F. D. CREESE AND OTHERS (DEFENDANTS) .... APPELLANTS;

1903 *Dec. 2, 3. *Dec. 9.

AND

TOBIAS FLEISCHMAN AND OTHERS (PLAINTIFFS) .... RESPONDENTS.

ON APPEAL FROM THE TERRITORIAL COURT OF YUKON TERRITORY.

Appeal—Discretion—Amendment—Formal judgment.

The Supreme Court should not interfere with the exercise of discretion by a provincial court in refusing to amend its formal judgment. Such amendment is not necessary in a mining case where the mining regulations operate to give the judgment the same effect as it would have if amended.

APPEAL from a decision of the Territorial Court of the Yukon Territory refusing to amend the certificate of judgment on application of the defendants.

The action between plaintiffs and defendants was to define the boundary between the plaintiffs' hill-claim and the defendants' creek-claims, under sections 10 and 13 of the placer mining regulations of 18th January, 1898. The plaintifts claimed that this should be a line along the surface and established by surface indications. The defendants claimed that this line should be a line along bed-rock established where bed-rock rose three feet above the lowest general level of the opposite gulch.

The reasons for judgment of the trial judge established the defendants' claim and the judgment as drawn up contained the following paragraph:

" And it is also adjudged and declared, that the side boundaries of said defendants' gulch-claims, as against the plaintiffs, are lines three feet higher than the lowest general level of the gulch existing on the surface of said claims at the time of plaintiffs' staking."

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*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Nesbitt and Killam JJ.

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The application was to correct the certificate of judgment so that the date thereof might read the 5th day of August, 1901, instead of the 26th day of August, 1901, and by inserting the words "along bed-rock" between the words "lines" and "three," in the above clause of said certificate

After this judgment was entered, one Berry bought into the plaintiff's claim knowing, as he admitted at the trial, of the alleged defect in the judgment and wishing to take advantage of it. The Territorial Court refused the amendment as Berry was not before them. The plaintiffs appealed.

J. Travers Lewis for the appellants. As to the power of the court to amend, see *Wilding* v. *Sanderson* (1); *Norris* v. *Lord Dudley Stuart* (2).

Berry was not a *bonâ fide* purchaser and the amendment may be made in his absence. See *In re Swire* (3); *Halton* v. *Harris* (4); *Stewart* v. *Rhodes.* (5).

Russell K.C. and *Haydon* for the respondents. This is purely a question of procedure with which this court will not interfere. *Toronto Railway Co.* v. *Balfour* (6); *Attorney General of Ontario* v. *Scully.* (7).

Moreover, it was a matter for the exercise of discretion by the Territorial Court. *Ryan* v. *Fish* (8).

The amendment cannot be made in the absence of Berry. *Hatton* v. *Harris* (4); *Gorton* v. *Hall* (9).

THE CHIEF JUSTICE.—I would dismiss this appeal (assuming that we have jurisdiction to entertain it), on the ground that a motion, like this one, to a court asking that court to vary, add to, or alter its judgment as entered so as to make it determine what the court intended to determine is particularly within the pro-

(1) [1897] 2 Ch. 534.
(2) 16 Beav. 359.
(3) 30 Ch. D. 239.
(4) [1892] A. C. 547.
(5) [1900] 1 Ch. 386.
(6) 32 Can. S. C. R. 239.
(7) 33 Can. S. C. R. 16.
(8) 9 Ont. P. R. 458.
(9) 11 W. R. 281.

vince of that court, and its ruling on such a motion should not be interfered with. I refrain from adding any other remark, as Berry is not a party to this record and his contentions cannot be passed upon in his absence.

GIROUARD J.—In this case, involving a point of local practice, we feel that we cannot interfere, especially as that part of the judgment sought to be rectified cannot cause any injury to the appellants. By that judgment the Territorial Court of the Yukon Territory has found that the appellants' claim was "a gulch" within the meaning of the regulations governing placer mining in the provisional district of the Yukon, approved by Order in Council of 18th January, 1898. Regulation 10 defines the nature, size and boundaries of such a gulch claim, which cannot be ignored by the court or the parties. There was not in our view any necessity for the motion to amend and it follows that third parties could not set up any claim involving a different interpretation in this case from that which would be applied as between the parties themselves, nor attempt to take possession of an area which, as the court below determined, was to be fixed by clause 10 of regulations. The appeal is dismissed, but under the special circumstances of the case and as the respondents opposed the motion to rectify and occasioned unnecessary costs, it is dismissed without costs in this court and in the court appealed from. Good faith demands such a conclusion even as to costs in the court below.

SEDGEWICK, NESBITT and KILLAM JJ. concurred for the reasons stated by Girouard J.

Appeal dismissed without costs.

Solicitors for the appellants: *Woodworth & Black.*

Solicitor for the respondents: *Herbert E. Robertson.*