
Ethel Blackmer (*Defendant*) *Appellant*;

and

Guaranty Trust Company of Canada

(*Plaintiff*) *Respondent.*

1972: February 4; 1972: June 19.

Present: Martland, Ritchie, Hall, Spence and Laskin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Mines and minerals—Title to minerals forfeited to Crown—Transfer by way of gift of donor's estate and interest in land—Donor dying intestate—Subsequent revesting of forfeited minerals—Title to minerals part of donor's estate—Widow entitled to one-third interest.

S, who died intestate on December 15, 1948, was in his lifetime the registered owner of certain lands, including mines and minerals. On February 20, 1948, as a result of proceedings for forfeiture under the provisions of *The Mineral Taxation Act, 1944,* title to the mines and minerals in the land was acquired by the Crown in the right of the Province of Saskatchewan. On August 11, 1948, title to the land, excepting thereout all minerals, was registered in the names of GS and the appellant as a result of a transfer to them, dated July 27, 1948, executed by S. The transferees were children of S by his first wife. Subsequently GS transferred his interest in the land to the appellant and her husband and title issued in

their names, with the same exception as to minerals, on November 20, 1950.

On November 21, 1951, on the application of GS and the appellant, an order was made, pursuant to the provisions of s. 22 of *The Mineral Resources Act*, R.S.S. 1940, c. 40, and Order in Council 1930/49, revesting the mines and minerals in the land in the name of the deceased S. Thereafter, the appellant, as administratrix of S's estate, applied for transmission of the title to the mines and minerals into her name, as administratrix. This was registered on January 10, 1952, and a new title issued accordingly. As administratrix, she then transferred title into her own name, in her personal capacity.

The respondent, as administrator of the estate of S's second wife, who under the laws of Saskatchewan was entitled to a one-third interest in S's estate, sued to obtain the vesting of title to one-third of the mines and minerals in the land and for an accounting as to moneys already received by the appellant in respect thereto. Judgment in the action was given in favour of the respondent, and the appellant's appeal therefrom to the Court of Appeal was dismissed. An appeal was then brought to this Court.

Held: The appeal should be dismissed.

The transfer made by S to the appellant and GS was a gift and he could transfer no more than that which he had, namely, title to the surface of the land. At the time the transfer was made S had no right to apply, under s. 22 of the Act, for revesting of the minerals, as more than three months had expired since the default in payment of mineral tax and, at that time, no extension of time for applying had been made by Order in Council.

In virtue of Order in Council 1930/49, made at a later date, S (through his administratrix) was able to obtain revesting. But the wording of para. 5 of the Order could not be interpreted so as to alter the effect of the transfer which he made before the Order in Council came into effect. The transferees received that which S was then able to give and the Order in Council did not give them any more.

The appellant's position was not assisted by the portion of s. 22 on which she relied. As held by the Court below, the words "intervening right", as contemplated in the section, meant a right that may have

been acquired by a third party through the Crown in the right of the Province during the time title to the minerals was in the Crown. Furthermore, s. 22 referred to a "right" which arose after the default in payment of mineral tax and before the order relieving from forfeiture. No right arose in this case in that period in respect of the minerals in the land.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], dismissing an appeal from a judgment of Bence C.J.Q.B. Appeal dismissed.

W. M. Elliott, Q.C., for the defendant, appellant.

E. C. Malone, for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.—This is an appeal from the unanimous judgment of the Court of Appeal for Saskatchewan, dismissing an appeal to that Court by the appellant from the judgment at trial, in favour of the respondent, which vested in it an undivided one-third interest in all mines and minerals in the South Half of Section 3, in Township 6, in Range 12, West of the Second Meridian, in the Province of Saskatchewan, hereinafter referred to as "the land", and which ordered an accounting as to moneys already received by the appellant in respect of the mines and minerals.

James W. Sherrow, hereinafter referred to as "Sherrow", on September 20, 1913, became the registered owner of the land, including mines and minerals. On February 20, 1948, as a result of proceedings for forfeiture under the provisions of *The Mineral Taxation Act, 1944,* title to the mines and minerals in the land was acquired by the Crown in the right of the Province of Saskatchewan. On August 11, 1948, title to the land, excepting thereout all minerals, was registered in the names of Gerald Ambrose Sherrow and the appellant, hereinafter jointly referred to as "the transferees", as a result of a transfer to them, dated July 27, 1948, executed by Sherrow. The transferees were children of Sherrow by his first wife.

[1] [1971] 3 W.W.R. 101.

The transfer did not make reference to mines and minerals, but, before registration, there was written on it by a member of the staff at the Land Titles Office "Excepting thereout all minerals within, upon or under the above described land acquired by His Majesty the King (Saskatchewan) by Instrument No. DQ 359." This exception appeared upon the title which issued in the names of the transferees. We did not have the actual transfer before us, but we were advised that its form, in compliance with *The Land Titles Act* (now R.S.S. 1965, c. 115), would be a transfer of "all my estate and interest in the said piece of land." Subsequently Gerald Ambrose Sherrow transferred his interest in the land to the appellant and her husband and title issued in their names, with the same exception as to minerals, on November 20, 1950.

Sherrow died intestate on December 15, 1948. Letters of Administration to his estate were granted to the appellant on December 28, 1951. The deceased left surviving him:

(a) Bessie Sherrow, his second wife;

(b) The appellant;

(c) Gerald Ambrose Sherrow;

(d) Helen Rubin, a daughter by his second wife.

Under the laws of Saskatchewan, the widow was entitled to a one-third interest in his estate. Each of the other beneficiaries was entitled to a two-ninths interest. Bessie Sherrow died intestate on February 7, 1966. The respondent is the administrator of her estate.

On November 21, 1951, on the application of Gerald Ambrose Sherrow and the appellant, an order was made by the Deputy Minister of Natural Resources, pursuant to the provisions of s. 22 of *The Mineral Resources Act, R.S.S. 1940,* c. 40, and Order in Council 1930/49, revesting the mines and minerals in the land in the name of the deceased, Sherrow.

Section 22 of the Act provided:

> Where forfeiture or loss of rights has occurred, the minister may, within three months after the default or within such further time as the Lieutenant Governor in Council upon the recommendation of the Minister may direct, upon such terms as he deems

just, make an order relieving the person in default from such forfeiture or loss of rights, and upon compliance with the terms, if any, so imposed, the interests or rights forfeited or lost shall be revested in the person so relieved, but subject however, to any intervening right of any person arising subsequent to the default sought to be remedied and prior to the order of the minister.

Paragraph (5) of the Order in Council provided:

(5) That in order to put those persons whose minerals were forfeited as aforesaid in the same position, as far as possible, as those persons whose minerals were not forfeited, it is considered to be desirable and in the public interest to revest the said forfeited minerals in the person from whom they were forfeited upon such person making application in that behalf prior to the 1st day of November, 1950, such revesting, however, to be subject to payment of all taxes owing under the said Acts up to the time of the revesting.

Thereafter, the appellant, as administratrix of Sherrow's estate, applied for transmission of the title to the mines and minerals into her name, as administratrix. This was registered on January 10, 1952, and a new title issued accordingly. As administratrix, she then transferred title into her own name, in her personal capacity.

The respondent, as administrator of the estate of Bessie Sherrow, sued to obtain the vesting of title to one-third of the mines and minerals in the land and for an accounting as to moneys already received by the appellant in respect thereto. It is the contention of the respondent that title to the mines and minerals in the land, when revested in Sherrow, became part of his estate in which Bessie Sherrow had a one-third interest. Judgment in the action was given in favour of the respondent, and the appellant's appeal therefrom to the Court of Appeal was dismissed.

The submission of the appellant is that the effect of the Order in Council was to revest the mineral rights in Sherrow as of the date of for-

feiture, and that, on that basis, the transfer to the transferees included the mines and minerals. Reliance is placed on the words appearing in para. (5) thereof:

> That in order to put those persons whose minerals were forfeited as aforesaid in the same position, as far as possible, as those persons whose minerals were not forfeited, it is considered to be desirable and in the public interest to revest the said forfeited minerals in the person from whom they were forfeited . . .

It was also contended that, when the mineral rights were revested in Sherrow's estate, it was subject to the rights of the transferees named in his transfer by reason of the words appearing in s. 22 of the Act:

> The interests or rights forfeited or lost shall be revested in the person so relieved, but subject however, to any intervening right of any person arising subsequent to the default sought to be remedied and prior to the order of the minister.

The transfer of title made by Sherrow to the appellant and her brother was a gift. It was a gift, in the words of the transfer, of all the transferor's estate and interest in the land. He could transfer no more than that which he had. All that he had, at that time, was a title to the surface of the land and not to the minerals in the land. That is what he transferred and the transferees obtained title to the land, excepting thereout all minerals.

At the time that transfer was made Sherrow had no right to apply, under s. 22 of the Act, for revesting of the minerals, as more than three months had expired since the default in payment of mineral tax and, at that time, no extension of time for applying had been made by Order in Council.

The Order in Council, 1930/49, made at a later date, permitted application to be made for revesting, prior to November 1, 1950, subject to payment of all taxes owing under the Act up to the time of revesting. The words at the commencement of para. (5) of the Order state the

purpose of its enactment; *i.e.*, "in order to put those persons whose minerals were forfeited . . . in the same position, as far as possible, as those persons whose minerals were not forfeited". The person whose minerals were forfeited, in this case, was Sherrow, and he (through his administratrix) was able to obtain revesting. But the wording of the paragraph cannot be interpreted so as to alter the effect of the transfer which he made before the Order in Council came into effect. The transferees received that which Sherrow was then able to give and the Order in Council does not give them any more. Had Sherrow survived, he would have been the only person who could have sought to obtain the revesting, and, the transfer having been by way of gift, he could not have been compelled by the appellant to transfer those minerals to her.

The appellant's position is not assisted by the portion of s. 22 on which she relies. I agree with the view expressed by Culliton C.J.S. in the Court of Appeal as to the meaning of the words "intervening right":

> Moreover, "intervening right" as contemplated by s. 22 of *The Mineral Resources Act,* supra, in my view, means a right that may have been acquired by a third party through the Crown in the right of the Province during the time title to the said minerals were in the Crown. This provision protected a person who may have acquired a right in the minerals, such as a lease or exploration permit from the Crown when it could legally and lawfully grant such right. Any right to the minerals, apart from this, would be of no concern to the Crown at the time of revestment.

Furthermore, it should be noted that s. 22 refers to a "right" which arises after the default in payment of mineral tax and before the order relieving from forfeiture. No right arose in this case in that period in respect of the minerals in the land. The transferees acquired no such right, because Sherrow was unable to give it to them, he having no right to the minerals in the land after the forfeiture until the revesting was accomplished. A right to the minerals in the land could only have arisen, during the period defined in the section, if

it had been created by the Crown, as it was the sole owner of those minerals during that time.

For these reasons, as well as for those given by Culliton C.J.S. in the Court of Appeal, I would dismiss this appeal.

Appeal dismissed.

Solicitors for the defendant, appellant: MacPherson, Leslie & Tyerman, Regina.

Solicitors for the plaintiff, respondent: Wimmer, Toews, Malone & Miller, Regina.