

Important Judgment

Mr. Justice Martin's Decision in Iron Mash Versus the Centre Star Mine Case.

Interesting Remarks on Scientific Knowledge and Evidence in Mining Litigation.

In the case of the Iron Mash vs. the Centre Star, the Hon. Mr. Justice Martin has handed down the following judgment:

The application by the plaintiffs for a jury is resisted on the grounds, (1) that this case is within rule 331 as being one "which previously to the passing of the Judicature Act could, without any consent of parties, have been tried by a jury;" and (2) that, in any event, it should be tried without a jury as being a case within rule 333 requiring "prolonged examination of documents," or "scientific or local investigation."

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"Judicature Act" here means, not the English Judicature Act, (which is referred to in the corresponding English rule 331 as "the principal act"), but cap. 12 of the B. C. Statutes of 1879, the first title of which is the "Judicature Act, 1879," and which is so referred to frequently in the Supreme Court Rules of 1880.

Rule 250 of 1880 guides us to what the practice as to trial by jury was prior to the Judicature Act; it was regulated by Statute No. 17, of 1876, entitled "An Act for giving to the parties to civil causes in the Supreme Court the option of having such causes tried by a judge or jury." This title is to be read as part of the act; Fielding vs. Morley Corporation, 1890, 1 Ch. 1.

Section 1 of this act is as follows: "All issues of fact in any civil action brought in the Supreme Court, and every assessment or enquiry of damages in every such action shall, in the absence of the notice heretofore mentioned, be tried by a judge, and assessed by a judge of the said court, without the intervention of a jury. Provided, that if the plaintiff requires such issue to be tried, or damages to be assessed, by a jury, he shall give notice to the opposite party, by serving with the notice of trial, and the defendant by delivering to the plaintiff within two days after, or at any time before, the trial, by the defendant of the notice of trial, or either party at any other time, by leave of the judge, delivering to the opposite party a notice in writing to the effect following, that is to say: (Form of notice here.) I have been referred to the notice of judgment of the late Mr. Justice Gray (see his Supreme Court Record No. 4, p. 157, June 3, 1879) in the case of McKenzie vs. The Corporation of the City of Victoria, on this notice, but in my opinion title, if any assistance can be derived from it; first, because it deals with the rights of parties when the notice has not been given, and the second because there was no argument, properly so called.

The effect of this section, and title though peculiarly expressed, is, to my mind, plainly to give to any party in any civil action the right to a jury if he so desires. It is true that in order to preserve the right a formal notice had to be given, but this "option," as the title expresses it, could be exercised in absolute right, and was not dependent upon anything other than the will of the party who wished to exercise it. It is urged that this statute only gave a conditional right, and that if it were failed to give the notice the cause could, without the consent of parties, have been tried without a jury; therefore there should be no jury here.

If no construction had been placed upon the meaning of this section I might have given effect to this argument, but it has already received judicial interpretation. In the case of The Temple Bar (1880) 11 P. D. 6, it was laid down by Lord Justice Lindley, p. 9, that "where before the act of 1875 parties had a right to a jury they have it now." This rule was adopted by Mr. Justice Chitty in Case vs. Ingram (1883), 33 Q. D. at p. 119 where he says, "The general effect of the above mentioned rule is, as I understand the judgment of the Court of Appeal, and particularly that of Lord Justice Lindley, to preserve to the parties the right of a jury in those cases where the right existed previously to the passing of the principal act, viz. the Supreme Court of Judicature Act, 1876." In Timson vs. Wilson, (1889), 22 Q. D. 22, the Temple Bar case was followed. Lord Justice Lindley in giving judgment, at p. 76, expresses himself as follows: "Every party who became a party to a suit after the 1st of November, 1883, was entitled to a jury if he so desired."

In Jenkins vs. Bushby (1891), 1 Ch. 480, the same learned judge expresses himself in similar language: "Where there was, before the Judicature Acts, a right to a trial by jury, such right still exists." And in the same case Lord Justice Lopes at 492 says: "I speak on the same lines. They do not take away the right of trial by jury where it existed before, or give it where it did not exist. It is a question of fact, and it is not a question of law. This last case is followed in Baring Bros. & Co. vs. Western of Uruguay Ry. Co. (1893), 22 Q. B. 406, wherein Lord Justice Lindley at p. 410 specially "refers back to the decision of the court given in a case about the same time took considerable trouble. Jenkins vs. Bushby."

I read the above and the effect is that the defendants had the option to have this case tried by a jury under the Judicature Act, and they have exercised that option. I am therefore entitled to a jury under rule 331 above quoted. In regard to this

rule I do not think that there will be here any such "prolonged examination of documents" as contemplated by the rule, and the defendants must rely on the case being one requiring "scientific or local investigation, which cannot be (may) be conveniently made with a jury." The plaintiffs rely mainly on the case of Hamilton vs. The Merchants Marine Insurance Co., (1889), 58 L. J. Q. B. 544. "Were I without other assistance than this case I should not make the order I am about to make, for it is an authority in favor of the plaintiffs even though it was an application to direct the trial before a jury, and the fact that I should be governed by the latter case of Swyn vs. N. E. Ry. Co., (1886), 74 L. T. 88, in which Hamilton vs. The Merchants Marine Insurance Co. was considered, and the application of the rule extended. That case laid it down plainly that where there was one "scientific issue" out of several other issues, that brought the action within the rule. The test applied by Lord Justice Lindley in that case was, "Is the case before us, a matter or issue requiring scientific investigation; that is to say, scientific knowledge?" And Lord Justice Lindley says, "I do not feel justified in saying that there must be some very special sort of case, for scientific investigation, because in that part of the rule, at any rate, there is nothing more than the plain word 'scientific.' I have no doubt, therefore, in arriving at the conclusion that in the present action there is an issue requiring a scientific investigation within the meaning of the rule."

Applying the language to the present case, I, in turn, have no difficulty in coming to the conclusion that a scientific knowledge of a high order, and the application of that knowledge to a scientific investigation, will be required to satisfactorily determine the main question raised in a suit of this originality and importance. I must not for a moment be understood to mean that as a rule mining litigation, in this country, partakes of this description, for I think it does not; but this case is of an exceptional character, and from the nature of the evidence which it now appears will be adduced at the trial, it is not one which could conveniently be tried by a jury. If the day of the trial were not so near at hand I should have liked time to have more fully discussed the question as to what evidence of the mining engineers and experts would in a case of this description (the ascertainment of extra-local rights) be deemed to be scientific, but as a speedy judgment is required I must content myself with the above general expressions.

Application refused. Costs in the cause. (Signed) ARCHER MARTIN. 25th March, 1899.

LEAD FROM CANADIAN MINES. Should Be Re-Admitted to Canada Duty Free, After Treatment at American Refineries.

J. J. Campbell, of the Hall Mines, Limited, addressed the Nelson Board of Trade the other night on the lead question. He has a plan of his own for improving the position of the service, and he says should meet with the approval of the Canadian miner, smelter and lead manufacturer. His plan was to induce the government to permit lead imported from the United States, to re-enter Canada free of duty. As the United States government already permitted the smelting and refining of foreign lead in bond, there would be no difficulty in the way of putting the new plan into effect.

As matters stand at present, the American smelters pay the Canadian miners the New York price for lead, less the United States duty, and as all Canadian lead bullion at present has to go to the United States, the Canadian smelters do the same. Neither in the case of the American or the Canadian smelter is there any advantage actually made. The lead going into the United States was refined in bond and used by the American smelters for their export trade. The American smelters in offering the metal which they do to the Canadian smelters, take into account in connection with their treatment rate the amount which they save through not being obliged to pay the United States import duty. It should not be thought that the United States smelters make a clean profit of the amount saved through the export of Canadian lead, because as the one and a half cents per pound were taken into account in the fixing of the treatment rate, it would merely mean that higher treatment rates would be charged should this saving be lost to the smelters.

We respect to the lead imports received into Canada, Mr. Campbell said that the imports of lead at present were greater than the lead product of all the mines of Kootenay. This showed that there was already a Canadian market for Canadian lead, and it was absurd that before the product of the Canadian lead mines could reach the Canadian lead manufacturers it had to pass through the United States refinery and be subject to a Canadian duty upon re-entry into Canada. At present there is imported into Canada annually 6,000,000 pounds of raw lead, upon which a duty of 15 per cent was paid. The result of this was that the Canadian lead manufacturer, in a country in which lead was produced, had to pay the world's market price for lead, plus the freight to London, plus the freight back from London, plus 15 per cent duty at the Canadian frontier. It could therefore be easily understood that if these two freight rates and 15 per cent duty could be saved to the lead manufacturers of the east it would place them upon a better footing in their attempt not only to supply the local market, but the export field as well. There must be a Canadian market for lead, and the fact that the Ontario, and if the Canadian lead manufacturers could secure a foothold in the export trade a sufficient market would be created for Canadian lead to make it profitable to open a refinery in Kootenay. As refined lead on the Pacific coast would have a freight preference of \$18 per ton over lead at the refineries on the Atlantic, the advantage which the Kootenay refinery would have in supplying lead for the Orient could be easily understood.—Nelson Tribune.

CATARH RELIEVED IN 10 TO 30 MINUTES.—One short puff of the breath through the Blower, supplied with French Catarrh Powder, cures Catarrh of the nose, throat, and lungs. It is a powerful and reliable remedy, and is sold by all druggists. It is a powerful and reliable remedy, and is sold by all druggists. It is a powerful and reliable remedy, and is sold by all druggists.

Work was commenced Monday on the new residence which is being built for Mr. William Johnston, Agnes street. On Sunday morning, at 7:45 o'clock, a severe shock was felt, as of an earthquake. No noise, or other indication of the cause of the quaking was noticeable, except in the West End of the city, persons living there, subsequently, reported a loud explosion in the direction of Lulu Island. For some time past there has been blasting in that direction, in small ways, but the Sunday morning blast must have exhausted the magazine.

The death occurred at 11 o'clock on Monday morning, in St. Mary's Hospital, of Scott McNamara, the present owner of the deceased young man was a native of Fredericton, N. B., and came here about a year ago. Since then he has been employed as second steward on the C. P. N. Company's steamers Transvaal and Beaver. Two weeks ago he was stricken with typhoid fever, and taken to St. Mary's Hospital, but, in spite of all that was done for him, he succumbed as above stated.

On Saturday evening, says the Columbian, the fire hall on Royal avenue was the scene of a pleasant social, or rather, fraternal gathering of all present and past members of the New Westminster fire department, since the going out of existence of the Hyack company. The occasion of the gathering was the approaching retirement of Chief Ackerman and Firemen E. B. Nobles and Newton Brown, and when all had assembled, these three were given a pleasant surprise by being presented by their comrades with souvenirs. To Mr. Ackerman was presented a handsome gold chain and locket, as a memento of ten years' service as chief of the fire department; Mr. Nobles received a pair of ivory, gold-mounted opera glasses, and to Mr. Brown was given a handsome watch chain. All presentations were gratefully acknowledged.

Sunday turned out a favorable day in every respect for the church parade of the No. 1 Company, 2nd Batt., 6th Regt., C.A., and there was a good muster, 83 officers and men out of a total of 94. The company paraded at the armories, and proceeded to St. Andrew's Presbyterian church. After the service, the corps re-formed on Cameron street, and returned through Merivale and Third streets and Queen's avenue to the armories. Before dismissing the men, Major White, adjutant, briefly congratulating them on their satisfactory appearance. It is understood No. 1 will join in a battalion church parade at Vancouver two weeks hence.

Those contemplating the beautifying of the streets, opposite their respective residences, will note that, hereafter, shade trees must be planted, at least, twenty feet apart, and three feet, six inches from the outer edge of the sidewalk. By observing this rule, a much to be desired uniformity will be secured, which, in one of two cases, has been ignored.

Provincial News.

NEW WESTMINSTER.

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Capt. Card will probably build a comfortable residence on his property on Cameron street. Considerable complaint is being found with a number of contractors who are making themselves obnoxious in regard to blocking the streets with building materials. While the City Council does not wish to interfere with building operations, it deems it in the interests of the citizens and the city to curtail the privileges abused by some of the contractors. According to a resolution passed at Monday night's council meeting, steps will be taken to rigidly enforce these regulations.

Some time between Saturday night and Monday afternoon some sneak thief entered Galbraith's sash and door factory and stole three carpenter's planes, valued at about \$50. The death is announced of Mr. Alexander James, one of the old-timers, and a highly respected resident of Coquitlam municipality. The deceased was about 80 years of age, and a native of Perwick-on-Tweed, and immigrated to Canada forty years ago. He came to Canada through the agency of the late Captain Pitt Meadows, where he has resided ever since. On Monday some of the neighbors visited the place, and found the old gentleman lying dead at his door, where he had apparently dropped and expired without pain or warning.

MISS GRADY, daughter of Mr. J. W. Grady, of the police department, is seriously ill. The bicycle thief is about once more and has caused a few machines to be listed as "missing." George Fisher, a native of Ramsdale, Bellinghoke, England, and late waiter at the Badminton, died yesterday. The funeral will be on Wednesday at 2 p.m. from St. James' church.

The Stanley park zoo has been further enlarged by the arrival of two Australian birds of the species commonly known as "laughing jackasses." They were brought over on the R. M. S. Warimbo by Mr. R. Walker.

It is reported that Lieutenant-Colonel Worsnop has received assurance from Mr. G. R. Maxwell, M.P., that the government will devote a sufficient sum, to the repair of the Central Park range to render it perfectly safe this year for the Lee-Enfield rifle. This will give the military seven targets instead of three, as at present.

The death occurred on Monday afternoon of Mr. P. C. Van Horne, formerly of Prince Edward County, Ontario. At the police court, Tuesday, the Prevention of Cruelty to Animals Society prosecuted William Heed. The cruelty complained of was knocking a horse down by hitting him over the head with a huge brickbat yet gone out of the defendant's plea, stating that his reason for using the stick (produced in court) was that he had nothing else to hit the animal with. The magistrate imposed a fine of \$10, or 20 days imprisonment.

Ethel M. Grady, the 18-year-old daughter of John Grady, of the police force, died at the city hospital on Tuesday after a painful illness. Mr. F. W. Hart, well-known in the city as the man who built Vancouver's first theatre, arrived from Dawson on Monday, and left for his home in the upper country by Tuesday's express. Mr. Hart has spent several months in the Yukon, and has returned with a valuable knowledge of the theatre business, and is interested in the Rossland Opera House, and is also

about to build two theatres in the upper country for Harry Lindley. Domestic and all sorts of trouble give the police a far from monotonous life, says the News-Advertiser. On Tuesday a terrible young wife approached one of the constables of the police and told him her husband had run away. The blue-coated worthy had a tender heart for the poor girl, and immediately set out investigating. He found that the husband had checked his baggage to England, via New York, in Vancouver. He had taken a ticket to the latter place, and then, proceeding to New Westminster, had booked through to England by the steamer Transvaal, of the Royal City. These inquiries lasted till afternoon, and then word was received that the decamping "hubby" intended leaving that day from New Westminster, so the constable wrote and a big, strong friend boarded the outgoing Atlantic express at this city. Upon the train's arrival at Westminster Junction, there was a brief and freeing meeting with the constable's wife, and the husband by the former being informed that, if he did not return voluntarily, there was an officer at hand to take him back "anyhow." He came back, and to show the sincerity of his repentance, he brought the constable's wife and a big, strong friend boarded the outgoing Atlantic express at this city. Upon the train's arrival at Westminster Junction, there was a brief and freeing meeting with the constable's wife, and the husband by the former being informed that, if he did not return voluntarily, there was an officer at hand to take him back "anyhow." He came back, and to show the sincerity of his repentance, he brought the constable's wife and a big, strong friend boarded the outgoing Atlantic express at this city. 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