of the other party.

Time is of the essence of the contract in all agreements for the sale of mining property, and in any agreement for the sale of land which is unilateral or lacking in mutuality; and where time is of the essence it seems notice of rescission is not necessary.

A verbal acceptance by the plaintiff of a written offer of the defendant is sufficient as against the defendant notwithstanding the Statute of Frauds, but to justify enforcement of the contract the acceptance must be unequivocal and unconditional.

It seems that where the last day for doing an act under a contract falls on a holiday and the act therefore cannot be done on that day it must be done on the next day prior that is not a holiday.

Proceedings by Thomas Cahill to enforce sale to him of mining claims T.R. 1965-6-7, held by the respondents Wilfred Ryan and Charles Mann and afterwards sold by them to the respondents E. B. Ryckman, W. Reamsbottom and C. A. Foster.

I. F. Hellmuth, K.C., *J. B. Holden*, and *J. L. McDougall*, for the claimant, Cahill.

J. W. Mahon, *George Ross* and *C. C. Robinson*, for the respondents.

4th March, 1909.

THE COMMISSIONER.—The claimant Thomas Cahill is seeking to enforce against the respondents an agreement or alleged agreement of sale of three unpatented mining claims situate west of Gowganda Lake, in the Montreal River Mining Division, known as T.R. 1965, T.R. 1966 and T.R. 1967.

He claims under a document written out and witnessed by himself and signed by the recorded holders, Charles Mann and Wilfred Ryan, all in lead pencil, as follows:

"Gowganda, Oct. 30th, 1908

This is to certify that we the undersigned agree to sell to Thos. Cahill the following Mining Claims in the Montreal Mining Division, T. R. 1965, T. R. 1966, T. R. 1967, on the following conditions: Five thousand dollars on or before the ninth day of November, 1908, forty-five thousand dollars on or before the 9th day of December, 1908, and the balance two hundred thousand dollars in one year thereafter. Said five thousand dollars to be deposited in the Bank of Commerce, Latchford, to the credit of Wm. Ryan and the forty-five thousand dollars likewise. We the undersigned agree to place the titles of said properties in the said above mentioned bank in escrow until the total amounts are paid. In default of balance not being paid titles return to us and you forfeit all money already paid.

Witness: C. Mann,
T. Cahill. Wilfred Ryan."

This document was written out and signed at Gowganda on 30th October, 1908. There is no direct evidence, verbal or otherwise, of acceptance or agreement on the part of Cahill, but the document was given to and retained by him. He admits that a further document was to be drawn up in regard to the ore from the property—the document that was signed being rather strangely silent as to the matters of possession and working of the property—and I infer from the evidence that the document that was to be drawn up was to be a formal document covering the terms of the document already signed and dealing specifically with the question of the ore, and consequently, as I take it, dealing also with the question of what were to be the rights of the parties in regard to working the claims pending the completion of the contract.

The day fixed for the payment or deposit of the $5,000, namely, 9th November, 1908, (Thanksgiving day), was a bank and public holiday. On that day the following telegram was sent from the Bank of Commerce at Cobalt to the Bank of Commerce at Latchford:

"Notify and pay Robert Mann and Wm. Ryan Five Thousand Dollars account N. A. Timmins on condition that payment due 9th December be extended 1st February. Acknowledge receipt by wire this message."

The 9th being a bank holiday the money was not put to Mann and Ryan's account until the following day, the 10th, and it was then entered as follows:

"Robert Mann and William Ryan, Elk Lake, subject to

condition that payment on property due 9th Dec. 1908, be extended to 1st Feb., 1909.

1908, Nov. 10, Ck. Cobalt Cr. $5,000."

On the same day, pursuant to the instructions in the telegram, letters were written by the manager of the bank at Latchford to R. A. Mann and Wm. Ryan, addressed to Elk Lake post office, advising them that the $5,000 had been transferred from the Cobalt branch to their credit "subject to the following condition, 'that the payment due 9th December be extended to 1st February, 1909.'" These letters were received by Mann and Ryan at Elk Lake on 16th November and were the first and the only information they had up to that time regarding the payment in of the money.

Meanwhile on 11th November a telegram was sent to the bank by Timmins, who was interested with Cahill in the deal, as follows:—

"Waive conditions attached to deposits credit of Mann and Ryan. N. A. Timmins."

and the bank manager at Latchford thereupon entered upon the above account the words "Condition waived 11th November, 1908, by telegram" and he states that on the same day he prepared and signed letters to R. A. Mann and Wm. Ryan, addressed to Elk Lake, notifying them that the condition attached to the deposit had been waived and telling them that he had neglected in his letter of the previous day to say that the transfer of the money had been made through their Cobalt branch for account of Mr. Timmins. The manager says these letters were "handed to the junior and despatched in the ordinary course of business." Robert A. Mann says he never received this letter, and that I find to be the fact, nor is there any evidence to satisfy me that the letter of the same date to Ryan was received. Robert Mann or R. A. Mann, as he is sometimes referred to, though not upon record as a holder of the claims, was a partner with the holders and had personal knowledge and personal conduct, as he says, of the matters relating to the proposed sale. The document which was signed on 30th October calls for the deposit to be made in the name of Wm. Ryan though the agreement is signed in the name of Wilfred Ryan, and the deposit with the condition attached was made to the joint account of Robert Mann and William Ryan.

After receiving the letters of 10th November from the bank manager the Manns and Ryan on the 16th left Elk Lake for Latchford and on their way out met Cahill on his way in at a stopping place known as Hill's, and here an interview occurred between them of which the particulars on Cahill's part are very meagre. I think, however, that Robert A. Mann's account of what occurred is correct. He says Cahill enquired what they were coming out for and he told him they were coming out to sell the property to another party. Cahill wanted to know why and they told him that he hadn't made the deposit. Cahill then told them that the condition had been waived, this being the first intimation they had of the waiver. They then told him that the waiver made no difference, and that they didn't recognize the deposit and were going to deal with other people. On reaching Latchford on the 18th they verbally informed the bank to the same effect.

On 19th November the document of 30th October was filed in the recording office in the usual form, the necessary affidavit of execution having been made by Mr. Timmins, who had been present and seen it signed at Gowganda, he adding his name at witness under the name of Cahill.

On 23rd November a document called an option signed by the recorded holders and their partners, agreeing to sell the properties to Edmund Baird Ryckmann, was filed in the recorder's office. This document bears date November 18th, 1908, the purchase price mentioned in it being the same as and the terms of payment very similar to those of the document of October 30th.

No title papers were ever placed in the bank pursuant to the document of October 30th. Cahill admits, however, that he knew the Manns and Ryan were not coming out before the time for payment of the first deposit and that he did not expect them to deposit the title papers on the 9th if they were not out, and he in fact admits that he arranged with them to send them in word as to whether or not the deposit was made.

This, I think, covers all the material facts so far as disclosed, except that it may be added that the second deposit or payment of $45,000 was in fact put to the credit of Wilfred Ryan at the Bank of Commerce at Latchford on the 9th of December, 1908.

In these circumstances I have to determine what are the rights of the parties. The first serious question is, was the document of 30th October ever more than an offer or option, or was it, or did it ever become, a contract.

The main principle of law involved is very elementary but its application to the facts—involving the inferences or presumptions which are to be drawn from what took place—is less easy. There is, as I have said, no direct evidence of acceptance. The burden of proving this or of showing facts from which it is to be inferred or presumed rests, of course, upon the claimant. It is well settled that, notwithstanding the Statute of Frauds, even a verbal acceptance by the party suing would be sufficient to charge a defendant who had signed a written agreement; *Dart, Vendors and Purchasers* (7th ed.), 1064; *Fry on Specific Performance* (4th ed.) 208; *Leake on Contracts* (4th ed.) 184. But acceptance of some kind, express or implied, there must be, and it must be communicated to the other party, and to justify enforcement of the agreement it must be plain, unequivocal and unconditional; *Leake on Contracts* (4th ed.) 13, 18; 3 *Encyc Laws of Eng.* (2nd ed.) 533, 535; *Carter* v. *Bingham*, 32 U. C. R. 615; *Cole* v. *Sumner*, 30 S. C. R. 379; *Fry on Specific Performance* (4th ed.) 120, 226, 227. It is urged on behalf of the claimant that the facts of his writing out and witnessing and retaining the document are sufficient to establish acceptance on his part and to convert the offer into a contract binding upon both parties, and cases are cited to show that writing out a contract and even signing it as witness sufficiently answers the requirements of the Statute of Frauds. All these cases, however, appear to be cases where from the wording of the document or from other evidence there was no doubt as to the intention to be bound by the terms which were written. In the case of *Johnson* v. *Dodgson*, 2 M. & W. at p. 658, Lord Abinger, C.B., points out that:—

> "The cases have decided that although the signature be in the beginning or middle of the instrument it is as binding as if at the foot of it; the question being always open to the jury whether the party not having signed it regularly at the foot meant to be bound by it as it stood or whether it was left so unsigned because he refused to complete it. But where it is ascertained that he meant to be bound by it as a complete contract the Statute is satisfied, there being a note or writing showing the terms of the contract and recognized by him."

and in the case of *Evans* v. *Hoare*, L. R. (1892) 1 Q. B. at 597, Cave, J., in summing up the principles to be derived from the decisions, says:—

"In the first place there must be a memorandum of a contract, not merely a memorandum of a proposal."

As has been said, the Statute of Frauds is "a weapon of defence, not offence," and "does not make any signed instrument a valid contract by reason of the signature if it is not such according to the good faith and real intention of the parties." *Fry on Specific Performance* (4th ed.) 233; per Lord Selborne in *Hussey* v. *Horne-Payne*, 4 App. Cas. at p. 323; 13 *Encyc. Laws of Eng.* (2nd ed.) 550. *Larkin* v. *Gardiner*, 27 O. R. 125.

Upon careful consideration of the wording of the document in question and of the circumstances connected with it and the nature of the subject matter being dealt with, I am satisfied it was not intended by either party to be a mutually binding agreement unless and until the first deposit at all events should be placed in the bank pursuant to its terms. The document, though it uses the word "agree" uses that word only with reference to the vendors. It seems purposely to avoid anything which could reasonably be construed as showing an intention to bind the purchaser. It states the promise or agreement to be on conditions mentioned. In providing for what is to happen in case of default in carrying out the contract it is only default of paying the balance that is provided for. Cahill takes pains to put his own name, or at all events endeavours to put it, only as a witness to the document. Were words contained in it indicating an agreement or promise on behalf of Cahill to buy as well as one on behalf of Mann and Ryan to sell, the fact of Cahill having written the document and inserted his own name in it and having signed it as witness of the truth of what it contained would, it appears to me, have a very different significance. The evidence shows that Cahill arranged to send in word to Mann and Ryan whether or not the deposit was made, and this I think is an additional fact to indicate that the document was not intended to be binding until the deposit had been made, and that it was the act of depositing the money as the document provided or the failure so to deposit it, that was to close the bargain or show that the deal was off.

Though not depending upon it for my conclusion, I may point out that the subsequent conduct of the claim-

ant himself shows that this was his own interpretation and understanding of the matter. The attempt to extend the time for the second payment by nearly two months and thus very vitally altering the terms of the document and the character of the deal was not as I take it an attempt on the part of Cahill or Timmins to escape a liability or obligation which they deemed either in honour or in law to be resting upon them, but rather a continuance of negotiation in a matter which they regarded as still open. Nor do I think from the impression I formed of Mr. R. A. Mann when giving his evidence that he would have attempted to avoid any obligation which he considered to be really resting upon him or his associates. It may be that both sides were mistaken in believing, as they may have done, that the owners were bound to hold their offer open for the 10 days between the 30th of October and the 9th of November—which, as a matter of law, I think they were not, though as a matter of honour they certainly were. There does not at all events appear to have been any disposition on their part to attempt to escape from this obligation.

Dealing then with the document as an option, to be accepted and converted into a contract by the act of paying in the $5,000 to the bank, as stipulated, on or before 9th November, or to lapse completely by failure so to pay in, the next question is, was the necessary act performed? Literally it certainly was not. The slight error in coupling the name of Robert Mann with the name of Ryan in the account might, I think, be overlooked, but the money was not really deposited to anyone's credit "on or before the 9th day of November, 1908." The bank was closed on the 9th and it could not be done on that day. Though I would regret to hold the acceptance bad on this account I think the better opinion seems to be that where the last day for doing such an act falls on a holiday, or at all events when it falls on a Sunday, the act must be done on the next day prior or the next day prior which is not a holiday or a Sunday. See *Whittier* v. *McLennan*, 13 U. C. R. 638; *McLean* v. *Pinkerton*, 7 A. R. 490. Here, of course, I am dealing with the matter upon the basis of there being only an offer or option. No question of reasonable time can arise. In equity as well as in law the acceptance of an offer must be strictly within the time during which the offer is open. Had the transfer of the money been made free from any

entangling condition, it does not seem likely that any trouble would have arisen. It seems probable that the vendors would have accepted it and proceeded with the contract. But however that may be, it is unnecessary in view of the conclusion I have reached upon the other features of the case to make any determination as to what were the strict legal rights of the parties in regard to what happened by reason of the holiday. The condition which was attached to the deposit that the time for payment of the $45,000 should be extended from 9th December to 1st February—subject to which only could Mann and Ryan obtain the money—is, I think, fatal to the case of the claimant. The direction to the bank to notify Mann and Ryan and the notification that the bank sent them in pursuance of those instructions, which was received by Mann and Ryan on the 16th, and which undoubtedly justified them in believing they could not get control of the money without acceding to this condition, and which justified them in believing that the offer contained in the document of 30th October was rejected, seem to me conclusive. This was a counter offer and a rejection of the offer or option of the vendors: *Hyde* v. *Wrench*, 3 Beav. 334, 337; *Anson on Contracts* (11th ed.) 47; *Leake* (4th ed.) 23; 9 *Cyc.* 290; and anything subsequently done by or on behalf of the claimants is immaterial. When on the 11th of November the condition was withdrawn and the money was really to the credit of Mann and Ryan the option had lapsed and was beyond power of acceptance.

Though convinced as I have said that the document of 30th October was not intended or understood to be binding upon Cahill but was intended to be left open to him for acceptance or rejection during the ten days intervening between the 30th of October and the 9th of November, I think even if it were to be regarded as a contract it was one which was intended and understood to be conditional and contingent upon the performance by Cahill of his part by depositing the money as provided in the document. *Fry on Specific Performance* (4th ed.) 424, 425.

I think the result would be the same were it to be held that Cahill had in reality accepted the offer at the time it was made and that there was therefore in existence from the 30th of October a completed contract mutually binding upon all parties. As I have already stated, I cannot but hold that the purchaser was in default at least until

the 11th of November in the performance of the first act required of him, namely, the deposit of the $5,000 to Ryan's credit, which was to be done on or before the 9th. Passing over for the moment the question of the effect of the notification sent to Mann and Ryan in regard to the change of time for payment of the second instalment, what was the effect upon the contract—if it be assumed to be a contract—of this failure to make the first deposit "on or before the 9th day of November, 1908," as the contract required?

No doubt the rule as to time in the performance of contracts is now the same at law as in equity, and in contracts for the sale and purchase of land time is not as a rule of the essence of the contract. Equally well settled is it, however, not only that time may be made of the essence by express words or necessary intendment of the contract, but also that in certain cases time is deemed to be essential from the surrounding circumstances of the case or from the nature of the subject matter involved; *Fry on Specific Performance* (4th ed.), 465, 467, 470; *Dart, Vendors and Purchasers* (7th ed.), 495-7; *Leake* (4th ed), 598; *Doloret* v. *Rothschild*, 1 S. & S. at 598; *Hipwell* v. *Knight*, 1 Y. & C. Ex. 401; *Roberts* v. *Berry*, 3 DeG. M. & G. at 291.

That such should be the case in regard to sales of mining property I think no one who is at all familiar with the nature of these transactions can feel any doubt, and there is ample authority upon the point.

Fry on Specific Performance (4th ed.), at 468, puts the matter as follows:—

> "The same principle applies with especial force to contracts relating to mines. The nature of all mining transactions is such as to render time essential; for no science, foresight, or examination can afford a sure guarantee against sudden losses, disappointments, and reverses, and a person claiming an interest in such undertakings ought therefore to show himself in good time willing to partake in the possible loss as well as profit."

To the same effect is *Bainbridge on Mines* (5th ed.), at 222.

> "Time is of the essence of the contract, in all agreements whether for the lease or for the sale of mines."

The same is held in the United States. *Lindley on Mines* (2nd ed.) at sec. 859, has the following:—

> "It may be accepted as a general rule that time is not of the essence of ordinary contracts for the purchase of real estate, unless

expressly so declared by the parties. An exception to this rule is well recognized where the character of the property renders it liable to fluctuations in value.

The authorities, both in England and America, recognize that where mines or mining properties are the subject of the contract, time is of the essence, independent of any express stipulation inserted in the instrument."

So also in British Columbia, where in the case of *Morton* v. *Nichols*, 12 B. C. R. 9, 3 W. L. R. 161, at page 164 of the latter report, Hunter, C.J., says:

"Now, this is a contract for the sale of property which is of a peculiarly fluctuating value, namely, mineral claims. There is no class of property that is of more fluctuating value, I presume, than mineral claims. So, although there is no stipulation that time shall be of the essence of the option, yet by the very nature of the property dealt with, it is clear that time shall be of the essence."

The judgment was affirmed on appeal, 12 B. C. R. 485.

Though the English cases in which this point has been expressly decided seem to be few, the judicial references to it are numerous. See *Prendergast* v. *Turton*, 1 Y. & C. C. C. 110; *Clegg* v. *Edmonson*, 8 DeG. M. & G. at 814; *City of London* v. *Mitford*, 14 Ves. 58; *Alliway* v. *Braine*, 26 Beav. 575; *Tilley* v. *Thomas*, L. R. 3 Ch. at 67.

It is clear also that if the agreement or contract be unilateral or in any wise lacking in mutuality, as I think the one before me is, time would on this account also have to be held to be essential. See *Fry on Specific Performance* (4th ed.), 472, 476; *Brooke* v. *Garrod*, 3 K. & J. 608, 2 DeG. & J. 62; *Ranelagh* v. *Melton*, 2 Dr. & Sm. 278; 11 L. T. 409; *Costlake* v. *Till*, 1 Russ. 376.

In *Dart's Vendors and Purchasers* (7th ed.), 497, it is remarked that "the tendency has been to hold persons concerned in contracts relating to land bound as in other contracts to regard time as material, especially when the property is connected with trade."

Holding then that time is of the essence of the contract, as I think, according to law and equity, and upon the real merits and substantial justice of this case, it should be held to be, what are the respective rights of the parties? I was at first in some doubt as to whether notice of recision might not be necessary. Even if so I think that what happened between Cahill and Manns and Ryan at Hill's on the 17th of November would be sufficient and effective notice of recision, and this was supplemented by the verbal notice given to the bank on the 18th. But after looking into the

authorities I am satisfied that notice was not in this case necessary: See *Sprague* v. *Booth*, 11 O. W. R. 151, affirmed in 12 O. W. R. 973, especially at 11 O. W. R. 159; *Atkinson* v. *Ferland*, 12 O. W. R. 598 and 1251, especially at 1257-8. In the case of *Atkinson* v. *Ferland* the Chancellor refers to the wording "on or before" (the same wording that is used in the document of 30th October) as indicating an intention that the payment must not be later than the date mentioned. Where time is essential failure of the plaintiff to show performance on his part within the time specified, is held to be fatal to his case. *Encyc. Laws of Eng.* (2nd ed.) Vol. 13, 572; *Fry on Specific Performance* (4th ed.) 463.

I think also that the fair interpretation of the claimant's conduct in doing as he did in regard to the payment in of the $5,000 and in causing the vendors to be notified as they were, is that it was a repudiation of the contract (if one existed) and I think the vendors were justified in so regarding and dealing with it. I cannot accede to the contention that what was done amounted to nothing more than a mere request for more time. The proposed change of terms was vital to the deal and must have been well known by Cahill and those acting with him to be so. The loss of interest on the $45,000 from 9th December to 1st February would be considerable but in the eye of any mine owner this would be but a trifling matter compared with the tying up of such a property for this extended period, merely upon what cannot in the circumstances but be regarded as a paltry consideration of $5,000.

Only one point remains to be mentioned, namely, the agreement by the owners that they would place the titles of the properties in the bank in escrow until the total amounts were paid. This is followed by a provision that in case of default of payment of the balance the titles should return to them and Cahill should forfeit all moneys already paid. Does the fact that the titles were never placed in the bank prejudice the owners in what as I find would otherwise be their rights? From the structure of the document I think it is plain that it could not have been intended that any documents of title were to be placed in the bank until after the first payment of $5,000 had been deposited. The provision that the titles should return to the vendors is limited to the contingency of default in payment of "balance," which indicates that it was intended that some part

of the $250,000 would be paid before the titles would be there, and from this fact and from the structure of the document generally and the surrounding circumstances I think there was no obligation to place the titles in the bank until the first deposit had been made at the bank, and there was clearly no intention or expectation by anybody that they should be placed there till after that payment. Cahill agreed to send the owners word whether the deposit had been paid, and he states that he did not expect the titles to be deposited before the time for the first payment. The placing or not placing of the titles had nothing in any way to do with the failure of the claimant to make his deposit or with his endeavour to get new terms.

I cannot find that the defendants acted in any way improperly or unreasonably in the transaction and I think upon the whole case that there is no claim that should be enforced against them and that it must be held that Cahill has no rights in the property in question.

Claim dismissed with costs.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

RE COLONIAL DEVELOPMENT SYNDICATE, LTD., AND MITCHELL ET AL.

Interest in Mining Claims—Claims for Transfer of Interest—Evidence —Taking Evidence Outside Ontario—Grounds for.

Where it appeared that the claimants were entitled to an interest in any right M. might have in the mining claims in question, but it was not shown what was the interest of the parties in whose names the claims stood, or that the claimants were entitled unconditionally to any interest M. might have, a declaration was made that the claimants were interested in any right or title M. might have, but an order for transfer of any interest to the claimants was refused without prejudice to future proceedings.

Application by a party to have his evidence taken in New York on the ground that he was busy organizing or promoting a company was refused.

Proceedings by the Colonial Development Syndicate, Ltd., against John A. Mitchell and W. S. Mitchell to have mining claims T. R. 450, T. R. 455 and M. R. 462 transferred to the syndicate.

W. D. McPherson, K.C., for claimants.

R. C. H. Cassels, for respondents.

6th March, 1909.

THE COMMISSIONER.—This is an application for a transfer of the claims in question to the claimants the Colonial Development Syndicate, Ltd.

The evidence put in is mostly documentary, supplemented only by the oral evidence of Thomas Plunkett, agent at New York for the Syndicate, and John A. Munroe and John Hammell, prospectors who assisted in staking out the claims.

The respondents were represented by counsel but were not personally present and put in no evidence at the hearing. An application had been made some time before on behalf of William Stewart Mitchell to have his evidence taken in New York but the only ground alleged for this was that he was busy organizing or promoting a company and could not leave. Permission was given to renew the application on better material but no further material or excuse for his absence was presented. The evidence put in in support of the claimant's rights is fragmentary and largely indirect and incidental. From it, however, I am satisfied that William Stewart Mitchell was acting in the acquisition of the claims as the agent or partner (there is no evidence to enable me to determine which) of the Colonial Development Syndicate, Ltd., or persons or firms now composing, or largely interested in, that syndicate. The claims in question were staked out in the names of J. E. Hammell and D. J. Munroe, who were employed by or through Mitchell in connection with the same firm or persons above mentioned.

Part of the bargain with the prospectors who assisted in taking up the claims was that they should be entitled to an interest in them. The claims had been staked in 1906, and two of them, T. R. 450 and M. R. 462, were on November 7th, 1907, as it seems at William Stewart Mitchell's request or direction, transferred to J. A. Mitchell and on the same date the other one, T. R. 455, was in the same way transferred to J. W. Mitchell, J. A. Mitchell being the brother and J. W. Mitchell the father of William Stewart Mitchell. After a long delay and it would seem after various unsuccessful attempts, the prospectors went to New York and there hunted up William Stewart Mitchell who took them to Mr. Plunkett, the present agent of the Syndicate, and there a settlement was reached as between the

prospectors and the other parties interested, and the memorandum of agreement embodying this settlement is the agreement upon which the Syndicate is basing its contention in the present case. I have no doubt that the claims in question are among the claims included in that memorandum of agreement, being therein referred to as numbers 1, 3 and 5 on a map referred to in the document. This memorandum of agreement is signed by and on behalf of the prospectors and by Mr. Plunkett on behalf of Rose, Van Cutsem and Syndicate, and is signed by W. S. Mitchell in the margin under the word approved. There is also some correspondence and especially a letter dated June 1st, 1908, written by Mr. Plunkett, and signed approved at the bottom by W. S. Mitchell, in which the settlement is referred to and in which it is stated that transfers to the Colonial Development Syndicate, Ltd., are to be made and signed by James Mitchell and J. A. Mitchell, and it also appears from the evidence of Mr. Plunkett that transfers, or at least some transfers in connection with the claims, were seen in the office of Mr. W. S. Mitchell's attorneys at New York, but Mr. Plunkett is not certain which of the Mitchell's signatures they bore and they have not been produced. They, of course, were never delivered.

The claims, as I have mentioned, are standing in the names of J. A. Mitchell and J. W. Mitchell and there is nothing upon the record to show that W. S. Mitchell is now interested in them, though the evidence is clear that they were originally taken up, as I have mentioned, on behalf of the Syndicate or those interested in it, or on their and Mitchell's behalf, and I have no doubt upon the evidence that the syndicate is at all events interested in any right or claim W. S. Mitchell may have in them. Why or upon what terms they were transferred to J. A. and J. W. Mitchell does not appear. I cannot feel that there is any evidence to justify me in finding that what is in their names belongs to the syndicate or that W. S. Mitchell should at the present time deliver over transfers of his interests. J. W. Mitchell is in fact not a party to and was not represented in the present proceedings. I think I can do nothing more than make a declaration that the claimant is interested in any right or title belonging to W. S. Mitchell. The disposition of the present case, however, should, I think, be without prejudice to any future proceedings the claimant may take against any of the parties.

From this decision the Syndicate appealed to the Divisional Court.

J. Bicknell, K.C., for appellants.

R. C. H. Cassels, for respondents.

The Court (BOYD, C., MAGEE, J., LATCHFORD, J.), refused to interfere, but directed that upon payment by the appellants of the costs of the appeal the case might be remitted to the Commissioner to make further enquiry and decide as he might be advised.

(THE COMMISSIONER.)

RE KOLLMORGEN AND WEBSTER.

Forfeiture—Relief from—Power to Grant—Working Conditions—Filing Report of Work—Mistake—Intervening Rights.

Failure to file a report of work will of itself cause forfeiture of a mining claim, as well as failure to perform the work.

The Commissioner has no power to relieve against such a forfeiture unless application is made to him within 3 months after default.

Power to relieve against forfeiture for default in performance of working conditions should be very cautiously and sparingly used, especially where intervening rights have in good faith been acquired under the belief that the claim had been intentionally abandoned.

Application to the Commissioner, by F. Kollmorgen, for relief from forfeiture of a mining claim subsequently restaked by the respondent A. R. Webster.

J. W. Mahon, for applicant.

J. E. Day, for respondent.

6th March, 1909.

THE COMMISSIONER.—This is an application by Mr. Kollmorgen for relief in the way of reinstatement of his application for mining claim No. 2095. The claim was forfeited for lack of performance of the working conditions required by the Act and the respondent Mr. Webster restaked the claim and filed his claim, No. 11956, upon the same land.

Mr. Kollmorgen's claim was recorded on 3rd October, 1906. 36 days work was recorded upon it on 27th June, 1907, and 40 days further work (not sufficient for the second

instalment) on 24th October, 1907. No certificate of work was obtained and no further work was performed since October, 1907. On 31st December, 1908, Mr. Webster staked the property and on 2nd January, 1909, he recorded his claim.

Though notice of forfeiture or of cancellation for forfeiture is not required by the Act the Recorder upon 4th January, 1909, notified Mr. Kollmorgen that the claim had been forfeited and Mr. Kollmorgen admits he received the notice, he thinks on 9th January. No appeal was lodged or proceedings taken until an appointment for the present hearing was applied for to me on 28th January, and my appointment for the hearing of the matter was issued on that date. The hearing took place on 16th February.

One of the chief grounds for relief put forward by the applicant is that in recording the work a mistake was made in reporting and swearing to more work on a neighbouring claim and less work on the claim in question than was the actual amount performed. The agent of Mr. Kollmorgen who reported and swore in the work was responsible for the error. Though the evidence is not altogether satisfactory I think that the mistake was made as alleged and that the amount of work that was intended to be and might properly have been recorded upon the claim in question on 24th October, 1907, was really 64 days work instead of 40 days. The 40 days work it will be observed was not sufficient to satisfy what may be called the second instalment or first year's work under the Act, amounting to 60 days, the first instalment being 30 days. Any excess of work in a prior term will, of course, apply on the work required for a subsequent term. I am asked to amend the record and enter the 64 days work instead of the 40 days work upon it as of date 24th October, 1907, and thereupon to reinstate the application of Mr. Kollmorgen and to cancel and remove the application of Mr. Webster.

In any view of the matter I think there is no escape from the fact that the application to me is simply one for relief under sec. 85 (2) of the present Act, from forfeiture. It will be noticed that both the present Act (sec. 84) and the former Act (secs. 167 and 168) make the failure to report and prove the necessary work within the time required, as well as the failure to perform it, a cause of forfeiture.

Upon any possible reading of the Act upon the question of working condition requirements the claim was undoubtedly forfeited a considerable time before the respondent Webster came upon it to stake out his claim. And even if it were to be admitted that the working condition provisions in force at the time the claim was staked out continue to govern the claim notwithstanding amendment (which it is unnecessary in the present case to decide) I think in any view the time (3 months) had gone by within which I would have authority to give relief under sec. 85, before application was made to me.

Looking, however, at the merits of the matter, I am satisfied that the respondent restaked the claim in good faith and in the belief that Kollmorgen had abandoned it as well as in the knowledge that it had been forfeited for failure to comply with the Act, as it undoubtedly and admittedly was.

Though no doubt in a proper case the powers given to relieve against forfeiture should be exercised yet it is a power which I think should be very cautiously and sparingly used, especially where, as in this case, a subsequent applicant has in his legal right and in perfect good faith restaked a claim knowing it to be open and believing it to have been intentionally abandoned. It will be observed that Mr. Kollmorgen did nothing upon the property after the 24th of October, 1907, and Mr. Webster did not stake until 31st December, 1908. I think, therefore, in any event I should not restore the old claim to Mr. Webster's prejudice. No part of the Act is more important to the welfare of the mining industry than the requirement of working conditions. But for this property would be kept uselessly tied up for long periods of time, and anything which would tend to weaken this part of the law would be very injurious. It is, of course, a matter of regret when any individual, even by his own or his employee's error, suffers what may seem to be a hardship but in all such cases the general welfare must govern. Though the loss of a claim in this way is termed a forfeiture I do not regard it such in the strict sense of that term. It is really merely a lapse of the application by failure to perform the conditions laid down in the Act as necessary for obtaining title. I have discussed the matter more fully in the case of *Re Drummond and Lavery et al.* (*ante*), and I cannot depart from the principles I endeavoured to follow in that case. If relief

is to be given in this case I think it should only be upon an application to the Minister under sec. 86.

Application dismissed.

NOTE.—As to the time within which work must be performed upon claims staked out under the Act of 1906 and 1907, and further as to the question of relief from forfeiture, see *Re Kollmorgen and Montgomery*, and notes thereto, *post*.

(THE COMMISSIONER.)

RE CROPSEY ET AL AND BAILEY.

Working Conditions—Forfeiture—Evidence.

Where the evidence of both sides regarding the performance of the requisite work was inconclusive and better evidence was not within the control of the holder, who had purchased the claims in good faith, declaration of forfeiture was refused.

Application by Herman M. Cropsey to the Commissioner to have mining claims held by the defendant Theodorus Bailey, declared forfeited for default in the working conditions.

F. A. Day, for applicants.
George Ross, for defendant.

18th March, 1909.

THE COMMISSIONER.—The claimants are asking to have the mining claims in question declared forfeited for lack of performance of the working conditions prescribed by the Act, in order that their own stakings and applications upon the same property, made subsequent to the time of the alleged forfeiture, may be recorded.

The defendant's counsel raised objections to the regularity of the claimants' proceedings but in view of the conclusion I have reached on the merits it is unnecessary to consider these.

The claims in question were staked in April, 1907. Two instalments of work, one of 30 days and another of 60 days, were due on each claim before the date of the restaking of the claims by the present claimants. Reports of due performance of both instalments of the work, verified by

affidavit, were filed in the usual way but the claimants allege that the work was not in fact performed.

The defendant, who at present holds the claims, was not the original staker. They were purchased by him for the sum of $1,600 after certificates of record had been issued and proof of the two instalments of work filed upon each claim. He seems to have exercised the usual care in seeing that the records were regular, and in addition employed an engineer to go over the properties with him. He swears he had no suspicion that the necessary work had not been performed or that there was anything in any way irregular about the claims, and this I find to be true; and, so far as appears, there was nothing to raise suspicion in his mind or put him on enquiry, and his engineer as a fact reported in favour of the purchase. Though if satisfied that the work had not been done and that the claims became forfeited I think the defendant could not stand in a better position than those from whom he purchased, yet I think his position at least entitles him to insist upon clear proof of the forfeiture, and as the facts are not really in his own possession or control, but rather in that of his vendors, I think the burden of proof of non-performance of the work must be left upon those who are seeking to dispossess him.

The performance or non-performance of work, except where the work is done in the form of sinking shafts or pits or deep trenching, is at any time a rather difficult matter to determine and after a season or two has passed and fire swept over the property, as in this case, it is more than usually difficult. It is almost impossible in such a case for any one to say with certainty what amount of work has been done. Evidence was given by the claimants themselves and by other witnesses that after examining the property they did not find indications of anything like the amount of work that has been sworn to. Most of this evidence, however, is very loose and inconclusive and is in fact not at all as satisfactory as even in the circumstances could be expected, though I am disposed to think that most of these witnesses really believed that the work had not been performed.

Two witnesses, Landon and Kibbe, who were concerned in the original acquisition of the claims, were called on behalf of the defendant. Landon spoke particularly of the first 30 days work and while his evidence was not as clear or explicit as might be desired I am satisfied that a good deal of time was in fact expended by himself and his men

and associates upon the properties doing work which might be held to be sufficient under the Act. Kibbe's evidence as to the details of the work was also not quite as satisfactory as could be desired but he produced accounts and documents showing that he had at all events expended a very large amount of money in connection with the properties.

Upon the whole evidence I think I would not be justified in finding that the work was not performed or in declaring that the claims had become forfeited.

(THE COMMISSIONER.)

RE BOOTH AND HYLANDS.

Agreement for Sale—Evidence—Insufficient Writing—Delay in Complying with and Enforcing Agreement.

A writing not definitely identifying the properties or showing the consideration to be paid or the share to be received—the other evidence and the circumstances showing that it was not the intention to part with the whole—is not a sufficient writing under s. 71 (2) (Act of 1908) upon which to enforce a contract (made after the staking out) for an interest in mining claims.

Unreasonable delay in complying with the conditions and in bringing proceedings for enforcement of an agreement relating to mining property where the transaction is one of a very speculative nature, will preclude enforcement.

Proceedings by G. E. H. Booth to enforce a claim to an interest in 5 mining claims, M R. 1096-1100, held by the respondent James Hylands, near Leroy and Miller Lakes.

J. Lorn McDougall, for claimant.

George Ross, for respondent.

24th March, 1909.

THE COMMISSIONER.—The claimant is seeking to enforce an alleged agreement for sale and transfer of a quarter interest in the mining claims in question.

The alleged agreement, as shown in the claimant's evidence, was entered into after the staking out of the claims, and was therefore governed by sub-sec. 2 of sec. 71 of The Mining Act of Ontario, requiring writing.

The writing relied on is a letter from the respondent to the claimant, dated 22nd July, 1908, giving a list of the expenditures incurred in connection with "the Bloom Lake pro-

perties," and figuring out the amount due the respondent after allowing the claimant credit for a payment of $23. This writing, I think, is clearly not sufficient to satisfy the Act. Even if it could be inferred from the surrounding circumstances, that it must have meant the properties in question, which, in view of the fact that the respondent held other properties in the district, would be difficult to assume, the writing seems to me at all events clearly defective in failing in any way to say or show what interest in the properties the claimant was to get, or in fact to show with any definiteness what he was to pay for them. If it were possible to hold that the meaning of the letter is that the claimant was to get all the interest the respondent had, the oral evidence clearly shows that this was far from being what was really intended by either of them. I think there can, therefore, be no question but that the writing produced is quite insufficient to satisfy the requirements of the section of the Act referred to.

The oral evidence as to whether or not a verbal agreement had really ever been entered into was conflicting, and the writings produced are as consistent with the version of one side as with that of the other. I am not able to say that I should believe either of the witnesses in preference to the other. I am rather disposed to think that there was really a misunderstanding between them. The burden of making out a case is of course upon the claimant, and upon the whole evidence it is impossible for me to find that any contract, even verbal, which was understood by both parties to be mutually binding upon them, was ever entered into.

The claimant also was guilty of what I think was unreasonable delay in making response to the letter of the respondent above referred to, and was also very late in commencing his present proceedings. Matters of this kind, where the property is very likely to be constantly and, perhaps, most materially changing in value, and where the deal in fact is of a very speculative nature, call for promptness, and upon the authorities I have discussed at some length in the recent case of *Cahill and Mann and Ryan* (*ante*), I think the claimant's delay in this case would have to be held to disentitle him to enforce the contract, if one had been made.

Claim dismissed.

(THE COMMISSIONER.)

RE SMITH AND LAUZON ET AL.

Agreement for Interest in Mining Claim—Interpretation—Employer and Employee—Prospecting Expedition—"Until the Snow Falls"—Good Faith—Merits.

L. agreed in writing with S. in consideration of $200, paid him to prospect "until the snow falls." After L. had staked 2 claims 2 slight snowfalls of 1 to 2 inches occurred, going off quickly and not seriously if at all interfering with operations. After this 6 more claims were staked.

Held, that S. was entitled to an interest in all the claims; the words used should be interpreted reasonably having reference to the objects in view and what must have been in contemplation of the parties; and upon the real merits and substantial justice of the case S. was so entitled.

Prospecting agreements require the strictest good faith upon the part of the prospector.

Claim by Thomas E. Smith to establish an undivided half interest in 8 mining claims, M.R. 1607-8, and 1808-13, near Miller and Elkhorn Lakes and the Wapoose River.

The claims had been staked out by the respondents Joseph Lauzon and Adelard Foucault in their own names and the names of the respondents Thomas Lauzon and P. B. Moyle, and the four had entered into an agreement to sell them to the respondents George Monteith and Walter Nicholls.

J. Wood, for the claimant.

J. A. Mulligan, for respondents Lauzon, the Foucaults and Moyle.

M. H. Ludwig, for respondents Monteith and Nicholls.

30th March, 1909.

THE COMMISSIONER.—The claim is based upon an agreement in writing entered into on 15th September, 1908, between the respondent Joseph Lauzon and the claimant, by which Lauzon agreed to set out forthwith on a prospecting trip into the Miller Lake country, and prospect from that time "until the snow falls," he to furnish his own outfit, provisions, etc., for the trip, all discoveries made by him to be for the joint benefit of himself and Smith, and to be recorded in such manner as to the parties should be agreeable. The claimant, under the agreement, was to pay Lauzon $200 cash as his contribution, and this money was duly paid upon the signing of the agreement.

Lauzon within a few days after proceeded to the district mentioned, going in company, without the knowledge of the claimant, with the respondent Adelard Foucault, upon the understanding between them as I find that they were to contribute to and share in the results of the trip equally. On 2nd October they succeeded in staking two claims M.R. 1607 and M.R. 1608, situated west of Miller Lake, these two claims being in fact close to Gowganda Lake. Shortly after the staking of these claims there was a slight snow-fall of about an inch, which disappeared in about half a day. Lauzon says that about this time he was thinking of returning, but that after consideration, he and Foucault determined to go some miles farther west to the Wapoose River and see what could be got there. Before any further claims were staked, however, another slight snow-fall occurred of about one and one-half or two inches. Within a day or less this also went off, at least for all practical purposes, though, as some of the witnesses say, traces of it might have lingered in secluded places even into or through the winter. The prospecting proceeded with at most very slight hindrance, and six claims were acquired in the vicinity of the Wapoose River. The witnesses differ somewhat as to the matter of the snow, but I think the facts are about as I have stated, and I find that there was up to the time of completing the staking of the last of the eight claims on 19th October, no snow to seriously interfere with the prospecting and the staking of claims. Two half days, or a half day and a whole day at most, would be all the time during which prospecting would really be interfered with by the snow that fell, and at the times the snow fell Lauzon and Foucault seem not to have been actually engaged in hunting for mineral, but in moving or arranging their camp.

Shortly after the staking of the eight claims was completed Lauzon and Foucault returned home. The two claims near Gowganda Lake were almost immediately recorded, but the other six were not recorded until 10th November. Lauzon, meanwhile, had seen the claimant Smith and asked him for more money, $150, and Smith gave him a cheque for $75. The two disagree in their evidence as to what was said at this time. Smith says Lauzon wanted the money to record claims, though he says Lauzon mentioned that there was assessment work to be done upon the properties. Lauzon says that he told Smith the money was for assessment work. I think that Lauzon at all events left upon Smith's mind the

impression that the money, or some of it, was needed for recording claims in which they were jointly interested. All the recording was in fact done by Foucault, for as Lauzon did not have a Forest Reserve Permit he was unable to actually do the staking, or make the necessary affidavits for filing the claim, and some of the proceeds of the $75 cheque were in fact used for recording the last six claims, Lauzon having given part of the money to Foucault, in repayment, however, as it seems, of indebtedness to Foucault in connection with the trip.

Lauzon never made any complete or definite report to Smith of his operations, or of the interests which Smith was to have, and appears not to have informed him of his associations with Foucault, nor does Smith appear to have inquired very specifically about the details of the trip. He seems, as he said in his evidence, to have had confidence in Lauzon, and to have trusted him to do what was right.

There is some conflict between Lauzon and Foucault as to the time when the fact that Smith had an interest with Lauzon was revealed to Foucault, but I am satisfied upon the evidence that this was not done until the claims had all been staked and recorded, though I think before the agreement for sale was entered into Foucault was at least, by what occurred, put upon inquiry as to Smith's connection with the claims in question.

On 9th January, after some negotiation, Lauzon and Foucault and the other two parties in whose names some of the claims had been staked, entered into an agreement in writing with the respondents Monteith and Nicholls for sale to the latter of the eight claims. Smith was not consulted about and was not cognizant of the sale, though he is not now objecting to it if his interest is protected. Part of the purchase money has been paid and abstracts and transfers of the claims have been deposited in the Traders Bank at Sudbury pending completion, and the purchasers have in fact, in addition to making the first payment of $750, expended considerable money in and about the properties.

In determining the question of Smith's interest, it will be convenient first to consider Foucault's position and interest in regard to the claims. I think it is clear that Foucault and his associate Moyle are entitled to one-half of all that was acquired, namely, one-half of the eight claims. This in fact is not disputed. I think it is clear also from the way the

parties have dealt with the claims, and according to the true understanding between them, there was not to be a division of claims, but rather a co-ownership or fractional division of interest as to each claim. The fact of Foucault giving Moyle a writing to the effect that Moyle's interest was to be one-eighth, indicates that the intention was to share in all the claims. An undivided one-half interest in all the claims therefore remains for Lauzon and his associates.

Of Lauzon's one-half interest how much is the claimant Smith entitled to? This is the chief point in controversy. The suggestion raised at one stage of the case that Smith had no interest in the last six claims because they were not near Miller Lake was not pressed, and I think in any view of it such a defence is quite untenable. It is contended, however, on Lauzon's behalf that the falls of snow above described terminated all his obligation to and employment with Smith and that Smith's interest extends only to the two claims that had then been staked, and that the six claims thereafter acquired were none of Smith's affair.

Smith's way of doing business and the wording of the agreement are no doubt both rather loose and less careful than they should have been, but after carefully considering the agreement and the circumstances under and purpose for which it was made. I have reached the conclusion that the expression "until the snow falls" should not be construed in the narrow and impractical way contended for. I think it must, having reference to the objects in view and to what must have been in contemplation of the parties, be given a reasonable interpretation. The stopping of prospecting by the snow was without doubt what was in their minds. The use of the word "the" might in fact even upon a narrower view be held to imply that winter snow or permanent snow was intended. A few flakes of snow might in that country fall in almost any month, except perhaps two or three months, in the year, and it would be absurd to say, and it was not contended, that that would terminate the agreement. Where then is the line to be drawn? I think it must be at the point where the snow-fall would stop or materially interfere with the operations in contemplation. The snow-falls that occurred before the staking of the six claims in question were not such as to seriously impede the work of the trip, being little, if any, worse than a rainfall. It is not in fact really pretended they were, and when the respondent found it reasonably and readily possible to continue the work,

practically without interruption, and thereby acquire claims for himself, I think it is right to hold that he was in duty bound to do as much for his associate who had paid him the money and was trusting to his probity. This is a class of agreement where the partner who remains at home is very much at the mercy of the one who goes out into the prospecting field, and the relation between the parties is one which I think demands the strictest good faith upon the part of the prospector. That Lauzon failed in what was due from him I think there is no doubt. Upon the real merits and substantial justice of the case I can feel no doubt but that Smith is entitled to one-half of all the interests acquired by Lauzon upon the trip in question. This will, of course, be subject to Smith bearing his proportionate share of all outlays and expenses, other than those covered by what he has already paid. The $200 covered only Lauzon's time and the furnishing of the outfit, provisions, etc., for the trip. The recording of the claims, the performance of working conditions, and all other outlays must be shared proportionately.

As the respondents Monteith and Nicholls purchased in good faith without any notice of Smith's interest, I think they should not be prejudiced, and as Smith does not at all events object to the sale, I think they are entitled to complete their purchase upon paying the money into the bank to the joint names of all persons now shown to be interested.

As to the question of costs, I think Joseph Lauzon should pay the costs of the claimant. The purchasers I think are also entitled to their costs and should be allowed to deduct them from the purchase money still unpaid, and the amount of the purchasers' costs and, subject to any set off Lauzon may have against him, also the amount of the claimant's costs, should be charged against Joseph Lauzon's share.

Order accordingly.

(THE COMMISSIONER.)

RE BABAYAN AND WARNER ET AL.

Enforcing Interest in a Mining Claim—Procedure—Claim or Dispute—Wrongfully tying up Claims—Unrecorded Interest—Purchasing without Notice—Certificate under sec. 77 (2)—Claims for Damages—Jurisdiction of Commissioner.

Where it is sought to establish an interest in a mining claim the proper procedure is by appointment under sec. 136 (Act of 1908), and notice according to Form 38 (obtaining and filing a certificate under sec. 77 (2), if desired), and not by a dispute under sec. 63, Form 8, which latter is to be used only when it is sought to have a mining claim cancelled or set aside as invalid.

A purchaser of a mining claim who has paid the purchase money and obtained and recorded a transfer from the recorded holder without notice of a prior unrecorded right or interest is protected from any claim or attack in respect of such right or interest.

The Commissioner has no jurisdiction to deal with a claim for damages for breach of contract.

Proceedings by B. Babayan to establish an interest in mining claims T.R. 2057-8-9, staked out by the respondent Thor Warner and by him transferred to the respondent George P. Matthewman.

S. Alfred Jones, K.C., for Babayan.

J. Lorn McDougall, for Matthewman.

Thor Warner in person.

29th April, 1909.

THE COMMISSIONER.—This is a matter transferred to me by the Recorder for adjudication.

What purports by its heading to be a dispute was entered by Babayan against each of the three mining claims in question on 1st February, 1909. What Mr. Babayan is seeking is really an interest in the properties which were staked by the respondent Warner on 8th September, 1908, and transferred by him to the respondent Matthewman in December, 1908. The document filed by Mr. Babayan sets up that the mining claims are illegal or invalid because Warner was not owner of all interest therein, but this allegation and the attempt to fit it into the form used is absurd. It was Form 38 of the Act, and not Form 8, that should have been used. The result is that the mining claims in question have been wrongfully tied up for a considerable time contrary to the provisions and intention of the Act, as Form 38 could not be recorded against a mining claim unless or until a certificate

had been obtained under sec. 77 (2), nor would the certificate be effective for longer than 10 days unless an order were obtained from the Recorder or the Commissioner continuing it, and the practice is to insist upon at least *prima facie* proof of the claimant's right, and it is only upon terms that the matter be brought to trial promptly that such an extension should be granted. Whether Mr. Babayan or the solicitor acting for him at the time is most to blame for what has occurred does not appear. I think, however, the Recorder should have rejected, or at least refused to record, the so-called dispute against the mining claims, as the dispute is not either in substance or in form in accordance with the provisions of the Act. How the solicitor could make the affidavit to which his name purports (if the copy put in before me be correct) to be attached, I am quite unable to understand. (The solicitor appearing at the hearing was not concerned in the preparation of the dispute.)

I have no hesitation upon the evidence in finding, and in fact it is not now disputed, that the mining claims in question were sold and transferred by Warner to Matthewman and all purchase money paid long before the filing of the so-called dispute, and before Matthewman had any notice or knowledge whatever that Babayan was claiming an interest. Under secs. 74, 75 and 76 of the Act the purchaser, upon the principles prevailing in ordinary cases under The Registry Act is in the circumstances mentioned absolutely protected from any unrecorded claim or interest. Though it is possible Mr. Babayan may when he filed the so-called dispute have suspected that some of the purchase money remained unpaid, the evidence leads me to believe that the filing was done for the purpose of holding up a resale which Matthewman was making of the property, and I cannot escape the conclusion that he (Babayan) at least acted recklessly and without any proper regard for Matthewman's rights. It is true Mr. Babayan says he did not desire to hold up the sale, but with all his protestations to that effect he continued the dispute upon the property down to the present time, and the respondent Matthewman has been himself compelled to bring the matter to trial to have the encumbrance removed. As I have said, it is not now disputed that he is entitled to such an order, and he is certainly also entitled to his costs of the proceedings.

As to matters between Mr. Babayan and Mr. Warner, all interest in the claims having been passed to and become

vested in Mr. Matthewman before the present proceedings commenced, any claim that Mr. Babayan might have against Mr. Warner must be merely a personal one for damages or a money demand, which I think must be pursued before the ordinary Courts and not before me. I may say, however, that it would in any event be impossible for me to find upon the evidence that Mr. Babayan was in any way entitled to any interest, either in the mining claims in question or in their proceeds. So far, therefore, as Mr. Warner may be involved in the present proceeding Mr. Babayan's claim against him must also be dismissed. As Mr. Warner appeared personally without a solicitor, and as he seems to have been summoned and paid as a witness by his co-respondent there will be no order for costs in regard to him.

Order accordingly.

NOTE.—There are very essential distinctions between a dispute according to Form 8, s. 63, and a notice of claim or dispute according to Form 38, s. 136 (4), (Act of 1908).

A dispute according to Form 8, though it may include a claim to the property under an adverse application, must always involve the invalidity of the mining claim against which it is directed; it is filed with the Recorder and noted, without further procedure, directly against the claim attacked (s. 63 (1)); it cannot be received or entered at all after a Certificate of Record has been granted for the claim.

A notice according to Form 38 (which it would probably have been better to have styled simply Notice of "Claim"—and not "Claim or Dispute") is used in bringing before the Commissioner or Recorder any matter which is within their jurisdiction under the Act (s. 123, &c.) and for which no other form is provided; it is not necessarily filed with the Recorder, but must be served with an appointment obtained from the Commissioner or Recorder, and it cannot of itself be entered upon the record of any mining claim (s. 73); but if it involves an interest in a mining claim and it is desired to preserve that interest against possible loss by transfer to an innocent purchaser, a certificate (in the nature of *lis pendens*) may be obtained and recorded under s. 77 (2), (3), and this can be done as well after a Certificate of Record has been granted as before; but the certificate is effective for only 10 days after filing unless within that time it is continued by order of the Commissioner or Recorder (s. 77 (4)), and it may be vacated at any time by order of the Commissioner (s. 77 (4).

These provisions seem well designed to prevent vexatious incumbering of title by idle litigation, while affording ample protection to bona fide claimants, and it is important that their purpose and intent should be carefully kept in view. The desirability of speedy determination of mining litigation has been elsewhere commented upon (*Re Bamberger and Sinclair et al.* and note thereto, *ante.*)

See also *Re Wishart et al. and Harris, post.*

(THE COMMISSIONER.)

(THE COURT OF APPEAL.)

19 O. L. R. 577; 14 O. W. R. 881.

RE SMITH AND HILL.

Dispute—Right to Appeal—Evidence—Inducements to Witnesses—Innocent Purchaser for Value—Merits—"Jumping" Claims—Lands Open—Onus of Proving—Affidavit—Discovery—Adopting Existing Discovery—New Trial—Appeal from Order for.

H. purchased a mining claim from M. S., alleging invalidity of the claim on the ground of fraudulent recording by M. and lack of discovery at the time of staking, restaked the claim in his own name, planting his discovery post upon mineral that H.'s men had opened up, and filed a dispute and an application claiming the property for himself. The evidence put in on behalf of S. was unsatisfactory and the circumstances such as to cast the gravest doubt upon the testimony.

Held by the Commissioner, dismissing the dispute, that, though the fact that H. was an innocent purchaser for value without notice or suspicion of illegality or fraud, did not give him immunity from attack, yet as the facts were not within his own knowledge and he was at the mercy of witnesses who had been offered inducements to side against him, the evidence should be clear to justify the setting aside of his claim.

It seems any discretion given the Commissioner by sec. 140 (Act of 1908), to decide according to the real merits and substantial justice of the case, must fall short of overriding a specific provision of the Act.

Where the holder of a claim is in actual occupation of the property, doing work upon it believing in good faith that he is entitled to it, the practice known as "jumping" should be discouraged.

Held also by the Commissioner, that under the decision in *McNeil and McCully and Plotke* (*ante*), S. could have no valid claim himself as he had no original discovery, and that in the Commissioner's own view he could have none because of the lands not being open when he staked.

On appeal direct to the Court of Appeal,

Held, per the Court, dismissing the appeal, that the Commissioner was in the circumstances justified in finding as he did upon the evidence.

That S.'s own claim to the property failed as he had not discharged the onus that was upon him to show that at the time of his staking the lands were open to prospecting, which he could only do by showing that H.'s claim had lapsed, been abandoned, cancelled or forfeited.

Held, per Moss, C.J.O., that there seemed much difficulty in holding that the mere adoption by a licensee of mineral opened up on a claim by another, while the latter is still working and claiming a right to work upon the property, can be a sufficient discovery upon which to ground a claim, at all events until after there had been an actual reverter to the Crown by lapse, abandonment, cancellation or forfeiture; and, per Meredith, J.A., that upon the facts S. had made no discovery such as the Act contemplates.

Held, per the Court, that an appeal lies from a decision of the Commissioner dismissing a dispute against a recorded mining claim, notwithstanding that the appellant has no right or interest in the property himself (overruling, upon this point, *Re Cashman and The Cobalt and James Mines, Ltd.*, (*ante*), and *Re Munro and Downey*, (*ante*)); and there appears to be no distinction in this respect between decisions of the Commissioner on appeal from the Recorder and decisions by him in the first instance.

Held, per Moss, C.J.O., on an application under sec. 152 (Act of 1908), for leave to appeal from an order of the Divisional Court granting a new trial, that as the Court had exercised its discretion in granting the new trial and had determined nothing in respect to the final rights of the parties, that discretion should not be interfered with, though upon the facts it might appear that such an order should not have been made.

Dispute by H. A. Smith against mining claim 10409, in the unsurveyed territory south of Lorrain, held by the respondent Henry S. Hill.

The claim had been recorded by one Montgomery on 7th January, 1908, and was by him sold to the respondent Hill on 23rd May following.

Hill put men at work upon the property and mineral was opened up indicating that the claim was very valuable.

The disputant Smith, learning of this, conceived the idea of attacking the validity of the claim and acquiring the property for himself; and on 17th June he caused it to be restaked in his own name, planting the discovery post upon the mineral that Hill's men had opened up, and on 18th June, 1908, he filed application for the property, together with his dispute against the Hill claim alleging that there had been no discovery at the time it was staked and that it had been fraudulently recorded by Montgomery, and claiming that it was an abandoned claim within the meaning of the Act.

The matter was transferred by the Recorder to the Commissioner for adjudication.

There were two hearings.

The Commissioner's decision upon the first hearing was given on 5th September, 1908, dismissing the dispute with costs, the grounds being in substance the same as in his second decision reported *infra*.

The disputant appealed to the Divisional Court, and on 10th November, the following decision was rendered:

RIDDELL, J.—The trial was in several respects not wholly satisfactory and I think justice will be done if we direct that the appellant upon paying within ten days after taxation the costs of this appeal, may have a new trial. If these costs be not paid the appeal should be dismissed with costs.

My brother Britton agrees in this result.

Hill applied for leave to appeal from the decision of the Divisional Court to the Court of Appeal, under sec. 152 of the Act (1908). The application was heard by Moss, C.J.O.,

who, on 14th December, 1908, refused leave, stating his reasons as follows:

Moss, C.J.O. (after reciting sec. 152 and pointing out that prior to 1908 appeal in such a case lay without leave.)—After reading all the papers and giving the matter my best consideration I have come to the conclusion that I ought not to grant leave in this case.

The judgment of the Divisional Court determines nothing in respect to the final rights of the parties.

It appeared from the affidavits and the evidence taken at the trial that all the facts had not been developed, there were other persons not called who might throw very considerable light on the matter.

I do not say by any means that upon the facts as they appeared before the Commissioner I should have arrived at a different opinion nor that sitting as a member of the Divisional Court I would have been in favor of granting a new trial even upon the terms imposed.

The Court having thought it proper in the exercise of its discretion to grant a new trial I have only to consider whether under the circumstances the case is one in which it is proper to allow a further appeal at this stage. The right to appeal is evidently intended by the Legislature to be more limited than it was before.

If this had been a final disposition of the rights of the parties the application would have been founded upon much stronger basis.

All that has been done is to put the case in train for a fuller and more satisfactory investigation of these rights.

It is very doubtful whether in such a case the applicant could convince an Appellate Court that it ought to interfere and I do not think that I ought to delay the new trial by allowing him the opportunity of making the attempt.

I must therefore refuse the application but the costs may be costs in the cause unless otherwise directed by the Mining Commissioner on the new trial.

The second hearing before the Commissioner took place on 28th April, 1909.

E. B. Ryckman, K.C., and *H. L. Slaght*, for the disputant, Smith.

J. Lorn McDougall and *F. Elliott*, for respondent, Hill.

28th May, 1909.

THE COMMISSIONER.—The disputant Smith is seeking to have the mining claim of the respondent Hill, number 10409 in the unsurveyed territory south of Lorrain, declared invalid and cancelled and to have himself recorded as entitled to the property.

The respondent Hill in May, 1908, purchased and obtained a transfer of the claim from one Montgomery, in whose name it was recorded, paying $400 for it and having, as he states, examined the records in the recording office and found everything apparently regular and valid. Shortly afterwards he took down a number of men to the claim and began mining operations upon it, having consulted with Montgomery and with one Gillies, who was connected with an adjoining property, as to the most promising place upon the claim to carry on the work. After some days' work his men opened up a very fine showing of cobalt, being apparently in a continuation of the same vein that had already been opened up upon what is described as the Day property with which Gillies was connected. Samples of what Hill's men had found were taken to their camp where they created somewhat of a stir as indicating a valuable find. The disputant Smith, who seems to have been in the neighborhood in connection with other properties, was shown one of the samples by O'Grady, Hill's foreman, and volunteered to take it to Hill at Haileybury, which he did, congratulating Hill upon the fine showing of mineral obtained from his property. The valuable mineral had also been seen by Renaud, who is alleged to have been connected with the original staking of the Montgomery claim, and though Renaud's evidence as to what really occurred between him and Smith is very hazy and incomplete (Smith not being called at all), interviews appear to have occurred shortly afterwards between Smith and Renaud in which they conceived the idea of ousting Hill and acquiring the property for themselves, and on 17th June, 1908, while some of Hill's men were actually working upon another part of the claim, one O'Hara, on Smith's behalf, planted a discovery post upon the mineral that Hill's men had opened up, and staked and filed a mining claim upon the property, at the same time lodging a dispute against the Hill claim alleging invalidity before Hill acquired it on the ground of lack of discovery, fraudulent recording and improper affidavit of discovery by Montgomery.

As to what happened upon and after Hill's acquisition of the claim there is in reality little dispute except, perhaps, upon the question of whether the Smith post was planted upon the mineral that Hill's men had opened up, but as to this I can upon the whole evidence feel no doubt. It was not only upon what had been disclosed on behalf of Hill, but because of it, that Smith sought to acquire the property.

The contentions of the disputant are directed to what he says happened in connection with the Montgomery staking before Hill came into the affair. Upon the original hearing the only direct evidence regarding the staking and recording of the Montgomery claim was that of Holland, which I did not then consider satisfactory or sufficient to oust the rights of the respondent. At the rehearing two additional witnesses were called by the disputant, namely, Renaud and Montgomery himself. Both sides disclaim friendliness with Montgomery and responsibility for his evidence. He undoubtedly sought to leave the impression that he was not friendly to the disputant, but what may have been his real feelings or desires in the case I am unable to say. As to Renaud, his manner of giving evidence was such that even aside from the part he played in working up the case and soliciting and holding out inducements to witnesses to join him in the attack upon the respondent's claim, I cannot feel justified in giving the slightest weight to anything he says. His desire seemed to be to say what he thought likely to assist the disputant and conceal what he feared might be injurious. He admitted, after a good deal of equivocation, that he had a written agreement with Smith's brother by which he was to receive either $900 or $1,200—he said he was not sure how much—for his interest if the case was successful. This agreement, the evident desire upon the disputant's side to conceal what the agreement was intended to accomplish, the fact that inducements were held out to other witnesses to enlist their support, and the general lack of scrupulousness in the methods of the disputant—to say nothing of any consideration of honor or fairness which it is only just to the mining community to say would have restrained the ordinary miner from the course pursued by the disputant in this case—cannot, to my mind, but cast the gravest suspicion and doubt upon his whole case. While I cannot accede to the proposition that the fact of the respondent being an innocent purchaser for value without notice or suspicion of illegality or fraud, which undoubtedly he is, would give him immunity

from attack, I think, as the facts were not within his own knowledge or control and he is at the mercy of witnesses all of whom have been approached with inducements to side against him, he is at least entitled to insist that the case against him should be clear. To me the evidence of the three witnesses, upon whom the disputant's case rests, was far from satisfactory or convincing. From their demeanor and the nature of the surrounding circumstances I cannot, with my experience in such matters, feel justified in setting aside a claim upon the evidence of any or all of them. How much of what they say may be true and how much, or what part, false, it is impossible to say, but I am satisfied that a jury, especially a jury of miners, would find as I do that no man should be deprived of any right upon such evidence and would refuse to find upon it that the claim in question had not been staked out and recorded in accordance with the Act.

Holding this view of the evidence upon which the disputant's case rests, it is perhaps unnecessary to discuss it in detail, but I may point out, first, as to the alleged staking on 5th November, that the stories of Renaud, Holland and Montgomery vary as to how this came about. Renaud sought to leave the impression that Montgomery gave a distinct and specific direction to him to stake the property at a sum agreed upon, while from Holland it would appear that there was merely a general understanding among them, and that a kind of partnership at some stage at all events existed among the three by which each was to share in all the claims, Montgomery being allowed, however, by the subsequent turn of events to keep the claim which had been staked in his name. There is nothing, to my mind, sufficiently clear or specific about the evidence to satisfy me that Montgomery or his transferee should be visited with any forfeiture under sec. 136 of the Act of 1907. While the provisions of that section are undoubtedly wholesome I think they should not be applied, certainly not against a subsequent transferee, unless a case clearly within them is made out, and as to this I am not upon any view of the evidence satisfied. It would seem that any commission or authority that Montgomery gave at all regarding the November staking was given to Renaud, and it is equally clear from what they say, if credence could be given to it at all, that Renaud did not stake the property. Montgomery says the claim was not recorded because he found that Renaud had not in reality staked or been on the claim, and this, if their stories are true, is as to the staking, absolutely,

and as to not being on the property, substantially true. Montgomery, as a fact, could not himself in any event record the claim without the assistance of the staker, if the staking was done at all as alleged, and Renaud, as he had not done the staking, could not supply the necessary assistance.

As to the other chief point of attack upon the claim, namely, that Montgomery was not upon the property on the 21st of December, the date given as the date of discovery and staking, and that he was not in fact upon it at all, though he made the affidavit of discovery and staking and recorded the claim, there are difficulties and improbabilities in any view of the case. Montgomery claims that after Holland and Renaud had come back from the December staking he became suspicious and determined to go down to the claim and look after it for himself, and though he is not clear as to dates he says he did go down before Christmas, and that it must have been on the 22nd or 23rd of December that he was there. He says he found a discovery and found that the staking was partially done in his name but not completed, and he says he completed it in proper form and returned to Haileybury before Christmas. Holland admits that he had not gone around the claim in doing his December staking, assuming, as he says, that it was unnecessary to go to the posts that he had put up before. If Montgomery's story as to this is believed, there would, as I think, be no substantial ground for holding the claim invalid even if the 21st was not the day that Montgomery was there, as to which I think I would hardly be justified in making a finding. There could be no object in Montgomery making it the 21st rather than the 22nd or the 23rd, and if, as he says, Holland had only partially completed the work the natural and in fact the legal thing to do was to complete it as Montgomery says he did. Montgomery asserted in his evidence that he could name a number of witnesses, some of them in the room where the hearing was being held, who could corroborate his statements as to his being upon the property at the time he swears to, but neither side saw fit to ask him for names. While it seems somewhat unlikely that Montgomery would have undertaken so long a trip, upon the other hand it is still more improbable that he would recklessly take the risk of swearing to the affidavit and recording the claim without having been upon the property at all when it would have been so easy for him to have the person who had been upon it and who said he had done the staking do so. It is difficult also to understand where Mont-

gomery could have got the necessary particulars for recording if he had not been upon the property himself, for Holland, the only person who could do so, states that he did not give him these particulars.

As to the question of discovery, while it would be impossible to find upon the evidence of the witnesses put forward by the disputant that there was no discovery—both Holland and Montgomery swearing that they found valuable mineral upon the claim—some doubt was raised in my mind as to the real existence of a discovery by the Inspector's inability at the time of his visit to find or identify the original discovery upon which the claim was staked. The Inspector gave evidence before me and stated that valuable discoveries existed at the workings but that he was unable to find anything that could be clearly identified as the original discovery. He states, however, that fire had swept over the claim between the date of the staking and the date of his visit and that original stakes and markings might have been obliterated, and that there might easily have been a discovery there upon which the claim was based which he could not locate or identify. I cannot therefore find that no discovery really existed at the time of the staking, and if the evidence of the disputant's witnesses was to be accepted, I would have to find that a discovery had actually been made.

Various other questions were raised during the argument, among them the contention by the respondent's counsel that as it had not been proven that Smith was the holder of a miner's license he had no standing to enter or to have entered upon his behalf a dispute against the claim of another miner: see sec. 63 of The Mining Act (1908). That this is a correct proposition of law I think there can be no question, and I think also that the disputant has failed to submit any sufficient evidence that Smith is the holder of such a license, but as to whether, even at the present stage of the case, he should not be allowed to supply such proof I express no opinion, though I think this is assuredly not a case in which any exercise of discretion which could not be demanded as a matter of course should be granted to the disputant. At all events no application to put in such evidence has been made. It was also urged by the respondent's counsel that whatever my findings as to the validity of the original staking and recording—and I think it cannot be disputed that the claim would not be valid unless at the time of staking a sufficient discovery had been made—I should in any event decide in

favor of the respondent under sec. 140 of the Act, the real merits and substantial justice of the case being with him. Disputant's counsel, however, contended that any discretion given by sec. 140 must at least fall short of overriding any specific provision of the Act. In the latter view of the law I think I must concur, though without doubt the real merits and substantial justice of the case are on the side of the respondent, and if I considered sec. 140 wide enough to justify or require it I would have no hesitation as between the two parties to the present proceeding in deciding in the respondent's favor upon that ground. The foundation principle of our law regarding the acquisition of mining claims and the granting thereof by the Crown is the encouragement of discovery and opening up of valuable mineral, the granting of the property upon which the mineral is situated being intended as a reward for the miner's industry in disclosing the mineral and thus conferring benefit upon the country. The price per acre exacted for the land is but a trifle compared with the value of the mineral, and bears no relation to it. That in the present case the mineral had been opened up before Smith had anything to do with the property is not disputed, and whatever may have been the help, in the way of pointing out a likely place to operate, which may have been derived by the respondent from the fact of mineral existing upon the adjoining property—which is but one of the ordinary incidents which miners are entitled to the advantage of—it was without doubt the money and enterprise of the respondent, and not that of the disputant, that led to the opening up of the valuable deposit, and as between the two the respondent has undoubtedly a stronger and in fact the only moral claim to the property. At the time the disputant came upon the claim the respondent was in actual occupation doing work upon it believing in good faith that he was entitled to it, and the disputant knew this when he put up his posts. As pointed out in the British Columbia case of *Granger* v. *Fotheringham*, 3 B. C. R. 598, 1 Martin's Mining Cases, 77 it is not in the interest of a mining country to discourage the investment of capital and the employment of labor by assisting the practice of what is known as the "jumping" of claims, men who carry on such a practice being aptly described as "parasites who always hang about rich mining camps." The suggestion that a wide discretion might in cases like the present one be properly exercised by the Crown is made by the Chancellor in *Attorney-General of Ontario* v.

Hargrave, 8 O. W. R. at 131 and 136, and the principles upon which lands of the Crown are accustomed to be dealt with is further illustrated by R. S. O. (1897), ch. 31, sec. 20, where it is provided that in cases of claims to Crown lands coming before the Heir and Devisee Commission the claims are to be dealt with as in the judgment of the Commissioners, "the justice and equity of the case requires, without regard to legal forms or to the strict letter of the law or legal rules of evidence." Could the disputant have any real claim upon the property there must be at least a good deal of hesitation in interfering with it even in favor of a prior moral right, but, as has been pointed out by the respondent's counsel, as the disputant Smith staked upon a discovery already made he could in no event, according to the decision of the Divisional Court in *Re McNeil & McCully and Plotke*, 13 O. W. R. at 14 (*ante*), have any valid claim to the property himself. This seems clearly to be the ground upon which the McCully claim was in that case held invalid. That was not the ground upon which I had thrown out the claim at the hearing, nor was I, prior to that ruling, prepared to go so far. The decision of the Divisional Court upon the point, however, appears to be explicit, and applying it to the case in hand the disputant's claim must be held invalid. My own view of the Smith claim would be that it was at all events invalid as having been staked upon property which was not at the time open to be staked, but as this view does not appear to have been concurred in by the Divisional Court in the case above mentioned, and as the law upon the Act as it then stood appears to be thus established, I need not pursue the matter further. Section 83 of the present Act (corresponding to old sec. 166) has since been amended (9 Edw. VII. ch. 26, sec. 31 (1)), making it clear that the grounds for construing an abandonment under that section do not include insufficient discovery.

Upon the whole case I think the dispute should be dismissed, and that all costs left in my discretion should be paid by the disputant.

From this decision appeal was taken (by leave under sec. 151 (4) of the Act) direct to the Court of Appeal.

G. T. Blackstock, K.C., and *C. C. Robinson*, for appellant Smith.

G. H. Watson, K.C., and *J. Lorn McDougall*, for respondent Hill.

30th October, 1909.

Moss, C.J.O.—Appeal by H. A. Smith from an order or decision of the Mining Commissioner brought directly to this Court by leave under sec. 151 (4) of The Mining Act of Ontario (8 Edw. VII. ch. 21).

The dispute relates to mining claim No. 10409 in the unsurveyed territory south of the township of Lorrain, of record in the office of the Mining Recorder of the Temiskaming mining division.

The claim was recorded in the office of the Mining Recorder on the 7th of January, 1908, by one Montgomery, the holder of a mining license. In the application, after describing the parcel and referring to the situation of the discovery post, it is stated that the discovery was made on the 21st of December, 1907, and the claim was staked and the lines cut and blazed on the claim "on the day of 21, 1907," but obviously the 21st day of December was intended, and no point has been made of this apparent slip.

On the 23rd of May, 1908, Montgomery being still the holder of a mining license, transferred all his interest in the mining claim 10409 to Hill, who was the holder of a mining license. This transfer was filed in the Recorder's office on the 12th of June, 1908. On the 18th of June, 1908, an application for the staking of a claim on the same location was filed in the Recorder's office on behalf of Smith, and on the same day a dispute of Hill's claim was filed on behalf of Smith under sec. 63 of The Mining Act of Ontario, which had come into force on the 14th of April, 1908.

The Recorder, acting under the provisions of sec. 130 (2) of the Act, transferred to the Commissioner with his consent the questions raised by these proceedings for his decision. The Commissioner, having heard the evidence and the parties, decided in favor of Hill.

Upon appeal to a Divisional Court a new trial was directed upon payment by Smith of the costs of the former trial and the appeal to the Divisional Court. An application on behalf of Hill for leave to appeal from the Divisional Court was refused (1908), 12 O. W. R. 1258 (*supra*). The parties then proceeded with the new trial. The Commissioner, after hearing the witnesses and the other evidence adduced, again determined in Hill's favor, and thereupon this appeal was brought.

The first question for consideration relates to Smith's status to dispute Hill's claim and to appeal to this Court. It was argued on the latter's behalf that unless Smith could show that he had acquired or held an interest in the property comprised in the claim, he was debarred from disputing it, and that, in any event, there was no appeal to this Court from the Commissioner's decision on a dispute. Reference was made to *Re Cashman & Cobalt* (1907), 10 O. W. R. 658 (*ante*), followed in *Re Munro & Downey* (1909), 19 O. L. R. 249, 14 O. W. R. 523 (*ante*), as supporting these contentions. In those cases the rights of the parties were governed by The Mines Act, 1906, as amended by the Act 7 Edw. VII. ch. 13. In this case, while those enactments apply to the discovery, staking, etc., made or alleged to be made by Montgomery, The Mining Act of Ontario is applicable to all the subsequent proceedings, and reference must be made to its enactments when dealing with the question of status. The language is not the same as in the former enactments, some of the changes probably owing their origin to *Re Cashman & Cobalt* (*supra*). Section 63 of The Mining Act of Ontario seems to place it beyond doubt that a dispute alleging that any recorded claim is illegal or invalid in whole or in part may be filed by any licensee without his being entitled or claiming to be entitled to any right or interest in the lands or mining rights; though if he claims on his own or some other person's behalf to be entitled to be recorded for, or to be entitled to, any interest, the dispute must so state. In this case the Commissioner dealt with the matter in the first instance and not by way of appeal from the Recorder, and it would seem to follow that an appeal would lie from his decision under sec. 151. The same right would appear to exist now, if not previously, even when the decision is upon an appeal from the Recorder. It must be taken as proved or not really open to dispute that Smith and O'Hara, who filed the application and dispute, were licensees and therefore entitled on that ground to dispute Hill's claim and to maintain this appeal against the adverse decision of the Commissioner. But in so far as Smith claims the right to dispute as a person entitled to be recorded as the owner or holder of a right or interest as upon a discovery followed by staking, etc., no case has been made to entitle him to such a position.

On the 17th of June, 1908, on which day Smith or O'Hara on his behalf alleges that he discovered valuable mineral and staked out the claim upon the lands comprised in it, the

same claim was under staking and record as a mining claim filed by Montgomery, duly transferred for valuable consideration to Hill, and upon it men in Hill's employ were then actually engaged in working.

The onus being upon Smith to show if he could that valuable mineral in place had been discovered by him or on his behalf on land open to prospecting (sec. 35) he could only do so in this instance by showing that Hill's claim had lapsed, been abandoned, cancelled or forfeited (sec. 34). And in this respect he has wholly failed. There was no abandonment of Hill's claim under the provisions of either sec. 82 or sec. 83, nor is there any evidence—but the contrary—of conduct amounting to an abandonment even if in the face of these enactments any other form of abandonment can be put forward.

Cancellation under sec. 91, or forfeiture under sec. 85, is equally out of the question. Nor upon the evidence can there be any reasonable suggestion of a lapse. That is something which must occur, if at all, by reason of omissions entitling the Crown, if it chooses, to resume the land, or of some course of conduct indicating an intention on the part of the person holding the claim to permit the lands to revert to the Crown. Whether or not there has been a lapse is a question of fact, and the evidence here does not justify a finding that on or before the 17th of June, 1908, Hill's claim had lapsed.

The lands comprised in the claim were, therefore, not lands open to prospecting under sec. 35. In view of this it is, perhaps, unnecessary to deal at any length with the contention that a discovery had been made by or on behalf of Smith. But speaking for myself, I perceive much difficulty in holding that the mere adoption by a licensee of valuable minerals taken out by another licensee in the course of working upon a claim at a time when he is still working it and claiming a right to do so, can be turned into a discovery sufficient to lay the ground work of a claim for the benefit of the adopter. If it could ever be so probably it could only be after there had been an actual reverter to the Crown from some of the causes mentioned in sec. 34.

I am inclined to accept the view taken in the Courts of British Columbia under the legislation of that province: see *Cranston* v. *English Canadian Co.* (1900), 1 Martin's Mining Cases, 394. *In re McNeil & Plotke* (1909), 13 O. W. R. 14 (*ante*), Riddell, J., delivering the judgment of a Divisional

Court, expressed the opinion that a licensee seeing a claim apparently regularly staked might nevertheless by reason of knowledge as to the actual state of the case, be able to make the affidavit required by sec. 157 of The Mines Act of 1906, as amended by the Act of 1907.

But I am not able to think that either Smith or O'Hara, knowing what they did in this case, could justly claim to be able in good faith to make the affidavit required by sec. 59 (3) of the Act of 1908.

There remains to be considered the question whether the dispute based on Smith's or O'Hara's position as licensee has been established.

I agree with the conclusion of the Commissioner. In my opinion he was justified in concluding that upon the evidence adduced it would be very unsafe to find against the validity of Montgomery's claim.

The circumstances developed in the course of the testimony were calculated to cast the gravest doubt upon the testimony put forward in support of Smith's contention, and he did not offer himself as a witness. Reading the testimony of the witnesses upon whom he relies, it appears to me so far from being satisfactory or convincing that I feel no hesitation in saying that no sufficient ground is shown to support the argument that the view taken of it by the Commissioner should be reversed or varied on this appeal.

I would dismiss the appeal with costs.

MEREDITH, J.—The appellant must recover, if he can recover at all, upon the strength of his own rights, under The Mining Act, not on the weakness of the respondents; but, apart from recovering himself he may, in my opinion, dispute the respondent's claim, with a view to defeating it, even though his own claim be invalid. Section 63 of the Act seems to me to make that quite plain. But it is said that no appeal lies from the Commissioner to a Divisional Court, or to this Court, by one who merely disputed the claim. Section 151, however, gives such a right of appeal, in plain words, and nothing contained in it gives color for any distinction between cases in which the appellant is seeking to enforce some claim and where he is merely opposing the claim of another. Section 133 applies only to the case of an appeal from the Recorder to the Commissioner, and, if it had been applicable to this case, it might not have been found difficult to point

out how any licensed prospector may be affected by a claim which is intended to withdraw the land in question from prospectors' rights under the Act, nor difficult to find a party adversely interested; but perhaps more difficult to give any satisfactory reason why a person who is given a right to dispute a claim is not affected by a dismissal of his objection.

Again, it must be borne in mind that mining lands are not lands without an owner which must be awarded to one or other of the parties to cases such as this. The lands are Crown lands and remain such until they are acquired in the manner provided for in the Act. So it may be that neither party is entitled to any rights in the land in question. That the appellant is not seems to me to be quite plain. The whole evidence makes it quite plain that he made no discovery such as the Act contemplates. His only discovery was of defects in the respondent's title which he sought to take advantage of, not only to defeat the respondent's claim, but also to give title to himself.

Section 35 provides that "a licensee who discovers valuable mineral in place" may acquire rights under the Act; and sec. 2, sub-sec. (x) that "valuable mineral in place" shall mean a vein or lode or deposit of mineral in place appearing at the time of discovery to "be of such a nature . . ."

I cannot think that on the facts of this case there was any such discovery by the appellant.

The appellant's claim therefore fails.

In regard to the respondent's claim I would have had great difficulty in coming to the conclusion which the Commissioner reached, upon the whole evidence as it now appears; but he had the great advantage of hearing and seeing the witnesses, and the knowledge which the local atmosphere affords; so great an advantage that, being unable to demonstrate his error, if such there be, it must stand, so far as I am concerned, and that even though it seems to me that his mind may have been affected by the notion that either one or the other of the parties must succeed in his claim to the land; and, in such an event, the leaning would be very strong towards the respondent.

He has found that there was a valuable discovery by Montgomery, duly followed up under the provisions of the Act.

I would dismiss the appeal.

OSLER, GARROW and MACLAREN, JJ.A., concurred.

NOTE.—A very important feature of this decision is the overruling of *Re Cashman and The Cobalt and James Mines, Ltd.*, (*ante*), and *Re Munro and Downey*, (*ante*), in regard to the right to appeal. It must now be taken as settled that where the Act gives the right to appeal from the Commissioner's decision upon a dispute, it gives it alike to a licensee having a right or interest in the property and to one having no such right or interest. And it is submitted that the same is true whether the dispute was heard in the first instance by the Recorder or by the Commissioner; and it is also submitted that the lack of a right or interest in the property is no bar to an appeal from the Recorder to the Commissioner in disputes against recorded claims.

There was never any doubt since the procedure was originated in 1907 that a licensee had a right (before issue of a certificate of record) to dispute a recorded mining claim, even though claiming no right in the property himself; nor until the Cashman case had it been contended that he could not take his case to the Divisional Court if he chose. Upon neither point, it is submitted, is there any real ground for distinction between the present (1908) and the prior Act; compare s. 158*a* (3) and Form 14*a* of 1907 (enacted by 7 Edw. VII., c. 13, s. 13) with present s. 63 and Form 8 as to entry of disputes; and s. 43 of 1907 with present s. 151 (1); or, to put it perhaps more correctly, the interpretation now established for the new Act was equally the proper interpretation of the old.

For further reference to the doctrine of the Cashman case see especially *Re Cashman and The Cobalt and James Mines, Ltd.*, and notes thereto, *ante; Re Munro and Downey, ante; Re McNeil and McCully and Plotke, ante;* and see Index Digest and Index to notes.

Another important point made clear by the decision in the present case, which might seem to have had some doubt cast upon it by *Re McNeil and McCully and Plotke, ante*, is that a licensee can not validly stake out a mining claim upon lands already under staking or record as a mining claim and is not justified in making affidavit therefor, unless he can show that the former claim had at the time of his staking lapsed or been abandoned, cancelled or forfeited, within the meaning of the Act. For a general discussion of the subject "lands open" see notes to *Re Smith et al. and The Cobalt Development Co., Ltd., ante.*

Upon one important question touched in the case the law has not been fully enunciated, viz., how far and when, if at all, may a licensee appropriate mineral opened up by another and use it as his own discovery as the basis of a mining claim. This is not a question peculiar to the Ontario Act, but one which may arise and has arisen in other jurisdictions also. See note to *Re Smith and McHale, ante*, and see *Re Wright and Coleman & Sharpe, post.*

(THE COMMISSIONER.)

RE WISHART ET AL. AND HARRIS.

Certificate that Interest in Mining Claim in Question—When it may Issue—Renewal of—Policy of Act Regarding—Lis Pendens out of High Court—"Proceeding."

It is only after a proceeding under the Act has been commenced that a certificate under sec. 77 (2) (Act of 1908) (in the nature of a *lis pendens*) can properly be issued or continued against a mining claim; a *lis pendens* out of the High Court does not authorize such issue or continuance, nor should such a *lis pendens* be entered upon the record of a claim.

Application by Mark Harris to remove certificate issued and continued by the Recorder under sec. 77 of the Act against mining claim 7209, south of Lorrain. The certificate had been obtained by George Wishart who, with one Thomas Costigan, was claiming an interest in the property.

J. E. Day, for Harris.

A. G. Slaght, for Wishart.

15th June, 1909.

THE COMMISSIONER.—The recorded owner, Mark Harris, has applied to me for an order to vacate a certificate under sec. 77 of The Mining Act of Ontario, issued and noted upon the record of his mining claim by the Mining Recorder, and he also asks for a declaration that the claimants George Wishart and Thomas Costigan have no interest in the claim in question.

At the hearing counsel appeared for Wishart and took objection that Thomas Costigan, for whom he said he did not appear, had not been served with the appointment or notice of application, though it was shown that the appointment and notice and demand of particulars had all been served upon the solicitors who had been acting for both Wishart and Costigan in litigation involving the same matters now pending in the High Court. The certificate which it is asked by Harris to have removed was put on on behalf of Wishart only, and Costigan was in no way mentioned in or connected with it. As to the sufficiency of service upon Costigan, or whether the service that was made should be allowed as good service, it is unnecessary to decide, for I do not think I should at the present time make any declaration of Wishart's or Costigan's rights or deal with that branch of the application at all, as

actions regarding it and application concerning the reference of it to me are now pending in the High Court.

As to what has been done by Wishart in cumbering the record of the claim in the Mining Recorder's office, I see no reason why I should not deal at once with that, as that is a matter which the Act requires to be dealt with exclusively by the officers appointed under the Act: see secs. 73, 77, 68, 123 and 154; and sec. 77 (4) is explicit in giving me power at any time upon application of any person interested to make an order vacating such a certificate. It is the plain purpose of the Act to prevent the encumbering or tying up of Crown lands by private persons beyond the power of the Crown officers, which is well known to have been a great abuse in the past and to be very detrimental to the mining interests and to the public welfare generally. When the records were open to the filing of all kinds of documents, and the noting of all kinds of proceedings, rightful holders were harrassed so much by vexatious documents and proceedings—often filed or entered for no other purpose than to extort money from them as the price of withdrawal—that it had become a scandal.

Therefore to refuse to deal with the question of the certificate complained of would be to defeat the clear intention of the Act. The importance attached by the Act to keeping the record of mining claims as free as possible from entanglements is illustrated by secs. 70, 73, 123 and 154.

The certificate complained of was issued and continued by the Recorder without the slightest evidence or any material whatever except the production of an ordinary *lis pendens* issued out of the High Court in an action between Wishart and Harris. No proceeding before the Recorder or before myself had in any way been commenced nor, apparently, was any contemplated by Wishart, under The Mining Act. The Recorder states he was in doubt as to the propriety of issuing the certificate, but was persuaded by Wishart's solicitor that the *lis pendens* from the High Court required or at all events warranted it, and the Recorder says that he thought in any event no great harm could come as any person interested had the right under sec. 77 (4) to apply to me at any time for its removal.

That the *lis pendens* itself could not properly be filed or noted upon the record of a mining claim is quite clear from sec. 73. The sole authority in the Act for the issue and

noting of such a certificate as the one in question is sec. 77 (2), which provides that " In a proceeding calling in question any interest in an unpatented mining claim or other recorded right or interest the Commissioner or Recorder may issue a certificate (Form 13) and upon receipt thereof and payment of the prescribed fee the Recorder shall file and note it as herein above directed."

That the proceeding mentioned in this provision must be a proceeding under The Mining Act and not elsewhere can hardly be questioned. It is only in such proceedings that the Commissioner or Recorder has authority, and secs. 123 and 68 and the provisions of the Act generally make it clear that proceedings affecting an unpatented mining claim must be pursued under the Act and not elsewhere.

I think, therefore, that the issue and noting of the certificate in this case—no proceeding whatever having been commenced under the Act—was clearly unauthorized and illegal, and its continuation by the Recorder equally so. The condition of things giving the right to do any of these things has never existed. Wishart has never even yet commenced any proceeding under the Act. So far from having done so the evidence put in on behalf of Harris shows that a demand made by Harris to him for particulars of the nature of his claim was ignored, and when the matter came before me he offered no evidence whatever to me to show that he had in reality a *bona fide* claim. The evidence offered by Harris, though I think the burden was not upon him in the circumstances to submit evidence at all, satisfies me on the contrary that the certificate, even had it been validly issued in the first place, should not now be continued.

Certificate vacated with costs.

(THE COMMISSIONER.)

RE OSLUND ET AL. AND BUCKNALL.

Agreement for Sale—Signed by Some Only of the Vendors—Whether Binding—Escrow—Misunderstanding of Terms of Agreement—Illiteracy—Misdescription.

Where 3 out of 4 owners of a mining claim signed an agreement for sale which it was intended should be signed by all, and the evidence and circumstances showed that it was not contemplated that the agreement should bind the interests of the 3 apart from the interest of the other, the agreement was held not to be binding upon any of the parties; the question of the effect of such a signing must be determined by the circumstances of the particular case.

Misunderstanding by the vendors as to the nature of the consideration they were getting, and misdescription in the agreement of the stock which it provided might be given them as the equivalent of money, the misunderstanding having been induced by the vendee, the vendors being Swedes inexperienced in stock transactions and not able to read English well, disentitle the vendee to enforce an agreement for sale of a mining claim.

Proceedings by Alexander Oslund, Nathaniel Oslund, Neil Oslund and Daniel Jonason, to have their mining claim, No. 8161, south of Lorrain, cleared of claims set up and recorded against it by the respondent Isaac Bucknall.

A. G. Slaght and *G. T. Ware*, for the applicants.

J. Lorn McDougall, for the respondent.

16th June, 1909.

THE COMMISSIONER.—The applicants are asking to have their mining claim cleared of claims set up by the respondent under a certain agreement recorded upon it at his instance on 23rd January, 1909, a duplicate of the agreement and a transfer of the claim in question having also been deposited by Bucknall with the Union Bank at Haileybury. Though all the 4 applicants were interested in the property and though it was intended that all should join in the agreement for sale, it was signed by only 3 of them. The transfer, however, was signed by the one of the 3 in whose name alone the claim stood in the Recorder's books. The fourth refused to sign or to join in the sale, and the respondent in this state of facts contends that he is entitled to enforce the sale against the 3 who have signed.

The facts are briefly that negotiations took place between the applicant Jonason and the respondent Bucknall for an agreement in the nature of an option between the four appli-

cants upon the one side and the respondent on the other, by which the respondent was to have the right, at his option, to purchase the property by paying the price agreed upon on or before a time specified. The respondent had some time previously held an option upon the same claim from the two of the applicants then interested in it, upon which he had paid $1,000, but which, after doing considerable development work, he permitted to lapse, and in the negotiations for the agreement now in question it was proposed that the terms of the old agreement should be accepted for the new one, but that the $1,000 which had been paid upon the old agreement should be credited upon the purchase price, $20,000, in the new one. Jonason seems to have assumed that his partners would all consent, and it was arranged that he should go down to where they were working and bring them up to Haileybury to complete the bargain and sign the agreement. One of the other three—Nathaniel Oslund—however, was absent, and he was able to get only Alexander Oslund and Neil Oslund. They and Jonason met Bucknall at Haileybury and proceeded to the office of Bucknall's solicitors where an agreement had already, under Bucknall's instructions, been prepared. This was read over by an assistant in the office, and the two Oslunds and Jonason, who did not like the mention in the agreement of turning them over certain stock in what was known as the Casey Mine, concluded to let the matter stand over until next morning. In the morning they made some inquiry and investigation in regard to the mine and Bucknall took them to the office of Mr. Jones and had exhibited to them there a document in the nature of an option which he held with one Mitchell under which Mitchell was to have the right to take over Bucknall's stock in the Casey Mine at $8.50 per share. Their inquiry elsewhere as to the character of the Casey Mine was not satisfactory, and just how Bucknall managed to overcome their dissatisfaction regarding the stock feature of the matter is not very clear, but I am satisfied upon the evidence that they were led by him in some way to understand that they were to get either money or what could readily be turned into money. They are Swedes not able to write English or to read it well, and had no experience in the nature of stock, while Bucknall is a good business man and a mining stock broker. They returned to the law office and signed the agreement. One of the Oslunds suggested getting another lawyer to look after their interest, but Jonason, who seems to have had a great deal of confidence in Bucknall personally

and in his promise to use them right, said that this was unnecessary. It is not disputed that the solicitors who drew the agreement were acting for and paid solely by Bucknall. While I have no doubt the agreement was carefully read over to them I am quite satisfied, as I have said, that they did not really understand the stock feature of the transaction, and I have no doubt they were quite ignorant of the manner in which the stock equivalent of $19,000 was figured out. They were admittedly told that the par value of the stock in question was $5 a share, and the agreement specifies that the stock which they were entitled to receive had that par value, while the fact is the company mentioned is an English company and the par value of its stock and of the stock that the respondent is endeavoring to force upon the applicants as a performance of his part of the agreement is £1 per share. What the real value of the stock is no one appears to be able to tell, but it seems certain that it is quite impossible at the present time, in this country at all events, to turn it into money, and there was no warranty for figuring it out as Bucknall did at the rate of $8.50 per share.

At the time the agreement and transfer and also directions to the bank to hold in escrow were signed, it was stated by the assistant with whom they were left that the documents would have to be signed by Nathaniel Oslund before they could go to the bank. It was arranged that Jonason should drive down for Nathaniel. Discussion took place on the way up between the two as to the bargain which was being made and particularly as to the stock mentioned in the agreement, and Nathaniel determined not to enter into the agreement, and in this position he was encouraged by Jonason who at this time had become suspicious that the stock part of the transaction was not satisfactory. Nathaniel, nevertheless, went to the law office, and after having the agreement read over declined to sign it. Nothing more was said between the parties. Bucknall in fact left immediately for Toronto, but before doing so instructed his solicitors to record the agreement as it was and to deposit the transfer and the duplicate agreement — lacking Nathaniel's signature — in the bank. These two things were done on the 23rd January.

On 29th January formal notice of repudiation of the whole transaction and demand for delivery up of the documents was served by the applicants' solicitor upon Bucknall and his solicitors. To this no response was made, but on 25th January Bucknall had written from Toronto to Nath-

aniel Oslund a letter which the latter received some time afterwards telling him that he (Bucknall) proposed going to large expense upon the property and that he (Nathaniel) would have to pay one-quarter of this large expense and pointing out the danger of loss, and the letter was otherwise couched in such terms as to show an intent to bully or terrorize Nathaniel into signing the agreement. Bucknall in fact admitted in his evidence that he should not have written such a letter but says he was not aware at the time that he could not legally call upon Nathaniel for what he was demanding.

The 2235 shares of stock of the Casey Cobalt Mining Company, Ltd., were placed in the bank within the time required by the agreement. I think the slight slip in the agreement in giving the name of the company as the Casey Cobalt Silver Mining Company, Ltd., instead of the Casey Cobalt Mining Company, Ltd., is unimportant. The stock, however, was not stock having a par value of $5 a share as Bucknall admits he represented it to the applicants to be, and as the agreement describes it, and I think the difference must be regarded as material.

The applicants though willing to take $19,000 cash refused to accept the stock, and upon Bucknall's declining to release the documents from encumbering their property brought the matter before me.

At the opening of the case Bucknall's counsel stated that he was not defending as against Nathaniel Oslund, but admitted Nathaniel's right to a quarter interest in the property, and said Bucknall was ready and willing to convey or assure that interest to him. It was in fact admitted throughout the proceedings that Nathaniel is interested in the property and the agreement under which Bucknall is claiming against the other three recites that the four applicants are joint owners.

The chief point of contention is as to whether the agreement for sale was complete as against the three of the applicants who signed it and enforceable against them as far as their interests extend, or whether it was incomplete and conditional as regards every person until Nathaniel joined in it. I think the law is that this question must be determined upon the facts and circumstances of the particular case in question: see *Latch* v. *Wedlake*, 11 A. & E. 959; *Leake on Contracts*, 5th ed. 303; and after careful consid-

eration I am quite satisfied that in the present case it was never contemplated or intended that the documents signed should bind the interests of the three apart from the interest of the other one. It is recited in the document that they were joint owners; the claim is dealt with as a whole and not the individual interests separately; the consideration is to be paid in one lump and to the vendors jointly and not severally; the covenants for title are joint covenants and such, I think, as any one or more of the vendors might decline to enter into unless, as contemplated, all four were joined; and from the facts and circumstances apart altogether from the form of the agreement, and even if the agreement were to indicate the contrary I am satisfied that the three who signed did not intend to and would not have made a sale of their interests apart from the interest of Nathaniel. I think, therefore, that Bucknall was not entitled to deal with the documents as he has done and that they should upon Nathaniel's refusal to sign have been delivered up or cancelled.

I think also that the mis-statement and misunderstanding as to the stock and the failure to hand over, and in fact the impossibility of handing over, stock of the kind called for by the agreement, are sufficient to disentitle Bucknall from enforcing the agreement even had it been signed by all parties.

Order declaring agreement and transfer not valid or binding and directing that they be delivered up and cancelled, with costs.

(THE COMMISSIONER.)

RE WRIGHT AND THE COLEMAN D. CO. & SHARPE.

Employer and Employee—Acquiring Claims Through Other Parties—Application for Mining Claim—Tendering of—False Affidavit with—Priority—Lands Open—Appropriating Existing Discovery—Abandonment—Costs.

W. made a valuable discovery 16th July and staked out a mining claim on it 17th July, 1906; the Recorder (erroneously) refused to record it by reason of a prior existing recorded claim of C. and W. restaked within every 15 days till he could get it recorded. G., on behalf of the Company for which S., a partner of W., was foreman, staked the same discovery as having been made by himself on 30th July and staked out a mining claim for the Company on it on 9th August and tendered application on 10th of August, which was refused. W. on 15th September by procuring abandonment of C.'s prior claim, got his own claim recorded on his discovery of 16th July and stakings of 17th July and 3rd September. The Company subesquently by mandamus order of the High Court got G.'s staking recorded and also three other stakings on another alleged discovery, the latter being clearly invalid.

Held by the Commissioner,

That W. was entitled to the property;

That a licensee is not entitled to appropriate or base an application on an existing discovery while under a subsisting staking of another licensee;

That, while it is desirable to discourage employees from entering into private enterprises of their own while under employment for others, an agreement by which S. paid a prospector to work with W. for a half interest in what might be discovered, there being no dishonest intent and no thought of making profit at the employers' expense, and the property acquired not being the fruit of the employers' labor or enterprise, was not invalid and W. and S. were entitled to the claim acquired by W.

Case remitted by Court of Appeal (*Re Wright & Coleman, ante*) for re-hearing before the Commissioner, Thomas Sharpe being added as a party.

The facts are fully set out in the decision.

J. Shilton, for Wright and Columbus.

A. G. Slaght, for the Coleman Development Co., Ltd.

Thomas Sharpe, in person.

14th July, 1909.

THE COMMISSIONER.—This is a matter remitted to me by the Court of Appeal to determine all questions and disputes regarding the claims of the parties hereto to the mining property known as the west half of the north-east quarter of the south half of lot two, in the third concession of the township of Coleman, containing about twenty acres, and their rights, title and interest therein.

The matter came before me originally upon a summary application made by Wright and Columbus under sec. 52 of the Act of 1906, as amended in 1907, to cancel certain claims of the Coleman Development Co. Having disposed of that application and made an order cancelling the four claims in question, one of them however upon a principle of law which the appellate Courts have since held inapplicable, I did not think it proper in the matter as then before me to proceed to deal with the question of the rights, if any, of the company in the mining claim application recorded by Wright.

The discovery upon which the Wright claim is based is the only original discovery of valuable mineral made upon the property, with the possible exception of what is known as the Columbus discovery to which I will refer later, and it was claimed on behalf of the company that the Wright discovery was really made by the company's men and that the company ought as a matter of equity to be held entitled to the property. The reason I did not think it proper then to go into this question was because secs. 9 and 10 of the Act of 1906, as amended by secs. 5 and 6 of the Act of 1907, (since repealed) laid down a different form of procedure for matters of that nature, and because Sharpe, who was shown by the evidence to be interested with Wright, was a necessary party and had not been added or notified of the hearing.

In cancelling the four applications or claims of the company above mentioned the ground upon which I held the one staked by Gillies invalid was that the subsequent applications of the company for the same property upon a different alleged discovery worked an abandonment of this application, adopting as to this the principles laid down in the Australian and United States authorities.

Upon appeal to the Divisional Court, 12 O. W. R. 248, (*ante*), that Court in addition to holding that the Gillies application should not be set aside on the ground of abandonment, awarded the property to the company. A further appeal was taken to the Court of Appeal, 13 O. W. R. 900 (*ante*), and that Court, while agreeing with the Divisional Court upon the question of abandonment, set aside the judgment of the Divisional Court upon the merits and remitted the whole matter to me for trial with a direction that Sharpe should be added as a party.

All matters are therefore open and must be dealt with now in such way as I have power to do under the present Act (1908), except that it has been declared by the highest Court to which such a case can be taken that as a matter of law the subsequent stakings and applications of the company did not *ipso facto* work an abandonment of the application made in their behalf by Gillies. The Chief Justice in delivering the judgment of the Court of Appeal makes it clear, I think, that this is the result, and he particularly points out that the effect of the mandamus order by which the company applications were got upon record is to be deemed an open question.

At the opening of the present hearing some questions were raised by counsel for the applicants Wright and Columbus as to my jurisdiction to deal with anything except what might be called the strict legal or nominal rights of the parties under the Act, excluding any question of trust or beneficial interest, reference being made to secs. 123 and 70 of the present Act and sec. 159 of the Act of 1906.

As I intimated at the time I think it is better, however, that I should deal with all phases of the matter as fully at least as it appears to have been contemplated by the judgment of the Court of Appeal that I should do.

The facts are somewhat complicated and upon some points the evidence is not as clear or definite as could be desired.

Apart from some earlier stakings—among them one by Mr. McKay, who appears to have been acting for the company—all of which had previously been thrown out as invalid for lack of discovery and do not enter into the present controversy, the first staking upon the property in question was that of Joseph Columbus on behalf of Agnes Columbus, his wife, on 4th June, 1906, application therefor being recorded on 15th June, 1906. He claimed to have made a discovery on 1st June, 1906, at a point 740 feet from the No. 1 post—a place several hundred feet distant from any of the discoveries subsequently claimed by the other parties. He built a cabin upon the property and seems to have done considerable work.

It was the custom at this time for other licensees—at least where they thought the existing discovery, or alleged discovery, insufficient—to continue to prospect upon property upon which a mining claim had already been recorded by

another licensee, and if they found valuable mineral to stake out and apply for the property, and in this practice, so far at least as the right to get the subsequent claim upon record is concerned, the Divisional Court has held that they were justified: see *Munro* v. *Smith et al*, 8 O. W. R. 452, 10 O. W. R. 97. This of course was under the Act of 1906, which has since been amended.

The Coleman Development Company, Limited, had had working and prospecting upon other properties in the vicinity of the one in question a number of men under the foremanship of Thomas Sharpe, who acted under the directions of its officers Brown, Gillies and McKay, Mr. Brown being supposed to visit and inspect the operations a couple of times a week. Toward the end of June Sharpe was directed by Mr. McKay to put some of the company's men upon the property now in dispute. This was done and the men worked there trenching on the 28th and 29th and possibly on the 30th of June, when Sharpe says Mr. McKay directed him to put the men back upon a property known as the McDonald lot.

Tiberius Wright had also for some time previously been prospecting with the assistance of one Helmer upon another property not very far away known the the Walter Wright lot, and in this Sharpe was interested with Wright through Colonel Hay to the extent of a one-fifth interest. Work on the Walter Wright lot ceased about the 27th of June and Helmer was employed by Sharpe and worked for the Coleman company on the property now in dispute for a couple of days covering the 28th and 29th of June.

Between the 29th of June and the 2nd of July it was arranged between Tiberius Wright and Sharpe that they would endeavor to acquire some mining property for themselves and that Helmer on behalf of Sharpe should work with Wright and under Wright's directions to this end. Helmer had even during the couple of days he was working for the company been living with Wright at the latter's tent, they having been camping together when they were working upon the Walter Wright property. No agreement was at first made as to where Wright should prospect and it seems that about the end of June he had crossed over and had made at least some examination of the property in dispute where some of the company's men were then working. There is some confusion as to the exact dates upon

which some of the matters in question occurred which perhaps is partly owing to the fact that it was assumed by counsel at the hearing that Saturday was the 29th and the last working day in June, whereas Saturday was really the 30th of June.

Wright and Helmer commenced work on the property in dispute on 2nd July at a point as I find which had no connection or relation in any way with the trenching of the company's men being a place where no previous work had been done by anybody and being 143 feet distant from the nearest part of the company's work. They removed their tent from the other property and set it up at the place where they were now working. On the 7th of July a formal partnership agreement was drawn up between Wright and Sharpe expressly relating to this property under which Sharpe was to bear certain expenses and have a half interest in the property. Wright and Helmer continued to work upon the property, their work consisting of rather deep trenching, and on the 16th of July Wright made a valuable discovery of mineral. He staked out the claim on the 17th and prepared the necessary sketch or plan showing the boundaries of the claim and the location of his discovery and other details required by the Act, and went a few days later to the Recorder at Haileybury and endeavored to record an application. The Recorder acting then upon what has since been declared by the Courts to be an erroneous practice under the Act as it stood in 1906, (*Munro* v. *Smith*, *supra*), declined to receive or permit him to record the claim as the property had already been recorded in the name of Columbus.

Finding that the Columbus claim was thus in his way Wright shortly afterwards got into communication with Columbus and on the 28th of July, 1906, a formal written agreement was entered into between Columbus and Wright and Sharpe by which it was agreed that whether the claim should be passed upon the discovery of Columbus or upon the discovery of Wright, or upon any future discovery that might be made by any of them, it was to be divided between and to belong to them in the proportion of one-half interest to Columbus and one-quarter interest each to Wright and Sharpe.

On the 30th of July, by reason it appears of the story brought to them by one Gavin, who had been working for

the company upon the property, that he had made a discovery of valuable mineral which Sharpe had neglected to stake, the company's officers Mr. Brown and Mr. Gillies visited the property and Gillies planted upon the mineral that had already been discovered and staked by Wright a discovery post claiming to have discovered that mineral himself on July 30th on behalf of the company.

Within fifteen days after his staking of 17th July Wright again staked the property, and he continued his stakings at like intervals thereafter until 3rd September in order to hold it, as he says, until he could get his claim recorded.

On the 9th of August Gillies and Brown returned with assistants and completed the staking of the claim on behalf of the company, claiming discovery by Gillies on July 30th, the discovery post being planted upon the mineral showing that constituted the Wright discovery, and Mr. Gillies and Mr. Brown say that they next day, August 10th, tendered an application upon this alleged discovery and staking.

On 25th August, 1906, the Wright discovery was inspected by Claim Inspector Mickle and reported to the Recorder to be a *bona fide* discovery of valuable mineral as required by the Act.

On 14th September, 1906, what purports to be an abandonment of the Columbus application was filed by Joseph Columbus assuming to act as attorney for Agnes Columbus, who was the holder of the claim. On 15th September a transfer was made from Agnes Columbus by her attorney Joseph Columbus to Tiberius Wright and on the same day, 15th September, Wright filed and got upon record an application for the claim upon his discovery of 16th July which in his application he described as having been staked on 17th July and restaked on 3rd September, 1906, his staking of 3rd September being the last of his periodical stakings of the property above mentioned, and upon the same day, 15th September, he transferred a one-half interest in the claim to Agnes Columbus in pursuance of the agreement which had already been entered into between them on 28th July.

On 20th October, 1906, an application was tendered to the Recorder on behalf of the company claiming discovery of cobalt to have been made on 29th June, and staking to have been done on 9th August and restaking on 6th October, 1906. The affidavit for this application was sworn by William Gavin (who succeeded Sharpe as foreman for the com-

pany) and states that the discovery had been made by Thomas Sharpe and himself while in the employ of the company and refers to the discovery of Wright as being subsequent to this Gavin discovery. The Recorder refused to record this application.

On 14th November, 1906, the company tendered an application purporting to be made out and sworn to 10th August, 1906, claiming discovery by Gillies on 30th July and staking on 9th August, 1906. This is the same application which Mr. Brown and Mr. Gillies say was tendered and refused on 10th August, 1906, and the discovery upon which it is based, as already mentioned, is in reality the discovery made by Wright, though a rather strange discrepancy appears in that the application claims discovery to have been made on 13th July while the affidavit attached swears to discovery on 30th July, 1906. This however, was probably merely a slip, 30th July, the date of Gillies' visit to the property, being no doubt intended. The application was again refused.

On 22nd November, 1906, the company tendered another application upon staking alleged to have been done 21st November, 1906, upon discovery sworn by Gavin to have been made on 29th June by himself and Sharpe on behalf of the company, and which he swears consisted of cobalt and apparently silver. He alleges in his affidavit also that he believes this discovery had been previously staked on the 9th of August, 1906, and on the 6th and 31st days of October, 1906.

On 17th January, 1907, the company tendered another application with affidavit by Gavin upon staking alleged to have been done 17th January, 1907, upon discovery of cobalt and apparently silver, claimed to have been made by Sharpe and Gavin on 29th June, 1906, the affidavit again referring to a former staking and to the adverse claims of Wright and Columbus and others.

All these applications of the company were refused by the Recorder and on the 29th of January, 1907, the company obtained, *ex parte* so far as the other parties interested in the property were concerned, a mandamus order directing them to be recorded as of the respective dates when they were alleged to have been tendered.

It is not now pretended that any of the three applications which may be referred to as the Gavin applications

of the company is of any validity, and Inspector Robinson's report and the other evidence show that there was no such discovery ever made as Gavin reported to the company's officers and swears in his affidavit as being made on the 29th June. Nor was this alleged discovery staked, as he deposed in his affidavit he believed it was, on the 9th of August. The point of discovery alleged by Gavin and which formed the basis of all the Gavin applications was distinct from that of the Wright and alleged Gillies discovery. It was claimed at the former hearing that it was 50 feet away but the evidence at the present hearing shows that it was really more than 140 feet from it. The Gavin alleged discovery was supposed to be in the trench made by the company's men and it was no doubt the story told the company's officers by Gavin that first aroused their suspicion against Sharpe and prompted their subsequent actions. This story was false, and the Gavin applications are really based upon false and fraudulent statements and must by reason of this and for lack of discovery be declared invalid and cancelled.

There remain to be considered the Gillies application of the company and the Wright application, and the question also of the abandonment of the Columbus application.

As to most of what I have so far recited there is really little dispute, but I am satisfied at all events that the facts are as I have above set out. It is claimed, however, on behalf of the company, that Wright and Sharpe conspired to defraud the company of its rights, and fraudulently made use of the company's men and supplies for their own benefit in making the discovery and acquiring the claim, and I am asked to find that the discovery claimed to have been made by Wright was really made by the company's men, and that the evidence given by Wright and Sharpe and Helmer is untrue.

That is far from the impression which these men and their evidence left upon my mind. Wright and Sharpe, like most of the witnesses at the hearing, were lacking in clearness and definiteness of statement as to a number of matters, but they did not at all impress me as untruthful or dishonest, and they were in most cases as ready to admit what was damaging to their own case as what would assist them, sometimes admitting what was clearly not the fact. Sharpe's appearance and manner indicate anything but a shrewd or designing or grasping nature, and the same is to a

large extent true of Wright. I am satisfied that at the time they entered into their arrangement with each other that they had no thought of defrauding the company or in any way wrongfully making use of the company's labor or profiting at its expense; nor can I find that there was any attempt to conceal their partnership or what they were doing on the property from the company. It is true that Sharpe's conduct showed a lack of proper appreciation of the proprieties of his position such as would have restrained a man of keener sensibility and better judgment from entering into an arrangement that might be expected to bring suspicion upon his honesty and perhaps trouble and difficulty in what they were undertaking. Perhaps in commenting upon his conduct at the former hearing, in my desire to discourage such a thing on the part of an employee, I expressed myself more strongly than I should have done. The worst of Sharpe's impropriety is not greater than I then stated it, namely, that while still in the employ of the company he entered into a partnership with Wright for the acquisition of property upon which the company's men had under his foremanship been endeavoring to make a discovery.

I was not at the former hearing convinced that he had been guilty of any legal or moral delinquency, and I am satisfied from the evidence at the re-hearing that he was not.

I feel no reasonable doubt as to the truth of his statement that he was directed by McKay, who had given him instructions to put some of the company's men upon the property in question, to take the men off, and that he did so about the end of June and did not afterwards put them back upon it and believed the company had given up the idea of acquiring the property. They had at this time no title or claim in any way to it and had done (during this season at all events) but a very small amount of work upon it. That they were paying but comparatively little attention to it is shown by the fact that Mr. Brown, who was supposed to make periodical visits about twice a week to the workings of the company's men, never visited this property at all until Gavin had come to him with the story that a cobalt vein had been discovered on the 29th of June.

The evidence is conflicting as to whether a small amount of work had been done on it by some of the company's men after 1st July. McGoff was certain that he had worked there on behalf of the company in the early part of July. Cook is not clear as to the dates when he worked but his

evidence does not harmonize with McGoff as to having been put back upon the property afterwards, though it does to some extent in regard to Wright being around there during that time. Upon the other hand the evidence of Helmer, Wright and Sharpe is pretty conclusive that no men were working on the lot on behalf of the company between the 1st and the 16th of July. As between the two sides I think it is more likely that McGoff is mistaken, either as to date or as to the identity of the property. Both McGoff and Cook think Wright was on the property, or somewhere around, while they were working there but they are very indefinite about it, as would hardly be expected if he was actually camped upon the spot and trenching with Helmer within 143 feet from the company's trenching, as the evidence is clear he was after the 2nd of July. Wright's passing over and inspecting the property as he says about the last day of June may perhaps explain the discrepancy.

Helmer, who has no interest in the dispute, says that where he and Wright started to work was a place where no work had been done before and that the company's work was not trending in that direction, and the fact that Wright and Helmer worked and that Wright made his discovery in a comparatively deep trench rebuts any probability of the existence of this mineral having been in any way known to Sharpe or the company's men previously. I have no suspicion that Wright did not himself make the discovery on the 16th of July, as he and Helmer say he did.

Among the strongest points urged on behalf of the company are the facts that some of the men who worked for it assisted also in the Wright working, that some of the company's dynamite was used by Wright in blasting, and that he got steel for drilling sharpened at the company's forge. All of these things are admitted, and there does not seem at any time to have been any attempt made to conceal or deny them, as perhaps might have been done had the parties concerned been dishonest or untruthful. Though the evidence is not quite as clear as might be desired, I am satisfied—though perhaps the time is not very material—that none of these things happened until after Wright had made his dicovery upon the 16th of July, and that the help was obtained and the drilling and blasting done after that date for the purpose of showing up the discovery for the inspection that was shortly to take place. The work complained of consisted of what Sharpe and two or three of the com-

pany's men, while working for the company in the daytime, did to assist Wright in the evening, but the men were paid by Sharpe himself and not by the company, though it would certainly have been better in the circumstances had they not been employed at all. The dynamite, which was not a large amount, was merely borrowed and was afterwards returned, and this and the sharpening of the steel seem not to be uncommon acts of neighborliness among miners or prospectors, though again it must be said that it would have been well to have avoided them in this case. The sharpening of the steel, consisting of only six or seven pieces a couple of times, would be of only trifling money value and for this and for anything else which the company might properly be entitled to Sharpe says he was ready and willing to settle with the company. He says he went more than once to obtain a settlement but the company's officers would not settle with him, and that they are still owing him between $80 and $90 of a balance, which is not denied.

The facts which I have recited coupled with the fact that Sharpe was foreman for the company at a salary of $3 per day constitute the whole ground upon which the company could have any claim to the Wright discovery or application, or to any interest therein. I think nothing has been concealed, and I see no ground for suspecting that there was anything deeper behind the facts disclosed. Sharpe was, as I have stated, in the employ of the company and in charge of its men who had been working upon the property. Had he attempted to appropriate for himself or to make over to Wright anything which could legitimately be regarded as the fruit of the company's labor or enterprise I think a way could be found to defeat such a purpose, but nothing of this kind I am satisfied took place. The lot was as open to Wright to prospect and acquire as it was to the company. Numbers of other prospectors were also prospecting upon it. The only person who could make any claim to anything in the nature of a title up to the time of the Wright discovery was Columbus. Whether Columbus had really a discovery of valuable mineral is not entirely clear. The facts and circumstances point strongly to the presumption that he had not. If it should be material to the issue, which I think it is not, that fact can afterwards be definitely determined by ordering an inspection of it, which has not yet been done.

I think I must deal with the Wright application and the Gillies application of the company upon their own merits as adverse and independent applications, and determine their respective merits and standing under the Act. However much it may be desired to discountenance any conduct or business enterprises by employees which might conflict with their duty to employers I think in the present case there is no legal or moral ground upon which the company could be entitled to anything acquired upon the strength of the Wright discovery. Discovery is to a large extent a matter of chance, and Wright's success was as much owing to his good fortune as to any skill or industry exhibited in connection with his operations. Sharpe's acquisition of an interest in it was the result of a bargain and of the payment of money by him to Wright and was not in any essential sense the fruit of his own labor.

As pointed out by counsel for Wright and Columbus discovery of valuable mineral is no doubt the most important condition upon which the acquisition of mining title depends. See secs. 117, 132 and 133 of the Mines Act, 1906. It is in consideration of the making of such a discovery and the benefit expected to accrue to the country therefrom that the land is granted to the applicant, the price per acre charged being only comparatively trifling and bearing no relation to the value of the property, and it has frequently been pointed out that every reasonable intendment should be made in favor of the *bona fide* discoverer: see *Clark* v. *Docksteader*, 36 S. C. R. at 637. It has also been universally held that where discovery is the inception and foundation of title that the first discoverer if he complies with other essentials of the law is entitled in priority to a subsequent discoverer.

In the present case, apart from any question as to the Columbus discovery, which I think is immaterial since Wright and Sharpe and Columbus have agreed to share the property between them, there is no doubt that the first discovery of valuable mineral was made by the applicant Tiberius Wright. This was on the 16th of July, and he duly staked out the property on the 17th and endeavored within the prescribed time to get it upon record, as, under the decisions since given, he was entitled to do. He came to the Recorder in the usual way with his sketch or plan and it appears that his application was also made out, though it has not been shown that he actually swore to the affidavit.

It was the practice at the time for the Recorder to take the affidavits himself, and owing to the form of the affidavit contained in the Act indicating that it was to be sworn before the Recorder some doubt existed as to whether it could properly be taken before any one else. It is abundantly clear at all events that Wright was prepared and qualified to take the affidavit and to perform all the requirements for recording, and would have done so had the Recorder not prevented it.

It was after all this had occurred and after Wright had again staked the claim in order to make sure of maintaining his rights, that the company's officers on 30th July came upon the property and examined the discovery that had been made by Wright and it seems planted a discovery post upon it, Gillies claiming the discovery to have been made by himself on that day on behalf of the company. On 9th August they returned and staked out the property on behalf of the company marking the discovery as having been made by Gillies on behalf of the company on 30th July, and upon this they endeavored to record their application and acquire the claim. Mr. Gillies and Mr. Brown state definitely that they tendered the application on the 10th of August. Though the Recorder seems carefully to have noted all the other tenders of applications no note appears of any tender on the 10th of August, and it is certain that Mr. Gillies is mistaken in saying that he made the tender on the 10th of August to the Recorder at Cobalt as there was at that time no recording office or Recorder at Cobalt, the office at Haileybury then covering the whole district. I am satisfied however that an attempt was made to record the application. Neither in this case nor in regard to the application of Wright was it shown that the necessary fee had been tendered to the Recorder with the application, but I have no doubt that the company was prepared to perform all requisites so far as the formalities of recording were concerned. I think, however, that if the application of the company is to go or to be considered as upon record as of the 10th of August then in all fairness the application of Wright should go upon record as of the 20th of July, being the date when he first endeavored to record it, as nearly as he can fix it. On the 15th of September at all events Wright did get properly upon record not only his staking of the

3rd of September but also his staking of the 17th of July, both based upon his discovery of 16th July.

Though finding that a tender of the Gillies application was made on the 10th of August I think this is really immaterial, as the claim cannot, as I view it, in any event be held to be a valid claim. No original discovery was made by Gillies on the 30th of July or at any other time, nor was any original discovery ever made by any other officer or employee of the company. Gillies assumed on the 30th of July and on the 9th of August to appropriate the Wright discovery for the benefit of the company, describing it as having been made by himself. At both these times the discovery and the claim were under lawful and subsisting staking by Wright. Even if the attempt to record the Wright staking of 17th July was not operative Wright again staked the property in his own name within 15 days thereafter, and this staking was in existence and valid at the time Gillies came upon the property and at the time he staked it out. The holding of the Divisional Court in the case of *Re McNeil and McCully and Plotke*, 13 O. W. R. at 14 (*ante*), is that a valid claim can not be acquired by staking a discovery already existing. Though that case goes somewhat further than I had been disposed to go prior to that decision the ruling seems to be clear and distinct, and I think it is binding upon me in the present case, and undoubtedly the provisions of the Act, in some respects at all events, strongly support it. But whether or not the principle therein laid down is a little too broadly stated in that case, I think there is no doubt about the law in the present case. The most that I had ever thought that a licensee might do in regard to an already existing discovery was to appropriate it after it had been abandoned by the original discoverer or when for any reason it stood unappropriated by any person who had a right to appropriate it. I think it could never be held that one licensee could go upon a claim and appropriate an existing discovery while it was still under appropriation and staking and in fact the property, as much as anything before patent can be the property, of another licensee, as the Wright discovery undoubtedly was at the time Gillies assumed to take possession of it as his own discovery and stake it for the benefit of the company. I think therefore the Gillies application must fail for lack of the most important essential of a mining claim—discovery

of valuable mineral. For this reason and because in any event the alleged Gillies discovery is subsequent to the discovery of Wright who I think has sufficiently complied with all the requirements of the Act and is upon the real merits and substantial justice of the case entitled to the property, I think the claim of the company should be disallowed and the Wright application held valid.

Various other points were raised in the argument and have occurred to me in the consideration of the case. It has not been proven as a fact that the company or Gillies was the holder or continued to the present time to be the holder of a miner's license, without which, of course, the company could have no claim to the property. Should this be found to be material, however, I think opportunity should be allowed the company to put in proof as to these facts.

It has also been pointed out that if the claim of the company is really to be deemed as of record on the 10th of August, 1906, it would have been forfeited for lack of performance and proof of the necessary working conditions, and this would appear to be the result, nor is it a case where I think I should grant any relief that might be in my power, from such a forfeiture where the effect might be to give it priority over a claim which is clearly based upon a prior right and upon a meritorious discovery.

It is doubtful I think also whether the abandonment by Columbus was really an effective abandonment, the power of attorney under which Joseph Columbus purports to make it, it appears to me, not authorizing such an abandonment, although authorizing a transfer of the property. I am also satisfied that Columbus was ignorant of Sharp's relationship to the company and of the facts upon which the company is now basing a claim to the property.

These, however, are matters which seem immaterial, as what I have before pointed out is sufficient in my opinion to dispose of the case.

I have had a good deal of hesitation regarding the costs, especially the costs of the prior proceedings, which have been left in my discretion. While I cannot feel that either Wright or Sharpe was guilty of any legal or moral wrong in anything they did toward the acquisition of the claim their conduct undoubtedly gave the company very strong grounds for suspicion and I will make no order for costs in favor of any of the parties.

Order accordingly.

(THE COMMISSIONER.)

RE SILVER AND PINDER.

Dispute of Mining Claim—Delay in Prosecuting—Amendment—Merits.

Where a dispute was filed against a mining claim but not prosecuted until the respondent brought it to hearing 7 months later, when the evidence entirely failed to prove the allegations in the dispute, but it was suggested that the claim might if amendment were allowed be successfully attacked upon other grounds of which no intimation had previously been given and of which no sufficient evidence was offered, leave to amend was refused and the dispute dismissed, the real merits and substantial justice of the case being at all events with the respondent.

Dispute by L. P. Silver against mining claim M. R. 1618, Gowganda, held by the respondent Nelson Pinder.

The disputant claimed that the respondent had removed some of his (the disputant's) posts and had wrongfully encroached upon his claim, No. 1618, which adjoined that of the respondent. The disputant's interests were sold to Messrs. Oakley, Irwin and Beatty some time after the dispute had been entered.

The dispute was transferred by the Recorder to the Commissioner for adjudication and was heard on 26th August, 1909.

J. McNairn Hall, for Oakley, Irwin and Beatty.

L. P. Silver, in person.

F. L. Smiley, for Pinder.

26th August, 1909.

THE COMMISSIONER.—The dispute was filed by Mr. Silver on 11th January, 1909, and alleges that the respondent's claim number 1618 is invalid because the respondent or some one interested with him removed, or caused to be removed, posts No. 1 and No. 2 and witness post belonging to the disputant's claim, 1629, which was staked subsequently to the respondent's claim, and the disputant claims that his application No. 1629 included the respondent's claim 1618.

Mr. Silver appears since to have sold his interest to Messrs. Oakley, Irwin and Beatty, who were represented by counsel at the hearing, Mr. Silver also being present in person.

The only evidence offered in support of the allegation that the respondent moved the disputant's stakes is that of Mr. Silver that when he was upon the property with the surveyor getting it surveyed he and the surveyor were unable to find the No. 1 and No. 2 posts, and the witness post, which he says he planted. Mr. Silver's evidence as to his staking is very hazy and unsatisfactory. He seems in fact to have forgotten the particulars of what he really did upon the property at the time of the staking and his own application and sketch do not at all correspond with his evidence, nor is there anything in his application or sketch or plan to show the actual location of what he staked. He admits that at the time he staked the property he saw the Pinder staking and did not know whether or not it had lapsed, and the suggestion is now made that the Pinder claim was not recorded within the time allowed by the Act, but there is no evidence upon which I could find this to be the case, nor do I think in all the circumstances that any amendment of the dispute should be allowed to enable the disputant at this late day to attack the respondent's claim upon grounds of which no intimation had been given in the dispute. The dispute has been allowed to stand since early in January without being brought to a hearing and it is only upon application of the respondent now that the matter has been brought up at all and I think the dispute might in the circumstances very properly have been dismissed for want of prosecution. There can be no doubt at all events that the real merits and substantial justice of the case are with the respondent. The dispute must be dismissed. Costs against the disputant.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

14 O. W. R. 1239.

RE SPURR & PENNY AND MURPHY.

Evidence—Inspection of Discovery—Working Permit Application—Defective Staking—Defective Application and Affidavit—Investigating Claims of All Parties.

S. and P. disputed the mining claim and Working Permit applications of M. and M. and claimed the property under mining claim applications filed by themselves. The Commissioner on application of M. and M. issued an appointment for the disposition of all matters concerning the property, and upon the evidence adduced declared that none of the parties had any valid application or claim, holding that all the mining claim applications were invalid for lack of discovery, and that the Working Permit application was invalid by reason of failure to mark the applicant's name or license No. on the No. 2, No. 3 and No. 4 posts, failure to do any fresh blazing, failure to show in the application or sketch the length of the boundaries and failure to make affidavit either in substance or in form as the Act required.

On appeal to the Divisional Court,

Held, dismissing the appeal, that the Commissioner was right in determining upon the validity of all the applications and that the preponderance of evidence was clearly in favor of his finding.

Appointment to dispose of all disputes and applications concerning the S. ½ of the N.-W. ¼ of the N. ½ of lot 1, in the 4th concession of the Township of Coleman.

R. E. Murphy had a mining claim application recorded upon the property, and J. E. Murphy had an application filed for a Working Permit.

Jay Penny had disputed the validity of the Murphys' applications and he and J. B. Spurr each had an application for mining claim filed upon the same property, but not recorded.

After a prior unsuccessful attempt at a hearing—proper notice not having been served—the Commissioner, on the application of the Murphys issued an appointment to dispose of all disputes and applications affecting the rights of the parties in the property.

S. White, K.C., for Spurr and Penny.

George Mitchell, for J. E. and R. E. Murphy.

31st August, 1909.

THE COMMISSIONER.—In these matters Jay Penny and J. B. Spurr are asking to have the Working Permit applica-

tion of J. E. Murphy and the mining claim application of R. E. Murphy declared invalid and cancelled, and to have their own mining claim applications, or one of them, declared valid and put upon record.

The stakings in question in the present case were done as follows: That of Jay Penny by Charles Penny acting in his behalf for a mining claim on 14th December, 1908; that of J. E. Murphy for a Working Permit on 25th December, 1908, between six and seven o'clock in the evening; that of R. E. Murphy by J. E. Murphy acting in his behalf for a mining claim on the same evening an hour or so later; and that of J. B. Spurr by Levi Ward acting in his behalf for a mining claim on 28th December, 1908.

A decision made by me on 23rd December, 1908, of which notice to the parties was despatched by me on the same day pursuant to the Act, cleared the claim of a number of invalid applications, prior to the applications above mentioned, which had been filed upon the property by the parties hereto or their associates. It was after Large, an associate of Murphy, received the notice of this decision and telegraphed Murphy to restake the claim, that the Murphy stakings for a Working Permit and for a mining claim on 25th December were done, and it was after Spurr received his notice that his staking of 28th December was done. The staking of 14th December was done after I had heard the former cases and while my decision therein was pending. I had in that case, pursuant to sec. 138 of the Act, ordered an examination of the property by Inspector Robinson to assist me in reaching my decision, and it seems to have been after learning that Mr. Robinson had reported adversely upon all the alleged discoveries then existing that Mr. Penny conceived the idea of restaking the claim. This report of Mr. Robinson's, however, did not determine the matter before me, nor did it cancel any of the former claims or reopen the property to staking, as it was a question for me to determine what weight I should give his report in connection with the other evidence already put in.

Evidence in the present case was gone into at length regarding the merits of all three mining claims above mentioned, as well as regarding the Working Permit application. Inspector Robinson had on 20th April, 1909, at the request of the Recorder, made an inspection of all the alleged discoveries pursuant to sec. 89 of the Act, and reported to the Re-

corder that none of them was a *bona fide* discovery, but the claims had not been cancelled by the Recorder pending adjudication of all the matters in question between the parties by me. The Inspector as well as a large number of other witnesses gave evidence before me as to the merits of the respective alleged discoveries.

Upon the evidence, I cannot feel any hesitation in finding that there was no *bona fide* or sufficient discovery of valuable mineral as required by the Act as the basis for a mining claim. Had I felt any reasonable doubt upon this question, I would have ordered another inspection, or an examination by another Inspector or expert, but it seems entirely unnecessary. Nor since I have so often gone into a discussion of the question of discovery in this district does it seem necessary to enter into any review of the evidence upon this point. From my four years' experience in regard to it, it would be wholly impossible for me to feel that a finding in favor of any of the alleged discoveries of any of the parties could be made on the evidence adduced.

This is sufficient to dispose of the three applications for mining claims, but I might also point out that the staking by Penny on 14th December was done at a time when, according to the ordinary understanding of the Act, the property was not open to be staked out for a mining claim, the staking and application of George H. Large then still existing upon the property, as well as another unrecorded staking and application of Jay Penny made in April, 1908.

The question of the validity of the staking and application of J. E. Murphy for a Working Permit remains to be dealt with. This application is attacked upon the ground, first, that it was illegal because it was staked on a holiday, Christmas Day. Upon this I make no ruling. And secondly, that it is invalid because of non-compliance with the Act in regard to marking the posts and lines—the name and license number of the staker or applicant not being put upon the No. 2, No. 3 or No. 4 posts and the boundary lines not being reblazed—and because of the application and sketch or plan and affidavit filed being defective and not in accordance with the requirements of the Act—the length of the boundaries not being shown in the sketch or plan and the affidavit, especially as to clause 2, not being in accordance with the Act in substance or in form. The defects which were proven in these respects I think must be held to be fatal. Neither

is there any special or substantial merit in the staker's favor. His staking of the property for a mining claim in his associate's name within an hour afterwards, without any pretense of original discovery, shows an evident intention to blanket the claim and prevent it being open to others for sixty days after application for Working Permit, as contemplated by the Act.

I find that the mining claim applications of R. E. Murphy, J. Penny and J. B. Spurr, and the Working Permit application of J. E. Murphy herein are all invalid and should be cancelled. No costs.

From this decision appeal was taken by Spurr and Penny to the Divisional Court, the appeal being heard by FALCONBRIDGE, C.J., BRITTON, J., SUTHERLAND, J.

McGregor Young, K.C., for appellants.

R. McKay, for respondent.

15th December, 1909.

FALCONBRIDGE, C.J.—The ground of objection stated in the notice of motion was that the decision was contrary to the evidence and against the weight of evidence, and contrary to law.

There is no reason to quarrel with the judgment of the Mining Commissioner on the facts. It is not necessary to invoke the rule enunciated in *Bishop* v. *Bishop*, 10 O. W. R. 177, because the preponderance of evidence is clearly in favor of the Commissioner's finding. I see nothing to justify the contention that the Commissioner delegated his functions to the inspector, nor to indicate that the Commissioner proceeded on his evidence alone.

But Mr. Young further contended that inasmuch as the Commissioner by one and the same decision pronounced against the mining claim application of R. E. Murphy, and the Working Permit application of J. E. Murphy, the rule laid down in *Re Cashman and Cobalt*, 10 O. W. R. 658, as to the status of the appellant, should not apply.

I am unable to see the force of this contention.

The Commissioner first proceeded to find that there was no *bona fide* or sufficient discovery of valuable mineral by

Spurr & Penny, and then he proceeded also to destroy the applications of the Murphys.

It is manifest from the statements of counsel and the presentation of the evidence that the validity of both sets of claims was attacked and placed before the learned Commissioner for adjudication.

See pp. 3 and 6 of the original paging and p. 1 of the new paging, where the issues are clearly stated.

In my opinion the appeal should be dismissed with costs.

BRITTON, J., and SUTHERLAND, J., concurred.

NOTE.—The reference in this case to *Re Cashman and Cobalt, ante*, seems hard to understand. See now however *Re Smith and Hill, ante*. As to the power of the Commissioner to investigate the rights of all parties whether as between rival claimants or between a claimant and the Crown see ss. 123 (2) and 139 (1); and as to ordering inspection and acting on report see ss. 89 (1), 138 and 139 (1).

(THE COMMISSIONER.)

RE BILSKY AND DEVINE.

Discovery—Removal of Posts—Forfeiture by—Successive Disputes.

A mining claim is invalid if discovery of valuable mineral is not made before staking.

Removal, by the holder of a mining claim, of his discovery post from an insufficient discovery upon which it had been planted at the time of the staking out of the claim, to a point where valuable mineral had been opened up some months later, the removal being for a deceptive and improper purpose, forfeits the claim.

A licensee should not be allowed to file and prosecute successive disputes against the same claim.

Dispute by Alexander M. Bilsky against mining claim T. R. 388, held by M. J. Devine.

J. Lorn McDougall, for disputant.

George Ross, for respondent.

31st August, 1909.

THE COMMISSIONER.—This is a dispute transferred to me by the Mining Recorder for adjudication.

Mining Claim T. R. 388 is claimed by the disputant Bilsky to be illegal and invalid by reason of the respondent

having no discovery of valuable mineral at the time he staked out the claim and by reason that after the claim had, for several months, been staked out and recorded the respondent moved the original discovery post which had been planted near the No. 1 post to a position not far from the opposite corner of the claim at which latter place a discovery of valuable mineral had been opened up by work done subsequently to the staking out of the claim, the contention being as to the matter of removal of the post that this was done for the purpose or fraud or deception or for an improper purpose within the meaning of sec. 167 (b) of the Act as amended in 1907.

The evidence was not lengthy and there is not very much dispute as to the main facts. The claim was staked out by Devine in his own name on 26th January, 1907, with the assistance of Thomas A. Roche, who accompanied him on the trip, and was recorded on 15th February, 1907. The alleged discovery upon which the staking was done was located some 76 feet from the No. 1 post and here the discovery post was planted and marked in the usual way, the minerals claimed to be found being galena, white iron, niccolite and copper. It cannot, I think, be seriously contended that this was really a *bona fide* discovery within the requirements of the Act. It is described as merely a tight crack and it is not claimed that it is of any value. Some months afterwards Roche and his associates were operating in the vicinity of the property and they did some work upon this claim, their efforts being directed to a point not very far from the south-west corner. After putting in some shots they opened up a vein showing cobalt bloom and smaltite, which so far as the mineral showing is concerned, constitutes a sufficient discovery within the Act, and it was in fact passed as such by one of the mining claim Inspectors to whom Devine pointed it out as his discovery. Before the inspection, however, Devine had, in the month of June, 1907, after his return to the property and after seeing the valuable mineral that had been disclosed by Roche and his men removed his discovery post from the place where it had originally been planted and placed it where the cobalt bloom and smaltite had been found by Roche, and he also blazed a line from the No. 1 post to this point. Devine swears that he had found or seen a discovery at or near this place the same day that he found his other alleged discovery and that what he saw consisted of about the same mineral that he found near his No. 1 post. He,

however, gives no definite description of what he really found or just where he found it. Roche swears that he and Devine did see the bluff or rock at or near where the Cobalt bloom and smaltite were afterwards found, and that they saw several stringers, but says he did not pay much attention to it, and upon the whole evidence I think it would be impossible for me to find that Devine had really made the discovery that was afterwards opened up by Roche or that he made any *bona fide* discovery of valuable mineral within the meaning of the Act prior to staking the claim. There is no pretense that he in January saw any cobalt bloom or smaltite, the minerals which are now reported as having the value, and this fact and the fact that his description of what he claims he did see but failed to stake, and Roche's evidence of what it consisted of, are so vague and indefinite as to satisfy me that no discovery was really made which would answer the requirements of the Act. See *Attorney-General* v. *Hargrave*, 8 O. W. R. 127 at 136; 10 O. W. R. 319. *Re Blye and Downey*, 11 O. W. R. 323, 12 O. W. R. 986 (*ante*).

Upon the second point I think also I cannot but find that Devine did within the meaning of sec. 167 of the Act (as it was in 1907) for the purpose of deception and certainly for an improper purpose remove a post belonging to this staking and thereby cause the forfeiture of his claim. All mining laws guard jealously the posts and markings used in the staking of claims, and most miners, even apart from legal penalty, properly regard any interference with them with great aversion, realising the confusion and trouble and injury that would likely result from it, and fortunately meddling with posts is a thing that does not very often happen among them. Any decision that would tend to weaken this feeling of respect for the sacredness of the posts and markings could not but have a bad effect. I think there can be no other interpretation of Devine's conduct but that he wished it to be believed that the mineral disclosed by Roche in April or May was what had been found and staked by himself in January.

I think therefore that upon both points the claim must be held to be void.

With this finding it will be unimportant to consider the status of the second dispute filed by the disputant against the claim, which seems to have arisen from the fact that the

first dispute had been mislaid, but I may say that I think a licensee should not be permitted to file and prosecute two successive disputes against the same claim, or at all events when one has been disposed of he should not be permitted to proceed with another.

The dispute also asks that the disputant Bilsky be recorded for the property. A claim was staked at his instance in the name of one Holland and this is already upon record. The facts connected with it were not sufficiently gone into, I think, to justify me in making any finding as to its validity or invalidity.

Order accordingly, with costs.

(THE COMMISSIONER.)

RE KOLLMORGEN AND MONTGOMERY.

Working Conditions—Retrospectivity of Statutes—Forfeiture—Relief from — Power to Grant — Appeal from Recorder — Finality of Recorder's Decision—Staking—Substantial Compliance — Abandonment—Lands Open—Disqualification—Status of Applicant for Crown Lands.

A mining claim was recorded 3rd Oct., 1906; 53 days work was done and filed upon it 27th June, 1907, and 63 days on 24th Oct., 1907, and nothing more was done.

Held that the time for doing the 3rd instalment or 2nd year's work expired 3rd January 1909, and that the claim was thereafter open to restaking.

Whatever may have been the proper interpretation of sec. 164 of the Mines Act, 1906, in regard to the exclusion from computation of what was known as the close season, the amendment made in 1907, limiting the exclusion to periods of time shorter than a year applied to all periods of time commencing subsequently to its passing, though the claim had been recorded previously.

Maintenance in full effect of the law of working conditions is of vital importance and the Commissioner and Recorders should be careful not to exceed the powers of relieving from forfeiture given them by the Act.

Where the Recorder cancelled a claim as forfeited for default in the working conditions and duly notified the holder of the claim by registered letter, this is conclusive that forfeiture in fact took place unless appeal is taken as provided by the Act.

A staking in which two of the corner posts were not numbered and none of the lines were freshly blazed and half of one boundary had never been blazed, was held in the circumstances to work an abandonment and to leave the land open to restaking, the staker being at all events disqualified by a prior staking which he failed to record.

Proceedings by F. Kollmorgen to establish a claim to the N. W. ¼ of the S. ½ of lot 12, in the 4th concession of the township of Tudhope.

Kollmorgen had an old application for mining claim on the property recorded 3rd October, 1906, which was cancelled by the Recorder for default of working conditions. On 12th January, 1909, he had a restaking done which he never recorded, and on 6th February, 1909, he procured another restaking (or partial restaking) upon which application was filed on 19th February, 1909.

The respondent, W. A. Montgomery, staked the property on 15th February and filed application on 17th February, 1909, and there being then nothing in the way in the recording office he was recorded for the claim.

Kollmorgen entered dispute (under sec. 63 (1)) against the Montgomery claim, and he claimed that the property should be awarded to him either under his staking of 15th February, 1909, or by reinstatement of his old application which he contended had not in fact become forfeited at the time the Recorder cancelled it or when the restakings were done.

J. W. Mahon, for Kollmorgen.

J. E. Day and K. G. Robertson, for Montgomery.

1st September, 1909.

THE COMMISSIONER.—The respondent contends that the original Kollmorgen claim had in fact become forfeited and void for lack of performance and proof of the working conditions required by the Act and that Kollmorgen is in any event now precluded from contending the contrary as he has never appealed from the act or decision of the Recorder in cancelling it, although duly notified by the Recorder of the cancellation, and that Mr. Kollmorgen is by his application filed upon his restaking of the claim on 6th February, 1909, in the affidavit of which it is sworn that the deponent believed the lands were at that date open to be staked out as a mining claim, estopped from denying the forfeiture and the fact that the lands were then open.

The respondent further contends that Kollmorgen can have no right or claim under his last staking and application because a prior staking which is admitted to have been done in his behalf on 12th January, 1909, and which was not recorded, disqualified him under sec. 57 of the Act from afterwards staking out or recording a mining claim upon the lands in question.

Kollmorgen upon the other hand disputes the validity of the respondent's application upon the ground that one or both of the claimant's applications was or were valid and subsisting applications at the time of the respondent's staking.

I find the facts to be as follows: The original Kollmorgen claim number 2096 was recorded on the 3rd of October, 1906. A discovery was reported upon it on 25th June, 1907, 53 days work was recorded upon it 27th June, 1907, and 64 days work on 24th October, 1907. (This is said to have been more work than was really performed upon it, a mistake having been made as to the exact number of days work performed, but for the purposes of the present case that point is immaterial). Since the 24th of October, 1907, no work has been recorded and it is not claimed that any has been performed. The work recorded is sufficient for the first two instalments, namely, the 30 days work required to be performed within three months from the recording of the claim and the 60 days work required to be performed within the year following three months from the recording of the claim.

On 12th January, 1909, Kollmorgen procured a new staking of the property, the staking being done upon the old discovery, by one Donahue and J. W. Miller in the name of Mr. Mahon, Mr. Kollmorgen's solicitor. This staking for some reason was never filed or recorded and on 6th February, 1907, J. W. Miller again staked the property for Mr. Kollmorgen. In doing this staking Miller used the posts that had before been used on the 12th of January by Donahue and himself, merely whittling off the markings that had before been put on them and remarking them for the 6th of February. Miller admits that when he examined these posts a few days ago the No. 2 and No. 4, or what were intended for the No. 2 and No. 4 posts, did not have the numbers upon them and he will not say that he ever put numbers on these two posts. He admits also that he did no blazing or marking of lines except for about 150 feet at each end of the line leading from the No. 1 post to the discovery post. He says he did not do any further blazing because the lines were already distinctly marked.

Montgomery swears that in going over the property he had seen the staking of 12th January and that J. W. Miller's name was on the posts as a witness, and he says that later he

saw and examined the staking of 6th February, and that none of the posts had numbers on them. His interest seems to have been aroused regarding the property, and he sent down to the recording office for an abstract of the Kollmorgen claim and thus ascertained the condition of affairs, and that the staking of 12th January had not been recorded, and as this staking had lapsed and he considered the staking of 6th February invalid he on the 15th of February staked the property for himself, planting his discovery post 20 or 25 feet from the Kollmorgen discovery on the same vein, and on the 17th February he went to the Recorder's office and filed his application.

Though Miller does not seem like an untruthful witness I think Montgomery, whose attention was directed to the matters at the time, is more likely to be right in his recollection of the nature of the staking and marking and as to what was then upon the posts, but even if only the two posts lacked the numbers I think I could hardly hold that the staking and marking of 6th February was in substantial compliance with the Act or sufficient in the circumstances. No reblazing of boundaries was done at all though Miller says that the No. 4 Donahue post was half a claim up the line from where he planted his own. The staking and marking of 6th February would certainly not bear much the appearance of a new staking, and even if it might be deemed sufficient had the posts been properly marked, the character of it made it more necessary that none of the requisite marking should be omitted from the posts, and in the circumstances I think it must be held insufficient, and that the property was in consequence open so far as that staking is concerned to restaking, under sec. 83.

I think, however, that the question of the sufficiency of the staking is not material, as the staking of 12th January and failure to record it clearly comes within sec. 57, and disqualifies Mr. Kollmorgen from again staking out the property. Under sec. 57 the prohibition is absolute and the motive is not material except as to getting relief from the Recorder, which was not done in this case. No explanation is given as to why the staking of 12th January was not recorded, but the fact that although application for the staking of 6th February was made out and sworn to on 8th February it was not taken to the Recorder until 19th February, after Montgomery had staked out and recorded his claim, leads to

the suspicion that both the Kollmorgen stakings were done with a view merely to keep other prospectors off the property and with no *bona fide* intention of recording applications upon them.

Reverting now to the original Kollmorgen application which Mr. Kollmorgen claims was not forfeited and should not have been cancelled by the Recorder. The Recorder after entering the forfeiture upon the record of the claim on 17th February, 1909, notified both Mr. Kollmorgen and his solicitor thereof by registered letter posted 18th February, 1909. Notwithstanding this notice no appeal has been taken. The dispute of the Montgomery application was not filed until 10th March. Sec. 133 (3) of the Act requires the appeal to be filed in the office of the Recorder and to be served upon all parties adversely interested within 15 days from the entry of the decision in the books of the Recorder or within such further period, not exceeding 15 days, as the Commissioner may allow, and sec. 130 (5) makes the decision of the Recorder final and binding unless appealed from as in the Act provided. At the time the claim was marked forfeited by the Recorder and at the time the notices were sent to Kollmorgen, Montgomery was a party adversely interested; see *Re Petrakos*, 9 O. W. R. 367 (*ante*). It is suggested that the dispute filed on 10th March, a duplicate of which was mailed by the Recorder (in conformity with the Act) to Montgomery might serve the purpose of and operate as a notice of appeal and that I might under sec. 133 (3) extend the time so as to make the filing of this on the 10th of March sufficient. I think, however, I would not be justified in doing this and that the Recorder's act on the 17th February must be taken to be final so far as appeal from his disposition of the question of forfeiture is concerned. The conduct of Mr. Kollmorgen and his agents in restaking as they did on the 12th January and the 6th of February led Montgomery to believe that the property was admittedly open and caused him to take the steps he did regarding it, and in any relief that there might be power in any way to extend to Mr. Kollmorgen Mr. Montgomery should at all events be protected in regard to any time or money he has expended in connection with the property.

In the veiw I take of the matters above mentioned it does not seem necessary to determine whether in reality the Recorder was right in deciding that the time for performance of the second year's work upon the original Kollmorgen claim had elapsed and the claim had in consequence become forfeited and the lands open for restaking, but it may be well that I should also indicate my view upon this point.

After giving it very careful consideration I find myself unable to disagree with the Recorder or with what I understand has been the uniform view and practice of the Departmental officers in this regard.

Sec. 160 of the Mines Act, 1906, after providing that a licensee who has staked out a mining claim under the Act shall during the 3 months immediately following the recording of the same in the office of the Mining Recorder, perform thereon work consisting of stripping, opening up mines, or actual mining operations, to the extent of not less than 30 days, enacts as follows:

"A licensee who has staked out a mining claim under the provisions of this Act shall, during each of the three years following the expiration of 3 months from the record by or on behalf of such licensee of the staking thereof perform thereon work as in the first subsection hereof provided as follows:

(a) During each of the first and second of such three years to the extent of not less than 8 hours per day for 60 days.

(b) During the third of such three years work thereon to the extent of not less than 8 hours per day for 90 days."

Sec. 164 of the Act of 1906 provides that

"In computing the time within which work or mining operations are required to be performed by this Act the period of time extending from the 15th November in one year to the 15th April in the succeeding year shall be deemed to be excluded, as shall also the time or times so stated by any Order-in-Council or regulations made under the authority of this Act."

By sec. 50 of ch. 13, 7 Edw. VII., passed 20th April, 1907, the words "if the same is shorter than a year" were inserted in sec. 164 after the word "time" in the first line thereof.

By sec. 169 it is provided that a patent of the mining claim shall be applied for within a period of 3 months after the expiry of 3 years and 3 months from the date of recording the claim and that failure so to apply and to pay the purchase price within such period of 3 months shall be deemed a forfeiture of all the interest of the licensee in

the mining claim and that the claim shall revert to the Crown freed and discharged from any such interest or claim.

Sec. 168 provides that all the interest of a licensee in a mining claim shall cease and be deemed to be forfeited and the mining claim revert to the Crown if the working conditions are not duly performed and the work reported to the Recorder or if application for a patent is not made within the time required by the Act, or if the purchase price is not paid as and when required by the Act.

The second year's work, or third instalment as it may be called, for the lack of which the mining claim in question was cancelled, was understood by the Recorder to be due on or before 3rd January, 1909, that is, within the second year following the expiration of 3 months from the recording. It is contended on behalf of Mr. Kollmorgen that the original sec. 164 as it stood in 1906, when the claim was staked and recorded, still governs the matter and that the proper interpretation of that section will extend the time for performance of work in this case far beyond the 3rd of January, 1909, the time at which the Recorder believed forfeiture to have occurred.

In view of sec. 169 and of the other provisions of the Act and having regard to the reason for which the winter season was excluded, there can be no doubt, I think, that the intention of the Act of 1906, or of the framers of it, was to exclude the winter season only when the period within which the work was required to be performed was less than a full year, the object plainly being to relieve the licensee from the necessity of performing work at the time of year when performance of it would be difficult—otherwise the provisions of the Act would be inconsistent and strangely illogical and erratic as to the time to be allowed in different cases. Whether the wording is such as to warrant the carrying out of what I think must be admitted to have been the real intention, may be doubtful. But however that may be, I think the amendment inserted in 1907 furnishes the construction that must be applied in the computation of all periods of time commencing at a date subsequent to its passing (20th April, 1907) in respect of work upon all claims staked out and recorded since the passing of the Mines Act, 1906.

The wording of sec. 164 in its amended (as well as in its original) form as well as that of sec. 160, covers all claims staked out since the passing of the Mines Act, 1906. To apply it, so far as the amendment may have altered its effect, to periods of time past or current at the time of the amendment would, I think, be unfair and contrary to the rule regarding the retrospective operation of statutes; but I see no reason why it should not apply to future periods, and I think it must be so applied in respect of all claims which its language covers.

The amendment of 1907 seems in fact to come within the principle applied to the construction of statutes which are passed to supply an omission or declare or explain what was intended by the original Act. Sec. 164 both before and after its amendment, and even apart from its rather peculiar use of the word "deemed," is explanatory or declaratory of the meaning to be given to another part of the Act, namely, sec. 160. See *Craie's Statute Law* (Hardcastle 4th ed.), 331, 332; *R.* v. *Darsley*, 3 B. & Ad. 469; *Atty-Gen.* v. *Pougett*, 2 Price 381; *Atty-Gen.* v. *Theobald*, 24 Q. B. D. 557.

It may be pointed out that even if a certificate of record could under sec. 140 of the original Act be considered to confer a right to hold to a continuance of what has been contended to be the law at the time the claim was staked out, the certificate of record in this case was not obtained until the 8th of August, 1907, after sec. 140 was amended by sec. 38 of the Act of 1907. Upon this feature of the matter the case of *Smith* v. *The King*, 40 S. C. R. 258 may be referred to as to the status of an applicant for Crown lands.

As to the manner in which changes in laws or local rules regarding the working conditions or holding of mining claims are construed in the United States, *Lindley on Mines* (2nd ed.), s. 270, and *Strang* v. *Ryan*, 46 Cal. 33, 1 M. M. R. 48, may be consulted.

Before the second year's work in the present case became overdue a revision and consolidation of The Mines Act and amendments took place and a new Act repealing the old one and substituting somewhat different provisions and making a material change in so far as it abolished altogether allowance for the winter season, was passed on 14th April and came into effect on 15th May, 1908. I think, however, this Act will not affect at all events the second year's work in the

present case, as the period of time allowed under the former Acts for that was current at the time of the passing and at the time of the coming into effect of the Act of 1908. None of the subsequent Acts I may point out made any variation from the original Act of 1906 in the amount of work required to be done to obtain title to the claim or in the time within which the patent is to be obtained.

I have considered with a good deal of care whether I should or could under the authority of sec. 85 (2) grant relief to Mr. Kollmorgen from the forfeiture which I think must be held to have occurred. I think it is not a case that can fairly be held to come within the intention of this provision. Maintenance in full effect of the provisions of the Act requiring, as the condition of continuing to hold the claim, the working and development of the lands that have been staked out and not the holding of them in idleness while others who desire to develop them are kept off, is of very vital importance to the general welfare of the mining industry, and what may seem to be a hard case should not be permitted to make bad law in this respect. The Act shows a very clear intention to limit the powers of the Recorder and the Commissioner in regard to granting relief, and care should be taken not to exceed those powers. There is, however, a provision in the Act, namely, sec. 86, under which I think relief could properly be given in the present case and I think in all the circumstances it will be proper for me to add to my decision a recommendation that relief be granted under that provision. Mr. Kollmorgen or his agents first discovered mineral upon the property in question and the respondent Montgomery, though acting, I think, in every way in good faith, no doubt made his discovery as a result of what had been done by Mr. Kollmorgen. Any relief granted, however, should, I think, be upon the condition that Mr. Montgomery should be compensated for all his time and money expended in connection with the claim and for the costs of the present proceedings.

Order accordingly.

NOTE.—In 1908 an important change was made in abolishing altogether what was known as the close season; the provisions regarding working conditions were then also collected and recast and made more complete; see ss. 78, 79. The change affects chiefly the first instalment of work—the 30 days—in computing the 3 months for doing which the time between 15th Nov. and 15th April was formerly excluded. All work must now be done within the time

limited by s. 78 except: (1) in the special cases provided for by s. 79; (2) where by reason of death or incapacity from illness of the holder or by reason of pending proceedings the Recorder extends the time under s. 80 (with which read s. 156); or (3) where within a year after the death of the holder the Commissioner makes an order vesting the claim in his representatives under s. 88.

Some question might perhaps be raised under the present Act as to whether where s. 79 operates to extend the 3 months allowed for the first instalment of work the time for subsequent instalments will commence to run from the end of the bare 3 months from recording or from the end of the 3 months so extended. It is submitted, however, that it is from the latter. The structure of present s. 78 is different in this respect from that of former s. 160. To avoid confusion or uncertainty it would be well that every extension of time made by the Recorder under s. 80 should expressly state what instalment of work the extension is to apply to and whether or not it is to affect subsequent instalments.

There are also sections 85 and 86 dealing with what may be called relief from forfeiture. S. 85 (1) provides for what may be called automatic relief by the party doing, within 3 months after default, what is therein prescribed in cases of failure to renew license or to file work that had in fact been done; s. 85 (2) gives the Commissioner power within 3 months to relieve where compliance with the Act has been prevented by reason of pending proceedings or by any other special cause not reasonably within the control of the holder; and under s. 86 the Lieutenant Governor in Council may upon recommendation of the Minister relieve in any case of hardship.

It is submitted that none of these powers should be exercised except in cases coming clearly within the true meaning and intent of the Act.

In the present case the Commissioner, while holding that he had no power to relieve, made a recommendation to the Minister that relief might be given by Order-in-Council. Though in some respects similar, the circumstances differed from those in *Re Kollmorgen and Webster*, *ante*, in which no recommendation was made. In that case the forfeiture (caused by the applicant's or his agent's own default) was of much longer standing, and in it the intervening staker staked in the belief that Kollmorgen had intentionally abandoned the claim, while in the present case the new staker knew when he staked that Kollmorgen was endeavoring to hold the property. Probably, however, the fact that the trouble arose from the applicant misunderstanding the meaning of the statute (which was not clear) most strongly influenced the recommendation for relief—the new staker having no merits as he had staked on Kollmorgen's vein.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

19 O. L. R. 622; 14 O. W. R. 943.

RE ROGERS AND McFARLAND.

Veteran Lands—Mining Claim on—Certificate of Record—Revocation of—Mistake—Option to Purchase—Jurisdiction of Commissioner—Appeal from Commissioner—Failure to Set Down and Lodge Certificate within Time—"Deemed to be Abandoned."

M., in 1904, located lands under the Veteran Land Grants Act. On 1st March, 1907, he applied for a patent, filing the necessary proof and being entitled, as the law then stood, to both the surface rights and the minerals. On 16th March, by his attorney, he gave C. an option for purchase of such title as he would receive from the Crown. On 22nd March R. staked out a mining claim upon part of the lands. On 3rd April Patent issued to M. including the minerals. On 10th April R. recorded his mining claim, and on 13th Sept., 1907, obtained a Certificate of Record therefor, the Certificate being issued by the Recorder in ignorance of the fact that the lands were veteran lands and in forgetfulness of the fact that the matter had been in doubt in his mind at the time of recording and that he had only received the application "for what it was worth."

Held by the Commissioner,

That the Certificate of Record was issued in mistake within the meaning of the Act and should be revoked.

That the giving of the option did not in the circumstances disentitle M. to the minerals, that the lands were therefore not open to be staked out or recorded as a mining claim, and that the mining claim was invalid and should be cancelled.

That the Commissioner had in the circumstances jurisdiction to revoke the Certificate of Record, and, it seemed, also to deal with the validity of the mining claim.

On motion to quash an appeal by R. to the Divisional Court, held by the Divisional Court, quashing the appeal.

That as the appeal had not been set down, and a Certificate of setting down lodged with the Recorder within the time limited by sec. 151 of the Act (1908) it must be deemed conclusively to be abandoned, and there is no power to extend the time beyond the limit prescribed by the Act.

Application by the Deputy Minister of Mines, at the instance of The James Proprietory Mining Co., Ltd., for an order revoking the certificate of record for mining claim 7071-½ of Lionel T. Rogers on part of the S. ½ of Lot 3, Concession 6, in the Township of James, and for an order cancelling the claim.

The facts are set out in the Commissioner's decision.

McFarland had transferred his title to Duncan Chisholm, nominee of Clinton who held the option, and the James Proprietory Mining Co., Ltd., had purchased and obtained a transfer of the property from Chisholm. McFarland was

therefore not really interested in the proceedings and the case was known before the Commissioner as *Re Rogers and The James Proprietory Mining Co., Ltd.*, but to avoid confusion the style of cause used in the Divisional Court has been adopted in the present report.

J. Bicknell, K.C. and *W. A. Sadler*, for Rogers.

A. M. Macdonell, K.C., and *J. W. Mahon*, for The James Proprietory Mining Co., Ltd.

9th September, 1909.

THE COMMISSIONER.—Application has been made to me in these matters by the Deputy Minister of Mines, at the instance of the James Proprietory Mining Company, Limited, who desire to have the certificate of record issued for the mining claim in question, and also the mining claim itself, cancelled.

I appointed a time and place to receive evidence and hear what might be submitted on behalf of the parties interested and duly notified all concerned. The James Proprietory Mining Co., Ltd., was represented by Messrs. Macdonell, McMaster & Geary, and Lionel T. Rogers by Mr. Bicknell and Mr. Sadler.

Upon the evidence and from the documents produced I find the facts to be as follows:

On 21st October, 1904, George McFarland located the south 160 acres of Lot 3, Concession 6, in the Township of James as what is commonly known as a veteran claim, under the Veteran Land Grants Act, 1 Edw. VII. ch. 6.

On March 1st, 1907, application was received at the Department of Lands, Forests and Mines from George McFarland for patent of this land, McFarland filing the usual affidavit that he had not parted with the same or given any agreement or instrument to do so.

On 16th March, 1907, an option was given by Campbell McFarland purporting to act as attorney for George McFarland to Charles M. Clinton, giving Clinton in consideration of $100 the exclusive right and option to purchase or lease for a period of 99 years both surface and mining rights of the south half of said lot 3 upon payment during the life of the option of the further sum of $1,325. The instrument

states that the property is held under the Veteran Claims Act, and that McFarland agrees to furnish such title as he receives from the Crown. The power of attorney has not been produced nor has its date been shown.

On 22nd March, 1907, Lionel T. Rogers staked out a mining claim upon part of the lands, namely the north-west quarter of the south half of lot 3, in the 6th concession of the township of James, containing about 40 acres.

On 3rd April, 1907, a Crown patent was issued to George McFarland of the 160 acres, expressly granting to him, in addition to the surface rights, all mines and minerals.

On 10th April, 1907, the mining claim was recorded in the office of the Mining Recorder at Haileybury.

On 10th June, 1907, by transfer under the Land Titles Act, dated 24th April, 1907, George McFarland's title was transferred to Duncan Chisholm, Chisholm being the nominee of Clinton, who held the option.

On 12th September, 1907, a certificate of record was issued for the mining claim.

On 21st January, 1907, Chisholm's title was transferred, under the Land Titles Act, to the James Proprietory Mining Company, Limited.

When the application for the mining claim was first brought in to the Recorder's office some question was raised as to the property being a veteran claim but upon the applicant's solicitor stating that it was not a veteran claim the Recorder put it on record, as he says "for what it was worth." The property of which the mining claim was a part was in fact marked upon one of the wall maps in the Recorder's office with the letter "V." indicating that it was a veteran claim, but the Recorder's township map, which was really the more official map of the two, did not as received from the Department have or purport to have the veteran claims marked upon it at all. The Recorder states that as information was received regarding lots he and his assistants marked them on the township map, but at the time the claim was filed and apparently at the time the certificate of record was issued the property in question was not so marked. Some time later, however, another map was received with the veteran claims, and this one among them, properly marked. The Recorder states that it was not an uncommon

thing to find that property marked as veteran claims on the wall map were not in reality veteran claims and that he therefore pursued the practice of recording applications even upon these where the applicant maintained that the property was not in fact a veteran claim.

When the certificate of record was issued the Recorder had forgotten that any question existed as to whether or not the property was a veteran claim, and had he known that it was a veteran claim or had he had it in mind that the matter was in doubt he would not have given the certificate of record.

In these circumstances I am asked to cancel the certificate of record and declare that the mining claim mentioned is invalid.

Counsel for Rogers raises the question of my jurisdiction to deal with these matters in view of the fact that a patent of the veteran claim has long since issued, referring to sec. 123 of the present Mining Act, while counsel for the James Proprietory Mining Co., Ltd., contends there is jurisdiction, and certainly so as to the certificate of record, the cancellation of which is specially provided for by sec. 66 of the Act.

As to my power to deal with the validity of the mining claim in the circumstances there may be some room for doubt, but it is my duty to come to a conclusion one way or the other, and upon a careful reading of sub-sec. 1 of sec. 123, which governs the matter, I think I have power to deal with it—and if I have and do not do so there would appear to be no remedy elsewhere. The mining claim with which I am asked to deal has not been patented, and the questions upon which its validity depends are, therefore, I think, questions arising before patent within the meaning of that subsection. It may also be noted that patent of the veteran claim was not issued until after the mining claim had been staked out, and the validity of the mining claim depends upon matters and things existing at the time of staking out—chiefly upon the question whether or not the lands were then open to be staked out for a mining claim—and these were matters prior to patent even of the veteran claim. But in any consideration I may give to the validity of the mining claim and any conclusion I may reach regarding it, I think the fact that a patent for the veteran claim subsequently issued should not be a factor; I think I should not find the mining claim in-

valid or cancel the certificate of record or give any relief merely upon the ground or by reason of the fact that the company holds a patent. I have nothing to do with the patented rights. If the company seeks relief in support of their rights under the patent they should look for it in the ordinary courts.

Dealing first with the application for the cancellation of the certificate of record as to which I think there can be no question of jurisdiction, I think the present is a case where the certificate of record has been issued in mistake within the fair meaning of what is contemplated by sec. 66, and I think it should be revoked and cancelled as provided for in that section. The company's chief complaint is in fact the existence of the certificate of record, as it is a document bearing the signature of an official of the department and so to some extent, as they say, authenticating the mining claim application.

The cancellation of the certificate of record, however, does not of itself dispose of the validity of the mining claim, and if a determination as to the latter can be made the question should not be left open or in uncertainty, and though I think as above stated, I have jurisdiction to deal with it, I think at all events less harm will be likely to come from my doing so than from my not doing so.

At the time the mining claim was staked out, 22nd March, 1907, the property of which it formed a part was under location by McFarland under the Veteran Land Grants Act, 1 Edw. VII. ch. 6, and application and necessary proof had some time prior to the staking out of the mining claim been made by McFarland for his patent and the application had been promised the attention of the department. This application was made under an amendment passed in 1906, to the original Veteran Land Grants Act, by 6 Edw. VII. ch. 13, s. 6, which reads as follows:—

"If any person belonging to one of the classes of persons mentioned in sec. 2 of 1st Edward VII., chapter 6, and amendments thereto who is regularly located for any land under the said Act and has not parted with the same by any agreement or instrument, or the heirs, executors or administrators of such person, apply for a patent for the same before the expiry of ten years from the date of location and without the performance of settlement conditions, such patent may issue, but from and after the date of said patent the land included therein shall be liable to taxation for all purposes, and the pine timber shall be reserved to the Crown."

The original sec. 7 to which the above subsection was added required the performance of settlement duties; the

amendment quoted dispensed with the necessity of performance of these duties in the circumstances mentioned, namely, where the applicant was one of the persons intended to be benefited by the Act and where he made application before expiry of ten years from the date of his location, but upon the other hand the amendment provided that when once the patent had issued the patentee was no longer entitled to exemption from taxation as provided in the original Act. McFarland on the 1st of March fulfilled all the conditions of the above amendment and was upon and from that date entitled to a patent of the property. He swears he had not up to that time parted with his interest, and there is nothing to contradict his statement or to indicate that it is untrue. The land, therefore, was not up to that time open to acquisition as a mining claim.

What effect then had the subsequent giving of the power of attorney by McFarland to his son and the giving of the option above mentioned by the son to Clinton, which happened before the mining claim in question was staked out? I do not think these matters affect the question in issue here, even though they might affect the exemption from settlement duties and taxation provided for in sec. 6 of the Act amended in 1903 and 1905.

The statutory provisions dealing with the extent of mineral rights acquired by the veteran are (1) sec. 11 of the original Act—which provided that sec. 15 of the Public Lands Act (which provides that minerals should be reserved from the grant) should not apply to lands granted under the Veteran Act; and (2) sec. 3 of 6 Edw. VII. ch. 13, passed in 1906—which repeals former sec. 11 and substitutes a new section which provides that sec. 15 of the Public Lands Act shall not apply to lands theretofore or thereafter granted to any person belonging to the classes described in sec. 2 of the Veteran Land Grants Act and located by a certificate issued to him under that Act, but, that, save as aforesaid, sec. 15 shall apply to lands granted under the Veteran Land Grants Act and all lands located under it shall be subject to the provisions of the Mines Act.

McFarland was within the class of persons mentioned and was entitled to the grant described. He never parted with his right to obtain patent. His agreement, in fact, required him to obtain it, for what he agrees to give Clinton

is such title as he shall obtain from the Crown. I do not see anything contrary to the intention or policy of the Act in the option which McFarland gave to Clinton. He had completed all that it was necessary for him to do to be entitled to the patent under the Veteran Land Grants Act, and had applied for and was entitled to it, and was, no doubt, expecting its issue at any time. Pending the issue of the patent there would seem to be no reason why he should be debarred from seeking to make a disposition of it. What he agreed to sell was not his unpatented right but the right or title he was to have after patent had been obtained. This would seem to me a much stronger case than that of *Meek* v. *Parsons*, 31 O. R. 529, in which it was held that an agreement to carry out a sale in the future was not a contravention of the statutory provision against alienation. And in the present case so far as the rights in question are concerned, I cannot see that there is any prohibition at all from doing what McFarland has done, sec. 11 as it originally stood and sec. 11 as substituted by amendment in 1906—the provisions which deal with the granting of the minerals—containing, as I read them, no prohibition against it. The substituted section provides that when the lands are granted to the veteran himself the minerals go with them, and that when not granted to himself they do not. It does not appear to me that entering into a bargain for the future transfer of the title which he was to obtain and which he was already entitled to would make any difference, or, if known to the department, would have prevented the issue of the patent to McFarland in the usual way.

Though, as I have said, I think it is not a phase of the matter which I should deal with or consider as a ground for my decision I may point out that it would seem that the James Proprietory Mining Co., Ltd., as registered purchasers for valuable consideration without notice would in any event be protected under the Land Titles Act from attack: see *Farah, et al.* v. *Glen Lake Mining Co. et al*, 17 O. L. R. 1; this fact I do not give as a ground for my decision, but it may weigh as an additional reason why I should endeavour to fully dispose of the matters in question if I can. In view of sec. 140 of the Mines Act, 1906, which was in force at the time, there may also be something in the company's contention that no rights in the mining claim could in any event be deemed to be acquired until after the recording of the

claim or the issue of the certificate of record, both of which were subsequent to the issue of the patent.

Order revoking the certificate of record and directing that the mining claim should be cancelled.

Rogers took steps to appeal to the Divisional Court from the above decision.

Sec. 151 of The Mining Act of Ontario provides that the Commissioner's decision shall be final and conclusive unless appeal from it is taken within 15 days after it is filed with the Recorder or within such further time not exceeding 15 days as the Commissioner or a Judge of the Supreme Court may allow; and further provides that unless the notice of appeal is so filed and the fee paid and unless the appeal is set down and a certificate of the setting down lodged with the Recorder within 5 days after the expiration of the said 15 days or the further time allowed as above, the appeal "shall be deemed to be abandoned."

The decision in the present case was filed with the Recorder on 13th September, 1909. On 18th September notice of appeal was filed with the Recorder (copies being also left with the Bureau of Mines and served upon the James Proprietory Mining Co., Ltd.) On 1st October the case was set down on fiat, but no order extending the time was procured.

On 29th October notice of motion to quash the appeal was served on behalf of the James Proprietory Mining Co., Ltd. The grounds were (1) that the Recorder's act was merely a ministerial one and under sec. 134 appeal from the Commissioner's decision upon it lay only to the Minister; (2) that the appeal was too late, not having been set down nor certificate of setting down lodged with the Recorder within the time required by the Act. Only the last ground was dealt with by the Court.

The motion was heard by FALCONBRIDGE, C.J., BRITTON, J. and RIDDELL, J.

J. R. Cartwright, K.C., for the Bureau of Mines.

A. McL. Macdonell, K.C., for the company.

W. M. Douglas, K.C., for Chisholm.

F. R. MacKelcan, for Rogers.

13th November, 1909.

RIDDELL, J.:— . . . .The statutory law is that in a case of this kind, the order or award of the Mining Commissioner is final and conclusive, unless appealed to the Divisional Court within 15 days after it is filed, unless the Commissioner or a Judge of the Supreme Court give further time; and that time cannot exceed 15 days longer, i.e., 30 days after the filing. The appeal being begun by filing a notice of appeal (as was done here) "shall be deemed to be abandoned" unless (1) it is set down within 5 days after the expiration of the 15 or 30 days, and (2) within the same time a certificate of such setting down is lodged with the Recorder.

Here the order of the Mining Commissioner was filed 13th September, 1909; 15 days thereafter was the 28th September, Tuesday; 5 days after the expiration of the 15 days was Sunday, 3rd October, or at the latest Monday, 4th October. Even if a Judge had acted, the time for lodging the certificate of setting down expired before the present time, i.e., on October 18th. This appeal, by the express words of the statute, must now "be deemed to be abandoned." The result must depend upon the meaning to be attached to the word "deemed."

The word etymologically does not differ from "doom," "damn," or "condemn;" but of course etymology is not always a safe guide to the meaning of a word, even in a statute.

I am unable, however, to find anything in the cases either in England, Ontario or the United States which assists the appellant. (Reference to ss. 48 and 78 (4) of the Mining Act; *De Beauvoir* v. *Welch*, 7 B. & C. 266, 278; *Re Shafer* (1907), 15 O. L. R. 266, at 273, 10 O. W. R. 409, at p. 414; *Ex p. Walton* (1881), 17 Ch. D. 746; *Milnes* v. *Mayor of Huddersfield* (1883), 12 Q. B. D. 443; *Lawrence* v. *Wilcocks* (1893), 1 Q. B. 696, 699, 700, 701; *Green* v. *Marsh* (1892), 2 Q. B. 330; *Hill* v. *E. & W. I. D. Co.* (1884), 9 A. C. 448, 455, 458; *Earl Cowley* v. *Inland Revenue Commissioners* (1899), A. C. 198).

All these cases seem to concur in a definition something like this: "be considered, adjudged or held for the purposes of the statute." Some of the earlier English cases may also be looked at as bearing upon the question. (Reference to *Reg.* v. *Manning* (1849), 2 C. & K. 887, 903; *Walton* v. *Gavin* (1850), 16 Q. B. 48, 71, 72, 81).

The cases in the State and United States Courts of the American Union are pretty uniform. *Commonwealth* v. *Pratt* (1882), 132 Mass. 246. The statute said: "Whoever embezzles or fraudulently converts to his own use . . . money, goods . . . which may be the subject of larceny . . . shall be deemed guilty of simple larceny." The defendant was charged and found guilty of larceny by embezzlement. The Court said, p. 247: "When by legislative enactment certain acts are deemed to be a crime of a particular nature, they are such crime and not a semblance of it nor a mere fanciful approximation to or designation of the offence;" p. 249; "In a legislative enactment the phrase 'shall be deemed guilty of larceny' is equivalent to and means that he is guilty of larceny." (Reference to *Blaufus* v. *People* (1877), 69 N. Y. 107; *Kirchoff Lumber Co.* v. *Olmstead* (1890), 85 Cal. 80, 24 Pac. 648; *Cory* v. *Spencer* (1903), 67 Kans. 648, 63 L. R. A. 275, 73 Pac. 920 *Lawrence* v. *Leidigh* (1896), 58 Kans. 594, 50 Pac. 600; *Powell* v. *Spackman*, 63 Pac. 503; *Kelly* v. *Owen* (1868), 7 Wall 496, 498; *Leonard* v. *Grant* (1880), U. S. 5 Fed. 11, 16; *Burrell* v. *Pittsburg*, 62 Pa. 472, 474.

Our own cases are also adverse to the appellant's contention, though of course not absolutely conclusive. In *Campbell* v. *Barrie* (1871), 31 U. C. R. 279, the Insolvent Act, 32 & 33 Vict. ch. 16, was under consideration. Section 86 provides that conveyances, &c., made at a certain time "are presumed to be made with intent to defraud . . creditors:" sec. 89 that sales, &c., made within 30 days before assignment, "shall be presumed to have been . . made in contemplation of insolvency." The Court, Adam Wilson, J. (Morrison, J., concurring, Richards, C.J., taking no part), considered p. 290, that "presumed to be made," in sec. 86, should be read as "deemed to be made," and consequently meant "are void." It is not necessary to consider whether the Court was right in identifying the meaning of "presume" with "deem"—it does not seem to have been considered that there was any doubt as to the meaning of "deem." So in speaking of sec. 89 the Court asks: "Should the word presumed be read deemed?" and on p. 292, *Nunes* v. *Carter* (1866), L. R. 1 P. C. 342, is cited. In that case the Jamaica Insolvent Act of 11 Vict. ch. 28, by sec. 67, provided that if any person in contemplation of insolvency transfered any of his estate to any creditor for the benefit

of such creditor, such transfer should be deemed fraudulent and void against the official assignee: provided that no such transfer should be so deemed fraudulent and void unless made within 6 months before a declaration of insolvency. It was held in the Jamaica Court by a divided Court that although there is no evidence of fraudulent preference a transfer of property by an insolvent within 6 months before a declaration of insolvency was absolutely void. In the Judicial Committee it was argued that the real question was whether there was a fraudulent preference, but their Lordships declined to take that view.

In *Lawson* v. *McGeoch* (1893), 20 A. R. 464, there was much difference of judicial opinion as to the meaning of the word "presume," in R. S. O. 1887, ch. 124, sec. 2, sub-sec. 2 (a), 2 (b). Mr. Justice Osler thought the presumption general and irrebuttable; Mr. Justice Maclennan that it was limited to cases of pressure, but irrebuttable, while Hagarty, C.J.O. (hæsitante), and Burton, J.A., thought it rebuttable. The Chief Justice, however, says, p. 467: "If here, as in the Jamaica case of *Nunes* v. *Carter*, L. R. 1 P. C. 342, the word had been 'deemed,' there would be no difficulty," while Burton, J.A., seems to approve, p. 468, of the reasoning and conclusions of Wilson, J., in the case of *Campbell* v. *Barrie*, 31 U. C. R. 279, considering that "presumed" meant "deemed," and therefore the presumption was irrebuttable. On p. 469 the same learned Judge says: "We should be prepared to find, if intended to be conclusive, the legislature . . . would have used some other word such as . . . 'deemed,' or a similar expression . . ."

It would, I think, be quite impossible for us, so far as the authorities go, to hold that "deem" means anything less than "adjudged," or "conclusively considered" for the purposes of the legislation.

Neither am I at all impressed with the circumstances that in sec. 92 a discovery not appealed against or finally allowed on appeal is to be deemed conclusively to be a discovery of valuable mineral in place—the expression is explained immediately afterwards—it cannot be called in question in any cause, matter or proceeding in any Court or under this Act. Quite a different case is being provided for in the two sections. But in any case the meaning of the word "deemed"

is not in my view to be cut down because of the circumstance that the legislature have in another place used a pleonastic expression. We have "full and complete" and the like used when one of the words would do as well—a term is "fully to be complete and ended"—"fully paid-up shares" are nothing but "paid-up" shares.

The word "deem" is used in many places in this Act. In some instances it refers to the judgment of some officer, e.g., secs. 48, 78 (4), 80 (1), 86, 123 (1), 133 (1), (3), 137 (2), (5), 138, 139 (1), 167 (3), 187 (1) (2). Leaving aside these sections we find by sec. 27 (4) the license shall be deemed to be the license of the licensee. Sec. 38, a water power of a certain kind shall not be deemed part of the claim. Sec. 83, noncompliance with any requirement of the Act shall be deemed to be an abandonment. Sec. 129, the Court may transfer any case to the Commissioner which should have been brought before him and thereafter it shall be deemed to be a proceeding before him. Sec. 162, an abandoned mine not properly fenced shall be deemed to be a nuisance. In all these there can be no doubt of the meaning of the word.

Where the Legislature has placed such a bar to our entertaining an appeal we have no power to extend the time. *Reekie* v. *McNeil* (1899), 31 O. R. 444, and cases cited. And the provision in sec. 153 of the Act that the practice and procedure on an appeal to the Divisional Court shall be the same as in ordinary cases under the Judicature Act, does not assist the appellant any more than the similar provision in the County Courts Act, R. S. O. 1897, ch. 55, sec. 40, assisted the appellant in *Reekie* v. *McNeil*.

In my opinion the appeal should be quashed with costs of a motion to quash only. We have not heard the merits.

FALCONBRIDGE, C.J.—I agree.

As to the meaning of the word deemed I refer also to *The Queen* (1869), L. R. 2 Ad. & Eccl. 354; *Lowe* v. *Dorling & Son* (1906), 2 K. B. 772; *Shepherd* v. *Broome* (1904), A. C. 342.

The appeal will be quashed with costs as of a motion to quash only.

BRITTON, J., concurred.

(THE COMMISSIONER.)

RE BURD AND PAQUETTE.

Discovery—Staking—Error in Boundaries—Substantial Compliance—Abandonment—Lands Open.

Where, in surveyed territory, the alleged discovery and the discovery post were outside the limits of the claim as applied for and as required by the Act to be applied for though within the boundaries as actually staked out on the ground, the boundaries through want of reasonable care having been erroneously located, the claim was held invalid.

Held also that the above defects in staking and the failure to mark the name and license number of the staker or the description of the lot on any of the posts worked an abandonment under sec. 83 (Act of 1908) and left the lands open to restaking.

Dispute by J. H. Burd on behalf of M. K. Burd against mining claim S. S. M. 1906, in the Township of Otter.

W. H. Hearst, K.C., for disputant.

W. B. Laidlaw, for respondent.

22nd September, 1909.

THE COMMISSIONER.—This is a matter transferred to me by the Mining Recorder of the Sault Ste. Marie Mining Division for adjudication.

The disputant claims that the respondent's mining claim is invalid by reason of improper and insufficient staking and lack of discovery of valuable mineral and that he, the disputant, is entitled to be recorded for the property.

Upon the evidence I find that Paul Spooner with the assistance of Paul Boyer, who staked out or partially staked out the claim in dispute, had on the previous day, the 4th of August, staked out for himself a claim purporting to consist of the south-east quarter or 40 acres of the south half of the lot. This lies immediately east of the property in dispute. On the 5th of August, making use of the west boundary of what they had staked out on the 4th of August, they proceeded to stake the claim in question. This line as a fact lay about two chains and a half east of the proper dividing line between the two 40 acre pieces, and the north end of this line and the north boundary of what was staked is about four chains and a half south of the proper boundary of the parcels in question. In staking the property they

located the south-easterly survey post of the lot and also the southern boundary without difficulty, but in measuring westerly from the east boundary of the lot and northerly from its southern boundary they fell short to the extent mentioned, and on the 5th of August when they came to stake out the claim in question they commenced as stated at this erroneous west boundary of the claim staked on the 4th and measured along the southerly boundary of the lot what they say they thought was 20 chains and from this point ran a line northerly, this line being in fact three chains and a half east of the westerly boundary of the lot. The evidence is clear that the survey post at the south-west corner of the lot was in existence and easily found, and that the southern line of the lot was clearly defined, and there would therefore have been no difficulty in their ascertaining this south-west corner and following the western boundary of the lot northward, as they should have done, had they exercised any reasonable care. They located the northerly line of the lot in question as an extension of the northerly line of the claim they had staked the previous day, being, as before stated, about four chains and a half south of where it should have been. The alleged discovery upon which the claim in question is based is located 30 feet from their No. 1 post, which brought it entirely outside the property which is being applied for and which, according to sec. 50 (d) they are required to apply for under such circumstances, thus leaving the claim in question without any pretence of discovery or discovery post, both the alleged discovery and the discovery post mentioned being really upon the parcel of property applied for by Spooner himself as having been staked out the previous day.

None of the posts planted by Spooner and his assistant had Spooner's name or license number marked on them as required by sec. 54 (a) of the Act, nor did any of them show the lot or part of lot being applied for as required by sec. 54 (c).

The claim of the respondent is clearly bad by reason of lack of any discovery or discovery post of any kind upon the property in question; see secs. 67 and 35 of the Act. The alleged discovery upon which the claim purports to be based is really upon and will be included in the Spooner claim to the east. The weight of evidence also is against this alleged discovery being really a discovery of valuable mineral within the meaning of the Act.

Had the defendant a genuine discovery upon the lands in question I would regret to hold his claim invalid for lack of sufficient staking but I think in the circumstances of this case I must hold that the staking was so far defective as to work an abandonment under sec. 83 of the Act and thus leave the property open to other stakers. Though technical accuracy is not to be required in the staking of claims or the running of lines where there is substantial compliance with the Act, I think the staking in the present case cannot be considered a substantial compliance with the Act, and it was far from being as correct as it could reasonably and easily have been made. The rapidity with which Spooner and his assistant staked the five claims applied for by him on behalf of himself and Paquette indicates that he was much less attentive than he should have been both to the requirement of discovery of valuable mineral and to the proper staking of the claims.

The claim of the respondent must be held invalid and the disputant held entitled to be recorded for the property. The order for costs will be limited to the witness fees which might have been allowed by the Recorder had the case been dealt with by him.

(THE COMMISSIONER.)

RE SEYMOUR AND LOGAN ET AL.

Prospecting Partnership—Termination of—Neglecting to Contribute—Attempting to Prevent Acquisition of Claim by Partner—Delay in Bringing Proceedings.

S. and P. had entered into a prospecting partnership, S. becoming thereby interested in the mining claim in question; S., though he contributed for a time, afterwards neglected and refused on various occasions to carry out his part, and P. finally repudiated further partnership; the claim was cancelled for lack of discovery; S. to prevent his former partner reacquiring this and other claims gave other prospectors secret information to enable them to stake them for themselves; L. and P. however succeeded in restaking the claim and from that time bore all the expense and labor connected with it including costs of litigation, S. meanwhile standing by and offering no assistance.

Held that proceedings brought by S. after the lapse of more than a year to enforce an interest should be dismissed.

Proceedings by R. F. Seymour to establish an interest in mining claim M. R. 1268, belonging to Hugh Logan and C.

E. Pinnelle, the claim being for 1-2 of the 1-3 interest belonging to Pinnelle.

W. J. Hanley, for claimant.
Edward Gillies, for Pinnelle.
Hugh Logan, in person.

6th October, 1909.

THE COMMISSIONER.—The claimant Mr. R. F. Seymour is seeking to establish a right to one-half of the one-third interest which Mr. Logan, the recorded holder, admits belongs to the respondent Mr. Pinnelle in Mining Claim MR-1268.

Mr. Seymour bases his claim upon what has been called a partnership agreement entered into between himself and Mr. Pinnelle in or about January, 1908. No written agreement was drawn up and the correspondence, or at least one letter from Mr. Pinnelle to Mr. Seymour which might throw light upon it, has been destroyed by fire in Mr. Seymour's residence. Mr. Pinnelle had been in partnership previously with a Mr. Brown and a one-third interest in the property in question, known as the Hubert Lake claim, but then under a different staking and record from that now in existence, was part of the partnership property. The proposition was that Mr. Seymour should take Mr. Brown's place. Mr. Brown, it appears, was paying all the expenses, and Mr. Pinnelle looking after the work. Mr. Seymour in his evidence claimed to have bought and paid for Brown's interest, but this I am satisfied he did not do, Mr. Pinnelle himself having bought and paid for Brown's interest and the amount, $50, which he paid, has not been paid by Mr. Seymour either to him or to Mr. Brown, though Mr. Seymour claims to have paid it by virtue of furnishing as he claims more than his share of supplies and expenses.

It would seem that the letter written by Mr. Pinnelle to Mr. Seymour which has been lost as above mentioned, contained the terms of the proposed agreement between them. Seymour claims that he was only to pay half the expenses and to get a half interest. Pinnelle claims that Seymour was to pay all the expenses and get a half or a third interest according as Seymour was or was not in the field in connection with the property which might be

the subject of ownership between them. There is little to assist so far as writing or circumstances are concerned in arriving at the truth between the two stories. While allowing Seymour equal credit with Pinnelle so far as lack of any deliberate intention to mis-state the facts is concerned, I cannot doubt that Mr. Pinnelle's account of affairs throughout is much the more accurate and reliable of the two. Mr. Seymour was clearly wrong in his recollection of many matters owing, I think, to imperfect memory. He is contradicted also upon some points by Knox, and even upon his own statement his conduct as to a number of things was inconsistent with the claim he is now setting up.

Sums of money amounting to about $80 were as a fact advanced by him to Mr. Pinnelle and he did up to the month of July also supply a considerable quantity of provisions and requisites for the work of acquiring claims. A number of claims were in fact staked out and recorded as a result, but owing to one reason or another the interests acquired seer to have proved valueless. More or less strained relations existed between the two for some time owing to the different views they took of matters connected with the partnership. In one case Mr. Seymour refused to put up the money which Mr. Pinnelle required for recording a couple of claims, and in another case refused to supply funds for the necessary assessment work and the claims were in consequence lost. In the month of July the final breach occurred as the result of an expedition to Miller Lake which Mr. Pinnelle at Mr. Seymour's request undertook in company with a number of other prospectors. Some eighteen claims were staked out, Mr. Seymour's permit having been used, and when Mr. Seymour arrived a week or two later he seems to have been dissatisfied about the matter, Mr. Pinnelle saying that he thought the claims were no good, Mr. Seymour saying that he objected because the claims would be illegal by reason of the use of his permit in his absence. Mr. Seymour at all events refused to contribute any share of the money for recording and Mr. Pinnelle thereupon told him that as it had been the third time that he refused to carry out the conditions of the partnership the partnership was therefore at an end.

About the same time difficulty occurred in connection with the inspection of the claim in question. Mr. Seymour had undertaken to look after the preparation of it for in-

spection and failed to do so or to inform Mr. Pinnelle of what had happened. The claim was thrown out as a result of the inspection. On the 19th of August, Logan and Pinnelle restaked and recorded the claim in question, Mr. Seymour contributing nothing to it although it seems he desired to go up on the trip. The extraordinary thing is, however, that Mr. Seymour after the quarrel with Pinnelle over the Miller Lake properties and Pinnelle's repudiation of any further partnership between them gave to Knox and other outside prospectors information about the claims which had been staked by Pinnelle and his associates and furnished them a plan of them that they might go up and restake them for themselves, Mr. Seymour telling them that the Pinnelle staking was illegal and could be thrown out, and Knox says that Seymour also told him that the claim in question was about to be thrown out and that Pinnelle and Logan were watching to restake it and that he (Knox) might get ahead of them if he chose.

Seymour contributed nothing to the enterprise after July and I think what took place between himself and Pinnelle regarding the Miller Lake properties and Mr. Seymour's actions regarding the restakings of all the properties mentioned must be considered to have put an end to any partnership or agreement existing between them, especially in view of its not having been the first time that he refused to carry out his part of the agreement to furnish money. Logan and Pinnelle as a matter of fact, along with their associate Evans, have done and paid for everything in connection with the claim of which Mr. Seymour is now asking a share. They also protected it through litigation which involved a good deal of trouble and expense, Mr. Seymour all this time standing by and contributing and offering nothing. After the lapse of about a year and after the claim has been cleared of entanglements and apparently has turned out to be of value he now comes forward and wants an interest. I think it would be very unfair if in such circumstances he could be allowed to succeed. It is to be noted also that his long delay has resulted in the destruction of the evidence which would have thrown more satisfactory light upon the negotiations and agreement between himself and Pinnelle. Certainly such belated proceedings are not to be encouraged and I think the claim must in all the circumstances be dismissed.

(THE COMMISSIONER.)

RE SEYMOUR AND CASTER.

Working Conditions—Illness of Holder—Extension of Time—Forfeiture—Discovery—Costs.

In case of illness of the holder of the claim and in the other circumstances specified in sec. 80 (Act of 1908) the Recorder has power to extend the time for performing work upon a mining claim even after the time has expired; but this is a power which should be very sparingly exercised, and where another claim has intervened, only in very extreme cases if at all.

Proceedings by the disputant Robert F. Seymour to have mining claim M.R. 3704 held by the respondent Nellie E. Caster set aside and cancelled.

W. J. Hanley, for disputant.

Edward Gillies, for respondent.

6th October, 1909.

THE COMMISSIONER.—The disputant is asking to have the respondent's mining claim MR-3704 set aside and cancelled upon the grounds (1) that it covers lands previously staked as mining claim MR-719 of which he is the holder, and (2), that it is not based upon a discovery of valuable mineral.

It is admitted that the disputed claim is upon the same territory as the original claim 719, but the respondent contends that at the time 3704 was staked out and recorded 719 had been forfeited for lack of performance of the working conditions.

The evidence shows that Rogers, who procured or had to do with the staking out of the claim by one Madden in behalf of E. Livingstone, in whose name it was recorded and who subsequently transferred it to the respondent, knew at the time of staking that claim 719 covered the same land but he had procured from the recording office an abstract of 719 and that showed that at the time of staking the claim would in the ordinary course have become forfeited for lack of performance of work had no extension of time for performing the work been obtained from the Recorder, and the abstract and record of the claim in the Recording office showed no such extension.

Mr. Seymour the claimant swears that he obtained from Mr. Torrance in December or January before the time had expired an extension of the time and that he had spoken to Mr. Torrance on different other occasions about it and that Mr. Torrance told him his claim would be protected. Mr. Torrance during the month of February and also for a short time between the middle and end of January was ill in bed and there was during the time an extraordinary rush of business in his office which may account for the non-entry of the extension of time which Mr. Seymour says was granted him.

Claim 3704 was staked on the 17th of March and filed on the 18th of March, 1909, and the application reached the recording office at or about the time a change of Recorders and the opening up of a new recording office was being arranged and by mistake was received and recorded by Mr. Sheppard, who was Recorder for the Gowganda Mining Division, whereas the property was in the Montreal River Mining Division. Some time subsequently it was transferred to the proper division, Mr. Skill then being Recorder, and he not knowing and the application not showing that it covered claim 719 entered it up in the usual way, but made no note of it upon claim 719. On April 21st Mr. Seymour applied to Mr. Skill, producing a doctor's certificate of his illness, and procured an extension of time to 1st of July, and this was entered upon the record of claim 719 in the usual way and it was only subsequently when Mr. Seymour heard that his property had been restaked that the Recorder discovered that the claims conflicted.

I think under secs. 80 and 156 of the Act the Recorder has power to extend the time for performing work even after the time has expired, though this is a power which I think should be very sparingly exercised, and perhaps not at all or at all events only in a very extreme case where another claim has intervened. Neither Mr. Torrance nor Mr. Skill was called to give any statement or explanation of the facts or to contradict Mr. Seymour. That some conversation occurred between Mr. Seymour and Mr. Torrance regarding the extension of time or keeping the claim good I have no doubt, and I cannot upon the evidence find that what he says about it is incorrect. No appeal has been taken by the respondent against what either of the Recorders has done and in all the

circumstances I think I must hold that claim 719 is still a subsisting claim and in good standing.

Upon the second ground of attack against the disputant's claim—lack of discovery—I think I must upon the evidence find that this has also been sustained. The discovery post consisted of a tree cut off about 8 feet high and the evidence is that there was no exposure of rock within at least 8 or 10 feet of it at the time the claim was staked, and it appears that the staker was in fact depending upon a vein which was known to exist upon the property to the east and which he supposed would extend across to the property in question, the only workings near it on the claim in question being Seymour's. Work has since been performed on behalf of the respondent at or near the place in question which prevents me from having an inspection, but the height of the tree-post indicates, as is admitted, that the staking was done upon the snow, and it also indicates that the snow had not been cleared away near the tree or the cutting off would no doubt have been lower.

It is to be regretted that the holder of the disputed claim has expended considerable money in doing work upon the property which she will derive no benefit from. I think, however, that a little fuller disclosure by the stakers of the claim to the Recorder of what they were doing, and certainly mention of the fact in their application that the claim covered old claim or part of old claim 719, would have prevented the trouble.

I think upon the whole case I must allow the dispute and find that the claim should be cancelled. The disputant's object of course is to establish his own title to claim 719, and as he will to some extent derive benefit from the work that that has been performed by the respondent I will make no order for costs.

(THE COMMISSIONER.)

RE JACKSON AND BILLINGTON ET AL.

Estoppel—Mistake—Notice—Certificate that Interest in Question.

J. as a friend drew up a writing for B. and K. which all understood and intended to relate to another claim but which by mistake purported to deal with the claim in question, mentioning it as belonging to B.

Held that J. was not thereby estopped from enforcing his rights to the latter claim and that D., who, while the proceedings were pending and while a Certificate under sec. 77 (2) (Act of 1908) was on record, purchased from K., who had notice of J.'s rights, was not in any better position than K.

Proceedings by Vernon P. Jackson to establish an interest in mining claim M.R. 3818, recorded in the name of the respondent C. Billington and of which the respondent Thomas J. Dillon purchased a ¼ interest under the circumstances stated in the decision.

W. J. Hanley, for claimant.

J. J. Gray, for respondent.

13th October, 1909.

THE COMMISSIONER.—The claimant Jackson is seeking to establish his right to ownership of Mining Claim M.R. 3818. The claim was staked out and recorded in the name of the respondent Billington but an agreement in writing and under seal was executed between him and Jackson by which it was agreed that Jackson should be owner of this claim, Jackson at the same time releasing to Billington all claim to another property lying north of this one. The agreement, however, was not recorded. Billington subsequently for valuable consideration transferred a quarter interest in the claim to one Howson. Though this as I find was wrongfully done Howson's transfer was put upon record and as Howson appears to have been an innocent purchaser for value without notice the claimant at the hearing renounced any right to proceed against this quarter interest and the contest therefore is in respect of the remaining three quarters.

The respondent Dillon claims a one-quarter interest under a transfer made to him by one Kemp since the com-

mencement of the present proceedings and while a certificate under sec. 77 was in existence and noted on the record of the claim, which, under the statute, affects him with notice of the claimant's rights. His rights therefore cannot be greater than those of Kemp from whom he purchased but who had no recorded interest. The question of the Kemp interest will be dealt with later.

Upon the main issue—between Jackson and Billington—even apart from the agreement already mentioned, which I think is perfectly valid and binding and conclusive as to Jackson's rights, I think the story of Jackson is the more correct one and upon the whole the more consistent with the facts and circumstances shown. I think the understanding was from the beginning that he was to be entitled to an interest in the two claims staked and that the division was made by the agreement above mentioned upon Billington's request. Billington at all events received the claim which he admits he thought the more valuable of the two, and even upon his own story as to Jackson agreeing to help him with the work on the north claim, which I do not accept in the way he puts it, he was clearly not justified by anything that happened or that he alleges happened in summarily forfeiting Jackson's rights to the south claim, as the one in question was referred to. Billington says he told Kemp of the agreement with Jackson and that as Jackson had not helped with the work on the north claim as he had agreed he had therefore forfeited his rights in the south claim. Kemp was not called and I think I must find, though with some hesitation, that he had notice of Jackson's rights. The most serious question as to the Kemp interest is perhaps whether Jackson is estopped as against Kemp from denying Billington's ownership of M. R. 3818 by reason of an agreement which Jackson as a friend appears to have written out for the two to secure Kemp in a one-quarter interest of the proceeds of the claim which Kemp was to get for assisting Billington in doing the assessment work. The agreement purports to deal with M. R. 3818 and mentions and deals with it as belonging to B. but both Billington and Jackson say that this was a mistake in the number and that the north claim which Billington really did own was the one intended, and the circumstance that no similar agreement was drawn up for the north claim confirms this. As Kemp therefore knew and understood the circumstances I think there can

be no estoppel as regards him, and, as I have said, I think the respondent Dillon can be in no better position.

I must find therefore that the claimant is entitled to the three-quarter interest now standing upon record in Billington's name, subject, however, to a charge as agreed by the parties of $75 in favor of the respondent Dillon who advanced money for survey, and to a lien of $35 in favor of the respondent Billington for work done upon the claim, and I think the claimant should be allowed his costs against the respondent Billington, which I will fix at a limited lump sum ($50), and that no costs should be allowed to or against the respondent Dillon.

(THE COMMISSIONER.)

RE BALFOUR AND HYLANDS ET AL.

Working Conditions—Excessive Area—Altering Boundaries—Moving Posts—Certificate of Record—Evidence—Forest Reserve—Permission to Work—Disturbing Title—Disqualification.

Where on a claim in a forest reserve part of the work filed was done before permission to carry on mining operations had been received but additional work was done afterwards, whether enough or not did not appear, declaration of forfeiture was refused, the holder of the claim having acted in pursuance of the practice in the district, the attack on his claim not being made till long after the occurrence and being one that would disturb a large number of existing titles if it succeeded.

Staking more than the prescribed acreage will not, in the absence of fraud, invalidate the claim except as to the excess, and in any event a Certificate of Record would, in the absence of fraud or mistake, preclude attack upon this ground, the claim having with the permission of the Recorder been reduced to the proper size.

Removing No. 3 and No. 4 posts pursuant to the written permission of the Recorder, in order to reduce the claim to the proper size, will not cause forfeiture of the claim.

Proceedings by W. Douglas Balfour to have mining claim M.R. 1098 standing in the name of James Hylands, and his partners Gardner and Johnston, declared invalid and forfeited.

C. Millar, K.C., and *J. P. MacGregor*, for the claimant Balfour.

George Ross, for the respondents.

16th October, 1909.

THE COMMISSIONER.—The claimant Balfour is asking to have the mining claim of the respondents declared invalid

and forfeited and to have it cancelled, on the grounds of (1) lack of performance of the working conditions required by the Act, (2) having included in the original staking a greater area than that prescribed by the Act, and (3), changing the boundaries of the claim by moving the No. 3 and No. 4 posts. He also asks to have it declared that he is entitled to be recorded for the property under staking done since the date of the alleged forfeiture.

The claim in question was recorded on 11th July, 1908, the application describing the property as containing 40 acres as prescribed by the Act. It is in the Temagami Forest Reserve and pursuant to clause 5 of the Forest Reserve Regulations permission to perform mining operations upon it was given, as appears from the certified abstract of the claim, on the 18th of August, 1908. Thirty days work was recorded on 5th September, 1908. The size of the claim was reduced in December, 1908; the holders having obtained a survey of the claim and finding the acreage excessive, 72.4 acres being included within its boundaries, they (as I find, by the written permission of the Recorder obtained after explaining to him the situation) moved their No. 3 and No. 4 posts far enough easterly to reduce the claim to 37.4 acres. A certificate of record was granted on 29th April, 1909, and on 23rd August, 1909, 160 days further work was recorded.

The work in respect of which default is alleged is the 30 days of 8 hours each which under sec. 78 of the Act is required to be performed within three months after the claim has been recorded or within the further time which in this case would be allowed under sec. 79 (b). Balfour and his associate Rice, who is interested with him, swear that on the 11th or 12th of August, 1909, and on subsequent days they examined the property carefully with a view to ascertaining whether or not this work had been performed. Balfour swears that at that time not more than three days work of stripping and trenching had been done and not more than two days blasting or in all five days work. Rice swears that about two days work would cover the trenching and three days would cover all the work done on the property at the time they first examined it, and both say they examined it very closely and could not be mistaken.

For the respondents a large number of witnesses were called including Gardner, Johnston and Shields, by whom

the necessary work is claimed to have been performed. Gardner impressed me as a very intelligent and truthful witness. He states that he and Johnston and Shields commenced work on the property on the 26th of July, 1908, and continued working until they were sure that more than 30 days work had been performed, and he gives the particulars of what they did and where they did it. He says they then worked on three other claims that they had in the vicinity and that he and Johnston then came back to this property and worked for about another week upon it, after which he went to the recording office on 5th September, 1908, and recorded 30 days work on each of the four claims and also upon another claim upon which the work had been done before the staking of this one. Johnston and Shields in a general way corroborate Gardner as to performance of the work, but I cannot feel that very much reliance can be placed upon the accuracy of their statements, though probably neither desired to swear to what was untrue. Hylands says that when he was on the claim about the end of August he examined the work then done and estimated it at about 45 days, and he describes with some particularity the details of it. Two mining engineers, Hatch and Greener, say that they examined the property for the purpose of estimating the amount of work done at the time in question and that in their opinion about 50 days old work had been performed upon the claim, their estimates as to the amounts differing slightly. Both describe in detail the location and character of the work and they say it is quite possible to distinguish what was done at that time from what was done during the past summer. Asquith, another mining engineer, who had passed over the property a number of times during the summer of 1908, says he knew Gardner and Johnston were camped there and that some work was then done, the particulars of which he did not note.

I can have no doubt upon this evidence but that the 30 days work and more was in fact performed Though Balfour and Rice, who allege the contrary, may be credited with the honest belief that the 30 days work had not been performed, it would be impossible to accept their view as against the other evidence, and Balfour's evidence is somewhat weakened by the making of what I think was a reckless affidavit at the commencement of the present proceedings in which he swears that no trenching or stripping had been done

on the claim and that all the work done on it would not exceed three days at the most.

Upon the main issue therefore, as to the performance of the work, the claimant must fail. Counsel upon his behalf, however, contended that as sec. 44 of the Act requires mining operations in a forest reserve to be carried on in accordance with the regulations made under the Forest Reserves Act, and that as clause 5 of these regulations prohibits mining operations in a forest reserve until written permission has been obtained from the Minister, and that as such permission was not obtained in the present case until 18th August, 1908, after a large part of the work sworn to had already been done, the work so done cannot be regarded as a legal or efficacious performance of the working conditions which sec. 78 of the Act requires and for lack of which sec. 84 imposes a forfeiture of the claim and opens the property to other stakers.

It seems clear however that some 20 days work was performed after the granting of the permission on the 18th of August and before the recording of the work on the 5th of September (the men having worked over 12 hours a day while the statute calls for only 8 hours a day), and it may be that sufficient additional work was performed after the 5th of September and before the time allowed by secs. 78 (1) and 79 (b) had yet expired, to make up with that 20 days the 30 days which the Act requires. There is evidence that work was continued upon this claim, or upon some of the four claims, after the 5th of September, but there is nothing I think to warrant a specific finding in regard to the amount of it, nor is there any evidence to show what length of time elapsed between the asking and the granting of permission to work (this time being under sec. 79 (b) excluded), and thus nothing to show when the time for doing the work in question really expired. The deficiency at most, if the work done prior to the receiving of the permission were to be excluded, would be very slight and an extremely slender ground upon which to oust holders who as to these matters have, as I have no doubt, acted in good faith and without any intention of wilfully contravening the Act or the Forest Reserve Regulations and who have expended very considerable labor and expense upon the property. But even if it were demonstrated that the work performed would

be insufficient without including some of what had been performed, before the permission was received I do not think that in such a case as the present one the claim should be declared forfeited. Looking to the object for which the working conditions are provided and for which forfeiture for default is imposed, it is well understood that the object is to ensure the working and development of the property which has been taken up, and to prevent its being held in idleness or for merely speculative purposes. In the present case all and more than the requisite amount of work has in fact been actually performed within the time limited, and the purpose and spirit as well as the letter of the working condition requirements have been fully complied with, and so far as the provisions in question are concerned there could be no reasonable justification for declaring a forfeiture. The holders did, it would appear, commit a technical violation of the Forest Reserve Regulations. That it was no more than technical is shown by the fact that permission to work was in fact granted within a few days afterwards and it would therefore seem clear that no circumstances existed which would make the work injurious to forest reserve interests. Even technical transgressions should be avoided but the Forest Reserves Act makes provision for the enforcement of its own regulations, and the Mining Act also provides its own remedies in secs. 33 and 176 for cases of wilful contravention of its provisions. Forfeiture of the claim upon the ground alleged is not one of these. The matters which will entail forfeiture of a claim are collected and specifically set forth in sec. 84. Those who transgress the Forest Reserve Regulations are liable to the penalties provided and in the absence of express provision I think it would be unwarranted and inappropriate upon the grounds here contended for to construe a forfeiture of a claim. To do so would, as I have ascertained, disturb nearly half the mining titles in the forest reserve, where the claim in question is situate, as a practice had grown up in districts where permission to work was granted as a matter of course of proceeding with the work without waiting for the receipt of the formal permission, and where the conditions existed under which permission would be granted and that permission has subsequently been received I do not think at this late time the claim should be interfered with, and there must always be most serious objection to disturbing so great a number

of existing titles upon any but the most substantial grounds. I think the attack upon the claim in question in respect of the working conditions must fail upon all grounds.

The second ground of attack is the taking in upon the original staking of much more land than the Act prescribes —72 instead of 40 acres. The excess is very large but I think it was the result of carelessness and that no fraudulent intention existed in regard to it. Hylands, in whose name the claim was staked, was not present at the staking, the staking having been done in his behalf by Gardner and Johnston. Gardner says they made the measurements by pacing and tried to make the boundaries as near the required length as they could, reckoning that about 600 paces would make the requisite 1,320 feet. Johnston's version differs somewhat from this but I think Gardner's must be accepted as much the more accurate and reliable of the two. I think there would be much to be said in favor of preventing the respondents from staking or in any way acquiring an interest in the part that had been cut off as excess, and I think this would have been a proper condition to have been imposed by the Recorder as the terms upon which permission would be given to remove the posts. That question however does not arise in the present case. The authorities in other jurisdictions are to the effect that a claim which exceeds the dimensions prescribed by the law is not in the absence of fraud void or invalid except as to the excess. *Granger* v. *Fotheringham*, 3 B. C. 590; 1 *Martin's M. C.* 71; *Armstrong's Gold Mining in Australia and New Zealand* (2nd ed), 128; *Lindley on Mines* (2nd ed.), sec. 362; 27 Cyc. 561.

But I think in any event objection upon the ground in question is precluded by the issue of the certificate of record. Section 65 of the Act makes this conclusive evidence of the performance of all requirements of the Act except working conditions in respect of the mining claim up to the date of the certificate, and the claim is not thereafter liable to impeachment or forfeiture except as expressly provided by the Act, unless fraud or mistake can be shown, neither of which exists in the present case. The certificate of record was issued by the Recorder with knowledge of the facts and after the posts had with his permission been removed so as to reduce the size of the claim within the prescribed acreage. I think therefore this matter cannot now

be reopened. Section 57 was also referred to and it was argued that the staking of the excessive acreage caused disqualification under it and that such a disqualification was not one of the things protected by the certificate of record. I am unable to find however that any such disqualification resulted from what was done in the present case.

The remaining ground of attack was that forfeiture occurred under sec. 84 (b) by the removal of the posts in reducing the boundaries, it being contended that the removal was for an improper purpose within the meaning of that provision. I think it would be impossible however to hold that there was any improper purpose in the removal of the posts under the circumstances in which they were removed, nor does there appear to have been any fraud or deception in any way in connection with the removal.

I think the claimant's attack must be dismissed upon all grounds, and I think his own claim is without any substantial merit and that the dismissal should be with costs.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

1 O. W. N. 290.

RE PERKINS AND DOWLING ET AL.

Working Conditions—Forest Reserve—Permission to Work—Merits—Disturbing Existing Title—Certificate of Work—Conclusiveness of—Evidence—Appeal from Commissioner.

Where in a forest reserve the work filed had been done before permission had been received though after application for it had been made to the Recorder, who allowed the work to proceed, and the Recorder had with knowledge of the facts granted a certificate under sec. 78 (4) (Act of 1908) that the work had been performed to his satisfaction;

Held by the Commissioner that, upon these facts, and as the substantial merits of the case were all with the holders of the claim, and as a different ruling would disturb a very large number of titles, a declaration of forfeiture should be refused.

On appeal to the Divisional Court,

Held by the Court, quashing the appeal, that the decision of the Commissioner as to the due performance of the work was final and not subject to appeal.

Proceedings by the claimant Albert S. Perkins to have mining claim M. R. 1725 of the respondents Juan E. Dowl-

ing and Paul E. Newmann declared forfeited for lack of performance of the working conditions.

The claimant also asked, as the first count in his claim, to have the respondents' certificate of record revoked, but nothing turned upon this at the hearing. The certificate of performance of work (with which the certificate of record may have been confused) was, however, a factor in the case.

The facts are fully stated in the decision.

J. M. Laing, for claimant.

W. J. Hanley and *A. A. Fraser,* for respondents.

16th October, 1909.

THE COMMISSIONER.—The claimant Albert S. Perkins is asking to have the certificate of record of the respondents for the mining claim in question set aside and revoked and to have the claim declared forfeited for lack of performance of the requisite working conditions, the ground alleged in the notice of claim being that the work was not in reality performed though an affidavit of its performance was filed with the Recorder. At the hearing the claimant also set up the ground that at all events the work, if done, was performed before permission to do it was granted, the claim being in a forest reserve and the Forest Reserve Regulations requiring permission to be granted by the Minister before mining operations are performed, the abstract of claim showing that the work was recorded on the 11th of December, 1908, while permission to perform the work was not granted until 15th February, 1909.

The claimant also asks to have it declared that he is entitled to the property upon a restaking made by himself on the 18th of August, 1909. The staking was proved but no sufficient evidence was given that he had filed or tendered his application within the time required by the Act.

The claim in question was staked out by J. A. Munro on behalf of D. J. Munro on 30th October, 1908, and was recorded on 2nd November, 1908. On 28th November, 1908, it was transferred to J. E. Hammell. On 11th December 30 days work was recorded as already mentioned. On 31st December, 1908, an agreement between Hammell and the respondent Dowling was filed. On 11th January, 1909,

Hammell transferred all interest to the respondent Dowling with whom the respondent Newmann seems to be associated. On 15th February, 1909, permission to perform the assessment work was granted as already mentioned and on the same day a certificate of record was granted.

Evidence upon the main question—as to whether or not the 30 days work had in reality been performed—was gone into at great length. Perkins himself and his witnesses Pender, Bone and Sinclair swear that they travelled over the claim, some of them at different times, and examined it closely in order to ascertain whether the work had in reality been performed and they say it had not, some of them being very emphatic as to having thoroughly examined the property and that it was impossible that any work could have been done upon it. The work is alleged to have been performed in and about the month of November, 1908, and the examination of the witnesses mentioned was made in August and September, 1909. It is agreed upon all hands that fire at some time passed over the property, or a considerable part of it. Perkins and a number of the other witnesses were more or less positive that the fire was before the staking. If this were the case and no fire went over the property subsequently the evidence on behalf of the claimant would be more worthy of weight than if the reverse were the fact, for everyone familiar with such matters will admit that a serious fire passing over a claim does much to obliterate traces of work, especially when the work consists of stripping or light trenching as is claimed to have been the case here.

Munro, who staked the property and who swore in the work, swears positively that the work was in fact done. He states that he and his companions Wilson and Goulet staked out the claim and that fire had not been over it when it was staked out, nor until after the work had been performed, and that when back to the claim afterwards he found that two of his posts had been burned and that with the permission of the Recorder he renewed them. He says that after staking the claim on 30th October, 1908, he came out to record it on the 2nd of November, and when recording spoke to the Recorder about performance of the assessment work and that the Recorder told him that it would be alright to go on with the work as permission in that district would no doubt be granted. He says he returned to the property and with the assistance of his companions Wilson and Goulet

and three other men whom he hired he performed the requisite 30 days work on the claim in question and upon four other claims which had been staked out by him about the same time, spending about a month of more than the statutory 8 hour days in its performance. He gives the order in which the work was performed on the different claims and states with as much detail, I think, as could be expected after the lapse of so long a time the nature and location of the work which was performed. He says that he visited the property again recently and that evidences of the work are still to be seen, though the fire has since been over the claim. A number of other witnesses who have been on the property state that they have seen evidences of work though they have not made any exhaustive examination for the purpose of estimating the amount. Wilson and Goulet who I ascertained were in town at the time of the trial but whom neither of the parties appeared to desire to call were called at my own instance and both, though differing as to some points, corroborate Munro as to what took place and as to the fact that at least a very considerable amount of work was done upon the claim in question. Wilson is distinct that fire had not been over the claim at the time of staking or up to the time of performance of the work. He says fire occurred in the fall after the assessment work had been performed and while they were actually performing work on some other properties, and that another fire occurred last May, and Goulet says that he does not think there had been any fire over the claim until after the work upon it had been performed.

Upon the evidence it would be impossible to find that the work in question had not in fact been performed. I think it is quite possible that all or most of the witnesses on behalf of the claimant were speaking what they believed to be the truth when they said it had not been done, but some of them were unwarrantably positive about it. Even upon the theory upon which their opinion seemed to be based—that no fire had since been over the property—I think it was impossible to say with certainty from such examinations as they made that no work had been done, and I have no doubt that evidences of at least some work are still to be seen upon the property. The evidence on behalf of the claimant was undoubtedly *prima facie* sufficient and enough to throw the burden of answering it upon the holders of the claim, but

this burden I think has been met and satisfied. I think as a fact the fire occurred after the work had been done.

It remains to consider the question raised at the hearing as to the work having been performed before permission to do it had been given. That question is not raised in the claimant's particulars but I think I should not in any case give effect to it. The Recorder appears to have allowed the work to proceed and with knowledge of the facts accepted and recorded the report and affidvait of work which were filed, and with knowledge again of all the circumstances granted a certificate that the work in question had been performed to his satisfaction. Had this not been done, and had objection been taken at the time, the holders of the claim would no doubt have performed additional work while there was yet time within the limit allowed by the Act, and it would seem unfair now in the circumstances to allow the claim to be impeached upon the ground contended for. There is nothing, I think, requiring a declaration of forfeiture in such a case. The substantial merits are all with the holders of the claim. It is certainly not in the interests of mining that claims should be set aside upon technicalities or that what may be described as mining title should be lightly disturbed. By inquiry from the officials at the Department I have ascertained that a very large number of claims, probably 50 per cent. of those in the forest reserve, are in a similar position, and though it may be desirable that steps should be taken to prevent performance of the work in the future until formal permission has actually been received I think it would be most unwise and mischievous to have claims interfered with by reason of any defect or irregularity which has taken place with the knowledge and consent of the Crown officials, as in this case. How far the certificate of work granted by the Recorder may be conclusive, especially after the lapse of so long a time, I need not consider, but I may mention that no fraud or mistake has been shown in connection with the granting of it in the present case. I have discussed the question of working without permission more at length in the case of Balfour and Hylands.

Claim dismissed with costs.

The claimant Perkins filed an appeal from this decision to the Divisional Court.

R. A. Reid, for appellant.

J. M. Ferguson, for respondent.

20th December, 1909.

On the appeal coming on for hearing, objection was taken on behalf of the respondent that no appeal lay, sec. 78 (4) of the Act making the decision of the Commissioner in regard to the performance of work final.

The Court, (MEREDITH, C.J., TEETZEL, J., SUTHERLAND, J.), upheld the objection and dismissed the appeal.

NOTE.—The question of the conclusiveness of the Recorder's Certificate of Performance of work under s. 78 (4) (Form 16) (Act of 1908) is not directly dealt with in this case. This certificate should not be confused with a Certificate of Record under s. 64 (Form 10). They cover entirely different matters. The Certificate of Record has nothing to do with the question of working conditions; see s. 65.

By amendment made to s. 78 in 1910 (Statute Law Amendment Act, s. 45 (3)) a Certificate of Performance of work, as to its conclusiveness and as to its revocation, is now put upon the same footing as a Certificate of Record. Cf. ss. 65, 66.

The amendment also states more clearly than the former section the law as laid down by the Divisional Court as to the finality of the Commissioner's decision upon the question of the due performance of work.

(THE COMMISSIONER.)

RE LIBBY AND ELLIS.

Prospecting Partnership—Duration of—Claims Restaked—Estoppel—Delay in Bringing Proceedings.

In the absence of agreement to or circumstances indicating the contrary, a prospecting partnership terminates with the expedition undertaken and leaves the parties merely co-holders of the claims acquired.

Where L. and E. staked out two claims, both of which turned out invalid and were cancelled or lapsed, and E. alone subsequently restaked the same lands and acquired rights therefrom and maintained and protected them solely by his own labor and money, a claim to an interest set up by L. two years later was dismissed.

Proceedings by D. A. Libby to establish an interest in mining claims 9262 and 9447 in the township of James, standing in the name of the respondent William G. Ellis.

G. T. Ware, for claimant.

J. E. Day, for respondent.

18th October, 1909.

THE COMMISSIONER.—The claimant Libby is seeking to enforce claim to an interest in the two mining claims in question, which have been staked out and recorded by and in the name of the respondent Ellis. The same property had previously been staked out by Ellis while he and Libby were partners in an expedition to the district in which they and others took part in March, 1907. What is referred to as the southerly claim was then staked and recorded in the name of one Hume who on the 28th of March, 1907, transferred it to Ellis, and what is referred to as the northerly claim was staked and recorded in the name of the claimant Libby.

On 30th July, 1907, the southerly claim was restaked by Ellis in his own name by reason of its having been found that the discovery upon which the original staking was based was outside its boundaries. Ellis made a new discovery within the limits of the claim and staked and recorded upon this. It is upon the restaking that this claim is now held, for the original staking was invalid and would besides be forfeited for failure to record the requisite work upon it.

The original staking of the northerly claim was cancelled by the Recorder on 24th August, 1907, for lack of discovery, and the property was on the 27th day of August, 1907, restaked by Ellis in his own name.

The claimant asks to be declared entitled to an equal interest with Ellis in these restakings.

The stories of the two parties are directly in conflict upon many points. Though the respondent in his anxiety to explain or justify what he feared might be considered hardly an honorable act in restaking for himself the northerly claim rather exaggerated, as I think, the part played by what was referred to as the copper proposition, I think on the whole his story is the more accurate and reliable of the two. The burden is upon the claimant and I think he has failed to establish a case sufficient to take away from the respondent what is now and has been for more than two years past recorded and standing in the latter's name.

It is not disputed that in the expedition in March, 1907, Ellis and Libby were to be equally interested in what was acquired, whether as co-owners in all the claims acquired or

by way of an equal division of claims does not appear to have been at the commencement mentioned or agreed upon. Ellis says that at the time of the recording it was agreed that the northerly claim should be Libby's, it having been staked in his name, and that the southerly claim, which was staked in one Hume's name, was to belong to him. The southerly claim was in fact transferred to Ellis on 28th March, 1907. Libby admits that at a later time there was talk of this division of claims but he says he did not consent to it, though it is plain even from his own story that he did not express any objection to it. The evidence is clear that Libby himself on occasions when speaking of the claims recognized this division of them, and even in his evidence before me he referred to some work which he did on the southerly claim as having been done for Ellis. Two letters written by Ellis to Libby in June, 1907, urging Libby to come up and assist with the assessment work seem rather to indicate a co-ownership, but they are not explicit and they are perhaps sufficiently explained by the fact that, as Ellis states, he and Libby had agreed previously to go up and do their work together. Though each worked to a small extent upon the other's claim the bulk of the work was in fact done by Ellis and it was only a trifling assistance that Libby gave him upon the south claim, Libby working for the most part on the north claim. This is of course unimportant except in so far as it may throw light on the relations existing between them regarding the properties in question. Ellis says that from the time of recording each had his own claim and that this condition of things was recognized and acted upon between them in all transactions relating to the property, and in this he is corroborated by Stanley Ellis and Libby's own conduct and admissions. Ellis states also that he told Libby in August after the latter had shown so little interest or energy in looking after his property, that he intended to restake it for himself if he could.

In prospecting enterprises, such as that engaged in by Libby and Ellis upon the original staking of the claims in question, the authorities are strong to the effect that the relationship between the parties is not a general or continuing partnership in connection with the claims but that the partnership, so far as it can be called a partnership at all, terminates with the expedition agreed on and results merely in the ownership of the property acquired, the presumption be-

ing against the continuance of the partnership for the purpose of working or otherwise dealing with the property; *McPherson and Clark, Law of Mines*, 44; *Lindley on Mines* (2nd ed.), s. 858; *Bainbridge on Mines* (5th ed.), 188; 27 Cyc. 756, 757; *Armstrong's Gold Mining in Australia and New Zealand* (2nd ed.), 213, 214; *Alexander* v. *Heath*, 8 B. C. 95, 1 Martin's M. C. 333; *Stewart* v. *Nelson* (1895), 15 N. Z. L. R. 637; *Hartney* v. *Gosling*, 10 Wyo. 346, 68 Pac. 118, 22 Morrison's M. R. 239; *Boucher* v. *Mulverhill*, 1 Mont. 306, 12 Morrison's M. R. 350. In the present case I think the partnership, if it can be called one, ended with the expedition upon which the claims were originally staked. The parties were afterwards merely owners in what had been acquired, and I am inclined to think it is not material whether it was a co-ownership in each of the two claims or an individual ownership of each party in one claim, though by what happened I think Libby might fairly be held to be estopped by his conduct from disputing the latter. The original stakings or acquisitions, however, are no longer in existence. They have lapsed or been cancelled or superseded by circumstances for which I think neither party is responsible to the other. The property was as open to restaking by outsiders as it was to restaking by the parties who did the original staking. In the staking or recording itself there is no merit. It is the discovery which is the chief consideration for the Crown grant, and in making the discoveries upon which the claims in question are now held the original expedition of the parties in March played no part. As Ellis was the discoverer in both cases and as I think I must find that there was nothing in the circumstances or in the relation between himself and Libby and nothing in any way agreed upon between them requiring him to protect the claim for his former associate or allow the latter any newly acquired interest in them I think Ellis must be held absolutely entitled under the restakings. The cases of *Page* v. *Summers*, 70 Cal. 121, 20 Pac. 120, 15 Morrison's M. R. 617, and *Perry* v. *Morton*, Argus, Nov. 20, (1868), (cited and discussed in *Armstrong's Gold Mining in Australia and New Zealand* (2nd ed.), 214, and *McPherson and Clark, Law of Mines*, 62), support this view. The case of *Burn* v. *Strong*, 14 Grant 651 cited in behalf of the claimant is not I think in conflict with these authorities but turns upon a different set of facts. In that case it was held that three associates

who had agreed to share in the ownership of one claim to the acquisition of which two of them were contributing their labor in work upon the claim and the third money to meet expenses, were similarly interested in another claim to which they had all subsequently transferred their operations and to which they had devoted their labor and money in the same way. The ground of the decision was that similar contribution to the new enterprise implied a continuance of the terms as to sharing in its results. In the present case the claimant Libby has contributed nothing to the stakings or titles under which the claims are now held. Neither in the making of the discoveries upon which the present title is based, nor in the staking out or recording of the claims, nor in doing any subsequent work upon them can I find that he has contributed anything. All that he did in connection with them was under and for the benefit of the original stakings and applications which resulted in nothing and are no longer in existence. Had it not been for Ellis and his industry and activity I have no doubt both claims would now be in the hands of strangers. Libby also was very dilatory in commencing his present proceedings, about two years having elapsed since the stakings by Ellis before any step was taken to enforce his claim, Ellis meanwhile being permitted to perform the required assessment work and do whatever was necessary to hold the property. Such belated proceedings should not be encouraged and I think upon the whole case the claim should be dismissed.

(THE COMMISSIONER.)

RE BILSKY AND RIBBLE.

Employer and Employee—Employee Staking for Another Person—Interest in Claim.

F. was in the employment of B.; R. in ignorance of this employed F. to stake out a claim upon land which R. previously knew of and desired to acquire, F. being paid by R. in money and getting no interest in the claim.

Held that B. was not entitled to any interest in the claim, his remedy being against F. personally for breach of contract or money received to his use.

Appeal by A. M. Bilsky from the decision of the Recorder dismissing his claim to mining claim M.R. 1866 staked out and recorded in the name of Gussie Ribble.

W. D. Henry, for appellant.

W. J. Hanley, for respondent.

18th October, 1909.

THE COMMISSIONER.—The appellant is seeking to enforce a claim to a mining claim which was staked out by one Jesse Farewell in behalf of the respondent and is appealing from the decision of the Mining Recorder dismissing his claim.

The facts are that the respondent's husband having been told by a friend of the property in question and that it would be desirable to acquire it, procured a license for the respondent and in her behalf employed Farewell to go out and stake the claim, Farewell being paid $10 for the job, which was furnished by the respondent in whose name the claim was staked and recorded. The respondent's husband is the keeper of an hotel at Elk Lake and Farewell usually put up at this hotel when at Elk Lake and it was on one of these occasions that Mr. Ribble saw him and employed him to stake the claim. Farewell was as a fact at the time under employment with the appellant Bilsky at $100 per month, for the purpose of doing assessment work upon properties in which the appellant was interested, Farewell being himself interested in some of the same properties, and Ribble being also interested in them to a small extent. The respondent knew nothing of Farewell's employment with Bilsky, and both her husband and Farewell swear that the husband knew nothing about it at the time. Though it seems somewhat strange that Farewell and Ribble should not have talked over the matter of the work that was being done upon properties in which both of them were interested it is not impossible that they did not do so. Ribble was undoubtedly exceedingly busy in his other business at the time, it being an unusually busy time in that region, and this may explain the lack of discussion of the affair with Farewell. Ribble swears as I have said that he did not in fact know of Farewell's employment with Bilsky and there was certainly nothing in his demeanor as a witness to justify me in disbelieving his evidence and I must find as a fact that he did not know of it. The appellant attempted to establish that the duties for which Farewell was employed particularly included the staking and acquisition of claims but I think nothing was stated at the time of his hiring, which was verbal in regard to anything but the performance of the assessment work. A subsequent agreement in writing

was drawn up on the 19th of December under which Farewell was employed to prospect for the appellant, which indicates that this was an agreement of a different nature from the original hiring, though I am not sure that this difference would be material to the present case. Bilsky was no doubt entitled under the first agreement to Farewell's time. According to Farewell's evidence he was at the time of staking out the claim waiting for favorable weather to go to Gowganda and he claims, or suggests, that his employer had not suffered by the time he spent in staking the claim. However this may be I think it would be impossible to hold that the claim which he staked belongs to the appellant. The respondent and her husband, and not Farewell, were the cause of the staking out of the claim and had it not been for them there is nothing to suggest that it would ever have been staked out, and had they not been able to procure Farewell to do the staking no doubt they would have procured some one else, and it would seem altogether unjust to them to hold that because Farewell without their knowledge happened to be employed with another man the ownership of the claim should revert to the latter. The appellant's remedy in the circumstances must be against Farewell for breach of contract or for money received to his use. The evidence is clear that Farewell was to receive and has received no interest whatever in the claim himself, and I can see no ground upon which the appellant could have any.

Appeal dismissed with costs.

(THE COMMISSIONER.)

RE LESLIE ET AL. AND MAHAFFY.

Working Conditions—Forfeiture—Failure to Perform Work—Failure to File Report of Work—Distinction Between—Cancelling Claim—Recording New Staking—Duties of Recorder—Evidence—Costs.

If work upon a claim has been done but report of it has not been filed, forfeiture does not occur until the 10 days allowed for filing (in addition to the time allowed for doing the work) have expired.

Until the lapse of the 10 days it is not to be presumed that the work has not been done and a new staking (though the applicant may insist upon filing it) should not be recorded until the 10 days have expired, unless the Recorder, after investigation (of which notice should be given to the holder of the claim) finds that the work has not in fact been performed.

But where there has been failure to file the report of work as the Act requires the Recorder will have knowledge of that from his own records and should act upon that knowledge and cancel the old claim and record the new one (if otherwise regular) accordingly.

Where the evidence was such that it would be impossible to find that the work recorded had not been performed and an inspection could not in the circumstances be hoped to give any information conclusive enough to warrant a declaration of forfeiture, inspection was refused and the case dismissed.

Claim by Frank Leslie and Ernest E. Campsall to have mining claim 11862 in the township of Lorrain, recorded in the name of George Mahaffy, declared forfeited for failure to perform the working conditions.

A. G. Slaght, for claimants.

J. W. Mahon, for respondent.

12th November, 1909.

THE COMMISSIONER.—This is a matter in which both parties are claiming to be entitled to the property in question. Three applications for a mining claim have been filed from time to time upon the property by the claimants—two of which have been cancelled and the third or last of which, though filed, has not been recorded—and one application has been filed by the respondent. The application of the respondent is the only one now on record, and the question of its forfeiture or nonforfeiture for lack of performance of the requisite working conditions is, as the matter now stands, the only point in issue.

This application—number 11862—was recorded on 30th November, 1908. Proof of performance of work upon it was

not filed until 8th March, 1909, this being after the time for performance of the first 30 days work required by the Act had expired but still within the time allowed by sec. 78 (3) for filing the proof. The Recorder had meanwhile on 2nd of March put upon record an application on behalf of the claimant Campsall the staking for which was done on that day. The Recorder, who gave evidence at the hearing, expressed some doubt as to whether it was proper for him to put this application upon record while the 10 days for filing the work upon the respondent's claim had not yet expired, and I think it was not. While in the circumstances he should, in conformity with sec. 62 (2), if desired, have received and filed the Campsall claim he should not, at all events until after the expiry of the ten days, have put it upon record.

Sec. 84, which governs the matter, provides that all the interest of a holder of a mining claim shall cease and the claim be forthwith open for prospecting and staking out if (among other things)—

> The prescribed work is not duly performed; or
>
> The report and affidavit of its performance is not deposited with the Recorder within the ten days above mentioned.

Each and either of these things is made a cause of forfeiture. If the work has not in fact been done forfeiture will occur at the expiration of the three months; if it has been done, but proof is not filed forfeiture will not occur until the expiration of ten days from the end of the three months.

If the Recorder had legal and convincing evidence on the 2nd of March that the work for the former claim had not in fact been performed he would in that event have been justified in cancelling that claim and recording the new one. But this, it is clear, he did not have, nor in such circumstances would it seem proper to accept any evidence as conclusive without giving the holder of the existing claim an opportunity to be heard. The filing or non-filing of the report and affidavit of the performance of the work on the other hand is a matter within the Recorder's own cognizance, and if such filing has not been done within the time allowed for it the Recorder's records will show this fact, and the Recorder is justified in acting and should act upon it, and a

new claim staked out upon the property after such default should be recorded as well as filed (the restaker, of course, in such a case running the risk of the former staker remedying his default in filing a report of work, in the way provided in sec. 85 (1) (b), as in fact a restaker in other cases or in all cases must take the risk of the old claim being restored by extension of the time for performing the work, under secs. 80 and 156, or by relief from forfeiture, under secs. 85 (2) or 86. Forfeiture takes place by reason of failure to file the report and affidavit of work without regard to whether or not the work had in reality been performed. Until, however, the 10 days allowed for filing the report have elapsed it is not to be presumed that the work has not been performed, and, though forfeiture for lack of performance of it may have occurred, the Recorder, so far as his records go, has no evidence of it.

The dispute in the present case, however, as is admitted, turns solely upon the question whether or not the 30 days work had in fact been performed within 3 months from the recording of the respondent's application. If it had not it is not disputed that the claimants would be entitled to be recorded for the property; if it had there would be no sufficient ground for attacking the respondent's claim. . . .

Several witnesses swore that they had examined the property at different times and were unable to find any trace of work having been performed upon the respondent's behalf. The only work which they said they could see was that performed by the claimants under their own earlier staking and application, which, after performing a very considerable amount of work, they unfortunately as it seems by lack of information as to the law inadvertantly allowed to lapse for lack of performance of the working conditions. These witnesses say they are satisfied that the work could not have been done on behalf of the respondent or they would have seen some trace of it.

Upon the respondent's behalf the witness Bowrey, who originally staked the claim, swears that he took two men, Thomas and Diffey, down to the property about the end of January or beginning of February and showed them where to pitch their camp and where to work, and that twice afterwards he visited the place and saw where they had been working and was satisfied that they had performed the work. These men are at present absent in the west (though their

address has been given) and their evidence could not without much expense be obtained. An affidavit from one of them alleged to be in proof of the performance of the work had to be rejected. That they were actually employed and paid to do this work there can be no question. In this Bowrey is corroborated by Mahaffy, who produced a number of cheques and receipts and statements showing that the men had been employed and had been paid considerable sums of money, part of which at least related to the property in question.

The work, done as it was in the winter time and confined to the part of the property upon which there was little or no soil, might as alleged, leave little trace, 30 days work not being a very large amount upon a property of forty acres. Though I am satisfied the claimants and their witnesses believed the work had not in fact been performed, I think the witnesses for the respondent are entitled to equal credit for truthfulness and honesty in what they assert, and upon the whole case it would be quite impossible for me to find that the work had not been performed, nor do I think an inspection of the property could in the circumstances be hoped to give any information conclusive enough to warrant a declaration of forfeiture for lack of performance of the working conditions.

The case must, therefore, be dismissed, but as the claimants have done considerable work upon the property, from which the respondent may derive benefit, and as the claimants, as I have no doubt, acted in the matter in good faith, I will make no order for costs.

(THE COMMISSIONER.)

RE WALDIE AND MATTHEWMAN ET AL.

Conflicting Claims — Identifying Land Staked—Survey—Effect of—Evidence—Inaccuracy in "Tying."

A claimant seeking to set aside another claim as subsequent to and overlapping his own cannot make out a case or establish title to the disputed territory by mere production of a survey including the disputed territory as part of his claim.

Where it was shown that the surveyor for the first claimant made his survey without any investigation or examination of the records at the recording office and located his lines without any proper warranty for placing them where he did, the survey was rejected, and a survey made for an opposing claimant which was shown to be in accordance with the latter's staking was confirmed.

Claim by James L. Waldie to establish the boundaries of his mining claim No. 1049, as extending over part of the subsequent claim, No. 2323, of George P. Matthewman and the Ottawa Gowganda Mining Co., Ltd.

A. A. Fraser, for Waldie.

J. Lorn McDougall, for respondents.

21st December, 1909.

THE COMMISSIONER.—The claimant, James L. Waldie, is asking for an order confirming the boundaries of mining claim MR-1049 as shown in his plan of survey filed, and for a declaration that the respondents' mining claim MR-2323 is illegal to the extent to which it overlaps the said survey. A triangular piece of ground containing some five or six acres is included in the survey of both claims, being at the west end of what has been surveyed as MR-1049 and at the east end of what has been surveyed as MR-2323.

Certificates of record have been issued for both claims, the Recorder apparently being at the time unaware that they conflicted or that there was any dispute. Claim 1049 is the earlier in date, having been staked 2nd July, 1908, and was also the first to obtain a certificate of record, which was issued April 20th, 1909. Claim 2323 was staked 7th January, 1909, and certificate of record was issued for it 24th June, 1909. A survey of 2323 was obtained in February, 1909, and a survey of 1049, or what purports to be a survey of 1049, was obtained in March, 1909.

The sole question as the matter presents itself to me is to determine what lands were really staked out and recorded as the claim in question.

Counsel for the claimant sought to make out his case by merely producing the records showing the priority of claim 1049 and producing the survey which the claimant's predecessor in title caused to be made and filed with the Department, but I cannot accede to the contention that title can be established by the mere production of a survey purporting to include the claimant's property, and in this case a comparison of the surveyor's plan with the application and sketch or plan filed by the original staker showed that it was impossible to identify the two as covering the same land. In fact the original application and sketch or plan filed when the claim was taken up show a property very different in

form and dimensions and different in location from that included in the survey. The surveyor was called as a witness, and his evidence discloses that he made the survey at the request of one Ranger who was at one time owner of the claim but who was not according to the application either the original staker or the person for whom it was staked. Though knowing before he went out that there was a dispute or question regarding the correct boundaries, the surveyor made no examination of the original application and sketch or plan of the claim or apparently any other inquiry or investigation at the recording office, and though unable to find any of the original posts except the No. 1 and No. 3, and unable to find any name or marks upon the No. 1 or No. 3 to identify to whom they belonged, he proceeded to lay out the claim and run the lines according to what Ranger told him, planting his No. 4 post, which caused the conflict with claim 2323, at a point where Ranger told him the old post had been. The absence of the old post is accounted for, or endeavored to be accounted for, by the fact that fire had passed over the property.

It would seem extraordinary indeed if a survey made as this one was could establish the rights of a claimant in a piece of property. The survey in fact included the triangular piece before mentioned, which had already been included in the survey of claim 2323. It does not seem from the surveyor's statement that any line at all existed prior to his survey between where Ranger told him the old No. 4 post had been, and where they found the No. 3 post which was assumed to belong to the Ranger claim. The direction of this line instead of being in the proper and usual direction of lines between No. 3 and No. 4 posts—north and south—was considerably nearer to being east and west. The form of the whole claim as surveyed, is a very unlikely and unusual one, the westerly angle being a very sharp point, though, of course, it is possible this might be accounted for by the fact that it was what is commonly referred to as a fraction, being a piece of territory remaining between other claims that had previously been staked out. As to this, however, it must be pointed out that the original application and sketch or plan for the claim do not describe it as a fraction, but as a regular claim in the form of a square twenty chains to a side.

The claimant therefore to my mind utterly fails to make out a case to any right or ownership in the piece of land in dispute.

The respondents' witnesses and surveyor, however, being present, I thought better in order thoroughly to clear up the matter if possible, to hear their evidence.

Young, who staked the claim on behalf of Matthewman, was called and described his staking, and his evidence and the evidence of the surveyor of the Matthewman claim satisfies me that the survey that has been made of claim 2323 is a correct survey of the property that was staked and recorded by Young for Matthewman, though the original application and sketch or plan filed for that, while being as to form and dimensions much more nearly accurate than those for claim 1049, do not correctly show the position of the claim, or, as prospectors would describe it, the claim is not accurately "tied," the claims represented as being east of it not being really in that position; but the identification of the stakes and the real situation of the property being shown to my satisfaction I do not think the mistake in tying the claim should be held to invalidate it.

I may mention that the location shown by the original application and sketch or plan of 1049 would be entirely to the east of any of the property now claimed to be included in it while that of claim 2323 would be a considerable distance to the west. This, perhaps, may explain the issue of certificates of record by the Recorder to both parties though the lands which they are contending for really overlap.

I can have no hesitation in dismissing the claim, and I must find that the claimant has no right or title in any of the land included in the survey of claim M.R. 2323, otherwise known as H.S. 498, and I think costs should follow the result.

(THE COMMISSIONER.)

RE MILNE AND DRYNAN ET AL.

Lands Open — Abandonment — The Cashman Case—Parties—Discovery; Original or Adopted—Working Conditions—Costs.

Insufficiency of staking works an abandonment of a claim and leaves the lands open to be staked by another licensee.

Where the evidence was not satisfactory that M. had merely adopted an existing discovery and it was shown that the licensee who had made the former discoveries assisted him in his staking an attack on M.'s claim for lack of original discovery was dismissed.

Proceedings to determine the rights of William Milne, George Drynan and Robert F. Seymour under their respective applications for mining claims upon the N. E. ¼ of the N. ½ of lot 6, in the 5th concession of James.

A. G. Slaght, for Milne.

S. White, K.C., for Drynan.

22nd December, 1909.

THE COMMISSIONER.—The matter to be determined in the present proceeding is the validity of the respective mining claim applications of Milne, Drynan and Seymour.

The Milne application is the prior one in date, being based upon discovery and staking of 4th March, 1908, and having been filed with the Recorder on 6th March, 1908, recording being at the time refused by reason of the existence upon the same property of an application of one Gamble which has since been found to have been invalid by reason of insufficient staking.

The Drynan application is based upon discovery and staking of 29th May, 1908, the application being filed and recorded on 30th May, 1908.

The Seymour application is based upon alleged discovery and staking of 26th August, 1908, and was filed with the Recorder on or about 4th September, 1908, but not recorded.

At the present hearing Milne and Drynan were both represented but no one appeared on behalf of Seymour, though I find that he was duly served with the appointment for the hearing.

The present peculiar position of having Drynan, whose discovery and staking are subsequent in date to Milne's, upon record, while the prior Milne discovery and staking are not upon record but merely upon file, arises from the fact that in the dispute between Milne and Gamble in regard to the

Gamble application already mentioned, the Recorder instead of putting the Milne application upon record upon the cancellation of the Gamble application declared the property open. On appeal to the Commissioner this decision was sustained, following what then appeared to be the opinion of the Divisional Court, especially the judgment of Mr. Justice Britton, in the case of *Re Cashman and the Cobalt and James Mines, Ltd.* (*ante*)—that insufficiency of a staking did not under the Act work such an abandonment of a claim as to leave the property open to another staking. That an insufficient staking did under sec. 166 of the Act as it was in 1906 and 1907, and does under sec. 83 of the present Act, leave the property open to a subsequent staking is now well established and has been given effect to by the Divisional Court, Mr. Justice Britton concurring, in the appeal of Milne from the ruling of the Commissioner and the ruling of the Recorder in the case referred to, and I think there can be no doubt that this is a correct interpretation of the law, and it was the interpretation I had followed prior to the decision of the Divisional Court in the *Cashman case*. The Divisional Court therefore upon the appeal (*Re Milne and Gamble, ante*), remitted the question of the validity of the Milne application to me for retrial. I had also stated in my decision that I did not think the Milne appeal could in any event be allowed without making Drynan or other subsequent stakers who had restaked the property after the Recorder had declared it open, parties to the proceeding, and upon the case being remitted to me I directed that these subsequent applicants should be served with the appointment, which was done, Drynan appearing but Seymour, as already mentioned, not appearing at the hearing.

The first point to be determined is whether or not the Milne application is a valid one.

Upon the evidence before me I find that Milne in fact made a discovery of valuable mineral and duly staked out the property in accordance with the Act on the 4th of March, 1908, and duly filed his application for a mining claim on 6th March, 1908, there being at the time as I am satisfied no other staking or claim upon the property to prevent a valid staking—the Gamble claim having been an abandoned claim within the meaning of the Act and there being no evidence of any other subsisting staking upon the property.

Some objection was raised on the ground that the Milne discovery was not in reality an original or bona fide discovery of valuable mineral but I think the circumstances here are easily distinguishable from cases in which it has been held that a licensee could not adopt a discovery which had been made by another licensee adverse in interest who was still claiming rights under it. I am not satisfied that Milne in fact merely adopted an existing discovery, but at all events Boyle and Doyle, who had made the former discoveries were in company with him at the time he staked out his claim and assisted him in the work, and I think it would be carrying the theory of original discovery very far indeed to hold that in the circumstances of the present case Milne was not entitled to be credited with the discovery upon which he has filed his application.

The application being valid and the discovery and staking upon which it is based being long prior to the Drynan and Seymour applications and stakings Milne must be held, so far as the validity of his staking and application is concerned entitled to the property and entitled to have his application recorded upon it.

I think, however, that the Drynan staking and application are at all events invalid by reason of the existence of the Milne staking and application upon the property at the time the Drynan staking was done. The Milne staking and application being valid and regular the lands would not when Drynan staked on the 29th of May, 1908, be open to staking out, and it follows that Drynan can have no valid claim upon the property under his application.

I find as a fact that Milne has not performed or filed proof of any work upon the claim since he staked it out but I do not think I should in the circumstances hold the claim to be on that account forfeited. The Recorder, under sec. 80 of the Act, has powers of dealing with the question of work which are not given to me, and though the claimant has been somewhat dilatory in bringing the present matter to a hearing it would seem to be a case where if an extension is necessary it should be made.

As Drynan apparently in good faith staked out and recorded the claim and performed a considerable amount of work upon it, from which Milne will no doubt derive some benefit, and as some of this would probably not have been performed if the case had been brought to hearing more promptly I think it is not a case for costs.

Order accordingly.

(THE COMMISSIONER.)

(THE DIVISIONAL COURT.)

(1 O. W. N. 545.)

RE SMITH AND MILLAR.

Agreement or Option for Purchase — Lapse of — Cancellation from Record of Claim—Recorder Acting Ex Parte—Appeal—Decision on Merits—Retrial—Adjournment.

S. had obtained from M. an agreement or option for purchase of 3 mining claims, and recorded it, and the Recorder noted it on the records of the claims. On failure of S. to pay deposits into the bank as the agreement or option required, M. applied *ex parte* to the Recorder who, on proof of the default, cancelled the noting on the record of the claims. S. appealed to the Commissioner who, pursuant to appointment, after refusing a request on behalf of the appellant for an adjournment for which no cause was shown, heard evidence, and finding S. had no longer any right under the agreement or option dismissed the appeal on the merits. On appeal to the Divisional Court a retrial before the Commissioner was granted on condition that the appellant should pay into Court the instalments in default. (See note to this case).

Appeal by J. A. Smith from the decision or act of the Recorder in cancelling the entry of his agreement or option for purchase on the records of mining claims 13218, 13219 and 13220 belonging to the respondent J. W. Millar.

The agreement or option provided that the appellant should be entitled to purchase the claims for $100,000, payable in four equal instalments of $25,000 each, the first of which was to be paid into the bank on 8th December, 1909. The time for making the first payment was extended by subsequent agreement to 8th January, 1910. The payment was not made and the respondent, after the time for making it had elapsed, applied with proof of the default and the lapse to the Recorder who, *ex parte*, cancelled the note of the agreement or option that had been entered upon the records of the claims and notified the appellant of the cancellation.

Appeal was made to the Commissioner, who, upon the application of the respondent, issued an appointment for 9th February, 1910, the appointment being in the form used for a retrial and containing a notification to the parties that they were required to be in attendance at the time and place mentioned with such witnesses and evidence as they might desire to submit. The appointment was served on 1st February.

At the time appointed counsel for the appellant asked an adjournment, stating that his client was not ready to go on

with the appeal, neither he nor his witnesses being present. No reasons were given or suggested, except that the appellant had notified the respondent's solicitor the day before that he would request the adjournment.

The Commissioner refused the adjournment, and counsel for the appellant proceeded with the appeal, calling the respondent as a witness and putting in the documents relating to the matter and going into the merits of the case.

J. McNairn Hall, for appellant.

G. M. Clark and *W. A. Gordon,* for respondent.

11th February, 1910.

THE COMMISSIONER.—After carefully perusing and considering the agreement or option and the extension thereof and the other evidence, I am satisfied the appellant has no claim or interest in the property nor any right to enforce the said agreement or option, and the appeal must therefore be dismissed with costs.

From this decision the appellant appealed to the Divisional Court.

O. E. Fleming, K.C., for appellant.

G. M. Clark, for respondent.

The Court (BOYD, C., MAGEE, J., and LATCHFORD, J.), on 17th March, 1910, ordered that, upon the appellant paying into Court within four days the two overdue instalments of $25,000 each, with interest, the decision of the Commissioner should be set aside and the matter remitted to him for retrial, the costs of the appeal to be in the discretion of the Commissioner; in default of such payment the appeal to be dismissed with costs.

No written reasons for the decision were given and no verbatim report is available. The reasons, as reported by counsel, were that as the Recorder should not have acted without notice to the appellant (as was conceded at both hearings) the Commissioner should have remitted the case to the Recorder and not dealt with it himself upon the merits; the Court stating that notwithstanding the appellant's

default before the Commissioner he should be given another opportunity to have his case heard; that he had a right to assume, when he served his notice of appeal, that the only matter that would come before the Commissioner would be the regularity of the proceedings of the Recorder, and that he was entitled to assume that by reason of the lack of notice the Recorder would not be upheld, and that the matter would be sent back to him for re-adjudication.

NOTE.—Section 155 of the Act (1908) (which does not appear to have been referred to in this case) provides that proceedings before the Commissioner or Recorder shall not be invalidated by reason of any defect in form or substance or failure to comply with the provisions of the Act, where no substantial wrong or injustice has been done. No power is given to the Commissioner, expressly at all events, to refer matters back to the Recorder, and both have equal powers of dealing in the first instance with matters of the kind in question; secs. 123,130. Sec. 133 provides for an appeal to the Commissioner from every decision of the Recorder and that upon such appeal the Commissioner may require or admit new evidence or retry the matter; sec. 140 provides that the Commissioner shall give his decision upon the real merits and substantial justice of the case; and sec. 137 provides that hearings shall be proceeded with promptly and that appointments, notices and other proceedings may be made returnable forthwith or at any other time.

With these provisions and the notification to the appellant in the Commissioner's appointment that evidence was to be submitted, it would not seem that the appellant could be justified in assuming that the matter would be dealt with otherwise than upon its real merits, or that it would as a matter of course be sent back to the Recorder because of the defect in the Recorder's proceedings. There was in fact no pretence before the Commissioner that he did so assume, and that he did not, and that he was not misled or in ignorance as to the nature of the hearing, is plain from the stenographer's report, and from his request for an adjournment and his failure to proceed upon the irregularity, for proof of which neither adjournment nor absent witnesses would be necessary.

The re-opening of the case by the Divisional Court seems therefore to be without any sufficient ground, unless it be that of general discretion. The reasons given (either in the above report or in the report in 1 O. W. N. 545) are not satisfactory. The Court could hardly have meant to decide that the Commissioner in a matter brought to him from the Recorder must, if a defect or irregularity appear in the Recorder's proceeding, remit the matter to the Recorder and not himself deal with it upon the merits; the Court's own remittal of it to the Commissioner with the costs of the appeal left in his discretion, is inconsistent with that; nor would such a holding seem tenable under the Act. Hardly either could the Court have meant to establish it as a precedent that an appellant in a proceeding tying up a miner's property, may, without showing any reason other than that he requests it, demand an adjournment of a hearing for which due notice has been given, and if adjournment is refused, appeal successfully for a re-opening of the case. If injustice was feared, the documents in question were before the Court, and might have been construed by it or some suggestion sought of how the appellant could still have rights under them.

As has often been pointed out, "it is in the interests of litigants and the public that mining cases should be quickly determined" (5 B. C. 229, 1 M. M. C. 137). The "speedy finality of litigation and the quieting of title with all due celerity" which have been declared (7 B. C. 268, 1 M. M. C. 304) to be the dominant policy of the British Columbia Mineral Act, (from s. 121 of which the

part of s. 137 above quoted is copied) are quite as much the policy of the Ontario Act. Proceedings, as is well known, are often kept on foot for no other purpose than to extort a settlement as the price of removing the embarrassment, the miner finding it cheaper to submit to extortion than to carry on extended litigation. Though in what happened in this case before the Commissioner the ear-marks of what the miner would call a "hold-up" were pretty plain, it is no doubt often hard to distinguish between vexatious litigation and a *bona fide* claim, and to protect the latter a Court's general discretion —a thing so variously defined and characterized—is properly very wide. That it was not in the present case well directed, and that the merits and nature of the case were not misjudged in the decision appealed from, the failure to pay in the money as ordered and the consequent dismissal of the appeal now leave no doubt.

(THE COMMISSIONER.)

RE BALL AND STEWART.

Certificate of Record—Effect of—Setting Aside — Appeal against Granting of—Extending Time for Appeal—Policy of Act.

S. on 2nd Sept., 1909, recorded a mining claim staked out by him on 1st Sept. At this time (though the lands were under the provisions of the Act open to staking) an appeal by another licensee against the cancellation of a former claim had not yet been disposed of. After this appeal had been finally dismissed the Recorder, on 29th Dec., granted S. a certificate of record. B. subsequently sought to record a new staking and to set aside the certificate of record and have S.'s claim cancelled for lack of discovery and other defects. No fraud or mistake within the meaning of the Act being shown and no evidence of merits or validity of B.'s claim being offered, it was held by the Commissioner that the certificate of record should not be set aside and that extension of time for appealing from the granting of it should be refused, and that the attack upon S.'s claim should be dismissed.

It is not the policy of the Act to encourage attacks upon mining claims after the time allowed for filing disputes against them has elapsed and a certificate of record has been issued.

Query, whether in the absence of fraud or mistake an appeal under the Act will lie against the granting of a certificate of record.

Application by Percy Ball to the Commissioner to cancel mining claim 823, of H. J. Stewart, on S. ½, N.-W. ¼, N. ½, of lot 1, concession 4, Coleman, and set aside the Certificate of Record therefor, in order that the applicant's own subsequent claim might be recorded. The facts are stated in the Commissioner's decision.

J. J. Gray, for Ball.

George Mitchell, for Stewart.

23rd February, 1910.

THE COMMISSIONER.—The claimant and appellant Percy Ball is seeking to have the mining claim of the respondent

cancelled and to have his own application for mining claim upon the same property recorded, and he is asking to have the Certificate of Record granted for the respondent's claim set aside and to have the time for appealing from the act of the Recorder in granting said Certificate of Record extended.

The respondent's claim was staked on 1st September, and application therefor filed on 2nd September, 1909, and Certificate of Record granted on 29th December, 1909.

The Act provides (sec. 64), that a Certificate of Record is not to be issued until the claim has been recorded for 60 days, and that (sec. 63) during this 60 days and until a Certificate of Record has been granted a dispute may be filed against the claim by any licensee who gives particulars of and verifies the invalidity of the claim.

Proceedings between other parties in respect of the same property had previously been had, but all prior claims had been cleared off by the Commissioner prior to the respondent's staking of 1st September. An appeal from the Commissioner's decision had, however, been taken, and the order dismissing this appeal was not lodged with the Recorder until the day on which the Recorder issued the Certificate of Record, the Certificate of Record apparently having been issued as soon as the Recorder found that the proceeding between the other parties had been finally disposed of.

The result was to leave the respondent's claim open to attack by ordinary dispute for nearly twice the length of time for which it would in the ordinary course have been so open. No such dispute, however, was filed, but the present proceedings are designed to attack the claim by another process upon the same grounds in effect that it might during the prior four months have been attacked by a dispute.

This is against the policy of the Act. Claims for which a Certificate of Record has been granted without fraud or mistake should not be lightly interfered with, and though I thought best in all the circumstances to receive all the evidence that was offered, I think the issue of a Certificate of Record must be held to be a bar to the present attack. No fraud of any kind has been shown, nor can I find that there was any mistake in any way of the kind contemplated by the Act which would be ground for setting aside the Certificate of Record, or depriving the holder of the claim of the protection which it affords.

The claimant and appellant, though contending that he had made out a case for setting aside the claim notwithstanding the Certificate of Record, also sought to appeal from the act of the Recorder in granting that certificate. Application was in fact made to me informally some time after the usual 15 days within which an appeal from the Recorder must be lodged, but within the 30 days in which I have power to extend the time, for an extension of time for appealing against the issue of a Certificate of Record. No affidavit or material of any kind, except what purported to be a copy of a notice of appeal, and which afterwards turned out to be an incorrect copy, was put in or sent me, but after perusing the papers which had come about the same time from the recording office I could find nothing in any way to warrant any extension of time, and so wrote the applicant's solicitor, whose application had been made to me by mail The applicant's solicitor, by a subsequent letter, expressed a desire to renew or make another application for extension of time for appealing from the issue of the Certificate of Record, and at the opening of the hearing the matter was again brought up. No specific evidence in support of the application was offered, and I reserved the question until the evidence at the hearing had been heard. The applicant's counsel, however, gave no evidence of merit in his client's claim and objected to questions from the respondent's counsel going to the question of the merits of his application. In these circumstances therefore I can see no ground upon which I should entertain any application for leave or extension of time to appeal, if indeed an appeal from the issue of the Certificate of Record will lie at all in the absence of fraud or mistake under sec. 65, as to which it is unnecessary for me here to decide. Counsel for the claimant sought by ingenuous argument to show that the Certificate of Record did not really protect the claim, and argued that the claim was in effect as open to attack after the issue of the Certificate of Record as before, or at all events that the protection afforded by the Certificate of Record should be held effective only where the claim was held by an innocent purchaser. I can entertain no doubt, however, as to the real intent and meaning of the Act. The provision that claims which have been open to attack for the prescribed time should thereafter be closed to litigation except in cases of fraud and mistake is an exceedingly wise and wholesome one in the interests of miners, and I think

of the public generally, and should not be frittered away by fanciful distinctions. The ground upon which the applicant sought to impeach the claim in the present case was for lack of discovery of valuable mineral, and from secs. 65 and 67 it is beyond doubt that with a Certificate of Record in existence this is not a ground upon which the claim is open to attack after the date of the issue of the certificate. Nor does insufficiency of discovery make the claim an abandoned one within the meaning of sec. 83, as the claimant's counsel contended; nor if it did could I agree with the argument that this is a thing which a Certificate of Record does not put past controversy. Section 65 expressly provides that (in the absence of fraud or mistake) the Certificate of Record is final and conclusive evidence of the performance of all the requirements of the Act (except working conditions) up to the date of the certificate.

This is sufficient to dispose of the case, and the question of discovery is not now an issue, but I may mention that, though from former proceedings and prior inspection of what is the same discovery as the respondent's, or one very closely related to it, I cannot but feel a great deal of doubt as to the real sufficiency of the respondent's discovery, the evidence in the present case falls short of showing that a discovery did not in fact exist.

A number of other objections to the respondent's claim have also been set up, but none of them has been sustained, nor has any ground been shown for interfering with what the Recorder has done.

Claim and appeal of Percy Ball dismissed with costs.

(THE COMMISSIONER.)

RE BENNETT AND HYLANDS AND BARR.

Certificate of Performance of Work—How Far Conclusive—Failure of Recorder to Enter Report of Work—Certificate of Record—Effect of.

Failure of the Recorder to enter upon the record of a claim a report of work duly filed would not work a forfeiture of the claim. Query, how far a certificate of performance of work is conclusive. (See note to this case.)

Claim and appeal by William J. Bennett to reverse the decision or act of the Recorder of the Gowganda Mining Division in cancelling his mining claim, G. G. 290, and declaring mining claim M. R. 939, of James Hylands and James Barr, in good standing.

The facts appear from the decision.

H. E. McKee, for appellant.

W. J. Hanley, for respondents.

24th February, 1910.

THE COMMISSIONER.—The mining claim M. R. 939 of the respondents, which is sought to be attacked, was staked out on 27th February, and recorded on 6th March, 1908, and Certificate of Record for it was granted on 24th July, 1908. The grounds of attack are, (1) that the first instalment of 30 days' work was not performed within the time limited by the Act; (2) that the entry of the filing of proof of this 30 days' work was not in fact made upon the record at the time it purports to have been made, and that it was fraudulently entered, and (3) that there was no valid discovery at the time of the staking out of the claim; and the appellant further claims that the ground was open at the time he staked out his own claim G. G. 290, which covers part of said claim M. R. 939, and that he has performed all the requirements with reference to said claim G. G. 290.

So far as the present proceeding may be an appeal from the Recorder, it seems clear that the appeal was not launched within the time provided by sec. 133 of the Act, and no circumstances have been shown which would justify me in extending the time as in that section provided.

The evidence, however, was proceeded with and on it I am quite unable to find that there is anything to justify me in setting aside what has been done by the Recorder. The respondents not only have a Certificate of Record which would protect their claim from attack in respect of the original staking and recording, unless mistake or fraud can be shown, which has not been done; but they have also a certificate of performance of the work which it is claimed they did not duly perform, and without making any decision as to how far this certificate is final and conclusive, I must find that in the present case there is nothing to justify me in setting it aside, or declaring that the work had not in fact been performed.

It is claimed that the appellant was told by an assistant in the recording office, before he staked his claim, that claim M. R. 939 had lapsed, and he and another witness state that the entry above mentioned of the performance of the 30 days' work was not upon the record of the claim at that time. I think, however, there must in some way have been a mistake as to this, but it does not seem material, and it is beyond question that the report of work in proper form had as a fact been duly filed, and it would be the Recorder's error if it had not been entered upon the record at the time. The record now, at all events, shows the entry in proper form.

Appeal and application dismissed with costs.

NOTE.—The doubt as to the conclusiveness of a certificate of performance of work has since been resolved by an amendment made to sec. 78 (4) by the Statute Law Amendment Act (s. 45) of 1910, putting it upon the same footing as a certificate of record. Cf. ss. 65, 66.

It is submitted that a Recorder should be careful not to grant a certificate of performance of work unless he is, in truth, as the Act provides, "satisfied" that the work has been duly performed. If for any reason he thinks it safer to do so he should, in the absence of inspection, call for further details or for corroborative affidavits or evidence, before issuing the certificate.

(THE COMMISSIONER.)

RE ODBERT AND FAREWELL, RIBBLE AND BILSKY.

Agreement for Interest in Mining Claims—Corroboration—Estoppel Agreement for Sale — Effect of Recording — Comparison with Registry Act — Prior Unrecorded Equitable Interest — Notice before Completion of Purchase — Certificate of Proceedings — Delay.

O. and F. were prospecting partners. F. on an expedition agreed upon between them and for which O. furnished money and supplies staked four claims. Before recording the claims F. by telling R., who knew of O.'s interest in the expedition, that he had not staked the claims on that expedition induced R. to advance him money and other consideration for a half interest and recorded the claims in the names of R. and his nominee. *Held*, that O. and R. were entitled to a half interest each.

B. obtained from R., the recorded holder, an agreement for sale of a three-quarter interest in the mining claims, and recorded it; and in pursuance of its terms entered upon the claims and did the assessment work and developed them, being up to that time in ignorance of O.'s rights, O. being in fact the owner of an unrecorded equitable half interest in the claims instead of F., who was a party to the agreement and who was presumed to own it. B. was to be entitled to a transfer on paying $2,000, but before he paid the money or obtained a transfer O. filed a certificate under sec. 77 of the Act, putting him on notice of O.'s rights. B. subsequently obtained from F. for $900 what purported to be a transfer of a half interest in the claims. In proceedings by O. it was *held* (1) that the transfer from and payment to F. were ineffective; (2) that the notice to B. before he paid the money and obtained a transfer protected O.'s rights; but (3) that in the circumstances, and by reason of delay, O.'s protection as against B. should only be in respect of the purchase money and should not deprive B. of his rights under the agreement.

Proceedings by George T. Odbert against Jesse Farewell, Asa Ribble and A. M. Bilsky to establish an interest in mining claims T. R. 2047, 2048, 2049 and 2050 in the Gowganda Mining Division.

The facts are fully stated in the decision.

The case also involved 3 claims in the township of Willett, but as the part of the decision relating to these seemed unimportant it has been omitted.

W. D. Henry and *George Mitchell*, for Odbert.

W. J. Hanley, for Ribble.

George Mitchell, for Bilsky.

28th March, 1910.

THE COMMISSIONER (after dealing with the Willett claims).—The four Gowganda claims which remain to be considered present somewhat greater difficulty. I find the

facts to be as follows: The claimant Odbert and the respondent Farewell came from Cobalt to the Elk Lake district in May, 1908, under verbal agreement between them that they were to prospect and acquire mining claims in common, the agreement in the first place being that Odbert should pay two-thirds of the expenses and get a two-thirds interest in the claims acquired, this being subsequently (after an unsatisfactory association with one Bell) altered to one-half the expenses and a half interest. They stayed for a time at the respondent Ribble's hotel, and seem to have been throughout the season on more or less friendly terms with the Ribbles, borrowing money from them and talking over mining matters generally and being associated to some extent in mining ventures together. Odbert's and Farewell's efforts were directed to properties in the township of Willett, but not with very great success, and in the beginning of September only the three claims in the township of Willett already mentioned were standing to their credit. Odbert determined to leave the district, for a time at least, but before going arranged with Farewell that the latter should make a trip to Gowganda in their joint interest. It is beyond question that Odbert made very considerable expenditures for his own and Farewell's operations during the summer, and that upon Farewell starting for Gowganda on 3rd September he supplied him with money and other necessaries for the trip. As to this Odbert is corroborated by the storekeeper Jodouin, and he is corroborated in his statement that he was to be in this trip a partner with Farewell by letters afterwards written to him by Farewell, and he is also corroborated by the admissions of Asa Ribble as to what Farewell told him. . . .

According to the records and to the applications which were filed and sworn to by Farewell, the claims now in question were staked out one on the 5th, two on the 7th and one on the 9th of September. The applications were sworn to before the Recorder on the 15th of September, though they were not actually recorded until the 22nd of September. Though three of the claims are recorded in David Ribble's name and only one in Asa Ribble's name, all were for the benefit of the latter, he having a power of attorney from his brother David Ribble. Asa Ribble swears that, though he knew Odbert and Farewell had been in partnership during their summer's operations, and though he knew Farewell went on the Gowganda trip in the joint interest, he was told by Farewell after

the latter came back from Gowganda that Odbert had failed to supply the money and other help that he had promised, and that he (Farewell) would have nothing more to do with Odbert. He says Farewell told him he had staked no claims on the trip, but that he would like to go back and stake if he (Ribble) would furnish the man and money and supplies which he claimed Odbert had promised but failed to furnish. Ribble admits that, when talking over matters with Odbert at Latchford, Odbert told him of Farewell's trip to Gowganda and asked him to take care of Farewell when he came back, meaning to let him have such money as he might require. To this Ribble appears to have made no reply, but it would seem that he did not at the time intend to advance the money, as he says Odbert had been rather slow in paying back other loans which he had made to him. Ribble says, however, that as a fact when Farewell on returning from the Gowganda trip asked him if Odbert had not arranged with him for advances he offered Farewell $20. This he says Farewell refused, saying it was altogether insufficient, and Ribble says it was after that that he himself entered into a partnership agreement with Farewell under which he furnished a man and money and supplies for which he was to have an interest in the Gowganda properties which Farewell was going back to stake—presumably a half interest.

The statements do not all fit. Farewell left on the Gowganda trip in his own and Odbert's interests on 3rd September—the evidence of Odbert, the filing of one of the Willett claims on that day, and the evidence of Jodouin as to the purchase on that day of supplies and loan of money by Odbert for Farewell for the trip, leave no doubt in my mind as to that. The journey between Elk Lake and Gowganda at that time required one and a half or two days each way. The stakings recorded are sworn by Farewell to have been done on the 5th, 7th and 9th days of September. Farewell must therefore have staked the claims on the first trip—the trip made for Odbert and himself—and when he told Ribble the contrary he told him what was not true. Farewell, from the evidence, appears to be in fact an extremely dishonest and unreliable character. On 17th September he wrote Odbert a post card telling him he had got four claims and had made arrangements with Ribble, and that he was going back to Gowganda that morning. Two subsequent letters speak in glowing terms of the properties acquired, and tell of the

sums of money that Ribble advanced to him and for which he and Odbert owed Ribble. Odbert in October and November, in response to Farewell's letters, forwarded Farewell two sums of $50 each.

Ribble saye he believed, as Farewell told him, that no claims had been staked on what may be called the Farewell-Odbert trip, but he had actual knowledge and notice from the beginning that anything acquired upon that trip was, to the extent of a half interest, the property of Odbert, and if Farewell deceived him that is no reason why Odbert should suffer. The circumstances were certainly such as should have put Ribble very much upon his guard as to making any arrangement with Farewell other than the one Odbert had asked him to enter into for the loan of money, and even on his own statement as to how he came to enter into partnership with Farewell the transaction is one from which he should, I think in the circumstances, have refrained. . . . The staking was the fruit of the Farewell-Odbert expedition for which Odbert contributed money and supplies and from which he was entitled to derive a half interest in the claims acquired. The requirement of sec. 71 (1) of the Act as to corroboration is amply fulfilled by the evidence of Jodouin, the post card and letters of Farewell and the evidence of Asa Ribble himself.

I must therefore find that Odbert is entitled as against the Ribbles and Farewell to a half interest in the four Gowganda claims.

Postponing for a moment the question of Bilsky's rights under his option and under his subsequent transfer from Farewell, it will be convenient next to consider Ribble's rights in regard to the other half interest in the claims—that is to say, the half interest which did not belong to Odbert. On the completion of the staking—Ribble having up to that time, according to his own evidence, taken in connection with the other undoubted facts, made no agreement with Farewell for an interest and advanced nothing toward the enterprise—the claims were unquestionably the property of Farewell and Odbert in equal shares. Any interest that Ribble acquired in them must be an interest acquired from Farewell and out of Farewell's share, after the staking. It may be assumed that Farewell never in fact intended to make over to Ribble any part of his own half interest, but expected to hold his own half and let Ribble have Odbert's half. The

way he intended to accomplish this was by putting all the claims in the Ribbles' names at the recording office—transferring them, it may be called, to Ribble. This transfer, for the reasons I have mentioned, cannot, so far as the Ribbles and Farewell are concerned, be allowed to defeat Odbert's interest, but what is its effect upon Farewell's own half interest? Upon this question depend Bilsky's rights under his subsequent transfer from Farewell.

Upon the ground that Farewell, for valuable consideration paid to him by Ribble, transferred or made over to Ribble the claims—the whole interest nominally, a half interest beneficially; and on the ground that Farewell, having represented to Ribble that he had the right to transfer him a half interest—that he did not give him the true explanation of how that right arose or that he had in his mind a different half interest from that which was really available I think cannot matter—and having thereby induced Ribble to advance the money and incur the expenditures which he did, is estopped from now saying that this representation was not true; and on the ground also that the real merits and substantial justice of the case are with Ribble rather than with Farewell or Farewell's subsequent transferee, who in the circumstances is estopped to the same extent as Farewell—I think I must find that Ribble is entitled, subject to the Bilsky option, to hold the half interest which at the time of the staking belonged to Farewell.

The position of the respondent Bilsky, otherwise than as already indicated, remains to be considered. On 4th November, 1908, he obtained from Farewell and the Ribbles—the only persons then appearing by the records to have any interest in the claims, and the only persons he had any reason to believe had interests in them—an option for the purchase of a three-quarter interest in the properties, Bilsky undertaking to perform the working conditions required by the Act and to have possession of the claims and to have the right to purchase the three-quarter interest in any or all of the four claims on or before 15th October, 1909, at $500 each. The option was recorded 24th November, 1908. The Odbert certificate of proceedings to enforce an interest was not filed until 11th June, 1909. Mr. Bilsky meanwhile by performance of work expended considerable money upon the properties. On 27th July, 1909 (after Odbert's certificate of proceedings had been filed), Bilsky obtained from Farewell

and recorded a transfer, already referred to, of all Farewell's interest in the properties for the expressed consideration of $900. Bilsky also appears to have deposited the money, $1,000, and done what he could to hold his option good upon the interest vested in Ribble.

There can be no doubt about Bilsky's right to enforce his option, so far as Ribble's real interest is sufficient to answer the purpose, Ribble having himself granted the option, but his rights in regard to the purchase of the other half interest which Ribble supposed to belong to Farewell and which as I find really belongs to the claimant Odbert present greater difficulty. The Bilsky option was obtained and put upon record before Bilsky had any notice or knowledge of Odbert's rights, Odbert's certificate of proceedings not being filed until after this had been done. Section 77 (3) of the Act, however, provides that the filing of such a certificate "shall be actual notice to all persons of the proceeding." Though before the filing of the certificate Bilsky had, under the option, taken possession of the claims and done considerable assessment work upon them and no doubt incurred other expenses in exploration and otherwise for which it would be difficult to recoup him, he had not paid the consideration other than to the extent to which it consisted in performance of the assessment work, and he has never obtained a formal transfer of the claims.

This condition of things raises two important questions: first, what are the rights of a person having a prior unrecorded equitable interest in mining claims as against one who has obtained from the recorded holders and put upon record an agreement for purchase but who has not obtained a transfer or conveyance; and secondly, what is the effect of notice of the prior equitable interest to the purchaser before completion of the purchase.

Had Bilsky paid all the consideration money and obtained and put upon record a transfer from the nominal holders of the claims before receiving notice that any one else was interested in them his title would of course be perfectly good, but in the present case he had not paid all the consideration money before being affected with notice and he has not at any time obtained a formal transfer of the claims.

The Mining Act puts what may be called title to unpatented mining claims upon much the same footing as title

to land under the Registry Act, the recording office taking the place of the registry office, instruments not being recorded being void as against a subsequent purchaser or transferee for value without notice (sec. 74), the recording of an instrument constituting notice to all persons claiming subsequent to the recording (sec. 75) and priority of recording prevailing unless there has been actual notice of the prior instrument by the party claiming under the prior recording (sec. 76). Sections 74, 75 and 76 of The Mining Act thus correspond to secs. 87, 92 and 97 of the Registry Act (R. S. O. 1897, ch. 136). Section 98 of the Registry Act, however—providing that no equitable lien, charge or interest affecting land shall be deemed valid as against a registered instrument executed by the same party—or its equivalent, does not appear in The Mining Act. Section 70 of The Mining Act forbidding the recording of a trust and making ineffective the describing of a holder of a mining claim as trustee, I think does not affect the present case. Sections 74, 75 and 76, above quoted, do not in terms at all events cover cases of equitable interests arising otherwise than from a written document, and I think such equitable interests cannot, especially in view of sec. 71 which clearly contemplates their enforcement, be held to be invalid, and where they come in conflict with other merely equitable interests questions of priority will, I think, have to be determined according to the usual rules of equity, depending upon the special circumstances of the particular case. It would no doubt have put recorded holders in a better position in some instances if sec. 98 of the Registry Act had been also adopted into The Mining Act, though it might not alter the decision of the case now in hand, for it has always been held that sec. 98 of the Registry Act does not invalidate or postpone equitable interests of which the recorded holder had actual notice before the taking and registration of his registered instrument: see *Armour on Titles* (3rd ed.), 98; *Forrester* v. *Campbell*, 9 Gr. 337; *Rose* v. *Peterkin*, 13 S. C. R. 677.

The rule is well established in equity that, where a registry law does not otherwise provide and where there are no circumstances giving the subsequent equitable claimant a better right or a stronger claim to consideration from the Court, the first in time among equitable interests must prevail: *Phillips* v. *Phillips*, 4 DeG. F. & J. 208; *Rice* v. *Rice*, 2 Drew 73. The rule, however, is not a strong one. It is

overridden by the rule that where equities are equal the law will prevail. The legal title will in general protect a subsequent equity and so also will the best right to call for the legal estate, and it is perhaps not too broad a statement to say that relief should be refused to the holder of the first equitable interest in any case where it would be unfair or inequitable to give him the relief, where, at all events, his own conduct has contributed to this condition of affairs. In the present case Bilsky obtained his option or agreement for purchase and put it upon record without notice of Odbert's rights; the agreement, though it did not give him the legal or formal title of the claims, gave him the right to possession; he paid part of the consideration money by doing the assessment work; he went into possession of the property and made improvements upon it in the way of development; he in fact preserved the claims from lapse as if the assessment work had not been performed the claims would have become void. In the nature of the case also he must necessarily have gone to trouble and expense, probably very considerable, in exploration and otherwise in connection with the property, matters for which it would be very difficult to compensate him in money, and matters upon which largely no doubt depends the value of the claims to anybody. Odbert subsequently filed his certificate of proceedings. This, as already mentioned, is made under sec. 77 (3) actual notice. But he rested there for several months well knowing as he must have, or must be assumed to have, known, of Bilsky's possession and the work he was doing and the expenses he was incurring. It does seem to me, therefore, that in the circumstances it would not be fair that he should be allowed to step in now since the development of the claims has apparently turned out satisfactorily and, having himself taken no risk, obtain the profit or a large share of the profit of Bilsky's operations. Section 140 of The Mining Act, providing that my decision shall be upon the real merits and substantial justice of the case, is perhaps wide enough to cover the matter, but there would seem at all events to be authority in support of the view which I think should prevail. The English and Canadian authorities are perhaps not very definite, but it was suggested in the case of *Phillips* v. *Phillips* (above) that the right to possession of the property would in such a case be a circumstance disentitling the prior equitable owner; and in the United States it seems to have been expressly held that where

the subsequent claimant is in possession of the property and has made valuable improvements thereon a Court of Equity will not turn him out of possession in favor of a prior claimant: Am. & Eng. Encyc. vol. 23, 486, citing *St. Johnsbury* v. *Merrill*, 53 Vt. 165. In the present case there is the additional circumstance of Odbert's delay in pressing his claim which in the case of mining property of this nature I cannot but regard as very important.

Odbert's right then, as I think I should hold, must be confined to a right in the unpaid purchase money so far as Bilsky is concerned, though there will remain, of course, to him the interest in the claims which Bilsky's option does not cover.

As to the right in the unpaid purchase money and the effect of notice of the prior claim before the purchase money has been paid in full, it is well settled that notice to a purchaser before payment of all the purchase money is effective and that a purchaser cannot thereafter proceed in disregard of the rights of which he has notice: *Dart, Vendors & Purchasers* (7th ed.), 836; *Smith's Equity* (4th ed.), 354; *Tourville* v. *Naish*, 3 P. Wms. 307; Am. & Eng. Encyc. vol. 23, 517. Bilsky was therefore, I think, quite unjustified in paying over any consideration money to Farewell and the transfer obtained from Farewell (who had no recorded interest) and put upon record subsequently is, I think, altogether inoperative, so far as the other parties are concerned. The proper proportion of money due for the share of the claims which Bilsky is getting out of what may be called the Odbert interest must therefore be paid by Bilsky to Odbert before any transfer of legal title is made to Bilsky.

Other authorities which may be referred to for a discussion of points involved in the present case are *Casey* v. *Jordan*, 5 Gr. 467; Encyc Laws of Eng., vol. 11, 566; vol. 12, 142; *Molsons Bank* v. *Eager*, 10 O. L. R. 452, and especially Campbell's Ruling Cases, vol. 21, 727, and Am. & Eng. Encyc. vol. 23, 517-519, in both of which a very full discussion will be found under the heading "Purchaser for Value Without Notice."

Bilsky must therefore be held entitled to obtain the three-quarter interest in the Gowganda claims for which his option calls upon payment, and only upon payment, of the $2,000 which I find remains due thereon.

Odbert to the one-quarter interest which Bilsky's option does not cover, and to one-third of the unpaid consideration money—being his proper proportion for the one-quarter interest which goes to Bilsky out of his half interest.

And Ribble to the remaining two-thirds of the unpaid consideration money.

Ribble's expenditures upon the claims set off against Odbert's costs and the parties left to their ordinary rights as regards any personal liabilities otherwise existing between them.

(THE COMMISSIONER.)

RE HEDLEY AND WILSON.

Claim to Interest in Mining Claims — Prospectors Assisting Each Other — Promising to Share Information.

Where the leaders of two prospecting parties assisted each other in a neighborly way in their expeditions and each promised to let the other know if anything good was found, but did not use their men or their provisions in common, and it was found upon the evidence that there was no agreement or intention to share interests in the claims acquired, a claim by one to an interest in claims staked by the other was dismissed.

Claim by Robert Hedley to 25 mining claims staked during the summer of 1909, in behalf of the respondents J. S. Wilson, W. S. Edwards and T. N. Jamieson, in what is now the Porcupine Mining Division.

J. J. Gray, for claimant.

G. T. Blackstock, K.C., and *A. Fasken*, for respondents.

4th April, 1910.

THE COMMISSIONER.—The claimant, Robert Hedley, is seeking to establish a claim to a half interest in a number of mining claims in the Porcupine Mining Division staked out by a prospecting party sent out by the respondents and operating under the management of the respondent J. S. Wilson during the summer of 1909.

The ground of the claim is that it was agreed by the respondent Wilson with the claimant Hedley during conversations at the latter's house at Driftwood, and afterwards when

the two were together on their way toward the region where the claims are situate, that they were to share in the results of the expedition as claimed. The claimant says that by agreement his party and Wilson's party took different directions so that they could cover a greater amount of territory, and that it was agreed if either found anything good he was to let the other know, and that after the discoverer had staked the first claim each was to have equal opportunities of staking further claims so that both parties would have the same number.

The agreement, even upon the claimant's own statement, is hazy and indefinite, for he makes no pretention that there was to be any joint interest or co-ownership in the claims staked. I think he could hardly, even upon his own evidence, succeed in the claim he is now setting up. During the long winter months, when the two families were the only English-speaking inhabitants of the little settlement where they were residing, many conversations no doubt took place as to their future intentions and as to various arrangements and expeditions which each had been contemplating, but upon the evidence I am quite unable to find that any agreement to share interests in the claims acquired was ever made or intended to be made between them. The circumstances also—the inequality in the forces and provisioning of the two parties, the fact that neither felt bound to remain in the district when he desired to go out, the fact that they used neither their men nor their provisions in common, and that there was nothing in all that happened but acts of the most ordinary neighborliness common between prospectors in such cases, of which nature also I cannot but believe were the mutual statements that when either had got all the claims he had licenses to stake he would let the other know if he could of what he had found—are all against the probability of any intention or agreement for community of interest in the claims acquired. I gather from the evidence also that the claimant was in fact —probably owing to valuable information which he thought he had acquired from some Frenchmen—keeping Wilson in the dark as to some at least of his movements and operations. During the time also that both parties were in the field Wilson's party as a fact found nothing which they believed to be of importance and staked only a single claim, and Wilson did in reality, as I have no doubt, truly disclose to the claimant

the results of his expedition up to that time as he believed them to be.

To go into the evidence at greater length seems quite unnecessary. I think the version of matters given by Wilson is the correct one, and I cannot but find that the claimant has entirely failed to make out a case, and that his claim must be dismissed with costs.

(THE COMMISSIONER.)

RE LAIDLEY AND KNOX AND DAVIDSON.

RE BOYLE AND DAVIDSON AND KNOX.

Claim to an Interest in Mining Claims — Prospecting Expedition — Finding Good Territory — Subsequent Discoveries and Stakings on it for Other Parties.

K. and L. in an expedition under a prospecting partnership agreement with B. and S. found (in company with other prospectors) promising prospecting territory—a ridge of good diabase rock—but made no discoveries of valuable mineral, and staked no claims. They reported this to S. and B., B. remarking that he did not want "rock." L. left the district, and B. and S., on the request of K. and one V., who desired to form a prospecting partnership with K., cancelled or withdrew from the agreement. K. and V. after several weeks' operations in other directions visited the diabase ridge which K. and L. had before seen, and which had meanwhile been rendered easier to prospect by reason of fire, and made discoveries and staked claims upon it. *Held*, that L. and B. were not entitled to any interest in the claims.

Proceedings by Isaac M. Laidley and Arthur J. Boyle to establish a claim to one-quarter interest each in mining claims M. R. 1744, 1745, 1746, 2042, 2043 and 2044, now in the Gowganda Mining Division, standing in the name of the respondent Davidson, but in which it was admitted by him that Knox was entitled to a half and one Vipond to a quarter interest.

The claims were staked by Knox and Vipond on 27th and 28th October, 1908, three of them in Davidson's name and three in Knox's, but in December the three Knox claims were abandoned and were restaked in the name of one Cunningham, who a few days later transferred them to Davidson.

Knox had previously been in partnership with the claimants Laidley and Boyle and one Seymour, and had then, in company with Laidley and other prospectors, visited the dis-

trict in which the claims are situated, and had seen the diabase ridge upon which they were afterwards located, and the present claim to an interest was grounded upon these facts and upon the contention that Knox had fraudulently concealed discoveries made upon that trip.

The facts are more fully stated in the decision.

J. E. Cook and *George Mitchell*, for Boyle and Laidley.
J. M. Godfrey, for Knox and Davidson.

9th April, 1910.

THE COMMISSIONER.—The claimants Laidley and Boyle contend that the discoveries upon which the claims in question are based were made by Knox and Laidley upon an expedition sent out in the early part of September of the same year in which Knox and Laidley and Boyle and one Seymour were equal partners, and that the discoveries were fraudulently concealed by Knox, and that as a consequence the claimants are now entitled to share in them under their partnership agreement—their contention being that the claims were in fact the fruit of the expedition mentioned.

Though the cases of Laidley and Boyle had been entered separately they were tried and have henceforward been dealt with together. The evidence was first taken at Elk Lake, but after the conclusion of the trial there and before my decision was given application was made to me to reopen the matter upon the ground of discovery of new evidence, which I did upon terms, and a number of further witnesses on both sides were examined before me at Haileybury.

The evidence in some respects is exceedingly contradictory, especially in regard to conversations with or admissions said to have been made by Knox regarding matters going more or less to the root of the case or bearing upon it.

After a careful consideration of all the evidence and the circumstances I am confirmed in the impression I formed during the hearing of the evidence that the claimants have failed to make out a case. The vital point in the matter is the question of what took place upon the Laidley and Knox expedition. Laidley and Knox upon this expedition visited a good deal of territory, but returned without staking any claims. It is admitted that, among other places, they visited

what is referred to as the diabase ridge, upon which the claims in question were afterwards staked. Laidley now claims that he then made upon this ridge a number of good discoveries, one of which especially he refers to, and that he wanted Knox to stake claims upon them but that Knox refused, and he says Knox told him on the trip that if they found anything good Boyle and Seymour (the other partners) "would not get a look-in." Laidley explains his own failure to stake as being by reason of his not having a forest reserve permit—the lack of which would make not only his staking but also his prospecting upon the forest reserve illegal. When Laidley and Knox were on their way back they met Seymour, and in the conversation which took place with him they told him of seeing this diabase ridge. As to what else took place in the conversation Laidley and Knox differ, and the claimants have not chosen to call Seymour. On getting back to Elk Lake, Knox and Laidley reported to Boyle telling him also of seeing this diabase ridge, which they described as good rock, but according to Boyle's evidence they both told him they had found nothing but this piece of good rock, to which Boyle answered that he did not want rock, and it seems in fact that it was not the desire of any of the partners to encumber themselves by the staking of claims unless something good was found. Though Laidley's story now is that they had in fact some good discoveries on this diabase ridge, his story to Boyle and to Seymour at the time was different, and his own conduct, as I view it, is entirely against such a supposition. He in fact in one part of his evidence admits that Knox made no concealment from Seymour as to what they found. The most conclusive evidence, however, upon this point is that of Devine and Turcotte, who explored the ridge in question with Laidley and Knox and who saw the alleged Laidley discovery. Devine says the alleged discovery was worthless and that nothing was seen on the ridge which his party thought worth while to stake. As to this being the fact I have no doubt, and I think throughout the story of Knox is to be accepted rather than that of Laidley where they are in conflict. I do not accept Laidley's story of Knox's promise to him to let him know when he was going back, and Laidley's present story in general seems to me to be very inconsistent with his actions as well as inconsistent with his former statement to Boyle.

An important feature of the evidence taken at Haileybury was the extraordinary story told by the witness Everall of conversations with and admissions made by Knox and which Knox denies. Knox is also in conflict upon another point with Boyle, and to determine in all respects what may be the truth between them is not easy. But even though there may be some foundation for what both say in regard to what Knox told them I have no doubt that the real facts upon which the present case depends are as above found. It is also to be noticed that even according to Everall's statements, though Knox would appear to have been astonishingly communicative as to all his doings and intentions, the description of what he really found on the trip in question, namely, a ridge of diabase rock, does not differ from Knox's description of the same thing to Seymour and Boyle. Among many strange things about the story is Knox's alleged request to Everall not to tell of the discovery of this diabase ridge, and not to tell of the subsequent staking of claims upon it, when as a fact Knox had freely disclosed both these facts to Boyle immediately after they took place, as Boyle himself admits. It is extremely improbable also that Knox, if he had really found anything which he believed to be good on this ridge, would have told a comparative stranger of it at all, and it seems past belief that he would have waited so many weeks before returning to acquire it, and only do so after quests in other directions had failed, for he must have well known that the possibility of other prospectors coming upon it would be very great. The making of the subsequent discoveries upon part of the same ground is no doubt accounted for largely by the fact that fire had, between the two trips, swept over and cleared off the covering from a large part of the rock, and the greater desire to stake at the subsequent time may be accounted for by the rush which, during the interval, had set in toward that part of the country.

Laidley's claim to an interest is, I think, quite untenable, and certainly no concealment by Knox could be complained of by him if it had occurred, as he was himself cognizant of all that happened. As to the claimant Boyle, it would seem that he was induced to the present litigation by the stories that Laidley subsequently told him and by Laidley's pointing out to him discoveries upon the property alleged to have been made on the Laidley-Knox trip. The Boyle claim to a one-

quarter interest is in a somewhat different position from the Laidley claim in two respects, first, Boyle was not, like Laidley, personally present on the expedition in which the conduct of Knox is complained of, and secondly, Boyle, on the other hand, before Vipond and Knox formed their partnership, expressly withdrew his name from and renounced any further claim under the partnership agreement under which he is now claiming. He says he withdrew in the belief that no discoveries had been made, and it is now contended on his behalf that the withdrawal would not be binding upon him if obtained by fraud, which is no doubt correct. As I have found, however, that there were no real discoveries made and nothing found which any of the parties at the time thought worth while to stake, and that no concealment was in fact made, and there was therefore no fraud, there can, I think, be no valid claim to an interest on behalf of Boyle. The written agreement which was drawn up by Seymour for the partnership specifies no time of duration. It seems in fact to have been hurriedly drawn and does not, according to the evidence, represent the true agreement between the parties, inasmuch as it binds them all to contribute to the expenses even though only some of them are in the field, which was clearly not the intention. It may be noted also upon this point that the expenditure of Boyle, or of Seymour for him, for the expenses of this trip, though no doubt sufficient to entitle him to an interest if anything had been acquired, must have been small and he has since contributed nothing in any way to the maintenance of the claims and has, like his co-claimant, been guilty of very long delay in bringing his claim to trial, permitting the other parties in the meantime to develop and bear all the expenses of maintaining the claims. I think as a fact the agreement in question came to an end on the termination of the Knox-Laidley expedition. Laidley upon the conclusion of it left the district to take permanent employment elsewhere. Seymour and Boyle both renounced any further continuance of it, and Seymour, with Boyle's consent, marked the document cancelled, and neither of them after that time contributed or offered any supplies or expenses for further prospecting, and bore no part of the work or expense of making the discoveries and doing the staking and recording upon which the claims in question are based.

Any claim to an interest that the claimants can set up must clearly be one arising from what happened upon the

Laidley-Knox expedition. No doubt in prospecting partnership agreements of this kind the utmost good faith is required and should be insisted upon among the partners. Could the acquisition of the claims by Vipond and Knox be considered in any proper sense the fruit of the Knox-Laidley expedition Boyle at least would have a strong equitable claim to an interest. But I do not think it can. The expedition resulted in nothing but the acquisition of information that there was in the district a promising field of rock. The information was brought back and correctly reported to the other partners, and so far as it may have been useful all had an equal opportunity to act upon it. It was not information that gives any right to the acquisition of the property; diabase rock cannot be the foundation for the staking or recording of a mining claim. At the highest it was no more than the finding of a good field to prospect in, which is a very different thing from the finding of valuable mineral which could be used as the foundation of mining title. The mining claims in question in the present proceeding have their foundation in and resulted from what was done on the Vipond-Knox expedition in October, in which the claimants were not partners, and to which they contributed nothing.

Though the above is sufficient to dispose of the case, I may add that I am satisfied from the evidence that Vipond acted throughout in entire good faith, and though he found by inquiry from Knox that a partnership with Laidley and Boyle and Seymour had existed he took the proper steps to assure himself that it was no longer in force, and he was in no way cognizant of anything which would prevent him from entering into the partnership arrangement which he entered into with Knox. That he may have been over-cautious or afraid of litigation I think cannot be counted against him. His anxiety no doubt arose from the fact that he feared the written agreement with Boyle and Seymour might as a matter of law be construed as still continuing to exist. I find also that Davidson, for whom however I think Vipond must be regarded as acting as agent, was himself ignorant of any connection of Boyle, Laidley or Seymour in any way with the claims or with Knox. The interests of Vipond and Davidson—one-quarter each—would therefore I think have to remain untouched even though the claim had succeeded against Knox.

Claim dismissed with costs.

THE

MINING ACT OF ONTARIO

(1908)

With Amendments of 1909 and 1910

WITH

ANNOTATIONS AND INDEX

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8 Edw. VII. Chapter 21;
9 Edw. VII. c. 17; and c. 26, ss. 17, 31;
10 Edw. VII. c. 26, ss. 35, 45.

(Consolidated for convenience, the amendments, with authority, being shown in Italics.)

ABBREVIATIONS USED IN ANNOTATIONS.

M. C. C. — Mining Commissioner's Cases, this volume.
M. M. C. — Martin's Mining Cases.
R. S. O. — R. S. O., 1897.
R. S. C. — R. S. C., 1906.
R. S. B. C. — R. S. B. C., 1897.

Note.—Index to sections will be found at the end of the Act.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as *The Mining Act of Ontario.* 6 Edw. c. 11, s. 1.

PART I.—PRELIMINARY.

INTERPRETATION.

2. In this Act

(*a*) "Agent" where it occurs in Parts IX. and X. shall mean any person having, on behalf of the owner, the care or direction of a mine, or of any part thereof. 6 Edw. c. 11, s. 2 (1).

(*b*) "Commissioner" shall mean the Mining Commissioner.

(*c*) "Crown lands" shall not include lands in the actual use or occupation of the Crown, or of any public Department of the Government of the Dominion of Canada, or of Ontario, or of any officer or servant thereof, or under lease or license of occupation from the Crown or the Minister of Lands, Forests and Mines, or set apart or appropriated by lawful authority for any public purpose or vested in the Temiskaming and Northern Ontario Railway Commission. 6 Edw. c. 11, s. 2 (2). *M. C. C. 165.*

(*d*) "Department" shall mean the Department of Lands, Forests and Mines.

(*e*) "Deputy Minister" shall mean the Deputy Minister of Mines.

(*f*) "In place" when used in reference to mineral shall mean in the place or position where originally formed in the solid rock, as distinguished from being in loose, fragmentary or broken rock, boulders, float, beds or deposits of gold-, or platinum-bearing sand, earth, clay, or gravel, or placer. 6 Edw. c. 11, s. 2 (4).

(*g*) "Inspector" shall include an inspector appointed under this Act, for a Mining Division or any part thereof, or for the Province, and any officer having the powers of an inspector.

(*h*) "Licensee" shall mean a person, mining partnership or company holding a miner's license issued under this Act or any renewal thereof. 6 Edw. c. 11, s. 2 (6).

(*i*) "Machinery" shall include steam and other engines, boilers, furnaces, stamps and other crushing apparatus, winding and pumping gear, chains, trucks, tramways, tackle blocks, ropes and tools, and all appliances used in or about or in connection with a mine. 6 Edw. c. 11, s. 2 (8).

(*j*) The noun "mine" shall include any opening or excavation in, or working of, the ground for the purpose of winning, opening up or proving any mineral or mineral-bearing substance, and any ore body, mineral deposit, stratum, soil, rock, bed of earth, clay, gravel or cement, or place where mining is or may be carried on and all ways, works, machinery, plant, buildings and premises below or above ground, belonging to, or used in connection with the mine, and also for the purposes of Parts IX. and X., any excavation or opening in the ground made for the purpose of searching for mineral, and any roast yard, smelting furnace, mill, work or place used for or in connection with crushing, reducing, smelting, refining or treating ore, mineral or mineral-bearing substance. 6 Edw. c. 11, s. 2 (9); 7 Edw. c. 13, s. 1.

(*k*) The verb "mine" and the word "mining" shall include any mode or method of working whereby the soil or earth or any rock, stone or quartz may be disturbed, removed, washed, sifted, roasted, smelted, refined, crushed or dealt with for the purpose of obtaining any mineral therefrom, whether the same may have been previously disturbed or not, and also for the purposes of Parts IX. and X. of this Act all operations and workings mentioned in paragraph (*j*) of this section. 6 Edw. c. 11, s. 2 (10); 7 Edw. c. 13, s. 2.

(*l*) "Mineral" or "Minerals" shall include coal, gas, oil and salt.

(*m*) "Mining lands" shall include lands and mining rights patented or leased under or by authority of any statute, regulation, or Order in Council, respecting mines, minerals or mining, and also lands or mining rights located, staked out, used or intended to be used for mining purposes. 6 Edw. c. 11, s. 2 (13).

(*n*) "Mining rights" shall mean the ores, mines and minerals on or under any land where the same are or have been dealt with separately from the surface. 6 Edw. c. 11, s. 2 (12).

(*o*) "Minister" shall mean the Minister or Acting Minister of Lands, Forests and Mines.

(*p*) "Owner" when used in Parts IX. and X. of this Act shall include every person, mining partnership, and company being the immediate proprietor or lessee or occupier of a mine, or of any part thereof, or of any lands located, patented or leased as mining lands but shall not include a person, or a mining partnership or company receiving merely a royalty, rent or fine from a mine or mining lands, or being merely the proprietor of a mine or mining lands subject to a lease, grant or other authority for the working thereof, or the owner of the surface rights and not of the ore or minerals. 6 Edw. c. 11, s. 2 (15).

(*r*) "Patent" shall mean a grant from the Crown in fee simple or for any less estate made under the Great Seal. 6 Edw. c. 11, s. 2 (16).

(*s*) "Prescribed" shall mean prescribed by this Act or by Order in Council or by rule or regulation made under the authority of this Act. 6 Edw. c. 11, s. 2 (18).

(*t*) "Recorder" shall mean the Mining Recorder of the Mining Division in which the lands in respect of which an act, matter or thing is to be done are situate. (*New.*)

(*u*) "Regulation" shall mean a regulation made by the Lieutenant-Governor in Council under the authority of this Act. (*New.*)

(*v*) "Shaft" shall include a pit.

(*w*) "Surface rights" shall mean lands granted, leased or located for agricultural or other purposes, the ores, minerals and mines whereof or under the surface whereof are reserved to the Crown. 6 Edw. c. 11, s. 2 (21).

(*x*) "Valuable mineral in place," shall mean a vein, lode or deposit of mineral in place appearing at the time of discovery to be of such a nature and containing in the part thereof then exposed such kind and quantity of mineral or minerals in place, other than limestone, marble, clay, marl, peat or building stone, as to make it probable that the vein, lode or deposit is capable of being developed into a producing mine likely to be workable at a profit. *6 Edw. c. 11, s. 2 (22); 7 Edw. c. 13, s. 3. M. C. C. 7, 12 (note), 61, 120, 139 (note), 167, 176, 193, 240.*

APPLICATION OF ACT.

3.—(1) Applicants for mining lands who had prior to the 14th day of May, 1906, complied with the provisions of Chapter 36 of *The Revised Statutes of Ontario, 1897*, or regulations thereunder respecting applications for such lands and whose applications were pending before the Department on the said date may prosecute their applications in the same manner and may acquire the same title to such lands as if *The Mines Act, 1906*, and this Act had not been passed. 6 Edw. c. 11, s. 3 (3). *M. C. C. 164.*

(2) Nothing herein contained shall affect the sale, lease or location, for agricultural or other purposes, of any lands, opened for sale or free grant under *The Public Lands Act*, or *The Free Grants and Homesteads Act*, or *The Rainy River Free Grants and Homesteads Act*, or any Act, Order in Council or Regulation respecting the sale and disposal of such lands. 6 Edw. c. 11, s. 6.

BUREAU OF MINES.

4. The Bureau of Mines established in connection with the Department, to aid in promoting the mining interests of the Province, shall be continued, and the Deputy Minister shall have charge thereof under the direction of the Minister. 6 Edw. c. 11, s. 44.

5. The Deputy Minister shall have all the powers, rights and authority of an Inspector, and such other powers, rights and authority for carrying into effect the provisions of this Act as may be assigned to him by regulation. 6 Edw. c. 11, s. 45.

PROVINCIAL GEOLOGIST, ASSAYER, AND INSPECTORS.

6.—(1) The Lieutenant-Governor in Council may appoint a Provincial Geologist, a Provincial Assayer and an Inspector or Inspectors, who shall be officers of the Bureau of Mines, and shall perform such duties as may be assigned to them by this Act or by regulation. 6 Edw. c. 11, ss. 47, 48, 49.

(2) The Provincial Geologist shall be *ex officio* an Inspector.

MINING RECORDERS; THEIR DUTIES AND POWERS.

7. The Lieutenant-Governor may appoint for each Mining Division a Mining Recorder, who shall be an officer of the Bureau of Mines. 6 Edw. c. 11, s. 51.

8. Every Recorder shall keep such books for the recording of mining claims, quarry claims and working permit applications and other entries therein as may be prescribed by the Minister, and such books shall be open to inspection by any person on payment of a fee of 10 cents for each claim or application examined. He shall also keep displayed in his office a map or maps showing the territory included in his Mining Division, and shall mark thereon all claims as they are recorded, and also all areas applied for under the provisions of this Act relating to working permits, and also all such areas, to be specially distinguished, in respect in which a working permit has been issued, and there shall be no charge for examining the map. *6 Edw. c. 11, s. 55. M. C. C. 173, 176 (note 2).*

9. Every document filed in the Recorder's office shall, during office hours, be open to inspection by any one on payment of the prescribed fee. *6 Edw. c. 11, s. 56. Cf. R. S. B. C. c. 135, s. 97.*

10. Every copy of or extract from an entry in any of such books, and of any document filed in the Recorder's office, certified to be a true copy or extract by the Recorder, shall be received in any court as *prima facie* evidence of the matter certified by him without proof of his appointment, authority or signature. 6 Edw. c. 11, s. 57. *Cf. R. S. B. C. c. 135, s. 98.*

EMPLOYMENT OF PROFESSORS, ETC.

11. Notwithstanding anything in *The Public Service Act* the Minister may employ any professor, instructor, or other person engaged in any educational or other institution to investigate the mineral resources of the Province or for any work in connection with this Act, and may pay him for such services at such rate as may be agreed upon, out of any moneys appropriated by the Legislature for that purpose. 6 Edw. c. 11, s. 76 (2).

GENERAL PROVISIONS AS TO OFFICERS.

12.—(1) No officer appointed under this Act shall directly or indirectly, by himself or by any other person, purchase or become interested in any Crown lands, mining rights or mining claims, and any such purchase or interest shall be void.

(2) Any officer offending against the provisions of sub-section 1 shall forfeit his office and shall, in addition thereto, incur a penalty of $500 for every such offence, to be recovered in any court of competent jurisdiction by any person who sues for the same. 6 Edw. c. 11, s. 77.

13.—(1) A subpœna shall not issue out of any court, requiring the attendance of the Deputy Minister, the Commissioner, the Provincial Geologist, the Provincial Assayer, or any Inspector, inspecting officer, or Recorder, or the production of any document in their official custody or possession without an order of the court or a judge thereof, or in matters before the Commissioner without a direction of the Commissioner. (*New.*)

(2) The Deputy Minister, the Commissioner, the Provincial Geologist, the Provincial Assayer, and any Inspector, inspecting officer, or Recorder shall not be bound to disclose any information obtained by him in his official capacity which a member of the executive council certifies ought not in the public interest to be divulged or cannot without prejudice to the interests of persons not concerned in the litigation be divulged and all such information shall be privileged. 6 Edw. c. 11, s. 78.

14. The Commissioner, and every Inspector, shall be *ex officio* a Justice of the Peace for every county and district in Ontario and a Recorder in his division shall be *ex-officio* a Justice of the Peace for the County or district in which any part of his Division lies; and it shall not be necessary that they shall possess any residential or property qualification. 6 Edw. c. 11, s. 42.

15.—(1) A Recorder may appoint any number of constables not exceeding four, who shall be constables and peace officers for the purposes of this Act, during the terms and within the Mining Division for which they are appointed. 6 Edw. c. 11, s. 53.

(2) A constable so appointed shall be paid such fees and expenses as may be allowed by the Recorder, but such fees shall not exceed $3 per day for the time certified by the Recorder. 6 Edw. c. 11, s. 54.

MINING COMMISSIONER.

16.—(1) The Lieutenant-Governor in Council may, from time to time, appoint an officer, to be known as the Mining Commissioner, for the purposes of this Act, and all other Acts relating to mining. *M. C. C. 193, 206 (note).*

(2) He shall be a barrister of at least ten years' standing at the bar of Ontario.

(3) He shall not practice as a barrister or solicitor in any matter arising under this Act, or act in any capacity as a legal agent or adviser in any such matter. 6 Edw. c. 11, s. 8, *part.*

MINING DIVISIONS.

17.—(1) The Lieutenant-Governor in Council may divide the Province into Mining Divisions and may alter the number, limits and extent thereof.

(2) Every Order in Council made under this section shall be published in the *Ontario Gazette* and shall take effect from the date of the first publication thereof. 6 Edw. c. 11, s. 79; 7 Edw. c. 13, s. 26.

18. Except as in this Act otherwise specially provided the Recorder's office shall be the proper office for filing and recording all applications, documents and other instruments required or permitted to be filed or recorded under the provisions of this Act, affecting any unpatented mining claim or quarry claim or any right, privilege or interest which may be acquired under the provisions of this Act to or in respect of Crown lands or unpatented mining rights, and all such applications, documents and instruments may, before patent, be filed or recorded in the said office, but after patent, the provisions of *The Registry Act* and of *The Land Titles Act* shall respectively apply. 6 Edw. c. 11, s. 80. *See s. 2 (t); and see ss. 59, 73, etc. See M. C. C. 57 (note).*

19. Where any part of the Province is not included in a Mining Division, or if there is no Recorder for a Mining Division, all applications shall be made to the Bureau of Mines, and all duties and powers of the Recorder shall be performed and exercised by the Deputy Minister; and all acts, matters and things which in a Mining Division are to be done by or before a Recorder shall be done by or before the Deputy Minister, and all such acts, matters and things which are to be done in the office of the Recorder shall be done at the Bureau of Mines. 6 Edw. c. 11, s. 66; 7 Edw. c. 13, s. 16. *Cf. R. S. B. C. c. 135, s. 104.*

20. Upon the issue of a patent by the Crown of any mining lands or mining rights, the Minister shall give notice thereof to the Recorder of the Mining Division in which the lands included in the patent are situate, and the Recorder shall keep in his office a list of all such lands. (*See* 6 Edw. c. 11, s. 82.)

SPECIAL MINING DIVISIONS.

21.—(1) The Lieutenant-Governor in Council may declare any locality to be a Special Mining Division.

(2) Every Order in Council made under this section shall be published in the *Ontario Gazette* and shall take effect from the date of the first publication thereof. 6 Edw. c. 11, s. 83.

LICENSES TO MINE AND LICENSE HOLDERS.

22.—(1) No person, mining partnership or company not the holder of a miner's license shall prospect for minerals upon Crown lands or lands of which mining rights are in the Crown, or stake out, record or acquire any unpatented mining claim, quarry claim, or area of land for a working permit or for a boring permit, or acquire any right or interest therein. 6 Edw. c. 11, s. 84; 7 Edw. c. 13, s. 27. *See ss. 27, 84 (1) (a). M. C. C. 1, 32, 58, 99, 172, 189, 211, 219. See also Florence M. Co. v. Cobalt L. M. Co., 18 O. L. R. 285, 13 O. W. R. 837. See Archibald v. McNerhanie (B.C.), 29 S. C. R. 564.*

(2) A clerk or employee of a licensee performing clerical, manual or other services of a like nature shall not be required to be the holder of a miner's license. 6 Edw. c. 11, s. 95. *M. C. C. 3.*

23.—(1) Any person over eighteen years of age, any mining partnership and, subject to the provisions of subsection 6, any company incorporated or licensed under the laws of Ontario to transact business or hold lands in Ontario, shall be entitled on payment of the prescribed fee to obtain a miner's license. (Form 1.)

(2) The license shall be dated on the day of the issue thereof and shall expire at midnight on the 31st day of March then next ensuing.

(3) The license shall be effectual throughout Ontario but shall not be transferable.

(4) Licenses to companies shall be issued only by the Minister or by the Deputy Minister.

(5) Licenses to individuals and to mining partnerships may be issued by the Minister or the Deputy Minister or by any Recorder.

(6) A license shall not be issued to a company if it is incorporated under the laws of Ontario unless or until it has satisfied the Minister or the Deputy Minister that it is so incorporated, and if it is not so incorporated, unless or until it has filed with the Bureau of Mines a copy of the license authorizing the company to transact business or hold lands in Ontario verified by the affidavit (Form 2) of an officer of the company. 6 Edw. c. 11, ss. 85, 88, 186.

24. Every miner's license shall be numbered, and shall also be lettered with a letter of the alphabet prescribed by the Minister to indicate the office from which it was issued. 6 Edw. c. 11, s. 90.

25. A miner's license held by a mining partnership or a company shall not entitle any partner, shareholder, officer, or employee thereof to the rights or privileges of a licensee. 6 Edw. c. 11, s. 89.

26. A person who is not a licensee shall not prospect for minerals or stake out a mining claim, quarry claim, or area of mining land for the purpose of obtaining a working permit or boring permit on behalf of a mining partnership or a company. 7 Edw. c. 13, s. 27, as s. 89 (2).

27.—(1) A licensee shall be entitled to a renewal of his license (Form 3) on production of his license before the expiration thereof and on payment of the prescribed fee.

(2) The license may be renewed by the Minister or the Deputy Minister or by any Recorder.

(3) The renewal shall bear date on the 1st day of April and shall be deemed to have been issued and shall take effect immediately upon

the expiration of the license of which it is a renewal, or of the last preceding renewal as the case may be. 6 Edw. c. 11, ss. 91, 92; 7 Edw. c. 13, s. 28.

(4) The renewal shall bear the same number and letter as the original license and after it comes into effect it shall be deemed to be the license of the licensee. (*New.*)

28.—(1) If a miner's license is accidentally destroyed or lost, the holder may, on payment of the prescribed fee, obtain a duplicate thereof from the office out of which the original was issued.

(2) Every such duplicate shall be marked "substituted license." 6 Edw. c. 11, s. 93. *Cf. R. S. B. C. c. 135, s. 7.*

29.—(1) No person, mining partnership, or company shall apply for or hold more than one miner's license.

(2) A contravention of this section shall be an offence against this Act. 6 Edw. c. 11, s. 94.

30. Every licensee shall upon demand produce and exhibit his license to an Inspector or a Recorder. 6 Edw. c. 11, s. 96.

31. Where application for a license or a renewal of a license is made during the absence of a Recorder from his office, the applicant may leave with the person in charge of the office his application and such documents as he is required to produce in order to obtain the license or renewal and the prescribed fee, and in every such case the license or renewal when issued shall be as effective as if obtained at the time of the application, and the license shall bear that date. 7 Edw. c. 11, s. 97. *Cf. R. S. B. C. c. 135, s. 6.*

32. A licensee under the age of twenty-one years shall, in respect of mining claims, mining lands and mining rights and all matters and transactions relating thereto, have the same rights and be subject to the same obligations and liabilities as if he were of full age. 6 Edw. c. 11, s. 87.

33. The Minister, on the recommendation of the Commissioner, may revoke the license of any licensee who is guilty of a wilful contravention of any of the provisions of this Act, and a license shall not thereafter be issued to such licensee without the authority of the Minister. (*New.*) *Cf. R. S. C. c. 64, s. 88.*
M. C. C. 213.

PART II.—MINING CLAIMS.—MINERAL IN PLACE.

WHAT LANDS OPEN.

34. Subject to the provisions herein contained, the holder of a miner's license may prospect for minerals and stake out a mining claim on any:—

(*a*) Crown lands surveyed or unsurveyed;

(*b*) Lands, the mines, minerals or mining rights whereof have been reserved by the Crown in the location, sale, patent or lease of such lands;

not at the time:—

(i) Under staking or record, as a mining claim which has not lapsed or been abandoned, cancelled or forfeited;

(ii) Under a subsisting working permit; or

(iii) Withdrawn, by an Act, Order-in-Council or other competent authority from prospecting, location or sale, or declared by any such authority to be not open to prospecting, staking out or sale as mining claims. 6 Edw. c. 11, s. 131; 7 Edw. c. 13, s. 34, as 131. *Cf. R. S. B. C. c. 135, s. 12.*

M. C. C. 64, 68 (note), 70, 78 (note), 79, 166 (note), 167, 249, 262, 275 (note), 349, 364 (note), 407, 455; and see 26, 32, 179, 314, 373, 419. See also under ss. 83, 84, 55. See s. 2 (c). See also Florence M. Co. v. Cobalt L. M. Co., 18 O. L. R. 275, 13 O. W. R. 837 (also in P. C.)

DISCOVERER MAY STAKE OUT A CLAIM.

35. A licensee who discovers valuable mineral in place on any lands open to prospecting or a licensee upon whose behalf valuable mineral in place is discovered by another licensee upon any such lands, may stake out or have staked out for him a mining claim thereon and, subject to the other provisions of this Act, may work the same and transfer his interest therein to another licensee; but where the surface rights in the lands have been granted, sold, leased, or located by the Crown, compensation must be made as provided in section 104. 7 Edw. c. 13, s. 35, as 132.

M. C. C. 4, 32, 64, 68 (note), 70, 79, 88, 99, 102 (note), 120, 167, 179, 193, 262, 314, 373, 394, 419. See, also, s. 67.

LANDS NOT OPEN.

36. No mining claim shall be staked out or recorded upon any land transferred to or vested in The Temiskaming and Northern Ontario Railway Commission, without the consent of the Commission, nor except with the consent of the Minister upon any land:—

(a) Reserved or set apart as a town site by the Crown;

(b) Laid out into town or village lots on a registered plan by the owner thereof;

(c) Forming the station grounds, switching ground, yard or right of way of any railway, electric railway or street railway or upon any colonization or other road or road allowance. (*See* 6 Edw. c. 11, s. 109.)

See M. C. C. 230, 240 (note). See Coniagas Mines v. Cobalt, 15 O. W. R. 761, 20 O. L. R. 622.

37.—(1) Notwithstanding that the mines or minerals therein have been reserved to the Crown, no person, mining partnership or company shall prospect for minerals upon the part of any lot used as a garden, orchard, vineyard, nursery, plantation or pleasure ground, or upon which crops which may be damaged by such prospecting are growing, or on that part of any lot upon which is situated any spring, artificial reservoir, dam or waterworks, or any dwelling house, out-house, manufactory, public building, church or cemetery, except with the consent of the owner, lessee or locatee of the surface rights, or by order of the Recorder or the Commissioner, and upon such terms as to him may seem just. 6 Edw. c. 11, s. 121.

(2) If any dispute arises between the intending prospector and the owner, lessee, or locatee as to land which is exempt from prospecting under subsection 1, the Recorder or the Commissioner shall determine the extent of the land which is so exempt. (*New.*)

38. A water power, lying within the limits of a mining claim, which at low water mark, in its natural condition, is capable of producing 150 horse power or upwards shall not be deemed to be part of the claim for the uses of the licensee and a road allowance of one chain in width shall be reserved on both sides of the water together with such additional area of land as in the opinion of the Recorder or the Commissioner may be necessary for the development and utilization of such water power. 6 Edw. c. 11, s. 155.

39.—(1) The Lieutenant-Governor in Council may withdraw any lands or mining rights the property of the Crown from prospecting and staking out and from sale or lease. 6 Edw. c. 11, s. 98.

(2) The Lieutenant-Governor in Council may re-open for prospecting and staking out and for sale or lease any lands or mining rights so withdrawn or which have been heretofore withdrawn. 6 Edw. c. 11, s. 99.

40. The Lieutenant-Governor in Council may direct that the mines and minerals in lands or mining rights so withdrawn or in any part thereof may be worked by or on behalf of the Crown under and pursuant to regulations to be made by the Minister. 6 Edw. c. 11, s. 100.

41. Lands or mining rights so withdrawn, until re-opened by Order-in-Council, shall remain withdrawn, and shall not be prospected, staked out, occupied or worked except by or on behalf of the Crown. 6 Edw. c. 11, s. 101.

42.—(1) Every officer appointed or acting under the provisions of this Act, and every assistant of such officer who makes a discovery of valuable mineral upon any lands or mining rights, open to prospecting and staking out as a mining claim, shall stake out and record a parcel thereof of the size and form of a mining claim on behalf of the Crown, and no license shall be required for that purpose.

(2) No proceeding shall be necessary for such staking out except to plant posts and blaze lines as provided in respect to a mining claim, but the officer or assistant shall mark upon the discovery post and No. 1 post the words "staked out for the Crown," and within the time limited by this Act for recording the claim shall notify the Recorder of the staking out, giving the date of staking out and the description of the property.

(3) The Recorder upon receiving such notice shall enter the parcel of land upon his record book as staked out on behalf of the Crown, and shall mark it upon his map with the letter "C," and after such staking out the parcel shall not be open to staking out or recording. 7 Edw. c. 13, s. 29, as 101a.

43. Lands or mining rights staked out on behalf of the Crown, and lands or mining rights reserved or withdrawn from prospecting, staking out, or sale as mining claims, may be worked, sold, leased or granted by the Crown or worked under an agreement or arrangement with the Crown in such manner and upon such terms and conditions and for such price as may be provided by Order-in-Council; and all sales, leases, grants or working agreements heretofore made in respect of any such lands or mining rights are hereby ratified and confirmed. 7 Edw. c. 13, s. 29, as 101b. See 6 Edw. c. 11, s. 100.

FOREST RESERVES.

44. No person, mining partnership or company, not the holder of a miner's license, shall use or occupy any of the lands in a Crown Forest Reserve, or prospect for minerals or conduct mining operations therein, and no licensee shall use or occupy any of the lands

in a Crown Forest Reserve or prospect for minerals or conduct mining operations therein, except in accordance with regulations made under *The Forest Reserves Act*. 6 Edw. c. 11, s. 104.
M. C. C. 1, 219, 430, 436; and see 192.

45. No lands shall be sold for mining purposes in a Crown Forest Reserve. 6 Edw. c. 11, s. 174 (2).

46.—(1) A lease of lands in a Crown Forest Reserve permitting mining operations therein may be made for a period not exceeding ten years with the right of perpetual renewal for periods of not more than ten years.

(2) Every such lease and every renewal of it shall be subject to such regulations as may from time to time be made by the Lieutenant-Governor in Council. 6 Edw. c. 11, s. 105.

LANDS UNDER TIMBER LICENSE.

47. Except as herein otherwise provided, the holder of a miner's license may prospect for minerals on any Crown lands under timber license under and subject to the following provisions:—

1. Upon the discovery of valuable mineral in place on any Crown lands under timber license the holder of a miner's license may stake out and record a mining claim thereon, and the Recorder within three days after the application for record shall notify the Minister thereof and the Minister shall thereupon notify the timber licensee.

2. The provisions of this Act with reference to mining operations on the mining claim shall be suspended until it has been decided by the Minister whether mining operations shall be permitted to be carried on, and if the Minister decides that mining operations may be carried on, the time for the performance of the working conditions shall begin on the day fixed by the Minister, of which date notice shall be given to the Recorder and the mining licensee.

3. The Minister may impose such restrictions and limitations as in his judgment may be necessary to protect the interests of the Crown and of all persons concerned.

4. The Lieutenant-Governor in Council may make regulations regarding the carrying on of mining operations on Crown Lands under timber license, but the provisions of subsection 3 of section 187 shall apply to such regulations.

5. The rights conferred upon the holder of a miner's license under this section shall be subject to the payment to the timber licensee of the value of his interest in any timber cut or damaged upon such mining claim, and any dispute between the mining licensee and the timber licensee in respect to the quantity or the value thereof or otherwise shall be disposed of by the Minister, whose decision shall be final. 6 Edw. c. 11, s. 130.

PROHIBITING MINING WORK.

48. The Minister, whenever he deems it necessary for the protection of timber or for any other reason, may prohibit the carrying on upon Crown lands of mining work or other operations which would otherwise be lawful under this Act until such time and except in accordance with such restrictions and conditions as he may deem proper. (*New*).

SIZE AND FORM OF MINING CLAIMS.

49. A mining claim in unsurveyed territory shall be laid out with boundary lines running north and south and east and west astronomically and the measurements thereof shall be horizontal, and in a township surveyed into lots or quarter sections or subdivisions of a section, a mining claim shall be such part of a lot or quarter section or subdivision of a section as is hereinafter defined, and the boundaries of all mining claims shall extend downwards vertically on all sides. 6 Edw. c. 11, s. 108.

Mining Claims not in a Special Mining Division.

50. Except in a Special Mining Division.

(*a*) A mining claim in unsurveyed territory shall be a square of 40 acres, being 20 chains (1,320 ft.) on each side. 6 Edw. c. 11, s. 110, *part*.

M. C. C. 430.

(*b*) Where mining locations the property of the Crown in unsurveyed territory have been surveyed in conformity with any Act into blocks of the following dimensions, namely, 20 chains in length by 20 chains in width, 40 chains in length by 20 chains in width, 40 chains square, or 80 chains in length by 40 chains in width or thereabouts, and the plans and field notes of such locations are of record in the Department, a mining claim staked out thereon shall be 20 chains in length by 20 chains in width, and one claim shall comprise the whole of a location 20 chains square. A location 40 chains in length by 20 chains in width may be divided into two mining claims by a line drawn through the centre thereof parallel to one of the shorter boundaries. In the case of a location 40 chains square a claim shall consist of one or other of the following subdivisions: the northeast quarter, the northwest quarter, the southeast quarter, or the southwest quarter. In a location 80 chains in length by 40 chains in width where the length of the location is north and south, a claim shall consist of the northeast quarter of the north half, the northwest quarter of the north half, the southeast quarter of the north half, the southwest quarter of the north half or any like subdivision of the south half; and where the length of a location is east and west a claim shall consist of the northeast quarter of the east half, the northwest quarter of the east half, the southeast quarter of the east half, or the southwest quarter of the east half, or any like subdivision of the west half. 6 Edw. c. 11, s. 115.

(*c*) In a township surveyed into sections of 640 acres subdivided into quarter sections, or subdivisions containing 160 acres or thereabouts, a mining claim shall consist of the northeast quarter, the northwest quarter, the southeast quarter or the southwest quarter of a quarter section or subdivision, and shall contain 40 acres or thereabouts. 6 Edw. c. 11, s. 111.

(*d*) In a township surveyed into lots of 320 acres, a mining claim shall consist of the northwest quarter of the north half, the northeast quarter of the north half, the southwest quarter of the north half, the southeast quarter of the north half, or any like subdivision of the south half, and shall contain 40 acres or thereabouts. 6 Edw. c. 11, s. 112.

M. C. C. 70, 419.

(e) In a township surveyed into lots of 200 acres a mining claim shall consist of the northeast quarter, the southwest quarter, the northwest quarter, or the southeast quarter of the lot, and shall contain 50 acres or thereabouts. 6 Edw. c. 11, s. 113.

M. C. C. 214.

(f) In a township surveyed into lots of 150 acres, a mining claim shall consist of the northeast quarter, the southeast quarter, the northwest quarter, or the southwest quarter of the lot, and shall contain 37½ ares or thereabouts. (*New.*)

(g) In a townsnip surveyed into lots of 100 acres, a mining claim shall consist of the north half, the south half, the east half, or the west half of the lot, and shall contain 50 acres, or thereabouts. 6 Edw. c. 11, s. 114.

Claims in a Special Mining Division.

51. In a Special Mining Division,

(a) A mining claim in unsurveyed territory shall be a rectangle of 20 acres, having a length from north to south of 20 chains (1,320 ft.) and a width from east to west of 10 chains (660 ft.). 6 Edw. c. 11, s. 127.

(b) Where mining locations the property of the Crown in unsurveyed territory have heretofore been surveyed in conformity with the provisions of any Act into blocks of the following dimensions, namely, 20 chains in length by 20 chains in width, 40 chains in length by 20 chains in width, 40 chains square, or 80 chains in length by 40 cnains in width, or thereabouts, and the plans and field notes of such locations are of record in the Department, a mining claim staked out thereon shall consist of the east half or the west half of a location 20 chains square, or the northeast quarter, the southeast quarter, the northwest quarter, or the southwest quarter, of a location 40 chains in length by 20 chains in width; or the west half of the east half of any of the following subdivisions of a location 40 chains square, namely, the northeast quarter, the northwest quarter, the southeast quarter, or the southwest quarter; or the northeast quarter of the northeast quarter, the northwest quarter of the northeast quarter, the southeast quarter of the northeast quarter, or the southwest quarter of the northeast quarter, or any like subdivision of the southeast quarter, the southwest quarter, or the northwest quarter of a location 80 chains in length by 40 chains in width, or where the length of such location is east and west, of the east half or the west half of the northeast quarter of the east half, the east half or the west half of the southeast quarter of the east half, the east half or the west half of the northwest quarter of the east half, or the east half or the west half of the southwest quarter of the east half, or of a corresponding subdivision of the west half of the location, and every such mining claim shall contain 20 acres or thereabouts. 6 Edw. c. 11, s. 128.

(*c*) In a township surveyed into sections of 640 acres, where the sections have been subdivided into quarter sections, or subdivisions, a mining claim shall consist of either the west half or the east half of the northeast quarter, the southeast quarter, the northwest quarter or the southwest quarter of a quarter section or subdivision, and shall contain 20 acres or thereabouts. 6 Edw. c. 11, s. 123.

(*d*) In a township surveyed into lots of 320 acres, a mining claim shall consist of the northeast quarter of the northeast quarter, the northwest quarter of the northeast quarter, the southeast quarter of the northeast quarter, or the southwest quarter of the northeast quarter, or any like subdivision of the southeast quarter, the southwest quarter, or the northwest quarter of the lot, and shall contain 20 acres or thereabouts. 6 Edw. c. 11, s. 124.

(*e*) In a township surveyed into lots of 200 acres, a mining claim where the side lines of the lots run northerly and southerly, shall consist of the northeast quarter of the north half, the southeast quarter of the north half, the northwest quarter of the north half, the southwest quarter of the north half, or any like subdivision of the south half; and where the side lines of the lots run easterly and westerly, the mining claim shall consist of the northeast quarter of the east half, the northwest quarter of the east half, the southeast quarter of the east half, the southwest quarter of the east half, or any like subdivision of the west half, and every such mining claim shall contain 25 acres or thereabouts. 6 Edw. c. 11, s. 125.

(*f*) In a township surveyed into lots of 150 acres a mining claim shall consist of the north half or the south half of the northeast quarter, the northwest quarter, the southeast quarter or the southwest quarter of the lot, and shall contain 18¾ acres or thereabouts. (*New.*)

(*g*) In a township surveyed into lots of 100 acres, a mining claim shall consist of the northeast quarter, the southeast quarter, the northwest quarter, or the southwest quarter of a lot, and shall contain 25 acres or thereabouts. 6 Edw. c. 11, s. 126.

IRREGULAR AREAS, ETC.

52.—(1) In unsurveyed territory an irregular portion of land lying between lands not open to be staked out, or bordering on water, may be staked out with boundaries coterminous thereto, but the claim shall be made to conform as nearly as practicable to the prescribed form and area and shall not exceed the prescribed area. 6 Edw. c. 11, s. 110, *part.*

(2) In a surveyed township where, by reason of land covered with water being excluded from the area of a lot, quarter section or subdivision of a section, or by reason of the lot, quarter-section or subdivision being irregular in form, or from any other cause, it is impossible to stake out a mining claim of the prescribed area in accordance with the foregoing provisions of this Act, the mining claim where practicable shall be of the prescribed form and area and shall have such, if any, of its boundaries as can be so made coincident with boundary lines of the lot, quarter-section or subdivision of a section, and shall have as many as possible of its boundaries which are not so coincident parallel to boundaries of the lot, quarter-section or subdivision which are straight lines, and where necessary to procure the prescribed area the mining claim may extend into any part of the

lot or quarter-section or subdivision of a section, but not into any other lot or quarter-section or subdivision of a section, and land lying between lands not open to be staked out or between such lands and a boundary or boundaries of the lot, quarter-section or subdivision of a section, may be staked out with boundaries coterminous thereto, but the claim shall be made to conform as nearly as practicable to the prescribed form and area and shall not exceed the prescribed area. 6 Edw. c. 11, s. 116; 7 Edw. c. 13, s. 30.

M. C. C. 58, 214.

NUMBER OF CLAIMS WHICH MAY BE STAKED OUT.

53. Not more than three mining claims may be staked out, applied for, or recorded in the name of a licensee in any one mining division or in territory not comprised in a mining division during a license year. 7 Edw. c. 13, s. 37, as 139.

STAKING OUT CLAIMS.

54.—(1) A mining claim shall be staked out by:—

(*a*) Planting or erecting upon an outcropping or showing of mineral in place at the point of discovery a discovery post upon which shall be written or placed the name of the licensee making the discovery, the letter and number of his license, and the date of his discovery, and if the discovery is made on behalf of another licensee for and in whose name the claim is to be staked out and recorded, also the name of such other licensee, and the letter and number of his license;

M. C. C. 32, 70, 120, 149, 314, 419; and see 285.

(*b*) Planting or erecting a post at each of the four corners of the claim, marking that at the northeast corner "No. 1," that at the southeast corner "No. 2," that at the southwest corner "No. 3," and that at the northwest corner "No. 4," so that the number shall be on the side of the post toward the post next following it in the order named;

(*c*) Writing or placing on No. 1 post all the particulars required to be upon the discovery post, and also plainly marking thereon the distance and direction therefrom of the discovery post, and if the claim is situated in a township surveyed into lots, quarter-sections or subdivisions of a section, the part thereof comprised in the claim, mentioning the lot and concession or the section by number;

M. C. C. 58, 139, 419.

(*d*) Writing or placing on No. 2, No. 3 and No. 4 posts the name or the licensee making the discovery, and if the discovery is made on behalf of another licensee for and in whose name the claim is being staked out, also the name of such other licensee; and

(*e*) Plainly blazing the trees on two sides only where there are standing trees, and cutting the underbrush along the boundary lines of the claim and plainly blazing a line from No. 1 post to the discovery post, or where there are no standing trees, clearly indicating the outlines of the claim, and marking a line from No. 1 post to the discovery post by planting durable pickets, not less than

five feet in height thereon at intervals of not more than two chains (132 feet) or by erecting at such intervals monuments of earth or rock not less than two feet in diameter at the base, and at least two feet high, so that the lines may be distinctly seen. 7 Edw. c. 13, s. 26, as 133.

M. C. C. 58, 193, 214.

M. C. C. 58, 70, 88, 193, 249, 277, 397. See ss. 58 83. And see M. C. C. 390.

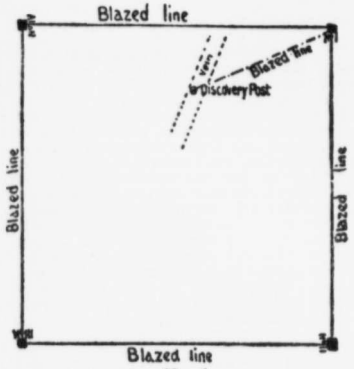
(2) Where at a corner of the claim the nature or conformation of the ground renders the planting or erecting of a post impracticable, such corner may be indicated by planting or erecting at the nearest practicable point a witness post which shall bear the same marking as that prescribed for the corner post at that corner together with the letters "W. P." and an indication of the direction and distance of the site of the true corner from the witness post. 7 Edw. c. 13, s. 36, as 133.

M. C. C. 179.

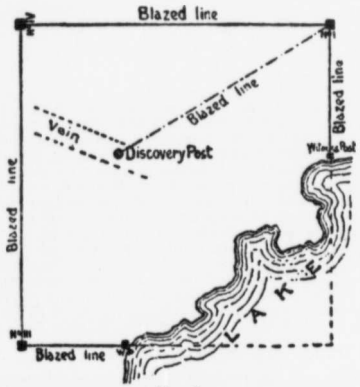
(3) Every post shall stand not less than four feet above the ground, and shall be squared or faced on four sides for at least one foot from the top, and each side shall measure at least four inches across where squared or faced, but a standing stump or tree may be used as a post if cut off and squared and faced to such height and size, and when the survey is made the centre of the tree or stump where it enters the ground shall be taken as the point to or from which the measurement shall be made. 6 Edw. c. 13, s. 2 (20). *Cf. R. S. B. C. c. 135, s. 2.*

M. C. C. 58, 271. See s. 58.

(4) The following diagrams are intended to illustrate the method of staking out a claim as mentioned in subsections 1 and 2.



No. 1.



No. 2.

55. After a discovery of valuable mineral in place, the licensee, if he desires to stake out a claim thereon, shall at once plant or erect his discovery post and proceed as quickly as is reasonably possible to complete the staking out of the claim, and if he is in fact the first licensee to make a discovery of valuable mineral in place and plant a discovery post thereon no other licensee shall be entitled to stake out or interfere with the property while he is so completing the staking out, but if he fails to proceed with the staking out

with such diligence and speed, he shall be liable to lose his rights in case another licensee makes a discovery of valuable mineral in place upon the property and completes the staking out before him. 7 Edw. c. 13, s. 36, as 134.

M. C. C. 83, 88, 149, 189, 193; and see 4.

56.—(1) Until a discovery post is planted or erected all licensees shall have equal rights upon lands open to prospecting, except that where a licensee has found what he believes to be a vein or deposit of mineral or to be an indication thereof, he may plant or erect not more than 150 feet apart two pickets, at least four feet in height, to be known as prospecting pickets, each marked with the letters "P. P." and his name and license number and letter, and may dig a trench not less than six feet long and six inches deep from each of such pickets along the line running towards the other picket, or where that is impracticable may erect a monument of rock or earth not less than two feet wide at the base and at least two feet high, extending six feet from each picket towards the other picket, and may also blaze the standing trees, if any, along the line between the pickets, and after he has so done, so long as he is diligently and continuously prospecting or following up indications on the block of land extending twenty-five feet on each side of a straight line between the pickets he shall be entitled to the exclusive right to prospect and to make a discovery thereon.

(2) Nothing in subsection 1 shall prevent any other licensee from prospecting anywhere outside the limits of such block of land, and the first licensee to discover valuable mineral in place and stake out a mining claim thereon shall, subject to the other provisions of this Act, be entitled to the claim, and if the claim includes such block of land the rights of such picketing licensee shall cease.

(3) A licensee shall not have more than one block of land picketed at one time, and if he has at any time more than one, all his pickets shall be void. 7 Edw. c. 13, s. 36, as 135.

M. C. C. 193, and see 170.

57.—(1) A licensee or other person who for any purpose does any staking out or plants, erects or places any stake, post, or marking upon any lands open to prospecting except as authorized by this Act, or causes or procures the same to be done, or who stakes out or partially stakes out any such lands, or causes or procures the same to be done and fails to record the staking out with the Recorder within the prescribed time, shall not thereafter be entitled to again stake out such lands or any part thereof, or to record a mining claim thereon, unless he notifies the Recorder in writing of such staking out, or partial staking out, or planting, placing or marking and of his abandonment thereof and satisfies the Recorder by affidavit that he acted in good faith and for no improper purposes and pays to the Recorder a fee of $20 and procures from him a certificate stating that the Recorder is satisfied that he so acted. 7 Edw. c. 13, s. 36, as 136. *Cf. R. S. B. C. c. 135, s. 32; R. S. C. c. 64, s. 36.*

M. C. C. 99, 193, 214, 262, 354, 397, 430.

(2) The Recorder shall enter every such certificate in his books with the date of its issue.

58. Substantial compliance as nearly as circumstances will reasonably permit with the requirements of this Act as to the staking out of mining claims shall be sufficient. 6 Edw. c. 11, s. 137. *Cf. R. S. B. C. c. 135, s. 16; B. C. 1898, c. 33, s. 4.*

M. C. C. 32, 58, 70, 88, 120, 139, 149, 214, 241, 249. See ss. 54, 83. Cf. Clark v. *Dockstader (B. C.), 36 S. C. R. at 637. See Richards* v. *Price (B.C.), 1 M. M. C. 156.*

RECORDING MINING CLAIMS.

59.—(1) A licensee who has staked out a mining claim or upon whose behalf a mining claim has been staked out shall, within fifteen days thereafter or within the further time allowed by subsection 4, furnish to the Recorder an outline sketch or plan of the mining claim, showing the discovery post and corner posts and the witness posts (if any) and their distance from each other in feet, together with an application (Form 4) setting forth the name of the licensee by whom the valuable mineral in place was discovered and of the licensee on whose behalf the application is made and the letters and numbers of their licenses, the name, if any, of the claim, and in the case of unsurveyed territory its locality indicated by some general description and such other information as will enable the Recorder to lay down the claim on his office map, or in the case of a surveyed township, designating the lot, quarter-section or subdivision of a section, and the portion thereof comprised in the claim, the length of the outlines, and if for any reason they are not regular the nature of such reason, the situation of the discovery post as indicated by the distance and direction from No. 1 post, the day and hour when the discovery of valuable mineral in place was made, when the claim was staked out and the date of the application, and with the application shall be paid the prescribed fee. 6 Edw. c. 11, s. 156; 7 Edw. c. 13, s. 43. See s. 2 (*t*).

M. C. C. 35, 88, 139, 144, 211, 219, 254, 314, 380; and see 285, 390, 451.

(2) If a licensee claims to be entitled to a free grant of a mining claim under section 108, he shall, in addition to the application to record the claim, make application (Form 5) for the free grant. 6 Edw. c. 11, s. 156; 7 Edw. c. 13, s. 43.

(3) The application and sketch or plan shall be accompanied by an affidavit (Form 6) made by the discovering licensee showing a discovery of valuable mineral in place upon the claim, with particulars of the kind of ore or mineral discovered, and, if possible, the kind of rock enclosing it, the date of the discovery and of the staking out, that the distances given in the application and sketch or plan are as accurate as they could reasonably be ascertained, and that all the other statements and particulars set forth and shown in the application and sketch or plan are true and correct, that at the time of staking out there was nothing upon the lands to indicate that they were not open to be staked out as a mining claim, that the deponent verily believes they were so open and that the staking out is valid and should be recorded, and that there are upon the lands or the lot or part lot or section of which they form a part no buildings, clearing or improvements for farming or other purposes except as set forth in the affidavit; and an applicant for a free grant shall also file an affidavit (Form 7) showing his right thereto. (See 6 Edw. c. 11, s. 157; 7 Edw. c. 13, s. 44.) *See s. 34.*

M. C. C. 79, 88, 144, 211, 219, 254, 262 275 (note), 314, 349, 364 (note), 380; and see 26. See Atty.-Gen. v. Hargrave, 8 O. W. R. 127, 10 O. W. R. 319.

(4) Where the claim is situate more than ten miles in a straight line from the office of the Recorder for each additional ten miles or fraction thereof an additional day shall be allowed for recording. 6 Edw. c. 11, s. 158.

60. A licensee by or on whose behalf an application is made to record a mining claim shall at the time of the application produce the license of the licensee by whom the staking out was done and of the licensee by or on whose behalf the application is made to the Recorder, and the Recorder shall endorse and sign upon the back of the last

mentioned license a note in writing of the record of the claim, and no such record shall be complete or effective until such endorsement is made unless upon application to or in any case coming before the Commissioner he deems it just that compliance with the requirements of this section should be excused. 6 Edw. c. 11, s. 59; 7 Edw. c. 13, s. 14, as 158*b*.

61. If by error a licensee records a mining claim in a division other than that in which the claim is situate the error shall not affect his title to the claim, but he shall within fifteen days from the discovery of the error record the claim in the division in which it is situate, and the new record shall bear the date of the former record, and a note shall be made thereon of the error and of the date of rectification. 6 Edw. c. 11, s. 81. *Cf. R. S. B. C. c. 135, s. 22.*

62.—(1) The Recorder shall forthwith enter in the proper book in his office the particulars of every application to record a mining claim which he deems to be in accordance with the provisions of this Act, unless a prior application is already recorded for the same, or for any substantial portion of the same lands or mining rights, and he shall file the application, sketch or plan and affidavit with the records of his office; and every application proper to be recorded shall be deemed to be recorded when it is received in the Recorder's office, if all requirements for recording have been complied with, notwithstanding that the application may not have been immediately entered in the record book. 7 Edw. c. 13, s. 13, as 158*a* (1).

M. C. C. 144; and see 173 and 176 (note 2), 293.

(2) If an application is presented which the Recorder deems to be not in accordance with this Act, or which is for lands or mining rights which or any substantial portion of which are included in a subsisting recorded claim, he shall not record the application, but shall, if desired by the applicant, upon receiving the prescribed fee, receive and file the application, and the applicant may appeal to the Commissioner against the Recorder's refusal to record; but such filing shall not be deemed a dispute of the recorded claim, nor shall it be noted or dealt with as such, unless a dispute verified by affidavit is filed with the Recorder by the applicant or by another licensee on his behalf as in the next following section provided. 7 Edw. c. 13, s. 13, as 158*a* (2).
M. C. C. 64, 179, 448.

DISPUTING APPLICATIONS.

63.—(1) A dispute (Form 8) verified by affidavit (Form 9) may be filed with the Recorder by a licensee alleging that any recorded claim is illegal or invalid in whole or in part, and if the disputant or the licensee in whose behalf he is acting claims to be entitled to be recorded for or to be entitled to any right or interest in the lands or mining rights, or in any part thereof comprised in the disputed claim the dispute shall so state, giving particulars; and the Recorder shall, upon payment of the prescribed fee, receive and file such dispute, and shall enter a note thereof upon the record of the disputed claim. 7 Edw. c. 13, s. 13, as 158*a* (3).

M. C. C. 83, 346, 348 (note), 349, 364 (note), 388.

(2) A copy of the dispute and affidavit shall be left by the disputant with the Recorder who shall not later than the next day after the filing of the dispute transmit such copy by registered post to the recorded holder of the mining claim affected thereby. If the copy is not left, the Recorder may refuse to file or note the dispute or may collect from the disputant ten cents per folio for making the copy. (*New.*)

(3) A dispute shall not be received unless it contains or has endorsed thereon an address for service at some place not more than five miles distant from the Recorder's office, and the provisions of subsections 4 and 5 of section 133 shall apply in respect to service upon the disputant. 7 Edw. c. 13, s. 13, as 158a (4), *part.*

(4) A dispute shall not be received or entered against any claim after a certificate of record thereof has been granted; *nor except by leave of the Commissioner after the validity of the claim has been adjudicated upon by the Recorder or by the Commissioner, or after it has been on record for sixty days and has already had a dispute entered against it; but this amendment is not retroactive and shall not apply to any case where such validity has heretofore been adjudicated upon by the Recorder or by the Commissioner.* 7 Edw. c. 13, s. 13, as 158a (4), *part. As amended in 1910 by c. 26, s. 35.*

M. C. C. 211, 394, 461.

CERTIFICATE OF RECORD.

64. Where a mining claim not within a Complete Inspection Area has been recorded for sixty days and the alleged discovery has not been adversely reported upon by the inspecting officer, or where a mining claim within a Complete Inspection Area has been recorded for sixty days, and the discovery upon which it is based has been inspected and finally allowed, upon application of the holder of the claim, and if there is no dispute standing against the claim and the surface rights compensation, if any, has been paid or secured, the Recorder, unless by reason of an order pending proceeding or other special matter or thing it would be improper to do so, shall give to such holder a certificate of record (Form 10), or if a portion of the claim is unaffected by any of the matters aforesaid he may, if he deems proper, give a certificate of record as to such portion. 7 Edw. c. 13, s. 13, as 158a (5).

M. C. C. 461.

65. The certificate of record, in the absence of mistake or fraud, shall be final and conclusive evidence of the performance of all the requirements of this Act, except working conditions, in respect to the mining claim up to the date of the certificate; and thereafter the mining claim shall not in the absence of mistake or fraud be liable to impeachment or forfeiture except as expressly provided by this Act. 6 Edw. c. 11, s. 71; 7 Edw. c. 13, s. 22; Cf. s. 78 (4); *Cf. R. S. B. C. c. 135, s. 28.*

M. C. C. 162, 211 (and note), 219, 254, 430, 461, 465. Cf. Coplen v. Callahan (B.C.), 30 S. C. R. 555, 1 M. M. C. 348, and 32 S. C. R. 371. Cf. Atty.-Gen. v. Hargrave, 8 O. W. R. 127, 10 O. W. R. 319.

66. Where the certificate of record has been issued in mistake or has been obtained by fraud, the Commissioner shall have power to revoke and cancel it on the application of the Crown or an officer of the Bureau of Mines, or of any person interested. (*New.*)

M. C. C. 407, 461.

EXTENT OF RIGHTS IN MINING CLAIMS.

67. Subject to the provisions of section 65, a licensee shall not acquire any right to or interest in a mining claim unless a discovery of valuable mineral in place has been made thereon by him or by another licensee on his behalf. 6 Edw. c. 11, s. 117; 7 Edw. c. 13, s. 31.

M. C. C. 4, 32, 86, 99, 102 (Note), 120, 162, 167 179 193 349 361 (Note), 373, 394, 427, 455, 461. See s. 2 (x). See s. 35. Cf. Collom v. Manley (B.C.), 32 S. C. R. 371, 1 M. M. C. 487.

68. The staking out or the filing of an application for, or the recording of a mining claim, or all or any of such acts, shall not confer upon a licensee any right, title, interest or claim in or to the mining claim other than the right to proceed, as in this Act provided to obtain a certificate of record and a patent from the Crown; and prior to the issue of a certificate of record the licensee shall be merely a licensee of the Crown, and after the issue of the certificate and until he obtains a patent, he shall be a tenant at will of the Crown in respect of the mining claim. 7 Edw. c. 13, s. 38, as 140. *Cf. R. S. B. C. c. 135, s. 34.*

M. C. C. 456, 365; and see 206 (Note), 223, 397.

ADDRESS FOR SERVICE.

69.—(1) Every application for a mining claim or a working permit and every other application and every transfer or assignment of a mining claim or of any right or interest acquired under the provisions of this Act shall contain, or have endorsed thereon, the place of residence and post office address of the applicant, transferee or assignee, and also, when he is not a resident in Ontario, the name, residence and post office address of some person resident in Ontario upon whom service may be made.

(2) No such application, transfer or assignment shall be filed or recorded unless it conforms with the provisions of the next preceding subsection.

(3) Another person resident in Ontario may be substituted as the person upon whom service may be made by filing in the office in which any such application, transfer or assignment is filed or recorded, a memorandum setting forth the name, residence and post office address of such other person and such substitution may be made from time to time as occasion may require.

(4) Service upon the person named as the person upon whom service may be made, unless another person has been substituted for him under the provisions of subsection 3, and in case of such substitution upon the person substituted, shall have the same effect as service upon the person whom he represents.

(5) The provisions of the next preceding subsection shall apply to every notice, demand or proceeding in any way relating to a mining claim or to mining rights or to any other right or interest which may be acquired under the provisions of this Act. (*New.*)

TRUSTS, AGREEMENTS AND TRANSFERS.

70.—(1) Notice of a trust express, implied or constructive, relating to any unpatented mining claim shall not be entered on the record or be received by a Recorder.

(2) Describing the holder of the mining claim as a trustee, whether the beneficiary or object of the trust is mentioned or not, shall not impose upon any person dealing with such holder, the duty of making any enquiry as to his power to deal therewith, but the holder may deal with the claim as if such description had not been inserted.

(3) Nothing in this section contained shall relieve the holder of the mining claim who is in fact a trustee thereof or of any part or share thereof or interest therein, from liability as between himself and any person, mining partnership or company for whom he is trustee, but such liability shall continue as if this section had not

been enacted, nor shall any provision in this Act relieve the holder from any personal liability or obligation. 6 Edw. c. 11, s. 159; 7 Edw. c. 13, s. 45. *Cf. R. S. O. 138, s. 103.*

M. C. C. 57 (and note); and see 373, 467. See Stuart v. *Mott (N.S.), 23 S. C. R. 384.*

71.—(1) No person shall be entitled to enforce any claim, right or interest, contracted for or acquired before the staking out, to or in or under any staking out or recording of a mining claim or of any mining lands or mining rights done in the name of another person unless the fact that such first-mentioned person is so entitled is made to appear by a writing signed by the holder of the claim or by the licensee by whom or in whose name the staking out or recording was done, or the evidence of such first-mentioned person is corroborated by some other material evidence, and where a right or interest is so made to appear the provisions of the Statute of Frauds shall not apply.

M. C. C. 156 (and note), 207, 219, 222 (note), 223, 230 (note), 288, 331, 341, 467; and see 305, 421, 441, 445, 476 478. Cf. McLeod v. *Lawson, 8 O. W. R. 213.*

(2) No person shall be entitled to enfore any contract, made after the staking out, for sale or transfer of a mining claim or any mining lands or mining rights, or any interest in or concerning the same, unless the agreement or some note or memorandum thereof is in writing signed by the person against whom it is sought to enforce the contract or by his agent thereunto by him lawfully authorized. 6 Edw. c. 11, s. 118; 7 Edw. c. 13, ss. 32, 45, as 159 (2), 159a. *Cf. R. S. B. C. c. 135, ss. 50, 130; R. S. C. c. 64, s 47.*

M. C. C. 17, 223, 230 (note), 296, 320, 339; and see 37, 368. See Chevrier v. *Trust & G. Co., 18 O. L. R. 547, 1 O. W. R. 101; and see Stuart* v. *Mott (N.S.), 23 S. C. R. 384; Archibald* v. *McNerhanie (B.C.), 29 S. C. R. 564.*

72. A transfer of an unpatented mining claim or of any interest therein may be in Form 11 and shall be signed by the transferor or by his agent authorized by instrument in writing. 6 Edw. c. 11, s. 118; 7 Edw. c. 13, s. 32, as 159a, *part.*

RECORDING DOCUMENTS.

73. Except as in this Act otherwise expressly provided, no transfer or assignment of or agreement or other instrument affecting a mining claim or any recorded right or interest acquired under the provisions of this Act, shall be entered on the record or received by a Recorder unless the same purports to be signed by the recorded holder of the claim or right or interest affected, or by his agent authorized by recorded instrument in writing, nor shall any such instrument be recorded without an affidavit (Form 12) attached to or endorsed thereon, made by a subscribing witness to the instrument. 6 Edw. c. 11, s. 118; 7 Edw. c. 13, s. 159a, *part. New in part.*

M. C. C. 365.

74. After a mining claim or any other right or interest acquired under the provisions of this Act has been recorded every instrument other than a will affecting the claim or any interest therein shall be void as against a subsequent purchaser or transferee for valuable consideration without actual notice unless such instrument is recorded before the recording of the instrument under which the subsequent purchaser or transferee claims. See R. S. O. c. 136, s. 87.

See M. C. C. 346, 467, and 57 (note).

75. The recording of an instrument under this Act shall constitute notice of the instrument to all persons claiming any interest in the claim subsequent to such recording, notwithstanding any defect in the proof for recording, but nevertheless it shall be the duty of the Recorder not to record an instrument except upon the proof required by this Act. See R. S. O. c. 136, s. 92.

M. C. C. 467.

76. Priority of recording shall prevail unless before the prior recording there has been actual notice of the prior instrument by the party claiming under the prior recording. See R. S. O. c. 136, s. 97.

See M. C. C. 346. 467.

77.—(1) The Recorder shall enter upon the record of any unpatented mining claim or other recorded right or interest a note of any order or decision made by him affecting the same, giving its date and effect and the date of the entry; and he shall upon receiving with the prescribed fee, an order or decision of the Commissioner, or an order, judgment or certificate in an appeal from him, or a certified or sworn copy thereof, file the same and enter a note thereof upon the record of the claim or right or interest affected thereby.

M. C. C. 173, 176 (Note 2).

(2) In a proceeding calling in question any interest in an unpatented mining claim or other recorded right or interest, the Commissioner or Recorder may issue a certificate (Form 13) and upon receipt thereof and payment of the prescribed fee the Recorder shall file and note it as herein above directed.

M. C. C. 346, 348 (note), 365, 428.

(3) The filing of a certificate shall be actual notice to all persons of the proceeding.

M. C. C. 467.

(4) The certificate, and the filing and noting thereof, shall be of no effect for any purpose whatever after the expiration of ten days from the date of filing unless within that time an order continuing the same is obtained from the Commissioner or the Recorder, and any person interested may at any time apply to the Commissioner for an order vacating the certificate. 7 Edw. c. 13, s. 46, as 159b.

M. C. C. 365.

WORKING CONDITIONS.

78.—(1) The recorded holder of a mining claim shall perform thereon work which shall consist of stripping or opening up of mines, sinking shafts or other actual mining operations as follows:—

(a) During the three months immediately following the recording, to the extent of thirty days of not less than 8 hours per day;

(b) During each of the first and second years following the expiration of such three months, to the extent of 60 days of not less than 8 hours per day;

(c) During the third year following the expiration of such three months, to the extent of not less than 90 days of 8 hours per day. 6 Edw. c. 11, s. 160. *Cf. R. S. B. C. c. 135, s. 24; R. S. C. c. 64, s. 41.*

M. C. C. 337, 397, 405 (note), 430.

(2) The work may be completed in a less period of time than herein specified. If more work is performed by or on behalf of the recorded holder than is herein required during the first three months or in any subsequent year, the excess upon proof of the same having been performed shall be credited by the Recorder upon the work required to be done during any subsequent year. 6 Edw. c. 11, s. 160.

(3) The recorded holder of a mining claim shall, not later than 10 days after each of the periods specified make a report (Form 14) as to the work done by him during such period, verified by affidavit (Form 15), but a report shall not be required for any period in which in consequence of the work having been previously done and reported no work has been done. *The report shall show in detail the names and residences of the men who performed the work and the dates upon which each man worked in its performance.* 6 Edw. c. 11, s. 161; 7 Edw. c. 13, s. 47, as *amended in 1910*, by c. 26, s. 45 (1). *Cf. R. S. C. c. 64, s. 41.*

M. C. C. 334, 448, 465.

(4) The Recorder if satisfied that the prescribed work has been duly performed may grant a certificate (Form 16), but he may first, if he deems proper, inspect or order the inspection of the work, or otherwise investigate the question of its sufficiency. *Such certificate, in the absence of fraud or mistake, shall be final and conclusive evidence of the due performance of the work therein certified, but where it has been issued in mistake or obtained by fraud, the Commissioner shall have power to revoke and cancel it upon the application of the Crown or an officer of the Bureau of Mines or any person interested. The question of the due performance of work shall not be appealable beyond the Commissioner.* (*See* 6 Edw. c. 11, ss. 162, 61; 7 Edw. c. 13, ss. 48, 51.) *As amended in 1910 by c. 26, s. 45 (3). Cf. ss. 65, 66. Cf. R. S. B. C. c. 135, s. 37. Cf. Cleary v. Boscowitz (B.C.), 32 S. C. R. 417, 1 M. M. C. 506.*

M. M. C. 436, 441 (note), 465, 466 (note), and see 397.

(5) A licensee who has given notice (Form 17) to the Recorder of his intention to perform all the work required to be performed in respect of not more than three contiguous mining claims upon one or two of them, may perform such work upon the claim or claims so specified and the report and affidavit as to work may be made accordingly. 6 Edw. c. 11, s. 163; 7 Edw. c. 13, s. 49. *Cf. R. S. B. S. c. 135, s. 24.*

(6) The construction of houses or roads or other like improvements shall not constitute "actual mining operations" within the meaning of this section. 6 Edw. c. 11, s. 160 (2).

See M. C. C. 86.

See also under s. 84.

Computation of Time—Extensions.

79. In computing the time within which work upon a mining claim is required to be performed, the following periods of time shall be excluded:—

(*a*) All time which by an Order in Council or regulation is excluded; 6 Edw. c. 11, s. 164, *part.*

(*b*) In a Forest Reserve the time elapsing between the delivery by the holder of a mining claim to the Bureau of Mines of an application to work upon the same and the granting of such permission;

See M. C. C. 430.

(c) In the case of lands under timber license the time during which working conditions are suspended under section 47;

(d) The time during which mining operations are prohibited by the Minister under section 48. (*New*).

M. C. C. 397, 405 (note).

80.—(1) If by reason of pending proceedings or of the death or incapacity from illness of the holder of a mining claim the work is not performed within the prescribed time, the Recorder may from time to time extend the time for the performance of such work for such period as he may deem reasonable and he shall forthwith enter a note of every such extension on the record of the claim. 6 Edw. c. 11, s. 72; 7 Edw. c. 13, s. 51, as 164a.

M. C. C. 397, 405 (note), 425, 455.

(2) Work performed within any such extended period shall be deemed to have been duly performed under section 78.

81. Where two or more persons are the holders of an unpatented mining claim, each of them shall contribute proportionately to his interest, or as they may otherwise agree between themselves, to the work required to be done thereon. In case of default by any holder, the Commissioner upon the application of any other holder and upon notice to and after hearing all persons interested or such of them as appear, may make an order vesting the interest of the defaulter in the other co-owners upon such terms and conditions and in such proportions as he may deem just. (*New.*) *Cf. R. S. O. c. 36, s. 37; B. C. 1900. c. 21, s. 4; R. S. C. c. 64, s. 45.*

M. C. C. 279, 288.

This provision shall apply to all mining claims staked out or applied for on or after the 14th day of May, 1906, or before that day under regulations made under the authority of *The Mines Act*, being chapter 36 of the Revised Statutes of Ontario, 1897.

ABANDONMENT.

82.—(1) A licensee may, at any time, abandon a mining claim by giving notice in writing (Form 18) to the Recorder, of his intention so to do.

(2) The Recorder shall enter a note of such abandonment upon the record of the claim, with the date of the receipt of the notice and thereupon all interest of the licensee in such claim shall cease and determine, and the claim shall thereupon be forthwith open for prospecting and staking out. 6 Edw. c. 11, s. 165.

M. C. C. 368, 349, and see 103.

83. Non-compliance by the licensee with any requirement of this Act as to *the time or manner of* the staking out and recording of a mining claim or with a direction of the Recorder in regard thereto, within the time limited therefor, shall be deemed to be an abandonment, and the claim shall, *without any declaration, entry or act on the part of the Crown or by any officer*, unless otherwise ordered by the Commissioner, be forthwith open to prospecting and staking out. 6 Edw. c. 11, s. 166. (*As amended in 1909, by c. 26, s. 31 (1).*) *Cf. R. S. B. C. c. 135, s. 19; R. S. C. c. 64, s. 42; 8 Edw. (Can.) c. 75, s. 18.*

M. C. C. 70, 78 (note), 79, 82 (note), 189, 193, 249, 251 (note), 262, 275 (note), 349, 397, 419, 455, 461; and see 68 (note).

FORFEITURE.

84.—(1) Except as provided by section 85, all the interest of the holder of a mining claim before the patent thereof has issued shall cease and the claim shall *without any declaration, entry or act on the part of the Crown or by any officer* forthwith be open for prospecting and staking out:—

(*a*) If the license of the holder has expired, and has not been renewed.

(*b*) If without the consent in writing of the Recorder or Commissioner, or for any purpose of fraud or deception or other improper purpose, the holder removes or causes or procures to be removed any stake or post forming part of the staking out of such mining claim, or for any such purpose changes or effaces or causes to be changed or effaced any writing or marking upon any such stake or post.

M. C. C. 193, 394, 430.

(*c*) If the prescribed work is not duly performed.

M. C. C. 430, 448.

(*d*) If any report under subsection 3 of section 78 is not made and deposited wth the Recorder as therein required.

M. C. C. 334, 448.

(*e*) If the application and payment for the patent required by sections 106 and 107 are not made within the prescribed time. 6 Edw. c. 11, s. 168; 7 Edw. c. 13, s. 52 as 167 (*as amended in 1909, by c. 26, s. 31 (2)*). *Cf. R. S. C. c. 64, s. 42; 8 Edw. (Can.) c. 77, s. 18; R. S. B. C. c. 135, ss. 9, 24.*

M. C. C. 58, 64, 162, 164, 282, 334, 337, 430, 436, 448; and see 68 (note). Cf. Grant v. Treadgold (Y.T.), 4 W. L. R. 173; Critchley v. Graham (Vic.), 2 W. & W. (L.) 211.

(2) No person other than the Minister or an officer of the Bureau of Mines or a licensee interested in the property affected shall be entitled to raise any question of forfeiture except by leave of the Commissioner. (*New*). *Cf. R. S. C. c. 64, s. 44, and R. S. B. C. c. 135, s. 28. See 1 M. M. C. 378, 512 (32 S. C. R. 417).*

85.—(1) Forfeiture or loss of rights under section 84 shall not take place for three months after default, if

(*a*) In a case under paragraph (*a*) the holder of the claim obtains a special renewal license which shall be so marked and shall be issued only upon payment of three times the prescribed license fee;

(*b*) In a case under paragraph (*d*) the holder files a proper report and pays therewith a special fee of $25;

(2) Where compliance with any of the other requirements mentioned in section 84 has been prevented by pending proceedings or by any other special cause not reasonably within the control of the holder, the Commissioner within three months after default may upon such terms as to compensation for expenses incurred by any other licensee who has acquired any interest in the claim during such period and upon such other terms as he may deem just make an order relieving the person in default from the forfeiture or loss of rights and upon compliance with the terms if any so imposed the order may be filed with the Recorder and thereupon the interest or rights for-

feited or lost shall re-vest in the person so relieved. 7 Edw. c. 13, s. 53, as 168 (1). *Cf. R. S. B. C. c. 135, s. 24; B. C. 1901, c. 35, s. 2; R. S. C. c. 64, s. 43.*

M. C. C. 259, 282, 334, 397, 406 (note).

(3) The Recorder upon any forfeiture or abandonment of or loss of rights in a mining claim shall forthwith enter a note thereof with the date of the entry upon the record of the claim and mark the record of the claim "Cancelled," and shall forthwith post up in his office a notice of the cancellation. 7 Edw. c. 13, s. 53, as 168 (2).

M. C. C. 397, 406 (note), 448.

86. The Lieutenant-Governor in Council, upon the recommendation of the Minister, may upon such terms, if any, as to compensation in respect of any intervening right or otherwise as he may deem just, relieve against any forfeiture or loss of rights under section 84 which he deems to be a hardship and re-vest the forfeited right or interest in the person who would but for the forfeiture have been entitled thereto. (*New.*)

M. C. C. 397, 406 (note), and see 164.

87. In the case of joint holders where the interest of a holder has ceased by reason of expiration of his license, such interest shall, if the Minister so directs, pass to and vest in the other holders in proportion to their interests in the claim. (*New.*) *Cf. R. S. B. C. c. 135, s. 9.*

88. Where a licensee in whose name a mining claim has been staked out dies before the claim is recorded, and where the holder of a claim dies before issue of a patent for the claim no other person shall, without leave of the Commissioner, be entitled to stake out or record a mining claim upon any part of the same lands or to acquire any right, privilege or interest in respect thereof within twelve months after the death of such licensee or holder, and the Commissioner may within such twelve months make such order as may seem just for vesting the claim in the representatives of such holder notwithstanding any lapse, abandonment, cancellation, forfeiture or loss of rights under any provision of this Act. (*New.*) *Cf. R. S. B. C. c. 135, s. 52; R. S. C. c. 64, s. 81.*

INSPECTION OF CLAIMS.

89.—(1) The Commissioner or the Recorder may inspect or order an inspection of and an Inspector or other officer appointed by the Minister may inspect a mining claim at any time with or without notice to the holder for the purpose of ascertaining whether the provisions of this Act have been complied with, but after the granting of the Certificate of Record no such inspection shall, except by order of the Commissioner, be made for the purpose of ascertaining whether a discovery of valuable mineral in place has been made or whether the claim has been staked out in the prescribed manner.

(2) Unless notice of the inspection has been given to the holder of the claim at least seven clear days prior thereto, either personally or by registered letter addressed to him at his address appearing on record in the Recorder's books he may apply to the Commissioner or to the Recorder for a re-inspection and the same shall be granted if it appears that the holder of the claim has been prejudiced by the want of notice.

(3) The Commissioner or Recorder may in any dispute, appeal or other proceeding before him make or order with or without notice a view or inspection of any mining claim or of any lands or other property. 6 Edw. c. 11, s. 67; 7 Edw. c. 13, s. 18.

See M. C. C. 61, 63 (note), 64, 120, 176, 285. See, also, ss. 138, 139.

90.—(1) Every Special Mining Division and every other part of Ontario which may be so designated by Order in Council published in the *Ontario Gazette*, shall constitute and be known as a "Complete Inspection Area."

(2) A Certificate of Record of the staking out of a mining claim in a Complete Inspection Area shall not be granted by the Recorder until the alleged discovery of valuable mineral upon which the application for the claim is based has been inspected and finally allowed.

(3) Upon a special application in writing the Recorder may direct immediate inspection of the discovery.

(4) Upon the establishment of a new Complete Inspection Area or upon the addition of territory to a Complete Inspection Area, all uninspected claims then existing therein shall be subject to the provisions of this section.

(5) The limits of any Complete Inspection Area may by Order in Council published in the *Ontario Gazette* be altered or the whole or any part thereof withdrawn from the operation of this section. 7 Edw. c. 13, s. 19, as 68.

(6) An Order in Council under this section shall take effect from the date of the first publication thereof in the *Ontario Gazette*.

91.—(1) A report of each inspection except when made merely for the purpose of a dispute, appeal or other proceeding shall be made in writing by the inspecting officer and shall be filed in the office of the Recorder who shall forthwith enter upon the record of the claim a note stating the effect of the report and the date of the entry.

(2) If the Recorder deems that upon the report the claim should be cancelled he shall mark the record of the claim "Cancelled" and affix his signature or initials and shall by registered letter mailed not later than the next day, notify the holder of the claim and the disputant and other interested parties, if any, of the receipt and effect of the report, and where the claim is cancelled in consequence of the report the notice shall so state.

M. C. C. 120, 173, 176 (note 2).

(3) An appeal from the cancellation of the claim or from the entry by the Recorder in his record book of the allowance of the discovery may be taken to the Commissioner by the holder of the claim or by the disputant or other interested party, within the time and in the manner provided by section 133.

M. C. C. 120.

(4) Upon the cancellation of a claim under this section the Recorder shall forthwith post up in his office a notice of the cancellation, and the lands or mining rights comprised in such claim shall thereupon, unless withdrawn from prospecting and staking out, be again open to prospecting and staking out, but such staking out shall be subject to the result of any appeal by a licensee whose claim has been cancelled. 7 Edw. c. 13, s. 21, as 70, *part*.

92. After a discovery has been inspected and allowed as a discovery of valuable mineral in place, and the allowance entered by the Recorder upon the record of the claim, it shall upon the expiration of the time for appeal from the report of inspection or upon the final allowance thereof upon appeal be deemed conclusively to be a discovery of valuable mineral in place, and the sufficiency of such discovery shall

not thereafter be called in question in any cause, matter or proceeding in any Court or under this Act. 7 Edw. c. 13, s. 21, as 70 (5).

M. C. C. 25½.

93. The holder of a mining claim or the disputant or other person interested shall be entitled on payment of the prescribed fee to receive from the Recorder a certified copy of any report of inspection of the claim filed with him. 6 Edw. c. 11, s. 63.

WORKING PERMITS.

94.—(1) A licensee may obtain a working permit giving him, for the purpose of prospecting for minerals, the exclusive possession of an area of land open to prospecting and staking out, such area being of the form and acreage prescribed for a mining claim, by proceeding in the following manner:

See M. C. C. 7½, 86, 167. See s. 3½; and see par. (b) of this section.

(*a*) By staking the corners and marking the boundaries of such area and placing numbers and particulars upon the posts in the same manner as far as possible as is provided in section 54 in respect to mining claims, omitting only what is provided in respect of discovery and the discovery post, but the words "working permit applied for" shall be written or placed on No. 1 post and each post shall be notched with three rings of notches not less than ¼ inch deep and not less than 2 inches apart, beginning about 2 inches from the top of the post. 7 Edw. c. 13, s. 39, as 141, *part.*

M. C. C. 390.

(*b*) By furnishing to the Recorder within 15 days after the staking out, an application in duplicate (Form 19), together with a map or plan, in duplicate, indicating generally and as definitely as possible the location of the area by reference to some ascertained boundary or locality, together with an affidavit (Form 20), stating the name of the licensee on whose behalf the application is made, and the letter and number of his license, the locality of the area as indicated by some general description and statement, and such other information as will enable the Recorder to lay down the area on his office map, and the time when the area was staked out, that at the time the area was staked out there was nothing on it to indicate that it was not open to be staked out for a working permit, that the deponent knows of no reason why the working permit should not be granted, and that he verily believes the applicant is entitled under the provisions of this Act to make the application. Where the area is situated more than ten miles in a straight line from the office of the Recorder, an additional day shall be allowed for furnishing the application for each additional ten miles or fraction thereof. 6 Edw. c. 11, s. 141 (10), (11); 7 Edw. c. 13, s. 39, *part.*

M. C. C. 26, 29 (note 1), 390.

(*c*) By procuring from the Recorder a certificate of the application (Form 21) and securely affixing the same to No. 1 post within three days after the granting of the certificate, and where the area is more than ten miles in a straight line from the office of the Recorder an additional day shall be allowed for each additional ten miles or fraction thereof. 6 Edw. c. 11, s. 141 (12).

(*d*) By paying or securing to the owner of the surface rights in the case of lands the surface rights of which have been theretofore granted, sold, leased or located, compensation for the injury or damage arising from the prospecting of such lands, as prescribed by section 104. 6 Edw. c. 11, s. 142.

M. C. C. 30.

(2) Upon compliance with the provisions of subsection 1 and payment of the prescribed fee, the applicant shall, after sixty days and within seventy days from the staking out of the area, procure from the Recorder a working permit (Form 22), which shall be for a period of six months from the date of its issue. Provided that in case the granting of a working permit is prevented by the recording of a mining claim after the property was staked out for the working permit or by any pending dispute or by failure of the applicant after reasonable diligence to arrange with the owner of any surface rights as to the compensation the Recorder or the Commissioner may, notwithstanding the lapse of the seventy days, order the granting of the working permit. 6 Edw. c. 11, s. 141 (13); 7 Edw. c. 13, s. 40.

See M. C. C. 14.

95. The Recorder shall post up in his office a notice (Form 23) of every application for a working permit. 6 Edw. c. 11, s. 146.

96. A licensee shall not apply for or hold in any license year more than three working permits in any one mining division or in territory not comprised in any mining division. 6 Edw. c. 11, s. 153.

97. Until a working permit has been granted, and a notice thereof (Form 24) has been affixed to No. 1 post, the area included in the application shall be subject to prospecting and staking out as a mining claim by any licensee, but thereafter during the continuance of the working permit or the renewal thereof, if any, the holder thereof shall have the exclusive right to prospect and stake out on the said area. Provided that at any time after the expiration of 60 days from the staking out where it seems just, the Commissioner or the Recorder may order that the area shall not be open to prospecting or staking out until the working permit application has been disposed of, and such order shall be effective as soon as a duplicate or certified copy thereof is affixed to the No. 1 post. 6 Edw. c. 11, ss. 144, 145, 150; 7 Edw. c. 13, s. 42.

98. Except as otherwise expressly provided, a licensee staking out an area of land for a working permit shall in all respects be subject to the same restrictions and conditions as to prospecting and staking out as are applicable to a licensee prospecting and staking out a mining claim, and without limiting the general application of this section, sections 34, 36 to 41, subsection 3 of section 42, sections 44 to 52, 57, 58, 60 to 63, 69 to 77 and 79 to 89, so far as they can be made applicable, and modified so far as may be necessary, shall apply to an application for a working permit and to a working permit when granted. 6 Edw. c. 11, s. 143.

99. Commencing not later than the expiration of two weeks after the granting of a working permit, the holder shall perform upon the area described in the working permit, work consisting of searching for minerals by sinking shafts or pits, digging trenches, making crosscuts, boring by diamond or other drill, or other *bona fide* operations of a like kind to the extent of five days of eight hours per day in each week. Provided that he may perform such work during a lesser period than six months, but so that the amount of work performed shall not at any time be less than that herein prescribed. 6 Edw. c. 11, s. 147.

Cf. s. 78.

100. A working permit may be transferred (Form 25), and upon the transfer being recorded the transferee shall be entitled to the unexpired term of the working permit and any right of renewal thereof. 6 Edw. c. 11, s. 151.

101. The Recorder may grant to the holder of a working permit who has complied with the requirements of this Act one renewal thereof (Form 26), for a period of six months, but the renewal shall be subject to the same requirements as to work to be performed and otherwise as the original working permit. 6 Edw. c. 11, s. 152.

102. If the holder of a working permit makes a discovery of valuable mineral in place upon the area of land included therein he may stake out and record a mining claim thereon and the necessary variations may be made in the application for the recording of the claim and in the affidavit to be filed therewith. 7 Edw. c. 13, s. 41, as 144*b*.

103. The decision or order of the Commissioner in respect of a working permit or of an application therefor or as to any right or interest thereunder or affected thereby shall be final and shall not be subject to appeal. 7 Edw. c. 13, s. 41, as 144*a*.

SURFACE RIGHTS COMPENSATION.

104. (1) Where the surface rights of lands have been granted, sold, leased, or located, or where lands are occupied by a person who has made improvements thereon which in the opinion of the Minister entitle him to compensation, a licensee who prospects for mineral, or stakes out a mining claim or an area of land for a working permit or a boring permit, or carries on mining operations, upon such lands, shall compensate the owner, lessee, locatee or occupant, for all injury or damage which is or may be caused to the surface rights by such prospecting, staking out or operations, and in default of agreement the amount and the manner and time of payment of compensation shall be determined by the Commissioner upon application to him after notice to the persons interested, and, subject where the amount awarded exceeds $1,000 to appeal to the Divisional Court, his order shall be final and may be enforced as provided in section 132 of this Act. 6 Edw. c. 11, s. 119; 7 Edw. c. 13, s. 33.

M. C. C. 21 (and note), 30, 31 (note), 44, 46 (note); and see 230.

(2) The Commissioner may order the giving of security for payment of the compensation and may prohibit, pending the determination of the proceeding or until the compensation is paid or secured, further prospecting, staking out or working by such licensee or any person claiming under him. 7 Edw. c. 13, s. 33 (2).

(3) Where an order is made prohibiting the prospecting, staking out or working of a mining claim under the provisions of subsection 2, no other licensee shall have the right to prospect or stake out a mining claim to the prejudice of the prohibited licensee while the proceeding is pending. (*New.*)

(4) The compensation shall be a special lien upon any mining claim or other right or interest acquired by the licensee or any person claiming under him in the lands so prospected, staked out or worked, and no further prospecting, staking out or working, except by leave of the Commissioner, shall be done by the licensee or any person claiming under him after the time fixed for the payment or securing of the compensation unless such compensation has been paid or secured as directed. 7 Edw. c. 13, s. 33 (2), *part.*

105. The Commissioner or the Recorder may reduce the area of any mining claim staked out where the surface rights have been

granted, sold, leased or located, if in his opinion an area less than the prescribed area is sufficient for working the mines and minerals therein. 6 Edw. c. 11, s. 120.

ISSUE OF PATENT FOR MINING CLAIM.

106.—(1) Upon compliance with the requirements of this Act and upon payment of the purchase price as provided in section 107, the holder of a mining claim shall be entitled to a patent for the claim.

(2) The application (Form 27) for the patent shall be made to the Recorder within three years and six months from the date of the recording of the claim. 6 Edw. c. 11, s. 169.

107. The price per acre of Crown lands patented as mining claims shall be $3 in surveyed territory and $2.50 in unsurveyed territory, and the price per acre for mining rights and quarry claims so patented shall be one-half the price payable for Crown lands. 6 Edw. c. 11, s. 174 (1).

108. A licensee who is the first discoverer of valuable mineral in place upon lands not in a Crown Forest Reserve at a point not less than five miles from the nearest known mine, vein, lode or deposit of the same kind of mineral and who has staked out a mining claim thereon and has complied with the requirements of this Act shall be entitled to a patent without payment of the price fixed by the next preceding section. 6 Edw. c. 11, s. 170.

109. In all patents for mining claims within the Districts of Algoma, Thunder Bay, Rainy River, Manitoulin and Sudbury, and that part of the District of Nipissing which lies north of the French River, Lake Nipissing and the River Mattawan there shall be a reservation for roads of 5 per centum of the quantity of land granted and the Crown or its officers may lay out roads on such mining claims where deemed proper. 6 Edw. c. 11, s. 171.

110. Every patent for Crown lands or mining rights by which it is intended to vest in the patentee the mines and minerals therein or any part thereof or any rights in connection therewith, shall state that it is issued in pursuance of this Act, or of the former Act under which it is issued. 6 Edw. c. 11, s. 172.

111. Every patent of Crown lands which purports to be issued in pursuance of this Act shall unless otherwise expressly stated vest in the patentee for the estate thereby granted all the Crown title in such lands and all mines and minerals therein. 6 Edw. c. 11, s. 173.

See Coniagas M. v. Cobalt, 20 O. L. R. 622, 15 O. W. R. 761.

112.—(1) Every patent of Crown lands sold or granted as mining lands shall contain a reservation of all pine trees and such pine trees shall continue to be the property of the Crown, and any person holding a license from the Crown to cut timber on such lands may at all times during the continuance of the license enter upon the lands and cut and remove such trees and may make all necessary roads for that purpose; provided that the patentee may cut and use such trees as may be necessary for the purpose of building, fencing and fuel on the land so patented, or for any other purpose necessary for the working of the mines therein, and may also cut and dispose of all trees required to be removed in clearing such part of the land as may be necessary for mining purposes, but subject as regards pine trees to the payment of the value thereof to the Crown or to the timber licensee or other person authorized to cut such pine trees, as the case may be.

(2) Any dispute between the patentee or those claiming under him and the timber licensee or other person interested with regard to the

quantity or value of the pine timber so cut or disposed of or otherwise regarding the trees cut shall be determined by the Minister, whose decision shall be final.

(3) This section shall not confer upon the patentee of mining rights only any right to cut timber upon the land described in the patent. 6 Edw. c. 11, s. 175.

SURVEY OF CLAIM BEFORE ISSUE OF PATENT.

113.—(1) Before a patent of a mining claim in unsurveyed territory is issued the claim shall be surveyed by an Ontario Land Surveyor at the expense of the applicant who shall furnish to the Recorder with his application the surveyor's plan in duplicate, field notes and description showing a survey in conformity with this Act and to the satisfaction of the Minister. 6 Edw. c. 11, s. 176.

(2) In surveying a mining claim in unsurveyed territory the surveyor shall run the boundaries of the claim by, running straight lines, from No. 1 post at the northeast angle of the claim to No. 2 post at the southeast angle thereof, from No. 2 post to No. 3 post at the southwest angle thereof, and from No. 3 post to No. 4 post at the northwest angle thereof, and from No. 4 post to No. 1 post. 6 Edw. c. 11, s. 177.

(3) The surveyor shall mark out the side lines on the ground by blazing the adjacent trees distinctly on three sides, one blaze on each side in the direction of the line and one on that side by which is passes.

(4) He shall give to the claim so surveyed a designating number or letter and shall mark the same on the posts.

(5) He shall in his discretion connect such survey with some known point in a previous survey or with some other known point or boundary so that the claim may be laid down on the office maps in the Department. 6 Edw. c. 11, s. 177.

M. C. C. 293; and see §51.

114. Where upon an application for a patent of a mining claim in surveyed territory the Minister is of opinion that a survey is necessary he may direct that a survey thereof shall be made at the expense of the applicant and such surveys unless otherwise ordered shall comply with the same requirements as a survey of a mining claim in unsurveyed territory. 6 Edw. c. 11, s. 178.

115. The surveyor immediately after the completion of every survey of a mining claim made by him shall deliver or forward by registered post to the Minister by his official title a certified copy of the plan and of his field notes and a description of the claim. (*New.*)

116.—(1) If it is found upon a survey required or authorized by this Act that the area of a mining claim exceeds the prescribed acreage, the Minister may direct the issue of a patent for a portion thereof not exceeding the prescribed acreage. 6 Edw. c. 11, s. 179.

(2) The reduction in unsurveyed territory shall, where practicable, be made as follows:—Keeping No. 1 post as the northeast corner and taking the straight line joining No. 1 and No. 2 posts, or if that line exceeds 20 chains in length the northerly 20 chains of it, as the eastern boundary; keeping the southern and western boundaries respectively parallel to or coinciding with the straight lines joining No. 2 and No. 3 posts and No. 3 and 4 posts, but shortening each of these boundaries to 20 chains where it exceeds that length, and in

the case of a mining claim in a Special Mining Division shortening the southern boundary to 10 chains where it exceeds 10 chains; and in each case connecting the northwest corner so established with No. 1 post for the northern boundary. 6 Edw. c. 11, s. 180.

PART III.—PLACER MINING.

117. A licensee, who makes a discovery of a natural stratum, bed or deposit of sand, earth, clay, gravel or cement carrying gold, or platinum, or precious stones, which is probably of such a size and character as to be likely to be workable at a profit, may stake out and record a mining claim to be called a "Placer Mining Claim," thereon, and the provisions of this Act, as to the staking out and recording of a mining claim upon the discovery of valuable mineral in place thereon, shall as far as practicable apply to the staking out of a placer mining claim as if the words "a natural stratum, bed or deposit of sand, earth, clay, gravel or cement, carrying gold or platinum, or precious stones, which is probably of such a size and character as to be likely to be workable at a profit," were used instead of "valuable mineral in place," and the other provisions of this Act as to mining claims shall also, as far as practicable, apply to a "Placer Mining Claim," and "mining claim" wherever used in this Act shall, unless repugnant to the context, be read as including placer mining claim. 6 Edw. c. 11, s. 182; 7 Edw. c. 13, s. 55.

PART IV.—QUARRY CLAIMS.

118.—(1) Where not situated within a Complete Inspection Area or within a Special Mining Division Crown lands containing any natural bed, stratum or deposit of limestone, marble, clay, marl, peat, building stone, sand or gravel, may be staked out and recorded as a mining claim, to be called a "Quarry Claim," upon proof being furnished to the satisfaction of the Recorder that such bed, stratum, or deposit is of a size and character to be workable for any one or more of such substances, but all valuable minerals shall be reserved therefrom.

(2) No such staking out shall be done on any land located, sold or patented under *The Public Lands Act* or *The Free Grants and Homesteads Act*, or *The Rainy River Free Grants and Homesteads Act*, and such substances, unless expressly reserved, shall be deemed to have been conveyed by any patent heretofore or hereafter issued under any of the said Acts; provided that this section shall not affect any rights heretofore acquired in any such substances or the lands containing the same. 6 Edw. c. 11, s. 3 (4).

(3) A quarry claim shall not interfere with the right of a licensee to stake out a mining claim on the lands embraced in the quarry claim, and as against such licensee the holder of a quarry claim shall have the same and no greater rights than if he were the owner of the surface rights and the quarry claim was a claim in respect of mineral rights. (*New.*)

(4) Except as provided in sub-section 3, the rights and duties of the holder of a quarry claim shall be the same as those of the holder of a mining claim, and all the provisions of this Act as to mining claims shall, except where inappropriate, apply to quarry claims. (*New.*)

PART V.—PETROLEUM, GAS, COAL AND SALT.

119.—(1) A licensee may obtain from the Minister, a boring permit (Form 28), granting him the exclusive right for a period of one

year to prospect for petroleum, natural gas, coal or salt upon an area of land open for prospecting and staking out in those portions of the Province lying north and west of the River Mattawan, Lake Nipissing, and the French River, by:

(*a*) Staking out or having another licensee stake out on his behalf and in his name such area by planting or erecting a post at each corner thereof in the manner and with the numbering provided by section 54, and writing or placing upon each post the words "Boring permit applied for," with his name and the letter and number of his license, and where the staking out is done by another licensee also the name of such licensee and the letter and number of his license; the date of the staking out and a statement of the area to be included in the application;

(*b*) Furnishing to the Recorder an application in duplicate (Form 29), verified by an affidavit (Form 30), within fifteen days after the staking out;

(*c*) Forwarding to the Minister not more than ninety days thereafter a plan or a diagram showing as nearly as possible the situation of the lands, and a written description of the same, including, if the area is in surveyed territory, the number of the lots and concessions or sections or quarter sections or other subdivisions, together with a fee of $100; and

(*d*) Proving to the satisfaction of the Minister that he has paid or secured to the owner of the surface rights, if any, the compensation agreed upon or determined as provided in section 104 for any injury or damage which is or may be caused to the surface rights, or, in default of agreement, that he has paid or secured such compensation, as determined in the manner provided by section 104.

(2) One duplicate of the application shall be forthwith posted up by the Recorder in his office, and the other forwarded by him to the Minister.

(3) If the area staked out is more than ten miles from the office of the Recorder, one additional day for every additional ten miles or fraction thereof shall be allowed for furnishing the application to the Recorder.

(4) The area of land included in a boring permit, if in unsurveyed territory, shall be rectangular in form and shall not exceed six hundred and forty acres in extent, the boundary lines thereof being due north and south and due east and west astronomically, and if in surveyed territory need not be rectangular in form, but may consist of any number of contiguous lots, quarter-sections or subdivisions of a section not containing in all more than six hundred and forty acres.

(5) The holder of a boring permit shall enter upon the area described therein within two months from the granting of the permit, and during the term of the permit shall expend thereon in actual boring, sinking, driving or otherwise searching for petroleum, natural gas, coal or salt, a sum amounting to not less than two dollars per acre.

(6) Upon proof being furnished to the Minister that such expenditure has been made and that all other terms and conditions of the permit have been complied with, the Minister, at the expiration of the boring permit, may grant one renewal of the same for one year upon payment of a fee of $100, and the renewal shall be subject to the like conditions as to expenditure and otherwise as the original permit.

(7) The holder of a boring permit may, with the consent of the Minister endorsed thereon, transfer (Form No. 31) all his rights in the permit or the lands included therein, and upon the consent being given the licensee to whom the permit is transferred shall thereupon be entitled to the unexpired term of the permit, with any right of renewal thereof. 6 Edw. c. 11, s. 181, *part*; 7 Edw. c. 13, s. 54, *part*.

120.—(1) Upon the holder of a boring permit proving to the satisfaction of the Minister that he has discovered petroleum, natural gas, coal or salt, or any one or more of such substances in commercial quantities upon the lands included therein, the Minister may direct the issue to the holder of the permit of a lease of the lands or any portion of them for a term of ten years at an annual rental of one dollar per acre, payable in advance, and subject to the expenditure of not less than two dollars per acre per annum, in obtaining petroleum, natural gas, coal or salt, or any one or more of such substances therefrom, or in actual *bona fide* operations or works undertaken or made for the purpose of obtaining the same. The lessee shall have the right of renewal of such lease at the expiration of the first term of ten years for a further term of ten years at the same rental, and at the expiration of the second term for a term of twenty years at such renewal rental as may then be agreed upon or provided by statute or regulation.

(2) Every such lease shall contain such other conditions, stipulations and provisoes as the Lieutenant-Governor in Council may prescribe, and shall be forfeited and void if the rental payable thereunder is not paid when due, or upon failure to expend the money required by subsection 1 to be laid out or upon failure to comply with any of the terms and conditions of the lease. Provided that relief from forfeiture for failure to pay rent when due may be had by the payment of all arrears within ninety days after the same became payable.

(3) The right conferred by any such lease upon the lessee shall be to enter upon the lands described, and to dig, bore, sink, drive or otherwise search for and obtain, raise and remove, petroleum, natural gas, coal and salt, or any one or more of such substances. All other valuable minerals shall be reserved to the Crown, and any holder of a Miner's License may at all times go upon the said lands and prospect the same and stake out a mining claim thereon, but subject to compensating the lessee for any injury or damage to his interest in the lands at the time and in the manner provided in section 104, and may obtain a patent therefor, but such patent shall reserve the petroleum, natural gas, coal and salt, in, on, or under the said land.

(4) No such lease shall issue for lands in unsurveyed territory until a plan in triplicate made by an Ontario Land Surveyor, field notes and description, shall be filed in the Department, showing a survey in conformity with this Act, and to the satisfaction of the Minister.

(5) The holder of a Boring Permit or of a lease for petroleum, natural gas, coal or salt, shall not be entitled to the timber upon the lands included in such permit or lease, but if the same are not covered by timber license and have not been located, sold or patented under *The Public Lands Act*, *The Free Grants and Homesteads Act*, or *The Rainy River Free Grants and Homesteads Act*, may, with the permission of the Minister, and upon payment of such rates as may be fixed, cut and use such timber or trees as may be necessary for boring and working the said lands. 6 Edw. c. 11, s. 181, *part*; 7 Edw. c. 13, s. 54, *part*.

PART VI.—DREDGING LEASES.

121.—(1) The Lieutenant-Governor in Council may make regulations respecting the issue of leases authorizing the holders thereof to

dredge in any river, stream or lake, in, on or flowing through Crown lands, or the bed of which belongs to the Crown, for the purpose of recovering any valuable mineral therefrom, and every Order in Council made under this section shall take effect from the date of the first publication thereof in the *Ontario Gazette*.

(2) Every such lease shall provide for the payment in advance of an annual rental of not less than twenty dollars per mile in length of any such river, stream or lake, and shall not be for a greater term than ten years, renewable at the expiration thereof for a further term of not more than ten years, and shall contain such provisions as may be required by the Lieutenant-Governor in Council for protecting all other public interests in such river, stream or lake, including the driving of logs and timber, and navigation. 6 Edw. c. 11, s. 183.

PART VII.—MINING PARTNERSHIPS.

122.—(1) Two or more persons, each being at least 18 years of age, or one or more of such persons and a company may form a partnership herein called a "Mining Partnership" for the purpose of prospecting for minerals and acquiring mining claims or any other right or interest under the provisions of this Act, and the performance of working conditions and doing work on a mining claim or any other act or thing which may be lawfully done before the issue of a patent for the claim, by signing personally or by attorney duly authorized in writing annexed thereto, a certificate (Form 32), setting forth:—

(*a*) The name, address and occupation of each of the partners;

(*b*) The partnership name;

(*c*) The total number of shares in the partnership;

(*d*) The number of shares owner by each partner;

(*e*) The date of the commencement of the partnership and the date on which it is to terminate; and

(*f*) The name, address and occupation of some person residing in Ontario or of a company having its head office in Ontario authorized, and in writing annexed to or forming part of the certificate consenting to act as agent of the partnership.

(2) A mining partnership may be recorded by filing with any Recorder a certificate in accordance with subsection 1 or a copy thereof certified by a Recorder to be a true copy of a certificate recorded in his office and on payment of the prescribed fee.

(3) After being recorded a mining partnership shall be entitled to a miner's license.

(4) A contract entered into in writing on behalf of a mining partnership by the recorded agent thereof shall be binding upon the partnership.

(5) The member or members of a mining partnership owning a majority of the shares may revoke the appointment of the agent (Form 33), but the revocation shall not take effect until a certificate (Form 34), signed by such member or members substituting another qualified agent who in writing annexed to or forming part of such certificate consents to act as agent for the partnership has been filed in all the offices in which the partnership is recorded.

(6) If the recorded agent of a mining partnership dies, the member or members owning a majority of the shares may, by signing a certificate (Form 34), appoint another qualified agent who, in writing

annexed to or forming part of the certificate, consents to act as agent for the partnership, but such appointment shall not take effect until recorded in all the offices in which the partnership is recorded.

(7) A share in a mining partnership shall be deemed to be personal estate and may be transferred to any person, mining partnership or company authorized to hold shares in a mining partnership by the owner thereof or by his executor or administrator or by the assignee for the benefit of the creditors of the owner or by a sheriff or bailiff in due course of law by signing and filing with the Recorder a transfer thereof (Form 35).

(8) A person to whom a share is transferred or to whom it passes by operation of law or otherwise, upon filing in every office in which the partnership is recorded the instrument of transfer or will or letters of administration or other instrument under which the share passes or a certified or sworn copy thereof, shall become a member of the partnership.

(9) A mining partnership may be dissolved before the expiration of the time fixed by the certificate of partnership by filing in all the offices in which the partnership is recorded a certificate of dissolution (Form 36), signed by all the members or their attorneys duly authorized in writing annexed to the certificate, but a mining partnership shall not be dissolved by the death of any member.

(10) Unless the certificate of dissolution otherwise provides the dissolution of a mining partnership shall not constitute a revocation of the authority of the recorded agent of the partnership, but thereafter the agent instead of being the agent of the partnership shall be the agent of the individual members or their legal representatives, as the case may be, and may bind the interest of the individual partners or their legal representatives in selling, mortgaging or otherwise dealing with and transferring in the partnership name, the property of the partnership until the affairs of the partnership are finally wound up.

(11) Nothing in this section contained shall relieve a recorded agent from liability for any breach of duty committed by him in wilfully disobeying the instructions given to him by the owners of a majority of the shares. 6 Edw. c. 11, s. 185.

PART VIII.—PROCEEDINGS BEFORE COMMISSIONER AND RECORDER.

POWERS OF COMMISSIONER.

123.—(1) Except as provided by sections 182 and 183, no action shall lie nor shall any other proceedings be taken in any Court as to any matter or thing upon which before the issue of the patent any right, privilege or interest conferred by or under the authority of this Act depends, but save as in this Act otherwise provided, every claim, question and dispute in respect to such matter or thing, shall be determined by the Commissioner, and in the exercise of the power conferred by this section the Commissioner may make such order and give such directions as he may deem necessary for making effectual and enforcing compliance with his decision. (See 6 Edw. c. 11, ss. 9 (*a*), 52; 7 Edw. c. 13, ss. 5, 12). *See also s. 68 hereof.*

M. C. C. 346, 365, 373, 407; and see 252, and see under subsec. 2.

(2) Without limiting the general powers conferred by the next preceding subsection, it is declared that the Commissioner shall have

jurisdiction and power to hear and determine all claims, questions and disputes arising before patent between contesting claimants or between the Crown and a claimant:—

(*a*) For or in respect to any unpatented mining claim, quarry claim, mining lands or mining rights or any right, title or interest therein;

(*b*) As to the existence, validity or forfeiture of any unpatented mining claim, quarry claim, working permit or boring permit, or application therefor, or of any right or privilege or interest which may before patent be acquired under the provisions of this Act;

(*c*) As to the boundaries and extent of the lands or rights included in any unpatented mining claim, quarry claim, working permit or boring permit, or application therefor, or in any such other right, privilege or interest;

(*d*) As to the right to possession of or the right to enter or prospect upon or stake out any unpatented mining claim, quarry claim, mining lands or mining rights;

(*e*) As to any right claimed under regulations made by the Lieutenant-Governor in Council under the authority of subsection 2 of section 187;

(*f*) As to whether and to what extent any unpatented mining claim or quarry claim or any working permit or boring permit or any other right, privilege or interest acquired by anyone under the provisions of this Act has before patent been transferred to or become vested in any other person. (*See* 6 Edw. c. 11, ss. 9, 52; 7 Edw. c. 13, ss. 5, 12, 38.)

M. C. C. 193, 206 (note), 305; and see 390 (and note), 469 (note).

124. A subpœna may issue out of the High Court or out of any County or District Court for the purpose of compelling the attendance of witnesses and production of documents and things in any proceeding before the Commissioner, and the Commissioner shall also have in respect to matters which may be dealt with by him under the provisions of this Act all the powers of summoning and enforcing the attendance of witnesses and compelling them to give evidence and produce documents and things which may be conferred upon Commissioners appointed under the authority of *The Act respecting Inquiries concerning Public Matters*. (*See* 6 Edw. c. 11, s. 26; 7 Edw. c. 13, s. 9.)

See s. 13.

125. In the exercise of the jurisdiction and power conferred by this Act, the Commissioner shall have all the authority and power conferred upon an official referee by *The Judicature Act* or by *The Arbitration Act*. 6 Edw. c. 11, s. 18.

126. In any matter or proceeding which may come before him under this Act, the Commissioner may make an order restraining any of the parties from doing any act which in his opinion ought not to be done or ought not to be done pending the final determination of any question involved in such matter or proceeding. (*See* 6 Edw. c. 11, s. 9.)

M. C. C. 64.

127. The Commissioner shall also have all the powers which by *The Act to prevent Trespasses on Public Lands* are conferred on commissioners appointed under the authority of that Act. (*New.*)

REFERENCES AND TRANSFER OF ACTIONS TO COMMISSIONER.

128. Where in the opinion of the Court in which an action is brought, or of a Judge thereof, the proceedings may be more conveniently dealt with or disposed of by the Commissioner, the Court or Judge may, upon the application of any party or otherwise, and at any stage of the proceedings, refer the action or any question therein to the Commissioner as an Official Referee, on such terms as to the Court or Judge may seem just, and the Commissioner shall thereafter give directions for the continuance of the proceedings before him, and, subject to the order of reference, all costs shall be in his discretion. (*See* 6 Edw. c. 11, s. 20.)

See M. C. C. at 231, and see Harrison v. *Mobbs, 9 O. W. R. 545.*

129. Where a proceeding is brought in any Court which should have been taken before the Commissioner, the Court or Judge may upon the application of any party or otherwise, and at any stage of the proceeding, transfer it to the Commissioner, and thereafter it shall be deemed to be a proceeding before him under the provisions of this Act, and there shall be no appeal from the decision of the Commissioner except as provided by this Act. (*New.*)

POWERS OF RECORDER.

130.—(1) A Recorder, as to lands situate in his Mining Division, shall have all the powers conferred on the Commissioner by sections 123 and 124. (*See* 6 Edw. c. 11, ss. 52, 65; 7 Edw. c. 13, s. 12.)

See M. C. C. 458, and 460 (note).

(2) Any question arising prior to the issue of a certificate of record of a mining claim or the granting of a working permit as to whether the provisions of this Act regarding a mining claim, working permit application or working permit have been complied with, unless the Commissioner otherwise orders or unless the Recorder with the consent of the Commissioner transfers such question to the Commissioner for his decision, shall in the first instance be decided by the Recorder. 6 Edw. c. 11, s. 60; 7 Edw. c. 13, s. 12, as 52 (2).

(3) The Recorder shall forthwith enter in the books of his office a full note of every decision made by him, and shall notify the persons affected thereby of such decision by registered letter mailed not later than the next day after the entry of such note. 6 Edw. c. 11, s. 62; 7 Edw. c. 13, s. 15.

M. C. C. 173, 176 (note 2).

(4) Every person affected by the decision shall be entitled upon payment of the prescribed fee to receive from the Recorder a certificate thereof which shall contain the date of the entry of such decision in the books of the Recorder. 6 Edw. c. 11, s. 64.

(5) The decision of the Recorder shall be final and binding unless appealed from as in this Act provided. 6 Edw. c. 11, ss. 52, 65; 7 Edw. c. 13, s. 12.

M. C. C. 22, 64, 120, 173, 176 (note 2), 241, 397.

131.—(1) The Recorder may give directions for the conduct and carrying on of the proceedings before him, and in so doing he shall adopt the cheapest and most simple methods and machinery for determining the questions raised before him. (*New.*)

(2) Where no such directions are given, the provisions relating to procedure before the Commissioner as far as the same may be applicable, shall apply. (*New.*)

(3) The Recorder shall not have power to award costs, but may in his discretion allow the fees and conduct money of witnesses and may direct by whom the same shall be paid. 6 Edw. c. 11, s. 63 (3).

ENFORCEMENT OF ORDERS.

132. A duplicate of any order made by the Commissioner or by a Recorder may be filed in the office of the Clerk of Records and Writs or in the office of any Local Registrar or Deputy Clerk of the Crown of the High Court of Justice, or in the office of the Clerk of the County or District Court of the County or District in which the lands lie, and upon being so filed shall become an order of the Court in which it is filed and shall be enforceable as an order of such Court, but the Court or a Judge thereof may stay proceedings thereon if an appeal is brought from the order (*New.*) *Cf. 6 Edw. c. 31, s. 34.*

APPEALS FROM RECORDER.

133.—(1) A person affected by the decision of, or by any act or thing, whether ministerial or judicial, done, or refused or neglected to be done by the Recorder, may appeal to the Commissioner, who shall decide the matter and make such order in the premises as he may deem just. 6 Edw. c. 11, s. 74; 7 Edw. c. 13, s. 12, as 52 (3).

M. C. C. 70, 78 (note), 144, 193, 349, 364 (note), 458, 460 (note), 461; and see 262.

(2) Upon an appeal from the decision of the Recorder the Commissioner may require or admit new or additional evidence or may re-try the matter. 7 Edw. c. 13, s. 24, as 74 (1).

See 458, 460 (note).

(3) The appeal shall be by notice in writing filed in the office of the Recorder (Form 37), and served upon all parties adversely interested within fifteen days from the entry of the decision in the books of the Recorder, or within such further period not exceeding fifteen days, as the Commissioner may allow. Provided that if notice of appeal has been filed with the Recorder within the said time, and the Commissioner is satisfied that it is a proper case for appeal and that after reasonable effort any of the parties entitled to notice could not be served within the said time, he may extend the time for appealing and make such order for substitutional or other service as he may deem just. Provided also that where a person affected has not been notified as provided in section 91 or 130 and appears to have suffered substantial injustice and has not been guilty of undue delay, the Commissioner may allow such person to appeal. 6 Edw. c. 11, s. 75; 7 Edw. c. 13, ss. 12, 25, as 75 (2), (3), 52 (3).

M. C. C. 16, 22, 83, 120, 173, 176 (note 1), 249, 257, 397, 461.

(4) The notice of appeal shall contain or have endorsed upon it an address for service at some place not more than five miles distant from the Recorder's office, and any notice or document relating to the appeal shall be sufficiently served upon the appellant if left with a grown-up person at such place, or if no such person can there be found then if mailed by registered post addressed to the appellant at the post office at or nearest to such place. 7 Edw. c. 13, s. 25 as 75 (3) *part.*

(5) If no address for service is given as provided in the next preceding subsection, any such notice or document may be served upon the appellant by posting up the same in the Recorder's office. 7 Edw. c. 13, s. 25 as 75 (3) *part.*

APPEAL TO MINISTER.

134.—(1) An appeal shall lie from any decision of the Commissioner in respect to any ministerial duty of the Recorder to the Minister only, and the decision of the Minister shall be final and shall not be subject to appeal.

(2) The appeal to the Minister shall be by notice in writing filed with the Bureau of Mines and served upon every adverse party within fifteen days after the date of the decision of the Commissioner, or within such further time as may be allowed by the Minister. 7 Edw. c. 13, s. 12, as 52 (4).

PROCEDURE BEFORE COMMISSIONER.

135. The words "*The Mining Act of Ontario*" shall be written or printed on all notices and other documents in every matter, application and appeal taken before the Commissioner. (*See* 6 Edw. c. 11, s. 10.)

136.—(1) An appointment shall be obtained from the Commissioner for the hearing of an appeal or of a dispute mentioned in section 63 or of any claim, question or dispute cognizable by him.

(2) In any matter or proceeding other than an appeal the Commissioner may, if a Certificate of Record has been issued, require that the applicant shall satisfy him that there is reasonable ground for the application or may in any such case, or in any case where leave to take the proceeding is necessary, give the appointment or leave only upon such terms as to security for costs or otherwise as may seem just.

(3) The appointment may be obtained upon a verbal or written application.

(4) A copy of the appointment shall be served upon all parties concerned, and except in the case of an appeal or dispute under section 63, a notice (Form 38) stating shortly the nature and particulars of the right, question or dispute, shall also be served. (*New.*) *Cf. 6 Edw. c. 11, ss. 9, 10, 52; 7 Edw. c. 13, ss. 5, 12, as 10 (2) and 52 (1).*

M. C. C. 346, 348 (note).

137.—(1) The Commissioner may give directions for having any matter or proceeding heard and decided without unnecessary formality, may order the filing and serving of statements, particulars, objections or answers, the production of documents and things, and the making of amendments, may give such other directions for the procedure and hearing as he may deem proper, and may make any appointment, notice or other proceeding returnable forthwith or at such time as he may deem proper, and may order or allow such substituted or other service as in the circumstances may seem proper. 6 Edw. c. 11, ss. 11, 21; 7 Edw. c. 13, s. 7, as 21 (1). *Cf. R. S. B. C. c. 135, s. 121.*

(2) In appointing the place of hearing, the Commissioner shall select the place that he may deem most convenient for the parties within the county or district or one of the counties or districts in which the lands or mining rights affected are situate, unless it appears to him desirable that the hearing should be in some other county or district. 6 Edw. c. 11, s. 21; 7 Edw. c. 13, s. 7, as 21 (2), *part.*

(3) The hearing shall be proceeded with as promptly as possible, having regard to the interests of the parties concerned. 6 Edw. c. 11, s. 11. *Cf. R. S. B. C. c. 135, s. 121.*

M. C. C. 36, 37 (note), 277, 388, 458, 469 (note).

(4) The Commissioner may take or order the evidence of any witness to be taken at any place within or without Ontario. 7 Edw. c. 13, s. 7, as 21 (2), *part.*

M. C. C. 331.

(5) The Commissioner may hear and dispose of any application not involving the final determination of the matter or proceeding at any place he may deem convenient, and his decision upon any such application shall be final and shall not be subject to appeal. 6 Edw. c. 11, s. 19; 7 Edw. c. 13, s. 7, as 21 (2) *part.*

138. The Commissioner may obtain the assistance of engineers, surveyors, or other scientific persons, who may under his order view and examine the property in question, and in giving his decision he may give such weight to their opinion or report as he may deem proper. Cf. 6 Edw. c. 11, s. 9.

See under s. 139.

139.—(1) The Commissioner, in addition to hearing the evidence adduced by the parties, may require and receive such other evidence as he may deem proper, and may view and examine the property in question and give his decision upon such evidence or view and examination, or may appoint a person to make an inspection of the property, and may receive as evidence and act upon the report of the person so appointed. Cf. 6 Edw. c. 11, s. 12.

See M. C. C. 1, 61, 63 (note), 64, 120, 139 (and note), 176, 390, 448.

(2) Where the Commissioner proceeds partly on a view or on any special knowledge or skill possessed by himself, he shall put in writing a statement of the same sufficiently full to enable a judgment to be formed of the weight which should be given thereto. 6 Edw. c. 11, s. 13.

(3) When the parties consent in writing, the Commissioner may proceed wholly upon a view, and in such case his decision shall be final and shall not be subject to appeal. (*New.*)

140. The Commissioner shall give his decision upon the real merits and substantial justice of the case. 7 Edw. c. 13, s. 24, as 74 (2), *part.*

M. C. C. 64, 164, 179, 193, 262, 276 (note), 341, 349, 388, 436, 458, 460 (note), 467; see 421, 441.

141. Where the Commissioner deems the matter or proceeding vexatious, or where it is brought by a person residing out of Ontario, he may order that such security for costs as he may deem proper, be given, and that in default of such security being given within the time limited or in default of speedy prosecution the matter or proceeding be dismissed. 7 Edw. c. 13, s. 24, as 74 (2), *part.*

142. Where the hearing is to take place at a place where a court house is situate, the Commissioner shall have the right to use the court room, and where the hearing is to take place in a municipality in which there is a hall belonging to the municipality but no court room, he shall have the right to use such hall. 6 Edw. c. 11, s. 24.

143. Sheriffs, deputy sheriffs, constables and other peace officers shall aid, assist and obey the Commissioner in the exercise of the powers conferred on him by this Act, whenever required so to do, and shall upon the certificate of the Commissioner be paid by the Treasurer of the County or District the same fees as for similar services in carrying out the orders of a Judge of the High Court. 6 Edw. c. 11, s. 25.

144. The evidence taken before the Commissioner need not be filed, or written out at length by the shorthand writer unless required by the Commissioner or by a party to the proceedings, and copies shall be furnished upon the same terms as in cases in the High Court. 6 Edw. c. 11, s. 36.

COSTS AND WITNESS FEES.

145. The Commissioner may in his discretion award costs to any party, and may direct that such costs be taxed by the Clerk of the County or District Court or by a local taxing officer of the High Court or by a taxing officer of the Supreme Court, or may order that a lump sum be paid in lieu of taxed costs. *See* 6 Edw. c. 11, s. 15.

M. C. C. 179, 305, 373, 425, 448, 455.

146.—(1) The costs and disbursements payable upon proceedings before the Commissioner, as to any matter in which the amount or value of the property in question does not in the opinion of the Commissioner exceed $400, shall be according to the tariff of the County Court, and as to any matter in which the amount or value of the property in question in his opinion exceeds $400, shall be according to the tariff of the High Court.

(2) The Commissioner shall in his order or award direct according to which tariff the costs and disbursements shall be taxed.

(3) The Commissioner shall have the same powers as a Judge of a County Court or a taxing officer of the Supreme Court with respect to counsel fees. 6 Edw. c. 11, s. 41.

147. The fees and conduct money to be paid to a witness before the Commissioner or Recorder shall be according to the County Court scale. 6 Edw. c. 11, s. 27.

DECISIONS.

148.—(1) Except where inapplicable, the decision of the Commissioner shall be in the form of an order or award, but need not show upon its face that any proceeding or notice was had or given, or that any circumstance existed necessary to give jurisdiction to make such order or award. 6 Edw. c. 11, s. 34, *part*.

(2) The order or award of the Commissioner, with the evidence, exhibits, the statement, if any, of view or of special knowledge or skill and the reasons for his decision, if any are given, shall be filed in the Bureau of Mines, or in the Office of the Recorder, as may be directed by the Commissioner, and the officer or person in charge of such office shall forthwith give notice in writing of the filing by registered post or otherwise to the solicitors of the parties appearing by solicitor and to the parties not represented by a solicitor. Cf. 6 Edw. c. 11, s. 31.

(3) Where the order or award is not filed with the Recorder of the Division in which the property affected is situate the Commissioner shall transmit a duplicate to such Recorder. (*New.*)

149.—(1) The Commissioner shall make in the books of his office a full note of every decision given by him. 6 Edw. c. 11, s. 32, *part*.

(2) Where a decision of the Commissioner finally disposes of the matter in question so far as he is concerned he shall give notice of the

purport of such decision to the parties to the proceeding by registered letter addressed to them at their addresses as entered in his books. 6 Edw. c. 11, s. 32, *part*.

150. Any party to a proceeding shall be entitled on payment of the prescribed fee to a certified copy of any order or award made by the Commissioner, and the copy shall show the date of the entry of the order or award in the books of the Commissioner. 6 Edw. c. 11, s. 33.

APPEALS FROM COMMISSIONER.

151.—(1) Where not herein otherwise provided, an appeal shall lie to a Divisional Court from every decision of the Commissioner, including an order dismissing a matter or proceeding under the provisions of section 141. 6 Edw. c. 11, s. 43.

See M. C. C. 70, 78 (note), 144, 193, 349, 364 (note), 436.

(2) Except in the case provided for by section 128, and in the case of a reference under *The Arbitration Act*, the order or award of the Commissioner shall be final and conclusive unless where an appeal lies it is appealed from within fifteen days after the filing thereof or within such further period not exceeding fifteen days as the Commissioner or a Judge of the Supreme Court may allow. 6 Edw. c. 11, s. 30.

M. C. C. 407, and cf. Hunter v. *Bucknall, 9 O. W. R. 817.*

(3) The appeal shall be begun by filing a notice of appeal with the Recorder of the division in which the property in question or a part of it is situate and paying to him the prescribed fee, and unless such filing and payment are so made, and unless the appeal is set down and a certificate of such setting down lodged with the Recorder within five days after the expiration of said fifteen days or the further time allowed under subsection 2 the appeal shall be deemed to be abandoned. 7 Edw. c. 13, s. 10, as 30.

M. C. C. 407.

(4) The appeal may be direct to the Court of Appeal if the parties consent or by leave of that Court or a Judge thereof. (*New.*)

See M. C. C. 349.

(5) The Recorder shall forthwith after the filing of the notice of appeal and the payment of the prescribed fee, transmit by registered post or by express to the Central Office at Osgoode Hall, Toronto, the order or award and all the exhibits, papers and documents filed therewith. (*New.*)

(6) Where the time for appealing is extended the appellant shall forthwith transmit the order for the extension, or a duplicate thereof, by registered post to the Recorder. (*New.*)

APPEALS FROM DIVISIONAL COURT.

152. If the Divisional Court reverses or varies the decision of the Commissioner, any party adversely affected by such reversal or variation, within thirty days from the date of the decision of the Divisional Court, may, by leave of the Court of Appeal, or of a Judge thereof if the Court is not sitting, appeal to the Court of Appeal, and there shall be no further or other appeal. 7 Edw. c. 13, s. 11, as 43.

M. C. C. 349.

PROCEDURE ON APPEALS.

153. The practice and procedure, including the disposition of costs, on an appeal to the Divisional Court or to the Court of Appeal shall be the same as in ordinary cases under *The Judicature Act*, except that it shall not be necessary to print the Appeal Book unless the Court of Appeal or a Judge thereof so directs. (*New.*)

See M. C. C. at 418.

VALIDITY OF PROCEEDINGS BEFORE COMMISSIONER OR RECORDER.

154. Proceedings under this Act shall not be removable into any Court by *certiorari* or otherwise, and no injunction, mandamus or prohibition shall be granted or issued out of any Court in respect of anything required or permitted to be done by any officer appointed under the authority of this Act. 7 Edw. VII. c. 13, s. 12, as 52 (5).

155. No proceeding before the Commissioner or a Recorder shall be invalidated by reason of any defect in form or substance or failure to comply with the provisions of this Act, where in the opinion of the Court before which any such proceeding comes in question no substantial wrong or injustice has been thereby done or occasioned. (*New.*)

M. C. C. 458, 460 (note).

POWER TO EXTEND TIME AFTER EXPIRATION OF PRESCRIBED TIME.

156. Where power is conferred by this Act to extend the time for doing an act or taking a proceeding unless otherwise expressly provided, the power may be exercised as well after as before the expiration of the time allowed or prescribed for doing the act or taking the proceeding.

M. C. C. 425.

PART IX.—OPERATION OF MINES.

REGULATIONS.

157. No boy under the age of fifteen years shall be employed or allowed for the purposes of employment to be below ground in any mine; and except in the case of mica trimming works no girl or woman shall be employed at mining work or allowed to be for the purpose of employment at mining work in or about any mine. 6 Edw. c. 11, s. 192.

158.—(1) No boy under the age of seventeen years shall be employed or allowed to be below ground for the purpose of employment in any mine on Sunday or for more than eight hours in any one day.

(2) The time during which any such boy may be below ground for the purpose of employment shall be deemed to begin at the time of leaving and to end at the time of returning to the surface. 6 Edw. c. 11, s. 193.

159. The owner or agent of every mine shall keep in an office at the mine, or in the principal office of the mine belonging to the same owner in the county or district in which the mine is situate, a register, in which he shall cause to be entered the name, age, residence and date of the first employment of all boys under the age of seventeen years who are employed in the mine below ground, and shall produce such register to any Inspector at the mine at all reasonable times

when required by him, and allow him to inspect and copy the same. The immediate employer other than the owner or agent of the mine of every boy under the age of seventeen years, before he causes him to be in any mine below ground, shall report to the owner or agent or some person appointed by him, that he is about to employ such boy in the mine. 6 Edw. c. 11, s. 194.

160. Where there is a shaft, incline, plane or level in any mine, whether for the purpose of an entrance to the mine or of a communication from one part of it to another, and persons are taken up, down or along the shaft, incline, plane or level by means of any engine, windlass or gin, no person shall be allowed to have charge of such engine, windlass or gin, or of any part of the machinery, ropes, chains or tackle connected therewith, unless such person is a male of at least twenty years of age. Where the engine, windlass or gin is worked by an animal, the person under whose direction the driver of the animal acts shall for the purposes of this section be deemed to be the person in charge of the engine, windlass or gin, and no person shall be employed as such driver who is under the age of sixteen years. 6 Edw. c. 11, s. 195.

161. Where any person contravenes any of the next preceding four sections, the owner and the agent of the mine shall also each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means to prevent such contravention by publishing, and to the best of his power enforcing the provisions of this Act. 6 Edw. c. 11, s. 196.

162. Where a mine has been abandoned or the working thereof has been discontinued, the owner or lessee thereof, and every other person interested in the minerals of the mine shall cause the top of the shaft and all entrances from the surface, as well as all other pits and openings dangerous by reason of their depth, to be and to be kept securely fenced; and if any person fails to act in conformity with this section he shall be guilty of an offence against this Act, and any shaft, entrance, pit or other opening which is not so fenced shall be deemed to be a nuisance. 6 Edw. c. 11, s. 203.

INQUEST TO BE HELD IN CASE OF FATALITY.

163. The coroner who resides nearest to a mine wherein or in connection wherewith any fatal accident has occurred, shall forthwith conduct an inquest, but if he is in any way in the employment of the owner or lessee of the mine he shall be ineligible to act as coroner, and any other coroner shall, upon application by any person interested, forthwith issue his warrant and conduct such inquest, and this section shall be his authority for so doing whether his commission extends to such territory or not. 6 Edw. c. 11, s. 204.

The Inspector and any person authorized to act on his behalf shall be entitled to be present and to examine or cross-examine any witness at every inquest held concerning a death caused by an accident at a mine, and if the Inspector or some one on his behalf is not present, the coroner shall, before proceeding with the evidence, adjourn the inquest and give the Deputy Minister not less than four days' notice of the time and place at which the evidence is to be taken. (Added in 1909 by 9 Edw. c. 17, s. 1.)

RULES FOR PROTECTION OF MINERS.

164. The following general rules shall so far as may be reasonably practicable be observed in every mine:

Sanitation.

1. An adequate amount of ventilation shall be constantly produced so that the shafts, adits, tunnels, winzes, rises, sumps, levels, stopes,

cross-cuts, underground stables and working places of the mine and the travelling roads to and from such working places shall be in a fit state for working and passing therein.

2. In every working mine which is entered by a shaft and operated to a greater depth than 100 feet and in every mine which is entered by an adit or tunnel and operated to a greater distance than 300 feet from the entrance to the adit or tunnel, the Inspector may require a sufficient number of portable water-tight privies to be provided for the underground employees of the mine, and such privies shall be taken to the surface and thoroughly cleansed every twenty-four hours.

Care of Explosives.

3. No magazine for powder, dynamite or other explosive shall be erected or maintained at a nearer distance than four hundred feet from the mine and works, or any public highway, except with the written permission of the Inspector, and every such magazine shall be constructed of materials and in a manner to insure safety against explosion from any cause, and shall be either so situated as to interpose a hill or rise of ground higher than the magazine between it and the mine and works, or else an artificial mound of earth as high as the magazine and situate not more than 30 feet from it shall be so interposed.

4. No powder, dynamite or other explosive in excess of a supply for 24 hours shall be stored underground in a working mine. It shall be kept in securely covered and locked boxes, and, where thawed underground, it shall be kept in unused parts of the mine, never less than ten feet from lines of underground traffic nor less than one hundred and fifty feet from places where drilling and blasting are carried on, and shall at all times be in charge of a specified man fully qualified by his experience to take charge thereof.

5. No fuse, blasting caps, electric detonators, or articles containing iron or steel shall be stored in the same magazine with powder, dynamite or other explosive, nor at a less distance than fifty feet from such magazine, and they shall be stored in a covered box in a place of safety.

6. Whenever a workman opens a box containing an explosive, or in any manner handles the same, he shall not permit any lighted lamp or candle to come closer than five feet to such explosive, nor permit the lamp or candle to be in such a position that the air current may convey sparks to the explosive, and a workman with a lighted lamp, candle, pipe or any other thing containing fire shall not approach nearer than five feet to an open box containing an explosive.

7. A thorough daily inspection shall be made of the condition of explosives in a mine, and the manager, captain or other officer in charge of the mine shall institute an immediate investigation when an act of careless placing or handling of explosives is discovered by or reported to him; and any employee who commits a careless act with an explosive or where explosives are stored, or who, having discovered it, omits or neglects to report immediately such act to an officer in charge of the mine, shall be guilty of an offence against this Act, *and the officer in charge of the mine shall immediately report such offence to the Inspector or to the Crown Attorney of the County or District in which the mine is situate.* (*As amended in 1909 by 9 Edw. c. 17, s. 2.*)

8. A suitable house in which to thaw explosives shall be built separate from the other mine buildings and shall be equipped with suitable apparatus for thawing explosives approved by the Inspector, and shall be under the direction of the mine foreman or some other

careful and experienced workman. Whenever deemed necessary by the Inspector suitable apparatus for thawing explosives shall also be provided for use in the mine and shall be used only under the direction of the mine foreman or of some other careful and experienced workman. The quantity of explosives brought into the thawing house shall not at any time exceed the requirements of the mine for a period of twenty-four hours, except where such requirements would be less than one hundred pounds.

9. In charging holes for blasting, no iron or steel tool or rod shall be used, and no iron or steel shall be used in any hole containing explosives, *and no drilling shall be done in any hole that has been blasted, nor shall any metal tool be introduced into the bottom of any such hole.* (*As amended in 1909* by 9 Edw. c. 17, s. 3.)

10. A charge which has missed fire shall not be withdrawn, but shall be blasted; and, in case the missed hole has not been blasted at the end of a shift, that fact shall be reported by the foreman or shift-boss to the mine captain or shift-boss in charge of the next relay of miners before work is commenced by them.

11. All drill holes, whether sunk by hand or machine drills, shall be of sufficient size to admit of the free insertion to the bottom of the hole of a stick or cartridge of powder, dynamite or other explosive, without ramming, pounding or pressure.

12. No powder, dynamite or other explosive shall be used to blast or break up ore, salamander or other material, where by reason of the heated condition of the ore, salamander or other material there is any danger or risk of premature explosion of the charge. (*As amended in 1910*, by c. 26, s. 45 (4).

Protection in Working Places.

13. Every underground plane on which persons travel which is self-acting, or worked by an engine, windlass or gin, shall be provided at intervals of not more than twenty yards with sufficient man-holes for places of refuge, and every such plane which exceeds thirty yards in length shall also be provided with some proper means of signalling between the stopping places and the end of the plane.

14. Every road on which persons travel underground where the produce of the mine in transit ordinarily exceeds ten tons in any one hour over any part thereof shall be provided at intervals of not more than one hundred yards with sufficient spaces for places of refuge, each of which spaces shall be of sufficient length, and of at least three feet in width between the waggons running on the tramroad and the side of the road, and the Minister may require the Inspector to certify whether the produce of the mine in transit on such road does or does not ordinarily exceed the weight aforesaid, and such certificate shall be conclusive as to the matters therein stated.

15. Every man-hole and space for a place of refuge shall be constantly kept clear, and no person shall place anything in a man-hole or in such space in such a position as to prevent convenient access thereto.

16. Where drifts extend from a shaft in opposite directions on the same level, a safe passage way and standing room for workmen shall be made on one or both sides of the shaft to afford protection against falling material.

17. Where a shaft is being sunk below levels in which work is going on, a suitable pentice shall be provided for protection of the workmen in the shaft.

18. The top of every shaft, unless otherwise directed by the Inspector, shall be securely fenced, and every pit or opening dangerous by reason of its depth shall be securely fenced or otherwise protected.

19. Guard rails shall be placed round the shaft openings on every level of the mine.

20. Where the enclosing rocks are not safe every working or pumping shaft, adit, tunnel, stope or other working shall be securely cased, lined or timbered, or otherwise made secure.

21. Every working mine shall be provided with suitable and efficient machinery and appliances for keeping the mine free from water, the accumulation or flowing of which might injuriously affect any other mine.

Ascending and Descending Shafts.

22. Where one portion of a shaft is used for the ascent or descent of persons by ladders or by a man engine, and another portion of the same shaft is used for raising the material gotten in the mine, the first mentioned portion shall be cased or otherwise securely fenced off from the last mentioned portion.

23. Workmen may not be lowered or hoisted in shafts, winzes or other underground openings of a mine,

(*a*) In buckets, skips or tubs, *except that men employed in shaft sinking shall be allowed to ascend and descend to and from the nearest level by means of the bucket used for hoisting material, but there must always be a suitable ladder in the shaft to provide an auxiliary means of escape.* (*As amended in 1909*, by 9 Edw. c. 17, s. 4.)

(*b*) In cages which are not provided with a hood, dogs and other approved safety appliances;

(*c*) In cages where detaching hooks to prevent overwinding in mines of upwards of 1,000 feet vertically in depth are not provided;

(*d*) Where no indications other than marks on the rope or cable are used to show to the person who works the machine or hoisting engine, the position of the cage in the shaft;

(*e*) Where the rope or cable passes through blocks instead of passing over a sheave of diameter suited to the diameter of the rope or cable and properly mounted on a secure head-frame.

The owner of every mine shall post and maintain at the mouth of the shaft or other conspicuous place a printed copy of this rule, and where the same has been posted and maintained in case of an accident occurring as a result of a violation of this rule the owner shall not be liable for damages except upon proof that he has permitted or authorized the employment of means herein prohibited for raising and lowering workmen in a mine, or that a suitable manway has not been provided.

24. Whenever a mine shaft exceeds four hundred feet vertically in depth, a safety cage shall be provided, kept and used for lowering and raising men in the shaft, unless otherwise directed in writing by the Inspector.

24a. All cross heads must be provided with a safety appliance so constructed that the cross head cannot stick in the shaft without also stopping the bucket. (*Added in 1909*, by 9 Edw. c. 17, s. 5.)

25. Skipways shall be provided with back timbers to prevent skips leaving the track where such skipways are inclined at more than 45 degrees from the horizon, unless otherwise directed in writing by the Inspector.

26. Hoisting with horse and pulley-block is forbidden where the depth of a shaft is more than seventy-five feet.

27. No open hook shall be used in hoisting or lowering.

28. On the drum of every machine used for lowering or raising persons there shall be such flanges or horns, and also, if the drum is conical, such other appliances as may be sufficient to prevent the rope or cable from slipping.

29. To every hoisting machine used for lowering or raising persons or material there shall be attached a brake adequate to hold at any point in the shaft the weight of the skip, bucket or other vessel used when filled with ore, and in any shaft of greater depth than 200 feet there shall also be in addition to any mark on the rope or cable a geared indicator which will show to the person who works the machine the position of the cage or load in the shaft.

30. No person shall ride upon or against any loaded car in any level, drift or tunnel in or about any mine.

Scaling, Escapement Shafts, Etc.

31. The Manager or Captain or other competent officer of every mine shall examine at least once every day all working shafts, levels, stopes, tunnels, drifts, crosscuts, raises, signal apparatus, pulleys and timbering in order to ascertain that they are in a safe and efficient working condition, and he shall inspect and scale, or cause to be inspected and scaled, the walls and roofs of all stopes or other working places at least once every week, *and shall enter the record of such scaling operations in a book kept for that purpose in the mine office and cause it to be signed by each of the men who did the scaling.* (*As amended in 1909*, by 9 Edw. c. 17, s. 6.)

32. The owner, operator or superintendent of every mine where six or more men are employed in underground work shall maintain a properly constructed stretcher for the purpose of conveying to his place of abode any person who may be injured while in the discharge of his duties at the mine.

33. Every person who has sunk in any mine a vertical or incline shaft to a greater depth than 100 feet, where the top of such shaft is covered or enclosed by a building which is not fire-proof, and who has drifted a distance of 200 feet or more from the shaft and has commenced to stope, shall provide and maintain to the hoisting shaft or the opening through which men are let into or out of the mine and the ore is extracted, a separate escapement shaft or opening. If such an escapement shaft or opening is not in existence at the time that stoping is commenced, work upon it shall be begun as soon as stoping is commenced, and shall be diligently prosecuted until the same is completed, and the escapement shaft or opening shall be continued to and connected with the lowest workings in the mine. The escapement shaft or opening herein provided for shall be of sufficient size to afford an easy passage way, and if it is an upraise or shaft it shall be provided with good and substantial ladders from the deepest workings to the surface. With the exception of any erection used solely as a shaft-house, no permanent building, for any purpose, shall hereafter be erected within fifty feet of the mouth of a mine.

34. All timber not in use to sustain the roof or walls or any part of a mine shall as soon as practicable be taken from the mine and shall not be piled up and permitted to decay therein.

35. All oils and other inflammable materials shall be stored or kept in a building erected for that purpose, and at a safe distance from the powder magazine and from the main buildings, and shall be removed therefrom for use in such quantities only as are necessary to meet the requirements of one day.

36. Every working shaft which exceeds 100 feet in depth in which persons are lowered and raised, unless otherwise permitted in writing by the Inspector, shall be provided with guides and some suitable means of communicating by distinct and definite signals from the bottom of the shaft, and from every level for the time being in work between the surface and the bottom of the shaft to the surface, and also of communicating from the surface to the bottom of the shaft, and to every level for the time being in work between the surface and the bottom of the shaft.

37. All methods of signalling in a mine shall be printed and posted up in the engine house or hoist house and also at the top of the shaft and at the entrance of each level. The following code of mine signals shall be used at every mine:—

Code of Mine Signals.

1 bell	Stop immediately—if in motion.
1 bell	Hoist.
2 bells	Lower.
3 bells	Hoist slowly.
4 bells	Blasting signal. Engineer must answer by raising cage a few feet and letting it back slowly, then one bell, hoist men away from blast.
5 bells	Steam on.
6 bells	Steam off.
7 bells	Air on.
8 bells	Air off.
3—2—2 bells	Send down drills.
3—2—3 bells	Send down picks.
9 bells	Danger signal in case of fire or other danger. Then ring number of station where danger exists.

Ladders and Footways.

38. A suitable footway or ladder, inclined at the most convenient angle which the space in which the ladder is fixed allows, shall be provided in every working shaft, and every such ladder shall have a substantial platform at intervals of not more than twenty feet, and shall not be fixed for permanent use in a vertical or overhanging position, and all ladders in shafts shall project at least two feet above the platform, and all holdfasts shall be of iron securely fixed in the shaft casing. The platform shall be closely covered, with the exception of an opening large enough to permit the passage of a man's body, and shall be so arranged that it would not be possible for a person to fall from one ladder through the opening to the ladder below.

Dressing Rooms.

39. If more than ten persons to each shift are ordinarily employed in the mine below ground, sufficient accommodation, including supplies of pure cold and warm water for washing shall be provided above

ground near the principal entrance of the mine, and not in the engine room or boiler room, for enabling the persons employed in the mine to conveniently dry and change their clothes.

Protection from Machinery.

40. Every fly-wheel and all exposed and dangerous parts of the machinery used in or about the mine shall as far as practicable be kept securely fenced.

41. Every steam boiler shall be provided with a steam gauge and a proper water gauge to show respectively the pressure of steam and the height of water in the boiler, and with a proper safety valve.

42. At least once in every six months every boiler shall be thoroughly cleansed, and at least once in every twelve months every boiler shall be subjected to an examination and hydraulic test by a competent person. The test of working boilers shall be equal to one and a half times the pressure at which the safety valve blows off.

43. No person shall wilfully damage, or without proper authority remove or render useless, any fencing, casing, lining, guide, means of signalling, signal, cover, chain, flange, horn, brake, indicator, ladder, platform, steam-gauge, water-gauge, safety-valve or other appliance or thing provided in any mine in compliance with this Act.

Time for Blasting.

44. Where parties working contiguous or adjacent claims disagree as to the time of setting off blasts, either party may appeal to an Inspector, who shall decide upon the time at which blasting operations thereon may be performed, and the decision of the Inspector shall be final and conclusive and shall be observed by them in future blasting operations.

Posting up Rules.

45. Instructions and rules required to be posted in or about a mine under the authority of this Act shall be written or printed in the language or languages most familiar to the workmen employed at the mine, and the owner or agent of the mine shall maintain such instructions and rules duly posted, and the removal or destruction of them shall be an offence against this Act. 6 Edw. c. 11, s. 205.

PAYMENT OF WAGES.

165.—(1) No wages shall be paid to any person employed in or about any mine to which this part applies at or within any tavern, shop or place where spirits, wine, beer or other spirituous or fermented liquor are sold or kept for sale, or within any office, garden, or place belonging or contiguous thereto or occupied therewith.

(2) Every person who contravenes or permits any person to contravene this section shall be guilty of an offence against this Act, and in the event of any such contravention by any person whomsoever the owner and agent of the mine in respect of which the wages were paid shall also each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means to prevent such contravention by publishing and to the best of his power enforcing the provisions of this section. 6 Edw. c. 11, s. 200.

DAMAGE TO OTHER CLAIMS.

166. In mining operations no person shall cause damage or injury to the holder of any mining property by throwing earth, clay, stones,

or mining material on such other mining property, or by causing or by allowing water which may be pumped or bailed or which may flow from a mining claim or other mining property of such person, to flow into or upon such other mining property, and the offender in addition to any civil liability shall incur a penalty of not more than $10 for every day such damage or injury continues, together with costs, and in default of payment of the penalty and costs, may be imprisoned for any period not exceeding one month. 6 Edw. c. 11, s. 198.

PARTY WALLS.

167.—(1) Unless the owners agree to dispense therewith, in all mining operations there shall be left between all adjoining properties a party wall at least fifteen feet thick, (being seven and one-half feet on each property) to the use of which the adjoining owners shall be entitled in common.

(2) The owners shall be entitled to use such party wall in common as a roadway for all purposes, and such roadway shall not be obstructed by the throwing of soil, rock or other material thereon, or in any other way, and any person obstructing the same in addition to any civil liability shall incur a penalty of not more than $10 for every day such obstruction continues, together with costs.

(3) Any such adjoining owner may in any case apply to the Commissioner, who may make an order dispensing with such party wall or roadway, or providing for the working of any mineral therein, or otherwise, as he may deem just. 7 Edw. c. 13, s. 56, as 198*a*. *Cf. R. S. O. s. 55.*

NOTICE OF ACCIDENTS.

168. Where loss of life or any serious personal injury to any employee occurs in or about a mine by reason of any accident whatever, the owner or agent of the mine shall within twenty-four hours next after the accident send notice in writing of the accident, and of the loss of life, or personal injury occasioned thereby, to the Deputy Minister, and shall specify in such notice the character of the accident, and the number of the persons killed or injured and their names if known. 6 Edw. c. 11, s. 207.

169. Where mining operations have been commenced upon any mine, claim, location or works in the Province, or where such operations have been discontinued, or where such operations have been recommenced after an abandonment or discontinuance for a period exceeding two months, or where any change is made in the name of a mine or in the name of the owner or agent thereof, or in the officers of any incorporated company which is the owner thereof, the owner or agent of such mine, claim, location or works shall give notice thereof to the Deputy Minister within two months after such abandonment, discontinuance, recommencement or change, and if such notice is not given the owner or agent shall be guilty of an offence against this Act. 6 Edw. c. 11, s. 206.

STATISTICAL RETURNS.

170.—(1) For the purpose of their tabulation under the instructions of the Minister, the owner or agent of every mine, quarry or other works to which this Act applies shall on or before the 15th day of January in every year send to the Bureau of Mines a correct return for the year which ended on the 31st day of December next preceding, showing the number of persons ordinarily employed below and above ground respectively, and distinguishing the different classes and ages of the persons so employed whose hours of labour are regulated by

this Act, the average rate of wages of each class and the total amount of wages paid during the year, the quantity in standard weight of the mineral dressed, and of the undressed mineral which has been sold, treated or used during such year, and the value or estimated value thereof, and such other particulars as the Minister may by regulation prescribe.

(2) The owner or agent of every metalliferous mine shall, if required, make a similar return for the month or quarter at the end of each month or quarter of the calendar year.

(3) Every owner or agent of a mine, quarry or other works who fails to comply with this section, or makes any return which is to his knowledge false in any particular, shall be guilty of an offence against this Act. 6 Edw. c. 11, s. 201.

PLANS OF WORKINGS.

171.—(1) On any examination or inspection of a mine the owner shall, if required, produce to the Inspector, or to any other person authorized by the Minister or Deputy Minister an accurate plan of the workings of the same.

(2) The plan shall show the workings of the mine up to within six months of the time of the examination or inspection, and the owner shall, if required by the Inspector or other authorized person, cause to be marked on the plan the progress of the workings of the mine up to the time of the examination or inspection, and shall also permit him to take a copy or tracing thereof.

(3) An accurate plan of every working mine in which levels, crosscuts or other openings have been driven from any shaft, adit or tunnel, and of every mine consisting of a tunnel or shaft fifty feet or more in length shall be made and a certified copy filed in the Bureau of Mines on or before the 31st day of March in each year, showing the workings of the mine up to and including the 31st day of December next preceding, and whenever work has been discontinued or abandoned for a period of one month such plan shall be filed within two months from the date of cessation of work.

(4) Failure on the part of the owner or agent of the mine to comply with any provision of this section shall be an offence against this Act.

(5) Every such plan shall be treated as confidential information for the use of the officers of the Bureau of Mines, and shall not be exhibited nor shall any information contained therein be imparted to any person except with the written permission of the owner or agent of the mine. 6 Edw. c. 11, s. 202.

POWERS AND DUTIES OF INSPECTOR.

172.—(1) It shall be the duty of every Inspector, and he shall have power to do all or any of the following things, namely:—

(a) To make such examination and inquiry as he may deem necessary to ascertain whether the provisions of this Act are complied with;

(b) To enter, inspect and examine any mine and every portion thereof at all reasonable times by day or night, but so as not to unnecessarily impede or obstruct the working of the mine;

(*c*) To examine into and make inquiry respecting the state and condition of any mine, or any portion thereof, and the ventilation of the mine, and all matters and things connected with or relating to the safety of the persons employed in or about the mine, or any mine contiguous thereto, and to give notice to the owner or agent in writing of any particulars in which he considers such mine or any portion thereof, or any matter, thing or practice to be dangerous or defective or contrary to the provisions of this Act, and to require the same to be remedied within the time named in such notice;

(*d*) To order the immediate cessation of work in and the departure of all persons from any mine or portion thereof which he considers unsafe, or to allow persons to continue to work therein on such precautions being taken as he deems necessary;

(*e*) To exercise such other powers as may be necessary for ensuring the health and safety of miners and all other persons employed in or about mines, smelters, metallurgical and mining works.

(2) It shall be the duty of every Inspector to make an annual report of his proceedings during the preceding year to the Deputy Minister.

(3) The annual report shall be laid before the Legislative Assembly. 6 Edw. c. 11, s. 50.

173.—(1) The Minister may direct an Inspector to make a special report with respect to any accident in or about any mine which has caused loss of life or personal injury to any person.

(2) In conducting the inquiry the Inspector shall have power to compel the attendance of witnesses and the production of books, documents and things, and to take evidence upon oath. 6 Edw. c. 11, s. 208.

174. Non-compliance with any rule contained in section 164 shall be an offence against this Act, upon proof of which the owner, and the agent *of the mine and* any contractor or foreman engaged in or about such mine shall each be guilty of an offence against this Act unless he establishes the fact that he has taken all reasonable means to prevent such non-compliance by publishing and to the best of his power enforcing such rules. 6 Edw. c. 11, s. 211. (*As amended in 1909*, by Edw. c. 17, s. 7.)

175. Where work in or about a mine is let to a contractor, or subcontractor, he shall comply with all the rules and provisions of this Act for the prevention of accidents, and any breach thereof by him shall be an offence against this Act punishable in the like manner as if he were an owner or agent. 6 Edw. c. 11, s. 210.

PART X.—OFFENCES, PENALTIES AND PROSECUTIONS.

176.—(1) Every person who,

(*a*) Prospects, occupies or works any Crown lands or mining rights for minerals otherwise than in accordance with the provisions of this Act, or 6 Edw. c. 11, s. 103;

See M. C. C. 167.

(*b*) Wilfully defaces, alters, removes or disturbs any post, stake, picket, boundary line, figure, writing or other mark lawfully placed, standing or made under this Act, or

(c) Wilfully pulls down, injures or defaces any rules, or notice posted up by the owner or agent of a mine, or

(d) Wilfully obstructs the Commissioner or any officer appointed under this Act in the execution of his duty, or

(e) Being the owner or agent of a mine refuses or neglects to furnish to the Commissioner or to any person appointed by him or to any officer appointed under this Act the means necessary for making an entry, inspection, examination or enquiry in relation to any mine, under the provisions of this Act other than Part IX., or

(f) Unlawfully marks or stakes out in whole or in part a mining claim, a quarry claim, or a placer mining claim, or an area for a working permit or boring permit, or

(g) Wilfully acts in contravention of the provisions of this Act other than Part IX. in any particular not hereinbefore set forth, or

(h) Wilfully contravenes any provision of this Act or any rule or regulation made thereunder for the contravention of which no other penalty is provided; or

(i) Attempts to do any of the acts mentioned in the foregoing clauses,

shall be guilty of an offence against this Act and shall incur a penalty not exceeding $20 for every day upon which such offence occurs or continues, and upon conviction thereof shall be liable to imprisonment for a period not exceeding three months unless the penalty and costs are sooner paid. 6 Edw. c. 11, ss. 103, and 209.

177. Every person who wilfully neglects or refuses to obey any order or award of the Commissioner except for the payment of money, shall, in addition to any other liability, incur a penalty not exceeding $250, and upon conviction thereof shall be liable to imprisonment for a period not exceeding six months unless such penalty and costs are sooner paid. 6 Edw. c. 11, s. 17.

178.—(1) No person who

(a) Carries on the business of mining or dealing in mines, mining claims, mining lands, or mining rights, or the shares, stocks, or bonds of a mining company, or

(b) Acts as broker or agent in or for the disposal of any mines, mining claims, mining lands, or mining rights, or of any such shares, stock or bonds, or

(c) Offers or undertakes to examine or report on a mine, mining claim, mining land or mining rights,

shall use the word "Bureau" as the name or title or part of the name or title under which he acts or carries on business.

(2) Every person who contravenes the provisions of this section shall incur a penalty of not more than $20 for every day upon which such offence occurs or continues, and upon conviction shall be liable to imprisonment for a period not exceeding three months unless such penalty and costs are sooner paid. 6 Edw. c. 11, s. 46.

179.—(1) Every owner or agent who is guilty of an offence against Part IX. shall incur a penalty *of not less than $100 nor more than $1,000.*

(2) Every person other than an owner or agent engaged or employed in or about a mine who is guilty of an offence against Part IX. shall incur a penalty *of not less than $10 nor more than $100.*

(3) Where the Deputy Minister or an Inspector has given written notice to an owner or agent or any person engaged or employed in or about a mine that an offence has been committed against Part IX., such owner or agent or other person shall incur a further penalty not exceeding *$100* for every day upon which the offence continues after such notice.

(4) Every such owner or agent shall upon conviction be liable to imprisonment for a period not exceeding three months unless the penalty and costs are sooner paid, and every person other than an owner or agent so employed shall upon conviction be liable to imprisonment for a period not exceeding one month unless the penalty and costs are sooner paid. 6 Edw. VII. c. 11, ss. 212, 213. *As amended in 1909 by* 9 Edw. c. 17, ss. 8, 9, 10.

(5) *Where the offence is one which is calculated to endanger the safety of those employed in or about the mine or to cause serious personal injury or dangerous accident and was committed wilfully by the personal act, default or negligence of the accused, every owner, agent or other person who is guilty of an offence against Part IX. of this Act shall, in addition to or in substitution for any pecuniary penalty that may be imposed, be liable to imprisonment with or without hard labor for a period not exceeding three months. Added in 1909* by 9 Edw. c. 17, s. 11.

180. No prosecution shall be instituted for an offence against Part IX. or any regulation made in pursuance thereof except

(*a*) By an Inspector, or

(*b*) By the direction of the County or District Crown Attorney, or

(*c*) By the leave in writing of the Attorney-General;

or for an offence against any other of the provisions of this Act or of any rule or regulation made in pursuance thereof, except

(*a*) By or by leave of the Commissioner or a Recorder,

(*b*) By leave of the Attorney-General, or

(*c*) By direction of the County or District Crown Attorney;

and no owner or agent or other person not being the actual offender shall be liable in respect of such offence if he proves that he had taken all reasonable means by notice or otherwise to comply with the provision or rule or regulation for a breach of which he is charged. See 6 Edw. c. 11, s. 214.

181.—(1) Except as to offences against section 12, every prosecution for an offence against this Act shall take place before a Police Magistrate or a Justice of the Peace having jurisdiction in the County or District in which the offence is committed, or before the Commissioner or a Recorder, and save as herein otherwise provided, the provisions of *The Ontario Summary Convictions Act* shall apply to every such prosecution. See 6 Edw. c. 11, s. 215.

(2) The prosecution shall be commenced within six months after the commission of the offence. See 6 Edw. c. 11, s. 216.

PART XI.—GENERAL PROVISIONS.

LIEN FOR WAGES.

182. The provisions of *The Mechanics' and Wage Earners' Lien Act* shall apply to mines, mining claims, mining lands or works

connected therewith except that in the case of unpatented lands and mining rights the registration provided for by the said Act shall be in the office of the Recorder. *See* 6 Edw. c. 11, ss. 188, 189.

183. Every person who performs labour for wages in connection with any mine, mining claim, mining lands or works connected therewith shall have a lien thereon and upon any other property of the owner therein or thereon for such wages, not exceeding the wages for thirty days, or a sum equal to his wages for thirty days, and such lien may be enforced in the manner provided by section 182. See 6 Edw. c. 11, s. 188.

LIQUOR LICENSES.

184. Excepting in cities, towns, and incorporated villages, no license shall hereafter be issued under *The Liquor License Act* for any tavern, shop or club, not on the 14th day of May, 1906, under license for the sale of intoxicating liquor, within six miles of any mine or mining camp where six or more workmen are employed. 6 Edw. c. 11, s. 199.

RIOT ACT.

185. The Lieutenant-Governor in Council may declare by proclamation that *The Act respecting Riots near Public Works* shall be in force in any Mining Division or in any defined locality therein, and upon and after the date named in any such proclamation section 1 and sections 3 to 11 inclusive of the said Act, shall take effect within the Mining Division or locality designated in the proclamation, and the provisions of the said Act shall apply to all persons employed in any mine or in mining within the limits of such Mining Division or locality in the same manner and to the same extent as nearly as may be as if the persons so employed had been specially mentioned and referred to in the said Act. 6 Edw. c. 11, s. 190.

EXPLORATORY DRILLING.

186. The Minister may, out of any moneys appropriated for that purpose, purchase such diamond drills as he may deem necessary for use in prospecting for ores or minerals under rules and regulations made by the Lieutenant-Governor in Council which may provide—

(*a*) For the control and working of the drills under the direction of a person employed for the purpose by the Bureau of Mines;

(*b*) For the payment of freight charges where the drills are used upon mines or lands other than those owned by the Crown;

(*c*) As to applications for use of the drills and the method of dealing therewith;

(*d*) As to charges for use of the drills and for damages thereto, or wear and tear connected therewith,

and otherwise as to the Lieutenant-Governor in Council shall seem proper. 6 Edw. c. 11, s. 187.

REGULATIONS BY ORDER IN COUNCIL.

187.—(1) The Lieutenant-Governor in Council may make such rules and regulations as he may deem necessary for carrying out the provisions of this Act or to meet cases which may arise for which no provision is made in the Act, or when he deems the

provision made to be ambiguous or doubtful, and may impose penalties not exceeding $200 or not exceeding three months' imprisonment for the violation of any such rule or regulation.

(2) The Lieutenant-Governor in Council may make such regulations as he may deem necessary for the opening, construction, maintenance and use of roads to, through or over mining claims, mining locations or lands heretofore or hereafter sold or granted as mining lands or recorded as mining claims or locations, and for the opening, construction, maintenance and use of ditches, aqueducts or raceways through over or upon such claims, locations or lands for the conveying and passage of water for mining purposes.

(3) Rules and regulations made under the provisions of this section shall have force and effect only after the same shall have been published in the *Ontario Gazette*, and if made when the Assembly is sitting shall be laid before the Assembly during the then Session, and if made at any other time shall be laid before the Assembly within the first fifteen days of the Session next after the date thereof, and in case the Assembly at such Session, or if the Session does not continue for three weeks after such rules or regulations are laid before the Assembly, at the ensuing Session, disapproves by resolution of such rule or regulation either wholly or in part, the rule or regulation, so far as the same is disapproved, shall have no effect from the time such resolution is passed. 6 Edw. c. 11 s. 7.

FEES.

188. Fees shall be payable under this Act according to the tariff in the schedule hereto, and except as otherwise mentioned shall be for the use of the Province. 3 Edw. c. 11, s. 184.

ON CANCELLATION OF PATENT, LANDS AND RIGHTS TO REVEST IN CROWN.

189. Whenever a patent or lease of mining lands, or mining rights is by proceedings in the High Court at the instance of the Crown repealed or avoided, such lands and mining rights shall thereupon become and be withdrawn from exploration, discovery, staking out, lease or sale; and every discovery upon and claim to such lands or mining rights and to the mines or minerals on, in or under such lands made or existing at any time before the repeal or avoidance of the patent or lease shall become and be absolutely null and void; and such lands, mining rights, mines and minerals shall be thenceforth vested in the Crown freed and discharged of and from every claim. 6 Edw. c. 12, s. 3.

DEFAULT OF LESSEE UNDER MINES ACT, 1897.

190. If default is made by the lessee of a mining location leased under the authority of *The Mines Act*, chapter 36 of the Revised Statutes of Ontario, 1897, in the payment of rent the lease shall be forfeited, but the lessee may defeat the forfeiture by payment of the full amount of rent within ninety days from the day when the same became payable; and in default thereof the lease shall be absolutely forfeited and void, any statute or law to the contrary notwithstanding, and all claims of the lessee or his assigns shall from and after such period forever cease and determine. R. S. O. c. 36, s. 36.

191.—(1) Upon the failure of any one or more of several co-owners or co-lessees of a location to contribute his or their proportion of the expenditures or of the rental necessary to hold such location, the co-owners or co-lessees who have performed the labour or made the improvements or paid the rent as required by the provisions of *The Mines Act*, chapter 36 of the Revised statutes of Ontario, 1897, may, at the expiration of the year, give such delinquent co-owner or co-lessee, or in case of his death, his personal representative, notice in writing, served personally or by registered post, addressed to his last known place of abode calling upon him to make the necessary payment; and if upon the expiration of three calendar months from such notice the delinquent co-owner or co-lessee or his personal representative shall have failed to contribute his proportion to meet such expenditures or rental, upon report thereof by the Deputy Minister of Mines, the Minister of Lands, Forests and Mines may order that the interest of the delinquent co-owner or co-lessee in the location shall become the property of and be vested in his co-lessees or co-owners who have made the expenditures or paid the rent, or if the Minister thinks fit to refer the matter to the High Court, the Court shall have authority to make the like order. See R. S. O. c. 36, s. 37 (1).

(2) In case of the death of a delinquent co-owner or co-lessee either before or after default in respect of his share, and no person has taken out administration to his estate or has obtained probate of his will, the notice provided for in the preceding subsection may be given to his heirs. R. S. O. c. 36, s. 37 (2).

192. The next two preceding sections shall be deemed to have been in force in the same manner and to the same extent as if Chapter 36 of the Revised Statutes, 1897, had not been repealed, and it is declared that the Minister of Lands and Mines and the Minister of Lands, Forests and Mines have each had all the powers by the said Revised Statute conferred upon the Commissioner of Crown Lands with respect to the matters provided for by the said sections and that the Deputy Minister of Mines has had with respect to such matters, all the powers by the said Revised Statutes conferred upon the Director of the Bureau of Mines. (*New.*)

REPEAL.

193. *The Mines Act, 1906*, (except subsection 2 of section 3 and sections 4 and 5), and all amendments to the said Act, (except the amendment to the said subsection 2), and section 3 of the Act passed in the sixth year of His Majesty's reign, chaptered 12, are repealed.

194. This Act shall not come into force until the 15th day of May, 1908.

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ABANDONMENT.

1. By Insufficient Staking.—Insufficiency of staking works an abandonment of a claim and leaves the lands open to be staked by another licensee. *Re Milne and Drynan, et al.* 455

2. By Insufficient Staking.—Failure to go around the claim, omitting the planting of 3 of the corner posts, and the blazing of the lines, and failure properly to mark the discovery post, renders the staking of a mining claim invalid.

Held, also, by the Commissioner, following the judgment of Britton, J., in *Re Cashman and the Cobalt & James Mines, Ltd.*—contrary in this respect to his own decision therein—that the existence of a claim which was invalid by reason of insufficient staking prevented until it was disposed of the staking out of a valid claim upon the same lands by another licensee; but held by the Divisional Court, overruling the judgment of Britton, J., and the Commissioner's decision following it, that it did not. *Re Milne & Gamble*.....249

3. By Insufficient Staking.—Where, in surveyed territory, the alleged discovery and the discovery post were outside the limits of the claim as applied for and as required by the Act to be applied for, though within the boundaries as actually staked out on the ground, the boundaries through want of reasonable care having been erroneously located, the claim was held invalid.

Held, also, that the above defects in staking and the failure to mark the name and license number of the staker or the description of the lot on any of the posts worked an abandonment under s. 83 (Act of 1908) and left the lands open to restaking. *Re Burd and Paquette*.....419

4. By Insufficient Staking.—A staking in which two of the corner posts were not numbered and none of the lines were freshly blazed and half of one boundary had never been blazed, was held in the circumstances to work an abandonment and to leave the land open to restaking, the staker being at all events disqualified by a prior staking which he failed to record. *Re Kollmorgen and Montgomery* 397

5. By Insufficient Staking.—L., on 26th February, 1907, staked out 17 acres of the prescribed 40 acre portion of the lot which he applied for, placing his discovery post in the unstaked part, marking it for another portion of the lot, and failing to connect it by a blazed line with his No. 1 post, and as a fact had no real discovery of valuable mineral at the post or on the claim. C., on 21st June, 1907, discovered valuable mineral on the unstaked part of the claim and staked out and applied for the 40 acres.

Held by the Commissioner that L.'s claim was invalid, and that as it was not staked out as provided by the Act nor in substantial compliance therewith, it must be deemed to be abandoned under s. 166, and that the lands were therefore, notwithstanding that it was upon record, open within the meaning of s. 131, as amended in 1907, to be staked out by another licensee, and that C. was entitled to stake out the property as he did and that his claim was valid and should be recorded.

An appeal to the Divisional Court was dismissed.

Held, per the court, that as the appellant company had no right in the property it was not competent for it to attack the claim of C., when if successful the only result would be to throw the land open to the public. (Overruled by *Re Smith and Hill*, 349.)

Held, per Britton, J., that the claim of L. was not an abandoned claim within the meaning of the statute. (Overruled by *Re McNeil and McCully and Plotke*, 262, and *Re Milne and Gamble*, 249.) *Re Cashman and the Cobalt and James Mines, Ltd.* 70

6. By Insufficient Staking.—Held, that it might not be too strict a ruling in the circumstances to hold that failure to blaze a discovery line worked an abandonment of the staking. *Re Munro and Downey* 193

7. Delay in Staking.—A discoverer who fails to stake out his claim within proper time, in at least substantial conformity with the Act, abandons or forfeits his rights where another discoverer intervenes with a valid discovery and completes staking before him. *Re McDermott and Dreany*....4

8. Delay in Staking.—T. made a discovery and planted a discovery post on 10th Sept., doing nothing further till the 24th, when he completed the staking out of his claim; F.

meanwhile made a discovery and on the same day, 14th Sept., completed the staking of his claim (being as a fact ignorant of T.'s discovery). Held, that F. was entitled to the property, T.'s delay working an abandonment and leaving the lands open to F.

It seems doubtful whether anything except inability to complete the actual staking out of a claim will excuse delay. *Re Trombley and Ferguson* 189

9. Delay in Staking.—Delay in staking is fatal only where someone else effectively intervenes, and a person disqualified cannot do so or in any way prevent another claim accruing to the property. *Re Munro and Downey*.....193

10. Lack of Discovery.—Held, by the Commissioner, that a claim invalid for lack of sufficient discovery is not an abandoned one within the meaning of ss. 166 and 137 (1907), and does not until disposed of leave the lands open to a subsequent staking. *Re McCrimmon and Miller*.....79

11. Lack of Discovery.—Held, by the Divisional Court, that a prior staking which is invalid for lack of a real discovery is deemed to be abandoned within the meaning of the Act, and so does not stand in the way of another staking or prevent the making of the necessary affidavit as to the lands being open. (But see amendment to s. 83 made in 1909 by c. 26, s. 31 (1). *Re McNeil and McCully and Plotke*.....262

12. Subsequent Applications by same Person.—C. staked out a mining claim 1st June and recorded it 15th June, 1906; W. made a discovery upon the same lands 16th July, but the Recorder would not receive his application because C.'s was on record; W. had formed a partnership with S., who was a foreman of the C. D. Co. which had had men prospecting on the lot; on 9th Aug. the Co. staked on W.'s discovery but its application was also rejected. On 14th Sept. W., by giving C. a half interest, got C.'s claim abandoned and his own on record. The Co. staked again on 6th Oct. and 21st November, 1906, and 17th January, 1907, on an alleged discovery of 29th June, which was not in reality a discovery within the meaning of the Act making successive applications which the Recorder rejected at the time but which were afterwards recorded under mandamus.

Held, by the Commissioner, following Australian and United States authorities, that the Co.'s subsequent stakings and applications on a different discovery worked an abandonment of its first staking and application, and that as the subsequent ones were admittedly not founded upon a real discovery all its applications were invalid; and he declined to deal with its equitable claim to the W. discovery and application until S. should be made a party and proceedings taken in the form prescribed by the Act.

Held, by the Divisional Court, that the subsequent applications did not work an abandonment, and (Riddell, J., dissenting), that the whole claim should be awarded to the Co.

Held, by the Court of Appeal, that an abandonment should not be construed from the making of the subsequent stakings and applications, but that Sharpe must be made a party and the matter remitted to the Commissioner for determination of the rights of all concerned. *Re Wright and The Coleman Development Co*.....103

13. Abandonment by Notice under the Act. — See *Re Wright and the Coleman D. Co. and Sharpe*.....373

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ACTS OF UNLICENSED PERSON.

Will not Prejudice—

The acts of an unlicensed person will not be permitted to prejudice or affect the acquisition of title by a licensee. *Re Trombley and Ferguson* 189

ADJOURNMENT.

1. Proceedings.—Proceedings in mining cases should be promptly disposed of, and where the appellant had sufficient notice and could have been ready, adjournment was refused

ADOPTING DISCOVERY OF ANOTHER.

See DISCOVERY OF VALUABLE MINERAL, 16-21.

ADOPTING FORMER MARKINGS.

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ADVERSE CLAIM.

"ADVERSELY INTERESTED."

1. In Appeal from Recorder.—In an appeal from cancellation of a mining claim by the Recorder a subsequent applicant for the same property is a party "adversely interested" under s. 75 of The Mines Act, 1906, and if not duly served with notice of the appeal the appeal must be dismissed. *Re Petrakos* 22

2. In Appeal from Recorder.—In an appeal from cancellation of a mining claim staked out while a working permit application was pending, the working permit applicant is a party "adversely interested" within the meaning of the Act, and if he is not served with notice of the appeal the appeal must be dismissed. *Re Chartrand and Large* 240

3. In Appeal from Recorder.—The Recorder gave his decision in a dispute between R. and McC. on 17th July; M. later the same day staked out and filed application for a mining claim upon the property in dispute. R. filed a notice of appeal from the Recorder's decision on 18th July, but did not serve either McC. or M.

Held, that McC. and M. were parties "adversely interested," within s. 133 (3) (1908), and that failure to serve them within the time limited by the Act was fatal to the appeal. *Re Rowlandson* 257

AFFIDAVIT OF DISCOVERY AND STAKING.

1. Who may Make.—It is only the licensee who was actually on the ground staking out the claim or personally superintending the staking, that is qualified or able properly to make the affidavit required to accompany a mining claim application. *Re McNeil and Plotke*.....144

2. False Affidavit.—Procuring the recording of a claim by a false affidavit will invalidate the claim. *Re Reichen and Thompson* 88

3. False Affidavit.—See *Re Wright and Coleman D. Co. and Sharpe* 373

4. Untruth and Deception.—Untruth and deception in an affidavit and application for a mining claim will invalidate the application. *Re McNeil and Plotke*.....144

5. False and Deceptive Statements.—See *Re Smith and Kilpatrick et al.* 314

6. Deponent not Present at Discovery.—An application on a discovery and staking of a non-licensee sworn to by an applicant who was not present at the discovery or staking is fraudulent and void. *Re Dennie and Brough et al.*.....211

7. Deponent Personating Licensee.—A claim staked out in the name of a licensee by a non-licensee and non-holder of a forest reserve permit, the recording of which was procured by the latter personating the former and swearing the affidavit in his name, cannot stand though a Certificate of Record has been issued for it, and where the facts appeared incidentally in another proceeding to which all persons interested were parties, the claim was declared invalid, and the guilty person reported for prosecution. *Re McDonald and Casey*.....219

8. Form of Affidavit.—See *Re McNeil and McCully and Plotke* 262
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AGREEMENT FOR INTEREST IN MINING CLAIM.

1. Corroboration Necessary.—A claim to an interest in a mining claim staked out in the name of another person cannot be established by the uncorroborated evidence of the claimant. (See s. 71, Act of 1908.)

Going with the expedition and living at the same camp does not necessarily imply a partnership for acquiring claims. *Re McDonald and Casey* 219

2. Contributing to Acquisition—"*Grubstaking*"—*Duration—Equal Shares where Shares not Fixed.*—In the absence of statutory provision to the contrary, a parol agreement, entered into before the staking out, for an interest in a mining claim is valid and enforceable notwithstanding the Statute of Frauds, where it is shown that the person claiming the interest has contributed something toward the acquisition of the claim—a distinction being made between agreements entered into before the staking out and agreements entered into after the staking out.

Where a claim staked out under a prospecting agreement is cancelled for lack of discovery and is afterwards restaked by one of the parties on a new discovery as the result of a subsequent expedition of his own, the other party to the original staking, who stood by and offered no assistance, will not by reason merely that the new staking covers the old ground be entitled to a share in the new claim—the discovery and not the staking being the chief consideration for which the Crown grant is made.

Grubstaking agreements or prospecting partnerships usually terminate with the expedition agreed upon and result merely in a co-ownership of the claims acquired, the presumption being against the existence of a partnership generally or of a partnership for developing or working the claims.

Where the evidence establishes that one person is to share in a mining claim with another, and nothing more appears, it will be presumed that they are to share equally. *Re Greene and Clinton* 223

3. Duration—*New Stakings—Writing—Corroboration.*—Two licensees entered into an agreement with two others for equal interests in part of a lot they were endeavouring to acquire as a mining claim, no limit of time for operations being mentioned or indicated, and none of the parties

having at the time any staking or claim upon the property. Two stakings and considerable work were done in the joint enterprise. One of the stakings had been thrown out and the other was about to be inspected when disagreement arose, and one of the first mentioned licensees quit work because the last mentioned ones refused him payment to which he was entitled. The latter, after the second staking was rejected, staked the property for and acquired on it a working permit, and claimed the right to hold it for themselves.

Held (hesitating), that the working permit came within the intention of the agreement and belonged to the partnership, its acquisition being merely a continuation of the original purpose of acquiring a patent of the property.

The leaning in such a case should be against holding continuance of interest in new stakings.

Such an agreement made before staking out need not be in writing, if there is corroboration as the Act requires. *Re Craig et al. and Cleary* 207

4. Refusal to Contribute.—O., who was under agreement with B. to give the latter a one-third interest in claims he might acquire, staked a claim under agreement with E. to give E., who had made the only real discovery upon the property, a one-half interest. Upon O. explaining the circumstances to B. and asking him for money to record the claim as the agreement provided, B. refused to pay anything or to have anything to do with the claim unless he would be given the whole of it, and told O. he might take the claim to some one else. B. stood by while O. and E. were at much trouble and expense protecting the claim through litigation, and he contributed nothing to the performance of the working conditions, without which the claim would have lapsed.

Held, that a claim subsequently brought by B. to enforce an interest should be dismissed. *Re Beaudry and O'Keefe et al.* 288

5. Clear Evidence—*Writing.*—A claim to an interest in a mining claim under an alleged parol agreement or promise (subsequent to the staking out and recording) where the claimant's connection with the property and acts regarding it are slight and attributable to causes other than the expectation of an interest, requires clear evidence to sustain it—even apart from the lack of tangible consideration and the lack of writing to satisfy the statute.

Section 71 (2) of The Mining Act (1908), (the equivalent of the Statute of Frauds), is a bar to a claim to an interest in a mining claim under a parol agreement entered into after the staking out of the claim; but where the claim is one for a share of the proceeds of the property when sold or where the parol evidence is merely in proof of a partnership, the statute appears not to apply.

Limits of the principle that the Statute of Frauds must not be made an instrument of fraud discussed. *Re Young and Wettlaufer* 296

6. "Until the snow falls"—*Good Faith Required.*—L. agreed in writing with S., in consideration of $200 paid him to prospect "until the snow falls." After L. had staked 2 claims 2 slight snowfalls of 1 to 2 inches occurred, going off quickly and not seriously, if at all, interfering with operations. After this 6 more claims were staked.

Held, that S. was entitled to an interest in all the claims; the words used should be interpreted reasonably having reference to the objects in view and what must have been in contemplation of the parties; and upon the real merits and substantial justice of the case S. was so entitled.

Prospecting agreements require the strictest good faith upon the part of the prospector. *Re Smith and Lauzon et al.* 341

7. Second Agreement in Fraud of First.—O. and F. were prospecting partners. F., on an expedition agreed upon between them and for which O. furnished money and supplies, staked four claims. Before recording the claims F. by telling R., who knew of O.'s interest in the expedition, that he had not staked the claims on that expedition, induced R. to advance him money and other consideration for a half interest and recorded the claims in the names of R. and his nominee. Held, that O. and R. were entitled to a half interest each. *Re Odbert and Farewell, Ribble and Bilsky*.....467

8. See also INTEREST IN MINING CLAIMS, ACQUISITION OF.

AGREEMENT FOR SALE.

1. Time for Completion not Specified—*Tender of Conveyance.*—Failure to specify a time for completion is not fatal to a written agreement for sale of an interest in a mining claim, a reasonable time being in that case inferred.

Where there is absolute refusal to carry out a contract of sale tender of conveyance is excused. *Re Connell and Wells* 17

2. Misunderstanding—*Improvidence—Statute of Frauds —Time of Essence.*—Where an agreement or option for sale of two mining claims differed from what the defendants understood and intended, and had interlined in it a vital alteration which was not in the supposed duplicate furnished by the plaintiffs and which would make the bargain a very unfair and improvident one, specific performance was refused.

Held, also, that as the real terms of the contract in other respects were not in writing the Statute of Frauds would apply, and even if part performance would take it out of the statute as regards a claim for specific performance it would not do so as regards a claim for damages.

In agreements for sale of mining property time is of the essence of the contract. *Hunter et al.* v. *Bucknall et al.*....37

3. Option or Contract—*Time of Essence—Acceptance of Offer—Conditional Deposit — Counter Offer — Conditional Contract—Statute of Frauds—Holiday.*—M. and R. agreed to sell three mining claims to C. on condition that $5,000 be deposited in the bank on or before 9th Nov., $45,000 on or before 9th Dec., and the balance of $200,000 in one year thereafter. Owing to 9th Nov. being a bank holiday, the $5,000 was not deposited until 10th Nov., and then only "on condition that payment due 9th Dec. be extended to 1st Feb." M. and R., having been notified of this condition, repudiated the sale and resold to other parties.

Held, that C. was not entitled to enforce the sale.

An option or offer must be accepted strictly within the time limited.

Attaching a condition to an acceptance is in effect a counter offer and a rejection of the offer of the other party.

Time is of the essence of the contract in all agreements for the sale of mining property, and in any agreement for the sale of land which is unilateral or lacking in mutuality; and where time is of the essence it seems notice of rescission is not necessary.

A verbal acceptance by the plaintiff of a written offer of the defendant is sufficient as against the defendant notwith-

standing the Statute of Frauds, but to justify enforcement of the contract the acceptance must be unequivocal and unconditional.

It seems that where the last day for doing an act under a contract falls on a holiday and the act therefore cannot be done on that day, it must be done on the next day prior that is not a holiday. *Re Cahill and Ryan, et al.* 320

4. Insufficient Writing—*Delay.*—A writing not definitely identifying the properties or showing the consideration to be paid or the share to be received—the other evidence and the circumstances showing that it was not the intention to part with the whole—is not a sufficient writing under s. 71 (2) (Act of 1908) upon which to enforce a contract (made after the staking out) for an interest in mining claims.

Unreasonable delay in complying with the conditions and in bringing proceedings for enforcement of an agreement relating to mining property where the transaction is one of a very speculative nature, will preclude enforcement...*Re Booth and Hylands* 339

5. Signed by Some only of the Vendors—*Misunderstanding of Terms—Illiteracy—Misdescription.*—Where 3 out of 4 owners of a mining claim signed an agreement for sale which it was intended should be signed by all, and the evidence and circumstances showed that it was not contemplated that the agreement should bind the interests of the 3 apart from the interest of the other, the agreement was held not to be binding upon any of the parties; the question of the effect of such a signing must be determined by the circumstances of the particular case.

Misunderstanding by the vendors as to the nature of the consideration they were getting, and misdescription in the agreement of the stock which it provided might be given them as the equivalent of money, the misunderstanding having been induced by the vendee, the vendors being Swedes inexperienced in stock transactions and not able to read English well, disentitle the vendee to enforce an agreement for sale of a mining claim. *Re Oslund, et al., and Bucknall.* 368

6. Effect of Recording — *Notice before Completion of Purchase—Delay.*—B. obtained from R., the recorded holder, an agreement for sale of a three-quarter interest in the min-

ing claims, and recorded it; and in pursuance of its terms entered upon the claims and did the assessment work and developed them, being up to that time in ignorance of O.'s rights, O. being in fact the owner of an unrecorded equitable half interest in the claims instead of F., who was a party to the agreement and who was presumed to own it. B. was to be entitled to a transfer on paying $2,000, but before he paid the money or obtained a transfer O. filed a certificate under sec. 77 of the Act, putting him on notice of O.'s rights. B. subsequently obtained from F. for $900 what purported to be a transfer of a half interest in the claims. In proceedings by O. it was *held* (1) that the transfer from and payment to F. were ineffective; (2) that the notice to B. before he paid the money and obtained a transfer protected O.'s rights; but (3) that in the circumstances, and by reason of delay, O.'s protection as against B. should only be in respect of the purchase money and should not deprive B. of his rights under the agreement. *Re Odbert and Farewell, Ribble and Bilsky.*167

7. Cancelling from Record of Claim.—See *Re Smith and Millar* 458

8. See also SALE AND PURCHASE.

9. See STATUTE OF FRAUDS, 4, 5.

ALLEGATIONS OF "JUMPING."

See *Re Gray and Bradshaw* 139

ALLOWANCE OF DISCOVERY.

Finality of.—See *Re Gosselin and Gordon* 354

ALTERING BOUNDARIES.

1. Enlarging Boundaries in Survey.—A survey of a mining claim which (without authority) enlarges the boundaries beyond the area originally staked out and applied for, gives the holder of the claim no right to the added land, and does not prevent the valid staking out and recording of such land by another licensee.

The holder of the claim, who employs the surveyor, must be held responsible for the way the survey is made. *Re Green* 293

2. Reducing Claim to Proper Size.—Removing No. 3 and No. 4 posts pursuant to the written permission of the Recorder, in order to reduce the claim to the proper size, will not cause forfeiture of the claim. *Re Balfour and Hylands, et al.*..430

3. See also POSTS.

AMENDMENT.

See *Re Silver and Pinder* 388

APPEAL.

1. From Recorder—*Service of Notice.*—A post office certificate of registration of a letter to respondent, assumed to contain notice of an appeal from the Recorder, which the respondent denied he received, is not sufficient to establish service of such notice under sec. 75 of The Mines Act, 1906, *Re Woodward and Carleton* 16

2. From Recorder—*Notice of—Party "Adversely Interested."*—In an appeal from cancellation of a mining claim by the Recorder a subsequent applicant for the same property is a party "adversely interested" under sec. 75 of The Mines Act, 1906, and if not duly served with notice of the appeal the appeal must be dismissed. *Re Petrakos* 22

3. From Recorder—*Time for—Findings of Fact.*—M. and L. on 27th Feb., 1907, staked out a mining claim for B. The claim after inspection was cancelled by the Recorder for lack of discovery, entry thereof being made on the record on the evening of 20th August after the office was closed to the public; notice was given next day—the Act requiring it to be given not later than the day after cancellation; appeal to the Commissioner was filed by B. on 5th September, the Act requiring appeal to be taken within 15 days from the record of the decision.

The evidence before the Commissioner showed that M. and L. in staking had used a standing tree cut off as the Act required for their discovery post, it being within 3 feet of a crack or small vein into which they had picked and put some shots on the day of staking, exposing a little iron pyrite; it was claimed that they had also found, and intended the post to apply to, another vein 15 or 20 feet from the post, which was afterwards opened up and found to be more promising.

Held by the Commissioner that the appeal filed on the 16th day after entry of cancellation was too late and must be dismissed upon that ground, but that on the merits it would also have to be dismissed as the crack near the post was out of the question as a discovery, and he was not satisfied on the evidence that M. and L. had discovered the second vein when they staked, and that at all events it was not until sinking had been done that anything valuable was disclosed there, the rich silver discovery of the respondent D., who staked the property on 22nd August, having meanwhile intervened.

Held by the Divisional Court that the appeal was not too late and that there was a sufficient discovery and that the appeal should be allowed, Anglin, J., however, holding that the staking was not sufficient and that the appeal should be dismissed upon that ground.

Held by the Court of Appeal that the appeal was too late and that there was no sufficient discovery, also that the burden of proof was on the appellant, and that the findings of the Commissioner who heard the evidence should not be interfered with unless for plain and weighty reasons. *Re Blye and Downey* 120

4. From Recorder—*Extending Time—Serving Substitutionally.*—Where notice of appeal from a Recorder is filed within the time allowed the Commissioner has power, if satisfied that it is a proper case for appeal, and that after reasonable efforts an adverse party could not be served, to extend the time for such service and order that the service may be made substitutionally, and this may be done on an *ex parte* application. *De Downey and Munro*.....173

5. From Recorder—*Party Adversely Interested.*—In an appeal from cancellation of a mining claim staked out while a working permit application was pending, the working permit applicant is a party "adversely interested" within the meaning of the Act, and if he is not served with notice of the appeal the appeal must be dismissed. *Re Chartrand and Large* 240

6. From Recorder—*Party Adversely Interested—Extending Time for Service.*—The Recorder gave his decision in a dispute between R. and McC. on 17th July; M. later the same day staked out and filed application for a mining claim upon

the property in dispute. R. filed a notice of appeal from the Recorder's decision on 18th July, but did not serve either McC. or M.

Held, that McC. and M. were parties "adversely interested," within sec. 133 (3) (1908), and that failure to serve them within the time limited by the Act was fatal to the appeal.

Extension of time for service was refused where the appellant failed to show that it was a proper case for appeal, and that after reasonable effort the necessary parties could not be served. *Re Rowlandson* 257

7. **From Recorder**—*Delay in Prosecuting.*—Proceedings under the Act must be prosecuted promptly, and if an appellant is not present with his evidence at the time appointed for hearing and no explanation is given, the appeal must be dismissed. *Re MacCosham and Vanzant*.....277

8. **From Recorder's Refusal to Record Application with Dispute**—*Procedure.*—Where a claimant, who has filed an application for a mining claim which the Recorder refused to record by reason of there being a prior application upon the same property, enters a dispute against the prior application and therein claims to be entitled to the property, an appeal against such refusal is not necessary. *Re MacKay and Boyer* 83

9. **Against Issue of Certificate of Record**—*Extending Time—Whether such an Appeal Lies—Policy of Act.*—S. on 2nd Sept., 1909, recorded a mining claim staked out by him on 1st Sept. At this time (though the lands were under the provisions of the Act open to staking) an appeal by another licensee against the cancellation of a former claim had not yet been disposed of. After this appeal had been finally dismissed the Recorder, on 29th Dec., granted S. a certificate of record. B. subsequently sought to record a new staking and to set aside the certificate of record and have S.'s claim cancelled for lack of discovery and other defects. No fraud or mistake within the meaning of the Act being shown and no evidence of merits or validity of B.'s claim being offered, it was held by the Commissioner that the certificate of record should not be set aside and that extension of time for appealing from the granting of it should be refused, and that the attack upon S.'s claim should be dismissed.

It is not the policy of the Act to encourage attacks upon mining claims after the time allowed for filing disputes against them has elapsed and a certificate of record has been issued.

Query, whether in the absence of fraud or mistake an appeal under the Act will lie against the granting of a certificate of record. *Re Ball and Stewart*.....461

10. Notifying Subsequent Stakers of the Hearing.—Where a subsequent claim is staked out and recorded after the Recorder has cancelled a former one the subsequent claimant should be made a party to and notified of the hearing of an appeal from the cancellation. *Re Milne and Gamble* 249

See also *Re Milne and Drynan, et al.* 455

11. Status of Appellant.—An appeal lies from a decision of the Commissioner dismissing a dispute against a recorded mining claim, notwithstanding that the appellant has no right or interest in the property himself (overruling, upon this point, *Re Cashman and The Cobalt and James Mines, Ltd.*, 70, and *Re Munro and Downey*, 193); and there appears to be no distinction in this respect between decisions of the Commissioner on appeal from the Recorder and decisions by him in the first instance. *Re Smith and Hill*.349

See also *Re Cashman and The Cobalt & James Mines, Ltd.* 70

Re McNeil and Plotke 144

Re Munro and Downey 193

Re McNeil and McCully and Plotke.....262

12. From Commissioner—*Failure to Set down and Lodge Certificate within Time.*—On motion to quash an appeal by R. to the Divisional Court, held by the Divisional Court, quashing the appeal,

That as the appeal had not been set down, and a certificate of setting down lodged with the Recorder within the time limited by sec. 151 of the Act (1908), it must be deemed conclusively to be abandoned, and there is no power to extend the time beyond the limit prescribed by the Act. *Re Rogers and McFarland* 407

13. From Commissioner—*As to due Performance of Work.*—*Held* by the Court, quashing the appeal, that the decision

APPLICATION FOR MINING CLAIM.

3. False Statements.—False and deceptive statements in the application and affidavit, and attempting to blanket the land in disregard of the law, disentitle the applicant to sympathy even where he has a discovery, and may be sufficient to invalidate his claim...*Re Smith et al. and Kilpatrick*...311

4. Untruth and Deception.—Untruth and deception in an affidavit and application for a mining claim will invalidate the application. *Re McNeil and Plotke* 144

5. Slight Defects.—Slight unintentional defects or inaccuracies in an application will not invalidate a claim. *Re Reichen and Thompson* 88

6. Defects and Inaccuracies.—See DEFECTS AND INACCURACIES, 2-5.

7. Affidavit with.—See AFFIDAVIT OF DISCOVERY AND STAKING.

8. Recording.—See RECORDING, 1-4.

9. Tendering.—See TENDER, 3.

APPLICATION FOR WORKING PERMIT.

See WORKING PERMIT.

APPROPRIATING ABANDONED OR EXISTING DISCOVERY.

See DISCOVERY OF VALUABLE MINERAL, 16-21.

AREA OF MINING CLAIM.

Excessive Area.—Staking more than the prescribed acreage will not, in the absence of fraud, invalidate the claim except as to the excess, and in any event a Certificate of Record would, in the absence of fraud or mistake, preclude attack upon this ground, the claim having with the permission of the Recorder been reduced to the proper size. *Re Balfour and Hylands, et al.* 430

ASSAYS.

ATTACKING MINING CLAIMS.

1. Policy of Act.—It is not the policy of the Act to encourage attacks upon mining claims after the time allowed for filing disputes against them has elapsed and a Certificate of Record has been issued. *Re Ball and Stewart*.....461

2. After Time for Dispute Elapsed.—After the sixty days allowed for a dispute have elapsed and a Certificate of Record is issued, the title should not be lightly interfered with. *Re Dennie and Brough, et al.* 211

3. Disturbing Title.—
See *Re Balfour and Hylands, et al.* 430
" *Re Perkins and Dowling, et al.* 436

4. Miner in Possession and Working.—See *Re Western and Northern Lands Corp. and Goodwin*.....230

5. After Issue of Certificate of Record.—*See* CERTIFICATE OF RECORD.

6. Status to Attack.—See APPEAL, 11.

7. Fraud Appearing Incidentally.—See *Re McDonald and Casey.* 219

8. Investigating all Rights in Dispute.—See *Re Spurr and Penny and Murphy* 390

9. Disputes as Provided for by the Act.—See DISPUTE AGAINST MINING CLAIM.

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Law of Referred to.—
As to abandonment by re-location—
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BOUNDARIES.

See ALTERING BOUNDARIES and ERROR IN BOUNDARIES.

BRITISH COLUMBIA.

Law of Referred to.—

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CAMPING IN COMMON.

See INTEREST IN MINING CLAIMS, ACQUISITION OF, 6, 7.

CANCELLING ENTRY FROM RECORD OF CLAIM.

1. Agreement for Purchase—*Recorder Acting Ex parte.*—See *Re Smith and Millar* 458

2. Correction of Error—See CLERICAL ERROR.

3. Altering Decision.—See *Re Smith and Pinder*....241

CANCELLING MINING CLAIM.

Working Conditions—*Forfeiture — Recorder's Duties.*—See *Re Leslie, et al., and Mahaffy*.....448
See secs. 85 (3) and 91 (2) of Act (1908).

CASHMAN CASE.

1. Followed.—*Re McNeil and Plotke*.....144
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2. Discussed.—*ReMcNeil and McCully and Plotke*..262
Re Milne and Drynan, et al. 455

3. Overruled (in effect).—*Re Smith and Hill*.....349

CAUTION.

See CERTIFICATE THAT INTEREST IN CLAIM IN QUESTION.

CERTIFICATE OF RECORD.

1. Effect of.—A mining claim for which a Certificate of Record has issued cannot, in the absence of fraud, be impeached for any defect or irregularity in its acquisition. (See note to this case.)

After the 60 days allowed for dispute have elapsed and a Certificate of Record has issued, the title should not be lightly interfered with. *Re Dennie and Brough, et al.*.....211

2. Effect of.—*Lack of Discovery.*—After issue of Certificate of Record, a mining claim is not open to attack for lack of discovery of valuable mineral unless the applicant did not *bona fide* believe he had a sufficient discovery and was therefore guilty of fraud. *Re Young and Scott and MacGregor* 162

3. Effect of—*Excessive Area.*—Staking more than the prescribed acreage will not, in the absence of fraud, invalidate the claim except as to the excess, and in any event a Certificate of Record would, in the absence of fraud or mistake, preclude attack upon this ground, the claim having with the permission of the Recorder been reduced to the proper size. *Re Balfour and Hylands, et al.* 430

4. Setting Aside—*Policy of Act—Appeal.*—S. on 2nd Sept., 1909, recorded a mining claim staked out by him on 1st Sept. At this time (though the lands were under the provisions of the Act open to staking) an appeal by another licensee against the cancellation of a former claim had not yet been disposed of. After this appeal had been finally dismissed the Recorder, on 29th Dec., granted S. a Certificate of Record. B. subsequently sought to record a new staking and to set aside the Certificate of Record and have S.'s claim cancelled for lack of discovery and other defects. No fraud or mistake within the meaning of the Act being shown, and no evidence of merits or validity of B.'s claim being offered, it was held by the Commissioner that the Certificate of Record should not be set aside, and that extension of time for appealing from the granting of it should be refused, and that the attack upon S.'s claim should be dismissed.

It is not the policy of the Act to encourage attacks upon mining claims after the time allowed for filing disputes against them has elapsed and a Certificate of Record has been issued.

Query, whether in the absence of fraud or mistake an appeal under the Act will lie against the granting of a Certificate of Record. *Re Ball and Stewart*.....461

5. Setting Aside—*Mistake.*—M., in 1904, located lands under the Veteran Land Grants Act. On 1st March, 1907,

CERTIFICATE THAT INTEREST IN CLAIM IN QUESTION.

1. Issue and Continuance of.—It is only after a proceeding under the Act has been commenced that a certificate under sec. 77 (2) (Act of 1908) (in the nature of a *lis pendens*) can properly be issued or continued against a mining claim; a *lis pendens* out of the High Court does not authorize such issue or continuance, nor should such a *lis pendens* be entered upon the record of claim. *Re Wishart et al. and Harris.* 365

2. Effect of.—J. as a friend drew up a writing for B. and K., which all understood and intended to relate to another claim, but which by mistake purported to deal with the claim in question, mentioning it as belonging to B.

Held, that J. was not thereby estopped from enforcing his rights to the latter claim and that D., who, while the proceedings were pending and while a certificate under sec. 77 (2) (Act of 1908) was on record, purchased from K., who had notice of J.'s rights, was not in any better position than K. *Re Jackson and Billington et al.*.....428

3. Effect of.—See *Re Odbert and Farewell, Ribble and Bilsky.* 467

4. Discussion as to Issue and Continuance.—*Re Babayan and Warner, et al*.....346

CLAIM.

See MINING CLAIM.

CLAIMING OVER PRIOR DISCOVERER.

Strict Compliance.—Where a claim is being set up against a prior discoverer perhaps a rather strict compliance with the law should be exacted. *Re Wellington and Ricketts*.....58

CLERICAL ERROR.

Correction of.—It seems a Recorder may correct a mere clerical error made in entering a matter in his books. *Re Munro and Downey* 173

Re Smith and Pinder 241

CO-HOLDERS.

1. Working Conditions — *Contribution.* — Where a co-holder of a mining claim failed to contribute his share to the performance of the working conditions an order was made that unless he made payment of the amount due and costs within a specified time his interest should be vested in the other co-holders. *Re Neil, et al. and Murphy*.....279

2. Failure to Contribute.—O., who was under agreement with B. to give the latter a one-third interest in claims he might acquire, staked a claim under agreement with E. to give E., who had made the only real discovery upon the property, a one-half interest. Upon O. explaining the circumstances to B. and asking him for money to record the claim as the agreement provided, B. refused to pay anything or to have anything to do with the claim unless he would be given the whole of it, and told O. he might take the claim to some one else. B. stood by while O. and E. were at much trouble and expense protecting the claim through litigation, and he contributed nothing to the performance of the working conditions, without which the claim would have lapsed.

Held, that a claim subsequently brought by B. to enforce an interest should be dismissed. *Re Beaudry and O'Keefe, et al.* 288

3. Neglecting to Contribute.—See *Re Seymour and Logan, et al.* 421

COMMISSIONER.

1. Jurisdiction — *Damages.*—The Commissioner has no jurisdiction to deal with a claim for damages for breach of contract. *Re Babayan and Warner, et al.*.....346

2. Jurisdiction—*Damages or Personal Demand.*—A claim by a syndicate against its manager for damages for negligence or other personal demand cannot be dealt with by the Commissioner. *Re Bilsky and Roche, et al.* 305

3. Jurisdiction and Powers — *Constitutionality of Appointment.*—See *Re Munro and Downey* 193

4. Jurisdiction—*Veteran Land—Certificate of Record.*—See *Re Rogers and McFarland* 407

COMPENSATION FOR INJURY TO SURFACE RIGHTS.

CONDITIONAL DEPOSIT.

CONFLICTING MINING CLAIMS.

CONSTITUTIONAL LAW.

CONTRACT.

See AGREEMENT FOR SALE and AGREEMENT FOR INTEREST IN MINING CLAIM.

CONTRIBUTION AMONG CO-HOLDEDS.

See CO-HOLDERS.

CORRECTION OF CLERICAL ERROR.

See CLERICAL ERROR.

CORROBORATION.

COSTS.

COUNTER OFFER.

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CROWN FOREST RESERVE.

"CROWN LANDS."

DAMAGES.

DATE.

DECISION ON MERITS.

"DEEMED TO BE ABANDONED."

DEFECTS AND INACCURACIES.

1. Slight unintentional defects or inaccuracies in an application will not invalidate a claim. *Re Reichen and Thompson* 88

2. Inaccuracy in Measurements.—Where in the staking and application for a mining claim the distance of the discovery from the No. 1 post was given as 1,250 feet instead of 910, the difficulty of making an accurate measurement in the circumstances being very great, it was held that this did not invalidate the claim.

It would be a hardship to hold a claim invalid by reason of such inaccuracies, but by them prospectors invite trouble and run serious risk of loss. *Re Gray and Bradshaw*.....139

3. Carelessness — *Costs.* — Where a party had invited trouble by carelessness and inaccuracy in his staking and application costs were withheld. *Re Sinclair*.....179

4. Staking and Application for Working Permit.—See *Re Spurr and Penny and Murphy*.....390

5. Inaccuracy in Tying.—See *Re Waldie and Matthewman, et al.* 451

6. See APPLICATION FOR MINING CLAIM.....1, 2

7. See STAKING, 8-24.

DELAY.

1. In Proceedings.—Proceedings in mining cases should be promptly disposed of, and where the appellant had sufficient notice and could have been ready, adjournment was refused and the appeal dismissed. *Re Bamberger and Sinclair, et al.* 36

In mining matters, even more than in other cases, it is important that litigation should be quickly and definitely disposed of. *Re Smith and Pinder* 241

2. In Prosecuting Appeal from Recorder.—Proceedings under the Act must be prosecuted promptly, and if an appellant is not present with his evidence at the time appointed for hearing and no explanation is given, the appeal must be dismissed. *Re MacCosham and Vanzant*.....277

DESCRIPTION OF MINING CLAIM.

DEVELOPMENT WORK.

DIAMOND DRILL.

DISCOVERER.

Reasonable Intendment in Favor of.—See *Re McLeod and Enright* 149
Re Munro and Downey, at 204
Re Boyle and Young, at 3
And see DISCOVERY OF VALUABLE MINERAL, 32.

DISCOVERY OF VALUABLE MINERAL.

1. Mining Claim Invalid Without. — A mining claim staked out without a discovery of valuable mineral as defined by the Act is invalid. *Re McDermott and Dreany*.....4

2. Must Precede Staking.—Discovery of valuable mineral must precede staking out of a mining claim, or the claim will be invalid. *Re Haight and Thompson and Harrison*.....32

A mining claim is invalid if discovery of valuable mineral is not made before staking. *Re Bilsky and Devine*.....394

3. Subsequent Discovery.—A mining claim is invalid if discovery of valuable mineral is not made before staking, and subsequent discovery will not cure the invalidity. *Re McCrimmon and Miller* 79

4. Belief not Sufficient—*Discovery after Staking Ineffective.*—There must be actual discovery of valuable mineral within the definition of the Act at the time of staking out a mining claim; mere belief of it is not sufficient.

A discovery made after the staking out will not validate the claim.

Ontario and United States laws compared. *Re Lamothe* 167

5. Insufficient Discovery—*Real Discovery after Staking.*—Discovery of valuable mineral must be made before a valid mining claim can be staked out, and where a claim was staked on an insufficient discovery, no real discovery having been made until after the staking had been completed, and no discovery post planted upon it until after the claim had been recorded, the claim was held invalid. *Re Smith and Kilpatrick, et al.* 314

6. Outside Limits of Claim.—Where, in surveyed territory, the alleged discovery and the discovery post were outside the

limits of the claim as applied for and as required by the Act to be applied for, though within the boundaries as actually staked out on the ground, the boundaries, through want of reasonable care, having been erroneously located, the claim was held invalid. *Re Burd and Paquette* 419

7. Within Boundaries of Another Claim. — A mining claim based upon a discovery which is within the boundaries of another existing claim is invalid. *Re Sinclair*.....179

8. Must be Made by a Licensee.—The discovery must be made by a licensee. *Re Haight and Thompson and Harrison.* 32

9. How Judged.—A discovery must be judged by the appearance and contents of what was in sight at the time of staking and not by what may have been subsequently found deeper down. *Re Munro and Downey* 193

10. "Valuable Mineral."—The requirement of "valuable mineral," as defined by sec. 2 (22) of The Mines Act, 1906, is not answered by a "moderate" calcite vein having a little copper pyrite, galena, sulphide of iron and zinc blend disseminated through it, and assaying an oz. of silver, but lacking the metals and indications which usually accompanied silver veins in the district, workable veins there being the exception and not the rule, and the best opinion being that it was most improbable that this vein was capable of being developed into a workable mine. "Probable" in the definition means more likely than not; and "workable" means workable at a profit, and it seems that the discovery should be judged as it stood at the time it is claimed to have been made, with the conditions and surroundings and probabilities as they then were. *Re McDonald and The Beaver S. C. M. Co.*....?

11. "Valuable Mineral." — Reasonable probability and not mere possibility that what is found is capable of being developed into a mine likely to be workable at a profit, is required to constitute a discovery of valuable mineral under the Act. *Re Tyrrell and O'Keefe*.....176

12. "Valuable Mineral."—Iron stained cracks in Keewatin rock impregnated in places with a little iron pyrites and perhaps pyrrhotite, were held not to be a discovery of valuable mineral within the meaning of the Act. *Re Rodd*....61

13. "Valuable Mineral."—See *Chartrand and Large*.240

14. Evidence—*Discovery not at Post—Subsequent Sinking.*—M. and L., on 27th Feb., 1907, staked out a mining claim for B. The claim after inspection was cancelled by the Recorder for lack of discovery, entry thereof being made on the record on the evening of 20th August after the office was closed to the public; notice was given next day—the Act requiring it to be given not later than the day after cancellation; appeal to the Commissioner was filed by B. on 5th September, the Act requiring appeal to be taken within 15 days from the record of the decision.

The evidence before the Commissioner showed that M. and L. in staking had used a standing tree cut off as the Act required for their discovery post, it being within 3 feet of a crack or small vein into which they had picked and put some shots on the day of staking, exposing a little iron pyrite; it was claimed that they had also found, and intended the post to apply to, another vein 15 or 20 feet from the post which was afterwards opened up and found to be more promising.

Held, by the Commissioner, that the appeal filed on the 16th day after entry of cancellation was too late and must be dismissed upon that ground, but that on the merits it would also have to be dismissed as the crack near the post was out of the question as a discovery, and he was not satisfied on the evidence that M. and L. had discovered the second vein when they staked, and that at all events it was not until sinking had been done that anything valuable was disclosed there, the rich silver discovery of the respondent D., who staked the the property on 22nd August, having meanwhile intervened.

Held, by the Divisional Court, that the appeal was not too late, and that there was a sufficient discovery, and that the appeal should be allowed, Anglin, J., however, holding that the staking was not sufficient, and that the appeal should be dismissed upon that ground.

Held, by the Court of Appeal, that the appeal was too late, and that there was no sufficient discovery, also that the burden of proof was on the appellant, and that the findings of the Commissioner who heard the evidence should not be interfered with unless for plain and weighty reasons. *Re Blye and Downey* 120

15. Appropriation Necessary.—Unless a discovery is appropriated by at once planting a discovery post upon it and

proceeding as quickly as reasonably possible to complete the staking out of a mining claim, the discoverer's rights may be lost or postponed. *Re Reichen and Thompson*.....88

16. Appropriating Abandoned Discovery. — A licensee may probably appropriate to himself a discovery laid open but abandoned by another, but his rights under it must date from the time he sees and appropriates it. *Re McDermott and Dreany* 4

17. Adopting Discovery of Another.—It seems that a licensee who, on lands open to prospecting, finds valuable mineral which has been exposed but not appropriated by another may adopt or appropriate it as a discovery. (But see note to this case.) *Re Smith and McHale*.....99

18. Lack of Original Discovery.—Held by the Commissioner that as McC. had made no original discovery but had staked upon discoveries that had been made and were at the time under staking by other parties, it could hardly be held, under sec. 140 (1908), that he had any substantial merit.

Held, by the Divisional Court, that McC. having staked upon existing discoveries and made no original discovery of his own, his staking was invalid. *Re McNeil and McCully and Plotke* 262

19. Adopting Existing Discovery. — Held, per Moss, C.J.O., that there seemed much difficulty in holding that the mere adoption by a licensee of mineral opened up on a claim by another, while the latter is still working and claiming a right to work upon the property, can be a sufficient discovery upon which to ground a claim, at all events until after there had been an actual reverter to the Crown by lapse, abandonment, cancellation or forfeiture; and, per Meredith, J.A., that upon the facts S. had made no discovery such as the Act contemplates. *Re Smith and Hill* 349

20. Appropriating Discovery Under Subsisting Staking. —A licensee is not entitled to appropriate or base an application on an existing discovery while under a subsisting staking of another licensee. *Re Wright and The Coleman D. Co. and Sharpe* 373

21. Original or Adopted.—Where the evidence was not satisfactory that M. had merely adopted an existing discovery,

DISCOVERY LINE.

1. Failure to Blaze.—Failure to blaze a discovery line may invalidate a claim. *Re Munro and Downey*.....193

2. See also STAKING, 8, 9, 11, 13.

DISCOVERY POST.

1. Failure to put up.—It seems failure to put up a discovery post will invalidate a mining claim. See *Re Smith and Kilpatrick, et al.* 314

2. Not at Discovery Claimed.—See *Re Blye and Downey* 120

3. See also STAKING, 9-12.

DISPUTE AGAINST MINING CLAIM.

1. Delay in Prosecuting—*Amendment.*—Where a dispute was filed against a mining claim, but not prosecuted until the respondent brought it to hearing 7 months later, when the evidence entirely failed to prove the allegations in the dispute, but it was suggested that the claim might if amendment were allowed be successfully attacked upon other grounds of which no intimation had previously been given and of which no sufficient evidence was offered, leave to amend was refused and the dispute dismissed, the real merits and substantial justice of the case being at all events with the respondent. *Re Silver and Pinder* 388

2. Innocent Purchaser—*Merits—Evidence.*

Held by the Commissioner, dismissing the dispute, that, though the fact that H. was an innocent purchaser for value without notice or suspicion of illegality or fraud, did not give him immunity from attack, yet as the facts were not within his own knowledge and he was at the mercy of witnesses who

DISPUTES AND PROCEEDINGS.

DISQUALIFICATION BY PREVIOUS STAKING.

staked out a mining claim, omitting a discovery line, his purpose being to hold the land till word came that a former claim had been cancelled; on the morning of the 22nd, no word having been received, he pulled up the posts and planted and marked them afresh for that date, again omitting to blaze a discovery line; word came later in the day that the old claim had been cancelled on the 20th, and M. allowed his staking to stand. S. on behalf of D. made a valuable discovery on the same land at 4.30 p.m. on the 20th, D. seeing it the same evening; they protected it by prospecting pickets until the afternoon of the 21st, when S. planted a discovery post; on the 22nd D. completed his staking; there was evidence that the old claim had lapsed for lack of work on the 16th.

Held by the Commissioner:—

That M.'s staking was invalid, because (1) he was disqualified under s. 136 (1907), having previously staked or partially staked without recording; (2) he had no discovery of valuable mineral when he staked; and (3) probably because he did not blaze a discovery line.

That D. was entitled to the property; for even if the lands were not open when his discovery was made on the 20th, which it appeared they were, his visit to and adoption of the discovery and discovery post on the 22nd and completing his staking on that date made his claim good as from that time.

That delay in staking is fatal only where some one else effectively intervenes, and M., being disqualified, could not do so, and could not in any way prevent another claim accruing to the property.

That a discovery must be judged by the appearance and contents of what was in sight at the time of staking and not by what may have been subsequently found deeper down.

That it might not be too strict a ruling in the circumstances to hold that M.'s failure to blaze a discovery line worked abandonment of his stakings.

That as D.'s claim was a very meritorious one, it should not be set aside upon any unsubstantial technicality.

On appeal to the Divisional Court,

Held, per the Court, that the Commissioner's findings should not be disturbed; and,

That M. was disqualified and his claim invalid. *Re Munro and Downey* 193

DISTURBING TITLE.

See ATTACKING MINING CLAIMS.

DOUBTFUL OR DEFECTIVE TITLE.

See *Darby, et al. and MacGregor* 47

EMPLOYER AND EMPLOYEE.

1. Surveyor.—A surveyor should not be encouraged to pick flaws in his employer's title, and where he set up a claim in derogation of it which had no substantial merit his claim was dismissed. *Re Sinclair* 179

2. See INTEREST IN MINING CLAIMS, ACQUISITION OF.

ENDORSEMENT.

See PROMISSORY NOTE.

ENFORCING SETTLEMENT OF CASE.

See *Re Lehigh Cobalt Silver Mines, Ltd., and Heckler, et al.* 252

ENFORCING INTEREST IN MINING CLAIM.

1. Procedure.—Where it is sought to establish an interest in a mining claim the proper procedure is by appointment under sec. 136 (Act of 1908), and notice according to Form 38 (obtaining and filing a certificate under sec. 77 (2), if desired), and not by a dispute under sec. 63, Form 8, which latter is to be used only when it is sought to have a mining claim cancelled or set aside as invalid. *Re Babayan and Warner, et al.* 346

2. See also DELAY, 4, 5, 6.

3. See EVIDENCE, 10-13.

ENLARGING BOUNDARIES.

See ALTERING BOUNDARIES.

EQUITABLE RIGHT OR INTEREST.

See *Re Wright and Coleman D. Co.* 103
" *Re Odbert, Farewell, Ribble and Bilsky*.....467

ERROR, CLERICAL.

See CLERICAL ERROR.

ERROR IN BOUNDARIES.

See *Re Burd and Paquette.* 419

ESCROW.

See Re Oslund et al. and Bucknall 368

ESTOPPEL.

1. Mistake in Drawing up Writing.—J. as a friend drew up a writing for B. and K. which all understood and intended to relate to another claim, but which by mistake purported to deal with the claim in question, mentioning it as belonging to B.

Held, that J. was not thereby estopped from enforcing his rights to the latter claim, and that D., who, while the proceedings were pending and while a Certificate under sec. 77 (2) (Act of 1908) was on record, purchased from K., who had notice of J.'s rights, was not in any better position than K. *Re Jackson and Billington, et al.* 428

2. See also *Hunter, et al.* v. *Bucknall, et al.*, at..... 41
" *Re McGuire and Shaw,* at 159
" *Re Libby and Ellis,* at.....444
" *Re Odbert and Farewell, Ribble and Bilsky,* at 471

EVIDENCE.

1. As to Discovery.—In determining the sufficiency of a discovery, inspection by a competent independent person is a safer reliance than evidence of interested parties, or of

19. Survey—*Insufficiency.*—A claimant seeking to set aside another claim as subsequent to and overlapping his own cannot make out a case or establish title to the disputed territory by mere production of a survey including the disputed territory as part of his claim.

Where it was shown that the surveyor for the first claimant made his survey without any investigation or examination of the records at the recording office and located his lines without any proper warranty for placing them where he did, the survey was rejected, and a survey made for an opposing claimant which was shown to be in accordance with the latter's staking was confirmed. *Re Waldie and Matthewman, et al.* 451

20. Taking Evidence Outside Ontario.—Application by a party to have his evidence taken in New York on the ground that he was busy organizing or promoting a company was refused. *Re Colonial Development Syndicate, Ltd., and Mitchell, et al.*.....331

EXCEPTION TO STATEMENT AS TO LANDS BEING OPEN.

EXCESSIVE AREA.

EXPERT OPINION.

EX PARTE APPLICATION.

EXTENDING TIME.

FALSE AFFIDAVITS.

FALSE STATEMENTS.

FILING APPLICATION FOR MINING CLAIM.

FILING REPORT OF WORK.

" FINAL."

FINALITY OF ALLOWANCE OF DISCOVERY.

FINALITY OF CERTIFICATE OF RECORD.

FINALITY OF RECORDER'S DECISION.

See RECORDER'S DECISION, FINALITY OF.

FINDING GOOD TERRITORY.

See *Re Laidley and Knox and Davidson*.....478

FINDINGS OF FACT.

Setting Aside in Appeal.—See *Re Blye and Downey*..120
Re Cashman and The Cobalt & James Mines Ltd., at 78

FOREST RESERVE.

1. Necessity of Miner's License. — See *Re Boyle and Young* 1

2. Forest Reserve Permit.—
See *Re Trombley and Ferguson*, at 192
" *Re McDonald and Casey* 219

3. Working Conditions—*Permission to Work.*—
See *Re Balfour and Hylands, et al*.....430
" *Re Perkins and Dowling, et al*.....436

FORFEITURE.

1. Proof Must be Satisfactory.—Proof of facts necessary to establish forfeiture of a claim must be satisfactory. *Re Young and Scott and MacGregor* 162

2. Leaning Against.—The leaning is against declaring a forfeiture if it can be avoided, where it would be a hardship and the adverse claimant has no substantial merit. *Re McDonald and Hassett* 164

3. Removal of Posts.—Removal, by the holder of a mining claim, of his discovery post from an insufficient discovery upon which it had been planted at the time of the staking out of the claim, to a point where valuable mineral had been opened up some months later, the removal being for a deceptive and improper purpose, forfeits the claim. *Re Bilsky and Devine* 394

FORM OF AFFIDAVIT OF DISCOVERY.

See AFFIDAVIT OF DISCOVERY AND STAKING.

FORM OF APPLICATION FOR MINING CLAIM.

See APPLICATION FOR MINING CLAIM.

FORM OF MINING CLAIMS.

See MINING CLAIM.

FRAUD.

1. Procuring Recording by.—A claim staked out in the name of a licensee by a non-licensee and non-holder of a forest reserve permit the recording of which was procured by the latter personating the former and swearing the affidavit in his name, cannot stand though a Certificate of Record has been issued for it, and where the facts appeared incidentally in another proceeding to which all persons interested were parties, the claim was declared invalid, and the guilty person reported for prosecution. *Re McDonald and Casey* 219

2. Staking and Discovery Sworn to by a Person not Present.—An application on a discovery and staking of a non-licensee sworn to by an applicant who was not present at the discovery or staking is fraudulent and void. *Re Dennie and Brough, et al.* 211

3. Affecting Mining Claims.—See CERTIFICATE OF RECORD.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

GRUBSTAKING.

See AGREEMENT FOR INTEREST IN MINING CLAIM.

GUARANTEEING PAYMENT.

HARDSHIP.

HOLIDAY.

Last Day for Doing an Act under a Contract.—It seems that where the last day for doing an act under a contract falls on a holiday and the act therefore cannot be done on that day, it must be done on the next day prior that is not a holiday. *Re Cahill and Ryan, et al.* 320

IDENTIFYING DISCOVERY.

ILLITERACY.

ILLNESS OF HOLDER OF CLAIM.

IMPEACHING CLAIM.

See ATTACKING MINING CLAIMS.

IMPERATIVE OR DIRECTORY.

INACCURACIES.

See DEFECTS AND INACCURACIES.

INFERIOR AND SUPERIOR COURTS.

INSPECTION.

INSTRUMENT OF FRAUD.

INTEREST IN MINING CLAIMS, ACQUISITION OF.

1. Employer and Employee— Verbal Agreement — *Prospecting Trip—Good Faith.*—An employee on a prospecting trip for the acquisition of claims should be held to strict probity and good faith toward his employer.

M. made a written agreement with H. to supply all necessaries, pay him a salary and furnish him an assistant for a prospecting trip, M. to have a ¾ and H. a ¼ interest in the

claims acquired. S. was hired as assistant and went on the trip knowing M. understood that everything staked was to be for the employer's benefit.

Held, that an alleged private agreement between H. and S. that S. might stake some claims for himself could not be given effect to, and that M. was entitled to a ¾ interest in a claim staked out on the trip and recorded by S. in his own name.

Held, also, that the Statute of Frauds was no bar to enforcing M.'s right against S.

A verbal agreement for an interest in a mining claim entered into before the staking out is valid and enforceable, if there is corroboration as required by the Act (in this case s. 159 (2) as amended in 1907). *Re McGuire and Shaw*.156

2. Employer and Employee— Prospecting Expedition— *Good Faith.*—L. agreed in writing with S. in consideration of $200 paid him to prospect "until the snow falls." After L. had staked 2 claims 2 slight snowfalls of 1 to 2 inches occurred, going off quickly and not seriously if at all interfering with operations. After this 6 more claims were staked.

Held, that S. was entitled to an interest in all the claims; the words used should be interpreted reasonably having reference to the objects in view and what must have been in contemplation of the parties; and upon the real merits and substantial justice of the case S. was so entitled.

Prospecting agreements require the strictest good faith upon the part of the prospector. *Re Smith and Lauzon, et al.* 341

3. Employee Staking for Another Person.—F. was in the employment of B.; R. in ignorance of this employed F. to stake out a claim upon land which R. previously knew of and desired to acquire, F. being paid by R. in money and getting no interest in the claim.

Held, that B. was not entitled to any interest in the claim, his remedy being against F. personally for breach of contract or money received to his use. *Re Bilsky and Ribble* 445

4. Employee in Partnership. — *Claiming on Partner's Discovery.*—W. made a valuable discovery 16th July and staked out a mining claim on it 17th July, 1906; the Recorder (erroneously) refused to record it by reason of a prior

existing recorded claim of C. and W. restaked within every 15 days till he could get it recorded. G., on behalf of the company for which S., a partner of W., was foreman, staked the same discovery as having been made by himself on 30th July and staked out a mining claim for the company on it on 9th August and tendered application on 10th of August, which was refused. W. on 15th September by procuring abandonment of C.'s prior claim, got his own claim recorded on his discovery of 16th July and stakings of 17th July and 3rd September. The company subsequently by mandamus order of the High Court got G.'s staking recorded and also three other stakings on another alleged discovery, the latter being clearly invalid.

Held by the Commissioner,

That W. was entitled to the property;

That a licensee is not entitled to appropriate or base an application on an existing discovery while under a subsisting staking of another licensee;

That, while it is desirable to discourage employees from entering into private enterprises of their own while under employment for others, an agreement by which S. paid a prospector to work with W. for a half interest in what might be discovered, there being no dishonest intent and no thought of making profit at the employers' expense, and the property acquired not being the fruit of the employers' labor or enterprise, was not invalid and W. and S. were entitled to the claim acquired by W. Affirmed by Divisional Court. *Re Wright and Coleman D. Co. and Sharpe*.....373

5. Prospecting Expedition — *Finding Good Territory.*— K. and L. in an expedition under a prospecting partnership agreement with B. and S. found (in company with other prospectors) promising prospecting territory—a ridge of good diabase rock—but made no discoveries of valuable mineral, and staked no claims. They reported this to S. and B., B. remarking that he did not want "rock." L. left the district, and B. and S., on the request of K. and one V., who desired to form a prospecting partnership with K., cancelled or withdrew from the agreement. K. and V. after several weeks' operations in other directions visited the diabase ridge which K. and L. had before seen, and which had meanwhile been rendered easier to prospect by reason of fire, and made discoveries and staked claims upon it. Held, that L. and B.

6. Camping in Common.—A claim to an interest in mining claims staked out and recorded by other licensees cannot be established merely by the fact that the stakers were at times subsequent or previous to the staking in the employ of the claimants, and that the stakers during their operations were staying at a camp put up and maintained jointly by the claimants' foreman and other persons who were friends and relatives of the stakers. *Re Bilsky and Roche, et al.*305

7. Accompanying Expedition. — Going with the expedition and living at the same camp does not necessarily imply a partnership for acquiring claims. *Re McDonald and Casey* 219

8. Prospectors Assisting Each Other—*Sharing Information.*—Where the leaders of two prospecting parties assisted each other in a neighbourly way in their expeditions and each promised to let the other know if anything good was found, but did not use their men or their provisions in common, and it was found upon the evidence that there was no agreement or intention to share interests in the claims acquired, a claim by one to an interest in claims staked by the other was dismissed. *Re Hedley and Wilson* 476

9. Prospecting Partnership—*Duration of — Claims Restaked—Delay.*—In the absence of agreement to or circumstances indicating the contrary, a prospecting partnership terminates with the expedition undertaken and leaves the parties merely co-holders of the claims acquired.

Where L. and E. staked out two claims, both of which turned out invalid and were cancelled or lapsed, and E. alone subsequently restaked the same lands and acquired rights therefrom and maintained and protected them solely by his own labour and money, a claim to an interest set up by L. two years later was dismissed. *Re Libby and Ellis* 441

10. Prospecting Partnership—*Termination of—Delay.*—S. and P. had entered into a prospecting partnership, S. becoming thereby interested in the mining claim in question; S., though he contributed for a time, afterwards neglected and refused on various occasions to carry out his part, and P. finally repudiated further partnership; the claim was can-

celled for lack of discovery; S. to prevent his former partner reacquiring this and other claims gave other prospectors secret information to enable them to stake them for themselves; L. and P., however, succeeded in restaking the claim and from that time bore all the expense and labor connected with it, including costs of litigation, S. meanwhile standing by and offering no assistance.

Held, that proceedings brought by S. after the lapse of more than a year to enforce an interest should be dismissed. *Re Seymour and Logan, et al*.....421

11. Prospecting Partnership—*Parol Agreement — Grubstaking—Sharing Equally where Shares not Agreed.*—In the absence of statutory provision to the contrary a parol agreement entered into before the staking out, for an interest in a mining claim, is valid and enforceable notwithstanding the Statute of Frauds, where it is shown that the person claiming the interest has contributed something toward the acquisition of the claim—a distinction being made between agreements entered into before the staking out and agreements entered into after the staking out.

Where a claim staked out under a prospecting agreement is cancelled for lack of discovery and is afterwards restaked by one of the parties on a new discovery as the result of a subsequent expedition of his own, the other party to the original staking, who stood by and offered no assistance, will not by reason merely that the new staking covers the old ground be entitled to a share in the new claim—the discovery and not the staking being the chief consideration for which the Crown grant is made.

Grubstaking agreements or prospecting partnerships usually terminate with the expedition agreed upon and result merely in a co-ownership of the claims acquired, the presumption being against the existence of a partnership generally or of a partnership for developing or working the claims.

Where the evidence establishes that one person is to share in a mining claim with another and nothing more appears it will be presumed that they are to share equally. *Re Greene and Clinton* 223

12. Claim to a Transfer—*Evidence.*—Where it appeared that the claimants were entitled to an interest in any right

M. might have in the mining claims in question, but it was not shown what was the interest of the parties in whose names the claims stood, or that the claimants were entitled unconditionally to any interest M. might have, a declaration was made that the claimants were interested in any right or title M. might have, but an order for transfer of any interest to the claimants was refused without prejudice to future proceedings. *Re Colonial Development Syndicate, Ltd., and Mitchell, et al.* 331

13. See also AGREEMENT FOR INTEREST IN MINING CLAIM.

INTEREST IN MINING CLAIM, NATURE OF.

Discussion of.—See *Re McGuire and Shaw*, at..... 157
See *Re Greene and Clinton*, at.....226
" *Re Kollmorgen and Montgomery*, at.....404
" Secs. 68, 123 (1) of The Mining Act of Ontario (8 Edw. VII. cap. 21).

INTERVENING RIGHTS.

1. Where Delay in Staking.—Staking out of a mining claim must be proceeded with promptly after discovery else the discoverer's rights will be lost to a subsequent discoverer who completes staking first. *Re MacKay and Boyer*.....83
See also STAKING, 2-7.

2. Where Relief Against Forfeiture Asked.—Power to relieve against forfeiture for default in performance of working conditions should be very cautiously and sparingly used, especially where intervening rights have in good faith been acquired under the belief that the claim had been intentionally abandoned. *Re Kollmorgen and Webster* 334

INVESTIGATING CLAIMS OF ALL PARTIES.

Procedure.—*Re Spurr and Penny and Murphy* 390
See ATTACKING MINING CLAIMS.

IRREGULARITIES IN STAKING.

See STAKING.

IRREGULAR TOWNSHIP LOT.

JOINT HOLDERS.

See CO-HOLDERS.

"JUMPING" CLAIMS.

1. When it Should be Discouraged.—Where the holder of a claim is in actual occupation of the property, doing work upon it believing in good faith that he is entitled to it, the practice known as "jumping" should be discouraged. *Re Smith and Hill* 349

2. Allegations of.—*Re Gray and Bradshaw,* at.....143

JURISDICTION.

See COMMISSIONER.

LAND COVERED WITH WATER.

See WATER CLAIM.

LANDS OPEN.

1. Prior Staking.—While an unexpired and unabandoned valid staking out of a mining claim exists upon a piece of land no right can be acquired thereon by another licensee staking out another claim. *Re Haight and Thompson and Harrison* 32

2. Prior Staking—*Working Permit.*—A Working Permit application based on staking done while stakings and applications for mining claims and another staking and application for a Working Permit existed upon the property—the applicant being by reason of these unable to show by affidavit as required by the Act that he had no knowledge of any adverse claim, the affidavit in fact showing that he had such knowledge though it stated that in his belief the adverse claimants had no *bona fide* discovery of valuable mineral—was held invalid, under s. 141 of The Mines Act, 1906. *Re Isa Mining Co. and Francey* 26

3. Prior Staking.—Under the Act as amended in 1907, only one staking and record for a mining claim is permitted on the same land at one time, and until it has ceased to exist as provided in the Act other licensees are not entitled to prospect, work upon or occupy any part of the claim. *Re Smith, et al. and the Cobalt Dev. Co., Ltd.* 64

4. Exclusive Status of First Staker—*Comparison of Laws.* The first staker of a mining claim has an exclusive status and while his claim subsists no other valid staking can be made upon the property.

Ontario and United States laws compared. *Re Lamothe* 167

5. Prior Claims must have Lapsed or been Abandoned, Cancelled or Forfeited.—H. purchased a mining claim from M. S., alleging invalidity of the claim on the ground of fraudulent recording by M. and lack of discovery at the time of staking, restaked the claim in his own name, planting his discovery post upon mineral that H.'s men had opened up, and filed a dispute and an application claiming the property for himself. The evidence put in on behalf of S. was unsatisfactory, and the circumstances such as to cast the gravest doubt upon the testimony.

Held by the Court of Appeal,

That S.'s own claim to the property failed as he had not discharged the onus that was upon him to show that at the time of his staking the lands were open to prospecting, which he could only do by showing that H.'s claim had lapsed, been abandoned, cancelled or forfeited. *Re Smith and Hill*..349

6. Insufficient Prior Staking.—Insufficiency of staking works abandonment of a claim and leaves the lands open to be staked by another licensee. *Re Milne and Drynan, et al*..455

And see ABANDONMENT, 2, 3, 4.

7. Prior Staking—*Abandonment—Insufficient Discovery.* —P., McC. and McN. had stakings and applications for mining claims upon the same property in the order named, P.'s claims being recorded; McN. and McC. filed disputes against P., each claiming to be himself entitled to the property; the Recorder dismissed the disputes and upheld P.'s claim.

On Appeal to the Commissioner, held by the Commissioner:

That an exception in the McN. affidavit to what the Act required to be sworn to as to the lands being open, and the fact that prior stakings and applications existed at the time McN. staked, invalidated the McN. application (following *Re Isa Mining Co. and Francey*, 26).

That the existence of prior stakings also invalidated McC.'s application.

On appeal to the Divisional Court, held by the Court

That a prior staking which is invalid for lack of a real discovery is deemed to be abandoned within the meaning of the Act, and so does not stand in the way of another staking or prevent the making of the necessary affidavit as to the lands being open.

That assuming that P. had no real discovery or real staking, his claim must also be deemed to be abandoned and not a bar to McN.

That adding the words "except applications . . . the validity of which I have disputed" to what the Act requires to be sworn to as to lands being open, does not invalidate an application (holding *Re Isa Mining Co. and Francey, ante*, not applicable).

The fact that stakes and markings belonging to previous stakings are found upon the property does not prevent a licensee, who knows that the stakings have lapsed or been abandoned, cancelled or forfeited, from staking out and swearing affidavit for a mining claim upon the same property.

(As to the holding of the Divisional Court as to abandonment see sec. 83 of the Act of 1908, as amended in 1909, by ch. 26, sec. 31 (1), and see notes hereto.) *Re McNeil and McCully and Plotke* 262

8. Prior Staking—*Insufficient Discovery.*—A claim invalid for lack of sufficient discovery is not an abandoned one within the meaning of ss. 166 and 131 (1907), and does not until disposed of leave the lands open to a subsequent staking. *Re McCrimmon and Miller* 79

9. Prior Claim—*Default in Working Conditions.*—A mining claim was recorded 3rd Oct., 1906; 53 days work was done and filed upon it 27th June, 1907, and 63 days on 24th Oct., 1907, and nothing more was done.

Held that the time for doing the 3rd instalment or 2nd year's work expired 3rd January, 1909, and that the claim was thereafter open to restaking.

LAWS COMPARED.

LICENSE.

LINES.

See STAKING and DISCOVERY LINE.

LIS PENDENS.

See CERTIFICATE THAT INTEREST IN CLAIM IN QUESTION.

LITIGATION.

Importance of Speedy Finality.—In mining matters even more than in other cases it is important that litigation should be quickly and definitely disposed of. *Re Smith and Pinder* 241

LIVING AT SAME CAMP.

See INTEREST IN MINING CLAIM, ACQUISITION OF, 6. 7.

LOCATION.

See STAKING, and see LANDS OPEN.

MARKINGS.

Lack of.—See STAKING.

MEDDLING WITH POSTS.

See *Re Milne and Gamble* 249
" also POSTS, 1-3.

MEASUREMENTS.

See DEFECTS AND INACCURACIES, 2.

MERITS.

(See sec. 140 Act of 1908.)

1. Lack of—*Order Refused.*—Where an applicant had no merits because he had no discovery of valuable mineral upon his mining claim, an order or decision in his favor was refused. *Re Smith, et al. and Coleman D. Co., Ltd*.....64

2. Surveyor Picking Flaws in Employer's Title.—A surveyor should not be encouraged to pick flaws in his employer's title, and where he set up a claim in derogation of it which had no substantial merit his claim was dismissed. *Re Sinclair* 179

3. Limits of Sec. 140 (Act of 1908).—It seems any discretion given the Commissioner by sec. 140 (Act of 1908), to decide according to the real merits and substantial justice of

MINER'S LICENSE.

See LICENSE.

MINING CLAIM.

3. As to other Matters regarding mining claims. See the various separate headings.

MINING COMMISSIONER.

See COMMISSIONER.

MISDESCRIPTION.

Agreement for Sale—*Company's Stock.*—See *Re Oslund, et al. and Bucknall* 368

MISLEADING OTHER PROSPECTORS.

See *Re Smith and Pinder* 241

MISREPRESENTATION.

See AGREEMENT FOR SALE, 2, 5.

MISTAKE.

1. Wrong License Number on Post.—Putting a wrong license number on the posts by mistake will not invalidate the staking out of a mining claim. *Re Haight and Thompson and Harrison* 32

2. Wrong Date of Discovery in Application.—An application for a mining claim is not invalidated by a mistake in giving the date of discovery and staking, at least where the mistake is explained by the circumstances and no one is misled or prejudiced thereby. *Re Thompson and Harrison*..35

3. In Date of Discovery and Staking in Application.—A *bona fide* mistake in giving the date of discovery and staking in an application for a mining claim will not invalidate the claim, the correct date having been put upon the posts *Re Gosselin and Gordon* 254

4. In Issue of Certificate of Record. — M., in 1904, located lands under the Veteran Land Grants Act. On 1st March, 1907, he applied for a patent, filing the necessary proof and being entitled, as the law then stood, to both the surface rights and the minerals. On 16th March, by his attorney, he gave C. an option for purchase of such title as he would receive from the Crown. On 22nd March R. staked out

a mining claim upon part of the lands. On 3rd April patent issued to M. including the minerals. On 10th April R. recorded his mining claim, and on 13th Sept., 1907, obtained a Certificate of Record therefor, the Certificate being issued by the Recorder in ignorance of the fact that the lands were veteran lands and in forgetfulness of the fact that the matter had been in doubt in his mind at the time of recording and that he had only received the application "for what it was worth."

Held by the Commissioner,

That the Certificate of Record was issued in mistake within the meaning of the Act and should be revoked. *Re Rogers and McFarland* 407

5. See *Re Kollmorgen and Webster* 334
" *Re Jackson and Billington, et al.* 428

MISUNDERSTANDING.

See AGREEMENT FOR SALE, 2 and 5.

MORAL CLAIM.

See *Re Reichen and Thompson*, at 98
" *Re Smith and McHale*, at 102
" *Re Smith and Kilpatrick, et al.*, at 319
See also MORAL OR EQUITABLE RIGHT.
And see MERITS.

MORAL OR EQUITABLE RIGHT.

See Re Wright and The Coleman Development Co....103

MOVING POSTS.

See POSTS.

NATURE OF HOLDER'S INTEREST IN UNPATENTED CLAIM.

See INTEREST IN MINING CLAIM, NATURE OF.

NEW TRIAL.

1. Granting of by the Divisional Court—
See *Re Smith and Hill* 349
" *Re Smith and Millar* 458

NOTICE.

"ON OR BEFORE."

ONUS OF PROOF.

OPTION.

OVERLAPPING CLAIMS.

See CONFLICTING MINING CLAIMS.

OVERLOOKING IRREGULARITIES.

Staking.—It seems that where there has been actual discovery and an honest attempt to comply with the law the tendency should be to overlook irregularities in staking, so far as the Act will permit. *Re Reichen and Thompson* 88

See STAKING, 8-24.
See DISCOVERER.
See DEFECTS AND IRREGULARITIES.

PAROL AGREEMENT.

See VERBAL AGREEMENT.

PARTNERS AND PARTNERSHIP.

See INTEREST IN MINING CLAIM, ACQUISITION OF.
And see STATUTE OF FRAUDS, 4.

PART PERFORMANCE.

Taking out of Statute of Frauds.—

See *Hunter, et al.* v. *Bucknall, et al.*..... 37
" *Re Craig, et al. and Cleary* 207

PARTIES.

1. Parties Adversely Interested in Appeal from Recorder.

See "ADVERSELY INTERESTED."

2. Subsequent Stakers.—Where a subsequent claim is staked out and recorded after the Recorder has cancelled a former one, the subsequent claimant should be made a party to and notified of the hearing of an appeal from the cancellation. *Re Milne & Gamble* 249

See also *Milne and Drynan, et al.* 455

3. Person Interested in Claim.—C. staked out a mining claim 1st June and recorded it 15th June, 1906; W. made a discovery upon the same lands 16th July, but the Recorder would not receive his application because C.'s was on record; W. had formed a partnership with S., who was a foreman of

the C. D. Co., which had had men prospecting on the lot; on 9th Aug. the Company staked on W.'s discovery, but its application was also rejected. On 14th Sept. W., by giving C. a half interest, got C.'s claim abandoned and his own on record. The Company staked again on 6th Oct. and 21st November, 1906, and 17th January, 1907, on an alleged discovery of 29th June, which was not in reality a discovery within the meaning of the Act, making successive applications which the Recorder rejected at the time, but which were afterwards recorded under mandamus.

Held by the Commissioner, following Australian and United States authorities, that the Company's subsequent stakings and applications on a different discovery worked an abandonment of its first staking and application, and that as the subsequent ones were admittedly not founded upon a real discovery, all its applications were invalid; and he declined to deal with its equitable claim to the W. discovery and application until S. should be made a party and proceedings taken in the form prescribed by the Act.

Held by the Divisional Court, that the subsequent applications did not work on abandonment, and (Riddell, J., dissenting), that the whole claim should be awarded to the Company.

Held by the Court of appeal, that an abandonment should not be construed from the making of the subsequent stakings and applications, but that Sharpe must be made a party and the matter remitted to the Commissioner for determination of the rights of all concerned. *Re Wright and The Coleman Development Co.* 103

PERMISSION TO WORK.

See WORKING CONDITIONS, 8, 9.

PERSONATION.

Recording Application by.—See *Re McDonald and Casey* 219

POLICY OF ACT.

1. Speedy Finality of Litigation.—See *Re Smith and Pinder*. 241

Re Bamberger and Sinclair, et al. 36

Re Smith and Millar 458

See secs. 137, 140, 141 of Act (1908).

POSTS.

1. Removal—*Forfeiture by.*—Removal, by the holder of a mining claim, of his discovery post from an insufficient discovery upon which it had been planted at the time of the staking out of the claim, to a point where valuable mineral had been opened up some months later, the removal being for a deceptive and improper purpose, forfeits the claim. *Re Bilsky and Devine* 394

2. Removing with Permission of Recorder.—Removing No. 3 and No. 4 posts pursuant to the written permission of the Recorder, in order to reduce the claim to the proper size, will not cause forfeiture of the claim. *Re Balfour and Hylands, et al.* 430

PRACTICE AND PROCEDURE.

4. Enforcing Interest in Mining Claim.—Where it is sought to establish an interest in a mining claim the proper procedure is by appointment under sec. 136 (Act of 1908), and notice according to Form 38 (obtaining and filing a certificate under sec. 77 (2) if desired), and not by a dispute under sec. 63, Form 8, which latter is to be used only when it is sought to have a mining claim cancelled or set aside as invalid. *Re Babayan and Warner, et al.* 346

5. Enforcing Settlement of Case.—Where in a proceeding before the Commissioner the parties and their counsel had settled the matters in dispute, and had signed and filed minutes of the settlement, but one of the parties afterwards refused to carry it out, an order was made by the Commissioner enforcing the settlement, and providing for the making of a vesting order to transfer the interest in the mining claim agreed to be transferred. *Re Lehigh Cobalt Silver Mines, Ltd., and Heckler, et al.*. 252

PRIORITY.

1. Among Mining Claims.—Priority among mining claims depends upon priority of discovery and staking, the date of filing being immaterial if all are within the limit allowed by the Act. *Re Boyle and Young*.....1

2. Among Mining Claims.—W. made a valuable discovery 16th July and staked out a mining claim on it 17th July, 1906; the Recorder (erroneously) refused to record it by reason of a prior existing recorded claim of C., and W. restaked within every 15 days till he could get it recorded. G., on behalf of the Company for which S., a partner of W., was foreman, staked the same discovery as having been made by himself on 30th July and staked out a mining claim for the Company on it on 9th August and tendered application on 10th of August, which was refused. W. on 15th September by procuring abandonment of C.'s prior claim, got his own claim recorded on his discovery of 16th July and stakings of 17th July and 3rd September. The Company subsequently by mandamus order of the High Court got G.'s staking recorded, and also three other stakings on another alleged discovery, the latter being clearly invalid.

PRIOR UNRECORDED EQUITABLE INTEREST.

PROCEDURE.

"PROCEEDING."

PROCEEDINGS BEFORE COMMISSIONER OR RECORDER.

"PROBABLE."

PROFESSIONAL AND CONFIDENTIAL EMPLOYEE.

PROMISING TO SHARE INFORMATION.

PROMISSORY NOTE.

Endorsement—*Guaranteeing Payment.*—The minutes of settlement of a case provided that promissory notes should be given by S. to H., and that payment of the notes should be

guaranteed by K. and G.: H. objected that notes made by S. to H. with K.'s and G.'s signatures on the back under the words "We guarantee payment of the within note," were not a proper fulfilment of the terms of the settlement, but the Commissioner refused to give effect to the objection.

The Divisional Court held that the notes were in compliance with the terms of the settlement, and that K. and G. were in fact liable upon them as endorsers, and affirmed the order of the Commissioner. *Re Lehigh Cobalt Silver Mines, Ltd., and Heckler, et al.* 252

PROOF OF INTEREST IN MINING CLAIM.

See EVIDENCE, 10-13.

PROOF OF SERVICE.

See *Re Woodward and Carleton* 16

PROSPECTING EXPEDITION.

See INTEREST IN MINING CLAIM, ACQUISITION OF.

PROSPECTING PARTNERSHIP.

See INTEREST IN MINING CLAIM, ACQUISITION OF.

PROSPECTING PICKETS.

See *Re Lamothe* .....167 at 170
" *Re Munro and Downey* 193

PROSPECTORS ASSISTING EACH OTHER.

See *Re Hedley and Wilson* 476

PURCHASER WITHOUT NOTICE.

See NOTICE, 2-5.

REAL MERITS AND SUBSTANTIAL JUSTICE.

See MERITS.

REASONABLY POSSIBLE.

See STAKING, 3-6.

RECORDER.

RECORDER'S DECISION, FINALITY OF.

In mining matters even more than in other cases it is important that litigation should be quickly and definitely disposed of. *Re Smith and Pinder* 241

2. Cancellation of Claim for Forfeiture.—Where a Recorder cancelled a claim as forfeited for default in the working conditions and duly notified the holder of the claim by registered letter, this is conclusive that forfeiture in fact took place unless appeal is taken as provided by the Act. *Re Kollmorgen and Montgomery* 397

3. See also *Re Smith et al. and the Cobalt Dev. Co. Ltd.*, at 65

RECORDING.

1. Recording Applications—*Claim Already on Record.*—Where there is an application for a mining claim on record another application for the same property should not be recorded until the first has been disposed of...*Re McNeil and Plotke* 144

Under the Act as amended in 1907, only one staking and record for a mining claim is permitted on the same land at one time, and until it has ceased to exist as provided in the Act other licensees are not entitled to prospect, work upon or occupy any part of the claim.

Where an application for mining claim is presented which the Recorder does not think proper to be recorded, he should nevertheless, if desired, receive and file it. *Re Smith, et al. and The Cobalt Dev. Co., Ltd.* 64

2. Water Claim—*Distinction between Filing and Recording.*—An application for a mining claim should not be rejected because it includes land covered with water.

The Act makes a clear distinction between filing and recording; where the Recorder believes the application is not in accordance with the Act or that it covers or substantially overlaps lands of a subsisting claim, he should not record it but should if desired put it on file. *Re Sinclair*.....179

3. Land Improperly Covered by Survey.—A survey of a mining claim which (without authority) enlarges the boundaries beyond the area originally staked out and applied for, gives the holder of the claim no right to the added land, and

2. As to Disqualification by Prior Staking.—See *Re Henderson and Ricketts* 214
See also *Re Reichen and Thompson*, at 98

RETRIAL.

See NEW TRIAL.

REVOCATION OF LICENSE.

See *Re Dennie and Brough, et al.* .....211 at 213

SALE AND PURCHASE.

1. Title—*Doubtful Title—Waiver—Tendering Payment.*—The ordinary principles of law regarding the matter of title should be applied as far as possible to the sale and purchase of unpatented mining claims, but the purchaser must be taken to know that the title is not absolute until the issue of a patent and that there can be no assurance, especially before issue of Certificate of Record, that adverse claims may not be set up.

The mere fact that a claim has been put forward by a third party, or that notice of such a claim has been sent to the Recorder, is not a valid objection to the title, in the absence of anything to show that what was threatened was more than idle litigation.

It requires clear proof to establish waiver by a purchaser of the right to object to the title.

Though the purchaser might by his conduct have been estopped from objecting to the title, negotiations with him by the vendor afterwards looking to the removal of objections will reopen the question.

Producing the amount of a payment to the trustee holding the transfers in escrow, with a demand that the title be fixed up, where there was failure to respond to a request for unconditional payment or to show continued readiness and willingness to pay, cannot be relied upon as a good tender of the purchase money. *Darby, et al.* v. *MacGregor*.....47

2. See AGREEMENT FOR SALE.

SERVICE.

Notice of Appeal—*Registered Letter.*—A post office certificate of registration of a letter to respondent, assumed to

SETTLEMENT OF CASE.

SETTING ASIDE CERTIFICATE OF RECORD.

See CERTIFICATE OF RECORD.

SIGNATURE TO WRITING.

SHAPE OF MINING CLAIM.

See MINING CLAIM.

SIZE OF MINING CLAIM.

See AREA OF MINING CLAIM.

SHORE.

SLIGHT DEFECTS AND INACCURACIES.

See DEFECTS AND INACCURACIES.

SPECIFIC PERFORMANCE.

STAKE.

See POSTS.

STAKING.

1. Discovery of Valuable Mineral Necessary before Staking.—Discovery of valuable mineral must be made before a valid mining claim can be staked out, and where a claim was staked on an insufficient discovery, no real discovery having been made until after the staking had been completed, and no discovery post planted upon it until after the claim had been recorded, the claim was held invalid. *Re Smith and Kilpatrick, et al*.....314

2. Staking Necessary.—A discoverer who fails to stake out his claim within proper time, in at least substantial conformity with the Act, abandons or forfeits his rights where another discoverer intervenes with a valid discovery and completes staking before him. *Re McDermott and Dreany*..4

3. Delay—*Rights Lost or Postponed.*—Unless a discovery is appropriated by at once planting a discovery post upon it and proceeding as quickly as reasonably possible to complete the staking out of a mining claim, the discoverer's rights may be lost or postponed. *Re Reichen and Thompson*.....88

4. Delay—*Rights Lost or Postponed.*—A discoverer who fails to plant his discovery post and complete the staking of the claim as quickly as in the circumstances is reasonably possible loses his rights when another licensee makes a discovery of valuable mineral and completes staking before him.

M. made a discovery of valuable mineral in the forenoon of 11th June and did nothing further that day except to put up at the discovery a small post or picket inscribed with his name; E. the same afternoon made another discovery and completed the staking out of his claim; M. the next day, after being told of E.'s claim and seeing his No. 1 post, completed his staking.—Held that E. was entitled to the property. *Re McLeod and Enright* 149

5. Delay—*Limit of.*—Staking out of a mining claim must be proceeded with promptly after discovery else the discoverer's rights will be lost to a subsequent discoverer who completes staking first.

Delay from the morning of one day till the afternoon of the next when the staking might readily have been completed the same afternoon or the next morning, is quite beyond the limit allowed. *Re MacKay and Boyer*.....83

6. Delay — *Limit of — Working an Abandonment.*—T. made a discovery and planted a discovery post on 10th Sept., doing nothing further till the 24th, when he completed the staking out of his claim; F. meanwhile made a discovery and on the same day, 14th Sept., completed the staking of his claim (being as a fact ignorant of T.'s discovery). Held, that F. was entitled to the property, T.'s delay working an abandonment and leaving the lands open to F.

It seems doubtful whether anything except inability to complete the actual staking out of a claim will excuse delay. *Re Trombley and Ferguson* 189

7. Delay—*When Fatal.*—Delay in staking is fatal only where some one else effectively intervenes, and M., being disqualified, could not do so, and could not in any way prevent another claim accruing to the property. *Re Munro and Downey* 193

8. Sufficiency — *Working Abandonment.*—L., on 26th February, 1907, staked out 17 acres of the prescribed 40 acre portion of the lot which he applied for, placing his discovery post in the unstaked part, marking it for another portion of the lot, and failing to connect it by a blazed line with his No. 1 post, and as a fact had no real discovery of valuable mineral at the post or on the claim. C., on 21st June, 1907, discovered valuable mineral on the unstaked part of the claim and staked out and applied for the 40 acres.

Held by the Commissioner, that L.'s claim was invalid, and that as it was not staked out as provided by the Act nor in substantial compliance therewith, it must be deemed to be abandoned under s. 166, and that the lands were therefore, notwithstanding that it was upon record open within the meaning of s. 131, as amended in 1907, to be staked out by another licensee, and that C. was entitled to stake out the property as he did and that his claim was valid and should be recorded. *Re Cashman and The Cobalt and James Mines, Ltd.*.....70

9. Sufficiency—*Lack of Posts and Markings.*—Failure to go around the claim, omitting the planting of 3 of the corner posts, and the blazing of the lines, and failure properly to mark the discovery post, renders the staking of a mining claim invalid. *Re Milne and Gamble*.....249

10. Sufficiency — *Defective Posts — Lack of Blazing — Substantial Compliance.*—Staking out a mining claim with pegs or short pickets instead of posts 4 feet high and 4 inches square as required by the Act, the posts also lacking the requisite markings and the boundary lines not being properly cut out and blazed, is not substantial compliance with the Act and is invalid.

So also a staking (in surveyed territory) without marking the number or portion of the lot on any of the posts and without properly blazing, marking or cutting out boundary lines, the application being also defective in describing property different from that staked out.

Where a claim is being set up against a prior discoverer perhaps a rather strict compliance with the law should be exacted. *Re Wellington and Ricketts* 58

11. Sufficiency—*Lack of Post and Blazing.*—Failure to plant a No. 4 post, to blaze a discovery line and boundary lines, and to make a proper discovery post and put the correct license number on the posts, invalidates a mining claim. *Re MacCosham and Vanzant* 277

12. Sufficiency — *Defective Posts — Substantial Compliance.*—Failure to erect a No. 1 post and using instead a tree 10 feet from the corner, the tree not being properly squared and not cut off, nor so fashioned as to be readily taken for a mining claim post, is not a substantial or sufficient compliance with the Act; nor it seems is a staking with the discovery post and the No. 1 post only half the prescribed size and the discovery post only 16 inches high. *Re Smith and Pinder* 241

13. Sufficiency — *Lack of Posts and Blazing—Working Abandonment.*—A staking in which two of the corner posts were not numbered and none of the lines were freshly blazed and half of one boundary had never been blazed, was held in the circumstances to work an abandonment and to leave the land open to restaking, the staker being at all events disqualified by a prior staking which he failed to record. *Re Kollmorgen and Montgomery* 397

14. Sufficiency—*Lack of Discovery Post.*—It seems failure to put up a discovery post will invalidate a mining claim. *Re Smith and Kilpatrick, et al.* 314

15. Sufficiency—*Lack of Discovery Line.*—Held by the Commissioner that it might not be too strict a ruling in the circumstances to hold that failure to blaze a discovery line worked abandonment of the stakings. *Re Munro and Downey* 193

16. Sufficiency—*Mistake in License Number.*—Putting a wrong license number on the posts by mistake will not invalidate the staking out of a mining claim. *Re Haight and Thompson and Harrison* 32

17. Sufficiency—*Slanting Post—Substantial Compliance—Every Reasonable Intendment in Favor of Discoverer.*—E.'s mining claim was not invalid by reason of his discovery post, where planting was difficult, having been placed in a slanting position, its point being in the vein and its side resting against and supported by a projecting piece of rock, this being considered in the circumstances substantial compliance with the Act.

It having turned out that M. had never really filed an application and could have no right to the property, every reasonable intendment which the Act permitted should be made in favor of the other discoverer rather than throw the property open. *Re McLeod and Enright* 149

18. Sufficiency—*Adopting Former Markings—Substantial Compliance—Honest Attempt — Tendency to Overlook Irregularities.*—Where in staking out a mining claim new or newly marked posts are planted, existing marking of lines, which the staker assisted in making, may be adopted, thus making substantial compliance with the Act, but it is safer to mark all lines anew.

It seems that where there has been actual discovery and an honest attempt to comply with the law the tendency should be to overlook irregularities in staking so far as the Act will permit. *Re Reichen and Thompson* 88

19. Sufficiency—*Assisted by Former Markings—Form of Claim—Irregular Lot.*—Where a township lot was irregular and the actual location of its west boundary was in doubt, there being conflicting surveys, laying out a claim in convenient form following the general purpose of the Act to secure compact shape and avoid ill-shaped remnants, is sufficient.

It seems the sufficiency of a new staking may be assisted by former markings of the same staker, but the principle

of allowing adoption of old markings is rather a dangerous one. *Re Henderson and Ricketts* 214

20. Sufficiency — *Delay—Adopting Staking — Merits — Technicality.*—M., having no real discovery and not believing he had one, on 21st Aug. staked out a mining claim, omitting a discovery line, his purpose being to hold the land till word came that a former claim had been cancelled; on the morning of the 22nd, no word having been received, he pulled up the posts and planted and marked them afresh for that date, again omitting to blaze a discovery line; word came later in the day that the old claim had been cancelled on the 20th, and M. allowed his staking to stand. S. on behalf of D. made a valuable discovery on the same land at 4.30 p.m. on the 20th, D. seeing it the same evening; they protected it by prospecting pickets until the afternoon of the 21st, when S. planted a discovery post: on the 22nd D. completed his staking; there was evidence that the old claim had lapsed for lack of work on the 16th.

Held, by the Commissioner,

That M.'s staking was invalid, because (1) he was disqualified under s. 136 (1907), having previously staked or partially staked without recording; (2) he had no discovery of valuable mineral when he staked; and (3) probably because he did not blaze a discovery line.

That D. was entitled to the property; for even if the lands were not open when his discovery was made on the 20th, which it appeared they were, his visit to and adoption of the discovery and discovery post on the 22nd and completing his staking on that date made his claim good as from that time.

That as D.'s claim was a very meritorious one it should not be set aside upon any unsubstantial technicality.

On appeal to the Divisional Court,

Held, per the Court, that the Commissioner's findings should not be disturbed; and

That M. was disqualified and his claim invalid.

Held, per Riddell, J., that there was no reason to doubt that D.'s claim was good. *Re Munro and Downey*.....193

21. Defective Staking for Working Permit.—A Working Permit application was held invalid by reason of failure to mark the applicant's name or license No. on the No. 2, No. 3 and No. 4 posts, failure to do any fresh blazing, failure to

STAKING WITHOUT RECORDING.

See DISQUALIFICATION BY PREVIOUS STAKING.

STATUS OF APPELLANT.

See APPEAL, 11.

STATUS OF APPLICANT FOR CROWN LANDS.

See INTEREST IN MINING CLAIMS, NATURE OF.

STATUTE.

STATUTE OF FRAUDS.

2. Verbal Acceptance.—A verbal acceptance by the plaintiff of a written offer of the defendant is sufficient as against the defendant notwithstanding the Statute of Frauds, but to justify enforcement of the contract the acceptance must be unequivocal and unconditional. *Re Cahill and Ryan, et al.* 320

3. All Terms not in Writing—*Part Performance.*—Held that as the real terms of the contract were not in writing the Statute of Frauds would apply, and even if part performance would take it out of the statute as regards a claim for specific performance it would not do so as regards a claim for damages. *Hunter, et al.* v. *Bucknall, et al.*.....37

4. Agreement for Interest—*Share of Proceeds—Partnership—Statute as Instrument of Fraud.*—Sec. 71 (2) of The Mining Act (1908), (the equivalent of the Statute of Frauds), is a bar to a claim to an interest in a mining claim under a parol agreement entered into after the staking out of the claim; but where the claim is one for a share of the proceeds of the property when sold or where the parol evidence is merely in proof of a partnership, the statute appears not to apply.

Limits of the principle that the Statute of Frauds must not be made an instrument of fraud discussed. *Re Young and Wettlaufer* 296

5. Prospecting Agreement—*Employer and Employee.*—M. made a written agreement with H. to supply all necessaries, pay him a salary and furnish him an assistant for a prospecting trip. M. to have a ¾ and H. a ¼ interest in the claims acquired. S. was hired as assistant and went on the trip, knowing M. understood that everything staked was to be for the employer's benefit.

Held, that an alleged private agreement between H. and S. that S. might stake some claims for himself could not be given effect to and that M. was entitled to a ¾ interest in a claim staked out on the trip and recorded by S. in his own name.

Held, also, that the Statute of Frauds was no bar to enforcing M.'s right against S.

A verbal agreement for an interest in a mining claim entered into before the staking out is valid and enforceable, if there is corroboration as required by the Act (in this

STORIES OF PRIOR DISCOVERY AND STAKING.

SUBSEQUENT APPLICANT.

1. When a Necessary Party.—See PARTIES.

2. Subsequent Discoverer Intervening.—See STAKING, 2, 3, 4, 5, 6, 7.

3. Right of to Stake and Record.—See LANDS OPEN, and see RECORDING.

SUBSTANTIAL COMPLIANCE.

See STAKING, 10, 12, 17, 18.
And see POLICY OF ACT, 4.

SUBSTANTIAL MERIT.

See MERITS.

SUBSTITUTIONAL SERVICE.

Order for Ex parte.—See *Re Downey and Munro*....173

SUCCESSIVE DISPUTES.

See DISPUTE AGAINST MINING CLAIM, 4.

SURFACE RIGHTS.

See COMPENSATION FOR SURFACE RIGHTS.

SURVEY OF CLAIM.

1. Enlarging Boundaries by—*Responsibility for Survey.*—A survey of a mining claim which (without authority) enlarges the boundaries beyond the area originally staked out

SURVEYOR.

TAKING EVIDENCE OUTSIDE ONTARIO.

TECHNICALITY.

TENDER.

TIME.

TIME OF ESSENCE.

TITLE TO MINING CLAIM.

TOWNSITE.

TREE FOR POST.

TYING.

UNAUTHORIZED STAKING.

UNCERTAINTY.

UNFAIR ADVANTAGE.

UNITED STATES.

Law of Referred to

UNREASONABLE DELAY.

UNRECORDED INTEREST.

"UNTIL THE SNOW FALLS."

"VALUABLE MINERAL."

VENDOR AND PURCHASER.

VERBAL ACCEPTANCE.

VERBAL AGREEMENT.

VESTING INTEREST IN MINING CLAIM.

VETERAN LANDS.

WATER CLAIM.

WAIVER.

WITNESSES.

WITNESS POST.

WORDS AND PHRASES.

WORKING CONDITIONS.

been done but report of it has not been filed, forfeiture does not occur until the 10 days allowed for filing (in addition to the time allowed for doing the work) have expired.

Until the lapse of the 10 days it is not to be presumed that the work has not been done and a new staking (though the applicant may insist upon filing it) should not be recorded until the 10 days have expired, unless the Recorder, after investigation (of which notice should be given to the holder of the claim) finds that the work has not in fact been performed.

But where there has been failure to file the report of work as the Act requires the Recorder will have knowledge of that from his own records and should act upon that knowledge and cancel the old claim and record the new one (if otherwise regular) accordingly. *Re Leslie, et al., and Mahaffy* 448

4. Importance of Working Conditions—*Retrospectivity of Statute.*—A mining claim was recorded 3rd Oct., 1906; 53 days work was done and filed upon it 27th June, 1907, and 63 days on 24th Oct., 1907, and nothing more was done.

Held, that the time for doing the 3rd instalment or 2nd year's work expired 3rd January, 1909, and that the claim was thereafter open to restaking.

Whatever may have been the proper interpretation of sec. 164 of the Mines Act, 1906, in regard to the exclusion from computation of what was known as the close season, the amendment made in 1907, limiting the exclusion to periods of time shorter than a year, applied to all periods of time commencing subsequently to its passing, though the claim had been recorded previously.

Maintenance in full effect of the law of working conditions is of vital importance and the Commissioner and Recorders should be careful not to exceed the powers of relieving from forfeiture given them by the Act. *Re Kollmorgen and Montgomery* 397

For remarks on the importance of working conditions see also *Re Drummond and Lavery, et al.*, at.....284

Re Kollmorgen and Webster, at 336

5. Diamond Drill—*Excuse for Non-performance.*—Held that — whether or not diamond drilling was work within the meaning of s. 160 — as enough had not been done since staking, the claim had become forfeited, and after more

than a year of inactivity, the only excuse being negotiations with officers of the Department, the forfeiture must be considered final.

It was pointed out that the proper course in the circumstances would have been to procure a working permit upon the property. *Re Waterman and Madden* 86

6. Extension of Time—*Illness of Holder.*—In case of illness of the holder of the claim and in the other circumstances specified in sec. 80 (Act of 1908), the Recorder has power to extend the time for performing work upon a mining claim even after the time has expired; but this is a power which should be very sparingly exercised, and where another claim has intervened only in very extreme cases if at all. *Re Seymour and Caster* 425

7. Extension of Time—See *Re Milne and Drynan et al.*455

8. Forest Reserve—*Permission to Work — Disturbing Title.*—Where on a claim in a forest reserve part of the work filed was done before permission to carry on mining operations had been received, but additional work was done afterwards, whether enough or not did not appear, declaration of forfeiture was refused, the holder of the claim having acted in pursuance of the practice in the district, the attack on his claim not being made till long after the occurrence and being one that would disturb a large number of existing titles if it succeeded. *Re Balfour and Hylands, et al.*....430

9. Forest Reserve — *Permission to Work — Disturbing Title—Finality of Commissioner's Decision.*—Where in a forest reserve the work filed had been done before permission had been received, though after application for it had been made to the Recorder, who allowed the work to proceed, and the Recorder had with knowledge of the facts granted a certificate under sec. 78 (4) (Act of 1908) that the work had been performed to his satisfaction:

Held, by the Commissioner that, upon these facts, and as the substantial merits of the case were all with the holders of the claim, and as a different ruling would disturb a very large number of titles, a declaration of forfeiture should be refused.

On appeal to the Divisional Court,

Held, by the Court, quashing the appeal, that the decision of the Commissioner as to the due performance of the

WORKING PERMIT.

in the application or sketch the length of the boundaries and failure to make affidavit either in substance or in form as the Act required.

On appeal to the Divisional Court.

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5. Time for Application.—Section 141 (13) of the Mines Act, 1906, requiring an applicant for a Working Permit to procure it within 70 days after the staking out, is imperative and not merely directory, and unless complied with strictly, so far at least as the things required to be done by the applicant are concerned, the application would be void. *Re McBean and Green* 14

See The Mining Act of Ontario (8 Edw. VII., c. 21, s. 94 (2)).

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