Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Geoffrey Teignmouth Clarkson and another v. George Wishart and another, from the High Court of Justice for Ontario (Privy Council Appeal No. 47 *of* 1913)*; delivered the 7th August* 1913.

PRESENT AT THE HEARING:

LORD ATKINSON.

LORD SHAW.

LORD MOULTON.

[DELIVERED BY LORD SHAW.]

This is an Appeal by special leave from the Judgment of the Divisional Court of the High Court of Justice of Ontario dated the 30th August 1912, which affirmed the Judgment of the Mining Commissioner for that Province dated the 16th April 1912. That officer held that the interest of the Respondent Wishart in a mining claim was not exigible under a writ of *fieri facias* against his lands and goods.

The facts are very simple. Wishart was the holder of an undivided interest in a certain mining claim. He had complied with the provisions applicable to prospecting, staking out his claim, and applying to have it recorded; and he had in point of fact received a certificate of record. All this was duly done under sections 34, 35, 53, 59, and 64 of the Mining Act of Ontario, 1908. Wishart having thus his interest in the mining claim—an interest the nature of which will be afterwards analysed—the Farmers' Bank of Canada, who were

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Wishart's creditors for $53,552, on the 29th September 1911 obtained a judgment against him for that sum. On the same day there was issued to the sheriff on that judgment a writ of *fieri facias* against his goods, chattels, lands, and tenements. The form is not objected to; it correctly followed the provisions of the Execution Act. Although Wishart at the date of that execution was, as stated, the duly recorded holder of a mining claim under the Act, no patent had been granted to him in respect thereof.

About three weeks thereafter Wishart, plainly seeking to avoid as against his mining claim the effect of the execution as laid on, purported to sell it to the Respondent Myers. At the end of the same month, namely, on the 31st October, the Appellant Clarkson, who is the liquidator of the execution creditor, the Farmers' Bank proceeded to sell the execution debtor Wishart's interest in the mining claim. The sale took place, but the Recorder refused to record. His principal ground for doing so was that there had not been, in his view, a compliance with the Statute, by reason of the absence of any duly executed transfer from Wishart himself. So far it is manifest that Wishart, by failing to execute a transfer to his creditor and by selling to a third party and ignoring the execution already laid on, had been enabled to defeat the execution creditor's rights and to part with something of value which he found it to his interest to dispose of and a third party found it to his interest to acquire.

This is the true nature of the case before the Board. The subsequent facts, so far as the question now at issue is concerned, are unimportant.

The purchaser at the execution sale was Mr. J. M. Forgie. On making application to the Recorder, that official, as mentioned, refused to record the sale deed from the sheriff. Mr. Forgie appealed from that decision to the Mining Commissioner. And he lodged a Notice of Claim on the 2nd February 1912, in accordance with the Mining Act. He claimed to be recorded, and further asked that the transfer by the execution debtor Wishart to the Respondent Myers of the 17th October 1911 should be set aside. The ground stated was that the transfer was fraudulently made with the intent to defeat the Appellant and the other creditors of Wishart. In the course of the litigation it was agreed, in the language of the Mining Commissioner, that "the question whether or not " Wishart's interest in the mining claim was " exigible and, if so, whether it should be sold " as land or as chattels, should first be disposed " of, Mr. Bayne admitting that if either of " these points were decided against him, his " client's claims must be dismissed."

The case before the Board was accordingly taken upon the footing that the only question to be determined was whether the interest in a mining claim duly recorded, but not yet the subject of a patent, was exigible for a judgment debt due by the claimant. Or in another form —and one of great general importance in the development of industrial enterprise—the question is whether the interest of a mining claimant at this stage of his operations is unavailing as a source of credit for a secured advance. There may be questions as to whether the actual form of sale should have complied with the provisions as referable to land or referable to chattels. But whatever the form of sale adopted, the question is whether the Respondents can

have any interest which they could set up in conflict with the seizure in execution made before any sale by the judgment debtor.

The principles of law applicable to a case of this character were fully laid down in *McPherson* v. *The Temiskaming Lumber Company, Limited* (1913, A.C. 145). The question there dealt with had reference to the nature of the interest in timber lands of a licensee, and the circumstances of the case—an attempt to ignore and to defeat the execution creditor's rights—were closely analogous to those of the present. It was held that "the nature " of the title of a licensee is a title (it may " be limited in character) to the land itself " and, in their Lordships' opinion, accordingly " it falls within the scope of the Execution " Act." The case followed *The Glenwood Lumber Company* v. *Phillips* (1904, A.C. 405); and the Judgment of Lord Davey therein as to the effect of the right of exclusive occupation, subject to reservations and restrictions, seems also applicable in terms to the case now before the Board.

The Mining Commissioner affirmed the refusal to record the sheriff's deed, and this Judgment was, on the 30th August 1912, affirmed in the Divisional Court of Ontario. The decision of the Temiskaming case by this Board was later in date, and the views taken by the learned Judges in the Courts below do not coincide with those which were here laid down.

But it may be mentioned that in the Divisional Court it was held that the holder of an unpatented mining claim had no interest higher than those of a tenant-at-will. And there seems no reason to doubt that the provisions of section 68 of the Mining Act demanded and received careful consideration from the Court below. That

section provides as follows:—"The staking out "or the filing of any application for, or the "recording of a mining claim, or all or any "of such acts, shall not confer upon a licensee "any right, title, interest or claim in or to "the mining claim other than the right to "proceed, as in this Act provided, to obtain "a certificate of record and a patent from the "Crown; and prior to the issue of a certificate "of record the licensee shall be merely a licensee "of the Crown, and after the issue of the certi- "ficate and until he obtains a patent he shall "be a tenant at will of the Crown in respect "of the mining claim."

Their Lordships are agreed in thinking that the section does not constitute an exhaustive enumeration of the rights of the holder of an unpatented mining claim, and they deem it necessary to give a reference to the other sections of the Statute to show how conclusively this is so. They are further of opinion that the reference to tenancy at will is a reference dealing solely with the relations of the claimant to the Crown before the Crown has parted by patent with the Royal rights. But such denomination, in their view, cannot be allowed to destroy the substance and reality of the rights in the claimant as against other subjects of the Crown if such rights be in truth conferred by the Act.

That they are so conferred is clear from the following provisions:—Under section 35 a licensee before patent may work the staked-out lands and transfer his interest therein to another licensee. Under section 59 a licensee who has so staked out his claim has the right to make application for a free grant and to have his claim defined and recorded. Under section 64 provisions are made for the granting of a

certificate of record, and under section 65 it is provided that after a certificate "the mining "claim shall not, in the absence of mistake or "fraud, be liable to impeachment or forfeiture "except as expressly provided by this Act." It is somewhat difficult to imagine anything more substantial.

Then after section 68, which has been already referred to, stipulating that before patent the claimant should be a tenant-at-will of the Crown, there come the following sections:—Section 72 provides: "A transfer of an unpatented mining "claim, or of any interest therein, may be in "Form 11, and shall be signed by the trans- "feror or by his agent authorised by instrument "in writing." Section 73 states the pre-requisites for recording instruments. Section 74 provides that after a claim has been recorded "every instrument other than a will affecting "the claim or any interest therein shall be "void as against a subsequent purchaser," &c. Section 77 makes careful provisions for the recording of Orders and Judgments, and that the filing of a certificate shall be actual notice to all persons of the proceedings. The whole of the latter provisions just mentioned seem radically inconsistent with a mere tenancy-at-will.

But when it is added that, by section 88, where the claimant dies even before the recording of the claim, or where he dies before the issue of a patent, no other person shall without leave of the Commissioner be entitled to acquire any right, privilege, or interest in respect thereof within twelve months after his death, and when there then follow these words, "and the Commissioner may within twelve "months make such order as may seem just "for vesting the claim in the representatives "of such holder," nothing could, in their

Lordships' opinion, more conclusively negative the limitation to a tenancy-at-will.

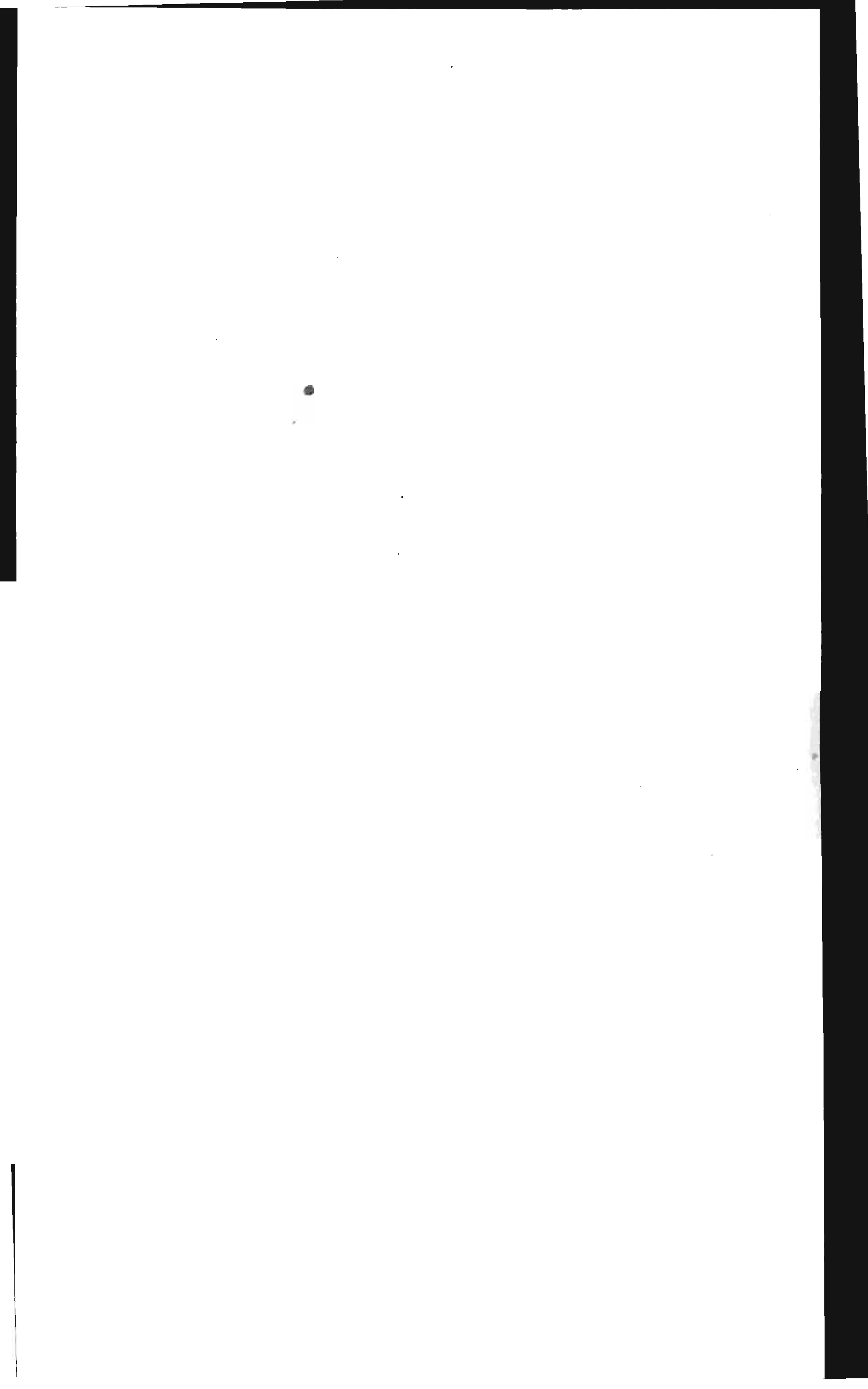
Their Lordships have thought it right to enumerate these sections so as to show that, in their view, the reference in section 68 to a tenancy-at-will from the Crown must be taken in conjunction with the whole of the other provisions of the Statute, and that on a full view of these no substantial doubt can remain that the interest of a mining claimant in an unpatented claim falls, in the language of the Execution Act of Ontario, within the category of "lands," subject, as in the Glenwood case and the Temiskaming case, to restrictions, to possible forfeitures, but also capable of transfer and of becoming vested in successors after death.

As to the point that no transfer in writing executed by the claimant himself has been made, and that therefore no record could take place, their Lordships would be slow to hold—if the true nature of the execution debtor's rights be what has been above described—that the lack or refusal of his signature should render ineffective against his property the course of law in execution for debt. Reference, in the opinion of the Board, may be usefully made to the powers conferred upon the Commissioner by section 123, providing for claims, rights and disputes being settled by him. The section goes on to say that "in the exercise of the power" he "may make such "order and give such direction as he may "deem necessary for making effectual and "enforcing compliance with his decision." The section particularly refers to questions and disputes in respect to unpatented mining claims, including this, namely, whether such an unpatented claim "has before patent been

"transferred to or become vested in any
"other person."

Even apart from the Statute, the Ontario officials and Courts might well have been considered vested with a power to restore against such a defeat of the law as would have been occasioned by the want, or, say, by the refusal, of the signature of an execution debtor. But under section 123 of the Mining Act such a power appears to be conferred in sufficiently wide terms. The writ of execution, in short, should have been treated as the equivalent of a transfer and recorded as such.

Their Lordships will humbly advise His Majesty that the Judgments of the Courts below should be reversed and that the interest of the Respondent George Wishart in the unpatented mining claim was seizable in execution by his judgment creditor, and that, the defence of the Respondents to the claim of James M. Forgie being unfounded, Mr. Forgie was entitled to be recorded as claimed by him. The Respondents will pay the costs of the proceedings throughout, including the costs of the Petition to dismiss the Appeal as incompetent, which Petition His Majesty will be humbly advised should be dismissed.



In the Privy Council.

GEOFFREY TEIGNMOUTH CLARKSON AND ANOTHER

v.

GEORGE WISHART AND ANOTHER.

DELIVERED BY LORD SHAW.

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