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*Mar. 27, 28, 29.

*May 2.

THOMAS W. KIRKPATRICK AND JAMES MUNROE (PLAINTIFFS) ... } APPELLANTS;

AND

JAMES McNAMEE, PERSONALLY AND AS EXECUTOR OF MARY McNAMEE, DECEASED, (DEFENDANT) .. .. } RESPONDENT.

ON APPEAL FROM THE TERRITORIAL COURT OF THE YUKON TERRITORY.

New trial—Contradictory evidence—Wilful trespass—Rule in assessing damages—Practice—Adding party—Reversal on appeal.

In an action for damages for entry upon a placer mining claim and removing valuable gold bearing gravel and dirt, the trial judge found the defendants guilty of gross carelessness in their work, held that they should be accounted wilful trespassers, and referred the cause to the clerk of the court to assess the damages.

The referee adopted the severer rule applicable in cases of fraud in assessing the damages. The Territorial Court *en banc* reversed the trial judge in his findings of fact upon the evidence.

Held, reversing the judgment appealed from, that the trial judge's findings should be sustained with a slight variation, but that the referee had erred in adopting the severer rule against the defendants in assessing the damages, and that his report should be amended in view of such error.

Semble, that the record and pleadings should be amended by adding the plaintiff's partner as co-plaintiff.

Held, per Taschereau C.J. dissenting, that although not convinced that there was error in the judgment of the trial judge which the court *en banc* reversed, while at the same time it did not appear that there was error in the judgment *en banc*, yet the latter judgment should stand, as the court *en banc* should not be reversed unless the Supreme Court, on the appeal, be clearly satisfied that it was wrong.

APPEAL from the judgment of the Territorial Court of Yukon Territory reversing the judgment of Mr. Justice Craig, at the trial, and dismissing the plaintiffs' action with costs.

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Idington JJ.

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The plaintiffs sued to recover damages sustained through trespasses committed by the defendants on fractional creek placer mining claim No. 20A, below discovery, on Hunker creek in the Yukon Territory, of which the plaintiffs were grantees from the Crown at the time the action was brought. The trespasses complained of consisted of the removal of the pay-dirt and gold-bearing gravel from a portion of the claim, covering an area of 964 square feet, and the washing up by the defendants and converting to their own use of the gold therein. The action was tried in June, 1903, before Mr. Justice Craig, who found that the defendants committed the trespasses complained of, and that they did so wilfully and deliberately, or at all events, that such gross carelessness was shown by them in the operations from which these trespasses resulted that they must be accounted wilful trespassers. At the trial it was agreed between counsel, with the approval of the court, that the issue being tried should not bear upon the quantum of damages, but that that should be referred to a referee later. Pursuant to this arrangement the judgment directed a reference to the clerk of the Territorial Court to take an account of the plaintiffs' damages in accordance with the declarations as to the rights and liabilities of the parties set out therein. The referee made his report fixing the plaintiffs' damages at $14,993, for which amount and costs judgment was entered. From this judgment and report the defendants appealed, and the Territorial Court *in banco*, Craig J. dissenting, reversed the judgment at the trial and dismissed the action. The plaintiffs now appeal.

Aylesworth K.C. and *Walsh K.C.* for the appellants.

Auguste Noël for the respondent.

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The Chief Justice.

THE CHIEF JUSTICE (dissenting).—I would dismiss this appeal. Not that I am convinced that there was error in the judgment of the trial judge, which the court *in banco* reversed, but because I am not convinced that there is error in the judgment *in banco* appealed from.

The appellant, I am free to confess, has succeeded in creating considerable doubt in my mind as to its correctness, but I cannot reverse upon a doubt. That judgment must stand if the appellant has not convinced us that it is wrong, and that, as far as I am concerned, he has failed to do. It may be that, had I formed part of the court *in banco*, I would have affirmed the judgment of the trial judge, because, though doubting, I would not have been clearly satisfied that he was wrong, but it is the judgment of the court *in banco* that the appellant asks us to reverse, and we cannot reverse it, though doubting, if not clearly satisfied that it is wrong.

In *Hale* v. *Kennedy* (1), it was held in that sense, that:

> The rule generally followed by the courts is not to review the finding of the judge of first instance where his decision depends upon a balance of testimony; still, if the court *in banco* has reversed that finding, this court must be satisfied upon appeal that the court *in banco* was wrong, before it will interfere with that judgment.
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> We are concerned directly, (said Lord O'Hagan, in *Symmington* v. *Symmington* (2) an analogous case,) not with the judgment of the Lord Ordinary, (the trial judge,) but with that which overruled it; and the latter, we ought to affirm unless we are satisfied of its error,—

followed in this court in *Demers* v. *The Montreal Steam Laundry Company* (3).

GIROUARD J.—I would allow this appeal and restore the judgment of the trial judge *in toto*, but, as the majority of the court has come to the conclusion to

(1) 8 Ont. App. R. 157. (2) L. R. 2 Sc. App. 424.
(3) 27 Can. S. C. R. 537.

send the case back to re-assess the damages, I will not dissent.

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DAVIES J. concurred with Idington J.

NESBITT J. concurred with Idington J.

IDINGTON J.—This appeal should be allowed and the judgment of Mr. Justice Craig restored upon amendment to be allowed.

A careful consideration of the judgments of Mr. Justice Dugas and of Mr. Justice Macaulay and the evidence they respectively lay stress upon, and the rest of the evidence supporting defendants' view of the case, leaves no doubt in my mind but that the learned trial judge is right in finding that the defendants had trespassed.

Much of the confusion that exists, arises from attaching too much importance to some answers of the witness Hovland, which if taken as literally and mathematically correct, may furnish an apparently good foundation for what the majority of the court below have built thereon. Such an interpretation of the witness's evidence is not warranted by it as a whole. He did not, though placing his finger at point "E" in Exhibit H, intend to convey the meaning that there was at that point, as distinct from shaft No 3 on same plan, another shaft with timber in it, and lagging leading from it towards or across the line dividing 21 from fraction 20*a*. If he had been for a moment so understood by court and counsel, we would have had much more relating to this point E than we have been favoured with. The witness, quite honestly, put himself, by his speaking of the centre of the cut and distances he gave from that point, at another place than he would be, consistently

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with holding him as referring to shaft No. 3 in much of his evidence. It is to my mind just one of those obvious errors that occur daily at the trial of cases where a witness, however much he tries, may not be able to be absolutely correct in regard to either time or space, and especially when dealing with maps or plans which many intelligent men often cannot comprehend.

The witnesses have been so numerous and the holes they refer to have been in their stories multiplied so many times beyond what appear on the plans before us, as to render the case somewhat troublesome. The learned trial judge, and counsel, I have no doubt, understood what each witness referred to, and when the witness happens to speak of "this" and "that," "here" and "there," without specifically identifying on the plan the point referred to, he was not confusing anybody at the trial. This furnishes to my mind (in addition to the usual reasons for so doing) abundant reason for here accepting the judgment of the learned trial judge rather than that in appeal. I think it is not at all a case where there is any need for assuming wholesale perjury to have existed in any view one might take of the case.

But there is needed in the trial judge of a case like this that keen discrimination that weighs the evidence by tests that separate, as the trial proceeds, the results of the accurate from the inaccurate witness, the candid, truthful one from the one less so. I am, therefore, slow to suggest that the learned trial judge may have erred in his finding wilful carelessness.

It is, however, by assuming that in the main the witnesses tried to give us the truth that we are here enabled so to reconcile nearly all the evidence, with the result arrived at. In doing so we have to assume defendant and his witnesses, with one or two excep-

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tions, honest, and if honest there cannot be that wilful carelessness imputed to the defendants that the law requires before assessing damages on the scale which has been adopted. I think the milder rule suggested in *Trotter* v. *Maclean* (1) should be adopted and the defendant should be allowed in any event the full cost of getting out the gold in addition to the mere cost of washing after the earth was dug out. I think, too, the referee has been influenced by the severer rule having been adopted, into treating this piece of ground as exceptionally rich as compared with all the surrounding ground, apparently thinking the defendant should be punished with a very high average.

I offer no opinion as to the proper result other than to say I am of opinion the result arrived at is unreasonable and excessive, and is not supported by the evidence.

It is not clear that in law the respondents who raised by their statement of defence the issue of title are precluded by their failure to press it at the trial from now taking the objection they have done as to Bonner not being a party. At all events the defendants are entitled to have the doubt removed and Bonner, in whose name (with that of his partner) as one of the partners the license stood when some of the trespasses were committed, bound by the recovery herein. I think, therefore, he should be added as a party plaintiff. He seems to have assigned his rights to his partner Kirkpatrick. That assignment may not so have transferred his right of action as to vest it in Kirkpatrick. But evidently he intended to sell all his interests to the remaining partner, and that sale carried with it the right to use his name.

(1) 13 Ch. D. 574.

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The case has been tried as if the defendants were liable therein for any of the trespasses that the licensees or any of them might have a right to complain of, and to give effect to this result let the suggested amendment be made; to carry out this let the court below amend the record and the referee then re-assess the damages on basis indicated.

The appeal then should be allowed with costs.

See *Harper* v. *Godsell* (1) at p. 428; *Dawson v. Great Northern and City Railway Co.* (2); *May* v *Lane* (3); *Colonial Bank* v. *Whinney* (4); *Job* v. *Potton* (5); *Caldwell* v. *Stadacona Fire & Life Insurance Co.* (6).

Appeal allowed with costs.

Solicitor for the appellants: *C. W. C. Tabor.*

Solicitors for the respondent: *Noël & Noël.*

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(1) L. R. 5 Q. B. 422.
(2) [1904] 1 K. B. 277.
(3) 64 L. J. Q. B. 236.
(4) 11 App. Cas. 426.
(5) L. R. 20 Eq. 84.
(6) 11 Can. S. C. R. 212.