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*Oct. 16-18.
*Nov. 20.

CHARLES W. McMEEKIN (PLAINTIFF) AND LEOPOLD J. BOSCOWITZ (DEFENDANT) ..... APPELLANTS;

AND

IRA FURRY, ADMINISTRATOR OF THE ESTATE OF OLIVER FURRY, DECEASED, AND THOMAS T. TURNER, JOSEPH BOSCOWITZ, D. A. BOSCOWITZ AND F. M. LEONARD (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Location of mineral claims—Construction of contract—Fictitious signature—Unauthorized use of a firm name—Transfer by bare trustee—Statute of Frauds—R.S.B.C. (1897), *c.* 135, *ss.* 50, 130.

Where B., acting as principal and for himself only, signed a document containing the following provision: "We hereby agree to give F. one-half (½) non-assessable interest in the following claims" (describing three located mineral claims), in the name of "J. B. & Sons," without authority from the locatees of two of the claims which had been staked in the names of other persons, and without their knowledge or consent.

Held, affirming the judgment appealed from (13 B.C. Rep. 20) that, although no such firm existed and notwithstanding that two of the claims had been located in the names of the other persons, who, while disclaiming any interest therein, had afterwards transferred them to B., the latter was personally bound by the agreement in respect to all three claims and F. was entitled to the half interest therein.

A subsequent agreement for the reduction of the interest of F. from one-half to one-fifth, which had been drawn up in writing, but was not signed by F., was held void under the Statute of Frauds.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington and Maclennan JJ.

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APPEAL from the judgment of the Supreme Court of British Columbia(1) which allowed, with costs, an appeal from the judgment of Hunter C.J., at the trial(2), and ordered that the said judgment should be varied.

The action was brought by the appellant, McMeekin, against the other parties to this appeal, for a declaration of the interests of all parties to certain mineral claims, known as the "Empress," the "Victoria," the "Queen" and the "Barbara Fraction," and for the partition and sale of the same. It was tried before His Lordship Chief Justice Hunter, who rendered a judgment declaring that the defendant, appellant, Leopold J. Boscowitz, was the owner of the said claims and that the other parties were interested only in the net proceeds thereof, to wit, the plaintiff to 17½%, the defendant Furry (administrator of the estate of Oliver Furry, deceased), to 20%, the defendant Thomas T. Turner, to 12½%, the defendant D. A. Boscowitz to 20%, and the defendant F. M. Leonard, to 17½%, respectively.

From this judgment the defendant Furry appealed to the full court where his appeal was allowed with costs by the majority of that court, Martin J. dissenting, and it was declared that the defendant Furry, as administrator of the deceased Oliver Furry, was entitled to a one-half interest in the "Empress," "Victoria," and "Queen" mineral claims. From this judgment the present appeal is asserted by the plaintiff and the defendant Leopold J. Boscowitz.

The questions in issue on this appeal are stated in the judgment of His Lordship Mr. Justice Idington, now reported.

(1) 13 B.C. Rep. 20. (2) 13 B.C. Rep. 21.

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The Chief Justice.

Davis K.C. for the appellants.

Jos. Martin K.C. for the respondents.

THE CHIEF JUSTICE agreed that the appeal should be dismissed with costs.

GIROUARD J. also agreed that the appeal should be dismissed with costs.

DAVIES J.—I agree that the appeal should be dismissed with costs for the reasons stated by His Lordship Mr. Justice Idington.

IDINGTON J.—The late Oliver Furry located three several mining claims under the "Mineral Act," as follows: one called "The Queen" in the name of Joseph Boscowitz, the father of Leopold J. Boscowitz and D. A. Boscowitz and two others called "The Empress" and "The Victoria" respectively in each of the names of these two sons. This was done by Furry and without the knowledge of any of these parties. And the claims were recorded on the 30th of September, 1898.

He could not have them entered by law in his own name and they could have entered only one in each of their names as he did.

These locations were made at the instance of Turner, a fur trader, who was in the employment of the elder Boscowitz and paid for recording and surveying them but the labour of locating was done by Furry.

He had performed similar service for Turner previously on the basis of a fifty per cent. non-assessable

interest being his own by way of compensation for his labour, skill and knowledge, and the remainder being Turner's, as his share for advancing the moneys for these fees and promotion of sale or development.

I infer that when Furry at Turner's request made these locations in question herein he did so on the understanding that he would be given the same terms by the locatees named or whoever should assume their ownership or accept the fruits of his labour.

No one did so except Leopold Boscowitz.

Neither the father nor David would for themselves have anything to do with them. Leopold makes it quite clear that they did not accept and that he alone intended to accept for all these results of Turner's effort for their welfare and adopt Furry's labours in accordance therewith.

It would manifestly be a gross wrong to deprive Furry's heirs or representatives of what was at one time so clearly intended to have been his.

The substance of the transaction is that Leopold having deliberately accepted and adopted the three locations as his own dealt with Oliver Furry on that basis, and intending to bind himself in such form as would best carry out this purpose and secure to Furry the fifty per cent. he was entitled to as the reward of his labour, first signed, to carry out this purpose, and gave on the 10th November, 1898, the following:—

VANCOUVER, B.C., November 10th, 1898.

We, J. Boscowitz & Sons, do give to Oliver Furry one-half (½) non-assessable interest in any or all claims which he has or may locate for us.

J. Boscowitz & Sons.

and on the 20th May, 1899, gave the following:—

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We hereby agree to give to Oliver Furry one-half (½) non-assessable interest in the following claims on Howe Sound, known as "Queen," "Empress," and "Victoria."

J. Boscowitz & Sons.

The first document was never recorded and save to throw light on the intention of the parties in the second, which was recorded, is now of no avail.

The first question raised is that this recorded document is not in compliance with the Statute of Frauds.

The agreement between the parties, apart from this document, was that the benefit of these locations should, to the extent of a half interest therein, belong to Oliver Furry whose money and labour had secured them.

The father was a fur trader and though wealthy never took part in such a business as mining or speculation in mining.

Leopold had done so. David, I infer, had not, and at all events expressly says in his evidence as follows:—

Q. And subsequently you conveyed them to Leopold? A. Yes.

Q. *And all the time the claims were his, from the start?* A. *Yes.*

Q. You never had any interest in them, and so far as you know, your father had not? A. *He gave him* 20%.

Q. I am speaking of up to the declaration of trust was made. That is the time you claim? A. Yes.

Q. July 11th, 1900.

It was necessary that some one should represent all these interests and become bound to Furry and Leopold was willing to stand good for them all and so adopted this crude method. Ignorant of it when location effected he says he ratified it when he came to know of it.

Is his undertaking in this form good?

He admits that he adopted this firm name and was

in fact the "J. Boscowitz & Sons" who signed intending to be bound for the purposes of this transaction. And this is reiterated time and again in the following evidence:—

Q. Where was it you signed the papers? A. For what?

Q. This paper, "A." A. He came to me—Turner—and said, "You sign this paper for Furry, and you get these claims."

Q. It is not signed by you? A. Certainly, that is my writing.

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Q. And all the arrangements between Furry and Turner, which were afterwards adopted by you, were with regard to you alone? A. Only me.

Q. And although Turner worked for your father, any mining deals he had with regard to either the "Britannia," or the "Empress" were entirely with you? A. Absolutely all mine.

Q. So when you signed J. Boscowitz & Sons to these documents, "A" and "B" you intended it for your own signature? A. Yes; Furry wanted it that way.

Q. You intended that for your own signature? A. Yes; they would not go in.

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Q. About having signed "A" (J. Boscowitz & Sons) at the instance of Furry? A. I don't say that I am wrong.

Q. I mean, so far as Furry himself was concerned, it may have been at Turner's instance. A. No, he came to me and said, "That is what Furry wants." As I told you before, Turner did all this.

Q. Furry could not have told you that? A. Turner told me.

Q. In Vancouver, before you went up there. And Turner understood, of course, you were binding yourself, only, by that? A. That is right.

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Q. But the difficulty, Mr. Boscowitz, is in knowing what impression to accept? A. I am very sorry, my lord, but Turner can explain that to you very much better than I.

Q. (Mr. Martin). Here is question 72;

That signature "J. Boscowitz & Sons" was your signature, and was intended to be you only? A. That is all. My father never had an interest.

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Q. How was it that you came to execute the second document, exhibit "B" of May 20th, '99? A. I don't know, except that he wanted it that way. Furry wanted it that way.

Q. Why? A. To shew his partnership with me.

Q. To shew that he was in partnership with you? A. Yes.

Q. The original document shewed that, didn't it? A. That was practically the original, wasn't it?

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Q. Exhibit "A" executed on the 10th of November?

Court. Shew him the document.

Mr. Martin. Exhibit "A." That shewed you were in partnership, that each was to have half? A. Yes.

Q. Then it could not have been for that reason that he wanted "B" executed? I mean by "B" the document of the 20th of May, '99? A. You see those names do not appear there. I suppose he wanted those three names.

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Q. Under the original arrangement between Furry and you, shewn in these two documents, signed "J. Boscowitz & Sons," he was not to go to any expense at all? A. No.

Q. No. The expenses in the way of surveying the ground, granting commissions to brokers, and everything of that kind, were to be paid by you. A. All fell on me.

Q. And he was to get one-half. So, naturally, when it came to making a survey you were—you employed McGregor? A. I did.

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Q. He found those three claims? A. Yes.

Q. And the bargain between you was he would give you a half interest if you would pay all the costs of the survey? A. Of the three claims.

Q. That was part of the consideration on which you got the claims. A. Yes; I had to keep them up; I didn't have to keep them up, I could let them run out, if I wanted to, and could have had them re-staked.

Q. You think that would have been honest? A. No; that would not have been a square deal.

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Q. Signed "J. Boscowitz & Sons." My learned friend made this statement to you, although in the form of a question, but you intended that "J. Boscowitz & Sons," merely for your own signature, and you said yes. Will you explain what you meant when you told him you intended that, that is, J. Boscowitz & Sons, merely for your own signature? A. Because I was the only one that was doing the business, they hadn't any interest in mining, and they didn't want any.

Q. What did you mean by the signature? A. As my own signature.

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Mr. Martin (to witness). The "J. Boscowitz & Sons" which is at the foot of these documents, "A" and "B," you know those documents, one of the 10th of November, '98, and the other of the 20th of May, '99. Whose signature did you intend that for? A. I intended it for my own.

Mr. Davis. What did you mean by that? A. Because he wanted the name of J. Boscowitz & Sons. I said, "There you are; I will sign it."

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Q. That is not your signature? A. No, that is not mine.

Q. What did you mean by saying you intended it as your signature? A. Because he wanted it that way.

Q. When you say "sign" you mean "write"? A. Yes, he wanted it that way, and I wrote it that way."

Assuming a firm name, though in fact it represents only one man, is much too common a device in use for business purposes to say that a man cannot be bound by any such name he chooses to adopt.

Usually the man doing so carries on for a longer or shorter period as the case may be his business in that way. But is length of time in the use thereof the measure of its efficacy in binding him who uses such a business name?

Yet we are asked to discard the manifest purpose of the parties and hold that this adopted name cannot in any way bind him who used it, and cannot bind him at all events as to two of the parcels of property that were in the minds of the parties from the inception as, and formed, part of the basis of their bargain. And why? They evidently both intended the bargain to cover all three parcels.

They as clearly expected the father and brother of him who was thus binding himself to surrender to him and that he was to acquire whatever legal interest they or either had and make it as completely subject to the domination of him who signed as was that he had already over one parcel.

It is said, however, that two of these interests stood in the names of others and that we must look at them as respectively owning them and that agency must be shewn on Leopold's part to enable him to thus bind their several interests even when they come to his hands.

But is that so? They made no claim to them, on

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the contrary disclaimed any and transferred to Leopold. They stood as respective trustees of them. True the trust as such was possibly not enforceable.

Even if they could not be looked upon as holding property purchased by Furry and procured by him to be conveyed to each of them for him in such a way that they were bound to account to him as in case of a resulting trust, and that they could not for want of a declaration in writing be held to an execution of the trust were they bound by law to commit a fraud?

If they did not choose to do so but had conveyed to Leopold (at his request and in good faith desiring to execute the purpose of his undertaking) the next day after the execution of this document of the 20th of May, '99, for the express purpose of carrying out the intention of Furry and himself could Leopold have refused to implement the undertaking it stands for?

It would rather shock one to find that such a thing could be argued as possible. Yet every argument adduced in support of this contention of the bearing of the Statute of Frauds on this part of the case is just as complete and strong in the case I put as in that.

Now what did happen is that, after a longer time than a day the property became absolutely vested in Leopold and whilst it was so vested, the document was registered. It does not seem to me that all the happenings between the 20th May, 1899, and the 10th of April, 1901, when the registration took place affected or could affect the neat legal point of whether or not Leopold was bound by virtue of the document to carry out his bargain so far as he could.

It was his duty to acquire with reasonable effort

the legal title that would enable him to carry it out. It was he who was bound. It was he who undertook to hold for or to give Furry the specified interest.

The statute requires that the

> agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party *to be charged therewith*, etc., etc.

Leopold was the only party to be charged therewith. He admits it. He was enabled by what had transpired and which clearly (apart from the unexplained dealings) was within the contemplation of himself and Furry, as likely to transpire, to discharge the duty cast upon him. What right has he to say "I was not possessed when I signed though I am now of the entire title or enough to answer my obligation to Furry?" It is not the case of selling a pretended title in violation of a statute. No such thing is pleaded. Nor is it the case of having by acquisition for valuable consideration another's interest that he is by law entitled to set up as beyond the purview of his agreement.

The objection is taken that the registration was, for want of the written authority of the principals required by section 50 of "The Mineral Act," void.

In the view I have just expressed, that it is not a case of agency at all but of one man using as his own a firm name, this objection falls to the ground.

The claim is made that this interest of one-half was reduced to twenty per cent. by a later agreement.

The objection is taken that this agreement for a reduction of this interest from one-half to one-fifth is not evidenced by the necessary writing under the Statute of Frauds. I agree that the objection is fatal to this claim.

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A clear case may be made by oral evidence of accord and satisfaction or even of a substituted agreement in some such cases. I cannot find either here.

Elaborate and able argument on either side has left so far as I am concerned the deepest distrust. I am glad there was a small writing, however unsatisfactory in some respects, to guide us in the part of the case I have been thus far enabled to form an opinion upon.

It would serve no good purpose now to analyse the mass of contradictions and improbabilities on either side and shew why I am unable to form an opinion; much less one that I ought to feel clearly established before giving effect to it as against the admitted writing.

A deeper cut than either party chose to take might have opened up a satisfactory solution.

One cannot help suspecting the whole trouble arose from evading the mining regulations of the statute but this was not set up and is not perhaps so apparent as to render it incumbent on us to notice it. I have treated the case as if nothing prevented Furry putting each of these properties in the names respectively of three separate persons and that two of them recognized themselves as trustees for him and the other one chose to accept the terms on which Furry had so placed his properties.

I think the appeal should be dismissed with costs.

MACLENNAN J.—I also agree in the opinion delivered by His Lordship Mr. Justice Idington.

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Appeal dismissed with costs.

Solicitors for the appellant, McMeekin; *Davis, Marshall & McNeill.*

Solicitors for the appellant, Leopold J. Boscowitz; *Bowser, Reid & Wallbridge.*

Solicitors for the respondents; *Martin, Craig & Bourne.*