J. FRANK COLLOM (DEFENDANT).....APPELLANT; 1902

AND *Mar. 5, 6, 7.
*May 15.

MARK MANLEY (PLAINTIFF).....RESPONDENT

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Mining law—Location of claim—Approximate bearing—Mis-statement—Minerals in place—B. C. "Mineral Act."

Accuracy in giving the approximate bearings in staking out a mineral claim is as necessary in the case of a fractional claim as in any other.

A prospector in locating and recording his location line between stakes No. 1 and No. 2 as running in an easterly direction whereas it was nearly due north does not comply with the statute requiring him to state the approximate compass bearing and his location is void. *Coplen* v. *Callahan* (30 Can. S.C.R. 555) followed.

Before a prospector can locate a claim he must actually find "minerals in place." His belief that the proposed claim contains minerals is not sufficient.

Judgment of the Supreme Court of British Columbia (8 B. C. Rep. 153) reversed,

APPEAL from a decision of the Supreme Court of British Columbia (1), affirming the judgment at the trial in favour of the plaintiff.

The facts of the case are as follows:—

One Robert Cooper on the 16th day of August, 1897, located the "Arlington Fraction" mineral claim, lying between the "Arlington" and "Burlington" mineral claims in the Slocan Mining Division of West Kootenay District, British Columbia, in the name of Charles A. Haller, who was then a free miner of British Columbia.

* PRESENT:—Sedgewick, Girouard, Davies and Mills, JJ.

(1) 8 B. C. Rep. 153.

1902

COLLOM v. MANLEY.

Subsequently and on the 29th day of November, 1897, while the "Arlington Fraction" was still a valid claim, the said Charles A. Haller filed a written abandonment of said location with the Mining Recorder, being the proper officer in that behalf.

On the same day, but subsequent in time to the filing of such abandonment, the said Robert Cooper relocated practically the same ground as had been covered by the "Arlington Fraction" for one John Halpin, who was then a free miner of British Columbia, calling it the "Native Silver Fraction" mineral claim.

On December 2nd, 1897, John Halpin by Bill of Sale conveyed a one-half interest in said "Native Silver Fraction" mineral claim to the said Charles A. Haller, and the same was duly recorded on the 4th day of December, 1897.

Haller did and recorded the necessary assessment work on said claim for the years ending 30th November, 1898, and 30th November, 1899, and on the 19th day of July, 1900, while still a free miner, sold his one-half interest in the claim to the Plaintiff, Manley, who was then a free miner of British Columbia.

Manley then did and recorded the necessary assessment work on the claim for the year ending 30th November, 1900.

On or about the 25th day of April, 1900, the defendant, Collom, entered upon and staked, or caused to be staked, the ground covered by said claim, calling it the "Arlington No. 1 Fraction," and caused work to be done and recorded on said claim, and applied for a certificate of improvements for same in the name of the "Arlington No. 1 Fraction." Collom had subsequently purchased a half interest therein from the then owner, Robert Cooper.

This action was then brought to adverse Collom's application.

The trial judge found—

That the "Native Silver Fraction" mineral claim was a good, valid and subsisting claim, and that the defendant Collom, had no interest in the lands covered thereby or the minerals contained therein except such interest as he had acquired by purchase in said claim, and that the plaintiff as a recorded owner of a half interest was entitled to possession as against the "Arlington No. 1 Fraction," and ordered that the "Arlington No. 1 Fraction" and the record thereof be set aside in so far as they affected the "Native Silver Fraction" miner claim.

From this decision the defendant appealed to the Supreme Court of British Columbia which dismissed the appeal and affirmed the judgment of the trial udge, Mr. Justice Drake dissenting.

The defendant now appeals from this decision.

Davis K.C. and *W. A. Macdonald K.C.* for the appellant, cited *Coplen* v. *Callahan* (1); *Callaghan* v. *George* (2); *Richards* v. *Price* (3); *Atkins* v. *Coy* (4); *Cranston* v. *The English Canadian Co.* (5); *Dunlop* v. *Haney* (6); *Clark* v. *Haney* (7); *Pavier* v. *Snow* (8); *Harmer* v. *Westmacott* (9); *DeGroot* v. *Van Duser* (10); *Langton* v. *Hughes* (11); *Madden* v. *Connell* (12); *Peters* v. *Sampson* (13); *Lawr* v. *Parker* (14).

Galliher for the respondent, cited *Gelinas* v. *Clark* (15); *Waterhouse* v. *Liftchild* (16); *Caldwell* v. *Davys*

(1) 30 Can. S. C. R. 555; 7 B. C. Rep. 422.
(2) 8 B. C. Rep. 146.
(3) 5 B. C. Rep. 362.
(4) 5 B. C. Rep. 6.
(5) 7 B. C. Rep. 266.
(6) 7 B. C. Rep. 1.
(7) 8 B. C. Rep. 130.
(8) 7 B. C. Rep. 80.
(9) 6 Sim. 284.
(10) 20 Wend. 390.
(11) 1 M. & S. 593.
(12) 30 Can. S. C. R. 109.
(13) 6 B. C. Rep. 405.
(14) 8 B. C. Rep. 223.
(15) 8 B. C. Rep. 42.
(16) 6 B. C. Rep. 424.

1902

COLLOM v. MANLEY.

(1); *Cranston* v. *English Canadian Co.* (2); *Peters* v. *Sampson* (3); *Granger* v. *Fotheringham* (4).

The judgement of the court was delivered by—

SEDGEWICK J.—In the case of *Coplen* v. *Callahan* (5), in considering the effect that should be given to the following sections of the British Columbia Mineral Act, viz., secs. 16 (*g*), 27 and 28, we held that every direction of sec. 16 was imperative that any deviations from or irregularity in respect to such directions were fatal to the location unless they came within the curative provisions of sub-section (*g*); that these were the only statutory provisions that could be invoked in favour of an otherwise invalid location; that section 28 did not include within its purview any area that had not been duly located but only those that had, and in consequence had become "mineral claims"; that the "irregularities" referred to must be such as occurred in the interval between the final location and registration of the mineral claim and the date of the record of the last certificate of work; and that, notwithstanding the certificate of work produced in that case, an inquiry might be had as to whether the provisions of section 16 had been so disregarded by the locator as to make his location invalid.

Nor did it appear to us that our interpretation of the section deprived it of its proper effect. It had not, so far as I know, ever been contended that section 28 in effect had repealed section 27. A prior duly located claim could not be displaced during the first year of its existence, by a subsequent location over the same ground and the production of an alleged certificate of work, even although the original locater and owner

(1) 7 B. C. Rep. 156.
(2) 7 B. C. Rep. 266.
(3) 6 B. C. Rep. 405.
(4) 3 B. C. Rep. 590.
(5) 30 Can. S. C. R. 555.

had no certificate at all. Nothing so monstrous as that could have been dreamed of, and we thought that section 28, notwithstanding these limitations upon its alleged universality and to the efficiency of its certificate as well, did fulfil a useful purpose, and particularly in the following way.

Assume a valid mineral claim. Its owner before a Crown grant issues is a tenant of the Crown. He must pay rent to the Crown. The legislature has permitted him to pay this rent either in money or work and to receive from a duly appointed agent of the Crown a certificate of work or payment. This really amounts to a receipt from the Crown of the tenant's annual rental. Whether the work was done or not, the money paid or not, was the business of no one except the Crown. And so it was, I think, reasonably enacted that whenever a dispute arose in which the payment of rent was concerned, the certificate of the Crown's officer as to the payment of the rent was to be conclusive against the world (the Crown included) unless the Crown, upon suit by the Attorney-General upon ground of fraud, had taken proceedings and succeeded in setting it aside.

In that case we, in effect, adopted the reasoning of Mr. Justice Drake in his judgment in the Court below, an opinion that was followed by Mr. Justice Martin in his dissenting judgment in *Gelinas* v. *Clark* (1), and again by Mr. Justice Drake in his dissenting opinion in the Court below in this case.

It may be that our late lamented brother Gwynne did not, as fully as he might, elaborate the propositions I have herein set out, but they are the conclusions to which we all eventually came when our judgment was pronounced. This being the case, I do not consider it proper to discuss further as to whether we

(1) 8 B. C. Rep. at p. 42.

1902

COLLOM v. MANLEY.

Sedgewick J.

were right or wrong in *Coplen* v. *Callahan* (1). We have so decided and that is an end of it.

The question remaining to be determined is as to whether the defendant made and recorded a valid location of his alleged mineral claim, a question to be considered altogether independently of section 28.

The grounds upon which it was contended that the location in dispute was illegal are stated by Mr. Jussice Irving in giving the judgment of the court below, as follows:

> The irregularities complained of are,—
>
> (1) That the plaintiff in locating and recording the "Native Silver" described his location line between No. 1 and No. 2 (posts) as running in an easterly direction, whereas in truth and in fact it was very nearly due north. I do not think it can be denied that this is a very serious omission to comply with the statute, which requires the locator to stake the approximate compass bearing.
>
> (2) The second point is that one or more of the Free Miner's licenses under which the plaintiff derived his title was issued by a person without proper authority.
>
> (3) That the locator of the "Native Silver" did not in fact find mineral in place, and
>
> (4) That the "Native Silver" location was a location over an abandoned claim, by the same people, and was illegal under section 32.

For the purposes of this appeal it is necessary to consider the first and third of these grounds only.

Now, as to the first, I must again refer to *Coplen* v. *Callahan* (1). In that case the requirements of the statute, sec. 16, were not complied with inasmuch as the approximate compass bearings were not correctly marked upon the initial post and that the departure from the true bearing was so great that it was

> calculated to mislead other persons desiring to locate claims in the vicinity. Sec. 16 (*g*).

We therefore held the location void. The violation of the statutory requirements is greater in the present

(1) 30 Can. S. C. R. 555.

case. Even the learned judge whose statements of the points in dispute I have just now set out, says,—

> the plaintiff in locating and recording * * his location line between Nos. 1 and 2 as running in an easterly direction, whereas in truth and in fact it is very nearly due north * * (was guilty of) a very serious omission to comply with the statute, which requires the locator to stake the approximate compass bearing.

So that we must hold the location invalid unless there is a difference in fact between this case and *Coplen* v. *Callahan* (1).

The only difference contended for is that, this being a fractional mineral claim, inaccuracies in the markings and setting up of the initial post are not so necessary as in ordinary cases. I am unable to see the difference. The particular rule as to the staking of the approximate bearings was intended for the benefit not of the locator who had already staked his claim, but of the prospector searching for precious metals in the wild lands of the Crown. He finds a post, it appears to be a post connected with a fractional claim. He knows nothing of the boundaries of the regular claims in the vicinity. He has found mineral in place and he wants to place his stakes in a place where haply he may find vacant land. True, he may search the mountains for the stakes of the unbroken claims. He must beware of staking there. He then returns to the first found post. He will regulate his staking by the bearings stated there. That and that only is the best evidence upon which he can rely. He acts accordingly—plants his stakes, locates his claim in what he thinks is vacant land, and in the end finds that he has been the victim of his preceding prospector.

The rules as to staking apply as well to fractional as to other claims; unless these are observed strictly, in the case of fractional claims, the confusion is still

(1) 30 Can. S. C. R. 555.

1902

COLLOM v. MANLEY.

Sedgewick J.

worse confounded and the persons for whom the rules were made lose the benefit of them and that benefit accrues to those who violate them. I am therefore of opinion that, on this ground, the disputed location is invalid.

Then as to the third ground:—The Mineral Act requires that no one can locate a claim unless he has actually discovered *mineral in place* on the claim; secs. 16 (*c*) and 16 (*g*). The curative provision expressly excludes from its operation a locator who has not made that discovery. The evidence satisfies me that he did not. It is true in his application to the mining officer he swore he did, but subsequently upon examination the question being put to him:

Did you discover mineral in place?

he refused to answer it categorically. The answer was,

I found mineral in places, I found float, lots of float in place,

and eventually the furthest he would go was

I am satisfied it was mineral in place.

That is in effect "I saw mineral in places, I saw float and that satisfied me it was mineral in place." The statute requires much more than the belief—the "satisfaction" of the locator; it requires a discovery in fact. The evidence fails to establish that. On this point as well as on the other I adopt the dissenting judgment of Mr. Justice Drake in the court below.

I am of opinion that the appeal should be allowed with costs and that judgment should be entered in the Supreme Court as prayed for in the defendant's statement of defence, with all costs in the court below.

Appeal allowed with costs.

Solicitors for the appellant: *Macdonald & Johnson.*

Solicitors for the respondent: *Galliher & Wilson.*