H. D. REID AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

W. H. R. COLLISTER AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

1919
*Oct. 17.
*Oct. 21.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Mines and mining—Certificate of improvements—Application for—Affidavit—Cessation of work—"Mineral Act," R.S.B.C. 1911, c. 157, ss. 49, 52, 56, 57.

The respondents, owners of mining claims under the "Mineral Act," complied with all the requirements of section 57 except the filing of the affidavit required by sub-section (g), which they were deterred from doing by the statement of the mining recorder that an adverse action had been begun and notice thereof had been filed with him, and this being so, the respondents were not in a position to swear that they were "in undisputed possession" of the claim. The respondents waited for such adverse claimants to proceed with their action and allowed two or three years to elapse without doing further work or making further payment on the claim. Section 49 provides that "if such work (annual work) shall not be done, * * * the claim shall be deemed vacant and abandoned, any rule or law of equity to the contrary notwithstanding."

Held, that, under the circumstances of this case, the respondents were relieved from the necessity of doing further work on the claims pending the issue of the certificate of improvements and that they were not subject to section 49.

Judgment of the Court of Appeal ((1919), 47 D.L.R. 509; [1919] 3 W.W.R. 229), affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Gregory J. and maintaining the respondent's, plaintiff's, action.

The material facts of the case and the questions in

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) (1919), 47 D.L.R. 509; [1919] 3 W.W.R. 229.

1919
REID
v.
COLLISTER.

issue are fully stated in the above head-note and in the judgments now reported.

Mayers for the appellant.
Bass for the respondent.

IDINGTON J.—Not without some doubts but largely because of such, I am unable to assent to the allowance of this appeal.

It seems to me that, on the evidence adduced, the curative sections of the Act relevant to the several questions raised, as to all but one question, which I am about to refer to, meet and answer them effectively.

The one question about which I have doubts is whether the learned trial judge was right in holding that because the respondents failed to meet the formal requirements of the "Mineral Act," they forfeited all their rights, and their claims are to be *ipso facto* deemed vacant and abandoned.

I agree so far with the learned trial judge that the language of section 49 is so plain and expressive that it requires a very exceptional case (such as this I fancy is) to render it possible to hold otherwise than he does.

It seems to me that having regard to a consideration of the purview of the statute, whilst it may be possible rightly to hold as the judgment of the learned trial judge does, that when there has in fact arisen default in a literal compliance with the requirements of the Act, no matter how induced, forfeiture must ensue. Yet the Act should not be so construed, when the omission to comply with its terms has been brought about, (through no fault of the claimant, who has had done everything to entitle him to a grant, save in the mere formal requirements of application therefor, being compiled with, and the acts necessary therefor have

been prevented), by the wrongdoing of some malicious person rendering it impossible to make the necessary affidavit in its entirety.

When we find, as herein, that the mere issue of a writ setting up an adverse claim, but never served though made to appear of record in the office of the Mining Recorder, is virtually held to suffice to frustrate an honest claim, I think we must pause and consider, as the Court of Appeal has done, whether the purpose and scope of the Act imperatively requires a declaration of forfeiture instead of any other alternative.

Indeed, the learned trial judge suggests other alternative courses were open to the respondents, but either of those suggested involved a possible, and probable, loss of time that would work a forfeiture if the section is to be taken in the sense declared or an expenditure never contemplated as part of the policy of the legislature before the claimants' right to a grant was recognized.

I cannot think the legislature ever in fact desired to produce such grossly unjust and absurd results and they should be averted if a more reasonable construction is open to us.

I am inclined rather to adopt one or other of the alternative views presented in the opinion judgments delivered in appeal and now called in question, and hence must refuse to allow this appeal.

Indeed my doubts, to put the matter no higher, preclude my assenting thereto.

I think there is, for the respective reasons assigned by Mr. Justice Martin, nothing in the other objections taken in support of the appeal herein. In some of such objections which are taken I do not agree with appellants' view of the facts.

I would dismiss the appeal with costs.

1919
REID
v.
COLLISTER.
Duff J.

DUFF J.—The question of substance presented for determination on this appeal is by no means free from difficulty; but after a full examination of the considerations presented by the appellant I think the better view is that expressed in the judgment of the Chief Justice in the court below. With his reasons I concur.

The appeal should be dismissed with costs.

ANGLIN J.—I concur in the opinion of the majority of the learned judges of the Court of Appeal as to the construction and effect of section 52 of the "Mineral Act" and as to the sufficiency of what was done by the plaintiffs as a compliance with its requirements. But, without further consideration, I am not prepared to accede to Mr. Justice Martin's view as to the scope and effect of section 56, which, if correct, would seem to render section 52 quite superfluous. The presence in the Act of the latter section indicates that the existence of the conditions which render section 56 operative does not *per se* suspend the obligations imposed by section 48. On the other questions in issue between the parties I accept Mr. Justice Martin's conclusions.

The appeal should be dismissed with costs.

BRODEUR J.—The plaintiffs, respondents, were the recorded owners of the claim in question; and if they have not filed with the Mining Recorder an affidavit shewing the performance of the conditions required by the "Mineral Act," it is due to the fact that an adverse action had been instituted against them by the appellants and that they had to swear in that affidavit that their possession was not disputed.

The appellants, however, did not proceed with their action before the courts; but they located mineral

claims upon the same land of which the respondents were the recorded owners.

The present action has been instituted by the respondents to restrain the defendants, appellants, from interfering with their rights.

I entirely agree with the view expressed by the learned Chief Justice of the Court below.

The appeal should be dismissed with costs.

MIGNAULT J.—The only serious question in this case is whether, in view of section 49 of the "British Columbia Mineral Act" (R.S.B.C. 1911, ch. 157), the mineral claims of the respondents must be deemed to have been vacant and abandoned. The learned trial judge considered this section as being conclusive against the respondents and expressed his regret at having to dismiss their action, the more so as in his opinion, and in this opinion Mr. Justice Martin of the Court of Appeal fully concurred, the appellants had simply "jumped" the respondents' claims. In the Court of Appeal, however, the objection based on section 49 did not prevail with the majority of the court and the learned trial judge's judgment was reversed.

The whole question is as to the effect of the "Mineral Act." And if section 49 does not stand in the way of the respondents, the appeal must be dismissed.

After consideration, I have come to the firm conclusion that section 49 does not deprive the respondents of their claims, for I cannot doubt that they had applied, which they could do verbally, to the Mining Recorder for a certificate of improvements. They were fully entitled to this certificate, having done and recorded work or made payments to the amount of $500.00 on each claim. And when they applied for

1919
REID
v.
COLLISTER.
Mignault J.

the certificate of improvements, the Mining Recorder informed them that an adverse claim had been filed and that the filing of that adverse claim stopped all proceedings in the matter of obtaining a certificate of improvements. The respondents had complied with all the requirements of section 57, with the single exception of the affidavit required by sub-section (g) of that section. But inasmuch as that form of affidavit obliged the affiant to swear that he was in undisputed possession of the claim, it was impossible for the respondents to make this statement on account of the filing of the adverse claim and the Mining Recorder told them that they could not make the affidavit.

Under these circumstances my opinion is that in view of the making of the application for a certificate of improvements, and while this application was pending, section 52 exempted the respondents from the obligation of doing any more work or paying any more money in connection with their claims. The result is that section 49 does not apply and the respondents' claims are not to be deemed vacant and abandoned.

Had I any doubt as to this result I would not, in the words of Chief Justice Macdonald, give the appellants, whose conduct places them in a somewhat unenviable position, the benefit of this doubt, but I really can feel no doubt after reading the judgment of the learned Chief Justice and the very complete and convincing opinion of Mr. Justice Martin.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Courtney & Elliott.*
Solicitors for the respondents: *Bass & Bullock-Webster.*