1957

*May 1, 2
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RICHARD L. REESE ET AL. (*Suppliants*) APPELLANTS;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Real property—Assistance to veterans—Effect of conveyance of land—Mines and minerals—No express reservation in agreement—Effect of acceptance and registration of transfer—Incorrect reference to statute—The Soldier Settlement Acts, 1917 (Can.), c. 21; 1919 (Can.), c. 71, s. 57—The Public Lands Grants Act, R.S.C. 1952, c. 224.

Lands were conveyed by the Soldier Settlement Board to the petitioners or their predecessors in title in 1919, 1920 and 1922 pursuant to agreements purporting to be made under the provisions of an order in council of February 1919 and the *Soldier Settlement Act, 1917*. The agreements were all made after the coming into force of the *Soldier Settlement Act, 1919,* which superseded both the earlier Act and the order in council. The 1917 Act contained no provision for the sale of lands to veterans, and the order in council, which did provide for such sales, made no reference to mineral rights, but the 1919 Act expressly provided in s. 57 that mines and minerals should be "deemed to have been reserved" from all sales and grants of land made by the Board, whether or not the deed so specified. By the petition of right, filed in 1953, the petitioners claimed the mineral rights in the lands on the basis of the original agreements or, in the alternative, under contracts alleged to have been made by them in 1949.

Held: The claims must fail.

The reference in the agreements to the 1917 Act and the order in council was rightly held by the trial judge to be a clerical mistake. In any case, there was nothing in either the order in council or the 1917 Act that conflicted with s. 57 of the 1919 Act, which must apply to all the agreements. Minerals were accordingly not included in the original grant.

An additional ground for rejecting the claims, in so far as they were based on the original agreements, was that in almost all cases transfers of the land, in each of which mineral rights were expressly reserved, had been issued, accepted and registered. In these circumstances, the rights of the settlers under the agreements merged in the transfers. *Leggott v. Barrett* (1883), 15 Ch. D. 306 at 309; *Knight Sugar Company Limited v. The Alberta Railway and Irrigation Company,* [1938] 1 All E.R. 266, applied.

As to the alternative claim, the facts did not establish the making of any agreement in 1949 and, although there had been statements by Ministers of the Crown that mines and minerals would be conveyed to soldier settlers who applied for them, there was no evidence of any order in council authorizing such a conveyance, which was essential under the *Public Lands Grants Act*. The onus was on the petitioners to show that such an order in council had been made, and they had not discharged this onus; on the contrary, the evidence established that none had been made.

*PRESENT: Kerwin C.J. and Locke, Cartwright, Fauteux and Abbott JJ.

APPEAL from a judgment of Ritchie J. in the Exchequer Court of Canada (1), dismissing a petition of right. Appeal dismissed.

George H. Steer, Q.C., for the suppliants, appellants.

F. J. Newson, Q.C., and *P. M. Troop*, for the respondent.

The judgment of the Court was delivered by

LOCKE J.:—This is an appeal from a judgment of Ritchie J. (1) delivered in the Exchequer Court, whereby the petition of right filed by the appellants was dismissed. The facts are reviewed at length in the reasons for judgment delivered at the trial and it is unnecessary to restate them.

The appellants' respective claims are based on the agreements of sale entered into by the soldier settlers with the Soldier Settlement Board in the years 1919, 1920 and 1922 and, alternatively, upon agreements claimed to have been made by the suppliants in the year 1949 with the "Directors of Soldier Settlement" for the sale to them of the mineral rights. These agreements, it is alleged in the petition, were made pursuant to an order in council, the date and terms of which, it is said, were unknown to them.

The agreements for the purchase of the various parcels of land entered into by the appellants Reese, Renton, John Lewis, Harper, Larsen, Roderick Lewis, Peter MacDonald, Nicholas, Bailey, Kerr and Stoutenberg, and by Andrew Liddle and Daniel Beaton, both of whom died prior to the commencement of the action, were all made after the date upon which the *Soldier Settlement Act, 1917* (Can.), c. 21, had been repealed by the *Soldier Settlement Act, 1919*, (Can.), c. 71, which came into force on July 7 of that year.

Notwithstanding this, the agreements, other than those made with Stoutenberg and John Lewis, contained, as para. 13, the following:

> 13. This agreement of sale is given and received under the provisions of the Order in Council of the 11th of February, 1919, P.C. 299, and all the provisions of the said Order in Council and the Soldier Settlement Act, 1917, and any amendments now made or which may hereafter be made thereto, and of any Soldier Settlement Act of Canada hereafter passed which can or may be applicable hereto, shall apply to and form a part hereof as if actually incorporated and embodied herein and the Board and the Purchaser shall be entitled to the benefits and privileges conferred

(1) [1956] Ex. C.R. 94.

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and subject to the duties and liabilities imposed by the said Order in Council, the Act and amendments thereto, or by any subsequent Act supplanting or supplementing the said Act.

Order in Council P.C. 299 was made on February 11, 1919, while the 1917 Act was in force, and, so far as it might be considered relevant to any issue in the action, authorized the Board to acquire suitable lands for settlement, either from the Government or from individuals or corporations, and to sell such lands to soldier settlers on terms defined with some particularity.

The Act of 1917 made no reference to the sale of lands or the mineral rights in lands. The 1919 Act, however, dealt with the matter of mineral rights in precise terms, s. 57 reading:

> 57. From all sales and grants of land made by the Board all mines and minerals shall be and shall be deemed to have been reserved, whether or not the instrument of sale or grant so specifies, and as respects any contract or agreement made by it with respect to land it shall not be deemed to have thereby impliedly covenanted or agreed to grant, sell or convey any mines or minerals whatever.

Mr. Justice Ritchie has found that the inclusion of para. 13 was simply a clerical mistake occasioned by the fact that use was made of a form of agreement which had, by reason of the repeal of the 1917 Act, become obsolete.

I find nothing in the order in council or in the 1917 Act which conflicts with s. 57 of the Act of 1919 and I agree with the learned trial judge that it applies to the agreements in question which were made with the individual settlers after the Act came into force. In the cases of Stoutenberg and John Lewis, whose agreements were executed respectively on May 29, 1920, and April 24, 1922, para. 13 was not included but, by a paragraph numbered 14, it was stated that the agreement was given and received under the provisions of the *Soldier Settlement Act, 1919.*

While this finding is fatal to the claims of all of the appellants in so far as they are based upon the original agreements made with the Board, in my opinion a further complete answer to the claims other than those of William Kerr and of the estate of Daniel Beaton is that, some years prior to the institution of the action, transfers of the various parcels of land made under the provisions of the *Land Titles Act*, now R.S.A. 1955, c. 170, were given by the Soldier Settlement Board to the settlers and were accepted

and registered and in each of them the mineral rights were expressly reserved. The rights of the settlers under the agreements, under these circumstances, in my opinion, merged in the transfers. In *Leggott v. Barrett* (1), James L.J. said, in part:

> . . . I cannot help saying that I think it is very important, according to my view of the law of contracts, both at Common Law and in Equity, that if parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and that you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself.

This statement of the law was approved by the Judicial Committee in *Knight Sugar Company Limited v. Alberta Railway and Irrigation Company* (2).

In the case of Kerr, who received but did not register his transfer, and of the Beaton estate, where no transfer had been given up to the time of the commencement of the action, no question of merger arises. However, in my opinion s. 57 applies to the agreements in both of these cases.

As to the alternative claim—the reference in the petition to the "Directors" was apparently intended to refer to an official described as the Director of Soldier Settlement in the form of application hereinafter mentioned.

A document described as a "News Release" made by the Department of Veterans Affairs early in January 1949, was put in evidence, in which the Minister of Veterans Affairs and the Minister of Mines and Resources were quoted as having announced that veterans settled on the land under "the Soldier Settlement Act of World War I" who had completed or did complete their contracts were to be granted mineral rights on their property in all cases where the Soldier Settlement Board acquired those rights with title to the land. The two Ministers were also quoted as saying that the veterans would have until March 31, 1950, to make application for the mineral rights; that where title had not yet been given to a property, the

(1) (1880), 15 Ch. D. 306 at 309.

(2) [1938] 1 All E.R. 266, [1938] 1 D.L.R. 321, [1938] 1 W.W.R. 234 at 237.

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mineral rights, with the surface rights, would be transferred upon settlement of the settler's indebtedness, and that where title to surface rights had already been transferred "approval may be given to convey the title to mineral rights".

Following this announcement, correspondence ensued between the majority of the present appellants, or their solicitors, and the District Solicitor of the Soldier Settlement Board at Edmonton. It is apparent that the solicitor, Mr. L. S. Cutler, thought that an order in council had been passed authorizing the sale of the mineral rights to the settlers, as he sent to several of them forms of an application, apparently prepared by someone on behalf of the Board, addressed to the "District Superintendent, Soldier Settlement & Veterans' Land Act," which read in part:

> As The Director of Soldier Settlement has now authority to accept from Soldier Settlers or if deceased their personal representatives, who purchased land or lands under the Soldier Settlement Act of 1919, applications for the issuance of a Grant of Title to the mines and minerals acquired with the Title to such lands, I hereby make application for the mines and minerals appurtenant to the land or lands hereinafter described which were purchased from the Soldier Settlement Board. The required fee of $25 is enclosed herewith.

The correspondence which ensued is set out at length in the judgment of Ritchie J. While the claims were not so pleaded, the appellants contend that these letters written by the District Solicitor constituted offers by the Crown. Even if that were so, and there is no evidence that Mr. Cutler was authorized to make any offer on the Crown's behalf, it is only in the cases of the appellant Peter MacDonald and that of the estate of the late D. W. Beaton that it can even be suggested that any agrement was made out.

In the case of MacDonald, a letter was written to him by Cutler on January 20, 1949, saying that a recent order in council had provided that soldier settlers who repaid their loans could obtain title to such mineral rights as were vested in the Director of Soldier Settlement and that it appeared from the Board's records that "you are entitled to mineral rights as shown on the enclosed form of application". A form of application, quoted above in part, was enclosed, and the letter asked him to complete it and return it with a fee of $25 when, it was said, a transfer conveying

the mineral rights would be requested. MacDonald signed and sent the application with a cheque for $25, but the application was not accepted and, at a later date, MacDonald was advised that the mineral rights were not at any time owned by the Board. The accuracy of this statement is immaterial in these circumstances.

There was no evidence that an order in council had authorized the transfer of the mineral rights, and Cutler's statement that it would appear from the records that MacDonald was entitled to the rights was merely an expression of his opinion which, so far as the record shows, was inaccurate. His letter was not an offer, but rather an invitation to make an offer.

As to Beaton, he was informed by a letter from the District Solicitor, on February 7, 1949, that, on payment of the outstanding debt on his land, the director of Soldier Settlement would be prepared to transfer such mineral rights as were acquired by him and, alternatively, if he was unable to pay the indebtedness, the Department of Mines and Resources had been authorized, subject to the approval of the Director of Soldier Settlement, to dispose of the mineral rights by sale, provided the proceeds from such disposal were applied on Beaton's indebtedness to the Board. Beaton wrote that he was not able to pay up his indebtedness and did not want the mineral rights sold. Later he was advised that the mineral rights had not come into the possession of the Soldier Settlement Board and that it was not possible for the Board to deal with them, and there the matter rested. Clearly this correspondence discloses no agreement.

In one other case, that of the appellant John Lewis, a letter was written by Cutler saying that an order in council, of the nature above mentioned, had been passed and that it would appear that Lewis was entitled to mineral rights, and a form of application was sent to him. This again was an error on the part of the solicitor in so far as the letter referred to the order in council and was simply an expression of his opinion as to the settler's rights.

Thus it appears to me to be clear that, even if Cutler had been authorized to enter into a binding contract on behalf of the Crown, he did not purport to do so.

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It is to be remembered that by reason of s. 57 of the Act of 1919 sales of mineral rights could not be made by the Soldier Settlement Board. The Act of 1917, upon which the appellants sought to place some reliance, was an Act to authorize loans to soldier settlers and to enable them to obtain homestead entries and did not purport to authorize the sale of land. As Mr. Justice Ritchie has pointed out, in the absence of any other statutory provision, the sale of public lands may be authorized by order in council under the *Public Lands Grants Act,* now R.S.C. 1952, c. 224. I agree with the learned trial judge that the onus lay upon the appellants to show that such an order in council had been made and that this was not proven. On the contrary, the evidence of the witness Cunningham showed that no such order in council had been made.

I would dismiss this appeal and with costs if they are demanded.

Appeal dismissed with costs if demanded.

Solicitors for the suppliants, appellants: Brownlee, Brownlee & Fryatt, Edmonton.

Solicitor for the respondent: F. P. Varcoe, Ottawa.