Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mott and others v. *Lockhart and others, from the Supreme Court of Nova Scotia, delivered 30th June* 1883.

Present:

LORD WATSON.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR ARTHUR HOBHOUSE.

The proceedings which gave rise to this appeal were commenced in the Court of the Commissioner of Public Works and Mines, who gave judgment on the 19th of May 1881 in favour of the Appellants. On the 1st of May 1882 the Supreme Court of Nova Scotia reversed that judgment, and their decision is now under appeal.

The Appellants and Respondents are rival applicants for leases of blocks of land which to a certain extent overlap one another, and the point to be decided is, which of the claims has priority over the other. There have been some changes of interest since the dispute began; but they are not material to the present question, and in stating the facts it will suffice to speak of the Appellants and Respondents as though there had been no change of interest or person.

On the 2nd of September 1880 the Appellants applied to the Commissioner for prospecting licenses over six blocks of land in a district not proclaimed as a gold district. No prior application

Q 9389. 100.—6/83.

[32]

had been recorded for any part of these blocks. The applications of the Appellants were received and recorded, and the statutory payments were made by them. No licenses were issued, but on the 6th of September the Appellants, acting as though they were licensed, began to work the ground. On the 18th or 19th of October they discovered the lead or lode of gold. In the month of November they applied to the Commissioner for leases of three of the blocks. Again their applications were received and recorded, and their money taken, but no lease was actually issued. In the same month they applied for a renewal of license over another of the blocks, and on the 1st of March 1881 for a lease of the same block; and the proceedings on these applications were the same as the proceedings on the former applications. Two of the six selected blocks have been abandoned. But as regards the other four, the Appellants worked them without interruption or question until about the end of March 1881, and got a substantial quantity of gold from them.

It appears from the evidence of Mr. Carman, Chief Clerk in the Mines Office, that the non-issue of licenses was a common thing. As to the non-issue of leases, that, Mr. Carman says, was due to the pressure of business in the office.

On the 9th September 1880 the Respondents went to make application for a lease of a block of land covering portions of the Appellants' block. What passed on that occasion may be stated from the cross-examination of Mr. Lockhart :—

"Next morning I appeared at the Mines Office. Watson Eaton and his son William went with me. I went to put in an application for the ground I had staked. If the ground we had staked was not taken, we were going to apply for a prospecting license. If it was taken, we were going to put in our application under the 33rd section. I did not then have a copy of the Mines Act with me, but for some years back have known of the 33rd section. We were going to apply for a lease under

the 33rd section. Mr. Eaton was writing out the application. No application was at that time written fully out. I asked Carman, when I went in office, if any claims were taken at Salmon River. He said there was. I asked if Archibald had taken them. He said, "No." His name was not in the office in connection with them. I asked who had taken claims there. He said Mr. Mott had taken 600 acres. He showed us the application, and told us where it was described. I told him we were going to put in application for part of that ground we had staked under Section 33, and I told him the reason why. He said he would not be justified in taking the application for that ground under that section, and would not do it. He did not understand that section himself, and did not think anybody else did. He was decided not to take our application unless we would guarantee that it would not go on that ground of Mr. Mott's. I judged from the quantity of ground he had taken and the locality that Mott's application covered my ground, and I would not guarantee that mine would not cover it. The paper was not written out and completed because Carman would not take it. That was the only reason."

The Respondents did nothing further until the 31st of March 1881, when their solicitor Mr. Eaton wrote to the Commissioner as follows :—

"Hon. Samuel Creelman, Commissioner of Public Works and Mines.

"Sir, Halifax, 31st March 1881.

"The applications hereto annexed are made under Section 33 of the Mines Act, and are a repetition of applications made by the same applicants on the ninth day of September last and then rejected. I am instructed that they then distinctly claimed the benefit of the provisions of Sec. 33, and that they were the original discoverers of gold-bearing quartz on the areas embraced in the annexed applications; that they were the first occupants thereof, and that their applications were made within the time allowed by said section. Their applications were rejected, as they instruct me, on the ground that said areas had already been applied for; and so positive was the refusal of their applications, and so confident and emphatic was the assurance of the Chief Clerk, to whom said applications were handed, that they had no claim or right to apply for the ground in question under the Mining Act, that the said applicants, until quite recently, were led to believe that they had lost all claim to said areas. Hence their delay in repeating the applications. Under the facts however which they have given me, and which they are prepared to substantiate, showing, besides those already mentioned, that they had been fraudulently overreached by the applicant whose applications were received, I have advised them that their applications, in my opinion, ought to supersede those of all others in respect of said areas.

"Without further statement of facts at this time, I beg, on behalf of these applicants, that you will grant them an opportunity to testify and be heard in support of their claims, and that in the meantime you will withhold any lease or license of said areas from other parties now claiming.

"I have the honour to be, Sir,
"Your obedient servant,
"(Signed) B. H. EATON,
"Solicitor of Applicants."

The applications sent with this letter were two in number, each dated the 28th of March. Mr. Carman refused to receive them, writing on each that it was "refused, as it was stated by "Mr. Eaton that it covered ground under appli- "cation by Charles F. Mott." The Commissioner then tried the case, and decided that the lease of the areas in dispute should issue to the Appellants.

The Respondents have urged at their Lordships' bar many grounds why the Commissioner should issue the lease to them. They say they were the earlier discoverers; but if they were, the statute does not annex any right to earlier discovery. They say that the Appellants stole a march upon them, and violated some understanding with them; but if the fact were so, the Commissioner could pay no attention to it. He is the creature of the statute, and has no jurisdiction given him to enforce equities entirely outside of the statutory proceedings. They say that the Appellants could not receive a license because they never gave a bond as required by the 39th section. But though it may be a breach of duty on the Commissioner's part to grant a license without the bond, it does not follow that such a license is void. And the Appellants are not bound to show that they were licensees. If they were applicants, that is sufficient to defeat a subsequent application by the Respondents.

The Supreme Court decided in favour of the Respondents on two main grounds. First,

they held that the Appellants obtained no title because the district was unproclaimed, and the Appellants were not explorers for minerals, and did not occupy under Section 33, or acquire under the clauses relating to unproclaimed districts. Secondly, they held that the Respondents did acquire title because they occupied and staked off areas, and applied on the 9th of September in good time under Section 33.

Their Lordships cannot quite follow the reasoning on which it is held that the Appellants obtained no title. As they read the statute, it contemplates the grant of both licenses and leases in all districts whether proclaimed or unproclaimed. The Appellants were not tied down to apply for a lease under Section 33. They might apply, and did apply, for licenses under Section 35 and the subsequent sections. Nor is occupation and staking off a condition precedent to all leases in an unproclaimed district. Section 42 clearly confers upon licensees the right to have leases. The provision in Section 33 as to parties occupying and staking off is evidently intended to lay down a rule of priority between persons resting their rival claims on the ground that they had occupied and staked off.

As regards the title of the Respondents there are fatal objections. The Supreme Court have decided that they ought to succeed on their application of the 9th of September 1880. But in the first place no application at all was made on that day. Applications must be in writing, and must be made to the Commissioner or Deputy Commissioner (Sections 14 and 15); whereas all that the Respondents did was to mention their wishes to the clerk in the office, and to take his assurance that they were too late. If however there was an application, there was also a rejection of it, and then the Respondents should have appealed. An appeal must, by Section 84, be presented within 20 days. In effect

the Supreme Court have entertained an appeal six months or more after the decision complained of.

The only effective application by the Respondents was that of March 1881. At that time the Appellants were occupants of the disputed ground. Either they were lessees in substance and right, though not in form, which their Lordships think to be the sounder view; or their applications for leases were still pending. In either case the applications of the Appellants could not, by the terms of Section 14, be received.

The result is that their Lordships will humbly advise Her Majesty to reverse the decision of the Supreme Court, and to dismiss with costs the appeal from the Commissioner. The Respondents must pay the costs of this appeal.