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Oct. 31,
Nov. 3.
Nov. 17.

THE HARVEY VAN NORMAN COMPANY AND BALFOUR & COMPANY (DEFENDANTS) .... APPELLANTS;

AND

F. R STEWART & COMPANY (DEFENDANTS) ....

AND

N. F. McNAUGHT (PLAINTIFF) ....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Mines and minerals—Free-miner's certificate—Annual renewals—Special renewals—Vesting of interest in co-owners—Sheriff—Levy under execution—R. S. B. C. c. 135, ss. 2, 3, 9, 34—62 V. c. 45, ss. 2, 3, 4—R. S. B. C. c. 72, ss. 12, 24.

The sheriff seized the interest in mineral locations held by an execution debtor in co-ownership with another free-miner and, prior to sale under the execution, the debtor allowed his free-miner's license to lapse. A special certificate in the debtor's name was subsequently procured by the sheriff under the provisions of the fourth section of the "Mineral Act Amendment Act, 1899," and it was contended that the debtor's interest had thus been revived and re-vested in him subject to the execution.

Held, that upon the lapse of the free-miner's certificate the interest in question had, under the statute, become absolutely vested in the co-owner and could not thereafter be revived and re-vested in the judgment debtor by the issue of a special certificate.

Judgment appealed from (9 B. C. Rep. 131) affirmed, Sedgewick J. dissenting.

APPEAL from the judgment of the Supreme Court of British Columbia, en banc (1), affirming the judgment of Mr. Justice Irving on the trial of an interpleader

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

(1) 9 B. C. Rep. 131.

issue declaring that the plaintiff was entitled to the interest in the mineral claims in question as against the defendants.

On the 29th of March, 1901, a seizure was made by the sheriff on executions issued by a number of creditors against a free-miner named McKinnon of an undivided one-fourth interest in the "Hampton Group" of mining locations in the Slocan Mining Division, in British Columbia, held by McKinnon in co-ownership with the plaintiff, also a free-miner. McKinnon's free-miner's certificate lapsed, on failure of renewal, on the 31st of May, 1901, and the plaintiff claimed that, thereupon, McKinnon's interests became absolutely vested in him as the co-owner of the claims under the provisions of the "Mineral Act" as amended by the "Mineral Act Amendment Act, 1899." On the 5th of June, 1899, the defendants, through the sheriff, procured the issue of a special free-miner's license in McKinnon's name and it was claimed on their behalf that, thereby, the interest seized had become revived, under the provisions of section 4 of the Act of 1899, and re-vested in the execution debtor subject to the executions.

On the trial of the interpleader issue the plaintiff was declared to be the owner of the interests in dispute as against the defendants and this appeal is asserted against the judgment of the full court affirming that decision.

The questions raised on the appeal sufficiently appear from the judgments reported.

Peters K.C. and *Lennie* for the appellants.

S. S. Taylor K.C. for the respondent.

The judgment of the majority of the court was delivered by:

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TASCHEREAU J.—I would dismiss this appeal. It seems to me incontrovertible, first, that McKinnon's certificate lapsed on the thirty-first day of May, 1901; secondly, that thereupon (if section 9 means what it says), his interest in that claim became vested in McNaught, his co-owner, leaving the seizure out of question for the present; and thirdly, that McKinnon had not, thereafter, at any time, the right by taking a special free miner's certificate to re-vest the title in himself.

But, would contend the appellants, though McKinnon had lost all his interest in that claim, yet the previous seizure of it we had caused to be made in execution of our judgment against him had the effect of keeping that interest in him, or of giving us the right to revive it after it had ceased to exist, so that it never passed to McNaught, or, if it passed, it re-vested in us as execution creditors of McKinnon, upon our taking out a special free miner's certificate five days after the lapsing of his certificate. That contention cannot prevail, in my opinion.

Sertion 4 of the Act of 1899 enacts that any one who allows his free miner's certificate to expire may, under certain conditions, obtain a special free miner's certificate which will have the effect of reviving his title to all mineral claims which he previously owned, either wholly or in part, *except such as, under the provisions of the Mineral Act, had become the property of some other person at the time of the issue of such special certificate.*

Now, I entirely fail to see why the exception in that clause does not cover McNaught's case. Whenever any one else but the Crown (for if it applied to the Crown the enactment would be nugatory, a special certificate could never be issued), has by the operation of the statute become the owner of the title, the first

owner has no right to a special certificate and to a revival of his lost ownership. That is what the statute unequivocally says. Now, here, McNaught had, by the operation of the statute, become the owner of McKinnon's interest; consequently, the execution creditors had no more right to a special free miner's certificate than McKinnon himself would have had. They had the right to seize it at the time they did, but that right was a defeasible one, as their debtor's was. Their seizure could not give it more vitality than it had in their debtor's hands nor prolong its duration beyond the period affixed to it by the statute. He could not have given a non-defeasible lien; and the appellants, likewise, cannot have secured a non-defeasible lien by their seizure. Had they renewed the certificate on or before the thirty-first of May, assuming their right to do so, McNaught would have had no right to McKinnon's interest. But they did not do so, and that is not the case before us.

The words "wholly or in part" in section four of the Act of 1899, whatever construction they are susceptible of, cannot be read as defeating the clear, unambiguous enactment of section nine, that, when a co-owner's interest lapses by his failure to keep up his certificate on the thirty-first day of May of each year, his interest is not forfeited to the Crown, nor to be considered as abandoned, but that it shall, *ipso facto*, be and become vested in his co-owners.

The appellants in one branch of their arguments at bar did not seem to controvert the proposition that McKinnon's interest passed to McNaught, but they argued that this interest was then subject to their execution as a lien upon it. That is the same question over again. McKinnon's whole interest came to an end by the operation of the statute on the thirty-first of May. The eventuality provided for by the statute

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upon which his interest passed to McNaught having happened, the appellants who dad seized that interest, knowing then of this possible eventuality, had seized it subject to it. If the sheriff had sold, had it been possible, before the thirty-first of May, would not the purchaser's share, had he failed, as McKinnon did, to renew on the thirty-first of May, have passed to McNaught? Clearly so, it seems to me. Now why? Because the sheriff had sold a defeasible right. Then, how can it be argued that he had seized anything else than a defeasible right?

SEDGEWICK J. (dissenting).—I regret to have to differ from my brothers in this case. In my view the obvious, as often happens, has been overlooked and, as a consequence, the vested interests of the judgment creditors have, by an erroneous interpretation of the Mineral Act and the Execution Acts of British Columbia, been confiscated and transferred to the respondents who have paid nothing for them and who have no more right to them than I have.

I admit that under the Mineral Act no one but a free miner can take or hold an interest in a mineral claim, but I contend that under the Execution Act, a judgment creditor having levied and seized through the instrumentality of a sheriff under execution against the interest of a judgment debtor, (being then a free-miner,) in a mineral claim that creates an interest or ownership in a mineral claim which is not forfeited or destroyed or transferred to co-owners of other interests upon the subsequent loss of the judgment debtor's status by reason of his default in not renewing his free-miners' certificate.

Section nine of the Mineral Act, so far as it relates to this case is as follows:

9. Subject to the proviso hereinafter stated, no person or joint stock company shall be recognized as having any right or interest in or

to any mineral claim, or any minerals therein, or in or to any water-right, mining ditch, drain, tunnel or flume, unless he or it shall have a free-miner's certificate unexpired. And, on the expiration of a free-miner's certificate, the owner thereof shall absolutely forfeit all his rights or interests in or to any mineral claim, and all or any minerals therein, and in or to any and every water-right, mining ditch, drain, tunnel or flume which may be held or claimed by such owner of such expired free-miner's certificate, unless such owner shall on or before the day following the expiration of such certificate, obtain a new free-miner's certificate ;

Provided, nevertheless, should any co-owner fail to keep up his free miner's certificate, such failure shall not cause a forfeiture or act as an abandonment of the claim, but the interest of the co-owner who shall fail to keep up his free miner's certificate, shall, *ipso facto*, be and become vested in his co-owners *pro rata*, according to their former interests ;

Provided, nevertheless, that a shareholder in a joint stock company need not be a free miner, and, though not a free miner, shall be entitled to buy, sell, hold or dispose of any shares therein ;

And provided, also, that this section shall not apply to mineral claims for which the Crown grant has been issued.

And section 12 of the Mineral Act is as follows:

12. Any interest which a free miner has in a mineral claim before the issue of a Crown grant therefor, or in any mining property as defined in the Mineral Act, and any placer claim and mining property, as defined in the Placer Mining Act, may be seized and sold by the sheriff, under and by virtue of an execution against goods and chattels.

The Mineral Act does not give a definition of the word "owner" as many English Acts do, but it provides that the words "mineral claim" shall mean the "personal right of property or interest in any mine."

It does not appear difficult to me to place a reasonable and proper construction upon clause nine of the Mineral Act. It provides for two classes of cases. First, where a free miner having a sole and absolute interest in a mineral claim, no other person, partnership, or company having any title to or any incumbrance, charge or lien on, or other interest in it or any part thereof, allows his certificate to lapse. In that case, his absolute and undivided interest (or owner-

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ship, if you will), is forfeited to the Crown and the area, which theretofore formed the mineral claim, becomes again vacant land of the Crown. And, secondly, inasmuch as the Crown is not solicitous of co-ownership or co-tenancy or co-partnership or co-interests with any of His Majesty's denizens or subjects in a mineral claim, inasmuch as such joint interests might in many possible and even probable cases lead to conflict and litigation between the Sovereign and his people, it was provided that

> should any co-owner fail to keep up his free miner's certificate, such failure shall not cause a forfeiture or act as an abandonment of the claim, but the interest of the co-owner who shall fail to keep up his free miner's certificate, shall *ipso facto* be and become vested in his co-owners *pro ratâ* according to their former interests.

Now what, upon his loss of status—his ceasing to be a free miner—becomes vested in his co-owners? Only the *interest* in the claim which at the time of his loss of status he had—no more, no less.

What was that interest?

He had, previously, at the time of the levy and seizure by the sheriff before referred to, the part interest in the respective mineral claims as set out in the pleadings and evidence. That was the interest which, under section 12 of the Execution Act, the sheriff, by virtue of an execution issued against the goods and chattels of the judgment debtor—then the holder of the interests mentioned—seized and had a right in due course to sell.

(It was on the 29th of March, 1901, that the seizure was made, and on the 31st of May following the judgment debtor's free miner's license expired.)

The effect of the sheriff's seizure was to diminish the interest of the judgment debtor or to charge that interest with the amount of the judgments together with subsequent costs and expenses. The interest of

the judgment debtor became charged with these sums and if, after this but before his loss of status, he had voluntarily sold his interest, as he might have done, to a free miner, the purchaser could only take subject to the satisfaction of the judgment creditors' claims. So that the value of the judgment debtor's interest, after the seizure, was its value before the seizure minus these claims. And I submit that it was that lesser and diminished interest alone which under the ninth section of the statute passed to the co-owners *pro ratâ* in proportion to their former interests.

Then to whom does the defaulting co-owner's, (the judgment debtor's), interest go? I answer—To all co-owners of any interests in the claim. They may be absolute transferees or mortgagees or holders of any lien or charge on the lapsed interest of the disenfranchised free-miner. They each are owners of his former interest *pro ratâ* according to their former interests, and the judgment creditors will participate accordingly.

It was admitted at the argument that if, before the seizure, McKinnon had absolutely transferred his interest to a free-miner, it made no difference to the latter whether he, McKinnon, renewed or did not renew his certificate. It could I think be admitted, too, that had the sheriff sold to a free-miner before McKinnon lost his status the purchaser would take. Any other contention would be absurd. I, a free-miner, buy from the sheriff or a free-miner the latter's interest in a mineral claim. Am I, in order to hold my claim, obliged to see that the man whose interest I bought continued to be a free-miner for ever?

But it is said that McKinnon did not tranfer to anybody. I think he did. In this respect there is no difference between a voluntary and an involuntary alienation. His submitting to a judgment and execu-

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tion against him and to the sheriff seizing his interest is equivalent to a voluntary charging or hypothecation by him and, as the Execution Act authorises the sheriff to seize and sell his interest, it is just as if he had sold his interest to the sheriff and the sheriff, though not a free-miner, had sold it to one who was.

To conclude, I affirm that no interest which the holder of a mineral claim has, whether voluntarily or involuntarily parted with to another—entitled to receive it—can be deemed or considered, under section nine of the Mineral Act, as other than the interest of that other and, therefore, cannot be confiscated upon the transferee's loss of his status as a free-miner. Sections 32, 34, 43 and 50 of the Mineral Act all throw light on the questions I have here discussed.

Appeal dismissed with costs.

Solicitors for the appellants, The Harvey Van Norman Co.: *Tupper, Peters & Gilmour.*

Solicitors for the appellants, Balfour & Co.: *Elliott & Lennie.*

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