Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Walhalla Gold Mining Company v. *Mulcahy and another, from the Supreme Court of Victoria: delivered 20th July*, 1871.

Present:

SIR JAMES W. COLVILE.
JUDGE OF THE HIGH COURT OF ADMIRALTY.
SIR JOSEPH NAPIER.
LORD JUSTICE JAMES.

THE property, the subject of this suit, is a small but valuable piece of auriferous land.

The Plaintiff has succeeded in obtaining from the Courts in the Colony, both on the original hearing, and on Appeal, a Decree in his favour. From those decisions the Defendant Company has appealed. It is part of the common case of both parties that the land in respect of which the Defendants have been treated as trespassers, was their undoubted property up to a very recent time, before the commencement of the litigation.

In the Colony, duly licensed miners are entitled to select certain limited portions of the Crown Gold Fields, and to acquire the exclusive right to mine within the limits. The area within the prescribed limits is called a claim. The claim-owner is for all mining purposes, possessed of the claim for a permanent estate determinable only by voluntary abandonment *de facto*, or by those breaches of conditions which amount to a constructive abandonment or forfeiture. The Defendant Company had the beneficial interest in a claim of this kind, including the land in question, but which was and remained registered in the names of Meglin and others, as trustees for the Company. It was known as Claim 7. The Defen-

dant Company having been the owners of the claim, including the disputed portion, it was of course essential to the Plaintiffs' case to show, first, that the Defendant had ceased to be such owners; and, secondly, that the property had become legally vested in Plaintiffs, and the *onus probandi* was on him.

The way in which it was alleged that the right had been so lost by the one, and acquired by the other was as follows:—

Besides the mining rights under claims it was by the mining laws of the Colony competent to the Crown to grant actual leases for terms of years for mining purposes. The Defendant Company applied for and obtained a mining lease. Their application was for a lease of the claim and other adjoining property.

But the lease actually granted did not include the whole of the property in the claim.

The southern boundary of the claim being at the same time the northern boundary of the adjoining claim No. 6, was not a straight line, but two lines forming an angle—a line from a post to a peg at the apex, and another line from that peg to another post.

When the Government Surveyor came to make his survey preparatory to the lease, through the neglect of the Defendant's servants on the spot, his attention was not directed to the apex peg, and he drew his line a straight line between the two posts and the Lease was granted up to that straight line.

There was thus left a small triangular piece of the claim not included in the lease.

The lease was dated on the 24th July, 1865, and was to one Johnson as a trustee for the Company.

The Plaintiff, Mr. Humphreys, and one John Hussey, on September 16, 1865, having in some manner learnt that there was this triangular piece so left out in the lease, thought they might treat it as unoccupied Crown land, and, accordingly, on September 16, 1865, they registered a claim thus, "for a piece of spare ground measuring about 23 feet along the line of reef situate between the claims of Nos. 6 and 7, North Cohen's Reef."

If the land were actually *de jure* and *de facto* unoccupied, or what is here called spare ground, this registration would undoubtedly have given the applicants a good claim right.

If the ground were *de jure* and *de facto*, subject to prior occupation, it would on the other hand, be absolutely void; if it were *de facto*, subject to an occupation not lawful, it would not confer any right until the Warden had put the applicants in possession, it being a positive law of the district, a most wise law, that no person should take possession by his own authority of any ground claimed to be occupied by any other person.

It was therefore incumbent on the Plaintiff to show that, on 16th September, 1865, the land in question was spare ground. Their Lordships have in vain sought to find a scintilla of evidence that it was so. It was properly conceded in the argument before them that, if the lease had never been granted, there was nothing whatever to distinguish the piece from the rest of the claim, and that the continued possession and occupation of the claim was the continued possession and occupation of every nook, corner, and portion of the claim.

It was also properly conceded that the taking a lease even by the claim-owner himself of a portion of the claim had no legal operation on the claim-right to the other portion, and that it could make no difference in point of law whether the portion left out of the lease was very large or, as in this case, very small. *A fortiori*, a lease to Johnson could have no legal operation on the claim right, the legal title in which was still vested in Meglin and others.

The lease having thus directly no legal operation, it appears to their Lordships impossible to give it indirectly the same effect by holding it as evidence, and sufficient evidence of an intentional abandonment.

It is, in truth, no evidence whatever of that fact.

The Court in the Colony appears to have overlooked that intentional abandonment is only to be proved by cogent evidence of the existence of that intention, evidence of express declaration or unambiguous acts or conduct; and that, on the other hand, the very smallest act, *animo possidendi*, is sufficient to negative such intention. In the absence of strong evidence to the contrary, or of some adverse possession, the continued possession of any part of any district of land held under one title is itself continued possession of the whole.

But the case does not stop here. It was clearly proved that, so far from abandoning all beyond the

lease line, the Company had actually a shaft in use outside that line, and were using some of the land beyond for their spoil heaps.

The Plaintiffs did indeed apply to the Warden to be placed in possession of the ground as unlawfully occupied by the Defendant; and, on the 23rd of October, 1865, the Warden pronounced the following Judgment:—

"I find this ground is lawfully occupied by Defendants. I adjudge the same, and refuse the application accordingly."

This finding and adjudication remain unreversed, and would appear to be an adjudication of the question of right between the parties.

It has been sought to get rid of the effect of this adjudication in this way. The Plaintiff states, that it only applies to a small part of the land in dispute. He says, that the claim marked out by him, did not include the part actually occupied by the Company's shaft and works; and, in certain plans made for the purposes of this suit, and since the suit, that portion is coloured blue, and the other portion is coloured yellow. He says, my claim was, and my suit is, for the yellow and not for the blue. But there never was any boundary, any division between the blue and the yellow; there is no such thing *in rerum natura* as that division; no such thing in any document, map, or plan, existing before the suit. The claim registered by the Plaintiffs is a claim to a piece of spare ground between claims Nos. 6 and 7. The map prepared by the Mining Surveyor for them, shows the spare ground as including the whole left out by the lease. The Plaintiffs' proceeding before the Warden would be on their present hypothesis utterly unintelligible and absurd. How could they have asked to be put in possession of ground as unlawfully occupied by the Company, if they had deliberately and actually left the land so occupied, out of the registered claim, on which alone their title rested.

It is manifest that the matter before the Warden was the possessory right claimed under the registered claim to the piece of ground on which the Plaintiffs alleged that the Defendants were trespassing, and that possessory right was according to the plain truth, law, and justice of the case adjudged to be in the Company.

No verdict or Judgment in an action of trespass to try title would ever be final if an unsuccessful claimant were to be at liberty afterwards to draw an imaginary line leaving out the spots on which the actual alleged trespass was committed, and then trying the matter over again on the allegation that the verdict only found the possessory right in those particular spots. The question in all these cases as to what was adjudicated is what is the close, the title to which was in issue and found, and their Lordships cannot doubt that the close described as "ground between Walhalla Company's lease and No. 6, North Cohen," which was then claimed by the Plaintiff, and found and adjudged to be lawfully occupied by Defendants, was the entire triangular piece left out by the lease. They could not have been lawfully possessed of any portion of the ground except under the claim. If they were lawfully possessed of anything beyond the lease, it was because the claim title had never been abandoned. Their Lordships cannot but express their surprise that it should ever have been considered that there could be any difference of title between the two portions yellow and blue.

It would really be quite analogous to the following case:—A man is in possession of a house and stable under one title, and he then takes the house under another title. It is alleged that he has given up the stable, and he proves that he has continued to keep a horse in it, and that his right to do so was the subject of an action in which he was successful. Would it be possible in a subsequent action to say that action has established the right to the one stall only, and leaves the question still open as to the other stalls?

But it is, however, said, that whatever were the real rights of the parties up to and at the time of that adjudication, and whatever would be the decision upon the facts of the case, the Plaintiffs' right was so conclusively established in a subsequent proceeding, that it is not open to any discussion of the merits.

It appears that the Plaintiffs, or rather Humphrey the Plaintiff and Hussy, notwithstanding the decision of the Warden, worked or continued to work on part of the ground. The Walhalla Company sued to remove them and to recover damages.

That action came on to be tried before the Warden and four Assessors, and the judgment is expressed as follows:—

"We, the undersigned, being the majority of Assessors, who have heard the above case, find that the Defendants above named have not encroached on the ground of the Plaintiffs named above, and adjudge accordingly and order that Plaintiffs pay costs, thirty pounds six shillings (30*l.* 6*s.*)."

From that finding there was an appeal made to the Court of Mines, which Court pronounced the following decision:— (p. 30)

"I feel therefore bound to reverse the decision of the Warden and Assessors, and I further order that the Appellant be put in possession of the ground in dispute, and that the Respondents do pay to the Appellants as damages the sum of 765*l.*, and the sum of 297*l.* 10*s.* for their costs.

"(Signed) "CHARLES B. BREWER."

It appears that the Judge of the Court having heard the case within his district afterwards by consent of the parties, when within another district, announced the decision he had arrived at, and gave his reason. The Supreme Court thereupon granted a rule *nisi* for a prohibition on one ground, and on one only, that the order was made and pronounced out of the mining district. No final judgment was ever pronounced in respect of that objection. Their Lordships cannot doubt that the objection was untenable. If a case is fully and fairly tried out before the Judge within his jurisdiction, and he takes time to consider his decision, there is nothing to prevent him from taking the papers home to his own library out of the jurisdiction and there considering and writing out his decision and judgment. And if, at the request or with the consent of the parties he allows them to attend him out of the jurisdiction to hear his reasons and conclusions, there is nothing whatever in this to prevent him, being afterwards within his jurisdiction, from giving his formal order formally signed to the proper officer to be duly recorded.

The Supreme Court having only granted a rule *nisi* on this one point that the order was made and pronounced out of the district, on the argument for making that rule absolute, granted an absolute prohibition on a totally different ground, namely,

that an Appeal did not lie from a decision of Assessors. Observations of great weight have been addressed to their Lordships to show the impropriety of making a rule absolute on a ground so essentially different from that on which the rule *nisi* was granted and for something essentially different, the rule *nisi* being to stay proceedings on a certain order, the rule absolute being to stay the Appeal altogether and like observations have been made against the construction which the Court put on the Act as to Appeals, it being alleged that they had overlooked much in the context leading to a different conclusion.

Their Lordships, however, have not the rule absolute before them for review in this case, and must consider it as a *res judicata* and binding, and, therefore, as having entirely swept away the decision of the Appeal Court in the Defendants' favour.

Indeed, if the arguments which were addressed to them as to the reasons of the Judges were well founded, it may well be that the actual decision as to the prohibition was right, as there was nothing in existence properly the subject of Appeal.

The Assessors, or the majority of the Assessors, are not the Court; and it is expressly provided by section 193, that a Minute of their decision shall be written in the register; and that the Warden shall make an Order in accordance with such decision, and write the same in the register, under the said decision; and such decision, with said Order so underwritten, shall be signed by the Warden; that every such entry shall be made in form, as the decision of the Warden; and the expression "decision of a Warden" shall, if not inconsistent with the context or subject-matter, be taken to include the decision of the Assessors.

That last direction appears to have been overlooked by the Court in giving their reasons for the prohibition, which, however, may well stand, not for the reasons assigned, but for the reason that there was no Order or Judgment of the Warden at all. Although the finding of the majority of the Assessors that the Defendants had not encroached on the ground of the Plaintiffs might have been a finding competent to them to make, the adjudication and Order, which appears only as the adjudication and Order of the majority of the Assessors

was a mere nullity. It may, therefore, be true that no appeal will lie from a decision of Assessors, because that decision requires to be followed by an express finding and Order of the Warden, as is expressed in the 25th Schedule, thus :—

"I find on the verdict of Assessors that, and I order," &c. &c.

Thus the decision and order thereby become the decision and order of the Warden, and it is that decision of the Warden which is the subject of Appeal.

Indeed, it is expressly provided (section 213) that no Appeal shall be heard unless a copy of the minute of the decision, *and of the order thereon*, signed and certified, shall be produced to the Court.

It has, however, been contended that the Appeal having been set aside, the original decision stands good as a final adjudication between the parties.

It is, however, sufficient to say that it is a mere verdict not followed by any judgment of the Court; and the defects in the order which made it not the subject of Appeal make it not admissible as a verdict for any purpose. It is not an estoppel, and it has under the circumstances no weight whatever as a finding.

Indeed, if there had been a formal finding of the Assessor that the Defendant had not encroached on the Plaintiff's land and a formal judgment of the Warden thereon, it would not have been an adjudication on the question of title, operating in any way by estoppel.

A verdict followed by Judgment, to be an estoppel, must be on the precise point, and a distinct finding thereon.

Nor is the effect of the verdict as an estoppel to be enlarged by parol evidence showing what the discussion was or what the evidence was. In this case all that is actually found is that the Defendants did not encroach on the Company's land. The Assessors, or one of them, might not have thought that the Acts complained of were done by the then Defendants at all, or may have thought that the lands were not held and claimed in point of law by the Walhalla Company, but by their Trustees, the original and still registered owners of the claim, or may have thought (which is perhaps the more

probable hypothesis to account for their finding) that the acceptance of the lease was in law a surrender of the claim.

Their Lordships are satisfied, therefore, that there was nothing whatever in that decision of the Assessors to prevent the case being fairly tried on the real facts and real title, and if it had been so tried the result must, in their judgment, have been, or ought to have been, for the reasons hereinbefore given, that the Bill should be dismissed with costs.

They will therefore recommend Her Majesty to reverse the Decree of the Supreme Court in Victoria of the 19th day of May, 1868, and to order that, in lieu and substitution for the Decree of the 2nd day of April, 1868, of Mr. Justice Molesworth, it ought to be declared that the Appellants were, as the beneficial owners and *cestui que* trusts of the registered owners of the Claim No. 7 in lawful possession of the land, the subject of this suit, and that the Respondents were not the holders of miner's rights entitling them to institute this suit; and with that declaration to recommend the dismissal of the Respondents' Bill with costs, such costs to include all costs of the proceedings subsequent to the Decree and of any interlocutory proceedings for injunctions and the discharge of the injunction granted against the Appellants; and that the Respondents should be ordered to restore to the Appellants any money which they may have received under any Order of the Court; and that it be remitted to the Supreme Court to take an account of all gold and auriferous substance taken or received by or on behalf of the Respondents since the Decree, which came out of so much of the Appellants' claim as is mentioned in the said Decree as a quadrilateral space, and also on account of the value of the said gold and auriferous substance, and also an account of all damage and injury done to such part of the Appellants' said claim or mine as is comprised in the said quadrilateral space by reason of the mining operations or wilful acts of the Respondents, their servants, or agents since the Decree, and that they be directed to pay to the Company whatever shall be found due on such account.

And with reference to the Order or Decree of Mr. Justice Molesworth of the 15th June, 1869, whereby the Appellants were ordered to pay to the

Respondents the sum of 3,964*l.* 10*s.*, with interest thereon at 8 per cent. per annum from the 25th March, 1869, and costs of suit, their Lordships do further agree to report to Her Majesty that the said last-mentioned Order or Decree ought to be reversed; and that any money paid under the said Order ought to be refunded, or any security given for payment of the same ought to be discharged.

The Appellants are to have their costs of this Appeal.

PRINTED AT THE FOREIGN OFFICE BY T. HARRISON.—24/7/71.