Privy Council Appeal No. 84 of 1919.

Angus Mackenzie and others - - - - - - *Appellants*

v.

Bing Kee - - - - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH AUGUST, 1919.

Present at the Hearing:
THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD ATKINSON.
MR. JUSTICE DUFF.

[*Delivered by* LORD ATKINSON.]

This is an appeal from the decision of the Court of Appeal of the Province of British Columbia, dated the 1st April, 1919, reversing the decision of Mr. Justice Gregory of the Supreme Court of that Province, dated the 30th May, 1918.

The action out of which the appeal has arisen was brought by the respondent to obtain a declaration that he is the owner of the surface rights of certain land and premises described as "Section 2 and 60 acres of Section 3, range 7, Cranberry District" on Vancouver Island, containing about 160 acres, and of the mines, beds of coal and other minerals lying thereunder, and also to obtain an order vesting the same in him, and also vesting in him all the right, title and interest thereto and therein of the appellants. He further claimed an injunction restraining the appellant company from sinking three shafts through the aforesaid beds of coal, from removing the coal thereby won, and from interfering with the surface rights in the aforesaid lands. The

respondent in his statement of claim set forth as the root of his title to the abovementioned lands and minerals a certain deed dated the 13th March, 1905, whereby the appellants, Angus Mackenzie and Charles Wilson, as executors and trustees of the estate of one Joseph Ganner, deceased, under his will, conveyed to him the aforesaid lands in fee simple, of which lands he was on the 3rd April, 1905, duly registered by the District Registrar of the City of Victoria in the aforesaid Province, as owner in fee.

In truth this deed was not the true root of the respondent's title to the land the subject of the suit, in the sense that the said Joseph Ganner deceased had himself acquired these lands in fee simple from the Esquimault and Nanaimo Railway Company by a deed dated the 24th December, 1890, which contained the following clause :—

> "And saving and reserving to the said Company their successors and assigns all coal, coal oil, ores, mines and minerals whatsoever in or under the land hereby granted or expressed so to be "

with full power to the Company, their successors and assigns to enter upon the said lands, search for, work, win, and carry away the minerals so reserved.

The word "excepting" would, in this connection, be no doubt a more appropriate word to use than the word "reserving," but the effect of the deed clearly was that the Railway Company, the grantors, continued to own these mines and minerals, and that Joseph Ganner deceased did not by virtue of this deed acquire any right or title to or interest in them of any kind or nature whatsoever.

The said Joseph Ganner died on the 26th January, 1904. It was contended, however, by respondent, that the right and title to and interest in the aforesaid lands which Joseph Ganner acquired under and by virtue of this deed of the 24th December, 1890, was not the only interest in them to which he and his executors as his representatives were entitled, but that distinct from what was granted to him by the Railway Company, he and his executors in his right became possessed of or entitled to an interest in the said lands in addition to, but altogether different from any interest conferred by the aforesaid deed, under the provisions of a statute passed on the 4th May, 1903, by the Legislature of the aforesaid Province entitled "The Vancouver Island Settlers' Rights Act," and the Acts amending the same. The words "Railway Land Belt" were by this Act defined, as was also the word "settler." This latter was defined to mean "a person who prior to the passing of the said Act took up land situate within the said Railway Land Belt with the *bona fide* intention of living thereon."

And it was by the third section of the statute enacted that :—

> 3. It shall be lawful for the Lieutenant-Governor in Council, upon satisfactory proof being furnished by any person that he is a settler within the meaning of this Act, or that he has derived his title through a settler, to

issue to such person, free of charge, a grant of all the rights vested in the Crown (save and except as to gold and silver) in respect of the lands taken up by the settler.

It is admitted that the land, the subject of the suit, is situate within this Railway Land Belt as defined, and that Joseph Ganner was a settler within the defined meaning of that term. This Act was the next year followed by another dated the 10th February, 1904, bearing, save as to the difference of date, a title similar to the last, by which the expression "Railway Land Belt" is similarly defined, and the word "settler" defined as a person who prior to the passing of the Act occupied or improved land situate within the said Railway Land Belt with the *bona fide* intention of living thereon.

Its third section ran as follows :—

"Upon the application being made to the Lieutenant-Governor-in-Council within twelve months from the coming into force of this Act, showing that any settler occupied or improved land within said railway land belt prior to the enactment of Chapter 14 of 47 Victoria, with the *bona fide* intention of living on the said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him or his legal representative, free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied or improved by said settler."

Joseph Ganner was a member of the class for whose benefit the Vancouver Island Settlers' Rights Act was passed, but neither he nor his trustees availed themselves of it within the time limited in that behalf. Many other settlers for various reasons also failed to take advantage of the Act, and for their relief the Legislative Assembly of the Province of British Columbia, on the 19th May, 1917, passed an Act entitled the "Vancouver Island Settlers' Rights Act, 1914, Amendment Act, 1917," section 2 of which provided as follows :—

"2. Section 3 of the 'Vancouver Island Settlers' Rights Act, 1904,' being chapter 54 of the Statutes of 1904, is hereby amended by striking out the words '*within twelve months* from the coming into force of this Act, in the second and third lines of said section and inserting in lieu thereof the words, 'on or before the first day of September, 1917.'"

It will be observed that the period of twelve months mentioned in section 3 of this Act had expired before the deed of the 13th March, 1905, was executed, so that at that date at all events and for the thirteen years succeeding, the executors of Ganner deceased could not have applied under the above quoted section of the Act of 1904, for a grant of the kind therein mentioned. It is alleged, however, and not apparently disputed that in the early part of the year 1904 the aforesaid executors agreed verbally and in writing with the respondent for the sale to him of the estate and interest of the said James Ganner, deceased, in these lands, this agreement being subsequently carried out by the

deed of the 13th March, 1905. The executors, therefore, could, had they been so minded, have applied for a grant under the abovementioned section 3 of the Act of 1904 up to the 10th February, 1905, but they did not do so. It may be that these executors and trustees as they were could, at this period, have legally agreed to assign, and had they acted before the 10th February, 1905, to have legally assigned to the respondent the rights which as Ganner's representatives this section conferred upon them. It is not necessary for their Lordships to decide that question, for as will presently be shown they never attempted to do anything of the kind.

It is not disputed that the respondent by deed dated the 6th October, 1917, granted the lands in suit as therein described to the appellants, Harry Whitney Treat acting on behalf of the appellant company, saving and reserving thereout and therefrom all mines, minerals, and beds of coal whatsoever in, under or beneath the lands thereby granted or expressed to be.

That exception, as it should be styled, was a perfectly natural one to introduce if the grantor in the deed, the respondent, was himself the owner of the excepted mines and minerals. But the conveyance was accompanied by an instrument in writing of equal date whereby, after reciting that the party of the first part, *i.e.*, the respondent, had applied—under the aforesaid Act of 1904, and the amending Act of 1917 for a Crown grant of fireclay and under-surface rights in the aforesaid lands, it was agreed between the respondent and the appellant, Harry Whitney Treat that the latter in consideration of the sum of $2,000 payable in two instalments of $1,000 each, one on or before the execution of the instrument, and the other upon the respondent obtaining said Crown grant, the said H. Treat was granted the option of purchasing the under-surface rights given by Crown grant of which the respondent had applied at the rate of $200 dollars per acre. In this instrument it is further provided that in the event of the respondent failing in his application for a Crown grant of the minerals underlying the lands in suit the agreement should become null and void, and all monies paid under it should be forfeited to the respondent. According to the respondent's case on this appeal, as their Lordships understand it, he was, and believed himself to be from the 13th March, 1905, the owner of the mines and minerals underlying the lands in suit. He did not require any Crown grant to entitle him to them. This agreement is entirely inconsistent with that case. These mines and minerals are treated not as something he already owned, but as something he might thereafter acquire.

The appellant Treat, in his defence filed the 10th May, 1918, states in reference to the lastmentioned agreement that he, on behalf of the appellant company entered into negotiations with the respondent towards the end of June or beginning of July, 1917, in reference to the mines and minerals under the lands in suit, that the respondent then informed him that he, the respondent, had no title to these mines and minerals, never having bought them from the appellants Mackenzie and Wilson, and that for

greater caution the appellant Treat had entered into this agreement of the 6th October, 1917, and a somewhat similar agreement of the 3rd July, 1917, whereby the respondent agreed to sell to the said appellant the said mines and minerals if he should ever acquire a good title to them. That it was an implied term of this agreement that the respondent should make a good title to the said mines and minerals, but when by letter dated the 23rd April, 1918, he was called upon by the appellant Treat to furnish an abstract of title to the same he declined to do so. The respondent in his reply to this defence and counter-claim joins issue upon it, but his only specific answer to it is that the option given was forfeited owing to the non-payment of 50 per cent. of the purchase price within the stipulated time, and that the appellant Treat was fully aware of the respondent's title to the aforesaid mines and minerals. Nothing could be more inconsistent with the respondent's present case.

On the 6th October, 1917, the appellant Treat conveyed to the appellant company the surface rights in these lands, which he had by deed of equal date acquired from the respondents.

On the 15th February, 1918, the trustees and executors of Joseph Ganner, under and by virtue of the beforementioned Vancouver Island Settlement Acts obtained a Crown grant in fee simple of the lands granted by the deed of the 13th March, 1905. They, by a deed of the 18th February, 1918, conveyed the same to the appellant Treat, who by deed of equal date conveyed them to the appellant company. Now in this state of facts the respondent contends that as the aforesaid executors of Ganner purported by their deed of the 13th March, 1905, to convey to him the fee simple of the lands in suit, when in fact they were only entitled to the surface right therein, and had no title to the mines and minerals thereunder, they were bound by estoppel on acquiring under the Crown grant the fee simple of the lands they so purported to convey to him, and as he, the respondent, had parted with the surface rights on these said lands, to convey to him the mines and minerals underlying them.

It is obvious that the cogency of this contention depends entirely upon the nature of the estate and interest which by the agreement leading up to the deed of 13th March, 1905, was intended to be conveyed, and was purported to be conveyed by the latter instrument. If the surface rights in the lands in suit were all that was agreed to be or purported to be conveyed to the respondent by these instruments, then the entire foundation upon which this contention rests disappears. Most unfortunately both these instruments have been lost. The deed itself, not the agreement, was duly registered on the 3rd April, 1905, but owing to the very defective manner in which the registry was at that time kept (now happily changed) little, if any, help is afforded by it to ascertain the contents of the registered instrument. The exceptions or reservations are either not set forth at all or not set out at length in the certificate of title in the registry.

Accordingly what one finds in the Land Registry Office is the document of which the following is a copy :—

"CERTIFICATE OF TITLE.

"No. 11001 C. 3rd April, 1905.

" Name of Owner.	Absolute Fees Book.	Date of Registration.	Parcels Short Description.
" Bing Kee.	Fol. 268 Vol. 22	3rd April, 1905 2.30 p.m.	Section 2 and East 60 acres of Section 3, Range 7 (less the right-of-way of the Esquimalt and Nanaimo Railway). Cranberry District.

"LIST OF INSTRUMENTS.

"Transfer: See Absolute Fees Book, Vol. 12, Fol.291, No. 11371A. 10th July, 1899. Will of Joseph Ganner. Filed No. 4459. 13th March, 1905. Angus McKenzie and Charles Wilson.

" (Trustees of the said Will)
" to Bing Kee. Conveyance in fee.

" (SEAL)

LAND REGISTRY OFFICE,
" CANCELLED
" 24/1/18
" J. C. Gwynn." Reg. Gen.
" per C.M.

" VICTORIA, B.C.
" S. Y. WOOTTON,
" Registrar-General."

Upon this question as to what was intended by all the parties concerned should be conveyed, and what was in fact conveyed by the deed of the 13th March, 1905, the evidence of Mr. Young, now a Judge of a County Court, is all important. He was the solicitor of the respondent in this matter. The executors of Ganner had not apparently any solicitor. On p. 29 of the Record this witness says: he knew that the lands about to be purchased by the respondent were in the Coal Belt. He was asked by counsel, " I suppose you discussed the purchase with Bing Kee on some occasion ? " and he replied :—

> " I must have done so, I was running a law office and was looking after Bing Kee's interests. I must have discussed the whole transaction with him. It was my duty to explain to my client what he was getting. I did my duty. I did tell Bing Kee at some stage of the negotiation that he was not getting coal, that the Ganners did not own the coal. What I presume I did was to explain that the coal was reserved to the E. and N. Railway Company. He (Bing Kee) was apparently satisfied with it."

In addition Mr. Young had in his practice become quite well acquainted with the title of the E. and N. Company. At p. 37 he says it was a matter of common knowledge that this company always reserved everything except the surface, that when he prepared the agreement from Mackenzie

and Wilson to Bing Kee he Bing Kee knew that all Mackenzie and Wilson had to sell was the title they had from the E. and N. Railway Company, and again he says it was quite clear that all they were selling was the E. and N.'s title, which they had, and again at p. 28 he says that the only matter of purchase and sale was the E. and N. title, that this was all that passed through his hands; that he was aware of no other title, that the question of coal rights or settlers rights or any claim of that nature did not come up at all. On p. 30 he is asked whether the proper practice was not to tell Bing Kee what he was getting when he signed the agreement. And he replies, "that would be a duty of a solicitor to his client;" that he was satisfied he did his duty, "but I don't pin myself down to any time." The Court then remarks, "It has been suggested that it was at the time the agreement was being made," and Mr. Young replied, "Yes, that would be the logical time to do it."

Their Lordships find nothing whatever in the case to induce them not to accept this evidence, and considering Mr. Young's experience, position, the mode in which he has, apparently, given his evidence, and the natural probability of the occurrences he deposes to, they regard it as accurate and trustworthy. There is no need to rely upon the principle that the facts of which a solicitor has notice or knowledge touching a matter with which he is retained to deal is attributed to the client. They are thoroughly convinced that Mr. Young made to his client, Bing Kee, the communications he says he made to him, and they think it is clear that all that the executors of Ganner had to sell to the respondent and did sell, and all the latter intended to buy and did buy from them, was what had been conveyed to Ganner by the E. and N. Company by their deed of 24th December, 1890, that is the lands in suit minus all "coal, ores, mines and minerals lying thereunder." The doctrine of estoppel has therefore no application to the case. The respondent got all he bargained for, the appellant gave all he had a title to give, and all he sold. At p. 31 Mr. Young, in reply to Court, suggested that he, in preparing the deed of conveyance to Bing Kee, may have used the short form of deed, a printed form, stating that this was the ordinary form used in his office, but he did not pledge his word that he had used it. He stated, however, that if he did use it he would have had to write in the E. and N. reservations if he wanted to introduce them into the deed.

A specimen of the short form of a deed of conveyance is to be found at p. 78 of the Record. In it the clause as to "reservations" runs thus:—"Subject nevertheless to the reservations, imitations, and conditions expressed in the original grant thereof from the Crown." Their Lordships are therefore of opinion that the decision of the Court of Appeal dated the 1st April, 1919, was erroneous, and should be reversed, and that the judgment of Mr. Justice Gregory was right and should be restored, and that this appeal should be allowed with costs here and below, and they will humbly advise His Majesty accordingly.

In the Privy Council.

ANGUS MACKENZIE AND OTHERS

v.

BING KEE.

DELIVERED BY LORD ATKINSON.

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