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*Nov. 5, 8.
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L. L. FULLER (PLAINTIFF).....APPELLANT;

AND

L. GARNEAU (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Sale—Sale of land—Agreement—Reservation of mines and minerals to Crown—Implied powers—Whether greater than those expressly reserved in Crown grant.

The reservation, in a Crown grant, of the mines and minerals "with full power to work the same and for this purpose to enter upon and use or occupy the * * * lands or so much thereof and to such an extent as may be necessary for the effectual working of the said minerals * * * " confers greater powers than those implied in a bare reservation in an agreement for the sale of the land so granted of "all mines and minerals." Sir Louis Davies C.J. and Idington J. dissenting.

Per Duff, Anglin and Mignault JJ.—The terms of both reservations imply the right to win, get at and take away the minerals; but the terms of the reservation in the Crown grant may imply furthermore the right to cause subsidence or destruction of the surface.

Judgment of the Appellate Division (15 Alta. L.R. 194) reversed, Sir Louis Davies C.J. and Idington J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of Scott J. (2) and dismissing the appellant's action.

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) [1920] 15 Alta. L.R. 194; [1920] (2) [1920] 1 W.W.R. 154. 1 W.W.R. 619.

The appellant is the purchaser from the respondent of certain lands under an agreement of sale "reserving unto His Majesty, His successors and assigns, all mines and minerals." Later on, the appellant discovered by a search made in the Land Titles Office that the reservation of mines and minerals in favour of the Crown was not in the terms as represented by the respondent; and alleging that it was a much more complete reservation, he claimed rescission of the agreement of sale.

J. R. Lavell for the appellant.

C. H. Grant for the respondent.

THE CHIEF JUSTICE (dissenting).—The single and only question which arises on this appeal for us to determine is whether the words of the reservation in the Crown grant are greater than, or different from, the words in the agreement of sale from the defendant respondent to the plaintiff appellant.

The words in the latter agreement are

> reserving unto His Majesty, his successors and assigns, all mines and minerals.

The reservation in the Crown grant is as follows:—

> Reserving thereout and therefrom all mines and minerals which may be found to exist within, upon or under such lands together with full power to work the same and for this purpose to enter upon and use or occupy the said lands or so much thereof or to such an extent as may be necessary for the effectual working of the said minerals, pits, seams and veins containing the same.

After reading the authorities cited by the counsel at bar to sustain their respective contentions, I am of the opinion that the appeal fails.

1921

FULLER v. GARNEAU.

The Chief Justice.

I think that Mr. Justice Ives, who delivered the judgment of the Appellate Division, correctly stated the question at issue, in his reasons for judgment, as follows:—

> Do the words in the Crown grant enable more extensive colliery operations to be carried on to get (or win) the minerals than do the words used by the defendant vendor in the agreement, extended by legal implication?

And he answered that question, I think, correctly when he said he thought they did not.

The full reservation merely adds to the reservation of the mines and minerals

> the full power to work the same and for this purpose to enter upon and use

so much of the lands and to such an extent as may be necessary for the "effective working of the minerals" or the mines, etc.

I cannot doubt under the authorities that these express powers are impliedly and necessarily contained in the simple reservation of the mines and minerals and that they do not extend or enlarge these implied powers which are essential to give efficacy to the reservation.

See per Bayley, in *Cardigan* vs. *Armitage* (1), and Lord Wensleydale in *Rowbotham* vs. *Wilson* (2); *Duke of Hamilton* vs. *Graham* (3),

We are not called upon to decide upon the respective rights of the mine owners under these reservations as against the surface owner, and, of course, do not do so. Whether or not they carry the right as against the surface owner to cause subsidence of the soil it is not either necessary or desirable on the facts

(1) [1823] 107 E.R. 356. (2) [1860] 8 H.L.Cas. 348.
(3) [1871] L.R. 2 Sc. App. 166 at p. 171.

before us to determine. That question is certainly a difficult and a delicate one and should only be dealt with, where necessary to determine, on the facts as found in each case. I do not, in the present appeal and on the facts as they appear in the record, feel called upon or justified in expressing any opinion on that question.

I simply determine that, in my opinion, the two reservations mean the same and that the implied powers arising in the one are equivalent to the express powers given in the other. But whether they give the right to cause subsidence as against the surface owner I leave for determination when a case actually involving that question arises and all the facts necessary to decide it are before the Court.

The appeal should be dismissed with costs.

IDINGTON J. (dissenting).—If the language used upon which it is attempted herein to rest a charge of fraudulent misrepresentation, is only applied in a common sense way, having regard to what I suspect is common knowledge on the part of every one dealing in real estate in Alberta, it would mean, to him to whom it was addressed there, exactly what the language of the reservation in a Crown grant expresses, when the title rests upon that with the reservation therein of mines and minerals.

I must be permitted to doubt if it took seven years on the appellant's part to discover this in face of such a falling market as ensued.

The ground of delay not having been expressly taken and argued out by reason of the narrow limitations of the direction of trial as presented to us, I need not pursue that phase of the question of delay.

1921

FULLER v. GARNEAU.

Idington J.

But the pleadings shew that the agreement of purchase which appellant accepted pursuant to such alleged misrepresentation, contained an express provision for the appellant purchaser getting a deed of conveyance pursuant thereto, subject to the conditions and reservations in the original grant from the Crown. That is all he is entitled to get and surely it embraces such a well-known common reservation of mines and minerals in the form now in question.

The cases relied upon by the appellant, in his factum, to overcome this express feature of the contract in question, do not seem to touch its force and efficacy as a complete answer to the pretension of misrepresentation and fraud as specified by appellant's pleadings set up as the fundamental part of his case.

The cases so cited and relied upon are the well-known cases of *Venezuela Co.* v. *Kisch* (1); *Redgrave* v. *Hurd* (2), and *Rawlins* v. *Wickham* (3).

And besides in their essential features of fraud or misrepresentation going far beyond anything pleaded herein, the first named shews how prompt action is required and delay may be inexcusable and destructive of such a claim.

There is in short no fraud or misrepresentation herein, if the pleadings are to be read as a whole, as the factums seem to indicate. We have in the case no copy of the order directing what is to be disposed of, but no doubt that in the record and the recognition by each factum of what is involved, may be taken as our guide to the limitations thereof.

(1) [1867] L.R. 2 H.L. 99. (2) [1881] 20 Ch. D. 1.
(3) [1858] 44 E.R. 1285.

I may be permitted to say that it does not seem to me at all necessary to rely upon some of the decisions cited in support of the judgment appealed from, and thereby impliedly to assume that the reservation in the Crown grant means, in every case, exactly what many of the decisions cited seem to imply in regard to subsidence of the surface, for they were, in many instances, by the consideration of a course of legal and judicial history which ultimately may not be found exactly to fit all the conditions leading to what was intended to be expressed in the reservations in the Crown grants for land in our North West provinces; especially when coal, for example, forms part of that very surface in question which inevitably must subside when such coal is taken.

It seems better to avoid putting, impliedly, an interpretation, or construction of the Crown reservation which I hold must have been, or should have been, from the foregoing considerations, presented to the mind of appellant.

The appeal should be dismissed with costs.

DUFF J.—The point of law to which the Appellate Division directed its attention is stated in the judgment of Mr. Justice Ives:—

> The plaintiff is the purchaser from defendant of certain lands, under an agreement of sale "reserving unto His Majesty, his successors and assigns, all mines and minerals."
>
> The full reservation of the Crown grant is in the following words:—
>
> Reserving thereout and therefrom all mines and minerals which may be found to exist within, upon or under such lands together with full power to work same and for this purpose to enter upon and use or occupy the said lands or so much thereof or to such an extent as may be necessary for the effectual working of the said minerals or the mines, pits, seams and veins containing the same.

1921

FULLER v. GARNEAU.

Duff J.

The issue is whether the words used in the Crown grant confer a wider power on the owner of the mines and minerals over the surface, than the words in the agreement, which admittedly are extended by the implied right to the mineral owner to enter upon the surface and dig for, get and carry away the minerals. Or perhaps we might put the issue thus: Do the words of the Crown grant enable more extensive colliery operations to be carried on to get the minerals than do the words used by the defendant vendor in the agreement, extended by the legal implication?

The precise question therefore upon which it is necessary to pass is whether an exception of "mines and minerals" gives in favour of the grantor rights as large as the rights given by such an exception associated with an express reservation of the right to work in the terms above stated. It is to be noted that the easement given by the reservation involves not only the right to take the minerals found in the lands granted but to enter and occupy the land for the working of all veins containing minerals that may be found in them. I should hesitate before holding that the powers of entry for the purpose of exploration under such a reservation are not greater than those given by a provision of the deed excepting *simpliciter* "mines and minerals."

There are other points which might be suggested but it is unnecessary to discuss them because in one respect at all events I have come to a definite conclusion that the reservation of the right to work in the terms of the patent confers wider rights than an exception in the more limited form. It is established doctrine that the right to work in such a way as to let down the surface does not arise under an exception of "mines and minerals" unless there is something in the terms of the deed which expressly or by necessary implication gives such a right. That is settled in a series of cases. *Love* v. *Bell* (1); *Butterley* v. *New*

(1) [1884] 9 App. Cas. 286.

Hucknall Colliery Co. (1). (See especially the judgment of Lord Macnaghten at pp. 385-6). But the rule seems to be also established that where there is an express right to work a specified kind of mineral even in terms less comprehensive than those we have now to pass upon that may, according to the circumstances, involve the right to work that kind of mineral notwithstanding this consequence. Ashbury J. in *Welldon* v. *Butterley Co.* (2), fully discussed the effect of a disposition where the reserved rights include by express stipulation the power to work the subjacent coal *eo nomine*, and where it is established as a fact that by no known method of working the coal can subsidence be avoided.

The reservation in the patent does not specifically mention coal or any other mineral but there is a reservation of all "mines and minerals" and a right to work all of them. It does not appear to me that a right expressed in these terms is less comprehensive as regards any particular mineral that may be found than a right derived from a stipulation in the same terms but applicable to that particular mineral alone. I think the judgment of Ashbury J. is convincing and although in express terms it applies only to the case of a reservation of the right to work specific minerals the reasoning does, I think, involve the conclusion that the rights under such a clause as that we have to consider are of the same character; and in that reasoning I concur.

This suffices to dispose of the precise question passed upon by the Appellate Division and decided by them in a sense adverse to appellant and the result is that the appeal from that decision should be allowed and the judgment dismissing the action set aside.

(1) [1910] A.C. 381. (2) [1920] 1 Ch. 130.

1921

FULLER v. GARNEAU.

Duff J.

The action will of course proceed in accordance with the Alberta practice in the usual course to the trial of the other questions which remain to be determined.

I express no opinion of course upon any of these questions nor do I make any suggestion whatever as to the ultimate effect of the present decision upon the determination of the concrete questions in controversy in this litigation.

The appellant is entitled to his costs of the appeal and of the hearing in the court of first instance.

ANGLIN J.—The question to be determined on this appeal is whether a reservation of mines and minerals *simpliciter* in a grant of land carries with it all the rights and privileges, actual and potential, which the reservation of mines and minerals

> with full power to work the same, and for this purpose to enter upon and use or occupy the lands or so much thereof and to such an extent as may be necessary for the effectual working of the said minerals or the mines, pits, seams and veins containing the same

found in the grant of the land here in question from the Crown, may confer. For the appellant it is contended that there is a substantial difference in regard to the right to destroy or cause subsidence of the surface and certain other rights.

The implication in the mere reservation of them in a grant of land of the right to win, get and take away the minerals is recognized by a long series of authorities. The powers which this implied right gives are well stated by Kekewich J., in *Marshall* v. *Barrowdale* (1). They may be formulated in terms not dissimilar to those above extracted from the Crown grant.

(1) [1892] 8 Times L.R. 275.

But that the right so implied is always subject to the condition that its exercise shall not prejudice the surface owner's natural right to support is conclusively established by many authorities in English courts of which the most recent is the decision of the House of Lords in *Thomson* v. *St. Catharine's College, Cambridge* (1). The surface cannot be destroyed however necessary it may be to do so for the practical working of the mines.

The same result follows in the case of an express power to work, etc., where it is possible to work the mines and extract the minerals without causing subsidence or destruction of the surface, and the right to do so is not conferred expressly or by necessary implication in the terms in which the power is couched. *Dixon* v. *White* (2); *Davis* v. *Treharne* (3). A modern instance of such a necessary implication is found in *Davies* v. *Powell Duffryn Steam Coal Co.* (4).

As Lord Macnaghten said in the *Butterknowle Case* (5), after referring to the more recent decisions of their Lordships:—

> The result seems to be that in all cases where there has been a severance in title and the upper and the lower strata are in different hands, the surface owner is entitled of common right to support for his property in its natural position and in its natural condition without interference or disturbance by or in consequence of mining operations, unless such interference or disturbance is authorized by the instrument of severance either in express terms or by necessary implication. This presumption in favour of one of the ordinary and most necessary rights of property holds good whether the instrument of serevance is a lease, or a deed of grant or reservation, or an inclosure act or award. To exclude the presumption it is not enough that the mining rights had been reserved or granted in the largest terms imaginable, or that powers or privileges usually found in Crown grants are conferred without stint, or that compensation is provided in measure adequate, or more than adequate, to cover any damages likely to be occasioned by the exercise of those powers and privileges.

(1) [1919] A.C. 468.
(2) [1883] 8 App. Cas. 833 at p. 843.
(3) [1881] 6 App. Cas. 460.
(4) [1917] 1 Ch. 488.
(5) [1906] A.C. 305, at p. 313.

1921

FULLER v. GARNEAU.

Anglin J.

But where it is established that the mines cannot be worked or the minerals extracted without entailing such consequences, an express power to work the mines and get the minerals necessarily implies the right to cause subsidence and destruction of the surface. This is the result of the decisions in *Butterley Co.* v. *New Hucknall Colliery Co.* (1); *Duke of Buccleuch* v. *Wakefield* (2), and *Bell* v. *Earl of Dudley* (3). The authorities on this branch of the law are ably discussed in the recent judgment of Astbury J. in *Welldon* v. *Butterley Co.* (4).

In this latest case it is stated to be now scientifically established that all systems of coal mining necessarily result in the subsidence of the surface. It may be that in the present case it can be shewn by evidence that whatever coal lies under the land in question cannot be removed without destruction of the surface. At all events the fact that the express powers reserved in the Crown grant expose the purchaser to the risk of such a result, to which he would not have been subject had the reservation been merely of "mines and minerals," in my opinion suffices to preclude an *a priori* finding that the title offered him is such as the vendor can compel him to accept.

Other differences between the scope of the expressed and implied powers urged by the appellant are probably negatived by the limitative word "necessary" in the clause of the Crown grant. But they, as well as the defences of notice by registration and waiver of the right to repudiate, and the effect of the provision in the agreement that the deed to be given shall be

(1) 1910 A.C. 381.
(2) [1869] L.R. 4 H.L. 377.
(3) [1895] 1 Ch. 182.
(4) [1920] 1 Ch. 130.

subject to the conditions and reservations in the original grant from the Crown,

can be dealt with more satisfactorily after a full trial of the action.

I am for these reasons, with great respect, of the opinion that the appeal should be allowed and the judgment of dismissal set aside and the action allowed to proceed to trial in the ordinary course. It may be that the plaintiff will then fail to satisfy the court that whatever minerals may be upon, in or under the land cannot be removed without permanent injury to the surface and that the defendant will on that ground eventually succeed.

The appellant is entitled to be paid his costs of the appeals to the Appellate Division and to this court; and the costs of the motion before Mr. Justice Scott should be costs in the cause to the plaintiff in any event thereof.

MIGNAULT J.—The issue of law tried on the pleadings in this case is whether the contention expressed in paragraphs 10 and 11 of the respondent's statement of defence is well founded for if it is the appellant's action was rightly dismissed. These two paragraphs are as follows:—

10.—The defendant says that the reservations set out in paragraph 7 of the statement of claim are the same reservations or less reservations than those implied by reservation of the mines and minerals.

11.—The defendant says that in law, reservation of the mines and minerals is equivalent to reservation of mines and minerals together with full power to work the same and, for this purpose, to enter upon and use or occupy the said lands, or so much thereof and to such an extent as may be necessary for the effective working of the said minerals or the mines, pits, seams and veins containing the same.

1921

FULLER v. GARNEAU.

Mignault J.

The appellant's action claimed rescission of an agreement of sale made with the respondent, on the ground, *inter alia*, that although the respondent stated that he could not agree to sell the mines and minerals, which were reserved, he represented that this was the only reservation, whereupon the agreement of sale was signed, reserving to His Majesty, his successors and assigns, all mines and minerals. And the appellant alleges in paragraph seven of his statement of claim (referred to in paragraph ten of the statement of defense), that since the agreement of sale, he has discovered by a search made in the Land Titles Office that the reservation of mines and minerals in favour of the Crown was not as represented by the respondent, but was a much more complete reservation, being as follows:—

> Reserving thereout and therefrom all mines and minerals which may be found to exist within, upon or under such lands together with full power to work the same, and for this purpose to enter upon and use or occupy the said lands or so much thereof and to such an extent as may be necessary for the effectual working of the said minerals or the mines, pits, seams, and veins containing the same.

The appellant's case is that under a bare reservation to the Crown of mines and minerals, while the mines and minerals lying under the surface could be—to use the terms found in most reservations—won, got at and taken away, this could only be done subject to the surface owner's natural right of support of the surface by the subjacent strata, whereas, under the reservation found in the Crown's grant, the Crown could, if necessary, cause a subsidence of the surface; so that the reservation in favour of the Crown is materially different from that represented by the respondent, and much more serious in its effects than a general reservation of mines and minerals would be.

The respondent's contention, as expressed in paragraph 10 and 11 of his plea, in my opinion, is clearly unfounded. I take it as being now well settled that a bare reservation of mines and minerals does not carry with it the right to cause subsidence of the surface. An express reservation, on the contrary, in terms such as those to be found in the grant from the Crown and quoted above, where the mines and minerals cannot be won, got at or taken away without causing subsidence of the surface, carries with it by necessary implication the right to work the mine and extract the minerals even to the point of depriving the owner of the surface of his right of support by the subjacent strata.

This distinction is well expressed in the head note to the decision of the English Court of Appeal in *Butterley Co. Ltd.* v. *New Hucknall Colliery Co. Ltd.* (1), as follows:—

> In construing instruments which involve the severance of surface or of a higher seam and subjacent minerals it is presumed that the owner of the surface or of the higher seam intends to reserve his common law right of support; the onus of shewing that this was not the intention of the parties to the deed lies on the mineral owner, and this onus is not discharged by the insertion of full powers of working and carrying away all the minerals expressed in general terms, or of wide provisions for compensation. But when the mineral owner proves not only that the upper seam will not be destroyed, but only injured to such an extent as will admit of compensation, and, further, that it is impossible to get the minerals at all without letting down the upper seam, all reasons for qualifying the general words of the powers of working are gone, and if the terms of the instruments make it clear that it was the intention of the parties that subjacent seams should be worked, it is a necessary implication that they intended that there should be a subsidence of superjacent strata.

As an example of a case where there is only a bare reservation of mines and minerals, I may refer to the recent decision of the House of Lords in *St. Catharines College, Cambridge*, v. *Dowager Countess of Rosse* (2),

(1) [1909] 1 Ch. 37. (2) [1919] A. C. 468

1921

FULLER v. GARNEAU

Mignault J.

where the right to cause subsidence of the surface was denied. And, as shewing where this right can be implied, when the terms of the reservation are sufficiently wide, and the mine cannot be worked without causing subsidence, there is the still more recent decision of Mr. Justice Astbury in *Welldon* v. *Butterley Co., Ltd.* (1). This last case, while not binding on us, is very instructive as shewing where the right to cause subsidence can be considered as a necessary implication of the right to work the mine, and the learned judge very exhaustively deals with all the authorities bearing on the matter.

On the issue of law raised in this case by the respondent's plea, I, with respect, think that the appellant is right in complaining of the dismissal of his action. His action should therefore go to trial, and inasmuch as the respondent alleges that he, the appellant, purchased subject to the conditions and reservations in the original grant from the Crown, it should be determined whether this (if proved) renders his purchase subject to the express reservation above quoted, and whether it is possible or not to win, get at and carry away the minerals without causing subsidence of the surface. The question will then be whether the appellant has made out a case for rescission of the agreement of sale.

The appeal should be allowed with costs here and in the Appellate Division, costs of motion to the plaintiff in any event.

Appeal allowed with costs.

Solicitors for the appellant: *Lavell & Ross.*

Solicitors for the respondent: *Rutherford, Jamieson & Grant.*

(1) [1920] 1 Ch. 130