[HIGH COURT OF AUSTRALIA.]

GRUNDT AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS,

AND

THE GREAT BOULDER PROPRIETARY GOLD MINES LIMITED . . . } RESPONDENT.
DEFENDANT,

H. C. OF A. 1937.

PERTH, *Sept.* 15-17, 20; *Oct.* 8.

Latham C.J., Dixon, and McTiernan JJ.

Mining—Tribute agreement—Trespass—Conversion—Description of land "by metes and bounds"—Construction of agreement—Power of cancellation—Estoppel—Mining Act 1904-1932 (*W.A.*) (*No.* 15 *of* 1904—*No.* 45 *of* 1932), *secs.* 142, 143, 145, 150.

In a tribute agreement the portion of the mine to be worked by the tributers was defined as lying between two parallel horizontal planes identified by reference to features of the site and between two parallel vertical planes identified by measurements from a reference point on the site. But the third dimension was given only as twenty feet on either side of a lode described as the east vein of a named lode.

Held that this description did not comply with sec. 143 of the *Mining Act* 1904-1932 (W.A.), which provides that every tribute agreement, unless it extends to the mine as a whole, shall by metes and bounds describe the land as a specified and defined block of ground, but that, as the tribute had been registered under the Act, it was not for this reason invalid against the tributers.

A tribute agreement provided that the ore won by the tributers should be delivered to the mine owner (a company) for treatment and that the latter should supply the compressed air for drilling and other things. The mine owner was to account to the tributers for half the gross proceeds of the gold, less specified

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deductions for supplies and the like. The tributers obtained ore from part of the mine found to be outside the true limits of the tribute. After a time the mine owner objected that the workings were outside the tribute but continued to supply air and to receive the ore, treat it, account for it, and pay over the share of the proceeds of the gold to which the tributers would have been entitled under the tribute agreement if the ore had been won within the boundaries of the tribute.

Held :—

(1) The mine-owning company was not estopped from insisting upon the true boundaries of the tribute.

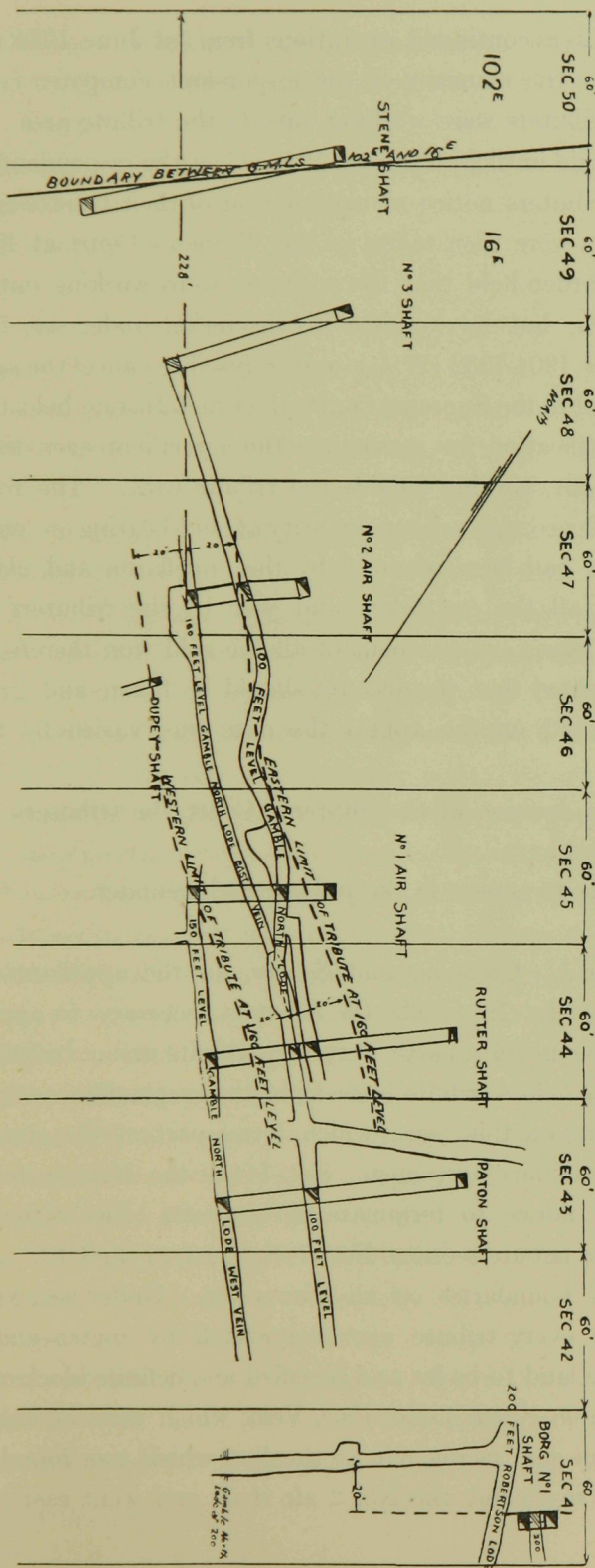
(2) But the company was not entitled to recover the amounts which it had paid over to the tributers after discovering that they were mining outside those boundaries, or to an account of their share of the proceeds of the ore so mined, because (*a*) the company had made the payments voluntarily with knowledge of the material facts, and (*b*) delivery of the ore by the tributers to the company itself did not constitute conversion of the ore on their part.

(3) The company was, however, entitled to recover the amounts which it had paid over before discovering that the ore was won outside the boundaries of the tribute and to an account of the tributers' half share of the proceeds of the ore so won.

Decision of the Supreme Court of Western Australia (*Northmore* J.) varied.

APPEAL from the Supreme Court of Western Australia.

The appellants entered into a tribute agreement with the respondent company to mine certain areas in the company's mine at Kalgoorlie. The parcels in the tribute agreement were expressed as follows :— " All that piece of ground on the Gamble North Lode, East Vein, in sections 41, 42, 43, 44, 45, 46, 47, 48, 49 and 50 from the 150 feet level to the 400 feet level as delineated on the plan herewith and further described as follows :—All that piece of ground in sections 41, 42, 43, 44, 45, 46, 47, 48, 49 and 50 extending from a point twenty feet south of the centre of the west cross-cut from Robertson's Lode on the 200 feet level to a point 228 feet north from the centre of the No. 2 air shaft at the 160 feet level to the northern limit of section 50 and for a height of ten feet above the floor of the 160 feet level to the 150 feet level, and for a depth of 240 feet below the 160 feet level to the 400 feet level. The tributers to have the right to mine twenty feet into the east wall of the lode from the centre of the lode and twenty feet into the west wall of the lode from the centre of the lode." The plan referred to in the agreement was as follows :—


SEC 50
SEC 49
SEC 48
SEC 47
SEC 46
SEC 45
SEC 44
SEC 43
SEC 42
SEC 41
102E
16E
BOUNDARY BETWEEN G.M.L.'S
STENE AND BORG SHAFT
N°3 SHAFT
N°2 AIR SHAFT
N°1 AIR SHAFT
RUTTER SHAFT
PATON SHAFT
BORG N°1 SHAFT
100 FEET LEVEL CAMBELL NORTH
EASTERN LIMIT OF TRIBUTE AT 100 FEET LEVEL
WESTERN LIMIT OF TRIBUTE AT 150 FEET LEVEL
NORTH LODE
LODE WEST VEIN
ROBERTSON LODE
200

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The tributers continued operations from 1st June 1934 until May 1935, when the manager of the respondent company complained that the tributers were working outside the tribute area. Nothing more was said until 20th August 1936, when the respondent company gave the tributers notice of cancellation of their tribute agreement. Proceedings were then taken in the Warden's Court at Kalgoorlie, and the Warden held that the tributers were working outside their tribute area, but he exercised his discretion under sec. 149 of the *Mining Act* 1904-1932 (W.A.) and refused to cancel the agreement. Upon appeal to the Supreme Court, the Chief Justice held that there was no justification for cancelling the agreement even though the tributers were working outside the tribute area. The respondent company alleged that a large quantity of gold-bearing ore outside the tribute area had been removed by the appellants and claimed an account of all the ore taken and won by the tributers from the company's leases and payment of all the gold won therefrom. The Warden ordered that the account should be taken and granted an injunction, but on the appeal the date was varied by the Chief Justice.

From the decision of the Supreme Court the tributers appealed to the High Court.

Further facts appear in the judgments hereunder.

Keenan K.C., *Crawcour* and *Seaton*, for the appellants. Under the *Mining Act* 1904-1932 (W.A.) it is necessary to appoint one tributer as agent for a party working a tribute area. In 1933 Grundt and a party held a tribute lease from the respondent company and were working on this lease, which forms part of the ground dealt with in this tribute agreement. Sec. 144 of the *Mining Act* requires six-months' notice to terminate agreements. The tributers had control over tribute sections Nos. 7, 8, 9, 10, 11, and 12. A tribute section has boundaries on all four sides. Under sec. 143 of the *Mining Act* every tribute agreement shall by metes and bounds describe the land to be let as a specified and definite block of ground. If the Gamble North Lode, East Vein, which was the only ground the tributers got, swung out at the line which was found between the Rutter shaft and the No. 2 air shaft and went east and west,

then the tributers would not only lose the right, on that construction, to follow the lode, they would actually lose the right to mine anything. Irrespective of where the lode went, the tributers were confined to the lode; if the lode went outside by turning, the contention of the respondents is that the tributers would lose the right to mine the lode altogether. There is a fixed boundary north-east and south-west; on the north-west side it is fixed by the boundary of section 50, and the south-east is fixed by a line shown on the plan—those points are ascertained. That is, between those points the parcels consist of the vein with twenty feet on each side of the vein, whatever turn the vein might take. The words "east" and "west" were only used in a rough sense, they are only approximate (See *The Moorcock* (1)). There is no doubt that the lode, where it went out to the west, called the western swing, is one and the same body of ore as the body of ore the parties knew about between the Rutter shaft and the face where the swing took place. This matter is of great importance, taking into consideration what the parties to the agreement intended (*J. C. Williamson Ltd.* v. *Metro-Goldwyn-Mayer Theatres Ltd.* (2)). The three questions to be decided are: (1) Were the appellants guilty of trespass? (2) If so, is the respondent estopped from recovering damages? (3) Had the Chief Justice jurisdiction to vary the Warden's order as to taking accounts from 1st June 1935? [Counsel referred to secs. 257 (6) and 268 of the *Mining Act*, and regs. 255 and 260 and Forms 59 and 62 of the regulations under the Act.] On the proper construction of the agreement the appellants were given the right to work a known body of ore between the Rutter shaft and No. 2 air shaft on the 160 feet level—it was the only ore body known at that level, and the appellants were given the right to mine and work that ore and follow it wherever it went in the sections from 100 feet to 400 feet. The ore body in the westerly swing is the same body where it turns south between the Rutter shaft and No. 2 air shaft. The evidence is that the work began at 225 feet level and went up to the 170 feet level, where it struck the ore body, and the evidence is uncontradicted that the western swing is the same ore body as had been worked where the swing took place. The characteristics of the two ore bodies are the same; they

(1) (1889) 14 P.D. 64, at p. 68. (2) (1937) 56 C.L.R. 567, at p. 579.

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have the same width, the same gold occurrence, the shearing is the same, the strength of shearing is the same, also the dip, and the character of the ore. If the lode did not swing to the west, but at a point forked, then the appellants were entitled to follow the better branch. The respondent, to succeed, must show that the ore body is an entirely different lode. There is no evidence that the lode at the 500 feet level is identical with the lode in the higher levels. Supposing the tribute agreement is an infringement of sec. 143 of the Act, what is the position ? At the time of registration the Warden examines the agreement as the Minister's agent and agrees to the sub-letting. That would be a perfect answer to any complaint by the Minister against sub-letting, so that whatever the Warden registers is valid (sec. 141 (2)). If the agreement infringes the Act the grantor could not complain, as these provisions of the Act are for the protection of the tributers.

[DIXON J. referred to *Tie* v. *Landsell* (1).]

The whole of the boundaries are laid down. The east and west dimensions are clear by the sections of the mine. The north and south boundaries are on the surface. [Counsel referred to *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Pty. Co. Ltd.* (2) ; *Cock* v. *Smith* (3) ; *Supreme Court Rules* (W.A.), Order LVIII., rule 6, Order LIX., rule 12 ; *Mining Act*, sec. 286 ; *Thompson* v. *Palmer* (4).]

Downing K.C. and *P. F. O'Dea*, for the respondent. By sec. 148 of the *Mining Act* the Warden is the tribunal appointed to determine a dispute as to ground held under tribute. Although the Warden's judgment is subject to appeal under sec. 278, the Warden saw and heard the witnesses and was in a better position to decide the facts than an appellate tribunal. Having heard the witnesses on both sides, the Warden found that the disputed lode was outside the tribute area, that is, was not part of the Gamble North Lode, East Vein. Unless this court can come to a clear conclusion that the Warden was plainly wrong, this part of the appeal must fail (*Powell* v. *Streatham Manor Nursing Home* (5)).

(1) (1900) 21 A.L.T. 191 ; 6 A.L.R. 38.
(2) (1911) 12 C.L.R. 398.
(3) (1910) 12 C.L.R. 11.
(4) (1933) 49 C.L.R. 507, at p. 546.
(5) (1935) A.C. 243.

Apart from the evidence of the witnesses, the plan attached to the agreement defines the tribute lode as one which extends some distance in a northerly direction past the junction with the lode in dispute; moreover, the existence of the lode in dispute was not known at the time of the signing of the agreement. As to the point of estoppel, the appellants commenced the work on the disputed lode shortly after the commencement of the tribute and worked on it without the knowledge of the responsible officers of the respondent until May 1935, when the respondent's plans were brought up to date. The respondent's manager then interviewed the appellants, and warned them against continuing to work the disputed lode. The appellants, however, claimed to work it as a matter of right under their tribute, and did so until the injunction was granted on the initiation of the proceedings in the Warden's Court. The doctrine of estoppel has, therefore, no application (*Ramsden* v. *Dyson* (1); *Willmott* v. *Barber* (2); *Russell* v. *Watts* (3)). The essential factors which give rise to an estoppel are stated by Lord *Tomlin* in *Greenwood* v. *Martin's Bank* (4). None of these elements is present. In directing the appellants to account for the gold won as from the 1st June 1935, the Warden was in error, and *Northmore* C.J. was right in amending the order to compel the appellants to account for all ore won from the disputed lode. Although the respondent did not give notice of cross-appeal from the Warden's judgment, the portion relating to the account was attacked by the respondent on the appeal to *Northmore* C.J., who had power under sec. 286 (1) of the Act to reverse or vary it. There is no provision in the *Mining Act* for a cross-appeal, and even under the *Supreme Court Rules* notice of cross-appeal is not necessary.

[DIXON J. referred to *R.* v. *Berriman* (5).]

That case was decided under a different Act, and the judgment emphasizes this. The respondent's contention on this point is supported by *Ex parte Clarke*; *Re Jenkinson* (6).

L. D. Seaton, in reply. Although there is provision in sec. 283 of the Act to vary the order, yet it was not used in these proceedings;

(1) (1866) L.R. 1 H.L. 129.
(2) (1880) 15 Ch. D. 96.
(3) (1883) 25 Ch. D. 559.
(4) (1933) A.C. 51, at p. 57.
(5) (1920) V.L.R. 609; 42 A.L.T. 107.
(6) (1862) 1 W. & W. (L.) 209.

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consequently it is not competent for the respondent to apply for a variation of the order now. It had not been put to the Warden; it was left entirely at large. Regarding the question of estoppel.—The company continued to supply power and to take the ore. The company by cutting off the power to work the machines could have prevented all work in the westerly swing, but apart from that they had their remedy under sec. 148 by applying to the Warden, that is, if the proper inference was that they maintained and continued to maintain that the appellants were out of their ground. The respondent could have applied to the court under sec. 148 for an order as to the disputed ground. [He referred to secs. 145A, 145B, 145C (1) (*c*), (*d*) of the *Mining Act*).] The person damaged can elect and is bound thereby. Here the respondent elected to take the proceeds of the appellants' working of the disputed land. The terms "east" and "west" walls are used in a purely conventional sense as opposed to an accurate sense. When construing an ambiguous document the court may refer to outside evidence to ascertain the intentions of the parties at the time. According to the evidence, there is no means of ascertaining distinctive strikes of lodes in this locality. [He referred to *Hobbs* v. *Tinling* (1); *Taylor* v. *The King* (2).]

Cur. adv. vult.

The following judgments were delivered:—

LATHAM C.J. The appellants, on 1st June 1934, entered into a tribute agreement with the respondent company, which held mining leases at Kalgoorlie. They conducted mining operations within the limits of the ground upon which the tribute agreement entitled them to mine, but in May 1935 the manager of the respondent company alleged that the tributers were working outside their area. The tributers continued to work until, on 20th August 1936, the respondent company gave them notice of cancellation of the tribute agreement. They then took proceedings in the Warden's Court at Kalgoorlie, asking for a declaration that they were working within the area granted to them by the tribute agreement and for an injunction restraining the company from preventing them carrying

(1) (1929) 2 K.B. 1, at p. 21. (2) (1918) 25 C.L.R. 573.

on their mining operations. They also alleged that the company was estopped from alleging that they were mining outside the area granted to them. The company defended the proceedings, alleging that the tributers had committed breaches of the tribute agreement and that therefore the company was entitled to cancel the agreement. The Warden found that the tributers were working outside their allotted area, and held that the company was entitled to cancel the agreement, but he exercised in favour of the tributers the discretion conferred upon him by the *Mining Act* 1904, sec. 149, and declined to order the cancellation of the tribute agreement. Upon appeal to the Supreme Court the learned Chief Justice held that, even if the tributers were working outside their ground, this fact provided no legal justification for cancellation of the agreement. There is no appeal from this part of the judgment of the Supreme Court, and accordingly it is unnecessary to consider this aspect of the case.

In its defence the company also alleged that the tributers wrongfully removed quantities of gold-bearing material from portions of the company's gold-mining leases which were not granted to the tributers by the agreement and that they converted the gold to their own use. The company further alleged that the tributers' operations had damaged the company's leases and claimed an account of all ore taken and won by the tributers from the company's leases outside the tribute area, payment of the value of all gold won therefrom, and damages. Upon these issues the company succeeded before the Warden, and the learned Chief Justice, upon appeal by the tributers, upheld the decision of the Warden upon this part of the case but varied the date from which an account was ordered to be taken. An appeal is now brought by the tributers to this court.

By the tribute agreement the company agreed to let to the tributers, who agreed to take, for a term of three years, all the mines, veins, seams or deposits of gold-bearing ground comprised in a portion of certain specified gold-mining leases described in the first schedule to the agreement. The first schedule described the ground demised as all that piece of ground on the Gamble North Lode, East Vein, in sections 41 to 50 (inclusive) from the 150 feet level to the 400 feet level as delineated on a specified plan and further described in the

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schedule. The further description in the schedule referred to the ground as that piece of ground in the sections mentioned extending from a point on the south of the mine to a point on the north of the mine between the levels mentioned. The schedule also contained the following words: "The tributers to have the right to mine twenty feet into the east wall of the lode from the centre of the lode and twenty feet into the west wall of the lode from the centre of the lode."

In argument upon the appeal, the parties agreed that the tributers were entitled under the agreement to mine the Gamble North Lode, East Vein, wherever it went within the mining sections mentioned, to a distance of twenty feet into the east wall and twenty feet into the west wall. The company contended that, if the lode took a turn so that there was no longer an east and west wall but walls which were more accurately described as north and south, the tributers ceased to be entitled to mine on the lode. The tributers, on the other hand, contended that the terms east and west were merely terms of identification, not of description, and that they were entitled to follow the vein wherever it went within the mining sections specified, and to mine for twenty feet on either side of the centre of the vein.

The plan annexed to the tribute agreement showed (*inter alia*) the Gamble North Lode, East Vein and West Vein. The lode was shown as at the 100 feet level, which was above the tribute ground. The east vein and the west vein were also shown at other levels, the former at the 160 feet level and the latter at the 150 feet level. The plan showed in dotted lines what were called on the plan the eastern and western limits of the tribute at the 160 feet level. These lines were drawn twenty feet on each side of the East Vein. The strike of the east vein, that is, the direction in which it ran, was approximately north-west and south-east. The walls of the vein were therefore respectively north-east and south-west, but one limit of the tribute was described on the plan as the "eastern limit," and the other limit was described as the "western limit." Thus, the terms "eastern" and "western" and "east" and "west" were not used in the agreement and the plans in their strict and absolute sense. The east wall was shown by the plan to be a means of describing a particular wall of the north lode, east vein, even though

that wall was not in the strict sense an east wall—similarly as to the west wall. These terms, therefore, are shown to have been adopted by the parties merely for the purpose of identification and not for the purpose of providing an accurate description of the walls of the vein in question. I am therefore of opinion that, as a matter of construction, the tribute agreement provides that the tributers may follow the east vein wherever it can be found within the limits of the mining sections mentioned.

The parties to the appeal concurred in regarding the tribute agreement as valid. It was not to the interest of either of them to contend that it was invalid. But a question arises as to the validity of the agreement which the court cannot ignore. Sec. 143 of the *Mining Act* 1904 is in the following terms :—" Every tribute agreement, unless it extends to the mine as a whole, shall by metes and bounds describe the land to be let as a specified and defined block of ground, and shall state the minimum number of men to be kept employed by the tributer, and the period for which such agreement shall operate, and shall set out the terms and conditions thereof." The section requires that the tribute agreement in such a case as the present, where it does not extend to a mine as a whole, shall describe the land by metes and bounds as a specified and defined block of ground. Where the land which can be worked by tributers is described only as the ground on either side of a lode the position of which at the relevant levels is not defined by reference to measurements from known points, it cannot be said that the land is described by metes and bounds or that it is a specified and defined block of ground. Where the description of the land is of the character mentioned, it would not be possible at the time when the tribute was let for a surveyor to specify the boundaries of the tribute ground. In the present case, for example, the Gamble North Lode, East Vein, had been practically lost at the 160 feet level and nobody knew where it might be found again. If it should happen that it was discovered in a particular part of the mining sections, then that part would be ground which could be mined by the tributers. If it were not so discovered, then that ground could not be mined by the tributers. Before proof that the lode existed at a particular place, it would be impossible to determine whether or not that

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place was within or without the tribute ground. In my opinion it is impossible to say, therefore, that the ground was specified and defined or described by metes and bounds in the tribute agreement. Sec. 143 contemplates such a description of the tribute ground as will make it possible at the time when the tribute agreement is made to draw lines in three dimensions so as to include within them the whole of the ground within which mining is permitted under the agreement. In my opinion it is the object of this section to prevent the making of tribute agreements in the form which the parties have adopted in the present case.

The question that now arises is whether non-compliance with sec. 143 makes the tribute agreement in the present case invalid. The group of sections of which sec. 143 is one contains a number of provisions with respect to the character and contents of tribute agreements. These sections require, for example, that every tribute agreement shall be in writing signed in duplicate by or on behalf of the lessee and by every other person at the time interested in the tribute. The tribute agreement must be lodged at the office of the Warden for approval and, subject thereto, for registration within twenty-one days after its execution (sec. 142 (1)). Provisions are made as to the term of a tribute agreement (sec. 144). Sec. 146 contains provisions as to the contents of the agreement. Sec. 145 provides that the Warden may refuse to register a tribute agreement if he considers that any of the terms and conditions of the agreement are inequitable. This section also provides that the Warden " shall before registering the same, satisfy himself that it complies with the provisions of this Act and the regulations." Sec. 150 (4) provides that " save and subject as hereinbefore provided, registered tribute agreements shall bind the land comprised therein, and shall in all respects be operative and of full force and effect against the lessee for the time being of such land."

In my opinion the provisions of secs. 145 and 150 (4) show that non-compliance with sec. 143 does not invalidate a tribute agreement which has been registered by the Warden and which remains so registered. The Act provides that the Warden shall perform the function and discharge the duty of satisfying himself that the agreement complies with the provisions of the Act. If the Warden is so

satisfied and registers the agreement, the effect of the Act is that it must be assumed, provided that no steps have been taken to set aside the Warden's decision and the consequent registration of the agreement, that the provisions of the Act have been satisfied. I am, therefore, of opinion that, though the present tribute agreement does not comply with the provisions of sec. 143, the Act makes the Warden the judge of such a matter, and that, as the agreement has been approved and registered by the Warden, it must be regarded as valid.

The next question which arises is whether the lode or vein upon which the tributers mined is in fact the Gamble North Lode, East Vein, or whether they did not at a certain point leave this vein and follow another lode. If they did so, they mined outside their ground, they are not entitled to the declaration to the contrary which they seek, and, prima facie, they are liable for trespass as alleged by the company.

When the tributers began to mine under the agreement, what may be called the future course of the east vein was not known. They began work at the 225 feet level and by stoping discovered a lode upon which they continued to mine. The evidence before the Warden's Court showed that this lode swung out from the Gamble North Lode, East Vein, in a westerly direction. The question is whether this westerly swing should be regarded as a continuation of the east vein or as another and a different lode.

The strike of the westerly swing was west at the 225 feet level, changing by degrees to south-west at the 400 feet level. The dip of the westerly swing was from west to east. The strike of the Gamble North Lode, East Vein, was south-westerly and the dip was from north-east to south-west. Thus, there was a difference in both the dip and the strike of the westerly swing and of the east vein as known at the 160 feet and lower levels. The apex of the westerly swing was placed by the evidence at the 170 feet level, and the tributers mined down to the 400 feet level. The evidence before the Warden showed that it was recognized by mining men familiar with the Kalgoorlie field that there were two systems of lodes upon the field, described respectively as main lodes and caunter lodes. The experts called for the tributers gave evidence with respect to

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the western swing from the 170 feet level down to the 400 feet level. They gave reasons for taking the view that the western swing was a continuation of the east vein, though in a different direction. Both the strike and the dip of any lode may vary from place to place as it follows the shear in the rock which made the fissure within which the ore body constituting the lode is contained. The witnesses for the tributers were of opinion that the western swing was not a caunter lode, and they referred in support of their views to identity or similarity between the east vein and the western swing in respect of width of ore body, values of gold obtained, strength of shear, dip of the lode, and the character of the mineral contents of the respective ore bodies. They also emphasized in their evidence the fact that there was no evidence between the 170 feet level and the 400 feet level that the western swing crossed the east vein. The western swing junctioned with that vein, but it did not intersect it. The witnesses for the company, on the other hand, called attention to variations between the two ore bodies in the various particulars mentioned, and gave evidence that the western swing was a caunter lode. They proved that on the 500 feet level, that is, 100 feet below the tribute ground, an ore body, which they said was continuous with the western swing of the higher levels, actually crossed the east vein from the western side over to the eastern side. This intersection, it was contended, definitely showed that the western swing was a caunter lode, and not a main lode, and that, therefore, it could not be regarded as a continuation of any part of the Gamble North Lode, which all witnesses regarded as a main lode.

The position, therefore, is that there was evidence to support the finding of the Warden that the western swing was a caunter lode. Though the opposite conclusion might have been accepted by the Warden, it is not possible to say that his decision is clearly wrong. The learned Chief Justice upheld the decision of the Warden. The onus is upon the appellants to show that the decision of the Warden is wrong. They have not, in my opinion, succeeded in discharging this onus, and, therefore, this court should not disturb the decision of the Warden, who has special knowledge in relation to mining matters such as that in question. The appeal must, therefore, be decided upon the basis that the tributers in fact mined outside the tribute area.

It follows that the tributers are not entitled to the declaration that their mining operations were carried on within the area granted to them by the tribute agreement. The decision of the Warden upon this question should be upheld.

This conclusion, however, is by no means decisive of the appeal. It is necessary to consider the acts of the parties in order to determine whether the company is entitled to succeed upon its claim for conversion of the gold-bearing ore and trespass upon parts of the mine not included within the tribute agreement. The plaintiffs, in their plaint before the Warden, alleged that the defendant company ought not to be heard to say that they mined outside the tribute ground, and that the defendant was estopped from so alleging by reason of certain conduct. The appellants relied upon the same estoppel as an answer to the claims of the company in relation to conversion and trespass. These claims were made in a defence, and there is no provision in the Act or regulations for any form of pleading in relation to a claim so made in a defence. The plaintiffs were, therefore, entitled to rely upon the alleged estoppel or any other matter by way of defence to the company's claim for damages for conversion and trespass. In order to determine the question raised by the plea of estoppel it is necessary to state the effect of the evidence which was given in relation to this matter.

In May 1935 the general manager of the company, Mr. Ernest Williams, sent for the representative of the tributers, Mr. William Grundt, and told him that he thought that the tributers were mining outside their ground. Grundt contended that this was not the case, and a discussion took place on the subject, each party maintaining his own views. Further discussion was postponed until plans could be obtained. About the end of May the discussion was resumed, and once again each party maintained his own view. Grundt proposed that the tributers should cease mining and that the question should be referred to arbitration. This offer, however, was not accepted by Williams, who said that he would have to give the case further consideration before he could take any action. According to Grundt, when he offered to pull the men up the shaft and let the matter go to arbitration, Williams said : " No, it does not matter," and said that he would hear from him later. Nothing more was

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heard of the contention that the tributers were mining outside their ground until 20th August 1936, when a notice cancelling the tribute agreement was served. One of the grounds alleged for the cancellation was that the tributers were mining outside their ground.

Between the end of May 1935 and 21st August 1936 the tributers went on mining on the western swing. Everything that they did was known to the company. The workings were visited not only by the company's tribute boss but also by the surveyors of the company. The company supplied the compressed air which was necessary for the tributers' mining operations, and charged for it in accordance with the terms of the tribute agreement. The tributers mined the ore and delivered it at the treatment plant of the company in accordance with the agreement. The company received the ore and treated it. They paid the tributers their share of the proceeds of the ore in accordance with the terms of the agreement. The company is now, in effect, seeking to recover the sums which it so paid to the tributers.

It is clear that the company cannot succeed upon the allegation that the tributers wrongly converted the gold-bearing ore to their own use. In fact the tributers delivered all the gold-bearing ore to the company, and the company dealt with it as it thought proper. The tributers did not handle either the gold-bearing ore or the gold produced from the ore after they delivered the ore to the company. Thus the claim for conversion fails.

The company has not in fact made a claim for money had and received, but in effect the claim which it makes is such a claim. The moneys paid to the tributers were paid by the company with full knowledge of all the material facts, and there is no ground upon which the moneys may be recovered by the company.

The claim for trespass is, in my opinion, successfully met by the defence founded upon estoppel. Up to 20th August 1936 the company dealt with the tributers upon the basis that the ore which the tributers won from the disputed ground was ore to which the terms of the agreement applied. The company received the benefit of the work done and of the expenditure of money made by the tributers, and in every respect acted upon the basis that the ore then being mined, including ore known to be derived from the

western swing, was ore which was to be dealt with in accordance with the terms of the agreement. Where a person obtains advantages by relying upon rights which can exist only upon the basis of an assumed state of facts, he is not permitted thereafter to rely upon other rights in relation to the same person which are inconsistent with the existence of the rights formerly asserted. The relevant principle is that stated by *Scrutton* L.J. in *Verschures Creameries* v. *Hull and Netherlands Steamship Co.* (1) :—" A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction." So, in *Thompson* v. *Palmer* (2), the general principle upon which estoppel *in pais* is based was expressed by *Dixon* J. in the following words :—" The object of estoppel *in pais* is to prevent an unjust departure by one person from an assumption by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment. Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment ; or because he has exercised against the other party rights which would exist only if the assumption were correct."

In the present case all the requirements of an effective estoppel are satisfied. The tributers had offered to cease mining but continued mining after the question had been raised as to whether they were or were not mining outside their ground. They were induced to act to their detriment (by doing work and spending money) as they would not have otherwise done, by the facts that the company acted so as to show that it was content to regulate the relations between the tributers and itself upon the basis that the agreement applied in all respects to the ore produced from the western swing. The company continued to provide essential mining facilities

(1) (1921) 2 K.B. 608, at p. 612. (2) (1933) 49 C.L.R., at p. 547.

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(access to the ground, compressed air, &c.) to the tributers, and, as already stated, received and treated the ore mined by the tributers and accounted to the tributers for half the proceeds of the ore. As soon as the company changed its attitude, and gave notice of cancellation of the agreement, the tributers took legal proceedings for the purpose of ascertaining their strict rights. It is, I think, quite unreasonable to suppose that the tributers would have continued to mine as they did, unless the company had, knowing that they proposed to continue their operations, been prepared to allow them to continue as upon the basis of the agreement. It is true that the tributers believed that they were right in their contentions that they were mining within their ground, but they did not act merely upon this belief. The undisputed facts show that the company was content until 20th August 1936 to act upon the basis and to allow the tributers to act upon the basis that the western swing was part of the Gamble North Lode, East Vein. The company cannot, therefore, now be heard to say that before 20th August 1935 the tributers were mining outside the Gamble North Lode, East Vein.

The line between estoppel, which precludes a person from proving and relying upon a particular fact, and waiver, which involves an abandonment of a right by acting in a manner inconsistent with the continued existence of the right, is not always clearly drawn. As *Isaacs* J., speaking for the court, said in *Craine* v. *Colonial Mutual Fire Insurance Co.* (1), with respect to estoppel and waiver, "the facts of a given case are often open to the application of either doctrine." In the present case the company, in my opinion, waived the tort of trespass. The company not only permitted the tributers to go on working as if the agreement applied to the disputed ground, but it actually facilitated such working. It cannot now say that it conserved all its rights as upon a trespass. A common case of waiver of a tort is to be found when a plaintiff sues in an action for money had and received for the proceeds of goods converted by the defendant, instead of suing for damages for conversion (*Smith* v. *Baker* (2)). The essence of such a case is that the plaintiff, instead of treating certain acts as constituting a tort, adopts those acts and obtains an advantage by doing so. If the owner of the goods,

(1) (1920) 28 C.L.R. 305, at p. 326. (2) (1873) L.R. 8 C.P. 350, at pp. 356, 357.

without suing, accepted the proceeds of the goods from the person who converted them so as to adopt the transaction from which the proceeds came, the position would be the same. So, in the present case, the company by a long course of action, recognized the tributers' actions as being duly done under the agreement, and it cannot now turn round and claim as for a trespass upon the basis that those acts were not lawful. Such action is a waiver of the tort, and the company is accordingly unable now to sue for the tort. On this ground also, which is either waiver or estoppel by waiver (according to various uses of these not too well-defined terms), the company should fail in its claim for trespass as to the period between 1st June 1935 and 20th August 1936, when the notice of cancellation was given.

Operations after 20th August 1936 (if any) stand upon a different footing. The estoppel arising from the conduct of the company could only operate so long as the facts upon which it was based continued to exist. The company had doubtless precluded itself from treating the mining outside the granted area before 20th August 1936 as a breach of condition entitling the company to cancel the tribute agreement, if, indeed (contrary to the decision of the learned Chief Justice, from which no appeal is brought), such mining constituted a breach of condition (*Panoutsos* v. *Raymond Hadley Corporation of New York* (1)). It may be said that, if the agreement, properly construed, did contain a condition against mining outside the granted area, the company had waived that condition in the sense that they had elected to treat such mining as had already taken place and as was taking place, as only a breach of warranty and not as a breach of a condition. But such a waiver has no significance in relation to possible future torts. Further, so long as the company continued to act in the manner described, it could not allege as against the tributers that they were mining outside their ground. Thus the doctrine of estoppel operates as a rule of evidence to prevent the company from proving and relying upon the statement of fact which was the necessary foundation of any claim for trespass in relation to any operations of the tributers during the period during which the relevant conduct of the company continued. But when

(1) (1917) 2 K.B. 473, at pp. 478, 479.

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that conduct ceased the estoppel was exhausted. There is no evidence that the company made any agreement with the tributers that they should have a right of mining outside their area for the term of the tribute or for any term. In view of the provisions of the *Mining Act* relating to tribute agreements, such an agreement (not in writing and unregistered) could not be effective as an agreement. But, apart from this consideration, there is no evidence of any such agreement. The dispute between the parties was left in suspense upon the footing that in the meantime (but only in the meantime) they could proceed upon the basis that the agreement applied to the ore delivered from time to time by the tributers. Thus the company is entitled to an injunction restraining the tributers from working outside the tribute ground after 20th August 1936.

It is argued, however, that even if the doctrine of estoppel applies in favour of the tributers, it cannot be so applied in respect of any period before the end of May 1935, when the discussion between the tributers and the general manager of the company took place. If, before that time, they were mining outside their ground, then they were plainly trespassing, and there had then been no conduct of the company upon which any estoppel could be based. The company did not appeal against this limitation of the accounting period, but the learned Chief Justice varied the order in favour of the company by applying it to the period before 1st May 1935. I have serious doubts as to whether the Act confers power upon the Supreme Court to vary any order of the Warden except at the instance of an appellant or in pursuance of or consequentially upon a variation sought by the appellant as a person aggrieved within the meaning of sec. 278 of the Act. But I recognize the force of the view that in the circumstances of this case the exercise of any appellate function enables and possibly requires the Supreme Court, and therefore this court upon appeal from the Supreme Court, to review the whole decision of the Warden, and, accordingly, I agree with the order proposed by my brother *Dixon*.

DIXON J. The proceeding out of which this appeal arises is a plaint in the Warden's Court at Kalgoorlie lodged by the appellants. The purpose of the plaint was to restrain an attempt to cancel or

forfeit a tribute agreement under which the appellants had been carrying on operations as tributers. The place where the workings were conducted was between the 150 feet level and the 400 feet level in the respondent company's mine.

The ground of the company's threat to cancel the tribute agreement was that the tributers had been winning ore beyond the limits of the tribute. By its defence the company alleged that this was so and made a cross-claim for an account and for damages. The Warden decided that the tributers had been working outside the tribute but relieved the tributers from forfeiture or cancellation of the agreement, acting under a statutory power conferred upon him by sec. 149 of the *Mining Act* 1904, as amended. That section enables the proprietor of a mining lease to cancel the agreement of tributers who fail to comply with its terms and conditions, but he must give seven-days' notice of his intention to do so. The tributers may then complain to the Warden, upon whom the section imposes the duty of hearing and determining the complaint and deciding whether or not, having regard to all the circumstances of the case, the tribute agreement should be cancelled by reason of the non-compliance. He is empowered to make such order as he thinks equitable, including any order as to compensation or costs, and his order is to have effect according to its tenor. The parties proceeded under this section, and the Warden said that, taking advantage of the powers it gave him, he would, instead of ordering cancellation of the tribute agreement, restrain the appellants from further trespassing outside the premises let upon tribute by the agreement. He further ordered that the tributers should account for ore taken outside the tribute and that the amount due by them to the company out of the proceeds of the gold won should be ascertained by the Mining Registrar. It is not clear whether the Warden considered that this further order was a condition of what I have called relief against forfeiture of the tribute, or regarded it as an independent order which, in any event, he should make against the tributers in the exercise of his ordinary jurisdiction.

An appeal lies to the Supreme Court from any final judgment or order of the Warden's Court at the instance of any party aggrieved. Some unusual provisions are made distinguishing between appeals

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on matter of law, on matter of fact and law, and on matter of fact. In the first case the appeal is to be by way of special case. In the second and third cases the appeal may be upon the material before the Warden or, if the Supreme Court so orders or the parties agree, it may be by way of rehearing, that is, by way of a second trial. It is for the appellant to say whether the appeal is to be on matter of law alone or is to extend to fact. After hearing the appeal, the duty of the Supreme Court is to " make such order reversing or varying the decision appealed against or dismissing the appeal as it thinks fit " (secs. 278 to 286 of the *Mining Act*). The tributers appealed to the Supreme Court against the decision of the Warden on fact and law.

In his order the Warden had limited the account to a period after the company had apprised the tributers of its claim or contention that they were working outside the tribute. His decision also refused to award damages, for the reason that, in his opinion, the workings of the tributers would not seriously interfere with the future working of the ground by the company.

The company did not institute an appeal on its part from the limitation of the period to which the account went back or from the refusal of damages.

Northmore C.J., who heard the tributers' appeal, upheld the decision of the Warden that the workings of the tributers were outside their tribute. But, as the agreement contained no express provision against the tributers working outside the limits of the tribute, his Honour held that there was no foundation for the company's claim to forfeit or cancel the agreement for failure to comply with terms or conditions contained therein. He therefore made an order allowing the appeal and setting aside the order of the Warden's Court. He substituted a declaration that the company's notice of intention to cancel was ineffectual and an order for an account of the proceeds of the ore obtained by the tributers outside the tribute, and he did not repeat the limitation which the Warden had placed upon the period of accounting.

From the order of *Northmore* C.J. the tributers now appeal to this court. They maintain that they did not carry on mining outside the limits of their tribute and that the decision of the

Warden's Court and of the Supreme Court that they did so involves an erroneous application of the parcels of the tribute agreement to the features of the ground worked. They further maintain that in any event the company is precluded by its conduct from asserting that the workings of the tributers were outside the tribute and from recovering the moneys or profits received by them in respect of the gold contained in the ore won. They also contend that it was beyond the power of the Supreme Court to order an account going further back than the date fixed by the Warden and thus to give to the respondent to the appeal greater relief than the order of which the appellants complained.

The first of these three grounds upon which the order of the Supreme Court is impugned depends upon the question how the description contained in the parcels of the tribute agreement and the plan accompanying the parcels should be applied to the physical features of the site. This question involves an inquiry into what the physical conditions of the ground show or indicate and how the description in the agreement operates thereon in determining the extent of the tribute.

Sec. 143 of the *Mining Act* provides that every tribute agreement, unless it extends to the mine as a whole, shall by metes and bounds describe the land as a specified and defined block of ground. It appears probable that the object or one of the objects of this provision, which is derived from the Victorian *Mines Act* 1897, sec. 159, through the Tasmanian *Mining Act* 1917, sec. 139, was to put an end to a practice at one time obtaining on mining fields of defining the workings of tributers by reference to seams, channels, dykes, lodes or veins which they might follow, or of leaving the place of such workings to the direction of the mine manager. The existence of such a practice at an early date is evidenced by *Thomas* v. *Kinnear* (1), *Vivian* v. *Dennis* (2), *Miller* v. *Fraser* (3) and *Chun Goon* v. *Reform Gold Mining Co.* (4). Notwithstanding this provision, the tribute agreement now in question is expressed to confer upon the tributers rights over mines, veins, seams or deposits of gold-bearing ground comprised and contained in a portion of certain

(1) (1863) 2 W. & W. (L.) 231.
(2) (1866) 3 W.W. & a'B. (M.) 29.
(3) (1867) 4 W.W. & a'B. (M.) 29.
(4) (1882) 8 V.L.R. (Eq.) 128, at p. 129; 3 A.L.T. 81, at p. 137.

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mining leases described as a piece of ground on a lode or a vein of a lode. The description specifies certain limitations which, so far as they go, pursue the requirements of the section. It is a piece of ground in certain sections the numbers of which are given. It is from the 150 feet level to the 400 feet level. In two directions points are given as providing the limits, directions shown by the plan to be north-west and south-east but conventionally called north and south respectively. Although clumsily and elliptically expressed, this means to confine the grant to so much of the vein or lode as lies within vertical planes parallel to the north-west and south-east boundaries of the sections, that is vertical planes at right angles with the lines drawn from datum points in the mine, given both by the plan and by the description, to the points prescribed as forming the limits of the grant of the vein or lode, the limits ascertained by means of the vertical planes passing through such points. But, although two dimensions are thus sufficiently defined by metes and bounds, that is, the dimensions horizontally and the dimensions vertically from north-west to south-east, there is no similar definition of the third dimension.

The name of the vein or lode is " The Gamble North Lode, East Vein." The plan shows the then actual workings of the vein on two levels. But as a definition of the third dimension there is nothing but this delineation on the plan and the description, " All that piece of ground on the Gamble North Lode, East Vein," together with an important statement at the end of the parcels. The statement I regard as explanatory of or epexegetical to the expression " ground on the Gamble North Lode, East Vein." It is as follows : " The tributers to have the right to mine twenty feet into the east wall of the lode from the centre of the lode and twenty feet into the west wall of the lode from the centre of the lode." This means that a grant is made to the tributers of a right to mine so much of the lode identified at two levels by the plan and called the Gamble North Lode, East Vein, as lies within twenty feet on either side of the middle of the lode as it descends or dips and as it runs or strikes, the strike being treated conventionally as north and south. The right is confined, however, within the two horizontal

boundaries stated and the north-west and south-east vertical boundaries.

The source of the dispute between the parties is the attempt to grant a tribute in respect of a lode or vein identified only where workings had laid it bare, to the intent that the tributers should be entitled to follow it wherever it went between the horizontal and north-west and south-east vertical boundaries. It appears clearly enough from the description and the plan that the parties supposed that the strike of the vein was north-west and south-east, what they called north and south. The tributers carried their workings south of west and claim that they were following the vein granted. The company maintains that the vein so worked would not be regarded as part of the vein described in the agreement. The dispute could not have arisen if the third dimension of the territory granted had been defined by metes and bounds with a reference point known and ascertained at the time of the agreement.

The policy which I have ascribed to sec. 143 is accordingly justified by the consequences of the present departure from it. When the section speaks of a specified and defined block of ground and requires that the metes and bounds shall so describe the land, it means, I think, that at the time of the tribute agreement the dimensions of the block shall be fixed and capable of ascertainment, for example, by survey. It may be said that although the course and extent of the Gamble North Lode, East Vein, was unknown, it was nevertheless an existing feature of the site and to take such a distance as twenty feet on either side of it is to adopt a means of measurement by metes and bounds. The answer to such a suggestion is that the measurements and boundaries connoted by the phrase require some point or points of reference presently ascertained upon or in the ground. It is intended that by the identification of the points of reference and the application thereto of the description by metes and bounds the block shall be immediately ascertainable. Further, the section itself expressly requires a defined and specified block of ground. Neither party contended or conceded that the agreement failed to comply with sec. 143. But I do not think that the requirements of that provision are fulfilled by the description which the tribute agreement gives of the land. It does not follow that the

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agreement is void. The purpose of sec. 143 is to secure such a definition of the land let on tribute that no difficulty will arise in determining where the rights of the tributers extend and to leave the tributers free to conduct their operations in the terms of the tribute within a definite block of ground. No doubt such a provision may work to the advantage of both parties, but in the legislation relating to tributes the primary concern of the legislature has been the protection of the tributer. To give such a provision as sec. 143 an interpretation which would in default of compliance annihilate the agreement and destroy the tributer's rights would not be in accordance with the general policy of the legislation. The proprietor of a mining lease, in the absence of a valid agreement, remains entitled to the gold won therefrom. To treat a tribute agreement as altogether void if it did not comply with sec. 143 would be not only to expose the tributer to dispossession of the ground but also to make him liable to account to the proprietor of the mining lease for what the tributer might have won before the defect was discovered. Under secs. 142 and 145 a tribute agreement is to be registered by the Warden, who must satisfy himself that it complies with the provisions of the Act and regulations. No doubt compliance with sec. 143 is a condition precedent to a right to registration, but the better interpretation of the provisions seems to be that which does not invalidate a registered tribute agreement if the Warden erroneously gives it his approval. Perhaps sec. 143 may be described as a directory and not an invalidating provision. Perhaps sec. 145 and sec. 150 (4) may be regarded as making registration conclusive of validity. But, whichever be the more correct statement of the position, the conclusion is the same, namely, that a registered tribute agreement is not void for failure to observe sec. 143.

As the tribute agreement now in question was duly approved by the Warden and registered, it follows that it is as valid as it would have been before the enactment of sec. 143. But, if the Warden who approved the agreement had given sec. 143 the meaning which I think it possesses and had applied it accordingly, the problem in which this litigation has its source could not have arisen. For he would have refused registration. As that problem has been presented to the court, it is of a strange nature. It calls upon the court to

find either an identity in or distinction between ore bodies existing without discontinuity and having the same nature but differing in direction. The investigation of the issue showed that the basal difficulty in determining it is to discover and fix some definite discrimen of identity or difference. In that part of the Kalgoorlie Goldfield with which we are concerned there are two well-recognized systems of lodes. One system runs roughly north to north-west and south to south-east. The lodes of this system are called main lodes. The other system runs transversely to the first system. The lodes of this system are described by the Cornish word " caunter " and are called caunter lodes or sometimes cross-lodes. Apart from the difference in this direction or " strike " of the lodes of the two systems, there are differences in the direction and degree of the underlay or dip with which they descend and in the occurrence of gold within the lode. These differences are said to be more or less characteristic of each system. Where a main lode and a caunter lode intersect, the greatest occurrence of gold is expected. The theory commonly held appears to be that at different times in the earth's history two systems of fissures or shearing occurred. The solutions carrying the gold circulated in them and formed the lodes. The system of shearing or fissures or faults running roughly north and south or north-west and south-east now carries what are called the main lodes and the other system of shearing carries the caunter lodes. Different conceptions are current as to the order in which the two systems of shearing occurred. Caunter lodes are regarded as intersecting with main lodes, as opposed to branching from or junctioning with them; but the view is also accepted that, where fissures perhaps originally intersected so as to break across one another, there has been a lateral movement, sometimes roughly horizontal and sometimes more vertical, by which the parts of a transverse fissure, as, for example, that of a caunter lode, have been moved so as no longer to be opposite or even very close. These views and conceptions appear to be part of the understanding of those conducting practical mining operations on the field, but whether they conform to the theories of scientific geology is not stated.

When the parcels in the present tribute agreement and the plan are considered in relation to this state of belief or knowledge, it is

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evident that the parties treated the Gamble North Lode, East Vein, as a main lode, the strike of which conformed generally to the direction of lodes of that system. The plan bears broken lines indicating twenty feet on either side of the vein as it had then been worked, and these lines run north-west and south-east.

When the tributers began the workings in pursuance of the agreement, they first stoped up from a drive on the 225 feet level at the north-western end. As they got up to a level of 170 feet they formed the view that there was a swing of the lode to the west. They sunk a winze in that direction back to the 225 feet level and found a lode. After putting in a cross-cut to get air from an air shaft to the north, they proceeded to work the lode which they had found to the west. The air shaft was situated a very short distance from the north-western end of the workings at the 160 feet level shown on the plan forming part of the agreement. It appears that the lode now in question branched or swung off the lode which these workings had followed and did so at a point which at the 225 feet level was a considerable distance south of the air shaft. The dip or underlay of the westerly lode was very much to the south. Thus, at the 329 feet level, the junction of the lodes was further south than at the 225 feet level, and at the 400 feet level further south still. As the workings had proceeded north, the values had diminished but the values were good upon the westerly swing.

On behalf of the tributers it was claimed that in a number of features a similarity existed between the lode bearing west and that part of the lode delineated on the plan lying south of the junction. It was said that these similarities did not exist in that part of the latter lode lying north of the junction. The features relied upon are width, the strength of the shearing, the mineralized nature of the lode, the occurrence of the gold and the values. In respect of some of these features the evidence is not very satisfactory. But it is quite clear that, looking only to the westerly side, the vein appears to bifurcate and go west and north without any discontinuity and that the richer branch is the westerly. Similarities such as those relied upon serve to prove little more than would appear the natural consequences of such a continuity.

On the other hand, the company called evidence to prove that between the lowest level of the tribute, viz., 400 feet, and the 500 feet level a stope had disclosed that at the junction a branch of the lode goes east which corresponds to that going west. *Northmore* C.J. regarded this evidence as establishing that the westerly vein worked by the tributers was a cross-lode intersecting the main lode the subject of the tribute. The manner in which this fact was dealt with in the evidence was not very satisfactory, but it seems probable that the Warden before whom the witnesses were examined took the same view as *Northmore* C.J.

As the argument proceeded before this court, it appeared as if the question at issue was regarded as depending upon the manner in which the lodes had been formed or laid down as a matter of geological history. For instance, it was said that the westerly swing represented the main lode because, even if there were two intersecting systems of shearing, the cross-shearing had widened the main fissure so as to form with it one channel for the lode. In my opinion the question rather must be determined by the conceptions of the parties to the agreement, as ascertained from the language they have used and the plan they have adopted, when considered with the state of knowledge or belief among those engaged in the conduct of mining. The parties appear to have regarded the direction of the strike as a matter serving to define the vein they intended. They were, no doubt, fully aware of the caunter system. Their conception of the strike of the lode is sufficiently indicated by the manner in which they defined the north or north-west boundary and left unlimited the west or south-west and east or north-east boundaries except for the twenty feet on either side of the lode. Their conception of the strike of the lode is further shown by the dotted lines on the plan, which exclude any swing to the west at the 160 feet level south of the air shaft. It is, no doubt, true that a forking or separation of veins is not uncommon, and such a thing would not in itself make either of the forked branches any less part of the east vein of the Gamble North Lode. But in the present case there is a strong lode bearing away transversely and proceeding westerly indefinitely. Even without the evidence of the corresponding easterly vein or lode at the 500 feet level, the direction or strike,

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and the distance to which it is known the strike is maintained would give the lode characteristics which lead those engaged in mining to distinguish between the two systems. Both the Warden, who no doubt possesses a special familiarity with the practice and conceptions of the Kalgoorlie goldfields, and *Northmore* C.J., who has had great experience in such matters, decided that the westerly lode was outside the tribute. Having regard to the circumstances to which I have referred, I think that their conclusion could not be disturbed and should be adopted by this court.

It follows that, in so far as the tributers obtained ore from the vein swinging to the west and did so beyond a distance of twenty feet from the middle line of the vein from which it branches or with which it junctions, they did so without any authority under the tribute agreement. Inside a distance of twenty feet from that centre or middle line, I think the tributers were at liberty to win ore from the vein branching west as well as from the main lode. This accords with the exact language of the agreement and with the limits shown by the broken lines on the plan incorporated with the parcels.

The tribute agreement is dated 1st June 1934, and within a few months from that date the tributers appear to have begun to obtain ore from the western lode. The agreement is of the type referred to in par. *b* of sec. 145A of the *Mining Act* (as amended by Act No. 38 of 1932, sec. 7). It is an agreement by which the royalty or tribute is secured to the proprietor of the mining lease by means of a division in equal shares between him and the tributers of the gross proceeds from the sale of the gold extracted from the ore produced. Such a tribute agreement is governed by sec. 145C. The result of the terms of the agreement and of the provisions of the section is, so far as material, to require the tributers to deliver all ore won to the company at its main shaft, to require the company to haul it to the surface, and, after assaying it, to treat it at its treatment plant. The company is then bound to pay the tributers half the gross proceeds of the ore extracted after making certain deductions, including deductions for air, tools and supplies belonging to the company used by or supplied to the tributers to enable them to deliver ore produced by them to the company. The company is

obliged to supply stores, and a scale of charges is fixed by the agreement for the use of air and tools.

The operations of the tributers were carried on by means of compressed air supplied through pipes under the control of the company. It was, of course, open to the company to prevent the tributers from mining the western lode by cutting off the supplies of air or by refusing to accept delivery of the ore won therefrom. It does not appear when the officers of the company first learned that the tributers were mining that lode, but in April and May 1935 the question whether they had travelled outside the tribute was definitely raised. But, apart from verbal objection, the company did nothing to prevent the continuance of the course of which it now complains. It went on supplying the air, tools and stores. It received the ore, treated it and paid over the net balance of half the gross proceeds of the gold extracted. This continued until the giving on 20th August 1936 of the notice of intention to cancel.

It is upon these and some further facts that the tributers rely for the contention that the company is precluded from obtaining the relief given by the order under appeal. The further facts consist in what occurred when the company raised the objection in April and May 1935. The witnesses are not in complete agreement as to the matter, but, accepting the version more favourable to the conclusion of the Warden, the substance of what took place seems to be this. On 24th April 1935 the general manager requested an interview with one of the tributers in order to discuss matters connected with the tribute. The discussion took place on 8th May 1935. The general manager said that the plans of the workings were not yet available, but it appeared that the tributers were outside their ground. The tributers answered that they were entitled to follow the lode irrespective of its direction, and the general manager said that he would have plans prepared and look into the agreement and then discuss the matter further. Plans were produced showing the workings on the western lode at the 236 and 335 feet levels. They made it clear that the lode worked branched off to the west or south of west. The general manager said that it was a caunter lode and that the tributers were outside their ground. A long statement of the tributers' case was made in answer. It was

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contended that they had a right to follow the lode and that what they were working was not a caunter lode but a branch of the main lode. Then it was suggested that the matter should go to arbitration. The general manager asked the tributers in the meantime to cease work on the lode which he said was outside the tribute. The tributers offered to cease work altogether on the entire tribute and asked, if they did so, would the period of the tribute be extended. The general manager made a reply the exact effect of which is not easy to determine, but which must have included some expression of a desire that the tributers should not bring all their men to the surface. The discussion ended by his saying that the tributers would hear from him later. In fact there appears to have been no further communication and no discussion of the question until some time in October, when the underground manager told one of the tributers that they were outside their tribute but that it was a matter for the general manager. The latter retired from office on 30th June 1936, and two months later the company took an unequivocal step by giving notice of cancellation.

Upon these facts, it is apparent that after 8th May 1935 the tributers were aware that the company disputed their right under the agreement to mine on the western lode. Although the general manager seems to have adopted an indecisive course, he did not give the tributers to understand that the company was content to act on the assumption that the agreement did extend to the western lode. It was left as a matter of dispute, where each party stood upon whatever rights belonged to it.

By mining outside the tribute agreement, the tributers committed a wrongful act, unless they did so by leave and licence or under some other justification. It is, I think, impossible to treat the conduct of the company as implying leave and licence in face of the objection expressly made. A justification would exist in the tribute agreement if the company were estopped from denying that the western lode fell within it. But on the facts I have stated I do not think there is a sufficient foundation for such an estoppel.

The conclusion that no estoppel arises on the facts does not mean that they are incapable of supporting any answer to the relief sought by the company. The question whether by its conduct the company

has lost its right to an account of the tributers' profits or receipts from the gold content of the ore and the question whether in the circumstances it can recover as damages or otherwise any part of the proceeds of the gold paid over to the tributers must both be distinguished from the entirely separate question of estoppel upon which I have just stated my opinion. That question is whether the company is precluded by estoppel from asserting that the tributers committed a wrongful act when they mined the western vein or caunter lode, that is, from asserting that the tributers in doing so went outside the agreement. The reasons I shall give for thinking that the company is not so precluded will be clearer if the rights and remedies available to the company as a result of such a wrongful act are first stated. By mining outside the parcels of the tribute, tributers commit the wrong of trespass and become liable in trespass for damages measured by the injury done to the mine. When a trespasser mines ore and treats it or otherwise deprives the mine owner of the property in the ore, he is guilty of conversion and is liable to the mine owner in that form of action for the value of the ore. Courts of equity administered relief in aid of the legal right by ordering an account of the proceeds. But in the present case the ore was delivered for treatment under the terms of the tribute agreement to the mine owner or lessee now said to be the true owner. In delivering the ore to the company which claims property in it, the tributers can scarcely be considered as converting it to their own use by depriving the true owner of his property. The company in treating ore delivered to it under a tribute agreement acts as principal and not as agent for the tributers. The property in ore won under a tribute agreement of the kind now in question probably never does vest in the tributers. At all events the tributers in the present case conceded the company's right to treat the ore and sell the gold extracted and relied only on the company's paying them half the sum equivalent to the net proceeds as estimated or calculated under sec. 145c. This the company did without making any claim to withhold the money as representing ore won outside the tribute and, therefore, belonging wholly to the company. An account of so much of the proceeds of the ore, or the gold content, as the tributers

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received is thus an account of payments actually made by the company itself to the tributers. It is evident, therefore, that, even if the tributers were wrongdoers in taking the ore and are liable in trespass, it by no means follows that under any head of relief they can be made liable for money actually received from the company itself.

But the estoppel set up by the tributers goes to the first step, the winning of the ore. The principle upon which estoppel *in pais* is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations. This is, of course, a very general statement. But it is the basis of the rules governing estoppel. Those rules work out the more precise grounds upon which the law holds a party disentitled to depart from an assumption in the assertion of rights against another. One condition appears always to be indispensable. That other must have so acted or abstained from acting upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption. In stating this essential condition, particularly where the estoppel flows from representation, it is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment. His action or inaction must be such that, if the assumption upon which

he proceeded were shown to be wrong and an inconsistent state of affairs were accepted as the foundation of the rights and duties of himself and the opposite party, the consequence would be to make his original act or failure to act a source of prejudice. Thus, when, in *Holt* v. *Markham* (1), the fact that the defendant had spent the money sued for, believing it to be his own to spend, was treated as a sufficient alteration of his position to estop the plaintiff from departing from the assumption which he had induced, the harm or detriment giving rise to the estoppel was that which would be done by requiring the defendant to repay money which he no longer had. When a bailee is estopped from denying his bailor's title to the goods, the detriment on which the estoppel is based is that which would ensue from placing goods in the possession of a person if he were permitted to set up a title to retain the goods or a right to hand them over to a stranger. An example of another kind is supplied by the facts of *Yorkshire Insurance Co.* v. *Craine* (2). The detriment to the insured arose from his having submitted to the insurer's claim to retain possession of the salvage. But in reality the detriment was that which would ensue if the insurer were permitted to deny that the insured had made under the policy a valid claim; because the existence of such a claim alone entitled the insured to possession of the salvage and to permit the insurer to obtain both that advantage and the advantage of repudiating the insured's claim as out of time would give him a combination of advantages amounting to a detriment to the insured.

Fulfilment of the condition which so far I have discussed is not enough to make it just to preclude a party from setting up a state of facts. The justice of an estoppel is not established by the fact in itself that a state of affairs has been assumed as the basis of action or inaction and that a departure from the assumption would turn the action or inaction into a detrimental change of position. It depends also on the manner in which the assumption has been occasioned or induced. Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it. But the law does not leave such a question of fairness or justice at large. It

(1) (1923) 1 K.B. 504. (2) (1922) 2 A.C. 541.

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defines with more or less completeness the kinds of participation in the making or acceptance of the assumption that will suffice to preclude the party if the other requirements for an estoppel are satisfied. A brief statement of the recognized grounds of preclusion is contained in the reasons I gave in *Thompson* v. *Palmer* (1), and it is convenient to repeat it :—" Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment; or because he has exercised against the other party rights which would exist only if the assumption were correct, as in *Yorkshire Insurance Co.* v. *Craine* (2); cp. *Cave* v. *Mills* (3); *Smith* v. *Baker* (4); *Verschures Creameries Ltd.* v. *Hull and Netherlands Steamship Co.* (5); and *Ambu Nair* v. *Kelu Nair* (6); or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption; or because he directly made representations upon which the other party founded the assumption."

It is important to notice that belief in the correctness of the facts or state of affairs assumed is not always necessary. Parties may adopt as the conventional basis of a transaction between them an assumption which they know to be contrary to the actual state of affairs. A tenant may know that his landlord's title is defective, but by accepting the tenancy he adopts an assumption which precludes him from relying on the defect. Parties to a deed sometimes deliberately set out an hypothetical state of affairs as the basis of their covenants in order to create mutual estoppel. In *Craine's Case* (7) both parties may have been aware that the claim of the insured was out of time. In his interesting judgment

(1) (1933) 49 C.L.R., at p. 547.
(2) (1922) 2 A.C., at pp. 546, 547; 31 C.L.R. 27, at pp. 30, 31.
(3) (1862) 7 H. & N. 913, at pp. 927, 928; 158 E.R. 740, at pp. 746, 747.
(4) (1873) L.R. 8 C.P., at p. 357.
(5) (1921) 2 K.B., at p. 612.
(6) (1933) L.R. 60 Ind. App. 266, at p. 271.
(7) (1922) 2 A.C. 541; 31 C.L.R. 27.

in *Ferrier* v. *Stewart* (1) *Isaacs* J. held that an indorser of a promissory note was precluded from showing that at the time when he placed his signature upon the back of the note it was payable to the order of a payee who had not indorsed it and that there had been no delivery of the note. The ground on which his Honour put the estoppel simply was that the parties adopted a conventional basis for the transaction. They impliedly agreed that, when the promissory note should be completed by other indorsements, it should be assumed to have been issued and indorsed by the parties in due order. From this assumption the indorsee was not permitted to depart, although all parties had been aware of the actual state of affairs.

In the application of these principles to the facts of the present case the two points at which, in my opinion, the tributers fail are the absence of any assumption that the lode or the ore fell within the tribute and the absence of any representation, agreement or conventional understanding on the part of the company. The company at no time represented that the ore body to the west formed part of the vein subject to the tribute. On the contrary, in April 1935, it distinctly objected that it was not. The tributers may have entertained a perfectly honest and perhaps a very strong opinion that they were entitled to work the lode. But they knew that they must depend on the correctness of such opinion and could make no assumption. If at the end of the discussion on 29th May 1935 the general manager had taken up the position that, although the company considered that the tributers had gone beyond the vein allotted to them, yet the company was content to treat the place where they were working as if it fell within the tribute agreement, then there would have been ample foundation for a conventional estoppel. By adopting such a common assumption as the basis of their working relations, the parties would each be precluded from denying it for any purposes arising out of the tribute agreement. But I think the general manager took up the contrary position. He was unwilling to bring about an entire cessation of work under the tribute agreement, but at the same time he made it clear that he was not prepared to accept the claim of the tributers and that

(1) (1912) 15 C.L.R. 32, at pp. 44-46

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the company did not give up its objection. In other words, as I have already said, the discussion ended with both parties still standing upon what they respectively conceived to be their rights.

But, although the facts do not, in my opinion, give rise to an estoppel which would afford an answer to the entire complaint of the company, they do provide considerations which have important consequences upon the relief to which the company is entitled. Up to the time when the responsible officers of the company became aware that the tributers were working outside the tribute no difficulty arises. Up till then the company received the ore, treated it and accounted for the tributers' share of the gold content, all in the belief that it was bound to do so and that the tributers had won the ore from a place they were entitled to mine. Up till then no reason is to be found for excluding from any damages recoverable by the company for trespass any part of the company's actual loss, even although the payment by the company itself to the tributers of their share of the gold might enter into that loss. While the company remained ignorant of the source of the gold in respect of which it made the payments, to pay over the money was a natural consequence of the tributers' trespass and of their delivery for treatment under the agreement of what may be called the company's own ore. In the same way there was no reason against the company's obtaining the equitable remedy of an account of the net proceeds received by the tributers in respect of their share of the gold, if the company elected to take that remedy. For such payments would have been made under a mistake of fact and would be recoverable at law as well as being subject to an account in equity as the proceeds of the ore wrongfully mined. But, after the company, by its responsible officers, became aware of the source of the ore, the matter wears a different complexion. There is a question whether if a mine owner receives ore for treatment as under a tribute agreement he can, on discovering that the ore was won outside the tribute, refuse to pay over the share to which otherwise the tributers would have been entitled. This question must be considered. But, in the meantime, let it be assumed that the company was at liberty to assert its equitable right to the entire proceeds of the ore unlawfully taken from its mine and to refuse to make payments in respect of

the gold contents of such ore. On that assumption every payment was voluntary which the company made to the tributers with knowledge that the ore came from outside the tribute. The company, after 8th May 1935 at all events, was in the position of a man who disputes a claim of right made against him but is unwilling to take the course of withholding payments growing out of the claim. Payments made in respect of a disputed liability are voluntary and cannot be recovered either directly or as damages representing part of a loss. On the hypothesis stated, the company was entitled to the money and its failure to insist upon its rights to do so cannot be considered a natural consequence of the trespass. It is a voluntary act based upon its unwillingness to act at once upon the objection that the ore was won from a caunter lode. Moreover, on the hypothesis stated, the equitable remedy of an account is met, not only by the voluntary character of such payments, but by the whole conduct of the company in failing to insist upon its objection, and, under cover of its objection, in allowing the tributers to go on. Equitable remedies are not available to parties who, though openly claiming a right at the time, so conduct themselves as to make it unfair and inequitable to go back and rip up a transaction or dealing in order to enforce the right against those who have infringed it. Such cases do not often arise, because, as a rule, those who act inconsistently with a claim of which they have warning must do so at their peril. But the doctrine of laches is flexible in its application and operates to create a bar where failure to insist upon a known right is coupled with circumstances making it inconsistent with fair dealing afterwards to seek a remedy for its infringement. In the well-known statement in *Lindsay Petroleum Co.* v. *Hurd* (1), besides cases of conduct equivalent to waiver, Sir *Barnes Peacock* mentions cases where there is no waiver of the remedy but the conduct and neglect of one party has put the other party in a situation "in which it would not be reasonable to place him if the remedy were afterwards to be asserted." A most important circumstance in such cases is the hazardous or speculative nature of the transaction upon which that other party is engaged. An account of the profits of the tributers would mean that they were made constructive trustees

(1) (1874) L.R. 5 P.C. 221, at p. 240.

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for the company of gold won by operations the results of which could not be known beforehand. The tributers were carrying on work of a speculative nature while the company was not only lying by but actively assisting in what it claimed was a violation of its rights. Its active assistance consisted in the supply of compressed air, tools and the like and the acceptance and treatment of the ore. Though it is true that the tributers knew that it was standing on its rights and not intending to waive them, yet the company was plainly unwilling to act on the claim or objection it propounded and stop the tributers' operations. The question is: Could it hold this position and wait and then, if the gold won made it worth while doing so, seek to make the tributers hand over their share of the proceeds? When the circumstance is added that the company, having those proceeds in its hands, chose to pay them over to the tributers, I think the answer must be that it is a course which the company cannot adopt and then afterwards obtain equitable relief to regain the money. In *Clegg* v. *Edmondson* (1) partners in a mining venture who had been excluded by the other members kept on asserting their rights but for many years took no steps to enforce them. Because such an enterprise requires a large and uncertain outlay to make it productive and because its profitable character depends on such contingencies, their continual claim was held insufficient to keep alive the rights of the excluded partners (Cf. *Clarke and Chapman* v. *Hart* (2)).

In dealing with the remedies available to the company, I have assumed so far that the mere acceptance of the ore for treatment under the tribute agreement would not have precluded the company from withholding payment to the tributers of half the gross proceeds of the gold therein contained. If this hypothesis were wrong, the validity of the conclusion would be affected, if not destroyed. For, in that case, the payments made by the company to the tributers would not be voluntary but compulsory and the only stages at which the company had any choice would have been in the supply of air and tools and in the acceptance of the ore for treatment. For practical reasons its power of choosing whether it would or would

(1) (1857) 8 DeG.M. & G. 787; 44 E.R. 593.

(2) (1858) 6 H.L.C. 633; 10 E.R. 1443.

not accept ore would be somewhat unreal. But, in my opinion, the hypothesis is correct. On the true construction of sec. 145c of the *Mining Act* it does not, I think, exclude the right of a mine owner to retain the proceeds of ore which is absolutely his own. It does not overreach the equitable right to the proceeds of ore which has been delivered as under the agreement for treatment but without any authority conferred by the agreement. Nor do I think that, because the tributers delivered the ore as under the agreement, the company was precluded by legal or equitable estoppel from setting up what was the truth, namely, that the agreement gave the tributers no right either in the ore or in its gold content.

My conclusion, therefore, is that the company was entitled to damages or an account of profits in respect of workings of the western lode outside the tribute up to some time, not later than 8th May 1935, when the company became aware of the fact that the tributers were outside the tribute and that in respect of workings after that time it was not entitled to any account, or to damages other than damages for actual injury to the mine as distinguished from damages for loss in respect of the gold contained in the ore.

According to the finding of the Warden, only nominal damages were suffered by the actual working of the mine outside the tribute. That finding has not been attacked and it is unnecessary to pursue that head of damages.

In considering what order should be made by this court on the view of the matter I have stated, it must be borne in mind that we can do only what, on an appeal from the Warden's Court, the Supreme Court might do. The appellant complains that the order of *Northmore* C.J. ought not, in the absence of an appeal by the company, to have taken the account further back than the order of the Warden took it, viz., 1st June 1935. As I think that no account should have been ordered after a time which at latest is 8th May 1935, the question whether an account can now be ordered in respect of the earlier period wears a different aspect to me. Upon the view of the case which commends itself to me the Warden's order is wrong in ordering an account in the later period and to that extent should have been set aside. The question then arises what could the Supreme Court substitute for it. The power given to the Supreme

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Court by sec. 286 (1) of the *Mining Act* appears to me to be ample to enable the substitution of that relief which a respondent ought to have obtained in respect of a cause of action or head of claim upon which he has rightly succeeded before the Warden, when the appellant successfully complains that the relief actually awarded is misconceived so that the Warden's order so far as it relates to that cause of action or claim must be set aside.

In the present case the Warden granted an injunction against future trespass or workings outside the tribute. In the order of the Supreme Court no such injunction was included. The respondent has not cross-appealed on that ground. Apparently the fact that the injunction had been omitted escaped notice. Perhaps an injunction for the future is not really necessary. But I think that, exercising the power which the Supreme Court possesses to make an order varying the decision of the Warden, this court should substitute for the account ordered by the Warden an account up to the time when the company by its proper officers became aware of the fact that the tributers were winning the ore from a lode outside the agreement. Unless the tributers desire an inquiry as to the actual date, I would fix it at 1st May 1935, a date which on the evidence must be sufficiently near the truth. No account can be satisfactorily taken without a declaration describing the place where the lode or ore body goes outside the parcels of the tribute.

In my opinion the appeal should be allowed with costs and the order of the Supreme Court discharged.

McTIERNAN J. I agree with the judgment of my brother *Dixon*, and it so elaborately states the reasons for the conclusion arrived at that it is unnecessary to add anything.

Appeal allowed with costs. Order of Supreme Court discharged. In lieu thereof appeal to the Supreme Court from the Warden's Court allowed without costs. Decision or order of the Warden's Court set aside except as to costs and the following order substituted therefor :—(1) *Declare that the plaintiffs were not and are not entitled under the tribute agreement, dated* 1*st June* 1934, *in the pleadings*

mentioned to mine or win ore from the lode or vein delineated or indicated on the plans of the 229 *feet level, the* 329 *feet level, the* 315 *feet level and the* 400 *feet level of the defendant's mine put in evidence on the hearing of the plaint and marked exhibits "S" and "U" as striking approximately west from the main lode or vein there delineated or indicated, except so much of the first mentioned lode or vein as lies within a distance of twenty feet from the centre of such main lode or vein which said distance is shown on such plans at the said levels by broken red lines.* (2) *Declare that the plaintiffs have in fact mined and worked the first-mentioned lode or vein outside such distance of twenty feet and ought to be restrained from further working or mining the same.* (3) *Declare that the plaintiffs are liable to account to the defendants for the amount received by them up to* 1*st May* 1935 *in respect of ore or the assayed value of the ore and the gold extracted from the ore so mined or won after deducting all costs and expenses paid or incurred by the plaintiffs in opening up, mining, breaking, winning and bringing to the surface such ore and any other cost or expense properly referable on apportionment or otherwise to the winning of such ore and raising it to the surface and delivering it to the defendant for treatment.* (4) *Order that an account be taken accordingly before the Mining Registrar.* (5) *Declare that, by reason of their knowledge of the source of the ore together with other circumstances, the appellants are not entitled to any such account in respect of the period after* 1*st May* 1935 *and before* 21*st August* 1936. (6) *Declare that the defendants are not entitled by reason of the conduct of the plaintiffs in so mining a lode or ore outside the tribute agreement to cancel the same.* (7) *Order that further consideration of the matter in the Warden's Court upon the report of the Mining Registrar be reserved and that all parties be at liberty to apply to the Warden's Court as they may be advised.*

Solicitor for the appellants, *L. D. Seaton.*
Solicitors for the respondent, *O'Dea & O'Dea.*