

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Hollyman and others v. Noonan and others, from the Supreme Court of Queensland; delivered 7th April, 1876.*

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Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE SMITH.

SIR ROBERT P. COLLIER.

THIS is an Appeal from a Judgment of the Supreme Court of Queensland discharging a rule *nisi* for a new trial obtained by the present Appellants, the Defendants in the Court below.

The action in which the rule was granted was brought by the Respondents to recover damages for a trespass alleged to have been committed by the Defendants in a close called Glanmire Prospector's Claim, at Gympie, in the Colony of Queensland, and in a mine of the Plaintiffs, under the surface of the said close, and for taking and removing therefrom certain gold and gold-bearing quartz, and converting the same to their own use.

The Plaintiffs obtained a verdict for 1,000*l.* damages, and a rule *nisi* was moved for and obtained by the Defendants upon the ground of misdirection.

The Plaintiffs' title is founded upon a claim called by them a prospecting claim, named Glanmire Reef. The Defendants claimed a right to take the gold and quartz in dispute under an ordinary quartz claim, called No. 5 South New Monkland Reef.

The rights of the parties respectively depend upon the proper construction of the Colonial Act

20 Vict., No. 29, intituled "An Act to amend the Laws relating to the Goldfields," and of certain rules made on the 15th November, 1866, by the Governor, with the advice of the Executive Council, under the authority of section 12 of the said Act.

It may be as well to state here that by the 2nd section of the Act it was enacted that certain terms, and amongst others the word "claim," should have the meanings thereby assigned to them if such meanings should not be inconsistent with the context or subject-matter, and that the meaning assigned to the word "claim" is the portion of land which each person or company shall be entitled to occupy, or to occupy and mine in, under any miner's right, license, or lease, issued under the provisions of the Act. (Record, p. 42.) The rules direct that the term "claim" is to be taken to apply to any authorised holding whatever, unless otherwise specified. (Record, p. 50.)

By the 3rd Section of the Act it was enacted that the Governor in Council might cause documents to be called "Miner's rights" to be issued.

The 4th Section is in the following words:—

"The miner's right' shall be in force for the period of twelve months from the date thereof, and shall during the said period authorize the holder to mine for gold upon any of the waste lands of the Crown, and to occupy (except as against Her Majesty), for the purpose of residence in connection with the object of mining so much of the said lands as may be prescribed under the rules and regulations to be made as hereinafter mentioned, and every such holder shall, during the continuance of such miner's right, be deemed in law to be the owner (except as against Her Majesty only) *of the claim which shall be occupied by virtue of such miner's right, and during such continuance as aforesaid all gold then being in and upon the said claim shall (except as against Her Majesty) be deemed in law to be the absolute personal property of such holder.*"

The effect of that Section, as their Lordships understand it, was not to entitle the holder of a miner's right to mine in any portion of the waste lands of the Crown, except such as should be authorised by a claim, license or lease granted to him under the rules.

Claims were defined, provided for, and regulated by the rules. They were of various descriptions. Prospecting claims, river claims, frontage claims,

alluvial claims other than river claims, and quartz reef claims.

River claims and frontage claims were respectively provided for by Rules 30 to 33, and 34 to 44.

Alluvial claims, other than river claims, were regulated by Rules 45 to 52, by the last of which it was declared that the owner or owners of any alluvial claim *should be entitled to have and enjoy all quartz reefs, veins, leaders and other deposits of gold within the area of such claims.*

Quartz reef claims are governed by Rules 53 to 90.

The rules are headed "Quartz Reefs."

By Rule 53 the term "reef" is to be taken to mean a *seam* of quartz, or any substance containing gold.

Rules 54 and 55 provide for the protection area to be allowed for prospecting claims, and the mode in which they are to be held.

"Rule 57 directs that as a reward for the discovery of gold in any new locality, the miner or miners discovering the same shall be entitled to a claim of 120 feet for any distance not exceeding two miles from any known working reef; beyond two miles and not exceeding five miles, 200 feet; beyond five miles, 300 feet on the line of reef, by a width of 300 feet—by a width in each case of 150 feet from centre of such reef; at a distance of 400 yards from any then working shaft on any line of reef, any miner or party of miners shall be entitled to a prospecting claim of 200 feet."

It is to be remarked that by this Rule, which, in their Lordships' opinion, extends to prospecting or reward claims only, it is expressly provided that *in all cases the owner or owners thereof shall be entitled to every reef, vein, leader, and all auriferous deposits within such limits.*

By Rule 58. The extent of ordinary claim allowed for each miner on the line of any quartz reef shall be 40 feet in the supposed direction of the same, by a width of 400 feet—200 feet on each side from the supposed centre of such reef; and the total number of claims allowed for any one party of miners actually employed shall not exceed six.

"Rules 60, 61, 63, 64 and 65 are as follows:—

"Rule 60. The holder of any quartz claim shall be entitled to occupy, where practicable, a surface area of thirty feet on each side of his shaft throughout the length of his claim, for the purpose of depositing rubbish and stone raised from the claim:



Provided that when any such claim shall run through or under any alluvial or surface soil supposed to contain gold it shall be lawful for any authorized person to take away or work any such earth or soil; and such person shall remove the same from within the boundaries of the surface area attached to the quartz claim, within a reasonable time, to be determined by the Commissioner.

“ Rule 61. Within two days after payable gold has been found in any claim notice thereof must be given to the Commissioner, who shall lay off the reduced width of such claim, and cause a red flag to be hoisted thereon. This clause applies to every description of sinking, except in cases of prospecting claims.

“ Rule 63. Miners occupying any portion of a quartz reef or vein shall be entitled to follow and work it in any direction that such reef or vein may take: Provided they do not trespass upon the claim of any other miner on the same line, or upon ground which may properly belong to the claim of such miner, or upon any part of the walls separating the claims.

“ Rule 64. It is provided also, that when the quantity of ground allowed under this regulation cannot be entirely taken up, by reason of the ground deficient being occupied as an alluvial claim, immediately on such deficient ground being vacated the same shall be deemed to be allotted, as a matter of course, to the quartz-reef holders, any fresh applications being unnecessary; and the owner or holders of any such amended claim shall be entitled to every reef, vein, leader, and all auriferous deposits within such limits.

“ Rule 65. Any miner or party of miners who may be in authorized possession of any quartz claim shall, for the information of all other persons, mark the boundaries of such claim by the erection of six posts,—one at each end of it, on the base line, and one at each corner to be at least three inches square, standing three feet above the ground, and kept at all times clear of rubbish, or anything which may tend to conceal them from view during occupation. And no person shall, on any pretence whatever, remove, destroy, or deface any such posts, nor shall any person erect any such posts with a view of inducing other persons to suppose that such ground is lawfully taken up and occupied.”

On the 14th April, 1868, the Defendants took up and registered an ordinary quartz claim, known as “No. 5, South New Monkland. They put a peg at the north end of the claim, and being a party of four, they measured 160 feet or thereabouts, being 40 feet for each of them, in a south-easterly direction, upon what they supposed to be the line of the New Monkland reef or seam of quartz, and there they drove another peg.

The Plaintiffs were the holders of a claim on the Glannire Reef, which was allotted and registered subsequently to the Defendants' claim, viz., on the 1st July, 1868. They were transferees, and not the original allottees of that claim.

The original allottees being a party of six, were entitled, under Rule 57, as the discoverers of gold in a new locality, to a prospecting or reward claim on the Glanmire reef of 120 feet. They were also entitled, under Rule 58, to an ordinary quartz claim on that reef of 240 feet, being 40 feet for each of them.

At the time when the claim was first allotted a peg was put into the ground on the line of reef, to mark the northern boundary. The actual direction of the reef was not accurately known at the time, but the Gold Commissioner measured a distance of 360 feet (being the 120 to which the discoverers were entitled as a reward, and 240 to which they were entitled as an ordinary quartz claim), along what was supposed to be the line of the reef, and at the point so arrived at, another peg was put in to mark the supposed southern boundary, the practice being to put pegs only at the ends of the length allotted, and not upon either side of the supposed base-line, as directed by Rule 65. Subsequently the actual line of the reef having become known, the Commissioner caused the extent of the claims to be indicated on the ground by causing another peg to be placed on the line of the reef at a distance of 360 feet to the south of the northern peg, which had never been removed. The new southern peg was some distance to the west of the southern peg originally put in, and was on the actual line of the reef. It was, however, considerably within 200 feet of that part of the line of the New Monkland reef, which was in the Defendants' claim.

It was admitted that both Plaintiffs and Defendants held miners' rights.

The Defendants' claim having been allotted and registered prior to that of the Plaintiffs, it is clear that if under their claim they were entitled to all reefs or veins of gold in the earth, at whatever depth, within the lateral limits of their boundary they were entitled to the gold and quartz in dispute. If, on the other hand, they were not so entitled, and their rights were limited to the gold and quartz in New Monkland reef included in their claim, and the Plaintiffs were entitled to a claim of 360 feet on the actual line of the Glanmire reef, measured from their northern peg, they are entitled to recover in the action.

The Chief Justice, before whom and a Jury of four the case was tried, held that the Plaintiffs were entitled to follow their reef—that is, the Glanmire reef—to the extent of their claim, and he left it to them to say whether the quartz taken from the reef was taken from within 360 feet from the northern peg of the Plaintiffs' claim. The Jury found for the Plaintiffs.

On discharging the rule *nisi* it was stated by the full Court that the *locus in quo* was in effect found by the Jury to be within the Plaintiffs' 400 feet of width (see p. 38, Cl. 7 and 8).

Their Lordships are of opinion that the ruling of the Chief Justice was right, and that under the Gold Fields Act and the Rules of 1866, the holder of a miner's right must, during the continuance of such right, be deemed to be the owner of the claim occupied by him, and that all gold in and upon such claim must be deemed to be the absolute property of such owner.

Secondly. That under the said Regulations an ordinary quartz claim did not vest in the holder the right to all gold or quartz beneath the surface area of the claim; and that under Rule 58 such claim was not a block claim, but was confined to the line of the quartz reef to which the claim referred.

Thirdly. That the Plaintiffs' claim entitled them to all the gold in the 360 feet in length of the Glanmire reef, measured from their northern peg; and to follow the line of the Glanmire reef to the extent of 360 feet from the northern peg, in whatever direction it might go, at the least within the lateral limits to which they were entitled, provided that in so doing they did not trespass upon the claim of any other miner.

Fourthly. That in following their reef to the spot from which the gold was taken they would not have been trespassing on the claim of the Defendants, that claim being limited to the line of the New Monkland reef, and the gold and quartz not having been taken on the line of that reef, but from the Glanmire reef.

This view of the construction of the rules is borne out by the whole scope of them.

The 58th Rule, in defining the extent of an ordinary claim, speaks of it as a claim *on the line of*



a quartz reef, and though it specifies the width on each side from the supposed centre of the reef, the specification was of the width within which the holder was to have the right to work the reef, which was the subject of the claim, and within which no other holder of a claim was to be entitled to work it.

The view that an ordinary quartz reef claim is confined to the particular reef to which the claim refers, and that the holder of it is not entitled to take gold or quartz from any other reef within the area or limits of the claim is borne out by the fact that the 58th Rule contains no words like those of the 52nd and 57th Rules, which declare that the owner thereof is entitled to every reef, vein, &c., within his area, or limits. It is also confirmed by the 60th Rule, which gives the holder of a quartz claim the right to occupy a surface area on each side of his shaft of 30 feet, which is much less than the width specified in Rule 58. Such a provision would have been wholly unnecessary if the claim gave him the right to use and mine in the whole of the soil in the block covered by the surface area. It is also confirmed by the 64th Rule, which provides that when the quantity of ground allowed to be taken up under the regulation cannot be taken up by reason of the ground deficient being occupied as an alluvial claim, the quartz reef-holder shall immediately, upon the deficient ground being vacated, be entitled to the same, and to every reef, vein, &c., and all auriferous deposits within such limits, thereby putting him in the position of the vacating alluvial claimholder. These rules, as pointed out by the Court below, also show that it was intended that different rights might exist within the same area or limits.

There are many other rules which support the same view, but it is not necessary to refer to them more particularly. They are pointed out in the reasons given by the Court below for discharging the rule *nisi*. The Rules more particularly referred to are the 63rd and 75th, which their Lordships agree with the lower Court in thinking refer to claims on the same line of reef; and the 76th and 77th, which respectively provide for the convergence of reefs, and for the division of a single reef into two or more distinct veins. — In the former case, as pointed out by the Court below, preference is not given until

the actual junction of the reefs; and, in the latter case, the holder of the claim may be called upon to elect which vein he will work, and the others may be allotted. Sections 78 and 79, as pointed out by the Court below, also show that it was intended that a quartz reef claimholder should be entitled to work only one reef within or under the surface limits of his claim.

It was contended by the Defendants that the Glanmire reef was not distant 100 yards from the New Monkland reef, and that therefore the discovery of gold was not in a new locality within the meaning of Rule 57, and that consequently the Plaintiffs' predecessors were not entitled to a reward claim; and further, that they were not entitled to an ordinary claim in addition to a reward claim. (Appellants' case, p. 3.)

The words of Rule 57 are: "As a reward for the discovery of gold in any new locality, the miner or miners discovering the same shall be entitled to a claim of 120 feet, for any distance not exceeding two miles from any known working reef," &c.

The Plaintiffs' predecessors were, therefore, clearly entitled to a prospecting or reward claim for their discovery of gold; but as the discovery of the Glanmire reef was not in a locality at a distance exceeding two miles from New Monkland reef they were not entitled to a prospecting or reward claim of more than 120 feet in length. It is also clear that they were entitled, as holders of miners rights, to an ordinary quartz claim in addition to a reward claim; otherwise, a party of miners discovering a quartz reef would be in a worse position than a party who had made no such discovery; for a party of six would be entitled to only 120 feet as a reward claim (Rule 57), whereas a party of six would be entitled to 240 feet as ordinary claims (Rule 58).

Section 6 expressly gives a right to a reward claim *in addition to any other claim which each individual would otherwise be entitled to*, and their Lordships are of opinion that Rules 57 and 58 must be construed as if they had contained similar words.

In the year 1868 a mining district called the Gympie Local Court District was formed and proclaimed pursuant to the provisions of the 20th



Section of the Act, and on the 22nd October, 1868, a new set of Regulations was made pursuant to the 21st Section of the Act, and all Regulations theretofore in force for the management of the gold fields, in so far as they affected the Gympie Local Court District, were, with certain exceptions, repealed, and the new Regulations substituted (Record, p. 73). On the 14th October, 1870, the Rules of 1868 were repealed, except such parts thereof as defined and preserved existing rights, and amended rules were made and substituted.

The claims of both parties were situate within the Gympie Local Court District, and were registered under the Regulations of October 1868.

The 34th section of the Rules of October, 1870, was as follows (Record, p. 111):—

“34. To remove all doubts as to the legality of title to mining property, and for increasing security of tenure, it is hereby declared that all claims *now* or which may hereafter be registered in the Registrar's office, of whatever tenure or description, are block claims, and the owner or owners thereof shall be entitled to hold and enjoy against all persons whatever (except Her Majesty) all reefs, veins, leaders, and other auriferous deposits which may be found within the perpendicular of the pegs marking the surface boundaries of such claim or claims.”

But by section 2 it was expressly provided that the area of existing mining tenements should not be diminished thereby, *nor the nature of the respective holdings changed in consequence thereof* (p. 100.)

Their Lordships are therefore of opinion that the claims of both parties, and their rights and interests thereunder, which were created before the making of the Rules of 1868 or the Rules of 1870, must be determined with reference to the Rules of the 15th November, 1866, the only Rules which were in force when the claims of both parties were allotted.

The Plaintiffs registered the whole of their 360 feet in the Gympie Local Mining Court District as a prospecting claim, but the 360 feet included the 240 feet of ordinary claims, which were to the south of the reward claim. The Plaintiffs are therefore not entitled to the benefit of Rule 57, and their rights in this suit must depend upon their title, not as reward or prospecting, but merely as ordinary quartz reef claimholders.

Looking to their rights as ordinary quartz reef claimholders, and as ordinary quartz reef claimholders only, their Lordships are of opinion that they were entitled to the gold and quartz which were the subject of the action, and to recover damages against the Defendants for removing and converting it to their own use.

There were several minor points in the case, but they, very properly, were not pressed.

For the reasons above given their Lordships are of opinion that the Court below were right in discharging the rule *nisi*, and they will humbly recommend Her Majesty to affirm their decision, and to dismiss this Appeal.

The costs of the Appeal must be paid by the Appellants.