HARVEY M. PAULSON (PLAINTIFF).....APPELLANT ; 1902

AND *Oct. 28, 29. *Nov. 17.

JAMES BEAMAN AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Mines and minerals—Adverse claim—Form of plan and affidavit—Right of action—Condition precedent—Necessity of actual survey—Blank in jurat—R. S. B. C. (1897) *c.* 135, *s.* 37—61 *V. c.* 33, *s.* 9 (*B.C.*)—*R. S. B. C. c.* 3, *s.* 16—*B. C. Supreme Court Rule* 415 *of* 1890.

The plan required to be filed in an action to adverse a mineral claim under the provisions of section 37 of the "Mineral Act" of British Columbia, as amended by section 9 of the "Mineral Act Amendment Act, 1898" need not be based on an actual survey of the location made by the Provincial Land Surveyor who signs the plan.

The filing of such plan and the affidavit required under the said section, as amended, is not a condition precedent to the right of the adverse claimant to proceed with his adverse action.

The jurat to an affidavit filed pursuant to the section above referred to did not mention the date upon which the affidavit had been sworn.

Held, that the absence of the date was not a fatal defect, and that, even if it could be so considered at common law, such a defect would be cured by the "British Columbia Oaths Act" and the British Columbia Supreme Court Rule 415 of 1890.

Judgment appealed from (9 B. C. Rep. 184) reversed, Taschereau J. dissenting.

APPEAL from the judgment of the Supreme Court of British Columbia, (1), reversing the decision of the trial court, (Martin J.) and dismissing the plaintiff's action with costs.

The facts of the case and questions at issue on this appeal are stated in the judgments now reported.

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

(1) 9 B. C. Rep. 184.

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S. S. Taylor K.C. for the appellant.

Davis K.C for the respondents.

TASCHEREAU J. (dissenting).—I am of opinion that the judgment of the full court of British Columbia should be affirmed. The appellant's action was rightly dismissed upon the ground that the map or plan required in an adverse action as a condition precedent by section 37 of the "Mineral Act" of British Columbia as amended in 1898 and 1899 was not filed by the appellant.

The contention that any surveyor can upon his oath of office make a map to be used in a court of justice of any lot of land that he has never seen seems to me untenable. Why would he be required to make a plan at all, if, as Mr. Justice Irving calls it, a picture by one of the parties would have been sufficient to all intents and purposes, if the appellant's contention prevailed. An order from the court to a surveyor to make a plan of certain premises necessarily implies, it seems to me, that the surveyor must make that plan from actual survey or personal inspection of the premises. I would think that this enactment implies the same thing.

I utterly fail to see why the intervention of a surveyor is at all required by the statute, if all that he has to do is to copy one of the parties' sketches and sign it. That sketch would have been as good for the purposes of the statute, without the surveyor's re-copy and signature. When the statute requires a plan made by the surveyor it must mean that the surveyor must make an actual survey. Otherwise his intervention would be futile.

I would dismiss the appeal with costs.

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SEDGEWICK J. concurred in the judgment allowing the appeal for the reasons stated by His Lordship Mr. Justice Davies.

GIROUARD J.—This appeal should be allowed with costs for the reasons given by Chief Justice Hunter (1).

DAVIES J.—Two questions only were argued on this appeal and both arise out of the proper construction to be given to the thirty-seventh section of The Mineral Act, ch. 135 R. S. B. C. (1897), as amended by section 9 of ch. 33 of the statutes of 1898.

The respondents, (defendants in the action), contend (1) that under the above section it is necessary for the plaintiff bringing the adverse suit or proceedings to file with the mining recorder a map or plan made by a provincial land surveyor and based upon a prior and actual survey made by him; (2) that the jurat of the adverse affidavit filed with the recorder along with the plan not having been dated makes the affidavit bad and there has therefore been no compliance with the statute.

The learned judges in the courts below were equally divided in opinion, the Chief Justice, who held that a previous personal survey by the land surveyor who made the plan was not necessary and that the absence of a date in the affidavit was not fatal, agreeing with Mr. Justice Martin, who had tried the adverse action, on both points, while Mr. Justice Irving and Mr. Justice Walkem held that a previous personal survey was necessary to make the plan a compliance with the statutory requirements.

I concur in the judgment of the learned Chief Justice and think, for the reasons given by him, that

(1) 9 B. C. Rep. 184, at p. 185.

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this appeal should be allowed. I think it is clear from the wording of the section itself and from the object the Legislature evidently had in view, that no previous actual survey by the land surveyor was contemplated, but only the filing of a plan properly made by one presumably competent to make it, namely, a land surveyor. The filing of the adverse writ and the affidavit and plan proved nothing and settled nothing. They simply showed to the mining recorder the particular claim the plaintiff was making so far as the claim he was adversing or contesting was concerned, and obliged the mining recorder to stay his hand and withhold from the defendants whose claim was being adversed or contested, the certificate of improvements he was demanding under the thirty-sixth section of the same Act.

These papers, then, amounted to nothing more than a caveat which stayed the recorder's hands until judgment in the adverse suit was delivered and filed with him. All this, I think, is quite clear from an examination of the two sections.

It is not necessary to set out the section at length. Its material words, so far as this controversy is concerned, are contained in the amendment of the year 1898. Previous to that amendment, if any person desired to "adverse" or contest a claim being made by any miner for a certificate of improvements, which was practically the equivalent of a Crown Grant and could only be impeached for fraud, he had, within certain prescribed times, to begin an action in the Supreme Court of British Columbia and file a copy of the writ in the action with the mining recorder of the district. The amendment required that he should also

file an affidavit to be made by the person asserting the adverse claim and setting forth the nature, boundaries and extent of such adverse

claim together with a map or plan thereof signed by a provincial land surveyor, and a copy of the writ, etc.

The section says nothing about an actual survey being made, while the previous section, where it was necessary to deal with the question of survey for the purposes of Crown Grants, most clearly requires an actual survey and sets out in detail how it shall be made. The affidavit of the boundaries is not required from the surveyor, but from the adverse claimant himself. To yield to the argument of the respondent, we would require to import into the section language which the Legislature has not used and impute to it an intention which I do not think it had.

With regard to the absence of the date from the jurat, I do not think that defect a fatal one. The test as to whether or not it is an affidavit is whether an indictment for perjury would lie upon it. The authorities are clear that it would and evidence as to the time when it was sworn would be admissible *aliunde*.

Even if the absence of the date were a fatal defect at common law in an affidavit, which I controvert, I think that The British Columbia Oaths Act (1) and rule 415 of the Supreme Court rules of 1890 of British Columbia cure the alleged defect.

The appeal should be allowed with costs in this court and in the court of appeal in British Columbia, and the case should be remitted back to the trial judge to complete the trial of the adverse action.

MILLS J.—This case arose from a controversy in respect to a mining claim in the Province of British Columbia. It is situated in the Ainsworth mining division of the province east of Duncan River and north of Dunn Creek.

(1) R. S. B. C. c. 3, s. 16.

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One John Hastie, on the 15th day of June, 1898, recorded a mineral claim called the "Iron Chief," in the office of the mining recorder at Kaslo. On the 26th day of August, 1898, he transferred to one P. A. Paulson an undivided one-half interest in the said claim, and Paulson by a writing dated the 30th of June, 1899, transferred to the plaintiff this undivided one-half interest in the claim. John Hastie was a free miner of the Province of British Columbia, and so also was P. A. Paulson. On the 22nd of May, 1899, the plaintiff obtained from the mining recorder at Kalso a certificate of work being done in compliance with the provisions of the Mineral Act for the year ending June the 15th of that year; and on the 15th of June, 1900, the plaintiff paid the mining recorder at Kaslo the sum of $100.

The defendants claim to be the owners of 38·68 acres of the lands and minerals comprised within the said claim which they maintain was located by the defendant Hendrix on the 16th of May, 1899, and recorded at Kaslo on the 1st of June following named the "Pearl" claim which embraces 38·68 acres of the mineral claim comprised within the claim known as the "Iron Chief." The plaintiff affirms that they applied for a grant within sixty days after the publication in the British Columbia Gazette of the notice of the defendants that upwards of 38 acres of the said "Iron Chief" mineral claim was comprised in the "Pearl" claim previously located by them.

The plaintiff maintained that the "Pearl" claim has always been an invalid location. It was not marked by two legal posts placed as near as possible on the line of the ledge or vein of mineral; that Hendrix did not blaze or mark the line as required by the Mineral Act; that he did not place a discovery post on the said claim; that he did not furnish the mining recorder

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the particulars required to be put on post Nos. 1 and 2; that he did not make affidavit that the legal notices and posts had been put on the claim, nor that the ground applied for was then unoccupied.

The defendants denied the plaintiff's allegations and affirmed that the "Iron Chief" mineral claim was a nullity. They also deny that the plaintiff's statement of claim discloses a cause of action against the defendants.

The case went down for trial before Mr. Justice Martin on the 19th of February last.

It was argued that section 37 of the Mineral Act as amended by the provincial legislature requires that a map or plan made by the Provincial Land Surveyor from a survey and measurement made upon the ground shall be filed with the recorder, and that, in this respect, there has been no sufficient compliance with the statute.

The judges of the British Columbia courts were equally divided upon this question; the Chief Justice and Mr. Justice Martin held that the plan must be prepared by the Provincial Land Surveyor, but he might do this from information supplied by the plaintiff, and it need not be from actual survey and measurements made by a competent land surveyor. Mr. Justice Irving, aud Mr. Justice Walkem held the contrary. Mr. Irving in his judgment said:

> A map to be made by a Provincial Land Surveyor, in my opinion, must be something more than a picture prepared by a Provincial Land Surveyor from data supplied to him by one of the parties to the action. The filing of such a document is not in my opinion within the spirit or letter of the Act.

The Chief Justice says:

> I am of opinion that it is not correct to say either that a plan must be based on a survey by a Provincial Land Surveyor, or that the filing of the affidavit and plan is a *sine qua non* of the right to prosecute the action.

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It is proper to look at the provisions of the statute in controversy. By section 36 of the Mineral Act (1) it is provided that, whenever the lawful holder of a mineral claim shall have complied with the following requirements, to the satisfaction of the Gold Commissioner, he shall be entitled to receive from the Gold Commissioner a certificate of improvements in respect of such claim unless proceedings by the person claiming an adverse right under section 37 of this Act have been taken. The lawful holder is required by sub-section (*b*) to have

> had the claim surveyed by an authorised Provincial Land Surveyor, who shall have made three plans of the claim, and who shall have accurately defined and marked the boundaries of such claim upon the ground, and indicated the corners by placing monuments or legal posts at the angles thereof, and upon such monuments or posts shall be inscribed by him the name and official designation of the claim, and the corner represented thereby, and who shall have on the completion of survey, forwarded at once the original field notes and plan direct to the Lands and Works Department, &c.

Now, under section 37, provision is made in respect to an adverse right, and it provides:

> In case any person shall claim an adverse right of any kind, either to possession of the mineral claim referred to in the application for ceatificate of improvements, or any part thereof, or to the minerals contained therein he shall within sixty days after the publication in the British Columbia Gazette of the notice referred to in section 36 hereof (unless such time shall be extended by the special order of the court upon cause being shewn) commence an action in the Supreme Court of British Columbia to determine the question of the right of possession or otherwise enforce his said claim, and shall file an affidavit to be made by the person asserting the adverse claim, and setting forth the nature, boundaries and extent of such claim, together with a map or plan thereof made and signed by a Provincial Land Surveyor, and a copy of the writ in said action with the Mining Recorder of the district, or mining division in which the said claim is situate within twenty days from the commencement of the said action, &c.

(1) R. S. B. C. (1897) ch. 135, s. 36.

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Now this proceeding is not for the purpose of acquiring any right, but for the purpose of setting out the limits of a mining location already surveyed under section 36, and for the purpose of indicating in what way, and to what extent, it is in conflict with some other claim. If there was no other prior survey under section 36 by one of the parties he could not under section 37 set up a claim adverse to one who had such claim by obtaining a surveyor to make a plan of a plot which had not been surveyed. It could never have been the intention of the legislature to permit one party who had made a plan but no survey to successfully set up a claim under the Mining Act against one who had made both.

The facts in this case not being fully disclosed in the papers before us, I am of opinion that the case should be remitted back to the trial judge to be tried out before him.

Appeal allowed with costs.

Solicitors for the appellant: *Taylor & O'Shea.*

Solicitors for the respondents: *McAnn & Mackay.*