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*Oct. 8.
*Oct. 20.

EDMUND C. TRAVES (DEFENDANT) ... APPELLANT;

AND

ALEXANDER FORREST AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Mines and mining—Mining agreement—Interest in ore to be mined—After-acquired chattels—Transfer and delivery—Registration—B.C. "Bills of Sale Act," 1905—Construction of statute.

An agreement creating an equitable interest in ore to be mined is not an instrument requiring registration under the provisions of the British Columbia "Bills of Sale Act," 5 Edw. VII. ch. 8.
Judgment appealed from (14 B.C. Rep. 183) affirmed.

APPEAL from the judgment of the Supreme Court of British Columbia(1), reversing, in part, the judgment of Martin J., at the trial.

The circumstances of the case, so far as they are material to the issues on the present appeal, are stated in the judgment of Mr. Justice Duff, now reported.

J. Travers Lewis K.C. and *Smellie,* for the appellant.

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

THE CHIEF JUSTICE.—I agree that this appeal should be dismissed with costs for the reasons stated by Mr. Justice Idington.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin J.J.

(1) 14 B.C. Rep. 183.

DAVIES J. agreed with Duff J.

IDINGTON J.—If we try to find and understand what the parties concerned in these apparently ambiguous writings submitted for our interpretation were about when signing same that apparent ambiguity will disappear and any need for worrying over a multitude of irrelevant points of law submitted to us will also disappear.

Smith, when he mortgaged his interest, never intended to prejudice or jeopardize respondents' interests, or rights, or reasonable expectations, nor did appellant seek to acquire more than Smith within these limits desired to give him.

Confessedly one-third of the whole property in question was an inaccurate definition of Smith's interest. Appellant's counsel claims it was, roughly speaking, one-third. I agree the share of Smith might, at the then stage in the manifold process of handling which the property had to go through, with approximate correctness be referred to as one-third; but clearly that would not have been mathematically correct, and, when we read further and look into the whole scope of the documents, we find it expressly defined as only "all the interest of the mortgagor," Smith, that was being dealt with.

When he called it one-third thus limited, or anything less than the whole, his language told any one trying to understand his meaning that he owned no more than what has been adjudged him and, through him, the appellant.

The appeal should be dismissed with costs.

DUFF J.—There are two questions. The material facts bearing on the first are these. Smith being the

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lessee of the "Payne Mine," mill and appurtenances, at Sandon, B.C., under terms entitling him to work the mine, but prohibiting sub-letting, entered into an arrangement with the respondent for working one of the levels, the terms of which (although the whole of them are not expressly stated) may be inferred with sufficient certainty from the facts in evidence. After Forrest had commenced work under this arrangement a document was signed, but on its face it is plain that it does not state the whole of the bargain. From this document, however, and the other evidence, it is quite clear that the respondent was, during the currency of the arrangement, to mine the fifth level and to have the ore reduced at the concentrator; that Smith was then to ship the ore to the smelter, and that the proceeds (which were to be payable to Smith) were to be distributed in the shares mentioned by the trial judge, Smith being beneficially entitled to five per cent. of the net returns. Forrest was to pay all expenses and to be responsible for all damage caused by his operations under the agreement.

The question is whether, under this agreement, the respondent acquired any interest legal or equitable in the ore mined under it. It seems very clear that from the time the ore should be broken down until the concentrates should be delivered to Smith for shipment to the smelter—while, that is to say, the respondent was handling it as required by the terms of the contract—the ore was to be in the possession and under the control of the respondent; so much would be necessary to enable him to perform his agreement. It is also undisputed that the effect of the agreement was to vest in the respondent the right to have the concentrates shipped to the smelter and to have a specific

share of the proceeds paid out to him. If the parties had agreed that the respondent should ship the concentrates in his own name and receive the proceeds himself, nobody could doubt that he must have been regarded in equity as having a specific interest in the concentrates themselves lying in the cars at the smelter or at the mill; or in the ore in his possession in the tramway or in the workings which he was both entitled and bound to have reduced to concentrates. Can it then make the slightest difference that the duty of shipping the concentrates is imposed upon the appellant and that the shipments were to be made in his name and the proceeds paid to him? It can make no difference because the appellant's custody of the concentrates as of the proceeds is merely that of a trustee for the purpose of carrying out the stipulation of the agreement.

It is not necessary to hold that the parties became, at law, tenants in common of the ore, and I am inclined to think they were not; but it is quite clear, I think, that, apart from the legal possession the respondent acquired under the agreement an equitable interest in the ore, which (with the performance of his obligations under the agreement) ripened into the beneficial ownership of an undivided share equivalent to seventy-eight per cent. of it. In truth, the substance of the transaction was that the respondent was to mine the fifth level for his own benefit, paying the appellant a royalty equivalent to five per cent. of the net smelter returns, together with royalties payable to the owner and to the Crown. The stipulation that these returns were to be made to Smith himself was probably inserted to satisfy the provisions of his lease, and ought not to be regarded as affecting the substan-

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tial nature of the bargain. When it is possible to do so, a court of justice ought to attribute to the ordinary transactions of business such a legal character as will effectuate, and not such as will frustrate, the real intentions of the parties to them.

The next question is whether the appellant's bill of sale is to prevail over respondent's interest. The appellant contends that it does and puts his contention on two grounds. First, that the agreement between Smith and the respondent being an unregistered bill of sale must be postponed to the appellant's registered bill of sale, and secondly, that the appellant, a purchaser for value without notice, having the legal estate, is entitled to priority over the respondent who has only an equitable interest.

As to the second ground, the defence is not pleaded and was not, I think, really set up at the trial; but at all events I agree with Clement J., that not only has the appellant not satisfied the onus upon him to prove the defence of purchase for value without notice, but that the evidence clearly shews he had constructive notice of the arrangement between Smith and the respondent.

As to the first, it seems disputable on several grounds; but it will not be necessary to refer to more than one objection which I think is conclusive.

The "Bills of Sale Act" of British Columbia was, as originally enacted in 1873, (in all respects material here), a transcript of the English "Bills of Sale Act" of 1854. The latter Act was, by a Divisional Court in *Brantom* v. *Griffits*(1), held not to apply to any assurance of goods which at the time of the execution of the assurance should not be in such a state as to be

(1) 1 C.P.D. 349.

"capable of complete transfer by delivery." This view was based upon the definition of "personal chattels" contained in the Act. Whether this view of these words—having regard to an expression of opinion to the opposite effect, not required for the decision of the case, by Lord Chelmsford in *Holroyd* v. *Marshall*(1)—is that which one would take if construing for the first time the provision in which they are contained, we need not, I think, consider. The British Columbia Act of 1873 was re-enacted in consolidations of 1888, 1897 and 1905, and the definition of "personal chattels" has throughout remained unchanged in any material particular; nor is there any change in any other provision of the Act which affects the application of this decision. The second section of the Act of 1905, which at first sight might appear to have some bearing upon the point, really has none; it is indeed a reproduction of the third section of the English Act of 1878, which was said by Lord Macnaghten in *Thomas* v. *Kelly*(2), at page 519, not to apply to assignments of "future or after-acquired chattels." There is further the opinion of Lord Macnaghten on the last mentioned case, at pages 518 and 519, that the construction adopted in *Brantom* v. *Griffits*(3) ought to be regarded as having been accepted by Parliament in passing the Act of 1878.

Such being the course of judicial opinion and the legislative action, I think we must assume that the view expressed in *Brantom* v. *Griffits*(3) has been adopted by the Legislature of British Columbia, and hold that the agreement in question relating to ore to be mined in the future, is not within the class of

(1) 10 H.L. Cas. 191, at p. 227. (2) 13 App. Cas. 506.
(3) 1 C.P.D. 349.

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assurances contemplated by the legislature in passing the "Bills of Sale Act."

ANGLIN J.—For the reasons stated by my brother Duff I am of the opinion that the document under which the respondent claims was not a bill of sale requiring registration under the British Columbia "Bills of Sale Act" in order to render it valid or to preserve its priority. I also agree that the interest acquired by the respondent under that document in the ore in question was such that he could not be deprived of it by a subsequent transfer, sale or mortgage of such ore, though by formal instrument duly registered, to a person affected with notice of his interest. That the appellant had notice of that interest, if not actual at least constructive, the evidence sufficiently establishes.

I am therefore of opinion that the defendant's appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Robert Wetmore Hanington.*

Solicitor for the respondents: *S. S. Taylor.*