

in connection with it. They had constructed a dam upon elevated ground, at a considerable height over the neighbouring creek, at a cost of several hundred pounds; and they had likewise erected, at a cost of several other hundreds, machinery of an experimental character, for the purpose of raising water from the creek to the dam. Experience proved that this machinery required many improvements to make it work efficiently and to a profit. But the capital of the owners was exhausted. They had borrowed money on the claim and had incurred other debts. The property was sold under execution for some of these latter debts, and the appellant Harris, with his partner Morrison, were the purchasers. For some time before this sale, the claim itself, owing to these pecuniary embarrassments, was unworked, although efforts were being made to get the machinery perfected. Lewis, who was one of the owners at that time, was in charge of the ground, but was doing no actual work on it. The ground itself was neglected, and the pegs and trenches, directed by regulation 2, section 1, to be maintained as boundaries, were not carefully kept up. Nothing in the case turned upon the non-working of the claim, as this could only be a ground for an application to the Warden for a forfeiture, which was never made, but the failure to keep up the boundaries was material. The sale alluded to took place under a Resident Magistrate's distress warrant against Lewis and his partner Mears, who were then owners. It was made on the 22nd of March, 1871. For several months before the sale Lewis had failed to take out a miner's right, and it did not appear that his partner Mears at any time held one. There was some evidence that he did not. The fact that Lewis for several months of his ownership did not hold a miner's right was another material fact in the case; and the legal consequences of it excited most controversy in the discussion. The sale having taken place to Harris and Morrison, Lewis was left in charge of the claim as a hired workman. Lewis was at that time, and had been up to the present, the holder of a miner's right, so also were Harris and Morrison, the purchasers. Many arrangements had to be made after the purchase. Among others, the claim had to be redeemed from a mortgage of £160, with accumulated interest. This money being paid off, contracts had to be made for perfecting the machinery, and this was in progress.

About the 27th of April, the respondents Labes, and his mate Molzow, looking out for ground came upon this claim, considered it likely ground, and were proceeding to examine it when they met Lewis, who told them that the claim belonged to Harris and Morrison. They asked to be shown the boundaries. Two of the four pegs were still standing, and were shown to them. The others could not then be seen, but were ultimately found—one of them lying among the grass, and the other bent down nearly flat. The trenches were nearly obliterated. Labes and his mate said that these were not legal boundaries, and that they had not been properly maintained; that they had a right to treat the ground as open to be taken up, and they thereupon proceeded to mark out an ordinary claim of two men's ground. Next day they came again, and marked out an extended claim of two men's ground (two acres), comprising the ordinary claim, and posted the usual notices of application to the Warden for such extended claim. Harris had meantime been negotiating with some third party for the sale of his portion of the claim, at the price of £150, but the proposed purchaser broke off on hearing of the proceedings of the respondents. Harris immediately entered a complaint in the Warden's Court against the respondents for their interference with his ground, laying his damages at £100. This case came to be heard on the 22nd of May. The interference complained of was the marking out of the ground, and the damages were estimated chiefly on the loss of the sale by Harris, in consequence of the claim thus set up by the respondents. At the hearing the respondents justified their conduct on two grounds. They contended that as Lewis had held no miner's right for some months before his interest was sold under the execution—and it seemed to have been taken for granted that his partner Mears was in the same position—their title (respondents contended) had altogether lapsed, and the ground had become free Crown land, open to the first comer; and as they had been in the same position before they executed the mortgage just alluded to, any miner's right that might have been held by the mortgagee made no difference in the material points. They likewise contended that as the boundaries were not maintained as required by regulation 2, the title had lapsed on this ground also; and they further contended that to sustain an action, injury and damage must concur, and that in this case there had been no damage—that the only interference complained of, the marking out of the ground, was no damage to the complainants. The Warden dismissed the complaint, founding his judgment mainly on the fact that in the time of Lewis's ownership, there was an interval of several months during which Lewis was not the holder of a miner's right. He was of opinion that the break discovered in the chain of miners' rights, two links back in the devolution of title, had made the ground at that time once more Crown land—*publici juris*—open to any person holding a miner's right; and that as no new title had been afterwards acquired, either by marking out an ordinary claim, or by an application for an extended claim, the ground was still in the same condition when the respondents marked it out. His opinion on the subject was so decided that he did not advert much to the matter of boundary. Against this decision the plaintiff below had taken the present appeal, which raised a question of the utmost importance to the mining community, as seriously affecting all titles held under miners' rights. All the evidence produced before the Warden had been again repeated before him, probably with much greater fullness.

Two questions lay before him for decision—the effect of the break in the chain of miners' rights, and the effect of the imperfect maintenance of the boundaries. He proceeded to say that if he were obliged to give a decision based on the break in the miners' rights, he would have reserved the point of law for the Supreme Court, as he considered the point was so important that it should not rest upon the decision of an inferior Court, especially when that Court would be giving its decision with great hesitation, as he must have done. He had put it to the appellant's counsel whether he would waive his point respecting the imperfect maintenance of the boundaries, and the effect of that imperfect maintenance on the question of damages, letting the case rest upon the break in the miners' rights—thus enabling him (the Judge) to refer the latter point to the Supreme Court; but counsel did not think it was the interest of his client to do so. Thus, on the view which he (the Judge) took of the whole case, it became impossible for him to have the question as to the miner's right decided on the authority of the Supreme Court, and he would not unnecessarily give any decision upon it. He would not, however, avoid pointing out the principal points that seemed to him capable of being raised on