

109. 1937

No. 123 of 1936.

In the Privy Council.

ON APPEAL

FROM THE APPELLATE DIVISION OF THE SUPREME
COURT OF ALBERTA.

BETWEEN—

KNIGHT SUGAR COMPANY, LIMITED
(Plaintiffs) *Appellants*

— AND —

10

THE ALBERTA RAILWAY AND
IRRIGATION COMPANY
(Defendants) *Respondents*.

APPELLANTS' CASE.

RECORD.

1. This is an appeal from a judgment of the Appellate Division p. 95.
of the Supreme Court of Alberta, dated the 28th February, 1936,
confirming the judgment of Mr. Justice Ford in the Trial Division p. 88.
of the Supreme Court of Alberta dated the 13th September, 1935.

2. The appeal raises two questions:—

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(1) Whether the Appellants are entitled under an Agree-
ment in writing of the 25th November, 1903, to all the mineral
rights, except coal, or alternatively to the petroleum and natural
gas rights under certain land, notwithstanding that the trans-
fers under the Land Titles Acts applicable at the material times
to the Province of Alberta of the said land by the Respondents'

predecessors in title (hereafter called "the Respondents") to the Appellants subsequent to that agreement excepted all coal and other minerals.

(2) Alternatively whether upon the true construction the words of the said exception in the transfers the Appellants are entitled to all the mineral rights except coal or alternatively to the petroleum and natural gas rights.

p. 50. **3.** By the terms of Articles of Agreement dated the 25th November, 1903, which referred to a prior Agreement dated the 19th July, 1901, made between the Appellants (referred to in the Agreement as "the Purchaser") and the Respondents (referred to in the Agreement as "the Company") the Appellants covenanted to pay therefor a sum specified in cash upon the date of the Agreement and the balance of the purchase price in nine equal annual instalments beginning on the 1st September, 1904.

p. 51, ll. 13-25. **4.** In consideration of the Appellants' covenant the Respondents ("the Company") covenanted for itself, its successors and assigns "to convey and assure or cause to be conveyed and assured "to the said purchaser (the Appellants), its successors or assigns, by "a good and sufficient Deed in fee simple, all those the said pieces "or parcels of land above described, together with the appurtenances thereto belonging or appertaining, freed and discharged from "all encumbrances, but subject to the conditions and reservations "expressed in the original grant thereof from the Crown;

"And also shall and will suffer and permit the said purchaser "its successors and assigns to occupy and enjoy the same until "default be made in the payment of the said sums of money or the "interest thereon or any part thereof, on the days and times and in "the manner above mentioned; subject nevertheless to impeachment for voluntary and permissive waste." 30

p. 53 to p. 54. **5.** The conditions and reservations expressed in the original grant from the Crown were set out in the Patents issued by the Crown and dated the 23rd August, 1901. Pursuant to these Patents a certificate of title under the Land Titles Act of the Province of Alberta had been issued to the Respondents' predecessor in title by the Registrar for the South Alberta Land Registration District dated the 20th September, 1901, with the following reservation:

p. 55. "Reserving unto His Majesty, His successors and assigns, all coal

p. 55, ll. 33-35. "mines, coal pits, seams and veins of coal and the right to work the same."

6. It is contended by the Appellants that if the Appellants made the payments required by the Agreement of 1903 they became 40

entitled to have conveyed and assured or caused to be conveyed or assured to them "by a good and sufficient Deed in fee simple" *inter alia* the lands the subject of this action together with the rights to all mines and minerals thereunder, subject only to the reservation to His Majesty of the coal rights.

7. The Appellants did make the payments specified in the Agreement and by the 20th September, 1912, all the sums due under the Agreement had been paid. p. 34, ll. 10-26.
p. 35, ll. 12-13.

8. In the years following 1903 transfers under the Land Titles Acts were issued from time to time by the Respondents either to the Appellants or to nominees of the Appellants. By the 12th March, 1913, transfers of all the lands in question in this action had been issued. The transfers were similar in form and one example of such a transfer appears as Exhibit 6 and each contained the following exception: p. 14, ll. 33-39.
p. 83, ll. 4-6.
p. 17, ll. 1-6.
p. 56.

20 "Excepting therefrom all coal and other minerals in and under the said land, and the right to use so much of said land or the surface thereof as the Company (the Respondents) may consider necessary for the purpose of working and removing the said coal and minerals, and any portion of said land heretofore taken for roads or public purposes." p. 57, ll. 28-33.

Certificates of Title were issued under the Land Titles Act to the Appellants or their nominees from time to time. Each of these certificates contained the following exception:—

"Excepting thereout all coal and other minerals." p. 58, ll. 18-19.

9. The Appellants made no demand for the transfer to them of the mineral rights other than coal until the 29th July, 1930. The evidence of Mr. James H. Walker (the officer put forward by the Appellants for the purpose of examination) as to the reasons for the delay in making the demand was:— p. 35, ll. 32-41.

30 "205. Q. And did the Knight Sugar Company ever make any demand on the Registrar of the South Alberta Land Registration District at Calgary to issue any certificates of title for any mineral rights on any of these lands which are covered by Exhibit Four?

"A. Not until we found out that we were entitled to mineral rights.

"206. Q. When do you say that you found out you were entitled to mineral rights?

"A. I don't know whether I can find that letter immediately or not. I just will have a look for it. February 13th, 1930.

p. 36, ll. 7-23.

“213. Q. From at least 1914 or 1915 onwards you knew that the railway
“company hadn’t transferred any mines and minerals?”

“A. Yes.

“214. Q. To the Knight Sugar Company under the lands included in
“that agreement Exhibit Four?”

“A. I did, yes, I knew that in drawing these transfers. I knew that the
“Knight Sugar Company didn’t own these mineral rights according to the
“way that the deeds were held at the Land Titles Office, and until February
“13th, 1930, I didn’t know that the Knight Sugar Company had bought and
“paid for the mineral rights until I referred to this old agreement and I saw 10
“there

“215. Q. What old agreement are you referring to?

“A. The original agreement.

“216. Q. Of 1901?

“A. Yes.

“217. Q. Which, I think, was Exhibit One?

“A. Yes. And when I saw that we had bought the land without any
“reservations as to minerals, I figured that we were entitled to them, and for
“that reason I called Mr. Allen’s attention to that.”

p. 44.

p. 83, ll. 41-42.

p. 50.

p. 33, ll. 25-40.

p. 87, l. 25 to
p. 88, l. 7.

The original agreement of 1901, Exhibit 1, was the Agreement 20
dated the 19th July, 1901, made between the predecessor in title of
the Appellants and the predecessor in title of the Respondents which
was in effect “an agreement to enter into an agreement” whereby the
predecessors in title of the Appellants were to purchase the land the
subject of this action if certain conditions were fulfilled and it was
superseded by the Agreement dated the 25th November, 1903.

10. Evidence of the actions of the Appellants subsequent to the
Agreement of 1903, was tendered by Counsel for the Respondents at
the trial and was admitted by Mr. Justice Ford subject to objection
by Counsel for both parties. The learned Judge held that he was 30
entitled to consider that evidence in construing the language of the
transfers. The Appellants respectfully submit that the learned
Judge was wrong and rely upon *Houlder Bros. & Co., v. The
Commissioners of Public Works*, 1908 A.C. 276. The evidence may be
summarized as follows:—

p. 83, ll. 31-34.

(a) The Appellants entered into agreements for the re-sale
to various purchasers of the lands in question from time to time
using a common form of agreement in which the covenant for

title was "subject to the reservations conditions and provisoes p. 62, ll. 6-8.
"contained in the original grant from the Crown."

(b) When the Appellants issued transfers under the Land Titles Act to implement its agreements for re-sale of the lands then at the request of the Registrar of Land Titles for the district of Calgary Alberta either the Appellants or the purchasers from them amended the transfers so as to include the following reservation :— p. 32, ll. 25-35.
p. 43, ll. 28-36.

10 "Reserving unto His Majesty all coal and unto the Alberta Railway
"and Irrigation Company" (the Respondents' predecessor) "all other
"minerals." p. 80, ll. 14-16.

Mr. Walker's explanation given in evidence was :—

"156. Q. Now do you know anything of the reasons pertaining to p. 32, ll. 1-6.
"the reservation of mines and minerals in transfers which were issued by
"the Knight Sugar Company?"

"A. Do I know?"

"157. Q. Yes.

20 "A. I would say that they did that for their own protection on that.
"I think you will find that those reservations were in all transfers that
"were issued."

(c) In the returns made since 1914 to the Registrar of Land Titles the Appellants had not shown the mineral rights in the lands in question in this action as belonging to them. p. 40, ll. 21-30.

(d) By a Trust Deed dated in July 1932, securing the issue of debentures executed in favour of The Royal Trust Company the Appellants had *inter alia* described some of the titles to the lands in question in this action as reserving "to the Alberta p. 40, ll. 38-41.
"Railway and Irrigation Company" (the Respondents' predecessors) "all other minerals." p. 41, ll. 9-11.

30 11. On the 29th July, 1930, the Appellants made a demand by a document in writing addressed to the Respondents for :— p. 41, ll. 20-29.
p. 74, l. 28.

"A tranfer of all mines and minerals, excepting coal in and to all the p. 75, ll. 4-6.
"lands mentioned and described as parcel No. 2 in the said Agreement dated
"July 19th, 1901."

No clear explanation appears in evidence for the reference in this document to the Agreement of 1901 instead of to the Agreement of 1903 which had superseded it. Mr. Walker did however state that on the 13th February, 1930, he "referred to this old agreement" p. 36, l. 13.
and later in his evidence says that the Agreement of 1903 would be p. 42, ll. 3-7.

in the possession of the Appellants "until that final payment" (20th September, 1912) "was made when the Alberta Railway and "Irrigation Company" (the Respondents' predecessors) "would call "for it."

p. 93, l. 20.

This demand was not complied with and accordingly an action was commenced in 1933 by the Appellants against the Respondents claiming that they were entitled to all the mineral rights other than coal or alternatively to the petroleum and natural gas rights. The Appellants' action was dismissed with costs by Mr. Justice Ford in the Trial Division of the Supreme Court of Alberta and his Judgment 10 was confirmed by an unanimous Judgment of the Appellate Division.

12. The first question raised in this Appeal relates to the Appellants' submission that they are entitled to all the mines and minerals except coal on the grounds that these rights were acquired by the Appellants by the executory agreement of the 25th November, 1903, and that the transfers were only a partial carrying out of this agreement leaving it open to the Appellants to require a transfer of the minerals other than coal.

p. 94, ll. 27-33.

13. Since the Chief Justice of the Appellate Division in giving his Judgment which was concurred in by the other members of the 20 Court held that this issue could not be considered by that Court on the ground that it was not the "issue raised in the Pleadings" it becomes necessary to deal shortly with the history of the issue:—

p. 75, ll. 4-6.

(a) The first claim by the Appellants against the Respondents to the minerals other than coal was a demand in writing dated the 29th July, 1930, for a "transfer of all mines and "minerals excepting coal in and to all the lands mentioned and "described as parcel No. 2 in the said agreement dated July "19th, 1901." It is admitted that the reference to the Agreement of 1901 was mistaken in that that Agreement had been super- 30 seded by the Agreement of the 25th November, 1903, and the explanation is suggested in paragraph 11 hereof.

p. 50 .o p. 52.

p. 5, ll. 7-8.

p. 2, l. 37 to
p. 3, l. 18.

(b) The Amended Statement of Claim dated the 3rd July, 1933, by paragraphs 7 (a) and 7 (b) pleaded the Agreement of 1903 and paragraph 13 of the Statement of Claim is as follows:—

p. 4, ll. 14-22.

"13. The Plaintiff asserts and claims that it is the owner of and "entitled to all mines and minerals in or under the said lands (subject "only to the reservations and exceptions which the Crown was entitled "to reserve or except, and did reserve or except in the said Grants of the "said lands from the Crown) with the right to work and win the same, 40

“which assertion and claim the Defendant has repeatedly denied and still
 “denies and disputes, claiming to be the owner of all mines and minerals
 “in and under the said lands.”

The prayer to the Statement of Claim did not repeat the
 Claim made in paragraph 13 but claimed:—

“(aa) In the alternative a declaration that the Plaintiff is the p. 4, ll. 34-37.
 “owner of and entitled to the Petroleum and Natural Gas Rights in and
 “under the lands described in the Articles of Agreement referred to in
 “Paragraph 7a hereof.”

10 (c) By their Statement of Defence dated the 5th September, p. 5, l. 13 to
 1933, the Respondents pleaded in paragraph 11:— p. 7, l. 21.

“11. The Defendant denies that the Plaintiff is the owner of or p. 6, ll. 18-21.
 “entitled to the mines and minerals in the lands referred to in Paragraph
 “13 of the Statement of Claim, or any of them.”

in paragraph 15:—

“15. Alternatively and in answer to the whole of the Statement of p. 6, ll. 37-43.
 “Claim, the Defendant says that after the accruing of the Plaintiff’s claim,
 “if any, to the said lands or to the mines and minerals therein the
 “Defendant executed and delivered to the Plaintiff and the Plaintiff
 20 “accepted and received from the Defendant Deeds or Transfers for all of
 “the said lands, and the Plaintiff’s claim was and is thereby merged and
 “extinguished.”

(d) In opening the case for the Appellants before the Trial
 Judge on the 26th June, 1935, Mr. Sinclair, Counsel, raised the
 issue in the following manner:—

“Mr. Sinclair: I am not asking for anything more than I have got. p. 9, l. 24 to
 “I appreciate that if I have not got it in my title then I can’t have it p. 10, l. 9.
 “because the executory agreement of 1903 was merged in the title, at
 “least that is all I can successfully argue in this Court because this Court
 30 “has made it perfectly clear that that is the law although Mr. Justice
 “Beck has doubted whether a transfer under the Land Titles Act has the
 “same effect as a deed but that suggestion has not been acquiesced in
 “in this Province so if it has to be decided otherwise it will have to be
 “decided elsewhere.

“The Court: How far did that case go?

“Mr. Sinclair: To the Supreme Court of Canada and Mr. Justice
 “Idington who dissented viewed with great favour the decision of
 “Mr. Justice Beck and later Mr. Justice Beck repeated his own view in
 “Stuart and the C. & E., saying he was doing so because he apprehended

“that that case might go to the Privy Council. My view is that the Court
“of Last Resort in this country so far as it is concerned the matter is
“settled.

“The Court: How far did Franz and Hansen go?

“Mr. Sinclair: The length of applying to a transfer and a title
“acquired under the Land Titles Act here the doctrine applicable in
“England to the merging of the prior executory agreement in the deed.
“Mr. Justice Beck points out the difference, the transfer is merely an
“order upon the Registrar to make a change in the title.

“The Court: If Mr. Justice Beck was right how far would that carry 10
“you?

“Mr. Sinclair: It might carry me to the length of saying I am entitled
“to everything except the coal. I have pleaded my agreement here
“merely for the purpose if I am taken elsewhere that I can rely upon the
“executory agreement. I am relying now, on the construction of the
“transfer. It would not have been necessary to plead it but I have
“pleaded it so that if I am taken elsewhere, to another Court, the matter
“is still open.

“The Court: You are not asking me to express an opinion?

“Mr. Sinclair: I would be delighted to have it but I do not think your 20
“Lordship would give some opinion unless it was to have some effect.”

12. 11. 20-28.

(e) Counsel for the Respondents, Mr. Smith, having
objected to the Agreement of 1903 being tendered as evidence,
said:—

p. 12. 11. 24-28.
“Mr. Smith: Dealing with what my learned friend
“Mr. Sinclair said I gather that the first reason he gave was that some
“day he might reach a Court beyond the Supreme Court of Canada and
“the document might be valuable to him at that time. My answer to
“that is *Franz vs. Hansen*.”

p. 83. 11. 7-23.
p. 85. 1. 35 to
p. 86. 1. 3.
p. 84. 11. 27-33.

(f) Mr. Justice Ford deals with the issue in three places in 30
his Judgment and refers to the fact that Counsel for the
Appellants “in his opening and in his argument at the close of
“the hearing, stated that he appreciated that if he cannot
“succeed upon the proper construction to be placed upon the title
“his client got under the transfers and certificates of title his
“claim fails, because, as he puts it, I am bound to follow the
“decision in *Hansen v. Franz*, 57 S.C.R. 57, and to take the law
“to be that ‘the executory agreement of 1903 is merged in the
“‘title’”

(g) By their Notice of Appeal to the Appellate Division of the Supreme Court of Alberta dated the 21st October, 1935, the Appellants' second and fourth grounds of Appeal were—

p. 89, l. 1 to
p. 90, l. 22.

"THE LEARNED TRIAL JUDGE ERRED:

p. 89, ll. 8-14.

"

"2. In not holding that the Transfers are to be treated as merely a "partial carrying out of the Agreement, leaving it open to the Plaintiff "to call for a conveyance of something not granted thereby.

p. 89, ll. 8-11.

"

10 "4. In holding that the Agreement of November 25th, 1903, was not "admissible in evidence to show what was purchased because it was "merged in the conveyance."

p. 89, ll. 19-21.

By reason of the foregoing the Appellants respectfully submit that the Chief Justice was wrong in holding that the second issue was not raised by the Pleadings and alternatively he was wrong in not considering the point since it was treated by Counsel on both sides and by the learned Judge in the Trial Division as though it were raised and was considered in the Judgment of the learned Trial Judge.

p. 94, ll. 27-33.

20 14. The Respondents pleaded in paragraph 15 of their Statement of Defence that the Appellants' claim under the Agreement of 1903 to the mines and minerals other than coal "was and is "thereby merged and extinguished" by reason of the execution and delivery to the Appellants of "Deeds or Transfers." The principle relied upon was cited by Mr. Justice Ford from the Judgment of James L.J. at page 309: *Leggott v. Barrett*, 15 Ch.D. 306 to the effect that "if the parties have made an executory contract which is to be "carried out by a deed afterwards executed the real completed "contract between the parties is to be found in the deed and you have
30 "no right whatever to look at the contract although it is recited in "the deed, except for the purpose of construing the deed itself."

p. 6, ll. 37-44.

p. 6, ll. 43-44.

p. 86, ll. 15-26.

It is submitted by the Appellants that this principle has no application in the absence of evidence that the parties intended that transfers should cover the whole ground covered by the agreement of purchase. (Fry, L.J. at page 359 in *Palmer v. Johnson*, 13 Q.B.D. 351) and they further submit that in any event the principle has no application when the executory contract is implemented by a transfer of title under the Land Titles Acts applicable at the material times in Alberta.

p. 9. ll. 26-31.

15. Counsel for the Appellants expressed the view that Mr. Justice Ford was bound by the decision of the Supreme Court of Canada in *Hansen v. Franz* 57 S.C.R. 57 to hold that the principle set out above was applicable to a transfer under the Land Titles Acts of Alberta. In the humble submission of the Appellants the decision of the majority of the judges in the Appellate Division of the Supreme Court of Alberta and in the Supreme Court of Canada ought not to be followed and that the dissenting judgment of Beck J. in the former Court and that of Idington J. in the latter Court ought to be preferred. Beck J. (reported in 36 D.L.R. 349) at page 355 10 said:—

“I think, as I said in the former case that those decisions are inapplicable
“in this jurisdiction where an agreement for sale is not followed by a deed
“of grant but by a Transfer, which in my opinion is in effect only an Order to
“the Registrar to cancel the Vendor’s Certificate of Title and to issue a new
“one in the purchaser’s name, leaving in my opinion in full force and effect
“all the covenants of the agreement for sale.”

Idington J. (reported in 57 S.C.R. 57) at page 64 said:—

“Mr. Justice Beck agreed in the result but apparently on the ground that
“the general rule thus recognised was not in the Alberta jurisdiction, where 20
“an agreement for the sale of land is not followed by a deed of grant, but by a
“Transfer which, in his opinion, is in effect only an order to the Registrar
“to cancel the Vendor’s certificate of title and to issue a new one in the
“purchaser’s name leaving, in his opinion, in full force and effect all the
“covenants of the agreement for sale.

“There certainly is much to be said for this view if, as I understand, the
“system introduced by the ‘Land Titles Act’ into Alberta that it forbids
“covenants in the instrument of transfer, and that in itself it is of no value
“until recognised, and given vitality by the Registrar’s certificate, which in
“truth is what passes the title; and also if we have regard to the origin and 30
“development of the rule in question.”

At the material time up to 1906 there was in force in Alberta the Land Titles Act (1894, Statutes of Canada Cap. 28) and from 1906 the Land Titles Act of Alberta (Statutes of Alberta 1906, Cap. 24). The dates of the transfers of the various parcels of land were not in evidence and it is submitted that the views of Beck J. and Idington J. apply to both Statutes and that there are no differences between the two Statutes affecting this issue. The forms of transfer appearing in the Schedule to each Statute are similar to the form appearing as Exhibit 6 in this case and show that only the trans- 40 feror is a party to it. It is submitted that the tenor of both Statutes shows that it is the Certificate of Title which is issued by the

p. 56, l. 19.

Registrar which effectively passes the title. (*Inter alia* the Appellants rely upon Section 102 of the earlier Statute and Section 104 of the later one).

By reason of the foregoing the Appellants respectfully submit that they are entitled to rely upon their rights under the Agreement of the 25th November, 1903, and pursuant thereto to a declaration in the terms of paragraph 13 of their Statement of Claim.

16. The second question raised by this Appeal was argued at length in both the Courts in Canada and was fully dealt with in the judgments of Mr. Justice Ford and of the Chief Justice of the Appellate Division of Alberta. The Appellants' contention is that the words in the transfers from the Respondents' predecessors to the Appellants, viz.:—

“excepting therefrom all coal and other minerals,”

p. 82.
p. 93.
p. 57, ll. 28-29.

only reserve coal or at most coal and “minerals of a like kind” and do not include petroleum and natural gas. p. 10, ll. 16-19.

The submission of the Appellants was that in construing the words of the reservation the principle stated after examination of the authorities by Lord Watson at page 675 in *Lord Provost of Glasgow v. Farie* (1888) 13, App. Cas. 657 should be followed. Lord Watson put the matter thus:—

“The only principle which I can extract from these authorities is this, “that in construing a reservation of mines or minerals whether it occur in a “private deed or in an enclosure Act, regard must be had, not only to the “words employed to describe the things reserved but to the relative position “of the parties interested, and to the substance of the transaction or arrangement which such deed or Act embodies. Mines and minerals are not definite “terms; they are susceptible of limitation or expansion according to the “intention with which they are used.”

30 It was contended by the Appellants that the transaction between the parties which the transfers embodied was contained in the Agreement of 1903 by which upon payment of the specified sums the Appellants became entitled to the land and to all the minerals subject only “to the conditions and reservations expressed in the “original grant thereof from the Crown.” A copy of the original Grant from the Crown appears as Exhibit 4 and the reservation was in these terms:—

“all coal mines, coal pits, seams and veins of coal, as well open as not “open, which shall or may be wrought, found out or discovered or which may “exist within, upon or under the said lands, together with full power to work “the same and for this purpose to enter upon and use and occupy the said

p. 51, ll. 18-19.

p. 53.

p. 54, ll. 4-10.

“lands or so much thereof and to such an extent as may be necessary for the
“effectual working of the said mines, pits, seams and veins”

It was submitted that the use of the words “coal and other
“minerals” was for the purpose of reserving to the Crown the right
to work and win coal notwithstanding that the mines, pits, seams or
veins might involve the removal of other minerals in the coal struc-
ture or surrounding the coal structure. As an illustration the words
of Mr. Justice Walsh cited at page 182 in *Creighton v. United Oils
Limited* 23 A.L.R. 175, were referred to:—

“If the mineral to be worked happens to be a solid substance lodged in 10
“one or more of the structures described in these words, these words reserve
“to the Crown the express power of entry for the purpose of working such
“structure or structures instead of the minerals themselves.”

It is respectfully submitted therefore that Mr. Justice Ford in
his judgment was right when he said:—

p. 85, ll. 9-12.

“For the purpose of finding out what was meant by or included in the
“words ‘other minerals,’ and especially for the purpose of supporting the
“suggestion that petroleum and natural gas were not included in the exception
“in the transfers, the agreement can be made use of, if it contains anything
“which would assist in that inquiry.”

20

but wrong when he said:—

p. 85, ll. 27-31.

“Here no aid to the construction of the exception is to be found in either
“of the agreements antecedent to the transfers. To say that the construction
“to be placed upon the words ‘coal and other minerals’ requires me to hold
“that coal only was excepted, is to say that no meaning is to be given to the
“words ‘other minerals.’”

17. Alternatively it was contended that the meaning of the
words “coal and other minerals” should be confined to coal and
other minerals like coal by the operation of the *ejusdem generis* rule.

p. 7, l. 39 to
p. 8, l. 3.

There was a preliminary issue between the parties as to whether 30
petroleum and natural gas (which were admitted to be minerals)
were minerals “like coal”. The Appellants sought to establish that
they were not “like coal” by adducing the expert evidence of a
geologist, Dr. John Andrew Allen. Dr. Allen’s evidence-in-chief
was that petroleum and natural gas differed from coal in the
following respects:—

p. 17, ll. 20-23.

(a) They were not the same in the geological and mining
world as coal.

p. 17, ll. 24-32.

(b) With an unimportant exception the method of winning
them was different from the method of winning coal. 40

(c) They were both found in the place where the materials have accumulated which have given rise to them; whereas coal is found in the place where it is deposited. p. 17, l. 32 to p. 18, l. 5.

(d) They are not rock strata of the same homogeneous character as coal. p. 18, ll. 6-10.

Dr. Allen also gave examples of minerals which he described as being of the same kind as coal and concluded by giving his opinion that petroleum and natural gas were not of the same kind as coal. p. 18, ll. 11-20. p. 18, ll. 19-20.

It is respectfully contended that there was nothing in
10 Dr. Allen's evidence-in-chief or in his evidence under cross-examination which justified Mr. Justice Ford in finding thus:—

“My appreciation of Dr. Allen's evidence leads me to the conclusion p. 87, ll. 20-24.
“that petroleum and natural gas are ‘minerals’ of ‘like kind’ with coal
“and come within some such general ‘category’ and have such similar
“‘characteristics’ as coal that they cannot be excluded from the exception
“however far the *ejusdem generis* doctrine may be pushed.”

The Appellants submit that the correct inference to be drawn from this evidence is that petroleum and natural gas are not of a “like kind” with coal.

20 **18.** The Appellants' argument in support of the alternative contention that the *ejusdem generis* rule should be applied to construe the reservation so as to exclude petroleum and natural gas from its scope may be summarized thus:—

The word “minerals” is ambiguous and they relied upon the following dictum:—

“No definition of ‘minerals’ is attainable, the variety of meanings which
“the use of the word ‘minerals’ admits of being itself the source of all the
“difficulty.”

(Lord Loreburn L.C. at page 289 in *Caledonian Railway v. Glenboig*
30 *Union Fireclay Co.* 1911, A.C. 290) consequently the intention of the parties who used the word, the relationship of the word “mineral” to other words in the reservation are matters which, it was submitted, may be looked at to assist in defining the word. Finally it was contended that since the transfers implemented an agreement between the parties which gave to the Appellants all the mineral rights except coal the *ejusdem generis* rule should be applied so as to restrict the scope of the reservation to accord as far as possible with the Agreement of 1903.

p. 87, ll. 1-3.

Mr. Justice Ford expressed his view in these words:—

“I think the *ejusdem generis* doctrine has no application here and that “the general words ‘other minerals’ must be taken to include all minerals “which at the date of the grants were owned by the grantor.”

p. 94, ll. 18-21.

The Chief Justice of the Appellate Division in a judgment with which all the members of the Court concurred held that there was “no justification for applying any rule here so as to construe the “term ‘other minerals’ as meaning other than what it says for the “words subsequently used are not so inapt to the obtaining of oil “and gas as to be of much significance.” 10

It is humbly submitted by the Appellants that learned Judges were wrong in so holding.

p. 7, ll. 1-10.

19. By paragraph 16 of the Statement of Defence the Respondents in answer to the whole of the Statement of Claim relied upon the provisions of the Real Property Limitation Act 1874 (as applied to Alberta by the Statute R.S.A. Chapter 90, Section 1). It does not appear by the Record of Proceedings herein that the matter was considered in argument and it was not dealt with in either of the judgments delivered in this case. If the Respondents seek to rely upon the point in this Appeal the Appellants will contend that 20 neither of these Statutes affords an answer to their Claim for the following reasons:—

(a) The Claim is not an “action or suit to recover any land “or rent.”

(b) The Respondents are not and have not been in possession of the mines or minerals the subject of this so as to entitle them to rely upon the Statute.

In any event the Appellants will rely upon the provisions of Section 162, of the Land Titles Act, R.S.A., Cap. 133 (which re-enacts substantially Sections 114 and 116 of the Land Titles Acts of 1894 30 and 1906 respectively).

p. 7, ll. 10-15.

20. By paragraph 17 of their Statement of Defence the Respondents allege that all the facts were within the knowledge of the Appellants for 21 years or more before the commencement of this Action and they contend that the Appellants are guilty of laches and are not entitled to seek any remedy, legal or equitable against the Respondents. This point does not appear to have been raised in argument nor is it dealt with in either of the judgments delivered. The Appellants deny that all the facts came to their knowledge before the 13th February, 1930, or alternatively at the earliest 40

according to the evidence "1914 or 1915" and they further submit that by the terms of the Agreement of 1903 no time was specified within which they were bound to require a transfer to them of the mineral rights other than coal. They further submit that in all the circumstances of the case they were not guilty of laches.

21. The Appellants with regard to the Appeal humbly submit that the judgments given both in the Trial Division and in the Appellate Division were wrong and that they are entitled:—

10 (1) Under the Agreement of 25th November, 1903, to all the minerals rights except coal or alternatively to the petroleum and natural gas rights under the land in question.

(2) Alternatively by the transfers under the Land Titles Acts the Appellants became entitled to all the minerals except coal or alternatively to the petroleum and natural gas rights for the following amongst other

REASONS.

On the first point:—

- 20 (1) Because by the terms of the Agreement of the 25th November, 1903, the Appellants were and are entitled to the mineral rights other than coal.
- (2) Because the transfers were only a partial carrying out of that Agreement.
- (3) Because the real transaction between the parties was to be found in the Agreement of 1903.

On the second point:—

- (4) Because upon the true construction of the words of the transfers the mineral rights other than coal or alternatively the petroleum and natural gas rights were transferred to the Appellants.
- 30 (5) Because petroleum and natural gas are not minerals "like coal."

STANLEY REES.

In the Privy Council.

ON APPEAL

FROM THE APPELLATE DIVISION OF THE
SUPREME COURT OF ALBERTA.

BETWEEN :—

KNIGHT SUGAR COMPANY, LIMITED
(Plaintiffs) Appellants,

— AND —

THE ALBERTA RAILWAY AND
IRRIGATION COMPANY
(Defendants) Respondents.

APPELLANTS' CASE.

LAWRENCE JONES & Co.,
Lloyd's Building,
London, E.C.3.