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*Mar. 16.
*April 29.

ADELARD ST. LAURENT AND ADELARD TRINQUE (DEFENDANTS) ..... APPELLANTS;

AND

AMABLE MERCIER (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE TERRITORIAL COURT OF YUKON TERRITORY, SITTING IN APPEAL.

Mines and minerals—Placer mining regulations—Staking claims—Overlapping locations—Renewal grant—Unoccupied Crown lands.

In August, 1899, M. staked and received a grant for a placer mining claim on Dominion Creek, Yukon, which, however, actually included part of an existing creek claim previously staked by W. In 1900 he applied for and obtained a renewal grant for the same area, W.'s claim having lapsed in the meantime, and was continuously in undisputed possession of that area, with his stakes standing from the time of his original location until March, 1901, when S. and T. staked bench claims for the lands embraced in W.'s expired location which had been overlapped by M.'s claim, as being unoccupied Crown land.

Held, affirming the judgment appealed from, Davies and Armour JJ. dissenting, that the application for the renewal grant by M., after W.'s claim had lapsed, for the identical ground he had originally staked and continuously occupied, gave him a valid right to the location without the necessity of a formal re-staking and new application and that, following the rule in *Osborne* v. *Morgan* (13 App. Cas. 227), the possession of M. under his renewal grant should not be disturbed.

APPEAL from the judgment of the Territorial Court of Yukon Territory, sitting as a Court of Appeal constituted by the Ordinance of the 18th of March, 1901, respecting the hearing and decision of disputes in relation to the mining lands in the Yukon Territory, which affirmed the decision of the Gold Commissioner maintaining the plaintiff's action with costs.

*PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Mills and Armour JJ.

The principal facts of this case are shortly as follows:— Creek claim No. 245, below Lower Discovery, on Dominion Creek, in the Yukon Territory, was recorded by one Waite, on the 29th January, 1898, renewed by him in January, 1899, but reverted to the Crown in January 1900. The plaintiff recorded a hill-side claim opposite the upper half limit of No. 245, below Lower Discovery, on August 15th, 1899, and applied for and obtained a renewal grant of the same in August, 1900. The defendant, Trinque, staked bench-claim, No. 245, on the first tier, on the 7th March, 1901, and recorded on the 18th March, and the defendant St. Laurent staked bench claim No. 245, on the second tier, on the 10th March, 1901, and obtained a grant for the same on the 19th March, 1901. The other circumstances material to the issues are set out in the judgments now reported.

All these claims were subject to the regulations governing placer mining of the 18th of January, 1898, and section 13 of the regulations of the 13th of March, 1901.

J. Lorne McDougall for the appellants. Under all the regulations staking and location constitute the root of title: See 1894-1899 Regulations, sec. 4; 18th January, 1898, Regulations, sec. 15; 13th March, 1901, Regulations, sec. 14; *Atkins* v. *Coy* (1). A *sine quâ non* of valid location, staking or grant, under all the regulations, is that the ground staked should be vacant unrecorded Dominion lands at the time of staking. 1894-1899 Regulations. See Form H, 18th January, 1898, Regulations, sec. 8 and Form H, 13th March, 1901, Regulations, sec. 8; *Belk* v. *Meagher* (2); *Cranston et al.* v. *English Canadian Co.* (3); *Victor* v. *Butler* (4); Lindley on Mines, p. 363; Barringer & Adams on Mines, p. 306; *Coplen* v. *Callahan* (5).

(1) 5 B. C. Rep. 6.
(2) 1 Morrison's Mining Reports, 510, 522.
(3) 7 B. C. Rep. 266.
(4) 8 B. C. Rep. 100.
(5) 7 B. C. Rep. 422; 30 Can. S. C. R. 555.

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If by reason of a prior valid location the staking is ineffectual as to the whole or a part of the ground staked, the subsequent abandonment or forfeiture of the proper location cannot inure to the benefit of the person claiming under the ineffectual location. Free miners have no right to enter upon nor to locate any ground lawfully occupied for mining purposes. A lawful location cannot be made on ground comprising part of a subsisting placer claim, nor will a subsequent abandonment or forfeiture of such subsisting claim make valid such location. Ground once lawfully occupied by a free miner must revert to the Crown before a valid re-location can be made on it.

The appellants do not seek to set aside nor curtail the grant issued to the respondent, but to have it declared that such grant did not include the ground which was, at the time of his staking, lawfully occupied as a placer mining claim, and that the extent of the respondent's grant was not added to nor otherwise altered by the renewal grant.

J. A. Ritchie for the respondent. When the plaintiff located in 1899, the ground was open for location. There is no evidence to the contrary. Even if the ground was not open for location, the defendants had no right to come and locate on ground lawfully occupied by the plaintiff.

Reference is made to *Osborne* v. *Morgan* (1); *Williams* v. *Morgan* (2); *Scott* v. *Henderson* (3); and to Williams on Real Property, (18th ed.) p. 540.

The CHIEF JUSTICE, and SEDGEWICK J. were of the opinion that the appeal should be dismissed with costs.

(1) 13 App. Cas. 227. (2) 13 App. Cas. 238.
(3) 3 N. S. Rep. 115.

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Davies J.

DAVIES J. (dissenting.)—This was a boundary action brought before the Gold Commissioner to determine the boundaries of the respective adjoining placer mining locations of the litigants. The Commissioner found as facts; (1). That the location of the respondent, Mercier, was staked in August, 1899, partially over a then legally existing creek claim and that such staking included the locus in dispute which was not then unoccupied Crown land; (2). That when Mercier obtained his renewal license in 1900 the said creek claim had lapsed and the lands in dispute were then unoccupied Crown lands but that Mercier did not re-stake or make any new application for a license, relying upon his former staking and application; (3). That, after Mercier's renewal license had issued, viz. on March 7th, 1901, St. Laurent staked his bench claim covering the lands in dispute and applied for and obtained a grant or license for the same.

Under these facts I am of opinion that the appeal should be allowed. I agree with the judgment of Mr. Justice Craig that the staking of a claim on unoccupied Crown lands is essential to the obtaining of a legal grant or license. It is the root of title, as has been so frequently determined under the law of British Columbia.

The staking by Mercier of the locus in August, 1899, was invalid because, at that time, the lands in question formed part of the creek claim, No. 245, below Lower Dominion. After this creek claim lapsed these lands became unoccupied Crown lands and were never again staked or located until staked by St. Laurent, the appellant. His was the only staking or locating on which a legal grant or license could issue and the renewal to Mercier of his original, but so far as the locus is concerned invalid, license or grant could not operate to give him any legal rights in the lands in dispute.

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MILLS J.—The matter in dispute here between the parties related to a mining location in the Yukon Territory. One Waite had acquired a certain location in 1898. Subsequently, Mercier acquired a location which overlapped that of Waite by six hundred feet. Waite's location being first in point of time Mercier acquired nothing of that portion of the land embraced within it. Waite's claim lapsed and Mercier, subsequently, applied for a renewal, embracing precisely the same area which he had at first staked out and which he had applied for on the first occasion and he obtained entry for the same. St. Laurent made application for the location that had been previously held by Waite and he did this some time after Mercier's second entry.

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

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under the circumstances, an altogether unnecessary proceeding and I think that the Gold Commissioner was right in recognizing the claim which Mercier had made as a valid one. He had been in possession; he had done work on the ground; he had obtained a renewal of his original claim, and there was no power in any one to make a second valid entry. At all events, if there was any irregularity in what he had done that irregularity was not one that St. Laurent could question.

In *Osborne v. Morgan* (1) I think the law is settled, that the party who had received here an entry after that obtained by Mercier had no right to try the validity of Mercier's claim, that this could only be questioned by the Crown. The statute, it was there said, gave no right whatever as against the land held by the Crown, and no title to try the validity of Crown leases relating thereto.

Here, Mercier had possession, and was recognized by the Gold Commissioner as having a valid claim to carry on mining operations within the area which he had marked out. When he obtained the second entry no one stood between the Crown and himself with any prior claim. The claim subsequently made was by a party who had knowledge of the claim which Mercier held under the authority of the Gold Commissioner and the recognition of such a proceeding would furnish facilities for illegal practices in those distant regions.

The acts of the Gold Commissioner are administrative acts and his decisions should, as far as possible, be supported. It would be a misfortune to have parties, many of whom are uneducated men, deprived of their claims on some technical ground and in this way pass into the possession of others. Such a course would lead to dishonest practices and sometimes to violence, and

(1) 13 App. Cas. 227.

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in a country so distant from the settled parts of the Dominion, it is desirable, as far as possible, to enable men who have honestly undertaken to mark out claims for themselves and to obtain entry to succeed.

Here, there is no doubt that Mercier's stakes were standing; that the limits of the ground claimed by him could be easily ascertained or seen. This ought to have been sufficient to have warned the party who was seeking to oust him from a claim which had already been recognized by the Gold Commissioner, that he could not acquire a title to any portion of the claim.

ARMOUR J. dissented from the judgment dismissing the appeal for the reasons stated by Davies J.

Appeal dismissed with costs.

Solicitors for the appellant; *Pattullo and Ridley.*

Solicitors for the respondents; *Noel, McKinnon and Noel.*