Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Meringhege Arnolis Fernando and another v. *Anthony Nicholas de Silva, from the Supreme Court of the Island of Ceylon (P.C. Appeal No.* 128 *of* 1910); *delivered the 29th November* 1912.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD MERSEY.
LORD MOULTON.

[DELIVERED BY LORD MERSEY.]

This was an Appeal by the Defendants from three Judgments of the Supreme Court of the Island of Ceylon affirming the Judgments of the District Court of Kegalle in favour of the Plaintiff.

The claim in the action was for an account of plumbago alleged to have been taken by the Defendants from the Plaintiff's land and for other consequent relief. It was admitted at the bar that such an action would not lie unless it could be established that the Plaintiff was entitled to possession of the minerals, and that the onus was upon the Plaintiff to make out his title.

The only title which the Plaintiff was able to substantiate was a title based upon a Crown grant of the 20th January 1882. This deed, after granting the land itself, proceeded as follows: "and We do hereby also save and reserve to Us, "our Heirs, and Successors, all right and title to

" the mines, minerals, gold, silver, copper, iron, " tin, lead, and other metals, and the ores thereof " in or upon the said lands, together with full " power of entry for the same respectively." The plumbago alleged to have been removed by the Defendants undoubtedly came within the words of this reservation, and according to English law the right to it remained in the Crown and did not pass to the Plaintiff. This objection was taken at the trial by the Defendants, and in their Lordships' opinion it is fatal to the Plaintiff's claim.

Apparently the Plaintiff had attempted after action brought to obtain from the Crown a title to the minerals, and during the hearing of the Appeal in the Supreme Court two letters were produced, one dated the 2nd October 1907, from the Assistant Government Agent at Kegalle, and the other dated the 2nd December 1907, from the Colonial Secretary. These letters contain a statement to the effect that the Crown " lays no " claim to plumbago found in lands sold by it " prior to 1901, anything in the wording of the " Crown grant to the contrary notwithstanding," and the learned Judges appear to have regarded this statement as curing the infirmity in the Plaintiff's title. Their Lordships desire to express no opinion as to the present value of these letters, but it is clear that no retrospective effect can be given to them so as to vest in the Plaintiff a title at the commencement of this action. That is the point of time at which the rights of the parties are to be ascertained.

An attempt was made to argue before their Lordships that according to Roman Dutch law the title to the minerals went with the surface of the land, notwithstanding the reservation contained in the grant. The point was not taken in the Court below, nor was any authority cited for it here. It need hardly be said that in

any system of law, plain and unmistakable authority would be required to show that when a deed purports to reserve rights, its legal effect is nevertheless to pass those rights away.

Their Lordships are of opinion that the Appeal ought to be allowed, and judgment entered for the Appellants, and they will humbly advise His Majesty accordingly. The Respondent must pay the costs here and below.

In the Privy Council.

MERINGHEGE ARNOLIS FERNANDO AND ANOTHER

v.

ANTHONY NICHOLAS DE SILVA.

DELIVERED BY LORD MERSEY.

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