Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Garden Gully United Quartz Mining Company v. *Shmidt, from the Supreme Court of the Colony of Victoria (in Equity); delivered 26th May* 1876.

PRESENT:

SIR J. W. COLVILE.
SIR BARNES PEACOCK.
SIR M. E. SMITH.
SIR R. P. COLLIER.

IT is acknowledged that the main question which was raised in this suit, namely, whether the shares of the Plaintiffs in this Company were duly forfeited, must follow the decision of their Lordships in the former case between the same Company and Mr. Lister, and that it must now be taken that the shares of the Plaintiff in this Company were not duly forfeited; but it has been desired to take their Lordships opinion upon another question which arises in the suit, namely, whether, although the shares were not duly forfeited, the Plaintiff has not, by his laches and conduct in the matter, abandoned his right to the shares, or, at the least, waived and abandoned any right to equitable remedies in respect of them.

Now it is to be observed, in the first place, that his Bill is brought, not to establish any mere equitable or executory right, but to enforce claims arising from his ownership of the property in the shares which he holds in this Company. The Bill prays that the dividends to which he is entitled may be paid to him: and,

as preliminary relief, that the forfeiture of the shares may be set aside.

The Answer, whilst setting up the validity of the forfeiture, ends with this paragraph, which is the only allegation contained in it raising the point now in question: "That even if such "forfeiture was not declared (though these "Defendants submit that the same was so "declared) with strict formality, that the Plain- "tiff has, by his laches and delay, deprived "himself of any remedy in this Court." That is an extremely general allegation. There is no averment that the shares had been abandoned, but a statement that, by the Plaintiff's laches and delay, he had deprived himself of any remedy in a Court of Equity. Laches and delay may undoubtedly constitute, either with other circumstances or by themselves, evidence of abandonment of shares, especially in mining concerns, and in that way the allegation, as it was contended by Mr. Fry, may be sufficient to raise the question which he has argued at their Lordships' bar. But whether, in strictness, the allegation would support the contention now made, it is not necessary for their Lordships to discuss; since they are unwilling to decide the case upon a question of pleading, when they have heard a full argument on the evidence, and have come to a clear opinion upon it.

They do not doubt that persons having shares in mining companies may, by laches and long delay, afford such evidence of an intention to abandon their rights as to preclude themselves from afterwards asserting them. Laches, either alone or coupled with other circumstances, may indicate an intention on the part of the holders of shares to abandon them altogether to the Company; and if the evidence is so unequivocal as to lead to that presumption, then there would be an abandonment to the Company as complete

as if it had been made by express relinquishment. Or a man by his laches and conduct may wilfully and of purpose lead the directors or managers of the company to believe that he intended to abandon his shares, although he had not that intention; and if that belief is acted upon, and the company, upon the faith that he had abandoned his shares, had gone to expense, or otherwise changed its position, he would be afterwards precluded or estopped from setting up the position which he had apparently disclaimed and disowned.

With regard to the latter proposition, there is really no evidence in this case that the company had incurred expense, or in any way altered its position, by reason of the Plaintiff's laches or conduct, at all events none that it did so subsequently to the notice of May 1869, which recognized him as the owner of the shares. The mine had been then let for five years; and remained so let up to the time of the commencement of this suit. The Defendants, therefore, in order to establish their present defence, must satisfy their Lordships that there has been a virtual abandonment of the Plaintiff's shares to them. Indeed it was not denied that upon the authority of Clarke and another v. Hart, 6 H.L. 633, it was incumbent upon them to go to this extent.

The evidence in support of this case is very slight. The dates, so far as they are material, are these. The last call of one shilling, which has not been paid, was made on the 30th April, and was payable on the 16th May 1867. That is admitted to be a heavy call, and the Plaintiff and other shareholders were no doubt dissatisfied with it. Shortly after, the Plaintiff appears to have seen Mr. Ashley, one of the directors; he then expressed his dislike to the call, and said that he for one would not pay it; the mine, he said, was not worth anything, and therefore he

should not pay the call. This statement was not made to the Board of Directors, nor even to the managing director, but appears to have occurred in the course of a casual conversation with Mr. Ashley in his shop. At most, it only indicates the state of his mind at that time, and that he then thought that it would not be worth while to pay the calls. It cannot be relied upon as a serious declaration that he meant under no circumstances to pay these calls and to abandon his shares. He appears shortly after to have left the place where he was then living, Sandhurst, and to have remained absent until May 1869—a period of about two years. Whilst he was absent, on the 23rd August 1867, a resolution was passed to forfeit his and other shares. That resolution was incomplete for want of proper advertisement, and was clearly irregular. After that resolution there was for some time a cessation of meetings. The directors, being made aware that the call in August 1867 was an irregular one, issued a notice to those who were in default giving them an opportunity to pay their calls, and amongst the defaulting shareholders included in that notice was the Plaintiff. The notice is in these terms:—"Notice is hereby given that "unless the calls due to the above Company on "the shares standing in the names of the under-"mentioned parties be paid within 12 days "from date, the said shares will be declared "forfeited in accordance with the rules of the "Company." Then Hermann Shmidt is mentioned as one of the defaulters, and as the owner of 427 shares, the numbers of which are given.

There is no evidence that the conversation, for it is nothing more, with Mr. Ashley, was ever reported to the directors. In this notice they treat the Plaintiff as an existing shareholder, and give him notice prospectively of an intention to forfeit the shares unless he pays

up the call. That notice was on the 26th May 1869; and on the 18th June 1869 a resolution was come to, to forfeit his shares amongst others. Nothing was done by him until the 20th June 1870, and undoubtedly there was that delay of about a year; but it would be going further than any case has hitherto gone to hold that the lapse of so short a period of time is sufficient to warrant an inference that the party interested in these shares had abandoned them, or meant to intimate to the company that he had done so. Mr. Fry felt that this delay alone might be insufficient, but he said that it might be interpreted by the previous declarations. He may be right in that view, viz., that previous declarations may be looked at to see what construction should be put upon the delay itself; but to enable the Court to act with anything like confidence upon the declarations of the party, it would be necessary that those declarations should be made in a much more precise way, and upon a more fitting occasion than was the case with these statements. As has already been observed, they were made in a casual conversation. There are probably few shareholders in a company such as this who at some period of its existence have not made, when heavy calls were proposed, similar statements. It would be dangerous to act upon such loose expressions reported after the lapse of many years by persons who may not even have fully apprehended the import of what was said. If any declarations had been made officially to the directors, a very different effect might have been given to them.

Then on the 20th June 1870 this letter is written:—"I have for some time past been "unlucky and absent from Sandhurst, and am "surprised that my shares have been forfeited, "as at the time the shilling call was made I

" had just paid my last money for the previous " call of sixpence, and was informed that the " shilling call was only made to prevent share- " holders selling their shares to persons unable " to pay calls. I have now to request " permission to pay the calls due, and that the " forfeiture of my shares may be written off " the share register." Now, so far from this letter being evidence of laches or delay, it shows the Plaintiff's strong desire to continue a member of the company; and that desire appears to have existed not only at the time of writing this letter, but for some time afterwards, for the Plaintiff made strenuous efforts to get rid of the forfeiture without litigation, by offering to pay the calls, and by strong appeals to the directors to restore him to the register. Within a very short period after his own letter, viz., on the 3rd July 1871, his attorney writes to the directors, stating "that the forfeiture " under the circumstances has operated harshly " upon them,"—that is, the Plaintiff and the other shareholders for whom he was concerned,— " inasmuch as since the forfeiture no money " has been expended by the company in " working expenses;" and he adds "that they " have for some months past been willing to " pay up the calls due by them, and that the " shares have not been sold as forfeited." These letters certainly cannot be treated as evidence of laches or delay. It was contended by Mr. Fry that they contained an admission or acknowledgment of the existence of the forfeiture and of its validity. But to make an acknowledgment or admission of the forfeiture binding on the Plaintiff, it must be shown to have been made after notice and knowledge of the facts. A mistake in the law would not get rid of the effect of an acknowledgment, if in other respects it was binding; but an admission made without

knowing the facts, and in the belief that the directors had acted according to their powers, when by reason of facts of which he was ignorant they had not, would not warrant the Court, in dealing with the rights of the parties, to act upon it.

The subsequent delay, following these letters in which the Plaintiff tries to get rid of the forfeiture and offers to pay up the calls, cannot be held to afford sufficient evidence of an acquiescence in the forfeiture, or of abandonment of the shares.

It is said that the Plaintiff did not attempt to regain his position in the company until there was a prospect of dividends being paid, and that he chose to lie by, and wait for the prosperous time which at last came; but it is to be observed that the letter of the 20th June 1870 was written a year before any dividend was declared; and that, although he may then have thought there was a prospect of the mine improving, he did not wait an undue time before making that application.

On the whole, their Lordships think that the Defendants have not established the case which they faintly allege in their answer, and they will therefore humbly advise Her Majesty to dismiss this Appeal, and to affirm the judgment of the Court below, with costs.