

The Knight Sugar Company, Limited - - - *Appellants*

v.

The Alberta Railway and Irrigation Company - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF
ALBERTA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 16TH DECEMBER, 1937.

Present at the Hearing:

LORD ATKIN.

LORD THANKERTON.

LORD RUSSELL OF KILLOWEN.

LORD MACMILLAN.

LORD WRIGHT.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

In this appeal from a judgment of the Appellate Division of the Supreme Court of Alberta, which affirmed the dismissal by Ford J. of the appellants' action, the relevant facts are not in dispute.

By an agreement dated the 25th day of November, 1903, (referred to hereafter as the sale agreement) the Alberta Railway and Coal Company, who were predecessors in title of the respondents, agreed to sell and the appellants agreed to purchase certain large parcels of land in Alberta amounting in extent to over 223,000 acres. The land was held by the vendors under Crown Grants which contained a reservation of coal, the certificates of title issued to them under the Land Titles Act containing a reservation unto His Majesty his successors and assigns of all coal mines, coal pit seams and veins of coal and the right to work the same.

Under the sale agreement the purchase price of \$446,249 was payable with interest in ten instalments, the first on the date thereof and the final instalment on the 1st September, 1912; and the vendors covenanted, on the payment of the purchase price and interest, to convey and assure to the appellants by a good and sufficient deed in fee simple the said parcels of land freed and discharged from all encumbrances but subject to the conditions and reservations expressed in the original Crown Grant.

Notwithstanding that the sale agreement only entitled the appellants to completion of the contract on payment of the whole purchase money and interest, the appellants from time to time during the years 1904-1913 resold portions of the lands to other purchasers, and the respondents at the request of the appellants from time to time assured the lands so resold either to the appellants or to their sub-purchasers. In the result the whole of the purchase money and interest had been paid by the appellants and the whole of the land conveyed away by the respondents by about the end of the month of March, 1913. In other words completion as to all the land comprised in the sale agreement had taken place by that date.

All the documents relating to these assurances have not been placed before their Lordships, but a few have been selected as samples of the bulk. From these it would appear that the transfers executed by the respondents all contained an exception in the following terms:—

“ excepting therefrom all coal and other minerals in and under the said land and the right to use so much of said land or the surface thereof as the Company may consider necessary for the purpose of working and removing the said coal and minerals.”

It would further appear that the certificates of title subsequently issued under the Land Titles Act to the new owners, contained the words—“ excepting thereout all coal and other minerals.”

The entire transaction having been closed early in 1913, apparently to the satisfaction of all concerned, nothing further occurred between the parties in relation thereto until more than 17 years later. The appellants then for the first time raised the contention that they were entitled to all minerals under the lands other than coal, and this alleged title they eventually sought to enforce in the present proceedings.

Their Lordships observe at the outset that there is no claim to rectify the documents of transfer by the respondents to the appellants upon the footing of any mutual mistake. The difficulties in the way of establishing the right to such relief in the present case are sufficiently obvious. Their claim to all minerals other than coal was put before their Lordships in the following way:—It was said that upon the true construction of the sale agreement the minerals other than coal were included in the parcels sold, that upon the signing of the sale agreement the vendors became trustees for the purchasers of the parcels sold, and their right as purchasers of minerals under the contract still continues to exist, because the doctrine under which a contract for the sale of land is merged in the conveyance on completion cannot apply where completion takes, as here, the form not of a deed of grant but of a transfer of land, registered under the Land Titles Act which, it is said, is merely an order to cancel an existing certificate of title and issue a new one in the purchasers' name.

The appellants also raised a subsidiary claim, viz. that upon the true construction of the transfers and certificates of title they were entitled to all minerals which were not minerals of the same class as coal, and that they were accordingly entitled to the petroleum and natural gas rights. It was admitted that petroleum and natural gas came within the definition of "minerals."

Their Lordships now proceed to consider these contentions.

They can see no foundation for the subsidiary claim last described. It would appear to depend upon some attempted application of what is known as the *ejusdem generis* rule. The words are clear. They are identical in transfers and certificates of title. What is excepted in each is—"all coal and other minerals," words which mean grammatically "all coal and all other minerals." All minerals are therefore excepted, and there is no room for the inclusion in the transfers or certificates of title of any *genus* of mineral. Even if the word "all" is to be restricted in its application to the word "coal," it would still be impossible out of the single ingredient "coal," to construct a *genus* of minerals to which the succeeding general words could be confined.

As regards the major question, there can, their Lordships think, be no doubt that the true construction of the sale agreement would not warrant an exception in the transfer of any minerals except coal. But it is well settled that where parties enter into an executory agreement which is to be carried out by a deed afterwards to be executed, the real completed contract is to be found in the deed. The contract is merged in the deed (see *Leggott v. Barrett* 15 Ch.D. 306). The most common instance perhaps of this merger is a contract for the sale of land followed by conveyance on completion. All the provisions of the contract which the parties intend should be performed by the conveyance are merged in the conveyance, and all the rights of the purchaser in relation thereto are thereby satisfied. There may, no doubt, be provisions of the contract which from their nature or from the terms of the contract, survive after completion. An instance may be found in *Palmer v. Johnson* (12 Q.B.D. 32 and 13 Q.B.D. 351), in which it was held that a purchaser could after conveyance, rely upon a provision of the contract and obtain compensation. The foundation of this decision was that upon the construction of the contract the provision for compensation applied after completion; in other words the parties did not intend it to be performed by the subsequent deed and it was therefore not satisfied by or merged in that deed.

There can be no question in their Lordships' view, that, so far as parcels were concerned, the parties in the present case intended that the provisions of the sale agreement should be performed by the transfer and the subsequent certificate of title, and that accordingly subject to a point

next to be mentioned, the real contract as regards parcels is to be found not in the executory agreement but in the completed transaction.

It was however suggested that this doctrine can have no application to the case of the sale of land to which the Land Titles Act applies (Revised Statutes Alberta, 1922, Chapt. 133); and this on the footing adopted by Beck, J. in the case of *Hansen v. Franz* (12 Alta. L.R. 406) reversed on appeal (57 S.C.R. 57) viz. that a transfer of land under that Act is nothing more than an order to the Registrar to cancel the existing certificate of title and to issue a new certificate.

Their Lordships are unable to accept this view. Sections 50 and 51 of the Act are in the following terms:—

50. After a certificate of title has been granted for any land, no instrument shall be effectual to pass any estate or interest in such land (except a leasehold interest for three years or for a less period) or render such land liable as security for the payment of money, unless such instrument is executed in accordance with the provisions of this Act and is duly registered thereunder; but upon the registration of any such instrument in the manner hereinbefore prescribed the estate or interest specified therein shall pass, or, as the case may be, the land shall become liable as security in manner and subject to the covenants, conditions and contingencies set forth and specified in such instrument or by this Act declared to be implied in instruments of a like nature.

[1906, c. 24, ss. 41, 46.]

51. So soon as registered every instrument shall become operative according to the tenor and intent thereof, and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land or the estate or interest therein mentioned in the instrument.

[1906, c. 24, s. 23.]

From the language used in these sections it seems clear that each of the transfers was a document prepared (and prepared it cannot be doubted in a form approved by both transferor and transferee) in order that, when registered, it should become operative according to the tenor and intent thereof, and should thereupon transfer the land mentioned therein. It is the transfer which, when registered, passes the estate or interest in the land; and it appears, for the purpose of the application of the doctrine in question, to differ in no relevant respect from an ordinary conveyance of unregistered land.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the respondents' costs.



In the Privy Council

THE KNIGHT SUGAR COMPANY,
LIMITED

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THE ALBERTA RAILWAY AND
IRRIGATION COMPANY

DELIVERED BY LORD RUSSELL OF KILLOWEN

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