1954

*Nov. 3

*Dec. 9

ELIZABETH BALZER and HENRI BALZER (*Applicants*) ..... APPELLANTS;

AND

THE REGISTRAR OF MOOSOMIN LAND REGISTRATION DISTRICT and JOHN FREDERICK LEESON CLEMENTS, sole surviving Executor of the Estate of Eliza Jane Clements, deceased, and the ATTORNEY GENERAL OF SASKATCHEWAN ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Real Property—Land Titles—Mines and Minerals—Unauthorized entry by Registrar on Certificate of Title—Application to cancel "Minerals in the Crown" and substitute "Minerals Included"—The Land Titles Act, R.S.C. 1953, c. 108, ss. 2 (1), (10), 65, 66, 82.

The appellants made application under s. 82 (*b*) of *The Land Titles Act*, R.S.S. 1953, c. 108, for an order directing the respondent Registrar to cancel the notation "Minerals in the Crown" appearing on the certificate of title to certain lands held by them and to substitute therefor

*PRESENT: Kerwin C.J. and Kellock, Estey, Locke and Cartwright JJ.

"Minerals Included". The lands in question were originally "Dominion Lands" as defined by *The Dominion Lands Act*, R.S.C. 1886, c. 54, and the grant from the Crown contained no reservation as to minerals but on the certificate of title issued to the original grantee on Dec. 23, 1889, there was endorsed the words "Minerals Included". Subsequent conveyances contained no reservation as to minerals and by virtue of a final order of foreclosure of mortgage, title was vested in one Eliza Jane Clements. By a certificate of title issued to her Dec. 20, 1928, there was entered thereon "Minerals in the Crown". Following her death the land was transferred to her executors and by the survivor of them to the present appellants. Certificates of title were issued the transferees on each occasion bearing a similar notation.

Held: There was no authority under *The Lands Title Act* (Sask.) for the notation "Minerals in the Crown" made by the Registrar of Land Titles on the certificates of title issued to Eliza Jane Clements, to her executors, or to the appellants, and the application of the latter so far as it asked for the cancellation thereof should be granted. The substituted notation asked for should not be allowed.

Judgment of the Court of Appeal for Saskatchewan (1954) 11 W.W.R. (N.S.) 469, reversed.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), McNiven J.A. dissenting, dismissing an appeal from the judgment of Davis J. (2) by which an application by the appellants for an order directing the respondent Registrar to cancel a notation on the certificate of title to certain lands and to amend the same by substituting another endorsement was dismissed.

E. C. Leslie, Q.C. for the appellant.

No one *contra.*

The CHIEF JUSTICE:—By notice of motion dated April 29, 1953, and returnable May 12, 1953, before the presiding judge in chambers of the Court of Queen's Bench of the Province of Saskatchewan, Judicial District of Regina, the appellants moved, under what is now s. 82 of *The Land Titles Act*, R.S.S. 1953, c. 108, for an order directing the respondent, the Registrar of the Land Titles Office, Moosomin Land Registration District, to cancel the notation "Minerals in the Crown" on certificate of title No. IG 239 of record in the Moosomin Land Registration District Land

(1) (1954) 11 W.W.R. (N.S.) 469; [1954] 2 D.L.R. 495.

(2) (1953) 9 W.W.R. (N.S.) 652.

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Titles office and substitute therefor the notation "Minerals Included". S. 82 reads as follows:

> 82. A judge of the Court of Queen's Bench may, upon such notice as he deems fit or, where in his opinion the circumstances warrant, without notice:
>
> (*a*) make a vesting order and may direct the registrar to cancel the certificate of title to the lands affected and to issue a new certificate of title and duplicate thereof in the name of the person in whom by the order the lands are vested;
>
> (*b*) direct the registrar to cancel any instrument or any memorandum or entry relating thereto or to amend any instrument in such manner as the judge deems necessary or proper. 1951, c. 34, s. 4.

We are concerned with (*b*) only.

While the only named respondent was the Registrar, the notice of motion was addressed to and served upon the Attorney General of Saskatchewan. By order of May 29, 1953, Mr. Justice Graham adjourned the motion to June 23, 1953, and directed that notice of the application and the adjourned date of hearing be given to John Frederick Leeson Clements, the surviving executor of the estate of Eliza Clements, deceased. As exhibits to the affidavit supporting the application were an historical abstract of the lands involved and a certified copy of the original Crown grant, dated July 8, 1889. Mr. Justice Graham ordered that the applicants file a certified copy of a certain mortgage on the lands registered as instrument No. K 218.

The application came before Mr. Justice Davis, after service on John Frederick Leeson Clements. Neither he, nor the Attorney General appeared, but a letter from the Deputy Attorney General was filed in which it is stated that it was not the intention of his Department to appear on the motion. The application was dismissed and an appeal to the Court of Appeal was also dismissed, the hearing thereof having been adjourned so that the appellants might comply with the direction of the Court of Appeal to serve notice of the appeal, judgments and material on Mr. Clements. Mr. Justice Proctor delivered reasons on behalf of the majority, while Mr. Justice McNiven dissented.

The historical abstract of title commences with a certificate of title issued by the Registrar to Archibald Bartleman, under date of December 23, 1889, and under the column "Remarks" appear the word "Marked 'Minerals Included'". The certified copy of the original grant from

the Crown in the right of the Dominion of Canada for the said land shews that the original was duly registered in the Land Titles Office for the Assiniboia Land Registration District on December 23, 1889. The grant is dated July 8, 1889, and recites that the lands are part of the lands known as Dominion lands and mentioned in *The Dominion Lands Act,* which was c. 5, R.S.C. 1886. By s. 48 of that Act it was provided that, unless expressly mentioned, mines of gold and silver did not pass in a grant of Crown lands. The grant itself conveys the lands, saving and reserving to Her Majesty only certain rights of navigation, fishery and fishing.

A transmission having occurred, a certificate of title was issued on July 7, 1916, to the administratrix of the estate of the original patentee, and in the "Remarks" column it is stated that this is "not marked as to minerals". A further transmission having occurred, the next certificate of title of October 8, 1921, was issued without being marked as to minerals. The new owner transferred the lands to Howard P. Bartleman, to whom a certificate of title was issued on October 8, 1921, and it was not marked as to minerals. Bartleman executed a first mortgage to Eliza Jane Clements (being the one produced by order of Mr. Justice Graham), including all his estate, title and interest in the lands. Other mortgages were granted, but ultimately a final order of foreclosure was granted to Eliza Jane Clements of all the right, title and interest in the lands, of the defendants in the foreclosure action. A certificate of title was granted to Eliza Jane Clements on December 20, 1928, and was marked "Minerals in the Crown". This was the first time that an endorsement to this effect was made.

Another transmission having occurred, a new certificate of title was issued on December 23, 1947, to Clifford Gibson Clements and John Frederick Leeson Clements, the executors of Eliza Jane Clements, and it is marked "Minerals in the Crown". Then followed the transfer from John Frederick Leeson Clements, the surviving executor, to the present appellants and a certificate of title was issued, dated March 7, 1953, registered as No. IG-239 and endorsed "Minerals in the Crown". It is this endorsement that the appellants seek to have removed.

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In my opinion there is no authority in the Saskatchewan Land Titles Act for the endorsements on the certificates of title to Eliza Jane Clements and to her executors and to the appellants, and, therefore, the application should be granted to cancel the notation "Minerals in the Crown" on certificate of title No. IG 239. However, the remaining part of the application should not be allowed, which was for an order that the Registrar substitute therefor the notation "Minerals Included". The Courts below seemed to have been fearful that if the relief, to which I think the appellants are entitled, was granted it might be argued that there had been a determination as between the appellants and some one not a party to these proceedings. Such, in my view, is not the result, as nothing is said beyond ordering the Registrar to remove from a certificate of title an endorsement for which no authority can be found.

The judgment of Kellock and Locke JJ. was delivered by:—

KELLOCK J.: This is an appeal from the Court of Appeal for Saskatchewan (1) dismissing an appeal from an order or judgment of Davis J. (2), in turn dismissing an application by the appellants for an order directing the respondent to cancel a notation on the certificate of title to certain lands and to amend the same by substituting another endorsement. None of the respondents appeared in the courts below and the appeal to this court was unopposed. The facts out of which these proceedings have arisen are as follows:

On December 23, 1889, following a Crown grant of the lands, a certificate of title thereto was issued to one Bartleman, on which certificate there was endorsed in the Land Titles Office the words "minerals included". Counsel for the appellant submitted that the words quoted were of no effect in view of the definition of "land" which he said was contained in the statute in force at the time the Crown grant was made and which was said to be in terms similar to s. 2(1)(10) of *The Land Titles Act*, R.S.S. 1953, c. 108. The statute referred to is, no doubt, *The Territories Real Property Act* of 1886, R.S.C., c. 51, s. 3(1). S. 48 of *The*

(1) (1954) 11 W.W.R. (N.S.) 469.

(2) (1953) 9 W.W.R. (N.S.) 652.

Dominion Lands Act, R.S.C. 1886, c. 54, provides that unless expressly mentioned, mines of gold and silver do not pass in a grant of Crown lands. For reasons which will appear, however, I do not think this court is required to pass upon the question as to what, if any, minerals were vested in the original patentee or in any succeeding owner.

The lands ultimately became vested in one Eliza Jane Clements by virtue of a final order of foreclosure of the 18th of December, 1928, registered on the 20th of that month, upon which day a certificate of title issued to the grantee. Upon this certificate there was endorsed in the Land Titles Office the words "Minerals in the Crown". This endorsement was unauthorized as it is not suggested that there had occurred anything between the original Crown grant and the final order of foreclosure upon which an endorsement could be founded.

Subsequently, on the death of Eliza Jane Clements, a new certificate of title was issued to her personal representative and, upon the sale and transfer of the lands to the appellants, a certificate of title was issued to the latter. Both certificates also bore the above mentioned notation. We were told that in each case this was effected by means of a rubber stamp.

While the transfer from the personal representative of Eliza Jane Clements to the appellants was of "all my estate and interest in the said piece of land" without any reservation, the effect of the decision in the courts below is that the mere notation on the certificate of title of December 20, 1928, issued to the late Eliza Jane Clements, created an estate in the minerals in the Crown and that all that could be transferred thereafter to the appellants was the land without the minerals. Reference is made in the judgment to a clause in the agreement for sale between the personal representative and the appellants under which the vendor covenanted to transfer the land to the purchaser subject to "the *conditions* and *reservations* contained in . . . the certificate of title hereto under the said Act subsisting on the day of the date hereof."

Even if the agreement for sale could be said to be a relevant document after the execution and delivery of the transfer in absolute terms, I do not think it can be said

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that the minerals were the subject of any "condition" or "reservation" contained in the certificate of title. The notation or endorsement was completely unauthorized and can have no more effect than had the Registrar written his name on the certificate. It could not have the effect of creating an estate in the minerals in the Crown. There is no suggestion that any other person not a party to the proceedings has acquired any rights against the appellants on the faith of any of these endorsements.

The appeal should be allowed, the judgments below set aside and an order made directing the Registrar to cancel the endorsement in question. As already mentioned, the court, in so doing, does not pass upon the question of the ownership of the minerals in the lands but merely directs the cancellation of an unfounded endorsement on the certificate of title.

ESTEY J.:—This is an appeal from a judgment of the majority of the Court of Appeal in Saskatchewan (1) affirming (Mr. Justice McNiven dissenting) the dismissal of the appellants' application by Mr. Justice Davis.

The appellants (applicants), as registered owners under Certificate of Title No. BG-3853, dated March 7, 1953, of SE 4-14-33 W1st, made the application under s. 82(*b*) (then s. 77(*a*)) of *The Land Titles Act* (R.S.S. 1953, c. 108, s. 82(*b*)) for a direction to the Registrar of the Moosomin Land Registration District to correct the notation upon their Certificate of Title to read "Minerals Included" rather than, as it now reads, "Minerals in the Crown." Section 82(*b*) reads:

> 82. A judge of the Court of Queen's Bench may, upon such notice as he deems fit
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> * * *
>
> (*b*) direct the registrar to cancel any instrument or any memorandum or entry relating thereto or to amend any instrument in such manner as the judge deems necessary or proper.

The original grant from the Crown to Archibald Bartleman, dated July 8, 1889, contained no reservation as to minerals and upon its registration Certificate of Title No. 4-48, dated December 23, 1889, was issued to the said Archibald Bartleman. This grant was prior to September 17, 1889, and, therefore, under the legislation (R.S.C.

1886, c. 54, s. 48) in effect at that time, the transferee from the Crown received the mines and minerals, except precious metals. The Registrar noted on the Certificate of Title, when issued, "Minerals Included."

Subsequent conveyances did not reserve the mines and minerals and the Certificates of Title issued consequent upon the registration thereof did not contain any notation with respect to minerals until the Registrar, in issuing Certificate of Title No. M-5452, dated December 20, 1928, to Eliza Jane Clements, consequent upon a final order dated December 18, 1928, made in foreclosure proceedings under a mortgage registered against the property, made a notation "Minerals in the Crown."

When Eliza Jane Clements died, upon an application by her executors for transmission, a new Certificate of Title No. GP-129, dated December 23, 1947, was issued to her executors, again with the notation "Minerals in the Crown."

The executors of her estate sold this land to the appellants, under an agreement for sale, upon the performance of which a transfer was issued to the appellants, and a new Certificate of Title No. IG-239, dated March 7, 1953, was issued in their name, with the notation "Minerals in the Crown." It is this notation that the applicants ask to be corrected.

Their application, as directed by Mr. Justice Graham, has been served upon the surviving executor of the estate of Eliza Jane Clements and again the notice of appeal to the Court of Appeal, by order of that Court, was served upon the surviving executor, who did not appear before Mr. Justice Davis, the Court of Appeal or this Court. The Attorney General of Saskatchewan was notified of these proceedings and, as a consequence, the Deputy Attorney General wrote a letter advising that he would not appear upon this application.

The mortgage foreclosed was the first encumbrance upon the land and the final order directed "that the Title to the said lands be vested in the Plantiff free from all right, title or interest or equity of redemption on the part of the Defendents or any of them or any person or persons claiming through or under them or any of them." I respectfully agree with Mr. Justice McNiven that this final order is an

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"instrument", as defined in s. 2(8), which, when registered, transferred the land to Eliza Jane Clements "according to the tenor and intent thereof" (s. 65(2)). This final order contained no reservation of mines and minerals and, therefore, as "land" was then defined (R.S.S. 1920, c. 67, s. 2(11)), now s. 2(10), these passed to Eliza Jane Clements.

The notation, therefore, cannot be justified by any provision in the final order, nor, in fact, has any document been disclosed which would, at that time, support such a notation as "Minerals in the Crown." All of the learned judges in the Courts below have concluded that this notation was placed upon the Certificate of Title by virtue of an error in the Land Titles Office. It would seem, therefore, that such an error should be corrected, unless third parties have acquired some right, under *The Land Titles Act,* by virtue of its presence on the Certificate of Title.

There is no reservation of minerals contained in the application for transmission and, therefore, the same reasoning would apply if it were suggested this notation might be justified upon the basis of that application.

Moreover, the transfer made by the surviving executor to the appellants contained no such reservation and, therefore, it cannot be suggested that the notation can be founded thereon.

In the Court of Appeal a majority of the learned judges emphasized a provision in the agreement for sale from the executors of Eliza Jane Clements, dated December 24, 1927, and which contained the following:

> . . . on payment of all sums payable hereunder by the purchaser, the vendor covenants, . . . to transfer the said land . . . to the purchaser, by a transfer under the provisions of *The Land Titles Act,* but subject to the conditions and reservations contained in the original grant of the said land from the Crown, and in the Certificate of Title thereto under the said Act, subsisting on the day of the date hereof, . . .

Mr. Justice Procter, writing the judgment for the majority of the Court, stated:

> Under the agreement the purchasers did not acquire the mineral rights in the land as the reservation "Minerals in the Crown" was endorsed on the title and the agreement provided that the transfer was to be subject to this reservation.

In my view it is unnecessary here to consider the effect, if any, of the provision in the agreement for sale as, in my

view, it was merged in the transfer dated February 23, 1953, and given by the surviving executor to the appellants which contained no such provision, but, on the contrary, provided:

> . . . transfer to the said Elizabeth Balzer and Henri Balzer, all my estate and interest in the said piece of land.

That this agreement for sale was merged in the transfer must follow from the decision of *Knight Sugar Co. Ltd.* v. *Alberta Railway and Irrigation Co.* (1), where, under the Alberta Land Titles Act, it was held that the agreement merged with the transfer. Lord Russell of Killowen, speaking for the Privy Council, at p. 238 stated:

> 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.

He then dismissed the contention that a transfer under the Alberta Land Titles Act was nothing more than an order to the Registrar to cancel an existing Certificate of Title and to issue a new Certificate and, dealing particularly with the transfer, he stated at p. 239:

> 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.

The language of the Alberta sections which Lord Russell had under consideration are, in all relevant particulars, to the same effect as ss. 65 and 66 of the Saskatchewan statute. It is true the words "except as against the person making the same," found in s. 65 of the Saskatchewan Act, are not in the Alberta statute, but these have no reference to the effect of an instrument when registered, but rather to its effect as against a party making same quite apart from registration. Whatever may be the effect of these words in an appropriate case, they are not of significance here, as neither party to the agreement is relying upon them.

(1) [1938] 1 W.W.R. 234.

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That portion of the Alberta statute of particular importance is contained in s. 51 and is to the same effect as s. 65(2) in the Saskatchewan statute, which reads:

* * *

65. (2) Every instrument shall become operative according to the tenor and intent thereof when registered and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land, estate or interest therein mentioned.

The "tenor and intent" both of the final order and the transfer to the appellants conveyed the "land" which, at the relevant times, was defined as in s. 2(10) and, therefore, included the minerals. With great respect to those who hold a contrary opinion, the notation here in question had no validity or effect when first made and, even if it were possible that it might, by virtue of subsequent circumstances, acquire some validity, such are not disclosed in this record.

In my view, and with great respect to the learned judges who entertain a contrary opinion, the application should be granted and the notation "Minerals in the Crown" should be cancelled and the Title amended accordingly, as provided under s. 82(*b*). The notation "Minerals Included", which the appellants ask to have endorsed on the Certificate, does not, upon this record, appear to be necessary and no order should be made in regard to it.

The appeal should be allowed.

CARTWRIGHT J.:—I agree that this appeal should be allowed, that the notation "Minerals in the Crown" on the Certificate of Title should be cancelled and that the application to have the words "Minerals included" endorsed on the Certificate should be refused. Counsel for the appellant having stated that he does not ask for costs there should be no order as to costs in this Court or in the courts below.

Appeal allowed.

Solicitors for the appellants: *MacPherson, Leslie & Tyerman.*