F. J. CLEARY AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

L. J. BOSCOWITZ (DEFENDANT) ..... RESPONDENT.

1902

*Mar 11,
*May 15.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Mining law—Location—Certificate of work—Evidence to impugn.

A certificate of work done on a mining claim in British Columbia is conclusive evidence that the holder has paid his rent and can only be impugned by the Crown. *Coplen* v. *Callahan* (30 Can. S.C.R. 555) and *Collom* v. *Manley* (32 Can. S. C. R. 371) followed.

C. believing that the statutory work had not been done on mining claims, and that they were, therefore, vacant, located and recorded them under new names as his own and brought an action claiming an adverse right thereto.

Held, affirming the judgment of the Supreme Court of British Columbia (8 B. C. Rep. 225) that evidence to impugn the certificate of work given to the prior locators was rightly rejected at the trial.

PRESENT :—Sir Henry Strong, C.J. and Sedgewick, Girouard, Davies and Mills, J J.

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APPEAL from a decision of the Supreme Court of British Columbia (1), affirming the judgment at the trial by which the action was dismissed.

The action was dismissed by the trial judge because it was admitted that the plaintiffs could only succeed by shewing that the defendant's certificate of work was issued without the full amount of work required by the statute having been performed or by impeaching the certificate on some other ground, and the learned judge was of opinion that evidence to that effect could not be received, the Attorney-General not being a party to the action. This ruling was affirmed by the full court and whether or not it was right was the only question to be decided on the plaintiffs' appeal to this court.

J. A. Russell for the appellants. The appellants adopted the proceedings provided by sect. 37 of the "Mineral Act" for asserting their adverse right and contend that section 28 does not override sections 36 and 37. Section 37 provides the only remedy open to an adverse claimant; *Hand* v. *Warren* (2); *Gelinas* v. *Clark* (3).

Section 28 has no bearing on "adverse proceedings" taken under sections 36 and 37. It has to do only with disputes between the party obtaining a certificate of work and the government in matters of irregularities affected by fraud, to protect the free-miner against his own admissions or irregularities in the same way that section 53 of the Act protects him from the omissions or irregularities of the government or its officials. This view of section 28 is confirmed in *Coplen* v. *Callahan* (4), per Gwynne J. at page 557.

The appellants also contend that work, as well as the certificate of work is necessary in order to keep alive the title to any mineral claim. Here the irregularity happened at the dates of the certificates of work, not

(1) 8 B. C. Rep. 225.
(2) 7 B. C. Rep. 42.
(3) 8 B. C. Rep. 42.
(4) 30 Can. S. C. R. 555.

previously thereto. This section is imperative that work on the claim itself shall be done. It is not sufficient that the Mining Recorder shall be made to believe by a false or insufficient affidavit that work has been done where, as a matter of fact, no work has been done. The certificate of work granted and recorded under such circumstances is merely evidence that the affidavit mentioned in this section has been produced to the Mining Recorder. He is not given any option to accept or to reject the affidavit. The section requires that the free-miner shall satisfy the Mining Recorder, by an affidavit of himself or his agent, that such work has been done. The Mining Recorder cannot require corroborative evidence or otherwise question the affidavit produced. He must accept it, true or false. It is not intended that the mere paper certificate shall take the place of actual work on the claim itself; work done and certificate recorded are essential to a proper compliance with section 24. Failure to do work on the claim itself goes to the root of the free-miner's title. Section 28 deals only with irregularities and does not preclude the appellants from challenging a vital essential of respondent's title or anything which makes his title void, not merely voidable. If respondent's title is a nullity because he did not do the work required to make his title, then section 28 does not deal with nor affect his position. *Coplen* v. *Callahan* (1). See also *Manley* v. *Collom* (2), per Drake J. at page 162.

Further, inasmuch as the respondent failed to give affirmative evidence of his title to the ground in question judgment should not have been given in his favour. See section 11 of the Mineral Amendment Act, 1898; also *Schomberg* v. *Holden* (3), and *Dunlop* v. *Hanley* (4).

(1) 30 Can. S. C. R. 555.
(2) 8 B. C. Rep. 153.
(3) 6 B. C. Rep. 419.
(4) 7 B. C. Rep. 2.

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The plaintiffs proved at the trial that they had complied with all the requirements of title, viz: (1) free-miners' licenses; (2) a proper location; (3) recording claims; (4) doing and recording necessary work within the year.

Partlo v. *Todd* (1), and *Johnson* v. *Kirk* (2), are analogous cases.

Davis K.C., for the respondent. It is not contended that section 28 will validate or give life to a mineral claim which, by reason of its location or otherwise, was illegal and void *ab initio*, but that, given a good and valid mineral claim originally, the title to such mineral claim is conclusively assumed to be perfect up to and including the date of the record of the last certificate of work preceding the time when the dispute in question arose, which in this case, would be the date of the location of the subsequent mineral claims, that is, the "Regina," "Royal" and "Royal Extension." The section certainly cures everything in the shape of an irregularity, and the *bonâ fide* omission to do a full hundred dollars worth of work, through mistake or otherwise, would be nothing more than an irregularity. On the other hand, if no work was done or an insufficient amount, deliberately and *malâ fide*, that would amount to fraud and, under the section, it would certainly be necessary for the Attorney-General to be made a party to the suit. The British Columbia authorities on the subject are mentioned in the judgment of Mr. Justice Martin. The same question to a certain extent, arose, but was not settled, in the case of *Coplen* v. *Callahan* (3).

The judgment of the court was delivered by:

SEDGEWICK J.—The mineral claims "Empress," "Victoria" and "Queen" were located and recorded

(1) 17 Can. S. C. R. 196. (2) 30 Can. S. C. R. 344.
(3) 30 Can. S. C. R. 555.

by the defendant, in September, 1898. The plaintiffs, in the year 1900, located and recorded, over the same ground, the alleged mineral claims "Royal," "Royal Extension" and "Regina." At the time this action was brought, all the claims had obtained certificates of work, but the certificates in respect to the latter three were later in point of date than the others. On the 2nd of August, 1900, the defendant applied for a certificate of improvements in respect of the three claims he owned, under section 36 of the Mineral Act as amended by chapter 33 of the Acts of 1898, secs. 7 and 8.

The (plaintiffs) appellants, claiming an adverse right and to be in possession of the ground or claims referred to in this application, commenced this action in the Supreme Court of British Columbia, under the provisions of said section 37, as amended by section 9 of of the "Minerals Acts Amendment Act, 1898," to determine the question of the right of possession to said claims, and otherwise enforce their adverse right.

The (plaintiffs) appellants, pleaded in their statement of claim that the locations made by them were on vacant and unoccupied land of the Crown.

The (defendant) respondent, in his statement of defence denied this fact and set up that he had obtained and recorded two certificates of work, each, on the "Empress," "Victoria" and "Queen" mineral claims, dated respectively, the 26th of September, 1899, and the 24th of July, 1900.

In reply, the appellants pleaded that these certificates of work were wrongfully and fraudulently obtained, for the reason that the work required by section 24 of said Mineral Act, as a condition precedent to such certificates of work being obtained, had not been done on the claims.

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At the trial of the action, the learned Chief Justice refused to hear any evidence impeaching the defendant's certificates of work or shewing that they had been issued without the full or any amount of work being done. It was stated by plaintiffs' counsel at the trial that the only question raised was as to the sufficiency of the work on which the certificates were obtained, it being impliedly admitted that, at the time of the location by the defendant, the "Empress," "Victoria" and "Queen" were valid existing mineral claims. The Attorney-General was not a party to the action, and the Chief Justice dismissed it with costs.

On appeal to the Supreme Court of British Columbia, the judgment of the learned Chief Justice was affirmed and the plaintiffs' appeal dismissed with costs. The appeal to this court is from that judgment.

The decision on this appeal depends upon the construction to be placed upon section 28 of the Mineral Act, which is as follows:

> Upon any dispute as to the title to any mineral claim, no irregularity happening previous to the date of the record of the last certificate of work shall affect the title thereto, and it shall be assumed that, up to that date, the title to such claim was perfect, except upon suit by the Attorney-General based upon fraud.

In *Coplen* v. *Callahan* (1) we dealt with this section and, in the case of *Collom* v. *Manley* (2), argued in the February term of this court, we endeavoured to place a more definite construction upon it. If we are right, then this appeal must fail, the late learned Chief Justice being right in refusing to receive evidence tending to shew that the certificates of work held by the defendant did not truly represent the facts but were fraudulently procured and void.

This case, it seems to me, affords an interesting illustration of what the legislature was aiming at

(1) 30 Can. S. C. R. 555. (2) 32 Can. S. C. R. 371.

when they passed it. In the present case, on the day when the plaintiffs made their attempt to "jump" (the word used in the courts below), the claims, the defendant was their duly located and recorded owner, holding the same as the tenant of the Crown By the statute, the rental payable by him to the Crown was the annual payment of $100 for five years, or the annual doing of work on the ground for five years. Upon the full payment of $500 or the doing of $500 worth of work, he becomes entitled to a certificate of improvements, which, in its turn, entitled him to a patent converting his estate for years into an estate in fee simple, as absolute a title as the law could give him. During this period the plaintiffs, having no interest in the property, imagined that the tenant Boscowitz, had not paid his rent to his landlord, and, coming to the conclusion that the claims had thereby become vacant, located and recorded them under new names as their own. One of the objects (I can imagine many others), which the legislature here had in view, was to prevent any legal effect being given to a transaction of that character. A certificate of work once given by the Crown's officer was made conclusive evidence to the world that the tenant had paid his rent; it was made irrefutable and indisputable except upon attack by the Crown itself. So that, as it was admitted in the present case that, at the time mentioned, the respondent had a valid title and had not abandoned it, the paper title held by the appellants and all locations and payments and work made or done by them were absolute nullities forming no basis for the adverse claim set up.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Russell & Russell.*

Solicitors for the respondent: *Davis, Marshall & Macneill.*