THE CANADIAN COAL AND COLONIZATION COMPANY (LIMITED)... } CLAIMANTS; 1892 Oct. 31.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Sale of Dominion Lands—Reservation of mines and minerals—The Dominion Lands Act (43 Vic. c. 26)—Rights of purchaser.

Where the Crown, having authority to sell, agrees to sell and convey public lands, and the contract is not controlled by some law affecting such lands and there is no stipulation to the contrary express or implied, the purchaser is entitled to a grant conveying such mines and minerals as pass without express words.

THIS was a reference to the court by the Department of the Interior of a claim respecting certain Dominion Lands. The reference was made under 50-51 Vic. c. 16 s. 23.

The facts of the case are stated in the judgment.

May 4th, 1892.

Hogg, Q.C. for the Crown:

The agreement, as well in its terms as in the negotiations and correspondence leading up to it and in the dealings of the parties subsequent to its execution, shows conclusively that so far as the Government were concerned they were dealing with farm lands. This is an element of great importance in view of the effect of the legislation and the order in council. The whole object and intention of Sir John Lister Kaye when he applied for this agreement was to start farms in that locality. And not only that, but all the conditions in the agreement had reference to farming and stocking and carrying grain and cattle upon the railway. On the 27th of March, 1887, Sir John Lister Kaye telegraphs: "Will the Government include coal in sale

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"of lands to me. Most important. Sixty thousand "pounds conditionally subscribed"; and the Government replied: "Will sell coal lands on usual terms, "ten dollars cash with deduction, however, on cash "price to you,—being a deduction in all of two dol- "lars and fifty cents per acre." So that if there was anything really required to show what the intention of the parties was both before and after this agreement was entered into, they have revealed it most plainly in these two telegrams.

Taking the whole conduct of the parties from the beginning to the end, although the agreement contains the words "fee simple," it must be held to have reference merely to the use of the land for farming or agricultural purposes. The proper and fair inference to be drawn from the mutual dealings is that when the Government was entering into the contract they were doing so with that view. It should not be assumed that the Government were entering into a contract which they had no power to make under the Act 42 Vic. c. 31.

He cites *Jones* v. *The Queen* (1).

Gormully, Q.C. for the claimants:—I thought that the words "fee simple" were of such a very ancient and settled meaning that any man who was entitled to get lands in fee simple was never satisfied to get merely the surface rights to the ground. (Cites *Cruise's Digest* (2).) These telegrams between the parties are quite independent of the contract, and the agreement itself is the best evidence of its own meaning. I submit that the words "fee simple" must include all mines and minerals, except gold and silver.

The Crown is the holder of these lands. The fee simple in these lands is in Her Majesty just as much

(1) 7 Can. S. C. R. 570. (2) Vol. 1 p. 55.

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as I am the owner of the fee in my own lands. Now the Crown makes a bargain which cannot be carried out, and am I not entitled to damages for the breach of contract? The claimants come into court having performed all the conditions necessary on their part to entitle them to relief, and ask a proper remedy in damages. Again, the orders in council which were supposed to have been made in 1883, have never been sufficiently published in *The Canada Gazette*, and are therefore, under the statute, not binding on the claimants or any body else.

Abbott, Q.C. followed on same side.

BURBIDGE, J. now (October 31st, 1892) delivered judgment.

The claimants purchased from the Crown certain Dominion Lands, of which the east half of section 12, township 12, range 5 and section 36, township 13, range 7, west of the 4th meridian, formed part. In the letters-patent issued to them of the half-section and the section mentioned was inserted a reservation of all mines and minerals. The claimants allege that they are entitled to letters-patent without any such reservation, and their claim in that behalf has been referred to the court for determination.

The lands described form part of 50,000 acres which, on the 11th February, 1887, the Crown agreed to sell and convey in fee simple to Sir John Lister Kaye for the price and upon the conditions set out in an agreement of that date, and which, under the authority of an order in council made on the 3rd of January, 1889, the Crown, for the price of $1.50 per acre, sold to the claimants as assignees of Kaye.

There is in the agreement and order in council nothing to support the reservation complained of, and

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limiting the question to what appears therein, I have no doubt that the claimants' contention must prevail.

I am unable, however, to go to the full extent of their argument and to hold that the question referred to is concluded by the use of the expression "fee simple" in the agreement. These words indicate that the estate is to be one of inheritance without any condition or limitation that would abridge or defeat the fee. But one may have an estate in fee simple in lands in which the right to take the minerals therein is in another, or is reserved. If, however, the Crown having authority to sell agrees to sell and convey public lands, and the contract is not controlled by some law affecting such lands, and there is no stipulation to the contrary, express or implied, the purchaser is, it seems to me, entitled to a grant conveying such mines and minerals as pass without express words.

But if by the law authorizing the sale thereof, such lands may not be sold without a reservation of the mines and minerals therein, then, I think the purchaser has no good ground of complaint if such reservation is inserted in the grant thereof, although by the terms of the agreement of sale the lands were to be conveyed in fee simple.

In the first place it is said for the Crown in support of the reservation that the sale was made subject to certain orders in council relating to coal lands passed, respectively, on the 26th of December, 1882, the 2nd of March, 1883, the 13th of May, 1884, and the 13th of April, 1886. By the first two of such orders certain lands, including those for which the letters-patent are in question, were declared to be coal districts, and were withdrawn from ordinary sale and settlement. By the third an upset price for coal lands was prescribed, and by the fourth coal districts were opened

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to settlement reserving, however, the coal rights therein. There was also an order in council of October 30th, 1887, upon which the Crown does not now rely, though it is set out in the statement in defence. This order authorized the insertion in letters-patent of all lands west of the 3rd meridian of a reservation of all mines and minerals, except in the case of lands which had theretofore been sold and disposed of for valuable consideration.

These orders in council were made under the authority of a clause in *The Dominion Lands Act* (1) by which it was provided that lands containing coal or other minerals should not be subject to the provisions of the Act respecting sale or homestead, but should be disposed of in such manner and on such terms and conditions as might from time to time be fixed by the Governor in Council by regulations to be made in that behalf—which regulations should not go into operation until after they should have been published for four successive weeks in *The Canada Gazette*. It turns out, however, that none of the orders-in-council referred to were published in accordance with the statute. Two were published for three weeks only, and the others were never published. So it happened, I think, that, at the time of the sale to the claimants, the lands in question had not been withdrawn from the operation of the provisions of the Act respecting sale (2), and there was nothing to prevent the Crown selling them without any reservation of the mines or minerals therein.

In the second place, for the Crown, it is contended that the reservation was properly inserted in the letters-patent for the reason that when the agreement of February 11th, 1887, was entered into the Crown and

(1) 43 Vic. c. 26 s. 6; 46 Vic. c. 17 ss. 42 & 81 (2); R. S. C. c. 54 ss. 47 & 91.

(2) 46 Vic. c. 17 s. 24.

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Kaye had in contemplation the sale of agricultural lands to be used for agricultural purposes only, and that, it appears to me, is a fair inference to draw from the following incident:—On the 27th of March, 1887, Kaye sent a message by cable to the Minister of the Interior asking if the Government would include the coal in the sale of the lands, to which the Minister two days later replied that the Government would, with certain reductions mentioned, sell coal lands on the usual terms of ten dollars per acre. Probably Kaye had seen the orders in council respecting coal lands and believed that he was purchasing subject to their provisions. But that does not, it seems to me, dispose of the question in issue between the parties. The orders not having been published cannot be regarded as valid regulations of which all purchasers of Dominion Lands were bound to take notice; and there is nothing to show that the claimants were aware of their existence. Neither had they knowledge of what passed between Kaye and the Minister of the Interior in respect to the purchase of the coal in the lands. When as assignees of Kaye they were accepted by the Government as the purchasers of such lands there was no intimation to them that the sale was made subject to any reservation. There was nothing in the agreement to put them on their guard. On the contrary by its terms they had, I think, a right to conclude that they would acquire all mines and minerals in the lands, excepting gold and silver (1). Then too, it appears to me, that the sale to the claimants of the 50,000 acres at $1.50 per acre, authorized by the order in council of January 3rd, 1889, even if it did not constitute, had in a great measure the character of, a new transaction to which the only parties were the Crown and the claim-

(1) 46 Vic. c. 17 s. 43 ; R. S. C. c. 54 s. 48.

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ants, and which could in no way be effected by any view Sir John Lister Kaye may have entertained of the rights he was acquiring under the agreement of February 11th, 1887.

*Judgment for claimants, with costs.**

Solicitors for claimants: *Abbotts, Campbell & Meredith.*

Solicitors for respondent: *O'Connor, Hogg & Balderson.*

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*REPORTER'S NOTE.—Upon a motion heard on 23rd January, 1893, on behalf of the respondent, to make absolute a rule *nisi* for a new trial or to vary the judgment, the learned Judge said the rule would be dismissed without costs. He was, however, glad of the opportunity afforded him to correct the statement in his reasons for judgment that the order in council of the 26th of December, 1882, was not published in *The Canada Gazette* in accordance with the statute,—the fact being that it was so published three times in English and twice in French, and in this way for four successive weeks; but that there was no evidence that it had been laid before Parliament, as was also required by the statute, and in any case he did not think the question as to whether or not that particular order was in force was in anyway material to the issues raised by the reference in the case.