Mining Commissioner's Cases

ONTARIO

1912—1917

BY

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PREFACE

This volume follows the publication of the Mining Commissioner's Cases by my predecessor, Mr. Samuel Price, K.C.

The cases which have been selected were heard by me as Mining Commissioner between the years 1912 and 1917 and have a bearing upon the present Mining Act of Ontario and Mining Laws in general.

Toronto,
21st November, 1918.

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Mining Commissioner's Cases

(THE COMMISSIONER.)

JAMES v. O'CONNOR ET AL.

Proportionate Contribution of Working Conditions by Co-owners —Application for Vesting Order—Evidence—Credibility.

Time spent in carrying in supplies cannot be allowed as assessment work.

O'Connor was not justified in making a report of work on the assumption that the claimant would finish his share of the work, and in ignorance whether it had been performed at the time the report was filed.

Proceedings under section 81 of the Act for an order vesting the interests of the respondents in the claimant James, for failure to contribute towards his share of the work to be performed on the claim in question.

October 23rd, 1912.

THE COMMISSIONER.—The claimant is asking to have the interests of the respondents in the three mining claims in question cancelled and transferred to himself under sec. 81 of the Act for alleged failure to contribute their share to the working requirements prescribed by the Act.

The parties hold varying interests in the claims and several agreements relating to their interests and to the work have been produced, some of which are upon record.

The work in respect of which the claimant really bases his present proceedings is the 60 days' work required to be done during the present year on claim

416-P, no complaint being made regarding work upon the other two claims, though the three claims have for the most part been dealt with together in the agreements and dealings between the parties.

During the hearing it developed that the claimant contributed nothing to the 60 days' work on claim 416-P, of which he was under obligation to perform half in 1911, and in any reasonable view of the evidence it would be impossible to find that any deficiency which the respondents may have been guilty of in 1912, was not more than offset by the claimant's delinquency in 1911.

It is contended, however, on behalf of the claimant, that as in 1912 he owned only a one-quarter interest, having transferred his other one-quarter interest to the respondent O'Connor, he was liable to contribute only one-quarter of the 60 days' work. O'Connor, however, claims that he was still to do one-half the work by agreement between them, and the claimant admits that he was willing at the time to do this and was proceeding on that basis. The written agreements which are produced are somewhat peculiar, but it does not seem by any means clear from them alone that the claimant could still be held liable for half the work. The matter, I think, however, is not crucial in the present proceedings. The respondents have been acting together on the one side in their contribution, and though the purchase of the one-quarter interest by O'Connor from the claimant took place subsequent to the claimant's default in 1911, I think the circumstances are not such that I can separate the interests of the respondents and make any order in favor of the claimant when he has as a fact been himself in default upon the matter as a whole. O'Connor's interest seems to be eleven thirty-seconds, he having purchased five thirty-seconds from the respondent Reilly. It has also been stated by counsel for the respondents that the respondents have performed

further work, and whatever may be the rights as between the claimant and O'Connor and the others this must be a matter of future adjustment between them after giving each credit for the work he has done.

The present proceedings as against the respondents Reilly and Malouf are without the slightest justification, nor was there any reason whatever for including mining claims 13814 and 14176 in the litigation. The fact that these claims were involved in the same agreements was only a matter of evidence and there is no pretence that there was any default of work in regard to these two claims. The proceedings, therefore, as respects the two claims mentioned, and as respects the respondents Reilly and Malouf, should be dismissed with costs.

As to the respondent O'Connor and claim 416-P, though as I have stated I think there is no case which could warrant me in making any transfer of interest to the claimant, his complaint is not without some color. O'Connor has filed a report of the 60 days' work in question which he was clearly not warranted in making or filing. The exact facts as to the trip of the applicant and O'Connor and his brother to the property and as to the amount of work they performed are not easy to arrive at. The versions of the two sides differ materially, the claimant swearing that only 6½ days of about 10 hours each were spent in working upon the claim by himself and Fergus O'Connor, brother of the respondent, and that no work was done by the respondent O'Connor himself, while the O'Connors claim 4 days' work by the respondent O'Connor and about 17 days by his brother, averaging about 12 hours a day. They differ also as to the dates when they left Cobalt for and arrived at the property, though the claimant is to some extent corroborated by the register or account book produced by one of the proprietors of the " Star Lunch " of Porcupine. The claimant, however, was not a satisfactory witness. It was difficult to get direct answers from him, and he

seems much given to telling only what suits his own side of the case, concealing as it appeared in the course of the trial very material facts even from his own solicitor. I do not feel justified in relying upon his version of what took place. Fergus O'Connor on the other hand endeavored, I think, to state the facts as he believed them, and corroborated as he is by his brother's and the other evidence, I think his version is much nearer the truth than that of the claimant. Fergus O'Connor was paid, however, for only 16 days' work and on a careful reperusal of all the evidence I am convinced that there was in fact a slight shortage, amounting, as well as I am able to estimate it, to 4 days in the 30 days' work which the two O'Connors were supposed to have performed upon the property. I think the discrepancy probably arose from the respondent O'Connor's misconception of what is properly deemed work within the meaning of the Act, he apparently being under the impression that time spent in carrying in supplies should be reckoned, which is clearly not the proper interpretation of the statute. Apart from this he was not justified in swearing the report of work on the assumption which I am willing to give him credit for that the claimant would finish up his remaining part of the 30 days. It may be that the remark which the claimant had made to Fergus O'Connor and which Fergus O'Connor reported to his brother as to the claimant's suggestion that he would not mind letting the claim lapse had contributed to his anxiety to have the work reported, but this was no excuse for filling out a report and making an affidavit as to work of which he had no actual knowledge, and which in the event turns out really not to have been performed in full at all at the time the affidavit was made. I am not disposed, however, to feel that he really intended to deceive or realized that he was doing wrong in making the affidavit. I think it arose from carelessness and thoughtlessness. In

dismissing the proceedings against him, however, it will be without costs.

I order that the claim of Thomas James herein to have the interests of the respondents Albert O'Connor, Thomas Reilly and J. H. Malouf in mining claims 13814, 14176 and 416-P, cancelled and vested in himself for default in contribution to working conditions, be and the same is hereby dismissed.

And I order that the said claimant do pay to the said Thomas Reilly and J. H. Malouf their costs of these proceedings, only one set of costs for both the said respondents, which costs I direct to be taxed on the High Court scale by the local taxing officer of the High Court at North Bay or by one of the taxing officers of the Supreme Court at Toronto.

(THE COMMISSIONER.)

DONAGHUE v. SINGLETON.

Working Conditions — Proportionate Contribution by Co-owners —Application under sec. 81, R. S. O. (1914), ch. 32.

The default complained of was not for refusal to contribute towards the work "required to be done thereon," but for work done nearly two years after the necessary working conditions required by the Mining Act of Ontario had been performed.

Held, work done as development or otherwise not required by the Act does not come within the meaning of sec. 81, but is a matter of contract between the parties; and a breach thereof would be a matter for the consideration of another Court.

That sec. 123 did not apply.

Application by William A. Donaghue under section 81 of the Mining Act to have the interest of the respondent, L. J. Singleton, a co-holder, vested in him in default of performance of a proportionate share of working conditions.

J. W. Mahon, for applicant.

Respondent not represented.

3rd December, 1912.

THE COMMISSIONER.—This is an application under sec. 81 of the Mining Act to have the interest of the respondent L. J. Singleton, who is a co-holder with the applicant, vested in W. A. Donaghue, the applicant, for failure to contribute his agreed share of certain work done upon the claim in question. The mining claim in dispute is known as 13674, recorded in the Recording Office for the Temiskaming Mining Division, and consists of the south-west quarter of the north half of lot 10 in the 1st concession of the township of Tisdale, and the claimant is the recorded holder thereof.

On the 8th day of January, 1910, William A. Donaghue entered into a written agreement with Leonard J. Singleton, which in part recited that Singleton had filed a dispute against the said claim, and in order to settle the dispute and to remove it from the records of the Recording Office the parties agreed in part, as follows: The claim was to remain recorded in the name of W. A. Donaghue, who acknowledged that Singleton was entitled to a one-fifth interest and agreed to hold the said one-fifth interest in the said claim in trust for him. In consideration of the acknowledgment of Singleton's part ownership as aforesaid he agreed to perform or cause to be performed forthwith after the execution of the agreement at least 30 days work as required by the Mining Act to be done upon the said claim. He further agreed in the language of clause 4 of the said agreement to do as follows: "The parties hereto agree each with the other that the expenses of any further work beyond the said thirty days work that may be done upon the said mining claim shall be borne by the parties hereto in the following proportions: The party of the first part shall pay two-thirds of the cost of the said work, and the party of the second part shall pay one-third of the cost of the said work." And the agreement closes by stating "that the majority interest in the

said claim shall govern in all questions arising regarding the arrangement and disposition of the said claim."

On the 4th day of February, 1910, 30 days work had been recorded as done on the said property, and on the 29th of September of the same year 210 days work had been filed and recorded, making in all 240 days assessment work done upon the said mining claim. Upon completion of 240 days work and compliance with other requirements of the Act the holder of the claim is entitled within three years and six months from the date of recording of the claim to apply for a patent.

Mr. Singleton is a prospector and at the time he lodged a dispute against the claim and entered into the agreement of the 8th of January, 1910, represented a party of men known as the Watson Syndicate, which was composed of S. H. Logan and R. B. Watson, both of the town of Cobalt, and others, and his interest in the claim was as agent for or partner with the members of the Syndicate. Mr. Donaghue caused monthly statements of work done upon the claim to be sent to Mr. Logan at Cobalt, showing the expenditure for that month, and requesting payment of one-third of the cost which Singleton had agreed to pay. Mr. Logan, who apparently was the financial agent of the Syndicate, satisfied Mr. Singleton's obligations under the said agreement until July of 1912, when Mr. Donaghue says the Syndicate had paid or caused to be paid for work done upon the claim the sum of about $1,000. I will mention now the fact that the Syndicate had received through Mr. Donaghue $900, being Mr. Singleton's portion of a payment made upon the property which had been taken under option by a prospective buyer, so that at the time of the default the amount expended by the Syndicate for work done and the amount received by them as above nearly balanced.

Substitutional service was allowed to be made on Singleton through Mr. Logan and by registered let-

ter, and he was in Haileybury when this application was heard, but did not appear in person or through counsel.

Early in August, 1912, Donaghue sent a statement as usual to Logan and at the same time drew upon him through a bank for the July work, when the draft was returned with a request to allow the matter to stand until the 1st of October. In September another statement was rendered to Logan for the expenditure made in August, with a draft attached thereto, to which a reply was made to bring the matter up again. Shortly after this Donaghue wrote Logan requesting a settlement of arrears, to which a reply was not received.

Frank S. Malcolm, who has an unrecorded interest with Donaghue, at the latter's request and in the month of October went to Cobalt to see Logan, when he was requested to wait there a few days until Mr. Watson returned, when the question of arrears would be discussed. Mr. Malcolm waited until Mr. Watson returned, and again pressed Logan for a settlement, when the latter replied that he would not do anything more himself, but was trying to get the other members of the Syndicate together. Mr. Malcolm in his evidence said that Logan complained that as Singleton under the said agreement must pay for one-third of any work Donaghue might wish to do upon the property, that their expenditure might become very heavy and he could not get the Syndicate to act in the matter. Some work was done in the following months of September and October, statements for which were not sent to either Singleton or Logan or any other members of the Syndicate. Contribution under the said agreement is now asked for from Singleton for work done in the months of July, August, September and October, 1912, upon the said claim, which amounts to $207.69. In the October statement an item of $35 is charged and is set out as Malcolm's expenses to Cobalt to interview Mr. Logan. This item

I would not in any event allow to be charged, but in other respects the amounts charged and shown in the statements filed appear to be reasonable and not excessive.

The applicant, in his notice of claim, states " that the grounds of claim are, that the said L. J. Singleton has not paid his proportion of the work done upon the said mining claim as required by the agreement entered into between the said Singleton and myself on the 8th day of January, 1910." Section 81 of the Mining Act says:—

"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."

The default complained of is not for refusal to contribute towards the work " required to be done thereon," but for work done nearly two years after the necessary working conditions required by the Act had been performed. I understand the words in the said section, " work required to be done thereon," to mean work required to be done on the claim as a condition of holding. The work required to be done by the Act is 240 days of 8 hours per day, and this had been done long before the default in question. Work done as development work or otherwise not required by the Act does not come within the meaning of sec. 81, but is a matter of contract between the parties and a breach thereof would be a matter for the consideration of another Court.

Mr. Mahon, for applicant, contends that if the facts in the case do not come within sec. 81 I have power under sec. 123 to grant the relief asked for. I do not think so. I am of the opinion that my jurisdiction to grant an order vesting the interest of the respondent in the applicant on account of failure to contribute

towards "the work required to be done thereon," is confined to sec. 81 of the Act.

The work required to be done by the Act as a condition precedent to the right to apply for a patent is only for my consideration, and I do not think the written agreement referred to, even though it may mean the respondent was compelled to contribute towards any work done on the claim, assists the applicant as far as my jurisdiction is concerned. The agreement in question does not provide that upon default the interest should vest in the co-holder, and even if it did so I doubt if I would have power to make an order to that effect.

The notice of claim is for contribution for any work done on the claim, not for work to be done by virtue of the Mining Act, and for these reasons the application is dismissed, without costs, as the respondent did not appear.

(THE COMMISSIONER.)

TOUGH v. YOUNG.

Verbal Agreement for Division of Commission—Purchase of an interest in the Properties by one of the Parties to Agreement—Statute of Frauds.

Tough, having the right to sell certain claims on commission arranged with Young to assist him, profits to be divided equally. Young purchased a three-quarters interest in the same claims from the owners and afterwards sold all but a three-eighths interest.

Tough claimed, under the verbal agreement, he was entitled to one-half the profits made on the one-half interest retained by Young.

Held, the agreement between the parties was to sell the claims for $15,000 and divide the agreed commission, but not that Tough should, in the event of a sale whereby an interest was purchased by Young, have an equal interest with him.

That, as the agreement relied upon by the claimant was made after the claims were staked and was not in writing as required by sec. 71 (2) and not being partners, the claimant's case failed also on that ground.

Claim by Robert R. Tough to a 3/16 interest in certain mining claims pursuant to a verbal agreement made with the respondent W. C. Young.

Frederick Elliot, for claimant.

W. A. Gordon, for respondent.

4th December, 1912.

THE COMMISSIONER. — The claimant Robert R. Tough claims to be entitled to an undivided three-sixteenths interest in mining claims L-1829-1830-1831 and 2103, all situate in the Larder Lake mining division, out of the interest held by the respondent W. C. Young, under a verbal agreement entered into between them in the month of October, 1911.

The claimant filed an affidavit which forms part of the record in this case in which he states that in the fall of 1911, he received instructions from the then owners of the claims in question, Edward Hargreaves and W. H. Wright, to sell the claims for $15,000, he to receive a commission of ten per cent., and that he arranged with Young to try to sell the properties as a partner with him in which all profits were to be divided equally.

Claims Nos. L-1829-1830 and 1831 were staked and recorded in the name of W. H. Wright and L-2103, in the name of Edward Hargreaves, and subsequently and at the time of the trial of this matter the respondent Young appeared as a holder of a three-eighths interest and Wright with a non-assessable one-quarter interest. All of the said claims were staked and recorded prior to the agreement purported to have been made between Tough and Young in October, 1911. Mr. Hargreaves is a brother-in-law of W. H. Wright, and they co-operated in effecting a sale of their interests. Mr. Tough secured from Wright a verbal option to sell the properties for $15,000 cash, upon which a commission would be paid of ten per cent. Mr. Tough was acquainted with Mr. Young, having through him sold a mining claim of his to one Flynn in October,

1911. Mr. Tough, after securing the option on the claims in question, went to Young at Haileybury, informed him of the option, and asked if he could find a purchaser for the claims at $15,000, to which he states Young answered he thought he could, and would go to Toronto that night. At this interview Tough states in his evidence that the agreement was that they should split the commission or any other profits to be made, and his explanation of profits was that they intended to increase or load the option price from Wright in order to make more than ten per cent. commission, and that in the event of a sale in which only a portion of the claim was sold, he was to have a half interest with Young in the portion to be retained.

Mr. Young did go to Toronto the night of this conversation or the next night thereafter, but he explained he had intended going in any event on other business. However he met Mr. Flynn there and induced him to go up to Swastika, near which the properties are, and make an inspection. Mr. Young said he quoted the properties to Flynn at $15,000 net, expecting to be repaid for his trouble out of the commission to be paid by Wright, which was to be divided between him and Tough. Mr. Tough says Young wired him from Toronto to get samples of the rock, have some assays made and to send them to him at Toronto, which he did. A few days after Flynn and Young came to Swastika, visited the claims in company with Tough and immediately after the inspection Mr. Flynn told Mr. Young he would not purchase. That night Young met Wright and told him if he would come to Haileybury and discuss a sale of the properties he might buy them himself.

After Mr. Flynn's visit to the claims Tough had a talk with Wright and secured an extension of the option for 15 days at the same price of $15,000, but Wright wanted that price for a three-quarter interest, as he was anxious to retain a quarter for himself, he having made a recent discovery and thought the claims more valuable than when the first option was given.

In October, 1911, Mr. Tough wrote Young advising him of the extension of the option and admits that he did not again see Young until some time in December of the same year, but states that he knew in November that Young had purchased the claim from Wright and Hargreaves.

From that time until the trial of the action Tough says that he met Young at intervals of a month or so, sometimes in Haileybury and once in Toronto at the King Edward Hotel, and each time asked him what interests they had in the property, and the replies followed, that "he had retained a good interest, 'that' he had got some real money," and when pressed as to what was the extent of the interest retained by Young the latter replied "nearly a half." On another occasion last winter when Tough happened to meet Young, as he put it, Young is said to have offered him a one-sixteenth interest, which he refused. Tough's statements of what took place at these meetings is emphatically denied by Young in his testimony at the trial. It is admitted by Young that Tough did introduce Wright to him at Swastika and that he was the first to mention the properties in question to him.

Shortly after Flynn's and Young's inspection visit to the claims Wright and Hargreaves came to Haileybury and called upon Young and offered the claims to him. At this time Wright and Hargreaves held a one-half interest each. An agreement was not reached at the first meeting, as Young wanted an option, but this Hargreaves refused to give. They returned to Young's office next day, when an agreement was arrived at whereby Hargreaves sold his half interest in the four claims for $6,000 and Wright a one-quarter interest for $1,500, and the further consideration that Young would do all necessary assessment work upon the claims to permit a patent being secured thereto, and upon other terms and conditions as set out in written agreements prepared by Messrs. Day & Gordon of Haileybury, and dated 1st November, 1911, which agreements were duly executed and placed on

record in the Recording Office at Haileybury on the 8th day of November, 1911.

As Young had under his agreement with Wright and Hargreaves to perform 960 days' assessment work upon the properties, which cost from $3,500 to $4,000, not including the cost of a shot drill, it will be seen that this work was a very material part of the consideration moving to Wright, and while he got less in cash than Hargreaves he retained a quarter non-assessable interest in the claims.

Wright does not deny that he promised Tough a commission of ten per cent. if a sale were effected, and Hargreaves states Wright told him of his obligation to Tough in the event of a sale. Mr. Wright admits that he did not mention to Young the question of Tough's commission as he thought Young understood it, and Hargreaves says that Young told him that he would look after Tough, otherwise he would not have reduced his sale price from $7,500 to $6,000, and Wright takes the same stand.

Mr. Wright has not been released by Tough from his promise to pay a commission nor does he appear to have been unduly pressed by him to make payment, but he has agreed to give Tough a one-sixteenth part of any money he derives from the sale of his quarter interest in the four claims, in order, as he states, to make up to him in part the agreed consideration, but he would not have agreed to pay a commission if he had known Tough expected to have a half interest with Young in any profits made upon a resale or of a division of any interest held by Young.

Mr. Young, who has been dealing in mining claims since 1906, in his version of what took place in his interviews with Wright and Hargreaves prior to and at the day of the sale, explains that he told them that as the sale to Flynn had not been made and as he was purchasing the properties himself, a commission would not have to be paid to Tough and that it was not contemplated by Tough when he asked him to sell the property that he would be the purchaser of the properties,

and he was most emphatic in his denial that he told Hargreaves he would look after Tough. Mr. Tough was not present at any of the interviews between Young and Wright and Hargreaves nor had he assisted in any way in the sale to Young beyond the introduction at Swastika. It is a matter of surprise to me that as Mr. Tough knew in November, 1911, that Young had purchased the claims he would not have gone to the Recording Office in Haileybury, where he would have found the agreements of sale had been placed on record on the 8th day of that month, and from their perusal the exact terms and conditions of the sale would have been learned. Instead of doing so his evidence is that he kept meeting Young from time to time after the sale was known to him, and his persistent enquiry was "what interest do we hold?"

The proper time for Tough to have asserted his rights was immediately after the sale had become known to him. It does not appear from the evidence that Mr. Tough consulted a lawyer or put his claim on record addressed to Young, and the latter states that the first he knew that action had been begun was when he saw it in a newspaper.

The purchase price and assessment work done on the properties has cost Mr. Young about $11,000, upon which must be credited $3,750 received from H. D. Symmes, who purchased a three-eighths interest in the claims and paid towards the assessment work about $1,000. Had Mr. Young in mind Mr. Tough's alleged right to one-half of his holdings when he made this large expenditure? I think not on the facts before me. That Mr. Tough is entitled to commission to be paid by some of the parties involved in this litigation is admitted, but with the question of commission on a sale of the properties or an interest in the proceeds I have no concern, as I believe it would be beyond my jurisdiction to deal with.

The claimant's notice of claim sets up that he is entitled to "one-half the profits realized on the sale thereof," which profits amounted to at least the three-

eighths interest now held by the respondent. And again in his affidavit filed he claims he was entitled to receive one-half the profits or one-half the interest retained by Young on the sale or option of the claims.

After a careful consideration of the facts, and not doubting the sincerity of Mr. Tough's evidence, I have reached the conclusion that the arrangements between the parties was to sell the claims for $15,000, and divide the agreed commission, but not that Mr. Tough should, in the event of a sale whereby an interest was held by Mr. Young, have an equal interest with him in the same.

I have dealt with the facts and disposed of the case upon its merits, but as the defendant's counsel has raised the question of the Statute of Frauds being a bar to the action, I will pass upon it. The claimant in that part of his claim wherein he sets up a right to an interest in the mining claims in question is answered, I think, by sec. 71 (2) of the present Mining Act. He asks for part of the profits or in the alternative an interest in the mining claim in question. As the contract set up by the claimant was made after the claims were staked and was not in writing as required by the said section, and had reference to an interest in or concerning mining claims, and as he was, in my opinion, not a partner, the claimant's case fails on this ground also.

Claim dismissed with costs.

(THE COMMISSIONER.)

DURKI v. SAINIO.

Claim for Interest in Property—Partnership—Weight of Evidence —Credibility—Onus of Proof.

Application to establish an interest in the claim of the respondent. The evidence of the claimant was denied by the respondent.
Held, the claimant failed to satisfy the onus of proof, and claim dismissed.

W. F. MacPhie, for claimant.
A. G. Slaght, for respondent
D. O'Sullivan with *Mr. Slaght.*

6th December, 1912.

THE COMMISSIONER.—The claimant alleges that he is a partner of the respondent and entitled to an undivided one-seventh interest in the claim staked and recorded in the respondent's name.

The property is situate in the Gillies Limit, which, by proclamation, was opened to prospectors on the 20th of August, 1912.

In consequence of the opening of this territory to prospectors, many who were aware of the intended proclamation reconnoitered the area and were prepared on the day of the opening to stake and record the particular property they had in view. The parties to this dispute were amongst the many who had decided to stake an anticipated claim if possible.

Alexander Durki had associated with him in his party John Helstein and Oscar Nordlund, and John Sainio's party was composed of Frank Mikkala, Henry Pannala, Alfred Hiervonen and John Louma. On the afternoon of the 9th of August, 1912, Durki and his party arrived at a boundary of the Gillies Limit, where Sainio's party was, and had been camped for five days previous thereto. Between 7 and 8 p.m. of the same day Durki and his followers called at

Sainio's camp and remained with them until the next day. According to Durki his partners Helstein and Nordlund had selected a property they desired to stake, and about 4 o'clock on the 19th he made an inspection of it, but Helstein in his evidence said they had no ground in view and took their chance with other prospectors. If they had previously selected a claim why it was not staked did not come out at the trial.

John Louma agreed to grubstake Sainio and his party and did so and paid the cost of recording the claim and subsequent legal costs in connection with a dispute which had been filed against the claim, but which at the time of the trial had been settled. As Louma was financier of the party he was allowed to stay at his home in Cobalt, whilst the others went out to discover and stake, so he was not at the camp when Durki called, nor did he take part in the staking of the claim.

It is contended by Durki that Sainio asked him to leave their bags at his camp and join his party in order that they might make sure of staking at least one claim, and that night before 12 o'clock Sainio took him to see the discovery on the claim in question. He further contends that it was understood that the seven men should have a one-seventh interest each in any claim staked. Whilst waiting for the hour of 12 midnight to come Durki and his party made posts to be used in staking, and the time was otherwise passed in telling stories.

At this time Durki and his followers had decided it would be too difficult for them to stake a claim on account of the great number of prospectors in the vicinity, and it was admitted they were not experienced prospectors, nor had they heretofore staked a claim. At the earliest point of time on the morning of the 20th the seven men lit a fire within 20 feet of the discovery made on the claim and there made their camp. The staking then proceeded and as to the procedure and who were active participants in it is a

matter of uncertainty on account of the direct contradiction in the testimony on this point. The evidence for the claimant is that Helstein planted the discovery post, and Durki posts Nos. 3 and 4, and that Sainio wrote upon them.

The respondent claims that he put in the discovery post; Frank Mikkala states he erected posts Nos. 1, 2, 3 and 4, and their evidence is corroborated by that of Alfred Hiervonen. Beyond the planting of the discovery post and posts Nos. 3 and 4 the claimant or his party did not apparently take any further active part in the staking of the claim. It was decided to allow the claim to be staked and recorded in the name of Sainio, and on the day of the staking he and Pannala went to Haileybury, recorded the claims and afterwards returned to the property where they remained for several weeks. The claimants Nordlund and Helstein all state that when they arrived at Sainio's camp he asked them to join his party and all would become equal co-holders in whatever they might stake. At the same interview Durki asked Sainio if he required any money and the latter replied that it had been advanced and he would ask for it when needed. A few days after the claim had been recorded Durki went out to the property and again asked Sainio if he wanted any money, as at this time he knew a dispute had been filed against the claim, but Sainio said it had not yet been recorded and he was not yet in need of funds. Subsequently in September the request to assist towards the general expenses connected with the property was again made by Durki and again refused by Sainio. About the 28th or 29th of October Durki met Sainio in Cobalt, when Helstein was present, and offered to assist in doing the assessment work then being done on the property, but Sainio refused the offer, saying that Durki's party had no interest in the claim which belonged to him and his companions. In rely to this evidence Sainio says that Durki did come to his camp shortly after the stak-

ing, stayed about half an hour and went away and nothing was said about his claiming an interest in the property. He also admits meeting Durki about the 26th of October and again on the 22nd of November, when Durki did claim an interest, and Sainio told him that he was not a partner of his and had no interest in the property. Durki and Sainio had been acquainted for three or four years. The claimant's evidence is supported by apparently two disinterested witnesses, one Abraham Pittisalo, who said that in August he met Sainio, whom he knew, and asked him how he got along recording the claim and how many were in the crowd who had an interest in the property, to which Sainio replied "seven." The other witness called was Annie Pittila, who at the time of the conversation referred to was in Durki's home nursing Mrs. Durki, who was ill, and Hiervonen, a partner of Sainio's, was there, and she asked him if they were to divide and he replied "yes." She said she did not ask him how many were to divide, but had reference to Durki and his party. The evidence of the two independent witnesses was not contradicted by the respondent.

I am asked to find a partnership which would entitle the claimant to a one-seventh share or interest in the property in question. It is urged that the plaintiff's cause is supported by unbiased evidence. It is quite true two witnesses were called who were not interested in the claim, but I cannot say they were strictly unbiased witnesses.

The claimant is further supported by the evidence of his two partners, but then I am confronted by the testimony of Sainio and his four partners, which in effect is a strict denial of the essential points in the evidence given on behalf of the claimant, so that the forces are evenly divided.

All of the witnesses were foreigners unable to give their evidence in English, so that their testimony reached me through an interpreter, and as to their

credibility I cannot speak, nor can I judge from their deportment in the witness box the value I should place upon their evidence.

The plaintiff appeared to give his evidence freely and earnestly. On the other hand the respondent did not impress me favourably, but in other respects the evidence of the other witnesses was given without hesitation.

I am strongly impressed by the fact that Sainio's party had been organized and financed and went to the immediate neighbourhood of the claim five days before the lands were thrown open for discovery. They knew of this particular claim and set out with the avowed object of securing it. On the other hand Durki went out to discover. If he had a claim in view as he stated, Helstein was apparently ignorant of it, and if they did, as Durki states, look over the property they had in view they did not, either because they thought they could not on account of the large number of prospectors around or because they could not make a sufficient discovery, stake it.

It must be borne in mind that they had decided not to try and stake the claim Durki speaks of before they first called upon Sainio at his camp about 7 p.m. on the night of the 19th.

Why the necessity of seven men to stake one claim upon whose limits they were camped waiting the hour when they might stake it? If Sainio had assigned each of the seven men a special duty that night in connection with the staking, the claimant's contention would have appeared more reasonable to me, but this was not done, nor was there any undue haste shown in blazing the lines or placing the stakes. I do not disregard the evidence of the two apparently disinterested witnesses called on behalf of the claimant, but even so the claimant has failed to satisfy the onus of proof. Under the circumstances I believe I will be doing substantial justice in the case by dismissing the application, but without costs.

(THE COMMISSIONER.)

SLOAN v. TAPLIN.

Dispute—Recording of Mining Claims—Staking—Affidavit of Claimant made before Claim was Staked — Necessity for Personal Knowledge — Compliance with Statutory Requirements — Substantial Compliance — (Sec. 58).

Section 59 of the Mining Act of Ontario governs the recording of mining claims. Making an affidavit in the form required by the Mining Act does not establish a valid claim unless the affidavit is true.

A licensee must swear to only what he knows at the time to be true and cannot be allowed to assume the fact to be true in order that he may defeat the claim of a more conscientious staker who has disregarded time in order that he might condition himself to depose to what he personally knew to be true.

Held, also, that the respondent had substantially complied with the requirements of the Mining Act.

T. B. Sloan and V. E. Taplin caused mining claims to be staked out in the same property in the Gillies Limit. Taplin was the first to record. Sloan filed his application and entered a dispute against the Taplin claim, alleging an affidavit of staking sworn to before the staking was complete and based upon knowledge not personal to the deponent and in other respects setting up an incomplete staking.

A. G. Slaght, for disputant.

J. W. Mahon, for respondent.

4th January, 1913.

THE COMMISSIONER.—The dispute filed herein has been transferred to me by the Recorder for adjudication. The disputant attacks the respondent's title to the claim in question and asks that his own application for the same property be put on record.

The claim covers part of the south-east quarter of the east half of the south-east quarter of block one, situate in the Gillies Limit, which by proclamation was opened to prospectors on the 20th of August last.

The contemplated action of the Government to open the limit for prospecting purposes had been generally known prior to the 20th of August, and in consequence a very large number of prospectors had assembled at the limit at midnight of the 19th of August last, ready to stake a claim if possible.

V. E. Taplin, a licensee, who was acting for the respondent, was one of the anxious many and at 12.01 on the morning of the 20th had erected a discovery post on the claim. He was accompanied by Fred. Langford, W. St. Amand and one Stanlick. He made the necessary stakes prior to staking and immediately after midnight in company with St. Amand placed the stakes in their respective positions. Mr. Taplin instructed Langford to go to the position where No. 1 post would be erected and remain there until it was time for him to stake, and Stanlick was to remain and stake at post No. 3 and St. Amand was to look after posts Nos. 2 and 4. A few minutes after 12 midnight and after he had issued his instructions and placed his discovery post in position, Taplin left for Haileybury to record the claim, which was done about 9.30 a.m.

It was admitted by Taplin that he had not personally erected the posts Nos. 1, 2, 3 and 4, or blazed the lines, or in fact done more than make his discovery and place a discovery post thereon prior to the time he made the affidavit of discovery and staking and recorded the claim. On this admission counsel for the disputant practically rested his case. No evidence was offered by the disputant affecting the completeness of the staking or the nature of the discovery by Taplin. After recording the claim Taplin went to Cobalt, where he had lunch, and returned to the claim, reaching there between 2 and 2.30 in the afternoon. On his arrival he met Sloan for the first time and the latter told him of his discovery, where it was situate, and remarked that he was the rightful holder of the claim. Taplin did not inspect Sloan's discovery but

went to his own Nos. 1 and 2 posts, which he says he found properly erected and in place, and then ordered the men to widen the blazes as in his opinion they were not wide enough and not such as the Act required. On the next day, the 21st, he inspected his Nos. 3 and 4 posts and found them placed satisfactorily, so that it was the day after the claim had been recorded that he was personally aware the stakes had been properly erected, and it was the afternoon of the 20th before the claim had been blazed to his satisfaction.

While Taplin was hurrying to the Recording Office his three men proceeded to stake the claim. Langford put up No. 1 post and remained there until 9 a.m., when he joined St. Amand at breakfast and afterwards assisted in blazing and cutting trails. Stanlick erected No. 3 post and assisted St. Amand in placing No. 2, and the latter also erected No. 4 post, and all of these posts were placed and erected after Taplin had left the claim on his way to Haileybury to record. It would appear that they all had breakfast about 9 a.m., the hour definitely fixed by Langford, and St. Amand says it was broad daylight, and it might have been after 8 a.m. when they had what he called a lunch. He also admits that it took them three or four hours to complete the blazing and make trails after breakfast, so that it would have been noon before the stakes were in place and the boundary lines blazed.

Mr. Taplin was fully alive to the fact that in order to stake a claim and be the first to record it he must use expedition, and adopted plans of procedure which would facilitate the work. He knew that to remain upon the claim until it was properly staked would place him upon equal terms with any other licensee staking the same claim and in that case the race would be to the swiftest. That night it seemed to be a question of the survival of the quickest, and while the method adopted by Taplin was well conceived it could

not be said to be fair to one who staked himself or personally superintended the staking before leaving for the Recording Office.

The one question to be considered is, did Taplin conform to the requirements of the Mining Act? Section 59 of the Act governs the recording of mining claims. It will be observed that a licensee may stake out a claim on his own or any other licensee's behalf, but if on behalf of another licensee, the application must recite the name of the licensee by whom the valuable mineral in place was discovered, and the name of the licensee on whose behalf the application is made, the letter and number of their licenses, etc. The object of the enactment is no doubt to make known to the world not only on whose behalf the staking has been done, but the actual staker himself. As it was not in question and the form of the application appears to be in compliance with the Act, it may be presumed in this respect Taplin had committed no irregularity. The application is a request to be recorded and sets out a short description of the locality, the time of discovery and date, the date of staking and in whose name the claim is to be recorded, and the dimensions of the claim. Appended to the application is a sketch or plan showing the discovery and corner posts and their distances from each other in feet. The application and sketch or plan must be accompanied by an affidavit in form 6 of the Act, which affidavit must be made by the discovering licensee, showing a discovery of valuable mineral with particulars of the kind of ore or mineral discovered, the date of discovery and staking out, and stating 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; also that at the time of staking out there was nothing upon the lands to indicate that they were not open to be staked and that the

deponent verily believes they were so open, and that the staking is valid and should be recorded, etc. The application as required with sketch or plan attached, accompanied by his affidavit, were filed and sworn to by Taplin at or before 9.30 a.m. on the 20th August, 1912.

Was Taplin seized of all the facts he swore to at the time of making his affidavit? It will be remembered that after placing his discovery post, and within a few minutes after 12 midnight he left the claim and did not return to it until between 2 and 2.30 p.m. of the same day. While the four corner posts were placed by his men probably before 9.30 a.m., that morning on their own evidence they had not completed the blazing and marking of the boundary lines until nearly midday, and their operations were continued in the afternoon under instructions from Taplin, who was not satisfied with the completeness of the blazed lines.

The affidavit of discovery does not say "I staked," or that "I staked prior to the claim being recorded," but when one undertakes to depose to facts it must be understood that the facts sworn to are accomplished acts. The application states that the claim was staked out and the lines cut and blazed on the 20th of August, and the affidavit on the back thereof sets out the same particulars. Taplin admitted that he assumed that what he ordered to be done was done, and felt justified in swearing to acts done that he had no personal knowledge had been performed or could safely conjecture had been done prior to the making of the affidavit. The method adopted was a means to an end and he was prepared to take the chance of perjuring himself rather than be defeated in his purpose. The affidavit was untrue and deceptive at the time sworn to. The sketch or plan must have been prepared before the lines were made or the distances properly or accurately measured, and certainly before the staking had been accomplished, and how could he say that there was nothing upon the claim to indi-

cate that it was not open for staking when he had not on that day prior to filing his application gone over the claim. Beyond the fact of the discovery the affidavit was mere conjecture. I believe that Taplin felt assured he could safely make the affidavit, but he courted disaster in doing so. The mere swearing of an affidavit in the form required by the Act can give no valid claim unless the affidavit is true.

The claim had not been staked at the time the application and affidavit were handed to the Recorder and the claim recorded, and therefore I find that the respondent has no valid claim upon the property in question under the above-mentioned staking and application. To find otherwise would be to open the door to false swearing and very loose methods of staking. A licensee must swear to only what he knows at the time to be true and cannot be allowed to assume the fact to be true in order that he may defeat the claim of a more conscientious applicant who has disregarded time in order that he might condition himself to depose to what he personally knew to be true.

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

The disputant T. B. Sloan claims in his dispute filed against Taplin that he is entitled to the said mining lands under discovery, staking and application filed therefor, numbered in the Recording Office as C-961. His discovery was made at 12.01 on the morning of August 20th last, and his discovery post planted 150 feet from Taplin's. He erected the discovery post, also Nos. 1, 3 and 4, and one Mick White planted his No. 2 post. As he went around the claim he blazed odd trees, following a surveyed line which he found around the claim, except between posts 3 and 4, so that I am able to find the demarcations of the claim were well defined. From this discovery post he went to No. 1, and blazed a line between these posts, and

from there around the claim until he reached No. 4, at which point he left for Haileybury to record the claim. A. R. McLaughlin was with Sloan at the time he made his discovery and planted his discovery post, and followed him to where he erected No. 1, but at that point left him as Sloan was travelling too fast for him to follow. Mr. Taplin questions Sloan's staking and his chief objections are that Sloan's No. 1 post had not on the 20th, written upon it the distance from the discovery post, that he had written upon it July 20th, 1912, instead of August 20th, 1912, and that the sketch or plan attached to Sloan's application was incorrect, as his No. 2 post was situate on the easterly boundary line of Gillies Limit, near an iron picket, and not as shown on the plan, five chains to the west thereof, and the further fact that he could not find Sloan's discovery post on that date. Neither Taplin nor St. Amand could find Sloan's discovery post, although they admitted it might have been there, but they did not see it. I accept Sloan's evidence that he made a discovery and erected a discovery post. I am strengthened in this belief because Sloan was an experienced prospector, and on the afternoon of the 20th, when he returned to the claim, he informed Taplin of his staking, and where his discovery was. Mr. Taplin, at that time, could very easily have asked Sloan to take him to it, but he did not do so. If Sloan had not made a discovery and erected a post he would not have been so candid with Taplin, and the latter admits Sloan told him where it was to be found. McLaughlin was present when Sloan put up his discovery post, and held a light while he wrote upon it, but what was written McLaughlin could not remember although Sloan had repeated it to him. On the 21st Taplin made another inspection and found that the distance from the discovery post to the No. 1 had been written on the latter. I have Sloan's positive statement that after he erected the No. 1 post and stepped the distance from it to the discovery post, he

wrote the distance upon the No. 1, and as there is no doubt it had the distance written upon it when Taplin made his scrutiny on the 21st, I must find that it was done at the time of the staking. It is admitted by Sloan his No. 2 post should be on the easterly boundary line of Gillies Limit and not as shown on his plan, but in all other respects his plan is accurate. His explanation of the error is that a Mr. Fisher prepared the plan for him and that he did not realize the mistake until after the application had been filed. The dispute filed by Sloan refers to the south-east quarter of the east half of the south-east quarter of Block 1, Gillies' Limit, which would, from plans produced, embrace the easterly limit line, and his application places his No. 2 post at the south-east corner of Block 1, which would locate it where erected, that is on the easterly boundary line of the limit. It is an error which is not fatal to the validity of the application and is corrected by the application itself, and there has been no suggestion that it proved misleading. Mr. Sloan candidly admits he blazed a tree here and there when following a surveyed line between the corner posts. The object of blazing on the two sides and cutting the underbrush on the boundaries is no doubt to fix the limits of the claim, and I find that what Sloan did in the circumstances in this case was an honest attempt to comply with the intention of the Act. The placing of the words " 20th July " on the discovery post was merely a mistake for the " 20th August," and was not seriously urged by the disputant.

I find there has been substantial compliance with the requirements of the Mining Act as to the staking out by Sloan, and I feel it wiser in this case to extend the elastic properties of sec. 58 of the Act to any irregularities of staking rather than open the property again. I therefore find the staking and application of Sloan to be valid, and he will be entitled to the lands embraced and set out in his application, and

also in his sketch, other than the situation of his post No. 2, which as a fact was placed and is to be found on the eastern boundary line of the limit, not five chains to the east thereof as shown on the sketch or plan filed. As Taplin has been rather unfortunate in not holding the claim he staked the application of the disputant will be allowed without costs.

(THE COMMISSIONER.)

ARMSTRONG v. DWYER.

Dispute—Alleged Prior Discovery—Licensee Staking on Behalf of Another Licensee — False Affidavit — Delay in Filing Dispute.

The disputant erected Nos. 2, 3 and 4 posts and made some blazes. Discovery and No. 1 post were planted by one Enright, a licensee acting on behalf of disputant and so marked. It was intended Enright should record, but on objection being taken by the Recorder, disputant made affidavit of discovery and tendered his application, which was refused as respondent in the meantime recorded an application for the same lands. Dispute was filed alleging prior discovery and absence of discovery and non-compliance with the requirements of the Mining Act by the respondent.

Held, that neither the disputant nor Enright could honestly make the affidavit of discovery, not having a personal knowledge of the facts sworn to. See *Sloan and Taplin* (Godson) M. C. C. 22,—that a discovery must precede the staking; and held also, that the affidavit was untrue. See *Attorney-General of Ontario* v. *Hargraves*, 8 O. W. R. 127; 10 O. W. R. 319; *Collom* v. *Manley*, 32 S. C. R., at p. 378.

Dispute by H. H. Armstrong against mining claim C-1058 in the Gillies Timber Limit, recorded in the name of the respondent Dwyer.

George Mitchell, for disputant.

A. G. Slaght, for respondent.

13th February, 1913.

THE COMMISSIONER.—The dispute filed herein has been transferred to me by the Mining Recorder for trial. (The property in dispute is the north-east

quarter of the west half of the north-east quarter of block 8, situate in the Gillies Timber Limit, and known as mining claim C-1058, in the Temiskaming Mining Division). The Gillies Timber Limit was thrown open to prospectors at midnight of the 19th of August, 1912, and the parties hereto were, with many others, in the vicinity of the limit at that time. The disputant Armstrong had previously known the claim in question, and had arranged with one Owen Enright, a prospector, to assist him in staking and recording the claim. It was arranged that Enright should erect the discovery post at a point previously pointed out to him by Armstrong and blaze a line to the point where the No. 1 post should be erected and plant the post, and then proceed as quickly as possible to the Recording Office at Haileybury to record the claim. In the meantime Armstrong was to proceed with the staking. As Enright had selected a claim adjoining the claim in dispute which he wished to stake for himself, he gave it his first attention and stated that immediately after midnight, about 12.01 on the morning of the 20th, he erected his discovery post on his claim known as 956, put up his corner posts and did the necessary blazing, all of which was completed in 5 or 6 minutes, or at most within 10 minutes, and then crossed to the adjoining claim to assist Armstrong. He admits that it might have been about 12.10 a.m. of the 20th when he put up Armstrong's discovery post, and about 12.13 when he completed a slight blaze from the discovery to the No. 1 post which he placed in position. The discovery post and No. 1 he stated were prepared by him prior to midnight and had been written upon by Armstrong in readiness to be erected or planted in position. Armstrong, in his evidence, said that he did not write upon either the discovery or No. 1 post, but that Enright had done so, and both were emphatic in their evidence as to this point. The posts had written upon them "Staked by Owen Enright for H. H. Armstrong," and their respective license numbers.

They had taken with them to the claim the day before the staking a form of application which Armstrong was supposed to have filled out, and in which it was stated that the discovery had been made by Enright at 12.01 on the 20th of August, 1912, and had attached to it the plan or sketch required by the Mining Act. With this in his possession and immediately after he had put up the No. 1 post Enright left for Haileybury to record. It was arranged amongst the prospectors assembled at the Recording Office waiting admittance to record and the Mining Recorder, that one man should record only one claim, and as Enright had his own claim to record he that evening sent word to Armstrong advising him that he must come in and personally record his claim.

After Enright had left for the Mining Recorder's Office Armstrong proceeded to complete the staking and it was after 3 a.m. when he had made and erected his Nos. 2, 3 and 4 posts and made the necessary blazes, and this being concluded he went to Enright's camp or claim 956 adjoining, where he stayed until it was bright daylight, when he went around his claim to see if everything was in order. At this time he did not see any posts put up by Dwyer, the respondent herein.

At 7 a.m. of the same morning Michael Dwyer and his assistants staked the same claim, and planted his discovery post in the neighbourhood of Armstrong's alleged discovery. Dwyer had known of what he appropriated as his discovery for several years before. Dwyer was with Enright on claim 956, and he states that at 12.01 a.m. of the 20th, Enright was between his discovery and No. 1 posts and from there he went to his No. 4, which would be about 8 or 10 minutes past 12, so that as Enright had to walk from this No. 4 to Armstrong's discovery and then proceed to plant Armstrong's discovery and No. 1 posts, it must have been between 12.10 and 12.15 a.m. before he had erected Armstrong's discovery post.

Prior to 7 a.m. Dwyer had seen the No. 1 post put up by Enright on which was marked 12.01 a.m., staked by Owen Enright for H. H. Armstrong, and that he also saw Armstrong's No. 2 and No. 3 posts, but could not find or locate his No. 4, although he searched in the locality where it should have been. He also looked for Armstrong's discovery post, but could not find it nor could he see any evidence of a blazed line running from the No. 1 post in any direction. John Killoran, who was helping Dwyer stake, saw the post which Enright erected as Armstrong's No. 1 at its position on the north-east corner of the claim, pretty much in an upright position, and this was at 9.30 p.m. of the night of the 19th, and it had written upon it "Staked by Owen Enright for H. H Armstrong," and his license number. At 5 or 6 minutes past 12 o'clock he saw Enright on claim 956, standing behind a tree, where he left him. When going around the claim in question with Dwyer he examined the No. 1 which Enright had put up and found it to be the same stake as he had seen at 9.30 on the previous evening. He also looked for a blaze from the No. 1 to the discovery post but could not find it, nor could he locate Armstrong's No. 4 post, and he states that many other prospectors in the vicinity at the time also looked for the No. 4 post, but could not find it.

R. P. Graham and George Wallingford also gave evidence to the effect that they looked for but could not find Armstrong's discovery post or his No. 4 post on the morning of the 20th, nor could they see any blazes leading from his No. 1 post. Number 1 post was also seen placed in a semi-upright position at the proper corner of the claim by George Sherridan at 9.30 p.m. of the 19th, and he stated he was hired by Dwyer to look around that night, and watch what was going on, and he was firm in his statement that he saw a man who told him his name was Saunders pick

up the No. 1 post which was adopted by Armstrong and drop it back again in its place at about 12.01 on the 20th, and he remained in that place until 6 or 7 minutes past 12, but up to that time Enright had not appeared.

After Dwyer had completed his staking he left for the Recording Office and placed his application on record. It was the evening of the 20th before Armstrong received Enright's message. He left for Haileybury on the morning of the 21st, and met Enright, who handed him the application he had intended recording, and as the application was made out in Enright's name and the affidavit of discovery also, Armstrong wrote his name and license number over Enright's name and license number, made the affidavit of discovery on the back of the application and then tendered it to the Mining Recorder for the purpose of being recorded. As Dwyer had been recorded for the same claim the application was placed on file only.

It was not until the 19th of October, 1912, that Armstrong filed a dispute, and it was Dwyer, the respondent, who took out the appointment for the trial in order to dispose of the dispute. In the dispute notice filed by Armstrong he sets up prior discovery and no valid discovery by Dwyer, and at the trial I allowed him to amend by adding clause (3), as follows—"Because the staking of said Michael Dwyer was irregular, and not in compliance with the Mining Act of Ontario."

On Saturday, the 24th of August, Dwyer went back to his claim in order to place a metal tag upon his No. 1 post, when he noticed that Enright's name had been removed from Armstrong's No. 1. Some days after the 20th, John Killoran found a blazed line running from No. 1 post which was not there on the 20th, and George Wallingford, on the 29th, found Armstrong's discovery post and a blaze which was running in the opposite direction to his No. 1. Both Enright and Armstrong, who were called in

reply, said that they had not altered the original wording on the discovery post or No. 1, nor had they authorized any one on their behalf to do so. To further confuse matters it remained for Barry Webster, who was called in reply by the disputant, to say that he was with Armstrong part of the morning of the 20th and saw his discovery and followed the blaze from No. 1 to the discovery post. He also saw his No. 4 and this was about 3 o'clock in the morning. It was Enright who made the discovery and erected the discovery post, and Armstrong does not pretend to say that he made a discovery that morning at 12.01, or at any time in the morning of the 20th, or that he planted a discovery post. All that Armstrong did towards the staking of the claim was to erect the Nos. 2, 3 and 4 posts and make a few blazes. He was at the south end of the claim when Enright says he put up the discovery post, and Armstrong did not see Enright between the night of the 19th and the morning of the 21st. Even if an arrangement had not been entered into, as Enright alleged, that one man should only record one claim, he could not, as he intended to, have successfully placed Armstrong's application on record. Form 6 of the Act provides the form of the affidavit to be made by the discovering licensee. A perusal of its terms shows how impossible it would have been for Enright to have honestly sworn to the facts therein mentioned. He did not even prepare the sketch nor had he been around the claim to measure the distances or see them measured, nor could he say that the claim had been staked on the 20th, as he left before its completion, or that the claim was open to be staked. Notwithstanding his lack of knowledge he said he had intended recording the claim. A prospector who will deliberately state under oath that he properly staked his own claim on a dark night with the aid of first a candle and then a lantern, within ten minutes, and was prepared to take his oath to facts he was not seized of, must not complain if his evidence

is not upheld when contradicted. I might also add that I was not impressed with the evidence of Barry Webster.

I cannot see how Armstrong has been prejudiced by Enright's failure to record, as he undertook to do something which both he and Armstrong must have known would be dishonest. Section 55 in part says: "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 sec. 59 provides the form of the application and sketch to be furnished the Recorder by the licensee staking out the claim. It is true Armstrong had a previous knowledge of the discovery made by Enright, but he had not made a discovery himself on the 20th, nor did he blaze a discovery post on the discovery appropriated by Enright for him, and the discovery stake was marked by Enright as having been discovered by him for Armstrong, and this post and No. 1 were left with this endorsation on at the time Armstrong filed his application. It was intended that Enright should stake and record for and on behalf of Armstrong, and when it was found this, under agreement entered into, was impossible, Armstrong did not make a discovery and restake the claim as I find he should have done. The same application and sketch that Enright had intended using was eventually used by Armstrong, with the alteration of the name and license number.

How could Armstrong truthfully make the affidavit of discovery and staking he did? He swore that he had made a discovery of valuable mineral in place at 12.01 on the the morning of the 20th, whereas he was at that time at the south end of his claim, and did not see Enright's discovery until some hours later It is an undisputed fact that Enright did not plant the discovery post at 12.01, but at the earliest 12.10 to 12.15 a.m., and even if Armstrong could adopt Enright's discovery and his posts, which I think he could

not, the time of discovery placed on the No. 1 post and sworn to in the affidavit was untrue and known to be untrue by both Enright and Armstrong. Their intention was to mark a time of discovery immediately following the opening of the limit to prospectors that would preclude others from staking the claim. The first discoverer will be protected in his rights, but he must not be allowed to attempt to blanket a claim to the exclusion of another prospector. A prospector might have, say, at 12.05 a.m., seen Enright's stake marked 12.01 and concluded he was too late to stake that particular claim, whereas if the true facts were known he would have been the first discoverer. In *Re Reichen and Thompson* (Price) M. C. C. 88, it was held that procuring the recording of a claim by a false affidavit will invalidate the claim. What I said in *Re Sloan and Taplin* (Godson) M. C. C. 22, "a licensee must swear to only what he knows at the time to be true, and cannot be allowed to assume the facts to be true," applies here.

I find that Armstrong did erect his No. 4 post, but that there was an insufficient blaze from his alleged discovery to his No. 1 post, and that Nos. 1, 2 and 3 posts were also irregularly marked. I also find that Armstrong did not make a discovery of valuable mineral in place at 12.01 on the 20th of August, 1912, as sworn to in his affidavit of discovery and staking, and that the discovery said to have been made by Enright was made not earlier than 12.10 a.m. of the 20th. Discovery must precede the staking, which was not the fact in this case. The affidavit was untrue. See *Attorney-General for Ontario* v. *Hargraves*, 8 O. W. R. 127, confirmed in Court of Appeal, 10 O. W. R. 319; also *Collom* v. *Manley*, 32 S. C. R., at page 378. I therefore find the Armstrong staking invalid, and his dispute filed herein should be dismissed.

It now remains to dispose of Armstrong's attack upon Dwyer's discovery and staking. Although insufficient discovery was alleged, no evidence was tend-

ered in support of that contention, and as I have no reason to disbelieve the affidavit of discovery sworn to by Dwyer and placed upon record, I therefore find he had a sufficient discovery within the meaning of the Act.

The only irregularity of staking brought out by counsel for the disputant was adduced under cross-examination of John Killoran, who admitted that the number on No. 3 post was placed towards the claim. Section 54 (b) requires the number to be placed so that it shall be on the side of the post towards the post next following it in order named.

I find that this is not such an irregularity as should be allowed to invalidate the staking and inasmuch as there was substantial compliance with the requirements of the Act I must hold that the application and staking of Dwyer are valid and should remain upon record. A disputant should promptly bring his dispute to trial, otherwise he may improperly encumber the record. In this case the application was filed on the 21st of August, and the dispute not until the 19th of October, and then it only came to trial through the respondent Dwyer applying for an appointment for the trial of the issue. Everything considered, the dispute will be dismissed with costs.

(THE COMMISSIONER.)

(THE APPELLATE DIVISION.)

5 O. W. N. 8.

RE OLMSTEAD AND EXPLORATION SYNDICATE OF ONTARIO, LIMITED.

Dispute as to Proper Boundary Lines—Application and Sketch—Certificate of Record.

Held by the Commissioner, the fact that the locality of the claim is stated in the application as being "North-west side of Lady Dufferin Lake," is evidence that the west shore was intended as the eastern boundary. The stakes themselves are public notice of the area embraced, and it was clearly indicated by one of the stakes that the distance from No. 2 to 3 post was twenty-five chains. The Mining Recorder treated the claim as extending to the river and so marked it on his office map, and there was the further fact that the line from No. 1 to No. 2 post was not blazed.

Held, also, that a certificate of record having been issued, and while it might not be deemed to quiet the title to a boundary line, it should be considered in conjunction with the other facts in the case.

On appeal to the Appellate Division (5 O. W. N. 8)—held, allowing the appeal that—the foundation of the right which a staker acquires or may acquire is the claim which he files with the Recorder, assuming, of course, that he has complied with the Act as to discovery, staking, etc., and therefore the fact that on the map in the office of the Recorder, the claim is shewn as extending to the river, cannot give a right to land not included within the claim as filed.

For the same reason the granting of the certificate of record does not assist the respondent. It is final and conclusive evidence of the performance of the requirements of the Act, except working conditions in respect to the mining claim up to the date of the certificate, and thereafter the mining claim is not, in the absence of mistake or fraud, liable to impeachment or forfeiture except as expressly provided by the Act.

That the certificate contains no description of the claim but refers to it only by its number. To ascertain what the area of the claim is, reference must be had to the application and sketch, and it is the claim as shewn on them in respect of which the provisions of sec. 65 can be invoked.

Proceedings by the Olmstead and Exploration Syndicate of Ontario to establish eastern boundary of mining claim 3145 in the Gowganda Mining Division.

J. Lorn McDougall, for disputant.

J. P. Vander-Voort, for respondent.

18th February, 1913.

THE COMMISSIONER.—What is the eastern boundary of mining claim 3145, situate in the Gowganda Mining Division, also known by its survey number as T.C.-384, is the question to be decided in this case.

The action is brought by George Olmstead, who staked mining claim G.G.-3498, referred to as H.R.-722, against the Exploration Syndicate of Ontario, Limited, to establish as the true boundary line between T.C.-384 and H.R.-722 as being a straight line drawn from the No. 1 to the No. 2 post of claim 384, and not the shore line of Lady Dufferin Lake. On the 22nd day of January, 1909, Neil Christie staked claim 384 and in that part of his application filed where the locality of the claim is required to be set out referred to it as being "north-west side of Lady Dufferin Lake." The length of the claim is given as 20 chains by 20 chains. A sketch or plan which is required to be filed with the application was attached thereto, and the claim recorded. The application and sketch or plan must shew the locality indicated by some general description and such other information as will enable the Recorder to lay down the claim on his office map; sec. 59 (1). The Mining Recorder at Gowganda accepted the application and sketch or plan as being sufficiently explicit as to locality and otherwise, and placed the claim on his office map as having its eastern boundary as Lady Dufferin Lake. A certificate of record was granted on the 22nd day of August, 1909.

On the 5th of July, 1910, A. S. Perkins staked mining claim 3498, or H.R.-722, making his western boundary the straight line between Nos. 1 and 2 posts of 384, taking in the waters of Lady Dufferin Lake and extending to the east side thereof. The discovery of valuable mineral in place on 722 is situate on the east shore or side of the lake, and on 384 a distance of 150 feet south-westerly from the No. 1 post, so that so far as the discoveries are concerned, they are not

in question in this dispute. When Perkins had completed his staking he presented his application to the Recorder, who refused to record it, as he stated there was no open land between the easterly boundary of 384 and the lake, contending that the claim had as its eastern boundary the west shore of the lake. In view of the attitude of the Recorder, Perkins had G. F. Summers, an Ontario Land Surveyor, survey his staked area, which was done about the 18th of August, 1910, and when this survey was shewn the Recorder the latter placed the claim on record, although he did not change his office plan or disturb the situation on it of claim 384. Before making the survey Summers read Christie's application and plan, inspected the corner posts, and found that as he had in his application described the claim as being 20 chains by 20 chains and his No. 2 post 27 feet east of the shore line of the lake where vegetation ceased, and in the absence of a blazed line from Christie's No. 1 to his No. 2 post, he ran a straight line from Perkins' Nos. 4 and 3 posts, which were at Christie's Nos. 1 and 2, and made that the western boundary of claim H.R.-722. The effect of drawing a straight line from Christie's Nos. 1 and 2 or Perkins' Nos. 4 and 3 left a strip of land to the east thereof and to the west of the lake, which at its widest point where it jutted out is 330 feet, and this piece of land or fraction is now in dispute. If Christie's application and sketch can be read so as to shew the westerly side of the lake as his eastern boundary, then the fraction in question belongs to him.

It will be noticed Perkins did not stake the land in question until nearly a year and a half after Christie had placed claim 384 on record, and in the meantime Christie and his assignees proceeded to work the claim, securing a certificate of record thereto, and having applied for a lease of the ground he caused Thomas G. Code, O.L.S., to make a survey thereof. Mr. Code surveyed this and other contiguous claims

at the same time for the defendant company, and completed his plan about the 1st of September, 1909. When upon the ground he found that Christie had placed his No. 1 post about 40 feet and his No. 2 post 27 feet west of the west shore line of Lady Dufferin Lake. He also noticed that a blazed line had not been made between these posts, as the Mining Act requires if it was intended to be made a boundary. Taking into consideration the application and sketch, and the situation of the posts in the absence of a blazed line, he concluded that the western boundary of the lake was the original boundary of the claim, and so surveyed it, marking on the ground lines in an easterly direction to the lake from the No. 1 and No. 2 posts. On his plan, exhibit 5, put in at the trial, he shows how he connected the No. 1 and 2 posts following the shore line of the lake. He did not think the posts were too far away from the shore line to estop Christie from making the western side of the lake one of his boundaries, as the shore had a gentle and continuous slope, and he invariably placed his posts or monuments some distance from the water line in order that they would not be washed away by the action of the water. While strictly speaking there is no such thing as a shore in non-tidal waters, it is used here to denote highwater mark or where vegetation ceases. On the sketch filed by Christie he shows the four corners of his claim and the direction of his discovery, and he connects all his posts by a straight line. The line drawn between Nos. 1 and 2 posts shows the west shore of the lake to touch at the No. 1 post and project into claim 384, continuing in a southerly direction, where it comes east again, leaving the claim a short distance north of his No. 2 post.

The correct survey of his claim shows that the shore line touches or is immediately at his No. 1, juts eastward for a short distance, then projects westward on claim 384 for a short distance, and then leaves the claim and extends to, at its widest point, 330 feet

east of a straight line between posts Nos. 1 and 2 of claim 384, again striking in a westerly direction at the position of No. 2 post. In the abstract of claim 3145 or 384 it is shown as being regular in its boundaries, but this of itself, being the act of the Recorder, and not so mentioned in the application other than that it is described as being 20 x 20 chains, would not be binding on the recorded owner. On his No. 2 post Christie had written or caused to be written, "25 chains west to No. 3," and in this respect his actual staking contradicts the dimensions given in his application, but is some evidence of his intention to make it an irregular claim.

It is contended by the claimant that Mr. Code should have run a straight line from the No. 1 to the No. 2 post of claim 384, as required by sub-sec. 2 of sec. 113 of the Mining Act, and that if Christie had intended to stake to the west side or shore of the lake he should have put up witness posts as indicated by sec. 54 (2). It is further argued that he is estopped from claiming the west shore or side of the lake as his eastern boundary line inasmuch as he drew on his plan a straight line connecting his No. 1 and 2 posts, and in his application described the claim as being 20 x 20 chains, which in effect would make it a regular claim.

"The intention of the parties must be ascertained from the instrument itself. Parol evidence is only to be resorted to to show the circumstances under which the deed was made to define technical terms or to explain latent ambiguities:" 2nd ed. Am. & Eng. Encyc. of Law, page 795. No attempt to introduce parol evidence in explanation was made by the respondent, so that my finding will have to be based upon what I consider the application and sketch to mean, having in view the situation of the stakes and other appurtenant facts.

Both the surveyors admitted they had made shore lines boundaries of claims; Mr. Code contending that

not having found a blazed line from Christie's No. 1 to his No. 2 post and their situation to the shore line, he was justified in surveying to the shore. He stated he invariably planted his survey stakes a sufficient distance from the water's edge in order that they would not be disturbed by the action of the water, and the posts in this case were properly planted to indicate to his mind an intention on Christie's part to use the shore line as a boundary. In reply to this contention Mr. Summers concluded from a reading of the application and sketch that if Christie had intended to stake to the water's edge he should have planted witness posts at the north-east and south-east corners of the claim, indicating on them where his No. 1 and 2 should be, and then a straight line would be drawn or shown on a sketch from the No. 1 to the No. 2 post. I do not agree with his reasoning. Witness posts are to be planted where the nature or conformation of the ground renders the planting of a post impracticable. It was not impracticable in this place if Christie wished to stake to the water's edge. Neither do I agree with the contention that a straight line must always be run between the posts. It was admitted irregular boundaries are sometimes made the boundary of a claim, and that under certain circumstances to insist upon a surveyor running a straight line would preclude a licensee from obtaining a particular piece of land properly staked and applied for: see also sec. 52.

It must be borne in mind that Christie staked in January, and at that season of the year he could not, with any definiteness, locate the true shore line, and as the shore sloped towards the stakes the fact that he placed his No. 1 about 40 feet and the No. 2, 27 feet from what the surveyors speak of as the shore line, would not of itself, in my opinion, be any evidence of his intention to leave the fraction in question open. It is reasonable to believe that in staking as close to the shore as he did he would not purposely

and knowingly leave a small piece of land between his stakes and the lake front open. The sketch to my mind shows an intention to stake to the water's edge. While posts Nos. 1 and 2 have been connected by a straight line the shore line is shown to touch at or to project over into claim 384, which would indicate that the applicant thought he had staked to the lake, and that the shore line dipped westward after leaving his No. 1 post on to his property and left it at or near his No. 2. If he had not drawn the line from 1 to 2 on his sketch his intention would have been more apparent, but because he has and it is afterwards learned by a survey made that instead of the shore touching or being in places on his property, it is as a matter of fact mostly to the east thereof, that should not be allowed to take from him what he thought he had staked, as I find no intervening rights have been prejudiced. The No. 2 post, which had written upon it 25 chains west to No. 3, was another indication of the staker's intention to make the claim an irregular one, and the shore line his eastern boundary. This stake and what was written upon it was seen by Mr. Summers, who surveyed for Perkins, through whom the claimant claims, and who was then upon notice as to Christie's intention. Plainly blazed lines and the cutting of the underbrush along the boundary lines of the claim are required by the Mining Act to be done in order to clearly indicate the outlines of the claim. It is admitted by Perkins that Christie had not blazed from his No. 1 to his No. 2 post. Is that not strong evidence of Christie's belief that he had staked to the shore and that the shore line would be his boundary? If not then it could not be said Christie had properly staked his claim unless sec. 58 of the Act is applied in relief of the omission.

As was said in *Re Sinclair*, Mining Commissioner's Cases, page 185, "I am satisfied that 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 no other ordinary miner or prospector would think of attempting to take up such a margin;" and in *Re Clarke* v. *Docksteader,* 36 S. C. R. 622, " Every reasonable intendment should be made to uphold the validity of a claim;" and in *Re Blye* v. *Downey* (Price) M. C. C. 124, — " Evidence of identification should not be so stringently applied as to disappoint the honest actual discoverer," are applicable here.

The fact that the locality of the claim is stated in the application, as being " North-west side of Lady Dufferin Lake," strengthens my opinion that the west shore was intended as his eastern boundary. If not the description probably would have been more definite and stated that his No. 1 was so many feet west of the shore of the lake. The further description of the claim as being 20 x 20 chains is incorrect, but not of itself fatal. The stakes themselves are public notice of the area embraced and it is clearly indicated by one of the stakes in question that the distance from No. 2 to 3 was 25 chains. The application was loosely drawn and the sketch itself not perfect, and the Mining Recorder might very properly have rejected it, but he, an experienced officer accustomed to the illiterate efforts of some of the prospectors, had no hesitation in accepting the application and placing the claim on his office map as going to the water's edge. It cannot be said Perkins or his assignee has been taken by surprise. They were fully aware of Christie's intention and that of the Recorder, and in its face insisted in staking the fraction and became recorded therefor. A further fact has to be considered for what it is worth, and that is a certificate of record has been granted to the recorded owner of claim 384. This certificate is issued as some guarantee of title, and while it may not be deemed to quiet the title to a boundary line, at the same time it should have passing notice in the particular circumstances of this case. I

find that there has been substantial compliance as near as circumstances would reasonably permit with the requirements of the Act as to the staking out of mining claims 3145 or T.C.-384. I am expected to give my decision upon the real merits and substantial justice of the case, and in reaching the conclusion that the application and sketch filed by Christie, together with the situation of his stakes and the absence of a necessary blaze sufficiently identify the land being taken in, and that his eastern boundary is the shore line or low-water mark of Lady Dufferin Lake, I feel I am fulfilling my obligations in the matter. The claim as now surveyed covers 50 acres. Upon application for a lease of the property the claim can be reduced to the regular size or area of 40 acres if the Minister so thinks advisable. There was no mention of discovery of valuable mineral on the piece of land in contest, and the only good purpose it would serve the claimant would be as a location for a shaft in order to further permit him to work some veins on claim 3241, which is across the lake, which could easily be arranged with the owners of claim 384.

In reaching my conclusion herein I have not been guided by what either Mr. Code or Mr. Summers said in reference to their opinion of what the proper interpretation of the agreement and sketch might be. The case is very arguable from both sides and has given me considerable thought in reaching a conclusion, and inasmuch as Christie was very careless in making out his application and sketch, I will not allow costs to the respondent.

I find that the eastern boundary line of claim 3145 or T.C.-384 is not a straight line running between Nos. 1 and 2 posts thereon, but the shore line or west side of Lady Dufferin Lake, more particularly indicated by a green line shown on the plan or sketch filed by G. F. Summers, O.L.S., dated August 18th, 1910, and marked exhibit 4 to this issue, and the application of George Olmstead here is therefore dismissed.

From this decision the appellant appealed to the Appellate Division.

J. Lorn McDougall, for appellant.

W. R. Smyth, K.C., for respondents.

The appeal was heard by MEREDITH, C.J.O., MCLAREN, MAGEE and HODGINS, JJ.A.

18th February, 1913.

MEREDITH, C.J.O.—The controversy is as to what is the eastern boundary of the mining claim of the respondents.

The claim as applied for is shewn by the sketch which accompanied the application to be rectangular in form and the "length of the outlines" of it is stated to be 20 chains by 20 chains, and the easterly boundary as shewn on the sketch, is a straight line from No. 1 post to No. 2 post.

It is, however, contended by the respondents that the easterly boundary is not this straight line, but that it is the westerly margin of the east branch of the Montreal River, called in the application "Lady Dufferin Lake," which is distant but a short distance easterly of the straight line, and the Mining Commissioner has adopted that view, being of opinion that the application and sketch, and the work on the ground, indicated that the applicant intended to include in the claim he was making the land lying between the straight line and the margin of the river.

The reasons which led the Commissioner to that conclusion were: (1) That the claim is stated in the application to be "north-west side of Lady Dufferin Lake;" (2) that the application was loosely drawn, and although it described the claim as being 20 chains by 20 chains, it was clearly indicated by one of the stakes that the distance from No. 2 to No. 3 was twenty-five chains; (3) that the Mining Recorder treated the claim as extending to the river, and so marked it on

his office map, and (4) that the line from No. 1 to No. 2 post was not blazed.

I am, with respect, of opinion that the Commissioner came to a wrong conclusion, and that the true eastern boundary of the respondents' claim is a straight line drawn from No. 1 post to No. 2 post.

In addition to the statement in the claim that it is 20 chains by 20 chains, and the fact that the sketch which accompanied it shews it as a rectangular figure, there is the cogent circumstance that, so far from the sketch shewing that the river or lake is the eastern boundary, it shews the contrary. It was supposed by the staker that there was a bend in the river extending into the rectangular figure, and it is plain that he intended that the claim should include that part of the river which lay within the figure. The fact that instead of there being a bend, the land extended some distance to the east of the rectangular figure, is immaterial on this point of the case, viz., what the application and sketch shewed was intended to be included in the claim. These circumstances, in my opinion, are much stronger against the respondents, than are the circumstances relied on by the Commissioner.

As I understand the Mines Act, the foundation of the right which a staker acquires or may acquire is the claim which he files with the Recorder; assuming, of course, that he has complied with the Act, as to discovery, staking, etc.; and therefore the fact that on the map in the office of the Recorder the claim is shewn as extending to the river, cannot give a right to land not included within the claim as filed.

For the same reason the granting of the certificate of record does not assist the respondents. It is final and conclusive evidence of the performance of all the requirements of the Act except working conditions in respect to the mining claim up to the date of the certificate, and thereafter the mining claim is not,

in the absence of mistake or fraud, liable to impeachment or forfeiture, except as expressly provided by the Act.

It will be observed that the certificate contains no description of the claim, but refers to it only by its number. In order to ascertain what the area of the claim is, reference must, therefore, be had to the application and sketch; and it is the claim as shewn on them, and that only, in respect of which the provisions of sec. 65 can be invoked by the appellant.

I would, therefore, reverse the judgment or decision of the Commissioner, and substitute for it a declaration that the eastern boundary of the respondents' claim is a straight line drawn from No. 1 post to No. 2 post, and I would make no order as to the costs of the appeal.

McLaren, J.A., agreed.

Magee and Hodgins, JJ.A., also agreed and referred to the former Commissioner's views as expressed in *Re Green*, Mining Commissioner's Cases, page 293.

Appeal allowed without costs.

Note.—In view of this decision sec. 59 was amended by adding sec. 2, s.-s. (5), 4 Geo. V. ch. 14—See also *Neilly* v *Lessard*, 11 O. W. N. 322.

(THE COMMISSIONER.)

F. M. CONNELL AND ARTHUR COCKERAM v. W. H. WRIGHT.

Appeal from Decision of Mining Recorder—Area of Mining Claim—Boundary Line — Discovery — Validity of — Fraction — Trial de novo.

In unsurveyed territory not in a Special Mining Division a claim even if irregular in form shall not exceed forty acres and its boundaries must be connected by straight lines when possible. The stakes are the outward and visible sign of the four corners of the land intended to be embraced by the staking, and the application and sketch should be in accord with the actual staking. To allow a licensee to place his stakes a distance of five chains from where by his application and sketch they were shewn to be and where the nature of the land permitted the stakes being placed where they should have been if his staking and application were to agree, would create uncertainty and encourage unnecessary litigation.

Held, that the south boundary of the claim was a straight line between the Nos. 2 and 3 posts and not the short line as indicated on the sketch.

The respondent having staked the area in dispute and his discovery being within that area, and attacked by the appellant—held, discovery post was not erected on a shewing of valuable mineral in place and mining claim ordered cancelled.

Appeal by Arthur Cockeram from the decision of the Mining Recorder dismissing his dispute entered against mining claim L-2645, recorded in the name of the respondent W. H. Wright.

A. G. Slaght, for appellants.

W. A. Gordon, for respondent.

18th April, 1913.

THE COMMISSIONER.—This is an appeal by Arthur Cockeram from the decision of the Mining Recorder of the Larder Lake mining division, dismissing his dispute as against W. H. Wright, the present recorded holder of mining claim L-2645.

It is contended that mining claim L-2645 is illegal or invalid, as being in unsurveyed territory it exceeds in area the prescribed 40 acres, that its southern boundary should be a straight line drawn between

posts Nos. 2 and 3, and not the shore line of Kirkland Lake, and that the provisions of the Mining Act as to staking, blazing and the placing of monuments have not been complied with by Wright.

It is also claimed by the disputant Cockeram that he is entitled to be recorded for that part of the lands now included in the said mining claim L-2645 which lies south of the said straight line between posts 2 and 3 and north of the northern boundary of mining claim L-2242.

The dispute was first heard by the Mining Recorder at Matheson, and his decision was given on the 3rd day of March last, dismissing the dispute.

Upon the appeal before me from the decision of the Recorder, the case was retried pursuant to sec. 133 (2) of the Mining Act.

The claim in dispute is situated in the unsurveyed township of Teck, in the Larder Lake mining division, and mostly under the waters of Kirkland Lake.

The claim was staked by the respondent W. H. Wright on the 26th day of August, 1912, at 10.45 in the morning. In his application on file in the Recording Office he describes the claim as staked to contain forty acres or thereabouts, and the outlines thereof to be as follows:—

"I to W. P. 3 chains south, thence easterly along lake shore to W. P.; thence south across lake 17 chains to No. 2 post at No. 1 post of L-2242; thence west following lake shore to 3; thence north 20 chains or thereabouts to No. 4, along boundary of L-1238 and part of boundary of L-2242; thence 6 chains to 1."

His No. 2 post is placed on the eastern shore line about 5 chains north of the south-eastern shore line of the lake, and his No. 3 post on the western shore line about 8 chains from the south-western limit of the lake and nearly opposite No. 2 post. If a straight line were drawn from the No. 2 to the No. 3 post as being the southern boundary of the claim the area thereof would be 44.6 acres, and by extending the southern boundary to the shore line of the lake the area

would be 50.5 acres, so that the portion of the lake now in dispute between a straight line from No. 2 to 3 post and the shore line would be 5.9 acres. Of this 5.9 acres four have been staked by Cockeram, and are now claimed by him.

The claim applied for by Wright is admittedly in excess of 40 acres, and if the area to the south of Wright's No. 2 and 3 posts subsequently staked by Cockeram and consisting of 4 acres, and the 1.9 acres again to the south thereof, and being a portion of the bay on the extreme south-east and south-west limits of the lake which, it is said, are included in mining claims 1557 and 16635, were deducted, Wright would still have 44.6 acres.

His intention as shown by his application was to make his southern boundary the south shore line of Kirkland Lake. His staking is inconsistent with his application in regard to his southern boundary. The position of his No. 2 post is 5 chains north, and his No. 3 post 8 chains north of the southern boundary of the lake at those points. On Mr. Wright's No. 2 post was found inscribed, amongst other essentials, "20 chains west to No. 3." He thought he had also written upon it, "along shore line," but when he examined the posts in February following the staking those words, if they had been written upon the post the day the claim was staked, were not then legible. In February, 1913, John A. Brown made a survey of the claim and examined No. 2 post, but did not find the words "along shore line" upon it, and further stated that he made it a practice when scrutinizing the staking to note in a memorandum book any unintelligible writing upon the posts examined, but in this case although the post was weather-beaten he did not notice any undiscernible words or letters that would indicate Wright had written the words he believed he had. From Wright's No. 3 to his No. 4 post would be about 22 chains, and following the shore line the distance between his No. 2 and No. 3 posts

would be about 30 chains. The dimensions of a regular claim of 40 acres would be 20 by 20 chains.

Previous to the staking of the claim Wright had camped at the position of his No. 3 post and was familiar with the shore line of the lake. His sketch appended to his application, which he says he prepared while on the claim, indicates that he was aware of the two bays at the extreme south-east and south-west of the lake, and he was by his familiarity with the location thereby enabled to select a suitable and proper place for his southern boundary stakes. He admits he could have placed his Nos. 2 and 3 posts farther south on the shore line of the lake, but did not want a straight line between the posts to conflict with mining claim 2242, which extends up to the south shore line of the lake.

The prescribed area of a mining claim in unsurveyed territory not in a special mining division, shall be a square of 40 acres; sec. 50 (a). The boundaries of an irregular claim in unsurveyed territory shall be made to conform as nearly as practicable to the prescribed form and area, and shall not exceed the prescribed area; sec. 52 (1). The second diagram shown in sec. 54 (4) of the Mining Act indicates how an irregular claim should be staked. The method to be adopted in surveying a claim is explained in sec. 113 (2), and it is there indicated that the posts must be connected by running straight lines. I take this section to mean when practicable.

The intention of the Act is therefore plain that in unsurveyed territory a claim, even if irregular in form, shall not exceed 40 acres in area, and its boundaries must be connected by straight lines when possible. If it is found after a survey is made that the lands staked exceed the prescribed acreage the Minister may direct the issue of a patent for a portion thereof not exceeding the prescribed acreage: sec. 116.

I find as a fact that mining claim L-2645 staked by W. H. Wright exceeds 40 acres, that it was pos-

sible to have placed or erected the No. 2 and No. 3 posts at a point more southerly on the shore line of Kirkland Lake than where placed, which would have been more consistent with the lands asked for in the application, that there was not written on the No. 2 post the words, "along the shore," and that from Wright's familiarity with the contour of the shore line at its southern end the placing of his Nos. 2 and 3 posts at an approximate distance of 5 and 8 chains from where he might have placed them, if he desired his stakes to be consistent with his application, was careless, inexcusable and misleading. His discovery is at the north-eastern corner of the claim, so it does not come in question in the excess area.

The process of staking consists of three essential elements, namely, discovery and staking, followed by a written application and sketch attached thereto, the latter showing discovery post, corner posts and the witness posts, if any, and their distance from each other. The stakes are the outward and visible sign of the four corners of the land intended to be embraced by the staking, and the application and sketch, so far as they are required to do so by the Mining Act, should be in accord with the actual staking. To allow a licensee to place his stakes a distance of five chains or more from where he by his application indicated they should be where the nature of the land permitted the stakes being placed where they should have been, if his staking and application were to agree, would create uncertainty and permit undue litigation. Wright could have placed a witness post at the points where he has now his Nos. 2 and 3 posts and there indicated where he intended the said posts to be on the southern shore line of the lake, but he did not do so.

Having in view the intention of the Act that a claim staked as in this case should not exceed 40 acres, I can best carry it out by making his southern boundary a straight line between his No. 2 and 3 posts.

His discovery is well within such boundaries. His two south posts are inconsistent with what he seeks to make his southerly line, as expressed in his application, and there was no reason why his posts should not have been so planted that his written intention would have been consistent with his staking. A prospector going upon the ground would naturally think there was open ground south of a line between his No. 2 and 3 posts. To learn otherwise would necessitate a visit to the Recording Office. It was also said by Mr. Brown, the surveyor, that if Wright were allowed to take in the southern shore line of the lake his staking would conflict with mining claims 1557 and 16635 and include 1.9 acres of those claims. I believe Wright felt that he had not staked or asked for more than the prescribed 40 acres, nor do I find that having staked or applied for more than 40 acres his staking is necessarily invalid, as sec. 116 of the Act must have been intended to serve some useful purpose in such an event.

Having in mind all the facts of the case I must find that the southern limit of the claim should be a straight line drawn between the No. 2 and 3 posts as erected and not the lake shore as mentioned in the application of W. H. Wright.

I reluctantly disagree with the decision of the Mining Recorder, who has had much practical experience, but I feel that the Mining Act will be best complied with and the merits and substantial justice of the case extended by fixing the southern boundary of the claim as aforesaid, and by allowing the appeal to that extent.

Having established the southern boundary of the claim staked by Wright, the fraction to the south thereof consisting of some 4 acres, more or less, staked by the appellant Cockeram, has now to be considered.

On the 15th of February, A.D. 1913, Cockeram believing that his south boundary should be a straight

line between his Nos. 2 and 3 posts, staked about 4 acres to the south, making a line between Wright's Nos. 2 and 3 posts his northern boundary and the north boundary line of mining claim 16635 his southern boundary, so that his Nos. 1 and 4 posts were at or near Wright's Nos. 2 and 3. His discovery post is said to be 1,250 feet from his No. 1 and is shewn on his sketch as being within the waters of Kirkland Lake on the west side thereof. The respondent Wright attacked Cockeram's discovery. The latter relied upon his affidavit of discovery filed with his application. The facts are that the discovery was alleged to have been made on the 15th of April, 1913, at 4 o'clock in the afternoon, and the discovery post placed through a hole in the ice at a point from 8 to 13 feet from the water line, or at any rate some feet from the shore in the waters of Kirkland Lake. In his affidavit of discovery Cockeram swore he found gold-bearing quartz. I have no evidence from him or on his behalf as to how the discovery was made or of its exact nature, and am asked to find a sufficient discovery on his sworn affidavit, made at the time of the staking. In February of this year Wright made an inspection of Cockeram's discovery post and found it standing on the ice frozen in about 8 to 12 feet from the water line of the lake. He took with him Charles A. O'Connell, an engineer in charge of a mining company in the vicinity. They used a shovel, pick and iron bar about 5 feet long with which they made a hole through the ice at the base of Cockeram's discovery post, and then probed in an endeavour to find rock beneath the discovery post. Wright said the ice was 2 feet thick at that point, that there were 10 inches of water and that there were 2 feet of mud, and that he had to put his bar down that depth before he struck anything solid, and what he did strike he thought was a boulder and not solid rock. As O'Connell had been taken there for an express purpose by Wright, he was more particular in his measurements, and stated that the ice was

27 inches thick, water 18 inches deep and no mud, nor could he strike rock, and he did not believe that Wright struck rock. He was also able to measure the length of the discovery post by placing the bar underneath it, so it is apparent that at that date the discovery post was not standing on the bottom of the lake. On behalf of Cockeram one N. L. Bouzan was called and his evidence was that it was three feet from the top of the water to the bottom of the lake at the point where the discovery post was, and that with an iron bar 4 feet long he was able to strike what he thought was bed rock. He based his judgment that it was bed rock from the jar of the steel when struck. Upon cross-examination he would not say it might not have been a boulder, but if so it was a big one. This investigation was made about, he thought, 8 feet from the shore. At a point 2 feet from the discovery post he again found rock, but did not find any mud at either point of investigation.

On the west side of the shore line and about opposite this water lot is another mining claim with a well-defined vein called the Hughes' vein, which Mr. O'Connell had seen and thought it had been stripped to within 25 feet of the water. The vein ran in an easterly direction towards the lake, but not in a straight line. The respondent Cockeram sought through O'Connell to shew that their vein, if it continued as far as his discovery post, would strike it, but with this contention O'Connell would not agree, stating that it would be mere chance to locate the trend of the vein in that way, and that it might cross Cockeram's discovery post, stop before reaching it, or go in another direction entirely when it reached the lake. Even if rock bottom was reached there is nothing before me to show that it was "valuable mineral in place."

The discovery post must be erected or planted upon an outcropping or showing of valuable mineral in place at the point of the discovery. In view of the evi-

dence of Wright and O'Connell, and even assuming that Bouzan did strike rock, what evidence is there before me that Cockeram's discovery post was planted on a showing of "valuable mineral in place?" It is true I have his sworn testimony that he discovered gold-bearing quartz at the point where his discovery post was planted, but in view of the attack made upon the discovery by Wright and the testimony of Mr. O'Connell, the burden of proof shifted back to Cock eram, and he has not satisfied it.

On the evidence I would have to find his discovery post was not erected on a showing of valuable mineral in place; in fact I would have to go so far as to say his post did not stand upon rock or land, but was a projection through the ice into the water beneath without reaching the bottom of the lake. It is quite apparent to me that Cockeram thought the Hughes vein extended into the lake and placed his discovery post at a point in the lake where he believed the vein would strike it. As his discovery was called in question it is my duty to scrutinize it carefully, and if the discoverer does not think it proper to fortify his affidavit of discovery and meet the oral testimony of others, he cannot complain if under the facts in this case his discovery is doubted.

The first element of staking is discovery and this is properly so in order that the claim shall not be blanketed or speculation encouraged. If Cockeram had not been sure of his discovery he could under the terms of sec. 56 have placed prospecting pickets where he believed his discovery to be and then proceeded to investigate his apparent discovery. This he did not do, but appropriated the water claim on an alleged discovery, which I believe he only thought he had. There must be an actual discovery before the claim can be staked out or recorded, and belief of the locatee is not sufficient. This has been frequently decided by the learned Mining Commissioner who preceded me.

I find that the appellant Arthur Cockeram did not make a discovery of valuable mineral in place as required by the Mining Act of Ontario, and his staking is therefore invalid, and I direct that his application now on file for the fraction in question be removed from the files of the Recording Office and cancelled.

And I further find that the southern boundary of mining claim L-2645, as recorded by W. H. Wright, is a straight line shown by a survey running between his Nos. 2 and 3 posts and not the shore line of Kirkland Lake, as mentioned in his application therefor, and the appeal of the said Arthur Cockeram to this extent is therefore allowed.

Success being divided I make no order as to costs.

(THE COMMISSIONER.)

LEDYARD v. POWERS AND ABODE.

Unsurveyed Territory—Lands Staked not as Applied for—Faulty Staking—Priority—Affidavit of Staking — Personal Knowledge Required.

The lands staked being situate in the Gillies Timber Limit in the Coleman special mining division and not having been surveyed into quarter sections or subdivisions within the meaning of section 51 (e) of the Mining Act, it was held to be unsurveyed territory. The situation of the stakes and the locality of the two claims being shewn to the satisfaction of the Commissioner, the fact that the claims as staked were not altogether as applied for did not invalidate them (Waldie and Mathewman (Price) M. C.C., at 454). One of the applicants having no personal knowledge that the staking had been completed at the time he filed his application, the affidavit of discovery and staking was deceptive and bad. Only the person who actually stakes the property upon the ground or who, at least, personally superintends the staking, is intended or authorized or in any way justified in making an affidavit of discovery and staking (*In re McNeill* v. *Plotke* (Price) M. C. C. 144).

Dispute entered by H. R. Ledyard against mining claim 996-C alleging lands staked not as applied for,

confliction with subsisting claim 939-C and priority of discovery.

G. G. T. Ware, for Ledyard, the disputant.

A. G. Slaght, for respondents, Powers & Abode.

23rd April, 1913.

THE COMMISSIONER. — This dispute was transferred to me for trial by the Mining Recorder at Haileybury.

The land in dispute is part of block 8, situate in the Gillies Timber Limit, in the Coleman Special Mining Division. The notice of claim or dispute filed by H. R. Ledyard in substance sets up that M. P. Powers, the recorded holder of mining claim 996-C, having applied for the north-east quarter of the west half of the south-east quarter of block 8, in the Gillies Limit, is only entitled to what he asked for in his application and not what he actually staked, and that his staking is bad in so far as it conflicts with mining claim 939-C, staked by C. G. Titus, who applied for the north-west quarter of the west half of the south-east quarter of said block 8; that mining claim 939-C has priority of staking, and recording over claim 996-C, and that if the latter claim had been described as it was staked, or partly staked out, the application would have been refused by the Recorder as Titus was already recorded for the same land.

On the 20th of August, 1912, C. G. Titus filed an application in the Recording Office at Haileybury for the north-west quarter, etc., and his affidavit fixed the time of his discovery as 12.01 a.m. of the same day. His application was received and given filing No. 939. On the same day M. P. Powers filed an application for the north-east quarter, etc., alleging a discovery made at one minute past 12 on the morning of the 20th, and his filing No. was 996. A further application was placed on file as 1053 by the Recorder from H. R. Ledyard for the north-west quarter, etc.,

and his discovery was said to have been made at one minute past 12 on the 20th of August last. Subsequently the application of Titus for the north-west quarter, etc., was placed on record as mining claim 939-C, and that of Powers for the north-east quarter, etc., as mining claim 996-C. As the application of Titus for the north-west quarter, etc., had been received by the Mining Recorder before that of Ledyard for the same quarter section, it was placed on record, and that of Ledyard on file as No. 1053. On the 4th of September, 1912, Ledyard filed a dispute against Titus, but on the 19th of December he withdrew, having in the meantime had transferred to him all the interest of Titus in the said mining claim 939-C, so that on the 4th of March, 1913, when the transfer was recorded, H. R. Ledyard was the recorded owner of the said claim.

A survey of the stakings of Ledyard, Powers and Titus disclosed the fact that the entire east line of Titus' staking was on the north-east quarter section or 2-½ acres outside of the aliquot part of said block 8 applied for; that Powers' staking was from 12 to 15 acres on the north-west quarter section or about half of the lands applied for were on the adjoining quarter section, and Ledyard's east line was also entirely on the north-east quarter section, and the south-east angle thereof south of the southerly boundary of the north-west and north-east quarter sections of the said block.

In view of the fact that Titus, Powers and Ledyard had staked lands outside of the limits of the land specifically applied for the question whether their applications are therefore invalid or only so as to that part of the lands staked not within the location applied for, or are entitled to the actual land within the four corners of their stakes, notwithstanding that they have improperly described its location, must not be considered. Block 8 in the Gillies Timber Limit within which the lands applied for are situate is within the

Coleman Special Mining Division. Each of the blocks in the said limit have been surveyed into mile squares, and on the north and south boundary pegs or stakes have been placed at every ten chains, and on the east and west boundaries at every 20 chains, but there has not been an internal survey of the block into quarter sections such as applied for in the applications in question. Government survey lines were not run from boundary to boundary at the situation of the stakes so placed on the boundaries. By sec. 51 (a) of the Mining Act a mining claim in a Special Mining Division in unsurveyed territory shall be a rectangle of 20 acres, and by sub-sec. (c) when a township is 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 east half of the north-east quarter, the south-east quarter, the north-west quarter or the south-west quarter of a quarter section or subdivision, and shall contain 20 acres. The Government Surveys Department at Toronto does not recognize such quarter sections or sub-divisions as existing in the Gillies Timber Limit. When a survey of a mining claim is received by that Department it is placed on their office map of the limit in such a position as the survey indicates, regardless of the quarter section mentioned in the application. It seems to have been the impression amongst licensed prospectors that mining claims staked in the Gillies Limit must be applied for as a particular quarter section, and the difficulty experienced by them in definitely locating the particular quarter they thought they had staked has led to this and many other disputes. It was said by Mr. Summers, O.L.S., who testified in this case, that to make an accurate survey of a particular quarter section of the block in question would take some 5 or 6 days, and Exhibit 10, a plan prepared by him, was only approximate, but his east and west line, he thought, was within thirty feet of

accuracy, and that being so it is easily appreciated how impossible it would be for a prospector at midnight or at any other time of the day to determine what particular quarter section his discovery was upon.

I find that said block 8 of the Gillies Timber Limit is in unsurveyed territory in the Coleman Special Mining Division, and has not been surveyed into quarter sections or sub-divisions within the meaning of sec. 51 (c) of the Mining Act. The lands in question not having been divided into quarter sections, then it was not necessary in the application or in the staking to designate the locality by an attempted description of the particular quarter section the claim might be upon, but the situation of the claim must be shown in such a manner as to enable the Recorder to lay it down on his office map. The situation of the stakes and the locality of the two claims being shown to my satisfaction the fact that the claims as staked are not altogether as applied for should not invalidate them: See *Waldie & Mathewman* (Price) M. C. C. at 454.

Having decided that mining claims 939 and 966-C are not invalidated by reason of the imperfect description of the lands as given in the respective applications and further holding that in regard to unsurveyed lands as herein, within the Gillies Limit, a licensee is entitled to the land as staked, the dispute herein is reduced to one of priority in staking and recording. The relative positions of the several stakings of Titus, Powers and Ledyard are shown in Exhibit 9. Powers' east line at No. 1 post is 113 feet, and at No. 2 about 264 feet east of Ledyard's, and his south line at his No. 2 is 100 feet and at his No. 3, 26 feet south of Ledyard's south line, but in other respects it is within the lands staked by Ledyard and Titus. The three discoveries were sworn to have been made at 12.01 a.m. on the 20th of August last, and the applications were recorded in the Recording Office in the following order: Titus, Powers and Ledyard. I have referred

to the fact that Titus became recorded for the north-east quarter section as mining claim 939-C, and Powers for the north-west quarter section as mining claim 966-C.

Then as to the respective stakings. The only part played in the staking by Titus was the discovery and erection of the discovery post, and the writing upon the posts. The rest of the staking was done by what he styled "his men." His No. 1 was planted, while he was present, by one of his men, whose name he did not give, but he did not personally touch the stake as a mark of identification. Both C. E. Reece and Horace N. Atkinson witnessed the planting of Titus' No. 1 post by someone. From No. 1 Titus left with Reece for Haileybury to record the claim, took his place in line before the Recording Office and waited for the doors to open at 8.30 a.m., when he succeeded in having his application received as No. 939 and subsequently recorded as 939-C. He did not go from his No. 1 to his Nos. 2, 3 and 4 posts nor did he blaze any lines or boundaries, but left all that to be done by his men. A blazed line was made from the discovery to his No. 1 by Reece, but who erected his Nos. 1, 2, 3 and 4 posts I do not know, as no names were divulged in evidence other than Reece and Atkinson. All that Reece did was to be with Titus when he made his discovery, and he blazed from his discovery to his No. 1 post. After Titus left the claim Atkinson walked and blazed from 1 to 4 and planted it at about 1 or 1.30 a.m. From there he blazed to 3, which he found erected, then blazed a line to No. 2, which was also standing, but he did not read what was on the post, and then he went to No. 1, blazing the line on the way. After Titus had recorded the claim Atkinson told him what he had seen and done. Titus admits that from the time he left the claim at No. 1 post until after he had sworn his affidavit of discovery and filed his application he did not see or hear from his men, whom he believed to have completed the staking for him.

Is such a staking permitted by the Mining Act, or in other words did Titus conform with the requirements of the Mining Act? To determine this question a perusal of secs. 34, 35, 54, 55 and 59 and forms 4 and 6 of the Act is necessary. It will be seen that a licensee may stake out a claim on his own or any other licensee's behalf, but if on behalf of another licensee the application must recite the name of the licensee by whom the valuable mineral in place was discovered and the name of the licensee on whose behalf the application is made, the letter and number of their licenses, etc. The application sets out a short description of the locality, the time of discovery and date, the date of staking and in whose name the claim is to be recorded and the dimensions of the claim. Appended to the application is a sketch or plan showing the discovery and corner posts and their distances from each other in feet. The application and sketch or plan must be accompanied by an affidavit in Form 6 of the Act, which affidavit must be made by the discovering licensee showing a discovery of valuable mineral with particulars of the kind of ore or mineral discovered, the date of discovery and staking out, and stating 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, also that at the time of staking out there was nothing upon the lands to indicate that they were not open to be staked, and that the deponent verily believes they were so open, and that the staking is valid and should be recorded, etc. In *Re McNeill and Plotke* (Price) M. C. C. at 144, one LaBrick, on account of illness of D. McNeill, who staked the claim, undertook to make the affidavit of discovery and record the claim. It appears that LaBrick was not on the claim the day it was staked, but the day after the staking he visited all of the stakes with the exception

of the No. 4. He had not been along the north or west boundary lines or along the blazed line from the No. 1 to the discovery post, nor did he write his name or license number upon the posts. His application was refused by the Recorder and an appeal taken to the Mining Commissioner, when the latter in his judgment at page 146 said: "It is 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 number of both must be put upon the posts. The public and other prospectors are entitled to know not only on 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." Since the case of *McNeill and Plotke* was tried the form of the affidavit of discovery has been altered. Formerly clause (2) of the affidavit read—"That at the time of my staking out, etc.," and clause (3), "as I could reasonably ascertain the same." The Act of 1908 as amended reads, clause 2—"That the said claim was staked out, etc.," and clause (3)—"As they could reasonably be ascertained." In other respects while the form of the affidavit has been changed, the substance is the same. The words of sec. 35 are clear—"A licensee who discovers valuable mineral in place on any lands open to prospecting, or a licensee on whose behalf valuable mineral in place is discovered by another licensee upon any such lands, may stake or have staked out for him a mining claim thereon, etc." Section 55 requires the licensee after discovery to at once erect his discovery post and proceed as quickly as is reasonably possible to complete

the staking, and sec. 59 governs the requirements attending recording. I do not think the changes made in the language of the affidavit of discovery have weakened the general intention of the Act. The first clause of the affidavit says—"I discovered valuable mineral," etc., and while the other clauses of the affidavit are not in the first person the deponent is required to have personal knowledge of the facts sworn to. There is nothing in the Mining Act to indicate otherwise and I adopt the language of the learned Mining Commissioner in *Re McNeill & Plotke* as the safest interpretation of the Act.

How could Titus honestly make the full affidavit of discovery sworn to? At the time the affidavit was made the only facts he was sure of were that he had an alleged discovery, a discovery post and a blazed line from there to his No. 1, and that the latter was standing when he left the claim. Notwithstanding this limited knowledge he swore that the claim had been staked as shown on the application and sketch attached thereto; that the distances given in the said application were as accurate as they could reasonably be ascertained and that at the time of such staking out there was nothing upon the said lands to indicate that they were not open for staking. He assumed his men would complete the staking and on that assumption took his oath. He had no personal knowledge that the staking had been completed at the time he filed his application and in consequence his affidavit was deceptive.

The exigencies of the situation at Gillies Limit at midnight of the 20th of August last required expedition, and Titus adopted his method of staking to meet it. To encourage such staking would soon destroy the whole fabric of the Mining Act and stimulate false and reckless swearing: See *Attorney-General of Ontario* v. *Hargraves*, 8 O. W. N., at p. 138. I do not make a finding of fact upon the Titus discovery, as in the view I take of the case I am not called upon to

do so, but if the case turned upon the sufficiency of discovery I would first order an inspection before giving judgment. I therefore find the Titus application and staking invalid, and the claim must be cancelled.

The Powers' staking has been attacked by the disputant, but not successfully so. The chief point of attack was made upon the situation of the discovery post. It was thought by Titus and Atkinson that Powers' discovery was on the north-west quarter section and not on the north-east quarter section as applied for. On the evidence I could not say with certainty that it was not on the section applied for, but as I have ruled that in this case the staking is to govern and not the lands applied for, I do not pass upon the point. The respondent Powers relied upon his affidavit of discovery, and his application is filed as proof of the sufficiency of his staking, and unless his good faith is impugned or his veracity questioned, I did not feel called upon to exact positive evidence of how he completed his staking. It was open to the disputant to attack at this point, but he did not do so nor did he offer any sufficient evidence of the insufficiency of the staking. The discovery made by Powers is within the lands staked and for these reasons I find the Powers' staking and application valid.

I have yet to dispose of the Ledyard application. Although Ledyard got title through Titus and stood behind the Titus staking, his failure to uphold it does not prevent him from setting up priority of staking between himself and Powers and relying upon his filed application.

There is no evidence before me that Ledyard's application should have priority over that of Powers. The latter's application was received at the Recording Office as No. 996, and that of Ledyard as No. 1053, which would indicate that Powers' application was on file first and subsequently recorded. The onus is upon Ledyard to show priority of discovery or im-

proper staking on the part of Powers. As to the actual time of staking there is no difference, and I have already passed upon the Powers' staking. The fraction of land between Powers' and Ledyard's west and north boundaries may be retained by Ledyard if his discovery is within that portion. At the trial counsel for Ledyard stated he had been unable to get in touch with his client in time to produce him at the trial, but elected to go on in his absence. If Ledyard's discovery is not on the land staked by Powers and is in the boundaries of his staking now left to him I will allow him such area. If he thinks such portion of his staking worth retaining, I will allow him, on notice to Powers, to file a survey showing the location of his discovery, and the matter can be spoken to at my next sittings at Haileybury on Tuesday, the 6th of May, 1913, at 2 p.m.

I find the staking by C. H. Titus of mining claim 939-C, situate in block 8 Gillies Timber Limit, in the Coleman Special Mining Division, to be invalid, and I order that the application now on file for the said lands be cancelled.

I further order that the said H. R. Ledyard is entitled to that part of the lands staked by him, being part of said block 8 situate to the north and west of mining claim 996-C, and within the north and west boundary lines of the lands so staked by the said H. R. Ledyard on the 20th of August, 1912, provided it is proved to my satisfaction on the 6th of May next or such other time as I may appoint, that the said discovery of valuable mineral in place by the said Ledyard is within the said fraction of land, otherwise I direct that the application of the said Ledyard, being No. 1053, be cancelled.

I order that the disputant H. R. Ledyard do pay to the respondents M. P. Powers and Frank Abode the sum of seventy-five dollars as costs of the trial.

(THE COMMISSIONER.)

(THE APPELLATE DIVISION.)

29 O. L. R. 398.

McLEOD AND ARMSTRONG.

JOHNSON AND ARMSTRONG.

Gillies Timber Limit—Unsurveyed Lands—Priority of Discovery—Invalid Staking — Lands Staked not Wholly within Lands Applied for—Affidavit of Discovery—Requisites of.

It being in unsurveyed territory the fact that the land staked was not wholly within the area applied for, did not invalidate these respective stakings.

It is not enough that what is sworn to in the affidavit of discovery and staking turns out to be true; it must be known to be true at the time the affidavit is made. It appears that while a licensee may be assisted in the staking he should remain upon the ground until the staking is complete and from a personal inspection of the posts and other requisites of staking be seized of what he is required to depose to in the affidavit of discovery and staking.

On appeal to the Appellate Division, held, affirming the decision of the Mining Commissioner, that the Mining Act does not permit the affidavit to be made on information and belief and that the claimant must satisfy himself not by guess-work but by personal knowledge and before he makes his affidavit that the Act has been complied with.

Dispute referred by the Mining Recorder at Haileybury to the Commissioner for disposition. The disputes set up priority of discovery and insufficiency of staking by the respondent Armstrong, the recorded holder of mining claim 942, being the same land applied for by the disputants.

W. A. Gordon, for Murdock McLeod.

A. G. Slaght, for George Johnson.

George Mitchell, for E. F. Armstrong.

24th April, 1913.

THE COMMISSIONER. — The disputes herein were transferred to me by the Mining Recorder of the Coleman Special Mining Division for trial.

By consent of the parties and as a matter of convenience the cases were tried together. On the 20th of August, 1912, E. F. Armstrong became located for the south-east quarter of the east half of the south-west quarter of block 2 in the township of Coleman in the Gillies Timber Limit, which lands were afterwards designated as mining claim 942, and on the 28th of August and the 19th of October of the same year respectively, Murdoch McLeod and George Johnson filed disputes against the said claim. On the 2nd of August, 1912, by an Order-in-Council approved by His Honour the Lieutenant-Governor, this and other portions of the Gillies Timber Limit, on the Montreal River, in the Coleman Special Mining Division, were ordered to be re-opened for prospecting and staking out, and sale or lease under the Mining Act of Ontario on and after Tuesday, the 20th day of August, 1912, and secs. 21 and 51 were ordered to apply thereto. On the 3rd of August, 1912, by instructions appended to the said Order-in-Council, the Minister of Lands, Forests and Mines directed that claims in blocks which had not been subdivided should in no case overlap the boundaries of the block, that is, a claim should be staked wholly within a particular block, and not include any portion of an adjoining block or blocks, and that claims were not to exceed twenty chains long from north to south or ten chains wide from east to west. The blocks in the Gillies Timber Limit were divided into areas of a mile square, having stakes or pegs placed on the north and south boundaries thereof at intervals of ten chains, and on the east and west boundaries of twenty chains apart, but the blocks were not subdivided into quarter sections or sub-divisions. The block in question at the time of staking consisted of one-half of the full area of one square mile, the northern half having been previously staked, and laid out as mining claims. While the Order-in-Council applied secs. 21 and 51 of the Mining Act to the Gillies Limit it is not necessarily conclusive that they are surveyed

lands. Section 21 simply states that the Lieutenant-Governor in Council may declare any locality to be a Special Mining Division, and there is no doubt that the Gillies Limit is within the Coleman Special Mining Division. Section 51 states the area of a mining claim in unsurveyed territory, but sub-secs. (c) and (*d*) of sec. 51 do not apply to this case as the block was not sub-divided into quarter sections or sub-divisions, and consequently I treat it as being in unsurveyed territory. In the case of *Ledyard and Powers and Abode*, in which judgment was given on the 23rd day of April, 1913, I decided that lands within block 8 of the Gillies Limit were unsurveyed territory and that sec. 51 (*c*) did not apply, and my reasons therein are applicable to the facts in this case. If, however, I am wrong in my conclusion, then if the discoveries of the several applicants are outside the limits of the claims as applied for, although within the boundaries as actually staked out on the ground, the claims would be invalid, following *Re Burd and Paquette* (Price) M. C. C. at 419.

The disputes of McLeod and Johnson set up priority of discovery and insufficiency of staking by Armstrong, the recorded holder of mining claim 942. The application of E. F. Armstrong states that he made a discovery of valuable mineral in place at 2 minutes past 12 a.m. of the 20th of August, 1912, and his application was received as Number 942. That of Murdoch McLeod alleges discovery at 5 minutes past 12 a.m. of the 20th of August, 1912, and his application was received as No. 947½. And Johnson purported to discover valuable mineral in place at 5 minutes past 12 a.m. of the same day and filed his application as No. 1022; all of the parties claiming to have staked the south-east quarter of the east half of the south-west quarter of block 2. I will not attempt to establish priority of discovery as between Armstrong's discovery of 2 minutes past 12, and McLeod's and Johnson's at 5 minutes past 12, and their respective

claims must stand or fall upon the sufficiency of their staking. The No. 2 posts of the respective stakings are together, but in other respects the situation of their stakes is not at exactly the same point, and I am unable to determine whether the lands so staked are within the lands applied for, but I find that the respective discoveries are within the several stakings. Having decided that the aliquot part of the said block as staked is unsurveyed territory, the fact that the land staked is not wholly within the area applied for will not invalidate the respective stakings if I am satisfied of the identification of the stakes and the real situation of the property as staked, and with this I am satisfied. I also find that they had a sufficient tie-line for the purpose of their staking and identification of their claims.

Then as to the sufficiency of McLeod's staking, Mr. McLeod, who is an old and experienced prospector, was very candid in his admissions as to the method he adopted in staking the property applied for. He stated that at 5 minutes past 12 he had erected his discovery post, on a discovery, the neighbourhood of which he had previously been familiar with, and from there he proceeded to his No. 1 post, a distance of approximately 720 feet, on the way blazing what trees were available. He stated that there were very few trees that he could blaze, and that possibly not more than three in number were so marked, nor did he place any pickets or other monuments to define the directions between his discovery and his No. 1 post. The blazing done he admitted was quite insufficient to identify the position of his discovery post from his No. 1. After reaching his No. 1 post he erected it and inscribed upon it what was required by the Mining Act. He had left a conveyance in charge of Peter Graham on the Silver Bar property, just north of the Kerr Lake branch of the T. & N. O. Ry., and immediately proceeded to Haileybury, arriving there, he thought, and also in the opinion of Graham, between 1.30 and

1.45 a.m. of the 20th. They had a fast horse, but notwithstanding that they made as much haste as possible under the circumstances, considering it was a dark night, they found Armstrong waiting outside the Recording Office when they reached there. It was arranged that they should have numbers in the order of their reaching the Recording Office, and in that order the applications would be received after the doors were opened at 8.30 o'clock, so that McLeod's application would necessarily be received subsequent to that of Armstrong, and he received filing No. 947½. Prior to leaving for Haileybury, McLeod had arranged with R. Montgomery to go around the claim and see that the posts were properly erected and the claim staked in accordance with the Mining Act and report to him at Haileybury. This Montgomery did, going to his No. 1, then to his No. 2, and saw it planted. From there he went to No. 3 and met J. Peria, who had been instructed to plant it, showed him where he put the post and on the way between the posts blazed the lines where he could, getting through his operations about 3.30 in the morning, and then he went on to Haileybury, met McLeod and reported what he had seen and done. No evidence was given as to who erected the Nos. 2 and 4 posts, nor was Peria called to say that he had properly erected No. 3. However, Montgomery was also an experienced prospector and felt satisfied the claim had been properly staked, and so reported to McLeod previous to the time the latter made his affidavit of discovery and application. McLeod did not see his posts Nos. 2, 3 or 4 or see the lines blazed, and I have only the evidence of Montgomery that this was sufficiently done by himself, so that when McLeod took his affidavit of discovery and staking he was relying upon the statement of his man Montgomery as to what had been done after he left the claim.

I will now consider the facts attending Johnson's staking. He adopted the more leisurely method of

appropriating the claim being sufficient unto himself, and completed the staking personally, making his discovery at 5 minutes past 12, and succeeded in placing his application on file as No. 1022, subsequent to that of McLeod and Armstrong. His application asks for the same lands as previously applied for by the aforesaid parties. After erecting his discovery post and properly inscribing it he blazed a line to his No. 1, from there he proceeded to No. 2, blazing on the way, made a post there, wrote upon it and erected it; then blazed to No. 3, made a post and planted it, and from there went to No. 4, blazing the line between 3 and 4 as he went along and erected his No. 4 post and blazed from 4 to 1. The three claims in question are supposed to adjoin a surveyed claim known as the Green property. It was about a quarter to 3 when Armstrong reached his tent on the Neilly claim immediately to the north, having concluded the staking, it having taken him two hours and a half, and from there he left for Haileybury, where he filed his claim as before mentioned. Neither McLeod nor Johnson nor any witnesses called on their behalf saw Armstrong on the claim that night. Since the staking Mr. Johnson visited the property and discovered that Armstrong's vein had been worked upon after the staking, and although there is no positive evidence of the time, I would suppose since the McLeod dispute was filed on the 28th of August the work done on the property was subsequent to that date. This of itself was a highly improper thing to do, if it was done by Armstrong or through his instructions, as an inspection if ordered could not verify the actual condition of the discovery at the time it was made. Then how did Armstrong stake the claim? His was an organized staking, mostly done through his deputies: Henry Holmes being placed at No. 1, W. H. Smith at No. 2, John Barker at No. 3 and George Mahrle at No. 4, and Armstrong himself made the discovery and planted the discovery post. He had taken with him

to the claims Messrs. Smith, Holmes and Barker, but picked up Mahrle, who was in the neighbourhood, and said he was open for a job. All of these parties took their positions at their respective posts. The discovery post is about 150 feet east of No. 2 post and near the southern boundary of the claim, and Armstrong says he saw Smith erect that post. He had arranged with Holmes that the latter should plant his post at 5 minutes past 12 and signify the planting by swinging a lantern across his knees, and this Holmes did within sight of Smith, who was standing at or near the claim. Both Smith and Armstrong said they saw each other at the time the signal was given and the latter replied to Smith by a similar signal, which signified that he had received the notice arranged for. Then Barker was at No. 3 post within about 200 feet of where Armstrong was and the latter heard someone chopping and assumed it was Barker making the post and planting it as instructed, and the latter on his way back from No. 3 post passed within 25 or 30 feet of where Armstrong was standing, but they did not address each other. Mahrle says he put up No. 4 at 5 minutes past 12 according to his watch, and did not see Armstrong again that day. After Armstrong had erected the discovery post, received the signal from Holmes, had seen Smith put in No. 2 and heard what he assumed to be Barker chopping at No. 3, he left on his way for Haileybury, passing No. 4 on his way out and inspected it and reached his conveyance, which was at a stable on a mining claim near the property he was staking, and immediately drove for Haileybury, reaching there before McLeod, although McLeod had a fast horse and drove quickly and left the claim immediately after he erected his discovery and No. 1 post. However, I am not finding priority on the question of time as it was suggested that Armstrong took a short cut and could have reached Haileybury before McLeod and not been seen by McLeod on the way there. The evidence was not definite that he

had taken any other road than that driven over by McLeod and the latter stated that they were not passed by any person on their way to Haileybury. Before Armstrong left the property he saw Smith and Holmes start to blaze. It was remarkable how much Armstrong saw on a dark night on 20 acres of land, and the position he took up that would allow him to command a view of Holmes' signal and the sound of Barker's chopping and be within sight of Smith's planting of No. 2 post was to say the least a strategic one, but I have no reason to doubt Mr. Armstrong's veracity, and do not question it. The only personal knowledge Armstrong had of his staking was that his discovery post was planted, that his No. 2 post was put up and that his men had started to blaze the lines and that No. 4 was in its proper position as he had previously given instructions. He did not visit his No. 3 post, but assumed from the sounds he heard that it was in position, nor did he feel it necessary although the man instructed to put it up passed within 25 or 30 feet of him to ask if the post had been properly inscribed and erected in its proper position. The question of the *bona fides* of the discoveries on the three properties is not disputed, so that I am assuming from the evidence given and from the silence of the disputant that all discoveries are within the meaning of the Mining Act.

As between the man who swears his affidavit of discovery before being informed by his agent or agents that the claim had been staked, and one who makes the affidavit after being so informed, and the facts attending the Armstrong staking, there can be no difference as far as the application of the Act is concerned. If so where is the line to be drawn? The commercial world encourages organized labour and expeditious business methods, but the discovery of valuable mineral in place and the staking of its confines cannot be deputized except by one licensee staking on behalf of another licensee and must be done by the one who

makes the affidavit of discovery. I think it a reasonable construction of the Act to say that the discoverer may be assisted in the staking, but he must remain at the staking until it is an accomplished fact and from personal inspection of the posts and the other requisites of staking become seized of what he is required to make oath to in the affidavit of discovery and staking.

Counsel for Armstrong argued that what he did amounted to superintendence under the authority of *McNeill & Plotke*, recited in Mining Commissioner's Cases at page 146. I do not think so. If superintendence is permitted by the Mining Act there cannot be such by a licensee who is directing the staking if he leaves the claim before its actual accomplishment. There was no superintendence of the blazing, a necessary requirement of the Act, nor a personal knowledge that the boundaries had been so blazed, nor was an inspection made of the No. 1 or No. 3 posts. To condition oneself to swear to actual facts from a knowledge based upon signs and sounds would be perilous to the deponent. Suppose Montgomery deliberately lied to McLeod when he told him the staking had been done or that Armstrong was deceived in the sounds that led him to believe that Barker had put up his No. 3 post or mistook the light of another for Holmes' signal, or that Smith and Holmes had decided not to blaze the lines; would not the affidavit be untrue? And if these omissions were not afterwards found out, an innocent and diligent prospector, who properly discovered and staked, would lose the fruits of his labour. It is not enough that what is sworn to turns out to be true; it must be known to be true at the time the affidavit is sworn, and hearsay evidence is insufficient. If the maker of the affidavit was not personally seized of the facts his affidavit should say he verily believed, etc., but the affidavit of discovery requires him to say it was staked, etc. What I have said in *Sloan & Taplin* and *Ledyard & Powers*

& Abode in regard to prerequisite knowledge before the affidavit of discovery is taken can be applied here. I therefore must dismiss the dispute of Murdock McLeod and allow that of George Johnson, and order the staking of E. F. Armstrong now embraced in mining claim 942-C to be invalid and his application cancelled. As to the disposition of costs. If the cases had been tried separately McLeod would have been ordered to pay Armstrong the costs of the action, and in the second action Armstrong would have been liable to Johnson for costs, but as they are tried together and heretofore the methods adopted for staking as shown in these cases had not been passed upon, I will make no order as to costs as between the parties.

E. F. Armstrong, the respondent, appealed from this decision to the Appellate Division.

The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE and HODGINS, JJ.A.

W. R. Smyth, K.C., for appellant.

A. G. Slaght, for respondents, the disputants.

22nd October, 1913.

The judgment of the Court of Appeal was delivered by

HODGINS, J.A.—It was gravely argued before this Court that an affidavit which the appellant did not know to be true when sworn to, was unexceptionable, if afterwards it was found that the facts stated had been correctly guessed at. Needless to say this proposition was advanced in support of a mining claim.

This is a new departure in affidavit making, and, if accepted, would simplify the acquisition of claims by allowing a prospector who finds valuable mineral in place, to quit the ground, and, having left others to do the staking, to make the necessary affidavit in

the pious hope that their work will justify the oath upon which he secures his claim.

Apart from the morality or immorality of the suggestion, and leaving aside for the moment the words of the Mining Act, there are two reasons which plainly render any such method of dealing with the requisite oath impossible.

It would enable a prospector to blanket claims and permit him, if he were sufficiently active, to go back upon the ground and stake out claims to correspond—a reversal of the universal practice, as I understand it, of taking up mining claims.

Secondly, if the registration is attacked, and it is open to the deponent to substitute for his original statement proof by others that that of which he was ignorant was, by a happy chance true, then he displaces his own affidavit as proof, and relies on what the Statute does not admit as primary evidence to secure the claim. He thus holds his position against others until he can get the proof, or, if there is no contest, then he shuts out others by a device not permitted by the Mining Act.

Best, in his work on Evidence, 11th ed., p. 43, puts upon the same plane as perjury a statement which the witness knows to be false and one of which he knows himself to be ignorant.

The Mining Act does not permit the affidavit to be made on information and belief—no doubt because the statements are intended to be made by one who can speak at first hand, and probably having in view the undesirability of founding a property right on statements which are not really evidence, as pointed out by Lord Justice Cotton in *Gilbert* v. *Endean* (1878), 9 Ch. D. 259, at pp. 268, 269. I do not know that it is necessary to add anything to the reasons given by the learned Mining Commissioner, in which I quite agree, for disallowing the appellant's claim. The real objection to the method pursued is, that the affidavit

must state certain matters of fact required under the Mining Act to exist, or to be done in order to secure a claim, *i.e.*, the discovery of valuable mineral in place, the situation of the discovery post, the length of the outlines, the staking done, the lines cut and blazed, the possession of a miner's license, and the absence of anything on the land to indicate that the lands were not open for staking.

There is nothing to require a licensee to do all these acts himself. See 8 Edw. VII. ch. 21, sec. 22, sub-sec. (2), and sec. 35; but before he records his application he must swear to the required affidavit, and, in view of the provisions of sec. 49 to 56, that affidavit necessarily includes a statement that the claim was staked out " upon the said discovery " and that " the distances given in such 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 shewn in the said application and sketch or plan are true and correct."

The claimant can, and must, therefore, satisfy himself, not by guess-work, but by personal knowledge, and before he makes his affidavit, that the Act has been complied with.

I agree with the conclusion reached that the lands are unsurveyed. Having regard to the provision in the instructions that claims must be 20 acres, sec. 51 can only apply to lands which have been surveyed into 640 and 320 acres (clauses (c) and (d)), and to lands unsurveyed. In both of these cases claims limited to this area are to be staked. The instructions appended to the Order-in-Council opening the lands in question to prospecting and staking distinguish between the " claims or locations already surveyed," and " claims on the blocks which have not been sub-divided," and all three claims in question here are part of block 2.

The main appeal of the appellant, Armstrong, should be dismissed with costs.

His appeal against Johnson's claim is brought by him as a licensee under sec. 63. I can see no ground for interfering with the learned Commissioner's decision in favour of Johnson, who appears to have complied with all the requirements of the Mining Act, and I think this appeal should also be dismissed with costs.

Appeals dismissed with costs.

(THE COMMISSIONER.)

GRAY v. MURRAY.

Dispute—Surface Rights — Restraining Order — Champerty—Certificate of Record—Fraud—Discovery.

G., surface rights owner in April, 1912, agreed with M., the miner, to allow mining operations, and in March, 1913, disputed working conditions alleged to have been performed by M. In May, 1913, G. gave option to A. of surface rights. Certificate of record was granted to M. 11th May, 1912. It being shewn M. had given financial assistance to G. to carry on dispute, M. contended agreement was champertous. While G. did receive financial assistance from A. Held, the option had not been exercised at time of trial and G. was in a position to prove his case outside of any agreement entered into, and its existence did not void the right of action he had without it. *Ramcomar* v. *Chunder*, 2 App. Cas. at 210. *Colville* v. *Small*, 22 O. L. R. 426.

M. having employed H. to stake the claim, and the latter having informed M. that he had made and sworn to a sufficient discovery, the onus which was on G. to shew that M. knew H. had not made such a discovery had not been satisfied and fraud had not been proved.

Held, also, that G. was not "any person interested" within sec. 66 of the Act.

John M. Gray, former surface rights owner, entered a dispute against mining claim 17336 in the township of Harris, alleging insufficient discovery and staking and procurance of a certificate of record through fraud.

H. H. Hartman, for Gray.

R. McKay and *J. M. Hall*, for Murray.

22nd May, 1913.

THE COMMISSIONER.—This matter was brought to trial by John M. Gray, who, in his notice of dispute filed in this office, alleged that mining claim 17336, situate in the Temiskaming mining division and being more particularly described as the north-west quarter of the north half of lot 6, in the 6th concession of the township of Harris, was illegal and invalid in consequence of no valuable mineral in place being discovered upon the said lands, and that the said claim was improperly staked and that the certificate of record granted therefor had been fraudulently obtained by the respondent Herbert Murray.

The claim was staked by one Howell for Murray on the 6th of March, 1912, and recorded on the 8th of March of the same year, and a certificate of record granted on the 11th of May, 1912, and it appeared from the evidence that Murray had caused the necessary assessment work to be done upon the said claim to permit him to secure a patent therefor, which he was about to apply for when this action was brought. The claimant John M. Gray has a certificate of ownership of the north half of the west half of lot 6 in the 6th concession of the said township, containing 78¾ acres, more or less, which parcel of land comprises the mining claim in question, and the certificate of ownership was granted subject to a reservation of the mineral rights therein. The notice of dispute filed by the claimant is dated the 18th day of March, 1913, and the issue brought to trial on the 7th day of May, in the same year.

Counsel for Gray at the opening of the case undertook to show that there was no discovery of valuable mineral in place on the claim so caused to be staked by Murray, and that such a fact was known to Murray at the time the application was recorded; in other words he attempted to show fraud on Murray's part. On the 6th of May, 1912, Gray made and filed an affidavit stating that he had performed on the said claim 30

days assessment work for and on behalf of the recorded owner Murray, and in his evidence admitted that he had received the sum of $60 for such service from Murray, and that the assessment work so sworn to as having been done by him was accomplished by digging a cellar under his residence which in his report of work he described as trenching.

On the 15th day of April, 1912, Gray and Murray entered into a written agreement whereby Gray assigned to the latter the surface rights of the lands in question for mining purposes, reserving to Murray the exclusive use of five acres of land for the purpose of erecting such buildings as he might require in his mining operations, and covenanting to execute all further instruments necessary for the purpose of obtaining the said mining claim, for which he received from Murray the sum of $300, and signed a receipt acknowledging such sum concurrently therewith. A further agreement was entered into on the 31st of March, 1913, in which Anna M. Andrews was the party of the first part, Gray of the second part, and Roland T. Irwin of the third part, which agreement in part recited that Irwin undertook to drill upon the said lands 100 feet for $500, which the parties of the first and second parts agreed to pay. Anna M. Andrews was to furnish all necessary wood and water for the operations and to deposit in the Royal Bank at Haileybury the sum of $900 as security for any further drilling over the first 100 feet, but reserving the right to her to stop the operations after the first 100 feet had been drilled. She also agreed to pay Irwin $1,500 if he found valuable mineral in place. On the 2nd of May of the same year Gray executed a written option to Anna M. Andrews of the said lands exercisable until the 1st of September, 1913, in which agreement the price of the property was fixed at $10,000, and it recited the present action and assigned to her in the event of the option being taken up all claims for damages, rights, benefits and advantages involved in the

claim in question before me, or any other application in connection with the mines, minerals or mining rights affecting the said lands, and to all claims or demands for damages or settlement of surface rights, etc. At the time of the trial this option had not been exercised. On the 10th of January, 1913, Mrs. Andrews wrote to the respondent Murray at his address in Toronto asking if the property was for sale, and if so to fix his price, and on the 17th of the same month she wrote a further letter asking him if he would consider an offer of $3,000 with an option of sixty days. The answers to these letters were not put in at the trial.

Although Gray had received compensation for his surface rights he apparently was not satisfied, for in February, 1913, he threatened Murray that unless he received $20,000 he would upset his title, stating that Murray had no right there, and that if he wanted to retain the mining claim he would have to pay the aforesaid sum. Gray freely admits this demand.

After an appointment had been taken out by Gray for the trial of this issue the respondent applied to me for an order restraining Gray from drilling upon the property until the matter at issue had been disposed of, setting up in his affidavits filed that Gray was not drilling for water as alleged, but was seeking to make a discovery upon the lands. I directed that this motion should be heard at the trial, and evidence was then given of the alleged drilling.

It would appear that from the time Mrs. Andrews wrote the two letters to Murray in January, 1913, she was the power behind Gray directing the attack upon Murray. She consulted a solicitor in New Liskeard on behalf of Gray, reported his advice to the latter, who at her instance went to North Bay to consult Mr. McKee, the Crown Attorney there, to see what criminal action might be taken against Murray. The agreement of the 22nd of March shows that Mrs. Andrews had more than a moral interest in the proceedings and her rights are sought to be protected by the option

agreement of the 2nd of May of the same year. It is admitted by Gray that he consulted Mrs. Andrews and asked for financial assistance to permit him to lodge the dispute against Murray, and he secured in all $55, for which he agreed to give her some interest, the amount of which did not come out in evidence, and while Mrs. Andrews admitted that she had made the advance she stated that she felt Gray had strong rights, and told him to repay the money when he could or " any old time." Gray's contention was that the drilling machine was brought upon the property for the sole purpose of finding water, as his well at 55 feet was not giving him a sufficient supply, and they started to drill alongside the pipe in the well and went a depth of 56 feet. Mrs. Andrews also took the position that while she was instrumental in employing Mr. Irwin to drill, it was primarily for the purpose of finding water, and after that she might utilize the drill to see if there was any mineral upon the property. This contention is not reconcilable with the letters written by Mrs. Andrews, the drilling agreement entered into by her, and the option on the land to her by Gray. The clause in the agreement that Irwin was to get $1,500 if he found a discovery is the keynote to the situation.

On the strength of this evidence counsel for the respondent urged that the claimant could not succeed as the agreement between Gray and Mrs. Andrews was champertous. While Gray did receive financial assistance from Mrs. Andrews, I would have some trouble in finding that there was a fixed agreement as to what her interest in the result of the litigation might be, and there was only an option from Gray to her of the lands, not an absolute assignment, and at the time of the trial the option had not been exercised, so that Gray was in a position to prove his case outside of any agreement entered into.

In the judgment of Sir M. E. Smith in *Ramcomar* v. *Chunder*, 2 App. Cas., at p. 210, he says: " A fair

agreement to supply funds to carry on a suit in consideration of having a share of the property if recovered ought not to be regarded as *per se* opposed to public policy," and in *Colville* v. *Small,* 22 O. L. R. 426, Mr. Justice Riddell, says: "If a party to a champertous agreement must rely upon it to sustain an action, he fails, but if he, although a party to such agreement, can make out his case without the agreement, its existence does not void the right of action he has without it."

While the contention of counsel may be correct, and in any event, it is perilously near being a champertous arrangement, I do not feel called upon to decide this question in view of my ultimate determination of the action. The questions which I will undertake to decide are—Had Gray a right to lodge the dispute or bring the action, and if so, then could he disturb the certificate of record after its issue? Section 117 of the Mines Act of 1906 was amended in 1907 by adding the words "subject to the provisions of sec. 71." The latter section is now 65 of the Act of 1908, and sec. 117 of the Act of 1906 is sec. 67 of the present Mining Act, so that while former sec. 117, as read with secs. 71 and 140, gave some ground for argument, the amendment of sec. 117 in 1907 by adding the words "subject to the provisions of sec. 71" (now sec. 65) to my mind has removed all doubt, as sec. 67 is qualified and governed by sec. 65. It is a question of interpretation of similar sections of the Act as amended by the Mining Act of 1908, with amendments to the present time. In *The Bank of England* v. *Vagliano* (1891), A. C., at p. 144, Lord Herschell laid down a rule of interpretation which was accepted by Perdue, J.A., in *Carruthers* v. *Canadian Pacific Railway Company,* 16 M. R. at p. 336, as follows: "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not

to start with inquiring how the law previously stood and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view;" and in the case of the *City of Ottawa* v. *Hunter*, 31 S. C. R. 10, it was said that where the Legislature has changed the language of an Act it is generally to be presumed that it thereby intended to change the law. Section 65 of the Act of 1908 states that a 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, etc., and thereafter the mining claim shall not, in the absence of mistake or fraud, be liable to impeachment or forfeiture, etc. By the change of 1907, sec. 67 now must be read with sec. 65, and while a discovery of valuable mineral in place must precede staking in order to validate a mining claim, it would appear that if the certificate of record has been granted it is conclusive as to the discovery. Applying the rules of interpretation as laid down by Lord Herschell, I think it must be said that after a certificate of record has been granted the question of discovery cannot be gone into. The ground upon which the applicant sought to set aside the certificate of record in this case was for lack of discovery of valuable mineral, and in view of this amendment, if there was a previous doubt, it must now be said that such an attack cannot be made after the certificate of record has been procured.

The object of the Act is quite apparent to my mind and does not require elaborate explanation. It was no doubt felt that 60 days was ample time in which to allow any parties interested to attack a mining claim on the ground of lack of discovery or insufficient staking, and that after that time if the land owner had been compensated for his surface rights, and a certificate of record had been secured, that there would be some security of title to a possible purchaser. If some time is not fixed when a title can be said to become quieted

then no one could safely purchase a mining claim, as a licensee might within a year or more lodge a dispute on the ground that a discovery had not been made, and in the meantime the purchaser believing he had a good title might have paid a considerable sum as purchase money and expended a large amount in development and otherwise.

A perusal of the following Mining Commissioner's cases (Price) will better elucidate my meaning: *Ball & Stewart,* at p. 462-3-4; *Dennie & Brough,* at p. 213; *Young & Scott & McGregor,* at p. 162. By sub-sec. (4) of sec. 63, a dispute shall not be received or entered against any claim after a certificate of record has been granted, etc. I find upon enquiry that the notice of dispute filed with me was not lodged with the Mining Recorder, as an ordinary dispute must be, so that the claimant is trying to reach the respondent in a roundabout way. By a perusal of the notice of claim filed by Gray, I find it is headed, "Notice of Dispute," and is in the same form and has attached thereto the same affidavit as is required by sec. 63 of the Act which deals with disputes. If he had intended to lodge a notice of claim under Form 38 of the Act, it would not have been necessary to have attached an affidavit thereto, and I find that the claim as lodged is in the form of a notice of dispute which should have been tendered the Recorder, and which sec. 63 of the Act distinctly states cannot be filed after a certificate of record has been issued for the claim.

In order to have all the facts before me I allowed the claimant or disputant, whichever term is applicable, to give evidence tending to shew that Murray knew he had not a discovery within the meaning of the Mining Act at the time he caused the claim to be staked and recorded, but I would not allow evidence to be given to show that on expert testimony Murray had not a discovery within the meaning of the Mining Act. A licensee might swear to a discovery which on an efficient inspection would be found to be one

not within the meaning of the Mining Act, but still his affidavit would not be fraudulent if he *bona fide* felt he had a discovery, and if this issue is to be determined upon the question of fraud in swearing to a discovery which was non-existent, then the question is was there fraud within the meaning of that term. The respondent met this part of the case by stating that he employed one Howell, a respectable prospector whom he believed honest, to stake the claim, and the latter reported to him that he had made a discovery of copper of sufficient value to justify making the affidavit of discovery of valuable mineral in place. Howell was not called as he could not be located, and I had some doubt at the trial if I could accept what Howell said to Murray as evidence, but I now feel that as fraud had been charged that Murray was entitled to give evidence of *bona fides*, and he could only do this by stating his belief, which was based on Howell's assertion. It was admitted by Murray that he had not examined the discovery that day, nor in fact did he subsequently, as he was not interested in a copper discovery, but sought to locate a vein running from a mining claim known as the Casey claim, which is very valuable, and his operations were not carried on at the point of discovery, but at a point which he felt was most advantageous. Murray owed no duty to Gray to satisfy his belief in Howell's statement by an investigation of the alleged discovery, but his neglect to do so might tend to show that he had not an honest belief in its truth. I have his positive statement that he believed Howell, and he had no reason to disbelieve him, and the onus is on Gray to prove his disbelief or dishonesty.

In view of *Derry* v. *Peake*, 14 A. C. at 337, and having in view the remarks of Lord Herschell, at page 374, and *Angus* v. *Clifford* (1891), 2 Ch. D. 449, at page 471, and the many cases following *Derry and Peake*, I would have some hesitation in finding as a fact that what Murray did in procuring the certificate

of record amounted to fraud, and in view of Gray's attitude throughout I would insist upon fraud being conclusively proved. It is not set up that the certificate of record was procured by mistake.

Now, then, was Gray one of the parties mentioned in sec. 66 of the Act entitled to bring the action? This section states 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 upon the application of the Crown or an officer of the Bureau of Mines, or of any person interested. He must get within the meaning of the words " any person interested " in order to launch the action. Gray had a patent to the lands in question, but not the mining rights.

In his notice of dispute he seeks only to set aside the certificate of record, but does not claim as a licensee the mining rights on the property, nor had he restaked or attempted to file an application for the lands previous to bringing his action to trial, so that the only interest he had was as a patented land owner. Before a certificate of record could be granted it was the duty of the Recorder to see that the surface rights owner had been compensated, and on the 15th of April, 1912, Gray signed off all his surface rights to the respondent for the sum of $300. After he had executed that agreement and received the consideration money he was not interested in the mining rights of Murray, and the only other party who could seek to set aside the certificate of record would be the Crown or an officer of the Bureau of Mines.

I find that Gray is entirely without legal or moral status and that he was a party to the fraud, if any, and sought to profit by it. On the 6th of March, 1912, when the claim was staked, he swore that he knew that Murray had not a discovery, but notwithstanding such knowledge he accepted the sum of $60 for doing the first thirty days' work thereon, and falsely swore to trenching when such work consisted of dig-

ging a cellar under his house for his own benefit. He rested upon his oars with this knowledge of fraud, which he now sets up, until the 18th day of March, 1913, nearly a year after, in the meantime having demanded from Murray the sum of $20,000 as silence money. He was not satisfied with his attempts to harrass Murray, but called in the assistance of Anna M. Andrews, and their concerted action possibly led to the issue reaching Court. Under the circumstances of this case, I would be very sorry to have to find fraud in securing the certificate of record, as litigation of this kind should not be encouraged, especially so under the circumstances developed by the evidence in this case.

I order that the application of John M. Gray herein be dismissed with costs, which I fix at the sum of $75.

(THE COMMISSIONER.)

MUNROE, McIVOR, SIMPSON AND RICHARDSON.

Appeal from Decision of Mining Recorder—Discovery—Staking—Lands Staked not as Applied for—Affidavit of Discovery made on Hearsay — Description of Land Applied for Indefinite and Vague.

M.'s application conflicting with others then or immediately afterwards on file, the Mining Recorder refused to record any of the applications until a decision of the Commissioner was obtained.

Held, the description of the lands applied for in part contradicted the sketch attached to the application, and the staking was in variance with the description in the application and the ground shewn on the sketch, and was indefinite, vague and misleading.

Held, also, that the staking was bad throughout, and within the authority of *Ledyard & Powers & Abode* (Godson), M.C.C. 60.

That the applicant Munroe did not satisfy himself by personal knowledge that the claim had been properly staked before he made the affidavit of discovery and staking, and that the affidavit was in that respect untrue.

That the discovery was not a good discovery within the meaning of the Mining Act.

The other applications were allowed to be recorded.

Appeals by the above-named from the decision of the Mining Recorder refusing to record their several applications for certain land staked. The description of the land applied for in M.'s application was inadequate, vague and misleading, and his affidavit of discovery and staking out was sworn to before discovery and the completion of the staking by his authorized agent.

W. A. Gordon, for McIvor.
J. E. Cook, for Munroe.
S. A. Jones, for Richardson.
G. M. Clarke, for Simpson.

19th June, 1913.

THE COMMISSIONER. — The four appeals herein were heard together by me at Haileybury on the 12th day of June, instant, as the lands applied for by the appellants are in default.

The application of C. A. Munroe was received by the Mining Recorder on the 7th day of February, 1913, and placed on file (not recorded), and those of the other appellants herein were filed in the order in which they reached the Recording Office. As the description in the tendered application of J. A. Munroe was difficult to follow and alleged to embrace an area of 80 acres, more or less, and appeared to be in conflict with previously recorded claims, the Mining Recorder refused to place the application on record, and the other applications which are in appeal herein following within a short period of time that of the Munroe application, and being in conflict with the lands applied for by Munroe, the Mining Recorder decided to ask the four applicants to appeal against his decision refusing to record their respective applications, and the matter reached me in this form.

Mr. John Munroe, who was staking on behalf of his brother C. A. Munroe, visited the Kirkland Lake sections, which at the present moment is supposed to

be of commercial value from a mining standpoint, and decided to stake that portion of the land under the waters of Kirkland Lake not then appropriated, and in the month of February last visited the Mining Recorder's Office at Matheson, and from searches made mapped out an area which he felt he would be entitled to stake and apply for. On the 7th of the same month, in company with one Joe. McLean, he visited the property in question and caused it to be staked by McLean and tendered his application to the Recorder on the same day. The only part Munroe took in the staking was to erect the No. 1 post. The balance of the staking was left to McLean, whom Munroe stated he had fully instructed. Immediately after placing the No. 1 post and directing McLean what to do, Munroe left for the Recorder's Office and filed his application. After Munroe had left the property McLean adopted a discovery which is marked on a plan filed herein, being Exhibit 1, as discovery No. 1, and which is admitted by Mr. Neelands, an Ontario Land Surveyor, and Munroe himself, to be upon a previously surveyed and recorded claim known as L-1754. This discovery was not known to Munroe at the time the application was filed, as he had in mind another discovery which was situate on the south-west part of the lands applied for and as shown on his sketch filed as bordering upon claim L-1825, and which discovery consisted of a fracture of rock under water. Through some misunderstanding McLean adopted discovery No. 1, planted his post there and completed the balance of the staking, following Munroe to the Recording Office, and there informed him that he had complied with his instructions and completed the staking. This information was imparted to Munroe prior to the time the application was filed. On the 1st of May Mr. Neelands was engaged by Munroe to make a survey of the property, which was in compliance with a request of the Recorder made at the time the application was tendered.

Mr. Neelands was largely guided in making the survey by the Munroe application, and the sketch attached thereto and a plan of the district handed to him by Mr. Munroe. It is admitted by Mr. Neelands that it was impossible for him to intelligently follow the description of the lands applied for in the Munroe application and that the plan which he prepared for Munroe was the outcome largely of what he believed Munroe wished to apply for, and is in many respects quite inconsistent with the actual language set out in the description in the application. The area shown by the survey is 69.67 acres.

On or about the 5th day of May Mr. Munroe again attended the locality, and erected a discovery No. 2, marked "subsequent in water," abandoned his previous No. 3 post and erected another one at an entirely different position, planted a No. 4 post which was marked "subsequent," and in these respects changed the previous staking of McLean. The discovery post No. 2 was planted by Munroe at a point where he intended McLean to have placed the original discovery post, as he was not familiar with the discovery adopted by McLean nor had he at that time or subsequently made any inspection of it, nor was he aware that it was a discovery of valuable mineral in place.

The description of the lands applied for in the application in part contradicts the sketch attached thereto, and the actual staking is in variance with the language contained in the application and the ground shown in the sketch. A No. 4 post is not mentioned in the application nor can the description of the land and water applied for be intelligently followed or permit a definite area of land being mapped out. The application, after setting out in cumbrous detail the description of the area applied for, closes with the general words "all the land under the water of Kirkland Lake not now applied for."

I find that the description of the lands applied for is indefinite, vague and misleading. The adoption by

Mr. Munroe of the words, "all the land under the water of Kirkland Lake not now applied for," was an over-zealous attempt on his part to blanket any open territory in the vicinity in which he wished to stake and which appeared to him to be of mineral and monetary value.

I also find that the affidavit of discovery sworn to by J. A. Munroe on the 7th of February, 1913, was untrue, as on that date he had not made a discovery at the point where his discovery post was planted by McLean. I do not find bad faith on the part of Munroe as he believed McLean was planting the discovery post at the position where his No. 2 discovery post now is, and felt that he was entitled to make the affidavit, having fully instructed his agent what to do.

The staking is also invalid within the authority of *Ledyard & Powers & Abode* decided by me on the 23rd of April last. It is not permissible for a licensee to erect his No. 1 post and leave the property before his discovery post is erected and the balance of the staking completed, even though the actual staking has been completed by one authorized by him prior to the time the affidavit was sworn to and the application placed on file.

On the description alone I would be forced to dismiss Munroe's appeal and uphold the Recorder that the staking is bad throughout in consequence of the false affidavit, and the improper method of staking adopted by Munroe. I also find that the discovery made by McLean on the date the application was filed is not such a discovery as is contemplated by the Mining Act.

It was contended by the appellants other than Munroe that the latter had not served notice of appeal upon the parties adversely interested, as required by sec. 133, but in the view I am taking of these appeals it is not necessary for me to pass upon this point.

The applications of McIvor, Simpson and Richardson do not conflict, are regular in form, and the Recorder stated that on the removal of the Munroe application they could be recorded.

Although Munroe is an experienced prospector I feel that the mistakes in his staking were made in good faith, and through being over-zealous in his desire to secure the territory applied for, and as he was the first on the ground and had made a discovery, I do not think it a case for costs.

I find that the application of C. A. Munroe now on file in the Mining Recorder's Office at Matheson as No. 3004 is invalid, and I direct that it be cancelled. Appeal from the decision of the Mining Recorder is dismissed.

The applications of McIvor, Simpson and Richardson are allowed to be recorded for the lands applied for.

(THE COMMISSIONER.)

DAVIS AND MATHESON.

MATHESON AND HANCOCK.

Gillies Timber Limit — Disputes—Staking—Unsurveyed Territory—Priority of Discovery—Inspection—Confliction of Claims.

D. and M. both applied for the south-east quarter of the west half of the north-east quarter of block 8, Gillies Limit, but neither staking was within the quarter section applied for. H. applied for and believed he had staked the south-west quarter of the same section, and subsequently M. applied for the same land, having ascertained H. had not staked the land applied for.

Held, land was unsurveyed territory; see *Ledyard & Powers & Abode* (Godson), M. C. C. 60.

Held, also, after inspection by Chief Inspector of Mines, Davis' discovery was insufficient and his dispute was dismissed. That the erection of the posts, blazing of the trees and the sufficiency of the discoveries made by Matheson and Hancock on mining claims, "C" 957 and 938, were equally good, and neither staking was invalid in those respects.

That in the absence of further and better evidence priority of discovery was established by the sworn affidavit of discovery and that Matheson had priority of discovery;

That M. was also entitled to the south-west quarter, but in order to do equity he was ordered to execute a transfer of that portion to H.

Disputes referred by the Mining Recorder to the Commissioner for adjudication. The facts are fully stated in the decision.

J. W. Mahon, for disputant.

A. G. Slaght, for respondent.

23rd June, 1913.

THE COMMISSIONER. — The disputes herein were transferred to me by the Mining Recorder at Haileybury for adjudication, and although the cases were heard separately they can be more conveniently dealt with in one decision.

I will first dispose of the Davis dispute. On the 20th of August, 1912, James E. Matheson staked what he believed to be the south-east quarter of the west half of the north-east quarter of block 8, in the Gillies Limit, in the Coleman Special Mining Division, and subsequently filed an application for the same, which was received by the Recorder and numbered 957. In his application he stated that a discovery of valuable mineral in place was made at 1 minute past 12 o'clock midnight. The same parcel of land was applied for by A. B. Davis and believed to have been staked by him, and in his application the time of discovery was fixed at 5 minutes after 12 of the same night. It was subsequently found that neither the Davis nor the Matheson staking was entirely within the quarter section applied for, but that of Matheson was more accurate, as his eastern and western lines were within the boundaries of the quarter section, but his north boundary is said to be 2½ chains south of the true north boundary of the said quarter section, which projects his claim a distance of 2½ chains south of the correct boundary of the said quarter section, and his discovery is within the quarter section applied for.

In a previous judgment in the case of *Ledyard & Powers & Abode*, dated the 23rd day of April, 1913 (Godson) M. C. C. 60, I had occasion to decide if

block 8 in the Gillies Timber Limit, was surveyed or unsurveyed territory, and I there found that it was unsurveyed territory, and that it was not necessary for the applicants to designate the particular quarter section of the block which they wished to appropriate and which they felt they had staked, and that if they had a sufficiently accurate tie-line, that having applied for a particular quarter section which they had not accurately staked, it would not be fatal to their application, provided the discovery was within the land staked; and it is not necessary for me to pursue the matter further, other than to apply that decision to these cases.

At the trial I was not satisfied with the evidence adduced as to the respective discoveries, especially that of Davis, so I instructed Mr. E. T. Corkill, Chief Inspector of Mines, to make an inspection, which he did, and filed his report on the 19th of May last, a copy of which was mailed to the several parties concerned, and the case was again spoken to at Haileybury on Thursday, the 12th day of June. Mr. Corkill found that the discoveries of Matheson, both on recorded claim 957 and in his application file No. 1162, were valid ones, and also that of Hancock on recorded claim 938, but that there was no vein or mineral of any kind at the point where Davis had planted his discovery post, and consequently he found it to be an invalid discovery and not within the meaning of the Mining Act of Ontario. I believe Mr. Corkill's report to be entirely consistent with the evidence adduced at the trial, and with which I am in thorough accord.

As a discovery is fundamental to a valid staking the Davis dispute must therefore be dismissed, and his staking declared invalid.

The correctness of the Matheson staking was questioned by Davis, but I am unable to find that his staking was not a reasonable compliance with the requirements of the Mining Act. It is quite true he did not blaze a direct line from his No. 1 post to his discovery, but his reason for not doing so was

that a large cliff intervened and he adopted the more practical method of indicating the direction of his discovery from his No. 1 post by blazing a line from his discovery to the northern boundary of the claim to a point at a distance of about 4½ chains from his No. 4 and then easterly along the northerly boundary to No. 1. He admitted that he could have blazed from No. 1 to the top of the cliff and there indicated by a witness post that his discovery was some feet beneath, but as no one was misled by his blaze so made I do not care to find that it was such an inaccuracy as would of itself defeat his staking.

On the same night and at the hour of 5 minutes after 12, if I accept the time fixed in his application, T. R. Hancock believed he had staked the south-west quarter of the west half of the north-east quarter of block 8, in the Gillies Limit, applied for the same, and his application was recorded as No. 938. On the 27th of August, 7 days subsequent to the Hancock staking, Matheson applied for the same quarter-section and had his application placed on file as No. 1162, and at the same time filed a dispute against the Matheson staking and the then recorded claim 938. He stated the reason he staked this particular block of land was because he found that Hancock's eastern boundary embraced nearly half of the adjoining quarter section which he (Matheson) had previously staked, known as the south-east quarter of the west half of the north-east quarter of the said block, and in that respect the Hancock staking would conflict with his (Matheson's) recorded claim 957, and his dispute was filed with the sole idea of having Matheson's eastern line or boundary moved to his western boundary, so that the two stakings would not conflict. It is quite evident from a plan filed at the trial, being Exhibit 5, that claim 938 is practically split in the middle by the boundary line between the two quarter sections, or, in other words, Hancock only succeeded in staking one-half of the lands applied for, and consequently

embraced nearly one-half of the territory previously staked by Matheson, known as mining claim 957.

If it was surveyed territory then there would be very little difficulty in disposing of the Matheson and Hancock stakings. In surveyed territory where the discovery is outside the limits of the claim as applied for, but within the boundaries as actually staked out on the ground, the claim would be invalid, but in unsurveyed territory if the discovery is within the 4 corner stakes and in other respects the claim had been staked in accordance with the Mining Act, then the staking would be held to be valid.

As between the erection or planting of the posts, the blazing of the lines and the sufficiency of the discoveries made by both Matheson and Hancock on mining claims 957 and 938, there is no distinction. One staking is as perfect as the other, and neither staking is sufficiently bad to declare it invalid.

Then can Matheson succeed on the question of priority of staking? He has sworn to a discovery made at 1 minute past 12 midnight on the 19th of August last, and Hancock made a similar affidavit, stating his discovery to have been made at 5 minutes after 12 on the morning of the 20th. Priority depends on the priority of discovery and staking, the date or filing being immaterial if all is done within the time required by the Mining Act, and it is necessary to say this as Hancock was recorded as No. 938 and Matheson as No. 957, which, in point of time, placed Hancock on record in the Recording Office first. Both Matheson and Hancock knew of the situation of their discoveries prior to the time of actual staking, and as an Order-in-Council had been issued stating that the limit would be thrown open to prospectors immediately after midnight of the 19th of August last, they were both on the ground ready to stake at the earliest permissible moment.

I am asked to find priority of staking by Matheson, and the facts are that both parties started to plant

their discovery posts at midnight of the 19th of August last. There was no definite evidence that Matheson completed his discovery at exactly 1 minute after 12, and the accuracy of his time is placed in doubt by A. Bigelow, who was called as a witness on his behalf, who stated that he saw Matheson put up his discovery post at 4 minutes past 12 by his (Bigelow's) time, which, if accepted, would fix Matheson's discovery as 1 minute prior to that of Hancock. Each of the parties in their applications and affidavits attached thereto stated and swore to definite time of discoveries, and they could properly be held bound by the times so adopted, which would in that case again give Matheson priority of discovery. If Matheson could be said to have priority of discovery, then, all other things being equal, he would be entitled to succeed on that point as against Hancock.

I have endeavoured to show the real merits of the two stakings as their respective discoveries are within the area embraced by the overlapping of their eastern and western boundaries. By an examination of Exhibit 5, being a plan prepared by R. S. Code, O.L.S., it will be seen that Hancock's discovery is several chains east of the eastern boundary of the quarter section applied for, or well within the lines of Matheson's staking. If it could be held that Matheson had priority of staking, then Hancock's claim must be declared invalid, and if priority is not so found then Matheson is in the same position as to the locality of his discovery as Hancock, as it is situate to the north and centre of mining claim 938, but within the limits of the quarter section applied for. As to the situation of their respective stakings, there is only this difference, that Matheson's is within the quarter section applied for and that of Hancock is not, but both discoveries are within the boundaries of the lands staked.

Hancock started out to stake the south-west quarter of the west half of the north-east quarter of the said

block 8, and Matheson the south-east quarter, etc., of the same block, with the result that Hancock succeeded in staking only a small portion of the eastern part of the quarter section applied for, and took in nearly half of the section immediately adjoining to the east thereof. Matheson was more accurate and kept his eastern and western lines within the boundary of the lands his application called for, but got his northern boundary about 2½ chains too far south. It was a physical impossibility for either of them, or any other prospector, to accurately stake a particular quarter section of the block in question, because it had not been internally surveyed into quarter sections, the Government having only placed stakes on the north and south boundaries at intervals of 10 chains, and on the east and west boundaries at intervals of 20 chains for the mile square. To add to the other difficulties it was midnight, and they are well aware that to succeed in securing a claim that night expedition must rule.

It was a general belief amongst the prospectors that they must apply for a particular quarter section and stake it as such, which they tried to do, with one of the results as shown in this case.

I find that Matheson's staking of mining claim 957 was a sufficient compliance with the requirements of the Mining Act and that his discovery was a valid one and within the lands staked. Being in unsurveyed territory and having staked mostly within the limits of the quarter section applied for, his tie-line was sufficiently definite to permit of the claim being located and laid down on the map in the Recorder's Office.

While I hesitate to find any priority of discovery I feel under the peculiar circumstances of these cases that what the parties, no doubt advisedly, adopted as the time of their respective discoveries, and so swore to, I must accept, and consequently find that Matheson staked mining claim 957 prior to the staking by Hancock of mining claim 938.

Having declared mining claim 957 valid and finding as I do that Hancock had properly staked mining claim 938, it must nevertheless be declared invalid in consequence of the discovery, although within the limits of the land staked, being upon mining claim 957, which I have declared had priority over 938. Therefore such discovery is upon a previously recorded claim, and invalid.

The result so far has been to give to Matheson what he sought by his application, and I think upon the facts he is justly entitled to succeed. But by finding priority of discovery I have unhorsed Hancock, who becomes a victim of time. I am not satisfied that Hancock should lose what he intended to, and thought he was staking and applying for, through a finding of priority based upon the slender facts in this case, and I intend that Matheson's application No. 1162 for the south-west quarter of the north half, etc., shall be applied in relief of Hancock's position. I have said that when Matheson staked the south-west quarter on the 27th of August last and filed a dispute he did so for the purpose of getting rid of that part of Hancock's staking which encroached on the south-east quarter, or mining claim 957, and he has succeeded. It was Hancock's intention to secure the south-west quarter of the north half, etc., and he succeeded in staking only part of it.

It is admitted that Matheson did not wish to secure the adjoining quarter section applied for by application 1162; his real purpose was, as already stated, to dispossess Hancock so far as the latter's claim 938 encroached on Matheson's staking of 957. It would be inequitable to allow Matheson to secure both quarter sections in consequence of Hancock's discovery being upon his claim 957, because he would be securing more than he had actually desired. It is stated in Matheson's dispute and also in evidence that he had agreed with Hancock to have a survey made of their stakings and that the one who had not staked

according to his application should abandon the conflicting area. I intend to hold the parties to this understanding and give them as far as possible what their applications call for.

This decision is given upon what I consider the real merits and substantial justice of the case, and in an endeavour to carry out the intention of the parties, which I believe I can do, as there are no other parties adversely interested. I will allow the application of James E. Matheson, now on file as No. 1162, for the south-west quarter of the north half, etc., and direct the Mining Recorder to place it on record, and concurrently therewith order the said Matheson to execute a transfer of the said mining claim to T. R. Hancock, who will become the vested holder of the same.

During the progress of the trial I stated that this was a proper case for settlement, and have since again intimated that it would be better for the parties to get together and adjust their difficulties. Apparently they could not do so, and as they have all added to the difficulties in the case I will withhold costs.

(THE COMMISSIONER.)

GRATTON ET AL. V. NEILLY.

Disputes—Validity of Discoveries—Staking—Reasonable Compliance—Affidavit of Discovery—Recording—Construction of Certain Orders-in-Council—License of Occupation—Land Open for Staking—Inspection.

Five applications were filed for the same property, one of which was accepted and recorded. The remaining four applicants filed disputes which were heard together by the Commissioner. The discoveries were inspected by the Chief Inspector of Mines, and of the five only those of Gratton and Neilly were reported favourably upon.

Held, by the Commissioner, upon the Inspector's report and evidence, the discoveries of all others than Gratton and Neilly were not valuable mineral in place.

Held, also, that neither Graham or Martel had staked their claims in accordance with the provisions of the Mining Act, and in each case the affidavit of discovery and staking had been based upon what they assumed had been done, but of which they had no personal knowledge.

Held, also, that while Davis had made a good discovery, his staking was defective and invalid, and that Gratton's discovery was sufficient, but his staking was not a reasonable compliance with the provisions of the Mining Act.

Held, also, that Neilly's discovery and four corner posts were properly erected and marked and lines blazed and the staking valid.

That what was intended to be reserved by the Order-in-Council of the 20th of August, 1912, were only the several rights-of-way therein mentioned and the mines and minerals in, on or under were in the Crown and open for prospecting and staking, and Neilly's discovery being upon the right-of-way was not therefore invalid.

In the result Neilly's claim was allowed to remain upon record.

The four disputants having filed applications for the same lands the Mining Recorder for the Coleman Special Mining Division transferred the disputes to the Commissioner. The facts are fully set out in the decision.

T. W. McGarry, for Martel, disputant.

W. A. Gordon, for Graham, disputant.

F. L. Smiley, for Davis, disputant.

G. G. T. Ware, for Gratton, disputant.

A. G. Slaght, for Neilly, respondent.

3rd July, 1913.

THE COMMISSIONER.—The lands herein were originally recorded in the name of Thomas Reilly as mining claim 932, and subsequently an abandonment was filed by Reilly and the claim cancelled. The application of Mr. Neilly, the respondent herein, being next in chronological order in point of time, was placed on record and the lands applied for became known as mining claim 940.

The four disputants having filed applications for the same lands, the Mining Recorder for the Coleman Special Mining Division on the 6th of March last transferred the disputes to me for trial. The five cases were heard together by consent at Haileybury on the 7th day of April, 1913. At the conclusion of the trial I decided to have a government inspection made of the several discoveries as I was not satisfied with the evidence in that respect.

On May the 9th, all the parties were notified by letter to meet Mr. E. T. Corkill, Chief Inspector of Mines at the property in question, on Saturday the 17th of May last, which they did, when an inspection was made in their presence by Mr. Corkill, and his report was handed to me on the 19th of the same month. Of the five discoveries those of Neilly and Gratton only were found by him to be valid ones, and they were said to be situate at a point on the pipe-line of the Cobalt Hydraulic Power Company where the power line of the same company crossed it. The alleged discoveries of Martel and Davis were found to be about 200 feet east of the discoveries of Neilly and Gratton and the Inspector stated that there was a possibility that they might be a continuation of the same fissure. The discovery made by Graham was entirely condemned. I arranged at the trial that the cases should be argued after the Inspector's report was filed, and the arguments were heard at Haileybury on the 10th of June.

The land in dispute consists of the north-east quarter of the east half of the south-west quarter of block 2 in the Gillies Timber Limit, which is within the limits of the Coleman Special Mining Division.

This block, amongst others in the limit, was opened by the Government for prospecting and staking out, etc., on Tuesday, the 20th day of August, 1912. All the applications in question were for the same quarter section of this particular block, and all the stakings were completed immediately after midnight of the 19th of the same month and within a few minutes of each other, particulars of which I will refer to.

In the Graham case absence of a valuable discovery of mineral in place is of itself fatal to his application. A sufficient discovery within the meaning of the Mining Act is a fundamental and essential requirement of a valid staking. I adopt the Inspector's report and find that Graham had not a valid discovery. His staking was also defective. The part played by Graham was a meagre one, the extent of which was the placing of his discovery and No. 1 posts. The rest of the work was performed by his associates or employees after he had left the property for Haileybury to record the claim. I find that one R. Montgomery put up the No. 3 post and blazed the lines and reported progress to Graham at Haileybury about 6.15 a.m. of the 20th, previous to the application being placed on file. No. 2 post was erected by Robinson, and Evans was instructed to plant No. 4, but whether he did so or not I cannot say as no evidence was given as to how the post was put up, although it was sworn to as being in place.

The only knowledge that Graham had that the claim had been staked according to his instructions was the statement of Montgomery. This knowledge so gained was insufficient to allow Graham to make the affidavit of discovery and staking which he did, and he was not conditioned to swear to the facts therein contained. His case in this respect is governed by that

of *McNeill & Plotke* (Price), M. C. C. 144, in *Ledyard & Powers & Abode* (Godson), M. C. C. 60, and *McLeod & Armstrong* (Godson), M. C. C. 71, I therefore declare Graham's staking invalid.

It was said by the Inspector that Martel's discovery standing by itself was insufficient and invalid, but that it might be a continuation of the same fissure upon which the discoveries of Neilly and Gratton were made. As the latter's discoveries are 200 feet west of Martel's, it would be mere conjecture to say that Martel might pick up the same vein at that distance. What is required is a discovery at the point indicated by the discovery post sworn to in the affidavit. It must be a valuable discovery at the time it is appropriated and the lands staked, and cannot afterwards be improved in order to constitute it a discovery of valuable mineral in place. I therefore find that Martel's discovery was not a valid one and as required by the Act.

Nor can his staking be upheld. He put up his discovery post and No. 1 and then left for Haileybury to record the claim. His agents Johnson and McGarry put up Nos. 2, 3 and 4 posts and did the blazing of the lines, if any was done. Martel did not go that night to his Nos. 2, 3 and 4 posts or travel the side lines, but notwithstanding this he made the affidavit and staked on the mere chance that it had been done as directed. The facts in this case are within the decisions in *Ledyard & Powers & Abode* and *McLeod & Armstrong,* before referred to, and I have no reason at present to change my mind in regard to the validity of such stakings. I find that the Martel staking was not in compliance with the Mining Act, and it is consequently invalid.

What has been said in reference to Martel's discovery applies with the same force to the alleged discovery of Davis, and his discovery must be declared insufficient and invalid. As Davis had completed the

actual staking in person he is unfortunate in not having a proper discovery; otherwise he might have figured amongst the few survivors in the struggle for the claim in question. The contestants by the process of elimination are now reduced to two, namely, Neilly and Gratton.

Although the application of Neilly was recorded it was done so by arrangement amongst the disputants herein. In order that there should be some application to dispute it was consented that Neilly being the next in order to file after Reilly's application, should be recorded without giving him an acknowledged title to the claim. Each of the disputants claimed priority of discovery one over the other.

Then what are the facts leading up to the applications of Neilly and Gratton? Dealing first with the Gratton staking. His discovery is situate about 4 or 5 feet away from that of Neilly, and upon the evidence and the Inspector's report it is clearly as good as Neilly's and is a sufficient one within the terms of the Mining Act. Neilly claims priority of discovery over Gratton, and I so find. It is admitted by Gratton, that he made his discovery and planted his discovery post after Neilly's appropriation of a discovery, and that it might have been only three or four seconds later, but it was in any event a subsequent discovery.

While his staking was completed with more rapidity than that of Neilly, who I find used proper expedition in marking out his boundaries, planting his posts and making out his application therefor, priority cannot be gained in such a manner. As discovery is the foundation of a good staking the first discoverer, if he at once proceeds to stake the claim, has priority over another licensee who immediately afterwards makes a discovery and succeeds in staking and getting on record first.

Of the five applicants Gratton established a record for rapidity of staking, but the race is not always to the swift. The distance around the claim from the

discovery post to the No. 1 would probably be about a mile, and to properly stake the claim the applicant is required to make a discovery, erect a post at that point, blaze a line to his No. 1, erecting four other posts, all of which must be properly marked and written upon, and blaze the boundary lines. It must be remembered it was midnight in a rough timbered country, and Mr. Gratton, in 12 minutes, satisfied himself he had made an honest and proper staking of the claim before he left the property. At 1 a.m. of the same morning he made another discovery on block 8 of the Gillies Limit, which is to the south of the block in question, and probably a mile distant from where the present claim lies, so that in one hour he had completed the staking of two independent isolated mining claims. He would well qualify as a midnight prowler, but his rapidity of staking mining claims cannot be approved of. It was physically impossible for him to stake this claim in 12 minutes and do it all by himself as he proclaimed. The imperfections of such a staking were exposed under cross-examination when Gratton admitted he had not blazed a line from his discovery to his No. 1 post, nor blazed the boundaries or attempt to show the position of his lines.

I find that the staking of the lands in question by Gratton was not in compliance with the requirements of the Mining Act and invalid, and that even if his staking could be said to be good, he has established priority of discovery by Neilly out of his own mouth.

Can Neilly then be held to be the properly recorded holder of the claim? If the answer depended solely upon the correctness of his staking, the answer would be yes. The situation of the discovery which Neilly selected was known to him sometime before the limit was open to prospecting, as he had occasion to pass through the limit from time to time. Appreciating that there would be a tremendous rush to the limit the night it was open he made his plans accordingly and engaged a special train to convey him from a

siding near the property to Haileybury, thinking that would be the quickest means of reaching the Recording Office after he had staked the claim, but his hopes were not realized as he found Reilly had reached there before him. Reilly, no doubt, felt his application could be successfully attacked and decided to withdraw his application, leaving the situation as we find it in these cases.

It was proved that Neilly placed all his posts himself and did some blazing. He had Gordon F. Summers, O.L.S., go around the claim with him to witness the planting of the posts, etc., and had the assistance of J. D. McPharlane and others in completing the staking. It was 42 minutes after 12 a.m. when Neilly reached the railway siding after completing his staking. McPharlane stated that half a dozen other licensees had blazed the same lines before him, so the boundaries were well defined. The blazing was not completed until daylight by McPharlane, when he left for Haileybury.

I am prepared to accept Neilly's blazing although recognizing as I do that he had not personally blazed all the lines. I do not wish to be understood as endorsing this casual method of blazing, but the unusual circumstances attending the opening of this limit at midnight and the mad rush to secure claims has made me more lenient in my scrutiny of Gillies Limit stakings than I would be under different circumstances. Neilly's discovery and four corner posts were properly erected and marked and a line blazed from his discovery to his No. 1 post. Sufficient blazing was done by Neilly or those with him, and in his presence, to identify the boundaries of the claim staked, and as his discovery has been approved of by the Chief Inspector of Mines, I find that his staking was a reasonable compliance with the Mining Act and valid.

The crux in the case has now been reached. It is proved by Mr. Corkill's report and admitted by Neilly

and Gratton that their discoveries are upon the right of way of the Cobalt Hydraulic Power Company at a point where the Cobalt Power Company's line crosses, and immediately beneath the transmission wires of the latter company. This is the difficulty in the case and if the strenuous arguments of counsel for the disputants other than Gratton and Neilly are to prevail, then Neilly's application must be dismissed.

It is argued that his discovery is upon a strip of land not open for prospecting or staking out, and the determination of the correctness of such arguments must be decided upon the construction of certain Orders-in-Council approved by His Honour the Lieutenant-Governor.

On the 14th of August, 1905, an Order-in-Council was passed in which all that tract of land known as Gillies Brothers' Timber Limit, containing 100 square miles, more or less, and situate in the township of Coleman, was withdrawn from exploration for mines and minerals, and from sale, lease or location. The said territory remained closed to prospectors until the 20th of August, 1912, when, by an Order-in-Council duly approved of and dated 2nd of August, 1912, certain portions of the said limit particularly set out in the Order-in-Council were re-opened for prospecting and staking out and sale or lease under the Mining Act of Ontario. Block 2 in question herein was amongst the parcels so opened.

A license of occupation was granted by the Ontario Government to the Cobalt Hydraulic Power Company on the 31st of December, 1908, and to the Cobalt Power Company on the 4th of December, 1909. The lands occupied by the several companies pass through block (2) herein and the transmission line crossed the pipe-line at the point where these two discoveries in question are situate. The lands embraced within the license of occupation consisted of a strip 100 feet in perpendicular width, 50 feet on each side of the centre line. The powers given to the companies

under the licenses were as follows—for the purpose of laying pipe-lines, erecting poles, stringing wires thereon, cutting down only such trees as it may be necessary to remove for the sufficient protection of the pipe and pole lines to be constructed and doing no damage to the timber berth through which the said pipe and pole lines may run, and of patrolling the said lands and keeping same in repair, *reserving, nevertheless, the mines, minerals and mining rights in, on or under the said lands, etc.*

It will be seen that the two licenses of occupation were issued prior to the Order-in-Council of 2nd of August, 1912, and that the mines, minerals and mining rights in, on or under the said lands had been retained by the Crown. The Order-in-Council of the 2nd August, 1912, recites that " subject to the reservations mentioned and set forth in the annexed report of the Honourable the Minister of Lands, Forests and Mines, those portions of the Gillies Timber Limit on the Montreal River described in the said report being lands of the Crown, heretofore withdrawn from prospecting and disposal for mining purposes, be, on and after Tuesday, the 20th day of August, 1912, reopened for prospecting, staking out, and sale or lease under the Mining Act of Ontario." In the recommendation sent to the Lieutenant-Governor by the Honourable the Minister of Lands, Forests and Mines, it was suggested that those portions of the Gillies Timber Limit being lands of the Crown heretofore withdrawn from prospecting and disposal for mining purposes, be on the 20th day of August, reopened for prospecting and staking out, etc., and the lands are specifically referred to, and then the following clauses occur:—

Reserving therefrom in the above-described area the right-of-way of the Cobalt Power Company's transmission line, 100 feet wide, 50 feet on each side of the centre line as shewn on plan of survey by O. L. Surveyor Homer W. Sutcliffe, dated July 12th, 1909, of record in the Department of Lands, Forests & Mines; the right-of-way of the Cobalt Hydraulic Company's transmission line being a strip of land 100 feet wide, 50 feet on each side of the centre line as shewn on plan of survey by O. L. Surveyor T. G. Code, dated November 17th, 1908, and the right-of-way of the Mines Power

Company's transmission line, being a strip of land 135 feet wide, 67½ feet on each side of the centre line as shewn on plan of survey by O. L. Surveyor Clayton E. Bush, dated November 1st, 1909.

Reserving also the right of the Crown to grant a right-of-way for a transmission line 100 feet wide, 50 feet on each side of the centre line for the purposes of a pole line and transmitting power from the water-power at Fountain Falls on the Montreal River over any portion of the above described area.

Reserving also one chain in perpendicular width along the north-easterly bank of the Montreal River.

It is contended by the disputants, other than Gratton, that the use of the words " reserving therefrom " as applied to the rights-of-way of the several companies takes those particular strips of land out of the general description of the lands thrown open and makes them prohibitive territory for the purpose of prospecting and staking out.

The Crown reserved the right to grant a right-of-way for a transmission line 100 feet in width for the purpose of a pole line and transmitting power from the water power at Fountain Falls *over any portion of the above described area* (referring to the Gillies Limit). If by this clause it was intended to prevent making discovery or staking upon such lands so to be selected could it be said that prior to the fixing of the boundaries of such right-of-way, if a discovery had been made thereon, that it would be held to be invalid? Supposing a claim had been staked on the limit and was being worked, and subsequently thereto the Government fixed the boundaries of the proposed power company's line, when it was found that the discovery was within its limits. Could it then be argued that the claim on that account was invalid as the Order-in-Council had reserved a piece of land to be selected and of which all prospectors had notice? If it could then it would have been unsafe for any prospector or company to stake a claim on the limit until the proposed right-of-way had been fixed and surveyed.

I do not think such an argument reasonable, and that being so, is not the real intention of the Order-in-Council shown? To my mind the reservations were

notices to prospectors of the previously granted rights-of-way to the three power companies and the right of the Government to grant a further right-of-way to another company not then formed and the preservation of a road allowance. It was notice that all stakings would be subject to such rights previously granted or to be granted, and their patents or leases to the lands so applied for would be restricted in that respect.

When the several licenses of occupation were granted the Crown reserved the mines, minerals and mining rights in, on or under the said lands, showing clearly that all the rights of the said companies had in or on the lands licensed were as expressed in their respective leases, but that they had no rights in the minerals. Why then, when the limit was thrown open, should the Crown seek to withhold the minerals, if any, on these particular strips of land or rights-of-way? All that the companies possessed was a right-of-way which is an easement and limited to certain definite purposes. Even the trees thereon were reserved, also certain rights of timber licensees.

The use of the words " reserving therefrom " in the Order-in-Council were not apt to meet a situation of this kind, and undoubtedly are embarrassing to a proper construction of the order. The whole Order-in-Council must be read in order to gather its meaning, and while the licenses of occupation already referred to were not put in at the trial, I have had access to the originals on file in the Crown Lands Department at Toronto, and feel that they must be read with the Order-in-Council to determine the rights of the parties in these disputes.

Subject to the provisions of sec. 34 of the Mining Act a licensee may prospect for minerals and stake out a mining claim on Crown lands surveyed or unsurveyed on which the mines, minerals or mining rights have been reserved to the Crown, which are not at the time withdrawn by an Act, Order-in-Council, etc.

The Gillies Timber Limit was Crown land and the mines and minerals are in the Crown.

Section 36 of the Act refers to lands not open, and sec. 39 recites that the Lieutenant-Governor may withdraw any lands or mining rights which are the property of the Crown or reopen the same for prospecting and staking out or for sale or lease. The Orders-in-Council closing the limit to prospectors on the 14th of August, 1905, and reopening it to them on the 20th of August, 1912, were quite in accord with the powers given by the Mining Act.

The word "reserved" taken baldly means "except" or "save," and if applied in its strictest form all the Crown reserved was the several rights-of-way in which it controlled the mines and minerals in, on or under, and to which the companies having access to the rights-of-way only had the right to use the surface land for the particular purposes set out in their licenses. I cannot feel that it was the intention of the Crown to single out these rights-of-way and make them inaccessible to discovery of mineral and staking out as mining claims when at the same moment they had thrown open the lands on each side for those purposes. The object of the Crown in opening the limit for prospecting was to exploit the mineral rights thereon, and what sensible purpose could be served by withholding the minerals on the lands within the rights-of-way? None to my mind. Mining could be safely carried on on the so-called reserved territory notwithstanding the situation of the pipe and transmission lines.

A valid discovery might be seen on the right-of-way and then the vein dip and its richness not be disclosed until delved for on each side of the argued prohibited strip of land. The situation to my mind would be ridiculous, and I prefer to extend to the words "reserved therefrom" a liberal construction and hold them to mean subject to the rights of the Cobalt Hydraulic Power Company, etc., and subject to the right

of the Crown to use the surface for the purpose of a road or other power lines.

The necessity of having mentioned the several rights-of-way or indicating the possibility of a further right-of-way is not apparent to me, as I believe the Crown would possess the right notwithstanding the lands had been staked. However I am firmly of the opinion that by reference to the " reservations " the Crown intended to give notice of the existing licenses of occupation and their further intention to use the limit for the purposes set out in the Order-in-Council and by that means prevent unnecessary disputes between surface rights owners and miners or licensees, and not to reserve the mines and minerals in, on or under the lands so said to be reserved.

I have been referred to the following cases by Mr. Slaght, counsel for the respondent Neilly:—

Wright v. *Jackson*, 10 Ont. Rep. 470; *Casselman* v. *Hersey*, 32 U. C. R. 333; *Fisher* v. *Webster*, 27 Ont. Rep. 35, and *Terry* v. *West Kootenay Power & Light Co.*, 11 B. C. R. 229.

In the latter case it was held that, " a conveyance of a right-of-way to a power company for a pole line and any other purpose which it may use it for, and the sole and absolute possession of the right-of-way, does not divest the grantor of his right to cultivate the right-of-way in such a manner as will not interfere with the company's poles or pole line," and such reasoning can be usefully applied here.

I have read *LaRose* v. *T. & N. O. Ry.*, 9 O. W. R. 513, at 515, referred to by Mr. Gordon, but did not find it helpful.

By sec. 140 of the Mining Act the Commissioner is required to give his decision upon the real merits and substantial justice of the case, and I have tried to do so here, and feel that my interpretation of the Order-in-Council in question is a reasonable one, consistent with the intentions of the Government, and in conformity with the merits and justice which should be

extended to the interested prospectors in this somewhat bitter controversy.

I find the applications of Edouard Gratton, Peter T. Graham, George Martel and Robert Davis, disputants, for the lands in question, to be invalid.

And I find the application of Balmer Neilly, the respondent, to be valid, and direct that it should remain upon record.

(THE COMMISSIONER.)

COX v. BRISBOIS ET AL.

Appeal from Mining Recorder — Dispute — Working Conditions — False Affidavit of Work—Evidence.

C., alleging non-performance of working conditions, applied to be recorded for the same claim, which application was refused by the Mining Recorder. C. also filed a dispute. Both appeal and dispute were heard by the Mining Commissioner.

Held, that the report of work sworn to by A. was untrue, and known to be untrue when the affidavit verifying the report of work was sworn to. That A., with such knowledge, wrongfully disposed of the claim to the respondents, who were innocent purchasers for value. The purchasers had accepted the risk which attends a mining claim before issuance of a certificate of performance of work or record, and they had no relief before the Mining Commissioner.

Proceedings by way of appeal to the Mining Commissioner from the decision of the Mining Recorder refusing to accept the application of the appellant and dispute against mining claim L-2454, situate in the township of Lebel, in the Larder Lake mining division.

George Ross, for disputant.

A. G. Slaght, for respondent.

July 18th, 1913.

THE COMMISSIONER.—On the 21st of April, 1913, George L. Cox filed a dispute against mining claim L-2454, situate in the township of Lebel, in the Larder

Lake mining division, recorded in the names of Victor Brisbois, J. Z. Desrochers and R. R. Tough, in which he claimed that the report of work filed on the 4th of July, 1912, by E. A. Alford, the original staker, was untrue, the work sworn to therein not having been performed. On the 12th of April, 1913, he tendered an application for the same property to the Mining Recorder, who refused to record it, and an appeal was taken to the Mining Commissioner from such act or decision of the Recorder on the 21st of April, 1913. I have heard both the appeal from the decision of the Recorder refusing to place the application of Cox as tendered on record, and the dispute filed against the claim, together.

If the facts set up by Cox are correct and the assessment work was not performed as alleged, then the interest of the recorded holders ceased and the claim became open for prospecting and staking out.

The claim was staked by E. A. Alford on the 19th and recorded on the 22nd of March, 1912, and on the 4th of July following a report showing 60 days' work done on the claim was duly filed. The report states that C. V. MacDowell, E. A. Alford and T. S. Vipond worked on the claim between 15th April and 2nd May, 1912, each 8 hours per day, total 36 days. If each of the parties mentioned worked the time stipulated then they would have performed 51 days, not 36, as stated, but whether Alford in inserting the figures 36 instead of 51 made a mistake is not material in view of the disposition I will make of the matter. In support of the contention that the report of work was untrue the appellant Cox called MacDowell as a witness, and he stated that Alford did not do any work on the claim between the 15th of April and the 2nd of May, 1912, as sworn to, nor did Vipond to his knowledge. Alford took MacDowell to the property about the 1st of April, Vipond having supplied the grubstake, and shortly after they arrived there Alford left for Toronto and then for Michigan, where he was called by sickness in his family. Vipond was not called to say

whether he worked upon the claim as alleged or not, nor was Alford prepared to swear that he did.

It was admitted by Alford that he only worked upon the claim 5 or 6 days, and had accepted the word of MacDowell that the necessary assessment work had been performed. It was denied by MacDowell that he told Alford the work had been done, but on the contrary he stated he informed him that "it was poor business to sell the property when the work had not been done." Alford sought to shelter himself behind MacDowell's alleged statement and the fact that MacDowell had supplied the money with which to record the work. This again is denied by MacDowell, who stated that Alford had paid a commissioner to prepare the report of work, and this was in the face of his objection that the work should first be performed.

On the 10th of October, 1912, MacDowell took an option on the claim from Brisbois with the intention of including it in other properties he had for disposal. I was not impressed with MacDowell's evidence, nor do I blieve that he had any moral compunction about the work being sworn to that had not to his knowledge been performed, as he subsequently took an option on the property with the object of selling it when he knew, as he stated, that the title was invalid in consequence of the failure to comply with the working requirements of the Mining Act. However, I accept his evidence that Alford did not work upon the claim as sworn to.

Alford cannot even state the days or the time of the month he worked the 5 or 6 days upon the claim as alleged, and admitted that he merely adopted the dates mentioned in the report of work believing that if the work had been done any time might be mentioned.

I do not believe Alford worked 5 or 6 days, or any time upon the property, nor do I accept his statement that MacDowell had told him the work had been done. I find that the report of work sworn to by Alford and recorded on the 4th of July, 1912, was untrue and

known to be untrue at the time the affidavit verifying the report of work was sworn to by him. His iniquity does not stop at false swearing, but with a knowledge of invalidity of title he disposed of his interest in the claim to Victor Brisbois and J. Z. Desrochers, from whom he obtained $800 on the admitted representation that the work had been performed as recorded.

I find that Brisbois and Desrochers were innocent purchasers for value, but I cannot protect them as they must be found to have taken the well known risk as to title which attends a mining claim before the issuance of a certificate of performance of work or a certificate of record, and they must have recourse to civil rights or otherwise against Alford.

As I find that the necessary assessment work was not performed within the time required by the Mining Act upon the claim in question, it was open for prospecting and staking out on the 26th of March, 1913, when staked by Cox.

I allow the dispute and appeal filed by George L. Cox against mining claim L-2454, situate in the township of Lebel, in the Larder Lake Mining Division, and order his application filed therefor to be placed on record.

I direct that mining claim L-2454, as originally recorded in the name of E. A. Alford, be cancelled, and I declare it invalid.

As the innocent purchasers from Alford were justified in defending their title as against the subsequent staker Cox, and having suffered financially through the perfidy of Alford, I make no order as to costs.

(THE COMMISSIONER.)

GLEESON AND BARTON ET AL.

Appeal to Commissioner from Decision of Mining Recorder—Mechanics' Lien Act—Lands Open for Staking—Pending Proceedings.

Claims were in good standing until the 22nd of March, 1913. On that date the Recorder extended the time for the deficiency of work until the 22nd of May. On the ground of pending proceedings a further extension of thirty days was granted. G. had performed work for the holders of the claims, but was not paid for his services and refused to file a report of work. The men employed by G. proceeded to collect their wages under the Mechanics' Lien Act. A report of work caused to be done by G. was tendered the Recorder on behalf of the holders, but refused as not being in proper form.

G. staked the claims on the 22nd of May, contending they were open for staking and that the Mining Recorder improperly granted an extension of time for the performance of work.

Held by the Commissioner, after reviewing the authorities, that the "Mechanics' Lien proceedings" were "pending proceedings," and as the proceedings were still before the Court on the 27th of May, 1913, the Recorder properly made the order that the claims were therefore in good standing when staked by Gleeson and the appeal was dismissed.

Directions to sheriff to bring the claims to sale to satisfy the claims filed by the lien-holders.

Proceedings by way of appeal from the decision of the Mining Recorder refusing to record applications for the lands known as claims TRS-1155, TRS-1156, Porcupine Mining Division.

A. G. Slaght, for Gleeson.

George Mitchell, for Barton and Menge.

23rd July, 1913.

THE COMMISSIONER.—This action is in the form of an appeal by T. J. Gleeson against the decision of the Mining Recorder refusing to record his application for the lands known as mining claims TRS-1155 and 1156, situate in the Porcupine Mining Division.

The respondent Margaret K. Barton appears upon the abstract of title as the recorded holder of the claims, but she is in fact trustee only for J. A. Menge,

who was added as a respondent at the trial. The co-respondents other than the Northern Canada Power Co., Ltd., having filed mechanics' liens, were made parties to the action as being adversely interested. The N. C. P. Co., Ltd., having a right of way over the property, the appellant thought it necessary to add them as respondents, but as the mines and minerals in, on or under their right of way remain in the Crown they had an easement only and were not adversely interested and were not represented at the trial. The claim of Pritchard has been satisfied, and the lien of Al. Boyd had been lost in consequence of his failure to comply with the requirements of the Mechanics' Lien Act. The other lien-holders have prosecuted their claims to judgment, which were secured about September, 1912. The form of judgment was settled by the learned trial Judge at Sudbury, the date of the sale fixed, and the sheriff directed to enforce the sale. The parties interested, for reasons not disclosed, but no doubt well considered, asked that the date of the sale be enlarged and the matter now stands in the sheriff's hands in this position.

On the 22nd of May, 1913, T. J. Gleeson having restaked the claims in question, tendered an application therefor to the Recorder, who refused to place it on record on the grounds that the claims were in good standing and not open for staking.

A report of work was filed on the 29th of June, 1910, showing 180 days assessment work performed upon each claim, which would keep the claims in good standing until the 22nd of March, 1913. As the Mining Act requires 240 days work to be done on a mining claim, there remained 60 days work to be performed on each claim on or before the 22nd of March, 1913. On the 22nd of March, 1913, the Mining Recorder granted the recorded holder an extension of 60 days in which to complete the work on the said claims, and it not then having been recorded a further extension of 30 days was granted by him on the 27th of May, 1913.

The appellant contends that the claims were open for staking at the time he tendered his applications on the 22nd of May last, that the Mining Recorder had not power to grant the extensions, hence the appeal from his decision refusing to record the applications when submitted. In the notice of appeal filed, which was supported by the evidence of Gleeson at the trial, he stated that in June, 1911, he was engaged by Menge to do assessment work on the claims, and on or about the 27th of May, 1911, he commenced work thereon in charge of a gang of men and continued the work for approximately two months, during that time causing to be performed thereon more than 60 days work on each claim. As he could not secure a settlement of his wages he refused to record the work, and the lien actions by the men employed by Gleeson were then filed.

On the 20th of January, 1913, Mr. George Mitchell, acting for Menge and some of the lien-holders, wrote the Mining Recorder enclosing reports of work for the final 60 days, requesting that they be placed on record, but the Recorder refused to do so as the reports did not show the specific dates upon which the men had worked on the claims, and it was not in conformity with the requirements of the Act. In the Recorder's reply to Mr. Mitchell refusing to place the reports of work on record, he stated that he would keep the claims in good standing by granting extensions of time until he had a ruling from the Bureau of Mines as to his right to place the report on record or until the matter was settled. At the time the reports of work were sent to the Recorder Mr. Mitchell stated he had a letter from Menge that the whole matter would be settled before the 1st of February of that year. Why Gleeson did not join the lien-holders in their action was not made clear, nor why he did not issue civil process for the collection of $900, which he claimed Menge owed him for the work done or caused to be done upon the claims, was not explained to my satisfaction. I cannot feel that he has a just claim against

Menge for the amount he states is owing him, nor could a man in his position allow the debt to remain unsettled and unsatisfied for a period of two years without making some effort to secure an adjustment. It is evident that he concluded that by withholding the report of work he would embarrass Menge and cause a forfeiture to occur, which would permit him to restake and record the claims. In that way he would liquidate his debt, if any, owing by Menge. The Mining Recorder had explained to Gleeson the reasons of his extensions, so the staking was not done in ignorance of the facts. It was stated by counsel for Menge, but not proven, that his client had not received an account from Gleeson, but that if he would render one it would be either accepted or rejected at once. The above appear to be the essential facts in the case.

If the Mining Recorder had the right to extend the time for the completion of the assessment work as he did, then the mining claims were not open for staking at the time the appellant staked them and subsequently tendered his applications therefor.

By sec. 80 of the Mining Act if by reason of pending proceedings 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 by sec. 156, where power is conferred by the Act, the power may be exercised as well after as before the expiration of the time allowed, etc. While the 60 days extension kept the claims in good standing until the 22nd of March, 1913, a forfeiture would have occurred between that time and the 27th of May, when the next extension was granted, unless the Recorder was supported by secs. 80 and 156 of the Mining Act.

The question is, were the mechanics' lien proceedings at the date of the several extensions "pending proceedings." Judgments in the lien actions were secured in September, 1912, and the extensions granted subsequent thereto. A proceeding under an ordinary judgment where execution is issued (and

under sub-sec. 5 of sec. 77 of the Mining Act, can be recorded against a mining claim), is different from proceedings under the Mechanics' Lien Act. In the latter case the proceedings are *in rem*, and the judgment, which is settled by the trial Judge who orders payment into Court of the amount found due, and upon default directs the lands to be sold subject to the approbation of the Master of the Court and the purchase money paid into Court subject to the credit of the action. Directions are also given as to who shall join in the conveyance of the lands in question. The Court also fixes the time and place of the sale, allowing a reasonable time after due advertisement.

In *Ulshafer* v. *Stewart*, 71 Pa. St. 170, the word "pending" was held to apply to a decided case in which successive *fi. fas.* had been issued, but not fully satisfied, and in *Wegman* v. *Childs*, 41 N. Y. 159, it was expressly decided that although a judgment had been recovered in a suit the action was still pending as long as such judgment remained unsatisfied; see also *Mitchell Furniture Co.* v. *Sampson*, 40 Fed. Rep. 805; *Gates* v. *Newman*, 18 Ind. App. 392; *Howell* v. *Bowers*, 2 Cromp. Mees & Roscoe 621. In the latter case it was decided that the issuing of an execution upon the judgment is a proceeding in the suit, and so with the supplementary proceedings and appointment of a receiver. The proceedings in this case were still before the Court on the 27th of May last, and the question of the title to the mining claims was pending until such time as they were disposed of by the Court, so that I find the Mining Recorder was justified in his actions by secs. 80 and 156 of the Act; and see *Seymour & Caster* (Price), M. C. C. 425.

If the execution had been in the sheriff's hands he would have been called upon under sub-sec. 7 of sec. 77 to have performed the necessary work to keep the claims alive so he could realize upon them, and while I feel that the solicitor for the lien-holders should have caused the 60 days work to be performed pending the sale of the property and not have relied upon the Min-

ing Recorder to keep them in good standing by virtue of sec. 80 of the Act, but not having done so it cannot confine the prerogatives of the Recorder.

The balance of the work was done by the lien-holders and within the time required by the Mining Act, and would have been recorded had the holder been able to secure the dates upon which the work had been performed. Forfeiture occurs from either failure to do the prescribed work or to report it. The work was done but not properly reported, and that being the case, would it not be wrong to allow a holder of a mining claim to keep his claim in good standing by filing a report of work which he had secured to be done for him and for which he had not paid? In this case "the labourer is worthy of his hire." The work had been done and the Mining Recorder by granting the extensions of time gave the holder Menge an opportunity of satisfying the judgment and at the same time kept the claims alive.

If the extensions had not been granted then the claims would have been forfeited and the lien-holders would have lost their chief remedy for redress. It is true they had their civil remedy, but Gleeson would not pay them and Menge resided outside the jurisdiction, and it might cost more than the judgment would be worth to proceed personally against him, so that in order to do equity it is better to extend a liberal meaning to the words "pending proceedings" so as to fit the facts in this case and hold that the Mining Recorder acted within his rights.

The real merits and justice of the case require that I pronounce the claims to have been in good standing when staked by Gleeson. To find otherwise would defeat the claims of the men who did the work upon the properties. The holder of the claim has had ample time in which to settle the lien actions, and if he is not in a position to do so then the sheriff should be directed to bring the claims to sale forthwith. I cannot see why sufficient data could not be procured from the parties

who did the work to permit the report being filed, and this should be done at once. If it is within my power. I direct that the claims be brought to sale by the sheriff before the 1st of September next, and the Mining Recorder shall not thereafter extend the time for filing the reports of work. If Mr. Gleeson has performed work upon the claims which forms part of the 60 days in question then he should be remunerated therefor, if Menge retains the claims, and the Mining Recorder might assist Mr. Slaght, solicitor for Gleeson, in procuring a settlement of his claim. It is questionable if the Mining Recorder would have the right to grant a further extension after the claims have been disposed of by the Court, so that immediately after the sale a forfeiture would occur. If that is the case then the title had better be made perfect pending disposition of the claims by the sheriff or otherwise.

I dismiss the appeal of T. J. Gleeson herein, and confirm the title to the mining claims TRS-1155 and 1156, situate in the Porcupine Mining Division, as they were when this appeal was filed.

(THE COMMISSIONER.)

PERRON AND BRADSHAW.

Dispute—Alleged Non-performance of Working Conditions—Onus of Proof not Satisfied.

When a claim is attacked on the ground of non-performance of working conditions, substantial testimony based upon an honest, careful and systematic inspection of the claim must be forthcoming and there was held to be an absence of such evidence in this case.

A dispute affecting mining claim L-2991 in the Larder Lake Mining Division referred by the Recorder to the Commissioner for trial.

George Ross, for Perron, disputant.

A. G. Slaght, for Bradshaw, respondent.

30th September, 1913.

THE COMMISSIONER. — The dispute filed by Alexander J. Perron against mining claim L-2991, situate in the township of Lebel, in the Larder Lake mining division, was transferred by the Mining Recorder at Matheson to me for trial.

The claim in question was staked in the name of R. A. Bradshaw, Sr., on the 25th of January, A.D. 1913, and a report of work showing thirty days work performed was filed on the 19th of July of the same year. On the 16th of July, A.D. 1913, Alexander J. Perron staked the same claim and filed an application therefor, and when the Mining Recorder refused to place it on record lodged the dispute herein.

It is alleged by the disputant that thirty days work was not done upon the property by Bradshaw or the present unrecorded holders and consequently his application should have been recorded by the Mining Recorder. On the 15th of July, about 7 p.m., Perron went on the claim at No. 3 post, followed the line to 4 and from there to 1, and while he saw evidences of work having been done between Nos. 1 and 4 and 1 and 2 posts, he was prepared to say that not more than 3 or 4 days work had been done on the property.

After this cursory inspection of the claim, and at dark with the aid of a candle, he looked around for a discovery, and at 5 minutes past 12 a.m. of the 16th staked the claim. In further support of his contention that a forfeiture had occurred, in consequence of the necessary work not having been done on the property, on the 8th of September, he, in company with Carl Willis, a mining engineer, William Taylor and John Miller, visited the claim and again inspected it. While William Willis counted nine spots where work had been done on the property he felt that most of the work had been done prior to this year, and that not more than three days work could have been done by the present holders. The evidence of William Taylor and John Miller I dismiss without comment as their

testimony did not ring true nor was their inspection such as would justify their assertion of the non-performance of work.

James Kilroy and John Weedon, who are mentioned in the report of work as the men who performed the work on the claim, both gave evidence that they had worked on the property from the 19th to the 29th of June, from as early as 4 o'clock in the morning to 8.30 at night, and during that time completed 243 hours labour on the claim. They were seen at work on the 21st by L. G. Baker and on the 23rd and 28th by F. Bedford, and I have no reason, in view of their positive evidence, and demeanour while giving their testimony, to disbelieve them. The report of work gives the time as between the 18th of June and the 1st of July, but this was admitted to be a mistake as the work was filed by Weedon in the absence of Kilroy, who had a memorandum of the days upon which the work was performed, and which was not accessible at the time the report was made out.

The onus of proof was upon the disputant and his haphazard inspection of the claim, bolstered as it was by Mr. Willis, was not sufficient to outweigh the evidence of the men who swore they did the work as reported. When a claim is attacked on the ground of non-performance of work substantial testimony based upon an honest, careful and systematic inspection of the claim must be forthcoming, and there was an absence of such evidence in this case.

Dispute dismissed.

(THE COMMISSIONER.)

MILLER v. BABAYAN.

Dispute—Working Conditions Alleged not to have been Performed —Merits—Onus of Proof—Boundary Line.

The respondent caused the work in question to be performed by his agent B., and a report of such work alleged to have been performed was filed within the time required by the Mining Act.

It was contended by the disputant that if the work was done as reported it had been performed upon the property north of the claim in dispute.

T. staked and transferred the claim to the respondent for a monetary consideration, and it was through T. that the claim was restaked by the disputant.

Held, by the Commissioner, that the onus of proof was fully upon the disputant, and that he had failed to establish clearly and beyond doubt that the work was not performed upon the claim in dispute.

A. G. Slaght for Miller.

George Ross for Babayan.

30th September, 1913.

THE COMMISSIONER.—A dispute was filed by John Miller on the 29th day of July, 1913, against mining claim 2970, situate in the Township of Lebel, in the Larder Lake Mining Division, and referred to me by the Mining Recorder for adjudication. On the 25th day of January, 1913, the claim in question was staked by William Taylor, who transferred to the present recorded holder B. Babayan, on the 31st January of the same year. On the 11th of July, 1913, a report of work was filed by Mr. Babayan, through his agent, D. M. Belec. On the 16th of July, 1913, Catharine Perron, through her agent, John Miller, staked the same claim and filed an application and asked to be recorded, and in consequence of the refusal of the Mining Recorder to place the application on record the present dispute was filed.

The grounds of attack are that the claim is illegal or invalid in consequence of the requirements of the Mining Act not being complied with, namely, that the

assessment work alleged to have been performed was not done, or in any event was not done upon the property in question. The subsequent staker, John Miller, who, as I have said, was acting on behalf of Catharine Perron, was advised by the original staker, William Taylor, that the first thirty days' work had not been duly performed upon this property, and pointed out the boundaries of the claim in order that he might restake it. Mr. Taylor had received from Mr. Babayan, the sum of $50.00 as consideration for the purchase of this particular claim, and, while he says he went upon the property prior to the time it was staked by Miller for the purpose of ascertaining if Babayan through his agents had located a lead on his property which would extend to the property to the north, namely, claim 2297, and staked and owned by Taylor, with others, I cannot accept that as being a true statement of the reason why he was upon the property at that time. His conduct in parting with the property to Mr. Babayan for monetary consideration and afterwards going upon the property to ascertain whether the work had been done, no doubt with a view of having it restaked, is not to be commended.

If a licensee who first stakes and records a property does not comply with the conditions of the Mining Act then a forfeiture occurs and the property is open to the public to restake, but at the same time one who has received consideration for a property and afterwards keeps a string to his bow with the object of getting possession of the same property again, must expect to be saddled with the full burden of proof of the claim he sets up. I am not thoroughly satisfied that the full 30 days' work sworn to by Babayan's agent was performed upon the property, or performed upon any property, but the onus is upon the claimant to satisfy me beyond doubt that the work was not done. I concede there was a good deal of force in the argument of Mr. Slaght, who represented the claimant, that even accepting the sworn report of work and applying to it the testimony of Mr. Belec, who admitted that Belanger

had only worked up to the 9th of July, and was not thereon the 10th, the full 30 days' work could not have been done, and in any event it would have been necessary for each man to have done more than ten hours a day. This situation was endeavored to be met by Mr. Belec by stating that prior to the time the work was started on the claim he had been on a prospecting tour on behalf of Babayan, had prospected the claim for two or three days and applied that work towards the deficiency in Belanger's time. Even accepting that statement, I am still in doubt whether they had consistently worked from 10 to 12 hours from the 6th to 10th of July inclusive. It is stated by one of the witnesses that he worked 10 hours at least, and as it has not been denied I can assume that the other men worked the same number of hours, and possibly more.

I intend to take a broader view of the question of work done upon this property than I would possibly do in another case, in view of Taylor's endeavor, to my mind, to resecure control of this property. Mr. Babayan has acted in good faith. If his agents have not done so, then I think it is my duty to ask him to bring the matter before the Lieutenant-Governor in Council through the Minister of Lands, Forests & Mines, under sec. 86 of the Act, and I would then strongly recommend that the work, even if it had not been performed upon the claim in question and was performed mostly upon the claim to the north, should be applied to this claim and that Mr. Babayan's title should stand.

It was also argued very strongly, but I did not feel that the evidence justified a conclusion such as I was asked to reach upon the argument, that the work done must necessarily have been performed from two to four hundred feet north of the south boundary of mining claim 2297 and east of mining claim 2037. It was admitted by one of the witnesses for the defence that if a straight line was continued from post No. 2, of claim 2037 in an easterly direction, then the work performed or caused to be performed by him for

Babayan was done upon claim 2297, and not upon claim 2970. Some of the witnesses for the defence stated that work had been done at other points on the claim, but nothing of a definite nature was pointed out to me. However I am assuming that more work was done than has been alleged on the northern part of this claim.

There is nothing positive to show that the map which Belec used as a guide when he went to do the development work is inaccurate, or that exhibit 5 (a sketch prepared by counsel for the claimant) shows the exact position of the claim in question in conjunction with 2297 and 2037, the latter of which the application states this claim is tied to. A survey is the only positive proof that the work was done north of the northern boundary of this claim, and this was not put in as evidence. It was agreed that an old blazed line existed between No. 1 and No. 4 posts of this claim, and that being so it seems remarkable that Belec, who is an old and experienced prospector, should have been misled in directing Thomas Leard and the others under his employ to do the work from two to four hundred feet north of this blazed line. However, it is quite possible the work was done there, but I am not definitely assured of that, and under the circumstances in this case I am casting the full onus and weight of proof upon the claimants and asking them to put before me clearly and beyond peradventure evidence that the alleged work was not done upon this claim, and I feel that they have failed to do so. Even if I had to find against the respondent the circumstances in this dispute would warrant the interference of the Minister of Lands, Forests & Mines, under section 86 of the Mining Act of Ontario, and my recommendation to him would be to sustain Babayan's title. I do not think it is a case for costs.

(THE COMMISSIONER.)

DERRAUGH AND ELLIOTT.

Alleged Agreement for Interest in Mining Claim — Statute of Frauds—Part Performance—Onus of Proof.

Held, the authorities seem to show that the plaintiff must first prove that the agreement he alleges was in fact entered into. If the contract is admitted by the defendant no difficulty arises, but if he proves a different contract to that alleged by the plaintiff the Court will refuse to interfere as the burden of proof is on the plaintiff. And, again, if the defendant denies the agreement alleged but admits another and the facts of the part performance are equally consistent with both agreements, parol evidence of the agreement alleged is not admissible: *Lindsay* v. *Lynch*, 2 Sct. & L. 1; *Price* v. *Salsbury*, 32-B., 446.

" The performance of assessment work by Derraugh was not inconsistent with the contract as alleged by Elliott and could be also referable to an agreement to perform the work for a fixed wage. As the act of part performance must be unequivocal and must have relation to the one agreement relied upon, and to no other, it is apparent the contract alleged by Derraugh cannot be set up.

" Derraugh's acts were not unequivocally referable only to an agreement such as alleged and consequently there was no right to enquire into the alleged agreement: *Harrison* v. *Mobbs*, 12 O W. R. 465; *Gunter* v. *Halsey*, Ambl. 586; Fry's Specific Performance (5th ed.), 294.

" Each alleged contract has some corroboration, but the fact remains that one of the parties to this application has distorted the true facts of the agreement entered into. The respondent is the recorded holder and it would be dangerous and probably a great injustice to take from him an interest on the strength of an alleged oral agreement insisted upon by the applicant. The burden of proof is properly upon such a claimant as herein and the wisdom of sec. 71 (2) of the Mining Act is certainly exemplified in this case."

Proceedings by Edmond Derraugh to establish a claim for a ¼ interest in mining claims L-1616 and L-1617, township of Teck, recorded in the name of the respondent David Elliott.

A. G. Slaght, for Derraugh.

Robt. McKay, K.C., and *F. W. Kearney*, for Elliott.

10th October, 1913.

THE COMMISSIONER.—The applicant Edward Derraugh in this action seeks to enforce a claim for a quarter interest in mining claims L-1616 and L-1617,

situate in the township of Teck, in the Larder Lake mining division, against the recorded holder David Elliott, the respondent herein.

The claim of interest filed by the applicant alleges a purchase of a quarter interest in the claims, and that the claimant is in possession thereof, by virtue of his interest therein.

The agreement relied upon by the applicant was a verbal one, and as a bar thereto, the respondent pleads the Statute of Frauds or its equivalent, sec. 71 (2) of the Mining Act of Ontario. As part performance was relied upon to avoid the statute, I allowed evidence of such to be given in order to admit, if proper, parol evidence of the agreement which is sought to be enforced.

That an agreement was made between the parties having reference to the claims in question, is admitted, but its terms are very much in dispute.

About the 9th of December last the litigants, who were then friends (Derraugh having previously worked for Elliott upon some mining claim), met in Haileybury, and entered into a general conversation, one subject of which was the discussion of a new discovery of gold upon the Hughes property, which is in the vicinity of these claims. The foundation of the time and place of the alleged agreement being fixed, Mr. Derraugh's version of what afterwards took place is that Elliott asked him if he would do one hundred and twenty days assessment work upon his properties, to which he replied that if Elliott would O.K. his note (meaning thereby to discount it), so that he could get sufficient money to purchase supplies, he would do so if given a quarter interest in the claims. Mr. Elliott then said, "go up and work for me and I will give you $2.50 a day and grub stake, or $5 a day if you find free gold." Derraugh said he preferred to do the work for an interest, when Elliott consented, and told him to get what provisions he required at Swastika, and he would pay for it.

The next day Derraugh left for the claims, and with the assistance of hired help, for which he paid $167.57, the necessary one hundred and twenty days is said to have been performed, a report of which was filed by Derraugh, and abstracts of the claims showing the work as recorded handed Mr. Elliott.

While the work was in progress, Elliott visited the claims three times, and upon two of such occasions he saw Derraugh, who reported that he had not found gold, but had picked up what he thought was an important lead, and counselled the further work being delayed until the snow had gone, but by Elliott's direction it was proceeded with.

About the 1st of June, or within a week from the conclusion of the work, Derraugh, who owed Elliott $20, went to Haileybury to satisfy the debt, and when leaving asked Elliott if he could get a transfer of his interest when the work was done, to which Elliott replied, "sure you can." He returned to the property, finished the few remaining days work, made out the report of work required by sec. 78 of the Mining Act, filed it in the Recording Office at Matheson, then secured two abstracts of the claims showing the registration of the work, and on the 8th of June returned to Haileybury and presented them to Elliott, again asking for his transfers, when he was told that as he had not found gold, he was not entitled to an interest.

Mr. Elliott had a different story to tell. He admits meeting Derraugh in Haileybury, and the general conversation they had, but his version of what the agreement was lends a different light to Derraugh's tale. He said he first offered Derraugh $3 a day and grub stake, to do the work, but Derraugh said he could not afford to accept his offer, as he could do better wildcating claims and prospecting. He then said, "As you have worked well all summer for me, you get the Hughes lead and free gold and I will give you a quarter interest in the two claims, but if you don't get free gold, you won't get anything." It was also agreed that Elliott should outfit Derraugh for the work.

Mr. Elliott denies that on the 1st of June, or about one week before the work was finished, he agreed to give Derraugh a transfer, and states that he told him that if he found free gold he would get a proper transfer of the interest claimed. He agrees that one week later, when Derraugh returned with his abstracts, he did refuse to execute transfers, as gold had not been found, and consequently the agreement not completed by Derraugh.

Captain W. H. Reamsbottom, a man whose veracity was not questioned, was called by the applicant, and he testified that he had taken dinner with Derraugh on several occasions, on the claims, and when he met Elliott, whom he knew, in Haileybury, told him of Derraugh's hospitality. In the general conversation that ensued Elliott said that Derraugh was his partner. The captain knew that Elliott was interested in the claims, and that is why he mentioned the matter to him. Captain Reamsbottom's evidence was given without the taint of partiality.

Dr. R. J. Robins, of Haileybury, recited a conversation he had with Elliott, some time after Xmas, in which Elliott told him that Derraugh had a quarter interest in the claims, and asked him if he thought he could buy a portion of Derraugh's interest, and Elliott said he would speak to him. In a couple of days after he saw Robins, and told him that Derraugh would not sell. This interview is remembered by Derraugh, who said that Elliott repeated Robins' request to him, and he refused it. He fixes this conversation as about Xmas.

On the 25th of April, 1913, Derraugh wrote a letter to the respondent in which he introduced the bearer Jerry Shea, a possible purchaser, and in which he said, "If you feel like making a deal with him, I will be satisfied with anything you do." This letter was not answered nor Derraugh's assertion of proprietorship repudiated.

Mr. S. J. Renaud, for whom Derraugh had worked on some properties known as the Ore Claims, and in

which Elliott was interested, related a conversation he had with Derraugh about Xmas, when he asked him how he was getting along on the claims, and Derraugh is said to have replied, " I have to do one hundred and twenty days work for a quarter interest and get free gold or $3 a day for one hundred and twenty days work, but I took the gamble."

Walter Little, a relation of Elliott, drew Derraugh's supplies to the claims, and had a talk with him when going in. He states that Derraugh said he was going to do work on Elliott's claims, but had to get the yellow stuff for a quarter interest. He subsequently saw Derraugh, and asked him if he had got gold and he replied, " not yet." Derraugh admits these conversations, but denies their accuracy as related by Renaud and Little. The latter asked him, " Have you got the gold or yellow stuff," and he replied, " No, I have to get it," meaning, as he stated, that he was anxious to get it. He told Renaud of his two options, $2.50 a day or a quarter interest, and that he had taken the latter.

Renaud said he told three or four people of his conversation with Derraugh, and also spoke to Elliott about it several times, but Little did not mention the matter to Elliott, until he was asked by him if he could give any evidence in his favour in the present case. Then James Williams, who had owned a quarter interest in the claims and had sold them to Elliott about Xmas time for $100, told of a conversation with Derraugh, when the latter asked him if he had sold his interest to Elliott, and then Derraugh is said to have told him that he had to find gold to get a quarter interest. This is denied by Derraugh.

Why Derraugh should explain the details of his agreement to Renaud, Little and Williams when they had their casual conversations, is not apparent to me, nor why Elliott should feel that Little could assist him in the trial, when he had not told him of his conversation with Derraugh.

Then Renaud was apparently so interested in the bargain between Elliott and Derraugh, he related it to three or four people, but he cannot remember when or to whom he imparted the information, but distinctly remembers telling Elliott what Derraugh said his agreement was. This conversation was before a dispute had arisen between Derraugh and Elliott, and it would be like carrying " coals to Newcastle " to tell Elliott what his agreement was with Derraugh. The only reason Elliott would have for thinking Little would know something about the bargain would be that he knew he had taken Derraugh's supplies into the claims, but even so, why should he think he should necessarily know what the contract was? I cannot say that I was impressed with the evidence of either Renaud or Little.

If Mr. Elliott's version of the agreement and what subsequently transpired is correct, then Derraugh knew a week before the work was completed that he had taken a chance and had lost, because at that time he had not found free gold, nor was it given in evidence that in the remaining few days he expected to. Notwithstanding Elliott's refusal to concede his right to a transfer until he found gold, he returned to Swastika, finished the work, and recorded it, paid the men, and returned to Haileybury with abstracts, and then asked for his transfer of a quarter interest. Now Elliott admits he asked him if he could obtain a transfer when the work was done, and a week later demanded it. If Elliott did tell Derraugh on those two occasions that he could not get a transfer until he found gold on the claims, why did Derraugh, within a week of the conclusion of the work, and knowing that gold had not been found, return to the claims, complete the work, and then ask for a transfer? His second request was not a supplication, it was apparently a request for what he thought he was entitled to.

If Dr. Robins' evidence is accepted in conjunction with Elliott's remark to Captain Reamsbottom, and Derraugh's inference of partnership, as expressed in

his letter introducing Mr. Shea to Elliott, what the agreement was might be found to be as stated by Derraugh.

The marketable value of the prospect prior to the agreement being entered into, was fixed by an option given by Elliott, at $2,000, and by a subsequent option given about a year later, the approximate value was fixed at $100,000. The first option expired unexercised before Xmas 1912, and the second between the time of the notice of claim filed by the applicant and the trial of the issue.

The Hughes claim which adjoins or is in the immediate vicinity of the properties in dispute, having disclosed valuable mineral, no doubt fixed the rapid increase in value of these claims. The discovery upon the Hughes claim was known to Derraugh before he undertook the work upon these claims, so that Elliott's version of the agreement cannot be said to be unreasonable and Derraugh's alleged desire to work for an interest, contingent upon discovery of gold, is also consistent with the gambling instinct of many of the northern prospectors and stakers. Neither was it suggested that Elliott could not afford to pay for the work, and had of necessity to part with an interest in order to have performed the necessary assessment work upon the properties.

Did the rapid increase in the apparent value of the claims cause Elliott to read into the contract the words, "if you get the Hughes lead and free gold," or was it responsible for a quickening of Derraugh's imagination, causing him to believe he was entitled to an interest in consideration of work done? The answer to these questions I will not undertake, nor attempt to find what the contract was, as I feel that the Statute of Frauds and the section of the Mining Act pleaded preclude the admissibility of parol evidence of the alleged agreement.

The authorities seem to show that the plaintiff must first prove that the agreement he alleges was in fact

entered into. If the contract is admitted by the defendant no difficulty arises, but if he proves a different contract to that alleged by the plaintiff the Court will refuse to interfere, as the burden of proof is on the plaintiff. And again, if the defendant denies the agreement alleged but admits another and the facts of the part performance are equally consistent with both agreements, parol evidence of the agreement alleged is not admissible: *Lindsay* v. *Lynch,* 2 Sct. & L. 1; *Price* v. *Salsbury,* 32 B. 446.

The performance of assessment work by Derraugh was not inconsistent with the contract as alleged by Elliott, and could be also referable to an agreement to perform the work for a fixed wage. As the act of part performance must be unequivocal and must have relation to the one agreement relied upon, and to no other, it is apparent the contract alleged by Derraugh cannot be set up.

If the facts set up by Derraugh are consistent with the contract alleged, they are equally so with the agreement invoked by Elliott. The performance of assessment work is commonly undertaken for a lump sum, a daily wage, or for a fixed interest, and Derraugh's work upon the claims might be referable to any one of the above arrangements or to others that could be suggested. The 120 days' assessment work is the only part performance relied upon, except an alleged possession by Derraugh's agent after the work was finished and his demand refused by Elliott, and which could not be said to be possession under the terms of the agreement alleged by either party. Derraugh's acts were not unequivocally referable only to an agreement such as he alleges and consequently there is no right to enquire into the alleged agreement. Reference to *Harrison* v. *Mobbs,* 12 O. W. R. 465; *Gunter* v. *Halsey,* Ambl. 586; Fry's Specific Performance (5th ed.) 294.

Each alleged contract has some corroboration, but the fact remains that one of the parties to this application has distorted the true facts of the agreement

entered into. The respondent is the recorded holder, and it would be dangerous and probably a great injustice to take from him an interest on the strength of an alleged oral agreement insisted upon by the applicant. The burden of proof is properly upon such a claimant as herein, and the wisdom of sec. 71 (2) of the Mining Act is certainly exemplified in this case.

I order that the claim of Edward Derraugh herein be dismissed.

(THE COMMISSIONER.)

MILLER & McDONALD v. BEILBY & FRITH.

Staking—Excess Area—Dispute—Evidence—Section 116.

The elastic term "more or less" cannot be properly applied to a staking containing 70 acres.

It is unwise to create a precedent by issuing a lease or patent to a mining claim containing 70 acres or more.

The disputants cannot be said to have improperly lodged their disputes, but they were not meritorious, and appeared to have been filed for the purpose of profiting by the embarrassment caused by an incumbered record.

The respondents should be entitled to relief under section 116 of the Act, R. S. O. 1914, cap. 32.

The recorded holders applied under section 116 of the Act for permission to reduce the acreage of Mining Claims T.R.S. 2193 and 2414, situate in the Sudbury Mining Division, each containing 70 acres or more, into two claims each. The disputants alleged invalidity of the claims on the ground of excessive acreage stated. The matter was referred to the Mining Commissioner by the Honourable the Minister of Lands, Forests and Mines.

G. E. Buchanan, for Disputants.

R. R. McKessock, for Respondents.

31st October, 1913.

THE COMMISSIONER.—The disputes herein were heard by me at Sudbury on Tuesday, the 28th of Octo-

ber, 1913, at the request of the Honourable the Minister of Lands, Forests and Mines.

The mining claims in question are situate in the Shining Tree District, in the Sudbury mining division, and were staked as follows:—

> Mining Claim T. R. S.—2193, lot W. D. 1159, staked by Alfred Frith on the 21st of April, 1911, recorded 2nd May, 1911, and now in good standing.

Upon survey made and shown upon plan Exhibit I it shows land area 65.5 acres, water area 8 acres; total 73.5 acres. A portion of the said lot W. D.-1159 and part of the staking by Frith lying to the west and south thereof, was appropriated by J. E. Miller on the 23rd May, 1912, and an application and dispute filed by him in the Recording Office on the 13th of June, 1912.

> Mining claim T. R. S.-2414, lot W. D.-1174, staked by C. J. Beilby, the present recorded holder, on 25th July, 1911, and now in good standing.

A survey thereof shown by Plan Exhibit I shows land area of 71.5 acres, water area 8 acres; total 79.5 acres. A portion of this claim lying to the west and south thereof was subsequently appropriated by Dan McDonald on the 21st of May, 1912, and his application and dispute filed with the Recorder on the 13th of June, 1912.

The disputes set up excess acreage or, in other words, that there was a violation of the Mining Act on the part of both Frith and Beilby when they staked their respective claims as they exceeded in each case 40 acres. The disputants being on the ground discovered that the lines of these claims were in excess of 20 chains and they then proceeded to stake the remaining portions, being the southern and western portions of the said claims, which would give them as their applications and plans indicate, about 30 acres

each and leave the original stakers 40 acres, more or less.

Upon the respondents communicating with the Surveys Department in reference to the first year's rental and lease of these claims their attention was drawn to the fact that W.D. 1159 contained 80.3 acres (which I think is a mistake and should have been 73.5 acres), and W.D. 1174, 71 acres, both being much in excess of the area allowed by the Act. The letter also pointed out that it was a rule of the Department, in order to keep the areas within reasonable bounds, to charge for the area exceeding 45 acres a rental of $10 per acre on the excess, and if that rule was applied the recorded holders would be required to pay $443 for the first year's rental of W.D.-1159 and a similar amount in proportion for W.D.-1174. To obviate this excessive expenditure the writer pointed out that the claim might be cut in two, separate applications made for the north and the south part, and that if that were done and the necessary amount of work recorded against each part of the lot a lease would be allowed to issue at the rate of $1 per acre for each claim. This letter was addressed to Messrs. McKessock & McKessock, solicitors for Beilby & Frith, and dated the 1st of August, 1912.

It will be remembered that both McDonald and Miller had filed their disputes against these claims on the 12th and 13th of June, two months prior to the date of the above letter, and their disputes would then be a matter of record, so that I cannot quite appreciate why this letter was written unless in ignorance of the adverse contention set up by the subsequent stakers. The respondents' contention now is that having this letter before them they felt quite secure in their holdings, but did not adopt the advice therein contained as the disputes were still pending and under consideration by the Mining Recorder, who, in March of the following year, handed out a decision, in which he held that he had not jurisdiction to deal with it and that the matter must be referred to the Minister under

section 116 of the Act, and that to have restaked the claims while the dispute was under adjudication by the Recorder would have been an improper act on their part. As a matter of ethics and propriety, no doubt that contention is quite correct, but they could have brought to the attention of the Recorder the letter of instructions written by the Department in August, 1912, and the difficulty would then have been early solved.

The application of the elastic term "more or less" cannot be properly applied to a staking of 70 or 80 acres as the case might be.

Both Beilby and Frith in their applications and sketches, show 40 acre claims having dimensions of 20 x 20 chains. Their actual stakings on the ground are inconsistent with their written applications and sketches, and instead of appropriating what they applied for they exceeded it, in one case by 39 acres and in the other by 33 acres, and again, while their plans show regular lines or a square, the land as staked is highly irregular, taking in a part of the lake upon which the claims border, so it must be found the claims were carelessly staked, but I believe *bona fide* and believing that they had not adopted more land than they were entitled to within the meaning of the Act.

The question now arises, were the disputants within their rights when they lodged the disputes herein?

Upon a proper construction of the Act, I think they were; therefore they are properly before the Minister in this application. It is difficult to ascertain the true state of mind of McDonald and Miller when they staked these fractions, as it is said by the recorded holders that they were aware an option had been given on one of the properties and that their object in filing the disputes was to embarrass them in the contemplated sale and force from them some monetary consideration. While McDonald admits he was aware an option existed he denies that it was the cause of the restaking. The existence of the option, no doubt,

placed a then commercial value upon the claims and would have been an incentive to a prospector to stake an overplus if he saw a proper opportunity to do so, and I feel that McDonald and his partner Miller were, to a certain extent, prompted to restake these properties by their knowledge of the existence of the option above referred to. I am fortified in that opinion by the fact that though their disputes were filed in June, 1912, an appointment was not asked for the trial of the same by the disputants, and the respondents, in order to clear the titles, were forced, on the 27th of February of the following year, to apply to the Mining Recorder for a hearing, which was granted, and the matter subsequently transferred to the Minister for his decision.

If the disputants had been anxious to acquire and develop the portions staked then they should have brought their disputes to an early trial. The recorded holders have been diligent in carrying on their assessment work and have performed more work than the Mining Act requires up to the present time, so that while they have staked in excess of what the Act allows they have exploited and developed the portions so staked and are deserving of consideration on this hearing.

In view of the attitude of the Department, as expressed in their letter to the respondents of the 1st of August, 1912, I think it would be unfair to interfere with their present holdings, especially so as I feel the disputes filed were not meritorious and lodged very largely for the purpose of profiting by the embarrassment caused by encumbering the record. I think it unwise that a precedent should be established by the issuance of a lease or patent for the area embraced in these several mining claims and would suggest that the spirit of the letter of the 1st of August, above referred to, be carried out by the claims being divided in two and placed in such manner upon the office map of the Mining Recorder at Sudbury.

While the disputants cannot be said to have improperly lodged their disputes still I feel they are upon an immoral ground and the respondents should not be required to compensate them for more than what would probably cover their actual expenditure in the restaking. Mr. Miller did not appear at the hearing and no witnesses were called other than Mr. McDonald, so that if the respondents are required to pay the disputants the sum of $100 I think justice will have been done in the matter. The fact that all of the work required to entitle the holders to secure a patent of the claims has been done, must, I think, largely weigh when dealing with the equities of a matter of this kind, especially so when I have found good faith on the part of the original stakers. They have by their assessment work done, exploited and developed their mining claims while the disputants were satisfied to wait many months before testing their title to the portion which they restaked.

(THE COMMISSIONER.)

(THE APPELLATE DIVISION.)

Not Reported. Oral Judgment.

PERRON AND HURD.

Boundary Line — Area of Mining Claim — Confliction of Mining Claims—Certificate of Record—Mistake in Granting—Sec. 116.

P. applied for a claim of 40 acres, but staked 46 acres. H. in a subsequent staking, not being able to find P.'s 2 and 3 posts, placed his Nos. 1 and 4 posts upon P.'s claim at a point where, according to P.'s application, his Nos. 2 and 3 posts should have been. H. secured a certificate of record, but which was admitted by the Recorder to have been issued by mistake in ignorance of the confliction.

Held, by the Commissioner that P. was not justified in extending his eastern and western lines 5.05 and 4.43 chains respectively in excess of the lands applied for.

That P.'s southern boundary should be a straight line run from his No. 2 to H.'s No. 4 post, which equally divided the area in dispute and still allowed P. a claim of 40 acres.

Reference to *Re Olmstead and Exploration Syndicate of Ontario Limited*, 5 O. W. N. at p. 9.

On appeal to the Appellate Division, held by Meredith, C.J.O., in an oral judgment, that P. had, in his application, deliberately limited his claim to 20 acres square.

That if there had not been a subsequent staking which included that part of what the appellant had staked, that was not included in his claim, sec. 116 of the Mining Act might apply.

Held also, *Re Olmstead and Exploration Syndicate of Ontario, Limited* (Godson), M. C. C. 39, applied.

Proceedings to establish the southern boundary of mining claim L-2459. Alexander Perron applied for a claim of 40 acres and staked 46 acres. Ralph Hurd staked claim L-2677, which included the southern part of L-2459. It is now contended by Hurd that Perron had staked more than he had applied for and the land in dispute was open and properly included in mining claim L-2677.

W. A. Gordon, for applicant.

A. G. Slaght, for respondent.

15th October, 1913.

THE COMMISSIONER.—On the 5th of March, 1912, Alexander Perron staked mining claim L-2459, situate

in the township of Lebel in the Larder Lake Mining Division, on behalf of Catharine Perron, the applicant herein. The claim, as subsequently surveyed by Messrs. Sutcliffe & Neelands, O.L.S., shows an area of 46.69 acres.

On the 2nd of September, 1912, Ralph Hurd staked mining claim 2677 on behalf of Walter Hurd, the respondent, and which is situated partly upon and immediately to the south of mining claim L-2459. The Hurd claim, which was surveyed about the 28th of March, 1913, has an area of 34.6 acres, and on the 31st of March, 1913, a certificate of record was obtained therefor from the Mining Recorder.

It is admitted that mining claim L-2677 extends upon mining claim L-2459 as to its eastern boundary north 5.5 chains, and as to its western boundary north 4.43 chains, and to this extent overlaps and conflicts with it.

It is contended by the applicant that the Nos. 4 and 1 posts of mining claim L-2677 should be at a point 4.43 chains and 5.05 chains respectively south of the situation located by the survey of Messrs. Routley & Summers, as shown on their plan filed as Exhibit 9. In other words the applicant says the respondent has encroached upon his claim L-2459 to the extent of 5.05 chains on the east and 4.43 chains on the west boundary and in that respect has reduced the area of his claim approximately 9 acres.

The point in dispute is the proper situation of the southern boundary of mining claim L-2459, and to fix this it may be of some assistance to trace the boundaries of the claims to the east and south thereof. Immediately to the south of the above claim is the respondent's claim L-2677, formerly staked by Edmund Croteau as L-2495 on the 12th of April, 1912, and its northern boundary as staked by Croteau was fixed at the same point as that adopted by Hurd when he restaked the claim as L-2677. Immediately to the east of the Perron claim L-2459 is the Croteau claim L-2808, previously staked by N. Logan in June, 1911, as L-

1698, and in each staking by Croteau and Logan its south boundary was fixed by extending eastward the northern boundary of what is now the Hurd claim L-2677. To the south of claim L-2808 is another restaking by Croteau known as L-2807, and this claim had been previously staked by N. Logan in June, 1911, and its northern boundary was the south boundary of L-2808, so that the three claims adjoining L-2459 previous to the latter's staking were tied to each other and could be said to be tied to the No. 1 post of mining claim L-2452, now L-2677. The apparent reason why the present northern boundary of L-2677 was adopted by the original staker of L-2452 and accepted by the original staker of L-1698 and 1699 as their southern and northern boundaries respectively when extended in a direct easterly direction, was that an old blazed trail existed at that point.

As Hurd staked his claim six months after Perron his attention should have been drawn to Perron's south line by the position of the latter's Nos. 2 and 3 posts. Hurd's contention is that when he staked his claim he could not find Perron's Nos. 2 or 3 posts, and it was not until March of the following year that he discovered them, when they looked as though they had been freshly marked. Although he saw an old blazed line leading from Perron's No. 2 to his No. 3 post he went north the respective distances complained of by Perron to an older and better marked place that had been previously adopted in the original staking of the claim which he was about to restake. If Hurd did not see Perron's Nos. 2 and 3 posts then the only way he could definitely locate the lines and area of the claim to the north of him would be by a scrutiny of the application and plan filed by Perron in the Recorder's Office. If he had made that examination he would have found that application had been made for a forty-acre claim, 20 chains between each corner post, and tied to L-1698, having its No. 1 post at the No. 4 of the latter claim. The sketch attached to the application would have shown that the claim applied for had

as its southern boundary an extension westward of the southern boundary of L-1698, and consequently the applicant, by the sketch and dimensions given, had adopted as her southern boundary the present northern boundary of mining claim L-2677.

Upon a survey of mining claim L-2459 the distances between Nos. 1 and 2 posts is given as 22 chains 42 links, and 24 chains and 19 links between Nos. 3 and 4 posts, so that the position of the stakes on the claim as staked does not correspond with the area as asked for in the application, and as shewn on the sketch or plan filed, and the ground staked is two chains 42 links on the east and four chains and 19 links on the west boundaries in excess of the applied-for area.

I do not agree with the contention of the respondent that Perron's Nos. 2 and 3 posts were not planted when the claim was staked, but accept his statement that he did not see them when he staked claim L-2677. The position of No. 3 post was seen by John Tough on the 12th of May, 1912, and its position would be properly indicated by fixing it at the south-west angle of L-2459, shown on Exhibit 5. He read the name and saw a blue pencil mark on it which Perron stated he placed on all his posts of that claim. He also fixed the position of the No. 3 post as at George Tough's No. 4, which it is not disputed is at the south-west angle of L-2459. Mr. Croteau also saw Perron's No. 3 and Alex. Perron positively swears he put it up where it now stands at the time he staked the claim. The position of the No. 2 is not seriously contested.

In March of the following year Perron arranged to meet Mr. Campbell, who was employed by Hurd, in order to point out to him the lines of his claims so that when surveyed, as he understood was contemplated, there would not be any confliction of lines. Mr. Campbell did not keep his engagement, and being on the claim Perron sought to find and identify his Nos. 2 and 3 posts. He states that he could not read the inscriptions on the posts on account of the ice which had formed on them, but he saw a post where his No.

2 should be and he made a blaze upon it, and as his No. 3 was under the snow he marked another post at the point where his No. 3 should have been standing. These are the markings spoken of by Hurd, but the fact is it has not been successfully shown that the said 2 and 3 stakes were not erected at the time of the staking and were not at the points indicated by Exhibit 5.

As the application and sketch filed by Perron when applying for claim L-2459 asked for and showed a claim regular in form with boundary lines of 20 chains each, and having an area of 40 acres, it is quite apparent his actual staking of the claim was inconsistent with what he asked to be recorded for. Having in view Mr. Hurd's statement that he did not see Perron's southern posts when he staked his claim, and while I found that they had been erected at the time of staking by Perron at the points where they now stand, it may be that they had fallen down at the time Hurd was upon the property, as No. 3 post at least was in that position a few months later when Perron tried to locate it. I cannot find that Hurd deliberately ignored Perron's posts, and went upon his claim and adopted the area now in dispute. It can be said in Hurd's favour that the northern boundary of his claim as staked by him was the same line as that used by Edmund Croteau in 1912, and at that point a well defined blazed line was to be seen, and if he is honest in his statement that Perron's southern posts were not to be seen (and I have no reason to disbelieve him) then he presents a reasonable excuse for staking what Perron claims was the southern part of his claim.

I do not consider the Perron claim well staked, especially as to posts 2 and 3, and it is incumbent upon a licensee to so erect his posts that they are readily discernible by one coming after him, even though it be months later.

While appreciating the difficulty of a prospector to stake 40 acres, no more, no less, as required by the Mining Act, he has no excuse in extending his lines 5.05

chains and 4.43 chains in excess of the land applied for in his application. The Perron claim appears upon the map on an angle, or, in other words, the lines are not straight north and south or east and west, and the same can be said as to L-2677. If plans (Exhibits 5 and 9) are studied it will be seen that if a straight line is run from the No. 2 post of the Perron claim to the No. 4 post of the Hurd claim, the area in dispute is practically cut in equal parts, and a straight line established as the southern boundary of the Perron claim. If this method of settling the dispute is adopted Perron will still have 40 acres or more and Hurd's claim will be reduced to about 32 acres.

What was said by Meredith, C.J.O., in *Re Olmstead & Exploration Syndicate of Ontario, Limited*, 5 O. W. N. p. 9: "As I understand the Mining Act, the foundation of the right which a staker acquires, or may acquire, is a claim which he files with the Recorder," applies here, and the applicant herein cannot be heard to complain that he is not now allowed to retain more than he at first asked for. He is entitled to 40 acres, which he is now getting, and the Mining Act is thereby complied with.

A certificate of record secured on the 31st of March, 1913, and recorded upon mining claim L-2677, was relied upon at the trial as a bar to any interference with the boundaries of that claim. At the hearing on the 10th of July last evidence was not submitted by the applicant as to the circumstances under which the certificate of record had been procured, and as it was apparent from a letter written by W. E. Hurd to the Recorder at Matheson on the 29th of March, 1913 (Exhibit 10), and the field notes of Messrs. Routley and Summers, filed in the same office, that there was a confliction of lines between mining claims L-2459 and L-2677, and without explanation it did not seem that the certificate had been properly issued, in order to clear the matter up I had the applicant produce Mr. Hough, the Mining Recorder, on 11th September at Haileybury, when his evidence was taken *viva voce* in

the presence of counsel for both parties. Mr. Hough stated that he was ill at the time the certificate was signed, and that his assistant, Mr. Browning, who was in charge of the office, brought the certificate to his house, explaining that all matters and conditions had been performed entitling the respondent to a certificate, and then signed it. Now, knowing the true facts, he states he would not have signed the certificate had they been presented to him as they existed. It is unnecessary for me to consider whether the certificate had been issued in " mistake " or not, as the respondent is quite willing to have his northern boundary fixed as a line between Perron's Nos. 2 and 4 posts. The case, however, seems to be in line with the facts in *Rogers & McFardand* (Price), M. C. C., at pp. 410-411.

The real merits and justice of the case I feel require me to fix the southern boundary of mining claim L-2459 as a straight line running between No. 2 post of the said claim and No. 4 post of mining claim L-2677.

As I have decided this case on what I consider are the merits and success being equally divided, I do not feel I should make any order as to costs.

I find that the southern boundary of mining claim L-2459 in the Larder Lake Mining Division, should be a straight line running between No. 2 post of the said claim and No. 4 post of mining claim L-2677, and that the respective claims should be so indicated on the office map in the Recording Office of the Larder Lake Mining Division at Matheson, Ont., and I so order.

From this decision the applicant appealed to the Appellate Division.

James E. Day, for appellant.

A. G. Slaght, for respondent.

Appeal heard by MEREDITH, C.J.O., MACLAREN, MAGEE and HODGINS, J.A. (Oral) judgment of MEREDITH, C.J.O.

Mr. Day has said all that could be said in favour of his appeal, but we think it must fail.

The basis of a claim is the discovery, and then the staking; and the requisites, under the Mining Act, are that the claim shall be staked out in accordance with the provisions of the Act and that it shall be recorded.

The staking in this case was of a larger area than 40 acres, probably owing to the formation of the ground and the difficulty of making an accurate survey, but when the appellant recorded his claim the description in the application filed by him was of a claim twenty chains square, and he therefore deliberately limited his claim to that area.

It is very probable, as Mr. Day argues, that if there had not been a subsequent staking of a claim which included that part of what the appellant had staked that was not included in his claim, sec. 116 of the Mining Act might apply, and that the appellant might have succeeded in having his claim patented for the whole area which had been staked. But a discovery having been made and a claim recorded which included the part not included in the appellant's claim as recorded, a different result follows.

Nothing was said in the appellant's application as filed from which a second applicant could know that the appellant intended to claim the piece of land in question.

The right to a mining claim depends upon discovery, staking and recording.

Re Olmstead & Exploration Syndicate, 5 O. W. N. p. 8, is, in principle, the same as this case, although in that case the staking had not been of a greater area than was recorded. That is the only point of difference between them.

The question of discovery on the disputed point is not material to the decision, and what I have said applies equally to a case where a second claim is staked contiguous to one already staked and including this excess.

(THE COMMISSIONER.)

SHERRILL v. MARTIN.

Appeal from the Decision of the Mining Recorder—Report of Work —Sufficiency of — Sec. 78 (4) of Mining Act — Sec. 140 not Applicable.

The report of work filed was misleading and inaccurate as to the amount of work done and failed to set out in detail the residences of the men who performed the work, and the dates upon which each man worked.

Held, by the Commissioner that sec. 78 (4) of the Mining Act, R. S. O. (1914), admitted of but one interpretation and that the report of work must be according to forms (14 & 15). That sec. 140 of the Mining Act did not apply. The real merits and substantial justice of the case cannot be allowed to interfere with a specific requirement of the Act upon the performance of which title to a mining claim depends. Appeal allowed.

Appeal by Charles L. Sherrill from the decision of the Mining Recorder allowing a certain report of work to be filed against mining claims 12969, 12970, 12972, situate in the township of Tisdale. A dispute also having been entered the appeal and dispute were by consent heard together by the Commissioner.

H. E. Rose, for disputant.
J. M. Ferguson, for respondent.

17th November, 1913.

THE COMMISSIONER.—By consent the appeal and dispute herein were heard together.

Mining claims 12969, 12970 and 12972, situate in the Township of Tisdale, in the Porcupine Mining Division, were on the 21st of January, 1910, transferred to D. K. Martin, the present recorded holder. The

first 30 days and the subsequent first and second years' work were duly performed upon the claims and a report thereof filed in the Recording Office. As the claims were staked on the 20th of September, 1909, the last year's work, consisting of 90 days, would require to be performed by December 28th, 1912, and a report of work filed within 10 days thereafter. Failure to do such work to duly report the same within such time would cause a forfeiture of the claims under sec. 84 of the Mining Act. Such forfeiture, however, would be avoided if within three months after default the holder filed a special report and paid thereon a special fee as provided by sec. 85 (d).

A special report of work showing the necessary 90 days' work to have been performed on each claim was filed by Martin on the 5th of April, 1913, and consequently the forfeiture would be avoided by the saving clause 85 (d), if the report was a proper one as required by the Mining Act.

On the 21st of January, 1912, former mining claim 12969 was restaked by James Pitblado as No. 6265-P and subsequently transferred to C. H. Jacobs. On the same day G. H. Brennan restaked 12970 and recorded it as 6266-P. The remaining Martin claim, 12972, was restaked on January 30th, 1912, by B. N. Fuller, as No. 6284-P, and the latter transferred it to Charles L. Sherrill on the 1st of February, 1913. Mr. Sherrill is also the unrecorded holder of claims 6265-P and 6266-P by purchase from Fuller and Jacobs.

It was permissible to restake the Martin claims as forfeiture had occurred, but such restaking was subject to avoidance of the forfeiture if the default was remedied within three months therefrom. As Mr. Martin had filed his special report of work within the extended time, the Recorder, if he deemed it to be in proper form, was justified in marking the restakings and new claims cancelled, which he did, so Mr. Martin again became the holder of the original claims.

This manipulation of the title to the claims precipitated the dispute and appeal. While many objec-

tions to the act of the Recorder cancelling the subsequent stakings and reinstating the original claims are set up in the dispute and appeal filed, I find the only arguable objection is that aimed at the sufficiency of the special report of work filed on the 5th of April, 1913.

That the special report of work is not strictly in the form prescribed by the Act is, I think, quite obvious. The assessment work was superintended by Mr. L. E. Bedford, mining engineer, under instructions from D. K. Martin. Mr. Bedford caused the work to be performed under contract, the first contract being let to Tyrrell, who sublet to John Warner, who recorded 76 days against each claim on the 27th of May, 1911. Then followed a contract to four men who worked four or five days immediately following Warner, and who were then dismissed for incompetency. Captain Samuel Shovel then undertook the work and commenced operations on the 21st of January, 1913, and finished on the 11th of February following. Immediately after the determination of Shovel's contract Mr. Bedford left the claims and went to California, where he remained until brought here to give evidence on behalf of Martin. The latter relied on Bedford to show that the reports of work were duly filed, as Bedford had previously instructed Warner to file the report of work which the latter had caused to be performed. Bedford did not know that Martin was relying upon him to file the reports of work, and consequently what was everybody's business turned out to be no one's business, resulting in the said forfeiture, but subject to avoidance.

The special report of work states 197 days' work was performed in January, 1912. This total Bedford admits should be reduced to 163 days, and he produced his time book in support of this statement. The total of 163 days included the following times: R. Harper, December, 3 days, January, 31 days; Pierce Allen, 31 days. As Harper was the cook for the camp

and Pierce Allen his assistant their times cannot be allowed, except two days that Allen actually worked on the claims, so that 63 days must be deducted from Bedford's allowance of 163 days, leaving 100 days to the credit of each claim during three days of December and the month of January, 1912. The report of work also gave 230 days for February, 1912, and while no specific dates or names of workmen are given the time is arrived at by allowing each man an average wage of $2.50 per day and dividing that into the amount paid Captain Shovel for the performance of the work, namely, $573. The estimate of 230 days is now cut down by Bedford to 169 days, and he arrived at that figure by totalling the amounts of cheques issued to Shovel for the men's board and time, and taking into consideration what each man received per day. Mr. Bedford's estimate of 169 days is supported by Captain Shovel, who filed a time sheet (Exhibit 15) made up from cheques received from Bedford and his own and Bedford's time books. This statement shows the names of the men, the month and the number of days they worked and the respective amounts they received. The 169 days I accept as being a safe estimate of the work done under Shovel's contract. As 76 days was reported done on each claim in 1911 by Warner, the overplus of 16 days can be added to the 169 days in 1912, which, with 100 days in December, 1911, and January, 1912, makes a total of 285 days' work done on each claim, and which I so find.

Having found that sufficient work was done on each claim to keep it in good standing and that the said report of work was filed within the time allowed by sec. 85 (d), the sole question remains, was the special report of work a proper one within the meaning of sec. 78 (3) of the Act (1908)?

About 10 days prior to the filing of the report of work Sherrill met Martin in the King Edward Hotel in Toronto, and told him he had secured a transfer of one of the former Martin claims, and had purchased the other two, and explained that the necessary work

had not been done on the claims, but that if it had the work had not been reported. This was the first intimation Martin had that the work he supposed to have been done was not done, or, if done, had not been duly reported. He immediately made efforts to locate Bedford, as he had only 10 days in which to file his special report of work, and as Bedford was in California and was without his cancelled cheques and time books he had to prepare affidavits as to the work he had caused to be performed from memory, and which were sworn to in the State of California, U.S.A., on the 20th and 21st of March, 1913. These affidavits referred to his January and February vouchers and were immediately forwarded to Mr. Martin, who, on the strength of them and on the strength of what other information he gained, made the report which is now in dispute. To this report was appended an affidavit by Martin, to which he made an exhibit, an option agreement dated 22nd November, 1911, between himself and C. H. Bunker. As this option agreement did not require the optionee to record the work he was required to do upon the claim, it does not help the position of the respondent. Other exhibits were attached showing January and February expense accounts and " Pay roll beginning January, 1912, and ending ———, 191 ." The report of work was not dated, but the affidavit was sworn on the 26th of March, 1913, and as the abstract shows its receipt in the Recorder's Office on the 5th of April, 1913, I take it the report bears even date with the affidavit.

Although I find Martin was in ignorance of the fact that the claims had been restaked in consequence of the default in doing what he believed his paid agents should have done until within 10 days of the time he might remedy his or his agents' laches, and that he then, and with proper diligence and upon ample inquiry, made a conjectural report of work, can he be relieved if it is found that he has in the end not filed what the Act specifically calls for?

Exhibit " C " referred to in Mr. Martin's affidavit attached to the report of work gives the names of the men, the number of days worked and the amount they each received, but no mention in detail of the residences of such men or the specific dates on which they worked are given other than that of R. Harper, who worked 3 days in December and 31 days in January. The exhibit is headed " Pay roll beginning January, 1912, ending ———, 191 ," but on what day in January they started or what month or year they stopped work can only be surmised from the statement in the report that the men referred to in Exhibit " C " worked 179 days in January, 1912. The report for February, 1912, is silent as to names and residences of the men and the specific dates they worked. The 230 days' work stated therein to have been performed in February was arrived at by a consideration of the lump sum of $573 paid to Captain Shovel for the work done and an average wage of $2.50 paid to each workman. The computations for January and February were both incorrect according to the evidence of Mr. Bedford. The report of work filed gives a total of 440, whereas upon the evidence of the respondent's witnesses I find that only 269 days' work was done, so that the report was misleading and inaccurate as to the amount of work done and failed to set out in detail the residences of the men who performed the work and the dates upon which each man worked in its performance.

The language of sec. 78 (3) is plain and admits of but one interpretation. It requires a report (Form 14) as to the work done, verified by affidavit (Form 15), and such 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." Prior to 1910, it was not necessary to state in the report the residences of the men and the date, but by an amendment to the Act of 1908, made by 10 Edw. VII., ch. 26, sec. 45 (1), the report " shall show in detail the names, residences and dates," &c.

By sec. 84 (d), if any report under sub-sec. 3 of sec. 78 is not made, &c., a forfeiture occurs, but by sec. 85 (d), such forfeiture is avoided if the holder files a proper report, &c. To ascertain what a proper report is sec. 78 (3) must be referred to.

In Maxwell on the Interpretation of Statutes (4th ed.), at p. 3, he says, "If there is nothing to modify, nothing to alter, nothing to qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of words and sentences," and again, at p. 4, "When the language is not only plain, but admits of but one meaning the task of interpretation can hardly be said to arise. The Legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction." The amendment of 1910 must be admitted to have been made advisedly and as a check, if necessary, upon the truthfulness of the report filed. I am asked to apply sec. 140 of the Act to the endeavors of Mr. Martin to file a proper report. The real merits and substantial justice of the case cannot be allowed to interfere with a specific requirement of the Act, upon the performance of which title to a mining claim depends. I cannot find any section of the Act which would permit me to disregard the requisites of a proper report of work as defined by sec. 78 (3).

I therefore find that a proper report of work was not made and filed by the respondent, and the appeal and dispute herein are allowed, with costs upon the High Court scale, to be taxed or fixed by me on application, with a set-off of costs to the respondent of the adjourned trial of the 27th of October.

I order that the dispute and appeal of Charles L. Sherrill herein be allowed, and with costs as aforesaid.

I declare that mining claims 12969, 12970 and 12972, in the Township of Tisdale, in the Porcupine Mining Division, are invalid, and order that mining claims 6265, 6266 and 6284-P, being restakings of the abovementioned mining claims, be reinstated as of their date of cancellation endorsed upon the records in the Recording Office of the Porcupine Mining Division.

(THE COMMISSIONER.)

MALOUF AND WALSH.

Appeal from the Decision of the Mining Recorder — Interest in Mining Claim—Contract—Onus of Proof—Statute of Frauds.

M. claimed an interest in the Mining Claims staked by W., alleging that he had informed W. that the claims were open for staking, and for such information he was to receive a half interest in the claims when staked and recorded. The claim made by M. was heard by the Recorder and allowed. From that decision the appellant W. appealed to the Mining Commissioner.

Held by the Commissioner that the respondent M. must accept the full onus of establishing a contract fully corroborated. That there was not the corroboration required by sec. 71 (1) (1914) of the Mining Act.

W. was the recorded holder of the claims and his prima facie ownership should not be disturbed as it was not conclusively shewn that M. was entitled to an interest.

Appeal allowed without costs.

Proceedings by N. N. Malouf to establish a half interest in mining claims 4039 and 4040 in the township of Munro, held by Hugh Walsh, the appellant herein. The Mining Recorder having allowed the claim Walsh appealed to the Commissioner, who allowed the appeal.

A. G. Slaght, for appellant, Walsh.

W. A. Gordon, for respondent, Malouf.

28th November, 1913.

THE COMMISSIONER.—This is an appeal from the decision of the Mining Recorder at Matheson, allowing N. N. Malouf a half interest in mining claims 4039 and 4040, in the township of Munro, in the Larder Lake Mining Division, recorded in the name of Hugh Walsh, the appellant herein.

The claims were staked and recorded by Walter Monahan in October, 1911, and subsequently cancelled for non-compliance with the working conditions of the Mining Act. Mr. Monahan told John Charles that the claims were open and asked him to stake and record them for a half interest. About the 28th of April, 1913,

Charles staked but failed to record the claims, and they again became open for prospecting and restaking.

On the 21st of June, 1913, Monahan met Malouf and tried to induce him to stake the claims upon the same terms as he had offered Charles, and upon that interview Mr. Monahan states Malouf said he was leaving with his engineer to inspect some other properties, and that he would look over the claims and let him know. About a week or ten days later Malouf told Monahan that he would not give fifty cents for them and that he (Monahan) was a foolish man to spend $5 on them. Mr. Malouf admits that his first knowledge that the claims were open came from Monahan, but he was familiar with the claims as he had taken an option from Monahan in 1909, on one or both of them, and knew where a discovery might be made, but he emphatically denied telling Monahan he would look them over or that he told him the claims were valueless. It will later appear that Malouf was anxious to have some one do for him what Monahan had proposed to him and thereby secure a half interest without the labour of staking or the expense of recording, and while this interview between Malouf and Monahan is not strictly relevant to the issue it shows Malouf's attitude prior to his meeting with Walsh. I believe Mr. Monahan to have been an unbiased and unprejudiced witness and of strict integrity, and prefer his statement of what took place on the 21st of June and the subsequent meeting to Malouf's rather sweeping denials.

The agreement relied upon by Malouf is said by him to have been made in his room at an hotel in Matheson on the 2nd of July last, the parties to which were Hugh Walsh, Harry Guise and himself. Up to the 26th of June these three men were strangers. Several days prior to that date Guise came to Matheson and was introduced to Malouf by his sister, who was employed at the Matheson Hotel and who knew Malouf, who apparently lived there. About the 26th of June Hugh Walsh came to Matheson and Guise

introduced himself to him. Miss Guise said Malouf had promised her to give a good tip to her brother when he arrived, and the latter was told by Malouf of certain claims in Munro township which were open for staking, but did not at that time indicate where they were situate or tell him their respective numbers With these facts in mind what subsequently took place between the parties can be better understood and weighed.

An agreement was made between Guise and Walsh whereby they should prospect in Beatty township, and they proceeded to Painkiller Lake, which is in that township and about five miles from the claims in question. A Mr. John McLaughlin, who was going in that direction, accompanied them, and while at Painkiller Lake told Walsh that if he was not satisfied with the formation in Beatty township he knew of two claims in Munro that had formerly been staked by W. Monahan and subsequently by John Charles, but was not sure whether the latter had recorded the claims and performed the first 30 days' work thereon, but that if they had been recorded and the work not performed the claims would be open for staking about the end of July, as they had been staked on the 28th of April. It was arranged that McLaughlin should return to Matheson and wait for Walsh, when the matter would be considered. It was on or before the 2nd of July that Guise and Walsh returned to Matheson, and the former then went away with his brother-in-law, Pete Leclair, to inspect some claims in Black township, and any prospecting agreement entered into between Guise and Walsh about the 26th of June then terminated. On the 5th of July Walsh, with the assistance of McLaughlin, staked the claims, on the 6th returned to Matheson, and on the 7th recorded them.

Malouf's evidence is that on the 2nd of July Walsh and Guise came to his room in an hotel at Matheson where he stayed, and Walsh was introduced to him by Guise as his partner. Walsh made inquiries about the claims Malouf had mentioned in general to Guise

and wanted to know their location. To this Malouf replied that they were valuable claims and he wanted a half interest for the information, to which both Walsh and Guise said they were very pleased to give it. He then told Walsh to get ready to go and stake them. Walsh came back to Malouf's room after dinner and said he had been told by the clerk in the Recording Office that the claims were not open, and then Malouf went with him to the Mining Recorder, Mr. Hough, and upon search and information tendered by the Recorder satisfied Walsh they were open for staking. On their return to the hotel Malouf said to Walsh, "Go and stake this claim and you and I will have half and half," and a little later said, "Go and stake them." What took place on both occasions on the 2nd of July constitutes what Malouf contends was the contract under which he is entitled to a half interest.

Mr. Malouf fixes the date of both interviews as the morning and afternoon of the 2nd of July. Mr. Guise did not remember the date, but thought it was the first part of July. He remembers being in Malouf's room with Walsh and looking at samples, and his version of what took place is in part as follows: "We were to stake them half between Walsh and I and half to Malouf. He showed us a blueprint of the township, a vein, etc." He stated that Walsh agreed to give Malouf a half, and he also consented. The day the agreement was made Guise went to Black township with Pete Leclair to look at some claims, and returned to Matheson that night. Before he went Walsh had told him he was going into Munro township with McLaughlin to help the latter run a line, but he did not ask Walsh to stake the claims while there, saying he thought Walsh would stake them, but he did not know. Guise fixes Walsh's return from Munro township as "the next day, I think; the next day after the 5th." It was the day of the alleged agreement that Guise went with Pete Leclair into Black township and returned the same night, but he states Walsh

returned from Munro the next day, which he fixes as the 6th of July. It is apparent that Guise is in error when he fixes the interview in Malouf's room as the 2nd, if he is correct in stating that Walsh returned from Munro the 6th of July. It was the day Walsh returned that Guise asked him if he had staked the claims, and his reply was "no." That day Walsh was seen boarding a freight and leaving Matheson, so Guise remained in Matheson a day or so and then went on a prospecting and fishing trip to Painkiller Lake with his wife and sister, and on his return to Matheson he learned that Walsh had staked the claims and he then asked for his interest, to which Walsh replied he had no interest to give him.

Guise was apathetic in regard to the alleged agreement, and appeared to be satisfied that Walsh would some time stake the properties. After receiving information from Malouf and entering into the alleged agreement he immediately left on another prospecting trip which occupied a day, and at that time he knew Walsh was going into Munro township, but did not take the trouble to ask him to stake the claims. He said he thought Walsh would stake them, but was not sure. When Walsh returned from Munro township, whether it was on the 6th of July or later, Guise states Walsh said he had not staked the claims. If that is so why did Guise allow Walsh to leave Matheson without having a definite understanding as to when they would be staked? He remained passively waiting in Matheson and prospecting and fishing at Painkiller Lake until his faithless partner appeared in order that they might stake the claims. During this time I believe Malouf was in Matheson, and saw Guise, but it does not appear in evidence that he counselled him to go out and stake the claims before they were appropriated, or inquired where Walsh had gone to.

The contract set up by Malouf is not admitted by Walsh. How Guise and Walsh and McLaughlin met in Matheson and went to Painkiller is not in dispute, but what took place subsequent thereto between the

parties is presented in a different light by Walsh. While at Painkiller Lake on the 27th of June, Walsh was told by McLaughlin of the two claims in question, and they were to again discuss the matter on their return to Matheson. On the 2nd of July Walsh asked McLaughlin if he was ready to go to Munro township, but the latter could not go at that time on account of a previous appointment. On the 4th McLaughlin asked Walsh if he was ready, and on the 5th they left for Munro township. In the meantime Walsh had seen Malouf, and he fixes their first talk at the hotel in Matheson after dinner on the 3rd of July. He was looking at some samples of rock in a showcase in the hotel and remarked that he thought they must have come from the Swastika district, when Malouf said no, they came from Munro township, and then invited Walsh to his room, where he showed him samples taken from his Munro properties. Walsh and Malouf were alone and the claims were not mentioned at that time. Towards evening of the same day (the 3rd) Walsh again met Malouf, who said, "There is a claim that is open, owned by Monahan; it is open to staking and I would like to see you get it," to which Walsh replied he did not think the claim was open as he had in mind McLaughlin's statement that the claim, if recorded by Charles, would not be open for default of working conditions until the end of July. Being of different minds a bet was made and determined by the records at the recording office next day, which Walsh states was the 4th of July. The claims being open Walsh paid the bet. Later on that day Malouf asked Walsh if he would go out and stake one of the claims, 4039, stating that if he was without funds he (Malouf) would record it for a half interest, and Walsh declined the offer and stated he had already a partner for Munro township, McLaughlin. Again that night Malouf offered to give him a map of Munro township, which Walsh refused, as McLaughlin, who was going with him, was familiar with the township.

It was on the 2nd of July when McLaughlin met Walsh and asked him if he was ready to go out to

Munro. McLaughlin remembers it was the next day, the 3rd, when he saw Malouf and Walsh going to the former's room in the hotel and saw them come down stairs together. He stated it was after dinner and Guise was not with them as he had started a few hours previously with Pete Leclair with packsacks on their way to Black township. It was the next day that McLaughlin asked Walsh to leave on the 5th for Munro. According to the evidence of Guise it was the same day the alleged agreement was made that he left with Leclair for Black township, and as he fixes the day as being in the first part of July, I accept the evidence of Walsh and McLaughlin that the meeting in Malouf's room was on the 3rd. Guise thought it was the next day, the 6th, that Walsh returned from Munro, and the day after he returned from Black township, so I think Guise is in error when he states he was in Malouf's room with Walsh on the 2nd of July. His statement that it was the first part of July is consistent with the evidence of Walsh and McLaughlin, who fixed the interview as having taken place on the 3rd.

On the 4th of July McLaughlin was not aware that Walsh knew the claims were open, but on the way to Munro on the 5th, Walsh told him of the fact, and they decided to visit the claims and stake them. It was the 7th when they returned and Walsh met Malouf, who wanted to know where they had been and he was told. He inquired if Walsh had staked the north claim 4040, which he said Monahan had held for four years and was not worth 50 cents. Malouf denies this interview, and fixed the first interview with Walsh after the staking as of the 11th of July, when he asked for a half interest and was told by Walsh that he would make out a transfer after dinner. This again is denied by Walsh, who fixes his next talk with Malouf after the 7th as of the 17th, when they met at the Detroit Mine in Munro township, but on that occasion Malouf asked if he had found anything on the claim and was told by Walsh that he had a lead.

That the claims were open for staking was common knowledge to Charles, Monahan and Malouf, and that this knowledge could not be concealed is beyond dispute. A passer-by might have his attention called to the claims, and a visit to the recording office would satisfy him as to the state of the title. In June, 1913, the claims were not in demand. Charles had been unable to finance the recording and Monahan was unable to influence sufficient capital to put them on record for a half interest. Malouf flirted with his information received from Monahan from the 21st of June until the 2nd of July before imparting it to Walsh. Each day brought its danger of the claims being staked, and yet he waited for his own man to return to Matheson so he might send him out to stake. Why not have told Guise when he first met him where the claims were and asked him to stake? Why wait from the 26th of June, when he met Guise, until the 2nd of July, when he says he met Walsh? Guise was anxious to stake something good; his sister had asked Malouf for a good tip, and the latter promised it. Why should he buoy Guise up with a hint of something worth while and not impart his whole knowledge? It was not necessary for Guise to wait for Walsh, nor do I think he knew on the 26th that he would meet him at a later date, and in any event the latter was not familiar with the locality, so nothing was to be gained by the delay, nor anything that I can see by Malouf. I feel that Malouf was waiting for some one to come along who would stake and record the properties and give him a half interest. That is what might be called good financing, and the fact that this township was attracting some public notice a few months later might be said to have recalled to Malouf's mind that he had some kind of an arrangement in regard to these claims.

Even if I accept Malouf's evidence of what took place in his room, at best it was only imparting knowledge that was open to the public, and the consideration, if any, for the alleged contract would be the information tendered to Walsh in Malouf's room. It

was a very general contract, if any: "I have valuable information, for which I want a half interest." And the other parties said they were willing, and later on when it was definitely decided that the claims were open the proposition was "You go out and stake them and we will each have a half interest." Guise apparently had been forgotten at this time. Were these two talks intended to make one contract, or was it that on the first meeting the contract embraced three parties and on the second only two?

The respondent Malouf must accept the full onus of establishing a contract fully corroborated. It is only by corroboration that the Statute of Frauds and sec. 71 (1) can be avoided, and in view of the testimony of Walsh and McLaughlin I cannot reach the conclusion that the contract set up by Malouf was agreed to by Walsh. The necessity of having a contract reduced to writing is again emphasized in this case, and to find what actually took place between the parties on such conflicting testimony is made most difficult. Mr. Malouf's credibility is weakened by his sweeping denial of the conversation spoken of by Monahan, whose evidence I accept in full. I do feel that Malouf had some discussion with Walsh in regard to these claims, but I cannot find that Walsh agreed to stake and record and give a half interest in them. I am satisfied I have not had put before me all the facts in the case. It may be that Walsh has distorted the true facts, but upon the evidence I cannot say that he has, nor can I find good reason to doubt his veracity. It is not a question if my judgment is right, but have I reached a proper conclusion upon the facts as presented? To find for the respondent Malouf would be to totally disregard Walsh and McLaughlin, and I cannot do that as I am not satisfied with the evidence of Guise, whose actions throughout were inconsistent with his announced desire to stake something good. After receiving what he termed his tip from Malouf he rested on his oars and

left it to a practical stranger to act upon it, and then he expected to share in the spoils.

Rightly or wrongly, Walsh is the recorded holder and his *prima facie* ownership should not be disturbed unless it was conclusively shown that Malouf was entitled to an interest in the claim. I do not impute dishonesty to either Malouf or Guise, nor am I without doubt in accepting the evidence of Walsh and McLaughlin, but upon the facts I feel I cannot safely find a contract as alleged and must allow the appeal.

I have not been able to reach the same conclusion upon the evidence as the Mining Recorder, and it is with respect to his judgment that I have felt it unsafe to interfere with the claim as recorded. In view of the uncertainty of having reached a proper conclusion I think it proper to withhold costs.

I order that the appeal of Hugh Walsh herein from the decision of the Mining Recorder at Matheson be allowed, without costs.

(THE COMMISSIONER.)

WELSH v. BOISVERT, PERRON AND CALLINAN.

Irregularity of Staking and Recording — Non-performance of Assessment Work—Fraud in Procuring Certificate of Record.

An application for cancellation of Claim L. 2791 on grounds of irregularity of staking, non-performance of assessment work and fraud in procuring certificate of record.

It was alleged by the claimant that Joseph Boisvert staked two claims north of Gull Lake, now known as L. 2790 and L. 1559, and situate to the east of the claims in question, namely, L. 2791 and L. 2886, and upon finding that the said claims were not open for staking, Boisvert removed a metal tag which he had affixed to one of the two claims alleged to have been staked by him and placed it on the No. 1 post of the present mining claim, L. 2791.

Subsequently the applicant Welsh staked and recorded L. 2886, the area of which embraced claim L. 2791 and several others; the total area being about 73 acres. Upon learning he had staked upon claims in good standing, Welsh notified the Recorder and abandoned a part of the area so staked.

It was admitted by Boisvert that he removed a metal tag which he had placed on L. 1559 to L. 2791, but his reason for doing so was satisfactorily explained by himself and the Mining Recorder.

Held, by the Commissioner, that the claim was regularly staked and the necessary assessment work performed thereon. There was no evidence to support claim that certificate of record was procured by fraud or mistake. The removal of metal tag from one claim to another held to have been done by mistake.

Claim dismissed with costs.

H. E. McKee, for Welsh.

W. A. Gordon, for respondents.

6th January, 1914.

THE COMMISSIONER.—The claimant herein applies for an order cancelling mining claim L. 2791, situate in the township of Lebel in the Larder Lake mining division, and a certificate of record granted therefor on the 14th day of January, 1913, on the grounds of irregularity of staking and recording, non-performance of the necessary assessment work and fraud in procuring the certificate of record.

It was alleged by the claimant that Joseph Boisvert on or about the 5th of November, 1912, staked two claims situate north of Gull Lake, now known as L. 2790 (Boisvert) and L. 1559 (Aman) and situate to the east of the claims in question. Upon finding that the said claims were not open for staking Boisvert in the month of March, 1913, removed a metal tag which he had affixed to one of the two claims alleged to have been staked by him in November and placed it on the No. 1 post of the present mining claim L. 2791.

On December 19th, 1912, George Welsh staked and recorded L. 2886, the area of which embraced mining claims 2790 and 2791, 3213, 2886 and 2448, with a total acreage of about 73 acres. I accept Mr. Welsh's explanation of his blanket staking and find that upon discovering he had staked upon claims in good standing he notified the Mining Recorder and abandoned a part of the lands so staked. The lands retained by him out of the original staking are shown by Exhibit 10, and cover the claim in dispute.

It is admitted that Boisvert did remove a tag which he had placed on L. 1559 to 2791, and the reason why is satisfactorily explained by both Boisvert and Mr. J. Atwell Hough, the Mining Recorder at Matheson.

The evidence supports a finding that the claim was regularly staked and the necessary assessment work performed thereon. There is no evidence that the certificate of record was procured by fraud or mistake, and while the placing of the tag in the first instance and its subsequent removal caused some confusion, I find it to have been done by mistake, which was properly rectified upon instructions from the Mining Recorder.

I order that the notice of claim filed herein by the claimant George Welsh be dismissed with costs, which I fix at fifty dollars.

(THE COMMISSIONER.)

PARADIS v. GUILLOTTE.

Dispute—Forfeiture — Restaking — Adoption of Standing Posts—Merits—Application of Section 86 of the Mining Act.

P. staked on T.'s license on behalf of a syndicate. Work was performed but not recorded. T. died. His license was alleged to have lapsed and forfeiture occurred. G., who had been shewn the claim by P., learning it was open, restaked it. P. restaked over G. and filed dispute.

Held, that the land was open and properly staked by G. That G. had acted unfairly in restaking the claim, and while the dispute must be dismissed, the disputant might find relief under section 86 of the Mining Act.

C. A. M. Paradis appeared in person.

J. M. Day for respondent.

24th February, 1914.

THE COMMISSIONER.—On July 29th, 1907, C. A. M. Paradis staked out a mining claim in the Temagami Forest Reserve in the name of G. Theriault, on behalf of a syndicate composed of himself, Theriault and others. About $250 was spent on the claim in development work, but a report of such work was not filed as required by the Mining Act. About two years ago Mr. Theriault died and his license lapsed, and no application was made to vest the claim in the personal representatives of the deceased. The claim consequently became forfeited to the recorded holder and the syndicate.

In August of 1913, J. W. Guilmett, who was working a claim in the Reserve in company with Francois Guillotte and who had become acquainted with Mr. Paradis, was shown by the latter the Theriault claim, its vein, and the work which had been done upon it. Guilmett was apparently impressed with the claim and took a sample which he said he would show in Montreal as coming from the claim he and Guillotte were working, the latter claim not being of any apparent value. The next day Guillotte and Guilmett

left for Montreal. The same day Paradis left for Toronto to interview the Department as to the standing of the claim, as he had repented showing the discovery to Guilmett and was suspicious of his sudden return to Montreal.

From information received at the Bureau of Mines, Paradis returned to the property and then found that the claim had been restaked by Francois Guillotte on the 10th of September. Notwithstanding Guillotte's staking Paradis adopted and wrote upon the four corner posts put up by Guillotte, remarked his old discovery post, and returned to Toronto to file his application therefor. At this time the Guillotte application had not reached the Bureau of Mines, but as Paradis had not blazed any new lines and had used the Guillotte stakes, he states he was advised to return and properly stake the claim. On the 3rd of September he wrote the Deputy Minister of Mines setting out the history of the claim, then known as TR-1427, and informed him that he had been assured that should Guillotte's application reach the Department before his (Paradis') return his rights would be protected. This letter was answered on the 2nd of October, wherein he was told that, "If application is received to record this claim the matter will be held until you get a chance to present your side of the case." On the 15th of October the disputant again staked the claim, but this time, having in mind his former irregular staking, he planted new posts and blazed his own lines, which followed the boundaries laid out by Guillotte. His discovery post was also placed next to that of Guillotte.

On the 24th of October the Department of Mines acknowledged receipt of Paradis' application for the claim staked on the 15th of October and informed him that it had been staked by Guillotte on the 10th of September and that Guillotte had been sent a copy of Paradis' letter of the 30th of September, and in the meantime the Paradis application would remain on file. The reply made by Guillotte being apparently satisfactory to the Department, a letter was written

to Paradis on the 14th of November advising that the claim was open at the time Guillotte staked and that his application had therefore been recorded. Mr. Paradis then filed a dispute.

Upon the facts, the claim staked by Paradis in 1907, was not in good standing at the time Guillotte planted his posts on the 13th of September, 1913, and was open for prospecting and staking out at that time. A report of the work which the syndicate performed upon the property was not filed, and in that respect alone forfeiture had occurred. The claim had been staked in Theriault's name and his license was allowed to lapse and after his death nothing was done to revive the claim and have it vested in the personal representatives of the deceased, so that on the 13th of September, 1913, it had ceased to be a subsisting claim.

The validity of the Guillotte staking or his discovery was not attacked by the disputant, and I find that the lands were open for staking on the 10th of September, when he started to stake the claim, and that the staking was a valid one.

The disputant, who is an old resident of Northern Ontario, admitted that he was familiar with the requirements of the Mining Act in regard to staking out and filing reports of work and otherwise, but in consequence of the death of Theriault he was not sure what was the proper procedure to adopt to protect the claim. It was about two years after the death of the recorded holder that the disputant became anxious as to the standing of the claim, and his knowledge of the Mining Act should have availed him when he became suspicious of the movements of Guilmett and Guillotte and then staked the claim regularly. The disputant cannot now be allowed to say that he was misled by what was said or written by any one in the Department of the Bureau of Mines, as he must be taken to know the law in respect of mining claims. However, I do not feel that he made an honest attempt to regain control of the property and that he *bona fide* felt secure in the assurance conveyed to him on

the 2nd of October. The matter was held in abeyance by the Department until the 14th of November, when a conclusion was reached that the claim was open when Guillotte staked, and the Guillotte application was accepted and placed on record.

The affidavit attached to the application filed by the disputant stated that "there was nothing on the said lands to indicate that they were not open to be staked out as a mining claim, etc." As a matter of fact, this statement was known by the deponent to be untrue, as he was well aware of the previous staking by Guillotte, but I find that it was innocently made or inadvertently allowed to remain in the printed form of affidavit used, as the officials with whom he had discussed the matter were made aware of the Guillotte staking, and Paradis felt he was justified in treating the claim as still open ground. It was argued by counsel for the respondent that the affidavit attached to the Paradis dispute, although bearing the name of the Justice of the Peace before whom it was supposed to have been sworn, not having been signed by the deponent, the dispute on that ground alone should be dismissed. In the view I have taken of the case it is not necessary for me to pass upon this contention, but it might be that I could have allowed the disputant to reswear the affidavit at the trial or have a new affidavit taken with the unsigned affidavit attached as an exhibit. The dispute had been accepted by the Department, and upon it the issue reached trial.

There is no doubt in my mind that Guilmett in the guise of a friend profited by the candor of Paradis, and being influenced by the allurement of the apparently rich sample he had taken from the claim he returned to the property from Montreal with the express object of staking the claim if any defects in Paradis' staking could be discovered, or another claim adjacent thereto. Their own claim was admittedly bad, and no doubt their financiers were anxious for some returns for money expended. Even if their intentions were to stake another claim near the Theriault

claim, the fact is they staked the claim which a few weeks before had been pointed out to Guilmett as the one in which Paradis was interested. They did not on their return from Montreal seek hospitality at the Paradis home as before, but proceeded to locate the claim and appropriate it.

Such conduct is not to be encouraged. While I am forced to find the claim was open for staking, and regularly staked by Guillotte, it is fortunate that I can still point the way for relief to the disputant. The claim is only a short distance from the home of Paradis and he has had it under his eye since 1907. While he has been passive in his attitude he felt he and the syndicate were secure in their title as against a subsequent staker, and as I find that Guillotte lost no time in profiting by the information given to Guilmett, and returned from Montreal with the avowed object of wresting the claim from Paradis if possible, I recommend the disputant to seek relief under sec. 86 of the Mining Act of Ontario, and I will then report the facts to the Honourable the Minister of Lands, Forests and Mines.

I order that the dispute of C. A. M. Paradis against mining claim T. R. 3442, south-east of Squirrel River and east of Sandy Inlet, in the Temagami Forest Reserve, be dismissed, without costs.

(THE COMMISSIONER.)

BAKER v. BENBOW.

Appeal from Decision of Mining Recorder—Trial de Novo—Discovery—Purchaser for Value—Onus of Proof—Staking for Homestead Purposes.

The filing of an affidavit of discovery is a necessary step upon an application to record a claim, but it does no more than establish a *prima facie* case of discovery.

The law is well settled that a mining claim is invalid if a discovery of valuable mineral is not made before staking and subsequent discovery will not cure the invalidity.

The respondent was not an innocent purchaser for value, as he was upon the ground before purchasing and had every opportunity to inspect the alleged discovery.

Clearing the land is not performance of working conditions, and it would appear the property was more valuable for agricultural purposes than as a mining claim.

Had a valid discovery been made where indicated by the discovery post, was the question to be decided upon the facts, and there was but one answer.

The appeal was allowed.

J. A. Knowles, for Plaintiff.

J. M. Forbes, for Respondent.

May 6th, 1914.

THE COMMISSIONER.—This is an appeal by L. G. Baker from the decision of the Mining Recorder at Porcupine dismissing the dispute filed by Baker against mining claim 3525 P, situate on the north-east quarter of the north half of Lot 3, Concession 2, in the Township of Mountjoy, which stands recorded in the name of Thomas Benbow, the respondent herein.

The appeal was taken before me in the form of a new trial and *viva voce* evidence was adduced on both sides. The ground of the dispute set upon the trial before the Recorder was the absence of a sufficient discovery, and this position was maintained on the appeal.

The claim was staked by John Benbow on the 3rd of April, 1911, and subsequently transferred to his

son Thomas. In the affidavit of discovery filed by John Benbow he deposed to a discovery of iron and copper.

It was admitted by the respondent that there was no surface rock on the claim and the only mineral bearing rock he had seen on the property was in a shaft about 15 chains south-west from the discovery post. Neither Benbow nor any of his witnesses had seen the discovery post on the property or had made any attempt to ascertain whether valuable mineral in place was to be found at that point. Mr. Benbow said he had worked in the shaft for his father and was satisfied to purchase the claim on the strength of what he had there seen, and was not concerned about the original discovery.

The *bona fide* assessment work on the property consisted of four trenches and two shafts. The trenches varied in size but I believe the largest was from 4 to 6 feet deep and from 20 to 30 feet long, and in none of them was any rock found. The smaller shaft was ultimately used as a well and the larger shaft, having been sunk to a depth of about 38 feet, it is said by Benbow disclosed at the bottom a formation of black schist which he styled mineral in place. Max Guenther, who gave evidence for the respondent, did not examine conditions at the discovery post but saw some mineral on the claim, though not mineral in place, and the only possible evidence of discovery of valuable mineral in place at the bottom of the shaft is that of Thomas Benbow. None of the witnesses called by him were in a position to corroborate the fact. William Thompson saw some schist which he said Benbow told him came from the bottom of the shaft. I do not consider the evidence relating to the alleged finding of mineral in place at the bottom of the larger shaft to be at all material to the disposition of this appeal. Its only relevancy is that it might support a theory that rock in place was not to be found on the claim, except at a depth of 38 feet.

The only evidence of a discovery at the discovery post is contained in the affidavit of discovery filed by

John Benbow at the time the claim was recorded. The appellant and his four witnesses spoke of a personal examination of the claim, especially at the point indicated by the discovery post. The latter is a stump of a balsam tree cut off and squared and marked as a discovery post. Baker in company with W. S. Dobbs, a mining engineer, and Allan Hubert, used a 5½ foot steel rod and tested the ground within a radius of 10 feet of the stump, driving the rod to a depth of 5 feet, and found no evidences of rock of any kind. The rod was driven at an angle under the roots of the stump and it was ascertained that there was no rock beneath it.

There is the undisputed fact that no rock is to be seen upon the surface of the claim, and none within a radius of 10 feet from the discovery post at a depth of 5 feet, nor is it denied by the respondent that the discovery post stands in a muskeg with the moss undisturbed around it, except for the holes made by Baker when probing for rock.

Counsel for the respondent argued that the appellant had not shown that there was not a discovery of valuable mineral in place at the point indicated by the discovery post, as the absence of such on the surface or at a depth of 5 feet was not conclusive evidence that it might not be found at depth, and that the affidavit of discovery should not on the evidence adduced be disregarded. By sec. 54 (1) of the Mining Act, "a mining claim shall be staked out by planting or erecting upon an outcropping or showing of mineral in place at the point of discovery," etc., and valuable mineral in place is defined by sec. 2 (x). That the discovery post was not planted or erected upon an outcropping or showing of mineral in place was conclusively established by the appellant. That no mineral in place was discovered by the original staker at the point indicated by the discovery post, even at depth, is, I think, a fair inference from the evidence. The filing of an affidavit of discovery is a necessary step upon an application to record a claim, but it does

no more than establish a prima facie case of discovery. I am of the opinion that when the appellant's case was closed the onus of proof had shifted to the respondent as at that stage judgment would have been given against him. The respondent contented himself by relying upon the affidavit of discovery and made no attempt to meet the case made out by the appellant.

The law is well settled that a mining claim is invalid if discovery of valuable mineral is not made before staking, and subsequent discovery will not cure the invalidity.

McCrimmon & Miller (Price), M.C.C., 79.
McDermott & Dreany (Price), M.C.C., 4.
Haight & Thompson & Harrison (Price), M.C.C., 32.
Bilsky & Devine (Price) M.C.C., 394.

A discovery of mineral in place 15 chains away from the discovery post does not offset the lack of an original discovery at the time of staking, nor is the planting of a discovery post upon undisturbed soil covered with moss a sufficient indication without further evidence of the discovery of valuable mineral at depth.

Mr. Auer, a witness for the respondent, remembers a conversation with Mr. John Benbow prior to the staking of the claim when Mr. Benbow expressed the opinion that he thought the Hollinger vein would come in the direction of the claim in question and that he might catch it at depth. The fact that he dug numerous trenches and two shafts seemed to indicate that he adhered to that opinion, but his optimism does not appear to have been rewarded. The present recorded holder quite candidly said he bought the claim as a mining claim and as a home. It is situated upon the banks of the Mattagami River, and I cannot but feel that Mr. Benbow felt it was more valuable as a homestead than as a mining claim. I should have liked an explanation from John Benbow as to his affidavit of discovery, but I was informed that he was at the time travelling in

Europe. In no sense can there be said to be a reasonable compliance with the Mining Act as to discovery.

A miner, who has an honest discovery, has no reason to fear the stringency of the provisions of the Mining Act. The present holder of the claim was not an innocent purchaser for value as he was upon the ground before purchasing and had every opportunity to inspect the alleged discovery. Why the full complement of assessment work was performed upon such a claim is hard to understand, unless as a site for a home, and it would appear from the evidence that some of the work recorded on the claim was clearing the land, which is not the class of work required to be done by sec. 78 of the Act.

The Mining Recorder likened the position of the appellant to that of a claim jumper. I think he has been too sympathetic. Had a valid discovery been made where indicated by the discovery post, was the sole question to be decided, and upon the facts there appears to be but one answer. Thomas Benbow must have known that his claim was in jeopardy until he had secured a patent, and having taken a chance and lost he should not now complain of money spent and labor lost. I must therefore, with respect, reverse the finding of the Mining Recorder and allow the appeal. The appellant has been the recipient of some favors from the respondent and might under the circumstances under which he first became acquainted with the claim have shown a more friendly spirit towards him. I will only allow the appellant his witness fees upon the new trial.

I order that the appeal of L. G. Baker herein be allowed, with costs of his witness fees only.

(THE COMMISSIONER.)

ANDREWS v. PARKER.

Dispute — Discovery — Meaning of "Valuable Mineral in Place"— Staking—Substantial Compliance—Sec. 56 of Mining Act.

Held by the Commissioner—That it could not seriously be argued that good looking cracks in conglomerate formation alone constituted "valuable mineral in place," or that the cracks adopted as discoveries could be said to even justify the assertion that they showed indications of silver. See *Re McDonald & Beaver S. C. M. Co.* (Price), M. C. C. 7.

That there had not been "substantial compliance" within the meaning of sec. 58 of the Mining Act, and that sec. 56 of the Mining Act should be used more liberally when a licensee is in doubt as to the validity of his discovery.

Dispute allowed with costs.

G. Lynch Staunton, K.C., and *A. N. Morgan*, for disputant.

G. M. Clark, for respondent.

6th June, 1914.

THE COMMISSIONER.—The disputant Anna M. Andrews on the 17th of December, 1913, obtained from John M. Gray a transfer of lot 8, in the 5th concession of the township of Harris, in the district of Temiskaming, subject to the reservation in the patent of all ores, mines or minerals which are or shall hereafter be found upon or under the said lands.

On the 22nd of April, 1912, Thomas Mitchell, an employee at that time of the Casey Cobalt Silver Mining Co., Ltd., and under instructions from an officer of the company, staked out upon the mining licenses of George M. Miller and R. W. Hart two mining claims situate upon the north-east quarter and south-west quarter of the north half of the said lot 8, and caused applications therefor to be recorded as numbers 17384 and 17385 respectively. Attached to each application was an affidavit of discovery sworn to by Mitchell in which he deposed to a discovery consisting of "a vein in the conglomerate formation showing indications of

silver." Sufficient assessment work has since been performed upon the properties to entitle the holder to apply for a patent.

The present holder of the surface rights is now the disputant, and alleges an insufficient affidavit of discovery and the entire absence of a discovery of valuable mineral in place at the point or place of the discovery post, or anywhere upon the properties. Why this attack is made at such a late date is a question that will obtrude itself but does not necessarily require an answer in order to permit a determination of the dispute.

The Casey Cobalt Silver Mining Co., Ltd., is an active mining company operating in the immediate vicinity of these claims and had discovered valuable silver veins in the conglomerate formation at depth. Mr. Mitchell, who was called by the disputant, stated that prior to staking the claims he had been told of an outcropping of conglomerate of about two acres, situated near the south-east boundary of claim 17384, and of the existence of two small shafts about four feet deep. Upon reaching the property, which he described as low and marshy, he looked for and found the outcropping of conglomerate that he had been told of, discovered a seam or crack in the rock near the shaft, and then planted his discovery post, supporting it with loose rocks against the edge of the crack, which was not wide enough to permit a post being placed in it. He examined the two shafts and the surface conditions seemed to continue to the depth sunk, namely, about four feet. He saw "indications of silver, that is, the conglomerate formation," and upon his knowledge that the Casey mine had found rich silver values in the conglomerate he concluded that the crack in this formation might give rich silver values if worked, and upon this assumption his "indications of silver" were based and his discovery sworn to.

Mitchell prospected claim 17385 and found an outcropping of conglomerate on which he discovered what

he styled "a good looking crack and good formation of rock," and promptly appropriated it as his discovery. He again swore to a discovery "showing indications of silver" and says he believed the crack might be a vein or lode containing mineral of such a kind and nature as to make it probable that it would be capable of being developed into a producing mine likely to be workable at a profit. This belief was not supported by a discovery of valuable mineral but simply a crack or seam in the conglomerate formation, which formation had been so fruitful in the case of the Casey Cobalt Silver Mining Co., Ltd. No assay or other chemical test was made to ascertain if these cracks really contained mineral, nor had any development work been carried on at the points of discovery. The substance of Mitchell's discoveries is summarised in his reply upon cross-examination that at the points of discovery he "did not see any more than cracks in the conglomerate."

Mr. Gordon Patterson went with Mitchell when he staked claim 17385 and saw the conglomerate formation only, and nothing to indicate silver at the place of discovery. He stated there was a seam in the rock that you might find in any rock. Mr. R. C. Bryden, a witness for the respondent and an accountant at the Casey mine, was also with Mitchell when he staked 17385 and described the crack as "a vein in the conglomerate; it was tight, but a vein all the same." He admitted the vein was very similar to other cracks he had seen in the conglomerate and that he did not see any mineral in the crack or vein. Mr. Bryden was the only witness called by the respondent, and the respondent's counsel refused an offer made by me to have the alleged discoveries inspected by a competent official from the Bureau of Mines.

The chief witness for the disputant was Charles Spearman, a mining geologist and engineer. On the 17th and 26th of May last, he made two careful inspections of these properties, examined the outcroppings

of conglomerate spoken of by Mitchell on claim 17384, followed the outcroppings on 17385 and made ten qualitative chemical tests, which were said to be one hundred per cent. more accurate than assays, and found absolutely no trace of valuable mineral in place on either claim. He was not able to locate the discovery posts said to have been erected by Mitchell, but having got the descriptions of the situations of the posts from the original applications on file in the Recording Office, he measured off the distances from the No. 1 posts, but could not locate the discovery posts or any mineral-bearing rock where they should have been. Mitchell said he only guessed at the distances, and as he planted the posts upon rock supported by small stones it is quite possible they had fallen down and had become obscured. It is not material that Spearman could not find the discovery posts, as he examined the ground where they should have been according to the descriptions given in the applications, and all the rock to be found upon the two claims, but no mineral-bearing rock was to be found. Sec. 2 (x) of the Mining Act defines valuable mineral in place, sec. 54 directs how a mining claim shall be staked out, and sub-sec. (a) requires the discovery post to be planted upon an outcropping or showing of mineral in place *at the point of discovery*. If a prospector is in doubt as to his discovery being a valuable one within the meaning of the Mining Act and only *believes* it to be one, his belief can be substantiated upon compliance with the terms of sec. 56, which allows prospecting pickets to be planted and the ground to be satisfactorily explored and tested to prove a valuable discovery. The Mitchell affidavits of discovery are at least candid when they say "conglomerate formation showing indications of silver." It would have been safer for the staker, had he any doubt as to valuable mineral in place existing at the points of discovery, to have sought the protection of sec. 56 and erected picket posts and then diligently developed the cracks

to see if they were mineralised, and if so if they contained or encouraged hope of containing at depth paying values.

Upon the evidence it must be admitted no mineral was to be seen where the discoveries were made. It cannot seriously be argued that good looking cracks in conglomerate formation alone constitute valuable mineral in place, or that the cracks adopted as discoveries could be said to even justify the assertion that they showed indications of silver. Upon the evidence they showed nothing of the kind; mere rock only was to be seen, and whether it contained valuable mineral at the points of discoveries was certainly not known to the staker, nor, as far as the evidence shows, has the inquiry been pursued by the holder of the claims.

If the cracks or seams adopted as discoveries can be dignified by the appellation of veins or lodes then they must be of such a nature and contain in the part thereof then exposed such kind and quantity of mineral or minerals in place, other than limestone, marble, clay, &c., 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. Upon the evidence I find that the cracks or veins at the points of discoveries did not contain valuable mineral in place, and that the careless way in which the discovery posts must have been planted as to have become lost even to the staker upon his subsequent hunt therefor, and the inexcusable absence of blazes from the discovery posts to the No. 1 posts, prevent the staker from setting up substantial compliance as to the staking out of the mining claims within sec. 58 of the Mining Act. Mr. Price, in his decision in the case of *Re McDonald & Beaver S. C. M. Co.*, reported in (Price) Mining Commissioner's Cases, 7, at great length carefully discusses what constitutes a valuable discovery as required by the Act of 1906 and that of 1908, and I cannot usefully add anything to what he has said.

I order that the disputes filed herein be allowed, with costs, to be taxed upon the High Court scale, and I declare mining claims 17384 and 17385, situate in the township of Harris, in the Temiskaming mining division, to be invalid, and I order that they be cancelled upon the records.

(THE COMMISSIONER.)

(THE APPELLATE DIVISION.)

FINUCANE v. THE PETERSON LAKE MINING COMPANY.

Appeal from Decision of Mining Recorder—Lands Staked under Water of Peterson Lake—Mining Lease—Plans—Survey—Crown Grant—Construction of—Merits.

The application of the appellant was refused by the Mining Recorder on the ground that the land applied for formed part of the bed of Peterson Lake which by letter patent from the Crown had been vested in the respondent's company.

Held by the Commissioner that the text and plan referred to in the Crown grant to the Peterson Lake Company established "an adequate and sufficient definition, with convenient certainty of what was intended to pass," and that the land staked by the appellant was not open for staking as it formed part of the lands granted to the Peterson Lake Company.

Reference to *Horne* v. *Straubene* (1902), A. C. 454, C. 458; *Llewellyn* v. *Earl of Jersey*, 11 M. & W. 183; *O'Donnell* v. *Tierman*, 35 U. C. R. 181; *Grasett* v. *Carter*, 10 S. C. R. at 112; *Bartlett* v. *Delaney*, 29 O. L. R. at 438.

The admission as evidence of the several documents leading up to the grant was quite proper in view of the circumstances in the case.

Reference to *Baird* v. *Fortune*, 4 Macq. at 149; *Brady* v. *Sadler*, 17 O. A. R. 365, at 372, 377.

On appeal to the Appellate Division held by the First Divisional Court:—Meredith, C.J.O.—That the controlling words of the description were those referring to the mining location by its number as shown in words plain, and the other description if not accurate as so shown must be rejected as "*falsa demonstratio.*" The rule of construction invoked by the appellant made against his contention, the cases establishing that where the lands intended to be conveyed are accurately and completely described the description is not controlled by reference to a plan on which they are stated to be shown.

The appeal failed and should be dismissed with costs.

The appellant Finucane appealed to the Commissioner from the decision of the Recorder refusing to record the application of the appellant for part of the land under the water of Peterson Lake.

C. A. Masten, K.C., for appellant.

McGregor Young, K.C., and *J. McEvoy,* for Peterson Lake Mining Co., Limited.

M. Gilmour, of Messrs. Blake, Lash and Cassels, for Cobalt Provincial Mining Company, Limited.

18th July, 1914.

THE COMMISSIONER.—This is an appeal from the decision of the Mining Recorder at Haileybury refusing to record the application of T. R. Finucane for the southerly portion of Cart Lake, properly known as Peterson Lake, and said to contain 4 acres or thereabouts. The appellant contends that the land in question was open for staking, a discovery of valuable mineral in place made and the claim properly staked, and that consequently his application should have been placed on record. The Mining Recorder being in doubt as to whether the land was open or not, placed the application on file and asked for instructions from the Bureau of Mines, and upon their advice that the land so staked comprised part of the bed of Peterson Lake, which had previously been granted to the Peterson Lake Silver Cobalt Mining Company, Limited, refused to record the application.

The land applied for was formerly covered by the waters of Peterson Lake and was part of the bed of Peterson Lake. It lies to the south of the 5th concession line of the township of Coleman, to the west of the eastern boundary of the Gillies Timber Limit, and in front of the Provincial Mine on the west and the

Savage Cobalt Mining Company, Limited, on the east. The dividing line between the Provincial and Savage mines is the eastern boundary line of the Gillies Timber Limit, which extends in a north-westerly direction across the south-westerly end of Peterson Lake into Mining Location R. L. 406, which lies to the west of Peterson Lake, so that the centre and eastern parts of the disputed land are within the township of Coleman and the western part within the Gillies Timber Limit.

As part of the land staked out and applied for is within the Gillies Timber Limit, the application of the appellant is incorrect when it gives the description as being in the north-west corner of lot 5, concession 4, in the township of Coleman, as that portion of the land within the limit is not in the township of Coleman, but as no confusion has arisen from the incomplete description and the sketch or plan attached to the application shows clearly the land staked out, and as the discovery is within the staking, the claim cannot be said to be invalidated in that respect.

Previous to the year 1905, W. C. Chambers, Arthur Ferland, W. A. McCaffery and Thomas Hebert had applied for and obtained Mining Locations R. L. 404, 405, 406, 407 and 408, and by letter dated January 13th, 1905, written by J. B. O'Brien to the Assistant Commissioner of Crown Lands, it would appear that he and the applicants were under the impression that the said mining locations took in and covered the bed of Peterson Lake, whereas the surveys on file in the Department of the several locations, made at the time the claims were applied for, show that their boundaries do not extend past the road allowance around the lake.

On the 26th of December, 1904, Ferland, Hebert and McCaffery assigned to William C. Chambers all their right and title under the Mines Act "to those lands covered by water (part of the original applica-

tions lodged by us abutting Mining Locations R. L. 406, 407, 408 and 405), which may be described as *all* the lands under the waters of Peterson Lake and the small lake to the south-west thereof," and requested a lease or patent to issue for the same to the said Chambers.

On the 9th of February, 1905, a plan and description of Mining Location S.V. 476 was prepared by A. T. Ward of the firm of Speight and VanNostrand, O.L.S., and sent to the Department of Lands by Mr. J. B. O'Brien, together with an affidavit made by W. C. Chambers, requesting the lease to issue for Mining Location S. V. 476 in the joint names of William C. Chambers and R. K. Russell, as the area exceeded 160 acres, the limit which could be allowed one claimant. In this respect Mining Location S. V. 476 was created.

The description of S. V. 476 as given by Mr. Ward reads as follows: "All and singular that certain parcel or tract of land and premises situate, lying and being in the Township of Coleman, in the District of Nipissing and Province of Ontario, being known as Mining Location S. V. 476, containing by admeasurement 195 acres, be the same more or less, as shown coloured *red* on a plan made by A. T. Ward, O.L.S., representing Ontario Land Surveyors Speight & Van Nostrand, dated at Toronto, 9th February, 1905, and filed in the Crown Lands Department at Toronto, and which said parcel is more particularly described as follows, that is to say: All the land under the waters of Peterson Lake, in the said township, also the islets therein designated as Nos. 14, 15, 16, 17, 18, 19 and 20 on the plan of the said township, of record in the Crown Lands Department at Toronto; the said lake being the body of water lying to the east of Mining Locations R. L. 404 and R. L. 406, to the south of Mining Location R. L. 401, to the west of Mining Locations R. L. 405 and R. L. 408, and to the north of Mining Locations R. L. 407 and R. L. 408." The plan referred

to coloured red is Exhibit 9 herein. If the part of the plan coloured red is adopted as the lands that passed ultimately by grant to the Peterson Lake Company, then the controversy between the parties is at an end, as it is admitted the land in dispute is coloured red on the plan and takes in all the bed of Peterson Lake, including what is commonly known as Cart Lake.

Pursuant to Mr. O'Brien's request of February, 1905, a lease did issue to William C. Chambers and R. K. Russell of Mining Location S. V. 476, which lease was dated the 1st of May, 1905. The said lease was assigned by Chambers and Russell to the Peterson Lake Silver Cobalt Mining Company, Limited, on the 22nd of May, 1907, and a grant made by the Crown to the Peterson Lake Company on the 5th of July, 1907, in which Mining Location S. V. 476 was described as follows: "Being composed of Mining Location S. V. 476, being land covered with the water of Peterson Lake in front of Mining Locations R. L. 404, R. L. 405, R. L. 406, R. L. 407 and R. L. 408, including also islets therein situate in the said township of Coleman as shown on plan of survey by Ontario Land Surveyor A. T. Ward, dated February ninth, nineteen hundred and five, of record in the Department of Lands, Forests and Mines heretofore under Mining Lease No. 3508, dated May first, nineteen hundred and five." The appellant now contends the grant to the company is the final instrument and its descriptive words of the lands granted must govern, and that such being the case the lands staked out and applied for by him were open for staking and the application improperly refused.

If the documents leading up to the grant to the respondent were properly admitted at the trial (of which I will treat later), I think it must be found that the holders of Mining Locations R. L. 404, 405, 406, 407 and 408 felt that they were lessees of all the lands under the waters of Peterson Lake and that Chambers tried to consolidate their alleged respective rights in

the bed of the lake in himself and Russell by his application for what afterwards became Mining Location S. V. 476. It will be observed that the assignment from Ferland *et al.* to Chambers (Exhibit 21), assigns all their rights in "*all* the lands under the waters of Peterson Lake and the small lake to the south-west thereof" (Cart Lake), and the plan accompanying the description of S. V. 476 made by A. T. Ward, filed with the application for S. V. 476, shows by the part coloured red that all the lake bed was included. It is again noticed that the description of the claim made by A. T. Ward states "all the land under the waters of Peterson Lake—the said lake . . . ," &c., emphasizing the fact from such language and the plan that the entire bed of the lake comprised S. V. 476, but the description goes on to say "the said lake being the body of water lying to the east . . . ," &c., when room for argument appears inasmuch as the land in dispute might not be accurately described as lying to the east of R. L. 404 and 406. In this respect the description may be said to slightly conflict with the plan and the opening words, "all the land under the waters of Peterson Lake."

The lease which followed the filing of Ward's description and plan of S. V. 476 described the land as "being composed of Mining Location S. V. 476, being land under the water of Peterson Lake in front of the aforesaid mining locations, as shown on plan by A. T. Ward, dated 9th February, 1905," and the ultimate grant by the Crown to the Peterson Lake Company practically follows the language of the lease to Chambers and Russell. While the assignment from Ferland *et al.* to Chambers and the description of S. V. 476 made by A. T. Ward used the words "all the land under the waters of Peterson Lake," the lease and subsequent grant from the Crown dropped the word "all" and used the language "the land . . . ." While this is a fact the survey of S. V. 476 shows by its description and plan that "all the land under the

waters . . . " were intended to be included in the claim, and the lease and patent assigns and grants Mining Location S. V. 476 as shown in A. T. Ward's plan. Trouble, however, occurs in these two instruments when the draughtsman after referring to a transfer of S. V. 476 as shown on Ward's plan, gives a more particular description by describing the location as *in front of* R. L. 404, 405, 406, 407 and 408.

Whether the disputed land can be said to be in front of any of these locations is a matter of argument. I have not the benefit of a surveyor's professional interpretation of " in front of," but I cannot find the words to be in direct contradiction with the other specific words of the lease and grant as to make the instrument uncertain as to what was to pass, and their adoption might be explained by the fact that at the date of the survey of S. V. 476 the lands to the south of the lake were unsurveyed territory.

The appellant points out that the plan attached to the grant, dated 21st December, 1909, to the Peterson Lake Company, of 33 feet road allowance around part of Peterson Lake, does not extend around the land in dispute. It is a well-known custom of the Crown Lands Department that where mining locations have been laid out around a body of water a survey is always made of a road allowance, and as there were no claims or locations to the south of the lake the reason why the road allowance was not continued at that end and through the Gillies Timber Limit is apparent. The Provincial mine, which lies to the south and abuts on the lake shore, did not come within the regulations of the department, as it was laid out by the department itself and first worked as a Provincial mine, and was afterwards sold by the Crown to the present owners of that claim.

The description in the patent to the Provincial mine, which lies to the south-west of the area in dispute, describes the east boundary thereof " as the western boundary of lot 5, concession 4, of the town-

ship of Coleman and the south-westerly shore of Cart Lake, otherwise known as Peterson Lake, in the Gillies Timber Limit." As Mining Location S. V. 476 was in existence at that time it is argued by the appellant that if the grant to Peterson Lake Company of that mining location was intended to include the southern part of the bed of the lake, which would take in the 4 acres in question, then the description would have read "the south-western part of Mining Location S. V. 476" in lieu of the words "the westerly shore of Cart Lake." It appears to me the argument is not conclusive and does no more than lend some weight to the contention of the appellant. Either description would be correct and in conformity with a proper description of the lands granted. Again, in support of the contention that all the bed of the lake did not pass, it is pointed out that the grant to the Peterson Lake Company uses the language "in front of Mining Locations R. L. 404, . . . " &c., whereas if the intention was to pass all of the bed of the lake the description should have gone farther and said "in front of the Provincial and the Savage Cobalt Silver Mines," &c. As the Provincial mine was not patented until 18th October, 1909, and the patent to the Peterson Lake Company issued in July, 1907, such a description could not have been used, but it could properly have been said "in front of the Savage Cobalt Silver Mine," as that claim was established by grant in November, 1905. Why certain suggested descriptions were not used (and which probably would have made more certain the lands to pass) cannot here be answered, but "the best and clearest way of identifying the subject matter" is by a plan accompanying the general description, and in all main references to S. V. 476 we find embodied in the text "as shown on plan of survey by A. T. Ward, dated February 9th, 1905, of record in the Department of Lands, Forests and Mines, heretofore under Mining Lease No. 3508," the latter lease being the first lease of S. V. 476 after its creation. Hodgins, J.A., in

Bartlet v. *Delaney*, 29 O. L. R. at 438, in this respect says: "Here it is an island composed of firm and low marshy land of most irregular shape and bounded by the sides of winding channels. Hence a plan of it is obviously the clearest and best way of identifying it, especially where a survey had been made of it, and where its position is not ascertained by exact bearings to definite landmarks on the mainland nearby." And his language, I think, amply fits the circumstances in this case.

The grant to the respondent fixes the area at 195 acres, more or less. Mr. Booth, called by the appellants, from a computation made from the plans on file, approximately fixes the total area now in possession of the Peterson Lake Company, including the grant of 18½ acres road allowance, as 220.7 acres, which does not include the land claimed by the appellants. From this is deduced the argument that taking away the 4 acres in controversy the respondents have still more land than their several grants call for, which is evidence of an intention to exclude the southern portion of the lake bed. In *Llewellyn* v. *Earl of Jersey*, 11 M. & W., 183, Park, B., said: "The rule of law applies that as soon as there is an adequate and sufficient definition with convenient certainty of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it according to the maxim "*falsa demonstratio non nocet.*" Upon the facts I think this rule of law applies here, and the cases upon a proper interpretation of the words "more or less" are helpful to the respondent's case.

In the description of S. V. 476 made by A. T. Ward at the time he surveyed the lake, the lands are said to be "as shown *coloured red* on the plan. . . ." As a matter of fact the whole of the bed of the lake is shown coloured red, but in the text of the grant to the Peterson Lake Company the word "red" is omitted, and the reference is "as shown on plan of survey. . . ." This, I take it, was a mere inadvertent omission and

cannot be held to help the appellant as the plan referred to shows the body of the lake all in red, and it must have been so coloured for some useful purpose, and that is shown by harking back to the description used by the surveyor in his reference to the colour red in the plan.

The appellant put in as part of his case a copy of a letter dated 17th April, 1914, addressed by the Deputy Minister of Mines to Geo. T. Smith, Mining Recorder at Haileybury (attached to Exhibit 1 herein), in which he said, in answer to the Recorder's inquiry, "the bed of Peterson Lake (including Cart Lake) was granted to the Peterson Lake Silver Cobalt Mining Company, Limited, and reference to the surveyor's plan and description and the terms of the grant appear to show that it was intended to cover the whole of the bed of the lake." The respondents put in a letter from the Deputy Minister of Mines to Col. A. M. Hay, dated 13th October, 1910, again repeating that the bed of the lake had passed to the Peterson Lake Company, and on the 2nd of March, 1906, the Minister of Crown Lands wrote P. D. Ross a letter in which he said "that a mining location covering the bed of this lake (referring to Peterson Lake) was leased about two years ago to W. C. Chambers and R. K. Russell." All of these letters show the position the Crown has taken from the time of the lease to Chambers and Russell down to the grant to the Peterson Lake Company and subsequent thereto. Whether these letters can be read into the case to explain the intention of the parties is a matter of law. I do not think the appellant can be heard to object to their introduction, as he put in a letter from the Deputy Minister of Mines to the Recorder showing the position of the department, and that at once placed the matter upon inquiry.

Counsel for the appellant suggested at the trial that the reason why this land did not pass to the Peterson Lake Company by the grant was because it

was within the Gillies Timber Limit, which, by proclamation dated the 14th of August, 1905, had been withdrawn from exploration for mines or minerals and from lease or sale. Only the south-western part of the lake is in the Gillies Timber Limit, the rest of the land in dispute being in the township of Coleman, so that the suggested reason is not a sufficient answer, and if the Crown took the position that the portion of the lake bed in the Gillies Timber Limit could not be included in a grant to the mining company, then that portion of the lake bed so staked by Mr. Finucane and here claimed, would be abortive under the proclamation of 14th August, 1905. Part of Mining Location R. L. 406 is within the Gillies Timber Limit, but was located before the proclamation withdrawing the limit from mineral exploration.

In the Ward description of S. V. 476 certain islets are referred to, one of which is No. 14. This islet is shown on his plan as being to the north of the south boundary of R. L. 406, but the plan is not an authentic survey of the islands, only of the lake. At page 6 of the report and field notes of the township of Coleman (Exhibit 11) this islet is shown partly within the Gillies Timber Limit, and the lake is also shown to extend a short distance into the said limit. The line between the township of Coleman and the limit is shown by red vertical lines. The grant to the company refers to "islets therein situate" without designating them by number, but states "as shown by plan," which plan shows this island, and from a correct survey as shown by the field notes the island is shown to be located within the area in dispute.

A significant fact is that all the land but the four acres in question has been granted, leased or located. Why should such a small portion be withheld by the Crown? I cannot find from all the documents before me any intention to withhold this land, nor do I find much difficulty in readily interpreting the grant and the plan referred to.

There is a specific grant to the Peterson Lake Company as shown by a plan. What was passed was to be as shown by a plan, and the plan identifies the land referred to in the text of the grant. By holding that the land shown in the sketch attached to the application of T. R. Finucane had previously passed to the respondent, such a decision is not reached by subordinating the text of the grant to the plan. The latter in this case elucidates the text and should be read into it. In *Horne* v. *Straubene* (1902), A. S. 454, at 458, the diagram was proved inaccurate and the text was relied upon. In this case the diagram or plan has not been proved inaccurate and it is reasonably consistent with the text of the grant. *O'Donnell* v. *Tierman,* 35 U. C. R. 181, and *Grasett* v. *Carter,* 10 S. C. R. at 112, appear to be in sympathy with the respondent's case.

I think the admission as evidence of the several documents leading up to the grant to the Peterson Lake Company was quite proper in view of the circumstances in this case. In *Baird* v. *Fortune,* 4 Macq. at 149, Lord Wensleydale said: "No parol evidence can be used to add to or detract from the description in the deed, or to alter it in any respect, but such evidence is always admissible to show the condition of every part of the property, and all other circumstances necessary to place the Court, when it construes an instrument, in the position of the parties to it, so as to enable it to judge of the meaning of the instrument." This case is referred to in *Brady* v. *Sadler,* 17 O. A. R. 365, and in the latter case Burton, J.A., at p. 372, said: "Now, I quite agree that these letters cannot be looked at to control the language of the patent, but all these negotiations and extrinsic facts and circumstances can be referred to for the purpose of construing words themselves, coupled with the further important fact that the Crown Lands Department making the grant were aware of all these facts. . . ." Mr. Justice Osler, at p. 377, also treats of the admissibility of such evidence.

I have reached the conclusion that the text and plan referred to in the Crown grant to the Peterson Lake Company establishes "an adequate and sufficient definition, with convenient certainty of what was intended to pass," and find that the land staked out and applied for by T. R. Finucane was not open for staking, but formed part of the lands granted by the Crown to the Peterson Lake Company.

There is no doubt of the intention of the applicant for S. V. 476 to apply for all the lands under the waters of Peterson Lake, and it has been shown that the intention of the Crown Lands Department was to give what was applied for. The appellant in order to succeed in defeating the intentions of the Crown must show that the strict legal interpretation of the Crown grant did not pass what they intended to convey, but in this I feel he has failed. By way of observation I might add that the respondent in any event might have the right to come back to the Crown and ask for a reformation of the grant if that were necessary, and if that is so then even if the appellant did succeed upon this appeal the respondents could seek relief and the parties might be placed in the same position as prior to the application for the lands in question by the appellant.

The result I have reached is based upon the real merits and substantial justice of the case, in conformity with sec. 140 of the Mining Act, and is not, I think, repugnant to the law bearing upon the facts.

I order that the appeal of T. R. Finucane herein be and the same is hereby dismissed, with costs, which I direct to be taxed upon the High Court scale.

From this decision the appellant appealed to the Appellate Division.

The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN and MAGEE, JJ.A.

C. A. Masten, K.C., and *L. C. Outerbridge*, for appellant.

McGregor Young, K.C., for the respondents.

13th November, 1914.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The refusal to record this claim was based on the assumption that the land in respect of which the claim was made, which forms part of the bed of Peterson Lake, had already been granted to the respondents; and the sole question for decision is whether or not the grant to the respondents covers the bed of the whole of Peterson Lake.

The letters patent by which the grant to the respondents was made are dated the 5th July, 1907, and the land granted is described as "all that parcel or tract of land and land covered with water situate, lying and being in the township of Coleman . . . containing by admeasurement 195 acres, be the same more or less . . . being composed of mining location S. V. 476, being land covered with the water of Peterson Lake in front of mining locations R. L. 404, R. L. 405, R. L. 406, R. L. 407 and R. L. 408, including also islets therein situate in the said township of Coleman as shewn on plan of survey by Ontario Land Surveyor Ward, of record in the Department of Lands, Forests and Mines, heretofore under mining lease 3508 dated May 1st, 1905."

Mining lease 3508 contains the same description, except that there is added to the description the words "a duplicate of which plan is attached to these lease letters."

Mr. Ward's plan, which, as the letters patent state, is of record in the Department, . . . shews that the whole of Peterson Lake is included in mining location

S. V. 476; and that is, in my opinion, decisive in favour of the respondents.

It was argued by counsel for the appellant that the controlling words of the description are, "being land covered with the water of Peterson Lake in front of mining locations R. L. 404, R. L. 405, R. L. 406, R. L. 407 and R. L. 408, including also islets therein," and, as it was also contended, the land in question not being in front of these locations, it did not pass by the grant.

In my opinion, neither contention is well-founded. Read even in its narrowest and most literal sense, mining location S. V. 476 is in fact, as shewn on Ward's plan, in front of one or other of the mining locations mentioned in the letters patent. Mining location R. L. 406 is irregular in form and is bounded on its irregular side by the lake, part of the location lying to the north and the remainder of it to the west of the lake, and the whole of the southerly end of the lake lies in front of the northerly part of the location.

But, if it were otherwise, the contention must fail. The controlling words of the description are those referring to the mining location by its number as shewn on Ward's plan, and the other part of the description, if it is not an accurate description of the mining location as so shewn, must be rejected as *falsa demonstratio*.

The rule of construction invoked by the appellant's counsel makes against their contention; the cases cited by them establish that where the lands intended to be conveyed are accurately and completely described the description is not controlled by reference to a plan on which they are stated to be shewn.

An illustration of the application of this rule is to be found in *Horne* v. *Straubène* (1902), A. C. 454 . . .

This and like cases are but instances of the application of the maxim "*falsa demonstratio non nocet;*" and instead of it assisting the appellant, it makes against him, for the description of the land as Mining

Location S. V. 476, as shewn on Ward's plan, is clear and unambiguous; and, if the reference to the other locations contradicts this description, it must, applying the maxim, be rejected. . . .

Reference to *Llewellyn* v. *Earl of Jersey* (1843), 11 M. & W. 183, 63 R. R. 569.

In the case of a grant of a lot in a Crown survey by number, concession, and township, the whole lot would pass notwithstanding that the land was also described by metes and bounds which embraced only part of the lot; and, in my opinion, the case at bar does not differ from such a case. Here the lot is described by its number according to a plan of survey of record in the Department . . . and therefore adopted as a Crown survey; and, even if the words on which the appellant relies have the meaning which he seeks to attach to them, they must be rejected as *falsa demonstratio.*

In my opinion, the appeal fails and must be dismissed with costs. . . .

It is unnecessary to determine the question raised . . . as to the competency of the appeal.

(THE COMMISSIONER.)

SAGER v. BOCK.

Written Agreement—Vendor and Purchaser—Specific Performance—Time being of the Essence of—Waiver—Revival—Transfer.

The claimant entered into a written agreement with the respondent B. for the purchase of the claim in question. The purchase price was payable in instalments, same was not made of the essence of the agreement. After default B. transferred to M. for consideration. The claimants asked specific performance of the agreement, or an order compelling the respondents to transfer the claim to the Cobalt Twentieth Century Mining Company.

Held by the Commissioner that time was of the essence of the contract although not expressly made so by the agreement. Following *Morton and Symonds* v. *Nichols*, 12 B. C. L. R. 485.

Review of authorities: *Re Dagenham (Thames) Dock Co.* (1873), L. R. 8 Ch. 1022, and *Kilmer* v. *British Columbia Orchards' Lands, Ltd.* (1913), A. C. 319, distinguished.

While there was a waiver, time was again made of the essence. *Webb* v. *Hughes*, L. R. 10 Ex. 281, at 286, and *Dahl* v. *St. Pierre*, 11 D. L. R. 775, distinguished.

Proceedings by Sidmoor Sager for specific performance of a written agreement or an order requiring the respondents to transfer mining claim L-1472 to the Cobalt Twentieth Century Mining Company.

A. G. Slaght, for claimants.

J. Lorn McDougall for defendants.

17th September, 1914.

THE COMMISSIONER.—This is an application by the claimants Sidmoor Sager and the Ontario Cobalt Twentieth Century Mining Company, Limited, for specific performance of a written agreement, dated the 23rd day of September, 1913, and for an order compelling the respondents John Bock and John Mahrle to transfer to the Cobalt Twentieth Century Mining Company mining claim L-1472, situate in the township of Maisonville in the Larder Lake Mining Division. This agreement reads as follows:—

"This agreement made this 23rd day of September, A.D. 1913.

Between:

John Bock, of the town of Cobalt, in the District of Timiskaming, of the first part,

and

Sidmoor Sager, of the City of Buffalo, in the State of New York, of the second part.

Witnesseth the party of the first part agrees to sell to the party of the second part mining claim No. L-1472, situated in the township of Maisonville, in the District of Timiskaming, for the price or sum of two hundred and fifty dollars cash, and ten thousand shares of the Twentieth Century Mining Company stock. And the party of the first part further agrees that the above mentioned claim is to be part of the Twentieth Century Mining Claim, and he further agrees to make all transfers necessary to complete this agreement.

The payments are to be made as follows:—

Fifty dollars cash at the signing of this agreement, the receipt whereof is hereby acknowledged, and one hundred dollars in sixty days, and one hundred dollars in ninety days from the date hereof.

In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

Signed, sealed, In the presence of Sgd. L. R. Lupton. } Sgd. John Bock. Seal. Sgd. Sidmoor Sager. Seal."

Before the conclusion of the trial application was made by the claimants to amend their notice of claim by adding the Cobalt Twentieth Century Mining Company as a claimant as in place and stead of the Ontario Cobalt Twentieth Century Mining Company, Limited, which application was granted. As John Mahrle is the present recorded holder of the claim, he appears as a respondent in the present action.

The Cobalt Twentieth Century Mining Company was incorporated under the laws of the State of Arizona, which was immediately followed by the incorporation of the Ontario Cobalt Twentieth Century Mining Company, Limited, having for their chief officers Sidmoor Sager, President; L. R. Lupton, Treasurer, and George Laws as Secretary. The President received $4 a day when working for the companies, the Treasurer $50 and the Secretary $25 each per month. The company, apparently, owned some mining prospects on which they had done some work, but up to the present their operations have not been remunerative. The three officers appear to guide the destinies of the respective companies from the head office in Buffalo, where the Secretary and Treasurer reside, with the co-operation of the President, who spends considerable of his time in investigation of their holdings in the northern mineral belt, while the Treasurer sallies forth to sell stock whereby the salaries of the several officers of the company may be paid and the company's operations carried on. It is admitted the existence of the company depends upon the sale of stock and at the time the agreement was entered into by Sager on behalf of the company the exchequer was devoid of funds and remained in that state at the trial of this issue.

The agreement is in the form of an option to sell, but signed by both interested parties. While executed by Sidmoor Sager he stated the agreement was made by him on behalf of the Cobalt Twentieth Century Mining Company. The agreement called for an initial payment of $50 when executed, but Lupton told Bock when the agreement was being executed at the Cobalt station prior to his and Sager's departure for Buffalo that the company was not in funds and that the most they could pay down was $10, which they then paid and promised to send the balance on their return to Buffalo. Further payments of $10 and $5 were made by Sager by cheque on the 10th of October and the 1st

of November, and the balance of the $50 sometime before Christmas, 1913. At that time the balance of the purchase money, $200, was unpaid. Between Christmas, 1913, and the 26th of May, 1914, Bock was in correspondence with Sager and Lupton in reference to the past-due payments. Up to the 26th of May Bock admits he still expected to get more money "on the old contract."

At the time the agreement was made $250 was a good figure for the claim, which was, at most, a prospect, but prior to the 26th of May a discovery of considerable value was made on a property distant a claim and a half away, which was known to Bock, and I believe also to Sager, and that naturally enhanced the value of the disputed claim.

Upon instructions from the President, Mr. Lupton went in search of Bock and finally met him in Haileybury on the 26th of May. From Bock's testimony, the following dialogue took place between him and Lupton: "Lupton said, 'how are we standing with our claim?' I said, 'you have forfeited unless you make a payment and pay up promptly.' He said he could give me $50 then. I followed him up and said, 'don't give me the cheque if you can't make the other payments,' to which Lupton replied he thought he could make the grade. I made him give me a paper that he would make the payments promptly. I didn't take it for a promissory note, only as evidence he would pay. I told him it was the last chance I would give them."

By consent John Bock was examined for discovery at Haileybury on the 20th of July last, and referring to what took place on the 26th of May at questions 87-88 and 267, he said:—

87. Q. Go on with your talk with Lupton. A. He says to me, 'we got a deal on with you up north and we have come to see you about the claim." I said he had forfeited the claim. He said, "won't you take any money?" I says, "I will take money if you pay

the other up promptly." He says, "I will give you $50 to-day," and he says, " when do you want the rest?" I says, " if you give me $50 to-day and if you give me $50 more on the 15th of June and the balance in sixty days, so Mr. Lupton says all right." He walked into the Vendome and made out the cheque. I says, " Do not give me that cheque if you cannot pay the others."

88. Q. Who was there? A. There was no one but Mr. Lupton and myself. I says, " Give me a note, and if you cannot pay the other to-day it is all off." He said all right.

267. Q. What date, according to your understanding, were they entitled to have in order to pay the money they had to pay in? A. I told Mr. Lupton when he gave me that last $50 cheque to be positively sure and pay me the other $50 on the 15th of June, and I told him if he did not pay me the money the company could have no claim on it, and he did not send the money, and for that reason I thought that I was entitled to transfer the claim.

Mr. Lupton, in his examination at the trial, said: " The question of balance arose, and after consideration as to the possibilities of what we might be able to do, I suggested that we might get to it by the 15th of June and $100 on August 15th. Bock then discussed the promptness of the payments. I told him the company was hard up and carrying a large burden, but I said we do our best to get the money to him. He naturally gave me to understand he wanted the money when it was due." He denies Bock replied as in question 267. The memorandum of the 26th of May, 1914, was then signed, $50 paid and a receipt given by Bock to the Cobalt Twentieth Century Mining Company, Limited, " to apply on our gold claim contract." The note, as it has been called, is in the words and figures following:

"Haileybury, 5/26, 1914.

Pd. check No. 447 $50 and agree to pay $50 more June 15th and bal. due of $100 sixty days from June 15th.

R. L. Lupton."

For their own benefit and in order to keep the claim in good standing the claimants caused to be performed the necessary assessment work thereon and filed at the trial a statement showing an expenditure in that respect of $214.61.

According to the agreement Bock was to get 10,000 shares of the stock of the Cobalt Twentieth Century Mining Company which was issued on the 3rd of June and sent to him by letter post-dated as of the 1st of June, but it was afterwards learned that it had not reached him as another person by the same name had apparently procured the letter with the enclosure at the post office at Cobalt, and had not returned it, but it appears that Bock is registered as a shareholder in the books of the company and they are willing to issue duplicate stock to him upon tender of a transfer of the claim. The letter of the 1st of June written by the Secretary enclosing the stock also states, "I believe this leaves a balance of $150 yet to be paid which I hope we will be able to send *promptly as per agreement.*"

The only correspondence between the company and Bock between the 26th of May and the 1st of June is the letter above referred to. On the 18th of June L. R. Lupton, as treasurer of the Cobalt Twentieth Century Mining Company, wrote John Bock from Buffalo as follows: "Enclosed please find our cheque for $30. We will send you the balance of the $50 between now and the 1st. Will probably see you within a few days." It is to be observed that the letter is dated the 18th of June and the cheque that was enclosed was drawn on the People's Bank of Buffalo and dated the 22nd of June. On the 29th of

the same month Mr. J. Lorn McDougall, solicitor for Bock, wrote the Cobalt Twentieth Century Mining Company, Limited, at Buffalo, as follows: "I have been instructed by Mr. John Bock to return you the cheque for $30 included in your letter of the 18th of June. I am to state to you that you not having complied with the terms of payment he considered the payment at an end and disposed of the claim to other parties." Before Mr. McDougall's letter was received by the company it appears that Sager had learned that Bock had placed the claim under option for $25,000 and immediately wired Lupton at East Aurora, N.Y., asking him to bring all papers having reference to the Bock claim to Sesekinika, which is in the vicinity of the disputed property. Lupton apparently immediately left for the north and met Sager, when they both went out to the claim and met Bock on the 2nd of July. Lupton told Bock that he was prepared to pay the balance, but the latter refused to discuss the matter, stating that there had been a forfeiture and referring them to his solicitor, Mr. McDougall. Previous to that date a further important discovery had been made on the claim immediately adjoining the one in question, which was known to both Bock and the officers of the company, and Mr. Sager candidly admitted for that reason they were very anxious to conclude the contract. A tender of the balance of the purchase money and interest was formally made to Bock on the 20th of July, at a time when he was being examined for discovery in the present action.

John Mahrle occupied the same shack with Bock and they had operated as partners. It is stated, and I believe it to be the fact, that from time to time Bock borrowed money from Mahrle, amounting to about $355, and Mahrle becoming impatient had requested payment when Bock told him that if the company did not meet their payments in accordance with the memo. of the 26th of May, he would transfer the claim to

him as security for the debt, and on the 22nd of June a transfer of the claim was executed by Bock to Mahrle and recorded on the 24th. Mahrle took title with notice of the agreement of the 23rd of September, 1913. After the second important discovery in the vicinity Bock was approached by an interested party for an option on the claim in question, and after the payment of the 15th of June became in default an option was given for $25,000, the time for the exercise of which has passed, and the option has been cancelled. Upon these facts the claimants ask for specific performance of the agreement.

It appears that Bock and Sager had been acquainted for a great many years, and that Bock had brought to the attention of Sager this and other claims and asked him to take them over, so it can be readily understood why the first payment of $50 was allowed to be paid piecemeal between the date of the contract and Christmas, 1913, and from the further fact that mining claims in that vicinity, at that time, were not in active demand. By the agreement the vendor became absolutely bound to sell, and while it may be said that through the signature of Sidmoor Sager and the fact that part of the purchase money was paid in accordance with the agreement between the parties, the relationship of vendor and purchaser was created, the right to recover the past due purchase money by the vendor under the terms of the memo. of the 26th of May, which was signed not by Sager but by Lupton, who acted for the company, but without any proper endorsation from them, would be a moot question. The agreement is silent as to time being of the essence of the contract, but upon the authorities I find that it became so. In *Hipwell* v. *Knight*, 1 Y. & C. Ex. 401, at 416 *et seq.*, Alderson, B., said: "If the thing sold be of greater or less value according to the effluxion of time it is manifest that time is of the essence of the contract, and a stipulation as to time must then be liberally complied with both

in equity as well as in law." In Fry on Specific Performance (4th ed.), at p. 468: "The same principle applies with especial force to contracts relating to mines. The nature of all mining transactions is such as to render time of the essence, 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." In *Roberts* v. *Berry* (1853), 3 DeG. M. & G. 284, Turner, L.J., at 291, said: "Time may be made of the essence of the contract by express stipulations between the parties, by the nature of the property, or by surrounding circumstances showing the intention of the parties that the contract was to be completed within a limited time."

Further reference to *Cahill* v. *Ryan* (Price), M.C. C., 329; Halsbury's Laws of England, vol. 27, pp. 67 and 68; *Spragge* v. *Booth*, 11 O. W. R. 151.

While time was of the essence of the contract there was an undoubted waiver by Bock by his acceptance of the first payment in extended form. By his admission that between Christmas, 1913, and the 26th of May, 1914, he expected payments to be made "on the old contract." He undoubtedly treated the contract of the 23rd of September as being then a subsisting one and I so find. When Lupton approached him on the 26th of May he took the ground that the contract was at an end in consequence of failure to make the payments as agreed, and Lupton apparently was of the same opinion, but as a matter of law there had been a waiver and no notice of cancellation was subsequently given, so that even though both parties treated the contract as at an end Sager or the company would have been in a position to have tendered the balance of the purchase money, and demanded a transfer. "The question whether time was originally

of the essence and whether it has since been waived is one of evidence and can therefore be disposed of only at the trial." Fry (5th ed.), paragraph 1128.

Time having been of the essence of the original contract and subsequently waived by the conduct of Bock, then has it been revived by what was said and written on the 26th of May? "The mere extension of time where time is of the essence of the contract is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essentiality of time." Fry (5th ed.), par. 1126. In *Barclay & Messenger* (1874), 43 L. J. Ch. 449: "No doubt the giving of time is only a waiver to the extent of substituting the intended time for the original time and not a destruction of the essential character of the contract." Also in *Winnifrith & Finkleman*, 6 O. W. N. 432, at 435 and 436, Middleton, J., held: "It was known that time was of the essence of this contract and when the plaintiff found himself unable to complete the contract on the 15th, as he had undertaken, the new contract having been made to close on the 17th, was a contract that, I think, embodied in it by implication all the appropriate terms of the original agreement between the plaintiff and Vanderwater, and thus time became and was of the essence of the contract." In this case I accept the evidence of Bock as to what took place between him and Lupton on the 26th of May as being most consistent with what would likely happen under the circumstances, having in view the subject matter of the conversation. While Bock was exceedingly lenient with the purchasers up to the 26th of May, he had good reason then to demand promptness as the property had then taken on an extra value and purchasers then might readily be found. I do not think Mr. Lupton's statement can be accepted when he says that while Bock did discuss promptness of payment and left upon his mind the fact that the payments must be made punctually, that he told him

they might be tardy in remitting as he (Lupton) might have occasion to be away from Buffalo and that they were carrying heavy burdens. It is unreasonable to believe that Bock, knowing the property had increased in value and realizing that it had been difficult to get even an initial payment of $50 from them, would, under such circumstances and at that particular time, have given a further extension upon such an indefinite promise of payment. In *Webb* v. *Hughes*, L. R. 10 Ex. 281, at 286, Sir R. Malin, V.-C., said: "A principal may make time the essence of the contract by a notice at any time during the progress of the negotiations." I feel that what was said by Bock to Lupton, who was acting upon instructions from the president of the company, was a putting on notice of Sager and the company that the extended payments must be made promptly, otherwise no latitude would be given and the agreement cancelled. It is admitted by Lupton that, "he naturally gave me to understand he wanted the money when it was due." I therefore find upon the evidence that time was again made of the essence of the original contract. *Webb & Hughes, supra,* and *Dahl & St. Pierre,* 11 D. L. R. 775, I do not think are in point as no negotiations were carried on after the 26th of May, which was a new starting point and the cases are not at all parallel.

What took place after the 26th of May is material. Mr. Lupton having left Bock with the impression that the understanding of the 26th of May was to be promptly and diligently carried out, wrote Bock on the 18th of June, three days after the payment of the 15th was due, and enclosed a cheque for $30, not $50, and postdated it the 22nd of June, and in the letter stated: "Will send you the balance of the $50 between now and the 1st." It is explained that the 18th was the date adopted in which to make the payment, as they felt they were entitled to three days of grace upon the so-called note. I think this is a mere subterfuge, as Lupton impressed me as being a business

man and thoroughly appreciated the fact that he had not given a promissory note to Bock when he wrote the memo. of the 26th of May, and if sued by Bock would probably have been found to say that he had not assumed any obligations under the said instrument. Time was again taken advantage of by enclosing a cheque dated four days after the date of the letter, which would make it seven days past the time when the payment of the 15th of June was due. The officers of the company again appeared to be sparring for time. A small payment of $50 depleted their exchequer and the best they can say to Bock is, "we enclose you $30 and will send you the balance between now and the 1st." I do not think they had any right to set up new dates of payment in view of the explicit understanding of the 26th of May. Instead of stating they expected to send the balance between the date of the letter and the 1st of the next month they should have asked the indulgence of Bock and requested him to extend the time until another definite period. It was not given in evidence what date Bock received Lupton's letter of the 18th of June, but I understand it was opened by him while he was on the claim, consequently it must have taken a few days to reach him, so I do not find he rested upon his oars considering whether he would accept the money or not when he caused his solicitor to write the company on the 29th of June cancelling the contract, being 11 days after the date of Mr. Lupton's letter, nor do I think it was unreasonable that he should have first consulted his solicitor as to what his proper legal position was. I am not satisfied that the claimants at all times intended to carry out the contract. The first payment was made haphazardly, and it was six months or more before a second payment was made upon the contract, whereas all payments should have been made under the contract within ninety days from the 23rd of September. When the contract was executed the company was without funds and its only source of income

was the sale of stock, which, apparently, was not saleable as on the 26th of May, and subsequent thereto they were still unable to make the payment of $50. I believe they were spurred to action by the news that valuable discoveries had been made in the vicinity of this claim, and while Bock, probably after the 26th of May, might naturally have preferred that they would not meet their payments when due, that, from his standpoint, was only reasonable, but it was the company's duty in view of what took place on the 26th of May to have made the payments promptly. From the letter of June 1st, written by the company to Bock enclosing the stock, it is quite apparent that they realized the payments were to be made promptly under the extension of the 26th of May, as they state therein: "I hope we will be able to send promptly as per agreement." There was no evidence that Sager or Lupton or the company possessed property upon which they could realize in order to meet their obligations under this contract. There was no stability about the company or its officers and it is doubtful even if a contractual relationship was created Bock could have recovered what was owing under the agreement.

"Specific performance in particular is a remedy in the application of which much regard is shown to the conduct of the party seeking relief:" Strong, J., in *Robinson* v. *Hughes,* 21 S. C. R. at 397, and again at p. 404: "To grant specific performance in such a case would, it seems to me, be to set at defiance the wholesome rule before adverted to which requires promptitude and diligence on the part of one who seeks at the hands of the Court this extraordinary relief." In *Tiley & Thomas* (1867), L. R. 3 Ch. at 67, Cairns, L.J., said: "A Court of Equity will indeed relieve against and enforce specific performance notwithstanding a failure to keep the dates assigned by the contract either for completion or for steps towards completion if it can do justice between the parties, and if (as

Lord Justice Turner said in *Roberts* v. *Berry*), there is nothing in the express stipulations between the parties, the nature of the property or the surrounding circumstances which would make it inequitable to interfere or modify the legal right. This is what is meant when it is said that in equity time is not of the essence of the contract." And again, in (*Barclay* v. *Messenger*), 1874, 22 W. R. 522, the Master of the Rolls, at p. 524, made this observation: "Looking to the nature of the subject matter and the conduct of the parties quite independently of the question of whether this was a case in which time was of the essence of the contract, the plaintiffs have not used that diligence which it was incumbent upon them to use to obtain the aid of a Court of Equity." Decisions upon the question of specific performance are difficult to reconcile, but in nearly all of the cases in which this question is involved the conduct of the parties and all the circumstances are looked at and the intention of the parties given effect to. I think the case of *Morton and Symonds* v. *Nichols*, 12 B. C. L. R., is in point, and should be followed notwithstanding several important and recent decisions which I will hereafter refer to. In the British Columbia case a mining claim was the subject of the dispute, and Hunter, C.J., held that time was essentially of the essence of the agreement, although not expressly made so by the contract, in view of the fact that it concerned a mining claim, which is of speculative value, and that the vendor was entitled to exact from the purchaser promptness, and under the circumstances refused specific performance. At p. 12 he said: "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."

I do not think the ownership in this case was transferred in equity by the contract and there is no provision for the sale of the property in case of default. It is not on all fours with the usual agreement for purchase whereby time is made of the essence, a forfeiture clause imposed with right to resell upon default, and there was no taking of possession as is usual in the case of agreements for the sale of the land. I think mining cases should be taken out of the sphere of modern cases where specific performance has been allowed, where default has been made in one or more instalments of the purchase money upon the ground that it was a penalty only. The market for mining claims is variable; the commercial value is continually on a sliding scale; there is no stability of title until a certificate of record or a patent has been procured and the performance of assessment work by the claimants in this case was not in the ordinary sense a taking of possession; it was an act of necessity on the part of the purchasers in order to keep the mining claim in good standing within the contemplation of the Mining Act, which had to be done either by Bock or Sager and his company, and it was essentially the duty of Sager, under his contract, to see that the work was so performed.

I do not think this case is governed by *Kilmer* v. *British Columbia Orchards' Lands, Limited* (1913), A. C. 319, or *Re Dagenham (Thames) Dock Co.* (1873), L. R. 8 Ch. 1022. The circumstances were entirely different. In the *Dagenham case* it was felt that it would be a strong thing to hold that a company authorized to buy land for purposes beneficial to the public could enter into a bargain with a landowner that if ever so small a portion of the purchase money remains unpaid he shall be entitled to take back the land. Such a contract would be a grievous wrong after part of the purchase money had been paid. The property was not of a speculative nature, and the purchaser had taken possession and spent considerable

sums of money upon the lands. It also acquired an estate in the lands and the provision for default was in the nature of a condition subsequent. So also in the British Columbia case possession was taken, obligations were incurred, the right to subdivide the property was given and the default was only of a few days. It was not felt by the trial Judge that the plaintiffs had given the purchaser sufficient notice that they intended to hold him strictly to the terms of the agreement, and that to enforce its strict terms would be oppressive, harsh and vindictive. The purchaser had also acquired an estate in the lands. I feel I can distinguish the case from *Boyd & Richards,* 29 O. L. R. 119. Middleton, J., followed *Kilmer & British Columbia Orchards' Lands, Limited,* but found there never was an intention to abandon, that the moment notice of cancellation was sent the money and interest was tendered; no notice during the year of default was sent to the purchasers and that everything pointed to the view that the vendor wished for default. In this case I am unable to find there was not an intention to abandon nor that the vendor even wished for default. In the *Boyd & Richards case* it was also found that the overdue payment was not made through an oversight or error on the part of the solicitors, but that the purchaser was in a position to complete the contract, and desired to do so, which is entirely different from the facts here. If time again became of the essence of the agreement in consequence of what was said and done on the 26th of May, I think the notice of cancellation given by Mr. McDougall was quite sufficient. The vendor, after default, exercised his election to rescind and as promptly as circumstances permitted him. There was not only a default as to time, but in amount, and the situation was aggravated by the company fixing a further time for payment without asking the indulgence of Bock. Even though Bock had unduly indulged them in regard to the initial payment they were

well aware the extended payments must be met with promptness in order to avoid cancellation. There was no mistaking the frame of mind he was in on the 26th of May, and to act as the company did in remitting the $30 shows clearly they had again thrown themselves on the mercy of Bock, whose patience had already been sorely tried.

In *Labelle & O'Connor*, 15 O. L. R. at 547 and 548, Anglin, J., tersely says: "But I find no authority for the proposition that where default has been made by a purchaser under a contract in which time is of the essence, the vendor, without demand of any kind, is bound, at the peril of losing his right, to give immediate notice to the defaulter that he elects to rescind or even to give such notice before tender of performance is made by the defaulter. He must not, of course, use his position unfairly; he must not play fast and loose; but what is there to impose upon him the obligation of seeking out the defaulter and giving him some notice for which the contract does not stipulate?" In *Clough* v. *London & North Western Ry. Co.* (1871), L. R. 7 Ex. 26, Mellor, J., on delivering the judgment of the Court, said: "Neither can we see the principle or discover the authority for saying that it is necessary that there should be a declaration of intention to rescind prior to the plea." The equity of the claimants' case seems to be met by the following extract from the judgment in *Alley* v. *Deschamps* (1806), 13 Ves. 225, 228: "It would be very dangerous to permit parties to lie by with a view to see whether the contract will prove a gaining or a losing bargain, and according to the want either to abandon it or, considering the lapse of time as nothing, to claim specific performance which is always the subject of discretion."

As specific performance is the subject of discretion, upon what equitable ground can the claimants put their case? Up to the 26th of May it was pay as

you can, but upon that date and thereafter it was an understood term of the agreement that payments must be met when due. Latitude had ceased because conditions required an ability to pay on the part of the purchasers and diligence in payment. "The consequence of disappointment on the receipt of purchase money at the appointed time may in many cases be so serious and ruinous that a purchaser not ready with the price according to his contract, ought, I think, to show a very special case for the interference of the Court against the vendor." *Gee* v. *Pearse* (1848), 2 De G. & Sm. 325, 346; *Aberamann Ironworks* v. *Wickens* (1868), L. R. 5 Eq. 485, 507. These were cases where time was not made of the essence, but when it has become so, then the duty becomes so much more onerous.

The title to a mining claim in part depends upon the sufficiency of the assessment work. Who should perform the necessary work was not mentioned in the agreement. If Bock relied upon Sager to do it, and he had that right, and the work was not performed and the latter ultimately withdrew from the contract the claim would be lost to Bock. This was not the case here, but it might have been, and is one of the incidents which show how essential punctuality is when dealing with a mining claim. A prospector who undergoes the necessary hardships incident to the life, with its many disappointments, should not be embarrassed at a time he might enjoy the fruits of his labour. To have waited the convenience of this company might have meant in the end keen disappointment to Bock, and I think what was said by Lord McNaughten in *Soper* v. *Arnold*, 14 App. Cas. at 435 *et seq.*, is pertinent: "If there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not." The company knew they had only a probable chance of paying, but if Bock was willing to play the

part of the lenient debtor they would endeavour to complete the payments if the market remained good. If there had been a decline in value it is fair speculation that they would not have gone on with the purchase.

If *Kilmer & B. C. Orchards' Lands, Limited,* applies to and governs the facts in this mining case then its principles are far reaching, and, with deference, I feel do not make for equity. The Mining Act requires me to base my judgment upon the real merits and substantial justice of the case, and in upholding Bock's title I believe I have done so without seriously colliding with leading cases upon the controversial facts.

(THE COMMISSIONER.)

McCAGHERTY v. ROBERTS.

Staking—Application not Accompanied by License—In Interval Restaked—Priority Amongst Mining Claims.

Disputant's miner's license was not enclosed with application, which was returned to applicant by the Recorder. On the 6th of July, Recorder again received application with license: In the meantime same land staked and recorded discovery having been made on the 27th of June. Disputant staked on the 22nd of June.

Held, by the Commissioner, that the disputant having staked on the 22nd of June, he had until the 7th of July in which to record, and on that date his application being in proper form and before the Recorder and having priority, was entitled to record the claim.

That the subsequent staker must have seen the disputant's stakes, and his affidavit of discovery and staking was, if not dishonestly, at least carelessly, sworn to.

Dispute allowed with costs.

A. G. Slaght, for Disputant.

Respondent not represented.

18th of September, 1914.

THE COMMISSIONER.—This matter having been transferred to me by the Mining Recorder at Matheson for adjudication, an appointment was issued and the

case heard at Haileybury on the 15th inst., but in the absence of the respondent, who, though served with a copy of the appointment on the 22nd day of August, did not appear personally or by counsel.

On the 3rd of July last the Mining Recorder wrote the claimant W. E. McCagherty acknowledging receipt of his application, stating that he had not enclosed his license and the application was returned for its production. The letter also stated that in the meantime his application was not safeguarded. The claimant replied to that letter enclosing his license and returning the application, which reached the Recorder on the 6th. On the 7th the Recorder again wrote the claimant, returning his application, money order and license, stating that the land applied for had been recorded as No. 4831.

On the 27th of June the respondent Roberts made a discovery on the same lands and filed his application subsequent to the time when McCagherty's application had been received by the Recorder, but refused on the ground of the license not having been enclosed, and became recorded for it before McCagherty had sent his license to the Recorder pursuant to his request. As McCagherty's discovery was made on the 22nd of June he had until the 7th of July to record his claim, even though it was not more than 10 miles distant from the recording office, which in this case I believe it was, and therefore on that date the Mining Recorder was in receipt of his application, money order for recording, and license, consequently his application was in form for recording.

As Mr. Roberts did not appear at the trial I was unable to learn how he found it possible in view of the facts to depose to clause 4 of the affidavit of discovery and staking out which is attached to his application for the claim. He must have seen McCagherty's stakes, which were then standing, and in the absence of some statement from him, and taking the most

lenient view I can, I must find that he deposed to the facts not fully appreciating what he was swearing to. The Mining Recorder acted quite properly throughout as it was owing to McCagherty's ignorance of what was necessary to accompany his application that to some extent placed him in the position in which he found himself at the trial. I think Roberts should pay the costs of the dispute as a corrective to his undue haste in seeking to record a claim which he knew or should have known had been staked and the time for recording which had not then elapsed.

I order that the dispute of William E. McCagherty herein against mining claim L-4831, in the township of Maisonville, in the Larder Lake Mining Division, be and the same is hereby allowed, with costs, which I fix at forty dollars.

(THE COMMISSIONER.)

(THE APPELLATE DIVISION.)

7 O. W. N. 405.

JESSOP v. JESSOP.

Husband and Wife—Interest in Mining Claims—Agreement—Statute of Frauds—Consideration—Failure to Establish Agreement —Partnership.

Claim by husband to one-half of his wife's interests in certain mining claims by reason of parol agreement, letters written and consideration given.

Held by the Commissioner,—That with reference to claim known as the fraction; even if the husband's statement was accepted he could not succeed as the agreement, if any, was made subsequent to the time the claim was staked and the Statute of Frauds, sec. 71 (2) of the Mining Act operated against him. The evidence of the wife was accepted as to the "Jessop Claims," the contention of the husband being fanciful and contrary to the facts. That the letters relied upon to establish an interest in the "Violette claims" were not referable to a proven contract, and even if an agreement could be found that section 71 (1) stood in the way of the claimant.

On appeal to the Appellate Division, Held by the Court, that the husband failed in making out his case and that the decision of the Commissioner should be affirmed.

George Mitchell, for claimant.

A. G. Slaght, for respondent.

1st October, 1914.

THE COMMISSIONER.—The litigants were married on the 13th July, 1907, and lived together until the 29th June, 1914. At the time of the marriage Mrs. Jessop was a public stenographer in Haileybury and her husband a law clerk. It was agreed that they should each pursue their several vocations after marriage and thereby augment their joint income. Mrs. Jessop continued her position as public stenographer at Haileybury and afterwards in Swastika, and having familiarized herself with the different forms pertain-

ing to mining, derived a fair income therefrom. Her husband's income was not so certain as he appears to have earned little money during their marriage.

Harvey Jessop claims one-half of his wife's interests in Mining Claims L. 2490, referred to as the fraction, L. 2762, 2763 and 2764, known as the Jessop Claims, and 16536, 16537 and 16538, known as the Violette Claims. His contention is that he is entitled to such an interest in consequence of consideration given and by reason of an agreement.

An interest in the fraction or L. 2490 was acquired, according to Jessop's statement, through George Tough, who had been offered a half interest by B. Carr if he recorded the claims.

Tough is said to have offered Jessop and his wife a quarter of his half interest if they would record, which suggestion they accepted, and each of them contributed half of the recording fee of ten dollars. The claim is recorded in the name of H. Routley for the interested parties. Mrs. Jessop does not agree that her husband paid half of the recording fee, and disputes his claim that an interest was offered him by either Tough, Carr or herself. Her evidence is that Tough made a proposition to her and she accepted it without his knowledge or approval. Even if Mr. Jessop's statement is accepted he could not succeed as the agreement, if any, was made subsequent to the time the claim was staked and consequently the Statute of Frauds, sub-sec. 2 of sec. 71 of the Mining Act of Ontario, operates against him. On the contrary Jessop did not appear to know what interest his wife really had in the claim and wanted a formal acknowledgment from her so that an interest could be protected in case he succeeded in this action. Such indefinite knowledge of a transaction of which he was supposed to be a principal is inconsistent with his allegation of ownership, and I find on the facts against him.

It is admitted Mrs. Jessop took out and kept renewed a miner's license in the name of her husband, and used it for her own purpose. Upon this license A. Stillar staked Mining Claims 2762, 2763 and 2764, and for so doing received a third interest. Subsequently Jessop transferred a two-third interest to his wife and one-third to Stillar. His reason for so doing he said was on account of a quarrel he had with Stillar, and on his wife's suggestion he transferred the claims to her, but on the understanding she would not record them. According to Mrs. Jessop's evidence Stillar was to get a third interest for staking, and he having demanded it she asked her husband to make out a transfer to him, which he did. Why he would transfer the remaining two-thirds to his wife because he had quarrelled with Stillar is not apparent to me, especially as he contends his wife was not to record the transfer. I think the reason given by Jessop for the transfers fanciful, not well considered, and contrary to the actual facts. He contends that Frank Hohenauer told him these claims (which Hohenauer had previously staked) were to be abandoned by him, and he then asked Stillar to stake them for an interest. Stillar was not present at the trial.

The cost of recording the three claims was thirty dollars, which amount Jessop says he borrowed from H. M. Cropsey for the purpose. He remembered asking Cropsey for the money and the latter asking him if his wife was aware of the request, when he told Cropsey to see his wife, which the latter did and then handed Jessop the money. Upon cross-examination he was not sure if the money was given him direct by Cropsey or taken by the latter to his wife. He afterwards repaid Cropsey fifteen dollars, his wife paying the balance. Mrs. Jessop denies that she received from either Cropsey or her husband thirty dollars with which to pay the recording fees. Mr. Hohenauer emphatically denies telling Jessop that the claims were to be abandoned, but on the contrary said that

he went out to restake the claims but found that Stillar had been there ahead of him.

I accept Mrs. Jessop's evidence as to how she procured the staking of the Jessop claims and why a two-third interest was transferred to her by her husband. She controlled his license and on it had the claims staked by Stillar for a third interest. She learned through the Recording Office that the claims were open for staking and acted on the knowledge so gleaned. Hohenauer contradicts Jessop's main contention that he got any of the claims through him. That Jessop should transfer the respective interests to his wife and Stillar was, under the circumstances, to be expected.

On the 11th February, 1911, Mrs. Jessop engaged Frank Hohenauer to stake three claims on her license in her maiden name, Mary F. Violette, for which Hohenauer was to get one-quarter interest. In consequence of the agreement Mining Claims L. 16536, 16537 and 16538 were staked by him for her. I do not think Jessop was aware of the existence of these claims prior to their staking, but if he was his knowledge came through his wife. Jessop's explanation is that on his way home from Quebec his wife had telegraphed him to stop over and go to Swastika to stake these claims, but that he did not receive the telegram, and in any event could not have gone as he was suffering from a frozen foot. Hohenauer returned with Jessop, but did not see him enquire for telegrams on their way home, nor does it appear that any telegrams were sent him.

It was in consequence of his inability to act for his wife to stake the claims that Hohenauer was engaged to do so is his further statement. Even if his wife had asked him to stake and he was so prevented, I cannot see how that fact helps him establish an interest. I am of the opinion that the claims were staked on the initiative of Mrs. Jessop without her husband's knowledge and at her own expense.

I find that Jessop did some assessment work on the claims with his wife's approval without salary, but provisioned and outfitted by her. It appears she undertook to perform all the assessment work of the interested parties for a price and her husband worked with the men so employed. She profited only by his time. At this time he was not otherwise engaged, and was not contributing to the household expenses.

The claimant put in at the trial a number of letters written by his wife to himself with which he seeks to fortify his legal position. In only one letter is there a reference to a claim in question. Mrs. Jessop, in part, said, " . . . is in to-night. Will be in Alex's room. He might talk fraction after he comes out." That is an item of news only and all of the letters are such as would be written by a wife to her husband informing him of her daily routine. They are written in a light and encouraging vein, and though such expressions as " It is the struggle of our lives," and " Don't leave a stone unturned," " We'll stick it out and forge ahead, it is the only way we can pull to shore now," are to be found in them, they are significant of nothing more than encouragement and a desire to write in a cheerful strain.

If a stronger foundation had been laid it might be that the letters could have been said in a slight degree to be referable to a contract. It appears to me that the chief obstacle in the way of the claimant is that he has failed to show a contract. What took place prior to the marriage and subsequent thereto did not amount to an agreement whereby all mining claims obtained by either of them became the joint property of both. Even if upon the evidence an agreement could be found then I am of the opinion that sec. 71, sub-sec. 1, stands in the way of the claimant's success, as the letters cannot be said to satisfy the Statute of Frauds, and neither was there sufficient corroboration of the alleged agreement.

To get rid of the Statute of Frauds the claimant contends what was said and done between the parties amounted to a partnership. In *Bradley* v. *Consolidated Bank,* 38 Ch. D. 238, the learned Judge said, "A partnership depends on agreement." An agreement to pursue their several vocations after marriage was entered into, but mainly for the purpose of providing a home and maintaining it. Jessop had no certain position nor was his income a definite one. He admits his wife was their mainstay and frequently paid his debts and made his way easier. Work done upon the disputed claims was not a consideration for an implied contract—he at least owed that much to his wife for obligations assumed by her to relieve him. I find their relationship was not one of partnership.

The attitude of Mrs. Jessop in this suit is suggested by the letter to her husband of the 7th June, 1914. In it she says, "I am willing that you should have something out of the proceeds of sale of the claims if anything like that ever occurs." By that statement, I believe, she will feel herself bound. I think Jessop quite honest when seeking an interest in the claims—morally he is entitled, but legally I think not. The future may show it would have been wiser for Mrs. Jessop to have kept by the side of her husband rather than risk the dangerous position of a wife separated from her husband. There are many pitfalls for such a position. I am forced to find against Jessop on the facts and the law, but I strongly feel he should receive a part of the spoils if at any time a division is made possible.

It is not a case for costs.

I order the notice of claim filed by T. Harvey Jessop herein be dismissed without costs.

From this decision the claimant appealed to the Appellate Division.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

W. R. Smyth, K.C., for the appellant.

A. G. Slaght, for the respondent.

7th December, 1914.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The parties are husband and wife, and the claim of the appellant is, that he is entitled to certain interests in six mining claims recorded in the name of his wife, and one recorded in the name of H. Routley, who holds one-quarter interest for the wife.

We are of the opinion that the husband failed in making out his case, and that the decision of the Commissioner should be affirmed.

The right of the appellant to a share in these interests or to have it determined that they belong to a partnership between his wife and him was denied by the respondent, who also denied that any such partnership existed.

Counsel for the appellant contended that certain expressions in letters which were written by him to his wife shew that they were jointly interested in the claims. Whatever might have been the force of this contention if the letters had been written by one stranger to another, written as they were by a wife to her husband, the expressions relied upon mean no more than that her husband was interested in the ventures just as any husband is interested in the ventures of his wife, and are not to be taken to indicate that the respondent was treating her husband as having proprietary interest in the claims.

It was also contended that, in giving her evidence before the Commissioner, the respondent admitted the right of her husband to a share in the claims; but that is not the effect of her evidence. She did not

admit any right of her husband to a share, but conceded that he had a moral right to a share, and said that she was willing to give him an interest, if the interest were so settled that he could not waste it, and if provision were made that she should have the control of the disposition to be made of the claims—a prudent safeguard, I think, in view of the habits of the appellant. That offer was not accepted, and is of course not binding on the respondent.

Appeal dismissed with costs.

(THE COMMISSIONER.)

TRICKEY v. HILLIS.

Application for Relief from Forfeiture—Facts Relied upon—Claim Restaked.

A prospector who makes discoveries in new fields, or in well-recognized mining locations, exploits its mineral wealth, and *bona fide* tries to comply with the requirements of the Act, should have some relief against one who waits for an opportunity to profit by the other's loss of the property through the strict conditions of the Mining Act.

Application to the Commissioner for relief from forfeiture which occurred through default in working conditions. The land had been staked after forfeiture occurred, and the application was opposed by the restaker.

H. L. Slaght, for Claimant.

Respondent not represented.

3rd November, 1914.

THE COMMISSIONER.—On the 27th March, 1912, the above mining claim was staked by Howard Duggan,

and the first ninety days' assessment work duly performed. On the 23rd February, 1914, Duggan transferred all his interest to John A. Montague, who immediately transferred to J. J. Trickey, for whom he was acting, who paid Duggan $1,200 cash as consideration for the transfer. On the 4th July forfeiture occurred and the claim was restaked by Duggan on the 3rd, believing that it was open on that date, and by L. O. Hedlund on the 4th, on behalf of Moses Hillis. No assessment work has been done by Hillis since the application was filed, and this enquiry is not further embarrassed by that fact.

L. O. Hedlund, who appeared for Moses Hillis at the trial, contends that under the circumstances in the case relief from forfeiture should not be granted.

I find there was a willingness on the part of Trickey to perform his assessment work, and his request of the 3rd June, 1914, for an extension of time until October was explained by his statement that he wished to do his work thoroughly and at a time when the flies were not troublesome. He waited until the 16th June for a reply to his request and in the meantime he asked Mr. Montague to see the Recorder and then advise him. Not having heard from either the Recorder or Montague within what he thought a reasonable time, he concluded that his request had been granted and left for the West, where he had intimated to Montague he had intended going.

On the return to his office on the 18th July he found a letter from the Recorder refusing an extension. At that time a forfeiture had occurred and the land had been restaked by both Duggan and Hedlund.

On the 21st August, 1914, Trickey wrote the Deputy Minister of Mines stating that he understood from Montague that the claim was in good standing until the 3rd September, 1914, and that Montagu had been so informed by the Department, and "in view

of this condition I have commenced doing the assessment work (60 days) on the claim and should have it completed by the date Mr. Montague advises me you have set." From a perusal of the report of work I find that 57 days' work was performed on the claim between the 24th August and the 3rd September, the other three days having been performed between May 13th and June 20th, so that Mr. Trickey did what he indicated he would do in his letter of the 21st August. A report of work was tendered to the Mining Recorder on the 11th September and refused by him on the ground the claim had been staked by Duggan and Hedlund, and he believed that a forfeiture had occurred.

On the 27th September Trickey again wrote to the Deputy Minister complaining of the act of the Recorder in refusing to accept his report of work of the 11th September, and recited the Department's intimation that the claim was in good standing until the 3rd September, to which the Department replied on the 22nd September, stating that they were in communication with the Mining Recorder. On the 30th September Trickey wrote the Department asking for relief from forfeiture.

There is no doubt that Montague was justified in reaching the conclusion after a perusal of the several letters of the Department dated 14th and 30th July, 1914, that the claim would be in good standing until the 3rd September, or a date subsequent thereto, and it was in consequence of such information that Trickey caused the assessment work to be done on the property at a time according to law the claim had been forfeited, but stated by the Department to be in good standing, and such work was concluded within the time intimated in the letters above referred to.

The Departmental letters, I must find, had the effect of causing Trickey to perform his assessment work in a belief that the claim was in good standing.

Upon these facts, Mr. Hedlund, who represented Hillis, strongly contends that relief should not be granted and that a strict compliance with the Mining Act should in all cases be enforced against the recorded holder. As the Mining Act is now constituted, having in mind section 85, I think it is a proper case for relief, and what Mr. Hedlund said was more directed towards an attack upon sections 85 and 86 of the Mining Act than the relative merits of the parties before me on this application. Duggan was the original discoverer of this property and his reward was $1,200, received from Trickey.

A prospector who makes discoveries in new fields or in well-recognized mining locations exploits the mineral wealth of the Province, and he or his assignees who are *bona fide* trying to comply with the requirements of the Act should have some protection as against one who waits for an opportunity to profit by the other's loss of the property through the strict conditions of the Mining Act. Hedlund was undoubtedly entitled to stake the claim, as he did, but at the same time as between him and the previously recorded holder I must find the merits are with the latter, and then it is only a question of fixing compensation, if any.

Hedlund has lost nothing but time and uncertain prospective wealth by claim G. G. 3875 being reinstated. His time is his own, and if he wishes to stake it against the possible chance of a recorded holder applying under section 85 for relief, then he cannot now be heard to complain when he loses, nor can I in fixing compensation say that Mining Claim G. G. 3875, which is at present only a prospect, might have produced wealth, and its value should be the extent of Hedlund's compensation.

Under all the circumstances I think Moses Hillis or L. O. Hedlund, whoever is really the interested party, would be well repaid for his outlay in staking this claim by receiving the sum of $75.00.

I order that Mining Claim G. G. 3875 be relieved from forfeiture in consequence of failure to perform the second year's assessment work thereon within the time permitted by the Mining Act of Ontario.

And I further order that such relief be conditional upon filing a proper report of work, payment of the special fee therefor and compensation as herein fixed.

I further order that the restaking of the said claim as G. G. 4114, now recorded in the name of Moses Hillis, be cancelled and that Mining Claim G. G. 3875 be reinstated.

And I direct that the claimant pay Moses Hillis, the adversely interested party, the sum of $75.00 as compensation.

NOTE.—See amendment to sec. 85 in 1918, extending the jurisdiction of the Commissioner.

(THE COMMISSIONER.)

MONTAGUE v. HILLIS.

APPEAL FROM DECISION OF MINING RECORDER.

Default—Non-performance of Working Conditions—Permission to Work—Delay in Application for—Time Allowed between Application for and Granting of such Permission—Winter Extension Operates in Respect of First Instalment of Work only—Report of Work—Acceptance by Recorder—Irregularity.

This is an appeal by John A. Montague from the decision of the Mining Recorder, placing on record the application of Moses Hillis for the said claim.

The property in question was originally staked and recorded in the name of J. J. Trickey. The claim became in default for non-performance of working conditions and was restaked by Howard Duggan on the 3rd day of July, 1914, and application filed for same on that day. On the 4th of July the same claim was staked by L. O. Hedlund on behalf of Moses Hillis and his application filed on the 6th of July. After consideration the Mining Recorder decided that the property was not open for staking until midnight of the 3rd of July, and recorded the application of Hedlund on behalf of Hillis. From this decision the appeal is taken.

The day that Duggan staked Montague visited the property with the same object in view and there arranged with Duggan to allow his staking to stand in consideration of a half interest, of which interest he (Montague) subsequently agreed to give Trickey a quarter.

Six days elapsed between application to Department for permission to perform work and the granting of same. When did default take place in respect of second year's assessment work?

Held, by the Commissioner, that if an application is made at the time the claim is recorded then the date of granting by the Department of a request to work is equivalent to the date of recording and the three months starts to run from that date, which naturally has the effect of extending subsequent work to that period.

Permission to work was not applied for until the 3rd and granted on the 9th of September, the delay being caused by failure of the solicitor acting on behalf of the staker to make the necessary request, and his first work was completed in ignorance of this fact. Under the circumstances the work should not have been recorded, but as permission was granted some months after recording, the Recorder having accepted the report of work, the irregularity not being raised by either party to the appeal, I do not feel I should now on that ground cancel the claim.

Appeal dismissed.

H. L. Slaght, for appellant.

Respondent not represented by counsel.

3rd November, 1914.

THE COMMISSIONER. — Mining Claim G. G. 3875, situate in the Gowganda Mining Division and recorded in the name of J. J. Trickey, was placed on record on the 27th March, 1912. The first fifteen months' assessment work was duly performed, but the second year's work was not done within the time allowed by the Mining Act, and a forfeiture occurred.

An application is now before me, on behalf of J. J. Trickey, under sec. 85 of the Mining Act, for relief from forfeiture in respect to Mining Claim G. G. 3875.

Forfeiture having occurred, and the land being open for staking subject to the right of redemption within the time limited by the Act, it was restaked by Howard Duggan on the 3rd July, 1914, and his application filed the same day. On the 4th of July the claim was staked by L. O. Hedlund on behalf of Moses Hillis, and his application filed on the 6th of July. After consideration the Mining Recorder at Gowganda decided that the property was not open for staking until midnight of the 3rd July, and recorded the application of Hedlund on behalf of Moses Hillis. From this decision the appeal is taken.

The day that Duggan staked John A. Montague appeared on the scene with the same object in view, but then arranged with Duggan to allow his staking to stand in consideration of a half interest, of which interest he subsequently agreed to give Trickey a quarter. Montague was a person affected by the decision of the Recorder in constituting Hillis the recorded holder of the claim, and therefore I think properly before me on this appeal.

It is admitted by the parties to the appeal that six days elapsed between the transmission of the application to do work on the claim and its permission by the Department, and pursuant to sub-sec. (*b*) of sec. 79 the holder would have three months and six days

for the performance of the first thirty days' work. The appellant, however, contends that the first, second and third year's work must date from a period three months after the recording of the claim, and not three months and six days from that date, as was permissible in respect of the first thirty days' work.

The forfeiture of Mining Claim G. G. 3875 occurred in consequence of the second year's work not having been performed in time, but the question arises upon what date did forfeiture actually take place, or, in other words, when was the property open for staking?

If the appellant's contention that the six days above referred to are not to be added to the time within which work is to be performed subsequent to the thirty days, then the application of Duggan should have been recorded, but if not then I think it beyond question that the property was not open for staking until midnight of July 3rd, and the Hedlund application on behalf of Hillis was properly placed on record as Mining Claim G. G. 4114.

By sec. 78, thirty days' work must be performed within three months immediately following the recording, subject to the exceptions in secs. 79, 80, 85, and 86. Subsequent work, according to sec. 78, must be performed each year for a period of three years following the expiration of such three months, so that a licensee would have a full three years and three months in which to perform the full complement of assessment work.

Conditions which might arise to qualify the time allowed by the Act for the performance of assessment work are provided for by sec. 79.

For expediency and precaution the Bureau of Mines requires a licensee forthwith after recording to obtain permission before performing assessment work on a mining claim situate in a forest reserve. If the Department withholds its consent for a time then it is obvious that the period between the appli-

cation and the permission given should not operate against or cut down the time allowed for the full performance of assessment work, and for this reason, I take it, sub-sec. (*b*) of sec. 79 was introduced into the Mining Act.

If the first instalment of work matured between the 16th November and the 15th April, then by sub-sec. (*e*) of sec. 79, the period of time between these dates is in the nature of a close season and does not run against the time allowed for the performance of the first instalment of work. It is expressly stated that "this shall not have the effect of extending the time for the performance of subsequent instalments of work," but clause (*b*) is silent as to the effect upon subsequent work.

The first work is to be performed within three months following the recording, subject to the extension given by clause (*b*) of sec. 79. That being the case and the absence of explicit language in the clause as in sub-sec. (*e*), (that the extension shall not affect subsequent work), I am of the opinion that if the application is made at the time the claim is recorded then the date of granting by the Department of a request to work is equivalent to the date of recording, and the three months starts to run from that date, which naturally has the effect of extending subsequent work that period.

To give effect to the contention of the appellant would be, in some cases, to restrict the time allowed by the Act for the performance of assessment work, viz., three years and three months, and might work a forfeiture in throwing the work beyond the time allowed for application for a patent, not through any fault of the staker, but owing to delay by the Bureau of Mines in giving consent for the performance of the work.

Permission to do work was not applied for until the 3rd, and granted on the 9th of September. This delay was caused by the failure of the solicitor who

had been instructed to apply on behalf of the staker, and his first work was completed in ignorance of this fact. Under the circumstances the work should not have been recorded, but as the Department granted permission to work some months after the recording, and the Recorder having accepted the report of work, and this irregularity not being raised by either party to the appeal, I do not feel that I should now, on that ground, cancel the claim, and especially so in view of the Department's letters of the 14th and 30th July, 1914.

For the above reasons I would dismiss the appeal of John A. Montague against the decision of the Mining Recorder in placing on record the application of L. O. Hedlund on behalf of Moses Hillis for mining claim G. G. 4114, situate in the Gowganda Mining Division, and I so order.

(THE COMMISSIONER.)

McDONOUGH v. BOYD.

Staking—Miner's License not Renewed when Lands Staked—Special Renewal not Effective to Cure Invalidity—Discovery—Agreement for Purchase of Mining Rights from Locatee—Discovery made 2nd July—Land Staked 16th of September—Delay—No Adverse Interests.

McD. purchased mining rights from locatee understanding such passed with patent to locatee. When B. staked claim on land his license had not been renewed, subsequently he took out a special renewal license. McD. made a discovery on 2nd of July, but did not stake, believing he was secure under his agreement with locatee. After B. had staked, McD. staked and adopted his discovery of the 2nd of July. Both stakings were reversed by the Commissioner.

Held, following *Re Sanderson and Saville*, 26 O. L. R. 616, that B. acquired no rights by his discovery and staking of the 22nd July, as he was not a licensee at the time and a special renewal license had not cured the invalidity. McD. having made a discovery in July would have then staked had he not believed his agreement with the locatee passed the mining rights. He had priority of discovery and his staking of the 16th of September with the adoption of the discovery of the 2nd of July, there being no adverse interests, was not invalidated by the requirements of section 55.

A dispute filed by Joseph McDonough against mining claim L-4934, situate on the north-east quarter of the south half of lot 10, in the 2nd concession of the township of Maisonville, transferred by the Mining Recorder to the Commissioner for adjudication.

George Grover, for disputant.
George Ross, for Mrs. Lindberg.
J. A. McEvoy, for respondent.

20th November, 1914.

THE COMMISSIONER.—This dispute was referred to me by the Mining Recorder at Matheson for adjudication.

On the 10th June, 1914, Joseph McDonough, by written agreement, purchased from Marie Lindberg, locatee of the south half of lot 10, in the second concession of the township of Maisonville, the mining rights thereon. On or about the 16th of June, upon the instigation of McDonough, Mrs. Lindberg applied through the Crown lands agent at Matheson for a patent to the lands, as her necessary settlement duties had been performed, when upon such application reaching the Department of Lands at Toronto the agent was informed that a patent would issue to her for the surface rights only, as her application as a settler had been received on the understanding that the mines and minerals on the lands would be reserved. The township of Maisonville had not been opened for settlement under the Public Lands Act as it was considered unfit for settlement and cultivation. Upon the conversation had with the Crown lands agent at Matheson by Mrs. Lindberg and McDonough the latter appeared to be satisfied that the minerals would pass to her with the patent, and that his title to the mining rights on the lands would be secure under his agreement of the 10th of June. I find that McDonough misapprehended what the agent told him in reference to the passing of the mining rights, but was

quite honest in his belief that as a result of the conversation the minerals passed to Mrs. Lindberg.

McDonough having met Alexander Boyd, an acquaintance of his, informed him of certain discoveries made by Maloof and Labine in the township of Maisonville, and of the fact that he was prospecting the lands in question, and advised him to try and secure some land in the neighbourhood. Shortly afterwards Boyd came over to the property and made an offer for a certain interest in the mining rights procured by McDonough from Mrs. Lindberg. The matter was left in abeyance. Boyd went away, and subsequently returned on or about the 4th or 5th of July, when McDonough showed him a discovery he had made on the second of the same month. An agreement to purchase was not consummated between them, and on the 22nd of July Boyd staked a mining claim on the lands and erected his discovery post on the discovery disclosed by McDonough on the 2nd of July. On the 16th of September last McDonough staked the boundaries of his discovery of the 2nd of July, and filed an application therefor with the Recorder at Matheson. Against Boyd's appropriation of McDonough's discovery the dispute herein was lodged. It was also agreed by counsel that the question of McDonough's right to stake on the 16th of September, having made the discovery on the 2nd of July, should also be disposed of upon this trial as the point was covered by the evidence already in.

During the course of the trial it was brought out by the disputant that Alexander Boyd had not renewed his miner's license for the year 1914, and that he had, on the 18th of August following, obtained an Order-in-Council, under sec. 86 of the Mining Act, allowing a special renewal of his miner's license for that year.

There was no intimation in the dispute filed that this question would be raised upon the trial, but I allowed the disputant to amend if he felt it was neces-

sary (which I did not), provided the respondent was not taken by surprise, but the latter elected to go on as it was not a matter of evidence but one of argument.

It is uncontroverted that Alexander Boyd did not renew his miner's license No. 223-J on the 1st of April, 1914, and had caused an Order-in-Council to be issued on the 18th of August following allowing its renewal.

While the decision in *Re Sanderson and Saville*, 26 O. L. R. 616, turns upon the effect of sec. 85 of the Mining Act of 1908, the reasons given by Riddell, J., apply with equal force to a case arising under sec. 86, and is, I think, directly in point. I feel that I cannot usefully add anything to what was said either by the Mining Commissioner or by Mr. Justice Riddell. I find that Boyd acquired no rights by his discovery and staking of the 22nd of July, as he was not a licensee at that time.

For the above reasons it is not necessary for me to pass upon the question of the validity of Boyd's discovery, but I find as a fact that Boyd adopted as his discovery the vein matter which had been disclosed to the eye by the efforts of McDonough and which McDonough adopted as his discovery and staked on the 16th of September.

Boyd's staking of the 22nd of July having been disallowed, then the question arises was McDonough within the Mining Act when he staked on the 16th of September a mining claim the discovery upon which had been made on the 2nd of July. The fact is that he would have staked the lands embracing his discovery if at that time he had not felt that it was unnecessary to do so in consequence of the then current public opinion that the mining rights passed to a locatee of public lands by virtue of the legislation of 1913 and of his conversation with the Crown lands agent at Matheson, which I have already found he

misapprehended. Having learned that Mrs. Lindberg might not be entitled to the mining rights upon the lands on which he had made a discovery, and that Boyd had staked a claim thereon, McDonough, in order to protect himself, proceeded to acquire his discovery through the medium of the Mining Act. I do not think sec. 55 of the Act stands in his way. While expedition is required to be used by a staker after a discovery, it could not be argued under this section, and under the circumstances in this case that McDonough was not justified in staking the lands as he did sometime subsequent to his discovery. He was the first licensee to make a discovery of valuable mineral in place, as alleged, and was justified in subsequently appropriating it under the terms of the Mining Act, as he did. On the date of the trial there were no intervening rights except that of Boyd. I do not pass upon the validity of McDonough's discovery or that of his staking.

I would therefore order that mining claim L-4934, situate on the north-east quarter of the south half of lot 10, in the second concession of the township of Maisonville, be cancelled, and the application of Joseph McDonough now on file in the recording office at Matheson be placed on record.

(THE COMMISSIONER.)

BARTLEMAN ET AL. AND FRANKER.

Staking—Surveyed Territory—Claim Staked not as Applied for—Discovery Outside Land Applied for—Insufficient Discovery.

F. applied for the S.W. of the S.E. ¼ of the S. ½ of lot 12, con. 3, Tisdale township. The west boundary of the eastern claim as staked by J. was near the centre and west of the S.E. ¼ of the lot, and the Nos. 1 and 4 posts were placed approximately north of the north boundary of the ¼ lot applied for, the result being an overlapping and confliction of claims creating invalid stakings. The discoveries were within the lines staked, but that for the west claim was situate on the north-east claim, and it being surveyed territory the discovery should have been within the land applied for. *Baird* v. *Paquette* (Price), M. C. C. 419, *McLeod* v. *Armstrong* (Godson), M. C. C. 71.

Also held that sec. 59, s.-s. (6), did not apply, and that the discoveries made by F. were not of valuable mineral in place.

Dispute filed by Thomas M. Wilson et al. against mining claims P-6913 and P-6914 and referred by the Mining Recorder to the Commissioner for disposition.

J. E. Cook, for disputant.

H. L. Slaght, for respondents.

28th December, 1914.

THE COMMISSIONER.—Mining Claims 6380 and 6381-P, situate in the Porcupine Mining Division and being the south-west and south-east quarter of the south half of lot 12 in the 3rd concession of the township of Tisdale, were officially cancelled in consequence of non-performance of assessment work. The recorded holders, represented by Thomas M. Wilson, applied to me for relief against forfeiture, which application I have refused.

On the 8th of July, 1914, the same claims were recorded in the name of Z. Hart as Nos. 6913 and 6914-P, having been staked by A. Franker on Hart's license.

Thomas M. Wilson, on behalf of himself and his co-holders, J. P. Bartleman, J. P. McLaughlin and R.

Bannino, filed a dispute against the Franker applications and the matter was referred to me by the Mining Recorder for adjudication.

On the 16th of July, Bartleman, on behalf of himself and his co-holders, staked the same quarter section covered by 6380 and 6381-P, and had his applications therefor placed on file. This restaking by Bartleman was an attempt to again regain control of the claims in the event of their application for relief from forfeiture being refused, and the attack upon the Franker stakings succeeding.

Franker's applications are for the south-west and south-east quarters of the south half of lot 12 in the 3rd concession of the township of Tisdale. This lot is surveyed into quarter sections, and the applications were properly made under the Mining Act for the particular section alleged to have been staked.

The boundaries of the claims staked by Franker are inconsistent with the lands applied for. The west boundary of the eastern claim is situate near the centre and west of the south-east quarter of the lot, and the number one and four posts are placed approximately seven chains north of the north boundary of the said quarter, the result being that his west claim takes in the south-west quarter and part of the south-east quarter of the said lot, and the north boundary line is much beyond the true boundary of the south-west quarter.

His alleged discoveries are within the lines of the claims staked, but both situate on the north-east quarter, so that his discovery for the west claim is not upon the lands applied for.

As this is surveyed territory the discovery and discovery posts must be within the limits of the land applied for, and such not being the case the application for the south-west quarter is invalid on this ground alone.

Baird v. *Paquette* (Price), M.C.C., 419; *McLeod and Armstrong* (Godson), M.C.C., 71.

The lands were badly staked and no explanation offered. The owner is not entitled to the protection of sub-sec. 5 of sec. 59 of the Mining Act, even if it could be said to be applicable.

The discoveries made by Franker were not of valuable mineral within the meaning of the Act. The respondents Franker and Hart relied upon their affidavit of discovery and did not give any further evidence of the nature of the discoveries sworn to. Upon the evidence tendered by the disputant at the trial I felt that the discoveries were not "in place," but in order to fully determine the matter I instructed Mr. James G. McMillan, an Inspector of Mines, to make an examination and file a report, which he did. Both sides were notified and accompanied Mr. McMillan when the inspection was made, and subsequently I heard argument of counsel upon the report. His report supports the evidence of the disputant, and I now find that the discoveries made by Franker were not such as were contemplated by the Act, and are therefore invalid.

Collom v. *Manley*, 32 S. C. R. 371.

At the trial counsel for the respondents sought to attack the discoveries made by Bartleman on the 16th of July. He relied upon his cross-examination of Bartleman and Wilson, but counsel for the disputant objected to this procedure on the ground that a dispute had not been filed or served and the matter was not properly before me, and if it was then he was entitled to notice in order to prepare his case. In order to avoid multiplicity of disputes, I have, in a number of cases, allowed such procedure, but only when I was convinced that the party attacked was not taken by surprise. Mr. McMillan's report touches upon the Wilson or Bartleman discoveries, but unexplained it is too meagre for me to pass an opinion upon; neither could I find upon the evidence of Wilson or Bartleman brought out under cross-examination that the discoveries were insufficient. I will not pass upon the

discoveries made by Bartleman on the 16th of July. Upon the Bartleman applications being placed on record a dispute can be filed in the regular way if an interested party so desires.

Dispute allowed with costs and claims P-6913 and P-6914 cancelled.

(THE COMMISSIONER.)

WILSON ET AL. v. HART AND FRANKER.

Application for Relief from Forfeiture — "Not Incapacitated Through Illness"—Laches—Jurisdiction of Recorder—Section 80—Lands Restaked.

At the time the application was made, the holders of the claim were "not incapacitated through illness," and the informal application by telephone was properly refused by the Recorder. A misunderstanding or inexcusable laches is not a ground for relief upon application under section 80 of the Act.

The jurisdiction of the Recorder under section 80 is quite definite in its terms, and should be readily understood.

An application to the Commissioner for relief from forfeiture and reinstatement of the claim.

J. E. Cook, for Applicants.

H. L. Slaght, for Respondents.

28th December, 1914.

THE COMMISSIONER.—The interests of the holders of Mining Claims 6380 and 6381 P, situate in the Porcupine Mining Division, having ceased through forfeiture, an application is now before me for relief.

That the first year's work was not done or recorded within the time required by the Mining Act of Ontario is an acknowledged fact.

Thomas M. Wilson was an active member of a syndicate of four who controlled the claims, and to him was left the task of causing to be performed the necessary assessment work upon the said properties

About the middle of March, 1914, Mr. Wilson spoke to Samuel Johnston about work being done and found that there was too much water on the land to permit of it then being carried on.

On or about the 10th of April, Wilson became sick and was confined in the Porcupine Hospital from the 14th of April until the 3rd of May, 1914. Between the 20th of May and the 16th of June and subsequently he was about attending to his business.

Around the 20th of May he telephoned the Mining Recorder at Porcupine, relating his illness and asking for an extension of time, which the Recorder is said to have consented to. The verbal application was not noted by the Recorder in the books of his office nor did he grant an extension.

At the time the application was made the holders of the claims were "not incapacitated through illness," and the informal application by Mr. Wilson was very properly refused or not acted upon by the Recorder.

Mr. Wilson, no doubt, was quite honest in his belief that his application had been granted, but he assumed too much in relying upon the indulgence of the Recorder in carrying him and his co-holders for an undetermined period, and during a time they could very easily have had the necessary work performed.

A misunderstanding or inexcusable laches are not grounds for relief upon an application of this kind, and especially so when the claims have been restaked.

The jurisdiction of the Recorder under Section 80 of the Mining Act is quite definite in its terms and should be readily understood by every lay mind.

I order that the application herein be refused with costs to be taxed upon the County Court scale.

(THE COMMISSIONER.)

(THE APPELLATE DIVISION.)

8 O. W. N. 360.

FRANKER AND BARTLEMAN.

Dispute—Discovery—Meaning of "Valuable Mineral in Place"—Quarry Claim.

The dispute turned on the question of discovery and the right to stake a quarry claim over a subsisting mining claim. In view of the conflict of evidence the Commissioner "viewed" the discovery, and on his view and the evidence, held the discovery such as was required by the Mining Act.

That it is always difficult to get a decided affirmative opinion that the discovery is such as is required by the interpretation clause respecting "valuable mineral in place," sec. 2 (x) and that the honesty of the licensee making the discovery should be considered in conjunction with the bona fides of the discovery.

Franker staked the same lands as a gravel claim.

Held, by the Commissioner, that he had a right to do so, and that a mining claim and quarry claim can co-exist at the same time.

On appeal by Bartleman to the Appellate Division,—

Held, that where land is under staking or record as a mining claim there is no right to stake out or record a quarry claim upon any part of it unless the mining claim has lapsed or been abandoned. See 5 Geo. V., c. 13, s. 13, amending sec. 118 (2).

The respondent on the appeal contended that Bartleman had not made a discovery of mineral in place.

Held, that the conclusion of the Commissioner was correct, and that there was a discovery of "valuable mineral in place."

J. E. Cook, for Bartleman.

R. L. Slaght, for Franker.

4th February, 1915.

THE COMMISSIONER.—The respondent in this case is a member of a syndicate who were the recorded holders of the claim in question, 6381p, which was cancelled for failure to complete the necessary assessment work required by the Mining Act. An application was then made to me for relief from forfeiture, which I disallowed. While the claim was open, and

pending the application for relief, it was restaked by Franker as 6194p. In the meantime Bartleman restaked the claim and tendered an application therefor which was placed on file, and at the same time disputed Franker's staking and discovery. After hearing the Bartleman dispute against Franker, and having received the report of James G. McMillan, the Mining Inspector, in regard to Franker's discovery, I caused the claim to be cancelled and the Recorder then placed on record Bartleman's application, which is now known as No. 6992p.

Franker now retaliates by disputing Bartleman's discovery made upon claim 6992p, and as a flank movement staked the same lands as a quarry claim under sec. 118 of the Mining Act.

The dispute having been transferred to me by the Mining Recorder at Porcupine, is, with the quarry claim application of Franker, now before me for adjudication.

The sole attack by Franker is upon the ground that Bartleman did not make a discovery of valuable mineral in place, and the disputant rests his case upon the evidence of Franker, the report of James G. McMillan filed in the case of *Bartleman* v. *Hart and Franker* (Godson), M.C.C., 251, and cross-examination of the respondent's witnesses.

The discovery relied upon by Bartleman was made on the 16th of July, 1914, while, on account of pending proceedings, his application was not placed on record until the 15th of January, 1915. The Mining Inspector was only asked to investigate the discoveries made by Franker on the lands in question and a claim to the west thereof, but when making his report he referred to the Bartleman discovery, which comment is now in evidence as part of the disputant's case. If the respondent at the trial had objected to the report being used against him I would have upheld him, but as it is now upon the record I will pass upon it.

Bartleman and his associates having received short notice of the Inspector's visit could not in the meantime sufficiently de-water the pit or trench in which the discovery is situated in order to allow a proper inspection, and consequently the inspection was made under unfavourable circumstances and with only four or five feet of the vein exposed. Mr. McMillan refers to the Bartleman discovery as follows: "The discovery on the east lot consists of a splash of quartz exposed in a trench from four to six feet deep." What he means by a splash of quartz I am unable to say, and his unqualified report on this discovery, I think, is due to the water in the trench and the limited time in which he had to make the inspection, which was said to have occupied not more than ten minutes, as it was necessary for him to leave by train in order to keep an important engagement.

Franker was with McMillan and states all he saw was "Country rock and a little splash of quartz on the side of the rock"—"two splashes in the side of the rock and a stain a foot long," which he could not call a vein or valid discovery.

Both Bartleman and Wilson maintain that the discovery consists of a quartz vein, varying in width from 10 to 18 inches and exposed for 9 feet in an overburden of about 4 feet of soil and snow. Bartleman saw in the vein iron and copper pyrites, and from a sample taken visible gold. Wilson thought it a discovery of a valuable quartz vein with exposed mineralization. Mr. W. G. Dickson, a Mining Engineer of 28 years experience, of which 8½ years had been spent in the Cobalt and Porcupine Camps, inspected the discovery and described it as "a quartz vein in place from 18 to 14 inches wide and exposed for a length of 9 feet." Country rock, he stated, was interspersed with the quartz in irregular quantities throughout the length of the exposed vein, but that was characteristic of the veins in the Porcupine mining division. He saw in the vein iron sulphides, and indication of mineral,

and in his opinion the vein matter indicated gold or precious metal of some kind. He would stake it as a gold claim.

As the disputant would not admit more than "a splash of quartz on the side of some country rock," and Mr. Dickson's evidence supported in full the testimony of the respondent and Wilson, I felt that I should like to see the discovery myself in order to, if possible, reconcile the divergent statements. Acting under the power given me by sec. 139 of the Act I intimated upon the close of the case that I would next morning go over to the claim and requested the litigants to accompany me. Mr. Franker found it inconvenient to do so, but was satisfied that I should view the discovery in his absence. Messrs. Wilson and Bartleman were present. As I do not possess any special knowledge or skill in mining I merely made "a view" of the discovery. I would agree with Mr. Dickson's description of the discovery, and after "a view" I am unable to understand the expression "splash" as applied to this discovery, as I would consider it a well-defined quartz vein.

The vexed question now arises is it a discovery of "valuable mineral in place," such as is meant by sec. 2 "X" of the Mining Act?

To read the clause to a mining engineer and then ask the question if the discovery comes within the said section, causes an immediate juggling with words and side-stepping of the question. If he ventures the opinion that the discovery is "capable of being developed into a producing mine, likely to be workable at a profit," and his forecast should not be fulfilled, his professional standing in the community becomes impaired, so that it is only natural that the most experienced engineer might baulk at an unequivocal answer in the affirmative. Dickson said he would have staked the discovery as a gold claim, and thought it auriferous quartz. He considered the vein characteristic of the district and which had produced values.

That mineral was discovered is supported by the evidence adduced on behalf of the respondent, and I would find that the discovery had financial worth. I think the evidence justifies the supposition that the discovery might be developed into a producing mine likely to be workable at a profit.

The Mining Act is intended to encourage and stimulate the exploitation of the mineral wealth of the province. In order to prevent indiscriminate staking and consequent blanketing or tieing up of Crown lands a bona fide discovery is necessary, but I feel that in the interpretation of "valuable mineral in place," I must look to the bona fides of the discovery in conjunction with the honesty of the discoverer. In this case the vein was exposed in low-lying land described as quagmire with considerable overburden, and was found after diligent probing with an iron rod.

I think the industry of the discoverer should be rewarded, and I am therefore inclined to give Bartleman the benefit of the doubt and find that his discovery was a valid one within the meaning of the Mining Act, and in so doing I feel the real merits will be satisfied and substantial justice done.

I think Franker was entitled to stake the same lands as a gravel claim under sec. 118 of the Act. He swears to a discovery of gravel, and in his evidence describes it as "gravel and boulders" within an area of 20 chains north and south and 5 chains wide. A gravel pit is being operated about a quarter of a mile away and there is evidence that the soil in the vicinity is composed of sand and gravel. From a perusal of sub-secs. 1 and 3 of sec. 118 I am of the opinion that a mining claim and a quarry claim can co-exist at the same time. The gravel, if any, seems to be at the south-east corner of the claim and operations would not likely extend to or interfere with the development of the mining claim, nor does there appear to be much chance of a surface rights claim being established by the quarry claim holder.

I allow the application of Franker for a quarry claim.

I order the dispute filed by Franker against mining claim P-6992 to be dismissed.

From this decision Bartleman appealed to the Appellate Court, the appeal being heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE and HODGINS, JJ.A.

H. E. Rose, K.C., for Bartleman, the appellant.

Franker not represented.

Appeal by Bartleman from a decision of the Mining Commissioner dated the 4th of February, 1915.

The judgment of the Court was delivered by

MEREDITH, C.J.O.—The question for decision is as to the right to stake out and record as a quarry claim land already staked out and recorded as a mining claim, and not lapsed, abandoned, cancelled or forfeited.

The right to stake out and record a quarry claim is conferred by sec. 118 of the Mining Act of Ontario, R. S. O. 1914, ch. 32. The right is to stake out and record "as a mining claim, to be called a quarry claim, lands containing any natural bed, stratum or deposit of limestone, marble, clay, marl, building stone, sand or gravel" (sub-sec. 1), and by sub-sec. 1 and sub-sec. 2 certain exceptions are made as to the lands which may be so staked. By sub-sec. 3 it is provided that 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 where a mining claim is so staked out, the respective rights and duties of the licensee and of the holder of the quarry claim are defined; and by sub-sec. 4 it is provided that

except as provided in sub-sec. 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 that all the provisions of the Act as to mining claims shall, except where inappropriate, apply to quarry claims.

Having regard to these provisions and especially to the fact that the quarry claim is to be staked out and recorded as a mining claim, and to the potential rights of the holder of a mining claim to obtain a patent of the land embraced in his claim, and the provisions of sec. 34 of the Mining Act, it is clear, I think, that where land is under staking or record as a mining claim there is no right to stake out or record a quarry claim upon any part of it unless the mining claim has lapsed, or been abandoned, cancelled or forfeited; and indeed, that section, as I read it, expressly so provides.

In addition to this the fact that by sec. 118 it is provided that the staking out of a quarry claim is not to interfere with the right of a licensee to stake out a mining claim on the land embraced in the quarry, indicates clearly, I think, that the framer of the Act recognised that the effect of sec. 34 is what I take it to be; and, therefore, inserted the provision I have just mentioned to do away with the operation of it to the extent of permitting a mining claim to be staked out on lands already embraced in a quarry claim, but made no provision for the converse case and thus left it to the operation of sec. 34.

The appeal should be allowed and the decision of the Commissioner reversed, and there should be substituted for it an order dismissing the application of the respondent for the recording of the quarry claim, with costs, and the costs of the appeal should be paid by the respondent.

Since the foregoing was written the respondent has applied to be heard, and has put in a written argument, the main purpose of which is to show that the appellant had not made a discovery of mineral in

place, or valuable mineral in place, within the meaning of the Act, and was therefore not entitled to stake out and record the mining claim which he has been allowed to record.

It is a sufficient answer to this contention that there is no appeal by the respondent from the decision of the Commissioner in this regard; but, if there were, I see no reason for differing from the conclusion of the Commissioner, which was based not only upon the oral testimony but also upon a view taken by the Commissioner of the *locus in quo*.

NOTE.—In order to make it clear that where land is under staking as a mining claim, there is no right to stake out or record a quarry claim upon any part of it: Sub-section (2) of sec. 118 (R. S. O. 1914), cap. 32, was amended by 5 Geo. V. cap. 13, sec. 13.

(THE COMMISSIONER.)

EVIS v. YOUNG.

DITTMAR v. YOUNG.

Appeal from Decision of Mining Recorder—Staking—Priority—Merits—Deceit—Estoppel—Substantial Justice — Abandonment —Public Lands Act.

The appellants having priority of staking and having tendered their applications to the Mining Recorder in due course and the validity of their respective stakings not being questioned, they would be entitled to succeed upon the appeal if priority was the sole question to be determined.

W., a locatee of the land in dispute and a resident thereon for eight years, being led to believe the mines and minerals would pass with a patent under the Public Lands Act, agreed to sell part of the property to Y., including mines and minerals, and received part of the purchase money.

Learning the appellants had staked claims on his land W., five days afterwards, staked the same lands and recorded them. From the refusal of the Mining Recorder to record the applications of the appellants they appealed to the Mining Commissioner.

Held by the Commissioner, that E. intended to deceive W. into the belief that he had acted as W.'s agent when staking the claims, and that W. was justified in relying upon the admissions made by E. That E. acting for D. the latter was bound by E.'s acts and admissions.

The law of estoppel applied and the applications of W. were rightly recorded notwithstanding the priority of staking by the appellants.

W. had previously staked the claims in October, 1914, but did not record, understanding the mines and minerals would pass to him as a locatee.

Held, even though he had not abandoned before staking in December, 1914, there was no attempt to "blanket" as he had disclosed to the Mining Recorder his previous staking.

As the township of Maisonville had not been opened for settlement under the provisions of the Public Lands Act, the mines and minerals did not pass with a patent.

Appeal from decision of the Mining Recorder refusing to record two claims staked in the township of Maisonville and prior to the applications subsequently recorded by the respondent W.

A. G. Slaght, for appellants.

W. A. Gordon, for respondent.

20th March, 1915.

THE COMMISSIONER.—The appellants, Frank Evis and Arthur Dittmar, have appealed against the deci-

sion of the Mining Recorder at Matheson refusing to record their applications for mining claims situate on the north-east, south-east and south-west quarters of the north half of lot eight in the first concession of the township of Maisonville.

On the 2nd of December, 1914, Evis staked mining claims on the north-east and south-east quarters, and the same day Arthur P. Dittmar staked a claim on the south-west quarter of the part lot in question. They tendered their applications therefor to the Recorder on the 17th of December and on the 29th they were placed on file, but not recorded.

On the 7th of December, 1914, the same quarter sections were staked for J. Walter Young by A. J. T. Wendt Wriedt, and the next day the applications were handed to the Recorder, who placed them on file. On the 30th of the same month the Recorder decided to place the Young applications on record, and the claims applied for became known as L. 5142-5143 and 5144.

On the 29th of December, when the applicants appealed under sec. 133 of the Mining Act, there were no subsisting mining claims recorded against the lands, as the Young applications were not placed on record until the 30th of the same month or next day.

As soon as the claims were recorded it would have been more in accordance with the practice for the appellants to have filed a dispute under sec. 63 of the Act, but I intimated at the trial that I would hear the matter as though a dispute had been filed.

The lands upon which these claims were staked were occupied by A. J. T. Wendt Wriedt, an applicant for purchase, and in possession with the consent of the Crown.

The township of Maisonville had not been opened for settlement under the provisions of the Public Lands Act, but Wendt Wriedt and other settlers had been allowed to take up certain lots, as it was said they were suitable for cultivation. By a recent amendment to the Public Lands Act the mines and minerals, if not specially reserved, passed to the locatee or pur-

chaser when a patent was taken out, but a difference of opinion arose as to the right of such settlers in the township to the benefit of this provision, inasmuch as this township had not been formally opened for settlement in accordance with the provisions of the Act. Such being the case most of the settlers' lands in this township were staked by parties other than the locatees, and in this way the present situation arose.

Wendt Wriedt has been on this particular lot for the past eight years, improving, cultivating it, and in other respects has lent his assistance in establishing a school and improving the roads in the township.

On the 5th of August, 1914, Wendt Wriedt entered into a written agreement with J. Walter Young whereby he agreed to sell a part of the said lot, together with the mines and minerals thereon, and has received all the purchase money with the exception of five hundred dollars, which is held back until such time as a patent issues to Wendt Wriedt.

I think Wendt Wriedt quite honest in his belief that the mines and minerals would pass to him with his patent, but he became anxious owing to the promiscuous staking of claims on the lands of this colony in Maisonville, and in October last he staked three mining claims on his farm having the same boundaries as the claims now before me. Evis, who is a neighbor of Wendt Wriedt, assisted him in the staking. Wendt Wriedt did not record his applications, as he was informed by an officer of the Crown, who had good reason for making the statement, that the minerals belonged to him and that he need not record his applications and he did not. In December Evis, Dittmar and Chouinard entered into an agreement to procure, if possible, the mineral rights on the Wendt Wriedt property, and on the 2nd of December staked the claims before referred to. About this time Young felt that Wendt Wriedt should stake the same claims in order to safeguard his interests under the agreement, and this Wendt Wriedt did on the 7th of December,

and subsequently secured his applications to be placed on record notwithstanding the prior applications of Evis and Dittmar for the same lands.

Both Evis and Dittmar have priority of staking over Wendt Wriedt, who staked for Young, and their applications were tendered to the Recorder within the time allowed by the Mining Act, and as the sufficiency of their staking of the claims has not been successfully attacked the appeal would be allowed if the question of priority was the sole determining point in the case.

Both Evis and Dittmar knew that Wendt Wriedt had agreed to sell the mines and minerals to Young, and Evis was aware that Wendt Wriedt had, in October, staked these same claims in order to protect Young under his agreement with him. Notwithstanding this knowledge and the fact that they were neighbours Evis was a party to a deliberate agreement with Dittmar and Chouinard to get title to mining claims that might be found on the Wendt Wriedt farm to the detriment of Wendt Wriedt and loss of Young.

On the night of the 7th of December, after Wendt Wriedt had staked the claims, he met Evis at the station at Sesekenika, when on the way to the Recording Office to record his applications and told Evis he had seen his stakes on the ground, to which Evis replied, "There was a lot of people around so I went up and put up posts to protect you," to which Wendt Wriedt said, "I have staked; can I go on and record?" and Evis replied, "Yes, it is all right." Ainar Klandereud overheard this conversation. About the 9th of January following Charles Labine met Evis, who told him that he had staked the claims for Wendt Wriedt and expected to be compensated for it. Evis also told Gilbert Labine, "I did it to protect Wendt Wriedt." Christian Sorenson, a witness called by the appellants, also overheard the conversation between Evis and Wendt Wriedt.

Evis played a deceitful role throughout; when he met Wendt Wriedt at the station he was aware that

he had entered into an agreement with Dittmar and Chouinard to stake these very claims, and while he talked well but not wisely with the two Labines, he, no doubt, meant to rely upon his rights, if any, under the staking of the 2nd of December. I believe he made the admissions given in evidence and the reason why was his moral inability to admit his act of injustice to Wendt Wriedt. Evis now contents himself with saying that he does not remember the several conversations referred to; I find that they took place and were truly related.

Such being the facts in the case and Evis and Dittmar now standing on their rights, what legal effect have the admissions of Evis on his and Dittmar's right to be recorded for the claims in priority to Young? What Evis said to Wendt Wriedt neither assisted or retarded his making title to the claims. It was not within Evis' power to get Wendt Wriedt's application on record merely by saying that he had the right to do so, as that was a matter for the determination of the Mining Recorder, and especially so as Evis and Dittmar then had prior applications on file which they had not officially withdrawn. There is no doubt Evis meant, for the time being, to deceive Wendt Wriedt into believing that he had acted as his agent when he staked the claims. Wendt Wriedt was justified in relying upon the statement of Evis that the three claims had been staked for and on his behalf. It is true that what was said did not alter Wendt Wriedt's position, but he was lulled into a sense of security by the admissions and only disillusioned on the 29th of December, when the appeals were taken. There is no evidence that between the 7th and 29th of December that either he or Dittmar informed him of their endeavour to place their applications then on file on record. If Wendt Wriedt, relying upon the Evis and Dittmar staking as done on his behalf, had not placed his own applications on file and used his best endea-

vours to put them on record, he might have lost the claims, as it is apparent that Evis meant to deceive Wendt Wriedt, and it is not necessary to enquire into his object. Evis must be held to have spoken for Dittmar as the latter was not at the trial, and I feel that Evis was the prime mover in the staking. Neither Evis nor Dittmar should now be allowed to say that their stakings on the 2nd of December were not for and on behalf of Wendt Wriedt. Estoppel is a rule of evidence, and while I admit that it may be straining the principles to apply them to the facts in this case, I can only do substantial justice and give judgment on the merits by invoking its aid. The principle of estoppel as enunciated in the Encyclopaedia of Law, 2nd edition, at page 431, aids my endeavour to do justice between the parties, and it is as follows: "It appears therefore to be a prevailing rule that it is not essential that the conduct creating the estoppel should be characterized by an actual intention to mislead and deceive. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the act or representations to be true, and believe that it was meant that he should act upon it as true, the party making the representations will be precluded from contesting it."

After the staking in October Wendt Wriedt did not abandon as required by the Mining Act, but I do not think his restaking could be precluded on this ground as what he did did not amount to a blanketing of the claims, and in any event he disclosed his staking of October to the Mining Recorder.

As to costs. The uncertainty as to whether this land was open to staking or not has practically led to this controversy, and notwithstanding Evis' unmoral act there was some justification in law for doing what he did, so I will not give costs.

I order the three appeals herein against the north-east, south-east and south-west quarters of the north

half of Lot eight in the first concession of the township of Maisonville, and being Mining Claims L. 5142, 5143 and 5144, be disallowed but without costs.

(THE COMMISSIONER.)

PETERSON v. WILSON ET AL.

Appeal from Decision of Mining Recorder — Non-performance of Working Conditions—Application for Relief from Forfeiture—Restaked before Report Filed—Notice of Appeal not Recorded —Pending Proceedings.

Forfeiture for non-performance of work took place with respect to mining claim recorded in the name of L. Lands were restaked and claim recorded by H., who happened to be one of the respondents. Within three months from default, L. filed proper report of work when Mining Recorder cancelled the H. claim. From this decision W. appealed to Mining Commissioner. Before appeal was heard, L. claim again became open and restaked by P., who was refused right by Recorder to record as W. appeal was not disposed of. From this decision P. appealed and both appeals were heard together and held by Commissioner—

That notice of appeal by W. was not properly entered, s. 133 (3). and the appeal could not be considered a "pending proceeding" under sections 80 or 85, as it was not properly launched and was abortive. That the H. claim was properly cancelled by the Recorder when proper report of work filed by L. That in any event W. had not performed working conditions, and was not protected by pending proceedings nor had any application been made under section 80 for an extension of time. The land was open when staked by P., but recorder acted properly in refusing to record until the notice of appeal by W. had been disposed of or removed from the records.

Appellant in person.

William A. Olmsted, for respondent.

13th May, 1915.

THE COMMISSIONER.—Mining Claim 13338, situate in the township of Tisdale in the Porcupine Mining Division, was staked and recorded in the name of A. G. Lindburg. The last year's work was not filed within the time prescribed by the Mining Act and forfeiture took place.

The lands then being open for staking, William Hersee, on the 5th of March, 1913, restaked it as Mining Claim 6310-P., and transferred his interests to Thomas M. Wilson, who disposed of a quarter interest each to A. Charles Dorschmer and Robert William Eopps.

On the 31st of March, 1913, and within the redemption period, Lindburg filed a proper report of work, together with the necessary fee, which was accepted by the Recorder and Mining Claim 6310-P was cancelled.

On the 14th of April, 1913, the recorded holders of former claim 6310-P. filed with the Recorder a notice of appeal to the Mining Commissioner against the decision or act of the Mining Recorder, cancelling claim 6310-P., and reinstating claim 13338 on the ground of "non-performance of certain work."

Mining Claim 13338 again became forfeited on the 4th of November, 1913, through failure to apply and pay for a patent thereto.

On the 11th of February, 1915, C. F. Peterson staked and applied for the same lands, his application being placed on file only as the appeal launched by Wilson and his co-holders had not then been disposed of. From the decision of the Mining Recorder refusing to record the application of C. F. Peterson he appealed to the Mining Commissioner, so that I have now before me a rather obsolete notice of appeal filed by the holders of P-6310 and that of Peterson.

Wilson undertook, on behalf of his co-holders, the carriage of their appeal, but did no more than file it with the Mining Recorder. He understood the notice of appeal had been served upon Lindburg by a clerk in the office of the Mining Recorder. That the notice of appeal was not served upon Lindburg by any clerk in the Recording Office has been proved by the evidence of Mr. Fred. Graham, nor did the Recorder or any of his clerks undertake to effect service, as it was not part of their duty to do so, and in the absence of any

direct evidence of service I must find that notice of appeal was not served upon Lindburg, or, at least, not within the time specified by sub-sec. 3 of sec. 133 of the Mining Act.

Mining Claim 13338 has ceased to exist by effluxion of time and the Wilson appeal became abortive through non-service, and from the elimination of the subject matter of the appeal Mining Claim 6310-P. was properly cancelled by the Recorder, when a proper report of work was filed by the holder of claim 13338.

The Wilson appeal could not be considered a "pending proceeding," as it was not properly launched, and even if it had been the laches of the appellant in bringing it to trial could not be overlooked, as its effect was to create a blanketing of the property for a time within the pleasure of the appellants.

Claim 6310-P. became in default in consequence of non-performance of work. An application was not made by the holders of the claim to the Recorder to extend the time for the performance of work on account of pending proceedings under sec. 80 of the Act, and even after Claim 13338 was cancelled on the 4th of November, 1913, and it could be said 6310-P. automatically took its place, no sufficient excuse is offered for not prosecuting the appeal with due diligence or for neglect in complying with the working conditions required by the Mining Act.

It would be against the spirit of the Mining Act to give priority to Wilson and his co-holders to the lands in question, inasmuch as they have slept upon their rights for a period of two years and have stepped in only when the land was sought to be appropriated by another staker.

I find that when the Peterson application was filed the lands were open for staking, and his application therefor should have been placed on record. The Mining Recorder acted quite within his discretion in refus-

ing to record the Peterson application until the title to the ground had been passed upon by me.

I order the appeal of Thomas M. Wilson, A. Charles Dorschmer and Robert William Eopps be dismissed and that the application of Charles F. Peterson for the lands known as the south-east quarter of the south half of Lot six in the third concession of the township of Tisdale, in the Porcupine Mining Division, be placed on record.

(THE COMMISSIONER.)

SHIELDS v. PORCUPINE EAST LAKE MINING COMPANY, LTD., AND JOHN H. McDONALD.

Work Performed—Judgment Creditor—Trustee—Fixing Ownership of Claims—Relief against Forfeiture.

S. had judgment against the Porcupine East Lake Mining Company, Limited, for assessment work done on certain claims in the township of Whitney. The claims were recorded in the name of John H. McDonald, and the applicants asked a declaration that McDonald held for the company, and as trustee only.

Held, by the Commissioner—The P. E. L. M. Co'y Limited was the true owner of the claim.

That the application was properly made under section 123 of the Act, as it was a "question" of title.

The claims being in default, a recommendation was made under section 86 for relief against forfeiture and reinstatement.

Application by Charles B. Shields to have it declared that Mining Claims P-2700, 2701, 2702, 2703, 2704, and 2705, township of Whitney, were held in trust by the recorded holder for The Porcupine East Lake Mining Company, Limited.

H. L. Slaght, for claimant.

Day, Ferguson & O'Sullivan, for respondents.

10th June, 1915.

THE COMMISSIONER.—The claimant herein on or about the 29th day of July, 1914, secured judgment against the respondent company for the sum of $918.85 and $37 for costs for performance of work done upon mining claims P-2700, 2701, 2702, 2703, 2704, and 2705, situate in the township of Whitney in the Porcupine Mining Division, at the instance and for and on behalf of the Porcupine East Lake Mining Company, Limited. The work so done was duly recorded by the claimant, and in that respect kept the claims in good standing. Many promises of payment have been made by the company, none of which have been fulfilled, and the claimant now asks that the Porcupine East Lake Mining Company, Limited, be declared the holders of the said claims so that he may be permitted to file a copy of the writ of execution against them pursuant to section 77, sub-section 5 of the Mining Act of Ontario.

The properties are at present recorded in the name of John H. McDonald who, by an acknowledgment filed upon the application, and dated the 26th day of May, 1915, stated he held the claims as a bare trustee for the Porcupine East Lake Mining Company, Limited. He was served with the notice of claim filed herein and appointment fixing the date of trial, but did not appear, it being conceded he had no personal interests to protect as against the claimant. It would appear from the evidence that the claims are allowed to remain in the name of John H. McDonald for economy sake, thereby saving the difference between the cost of an individual license fee and that of a limited company with a fixed capitalization.

I have no hesitation in finding that the Porcupine East Lake Mining Company, Limited, is the true owner of the said claims; they are referred to in the prospectus issued by them, and locally known as the properties of the company. The company, who appeared by counsel, contend that I have no jurisdiction

to make the order as asked. The application was adjourned a week upon request of their counsel in which to permit him to get further instructions, and upon return of the application it was intimated to me that the counsel of the company would not again appear as he was without instructions.

The work done by Shields is the last period of assessment work required to be performed on the claims under the Mining Act, and immediately thereafter the holders could have applied and obtained a patent thereto. The claims became forfeited on or about the 14th day of February, 1915, in consequence of the holders' failure to apply and pay for a patent to the lands. They have not been restaked and still stand in the name of John H. McDonald.

This is a meritorious application and the claims should be made if possible to pay the cost of the work done upon them by Shields, which is now fixed by his judgment.

I am of the opinion that I have jurisdiction under section 123 of the Act, and Shields, as an execution creditor of the company, I think, is properly before me to have the "question" of the title to the claims determined.

The president of the respondent company engaged Shields to perform certain work without first knowing whether he or the company could pay him, and such reprehensible conduct cannot be encouraged. The company would neither deny or admit ownership of these claims, although they appeared upon the application, and have done or suggested nothing whereby the debt due Shields could be satisfied.

I find that mining claims P-2700, 2701, 2702, 2703, 2704 and 2705, situate in the township of Whitney, in the Porcupine Mining Division, are held in trust by John H. McDonald for the Porcupine East Lake Mining Company, Limited, and that he has no equitable interest therein.

I would recommend to the Lieutenant-Governor in Council that an Order-in-Council be passed relieving

the claims from forfeiture on the condition that patents thereto be taken out not later than the 1st day of September, 1915, and if acted upon then my judgment herein can be recorded against the claims.

I allow the claimant one hundred dollars ($100) as costs of the application which was defended by the respondent company.

(THE COMMISSIONER.)

STEEP v. COCHRANE.

Dispute—Priority—When Lands Open for Staking—Computation of Time—Forest Reserve (Sec. 79)—Orders-in-Council Extending Working Conditions—Forfeiture of Right to Further Staking (Sec. 57).

By section 79 (B) R. S. O. 1914, cap. 32, 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 shall be excluded. Section 44 forbids prospecting for minerals, etc., in a Forest Reserve except in accordance with regulations made under the Forest Reserves Act.

The law will not regard the fraction of a day, but will, if necessary, enquire into the priority of acts that occurred on the same day.

The day of recording is excluded in fixing the time within which work must be performed in accordance with section 78 (a): *Burns* v. *Hall*, 20 O. W. R. 526. The day of recording and the time elapsing between the application and the granting of permission to do work, both being excluded, it follows the lands were not open for staking on the 7th of August, 1915, the day Steep made his discovery and staked.

There was no contravention of sec. 57 by C. as that section refers to Crown lands open to prospecting which was not the fact in this case.

The dispute was dismissed.

Proceedings by Edward Steep to establish priority of discovery and staking and right to record. The land in dispute was a restaking of a claim in a Forest Reserve, and the main question for determination was upon what date was the land open for staking.

J. S. McKessock, for Disputant.

J. Lorn McDougall, for Respondent.

6th November, 1915.

THE COMMISSIONER.—Mining Claim T. R. S. 2509, situate in the township of MacMurchy in the Sudbury Mining Division, was staked and subsequently recorded on the 6th day of September, 1911. All work was performed with the exception of a portion of the last period, and for default in its performance the interests of the holder became forfeited.

On the 7th of August last the same lands were staked by Edward Steep, and on the 10th by Samuel Cochrane. Steep reached the Recording Office on the 13th and tendered his application when he was informed and learned that Cochrane had earlier on that day placed his application on record, and the claim became known as T. R. S. 3715.

It was admitted by Cochrane that on the 26th of July, believing the lands to be open, he attempted to stake them, and afterwards discovering his mistake removed his stakes, but did not thereafter notify the Recorder of such staking out as required by Section 57 of the Mining Act of Ontario.

Steep filed a dispute against the Cochrane staking of the 10th, on the ground that the land was open for staking on the 7th, and consequently his application should have priority, and that Cochrane, by his abortive staking of the 26th of July, and subsequent restaking of the 10th of August, had acted contrary to the provisions of said Section 57. These several issues are now before me for determination.

The time of forfeiture in respect of former claim T. R. S. 2509 is in dispute. The claim was recorded on the 6th of September, 1911. Being in a Forest Reserve permission to do work was applied for by letter written at Sudbury on the 14th day of September, 1911, and replied to by the Bureau of Mines on the 16th. From an abstract put in at the trial by the Disputant to show the time when the application was made and granted, the 15th is given as the date

of the application. The Recorder may have assumed that the date of the receipt of the application at the Bureau of Mines was the time of delivery and so endorsed it on the record.

By Section 79, sub-section (b), "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, shall be excluded," in computing the time within which work upon a Mining Claim is required to be performed. Section 44 of the Act forbids prospecting for minerals or conducting mining operations in a Crown Forest Reserve except in accordance with regulations made under the "Forest Reserves Act"; such regulations require the consent in writing of the Minister before prospecting or mining operations can be granted. It was argued, but, I think, without conviction, that the most the holder of Claim T. R. S. 2509 could expect from a proper interpretation of Section 79 (b) would be a fraction of a day. The law will not, as I understand it, regard the fraction of a day, but will, if necessary, enquire into the priority of acts that occurred on the same day. Even if the contention is acceded to there is no evidence that would assist me in determining priorities as it is known that Steep made his discovery at 12.10 a.m. on the 7th day of August, 1915, but there is no evidence to fix the time of the day when permission was granted to do the work on the cancelled claim. Whether the sub-section means that the time shall start to run from the date of the transmission of the request or its receipt at the Bureau of Mines is not, I think, necessary for me to determine in this case as in any event the letter, no doubt, was received at the Bureau of Mines on the 15th, and consented to the following day, and a letter to that effect was sent to the applicant to his address at Sudbury. Forfeiture being involved, the clause, I take it, should be construed liberally so that the applicant would be entitled, in any event, to one whole day and such should

be excluded in computing the time within which work upon the claim was required to be performed.

The day of recording is excluded in fixing the time within which work must be performed in accordance with Section 78 (a)—*Burns* v. *Hall,* 20 O. W. R., 526. The day of recording and the time elapsing between the application and the granting of permission to do work both being excluded, it follows the lands were not open for staking on the 7th of August, 1915, the day Steep made his discovery and put up his posts.

Then did Cochrane, by his staking of the 26th of July and subsequent restaking contravene Section 57 of the Act? This section refers to "any land open to prospecting," and such lands are described in Section 34 as (a)—"Crown lands, surveyed or unsurveyed" not at the time—(i) "under staking or record as a Mining Claim which has not lapsed or been abandoned, cancelled or forfeited."

If my deductions of time are correct then T. R. S. 2509 was under staking and record as a Mining Claim on the 7th of August, 1915, and had not lapsed, been abandoned, cancelled or forfeited, and it follows that the claim was not open for staking until the earliest moment of the 8th of August.

Cochrane, believing the claim to be open for staking on the 26th of July, 1915, and after staking it, went to the Mining Recorder at Gowganda to procure guidance in the preparation of his application which he intended filing in the proper Recording Office in Sudbury. He was then told the claim would not be open until the 8th of August, and shortly afterwards he returned to the claim and removed his stakes. What he did was done, I think, innocently, and not with the intention of blanketing the property. The evil Section 58 aims at is the pernicious staking of open land without first having made a sufficient discovery, and holding it for the allotted time within which the claim might be recorded, and then instead of recording, which could not honestly be done, restaking

it. This process is known as blanketing and is adverse to the interests of a *bona fide* prospector. What Cochrane did cannot be said to be an offence or violation of the section, as the records in the office of the Mining Recorder show that the claim was a subsisting one and Cochrane's stakes, which remained there for a few days, would not hinder or defeat the interests of a *bona fide* prospector as he obtained no rights thereunder and could not until the claim became open by law.

I order that the dispute herein be dismissed with costs fixed at the sum of seventy-five dollars.

(THE COMMISSIONER.)

SWEET v. O'CONNOR.

Dispute, Staking—Posts Incorrectly Marked—Evidence—Abandonment.

The misdirection inscribed upon the discovery post and the marking of the 31st of September as the date of discovery were acts of inadvertence and did not invalidate the staking. It was difficult to reconcile the evidence as to what was marked on the number one post. In any event the land applied for was the land staked and there had been no misleading in that respect. *Reichen* v. *Thompson*, M. C. C. (Price) 88. Dispute dismissed.

A dispute filed by Joseph Sweet against mining claim C-1302, being the south-west quarter of the west half of the south-west quarter of block 2, Gillies Limit, and for an order allowing his own application to be placed on record.

D. O'Sullivan, for disputant.

George Mitchell, for respondent.

27th November, 1915.

THE COMMISSIONER.—On the 30th of September, 1915, Joseph Sweet made a discovery on the south-

west quarter of the west half of the south-west quarter of block 2, Gillies Limit, and on the 1st day of October staked the said lands. On the 13th of October, Sweet attended the recording office for the purpose of recording his application therefor, when he learned that Mary O'Connor had, on the 12th of the same month, recorded an application for the same lands. On the 14th Sweet tendered his application to the Recorder, had it placed on file, and the next day filed a dispute against the O'Connor staking which was then known as mining claim C-1302.

The dispute was transferred by the Recorder to me, with my consent, for adjudication.

Sweet, in his dispute, claims priority of staking, and denies a legal abandonment within the meaning of sec. 83 of the Mining Act, by reason of insufficiency of staking.

Albert O'Connor, who staked on behalf of Mary O'Connor, his wife, justifies his staking on the two grounds that the Sweet discovery post was marked September 31st, and the absence of the endorsement on the No. 1 post of the part of the quarter section of the block staked. It is admitted by Sweet that he incorrectly but inadvertently indicated on the discovery post that his discovery was made on the 31st of September, the fact being it had been made on the 30th, and that he wrote thereon "North-west to No. 1 post," the proper direction being north-east. The marking of the discovery as the 31st of September was clearly a mistake, as the application gives the date as the 30th, and states that the discovery post was improperly dated the 31st of September. In the evidence of the disputant, Sanderson and O'Gorman also fix the day as the 30th of September. The application states the discovery post is situated 330 feet from No. 1 post, south-west, and the No. 1 post is so marked. There was a sufficient blaze from the discovery post to the No. 1, and the mere error of writing north-west instead of north-east on the discovery post did not

deceive or mislead O'Connor, nor could it be said the misdirection made it difficult or impossible to find the No. 1 post. I find that the misdirection upon the discovery post and the marking of the 31st of September as the date of discovery were inadvertently made and do not thereby invalidate the staking.

It was further contended by O'Connor that on the 12th and 15th of October he examined the discovery and No. 1 posts put up by Sweet, and that in addition to the defects I have dealt with Sweet did not, as required by sec. 54 (*c*), mark upon his No. 1 post a description of the lands staked. On the 15th of October he was accompanied by Mr. Norman Fisher, Mining Engineer, who went out to see the property with the view of purchasing it; he states he told Mr. Fisher he was likely to have some trouble over the property and asked him to read what was on the discovery and No. 1 posts and he would write it down. This Fisher did, and the notes are now in as Exhibits 5 and 6. Mr. Fisher says that to the best of his knowledge the description of the land was not written on the No. 1 post. O'Connor contends he drew Fisher's attention to the fact that a description of the lands stated was not marked upon the No. 1 post, but Fisher does not endorse this statement, his attention being directed only to the date of the 31st of September on the discovery post, and I feel that was what most impressed O'Connor. Mr. Fisher went to the property to examine its possible value and not to make mental notes of what was marked upon the posts by Sweet, and he said the only reason why he thought a description was not written on the post was because he had not a picture of the "hieroglyphics" in his mind. It is to be noted that O'Connor speaks of what he saw on the 12th and 15th of October, and that Sweet staked on the 1st of October. It is with the latter date that the sufficiency of the marking must be determined as it is conceivable and possible that what was properly written upon the post on the 1st of October could by

some means have become erased or obliterated through no agency of Sweet's.

Sweet is most positive that he properly marked the description of the lands on the No. 1 post when it was put up on the 1st of October, and he is supported in this testimony by Daniel R. O'Gorman, who, though an unsatisfactory witness, through, I think, timidity, appeared to me to be thoroughly honest, and from his demeanour in the witness box and a sifting of his evidence I have reached the conclusion that when he and Sweet made the second inspection of the posts on the 1st of October to see if the claim had been properly staked he or O'Gorman noticed that the description was not on the No. 1 post and then wrote it upon it. O'Gorman said he was prepared to contradict anyone who would say the proper description was not on the stakes, and while his mind was in a confused state while giving his evidence, I have no doubt had his environments been different he could have more clearly stated just what he and Sweet did when the claim was staked, and I believe it to be a fact that the post had upon it a description of the lands applied for.

The land staked was such as was applied for, namely, the south-west quarter of the west half of the south-west quarter of block 2, Gillies Limit, and any unnecessary or imperfect description of the lands staked and applied for written upon the discovery post did not create a blanketing of the property as alleged by O'Connor, or in that respect invalidate the claim.

There was no attempt by Sweet to blanket the property or hold it against a *bona fide* prospector until such time as he might feel disposed to record his staking. If he had intended blanketing the property he would not have made the errors in staking alleged nor would he have attempted to record his staking within the time allowed by the Mining Act.

I think there was more confusion than carelessness in the Sweet staking, and it is very difficult to reconcile the evidence as to what was marked upon the No. 1 post; however, the land applied for in the application was the land staked and sufficiently identified and marked the claim. I think the observations of the Mining Commissioner in *Reichen* v. *Thompson* (Price), M. C.C. 88, apply here, and if it is necessary to find what was written upon the No. 1 post I would accept the evidence of the disputant and by doing so not necessarily reflect upon the testimony of Mr. O'Connor, as I have stated before O'Connor speaks of the 12th and 15th of October, whereas Sweet speaks of the day of staking.

Whether O'Connor was justified in staking over Sweet is a moot question. Non-compliance with the Mining Act as to staking works an abandonment under sec. 83 of the Act. O'Connor's sole excuses for staking over Sweet's posts were the admitted incorrect date of discovery marked on the post and the alleged absence of a description of the lands on the No. 1 post.

I think it was taking too much for granted to assume an abandonment from the reasons assigned by O'Connor. The filing of his application and a dispute would, it seems to me, to have been the proper course for him to have followed. In accepting the evidence of Sweet and O'Gorman as to the sufficiency of the staking I do not question Mr. O'Connor's veracity; he speaks of the conditions existing on the 12th and 15th of October and the disputant to the 1st of October, the day the posts were put up. If there is a doubt it is only equitable that I should give Sweet the benefit of it, and I do not think that I could be helped, as was suggested by counsel for the respondent, by ordering an inspection of the posts to be made, especially as I am disposed to accept the evidence of the disputant as to the staking.

I order mining claim C-1302, being the south-west quarter of the west half of the south-west quarter of block 2, Gillies Limit, be cancelled upon the records and that the application of Joseph Sweet for the same lands now on file in the Recording Office of the Timiskaming Mining Division be placed on record in lieu thereof.

(THE COMMISSIONER.)

LEDUC v. GRIMSTON.

Dispute—Restaking of a Former Surveyed Claim—Lines not Followed—Creation of Fraction—Discovery Outside Limits of Claim as Staked—Blazing.

Held, by Commissioner—L. found no difficulty in following the surveyed lines; that G. should have taken more time and trouble in staking what he intended appropriating. That it was not a case of substantial compliance with the requirements of staking.

To allow G. to move his No. 3 post to the south-west corner of the surveyed claim would not avail, as his southern boundary would then be a straight line from his No. 2 to the corrected No. 3, which would have the effect of placing his discovery outside the boundaries of his stakes.

That the land having been burned over, was not a sufficient excuse for not properly blazing a line as pickets could have been used, but in the result the Act had been substantially complied with by L.

Leduc appeared in person.

J. M. Forbes for Respondent.

9th December, 1915.

THE COMMISSIONER,—This is a dispute referred to me by the Mining Recorder at Porcupine.

The land in question was formerly mining claim P-6081, which was surveyed and known as H. R. 830.

Forfeiture having occurred, the claim was cancelled, and on the 8th of July, 1915, Grimston attempted

to restake it, filed an application therefor, and on the 29th became the recorded holder as number P-7110.

On the 10th of July, J. P. Leduc, having made a discovery, followed the lines of the surveyed claim H. R. 830, erected his posts, made some blazes, and on the 12th, applied for the lands.

The claim being on record in Grimston's name, Leduc's application was placed on file together with a dispute which is now before me for disposition.

It was Grimston's intention to stake H. R. 830, but apparently he found some difficulty in following the surveyed lines, and it now appears from the admitted positions of his stakes that his No. 1 and 2 posts are 460 feet west and 260 feet north-west of the No. 1 and 2 posts of the surveyed claim H. R. 830. His No. 3 post is 384 ft. south-west of the No. 3 post of the surveyed claim, and upon patented property. His No. 4 post is properly situate at the north-west corner of the claim, He has, in fact, staked a portion of the eastern part of a patented claim which adjoins H. R. 830 on the west and his western boundary is entirely upon the patented land. To allow Grimston to move his No. 3 post to the south-west corner of the surveyed claim would not avail as his southern boundary would then be a straight line from his No. 2 to the corrected No. 3, which would have the effect of placing his discovery outside the boundaries of his stakes and lines.

As his No. 1 and 2 posts are west and north-west of the true corners and boundaries of the surveyed claim, to uphold his staking would create a fraction which is not desirable nor permissible under the circumstances.

Leduc found no difficulty in following the surveyed lines, and it is unfortunate that Grimston did not take more time and trouble in staking what he intended appropriating. I prefer to uphold the original staker if conditions permit, but this is not a case of substantial compliance with the requirements of staking nor can I see how it is possible to allow Grimston to

change the position of his No. 3 post without in the result invalidating his staking on the ground that his discovery is without the lands staked.

While Leduc did not make complete blazes around his boundaries or from his discovery to the No. 1 post, his excuse is that the land having been burnt over it was difficult to do so. That is not an answer which would at all times prevail as he could have placed pickets where the land did not permit of blazes, but in substance I find, it being a surveyed claim the lines were sufficiently pronounced and in that respect Leduc had substantially complied with the Act. It is undesirable that the land should be thrown open, and as between Grimston and Leduc the latter is entitled to the claim.

I allow the dispute and order that mining claim P-7110 be cancelled and that the application of J. P. Leduc as filed be recorded in lieu thereof.

(THE COMMISSIONER.)

SISSON v. PICHE

Appeal from Mining Recorder—Application for Certificate of Record—Refusal—Confliction of Lines—Forfeiture.

The Commissioner,—"It is quite evident the respondent staked land not applied for or shown on his sketch, and the greater portion of which comprised a then subsisting claim."

"The respondent's claim is in default for failure to apply for and take out a patent, and it is apparent that he has determined to abandon any claim he might have to the land in dispute, having been served with notice of appeal and appointment and not appearing in person or by counsel. The appeal will be allowed with costs and M.C. 16675 cancelled."

J. M. Hall, for Appellant.

Respondent not represented.

5th January, 1916.

THE COMMISSIONER.—The appellant, the holder of Mining Claim L-1339, situate in the township of Teck, in the Larder Lake Mining Division, applied to the Recorder for a Certificate of Record, which was refused as the claim apeared to conflict with a previously recorded claim 16675; from this decision an appeal was taken.

L-1339 lies immediately south of 16679 and was formerly 16541. The position of the claims as plotted in the Recording Office and as shown in the respective applications and sketches is indicated by exhibit 10.

Mr. G. F. Summers, O.L.S., surveyed L-1339 and filed a plan (exhibit 5), showing the manner in which 16675, as staked, conflicts with L-1339. He stated that the lands staked by Piche were not such as applied for nor as shown on his sketch accompanying the applications or any portion of it.

Piche staked claim 16675 on the 28th of February, 1911, and 16541 was staked on the 15th of February, 1911. The survey (exhibit 5), shows that claim 16675 includes all of claim L-1339 except a small portion of the south-eastern part and lands on each side of the said claim. At the time 16675 was staked 16541 (now L-1339) was in good standing and that part of the land so staked comprising 16541 was not open when Piche caused it to be staked. Whether the land on each side of 16541, which was included in the staking by Piche, was open or not was not given in evidence.

It is quite evident Piche staked land not applied for or shown on his sketch, and the greater portion of which comprised a then subsisting claim (16541). From his application and sketch it would appear to have been his intention to stake lands to the north-east of the present claim (L-1339) and to tie on to the number 2 post of claim 16608.

16675, the Piche claim, is now in default for failure to apply for and take out a patent, and it is apparent that he has determined to abandon any claim he might

have to the lands in dispute as he was served with notice of appeal and appointment for the hearing but did not attend, neither was he represented by counsel.

The appeal will be allowed with costs and mining claim 16675 will be cancelled.

I order that mining claim 16675, recorded in the name of Louis Piche, and situate in the township of Teck in the Larder Lake Mining Division, be marked cancelled upon the records and that a Certificate of Record issue to the holder of mining claim L-1339 and that the appeal herein be allowed with costs upon the County Court scale.

(THE COMMISSIONER.)

COUTTS v. AMAN.

Application by Mining Rights Owner to Fix Compensation (sec. 104)—Claim by Surface Rights Owner to Mines and Minerals—Public Lands Act, R. S. O. 1914, cap. 28—Access to Claims—Working Conditions—Application Enlarged to Permit Claimant to File Notice of Claim Setting up Want of Discovery and Fraud in Procuring Certificates of Record—Burden of Proof—"Person Interested"—Section 66—Working Permit—Fraud.

C., surface rights owner, claimed the mines and minerals on lands in dispute and refused A., mining rights owner, access to the properties. A. applied to the Commissioner for an order allowing access to the claims, and to fix compensation under sec. 104 of the Mining Act. Upon hearing, C. desired to attack discoveries and allege fraud in procuring certificates of record. Application enlarged to permit C. to file notice of claim, amongst other things setting up want of discovery and fraud. Upon the case being resumed.

Held, by the Commissioner,—The application for a working permit on the lands subsequently known as M.C. 17517 evidenced an honest attempt to make a discovery. That L., who staked for A., honestly believed he had made a valuable discovery, and that there was nothing in the evidence of the claimant, or that adduced on his behalf, which seriously conflicted with the evidence adduced by A. Upon the proof of fraud, the claimant's case stands or falls: *Re Young and Scott* v. *MacGregor* (Price), M.C.C. 162—*Gray* v. *Murray* (Godson), M.C.C. 83. That if it were necessary to pass upon the validity of the discovery, which it was

not, I might safely reach the conclusion that it was a valid one. Claim 17423 was staked by W. under instructions from L. The Commissioner,—The question was not was there a valid discovery in fact, but was W. conscious when he made the affidavit of discovery that it was false, or if he was not, did he make it without knowing whether it was false or without caring. See Bowen, L.J., in *Angus* v. *Clifford*, 2 Ch. Div. (1891) at 471. The question would have been solved by the production of W., who was in the court room at the trial. It was better to accept the affidavit made by W. as being true, and find that L. believed W. when he told him he had made a valuable discovery rather than find fraud when conclusive evidence was at hand and not utilized by the claimant, who sought to make out his case through fraud. See Bowen, L.J., in *Angus* v. *Clifford*, *supra*, at p. 474. *Derry* v. *Peake*, 14 A. C. 337, *Smith* v. *Chadwick*, 9 A. C. 187. The full burden of proof was upon the claimant.

As to whether C. was an interested party within the meaning of the Act was not necessary to be decided upon this application. That sec. 67 qualified sec. 65 of the Mining Act, and the changes in the Mining Act leading up to the Act of 1908, made it clear that it was felt advisable that after sixty days from the recording, all other conditions having been complied with as set out in sec. 64, a certificate of record might be granted and the title quieted, subject only to its being procured by mistake or fraud. That a case could be anticipated where the certificate might be procured by mistake, but not by fraud. If it was not the certificate that was fraudulent, then it must be the dishonest staking or discovery upon which it was based.

George Ross, for Claimant.

J. Lorn McDougall, for Respondent.

14th January, 1916.

THE COMMISSIONER.—The Claimant is the owner of the surface rights of the south half of the north half of Lot 6 in the 1st Concession of the township of Casey, through purchase from the former owner, John McQuay. The transfer was made on the 7th of April, 1914, with an absolute title in Coutts, subject to the reservations contained in the original patent from the Crown, namely, all ores, mines or minerals which are or shall hereafter be found on or under the said lands.

On the 4th July, 1912, E. G. Aman, through E. M. Loring, procured Mining Claim 17423 to be staked on the south-east quarter of the said lands, and on the 9th of September, 1912, a Certificate of Record was granted.

On the 20th of June, 1912, E. M. Loring staked the south-west quarter of the said lands, and applied for a working permit, which was granted on the 29th of August. In September following a diamond drill was used for the purpose of making a discovery. Dr. MacIntosh Bell, an engineer of considerable and varied experience, was asked by the chairman of the Syndicate, who were interested through Aman in the property, to direct the site for the bore holes, which he did in September. He started the drilling and then left for British Columbia, returning to the property in December. Four bore holes in all were put down and numbers 3 and 4 went through Keewatin and Conglomerate and carried stringers of calcite, quartz with iron pyrite, some of which on analysis was said to carry silver.

As a result of the drilling a discovery was made on the 4th of July, 1912, and the claim staked as No. 17517. On the 28th of May, 1915, a Certificate of Record was granted. Both claims were in good standing at the time Coutts purchased the surface rights from McQuay.

In 1915 the holders of the two claims wished to proceed with the working conditions necessary to be performed, but were refused permission to go upon the lands by Coutts, who claimed to be the owner of the minerals through his transfer from McQuay, and believing that the Public Lands Act,—R. S. O. Cap. 28—gave the minerals to the owner of the surface rights of the lands. If certain assessment work was not done in 1915 a forfeiture would occur and the holders would lose the claims, so they applied to the Mining Commissioner for an order permitting access to the lands for the purpose aforesaid and to fix compensation, if any, to be paid to Coutts as surface rights owner. An appointment was made and the application partly heard at Haileybury on the 21st of July, 1915. From the evidence taken it was shown that Coutts, when he purchased from McQuay, was aware that the latter

had by a written memoranda on the 26th of August, 1912, fixed compensation to be paid to him for interference, and that Coutts told McQuay that he would "take chances," believing that the owners of the claims who had not actively worked on the property since 1912, had determined to abandon them.

Counsel for Coutts wished to go into the question of the validity of the discoveries upon the claims, but as the applicants were not upon notice and unprepared to meet that issue I directed a Notice of Claim to be filed and served and the Certificate of Record attacked on the ground allowed by the Mining Act. Counsel for Coutts agreeing to proceed with his Notice of Claim, I enlarged the application then being heard until the question of the validity of the claims as raised by Coutts had been dealt with and that issue is now before me for determination.

Mining Claim 17517 was staked by E. M. Loring on behalf of E. G. Aman. Mr. Loring is a Mining Engineer by profession. In speaking of the Number 3 hole, which was bored while the property was held under a working permit, he said:—"We found that the vertical depth of the overburden was 83 feet, and thickness of Huronian 61 feet; thickness of Keewatin to bottom of bore hole, 51 feet; depth of drilling, 159 feet." The formation was Keewatin and Diabase, and "I considered it very good." In his affidavit of discovery he swore to, "Pyrites in calcite and quartz in conglomerate (Huronian) near diabase contact, calcite carrying silver values." He based his belief that the calcite carried silver upon some assays made, the certificates for which he did not produce. As fraud is charged I allowed Loring to say on what grounds he based his belief of the existence of silver in order to show *bona fides*.

It would appear that the Huronian Belt Syndicate of London, England, has become interested in the claims through Mr. Aman, and at the instance of the Chairman of the Syndicate, Dr. Bell, their consulting

engineer, was requested to proceed to the properties and direct the location of the bore holes to be made on Number 17517. In September, 1912, Dr. Bell chose the sites of the bore holes and drilling was proceeded with in his absence. In December he returned to the property and spoke of results as he found them. Numbers 3 and 4 bore holes went through Keewatin and Conglomerate and carried stringers of calcite; quartz with iron pyrite which on analysis was said to carry silver. In speaking of the discovery he said, "I think, certainly, it was a valuable discovery. The discoveries were certainly of value; of an extremely valuable nature." He was asked the question. Question:—"As a mining engineer and familiar with the formalities that have to be gone through in the staking of a claim, would you, after examining these cores, have considered them to contain valuable mineral in place such as would warrant the staking of a claim?" Answer:—"Certainly, absolutely, the actual calcite couldn't be considered valuable but it is indicative of value." Later on, in his evidence he was asked by the Mining Commissioner—Question: "Dr. Bell, Mr. Loring, who made the affidavit of discovery, in clause (1) of the affidavit stated that he had discovered valuable mineral in place upon lands comprised in the Mining Claim in question here which consisted of pyrites in calcite and quartz in Conglomerate (Huronian) near diabase contact; calcite carrying silver values; was he justified in making that affidavit from what he saw?" Answer: "Absolutely; I personally didn't see the assay made but there is no doubt about the rest being fully justified." Whether Dr. Bell's examination was made prior to or after the discovery sworn to by Loring is not, I think, of much importance as he affirms in strong words the *bona fides* of the discovery and justifies it under the Mining Act. Mr. Aman was told by Dr. Bell that the results of the borings were "quite satisfactory."

The application for a working permit evidenced an honest attempt to make a discovery. That Loring

honestly believed he had made a valuable discovery of mineral in place I have no doubt. That the discovery was at depth is admitted and I can find nothing in the evidence of the claimant or that given on his behalf which is seriously in conflict with the positive evidence of Loring and Bell.

The Notice of Claim alleges fraud in the securing of the Certificate of Record of each of the said Mining Claims, and that the several affidavits of discovery were fraudulently made.

"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, 8 Edw. VII. c. 21, s. 65."

"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. 8 Edw. VII. c. 21, s. 67."

It will be seen that Section 67 is qualified by Section 65 and the changes in the Mining Act leading up to the Act of 1908 make it clear that it was felt advisable and expedient that after sixty days from the recording of a Mining Claim, all other conditions having been done or complied with as set out in Section 64, that a Certificate of Record might be granted and the title quieted subject only to its being procured by mistake or fraud. I can anticipate a case where the Certificate itself might be procured by mistake but not by fraud. If it is not the Certificate that is fraudulent then it must be the dishonest staking or discovery upon which it is based.

Upon the proof of fraud the Claimant's case stands or falls. *Re Young and Scott* v. *MacGregor* (Price), M.C.C., 162; *Gray* v. *Murray* (Godson), M.C.C., 83.

I have no hesitation in finding that the discovery sworn to on Mining Claim 17517 was honestly believed to be a good and sufficient discovery within the contemplation of the Mining Act, and if it were necessary to pass upon the validity of the discovery, which it is not, I might safely reach the conclusion that the discovery was a valid one.

Claim 17423 gives more trouble. The discovery was made on the mandate of Loring to Waugh to sally forth and find one on the property. Counsel for Coutts enquired of Loring why he did not make a discovery himself. While the question was a pertinent one, its answer by Loring, for what I consider rather an indifferent reason, however, is typical of how many discoveries are made, some of which are perfectly *bona fide*, and I cannot for that reason alone find fraud. Mr. Loring's explanation is that as 17423 is high land they thought it probable that a discovery could be made on account of the geology and its proximity to the Casey Cobalt Mine. He said: "I didn't look it over very carefully but thought we could make a discovery on it. I came down to Haileybury and I telephoned to Waugh and asked him if he would go and make a discovery on that claim and stake it." Waugh went and made an alleged discovery and staked the claim. He returned to Haileybury and reported to Loring that he had discovered "pyrites chalcopyrite in quartz, in diabase." Loring made out the application and affidavit of discovery, and the latter was sworn to by Waugh. Under cross-examination Loring said: "I may have seen some rock, or I may not have." "I don't remember seeing any rock." "I think rock could be found there." "I walked over the claim on a trail but I didn't see any rock." In speaking of the discovery made by Waugh in answer to a question if there was anything there, he replied "Yes, diabase," and was prepared to contradict the witnesses of the Claimant who all swore that there was no rock in place at the surface or at the depth of

6 feet at the point of discovery. Later in his evidence he said: "I swear there was rock and I believe it was diabase, but I do not remember examining the discovery." Waugh and Loring had discussed the claim before it was staked, and this was one reason given why he employed him to look for a discovery.

The witnesses for the Claimant spoke of gravel only at the discovery post and at a depth of from 5 to 6 feet could not find rock in place. Loring went over part of the claim and made a casual search for an outcropping of rock but did not see any. From the contour of the land he felt as an engineer, a surface discovery might be made. Waugh knew the claim through Loring and was instructed by him to proceed to the property and see if he could find a discovery. Waugh alleged a discovery and swore to it. Loring said he believed Waugh and made out the application Form 4. Whether the discovery was on the surface or at a depth is not clear. Loring saw rock at Waugh's discovery post which he thought was diabase. What he saw may have been pieces of rock taken out of the hole spoken of by the witnesses for the claimant, or it may have been in place; it is not clear from the evidence. He was not asked as to the nature of the discovery nor was he capable of answering that question as he "didn't remember examining it."

On the one hand it was said there was no surface rock or rock in place at a depth of 6 feet at or near the point of discovery, and on the other a discovery of pyrites and chalcapyrite in quartz in diabase was found and diabase rock seen. It is difficult to reconcile the evidence. I find it hard to believe Mr. Loring would be so untruthful and I feel I must give the affidavit of Waugh the stamp of honesty as I was denied the undoubted advantage of hearing his sworn testimony in open court.

Diabase rock or pyrites and chalcapyrite do not necessarily establish a discovery, but the question is not, was there a valid discovery in fact, but was

Waugh conscious when he made the affidavit of discovery that it was false, or if he was not did he make it without knowing whether it was false or without caring. This was the test laid down by Bowen, L.J., in *Angus* v. *Clifford*, 2 Ch. Div. (1891) at 471. The same test applies to Loring, who procured Waugh to make the discovery. If Waugh honestly believed he had made a sufficient discovery, and told Loring so, who believed him, I think I am precluded from finding fraud. There was no suggestion that Loring asked Waugh to perjure himself, and nothing whatever was said about the character of the invisible Waugh. The solution of the problem would have been settled by the production of Waugh. It appears he was in the court room and to the knowledge of both counsel. No doubt counsel for the respondent felt that it was not incumbent upon him to put Waugh in the witness box, and counsel for the claimant, apparently, did not like to take the chance. While the circumstances leading up to the discovery left upon my mind an impression of want of *bona fides*, the burden of proof had not shifted, and the responsibility of proving fraud was still heavily upon the claimant.

I adopt the language of Bowen, L.J., in *Angus* v. *Clifford*, at page 474:—"We ought not to find fraud against a man, which is a serious and grave thing, unless one is perfectly clear and ready to act upon one's opinion in a matter which affects others so greatly."

It is better that I accept the affidavit made by Waugh as being true and find that Loring believed Waugh when he said he had made a valuable discovery, rather than taint their characters with fraud when conclusive evidence was at hand and not utilized by the interested party who sought to make out his case through fraud. To have seen and heard Waugh would have settled the doubt in my mind. It cannot be said Aman was a party to any alleged fraud:—

Reference to *Derry* v. *Peake*, 14 A. C. 337, and *Smith* v. *Chadwick*, 9 A. C. 187.

Coutts bought the property in April, 1914, and it was not until the 28th of May, 1915, that a Certificate of Record was procured for Claim 17517. If he had acted more promptly his difficulties would not have been so great, and the obstacle presented by the Certificate of Record would not have intervened. Coutts cannot be censured because of his desire to get rid of the mining rights on the lands, but his attack was rather belated. A Certificate of Record is intended to serve the useful purpose of giving stability of title after the lapse of sixty days from recording. To give effect to the intention of the Act the full burden of proof of fraud or mistake should be laid upon the Claimant. It must not be understood that I would seemingly encourage dishonest staking or discovery by making the road hard for the interested party who sought to show fraud, but he must understand the barrier is down after a Certificate of Record has been procured and he faces the necessity of showing a dishonest belief in what was sworn to, or a careless disregard of the honesty of the facts deposed to. I am not blind to the moral code adopted in mining matters. Affidavits are sworn to of discoveries, stakings and work done that the deponent would never dream of making in matters of business outside of mining. It would be well if every prospector or miner would at once realize that there cannot be any distinction or degrees of truthfulness when applied to stakings, discoveries and work performed. The same honesty is required in mining matters as in other business transactions, and it is my aim to require such from all licensees. If Coutts was bound by the agreement made by McQuay with the holders of the claims for settlement of surface rights, then it might be properly argued he was not an interested party within the meaning of the Act and not entitled to attack the Certificate of Record as herein. I do not pass

upon this question as Coutts' right to compensation has as yet to be disposed of in a pending application, and it is sufficient for me to negative fraud in order to dispose of the main issue in this case.

I order that the claim herein be dismissed but without costs.

(THE COMMISSIONER.)

BEAUREGARD v. HEBERT AND BOUVRETTE.

Dispute—Working Conditions—Orders-in-Council Extending Working Conditions—Construction of—When Claims Open.

The claims were recorded on 20th August, 1912, the first three periods of work being performed. Bouvrette staked same properties on 22nd November, 1915, and recorded. Beauregard, the former holder, disputed on the ground that forfeiture had not occurred on 22nd November, 1915.

Held, by the Commissioner,—By Orders-in-Council dated respectively the 17th day of August and 23rd day of October, 1914, the time between the 15th of August, 1914, and the 15th day of April, 1915, both days inclusive, was excluded in computing the time within which certain work under section 78 of the Act was required to be performed. To exclude a period was the equivalent to establishing a time within which no assessment work was required to be done and within which time the provisions of section 78 did not operate.

The practical and sensible construction of the Orders-in-Council in order to provide the relief aimed at was to treat the said periods as excluded; as not existent as far as the operation of working conditions was concerned. Upon that construction it followed the claims were not in default when staked by Bouvrette.

F. A. Day, for disputant.

H. L. Slaght, for respondents.

March 29th, 1916.

THE COMMISSIONER.—Mining claims L-2622 and 2633, situate in the townships of Gauthier and McVittie respectively, in the Larder Lake Mining Division, were recorded on the 20th of August, 1912. The first three periods of work have been performed on each claim, leaving ninety days' assessment work yet to be done.

On the 22nd of November, 1915, the claims were restaked by Alfred Beauregard, as Nos. L-5982 and L-5983, and were filed on the 4th of December and afterwards allowed to be recorded on the 10th of the same month.

The former holders now contend that the claims had not lapsed for failure to perform working conditions, and that the land was not open for restaking on the 22nd of November, 1915.

The last day for the performance of the second year's work was the 20th of November, 1914, and by section 78 (*c*) of the Mining Act of Ontario the holders had one year from that date in which to perform the last period of work which would require its performance by the 20th of November, 1915.

In August, 1914, a petition was addressed to the Honourable the Minister of Lands, Forests and Mines by the miners and prospectors of the district of Timiskaming alleging a fifty per cent. increase in the cost of miners' and prospectors' supplies and inability to secure money for the purpose of prosecuting assessment work upon mining claims in consequence of the condition arising from the state of war then existing. It was urged that the performance of work on unpatented claims should be postponed for a period of three months. The petition was granted and an Order-in-Council issued on the 17th of August, 1914, "to extend the time for performing work under the Mining Act of Ontario on all mining claims in the province for a period of three months from the 15th day of August, 1914, and that in computing the time within which work upon mining claims in the province is required to be performed, the period of time for such extension be excluded, such extension, however, not to change the date from which the next or any succeeding period shall be reckoned for performing work required by the said Act with respect to any such claims."

On the 23rd of October, 1914, a further Order-in-Council was passed,—"that in computing the time within which work upon a mining claim is required to

be performed, the time between the 15th day of November, 1914, and the 15th day of April, 1915, both days inclusive, be excluded.

Upon the interpretation of the second Order depends the answer whether said claims were open for staking on the 22nd of November, 1915, for default of performance of the third year's assessment work.

Section 79 provides:—"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."

By the Order-in-Council of the 23rd of October, 1914, the time between the 15th day of November, 1914, and the 15th day of April, 1915, both days inclusive, is excluded. To exclude a period is the equivalent of establishing a time within which no assessment work was required to be done, and within which time the provisions of section 78 did not operate against the holder of a mining claim.

On the 21st of November, 1914, the time for the performance of the last period of work started to run against the holder; by section 78 (*c*) a full year from that date is allowed for its performance which would mature the work on the 20th of November, 1915. By Order-in-Council, the time between the 15th of November, 1914, and the 15th of April, 1915, is excluded in computing the time for the performance of work, and it then necessarily follows that the holders of mining claims L-2622 and L-2623 were not in default with respect to work to be done, and the claims were improperly staked on the 22nd of November, 1915.

It was urged that the first Order-in-Council reciting that,—"such extension, however, not to change the date from which the next or any succeeding period shall be reckoned for performing work required by the said Act with respect to any such claims," should be read into the second Order-in-Council of October 23rd, 1914. To dispose of this dispute it is not necessary to consider the Order-in-Council of the 17th of August,

1914; the two Orders-in-Council are separate and distinct. Circumstances might arise which might make it necessary to consider the Orders collectively, but the default, if any, took place during the excluded period created by the second Order, and upon its wording and sense the debated point should be disposed of.

The practical and sensible construction of the Orders-in-Council in order to provide the relief aimed at is to treat the period between the 15th of August, 1914, and the 15th of April, 1915, as an excluded period; as non-existent as far as the operation of the Mining Act is concerned.

Because one period of work falls within the excluded period and entitles the holder to eight months extension under the Order-in-Council is not a reason why he should be deprived of a full year for the ensuing year's work by allowing the time to run during the time from which his work started to run and the 15th of April, 1915. To my mind, to deprive him of that right, would be to defeat the object of the Order-in-Council.

If the two Orders-in-Council should be considered together, I would hold that the distinct language of the second Order, which has no reference to "change of date from which the succeeding period shall be reckoned," should prevail over the first Order-in-Council and the time between the 15th of August, 1914, and the 15th of April, 1915, should be excluded.

In any event it might with reason be said that the interpretation I have given the Order-in-Council does not offend the express enactment of the first Order-in-Council that there should be no change of date from which the succeeding period should be reckoned as the starting point of the third year's work is accepted as the 21st of November, 1914, but the period between that date and the 15th of April, 1915, is treated as excluded in compliance with the express provision of the Order-in-Council.

I order that mining claims L-5982 and L-5983 be cancelled, and that the recording fees therefor be

returned to the recorded holder Alfred Beauregard, and I make no order as to costs as the point for determination admitted of much argument.

(THE COMMISSIONER.)

AMAN ET AL. V. COUTTS.

Surface Rights Compensation—Sale of Land Subject to Agreement Fixing Compensation—Agreement not Registered in Land Titles Office at Time of Sale—Caution—Agreement not Binding on Purchaser—Land Titles Act and Registry Act Compared—Compensation Fixed by Commissioner.

C. purchased the land embracing Mining Claims 17517 and 17423 from McQuay, and was informed surface rights compensation had been fixed by agreement between the then owner A. and the owner of the mining rights. The agreement was not placed on record in the Land Titles Office by way of caution, and C. contended he was not bound by it, and asked the Commissioner to fix compensation under sec. 104 of the Act.

Held by the Commissioner,—For the purpose of notice under section 80 of the Land Titles Act, the agreement should have been entered or noted on the record of that office by way of caution. The letter filed in the Recording Office was not notice to C. under the Land Titles Act. The policy of the Act was to simplify titles and facilitate the transfer of land, and a registered owner who bought on the faith of the register was entitled to protection.

Reference to *McLeod* v. *Lawson* (1906), 8 O. W. R. 213 at 220; *Assets Company, Limited* v. *Mere Roihi* (1905), A. C. 176 at 202.

Under the Registry Act priority of registration prevails unless before the prior registration there has been actual notice, but the Land Titles Act does not, apparently, admit of such a qualification. *Rogers* v. *McFarland*, 19 O. L. R. 622.

In view of sections 42 and 80 of the Land Titles Act a *bona fide* purchaser under a registered title would appear to be protected even against express notice of the surface rights agreement which was not registered. *Skill* v. *Thompson*, 11 O. W. R. 339; 17 O. L. R. 186.

Peebles v. *Hyslop*, 30 O. L. R. 511.

Compensation fixed as asked.

Application by E. G. Aman and Huronian Belt Company, Limited, to fix compensation to surface rights by mining operations on Mining Claims 17517 and 17423, situate in the township of Casey.

J. Lorn McDougall, for applicants.

George Ross, for respondent.

5th May, 1916.

THE COMMISSIONER. — Robert Coutts purchased from John McQuay the south half of the north half of lot 6 in the first concession of the township of Casey, in the district of Temiskaming, and received a transfer on the 7th of April, 1914.

On this part lot Mining Claims 17423 and 17517 are situate, and stand recorded in the name of E. G. Aman. They were recorded on the 5th of July and the 3rd of December, 1912, respectively. Certificates of record were procured in September, 1912, and May, 1915.

On the 26th of August, 1912, John McQuay entered into an agreement with E. G. Aman, as follows:—

Sutton Bay, Ont.,
26th August, 1912.

To E. G. Aman and E. M. Loring,
Haileybury, Ont.

Dear Sirs,—I agree to accept twenty-five ($25) dollars as compensation for any damage that may be caused by you to the surface rights of the south half (1/2) of the north half (1/2) of lot 6, concession one (1), Casey township, by your prospecting and mining operations, including drilling holes, and that should you do mining work to the extent of sinking one or more shafts to the depth of one hundred feet or more that you pay me for any land you may occupy for buildings or shafts or for other purposes of mining operations at the rate of thirty dollars per acre for each acre so occupied. I hereby acknowledge receipt of the twenty-five ($25) dollars above mentioned.

Yours truly,
Sgd. John McQuay.

Witness to the signature of
John McQuay.
Sgd. W. I. Waugh.

Before purchasing the lands Coutts was informed by McQuay of the surface rights agreement. Coutts

said he was not interested in the minerals and would take a chance on the owner of the claims continuing mining operations. He had been in occupation of the lands for about six months when he heard that mining operations were to be resumed, and it was at this time he asked McQuay to show him the agreement.

On the 31st of May, 1914, Coutts was written to on behalf of the owner of the claims stating his readiness to abide by the terms of the McQuay agreement and notifying him that he contemplated carrying on mining operations on an acre of land and tendered him thirty dollars in accordance with the terms of the agreement. Coutts persistently refused to allow the owner to proceed with his necessary assessment work and contemplated mining operations. The owner brought the matter before me in the form of a motion for an injunction restraining Coutts from interfering with his mining operations. On the application being heard I ordered it stayed until a notice of claim was filed by Coutts attacking the validity of the claims. The claim was filed and served and came to trial when the mining claims were declared valid and the notice of claim dismissed. I am now dealing with the enlarged injunction motion, which is one for compensation, if any, to be paid Coutts as surface rights owner under section 104 of the Mining Act of Ontario.

Coutts sets up section 80 of the Land Titles Act, R. S. O. ch. 126, as a bar to the owner's right to operate under the terms of the McQuay agreement. While he had actual notice of the McQuay agreement prior to the purchase of the lands and bought subject to it, he contends he was not bound by it as it was an unregistered agreement at the time he received his transfer from McQuay. Section 104 refers to a licensee who prospects for minerals or stakes out a mining claim—or carries on mining operations. Under the Mining Act of 1906, the right to compensation was to be had against the licensee only; now it applies to one who "carries on mining operations," as in this case.

My learned predecessor has held that under the Act of 1906, compensation must be fixed "once for all." *Dodge* v. *Dark* (Price), M.C.C. 44.

The compensation is for, "all injury or damage which is or may be caused to the surface rights by such prospecting, staking out or operations." By section 64 surface rights compensation must be paid or secured before a certificate of record can be issued by the Recorder. The compensation to be fixed is for the present and future damages. Once that is arranged and other requirements of section 64 having been met, then the holder of the claim is entitled to a certificate of record which gives stability of title. The surface rights agreement of the 26th of August, 1912, arranges a present consideration of twenty-five dollars and a fixed sum per acre for further development of the claims. In all respects the agreement meets the requirements of section 104 as to damage, "which is or may be caused to the surface rights."

About the month of September, 1912, the following letter was filed in the Recording Office at Haileybury, no doubt for the purpose of satisfying the Recorder that surface rights compensation had been arranged with McQuay so that certificates of record might issue.

Hotel Canada,
New Liskeard, Ont.

To E. G. Aman and E. M. Loring,
Haileybury, Ont.

Dear Sirs,—This is to acknowledge that I have arranged with you for compensation for any damage that may be caused by mining operations to the surface rights of the south half (1/2) of the north half (1/2) of lot six (6), concession one (1), Casey township.

Yours truly,
John McQuay.

Witness to signature of John McQuay,
W. I. Waugh.

Neither the letter nor the agreement of August, 1912, were on record in the Land Titles Office.

For the purpose of notice the agreement should have been on record in the Land Titles Office and shown against the title to the lands in question. This should have been done by way of caution. The letter filed in the Recording Office was not notice to Coutts under the Land Titles Act.

By section 42,—

"A transfer for valuable consideration of land registered with an absolute title, when registered, shall confer on the transferee an estate in fee simple in the land transferred, together with all rights, privileges and appurtenances belonging or appurtenant thereto, subject to:

(*a*) The incumbrances, if any, entered or noted on the register;

and as to such rights, privileges and appurtenances, subject also to any qualification, limitation or incumbrance to which the same are expressed to be subject in the register, or where such rights, privileges and appurtenances are not registered then subject to any qualification, limitation or incumbrance to which the same are subject at the time of the transfer; but free from all other estates and interests whatsoever, including estates and interests of His Majesty, which are within the legislative jurisdiction of Ontario. 1 Geo. V., ch. 28.

The effect of unregistered instruments is stated in section 80,—

"No person other than the parties thereto shall be deemed to have any notice of the contents of any instruments other than those mentioned in the existing register of title of the parcel of land or which have been duly entered in the books of the office kept for the entry of instruments received or are in course of entry. 1 Geo. V., ch. 28, sec. 80."

The policy of the Act is to simplify titles and facilitate the transfer of land. See Moss, C.J.O., in *McLeod* v. *Lawson* (1906), 80 W. R. 213, at 220. A registered owner who buys on the faith of the register is entitled to protection. A certificate of search dated the 14th of July, 1914 (Exhibit 8), procured from the Master of Titles, was evidence of the then state of title and upon which the registered owner was entitled to rely as the scheme of the Act aims to render the certificate of title conclusive evidence thereof. The sections making registered certificates conclusive evidence of title are too clear to be got over. Lord Lindley in *Assets Company, Limited* v. *Mere Roihi* (1905), A. C. 176, at 202.

Under the Registry Act priority of registration prevails unless before the prior registration there has been actual notice, but the scheme of the Land Titles Act does not, apparently, admit of such a qualification. Section 80 of the present Land Titles Act was formerly section 84 of the Revised Statutes of 1897, with the change of the word "held" to "deemed." The word "deemed" has been interpreted to mean, "adjudged or conclusively considered." *Rogers* v. *McFarland*, 19 O. L. R. 622.

In view of section 42 it would seem that the words of section 80 are strong enough to protect a *bona fide* purchaser under a registered title even against express notice of the surface rights agreement which was not registered. It is not said Coutts was not a *bona fide* purchaser, nor could I so find even if it had been alleged that McQuay had conspired with Coutts to defeat the written agreement of the 26th of August, 1912.

Reference to *Skill* v. *Thompson*, 11 O. W. R. 339; 17 O. L. R. 186.

Peebles v. *Hyslop*, 30 O. L. R. 511.

The obligation was upon Aman, not McQuay, to register the surface rights agreement. Coutts did not see the agreement until after he was in possession for

some time, but he was aware before purchase that the owner of the mining claims had some arrangement with McQuay as to the surface rights. In the view I take of section 80 I am precluded from considering such notice of the arrangement between McQuay and Aman as was given Coutts by McQuay prior to his purchase of the lands. While compensation for surface rights should be a final settlement, it can apparently only be made so against a registered purchaser of the lands by notice through the Land Titles Act by way of caution.

The land is cleared, but not cultivated, where the present operations are desired to be carried on, but in fixing compensation the fact must be considered that the miner will, if an award is made, be entitled to interfere with any part or portion of the surface rights within the boundaries of his claims. The extent of the interference with the surface rights is problematical and no mining operations have been carried on since Coutts has been in possession. The work may, at any time, be suspended and the claims abandoned before patents are applied for.

In justice to the miner, I think a proper disposition of compensation would be to direct payment to Coutts, the patentee of the surface rights, of the sum of five hundred dollars ($500), of which two hundred and fifty dollars ($250) shall be paid on or before further prospecting, working or mining operations are carried on by the holders of the said claims, and a further sum of two hundred and fifty dollars ($250) shall be paid at the issue of a patent or patents, as the case may be, of the mining rights, and I do so award and direct.

Coutts should have his costs of the application to be taxed upon the County Court scale.

(THE COMMISSIONER.)

McRAE AND HITCHCOCK v. JORDAN.

Vesting Order—Section 81 of the Act — Co-owners — Merits— Restaking.

McRae having secured an order extending the time for performance of his co-owner's, H.'s, share of work, and relieving against forfeiture caused by H's default, performed the work and applied under section 81 of the Act for an order vesting the interest of H. in himself.

J., also a co-owner, believing a forfeiture had occurred, staked and applied to have the claims recorded.

Held by the Commissioner—Forfeiture had not occurred when the claims were staked by J., and his application must be refused.

McRae took the proper course to protect the claims against forfeiture and which had the effect of preserving to J. and the other co-owner their respective interests.

J. was not entitled to share with McRae the forfeited interest of H., and an order was made vesting the interest of H. in McRae and declaring the staking by J. to be invalid.

F. A. Day, for applicant.

F. L. Smiley, for respondent.

23rd May, 1916.

THE COMMISSIONER.—It is admitted that the lands were not open when staked by Jordan, and that his application therefor, under the authority of *Beauregard* v. *Hebert* (Godson), M. C. C., page 299, must be disallowed.

All assessment work had been performed with the exception of Hitchcock's share. McRae was under the impression Hitchcock's work would require to be done on or before the 4th day of January, 1916; otherwise a forfeiture would occur. In December he called at Jordan's camp and enquired if he knew Hitchcock's intention in regard to the performance of his work, when Jordan was of the opinion that Hitchcock was procuring an extension of time for its completion. McRae then wrote the Department of the Bureau of Mines, at Toronto, setting out his difficulty, and asking for an extension of time in which to com-

plete Hitchcock's work, and was referred by the Department to the Mining Commissioner. Upon the application of McRae, I issued an order on the 14th of January, 1916, extending the time for the performance of the deficiency of work until the 1st of April, and McRae had the work performed between the 15th of February and the 4th of March, and recorded it on the 15th of March.

Jordan, who held a third interest in the claims, restaked the lands on or about the 5th day of January, 1916, and caused his application to be placed on file in the Recording Office. As the lands were not open when staked by Jordan, his staking was illegal, and it now appears it was not necessary for McRae to have applied for an extension order as the work was not required to be performed before the 15th of April, 1916. The work was performed by McRae at a time it was not in default, but from Hitchcock's letter of the 2nd of February to McRae, it is evident he had no intention of performing his work, nor had he done so on the date of the application on the 16th instant. Jordan now asks to be allowed to share the cost of the Hitchcock work done by McRae, and that an order should be made vesting the Hitchcock interest equally in McRae and himself. I think McRae took the proper method to protect the claims against forfeiture, which had the effect of preserving to Jordan and the other co-holders their respective interests. The restaking by Jordan, if it had stood, would have benefited him only, and his co-holders in the former mining claims would have lost their interests in the land. I think it is now too late for Jordan to ask to be protected by McRae's work. It is a last resort request, and launched after he found that he could not hold the lands under his restaking. It is apparent that he had made up his mind to restake the claims when he thought default would take place, but he did not divulge his intentions to McRae or his other co-holders, neither did McRae tell Jordan that he intended doing Hitchcock's work in order to protect the claims, but

his enquiry as to Hitchcock's intentions was notice to Jordan of McRae's desire to see the work done and the claims kept in good standing. In any event, what McRae did has kept intact the interests of Jordan in the claims and he profits accordingly. If McRae had not performed Hitchcock's work, then a forfeiture would have occurred, and the claims would have been lost to all the interested parties. Jordan's action in restaking the claims would not have assisted them, as he intended to keep them to himself, and it is now found that his staking was illegal, and in the result Jordan should be well pleased if he still has an interest in the claims.

For the performance of the work McRae paid in wages $210, which is not unreasonable. I allow him this amount, also $12.60 personal expenses in connection with the procuring of the extension order for the performance of the work, making in all $222.60, which Hitchcock must pay McRae through the Recording Office at Elk Lake on or before the 10th day of June, A.D. 1916.

I order that the applications of C. F. Jordan for the lands comprised within the boundaries of Mining Claims M.R.—5223 and 5224, and now on file in the Recording Office at Elk Lake, be disallowed and removed from the records of the said claims.

I further order that in default of payment of the sum of $222.60 and costs by Hitchcock to McRae on or before the 10th day of June next, the interest of Hitchcock in the said mining claims be and the same is hereby vested in McRae.

I further order that the respondent Hitchcock pay the applicant, McRae, the sum of $25 as costs.

I make no order as to costs against Jordan.

(THE COMMISSIONER.)

McDONALD v. PINELLE AND BROOKS.

Non-performance of Working Conditions—Forfeiture—Evidence—Reports of Work—Forfeiture of Right to Further Staking—Section 57 of the Act—When Land Open for Staking.

Disputant alleged non-performance of working conditions, and on the 16th of August, 1915, staked the claims of the respondents. The applications were refused by the Recorder on the ground that the time for the performance of the then period of work had not expired when disputant staked. Subsequently, on the 18th of August, and after forfeiture had occurred, disputant, with the consent of the Recorder, restaked the claims.

Held, by the Commissioner—The claims were in good standing until midnight of the 16th of August, and the disputant's staking of that date was abortive. As the land was not "open to prospecting," what the disputant did on the 16th of August did not preclude him from again staking on the 18th. See section 57 of Act.

That reports of work in question filed by the respondent Pinelle were untrue, at least incorrect, and the work had not been performed as sworn to.

Dispute allowed and former claims cancelled.

Dispute by Daniel McDonald against L2681 and L-2682, situate in the township of McVittie, alleging forfeiture and ground open when staked by him, and for an order of cancellation of the said claims.

Parties appeared in person, not being represented by counsel.

30th May, 1916.

THE COMMISSIONER.—C. E. Pinelle is the unrecorded holder of a half interest in mining claims L-2681 and 2682, situate in the township of McVittie, in the Larder Lake mining division. B. T. Brooks is the recorded holder of the remaining half interest, but he has not performed his share of the working conditions and has allowed his miner's license to lapse. His present address in Ontario being unknown, I allowed substitutional service upon him at his last known place of residence in Ontario.

The disputes filed allege non-performance of work resulting in a forfeiture.

On the 5th of December, 1913, Rudolf Pallas filed a notice of intention to perform upon mining claim L-2681 all the work required by the provisions of the Mining Act of Ontario for L-2681, 2682 and 2683. The abstracts of the said three claims so indicated that the work would be performed on L-2681 for the three.

On the 24th of December, 1913, Rudolf Pallas, through C. E. Pinelle, made out and swore to two reports of work done on L-2681 and 2682, at the bottom of which appears, "done on mining claim L-2683 in accordance with notice filed to that effect." The notice of intention filed was for the performance of work on L-2681 for the three claims, and in that respect the reports of work are in error in stating the work was done on L-2683 pursuant to notice of intention.

The reports of work show that Thomas Grier, C. H. Van Aspern and C. E. Yuile each performed 15 days' work on mining claims L-2681 and 2682, or thirty days each, between the 10th of November and the 16th of December, 1913. All of the three men testified that they did not work at any time upon claims L-2681 and 2682, and that the work they performed was done on L-2683. Grier said he did 15 days at one time on L-2683, and later performed about 5 days' work, but that it was all done before the 3rd of November. Yuile was sure he did not do more than 15 days' work on L-2683, and was of the opinion that he worked at times in September and October, but was positive he did no more than 16 days at most. It was proved that Van Aspern was working in the Huronia Mines, Limited, between the 30th of November and the 24th of December, 1913. He stated what work he did for Pinelle was on L-2683 and done before the end of November, and that they did, "in a general way, 60 days' work." Sixty days' work was the amount required to be performed on L-2683 alone, and it is significant that Van Aspern should say that he did 60 days' work and that his co-workers admit not more

than 15 or 16 days each of work on L-2683. As Pinelle worked with the three men and they have sworn to have performed 15 days' work each, that would make the complement of 60 days on L-2683; but what about L-2681 and 2682? If Grier did no more than 15 days, or at most 20 days, Yuile 15 or 16 and Van Aspern 15, then work said to have been performed by them to the extent of 45 days each is untrue and falsely sworn to.

Pinelle is met with the uncontradicted statements of Grier, Van Aspern and Yuile that they worked on L-2683 only, and did no more work than was sufficient, with the work performed by Pinelle, to complete the 60 days' work required on that claim.

The notice of intention indicated the work to be done on L-2681 for the three claims, whereas the work was performed on L-2683, and if I accept the evidence of the workmen, sufficient only was done for that claim. That Van Aspern, at least, did not work between the 10th of November and the 16th of December, was admitted by him, and endorsed by an official of the Huronia Mines, Limited. Yuile and Grier were of the opinion that they worked not later than the middle of November, and were positive that they did not work in December. Even though the reports of work refer to the fact that the work was performed on L-2683, and assuming that the notice of intention inadvertently showed the work to be done on L-2681 for the three claims, the onus, which had shifted to Pinelle of proving the correctness of the several reports of work, was not met. Of a total of 180 days' work which the reports of work show to have been done on L-2681, 2682 and 2683, only sufficient is admitted by the men whom Pinelle swore performed the work, to make a total of 60 days, more or less. Pinelle claimed they were co-holders and worked with him from June to November on these and other claims, and that he grubstaked them during that time, but Pinelle failed to prove through them that they had performed a total of 45 days each as sworn to.

In view of the positive statements of the three men who performed the work, and the conflict between the intention to do work and the reports of work filed, I must find the work sworn to have been performed on L-2681 and 2682 was not so performed and that a forfeiture accordingly occurred on the 17th of August, 1915.

Pinelle procured from the Mining Recorder a certificate of interest which was subsequently continued until trial by the Recorder on the grounds that he was the unrecorded holder of a half interest in the claims and wished to proceed against B. T. Brooks, his co-holder, under section 81 of the Act, for failure to perform his share of the assessment work. The application was not brought to trial as personal service could not, at that time, be effected upon Brooks, and McDonald had informed Pinelle he intended filing disputes which he subsequently did. Brooks did not appear upon the trial of the disputes, and as it was proved he had allowed his license to lapse, his interest, in any event, had been forfeited.

Mining claims L-2681 and 2682 were restaked by McDonald on the 16th of August, 1915. His applications were refused by the Recorder on the grounds that the time for the performance of the second sixty days' work would not expire until midnight of that day. He then asked the Recorder if he might restake the claims, which he stated the Recorder consented to if Pinelle did not apply for an extension of time.

On the 18th of August he redated the posts he had placed on the claims on the 16th. According to the records the claims were in good standing until midnight of the 16th, and his staking of that date was abortive. By section 57 of the Mining Act of Ontario, a licensee who stakes land "open to prospecting," and fails to record, shall not thereafter be entitled to again stake out the same lands unless he notifies the Recorder in writing of his staking and abandonment, and procures a certificate that he acted in good faith. This section does not apply in this case as the lands

were not open for prospecting on the 16th of August, as far as the records showed. It has now been proved that forfeiture occurred in December, 1913, but that fact had not been proved nor was it apparent when McDonald staked on the 16th of August, 1915.

While McDonald swore to a discovery on the 18th of August, which in fact was made on the 16th, and adopted his stakes of the 16th for the purpose of his staking on the 18th, I do not think I should find his staking irregular. Between the 16th and 18th no intervening interests had arisen and the equities will be served if I find his stakings of the 16th and 18th constituted one complete staking, and done in good faith.

Mr. Pinelle attacked the McDonald discovery through McDonald, and by way of cross-examination he did not tender any evidence as to the insufficiency of the discovery but contented himself with the admissions obtained from McDonald in that regard. I do not pass upon the question of discovery. The issue before me was the non-performance of work on the part of the holders of the claims in question. Whether McDonald has a sufficient discovery or not was not pertinent to the disposition of the case. Assessment work is carelessly sworn to without consideration of the date or month of its performance, and it may be that the work in this case was performed, but inadvertently and incorrectly recorded, but as Pinelle kept a record of the time the men worked he should have produced it at the trial and met the evidence of Grier et al., and in its absence the reports of work and the evidence of the men who have sworn to have performed it must be my guide.

I order that mining claims L-2681 and 2682, situate in the township of McVittie in the Larder Lake Mining Division, be and the same are hereby cancelled.

I further order that the application of Dan McDonald for the same lands now on file in the Recording Office at Matheson be placed on record.

(THE COMMISSIONER.)

WHITING v. MATHER.

Staking — Sufficiency of — Dispute — Refusal by Recorder to Hear Evidence—Appeal to Commissioner—Application of Sections 57 and 58 of the Act.

On the 7th July Mather put up a discovery post, nothing more, and continued to do work on the property until the 31st. On the 9th of August he learnt that the claim had been staked by Whiting. M. secured a certificate from the Recorder under section 57 of the Act, completed his staking of July on the 12th August and recorded the claim. W. tendered his application on the 10th of August, which was subsequently refused—W. then disputed. The Recorder, for the reason given that "no material had been put in to show why the above claim is valid," refused to hear the dispute. From this decision an appeal was taken to the Commissioner.

Held, that W. had a remedy by appeal from the decision of the Recorder refusing to record his application, but he was not prohibited from attacking the M. staking by way of dispute. The refusal of the Recorder to hear the dispute for the reasons given was not well founded. It was not a case of an isolated unsubstantial technicality but a series of defective acts, making on the whole an invalid staking by M.

A discovery and a post to mark it without anything more is not a compliance with section 54. Neither sections 57 or 58 were helpful in making valid what M. did on the 7th of July and were improperly applied by the Recorder.

The Mining Act, as applied to staking, is made elastic by section 58, but the section must be carefully applied.

The stakings by "M." of July and August were indistinct and neither of them complete or in compliance with the Act.

Appeal to the Commissioner from the decision of the Recorder to have declared mining claim K-642, situate in the Kenora Mining Division, invalid.

J. F. McGillivray, for appellant.

J. S. Allan, for respondent.

6th October, 1916.

THE COMMISSIONER.—Location 314-P comprises an irregular area of land of fifty-seven acres partly bounded on the north and south by the waters of Moore and Andrew Bays. The claim was surveyed in 1890 but it was not patented and forfeiture occurred.

Mr. D. L. Mather is liquidator of the Dryden Timber and Power Company, Limited, whose mill is at Dryden, in the district of Kenora. He was aware that soapstone was required for the purposes of the company and was being obtained from West Virginia in the United States of America. He knew that soapstone had been discovered some years ago in the Kenora district, and no doubt had this particular location in mind, as on the 7th of July, 1915, he went directly to it, found a deposit of soapstone and put up a discovery post upon it on which he wrote his license number, name and date of discovery. Nothing more was done at that time towards completing a valid staking of the lands. Mather, in an affidavit filed with the Mining Recorder at Kenora, of record in his office, stated he was under the impression that having made a discovery and placed a discovery post thereon he had legally acquired the lands referred to as surveyed location 314-P, and immediately started four men to work on the property. The work was continued until the 31st of July, when forty tons of soapstone had been taken out and shipped to the mill at Dryden.

On the 9th of August he returned to the property and found there a Mr. Kendall, who informed him that the claim had been staked as he (Mather) had not legally staked it. Whiting, the appellant, claimed he had the location surveyed in 1890, and was the original discoverer of it.

Mr. Mather returned to Kenora, consulted his solicitor and attempted to cure his abortive staking of the 7th of July by the application of sections 57 and 58 of the Mining Act of Ontario. On the 12th of August he procured from the Recorder a certificate based upon the affidavit I have referred to, that he had "acted in good faith and for no improper purpose in failing to complete and record his staking within the prescribed time." This certificate was given by the Recorder, believing it to be effective under section 57. On the 13th of August the Recorder accepted and recorded an application from Mather for the location 314-P, in which

it was stated the claim was "staked out, the lines cut and blazed thereon and completed on the 12th day of August, 1915."

Mr. Whiting, on the 10th of August, tendered the Recorder an application for "the east part of old mining location 314-P on Pipestone Portage, Lake of the Woods." The land being then open, the Recorder accepted the application, and received from Whiting the recording fee and his miner's license. The application was prepared by Mr. Spry, the Recorder, under instructions from Whiting, and the latter prepared the sketch attached to the application. On the 13th of August the Recorder wrote Whiting to stay assessment work until further notified, as "there is another staking and application showing prior discovery to the lands staked and applied for by you." Whiting replied on the 16th, intimating his surprise at the letter received and professing a preparedness to perform the necessary assessment work. On the 18th the Recorder wrote Whiting that his application had been refused and returned the recording fee and his miner's license. On the 20th of September Whiting filed a dispute which was replied to by a letter from the Recorder on the 2nd of October, requiring Whiting to file "evidence by affidavit in support of your contention that this claim is invalid." Mr. Whiting then consulted his solicitor and a further dispute was filed on the 8th of October in which it was reiterated that the Mather claim then on record as K-642 was invalid on account of insufficiency of staking, and that the lands applied for were open for staking at the time the application therefor had been accepted. By letter dated the 12th of October Mr. Spry refused to consider the dispute or allow it to be entered against the claim upon the grounds, "no material has been put in to show why the above claim is invalid." From this decision the appellant appealed to the Mining Commissioner by notice of appeal dated the 20th of October.

A preliminary objection was taken by counsel for the respondent that the appellant's proper procedure

was by way of appeal against the decision of the Recorder refusing to record the application and that he could not attack by way of dispute. It is quite correct, he had a remedy by way of appeal from the decision of the Recorder of the 18th day of August, but he was not precluded from attacking the validity of the Mather staking by way of dispute. The dispute having been formally disposed of by the Recorder he is properly before me by way of appeal from the Recorder's decision.

The several disputes filed were sufficient in form and substance to disclose the issue and the disputant was entitled to adduce evidence in support thereof, and the Recorder's duty was to give his decision thereon under the jurisdiction conferred upon him by section 130 of the Mining Act of Ontario. The refusal by the Recorder to hear the disputes for the reasons given was not well founded under the Act.

That Whiting, on the 6th day of August, had a right to stake the east part of old mining location 314-P, being lands open for staking, I have no doubt.

The respondent attacks the appellant's staking. On the 6th of August Whiting put up a discovery and No. 1 post, and blazed a line from the No. 1 to No. 2. He was not sure how to properly stake the part of the claim he wished to be recorded for, so returned to Kenora on the 7th and consulted the Recorder. Sunday intervening, he returned to the property on the 9th and finished the staking. He applied for the "east part of old mining location 314-P, situate on Pipestone Portage, Lake of the Woods." For the outlines of the claim the applicant refers to the sketch attached. Mining location 314-P does not take in the land under the waters of Andrew and Moore Bays, but follows the shore lines where it touched the waters of the bays. The sketch, which is part of the application filed by Whiting, includes land under the waters of Andrew and Moore Bay, and in this respect conflicts with the

land applied for which is the "east part of old mining location 314-P, situate on Pipestone Portage, Lake of the Woods." It is for this and other apparent inconsistencies, which were not cleared away at the trial, that I, upon notice to both parties, requested the Mining Recorder to visit the property and report upon the situation of the posts put up by Whiting and what was written upon them. This was done on the 30th of December last in the presence of Whiting, Kendall and Albert McMeekin, O.L.S. Mr. Spry, the Mining Recorder, has filed with me his report, and Mr. McMeekin prepared a plan showing the lines and position of the claim as staked by Whiting. A blue print of the plan and a copy of the report were sent to counsel for the interested parties. Counsel for the appellant asked to be allowed to have a surveyor's plan filed in answer to the report of Mr. Spry, and the plan prepared by Mr. McMeekin, and in order that full latitude should be allowed counsel to place all the facts on record I took further evidence at Kenora on the 23rd day of June last.

Whiting did not follow the surveyed lines. His No. 1 is north of and his No. 2 to the north-west of the north-east and south-east corners of the location. Instead of following along the southern boundary of the surveyed location his line from the No. 2 post runs in a north-westerly direction until it reaches a contour of Andrew Bay at a point five chains north from a point where the south boundary of the surveyed claim running westerly is in contact with the shore of Andrew Bay. At that point he put up a witness post which on his sketch he indicates as post No. 3. The witness posts at the points shown on the sketch as Nos. 3 and 4 posts indicate an intention to take in part of the land under the water of the two bays, and his sketch confirms this. Instead of following the blazed or surveyed line from the No. 1 of the old location in a westerly direction until its contact with Moore Bay, his line follows to the south in the shape of a half moon. His No. 1 post is without a

name, date of discovery or license number. Two of the witness posts were standing trees and did not conform with the requirements of sub-section (3) of section 54 of the Mining Act of Ontario. Only the No. 1 and the discovery post were said to have been put up on the 6th of August, whereas one of the witness posts is marked as of that date.

I can appreciate that Whiting would have some difficulty in following the true lines of the old location on account of the lapse of time since the location had been surveyed with the consequent difficulty in finding the corner posts. However, more care would have disclosed, as it did fo McMeekin, one of the old posts on the south side of the location and from which Mr. McMeekin got his directions.

Whiting's application is for the "east part of old location 314-P, situate on Pipestone portage, Lake of the Woods." The staking sketch and evidence show an intention to leave the true lines of the location applied for and place the No. 3 and 4 posts in Andrew and Moore Bays so that the application contradicts the sketch and the actual staking. That the inclusion of land under the water would give Whiting more than forty acres is evident. This conflict of staking with the application as filed could be cured by the application of section 59 (5). The distance between the discovery and the No. 1 posts is inaccurately stated in the application and on the posts, but this is not of itself fatal to the staking as the mistake would be excusable on account of water intervening between the posts, making its actual measurement somewhat difficult. I cannot disregard Whiting's failure to properly inscribe on post No. 1 the requirements of section 54 (*c*), nor his breach of section 54 (3), which specifically states that a stump or tree may be used as a post if cut off and squared. Neither of the trees were cut off, and I find no sufficient reason for the neglect.

Taking the staking as a whole, it was a very imperfect one. It is not a case of an isolated unsubstantial technicality but a series of defective acts, making in

the whole an invalid staking. It has not been a substantial compliance, as far as circumstances would reasonably permit, with the requirements of the Act, consequently section 58 does not properly apply.

Mather's staking was a meagre one; a discovery and a post to mark it is not a compliance with section 54. Neither sections 57 or 58 were helpful in making valid what Mather did on the 7th of July. The purpose of section 57 is to prevent blanketting, and section 58 was improperly applied to the facts in the case. It is very unfortunate that Mr. Mather started out to stake a claim without being seized of the necessities of staking. The Mining Act, as applied to staking, is made elastic by section 58, but this section must be carefully applied. Its indiscriminate application to defective stakings would undermine the strict requirements of the Act and certainly cannot be used in this case. Because Mather did not know how to stake a claim does not excuse him.

Both parties urge strong moral rights. I think it proved that Whiting and his associate, Kendall, were interested in location 314-P as far back as 1890, and it would appear that then or later Mather was asked to take an interest in it. The land has been in the Crown for many years since then, and it was open for appropriation by either Kendall or Whiting if they desired to stake it. They rested on their oars until Mather proved it possessed a marketable value, and then took advantage of the weakness of his staking to appropriate it for themselves. I will not say they had not such a right or that they should be condemned for taking advantage of an opportunity which presented itself, as such is the business life of the world to-day, but it does, nevertheless, weaken their moral claim.

I feel forced to judge the Whiting staking strictly. He was not the first discoverer, as far as the year 1915 is concerned, at which time the land was in the Crown, and it is only by a successful attack upon Mather's staking that he would have succeeded upon going upon record for the same land, provided his applica-

tion and staking were regular. If I condone Whiting's many imperfections of staking and applied the saving clauses of the Act, I feel I would be doing Mather an injustice.

What Whiting did must be judged by the same standard that he expects me to apply to the Mather staking: "He who seeks equity must do equity."

Mather made two attempts at staking as of the 7th of July and the 12th of August, each distinct and isolated, and neither of them complete or in compliance with the requirements of the Mining Act, nor can they be assumed as one staking being bad "*ab initio*": section 55. I regret the necessity of declaring the land open for staking; I would have preferred that one of the litigants should have succeeded in upholding his staking.

Section 140 requires, "The Commissioner shall give his decision upon the real merits and substantial justice of the case," and I believe I have done so.

As to costs,—Whiting's appeal against the decision of the Recorder refusing to accept his application and placing the application of Mather on record succeeds, but he has failed under attack to show a valid staking. While he succeeds in part his costs would be offset by the costs to Mather upon his attack upon the Whiting staking, which in effect was a separate dispute but tried by consent in conjunction with the Whiting appeal. There will be no costs to either party.

(THE COMMISSIONER.)

MURPHY v. ROWAN.

Dispute—Forfeiture—When Occurred—Claim not Marked Cancelled when Staked.

The marking of a claim as cancelled by the Recorder is merely a record of forfeiture, not the Act itself. Under section 84 of the Act of 1914 forfeiture occurs "without any declaration, entry or act on the part of the Crown or of any officer"—section 84 of the Act of 1908 as amended by Geo. V., chapter 26, section 31 (2).

The dispute was referred by the Mining Recorder to the Commissioner for adjudication, the contention being that mining claims L-6526 and L-6527, situate in the township of Teck, should be declared invalid, the lands comprised therein not being open when staked.

J. M. Hall and *E. W. Kearney*, for disputant.
F. L. Smiley, for respondent.

6th October, 1916.

THE COMMISSIONER.—The disputes herein were referred to me for adjudication by the Mining Recorder at Matheson.

The disputant's sole contention is that mining claims L-6526 and 6527 should be declared invalid, the lands comprised therein not being open for staking when staked.

It is contended that before a claim has lapsed, been abandoned or forfeited, it must be marked "cancelled" upon the record of the claim by the Recorder pursuant to section 85 (3) of the Mining Act.

Mining claims L-2253 and 2254, situate in the township of Teck, in the Larder Lake mining division, were recorded on the 17th of November, 1911; all working conditions were performed. The holder had until the 17th of July, 1916, in which to apply and pay for patents to the lands, which was not done, and on the 18th of July the same lands were staked on the license

of Eugene Rowan, and recorded in his name as mining claims L-6526 and 6527 on the 29th of July, and on the same day the Mining Recorder marked the former mining claims L-2253 and 2254 cancelled on the records.

On the 27th of August R. Y. Campbell staked the same lands on behalf of J. A. Murphy and tendered his applications therefor to the Recorder, who refused to record them on the ground of the previous staking and recording of mining claims L-6526—6527 by Rowan on the 18th of July previous.

By section 34 of the Mining Act a licensee may stake out a mining claim on Crown lands not at the time,—

(*i*) "Under staking or record as a mining claim which has not lapsed or been abandoned, cancelled, or forfeited."

By section 84 of the Mining Act,—

(I) "All the interest of the holder of a mining claim before the patent thereof has issued shall, without any declaration or act on the part of the Crown, or by any officer, cease and the claim shall forthwith be open for prospecting and staking out."

(*e*) "If the application and payment for the patent required by sections 106 and 107 are not made within the prescribed time."

Patents not having been applied for by the 17th of July, a forfeiture "*ipso facto*" occurred. The words, "without any declaration, entry or act on the part of the Crown or by any officer," were added to section 84 of the Act of 1908 by 9 Edward VII., cap. 26, section 31, sub-section (2) (1909), and thereby removed any doubt as to the effect of section 85 (3) of the Act of 1908, now 85 (2), requiring cancellation by the Recorder after forfeiture or abandonment upon the express language of section 84 as to when forfeiture took place.

The marking of a claim as cancelled by the Recorder is merely a record of forfeiture; not the act itself. To hold that a mining claim is not open for staking until marked "cancelled" on the records would be to defeat the express language of section 84 of the Act. A Recorder should observe and follow the directions of section 85 (2), as it is expedient that all lands open for staking should be made known and publicly advertised by posting up in the Mining Recorder's office. To allow the contention of the disputant, would, for many reasons, seriously interfere with prospecting and staking out.

I order that the dispute filed by J. A. Murphy against mining claims L-6526 and 6527, situate in the township of Teck, in the Larder Lake Mining Division, be and the same are hereby dismissed with costs fixed at $25.

(THE COMMISSIONER.)

HAMILTON v. JAMES.

Default in Working Conditions—Relief from Forfeiture—Dispute.

The applicant applied for relief from forfeiture and at the same time upon consent filed a dispute against the claim staked by the respondent.

Held:—It is not intended that the Mining Recorder should, under section 80 of the Act, grant an extension of time on the plea of illness of the holder who did not expect or desire to do or perform the work personally.

The applicant had been allowed a three months' extension of time for the performance of the preceding period of work, and this indulgence, no doubt, encouraged a belief that extensions were easily obtained, which is not the fact, and must be based upon substantial grounds contemplated by the Act.

Upon the evidence, it could not be found that the respondent had not made a valuable discovery, but as he had staked in the face of section 85 and upon the merits, the application for relief was granted upon terms.

Application by J. W. Hamilton for relief from forfeiture with respect of mining claim L-2881, situate in

the township of Bernhardt, in the Larder Lake mining division.

G. G. T. Ware, for applicant.

F. A. Day, for respondent.

11th November, 1916.

THE COMMISSIONER.—The holder of mining claim L-2881 has applied under section 85 of the Mining Act of Ontario for relief from forfeiture, the claim having been cancelled by the Mining Recorder on the 22nd of April, 1916, for non-performance of the last period of work within the time required by the Mining Act and Orders-in-Council having reference to extensions of time for the performance of working conditions.

On the 22nd of April, 1916, the same claim was staked by O. Chenette as L-6245, and on the 1st of May by H. W. James, the respondent herein, who filed a dispute against the Chenette staking which was heard by the Mining Recorder at Matheson on the 12th of May and disposed of in a written judgment dated the 15th of June, in which the Chenette staking was declared invalid; mining claim L-6245 cancelled and the application of James for the same land recorded as L-6256-1/2,

The applicant, at the hearing, wished to be allowed to attack the James discovery, which was permitted upon consent of the respondent, James, and upon his filing a dispute in the regular way, which has now been done. The application for relief from forfeiture and the dispute were then heard together.

I feel that the application should be dealt with strictly on its merits, and do not therefore think it advisable to pass upon the validity of the discovery made by James other than to say that he has sworn to a valuable discovery of mineral in place in his affidavit of discovery filed with his application for the lands, which has been supported by the evidence tendered at the trial, and while I am in some doubt as to the strict

validity of the discovery and could only be perfectly satisfied by a report of a Mining Inspector or other official of the Crown to be appointed by me, I do not deem it advisable to have this done, as it would properly entail an inspection of the discovery made by Hamilton and might in the result have the effect of opening the land for restaking at a loss to both litigants. I feel James' discovery has sufficient merit to permit him to say the application of Hamilton for reinstatement of the former claim L-2881 should not be granted unless upon reasonable terms of compensation.

The Hamilton claim is in default for non-performance of the last period of work which should have been done not later than the 16th of April last. On the 10th of February last Hamilton wrote Mr. Hough, Mining Recorder at Matheson, from Fort Wayne, Indiana, U.S.A., that he was ill and pointed out the difficulty of performing assessment work in the winter and asked for a three months' extension of time. He did not hear from Mr. Hough until the 3rd of May, when he was advised the claim had been cancelled and restaked.

It would appear that Hamilton, although he did not receive a reply from Hough to his letter of the 16th of February, believed the extension had been granted, and on the 2nd of April wrote his agent, Hohenauer, to proceed with the work. From the evidence I am satisfied Hamilton intended to complete the work required to be done upon the claim, but improperly assumed that he could and would receive an extension of time upon an application based on illness. I do not think it was intended that the Mining Recorder should, under section 80, grant an extension of time on the plea of sickness to one who did not expect or desire to do the work for himself. The previous work caused to be done by Hamilton was by contract and he had no intention of personally performing the work in question, so that the Mining Recorder might properly have refused his application. What Hamilton really wanted

was time, not from sickness but from monetary or other reasons, as the plea of working in the winter was not sufficient under the circumstances as it could have been done in the preceding fall. He had been allowed a three months' extension for the performance of the second period of work, and this indulgence, no doubt, encouraged a belief that extensions were easily obtained. His neglect to live up to the requirements of the Mining Act resulted in the Chenette and James staking, and the dispute between these two men with loss of time and money to both of them. James has defended his rights to the land as against Chenette and succeeded, and if Mr. Hamilton is now to be relieved equity requires that he must pay James a reasonable compensation. I do not think that Hamilton should lose the claim as his actions throughout justify the belief that he wished to patent the claim. James was legally justified in staking the claim but did so in the face of sections 85 and 86, which allowed an application for relief from forfeiture on the part of the former holder.

If Hamilton pays to James through his solicitors, Messrs. Day & Gordon, of Haileybury, the sum of one hundred and fifty dollars ($150) without costs, on or before the 10th day of December next, I will issue an order reinstating mining claim L-2881 and extending the time for the performance of the last period of work until the 1st day of July, A.D. 1917, but such extension of time, if given, shall not have the effect of further extending the time in which to take out a patent.

(THE COMMISSIONER.)

(THE APPELLATE DIVISION.)

11 O. W. N. 322.

NEILLY v. LESSARD.

Staking — Unsurveyed Territory—Boundaries— Conflicting Priority.

Owing to confliction and overlapping, the holders of Mining Claims C.945 and C.1009 were refused patents until the Mining Commissioner fixed their respective boundary lines. L. contended he had priority of staking.

All that either N. or L. were entitled to according to their applications, were claims 20 x 10 chains containing 20 acres each.

That the eastern and western boundary lines as laid down and staked by both claimants, exceeded in length that applied for and allowed by the regulations of the Department of the Bureau of Mines in respect to staking claims in the Gillies Timber Limit, and that of the Mining Act, but in the result N. had staked 19.5 and L. 24.13 acres.

That section 59 (5) applied and avoided an invalidity.

The Act should not be strictly applied as against N., as he had priority of discovery and staking. That while L. was an adversely interested party, if he had staked the land applied for there would not have been a confliction of lines.

On appeal to the Appellate Division,

Held, by the Second Divisional Court, "That what a discoverer is entitled to is twenty acres laid out in the manner imperatively and minutely (with diagram) prescribed by the Act.

The provisions of section 59 (5) added by 4 Geo. V. ch. 14, section 2, meant that, "Notwithstanding the fact that the discoverer has not laid out his claim in the way in which the Act requires, he may in the circumstances there provided for have that which the Act so gives to him, not that which he has inaccurately laid out.

F. A. Day, for disputant.

Respondent in person.

7th December, 1916.

THE COMMISSIONER.—The holders of Mining Claims C-940 and C-1009 have applied for patents which have not issued owing to confliction of boundary lines. The matter is now before me on the application of Balmer Neilly, holder of Mining Claim C-940.

Both claims are part of block 2, situate in the Gillies Timber Limit, in the Coleman Special Mining Division.

Neilly, in his application to record claim C-940, applied for the north-east quarter of the east half of the south-west quarter of block 2, with his eastern and western boundaries twenty chains, and his northern and southern boundaries ten chains each, and stated that a discovery had been made upon the said lands at one second after 12 o'clock on the 20th day of August, A.D. 1912.

Felix Lessard staked and applied for what is now known as C-1009, on the 20th of August, 1912, and made a discovery at five minutes past twelve a.m. on the same day. In his application to record, he described the lands staked as being the south-west quarter of the east half of the south-west quarter of block 2, the outlines of the claim being 10 x 20 chains. Upon a survey of the two claims being made, it appears that part of the northern boundary of C-1009 extended over and above C-940 at the south-east quarter thereof to the extent of a half an acre or thereabouts.

On the 2nd of August, 1912, by an Order-in-Council approved by His Honour the Lieutenant-Governor, this and other portions of the Gillies Timber Limit on the Montreal River in the Coleman Special Mining Division were ordered to be reopened for prospecting and staking out for sale or lease under the Mining Act of Ontario, on and after Tuesday, the 20th day of August, A.D. 1912, and sections 21 and 51 of the Mining Act were ordered to apply thereto. On the 3rd of August, 1912, by instructions appended to the said Order-in-Council, the Minister of Lands, Forests and Mines directed that claims in blocks which had not been subdivided should in no case overlap the boundaries of the block, that is, a claim should be staked wholly within a particular block, and not include any portion of an adjoining block or blocks, and that claims were not to exceed twenty chains long from north to south, or ten chains wide from east to west. The blocks in the Gillies Timber Limit were divided into areas of a mile square, having stakes placed on the north and south boundaries thereof at intervals of ten

chains, and on the east and west boundaries of twenty chains apart, but the blocks were not subdivided into quarter sections or sub-divisions. Section 51 states the area of a mining claim in unsurveyed territory, but sub-section (c) and (d) of section 51 do not apply as the claims were not subdivided into quarter sections or sub-divisions; consequently the land staked was in unsurveyed territory. (*Ledyard and Powers* v. *Abode* (Godson), M. C. C., page 60.

The Government Surveys Department in Toronto does not recognize such quarter sections or subdivisions as applied for herein as existing in the Gillies Timber Limit. When a survey of a mining claim within the limit is received by that Department, it is placed on their office map in such a position as the survey indicates, regardless of the quarter section mentioned in the application. It seems to have been the impression amongst licensed prospectors that mining claims staked in the Gillies Limit must be applied for as a particular quarter section, and the difficulty experienced by them in definitely locating the particular quarter section they thought they had staked has led to many disputes.

Section 51 of the Mining Act of Ontario states that a claim in unsurveyed territory shall be a rectangle of twenty acres having a length from north to south of twenty chains, and a width from east to west of ten chains, and the regulation attached to the Order-in-Council of the 2nd of August, 1912, when the Gillies Limit was opened for staking, required a licensee to conform to section 51 when staking a claim.

Both Neilly and Lessard applied for claims 20 x 10 chains containing twenty acres, but Neilly's claim as staked had a length from north to south of 23.651 chains on the east and 22.095 chains on the west boundaries, and 10.084 and 7.05 chains on the north and south boundaries respectively, embracing an area of 19.5 acres. The outlines of the Lessard claim as staked were on the east 21.18 chains, on the west 22.26 chains, and on the north and south 10.38 and 12.37

chains respectively, with a total acreage of 24.13 acres; so that both Neilly and Lessard contravened the regulations issued by the Department and section 51 of the Mining Act with respect to the length of the outlines of their claims, and Lessard also offended with respect to the total acreage staked, he having exceeded the acreage allowed to be staked by 4.13 acres.

The lands being in unsurveyed territory, it was not necessary for either applicant to apply for a particular section, and although they did so, and their stakings were not wholly within the lands applied for, their respective discoveries were within the lands as staked and their claims are not invalid in that respect.

Neilly had a surveyed line as the northern boundary of his claim, from which he could have accurately run a north and south line of twenty chains, and Lessard had a southern surveyed line from which he could have run an accurate north and south boundary of twenty chains, taking his southern line as his starting point, and running north a distance of twenty chains, but the fact that the limit was thrown open for staking by the Department at midnight on the 20th of August, 1912, and the territory therein embraced being supposed to contain valuable mineral in place, necessarily induced a rush, and more or less confusion arose in fixing the exact dimensions of the boundary lines, and the case now before me is one of the many confusions that have arisen with respect to the land staked in the Gillies Timber Limit.

Lessard contends that even though Neilly staked at one second past 12 o'clock a.m., and had a priority of a little more than 4 minutes over his own staking, that inasmuch as the Neilly discovery was situate 1,250 feet from the number 1 post, that by the time he had blazed a sufficient line and erected his discovery and number 1 posts, he would have completed the staking of his claim, as his discovery was only 200 feet from his number 1 post, and, consequently, he had completed his staking first, and was entitled to the

small piece of land in dispute. This contention cannot be allowed, as there is no reliable evidence that he completed his staking before Neilly; or, even if he had done so, the fact remains that Neilly had priority, if I am to accept the time of his staking as being accurate, and by section 55 of the Mining Act, had a reasonable time in which to complete the staking out of the claim. All that either Neilly or Lessard were entitled to after placing their discovery posts was a claim of 20 x 10 chains, containing twenty acres, and while Neilly had priority of staking, he was only entitled to extend his lines from north to south twenty chains, and the same remark applies to Lessard. I find that both have exceeded the limits allowed by the regulation and Mining Act. It is also to be noted that in the result Neilly staked less than twenty acres, and Lessard more; so that in arriving at a decision as to who should be entitled to the land in dispute, I have to look more at the equities of the case as they are both offenders. In other words, if Lessard had run an accurate line from the fixed survey line at the south of his claim twenty chains north and kept within the quarter section he applied for, he would not have conflicted with Neilly, and the same remark applies to the Neilly staking. If there had been an accurate staking by both licensees, then the southern boundary of the Neilly claim would have met or been in the immediate vicinity of the northern boundary of the Lessard claim.

If I were to order the east and west lines of the Neilly claim to be shortened so as to meet the requirements of the Act, I would be in duty bound also to require the Lessard claim to conform with the Act before a patent issued.

Sub-section (5) of section 59, in respect of the number of acres staked, and the failure to set out in the application, sketch or plan filed the actual area staked, applies both to the Lessard and Neilly stakings, as in one case there is an inclusion of more and

in the other of less, and both applicants wrongly described the land staked, and had it not been for that provision, both claims might have been declared invalid, as the foundation of the right which a staker acquires, or may acquire, is the claim which he files with the Recorder, and the claims filed by both applicants included twenty acres with the dimensions of twenty chains on the east and west and ten chains on the north and south. (*Olmstead* v. *Exploration Syndicate of Ontario, Limited,* 5 O. W. N. p. 8.)

I am required to give my decision upon the real merits and substantial justice of the case, and in view of the fact that both parties before me have not strictly complied with the requirements of the Mining Act, or staked their claims in conformance with the regulation of the 3rd of August, 1912, I cannot equitably, nor can I strictly apply the Mining Act as against Neilly and allow the fraction in dispute to be included in the Lessard claim. Rather than order that the lines of the claims staked should be cut down to comply with the requirements of section 51 of the Mining Act, I prefer as between Neilly and Lessard to uphold the staking of Neilly as shown in the plan of survey made by G. F. Summers, O.L.S., on the 8th day of July, 1913, and filed as exhibit 1 herein.

I have had recourse to the plan, on file in the Department, of the Gillies Timber Limit showing the claims staked and their situation on the plan, and I find that in nearly every case the lines have exceeded the allotted lengths, but patents have issued as no adverse interests had appeared. In this case there is an adverse interest to the Neilly staking, and the lands were practically staked simultaneously; but the adversely interested party was in as much default as Neilly, and "He who comes into a Court of Equity must come with clean hands."

I order that Mining Claim C-940 as shown on the plan of survey prepared by G. F. Summers, dated the

8th day of July, A.D. 1913, stand as recorded, and that a patent issue thereof upon application.

The appellant appealed from this decision to the Appellate Division.

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

17th January, 1917.

MEREDITH, C.J.C.P.—Appeal by Felix Lessard and others from a decision and order of the Mining Commissioner upon a confliction of boundary lines between mining claim C-1009, being the south-west quarter of the east half of the south-west quarter, block 2, Gillies Limit, in the Temiskaming Mining Division, and mining claim C-940, being the north-east quarter of the east half of the south-west quarter of the same block 2.

Balmer Neilly, in his application to record claim C-940, applied for the north-east quarter of the east half, with his eastern and western boundaries 20 chains, and his northern and southern boundaries 10 chains each, and stated that a discovery had been made upon the said lands at one second after 12 o'clock on the 20th August, 1912.

Felix Lessard staked and applied for C-1009 on the 20th August, 1912, and made a discovery at 12.05 a.m. on the same day. In his application to record, he described the lands staked as being the south-west quarter of the east half, the outlines being 10 by 20 chains.

Upon a survey of the two claims being made, it appeared that part of the northern boundary of C-1009 extended over and above C-940 at the south-east quarter to the extent of half an acre or thereabouts.

The Mining Commissioner, in written reasons for his decision, said that neither party had strictly com-

plied with the requirements of the Mining Act, R. S. O. 1914, c. 32, and neither had staked his claim in conformity with the regulation of the 3rd of August, 1912; and, therefore, the Act could not be strictly applied as against Neilly so as to allow the fraction in dispute to be included in the Lessard claim; and he ordered that mining claim C-940, as shown on the plan of survey prepared by G. F. Summers, dated the 8th July, 1913, should stand as recorded, and that a patent should issue therefor.

At the conclusion of the argument, the judgment of the Court was delivered by MEREDITH, C.J.C.P., who said that what a discoverer is entitled to is 20 acres laid out in the manner imperatively and minutely (with diagrams) prescribed by the Act. (See s. 51 *et seq.*). The provision upon which the respondent relied, s. 59, s.-s. (5), added by 4 Geo. V. c. 14, s. 2, meant only this; that, notwithstanding the fact that the discoverer has not laid out his claim in the way which the Act requires, he may in the circumstances there provided for, have that which the Act so gives to him, not that which he has inaccurately laid out. And, that being so, the ruling of the Commissioner was wrong; the claims of both parties should be laid out as the Act imperatively prescribes; and, that being done, there is no conflict; the boundaries of the one do not come in contact anywhere with those of the other.

Appeal allowed with costs.

(THE COMMISSIONER.)

(THE APPELLATE DIVISION.)

Oral judgment.

KELL v. KNOX AND LEACH.

Interest in Mining Claim—Agreement—Working Conditions—Forfeiture — Restaking by Co-holder — Trustee — Appeal — Purchaser.

K. was entitled to a transfer of a quarter interest in Mining Claims T.R.S. 3345 and T.R.S. 3346, upon the recording of certain work. Whether he was relieved from the performance of the work by what J A. Knox or W. R. Knox said or did subsequent to this agreement was the chief issue in the action.

Held by the Commissioner that K. had a right to assume that from what Knox said and did, the work K. was required to do would be performed and recorded by the company formed by Knox. That Knox acted in a fiduciary capacity from which he had not been relieved. If Knox had applied for relief from forfeiture there being no adverse interests, the claims would have been reinstated and K. would have retained his interest. The purchaser Brady was not prejudiced by K. retaining his interest as he had dealt with Knox on that contingency.

Reference to Halsbury's Laws of England, Vol. 28, p. 58.

Stewart and Lupton, 22 W. R. 855.

On appeal to the appellate division, judgment of Mining Commissioner affirmed.

Claim by H. L. Kell to establish a one-quarter interest in Mining Claim T.R.S.-3773 and T.R.S.-3774, formerly T.R.S.-3345 and T.R.S.-3346, pursuant to a written agreement.

D. W. O'Sullivan, for claimant.

J. Lorn McDougall, for respondents.

20th December, 1916.

THE COMMISSIONER.—The claimant asks for an order vesting a quarter interest in him in mining claims T.R.S.-3773 and 3774, situate in the township of Churchill in the Sudbury mining division, and for an accounting by the respondents of all monies received by them or either of them with respect of any dealings with the said mining claims, or with the former mining claims T.R.S.-3345 and 3346. Claims T.R.S.-3345 and 3346

were staked on the license of W. M. Knox and recorded on the 6th day of December, 1911. The first and second periods of work were duly performed upon the said claims; the third period of work, or the second sixty days, was required to be performed by the 6th day of March, 1915. On the 15th of March, 1914, a three months' extension of time for the performance of the work was recorded upon the application of J. A. Knox, who is the son of the late W. M. Knox, and who had control or charge of the claims on his behalf. On the 17th of June following, Knox procured a further extension of one year on account of the death of his father, who had died on the 19th of March, 1914. On the 24th of October, Kell had performed sixty days work on claim T.R.S.-3346 and 108 days on T.R.S.-3345, and recorded the same, which was within the extended time, and the claims were then in good standing for work until the 6th day of November, 1915, when the last period, namely, ninety days on each claim, was required to be performed. As Kell had filed 168 days, and was only required at that time to do 120, the excess would be allowed on the last period, which was due on the 6th of March, 1915, and which left him a balance of 132 days to perform before that date. On the 24th of October he filed notice of intention to perform work on T.R.S.-3345 for T.R.S.-3345 and 3346, which is significant of the fact that he had an intention of performing the balance of the work required to be performed upon the claims.

In the fall of 1913 Kell went over the claims with J. A. Knox, and agreed to do the balance of the work required to be performed upon them for a quarter interest. After the work was done and which was recorded on the 24th of October, Kell asked for an agreement, which was entered into on the 4th of September, 1914, between W. M. Knox and himself, but signed by J. A. Knox, who, it was admitted at the trial, had authority at that time to act on behalf of W. M. Knox, deceased. The agreement embodied the

verbal agreement, and gave Kell a quarter interest upon the performance of 150 days' work on each claim. "Upon the completion of the said work and recording of the same," he was to receive a transfer of a quarter interest. Whether he was relieved from the performance of the said work by what J. A. Knox or W. R. Knox said or did subsequent to the date of the agreement is practically the issue involved.

On the 4th of May, 1915, W. R. Knox entered into an option agreement with C. Boxall for the sale of the claims for the sum of thirty thousand dollars, of which ten thousand was to be paid before the 15th of July and one thousand before the 15th of August, 1915.

On the 14th of July Knox agreed to extend the time for payment of the first instalment until the 1st of August, which sum was paid by or through Boxall. On the 5th of September W. R. Knox sent Kell a cheque for two hundred dollars which he stated was his share of the thousand dollar payment fixed upon a quarter interest and after allowing for a 20 per cent. commission for the sale of the claims. Knox also asked Kell to pay him $17.50, being part of his personal expenses in connection with attending at Toronto and the Recording Office and other services in connection with the sale. In the meantime Kell had consulted his solicitors, Messrs. Slaght & Slaght, of Haileybury, and they wrote Knox with respect to the second payment to which he replied on the 5th of October,—"that nothing more was coming to him until another payment was made." On the 17th of the same month Knox wrote Kell that "Friday being the 15th, the next payment due on that date has not been paid and I am leaving here to-night and will be away ten days and will see to it when I come back." He also asked Kell to pay him the $17.50 due him for expenses or he would place it in a lawyer's hands for collection. On the 4th of November, 1914, Messrs. Slaght & Slaght wrote Knox that they had on the 1st of October written him on behalf of Kell requesting a statement of any dealings Knox had had with the claims, and he

had not furnished them with the particulars. They also reserved to Kell the right to take such proceedings as he might be advised to have any sale of the claims set aside as being without his authority or consent and made a further demand for full and complete particulars of any transactions affecting Kell's interests in the claims. They asked particularly for copies of any agreements of sale or options and disclosure of escrow agreements, if any, together with a statement showing what amounts had been paid on account of purchase or option agreements and gave him until the 11th instant to answer and produce. Knox acknowledged their letter and promised to forward the agreements. On the 18th, the Imperial Bank, at Elk Lake, advised Kell they had received a cheque from Knox for $100 and asked him to advise. This was Kell's share of the second payment, namely $500, which had been made under the option agreement, making in all $1,500 paid. The Imperial Bank placed this amount to Kell's credit. Again on the 24th, Messrs. Slaght & Slaght wrote to Knox acknowledging the option agreement, and protesting against the payment of 20 per cent. to the party who had made the sale. They also objected to the payment of any part of Knox's expense account without knowing how it was incurred. They further said, —"We have repeatedly written you for full information with respect to this transaction, but we are not yet at all sufficiently informed. We require production of your commission agreement and reasons for charging Mr. Kell with the $17.50. Also a written direction from you to the optionee and to the bank to deduct and pay to Mr. Kell his one-quarter out of the balance of the payments to be made under the option agreement. Unless you can see fit to comply with these requests forthwith, we shall be compelled to move before the Mining Commissioner. The matter has now dragged along for months and we propose to have it definitely settled without further unnecessary delay." Knox notified Kell on the 23rd, that the last

payment on the claims due on the 15th had not been paid, and it looked very much like as if the deal was off. This letter was followed by advice from Knox that, "I intend giving over all my three-quarter interest to the company for stock, and at the same time turn over your agreement to the company, so in the future the Company will deal with you." On 27th, Messrs. Slaght & Slaght received a letter from Knox that he was making a new agreement with W. E. Caldwell, the company's representative, for his interests, and that in future they could deal with Caldwell regarding Kell's quarter interest. Also advising that he had turned Kell's agreement over to the company.

On this date the correspondence between Knox and Kell ceased. On the 4th of November, 1915, Messrs. Slaght & Slaght wrote the Mining Commissioner asking for a certificate of interest to file against the properties until such time as an appointment could be taken out for trial. It would appear that the certificate of interest was not issued, and the matter stood until an appointment was taken out this fall.

Both Kell and Knox understood that the time for the performance of the last period of work on the claims expired on the 6th of June, 1916, whereas the work was in default on the 7th of November, 1915, and forfeiture had occurred. Kell said J. A. Knox always told him when he wanted the work done and he relied upon him to do so, and it was from Knox that he understood the work was not due until the 6th of June, 1916. In March, 1916, Knox consulted a solicitor as to when the last period of work was required to be performed and he was advised by letter it was due on the 6th of August, 1916; so that what Knox did after November, 1915, was done under the impression that the claims were in good standing until June, 1916, which afterwards, on advice, was fixed as August.

Kell's solicitors got into communication with Caldwell with reference to Kell's interest, and on the 22nd of May prepared an assignment of his interest in the

two claims to C. Boxall for $2,500. The assignment was executed by Kell but not accepted by Boxall, the reason for which was not disclosed at the trial.

On the 5th of June, 1916, W. R. Knox agreed to sell the same claims to John P. Brady. The optionee was mentioned in the agreement as the Knoxwell Mining Company, Limited, and erased to read John P. Brady; the latter was the President of the Knoxwell Mining Company, Limited, W. E. Caldwell, the General Manager, and C. Boxall, who was a woman, allowed her name to be used on behalf of the company. This last agreement was a sale of a three-quarters interest only subject to Kell's quarter interest, and required the optionee to perform and record the last year's work.

It was on the 2nd of June that Knox first learned that the claims had been in default since the 7th of November, 1915, and why he entered into the agreement with Brady on the 5th of June covenanting that they were valid and subsisting claims is hard to understand from the evidence, except it may be that he at the time had intended applying to the Mining Commissioner for an extension of time for the performance of the work and relief from forfeiture. Knox did state that when he learned of the default on the 2nd of June, he first decided to apply for relief and left it to his solicitor, and then decided to go right up to the claims and restake them, as he felt that Kell might have done so or would at any time.

Knox secured the services of L. O. Hedlund who restaked the claims on the 7th of June, and on the 14th transferred all his interests to L. T. Leach. Knox explains that as his license had expired and had not then been renewed is the reason why he had Hedlund transfer to Leach rather than to himself. Knox exercised business acumen and must have been impressed with the motto of "Safety First" when he entered into the agreement of the 11th of July—Exhibit 21—in which the Knoxwell Mining Company, Limited, agreed to indemnify W. R. Knox, J. A. Knox and Joana Knox, administratrix of the estate of W. M.

Knox, against any expenses incurred by them in defending an action brought by Kell for his quarter interest or for any loss sustained by an accounting that might be demanded by him.

Nothing having been paid under the agreement of the 5th of June, and the claims being restaked as Nos. T.R.S.-3773 and 3774, Knox fortified by the indemnity agreement, caused Leach, who was his nominee, to enter into a further option agreement for the same claims and for the sum of $20,500. This agreement was signed on the 2nd of August, 1916. $6,000 was paid to Knox on the execution of the option, and the balance of $14,500 became due and payable on the 1st day of June, 1917. Knox also received 1,000 fully paid-up shares of the Knoxwell Mining Company, Limited. The purchase price of $20,500 is the equivalent of Knox's three-quarters interest based upon the sum of $30,000 for which the claims were originally optioned to Boxall, and after allowing monies paid under that option, so that it appears that Brady dealt with Knox at the price of a three-quarters interest, only expecting that he might, at some time, have to recognize Kell's quarter interest, which would make the sum to be paid by him in all $30,000.

In the spring of 1915 Kell was told by J. A. Knox that a sale was on and asked him to go with him and do some work on the property before inspection. Kell did so and at that time performed thirty days' work on the claims. In September he was again on the property with J. A. Knox performing work, and was told that the parties expected in the spring did not arrive but would come that fall and he then did a further thirty days' work on this account. On this occasion he was told by J. A. Knox that a sale had been made for $30,000. He asked Knox for a copy of the agreement but was told that he did not think it would be satisfactory to him and that he had better keep quiet. The day of this conversation he saw W. R. Knox and arranged where his share of the purchase money should be paid. Kell states that J. A. Knox told him

the company would be responsible for the work and he would record it and that Kell could not go on the claims until after June, 1916, when the option expired. Kell appears to have had some disagreement with J. A. Knox, and he alleges that Knox said he could do him out of his interest, to which he gave reply that he could still do his work, and Knox said the company would not allow him on the property until after June. Both Kell and Knox understood the last period of work was not due until the 6th of June, 1916, and the claims were under option to Boxall (who was the company) on the 8th of May, 1915, which was previous to Kell's conversation with Knox and which lends some weight to the alleged conversation. Kell was firm in his statement that he relied upon Knox to instruct him when to do the work and emphasized that he told Knox on three different occasions before he believed the work to be due that he was prepared to go on and do it, but he was not permitted to do so by J. A. Knox on the ground that the company would not allow him on the properties.

In the option agreement of the 8th of May Boxall was required to *perform* and *record* the last year's work, which in itself lends truth to Kell's statement that Knox had told him the company would do the work and he would record it. If Knox did not tell Kell the company would do the remaining assessment work then I cannot account for Kell failing to record the sixty days' work he performed in the spring and fall of 1915. He had done and recorded 168 days, leaving a balance of 132 days, and had, he presumed, until June, 1916, to complete it. If he had recorded the extra sixty days he was well on his way to complete the work he was under obligation to do by his agreement with Knox. Then why did he not record the sixty days' work? In the absence of any testimony from J. A. Knox to the contrary I must accept what Kell has said, and I find no reason to disbelieve him, and believe on the evidence that he had been lulled into a sense of security by what J. A. Knox had told him

and did not think it necessary to record further work on the claims which the optionees were required to perform and record.

Kell, through his solicitors, in the fall of 1915, tried to get a copy of the option agreement, and a statement of the monies paid, escrow agreements or other particulars relating to a sale, and after pressure all he got was a copy of the option agreement. By that option agreement the optionee was required to perform the work which Kell was obligated to do. Kell had the agreement before him in November, 1915, and could see that the optionee was required to perform the remaining work; he had been paid his share of the purchase money up to that time, and J. A. Knox had told him he would see that the work was recorded. It is a reasonable assumption that Kell would understand that as to the deficiency of work to be performed the company had assumed his obligations, and that Knox had put them in his place. That he intended to do the work is shown by the records when he filed a notice of intention on the 24th day of October, 1914, to do work on one claim for the two.

Why did Knox require the optionee to do the work if he expected Kell to perform it, and why did Knox not tell Kell the optionees had not performed the work as he, Knox, had bound them to do and request Kell to go on and fulfil his agreement of May, 1914?

The company had sunk forty feet in solid rock, between the date of the option of the 8th of May, 1915, and June, 1916, and this work was in itself sufficient to complete the number of days required to be done, and why was it not recorded? I think the answer is: it was on account of the neglect of J. A. Knox or his brother. J. A. Knox was the man on the ground, and his brother looked to him to see that the work done would be recorded. They knew Kell was not doing the work and they stood to lose the claims if forfeiture occurred for non-performance of working conditions.

The claims were sold on the 5th of June, 1916, to John P. Brady, subject to a quarter interest in Kell. A clause in the agreement reads:—"It is understood that this option shall entitle the optionee to any right or interest in the said claims which the optionor may acquire during the life of this option." I do not see the purport of this clause unless Knox felt that he might acquire Kell's quarter interest upon terms satisfactory to himself, or that upon an application for relief from forfeiture an extension of time would be procured for the performance of the balance of the work which he would do and obtain it under section 81 of the Mining Act. To understand why the agreement was entered into on the 5th of June, it must be borne in mind that Knox and his solicitor at Orillia were under the impression that the claims were not in default until the 7th of August, 1916, and Knox had procured this information from another solicitor in the north who had advised him to that effect. Knox learned on the 2nd or 3rd of June that the claims had been in default since November, 1915. He was in Toronto at the time and at once decided to restake so as to protect his interests and his agreement with Brady which his solicitor at Orillia had prepared and which was signed on the 5th of June. Knox went direct from Toronto to either Sudbury or the claims having, apparently, arranged by wire with L. O. Hedlund who restaked them. After the claims were recorded he sent word to his solicitor at Orillia to that effect.

Knox told Brady that Kell had no interest in the restaking; that he could deal with Kell but he thought he had lost his interest for default in work. Knox may have felt that Kell was out but he certainly was not going to take any chance as he required the Knoxwell Mining Company, Limited, to indemnify him against loss by reason of any action which Kell might take. The Knoxwell Mining Company, Limited, which is Brady, Caldwell and Miss Boxall, would not have undertaken to give such an indemnity as it entered

into on the 11th of July, 1916—Exhibit 21—if it had not bought the sole title to the claims on the basis of three-quarters of the price it had fixed as their value; the company simply gambled on Kell acquiring an interest in the new staking, and if he did not the claims would have cost one-quarter less than it was prepared to give.

If Boxall, under the option agreement of May, 1915, or Brady, under the agreement of June, 1916, had performed the work still required to be done on the claims pursuant to the Mining Act, and as Knox required and which they agreed to do, can it then be said that Kell by not performing the same work had forfeited his right to a quarter interest? If not, then what has occurred since the restaking to alter the position of the former owners? The same discovery was adopted and the same lands restaked and were again owned and dealt with by Knox. Upon the cancellation of the old and the advent of the new claims all interests were as they stood before the restaking, except it could thereafter be said that Kell is not entitled to a transfer of a quarter interest on account of the non-fulfilment of his agreement. The answer to that argument appears to me to be that the purchaser of the new claims was the same party or company, and he negotiated for the purchase of the cancelled claims and at the same purchase price. From the agreement in May, 1915, up to the agreement of August, 1916, the same parties were negotiating for the same lands and at a figure fixed in the Boxall agreement.

I think Knox acted in a fiduciary capacity; he applied for an extension of time for the performance of work that Kell was required to do; he paid money to Kell under the Boxall agreement that he might properly have withheld until Kell had completed the work. I cannot reconcile the position that Knox now takes that Kell was bound to do the work before he secured a transfer with his dealings with these claims in which he obligated certain optionees to do the same work. There was no object in duplicating it and Kell was

kept in the dark as to whether the work was being performed by the optionees or not. Under the circumstances I think Kell had a right to presume the work was to be done and recorded and the claims, in that respect, kept in good standing.

I do not think Knox relieved himself of his fiduciary relationship with Kell by his letter of the 24th of November, 1914. It was not enough to say that he could thereafter deal with the company as it has been shown the company refused to deal with Kell by breaking off negotiations when the assignment of May, 1916, was sent them. It was, I think, the plain and honest duty of Knox to tell Kell it was for him to do the work in the event of the optionees failing to do so and to have given him sufficient notice of their default.

I do not think it was Knox's intention to allow the claims to become in default through insufficiency of work, and there is no doubt he relied upon his brother to see that all work done by the optionees be recorded. As late as June, 1916, he knew that Kell had not performed the balance of the work upon the claims, and with that knowledge he advisedly required Brady or the company to do the work.

After the claims had been restaked I think it was too late for Knox to say that Kell had not performed the work and was not therefore entitled to a quarter interest in the restaking. Up to the date of restaking Knox recognized Kell's interest and in the several option agreements he required the optionees to perform work Kell was bound to do to protect his interests. He acted without consulting Kell and at the same time made an agreement which affected Kell's obligations under the agreement of September, 1914.

Having assumed to act for Kell I think he is now estopped from saying Kell has not performed the work under his agreement and is not entitled to a quarter interest.

If the claims had been restaked by adversely interested parties to Kell and Knox, then the Leach agreement of August with Brady could not have been

entered into and Knox would have lost his three-quarters interest unless an application was made to the Mining Commissioner for relief from forfeiture under section 85 of the Mining Act, and if granted then the claims would have been reinstated and Kell's interest would have been intact. That being so, then upon what grounds, either moral or legal, could it be said that as the claims had become invalid through a forfeiture of interests that one of the co-holders should cause them to be restaked to the prejudice of a former co-holder but with profit to himself? It would be highly unmoral to allow such a transaction to go through without strongly endeavouring to uphold the interests of Kell. Knox is not trying to hide anything and I think that it was only upon learning on the 2nd or 3rd of June that the claims were much in default and in his desire to protect his deal with Brady that he determined his only recourse was to restake and then he decided, having done so, that Kell's interests must be judged strictly upon the terms of the agreement of May, 1914.

If Knox had, upon learning that the claims were in default, promptly applied for relief from forfeiture, the claims would have been reinstated and Kell would still be the holder of a quarter interest and would profit by any arrangement that Knox might make for the sale of the properties. Why then should I put him in a worse position now than he was on the 5th of June as against Knox. Surely not because he did not do the work, because there has been sufficient reason for his not doing so. I think Knox is now precluded from enforcing the strict requirements of the agreement of May, 1914, against Kell.

If Kell holds his interest Brady is in no worse position than if he had dealt with Kell through Leach under the last agreement. He will have to satisfy Kell's interest, which he reckoned upon, and Knox will still get, under the agreement, what he bargained for.

I must say Knox has not sought to becloud the issue and all documents put in show that he was keeping faith with Kell until the restaking when he seemed to change his mind and put him strictly upon his rights.

The real merits and justice of the case require me to find on evidence that Kell was entitled to a quarter interest in the lands restaked.

Reference to Halsbury's Laws of England, volume 23, page 58. Stuart and Lupton, 22 W. R. 855.

I order that a quarter interest in the said Mining Claims T.R.S.-3773 and 3774 be and the same is hereby vested in H. L. Kell upon the performance or causing to be performed on his behalf 66 days' assessment work on each of the said claims, but in the event of the said Brady or other optionee doing assessment work upon the said claims, and within the time required herein to the extent of the said 132 days, the said Kell shall be relieved from the performance of the said work.

I further order that the respondent Knox account to Kell for all monies received in respect of the said Mining Claims T.R.S.-3773 and 3774 and that Knox and Leach account to Kell for all money received or to be received under the agreement entered into between the said Leach and J. R. Brady dated the 2nd day of August, A.D. 1916, and for that purpose the matter may be referred to the Mining Commissioner for further directions.

If the respondent Knox makes application for an order relieving against forfeiture his and Kell's interests in former Mining Claims T.R.S.-3345 and 3346 I will report to the Lieutenant-Governor in Council that an Order-in-Council be passed granting the relief applied for and extending the time for the performance of the deficiency of work until the 1st day of July, A.D. 1917, and cancelling Mining Claims T.R.S.-3773 and 3774. In the event of the said interests of the

said Kell and Knox in the said Claims T.R.S.-3345 and 3346 being relieved against forfeiture, I direct Kell to perform or have performed on his behalf 66 days' work upon each claim, being the deficiency of working conditions thereon, and thereupon the said Kell shall be entitled to a transfer of a quarter interest in the said Mining Claims T.R.S.-3345 and 3346, or an order of the Mining Commissioner vesting such an interest in him.

The said Kell may be relieved from the performance of the said 132 days' work as aforesaid upon its performance by the said Brady or other optionee.

I allow the plaintiff costs upon the High Court scale and I so order.

From this decision the appellant appealed to the Appellate Division, when judgment of the Mining Commissioner was affirmed.

(THE COMMISSIONER.)

JUNELL v. PROUT AND BRYDON.

Discovery—Absence of — Overburden — Location — Surface-rights Owner.

The disputant, the owner of the surface rights, alleged the respondent could not and had not made a discovery as there was no exposed work on the claims, nor could he find a discovery post.

Held, J. must have known of the exposed rock in the eastern part of the claims and could have seen P.'s discovery post and evidence of trenching. As J. had lived upon the property since 1912, his assumed ignorance was no doubt due to the fact "that none are so blind as those who won't see."

Geo. Ross, for disputant.

F. L. Smiley, for respondent.

6th January, 1917.

THE COMMISSIONER,—On the 28th of August, 1914, Emil Junell secured a certificate of ownership of the

south half of lot 7, in the first concession of the township of Casey, in the district of Temiskaming, containing 159-1/2 acres, in which was reserved to the Crown all mines, minerals and mining rights on the north-east, north-west and south-west quarters of the said south half of the said lot.

On the 23rd of April, 1913, Fred. Prout, the respondent herein, staked and, subsequently, on the 3rd of May, recorded Mining Claim 17561, situate on the north-east quarter of the said lot.

On the 25th of September, 1914, an order was secured from the Mining Commissioner allowing Prout to perform the second year's assessment work on the said claim, subject to the rights of Junell as surface rights owner.

On or about the 6th of August, 1915, Junell filed a dispute against the Prout claim based on the sole ground of absence of a sufficient discovery. When the dispute came to trial in September following counsel for the disputant was taken by surprise as he was not aware that a certificate of ownership had been issued to Junell of the said lands subject to mining rights. It appears that through mistake a patent had been granted to Junell carrying minerals and upon the error becoming known the old patent was cancelled and a new one issued reserving to the Crown all mining rights, etc. Junell was very well aware of this and fought strenuously against the mistake being rectified and should have fully advised his counsel. An adjournment was allowed in order to permit counsel to consult with his client, and after several adjournments at the instance of both parties the dispute came to trial at Haileybury on the 22nd of February last.

Upon conclusion of the case and owing to conflict of testimony I directed Mr. James Bartlett, Mining Inspector, to visit the claim and find a certain stump of a tree which Junell claimed was the discovery post used by Prout, and to report upon its distance and

direction from No. 1 post; also to make an examination of the claim in and around where Prout said his discovery post was and to report as to the situation of his discovery post and the exposure of rock in that neighbourhood. He was not asked to pass upon the validity of the alleged discovery. Bartlett made his report in writing dated the 18th of March, 1916, the substance of which was that Junell was unable to point out the post or tree which he, at the trial, stated he had seen in the swamp and which was, he believed, Prout's discovery post. Junell and Prout were both present upon the inspection and Prout pointed out to Bartlett his discovery post which was almost due south of the No. 1 post at a distance, approximately, of 15 chains; the discovery being about 125 feet west of the eastern boundary of the claim. South of the discovery a low ridge of rock runs along the eastern boundary of the claim.

In order that a thorough search might be made for the discovery post which Junell alleged was the true discovery post of the claim, I asked Mr. Bartlett to make a further search, which he did, on the 24th of May, accompanied by Prout and Junell. His report thereon is dated the 24th of May, in which he stated he found a stump which was 4 feet 6 inches high, the upper part being roughly squared and which appeared to be several years old, but no signs of writing on it except on one side where several shavings had been taken off within the past year and where the following was written:—"J. H. Carr, Yeston? to this post." Prout's No. 1 post is 9 chains 57 feet from the stump and lies approximately 25 degrees east from it. The line between the stump and No. 1 post was not cut or blazed. Junell admitted to Bartlett that one Carr had been employed by him to do recent chopping on the land.

Prout's application and sketch show his discovery to be 13 chains south-west from his No. 1 post, but admits the sketch as being inaccurate in showing the discovery

well towards the western boundary, whereas it is only in the neighbourhood of 125 feet from the eastern line. The sketch was prepared by Mr. Howard, Mining Engineer, who was not at that time familiar with the exact location of the discovery. I accept the explanation as the fact is that at and around the stump alleged by Junell to be the situation of the discovery post the land is swampy and rock could not be found at some depth, and it is not reasonable to suppose that Prout would select such a position for his discovery post, well knowing that such a fraud would be found out, and in view of the fact that there is a considerable outcrop of rock along the eastern boundary of the claim and the existence of a vein at the point, he insists is the true situation of his discovery. Prout asserted that his discovery post was placed in a hole on the vein he thought about 200 feet west of the eastern boundary and about 1,300 feet south of the No. 1 post and that it remained standing until the summer of 1914, when it disappeared. The disappearance of the post made me anxious to locate the stump spoken of by Junell and led to the inspection by Bartlett. I felt its location should first be determined before I could allow myself to say the discovery post spoken of by Prout had been so placed by him and had through no agency of his been removed. I am now satisfied on the evidence and reports of Mr. Bartlett he made a discovery, placed his discovery post as alleged and that it is such a discovery as satisfies the Mining Act.

Junell must have known of the exposed rock on the eastern part of the property and could have seen Prout's discovery post and evidencing of trenching done on the claim. He bought the farm in 1912, lived upon it, and his assumed ignorance as to a subsisting mining claim being on that part of the land is due, no doubt, to the fact: "That none are so blind as those who won't see." He bought the farm with the knowledge of this and other claims being recorded upon it and in good standing, and that his remedy against the

miner was as a surface rights owner for compensation under section 104 of the Mining Act of Ontario. He has been very tardy about asking for compensation, but this application is now before me and will be dealt with in a separate order.

I order that the dispute filed herein by Emil Junell against said Mining Claim 17561 be and the same is hereby dismissed with costs upon the County Court scale.

(THE COMMISSIONER.)

JUNELL v. PROUT AND BRYDON.

Compensation for Surface Rights — Subsisting Mining Claim—Assessed Value — Mining Operations—Interference—Present and Future Damages or Injury.

When compensation is to be fixed, the assessed value is not a basis from which a proper deduction may be made. While it was annoying to have one's lands open to others, the surface owner knew when he purchased that he might at any time be subjected to interference by mining operations, and the only remedy in this case was by way of compensation for injury or damage caused or to be caused. Award made fixing compensation for present and future damage, half of which amount was made payable at a fixed time, and the balance when patent applied for, with directions for fencing for protection of cattle.

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

Geo. Ross, for applicant.

F. L. Smiley, for respondent.

9th January, 1917.

THE COMMISSIONER.—Emil Junell purchased the south half of lot 7, in the first concession of the township of Casey, in the district of Temiskaming, contain-

ing 159-1/2 acres, subject to a reservation to the Crown of all mines and minerals thereon.

On the 3rd of May, 1913, Mining Claim 17561 was recorded on the north-east quarter thereof and is now in good standing.

A dispute filed against the said mining claim by Junell has been tried and the action dismissed. This application is now to fix compensation under section 104 of the Mining Act. The north-east quarter of the lot, and on which the said mining claim is situated, has not been cleared nor is any part of it under cultivation. Junell's house and other buildings are all on the south-west quarter of the part lot, and in all thirty acres have been cleared. Last year he grew about 200 bushels of oats, a small quantity of rye and 70 bags of potatoes. This is not intensive farming after four years of occupation, and it would appear from the evidence that Junell derives his income from sources other than farming. Of late he has not lived on the property, and it is very doubtful that he will develop it into a self-sustaining farm.

Land in this vicinity is supposed to contain mineral at depth on account of its proximity to the Casey Cobalt Mines, Limited, which is a going concern, and has found a pay ore at considerable depth. The evidence given by Junell and tendered on his behalf was based on the value of farm lands having potential mineral wealth. Junell has been impressed with the idea that if he can get rid of the present mining claim the mines and minerals on the property, if any, would revert to himself under the Public Lands Act and the value of the land would be much enhanced in that respect. No matter what his intentions are in regard to the property, he is now entitled to compensation for all injury to surface rights, "which is or may be caused" by mining operations. No present damage is alleged so that the whole question is to what extent might the lands be damaged by the operations of the holders of the mining claim.

Prout asks me to accept the assessed value of the whole farm as a basis of fixing compensation. When compensation is to be allowed the basis of assessment is not a principle from which a proper deduction may be adduced. The question to be decided is what damage or injury may be caused to the surface rights, and on that ground I have little evidence to aid me.

This quarter section of the half lot is said to be low ground with sufficient natural drainage to permit it to be worked for farm purposes. It has yet to be cleared, having only been burnt over by forest fires, and the cost of clearing is placed at from $5 to $25 per acre. The only surface rock is to be found at the eastern boundary towards the south. The mining operations will necessarily be on or near the outcrop of rock and an entrance could be had to their work from the south-east over the exposed rock, so it would appear there will be little interference with the farm proper or its use by Junell. Protection from danger to Junell's cattle or otherwise would have to be provided for from exposed holes, trenches or pits caused by the miner in his operations, and if this is done by fencing or other safe method I feel that mining operations can be carried on with little loss or interference to or with Junell.

I appreciate that it is annoying to have one's lands open to others, but Junell knew when he purchased the property that he might at any time be subjected to interference by mining operations, and his only remedy was by way of compensation for injury caused or to be caused.

I feel that in fixing the sum of $400 as the amount of compensation to be paid by Prout to Junell for present and future damage or injury to the lands caused by mining operations I will be doing justice to both parties.

Of the said amount $200 shall be paid to Junell on or before the 15th day of February next, and the balance thereof ($200) when and at such time as a patent

of the said claim is applied and paid for, and I so direct and award.

I further direct that the said Prout place or erect a fence or other safeguard around any holes, trenches, pits or other openings caused through his mining operations and which will or might place the cattle of the said Junell in jeopardy.

(THE COMMISSIONER.)

(THE APPELLATE DIVISION.)

12 O. W. N. 133.

WATSON v. MONAHAN.

Forfeiture—Relief from—Lands Open—Section 85—"Good Cause Shown"—"Prevented by"—Merits.

Forfeiture arose through alleged ignorance of the proper time within which a certain period of work should have been performed. The holder had no intention of abandoning the claim. It was restaked after forfeiture by M., who opposed the application of W. for relief from forfeiture.

Held by the Commissioner—That while he appreciated that W., who was an educated man, could or should not if he had properly read section 79 (E), have formed an opinion that it had the meaning alleged, that the application should be considered upon its merits and good cause shown, and that while the powers of the Commissioner were limited, it appeared to be a proper case for relief, and especially as against M., who was not the original discoverer, and who would probably use the claims for sale purposes only.

Upon appeal to the Appellate Division, Held, that W. was not "prevented" from doing the work, and there was not "good cause shown."

NOTE.—See sec. 85 as amended in (1918).

An application by J. Craig Watson for an order under section 85 of the Act relieving Mining Claims

L-5519 and L-5520 from forfeiture upon grounds stated upon the application.

Frederick Elliot, for applicant.
H. L. Slaght, for respondent.

28th February, 1917.

THE COMMISSIONER.—This is an application for relief from forfeiture in consequence of the holder failing to perform the second instalment of work upon the said claims within the time required by the Mining Act of Ontario.

The claims were marked cancelled by the Mining Recorder on the 29th of December, A.D. 1916, and restaked on the day of by the respondent as L-6869, L-6870.

Mr. Watson bases his application upon the ground that he had no intention of abandoning the claims, and as a matter of fact had let a contract to have the necessary working conditions performed when he learned that the claims had been cancelled and restaked by the respondent. It appeared from the evidence that he had in mind the winter extension, section 79 (*e*) had the effect of extending the time for the second instalment of work.

Mr. Monahan is a farmer, resident at Matheson; he also represents a Pulp Company and occupies his spare time in dealing with mining claims. He knew Mr. Watson; the latter had purchased a claim from him in the immediate vicinity for $1,500, and the day he restaked the claims in question he knew that Mr. Watson had formed a Syndicate for the purpose of taking over the claims but, notwithstanding, restaked them. The claims were staked by him without any loss of time as he drove several men to a neighbouring property, for which he was paid, and while his horses were feeding at noon he went out to this property, restaked the two claims in the course of two

hours, returned for his passengers and took them back to Matheson, where he resides. After the staking he got in touch with Watson and offered to transfer the claims to him for $500, stating that he had had a previous offer of that amount from a Mr. Quinn, which he had refused, desiring to allow Watson the first opportunity of getting the property back. Since the case was closed I have received a letter dated the 22nd instant, written by George W. Quinn, in which he states that he understood one Roberts, a witness on behalf of Monahan, had sworn that he had offered Monahan $500 for the claims in question, and stated that he had not done so, but merely asked him if he would take that sum for them. I was quite satisfied upon the hearing that was the true position and that Monahan had not received a direct offer of $500.

Mr. Quinn's letter is not evidence, as it has not been proved, and I am not allowing it to enter into my judgment but merely refer to it as having been received.

I quite appreciate that Mr. Watson, who is an educated man, could not, if he had read section 79 (*e*), have formed the opinion that it had the effect of extending the time for subsequent work, but while that is true, men of his class dealing in mining claims very frequently form an impression of the requirements of the Act, which are, strictly speaking, not correct, and carry on on that assumption. I feel that I should not take from Mr. Watson his right under section 85 of the Act on the ground that his mistake was not a reasonable one and such as a man of his standing should make inasmuch as the fact is that he had no intention of abandoning these claims but, on the contrary, had instructed a contractor to proceed with a diamond drill to do the second instalment of work on the properties.

As between a licensee who through inexcusable inadvertence neglects to carry out the strict requirements of the Act and who had an intention to carry on and did not come back for relief solely because

of revived interest in the neighbourhood of the property and one who restakes without any effort or loss of time and who is not the original discoverer and has added nothing in the particular case to the development of the property and has only used Crown property for the purpose of sale and barter, I feel that my discretion is properly exercised when I find that the applicant has shown good cause for relief from forfeiture and that the respondent is sufficiently compensated by allowing him $90 and the costs of the application which I fix at $25.

It is very difficult in applications under section 85, where I have certain discretionary powers, to have fixed principles upon which applications should be allowed, as each case must be considered upon its own merits and upon good cause shown, and if I were to deny Watson, who is a *bona fide* miner, his application, I would be taking something from him upon which he has expended money and intended to spend more and allow another licensee to retain it who, possibly, would do no more than transfer it to another for a monetary consideration;

In passing I am bound to remark that the staking by Monahan performed within two hours, on a casual visit to the claims, would not I feel upon an inspection, disclose that a sufficient discovery had been made or a thorough staking performed. I am impressed with the viciousness of what is commonly called snow staking and of the necessity of taking action in some way of insisting and requiring a licensee to make a valid discovery and an honest staking of a mining claim.

I order that the interests of J. Craig Watson in Mining Claims L-5519 and L-5520 be and the same are hereby relieved against forfeiture, and the time for the performance of the deficiency of working conditions be extended until the 15th day of May next.

And I further order that the application of Walter Monahan for the said lands be removed from the files

of the Recording Office and that the claims as restaked by him, namely, L-6869 and L-6870, be cancelled.

As a further term of this order I direct the applicant, J. Craig Watson, to pay the respondent, Walter Monahan, the sum of $90 and the further sum of $25 as costs of the application, both sums to be paid to the solicitors for the respondent Monahan, Messrs. Slaght & Slaght, at Haileybury, not later than the 10th day of March next.

From the decision of the Mining Commissioner the respondent appealed to the Appellate Division. The appeal was heard by Meredith, C.J.C.P., Riddell, Lennox, and Rose, JJ.

A. G. Slaght, for the appellant.

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

April 13th, 1917.

MEREDITH, C.J.C.P.:—If the rights and interests of the parties to this appeal only should be affected by our judgment in it, and if the power of the Mining Commissioner in such a matter were unlimited, there should be no hesitation in dismissing the appeal, the respondent being the first discoverer of "valuable mineral in place" on the land in question and one who never had any intention of abandoning his rights as such, nor of evading his duties in acquiring title to the land, but who merely let the time slip by in which some of them should be performed, and is now willing and ready to make good his default; whilst the appellant is described by the Commissioner as a "vulture" hovering about mining centres seeking for opportunity to acquire such rights upon the default of the first discoverer, even though inadvertently or through inability to perform his duties, a default which is noted in the mining records of the district and so made plain to the hoverer.

But other and much wider and more important considerations intervene; nothing should be done contrary to the policy and purposes of the legislature intended to be given effect to in its mining legislation; and no one concerned in carrying out the provisions of such legislation should be permitted to exceed the power conferred upon him by it. The question is not whether "natural justice" has been accorded to these two parties; it is, what are the powers of the Commissioner in all such cases, and how should they be exercised in all cases; and, having regard to the answers to those two general questions, how this case, upon its particular facts, should be dealt with.

The application to the Commissioner was made by the respondent for relief from a forfeiture or loss of his rights through such default as I have already mentioned; and was based upon sec. 85 of the Mining Act of Ontario, that section being in these words:

85.—(1) Where compliance with any of the requirements mentioned in section 84 has been prevented by pending proceedings or incapacity from illness of the holder, or other good cause shown, the Commissioner within three months after default may upon such terms as he may deem just, make an order relieving the person in default from the forfeiture or loss of rights, etc.

The order in appeal, relieving the respondent, was made under the provisions of this section; and this appeal is against that order.

These questions are raised—they indeed raise themselves,—upon this appeal: (1) Whether an appeal lies to this Court in such a case as this; (2) Whether the Commissioner had power to make the order appealed against, that is, whether the facts of the case bring it within the provisions of sec. 85; and (3) Whether, on the merits of the cases, if it be one within the section, the order should have been made. But it will be more convenient to consider question (2) first.

The material facts mainly affecting the case are: that the respondent, who was a licensee, under the provision of the Act, had been duly recorded as a discoverer of "valuable mineral in place" in the land in question, and had apparently done all things necessary to perfect his claim until the expiration of three months next following the recording of it; but had done nothing after that up to the time when the Mining Recorder noted his rights as cancelled, on 29th December, 1916, when he recorded the claim of the appellant as one by a new discoverer.

Section 83 of the Act is in these words:

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. 8 Edw. VII. c. 21, s. 83; 9 Edw. VII. c. 26, s. 31 (1).

The respondent's application was for relief, under sec. 85, from the effect of sec. 83, upon his claim; and for that only; and for that purpose it must be taken that he had made default and was to be treated as if he had abandoned it; and that being so he could rightly be given relief only if compliance with the requirement of the Act in respect of which he was in default, had been " prevented by pending proceedings, or incapacity from illness of the holder or other good cause shown;" words all of which cannot be given any good grammatical construction, but none the less words which must be given their real meaning if it can be ascertained from them and the context.

" Prevented by other good cause shown " is not an intelligible expression literally; but if read, as it seems to me the section may and should be, as meaning

" prevented by, etc., or for other good cause shown," any doubt or difficulty is at once expelled. The words " or other good cause shown " seem to me to have been inserted after the section had been drafted; and, as occasionally occurs, were awkwardly inserted. Section 80 (1) gives colour to this suggestion. Under it, the time for doing the work in respect of which the respondent must be taken, for the purposes of this case, to have been in default, may be extended by the Recorder in case of " pending proceedings or of the death or incapacity from illness of the claimant." The words " other good cause " have not been added here. There does not seem to be any especial reason for confining the relief to cases of illness or pending proceedings; or any for excluding any other good reason for failure to comply with the requirement of the Act; though such reason ought to be of a preventing character. And so if any good reason for giving the relief which the order in appeal affords, were proved, the order ought to be sustained here, the appellant's conduct upon his own showing being such as to deserve no better if not worse, estimation of it than that given to it by the Commissioner.

But I am unable to find in any of the circumstances of the case any good cause for relieving the respondent. He simply neglected to comply with the requirements of the Act, which he had read and was as capable as most of understanding.

The purpose of the legislation was to encourage the discovery of valuable minerals and the development of mines and mining in this province; and for that purpose somewhat stringent provision as to development and working of mining claims is necessary; and those provisions are not to be lighly regarded, and certainly not to be treated as if of no consequence even where no claim has arisen.

There is, of course, the difficulty, and the disadvantage, which arises from the encouragement to those who were spoken of by counsel for the appellants as well as by the Commissioner as " vultures," but that,

if unavoidable, is not enough to displace the main purpose of the Act, a quick development of hidden mineral wealth of the Province; and it is avoidable to some extent, for, when an applicant brings himself within the provisions of section 85, relief may well be given against such a new discoverer, which would not be given against one acting in good faith, and not on searches of the records for the purpose of pouncing on the claims of the neglectful, or knowledge acquired in transactions with, or otherwise from the first discoverer.

There being then no ground proved which could entitle the respondent to the relief he sought, this appeal must be allowed, if this Court has power to entertain it; and that it has, seems to me to be plain.

The power conferred upon the Commissioner by sec. 85 is of a judicial character; the power to make good a claim which this legislation has said is to be deemed to have been abandoned; and to make bad a subsequent claim which, for the purposes of this application, was treated as a good claim under the provisions of the Act; though I feel bound to add that I can perceive no good reason why the Commissioner might not have dealt with the question of the validity, as well as the character otherwise, of the appellant's claim, not with a view to determine whether it was a valid one, but with a view to determine whether it afforded good ground for refusing relief to the applicant even if he had otherwise shown good cause. In a case of equal equities it is not usual to interfere; though it may be that seldom the new discoverer is really a new discoverer unaided by the work of the earlier discoverer.

No good reason has been suggested why there should not be an appeal in such a case as this, whatever might have been said if conflicting rights were not, and could not be, involved upon such an application. It is not suggested that if the question to be determined were whether the appellant's claim is a valid

one, an appeal would not lie against a decision that it is not; yet on such an application as this he can be deprived of all his rights incidental to the restoration of the applicant to his, and so deprived without any compensation.

Then when the legislature has intended that a decision of the Commissioner shall be final, it has, in one case at all events, plainly said so: see sec. 78 (6); and the right to appeal generally is given in these wide words: "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 sec. 141:" see sec. 151. The "decision" which may not be appealed against by reason of sec. 78 (*b*) is one relating to the performance of working conditions "under the Act;" if such a ruling be called a "decision" in that section, it is difficult to perceive why a ruling under sec. 85 should not be considered a "decision" under sec. 151, and so expressly appealable.

And besides all this, sec. 154 prohibits certiorari, injunction, mandamus and prohibition, plainly showing that the right to appeal to this Court was intended to afford protection in all cases against the errors of the Commissioner.

Reaching these conclusions, the third question which I mentioned, as to the merits of the application, falls to the ground; the appellant succeeds on the ground of the want of power in the Commissioner to make any order giving relief under sec. 85; but this conclusion does not leave the respondent remediless, if he should have relief. Under sec. 86 the Lieutenant-Governor in Council has power, a fact which adds weight to the conclusion that the Commissioner has not. Nor is the validity or invalidity of the appellant's claim to the land in any way affected. The appeal should be allowed; and the order of the Commissioner should be set aside; the general rule as to costs here should also prevail.

RIDDELL, J.:—Mr. J. Craig Watson, a mining engineer, graduate of a respectable American University, who had had for some years considerable experience in buying and selling mines in our mining regions, staked out a certain claim in a surveyed township. He performed the first year's work as required by the Act, but failed to perform the second year's. Thereupon Monahan (making, it is said, a new discovery), restaked the claim; Watson applied to Mr. Godson, the Mining Commissioner, for reinstatement under sec. 85 of the Act. The Commissioner granted the request, and Monahan now appeals.

There are only two points which I think it necessary to consider.

1. It is said by the respondent that the exercise by the Mining Commissioner of the power given by sec. 85 is not the subject of an appeal under sec. 151.

I do not think that this objection can be sustained. Section 151 gives an appeal against any decision of the Commissioner—the Commissioner was called upon to exercise not an arbitrary but a judicial discretion on the application before him, and his determination was a "decision." It never could have been the intention of the legislature to give any office the power of arbitrarily, and according to his own whim, giving to one person and taking away from another rights which might be of great value.

2. It is argued for the appellant that the Commissioner had no power under the circumstances of this case to grant the application of the respondent.

It will be seen that the Commissioner has power only when compliance with the statute is prevented: (1) by pending proceedings; or (2) by incapacity from illness of the holder; or (3) by other good cause shown. Nothing of the kind appears here; the holder was not prevented from doing the work at all; on his own story he misunderstood the Act, and while he did not intend to let his claim go, he did not intend or try to

do the necessary second year's work at the proper time.

As Watson was not prevented from doing the work, the jurisdiction of the Commissioner does not attach.

There is of course nothing to prevent the respondent from applying to the Lieutenant-Governor under sec. 86, when all the facts can be taken into consideration; nor is there anything to prevent his claiming that his understanding of the Act is the true construction and so disputing the validity of Monahan's claim. All we do is to set aside the order of the Commissioner with costs here and below.

ROSE, J.:—J. Craig Watson, the applicant, staked out and recorded two mining claims. He did the first thirty days' work. As the Commissioner finds, he had no intention of abandoning the claims, but he neglected to perform the sixty days' work that ought to have been performed during the first year following the expiration of the three months immediately following the recording (sec. 78 (*b*)); and under sec. 84 his interest ceased and the claims became open for prospecting and staking out. Shortly after the claims had become open the respondent, Walter Monahan, searched in the Recorder's Office, found that the claims were open and proceeded to restake and to record his applications.

Upon an application to the Mining Commissioner, upon behalf of Watson, for relief under sec. 85, of the Mining Act, it appeared that the applicant's failure to do the work was probably due to a misapprehension on his part as to the time within which the work had to be performed. He had either forgotten the precise effect of sec. 89 (*e*) or had carelessly misread that section, and had formed the impression that the period from the 16th November to the 15th April was excluded from the computation of the time.

The Commissioner made an order relieving the applicant from the forfeiture or loss of rights and this appeal is from that order.

Mr. Robertson objected that no appeal lay. Judgment upon the objection was reserved and the argument of the appeal proceeded subject to the objection. It seems to me that the order in question is a " decision " within the meaning of sec. 151, and that an appeal lies. I would, therefore, overrule the objection.

The Commissioner heard the evidence of the applicant and the respondent investigated the conduct of each in connection with the matter and in a considered judgment stated his reasons for thinking that in the exercise of his discretion he ought to " find that the applicant has shown good cause for relief from forfeiture." The Commissioner has had great experience in the administration of the mining law, and is very familiar with the practice of miners and is peculiarly well qualified to say when relief ought to be granted against a forfeiture. If, then, I thought that this was a matter within the discretion of the Commissioner, I should be very loath to interfere even if there was a right to appeal from such a discretionary order.

However, I do not think that he had jurisdiction in the particular case. Section 85 gives jurisdiction to the Commissioner to relieve against forfeiture " where compliance with any of the requirements mentioned in sec. 84 has been prevented by pending proceedings, or incapacity from illness of the holder, *or other good cause shown*," as controlled by the word " prevented," and to hold that no jurisdiction is conferred upon the commission unless the license holder has been *prevented* by good cause shown.

The meaning of the word *prevented* has been considered in many cases. Perhaps the most helpful of them is *Burr* v. *Williams* (1859), 20 Ark. 171, at pp. 185 and 186, but in no case that I have seen was the context similar to that in the section that we have to construe, and there is, therefore, little assistance to be had from the decisions.

Taking then the words of the section as it stands, with such little assistance as is to be had from the

decisions, I do not think that the applicant was *prevented* from doing the sixty days' work within the time limited by the statute. He could have done it at any time if he had chosen to do so. He seems to have thought that he knew of reasons why he need not do it; but that does not seem to be the same thing as being *prevented*. Therefore I think the Commissioner had no jurisdiction under sec. 85, and that the only jurisdiction is that conferred by sec. 86 upon the Lieutenant-Governor in Council, upon the recommendation of the Minister, and the report of the Commissioner.

For these reasons I would allow the appeal with costs.

LENNOX, J., agreed.

(THE COMMISSIONER.)

HAMILTON AND DOBBINS.

Survey and Patent—Proportionate Contribution by Co-owner—Evidence—Section 81.

The onus was upon D. to show he had been relieved from the obligation imposed by the Act of paying his proportion or share of the cost of survey and patent as a co-holder. On the evidence, D. was liable for his share of the purchase price leading to patent, but was not responsible for the cost of the survey.

Application to have the interest of Edward Dobbins vested in Joel W. Hamilton for default in payment of a share of the cost of survey and patent.

G. G. T. Ware, for applicant.

D. W. O'Sullivan, for respondent.

2nd March, 1917.

THE COMMISSIONER.—There is a direct confliction of testimony as to who should pay the cost of the survey made, and the purchase price of the lands con-

tained in the mining claim in question. As Dobbins has executed a transfer of a half interest in the claim to Hamilton and which is now on record, the onus is upon Dobbins to clearly show that he has been relieved from the obligations imposed by the Mining Act of Ontario of paying his proportion or share of the cost of survey and patent as a co-holder.

Concurrent with this application or thereabouts, Mr. Dobbins paid the Mining Recorder his share of the purchase price leading to patent in order that he might protect himself against forfeiture until the matter was finally disposed of by me. On the evidence, I find that he was not relieved of his liability as a co-holder.

After the purchase money had been paid Hamilton went with Dobbins to the surveyor's office and paid his account for surveying the claim, which Dobbins had ordered, and he now seeks to recover the whole amount paid on the grounds that before the agreement was consummated Dobbins had assured him the property had been surveyed. As a matter of fact the claim had been surveyed, the cost of which had not been paid, and Dobbins states that he did not assure Mr. Hamilton that it had. He also contends that Hamilton agreed to pay the surveyor, and went with him for that purpose, and that he is not answerable for any part of the account. On the 30th of October, 1916, Hamilton wrote Dobbins a letter mentioning certain sums that he had expended on the property, amongst which was an item for survey, and in concluding he made a request that Dobbins should pay his share of the purchase price of the lands from the Crown. There was no demand made for the cost of survey and I find that it was not intended that Dobbins should pay that item.

I order that the application herein be dismissed without costs, success being equally divided.

(THE COMMISSIONER.)

McGREGOR v. GILLIES.

Appeal from Decision of Mining Recorder—Staking—Priority—Incomplete Application—Sec. 59 s.s. (3)—Reference to sections 58 and 140.

McGregor staked on the 20th of December. McGregor was unable to make the affidavit of discovery owing to the absence of the Recorder, and left the application at the office in its incomplete state until the 9th January, when the affidavit was sworn to and the application tendered. G. had staked the same lands on the 23rd of December and recorded his application.

An appeal to the Mining Recorder from the Recorder's refusal to record the McGregor application.

Held, That while having priority of discovery, McGregor had not tendered a proper application to the Recorder until the 9th of January, some days after the time within which his application could be accepted.

Section 59, s.-s. (3) was imperative in its terms, and sections 58 and 140 were inapplicable (*Smith and Hill* (Price), M. C. C. 349). In other respects the staking by McGregor was invalid.

Appeal dismissed.

Appeal by William P. McGregor from the decision of the Mining Recorder refusing to record his application for Mining Claim M.R.-5393, situate in the township of Cairo in the Montreal River Mining Division.

W. A. Gordon, for disputant.

Frederick Elliot, for respondent.

15th March, 1917.

THE COMMISSIONER.—This matter is before me by way of an appeal from the decision of the Mining Recorder refusing to place on record the application of William P. McGregor, and dispute filed against Mining Claim M.R.-5393, alleging prior discovery and staking, and failure by the respondent to stake in accordance with the requirements of the Mining Act. The Recorder having referred the dispute to me for trial both appeal and dispute were heard together.

On the 20th of December, 1916, McGregor, the disputant, staked the lands now known as Mining Claim

M.R.-5393. The Mining Recorder's office for this district is situate at Elk Lake, to which place McGregor returned on the night of the 25th of December, and on going to the Recording Office on the morning of the 26th he found a notice on the door with directions to see a Mr. Harvey, a local store-keeper. He saw Harvey that day and was told by him that the Recorder was in Toronto on a few days' vacation, and that the affidavit of discovery could not be sworn before him as he was not a Commissioner or otherwise qualified; he would accept the application subject to the affidavit being sworn but would not accept the recording fee. He also informed Mr. McGregor that Mr. Browning, the Recorder, had said that all applications that came in during his absence would be placed on record in their order as filed. On the 28th McGregor left his application with Harvey with the affidavit of his staking and discovery not sworn. As McGregor intended leaving Elk Lake the next day he left the recording fee with a Mr. Porter, a merchant, on the understanding that if the Recorder returned before he did the money should be handed over to him. On the 8th of January, 1917, McGregor returned to Elk Lake and on the 9th saw Mr. Browning (who, I understand, had returned some days before), and was told Alexander Gillies was recorded for the same lands.

Gillies staked on the 23rd of December, returned to Elk Lake on the 25th, saw Harvey on the 26th, when learning there was no one in Elk Lake who could take his affidavit as to discovery and staking, went to Haileybury where he completed the affidavit on the 28th and returned the application by mail to the Mining Recorder's Office, which was duly placed on record on the 29th.

On the facts, McGregor had priority of staking by three days, and had fifteen days in which to record, together with one additional day for each ten miles or fraction thereof; the claims being situate more than ten miles in a straight line from the office of the

Recorder, the distance being said to be between twenty-five and thirty miles, which added an additional two days, in all seventeen days from the time of staking in which to record. The application was tendered within the time, but it was not a completed application as required by section 59. The affidavit of discovery was not sworn to until the 9th of January and the application was not, until then, in the proper form to record, and it was properly refused.

I do not think the Recorder should have recorded the Gillies application until the full time allowed McGregor to complete his application, as the latter's application was on file with the affidavit only to be sworn to and he might have done so before the 5th of January, and been within the time allowed him. However, it does not affect the real issue in the case as the application was not completed until the 9th of January which, as I have said, was too late to be effective as against Gillies.

As a matter of convenience to licensees the Mining Recorder is invested with the right to take affidavits, but it is not incumbent upon the Government to see that at all times such an officer is on hand for that sole purpose. Notwithstanding the Recorder's absence the Recording Office was open to receive applications in proper form, and for other usual purposes. McGregor had the same alternative as Gillies of proceeding to the nearest Commissioner or other qualified person and completing his affidavit; there was plenty of time in which to do so, and if the claim was worth staking it should be worth the extra expense that would have been incurred in properly placing it on record.

Section 59 (3) of the Mining Act is imperative in its terms, and neither sections 58 nor 140 are applicable to the facts in this case. See *Smith* v. *Hill* (Price), M. C. C. 349.

The affirmative assertion by McGregor that he made a discovery and erected a discovery post was

not met by the evidence adduced by the respondent of failure to find such a discovery or post, and if the case turned upon that point I would for greater certainty have caused an inspection to be made.

The contention that McGregor had not written his name upon the Nos. 2, 3 and 4 posts was not met, and I find that he did not do so; see section 54 (*d*). The staking by McGregor in this respect was bad, inexcusable, and the use of a fictitious permit number was misleading and conducive of litigation.

The written application was incomplete when tendered, and not put in proper form within the time allowed in which it could have been placed on record. The application by McGregor for the land in dispute must be disallowed.

The disputant, in his dispute filed, alleged an improper staking, but did not, at the trial, give any specific instances of a departure by the respondent from the requirements of the Mining Act with respect to the staking of this mining claim, and upon the evidence I cannot find the claim was irregularly staked.

I order that the appeal and dispute filed herein be dismissed with costs, which I fix at $40, as I feel that in view of all the facts the successful party is not entitled to full costs of the unsuccessful appeal and dispute.

(THE COMMISSIONER.)

GIOVINAZZO v. PAPASSIMAKES.

Application to Remove Agreement from Records of Claims—Interest in — Construction of Agreement — Evidence — Adjournment of Trial—Further Enlargement Refused—Case Closed in Absence of Respondent.

Mining litigation is largely the result of public interest and the consequent demand for mining prospects or claims; but there is no certainty of sustained interest or demand as such depends upon the money market, the stability of labour and other forces, and while a likely prospect may have a large monetary value to-day, a month hence it may have lost its marketable value, while still retaining its intrinsic value, and for this reason, amongst others, all mining disputes or other contentious matters based upon mining interests should be promptly brought to trial and decided at the earliest possible moment.

The offer made was for a joint not the several interests, and the consideration was based upon a transfer of all the interests mentioned in the agreement or letter.

The document was required to be signed and accepted by all the parties thereto and was not binding until signed by all. See *Re Oslund et al.* v. *Bucknall* (Price), M. C. C. 368.

There was no mutuality of obligation as between G. and P., and the latter's action might be one in damages for misrepresentation. The agreement when placed on record at once formed a cloud against the title to the claim, and in such a way lent itself to the respondent's purpose. The proper course to have pursued was to obtain a certificate of interest and then proceed to trial promptly.

An application by Mr. Giovinazzo for an order erasing from the records of Mining Claims L-2582, L-4902, L-4987 and L-5383 a certain letter or agreement and for a declaration that the respondent was not entitled to an interest in the said mining claims.

W. A. Gordon, for applicant.

A. G. Slaght, for respondent.

21st March, 1917.

THE COMMISSIONER.—The applicant asks for an order removing from the records of Mining Claims L-2582, 4902, 4987 and 5383 a certain letter or agree-

ment dated the 14th day of August, A.D. 1916, and for a declaration that the respondent is not entitled to any interest in the said mining claims thereunder.

Mining litigation is largely the result of public interest and the consequent demand for mining prospects or claims, but there is no certainty of sustained interest or demand as such depends upon the money market, the stability of labour and other forces, and while a likely prospect may have a large monetary value to-day a month hence it may have lost its marketable value while still retaining its intrinsic value, and for this reason amongst others all mining disputes or other contentious matters based upon mining interests should be promptly brought to trial and decided at the earliest possible moment. I fully recognize the difficulties that Mr. Slaght has met with, but there is a settled procedure to be followed upon an application for postponement, which has not been followed in this case, and the time is reached when it should be closed as against the respondent.

Mike Giovinazzo was one of the first prospectors in this district and one of the few licensees who had abiding faith in the possibilities of the mineral formation in Boston and surrounding townships. He knew Papassimakes and had some business dealings with him prior to the negotiations in question.

Mr. Papassimakes is an active mining man and in command of capital and largely interested in mining claims in the Boston Creek district. He makes his mining headquarters at what is known as Boston Creek, and is in control of the Boston Inn, in which is the post-office for that neighbourhood.

On the 8th of August last Giovinazzo had occasion to visit the post-office and met Papassimakes, who discussed a previous deal in which Giovinazzo had made some money through a sale of a part interest in a certain claim and asked him if he would like to entertain a similar deal to be put through by him.

Giovinazzo has a recorded 3/8 interest in each of Mining Claims L-2582 and L-4902, a 1/4 interest in L-5383 and a 1/4 interest in the patented claim L-2000, and he told Papassimakes that he had partners, who they were and their respective interests.

The recorded co-holders or partners, as Giovinazzo styled them, from the abstracts of the claims and the evidence given, are, with their respective interests, as follows:—

L-2582	1/8 in Mike Catania.
	1/2 in Nathan Ginsberg.
L-4902	1/8 in Mike Catania.
	1/2 in Nathan Ginsberg.
L-4987	All in Mike Catania.
L-5383	1/4 in Mike Catania.
	1/2 in Frank H. Todd.

L-2000 is a patented claim in which all the aforesaid parties, with the exception of Todd and the addition of J. Vigna, have a 1/4 interest.

When Papassimakes was told of the other interested parties he said he would telegraph Ginsberg at his address, Sturgeon Falls, to come to Boston Creek, and desired Giovinazzo to tell Catania he wanted to see him. Giovinazzo left to see Catania, who was working on a claim not far distant, and on the 9th, when at Boston Creek, again saw Papassimakes who told him Ginsberg had telephoned he would be in Boston Creek on the 10th. On that date Giovinazzo, Catania and Ginsberg went to Papassimakes' office and a general discussion ensued. Giovinazzo told Papassimakes that he had a written agreement with J. Vigna with respect to Claim L-2000 and that neither could sell without a written consent. Papassimakes outlined his proposition which was in part set out in the letter or written proposal by Papassimakes in the words and figures following:—

Boston Creek, Ontario,
August 14th, 1916.

To H. Todd, Esq., Cobalt.
To M. Catania, Esq., Timmins.
To Mike Giovinazzo, Esq., Cobalt, Ontario.

Dear Sir,—For consideration of your transferring to me on or before the 20th day of August, 1916, the following interests:

Twenty-five per cent. interest in Claim L-4902;

Thirty-seven and one-half per cent. interest in Claim L-2000;

Twenty-five per cent. interest in Claim L-2582;

Fifty per cent. interest in Claim L-4987;

Fifty per cent. interest in Claim L-5383;

all of which are located in the township of Boston. I hereby agree to do ninety days' work on Claim L-4902 and pay for the patent, also to pay for patent on L-4987, also to do one hundred and eighty days' work for Claim L-5383 on Claim L-2582 and pay for patent.

Yours truly,
Sgd. John K. Papassimakes.

I would gather from the evidence Papassimakes had represented that as a reason why he should be taken in on the terms set out in the letter of the 14th of August was that he was in touch with outside capital and would probably sell the remaining interests for $100,000. Ginsberg objected to the proposition and said, "as far as I am concerned I am not ready to sell," when Papassimakes replied that he could tie his interest up. It was then proposed by Papassimakes, "We will leave Ginsberg out, and we will sell your interests for $75,000," afterwards telling Giovinazzo to "go ahead and have the boys agree and I will send my brother Paddy next morning to do the work, and you won't have to do any work on the claims." The second period of work was required to be done on L-5383 before the 15th of October last, and

no doubt this was the particular work Papassimakes had in mind should be done immediately after an agreement was entered into.

Ginsberg told Papassimakes that "if the boys agree and do my share of the work I will be willing to pay your brother what my work is worth." Ginsberg returned to his home that night and the only communication he has since had with Papassimakes was a letter of the 31st of August, Exhibit 10, asking him for a statement in writing of exactly what occurred at the interview of the 10th, to which Ginsberg did not reply.

On the 11th, Catania told Giovinazzo he did not like the proposition. On the 14th Papassimakes handed Giovinazzo the letter (Exhibit 5), stating that he had seen Catania who asked him to give it to him. Giovinazzo was surprised as Catania, a few days before, had expressed his intention not to enter into the deal, and so told Papassimakes, who said it was not an agreement but to get his lawyer to draw a proper agreement and then send it to Catania at Timmins. It was again suggested by Giovinazzo that Vigna's consent was also required, and "if all sign I will go into it; if not I no go in at all." Papassimakes said to him in reply: "If one don't sign the deal is off, I have not spent any money yet." After this conversation, and having had Papassimakes add the names of Todd and Catania to the letter, Giovinazzo signed his name under the word "accepted." Subsequently an agreement was prepared by Giovinazzo's solicitors and sent to Catania to sign, who destroyed it and wrote to Giovinazzo on the 18th, explaining his reason why. The agreement was drawn between Giovinazzo, Catania, Vigna and Todd, of the first part, and Papassimakes, of the second part, but what its purport was was not shown, a copy not being proven or put in. During this time neither Giovinazzo nor Papassimakes had seen Todd nor had the proposition been discussed with them.

Frank Todd, who was the holder of a recorded half interest in L-5383, and an insurance agent by occupation, had occasion to visit Boston Creek on business intent sometime after the 30th of August, and met Papassimakes who referred to his interest in L-5383, and stated he had had some dealings with Giovinazzo which had not gone through to the effect that "we were to transfer one-half of our interests, that is in my claim and these other claims in consideration for which he would do all the assessment work, and take out patents and pay for the other half $75,000." I asked him about it; I didn't know anything about it. Papassimakes said he had some men in New York ready to go into this, and this agreement, or option, had to be in his hands, I think, by the 20th of August; it hadn't been delivered and it had given him a lot of trouble with his people; he had gone down and made this arrangement and evidently it was off, and he was in great trouble, and I said, "Well Giovinazzo is here and I would see what has happened." Todd then looked Giovinazzo up and after discussing it with him returned and told Papassimakes that, "it didn't seem fair on the face of it," and asked him if he would guarantee to pay the $75,000 to them, and further said, "if you will do that it is alright to me, and I think it would be alright to the others." Papassimakes replied, "I am not foolish; there is the deal but I won't guarantee that you will get it." Todd then said, "Well it is hardly good business to give away a half interest in these claims for the amount of the assessment work and the patents which only amounts to a few hundred dollars, and take a chance of not getting anything further." Todd was also told by Papassimakes that he had an agreement signed by Giovinazzo to the effect that "he would do this if his partners would go into it." Todd then refused to entertain the proposition when Papassimakes told him that "he had gone into the matter with his principals, and if it didn't go through it would make it bad for him, and

that he was in a position to put a caution on the claims and tie them up for all time to come and nobody would get anything."

The day after Todd left Boston Creek Giovinazzo met Papassimakes and told him that Catania, Todd or Ginsberg would not got into the deal, when Papassimakes threatened to file a caution against the respective interests.

On the 27th of September the letter or alleged agreement was caused to be recorded against the four unpatented claims, and a caution placed against the remaining patented property. On the 16th of October Messrs. Day & Gordon wrote Papassimakes asking that the letter be removed from the records and caution withdrawn, otherwise action would be taken; they also referred to the fact that under the said agreement Papassimakes was required to perform the deficiency of assessment work, and that he had failed to do so, the time for which was then passed. Diplomatic letters then passed between the respective solicitors. Messrs. Slaght & Slaght of Haileybury replied on the 21st that their client was prepared to pay for the work done on receipt of a memo. of the cost. Giovinazzo did the necessary work on L-5383 and recorded it; otherwise the claim would have been in default. In October Papassimakes asked Giovinazzo if he got $25,000 for his interests if he would give an option and he was referred to his solicitors for further discussion which did not take place.

I was impressed with the honesty of all the witnesses and while there was complete unanimity by all as to the essentials sworn to by each, there was not, I am sure, a rehearsal of the evidence before trial, or an understanding as to what was to be sworn to.

The letter which is relied upon by Papassimakes as a binding agreement is addressed to three of the recorded holders of interests in the claims in question. Ginsberg was properly left out as he, at the time the letter was drawn, had refused to consider

the proposition. It is admittedly accepted by Giovinazzo, but the other holders, Catania and Todd, whose names were typewritten in under the word "accepted," did not sign it and at no time agreed to do so. The respondent now seeks to bind and hold the interests of Giovinazzo having abandoned his claim as against Catania and Todd.

What Papassimakes required was half of each of the interests of Giovinazzo, Catania and Todd in the claims mentioned and upon a transfer of such interests being made Papassimakes was required to perform working conditions and to patent certain claims. It was addressed to them jointly and was to be accepted by all as indicated by the letter. I can only pass upon the evidence before me and not anticipate what the respondent might say or the defence would be, but the letter itself may preclude Papassimakes from asserting any claim to the interest of Giovinazzo as the latter could not under the express words of the offer have upon making a transfer of his interests only demanded that Papassimakes perform working conditions and other obligations mentioned therein. There was no mutuality of obligation as between Giovinazzo and Papassimakes, the latter's action would possibly be one in damages for misrepresentation if it is alleged Giovinazzo represented that he had authority to act for and on behalf of all the interested parties.

The offer is made for the joint, not the individual interests, and the consideration is based upon a transfer of all the interests mentioned. It was suggested by Papassimakes that the memorandum of agreement should be put in proper form and asked Giovinazzo to have his solicitors prepare an agreement which Giovinazzo did and which was not signed by any of the holders of interests in the claims. Giovinazzo testified that he told Papassimakes he would not enter into the agreement unless it was agreeable to the other parties, and his evidence is quite consistent with, I think, a proper construction of the letter that it was a joint and not a several offer.

I feel satisfied that the document was required to be signed and accepted by all the parties mentioned and who held the interests sought to be acquired and was not binding on any until signed by all. See *Re Oslund et al. and Bucknall* (Price), M. C. C. 368.

If Papassimakes had felt that he had acquired rights under the document signed by Giovinazzo he should have performed the necessary working conditions on L-5383 before it matured, which he did not do, and I attach no importance to his solicitor's letter of the 21st of October offering to pay for such work which had then been done by Giovinazzo and treat it rather as a solicitor's sagacity and in the nature of a prop for what it was worth to the respondent's case.

If Giovinazzo had not performed the work the claim would have been in default, and it was rather late to make the suggestion that he would pay for the work which, if there was an existing contract, he was under obligation to perform, and should have performed before the letter was written.

I think it was wrong to have the alleged agreement placed on record as it at once formed a cloud against the title, and in such a way lent itself to the respondent's purpose, if his object was to embarrass the holders and force them to a settlement. I do not suggest that was his intention as his evidence is not before me, but his proper course was to have come before me and asked for a certificate of interest and then if that had been granted the respondent would have been asked to go to trial at once.

I order that a certain letter or agreement dated the 14th day of August, A.D. 1916, and recorded on or about the 27th day of September last against Mining Claims L-2582, 4902, 4987 and 5383, situate in the township of Boston, in the Larder Lake Mining Division, be cancelled and removed from the records of the said claims.

And I further order that the respondent do pay the applicant the costs of the trial and adjournments throughout upon the High Court scale.

(THE COMMISSIONER.)

IRESON v. MASON.

Staking—Discovery — Prospecting Pickets — Licensee — Delay in Completing Staking.

On the 4th of October I., a licensee, showed T., a non-licensee, his discovery and where to plant a discovery post. On the 2nd T. put up a discovery post, I. not being present. On the 18th I., T. and a surveyor put up the remaining posts. M. attempted to stake the same parcel of land on the 3rd of November and recorded his application.

Held, that the discovery must be made by a licensee. That it was not I. who made the discovery but T., and had I. been present, or had a personal knowledge, it might be that what T. did as a non-licensee would not invalidate the staking. I.'s affidavit of discovery was not based upon personal knowledge and was bad. What T. did on the 2nd could not be considered as part of the staking of the 18th of November. Both attempts at staking were isolated and invalid. The staking by and for I. was bad throughout.

M.'s discovery was insufficient and his staking was invalid in other respects. The sketch filed did not conform with the requirements of section 59, and the application and sketch indicated and asked for a claim altogether different from the ground staked.

Section 59, sub-sec. (5) was not helpful.

Both applications disallowed.

Dispute filed by Charles E. Ireson against Mining Claim P.S.-329, Parry Sound mining division, and transferred by the Recorder to the Mining Commissioner for adjudication.

Neither party represented by counsel.

12th April, 1917.

THE COMMISSIONER.—The dispute herein was transferred to me by the Mining Recorder at Parry Sound for adjudication.

The disputant, Charles Edward Ireson, alleges that he had a prior discovery and that James H. Mason, the respondent, did not stake Mining Claim P.S.-329 as required by the provisions of the Mining Act of Ontario.

In May, 1916, Ireson was prospecting the property for mica, but concluded it was not there in paying

quantities. He then prospected for feldspar and in June had four prospecting pickets put up on a showing near the Maganetawan River, and in July had two more placed near the Canadian Northern Railway trestle on the north-eastern portion of the lot. He submitted samples to Messrs. Thomas Heys & Son, assayers at Toronto, who reported that it had not, at present, any commercial value and he also received a discouraging report from an authority in Cleveland, Ohio. In September he learnt that the Guelph Agricultural College had been experimenting on feldspar for potash, and then seeing a commercial possibility for feldspar, concluded to stake the property in question.

On or about the 4th of October, Ireson accompanied by Norman Taylor, who had previously helped him to put up the prospecting pickets, went over the property with the view of staking it, but owing to the limits of the lot not being well defined, they concluded not to do so and Mr. Ireson returned to Toronto with the object of securing the services of a surveyor. Before leaving he told Taylor where he wanted his discovery post placed.

G. S. Abrey, an Ontario land surveyor, undertook to make a survey and arranged to go to the property on or about the 17th of November

Ireson notified Taylor that he expected to return to the property about the 1st of November, and Taylor made arrangements to be free that day in order to assist in the staking. Ireson not having come as arranged, Taylor went to the property on the 2nd and put up the discovery post at the place previously shown him by Ireson. Taylor was not a licensee at the time nor was Ireson present when he erected the discovery post. The post was inscribed with Ireson's name, license number and date of discovery. On Saturday the 18th Ireson, Taylor and Abrey were upon the property. Abrey, who was familiar with the locality, had, he said, no difficulty in getting the limits of the lot, and proceeded to make a survey according to

the Survey Act, and his plan (Exhibit 6) was filed. He ran the northerly and easterly limits; the southerly boundary was defined by the Maganetawan River, and the westerly line being the surveyed western boundary of the lot he did not blaze it. He also erected Nos. 1, 2 and 4 posts, the No. 3 post being placed by Taylor as Abrey said he had not time. The posts were marked by Taylor with their numbers, but no mention of Ireson's license number or his name was placed on them other than on the No. 1 post. This was the part played by Abrey in the staking.

The application states that the claim was staked, and the lines cut and blazed on the 20th, whereas it would appear from the evidence, Saturday the 18th was the correct date, the 20th being no doubt the day the application was completed and handed to the Mining Recorder.

Mr. Mason, who is interested in mining by profession, was attracted to the property by an outcrop of feldspar, but Mr. Ireson imputed that it was on account of his observance of his (Ireson's) prospecting picket that drew Mason's attention first to the property; however it is of no consequence how or why he attempted to stake the same lands as the privilege was his if the ground was open.

After making due enquiries and leaving the matter open for some weeks he learned that the land was open and on the 3rd of November planted his discovery post which is situate to the east of the right-of-way of the Canadian Northern Railway, and near the north-east boundary of the lot. He staked the claim that day. What he applied for was the north 47 acres of lot 37, concession 14, township of Burton, with his east and west lines 24 chains and the north and south lines 20 chains long. His sketch attached to the application does not show the length of the lines, that is, the distance between each corner post, nor the distance from the discovery post to the No. 1, nor the situation of the witness post planted for the No. 1 or its distance from it.

Mason arrived at his distances by "pacing off" and by the "eye." Mr. Abrey went over the claim as staked by Mason and said that his No. 1 post was well in on the claim, and not at the true north-east corner of the lot, and the correct distance from the north-east corner of the lot where the No. 1 post should have been and Mason's No. 2 post was about 15 1/2 chains, and from the position of his No. 1 as indicated by the witness post the distance was only 8 1/2 chains to his No. 2; that the distance from his No. 4 to his No. 1 post was 8 1/2 chains, and 10 1/2 chains from the north-east corner of the lot. In his application Mason indicates that his discovery post is 450 feet from his No. 1, it in fact being, according to Mr. Abrey, only 150 feet. I quite agree with Mr. Abrey that all signs point to a hurried staking. His No. 3 was not seen by Abrey, but Mason speaks of it as being on the south side of the lake, shewn on the plan filed (Exhibit 6), in the water, and he indicated it by placing a witness post on the north side of the lake. Mr. Mason does not think the position of the lake is properly shewn on the plan, but as he did not, as I suggested, put in a survey shewing the exact situation of the land staked, I must accept the surveyor's plan as being correct.

What Mason intended to stake and apply for was the north part or half of the lot, and what he staked was only a part of it. His witness post for No. 3 is not properly placed, nor did he fix his No. 1 at the true north-east corner of the lot as he should have done. His No. 4 and No. 2 posts are nearly 50 per cent. short of the distances indicated in his application, and I accept Mr. Abrey's statement that the true distance is not given between the discovery post and No. 1. I cannot excuse these mistakes on the ground that he made his observations from a plan secured from the railway company, as even if the railway plan was not strictly accurate, there was no reason why the lines should not have been approxi-

mately the distances defined in the application if proper attention and ample time had been given to the staking.

The sketch or plan attached to the application does not conform with the requirements of section 59, and the application and sketch indicated a claim altogether different from the claim as staked and the claim as laid down by the Recorder on his office map pursuant to the application would be entirely inconsistent with the actual outlines of the claim as staked.

Sub-section (5) of section 59 (4 Geo. V. cap. 14, sec. 2) does not afford relief, as I believe it was not intended to apply to a defective staking of this kind, and I cannot find that what was done was an attempt in good faith to comply with the provisions of the Act. See *Neilly* v. *Lessard,* 11 O. W. N. 322.

Reasonable care was not exercised in marking off and defining the boundaries, and I cannot hold that what was done was a substantial compliance with the requirements of the Act as to the staking out.

It must be remembered that Mason complains of the indifferent staking done by Ireson, and he must expect to be measured by the same rule that he wishes applied to one who, at least, had a prior discovery and had kept his eye on the property months before Mr. Mason had known of it.

Mr. Mason is a keen and bright business man, versed in mining, and showed a very apt knowledge of the requirements of the Act, which also worked to his disadvantage in a proper consideration of the many delinquent acts evolving out of the staking.

Mason's discovery was attacked and Doctor Coleman, an eminent geologist, testified that it was not such a discovery as is required by the definition of "valuable mineral in place," section 2 (x). While I am not disposed to decide a case upon the ground of insufficient discovery, if it can be avoided, I cannot disregard the evidence. Mason said he had other indications of feldspar throughout the claim, but what

a licensee is required to stand by is the discovery at the situation of his discovery post. It may be that sufficient feldspar can be taken from the claim to make it a profitable undertaking, but on the evidence there is no such apparent indication, and I find the discovery to be not as required and insufficient.

Mr. Ireson elected to proceed under section 56, but while doing so contravened sub-section (3), which requires that a licensee shall not have more than one block of land picketed at one time. The evidence discloses that he had three blocks picketed and in consequence all his picketings were void. Neither did he carry on as required by section 56; there was no evidence of diligent and continuous prospecting or following up indications on the block of land extending 25 feet on each side, in fact he only took samples from the exposed rock and sought to hold the property as against other licensees until such time as he by enquiry, and not by work, ascertained the commercial possibilities of his discovery. Between June, when the pickets were put up, and November, when the claim was staked, no work had been done, and the pickets were nothing more than a notice to the public to keep off.

The discovery while known to was not made by Ireson, but by his nominee Taylor, who was not a licensee at the time; neither was Ireson present when the discovery post was planted by Taylor. Section 54 requires that the discovery post shall have written or placed upon it the name of the licensee making the discovery, the letter and number of his license, etc., or if made on behalf of another licensee the latter's name and number of license. In conjunction with section 22, I think it apparent that what the Act contemplates is that one who makes a discovery and erects the discovery post shall be a licensee. For the purpose of the staking and application it was not Ireson who made the discovery but Taylor, and had Ireson been present, or had he personal knowledge of what

Taylor did, then it might be said that what Taylor did as a non-licensee did not invalidate the staking. Either Taylor or Ireson had to make the application, and whoever made it was required to be a licensee, and Ireson who made the affidavit of staking and discovery was not in a position to swear that he made a discovery on the 2nd of November, as in fact he was not on the ground, and he knew that it had been made by Taylor on his suggestion. The affidavit then was not based upon personal knowledge and was bad. I recognize that what he swore to was done in good faith on the assumption that it was his original discovery, but nevertheless it was an untrue statement of the facts as they existed.

Section 55 requires that "After discovery of valuable mineral in place, a licensee who 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, etc." The placing of a discovery post on the 2nd, and completing the balance of the staking on the 18th, is not "proceeding as quickly as is reasonably possible to complete the staking out of the claim." That he was waiting for the surveyor is not an answer, as it was his duty to see that he was in a position to at once complete the staking before he put up the discovery post.

What Taylor did on the 2nd of November cannot be considered any part of the staking of the 18th. Both attempts were isolated and abortive as neither was complete in itself.

To apply the two events of the 2nd and 18th of November, and hold it to be one whole and conclusive staking on the facts in this case would undermine the structure of the Mining Act, and have a tendency to create blanketting and other bad effects. Three of the corner posts were insufficiently marked and throughout the staking was bad and must be held to be invalid. Reference to *Sloan* v. *Taplin* (Godson), M. C. C. p. 22; *Armstrong* v. *Dwyer* (Godson), M. C. C. p. 30; *Whit-*

ing v. *Mather* (Godson), M. C. C. p. 318; *Leduc* v. *Grimston* (Godson), M. C. C. p. 285; *Dennie* v. *Brough* (Price), M. C. C. 211.

In the result the lands staked by both applicants become open, which is to be regretted, but I foresaw this and during the trial suggested that the litigants make a settlement, but they apparently desired a finished fight and they have had it.

I order that the dispute filed herein be dismissed.

I further order that mining claim P.S.-329 recorded in the name of James H. Mason of record in the recording office at Parry Sound, be cancelled, and I declare it to be invalid.

I further order that the application filed by Charles Edward Ireson be not recorded and that the staking of the said lands be declared invalid.

There will be no costs to either party and I so order.

(THE COMMISSIONER.)

LAHAY v. MERRICK.

Forfeiture—Relief from—Working Conditions — Intervening Rights —Purchaser for Value.

A lease of the claim was not applied for within the time required by the Mining Act and forfeiture occurred. The claim was restaked by K. and sold to M. for value. As forfeiture had occurred the land was open when staked by K., and M. was a purchaser for value.

Application to the Commissioner by L. J. Lahay for relief from forfeiture of a Mining Claim subsequently restaked and transferred to the respondent J. G. Merrick.

Hugh John Macdonald, for applicant.

Joseph Montgomery, for respondent.

23rd August, 1917.

THE COMMISSIONER.—This is an application under section 86 of the Mining Act of Ontario made by L. J.

Lahay, the recorded holder of Mining Claim T.R.S.-2688, situate in the township of Churchill in the Sudbury Mining Division.

The application was heard *viva voce*, at my office, Parliament Buildings, and all interested parties were present and represented by counsel.

It appears that the mining claim in question became in default for failure to apply for lease on or about September the 23rd, 1915. Lahay stated that he was unaware of the exact date when application should be made for a lease and expected that he would have been advised by the recorder before the claim was marked cancelled.

Heretofore it had been the practice of the recorders to notify the recorded holders when a patent or lease should be applied for, and following such notice to cancel the claim if the holder did not promptly make application. This practice had been done away with by instructions from the Department, as it led to misunderstanding and operated against the strict requirements of the Mining Act.

I have given this matter considerable thought, having been in correspondence with Mr. Lahay prior to the hearing, and had seen him in person, and was disposed to recommend relief from forfeiture provided it could be shown that the present holder Merrick was not a *bona fide* purchaser from Knox, the restaker of the claim. Before issuing an appointment, I took the matter up with Mr. Merrick, and he claims that he paid or was obligated to Knox to the extent of one thousand dollars ($1,000), and at the hearing he endorsed this statement and I have no reason to doubt it. Upon the conclusion of the hearing, I suggested that inasmuch as Lahay had made considerable outlay in the performance of work upon the property, that Mr. Merrick might consent to a cancellation of the restaked claim and secure an order vesting the old claim in him, and which would be relieved against forfeiture and thereby he would secure the benefit of the

work done on the forfeited claim upon payment to Lahay of a sum to be agreed upon.

After consideration, counsel for Mr. Merrick informed me that his client could not consent to my suggestion, as he could not see any results from the work alleged to have been done, and desired to superintend the working conditions himself so that the property might be developed.

As the parties could not reach a settlement, and as Mr. Merrick is undoubtedly a *bona fide* purchaser for value and the claim being open for staking when restaked by Knox, I have no other recourse than to recommend that the application of Lahay be refused.

(THE COMMISSIONER.)

BRADSHAW v. KREISLER.

Conflicting Mining Claims — Certificate of Record — Mistake or Fraud—Procedure—Appeal—Excessive Acreage—Reduction of —Invalidity—Patent.

Mining claim L. 5633 overran and conflicted with L. 2297, which was then ready for patent. The staker of L. 5633 admitted he intended staking a claim to the south of L. 2297, but owing to inaccuracies in the blue print which he relied upon he staked part of L. 2297. It was contended by B. that K. had staked a greater area than allowed by the Act and had obtained a certificate of record by fraud.

Held, that B. had staked over a then subsisting claim, and land he had not applied for. There was no fraud or mistake in the procuring or the issuance of the certificate of record, and the staker of L. 5633 did not use sufficient care in ascertaining if the land entered upon was open for staking. The staking of more than the prescribed area would not invalidate the claim except as to the excess acreage. The certificate of record would in the absence of mistake or fraud preclude an attack upon the grounds of excess acreage. *Balfour* v. *Hylands et al.* (Price), M. C. C. 430. In order to avoid a possible invalidity where a claim includes more than the prescribed acreage, section 59 of the Act was amended by 4 Geo. V. cap. 14, sec. 2, but the amendment did not apply herein. See *Olmstead* v. *Exploration Syndicate of Ontario*, 5 O. W. N. 8; *Neilly and Lessard et al.*, 11 O. W. N. 322.

B's relief, if any, was under section 116.

Application by Bradshaw to set aside a certificate of record issued to the respondent and recorded

against Mining Claim L.-2297 in the township of Lebel, Larder Lake Mining Division, and for an order reducing the size of the said claim to 40 acres.

Frederick Elliot, for applicant.

G. G. T. Ware, for respondent.

13th November, 1917.

THE COMMISSIONER.—The claimant alleges that the mining recorder issued through mistake or fraud a certificate of record to the respondent Kreisler, one of the recorded holders of Mining Claim L-2297.

Claim L-2297 was recorded on the 5th of December, 1911, all work having been performed, application for patent made and purchase price paid; the recorder on the 18th of December, 1916, issued a certificate of record.

Claim L-5633 was recorded on the 13th day of December, 1913, and ninety days' work was performed thereon.

On the 19th of December, 1916, the recorder addressed a letter to the holders of claim L-5633 advising them that their claim covered the same ground as L-2297, and as the latter claim had priority a certificate of record was being issued, and informed them to take action against his decision if so advised within fifteen days from the date of the letter.

The applicant Green admits that he understood he was staking cancelled claim L-2970, in which claim he had held an interest with one B. Babayan. Unfortunately the original applications of L-2297 and L-5633 have been burned in the fire which destroyed the recording office last summer; but the abstract of L-2970 shows that the No. 4 post was at the No. 2 post of L-2037, and the abstract of L.-5633 indicates that its No. 3 post was at the No. 2 post of L-2037.

L-2037 is immediately to the east and L-2970 to the south of L-2297, so that it would appear that on the evidence of Green and what is shown by the abstract, that what he set out to stake was mining claim

L-2970, in which he had held an interest, and which was then cancelled on account of non-compliance with working conditions, and was situate immediately to the south of L-2297, over which he admittedly staked, and is now known as L-5633.

This confusion, Green alleges, was due largely to certain blue prints prepared by some local surveyors, but which were not issued from the Department of the Bureau of Mines, or from the office of the recorder, and I have before me an authentic plan showing the exact situation of the claims and they are as indicated above.

If Kreisler had staked not more than 40 acres in each of the claims L-2296 and L-2297, there then would have been an area of approximately 30 acres to the south of L-2297. The blue print which Green relied upon no doubt took into consideration a claim of 40 acres each, and so placed the claims on the maps. As the blue print shows the northern boundary of L-2297 to be about two-thirds of the length of the eastern and adjoining boundary of L-2037, there would be land to the south of L-2297 and north of the southern boundary of L-2037 upon or at least not included in the claim L-2297. A plan prepared by a draughtsman of the Bureau of Mines shows the southern boundary line of L-2297 and L-2037 to be the same, and in that respect differ from the blue print put in at the trial, and which is now admitted to be incorrect.

Green admits he intended applying for and staking mining claim L-2970, which as I have said is to the south of L-2297; but in mistake applied for and staked nearly all of the land embraced within the Kreisler claim. It was essential that he should know his locality, and if he had been in doubt his proper course was to procure a survey.

He applied for a claim having boundaries 15 x 20 chains, and he staked a claim with boundaries of 22.61 chains on the east; 15.57 chains on the south and 23.24 chains on the west. Mining claim L-2297 has an area

of 57 acres, whereas the application was for a claim of 20 chains square, which would entitle the holder to an area of 40 acres. It is also to be observed that the claim immediately to the north, L-2296, and in which Kreisler is interested, has an area of 52.6 acres, and the Kreisler claim to the west also exceeds the area which under the Mining Act an applicant is entitled to.

When Mr. Gordon F. Summers was making a survey, he saw the Green No. 1 post with a tag upon it in the same position as the No. 1 post of L-2297, and while it is denied by Green that there was anything upon the lands to indicate that he was staking over a then subsisting claim, the fact remains that whereas the legends upon the post might not have been discernible, the posts were still standing and were an indication to the staker that the land had been taken up, and immediately put him upon inquiry.

There is no doubt that Green did stake over a then subsisting mining claim, and at a time when all work had been performed upon it, and that he staked land he had no intention of applying for and did not know he was upon.

On the evidence I cannot find that the certificate of record issued to the recorded holders of L.2297 was secured in mistake or fraud. There is nothing to indicate that, and it cannot for one moment be said that Kreisler or his associate exercised fraud in procuring it, or that the recorder was misled when he granted it, as the recorder's letter dated the 19th of December, A.D. 1916, clearly shows that he was aware of the position, and upon the facts was determined that L-2297 having priority and being in good standing, and all work having been performed, that the holders were entitled to a certificate of record in order to enable them to secure a patent to the lands. I do not think it necessary to dispose of the contention of the respondent that the applicants' proper procedure was by way of an appeal from the letter of the mining

recorder dated the 19th December, 1916, under section 133 of the Mining Act. There is no doubt that if the applicants had then appealed against the decision of the recorder the matter would have been promptly determined. A notice of claim filed by the applicants is dated the 18th April, A.D. 1917, being the first time apparently they took the trouble to consult a solicitor in regard to the position of the title of their claim. I find there was no fraud or mistake in securing or the issuance of the certificate of record, and that the staker of L-5633 did not use sufficient care in ascertaining if the land he entered upon was open for staking. The staking of more than the prescribed acreage will not invalidate the claim, except as to the excess acreage. The certificate of record would in the absence of mistake or fraud preclude an attack upon the grounds of excess acreage. See *Balfour* v. *Hylands et al.* (Price), M. C. C. 430. In order to avoid an invalidity where it appeared that a claim included more than the prescribed acreage, section 59 of the Mining Act was amended by 4 George V. cap. 14, sec. 2; but this amendment does not apply to the present case. While Green was at fault in staking over L-2297, I cannot find he had a guilty mind, as he appears to have performed 90 days' work on the claim, and I prefer to find that what he did was the result of insufficient care rather than a deliberate attempt to interfere with a property in good standing. I think his relief, if any, is under sec. 116 of the Mining Act, and upon the facts it might appear to be equitable that L-2297 should be cut down to 40 acres.

I order that the notice of claim herein be dismissed.

I allow the respondent costs, which I fix at $50.

(THE COMMISSIONER.)

REMO AND PELLERIN v. HAMILTON

Forfeiture—Relief from — Agreement to Purchase — Trust—Agreement—Claims Restaked by Trustee—Intervening Rights—Work Performed—Compensation.

Applicants agreed in writing to transfer to H. certain claims to be held in trust until a company was incorporated. The claims at time of transfer were in default, but unknown to transferors. H. did not search title before forming company. Upon learning of forfeiture, H. restaked and performed work notwithstanding notice of application by former holders for relief from forfeiture. It was found by the Commissioner that the applicants believed the claim to be in good standing when transfer was made, and held that it was as much the duty of H., who acted in a fiduciary capacity, to have searched the records of the claims when purchasing, as it was the duty of the applicants to have known the state of the titles to the claims transferred. That H. proceeded with working conditions on the restaked claims in the face of notice of application for relief, and in any event he was bound by the agreement to do more work than the work performed on the claims restaked. That H. was not justified in restaking in view of all the facts.

Application by Louis Remo and Fred Pellerin for relief from forfeiture under section 86 of the Mining Act.

Frederick Elliot, for applicants.

G. G. T. Ware, for respondent.

5th December, 1917.

THE COMMISSIONER.—The application herein was heard in open Court at Haileybury on the 23rd of October last, all interested parties being present and represented by counsel.

Upon the evidence, I find that forfeiture occurred on or about the 2nd of July, 1916, and the claims were restaked by Joel W. Hamilton on the 14th of July, 1917.

On the 19th of February, 1917, Hamilton entered into a written agreement with Remo and Pellerin whereby the said mining claims were to be transferred

to Hamilton to be held in trust until a company was incorporated to take over the claims, and certain other claims held by John and Peter J. McGinley, Eli Wilton and Thomas Grier. The company was to be incorporated within three months from the date of the agreement, otherwise the declaration of trust became cancelled and the transfers of the claims which were held in trust by the bank, were to be handed over to the respective owners.

The company was incorporated within three months and a term of the said agreement required that as consideration for a transfer by Pellerin and Remo, Hamilton should assign them 125,000 shares of stock. All subsequent assessment work on the claims was to be performed by Hamilton, who knew at the time the agreement was entered into that 120 days' work had been performed upon 17546 and 128 days on 17545, leaving approximately the last period of work to be performed on each claim.

Shortly after the agreement was entered into Hamilton left for the United States to interest parties in the company about to be formed, and at that or some time subsequent disposed of certain shares or interests, for which he received certain sums not disclosed at the hearing.

On his return he learned that the claims were in default and had been cancelled, and on the 14th of July caused both of the former claims to be restaked as 18403 and 18404.

In July Pellerin learned that the claims had been restaked, saw Mr. Hamilton and tried to make some adjustment. Pellerin gives as his excuse for not performing the last period of work and allowing the claims to become forfeited, an understanding that he and his co-owner had a period of one year from May, 1916, and asserted that he believed the claims to be in good standing at the time he entered into the agreement with Hamilton.

I find that both Pellerin and Remo honestly believed the claims to be in good standing on the 19th of February, 1917, when the agreement was entered into and transfers made and acted throughout in good faith.

Mr. Frederick Elliot, who had been retained by Pellerin and Remo, a few days after the claims had been restaked by Hamilton, discussed the situation with him, and then advised that he intended applying to the Honourable the Minister of Mines for reinstatement and relief from forfeiture, and subsequently on the 21st of the same month wrote Mr. Ware, solicitor for Mr. Hamilton, that his clients would not consent to accept Mr. Hamilton's offer to allot them 50,000 shares instead of 125,000 as the agreement required, but agreed to reimburse him to the extent of the recording fees and the cost of restaking the two claims. Notwithstanding the interview which took place with Mr. Elliot a few days after the staking, and being on notice that an application was to be made for relief from forfeiture, Mr. Hamilton proceeded to have assessment work done upon the properties, and in between the 16th of July and the 6th of August 152 days' work was done.

Mr. Elliot wrote the Mining Commissioner with reference to relief from forfeiture on the 20th of July last, and the matter was pending until this hearing in October.

In order to have the matter amicably settled, I made the suggestion that Hamilton should receive 10,000 shares of the Pellerin and Remo stock as compensation, but this he has refused, and is asking for monetary consideration amounting to $867.61.

The restaking by Hamilton cannot be considered in the nature of an adverse interest, and consequently the application by Pellerin and Remo for relief from forfeiture would and should be granted. Hamilton was in the position of a trustee, and it was just as much his duty to have searched the title of the claims

when the agreement of February was entered into as it was the duty of the transferors to have known the state of the title they were transferring. There was no deceit on the part of Pellerin and Remo as the record in the recording office would have disclosed the state of the title. Hamilton owed a duty to the parties he intended interesting in these and other claims to see that the claims were in good standing.

Mr. Hamilton admits that he was not under a misapprehension as to the amount of work to be performed upon the two claims, namely, the last period. so that it would appear from that fact alone that both Pellerin and Remo were under an honest belief when they transferred the claims that the last period of work had still to be performed, and that the time for the performance had not expired.

I cannot appreciate Mr. Hamilton proceeding with assessment work in view of Mr. Elliot's personal interview and his letter of the 21st of July. He was advised that an application for relief was to be made, and proceeded to do work which he now asks to be reimbursed for if the claims are to be reinstated.

It was quite apparent that work was performed by Hamilton upon these claims in order to exploit them, so that the parties to be interested might be impressed by the value of the claims, and these claims were selected as the ones upon which exploitary work was to be performed. Having that in mind, all that was done by Hamilton was for the purpose of facilitating the promotion of the company and insuring its success. While he performed the 152 days' work he was required under his agreement to do 180 days, and he has had no loss in that respect.

There is no doubt in my mind that the proper course for Mr. Hamilton to have pursued when he learned the claims were in default was to either restake them and then ask the former holders to apply for relief from forfeiture, or simply had an application for relief promptly sent in, and there being no adverse

interests the application would in due course have been granted. He complicated the situation, and the result is due entirely to his own method of procedure.

As Mr. Hamilton has refused to accept stock as compensation, I would recommend that he be allowed cost of recording and restaking the two claims, which I would fix at $50. I would further recommend that the work done upon the restaked claims should be permitted to be applied upon the forfeited claims, so that the holders would be in a position to apply for patents forthwith.

(THE COMMISSIONER.)

WATSON v. MONAHAN.

Staking—Discovery—Valuable Mineral in Place—Requirements of Act with Respect to — Inspection — Comments on—Evidence—Claim Jumping—Deception.

The evidence disclosed a considerable number of mistakes in staking, none of which by itself would constitute an invalid staking, but taken as a whole required to be considered in the light of the strict requirements of the Act. The requirements of the Act with reference to staking may appear to be rather technical and unimportant, but a standard must be set and maintained, and where there are two applicants for the same claims the staking of each must be carefully considered and weighed having in mind priority of discovery and thoroughness in staking. A discovery and post to mark it is the foundation of a mining claim and of priority of staking. While the interpretation put on 'valuable mineral in place' by section 2 (x) of the Act may not be satisfactory, it was the duty of the Commissioner to construe the Act as he found it. The popular term "claim jumper' is offensively and improperly used when applied to a restaker of a forfeited claim.

Dispute against the respondent's mining claims in which the discoveries and staking were attacked.

Frederick Elliot, for disputant.
H. L. Slaght, for respondent.

December 12th, 1917.

THE COMMISSIONER.—This claim has been the cause of much litigation. It was formerly held by the present disputant, but owing to non-performance of certain assessment work the claim was cancelled and restaked by the respondent.

Watson applied for relief from forfeiture and urged what I thought was sufficient ground for relief which I granted on terms. On appeal to the Appellate Division, my decision was reversed on the grounds of want of jurisdiction, and suggesting that the applicant might find relief under section 86 of the Act. Watson lost the claim through a misunderstanding of the proper application of the Act, which the Appellate Division enforced strictly against him, and Monahan became the recorded holder. Watson was not satisfied that Monahan could make a discovery and stake the claim with snow on the ground in the month of January in one hour's time, and after an inspection of the staking by Monahan, he staked and filed the dispute which is now before me.

The evidence disclosed a considerable number of mistakes in staking, none of which isolated and standing by itself would in my opinion constitute an invalid staking, but taken as a whole requires to be considered in the light of the strict requirements of the Mining Act.

The requirements of the Act with respect to staking a mining claim may appear to be rather technical and unimportant, but a standard must be set and maintained, and where there are two applicants for the same claim the staking of each must be carefully considered and weighed, having in mind priority of discovery and thoroughness of staking.

The claim staked is known as the s.w. 1/4 of the s. 1/2 of lot 8, township of Munro, and was applied for as such by Monahan.

In marking his No. 1 post which should be inscribed with a description of the particular or part

lot applied for, Monahan improperly marked upon it the S.E. 1/4 of the S. 1/2 of lot 9, both the part and number of the lot being incorrect. He staked according to his application on the 28th of December, but the No. 1 post was marked the 27th.

In the application the discovery post was shown to be 750 feet from the No. 1 post, but the No. 1 as marked and inscribed showed the distance to be 800 feet.

The east boundary line was blazed, but the south and west being surveyed lines were not blazed, neither was the north boundary blazed or pickets put up. As Monahan expressed it, " I blazed a few odd trees; as they were old lines I was not so particular."

Section 59 requires the sketch attached to the application to show the discovery and corner posts and distance from each other in feet. This was not done.

The No. 1 post was planted before the discovery post was erected, which might, under other circumstances, have led to unnecessary litigation and loss to the staker on the grounds of priority of discovery.

A discovery and post to mark it is the foundation of a mining claim and of priority of staking. A discovery post is required to be planted or erected upon an outcropping or showing of mineral in place at the point of discovery, section 54 (2). What Monahan did was to put the discovery post in the snow against the rock. "It was against the discovery; it might have been on the discovery, I cannot say." While it was difficult it was not impossible for Monahan to have planted his discovery post in a crevice of the rock at the point of discovery. To place it against the discovery temporarily held in place by the snow eventually meant a lost discovery post and an attack on the ground that the post had not been planted or in any event could not be found at the point of discovery.

It was alleged but not positively proved that Monahan's No. 1 post was one chain and 52 feet north and 63 feet west of the surveyor's post at the north-east corner of the part of lot applied for.

The staking indicates undue haste and disregard of the requirements of the Act in respect to a discovery and staking.

The disputant contends the respondent did not make a discovery of valuable mineral in place. The respondent in his affidavit of discovery swore to a discovery of gold bearing quartz. Upon the trial and under cross-examination Monahan said he did not find a defined vein, but the discovery was just as good: "Lots of quartz, it is gold-bearing quartz, I would not say it contained gold." An assay was not made and it is a question whether the outcrop of the rock adopted as a discovery was not a boulder. Mr. McLelland, an old prospector, viewed the claim and had seen Monahan's discovery, and in his opinion it was not very promising rock and he would not have staked the claim. At the close of the case I suggested an inspection which was not acceptable to either counsel. The disputant contended a case had been made out irrespective of discovery and upon the evidence the discovery could not stand. The respondent's counsel thought inspections unsatisfactory. I quite agree as a general rule inspections are unsatisfactory, and I find myself able to reach a conclusion without the aid of an inspection by a government official.

Valuable mineral in place is interpreted by section 2 (x) of the Act. I am not in sympathy with the requirements of the discovery of valuable mineral or its interpretation, as in my experience as Mining Commissioner the great proportion of discoveries are not such as are required by the Act, and what I would term innocent, nevertheless false affidavits of discovery, are continually being sworn to. It is my duty, however, to consider the Act as I find it, and taking the most lenient and charitable view of Monahan's discovery, I am still forced to find he has failed to make such a discovery as is contemplated by the Mining Act. Upon his own testimony he had neither "a vein or lode or deposit of mineral." Quartz is not necessarily valuable mineral in place and there is

nothing in the evidence to indicate that there was such "a discovery as to make it probable that the vein lode or deposit was capable of being developed into a producing mine likely to be workable at a profit."

The Act, I take it, would be satisfied if there was enough ore or mineral in sight at the point of discovery as to make it probable that the vein, lode or deposit was capable of being developed into a producing and profitable mine. It would either be a case of good luck or previous knowledge of a discovery that would permit a prospector to make a discovery and stake a claim in the short space of time under winter conditions as Monahan did. The former holder and present disputant's application for relief from forfeiture was opposed by the respondent and it was urged on his behalf that the Act should be strictly enforced and that working conditions should be lived up to. The respondent cannot, in face of his own advocacy of a strict interpretation of the Act as against the disputant, ask for any other measure than that meted out to his adversary upon that application.

It has been held by Mr. Price, my predecessor, that it is extremely unsafe to accept a claimant's own description or estimate of his discovery without verification, and with which observation I entirely agree. *Re McDonald and The Beaver S. C. M. Company* (Price), M. C. C. 7.

Mr. Monahan has had a long experience as a prospector and farmer in Northern Ontario, and I regret that in the final result I have had to find his staking was carelessly and improperly done and his discovery inadequate. One who restakes a claim which has become forfeited owing to non-performance of either working conditions or failure to apply and pay for a patent, is commonly called "a claim jumper," which is quite an improper term, as the Act is positive in its language as to when a forfeiture occurs, after which the land is open for restaking to the public, and while I endeavour to relieve against forfeiture where it can

be done without interfering with the machinery of the Act or unduly affecting the restaker, it may be that one who takes advantage of a former holder's delinquency and appropriates the property to himself serves a good purpose in stimulating holders of mining claims to faithfully observe the essentials of discovery and staking and maintenance of a claim.

It was urged by counsel for the respondent that all of the grounds relied upon by the disputant as constituting an invalid staking had not the effect of misleading or deceiving any licensees or prospectors, and while that may be a fact I have to judge between the staking of Monahan and the subsequent staking by Watson, which has not been attacked and which for the purpose of this trial I must assume is regular, and as between the two the latter is entitled to hold the claim.

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Section 57 of Mining Act (1914).—What was done was not in the nature of a blanketting of the claims or for that purpose and the previous staking had been disclosed to the Mining Recorder and the reasons therefor. *Re Evis and Young*.... 264

R.S.O. 1914, ch. 32, sec. 57.—This section refers to "any land open to prospecting" and such lands are described in sec. 34 (*a*). The lands not being open to staking, C. was not estopped by what he did by afterwards staking the same land when open. *Re Steep and Cochrane*..... 276

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Record of Forfeiture.—Cancellation not required to create a forfeiture. See secs. 84 and 85 (2), Act of 1914. *Re Murphy and Rowan* 326

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Personal Knowledge Required.—A licensee must swear to only what he knows at the time to be true and cannot be allowed to assume the fact to be true. *Re Sloan* v. *Taplin*.....22

Who May Make.—That neither the disputant nor the licensee who staked on his behalf could honestly make the affidavit of discovery, not having a personal knowledge of all the facts required to be sworn to. Reference to *McNeill and Plotke*, M. C. C. 144; *Ledyard and Powers* v. *Abode; Attorney-General of Ontario* v. *Hargrave*, 8 O. W. R. 127, 10 O. W. R. 319; *Cotton* v. *Manley*, 32 S. C. R. at page 378. *Re Armstrong and Dwyer*.....30

Who May Make.—At the time he made the affidavit of staking, the only facts known to T. were that he had a discovery indicated by a discovery post and blazed line from it to the number 1 post. Notwithstanding this limited knowledge he swore the claim had been staked, that the distances given in the application were as accurate as they could honestly be ascer-

tained, etc. On the assumption that the claim had been staked he made the affidavit of discovery and staking. Held, a deponent is required to have personal knowledge of the facts sworn to and the affidavit being based upon assumption was deceptive and false. See *McNeill and Plotke*, M. C. C. p. 144; *Sloan and Taplin*, p. 22; *Armstrong and Dwyer*, p. 30. *Re Ledyard, Powers and Abode*.....60

Deponent not Present When Staking was Completed.—Held, by the Commissioner,—If superintendence is permitted by the Mining Act there cannot be such by a licensee who is directing the staking if he leaves the claim before its actual accomplishment. To condition oneself to swear to actual facts from a knowledge based upon signs and sounds would be perilous to the deponent. What I have said in *Sloan and Taplin and Ledyard and Powers and Abode* applies here. It is not enough that what is sworn to turns out true at the time the affidavit is sworn to and hearsay evidence is insufficient. *Re McLeod and Armstrong* 71

On Appeal to the Appellate Court.—Held, Hodgins, J.A.: "It was gravely asked before this Court that an affidavit which the appellant did not know to be true when sworn to was unexceptionable, if afterwards it was found that the facts stated had been correctly guessed at. This is a new departure in affidavit making, and, if accepted, would simplify the acquisition of claims by allowing a prospector who finds valuable mineral in place to quit the ground and having left others to do the staking to make the necessary affidavit in the pious hope that their work will justify the oath upon which he secures his claim. There are two reasons which plainly render any such method of dealing with the requisite oath possible. *Re McLeod and Armstrong* 71

Deponent not Present at Discovery.—A discovery not having been made at the point where the discovery post was planted the affidavit of discovery was untrue. It is not permissible for a licensee to erect his number 1 post and leave the property before a discovery post is planted and the staking completed even though the staking had been completed by one authorized by him prior to the time the affidavit was sworn to by the licensee. There must be personal knowledge. *Re Munroe, McIvor et al.* 93

Who May Make.—N. placed his discovery and No. 1 post and then left for the Recording Office to file an application. His agents placed Nos. 2 and 3 and 4 posts and did some blazing after N. had left the property. Held, the staking was invalid as N. had not personal knowledge and was not conditioned to make the affidavit of discovery and staking. See *Ledyard and Powers and Abode*, p. 60; *Re McLeod and Armstrong*, p. 71. *Re Gratton and Neilly*. 107

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Parol Agreement—*Husband and Wife—Statute of Frauds.*—Held, by the Commissioner,—That the claimant failed to make out a contract. What took place prior to the marriage and subsequent thereto did not amount to an agreement whereby all mining claims obtained by either of them became the joint property of both. Even if upon evidence an agreement could be found, sec. 71 (1) stood in the way of the claimant, as the letters put in could not be said to satisfy the Statute of Frauds nor was there sufficient corroboration of the alleged agreement. The relationship was not one of partnership. *Bradley* v. *Consolidated Bank*, 38 Ch. D. 238. *Re Jessop and Jessop* 230

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Option or Contract.—*Time of Essence Implied—Waiver of Time—Removal—Specific Performance.*—The claimant entered into a written agreement with the respondent Bock for the pur-

chase of a claim. The purchase price was payable in instalments, and time was not made of the essence of the agreement. The claimant asked specific performance. Held, that the ownership was not transferred in equity by the contract and there was no provision for the sale of the lands in case of default. The contract was not on all fours with the usual agreement for purchase whereby time is made of the essence and a forfeiture clause imposed with the right to resell upon default and there was no taking possession of the lands by the purchaser. The market for mining claims is variable. The equity of the claimant's case seems to be met by what was said in *Alley* v. *Deschamps* (1806), 13 Ves. 225, 228. "It would be very dangerous to permit parties to lie by with a view to see whether the contract will prove a gaining or a losing bargain; and according to the want either to abandon it or considering the lapse of time as nothing to claim specific performance which is always the subject of discretion." Reference to *Morton and Symonds* v. *Nichols,* 12 B. C. R. 9; *Boyd* v. *Richards,* 29 O. L. R. 119; *Kilmer* v. *British Columbia Orchards Lands Ltd.* (1913) A. C. 319; *Dagenham (Thames) Dock Company* (1873) L. R. 8 Ch. 1022, distinguished. "If there is a case in which a deposit is rightly and properly forfeited, it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not." *Soper* v. *Arnold,* 14 App. Cas. at 435 *et seq.* Time was held as being of the essence of the contract and specific performance refused. *Re Sager* v. *Bock* 209

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From Mining Recorder—*Working Condition.*—C. applied for Mining Claim L-2454, Lebel township, in the Larder Lake Mining Division and disputed, alleging non-performance of working conditions. Held, by the Commissioner, that the affidavit verifying the report of work was untrue and known to be untrue when sworn to and the claim was ordered cancelled. The respondents were innocent purchasers for value but could not be protected in proceedings before the Mining Commissioner as they had accepted the risk of purchasing a mining claim before the issuance of a certificate of performance of work or record. *Re Cox and Brisbois et al.* 120

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From Recorder—*Question of Fact — Claim of Interest in Mining Claims Based on Alleged Verbal Agreement—Statute of Frauds—Section 71 (1) (1914).*—Held, statute not satisfied. *Re Malouf and Walsh* 166

From Recorder.—Held by the Commissioner: The law is well settled that a mining claim is invalid if discovery of valuable mineral is not made before staking and subsequent discovery will not cure the invalidity. The filing of an affidavit of discovery is a necessary step in an application to record but it does no more than establish a *prima facie* case of discovery. The onus of proof had shifted to the respondent and he had not satisfied it. Had a valid discovery been made, was the sole question to be decided and upon the facts there had not. Appeal allowed. *Re Baker and Benbow*.....183

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formed part of the bed of Peterson Lake which by patent from the Crown had been vested in the respondents. Held, by the Commissioner, that the text and the plan referred to in the grant to the company established "an adequate and sufficient definition with convenient certainty of what was intended to pass," and that the land staked was not open and the application properly refused. Reference to *Llewellyn* v. *Earl of Jersey*, 11 M. O. W. 183; *Grasett* v. *Carter*, 10 S. C. R. at 112; *Bartlet* v. *Delaney*, 29 O. L. R. at 438; *Horne* v. *Struben* (1902), A. C. 454 at 458. That documents leading up to the grant were admissible as showing the negotiations and extrinsic facts and circumstances and helped to elucidate the grant, see *Brady and Sadler*, 17 O. A. R. 365. On appeal to the Appellate Division, 32 O. L. R. 128—Held, that the rule of construction invoked by the appellants' counsel made against their contention; the case cited established that where the lands intended to be conveyed are accurately and completely described the description is not controlled by reference to a plan on which they are stated to be shown. Appeal dismissed. *Re Finucane* v. *Peterson Lake Mining Company*.....193

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Misdescription—*Affidavit of Staking Based upon Assumption.*—The situation of the stakes and the locality of the claims being shown to the satisfaction of the Commissioner the fact that the claims as staked were not altogether as applied for did not invalidate the claims. See now *Olmstead and Exploration Syndicate of Ontario, Limited*, 5 O. W. N. 8, sec. 59 (5) of Act of 1914, and *Neilly and Lessard*, 11 O. W. N. 322. An affidavit of discovery and staking must be based upon personal knowledge. Mere assumption that the staking was complete at the time the affidavit was sworn to is not sufficient. See *McNeill and Plotke*, M. C. C. 144; *Sloan and Taplin*, p. 22; *Armstrong and Dwyer*, p. 30. *Re Ledyard, Powers and Abode* 60

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Confliction—*Land Staked not as Applied for—Gillies Limit.* —Held, by " Second Divisional Court," that what a discoverer is entitled to is twenty acres laid out in the manner imperatively and minutely (with diagrams) prescribed by the Act. The provisions of sec. 59 (5) added by 4 Geo. V. ch. 14, sec. 2, meant that " notwithstanding the fact that the discoverer has not laid out his claim in the way in which the Act requires he may in the circumstances there provided for have that which the Act so gives to him, not that which he has inaccurately laid out." *Re Neilly and Lessard et al*.....332

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to the certificate being procured by mistake or fraud. A case can be anticipated where the certificate itself might be procured by mistake but not by fraud. If it is not the certificate that is fraudulent then it must be the dishonest staking or discovery upon which it is based. *Re Coutts and Aman*.....289

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Failure to Contribute—*Vesting Order.*—McRae having secured an order extending the time for performance of his co-owner's Hitchcock's share of work, and relieving against forfeiture caused by Hitchcock's default, performed the work and applied under sec. 81 of the Act for an order vesting the interest of Hitchcock in himself. Jordan, also a co-owner, believing a forfeiture had occurred, staked and applied to have the claims recorded. Held, by the Commissioner,—Forfeiture had not occurred when the claims were staked by Jordan and his application must be refused. McRae took the proper course to protect the claims against forfeiture and which had the effect

of preserving to Jordan and the other co-owner their respective interests. Jordan was not entitled to share with McRae the forfeited interest of Hitchcock, and an order was made vesting the interest of Hitchcock in McRae and declaring the staking by Jordan to be invalid. *Re McRae and Hitchcock* v. *Jordan* 310

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Plan or Sketch.—Where the plan attached to the application incorrectly showed the situation of the No. 2 post, but in all other respects was accurate and the situation of the stake as planted conformed with the written application, the staking was not invalid in that respect. *Re Sloan and Taplin*.....22

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Unsurveyed Territory.—The land in question not having been divided into quarter sections within the meaning of sec. 51 (*c*) of the Act, it was not necessary in the application or in the staking to designate the locality by an attempted description of the particular quarter section the claim might be upon, but the situation of the claim must be shown in such a manner as to enable the Recorder to lay it down in his office map. The fact that the claims as staked were not altogether as applied for did not invalidate them. Reference to *Waldie and Mathewman* M. C. C. p. 454; *Olmstead and Exploration Syndicate Limited*, p. 39, and 5 O. W. N. p. 8, 4 Geo. V. ch. 14, sec. 2. Section 59 (5) of R. S. O. ch. 32 (1914); *Neilly* v. *Lessard*, p. 332 and 11 O. W .N. 322; *Ledyard, Powers and Abode*..... 60

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DISCOVERY OF VALUABLE MINERAL.

Belief not Sufficient. — The discovery post was projected through the ice into the water of the lake but did not rest upon an out-cropping or showing of mineral in place. Claim declard invalid. *Re Connell and Cockeram* v. *Wright*..... 51

Alleged Fraudulent Affidavit.—A Certificate of Record having been granted, evidence was allowed to show that the deponent knew he had not a discovery within the meaning of the Act when the affidavit of discovery was sworn to, but the claimant was not allowed to adduce expert evidence as to the notice of the discovery. Held, by the Commissioner,—A licensee might swear to a discovery which, after examination, might be found to be insufficient, but still his affidavit would not be fraudulent if he *bona fide* felt he had a discovery, and the test was had there been fraud within the meaning of that term? The deponent relied upon the statement of the staker that he had made a discovery and the claimant had not shifted the onus of proof. See *Derry and Peake,* 14 A. C. at 337 and 374; *Angus and Clifford* (1891), 2 Ch. D. at 471. *Re Gray and Murray* 83

Mining Claim Invalid Without. — A sufficient discovery within the meaning of the Mining Act is a fundamental and essential requirement of a valid staking. What is required is a discovery at the point indicated by the discovery post and it must be a valuable discovery at the time it is appropriated. *Re Gratton and Neilly* 107

Mining Claim Invalid Without.—The law is well settled that a mining claim is invalid if discovery of valuable mineral is not made before staking, and subsequent discovery will not cure the invalidity. *Baker and Benbow* 183

Valuable Mineral.—The requirement of valuable mineral in place as defined by sec. 2 (*x*) is not satisfied by "good looking cracks in conglomerate formation." Section 56 of the Act should be used more liberally when a licensee is in doubt as to the validity of his discovery. *Re Andrews and Parker*. . . . 188

Valuable Mineral in Place—*Definition of — Difficulty of Proof—Inspection by Commissioner. Re Franker and Bartleman* 256

Sufficiency of—*Fraud—The Commissioner.*—While the circumstances leading up to the discovery left upon my mind the impression of want of *bona fides* the burden of proof had not shifted and the responsibility of proving fraud was still heavily upon the claimant. *Re Coutts and Aman* 289

Sufficiency of.—*Re Hamilton and James* 328

Overburden—*Location of Discovery Post—Outcropping of Rock—Surface Rights Owner.—Re Junell and Prout*.....354

Valuable Mineral. — While the interpretation put upon "valuable mineral in place" by sec. 2 (*x*) of the Act may not be satisfactory it was the duty of the Commissioner to construe the Act as he found it. A discovery and post to mark it is the foundation of a mining claim and of priority of staking. The Act requires sufficient ore or mineral in sight at the point of discovery as to make it probable that the vein, lode or deposit was capable of being developed into a producing and profitable mine. *Re Watson and Monahan*.....407

Sufficiency of.—A discovery at the point of discovery post is required. *Re Ireson and Mason* 389

DISPUTE AGAINST MINING CLAIM.

Alleged Non-performance of Working Conditions—*Merits—Onus of Proof — Insufficient Evidence.—Re Miller* v. *Babayan* 133

Delay in Prosecuting.—If the disputants had been anxious to acquire and develop the land staked then they should have brought their disputes to an early trial. The recorded holders have been diligent in carrying on the assessment work and have performed more work than the Mining Act requires, so that while they have staked in excess of what the Act allows they have exploited and developed the portions so staked and are deserving of consideration. *Re Miller et al. and Beilby et al.* 145

Dispute.—P. staked on T.'s license. The latter died, his license lapsed and no application made to vest under sec. 88 of the Mining Act. G. having been shown the claim by P. and knowing he was interested, restaked. P. then restaked over G. and filed a dispute when it was held that forfeiture having occurred the land was open and regularly staked by G., and that while the dispute must be dismissed P. should get relief under sec. 86 of the Mining Act. *Re Paradis* v. *Guillotte*..178

Dispute and Appeal.—The Commissioner: "It is quite correct Whiting had a remedy by way of appeal from the decision of the Recorder but he was not precluded from attacking by way of dispute. The dispute having been formally disposed

of by the Recorder there was an appeal to the Commissioner." *Re Whiting and Mather* 318

DISTURBING TITLE.

See CERTIFICATE OF OWNERSHIP — CORROBORATION—STATUTE OF FRAUDS. *Re Malouf and Walsh*.....166

ERROR IN BOUNDARIES.

Re Davis and Matheson 98
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EXCESSIVE AREA.

See AREA OF MINING CLAIM.

EXECUTION CREDITOR.

Application to Have it Declared the Recorded Holder, held as trustee for a company against whom the applicant had secured a judgment for assessment work performed. Held, that the application raised a question of title and there was jurisdiction under sec. 123 of the Act. *Re Shields and P. E. L. Mfg. Co., Ltd.* 273

EVIDENCE.

Claim to an Interest—*Clear Evidence Required—Failure to Satisfy Onus of Proof.—Re Durki* v. *Sainio*..... 17

As to Discovery—*Certificate of Record.*—Evidence that the licensee making the affidavit of discovery knew he had not a sufficient discovery was allowed in order to prove fraud in procuring the certificate of record, but the claimant was not allowed to adduce evidence as to the sufficiency of the discovery. A licensee might swear to a discovery which on examination might be found to be insufficient, but nevertheless his affidavit would not be fraudulent if he *bona fide* felt he had a discovery. Fraud must be shown and the onus of proof was upon the claimant. *Re Gray and Murray*..... 83

Working Conditions.—When a claim is attacked upon the ground of non-performance of work evidence based upon an honest, careful and systematic inspection is required. *Re Perron and Bradshaw* 130

Working Conditions.—One who has received consideration for a claim and afterwards attacks its title, alleging non-performance of work, with the desire of re-ownership, must expect to be saddled with the full burden of proof of the claims set up. *Re Miller* v. *Babayan* 133

Agreement for Sale.—The question whether time was originally of the essence and whether it has been waived is one of evidence and can therefore be disposed of only at the trial. Fry (5th ed.), par. 1128. *Re Sager and Bock*.....209

Claim to an Interest—*Husband and Wife.—Re Jessop and Jessop* 230

Documentary Evidence Leading up to Grant of Crown Lands.—*Admissibility.—Re Finucane* v. *Peterson Lake Mining Company* 193

FOREST RESERVE.

Working Conditions—*Permission to Work—When Forfeiture Occurred.—Re Steep and Cochrane* 276

FORFEITURE.

Merits—*Application for Relief from Working Conditions.*—A prospector who makes discoveries in new fields or in well-known mining locations and *bona fide* tries to comply with the requirements of the Act, should have some relief as against one who waits for an opportunity to profit by the loss of the former holder of a claim through failure to strictly observe the requirements of the Act. The beneficial operation of sec. 85 having been curtailed by the decision of the Appellate Court in *Re Watson and Monahan*, 12 O. W. N. 133, the section was amended in (1918), 8 Geo. V. ch. 9, sec. 7. *Re Trickey and Hillis* 237

License.—At time Boyd staked his license had expired. He subsequently obtained a special renewal license. Held, he acquired no rights under his staking as he was not a licensee at

the time and the special renewal license did not cure the invalidity. See *Sanderson and Saville,* 26 O. L. R. 616. *Re McDonough* v. *Boyd* 246

Application for Relief.—At the time the application was informally made by telephone the holders of the claim were "not incapacitated through illness," and the application was properly refused by the Recorder. A misunderstanding or inexcusable laches is not a ground for relief upon an application under sec. 80 of the Act. *Re Wilson et al. and Hart and Franker* 254

Forest Reserve.—The time elapsing between the delivery of an application to work and its acceptance being excluded (sec. 79 (B)), and the day of recording also being excluded (*Burns* v. *Hall,* 20 O. W. R. 526), the claim was not open for staking when restaked. *Re Steep and Cochrane* 276

Working Conditions. — Construction of Orders-in-Council dated respectively 17th August and 23rd October, 1914, extending time for working conditions and their application to sec. 78 of the Act considered. Claims held not to have been forfeited and ground not open when staked by the respondent. *Re Beauregard and Hebert and Bouvrette* 299

Right to Further Staking.—See R. S. O. 1914, ch. 32, sec. 57. *Re Steep and Cochrane* 276

Disqualification by Previous Staking—*Working Conditions—Report of Work—Successive Stakings.*—McDonald staked on the 16th of August, 1915, at a time forfeiture of the recorded claims had not taken place. His application was refused by the Recorder with the understanding he might again stake on the 18th, when the claims would be open if the holders did not at that time apply for an extension of time in which to perform the deficiency of work. He staked on the 18th and filed a dispute. Held, by the Commissioner,—Section 57 of the Act did not apply as the lands were not "open to prospecting" when staked on the 16th, and the disputant was not precluded from again staking on the 18th. The report of work in question was falsely or carelessly sworn to and was untrue. Dispute allowed. *Re McDonald and Pinelle et al.* 313

Application for Relief From—*Default in Working Conditions.*—It is not intended that a Mining Recorder should, under

sec. 80, grant an extension of time on the plea of illness when the holder did not expect or desire to do the work personally. *Re Hamilton and James* 328

Without Cancellation. — The marking of a claim as cancelled by the Recorder (sec. 85 (2)) is merely a record of forfeiture, not the Act itself. Under sec. 84 forfeiture occurs "without any declaration entry or action on the part of the Crown or by any officer." *Re Murphy and Rowan*.....326

Relief From—*Good Cause Shewn—Prevented by—Note.*—Amendment to sec. 85 by 8 Geo. V. ch. 9, sec. 7. *Re Watson and Monahan* (12 O. W. N. 133) 361

Working Conditions—*Relief from — Section 86, Written Agreement—Claims Restaked by Trustee—Work performed on Restaked Claims—Notice to Respondent by Former Holders of Application for Relief from Forfeiture—Report—Compensation. —Re Remo and Pellerin and Hamilton* 403

Working Conditions—*Relief—Intervening Rights — Purchaser for Value.—Re Lahay and Merrick*.....396

FRACTION.

Re Leduc and Grimston 285
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FRAUD.

Affidavit of Discovery—*Certificate of Record.*—A licensee might swear to a discovery which on examination might be found to be insufficient, but nevertheless his affidavit would not be fraudulent if he *bona fide* felt he had a proper discovery. The question to be determined is one of fraud. As the licensee honestly believed the statement of the staker that he had made a good discovery the onus was upon the claimant to show otherwise. See *Derry and Peek*, 14 A. C. at 337 and 374; *Angus and Clifford* (1891), 2 Ch. D. at 471. *Re Gray and Murray*....83

Affidavit of Discovery.—The question is not, was there a valid discovery in fact, but was W. conscious when he made the affidavit of discovery that it was false or if he was not did he make it without knowing whether it was false or without caring?

See Bowen, L.J., in *Angus* v. *Clifford*, 2 Ch. Div. (1891) at 471; *Derry & Peek*, 14 A. C. 337; *Smith and Chadwick*, 9 A. C. 187. If W. honestly believed he had made a sufficient discovery and told L. so, fraud under the circumstances here cannot be found. *Re Coutts and Aman*.....289

IDENTIFYING LAND STAKED.

Re Perron and Hurd 151

ILLNESS OF HOLDER OF CLAIM.

Application for extension of time for performance of work under sec. 80 of the Act. *Re Wilson et al. and Hart and Franker* 254

INNOCENT PURCHASER FOR VALUE.

Re Baker and Benbow 183
Re Lahay and Merrick 396

INSPECTION.

Discoveries.—The evidence as to the sufficiency of the respective discoveries, leaving the question in doubt, the Commissioner requested the Chief Inspector of Mines to make an inspection, and on his report and the evidence the discovery of the disputant Davis was held invalid Reference to secs. 89 to 93. *Re Davis and Matheson* 98

As to Sufficiency of Discovery.—Where evidence in regard to the merits of the discovery was inconclusive, the Commissioner made a personal inspection, and on the evidence and his "view" of the discovery it was held sufficient and the dispute dismissed. *Re Franker and Bartleman*.....256

INTEREST IN MINING CLAIM.

For Work to be Performed– *Agreement—Forfeiture — Restaking by Former Co-holder—Purchaser.*—Held, by the Commissioner,—That Kell had a right to assume that from what Knox said and did, the work Knox was required to do would be performed and recorded by the company formed by Knox. That Knox acted in a fiduciary capacity from which he had not been released. The purchaser Brady was not prejudiced by

Kell retaining his interest as he had dealt with Knox on that understanding. Reference to Halsbury's Laws of England, Vol. 28, p. 58; *Stuart and Lupton*, 22 W. R. 855. On appeal to the Appellate Division, judgment of Mining Commissioner affirmed. *Re Kell and Knox and Leach*.....340

INTEREST IN MINING CLAIM—ACQUISITION OF.

Partnership Alleged.—*Re Durki* v. *Sainio*..... 17

Any Person Interested.—G., former surface rights owner and who had settled and accepted compensation, attacked the owner of the claim alleging fraud in procuring the certificate of record and insufficient discovery. Held, G. was not "any person interested" within the meaning of sec. 66 of the Act, and that he was a party to the fraud, if any, and sought to profit by it. *Re Gray and Murray* 23

Nature of.—*Re Malouf and Walsh*.....166

Husband and Wife.—The husband claimed a one-half interest in all mining claims held by his wife, alleging an agreement and relying also upon certain letters written to him by her. He also set up a partnership. Held, that with reference to the fraction he could not succeed as the agreement, if any, was made subsequent to the staking: sec. 71 (2). That the evidence of the husband regarding the "Jessop Claims" was fanciful and contrary to the facts, and that the letters relied upon did not establish an interest in the "Violette Claims," not being referable to a proven contract, and even if a contract had been established the claim was barred by sec. 71 (1). On appeal to the Appellate Division, judgment of the Commissioner was affirmed. *Re Jessop and Jessop*.....230

Employer and Employee.—The respondent being the recorded holder it would be doing him a great injustice to take away his interest on the strength of an alleged oral agreement. The burden of proof was upon the claimant, and the wisdom of sec. 71 (2) of the Mining Act as exemplified in this case. *Re Darraugh and Elliott* 137

Execution Creditor.—Application to have it declared the recorded holder held as trustee for the Porcupine East Lake Mining Company, Limited, in order to permit the applicant to file a writ of execution against certain claims held by the company. *Re Shields and P. E. L. Mfg. Co., Ltd*.....273

JUMPING CLAIMS.

The popular term "Claim Jumper" is offensive and improperly used when applied to a restaker of a forfeited claim. *Re Watson and Monahan* 407

See *Re Paradis and Guillotte* 178

LANDS OPEN.

Right of Way for Transmission Line—*License of Occupation—Reservation of Mines, Minerals and Mining Rights in, on or under said Lands—Discovery upon Right-of-way.—Re Gratton and Neilly* 107

Pending Proceedings.—The Recorder having extended the time for the performance of work on the ground of pending proceedings the land was not open when staked. *Re Gleeson and Barton et al.* 124

Forfeiture.—Claims alleged to be forfeited were recorded on 20th August, 1912, and all work performed except last period. Bouvrette staked same properties on 22nd November, 1915. Held, by the Commissioner,—That by Orders-in-Council dated 17th August and 23rd October, 1914, the time between the 15th August, 1914, and 15th April, 1915, was excluded, and against which time the provisions of sec. 78 did not operate. The claims were not open to be staked on the 22nd November, 1915, and dispute allowed. *Re Beauregard and Hebert and Bouvrette* 299

Abandonment—R. S. O. 1914, ch. 32, sec. 57.—This section refers to "any land open to prospecting," and such lands are described in sec. 34 (*a*). The lands not being open to staking C. was not estopped by what he did from afterwards staking the same land when open. *Re Steep and Cochrane*.....276

LICENSE.

Renewal.—At time B. staked, his license had lapsed. He subsequently obtained a special renewal license. Held, he acquired no rights under his staking as he was not a licensee at the time and the special renewal license did not cure the invalidity. See *Sanderson and Saville*, 26 O. L. R. 616. *Re McDonough* v. *Boyd* 246

Discovery.—The discovery must be made by a licensee.—*Re Ireson and Mason* 389

MECHANICS' LIEN.

Extension of time for performance of work on ground of "Pending Proceedings." *Re Gleeson and Barton et al.*.....124

MERITS.

Section 140 of the Mining Act, R. S. O. (1914), ch. 32.—The real merits and substantial justice of the case cannot be allowed to interfere with a specific requirement of the Act, upon the performance of which title to a mining claim depends. *Re Sherrill* v. *Martin* 159

Agreement for Sale—*Default in Payment — Time of the essence implied.—Re Sager and Bock*.....209

Lack of.—*Re Evis and Young* 264
See *Re Perron and Hurd* 151
See *Re Whiting and Mather* 318

MINING CLAIM.

Form of—*Surveyed Land—Irregular Lines.—Re Ireson and Mason* 389

Boundaries—*Excess Acreage — Unsurveyed Territory.—Re Connell and Cockeram and Wright* 51

MISDESCRIPTION (When not to Invalidate Claim).

Confliction.—Held by "Second Divisional Court." The provisions of sec. 59 (5), added by 4 Geo. V. ch. 14, sec. 2, meant that "notwithstanding the fact that the discoverer has not laid out his claim in the way in which the Act requires he may in the circumstances there provided for have that which the Act so gives to him, not that which he has inaccurately laid out." *Re Neilly and Lessard et al.*.....332

Lands Applied for not as Staked.—*Re Ireson and Mason*.389.
The situation of the stakes and the locality of the claim being shown to the satisfaction of the Commissioner the fact that the claim as staked was not altogether as applied for did not invalidate the claim. See *Munro, McIvor et al.*, p. 93;

McLeod and Armstrong, p. 71; *Olmstead and Exploration Syndicate of Ontario*, 5 O. W. N. 8, and p. 39; *Connell and Cockeram and Wright*, p. 51. *Re Ledyard, Powers and Abode* 60

MISTAKE.

Removing Tag.—*Re Welsh* v. *Boisvert* 176

MORAL OR EQUITABLE RIGHT.

Re Davis and Matheson 98
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NATURE OF HOLDER'S INTEREST IN UNPATENTED MINING CLAIM.

See Interest in Mining Claim—*Nature of.*—*Re Shields and P. E. L. Mfg. Co., Ltd.* 273

NOTICE.

Innocent Purchaser.—Before certificate of performance for work or record had issued—Attending risk. *Re Cox and Brisbois et al.* 120

To Purchaser of Unrecorded Agreement Fixing Compensation for Surface Rights.—Land Titles and Registry Act compared. *Re Aman et al.* v. *Coutts* 303

ONUS OF PROOF.

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Alleged Non-performance of Working Conditions—*Onus of Proof upon the Disputant—Not Satisfied in this Case.*
Re Perron and Bradshaw 130
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ORDER.

Restraining Surface Right Owner. — *Re Gray and Murray* 83

ORDERS-IN-COUNCIL.

Extending Time for Working Conditions—*Order-in-Council 17th August and 23rd October, 1914—Construction of.—Re Steep and Cochrane* 276

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PAROL AGREEMENT.

Verbal Agreements Made Before and After Staking.—*Re Jessop and Jessop* 230

PARTNERS AND PARTNERSHIP.

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PENDING PROCEEDINGS.

Mechanics' Lien Actions—*Extension of time by Recorder on ground of. Re Gleeson and Barton et al.* 124

Nature of.—The appeal not having been properly launched and being abortive it could not be said to be "pending proceedings" so as to entitle the appellant to protection against forfeiture under sec. 80. *Re Peterson* v. *Wilson et al.*.....270

"PERSON INTERESTED."

See *Re Gray and Murray* 83

Section 66.—*Re Coutts and Aman*.....289

PLAN.

Referred to in the Text of Crown Grant.—Where lands intended to be conveyed are accurately and completely described the description is not controlled by reference to a plan on which they are stated to be shown. *See Horne* v. *Struben* (1907), A. C. 454. *Re Finucane* v. *Peterson Lake Mining Company* 193

POLICY OF ACT.

Certificate of Record.—*Re Gray and Murray*..... 83

POSTS.

Adopting Posts of Prior Staking.—*Re McDonald and Pinelle et al.* 313
See also *Whiting and Mather*.....318

PRIORITY.

Among Mining Claims.—*Re McLeod and Armstrong*.. 71

Of Discovery.—Both stakings being equally good the dispute had to be disposed of on the ground of priority of time of discovery. Held, that in the absence of further and better evidence priority was established by the time fixed in the affidavit of discovery. *Re Davis and Matheson*..... 98

Among Mining Claims.—The disputant's application was returned by the Recorder as the applicant's license was not enclosed. Before receiving the license the claim was restaked. Held, by the Commissioner,—The disputant's application was in the hands of the Recorder in proper form within the time allowed by the Act, and as he had priority of staking he was entitled to record. *Re McCagherty and Roberts*.....227

Among Mining Claims. — W., a locatee in a township not officially opened for settlement by Order-in-Council, staked two mining claims on the land but did not record, being assured the mines and minerals passed with the patent. Subsequently he found that E., who had assisted him in staking, had staked the same claims. W. five days later again restaked the claims and tendered his application to the Mining Recorder, who decided to refuse the application of Evis and record those of W. From this decision Evis appealed to the Mining Commissioner. Held, by the Mining Commissioner,—The appellants having priority of staking and having tendered their application to the Mining Recorder within the time allowed by the Mining Act and the validity of the appellants' staking not being questioned they would be entitled to succeed upon the appeal if priority was the sole issue. That T. was estopped from denying his admissions to W. that he had staked on his behalf and for his protection and was bound by the representation and his appeal filed. *Re Evis and Young* 264

Among Mining Claims.—The law will not regard the fraction of a day but will of necessity enquire into the priority of acts that occurred on the same day. *Re Steep and Cochrane* 276

PROSPECTING PICKETS.

Section 56 of the Act should be used more liberally when a licensee is in doubt as to the validity of his discovery or find. *Re Andrews and Parker* 188

PURCHASER FOR VALUE.

See FORFEITURE. *Re Lahay and Merrick*.....396

PURCHASER WITHOUT NOTICE.

Before Certificate of Performance of Work.—The respondents who were innocent purchasers for value could not be protected in the proceedings before the Mining Commissioner as they must be presumed to have accepted the risk attending the purchase of a claim before a certificate of performance of work or record had been obtained. *Re Cox and Brisbois et al*...120

QUARRY CLAIM.

Staking Over Mining Claim.—Held by The Commissioner:—That a mining claim and quarry claim can co-exist at the same time. On appeal to the Appellate Division, 8 O. W. N. 360—Held, that where land is under staking or record as a mining claim there is no right to stake out or record a quarry claim upon any part of it unless the mining claim had lapsed or been abandoned. See 5 Geo. V. ch. 13, sec. 13, amending (R. S. O. 1914), ch. 32, sub.-sec. 2 of sec. 118. *Re Franker and Bartleman* 256

REAL MERITS AND SUBSTANTIAL JUSTICE.

See MERITS.

RECORDING.

Rights Acquired—*By Staking and Recording.—Re Olmstead and Exploration Syndicate of Ontario, Ltd.* (5 O. W. N. p. 8) and 39

Procuring by Alleged False Affidavit of Discovery—*Evidence—Certificate of Record.—Re Gray and Murray*..... 83

Order of.—See *Gratton and Neilly*.....107

Recording Applications.—*Priority Among Mining Claims. —Re McCagherty and Roberts* 227

Claim Already on Record.—Notice of appeal by another appellant pending. Held, by Commissioner, that when the Peterson application was filed the lands were open for staking but the Mining Recorder had acted quite properly in refusing to record the application until the prior appeal against the same claim had been disposed of by him. *Re Peterson* v. *Wilson et al.*.....270

Surface Rights Agreement.—In view of secs. 42 and 80 of the Land Titles Act, R. S. O. (1914), ch. 126, a *bona fide* purchaser is protected under a registered title even against express notice if the agreement relied upon was not registered. Reference to *Skill and Thompson*, 11 O. W. R. 339; *Peebles* v. *Hyslop*, 30 O. L. R. 511. Registered titles under the Land Titles Act are conclusive evidence of title. Registry Act compared. *Re Aman et al.* v. *Coutts* 303

Recording Applications—*Claim Already on Record.*—The application was tendered within the time but was not a completed application as required by sec. 59, sub-sec. (3). The affidavit of discovery was not sworn to until the 9th of January and the application was not until then in proper form to record and was properly refused. *Re McGregor and Gillies*.....376

RELIEF FROM FORFEITURE.

See FORFEITURE. *Re Trickey and Hillis*.....237

REPORT OF WORK.

Proper Report of Work—*Requisites of.*—Review of prior sections. Section 78 (4) of the Mining Act must be followed strictly. *Re Sherrill* v. *Martin* 159

SALE AND PURCHASE.

Time of the Essence—*Waiver.*—The question whether time was originally of the essence and whether it has been waived is one of evidence and can therefore be disposed of only at the trial. Fry (5th Ed.), par. 1128; *Winnifrith* v. *Finkleman*, 6 O. W. N. 432 at 435 and 436. *Re Sager and Bock*.....209

SECTIONS 57 AND 58, ACT OF 1914.

Re Whiting and Mather 318

SPECIFIC PERFORMANCE.

Agreement for Sale.—The time for payment of an instalment of the purchase price, which had been extended by agreement, was not met and the agreement was cancelled and a transfer refused upon tenders of the payment in default. Held, that while the agreement was silent as to time being of the essence of the contract it was implied. In *Hipwell* v. *Knight*, 1 Y. & C. C. Ex. 401 at 416 *et seq.*, Alderson, B., said: "If the thing sold be of greater or less value according to the effluxion of time, it is manifest that time is of the essence of the contract and a stipulation as to time must then be literally complied with both in equity as well as in law." In Fry on Specific Performance (4th Ed.), p. 468, the same principle applies with especial force to contracts relating to mines. The nature of all mining transactions is such as to render time of the essence, 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. See *Robert* v. *Berry* (1853), 3 DeG. M. & G. 284 at 291; *Sprague* v. *Booth*, 11 O. W. R. 151; *Morton & Symonds* v. *Nichols*, 12 B. C. R. 9. *Re Sager* v. *Bock* 209

STAKING.

Sufficiency—*Blazing—Substantial Compliance.*—Where the plan or sketch attached to the application incorrectly shows the situation of the No. 2 post, but in all other respects is accurate and the situation of the stake as planted conforms with the written application, the staking is not, in that respect, invalid. It was also held that the staking in other respects was a substantial compliance with the requirements of the Mining Act. Reference to 4 Geo. V. ch. 14, sec. 2; sec. 59, sub-sec. 5 of Act, 1914. *Re Sloan and Taplin* 22

Rights Acquired.—The foundation of the right which a staker acquires is the claim which he files with the Recorder, assuming, of course, that he has complied with the Act as to

discovery, staking, etc., and therefore the fact that on the map in the office of the Recorder the claim is shown as extending to the river cannot give a right to land not included within the claim as filed. *Re Olmstead and Exploration Syndicate of Ontario, Ltd.*, 5 O. W. N. p. 8 and 39

Essentials of.—The first element of staking is discovery. There must be an actual discovery before the claim is staked; belief is not sufficient. Until a discovery post is planted all licensees have the same rights except where a licensee has found what he believes to be a deposit of mineral or an indication thereof and has planted a prospect picket pursuant to sec. 56 of the Act. A discovery post projected through the ice into the water of the lake but not resting upon an out-cropping or showing of mineral in place, is not a compliance with the requirements of staking. *Re Connell and Cockeram* v. *Wright* 51

Unsurveyed Land—*Misdescription—Affidavit of Discovery.* —T. admitted that from the time he left the claim at the No. 1 post, and until after he had sworn his affidavit of discovery and filed his application, he had not seen or heard from his men whom he had instructed to complete the staking. Held, to allow such a staking would destroy the whole fabric of the Mining Act and be an incentive to false and reckless swearing. A licensee making the affidavit must have personal knowledge. Reference to *Attorney-General of Ontario* v. *Hargraves*, 8 O. W. N. p. 138; *McNeill and Plotke*, M. C. C. 144. Held, also,—The claims as staked not being altogether as applied for did not necessarily invalidate them. Reference to 4 Geo. V. ch. 14, sec. 2, sec. 59, sub-sec. 5 of Act of 1914, and *Neilly and Lessard*, 11 O. W. N. 322. *Re Ledyard, Powers and Abode* 60

Sufficiency of.—McLeod erected his discovery post, made a light blaze to No. 1 post and marked it. Having arranged with M. to go around the claim and see that the posts were properly erected and the other requisites of staking completed, he left for the Recording Office. M. subsequently met McLeod and informed him the claims had been staked, whereupon McLeod swore his affidavit of discovery and staking and tendered his application to the Recorder. Armstrong's was an organized staking, but was done through his deputies. The only personal knowledge A. had was that his discovery and

No. 2 and 4 posts were up and the blazing under way, and on such facts completed his application and filed. Held, by the Commissioner,—That while the discoverer may be assisted in the staking he must remain upon the ground until the staking is completed and from personal inspection of the posts and the other requirements of staking become seized of what he is required to know to make the affidavit of discovery and staking. To condition oneself to swear to actual facts from a knowledge based upon signs and sounds would be perilous to the deponent. In the result the application of both McLeod and Armstrong were disallowed, the lands were held to be in unsurveyed territory and the misdescription in the application of the lands staked did not create an invalidity. *Re Ledyard, Powers and Abode*, 60. *Burd and Paquette*, M. C. C. 419.

On Appeal to the Appellate Division.—Judgment of Mining Commissioner affirmed. *Re McLeod and Armstrong*..... 71

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Alteration and Change of Situation of Posts After Application on File—*Misdescription of Lands—Land Staked not as Applied for—Survey at Variance with Description of the lands Contained in Application.*—Held, the description of the lands applied for was indefinite, vague and misleading and an overzealous attempt at blanketing. The staking was also invalid within the authority of *Ledyard, Powers and Abode, ante.* It is not permissible for a licensee to leave the property before his discovery post is erected and the staking accomplished, even though the staking was completed before he made his affidavit of discovery. Personal knowledge is required by the deponent. *Re Munro, McIvor et al.* 93

Boundaries—*Confliction of Lines—Excess Acreage.*—While appreciating the difficulty of a prospector in staking a claim of 40 acres only it is not excusable to extend his lines 5.05 and 4.43 chains in excess of the land applied for, and where it results in confliction with another claim it is incumbent upon a licensee to so erect his posts that they may be readily seen by one coming after him even though it be months later. *Re Perron and Hurd* 151

Alleged Irregularity of Staking and Recording—*Non-performance of Assessment Work—Fraud in procuring Certificate*

of Record—Removal of Metal Tag.—Held, by Commissioner: That the claim was regularly staked and necessary assessment work performed. There was no evidence to support the claim that certificate of record was procured by fraud or mistake and that the removal of the metal tag from one claim to another had been done in mistake and fully explained. *Re Welsh and Boisvert et al.* 176

Substantial Compliance.—Carelessness in planting discovery post which could not afterwards be located and the inexcusable absence of blazed lines disentitled the staker to the benefit of sec. 58 of the Mining Act. *Re Andrews and Parker*.....188

Filing Application.—The date of filing is immaterial if within the time allowed by the Act. *Re McCagherty and Roberts* 227

Delay.—McD. having made a discovery on the 2nd of July, but believing his agreement with the locatee for the purchase of mining rights passed the mines and minerals thereon, did not stake. Subsequently, and on the 16th of September, he staked a claim on the lands and adopted his discovery of the 2nd of July. Held, there being no adverse interests sec. 55 of the Act was not a bar and the staking was upheld. *Re McDonough* v. *Boyd* 246

Quarry Claim.—When land is under staking or record as a mining claim there is no right to stake out or record a quarry claim upon any part of it unless the mining claim has lapsed or been abandoned. See sec. 118 (2). *Re Franker and Bartleman* 256

Priority—*Appeal from Refusal of Mining Recorder to Record —Merits—Estoppel.*—W., a locatee in a township not officially opened for settlement by Order-in-Council, staked two mining claims on the land but did not record, being assured the mines and minerals passed with the patent. Subsequently he found that E., who had assisted him in staking, had staked the same claims. W., five days later, again restaked the claims and tendered his applications to the Mining Recorder, who decided to refuse the application of Evis and record those of W. From this decision Evis appealed to the Mining Commissioner. Held, by the Mining Commissioner,—The appellants having priority of staking and having tendered their applications to the Mining Recorder within the time allowed by the Mining Act and the

validity of the appellants' staking not being questioned, they would be entitled to succeed upon the appeal if priority was the sole issue. That E. was estopped from denying his admissions to W. that he had staked on his behalf and for his protection and was bound by the representation and his appeal failed. *Re Evis and Young* 264

Sufficiency.—*Incorrect Marking of Discovery and No. 1 Posts.*—The disputant admitted he incorrectly marked on the discovery post the 31st of September in mistake for the 30th the day of discovery and the date set out in his application, and that he wrote "north-west" to No. 1 post instead of "north-east." Held, the inscriptions were inadvertently made and did not invalidate the staking. He staked what he applied for, and as there had not been any deception or misleading and the disputant having priority of discovery the staking was held valid. It was taking too much for granted to assume an abandonment under the circumstances and the respondent should have filed his application and lodged a dispute. *Re Sweet and O'Connor* 280

Sufficiency of. — G. intended staking a former surveyed claim; he in fact staked a portion of a patented claim and his western boundary was upon patented land. L. subsequently staked the same surveyed claim and disputed G., who was on record. Held, by the Commissioner,—To allow G. to move his No. 3 post to the S. W. of the surveyed claim would not avail as his southern boundary would then be a straight line from his No. 2 to the corrected No. 3 post, which would have the effect of placing his discovery outside the limits of the claim as staked. To uphold the G. staking would create a fraction which was not desirable or permissible under the circumstances. That there had not been "substantial compliance." *Re Leduc and Grimston* 285

Adopting Former Posts.—McDonald staked on the 16th of August when he afterwards learned the claims were not open. On consent of Recorder he staked on the 18th and redated the posts put up on the 16th. Held,—As no intervening right had arisen between the 16th and 18th the staking should not be held irregular. *Re McDonald and Pinelle et al.*.....313

Sufficiency of.—A discovery post and a post to mark it and nothing more is not a compliance with sec. 54. Where the application contradicted the sketch and the actual staking, the

distance between the discovery and No. 1 post being inaccurately given in the application and marked on the posts, failure to properly inscribe the posts and the use of standing trees without being cut off and squared together created an invalid staking. The two attempts at staking on the 7th of July and 12th of August were each distinct and isolated and neither of them complete or in compliance with the Act. *Re Whiting and Mather* 318

Sufficiency of—*Substantial Compliance.*—The requirements of the Act with reference to staking may appear to be rather technical and unimportant, but a standard must be set and maintained, and where there are two applicants for the same claims the staking of each must be carefully considered and weighed, having in mind priority of discovery and completeness of staking. Inscribing a wrong description of the land staked on the No. 1 post, neglecting to show on the sketch the distance between the corner posts, insufficient blazing of lines and other inaccuracies shown in staking were held to be not a substantial compliance with the Act. *Re Watson and Monahan* 407

Sufficiency—*Delay — Discovery — Non-licensee.* — Ireson showed Taylor, a non-licensee, his discovery. Subsequently on the 2nd of November when Ireson was not present Taylor put up a discovery post and Ireson completed the staking on the 18th. On the 3rd of November Mason attempted to stake the same parcel of land. Held,—A discovery must be made by a licensee and Taylor, not Ireson, had made the discovery and put up the discovery post in Ireson's absence and without his personal knowledge. What was done on the 2nd and 18th of November did not constitute one complete staking but were separate and each part staking invalid. What is required is a discovery at the situation of the discovery post which Mason had failed to establish. His sketch filed did not conform with sec. 59 and his application and sketch indicated and asked for a claim different from the claim as staked and was invalid. *Re Ireson and Mason* 389

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Agreement for Interest.—M. claimed an interest in certain mining claims staked by W., alleging he had informed W. that the claims were open for staking and in return was to receive the interest asked for. Held, that there was not the corroboration required by sec. 71 (1) of the Act, R. S. O. 1914, ch. 32. The ownership of a claim should not be disturbed unless the claim set up is conclusively proved. *Re Malouf* v. *Walsh* 166

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