WILLIAM S. MACPHEE AND ELMORE H. POINTER (PLAINTIFFS) ..... } APPELLANTS;

AND

JEAN BOX, ELIZABETH BOX, TOM BOX, THE STERLING COLLIERIES CO. LTD. AND THE MINISTER OF NATURAL RESOURCES OF THE PROVINCE OF SASKATCHEWAN (ADDED BY ORDER OF COURT AT TRIAL) (DEFENDANTS) ..... } RESPONDENTS.

1936
* Oct. 20.
1937
* April 21.

ON APPEAL FROM THE COURT OF APPEAL OF SASKATCHEWAN

Mineral claims—Lapse of, through failure of recorded owner to do work required—Same person subsequently staking them on behalf, and having them recorded in names, of others (defendants)—Others (plaintiffs) subsequently staking them, refused a record, and bringing action attacking validity of said former staking and recording as not done according to regulations—Right or status of latter (plaintiffs) to do so—Regulations for the Disposal of Quartz Mining Claims, approved by order in council (Dom.) dated January 19, 1929, and made applicable by order in council (Sask.) dated November 27, 1931.

The defendant T.B. had become the recorded owner of six mineral claims near Beaver Lodge, Saskatchewan. In 1933 the claims lapsed through T.B. failing to perform the work required under the mining regulations (Regulations for the Disposal of Quartz Mining Claims, approved by order in council (Dom.) dated 19th January, 1929, and made applicable by order in council (Sask.) dated 27th November, 1931). In August, 1934, T.B. staked three of the claims on behalf of the defendant J.B. and the other three on behalf of the defendant E.B., and had them recorded in the names of J.B. and E.B. respectively. Subsequently the plaintiff M., personally and on behalf of the plaintiff P., purported to stake the same claims, believing that said staking as done by T.B. was not in accordance with the regulations. He applied for a record of the claims, but this was refused because the claims were already recorded as aforesaid

The affidavit in form "A," required on an application to record a claim, contains the statement "that to the best of my knowledge and belief the ground * * * is unoccupied and unrecorded by any other person as a mineral claim." M. varied this by "excepting" J.B. or E.B. respectively and inserting: "That I claim that the staking and recording by [J.B. or E.B. respectively] of said ground was illegal and that the said ground was open for staking at the time that I staked the same."

Plaintiffs brought action for a declaration that the alleged claims of J.B. and E.B. to the claims were null and void and that plaintiffs were the holders or owners of the claims and were entitled to have records in their names, and other relief. MacDonald J. dismissed the action on the ground that plaintiffs had no status to maintain it ([1935] 3 W.W.R. 226). An appeal was dismissed by the Court of Appeal

* PRESENT:—Duff C.J. and Rinfret, Crocket, Kerwin and Hudson JJ.

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for Saskatchewan ([1936] 2 W.W.R. 129). Plaintiffs appealed to this Court.

Held: Plaintiffs' appeal should be dismissed.

The case was not one contemplated by ss. 7 and 8 of the regulations (requiring certain procedure and permission as to relocating). Ss. 7 and 8 contemplate a case where, a claim having been abandoned or forfeited (and assuming, but not deciding, that this embraces a case in which the claim has lapsed by reason of failure to perform the representation work), the owner wishes to relocate the claim for himself. The question whether or not in point of fact T.B. was not acting on behalf of J.B. and E.B. but under some understanding, express or tacit, was making an unlawful use of their licences for the purpose of acquiring the ground for himself, was not a question upon which it was competent to the mining recorder to enter.

The claims having been staked out and the mining recorder having accepted the staking as *bona fide* and sufficient, there were records of them in the names of J.B. and E.B. *ex facie* valid which the mining recorder could not treat as nullities. Plaintiffs could not, when they staked their claims, make the affidavit in form "A," and, such being the case, they could not lawfully either stake out the ground as a mineral claim or obtain a record of it as such.

Osborne v. *Morgan,* 13 App. Cas. 227, *Hartley* v. *Matson,* 32 Can. S.C.R. 644, and other cases discussed. To what extent the principle of those decisions is applicable for the protection of a holder of a record of a mineral claim under the regulations now in question, it was not necessary to determine for the purposes of the present appeal. This Court did not endorse, or decide on, the view that the existence of a record in itself precludes a licensee from all remedy against the holder of the record where the facts of the particular case bring it within a class of cases in which the regulations expressly or by necessary implication enact that the ground within the limits of the claim described in the record is open to location generally by the holders of miners' licences.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Saskatchewan (1) dismissing their appeal from the judgment of MacDonald J. (2) dismissing their action.

The action was brought for a declaration that alleged claims of the defendants Jean Box and Elizabeth Box to certain mineral claims in the vicinity of Beaver Lodge, Saskatchewan, were null and void and for a declaration that the plaintiffs were the holders or owners of said mineral claims and were entitled to have records in their names thereof, and other relief.

In the year 1930 the claims (six in number) were recorded in the names of certain persons who subsequently trans-

(1) [1936] 2 W.W.R. 129; [1936] 3 D.L.R. 286.

(2) [1935] 3 W.W.R. 326.

ferred or assigned them to the defendant Tom Box who registered the transfers and became the recorded owner of the claims. In November, 1933, the claims lapsed through Box failing to perform the work required to be done under the mining regulations (Regulations for the Disposal of Quartz Mining Claims, approved by Dominion order in council dated 19th January, 1929, and made applicable by Provincial order in council dated 27th November, 1931).

In August, 1934, Box purported to restake three of the claims on behalf of the defendant Jean Box and the other three on behalf of the defendant Elizabeth Box. In so doing he made use of the stakes previously placed, placing the new inscriptions below the inscriptions already there; he did very little reblazing and relied upon the old lines. He then made application for records of such claims, and orally made known to the acting mining recorder just what he had done by way of staking and marking. The acting recorder recorded the claims in the names of said Jean Box and Elizabeth Box respectively on October 15, 1934.

Subsequently, in May, 1935, the plaintiff MacPhee, personally and on behalf of the plaintiff Pointer, purported to stake the same mineral claims. He had knowledge of what had been done by Box, but thought that it was contrary to the mining regulations and that the records issued were invalid and void. He later applied for a record of said mineral claims, which application was refused because the claims were already recorded in the names of Jean Box and Elizabeth Box as aforesaid.

Paragraph 9 of the affidavit in form "A," required to accompany an application, is as follows:

> 9. That to the best of my knowledge and belief the ground comprised within the boundaries of the said claim is unoccupied and unrecorded by any other person as a mineral claim; that it is not occupied by any building or any land falling within the curtilage of any dwelling house or any orchard, or any land under cultivation or any land reserved from entry under the Quartz Mining Regulations.

The affidavit of MacPhee varied this by inserting after the words "is unoccupied and unrecorded by any other person" the words "excepting Jean Box" (or "excepting E. Box") and by adding at the end of the paragraph the words: "That I claim that the staking and recording by said Jean Box [or "by said E. Box"] of said ground was illegal and that the said ground was open for staking at the time that I staked the same."

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The plaintiffs then brought the present action. They made the Sterling Collieries Co. Ltd. a party defendant on the ground that, by virtue of an agreement with the defendant Tom Box dated December 14, 1934, and subsequently recorded in the Department of Natural Resources, the company claimed an interest in the claims.

Besides alleging that the mineral claims recorded in the names of the defendants Jean Box and Elizabeth Box were invalid and null and void by reason of non-compliance with the mining regulations in the staking thereof, the plaintiffs alleged in the alternative that the defendant Tom Box relocated the mineral claims by and on behalf of himself and that such relocation was invalid and null and void by reason of his failing to comply with the regulations as to staking, etc., and also by reason of his failing to obtain permission from the mining recorder to relocate and also failing prior to so relocating to post a notice of the abandonment or forfeiture of the claims and also failing to file a statutory declaration of posting notice.

Sections 7, 8, 53, and (in part) 65, of the regulations, read as follows:

7. If a mineral claim has been abandoned or forfeited by any person, the mining recorder may, in his discretion, permit such person to relocate such mineral claim or any part thereof; Provided that such relocation shall not prejudice or interfere with the rights or interests of others.

8. No claim shall be so relocated by or on behalf of the former holder thereof within thirty days of its being so abandoned or forfeited, nor until after notice of such abandonment or forfeiture has been posted up for at least a week in a conspicuous place on the claim and in the office of the mining recorder, nor until a statutory declaration has been filed with the mining recorder that the notice has been so posted.

* * *

53. If, however, the amount of work is not done and duly recorded, as prescribed in section 52, the claim shall, at the expiration of the period of one month provided for, lapse, and shall forthwith be open to relocation under these regulations, without any declaration of cancellation or forfeiture on the part of the Crown, subject, however, to the provisions of section 65 of these regulations.

* * *

65. Where forfeiture or loss of rights has occurred,—

* * *

(*b*) by reason of failure to submit evidence that the prescribed work has been performed, as provided in subclause 4 of section 52:

* * *

the Minister may, within three months after such default has occurred, upon such terms as he may deem just, make an order relieving the person in default from such forfeiture or loss of rights, and upon compliance with the terms, if any, so imposed, the interest or rights forfeited or lost shall be revested in the person so relieved, * * *

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The trial Judge, MacDonald J., dismissed the action, on the ground that the plaintiffs had no status to maintain it (1). An appeal to the Court of Appeal for Saskatchewan was dismissed (2).

By the judgment now reported, the plaintiffs' appeal to the Supreme Court of Canada was dismissed with costs.

O. M. Biggar K.C. for the appellants.

S. W. Field K.C. for the respondents.

The judgment of the court was delivered by

DUFF C.J.—This appeal presents questions of no little difficulty. I have reached the conclusion that the appeal must be dismissed; and that conclusion rests upon a rather limited ground which can be explained without much elaboration. I prefer to express no opinion upon some questions suggested by the judgments in the Saskatchewan courts which, in the view I take, it is unnecessary to decide.

The purpose of the Regulations under examination is to regulate the location of mineral claims upon lands which, by the provisions of the Regulations, may be "located for such purposes." One of the cardinal features of them is found in sections 12, 13 and 14 which provide for the grant of miners' licences; and which make it perfectly clear that no person who is not and has not been the holder of a miner's licence can lawfully prospect for minerals upon the lands affected by the Regulations, or acquire any interest of any description in any mineral claim for which a lease or a patent "has not been issued."

Section 65 authorizes the Minister to relieve a person who has suffered loss of rights or forfeiture by reason of the failure to renew his miner's licence; but there is no authority under the Regulations, and, so far as I know, no authority derived from any source, vested either in the Minister or in any official to recognize any person who has never held a miner's licence as the occupant of mineral lands governed by the Regulations; or, indeed, to recognize anybody as entitled to mine upon lands governed by the Regulations except in pursuance of the Regulations themselves. The holder of a miner's licence is entitled, subject to s. 16, to enter, locate, prospect and mine upon

(1) [1935] 3 W.W.R. 326.

(2) [1936] 2 W.W.R. 129; [1936] 3 D.L.R. 286.

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"vacant Dominion lands" for minerals defined by the Regulations, and also to mine for gold and silver on land in respect of which the right to mine for such minerals has been reserved to the Crown. By section 16, the licensee is excluded from certain defined classes of lands, which classes include "any land lawfully occupied for mining purposes."

There are some enactments in the Regulations, which it is convenient to notice at the outset, that provide, either expressly or by necessary implication, for cases in which lands that have been lawfully occupied for mining purposes under the Regulations cease to be lands within that category, and become subject to location under the provisions contained in sections 18 to 36 inclusive. By section 37, for example, a claim which has not been recorded within the appropriate period prescribed shall be deemed to be abandoned or forfeited without any declaration of abandonment or forfeiture on the part of the Crown.

Section 49 provides for the abandonment of a mineral claim by the holder, which is effected by giving notice in writing to the Mining Recorder.

By section 53, where the holder of a mineral claim has failed within the prescribed periods to do the work required by section 52 upon his claim and to file evidence of it with the Recorder, the claim lapses and becomes "forthwith * * * open to relocation under" the Regulations "without any declaration of cancellation or forfeiture on the part of the Crown."

By section 60, failure to make application for a certificate of improvements within the prescribed period results in the lapsing of the claim as under section 53, subject always to the authority of the Minister to grant relief under section 65.

Section 37 deals with the recording of mineral claims and provides that application for a record shall be made within fifteen days after the "claim has been staked out"; or a more extended period according to the circumstances as defined by the section. This section contains a vitally important provision which is to the effect that the application shall be made in "the prescribed form."

By section 40, no claim can be recorded unless the application is accompanied by an affidavit or solemn declaration

in form A of the Regulations. Form A includes, in paragraph 9, this affirmation:

> That to the best of my knowledge and belief the ground comprised within the boundaries of the said claim is unoccupied and unrecorded by any other person as a mineral claim; that it is not occupied by any building or any land falling within the curtilage of any dwelling house or any orchard, or any land under cultivation or any land reserved from entry under the Quartz Mining Regulations.

It is plain, when sections 37 and 40 are read in light of the terms of form A, that the Regulations do not contemplate the granting of an application for a record where the applicant knows he cannot truly affirm that

> the ground comprised within * * * [his] claim is unoccupied and unrecorded by any other person as a mineral claim.

This language is very sweeping and in *Wekusko Mines Ltd.* v. *May* (1) the Manitoba Court of Appeal seems to have thought that where a claim has lapsed and, by section 53, has become "forthwith" open to "relocation" under the Regulations, the ground cannot, if the former holder of the lapsed claim remains in possession, be located and recorded as a mineral claim by another licensee, in consequence of the fact that such licensee cannot, in such circumstances, truly make this affirmation; and, if the owner of the lapsed claim remains in possession with the intention of applying within three months for relief under section 65, this view is, perhaps, not without plausibility, although not easy to reconcile with the explicit words of section 53.

By section 49,

> * * * Upon any forfeiture, abandonment, or loss of rights in a mineral claim, the mining recorder shall forthwith enter a note thereof, with the date of entry, upon the record of the claim, and shall mark the claim "lapsed."

It is unnecessary for the purposes of this case to consider whether we should be forced to hold, in virtue of the terms of form A and the provisions of sections 37 and 40, that a claim which has been staked out, and is still, to the knowledge of the applicant, in the physical occupation of the locator, can be located or recorded as a mineral claim by another licensee in circumstances in which the Regulations, either expressly or by necessary implication, declare that the claim first located never came into existence as a mineral claim (where, for example, the locator has never held a miner's licence); or has ceased to exist in the eye of

(1) [1926] 1 W.W.R. 225.

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the law by reason, for example, of failure to obtain a record within the period prescribed by s. 37, or by reason of failure to do and file evidence of the work required by section 52. It is not necessary to enter upon these questions because, in the view I take of sections 7 and 8, the claims now in question having been "staked out," and the Mining Recorder having accepted the staking as *bona fide* and sufficient, there were records of them in the names of Elizabeth and Jean Box *ex facie* valid which the Mining Recorder could not treat as nullities.

The effect of sections 7 and 8 is, I think, when they are read together, this: where a claim has been forfeited or abandoned, the owner of the claim is not entitled to relocate the ground embraced within the claim for himself, either personally, or by the agency of another. Section 7 makes it quite clear that the cases contemplated are such cases. By that section the permission authorized is a permission given to the person who has lost a claim by abandonment or forfeiture, not a permission given to a licensee as agent of somebody else.

It follows, therefore, that the locations in the name of Elizabeth Box and Jean Box were valid locations on their face. The question whether or not in point of fact Tom Box was not acting on behalf of these persons but under some understanding, express or tacit, was making an unlawful use of their licences for the purpose of acquiring the ground for himself, was not a question upon which it was competent to the Mining Recorder to enter. He had no means at his command of investigating such a question and the Regulations give him no authority to make any such investigation.

Some elucidation may, perhaps, be useful at this point. The holder of a miner's licence, by section 15, is given the right "to enter, locate, prospect and mine," as already observed, "upon any vacant Dominion lands," but that section makes it quite clear that this right of the licensee must be exercised by him "personally, but not through another" except in the cases provided for by section 20. Section 20, in so far as pertinent, is in these words:

> 20. A licensee may, in any one licence year in any one mining division, stake out and apply for:—
>
> (*a*) Not more than three mineral claims on his own licence;
>
> (*b*) Not more than three claims each for not more than two other licensees, being nine claims in all;

By section 26, it is the duty of the locator to place upon "post No. 1" not only his own name and the number of his licence as the person staking the claim, but also, where the claim is staked on behalf of another licensee, the name of such other licensee; and, by section 37, the licensee who stakes a claim on behalf of another is authorized to make application for a record of such claim, and it is the duty of the applicant, when the application is made on behalf of another, at the time of the application, to produce, not only his own licence, but also the licence of the licensee on whose behalf the application was made. And it is the duty of the recorder to endorse upon this last mentioned licence, and not upon the licence of the staker, a note in writing of the record of claim; and no such record is "complete or effective until such endorsement has been made."

In paragraph 1 of form A the applicant gives the number and date of his own licence and in paragraph 11 he gives the residence, the post office address, the number and date and the place of issue of the licence of the person in whose name the claim is to be recorded. From these provisions of the Regulations and paragraphs 2 and 11 of form A, it is plain that section 20 contemplates the use by one licensee of the licence of another; and that the first mentioned licensee is acting on behalf of the second.

Now, there is a general principle of law stated very clearly and forcibly by Sir George Jessel in *In re Hallett's Estate* (1) which comes into play here. The passage is in these words:

> Now, first upon principle, nothing can be better settled, either in our own law, or, I suppose, the law of all civilized countries, than this, that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly. A man who has a right of entry cannot say he committed a trespass in entering. A man who sells the goods of another as agent for the owner cannot prevent the owner adopting the sale, and deny that he acted as agent for the owner. It runs throughout our law, and we are familiar with numerous instances in the law of real property. A man who grants a lease believing he has sufficient estate to grant it, although it turns out that he has not, but has a power which enables him to grant it, is not allowed to say he did not grant it under the power. Wherever it can be done rightfully, he is not allowed to say, against the person entitled to the property or the right, that he has done it wrongfully. That is the universal law.

(1) (1880) L.R. 13 Ch. D. 696, at 727.

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Therefore, Tom Box, having, in recording the claims in question in the names of Elizabeth and Jean Box, professed to act as their agent, would not be permitted to aver as against them that he, and not they, was the owner of the claims recorded in their names. In an adverse proceeding by the Crown, or by any other party having a status to take such a proceeding, based upon allegations that Tom Box was not acting for his wife and daughter but for himself or some other person, it would be necessary to establish in fact that there was some arrangement, express or tacit, between Elizabeth Box, Jean Box and Tom Box and the alleged beneficial owner other than Tom Box (if there should be such) which had the effect of making Tom Box's use of the miners' licences of his wife and daughter illegal. That would, probably, be a very difficult proposition to establish.

The case in this respect is very different from the case in which a claim is staked out for a person who is not the holder of a miner's licence. That is a matter upon which it is the plain duty of the Mining Recorder to satisfy himself in performing his duties under section 37; the record, by the explicit terms of the section, is incomplete until the licence is produced and the proper endorsements are made upon it. Nor is it at all like the case in which a claim has lapsed by reason of the failure of the owner of the claim to do and record his representation work. That again is a matter with which the Mining Recorder is officially concerned because, as above pointed out, by sections 49 and 53 it is his duty in such a case forthwith to mark the claim "lapsed."

In the circumstances before us, it seems to me that the appellants could not, when they staked their claims, make the affidavit in form A and, such being the case, they could not lawfully either stake out the ground as a mineral claim, or obtain a record of it as such.

I am assuming, I should observe, for the purposes of this discussion that section 7 embraces a case in which the claims have lapsed by reason of failure to perform the representation work. It must be understood, however, that I am not deciding the point or expressing an opinion upon it. I assume in favour of the appellants that such is the case; and on that assumption Tom Box's procedure on its face

and that of the Mining Recorder were not obnoxious to the enactments of sections 7 and 8 for the reasons I have mentioned.

The respondents rely, and the Saskatchewan courts largely, if not entirely, proceeded, upon the authority of *Osborne* v. *Morgan* (1); *Hartley* v. *Matson* (2); *St. Laurent* v. *Mercier* (3), and *Seguin* v. *Boyle* (4). I am not going to express any decided opinion upon the question whether, when a record has been obtained ostensibly under these regulations, there is any general rule by which the holder of the record is protected under a principle analogous to that which was applied in these cases. It is unnecessary to pass upon this point for the purposes of this appeal; but one or two observations upon these decisions may not be entirely valueless.

As regards *St. Laurent* v. *Mercier* (5), one is not entitled to assume (it should be noticed) that the reasons given by Mr. Justice Mills in his judgment were the grounds upon which the Chief Justice and Mr. Justice Sedgwick proceeded in deciding that the appeal should be dismissed. In that case, when Mercier received his renewal grant the original Hill claim had lapsed and the lands were vacant. As the present Chief Justice of British Columbia, then Martin J., pointed out in his judgment in *Voight* v. *Groves* (6), the Privy Council held in *Chappelle* v. *The King* (7) that the placer miner (that is to say, Mercier)

> on renewal holds under an annual grant in substitution for, but not in continuation of, his original grant.

The Chief Justice and Sedgwick J. may very well have taken the view that the invalidity of Mercier's original grant did not affect the validity of the renewal grant and, besides, counsel for the respondent contended that on the facts the ground was open for location in 1899 when Mercier staked out his claim. In truth, *St. Laurent* v. *Mercier* (5) ought never to have been reported. Anybody familiar with the process of reporting decisions of this Court in those days will readily realize that in the circumstances the headnote cannot safely be relied upon.

(1) (1888) 13 App. Cas. 227.
(2) (1902) 32 Can. S.C.R. 644.
(3) (1903) 33 Can. S.C.R. 314.
(4) [1922] 1 A.C. 462.
(5) (1903) 33 Can. S.C.R. 314.
(6) (1906) Martin's Mining Cases, Vol. 2, 357 at 361.
(7) [1904] A.C. 127, at 134-135.

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In *Osborne* v. *Morgan* (1) (*supra*) the Privy Council held two things: first, that no land within the boundaries of a lease for any purpose other than pastoral purposes fell within the category of "Crown lands"; and, consequently, that the rights conferred by "miners' rights" did not affect such land; second, they held also that the lease, if impeachable at the suit of the Crown, was, even in such a proceeding, voidable only, and not void.

In *Hartley* v. *Matson* (2), this Court had to consider a case in which an hydraulic mining lease had been granted to the defendants by the Minister of the Interior, and the decision was that holders of free miners' licences could not, by "staking claims" within the boundaries of the lease, acquire a right to impeach the lease upon the ground that it had been obtained by misrepresentation; a sufficiently obvious conclusion when the regulations governing the granting of such leases are considered. That such cases as *Osborne* v. *Morgan* (1) and *Hartley* v. *Matson* (2) are generally applicable in protection of the person who has obtained a record from a mining recorder professing to act under the Regulations before us is a proposition not obviously deducible from these decisions. *Seguin* v. *Boyle* (3), in so far as pertinent, involved the same question as that raised by *Hartley* v. *Matson* (2).

It is perfectly plain, of course, that if the holder of a miner's licence has staked a claim on lands open for location in complete conformity with the requirements of sections 18 to 36, the Mining Recorder has no discretion to refuse his application for a record when it is made within the proper time. The licensee in such circumstances has a statutory right to a record. On the other hand, the Mining Recorder has no discretion to dispense with statutory prerequisites generally. He has no authority to grant a record in response to an application by a person who by the Regulations is disqualified from locating mineral claims generally, or locating a mineral claim upon the ground to which the application relates.

In *Osborne* v. *Morgan* (1), the lessee held under a formal lease granted by the Governor of the colony in the name of Her Majesty, and the regulations provided the machin-

(1) (1888) 13 App. Cas. 227. (2) (1902) 32 Can. S.C.R. 644.
(3) [1922] 1 A.C. 462.

ery by which lands in *de facto* occupation under the Crown, but liable to forfeiture, could be purged of any such occupation and thrown open to location by free miners.

The regulations under consideration in *Hartley* v. *Matson* (1) affecting the granting of hydraulic leases vested a discretionary authority in the Minister of the Interior whose duty it was to satisfy himself that the provisions of the law had been complied with. The lessee held under a formal lease and by the regulations he had the exclusive right to enter upon and occupy the leased premises for the purpose of mining thereon with the exception of quartz mining and, subject to the right of any free miner to enter upon the premises to locate and mine for minerals in veins and lodes. Free miners were excluded from mining in such location by the express terms of the regulations except in pursuit of quartz mining. Such a formal lease, if obtained by misrepresentation, might have been voidable at the suit of the Crown, but it is difficult to understand on what principle the holder of a free miner's licence, which could be obtained by anybody on payment of the specified fee, could attack the validity of the lease as a hindrance to the exercise of the rights of such licence holders in placer mining. So long as the lease subsisted, licence holders were excluded from placer mining within the leased premises and no such licence holder had any title to maintain an action in the interests of all persons who might hold a free miner's licence or who might obtain one on the payment of the specified licence fee.

To what extent the principle of these decisions is applicable for the protection of a holder of a record of a mineral claim under these Regulations it is not necessary to determine for the purposes of the present appeal; and I am not endorsing (I wish to make it quite clear) the view that the existence of a record in itself precludes a licensee from all remedy against the holder of the record where the facts of the particular case bring it within a class of cases in which the Regulations expressly or by necessary implication enact that the ground within the limits of the claim described in the record is open to location generally by the holders of miners' licences. While I am not endorsing that view, I am giving no decision upon the point involved.

(1) (1902) 32 Can. S.C.R. 644.

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It is, perhaps, advisable to add that, although these Regulations were originally based upon the British Columbia *Mineral Act* of 1896, the provisions for recording mineral claims in their present form differ in several material respects from the corresponding provisions of British Columbia statutes upon which the Regulations were originally founded. Under the B.C. Regulations the duty of the free miner who has located a claim is to record it within the time specified. Under these Regulations, his duty is to apply for a record. Under the B.C. statutes, no such affirmation as that contained in paragraph 9 of form A is required; and it may be added that the duty of passing on the *bona fides* and sufficiency of the locator's proceedings in staking his claim by these Regulations devolves, within rather broadly defined limits, upon the Mining Recorder, while under the B.C. statutes it devolves upon the courts of law. Moreover, the B.C. statute contains no provision corresponding to section 65.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *MacPherson & Leslie.*

Solicitors for the respondents: *MacKenzie, Thom, Bastedo, Ward & McDougall.*