

2, 1953

Charles Russell

In the Privy Council.

No. 17 of 1952

No. 18 of 1952

UNIVERSITY OF LONDON
W.C. 1.
12 NOV 1958
INSTITUTE OF ADVANCED
LEGAL STUDIES

**ON APPEAL
FROM THE SUPREME COURT OF ALBERTA
(APPELLATE DIVISION).**

33545

BETWEEN

MICHEAL BORYS APPELLANT

AND

CANADIAN PACIFIC RAILWAY COMPANY and
IMPERIAL OIL LIMITED RESPONDENTS

— AND BETWEEN —

CANADIAN PACIFIC RAILWAY COMPANY and
IMPERIAL OIL LIMITED APPELLANTS

AND

MICHEAL BORYS RESPONDENT.

(CONSOLIDATED APPEALS).

CASE FOR THE RESPONDENT

IMPERIAL OIL LIMITED.

1.—This is an Appeal by Micheal Borys (Plaintiff) and a further Appeal by the Canadian Pacific Railway Company and Imperial Oil Limited (Defendants) from a Judgment of the Appellate Division of the Supreme Court of Alberta delivered 6th February, 1952. The Appellate Division, with Mr. Justice Macdonald dissenting, reversed in part the Judgment of Chief Justice Howson of the Trial Division delivered 9th May, 1951.

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pp. 748-763
p. 773
pp. 702-725
p. 726

2.—For the purpose of this case Micheal Borys (Plaintiff) is referred to as the Appellant and the Canadian Pacific Railway Company and Imperial Oil Limited (Defendants) are referred to collectively as the Respondents.

10 3.—An appeal by the Appellant from the Judgment of the Appellate Division was admitted by Order of the Appellate Division dated 11th February, 1952. A further appeal by the Respondents was admitted by Order of the same Court dated 11th February, 1952.

p. 776, l. 28 to
p. 777, l. 49
p. 778, l. 18 to
p. 779, l. 41

CASE FOR IMPERIAL OIL LTD.

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4.—The principal issue involved in this Appeal is the interpretation of a reservation of “all petroleum” contained in a Certificate of Title issued under The Land Titles Act of Alberta.

Ex. 5, p. 68, l. 30

5.—By Certificate of Title No. 165-N-120 dated 18th December, 1947, the Appellant was registered under The Land Titles Act of Alberta as the owner of an estate in fee simple of the Northeast Quarter (N.E. $\frac{1}{4}$) of Section Nineteen (19), Township Fifty (50), Range Twenty-six (26), West of the Fourth (4th) Meridian, Alberta, “Reserving thereout all coal, petroleum and valuable stone” (hereinafter referred to as “the said lands”).

6.—Since 19th November, 1920, Canadian Pacific Railway Company (hereinafter referred to as “Canadian Pacific”) has been the registered owner under The Land Titles Act of Alberta of an estate in fee simple of all coal, petroleum and valuable stone under the said lands by virtue of Certificate of Title No. C.P.R. 2687. 10

Ex. 8, p. 79, l. 34

Ex. 6, p. 69, l. 1

7.—By a Lease dated and registered 21st September, 1949, Imperial Oil Limited (hereinafter referred to as “Imperial”) is lessee of estate of Canadian Pacific to “all petroleum” which may be found within, upon or under the said lands.

Ex. 136, p. 700, ll. 3 to 5

8.—A right of entry to the said lands under The Right of Entry Arbitration Act was obtained by Imperial from the Board established pursuant to that Act. The Order of the Board granted to Imperial the right to occupy and use such portions of the said lands as may be required for any or all of its purposes in drilling for petroleum subject to a later ruling of the Board in the matter of compensation. A well known as Imperial Leduc No. 250 was then commenced by Imperial and had reached a depth a short distance above the D-3 producing horizon, when an interim injunction obtained by the Appellant prevented Imperial from producing natural gas. It is impossible to produce oil without producing natural gas and drilling was therefore stopped at the position shown in Exhibit 98. 20

p. 372, ll. 12 to 18

p. 372, l. 23, Ex. 98, p. 809

p. 163, ll. 5 to 10, p. 256,
ll. 18 to 20

p. 371, l. 30, p. 809

p. 724, ll. 39 to 41, p. 727,
ll. 5 to 7

p. 762, ll. 40 to 41, p. 774,
ll. 28 to 33

p. 780 to 781

9.—This interim injunction was made permanent by the learned trial Judge and, although set aside by the Judgment of the Appellate Division, the Appellate Division has on a further application of the Appellant granted a stay of proceedings continuing the injunction until the final disposition of these proceedings. 30

p. 348, ll. 10 to 13, Ex. 84,
p. 799

10.—The said lands are located in the Leduc-Woodbend oil field of Alberta and under the surface of the ground at various depths are various formations containing oil and natural gas. The D-2 formation contains oil with natural gas in solution with the oil in the formation. The D-3 formation contains oil with natural gas in solution and also contains an overlying gas cap. The said lands are surrounded on three sides by producing wells. 40

p. 351, l. 42 to p. 352, l. 9

p. 357, ll. 33 to 44

p. 361, l. 21 to p. 365, l. 3,

Ex. 85, p. 349 and p. 800,

Ex. 97, p. 808

- 11.—Micheal Borys commenced an action on 16th November, 1949, in the Supreme Court of Alberta against Canadian Pacific and Imperial. He alleged that he was registered as owner under the Land Titles Act of Alberta of an estate in fee simple of all mines and minerals except gold, silver, coal and petroleum and valuable stone within, upon or under the North East Quarter (N.E. $\frac{1}{4}$) of Section Nineteen (19), Township Fifty (50), Range Twenty-six (26), West of the Fourth Meridian in the Province of Alberta. He admitted that Canadian Pacific is the owner of the petroleum reserved from his title. He alleged that under the existing facts and circumstances petroleum is a liquid and does not embrace or include natural gas because it is a separate and distinct substance from petroleum. Micheal Borys prayed for a declaration that he is the owner of the natural gas, and an injunction restraining the Respondents from using, removing, wasting, interfering with or otherwise disposing of the said natural gas. Relief by way of damages was claimed but this relief was abandoned at trial.
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- 12.—Canadian Pacific and Imperial, by separate defences denied the allegations of Micheal Borys. Imperial in its defence alleged that natural gas under the said lands is embraced within the reservation of petroleum, that it has the right to work, win and carry away petroleum in any or all of its forms of occurrence including its gaseous phase, that it has the right to work, win and carry away both natural gas occurring in the same reservoir with the petroleum in its liquid phase and the natural gas contained in solution in the petroleum and finally that it has the right without compensation to remove, use and dispose of such natural gas as may be necessary or incidental to the production of petroleum in its liquid phase. The defence of Canadian Pacific was in substantially the same terms. There is a counterclaim by Canadian Pacific and a counterclaim by Imperial whereby the foregoing allegations have been made the basis of relief which each seeks by way of counterclaim.
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- 13.—The learned Trial Judge held that petroleum did not include gas, whether wet, dry or held in solution. The Appellate Division held that in common usage petroleum and natural gas are two different substances, but held that petroleum includes oil and any other hydrocarbons and natural gas in solution or contained in the liquid existing in its natural condition in strata. The Appellate Division therefore concluded that all the petroleum reserved, including all hydrocarbons in solution or contained in the liquid in the ground was the property of the Respondents who are entitled to do as they like with it, subject to the observance of all relevant statutory provisions and regulations. The Appellant was held to be entitled to the remaining gas in the reservoir. The Appellate Division further found that the Respondents were entitled to extract all of the substances belonging to them from the earth, even if there is interference with and wastage of the gas belonging to the Appellant, so long as in the operations modern methods are adopted and reasonably used.
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- 40
- pp. 1 to 3
p. 1, ll. 36 to 46
p. 1, l. 46 to p. 2, l. 1
p. 2, l. 44 to p. 3, l. 4
p. 3, ll. 12 to 14
p. 3, ll. 16 to 22
p. 3, ll. 24 to 26, p. 60, ll. 43 to 44
p. 4, l. 1 to p. 6, l. 15,
p. 7, l. 34 to p. 9, l. 45
p. 8, ll. 35 to 37
p. 9, ll. 6 to 9
p. 9, ll. 16 to 18, p. 9,
ll. 25 to 28
p. 9, ll. 33 to 38
p. 4, to p. 6
p. 6, l. 20
p. 10, l. 1
p. 722, ll. 10 to 15
p. 752, ll. 32 to 34
p. 752, l. 45 to p. 753, l. 1
p. 753, ll. 3 to 9
p. 753, ll. 10 to 11
p. 761, ll. 22 to 28

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14.—Imperial contends that the adjective “all” in the reservation by Canadian Pacific of “all coal, petroleum and valuable stone” must be read grammatically with the word “petroleum.” The inquiry thus relates to a reservation of “all petroleum.”

p. 171, ll. 29 to 47
 p. 267, l. 37 to p. 268, l. 5
 p. 235, ll. 4 to 30
 p. 541, l. 41 to p. 542, l. 45
 p. 452, l. 24 to p. 453, l. 20
 p. 409, l. 43 to p. 410, l. 10
 p. 559, ll. 21 to 40
 p. 582, ll. 23 to 40, p. 692,
 ll. 29 to 32
 Ex. 50, p. 284
 Ex. 111, p. 509 & p. 823
 p. 419, ll. 40 to 47
 p. 591, l. 38 to p. 592, l. 12
 p. 599, l. 2 to p. 600, l. 28
 Ex. 126, p. 600, Ex. 127,
 p. 600
 p. 533, ll. 19 to 33
 p. 151, ll. 11 to 32
 p. 429, ll. 22 to 30

15.—Petroleum is a complex mixture of hydrocarbons which can and do exist in nature in solid, liquid and gaseous phases. Petroleum contains many constituents. Natural gas is the gaseous component of petroleum, although it may contain impurities. Natural gas is a factor of considerable importance in the recovery of the liquid phase of petroleum, commonly known as oil.

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Ex. 114, p. 826
 Ex. 126 and 127, p. 600
 p. 512, ll. 18 to 41
 p. 582, l. 42 to p. 583, l. 6

16.—The evidence indicates that all of the hydrocarbon constituents are common to both an oil reservoir and a gas reservoir so called, and are also common to the well effluents obtained from so called oil wells and gas wells, although present in different proportions.

p. 163, ll. 5 to 10, p. 256,
 ll. 18 to 20
 p. 419, ll. 3 to 12

17.—Although commonly referred to as oil wells, in fact all so called oil wells produce both oil and gas as oil cannot be recovered without gas.

p. 437, ll. 20 to 23
 p. 538, ll. 9 to 14
 p. 538, ll. 21 to 24

18.—During production the liquid and gaseous phases of petroleum are constantly interchanging, this process occurring in the reservoir, in the well bore and at the surface. Therefore, it is necessary to postulate an arbitrary set of scientific conditions in order to separate the liquid and gaseous phases of the hydrocarbons in the mixture produced by the well. An expert witness for the Appellant said that the basis for such a separation is atmospheric pressure and room temperature. While the Appellant took the position that the distinction between liquid petroleum and natural gas was such that it was understood by the common man and was known in the vernacular, when it came to arrive at a basis for separation of liquid petroleum and natural gas the Appellant's experts resorted to an arbitrary scientific formula, namely, atmospheric pressure and room temperature, which scientists set at 60° Fahrenheit and 14.4 pounds per square inch. This must necessarily result in confusion as atmospheric pressure and room temperature are variable factors unless an arbitrary scientific basis of separation is accepted and such a basis is obviously not one intended by ordinary usage. The arbitrary set of scientific conditions referred to occurs only accidentally and infrequently during the process of production if at all.

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p. 166 to p. 167, l. 42
 p. 167, ll. 23 to 29
 p. 179, ll. 28 to 35
 p. 180, l. 46 to p. 181, l. 15

19.—Imperial contends that when a word or a phrase which is capable of a comprehensive meaning and a limited or narrow meaning is used in a reservation relating to land, the true construction of such a word or phrase is the comprehensive meaning. If a limited or narrow meaning is to be given to the word or phrase, clear words are necessary to so limit the word or phrase used. The evidence makes clear that the word “petroleum” is capable of both a comprehensive and a limited meaning but no words of limitation are to be found in the reservation. In some circumstances it refers to a liquid. Imperial, however, contends that this limited or narrow meaning and usage applies to petroleum only after it has been captured and brought to the surface and is being dealt with as a commercial product. However, with relation to the substances in the reservoir the word includes all the naturally occurring hydrocarbons whether gaseous, liquid or solid and therefore would include natural gas. In the present case the word is used in a reservation in a title to land, where the meaning attached to liquid petroleum as an article of commerce has no application. Imperial contends that the “common usage” relating to the surface product is not the usage which is descriptive of petroleum in the reservoir.

p. 411, l. 7 to p. 414, l. 1
 p. 446, l. 28 to p. 447, l. 37
 p. 449, l. 22 to p. 451, l. 19
 p. 459, l. 40 to p. 460, l. 32
 p. 539, l. 6 to p. 556, l. 46
 p. 583, l. 8 to p. 591, l. 19

20.—In the Courts below the Appellant emphasized and relied on various Statutes and Orders-in-Council. Imperial contends that these Statutes and Orders-in-Council are either particularly concerned with petroleum as a commercial product after it has been captured and are therefore of no assistance in determining the true construction to be given to the phrase “all petroleum” in a reservation or that the word “petroleum” was loosely used and cannot be interpreted so as to exclude natural gas. The same is true of the so called “petroleum and natural gas” leases.

Ex.15 to 28, pp. 111 to 129

Ex.58 to 74, pp. 310 to 329

21.—The document upon which the claim of the Appellant is based is his Certificate of Title, and it was submitted that documents precedent to it should not be resorted to for construction but in the Courts below some weight was given to such precedent historical facts and documents existing prior to 1947 and the chain of title of the Appellant in the said land was considered.

p. 706, l. 45 to p. 707, l. 9
 p. 708, l. 44 to p. 709, l. 14

22.—The Respondents called as witnesses James O. Lewis, a Consulting Petroleum Geologist and Engineer from Texas, Dr. Katz a Professor of Chemical Engineering of the University of Michigan, and Professor Fancher, a Professor of Petroleum Engineering of the University of Texas, all of whom had extensive practical experience. These witnesses produced a considerable amount of literature and technical works from which, it is submitted, a dual meaning of the word “petroleum” from before 1906 up to the present time appears quite clearly. They testified that in their view the meaning of petroleum in 1906 and at present, where it refers to the reservoir is the comprehensive meaning which includes the hydrocarbon gases as well as the liquids and solids. The narrow usage and limited meaning of petroleum relates to the liquid product as an article of commerce.

pp. 407 to 498
 pp. 498 to 577
 pp. 578 to 685

p. 411, l. 7 to p. 414, l. 1
 p. 415, l. 15 to p. 416, l. 40
 p. 446, l. 28 to p. 447, l. 37
 p. 449, l. 21 to p. 451, l. 19
 p. 459, l. 40 to p. 460, l. 32
 p. 539, l. 6 to p. 556, l. 46
 p. 583, l. 8 to p. 591, l. 19
 p. 409, l. 43 to p. 410, l. 10
 p. 507, l. 47 to p. 509, l. 12
 p. 537, l. 35 to 43
 p. 582, l. 21 to p. 583, l. 30

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p. 691, l. 34 to p. 699, l. 20
 p. 691, l. 44 to p. 692, l. 28
 p. 692, ll. 29 to 32

23.—S. J. Davies, a Petroleum Engineer practising in Calgary, was also called by the Respondents. He received his education in Alberta and at the Royal School of Mines in London, England, from which he graduated as an Associate in the Technology of Oil. He has had a long and extensive experience in the industry. Mr. Davies testified that the word "petroleum" imports to him a mixture of hydrocarbons, liquid, gaseous and solid, and that his views go back to his early experience in the profession.

p. 513, ll. 21 to 31
 p. 526, ll. 20 to 40
 p. 527, ll. 30 to 35
 p. 533, ll. 19 to 33
 p. 538, ll. 5 to 8
 p. 505, ll. 23 to 31
 p. 526, ll. 32 to 40
 p. 528, l. 3 to p. 533, l. 6
 p. 513, ll. 21 to 31
 p. 538, ll. 21 to 24
 p. 538, ll. 15 to 19
 p. 550, ll. 7 to 47
 p. 690, ll. 37 to 43
 p. 240, l. 34 to p. 241, l. 41

24.—Dr. Katz testified that natural gas is not a distinct substance. It is a mixture of hydrocarbon gases. The composition of such natural gas depends upon temperature, pressure and source. Since natural gas constituents assist in the recovery of liquid from the reservoir, efficient production methods require a minimum withdrawal of gas until the oil has been recovered. He also stated that there is an interchange between the liquid phase and the gas phase of the constituents and that natural gas normally contains constituents which may be extracted and sold as liquids. He testified that no distinct division of a well stream can be made into gas or liquid short of an arbitrary specification of the separation process. The final products depend upon the final conditions of separation. Dr. Katz also stated as did Mr. Nowers and Mr. Slipper, that in Alberta in 1906 a natural gas was known to be valuable.

p. 591, ll. 1 to 19
 p. 596, ll. 11 to 20
 p. 594, l. 45 to p. 595, l. 13
 p. 616, l. 40 to p. 617, l. 14
 p. 618, ll. 40 to 48
 p. 619, ll. 16 to 17
 p. 619 to p. 634
 p. 637, ll. 30 to 35

25.—Professor Fancher testified that in 1900 as today it was established that petroleum consists of both oil and gas, and that oil and gas are of common origin and occurrence. The anti-clinal theory of the occurrence of oil and gas had also been verified. He also testified that if maximum recovery of oil is to be achieved, the production of natural gas must always be incidental to the production of oil. If this is not done, it produces irretrievable waste of a great natural resource.

26.—It is submitted that all of the scientific evidence as to the inter-relationship between gas and oil in the reservoir and the behaviour of these two products at the surface is not in dispute.

p. 686, l. 1 to p. 691, l. 32
 p. 686, ll. 23 to 29
 p. 686, ll. 11 to 18
 p. 687, ll. 17 to 24

27.—The Respondents also called E. B. Nowers whose qualifications were recognized by the learned Trial Judge, to discuss the meaning of the word "petroleum" as a land owner. He has been a land agent since 1905 and in the course of his work encountered the word "petroleum" about the year 1912. He testified that his understanding throughout the years has been that it includes natural gas.

28.—In the Courts below reference and reliance has been largely placed on the case of *Barnard Argue Roth Stearns Oil and Gas Company v. Farquharson* (1912) A.C. 864, per Lord Atkinson affirming the Ontario Court of Appeal (Meredith, J.A. dissenting) (1912) 25 O.L.R. 93, which had

affirmed the Judgment of Chancellor Boyd at trial (1910) 22 O.L.R. 319. Imperial relies on the Barnard Argue case and submits that it supports the contentions advanced herein.

29.—Chief Justice Howson held that the terms “rock oil” and “mineral oil” as used by the Privy Council have, in his opinion, the same meaning as the word “petroleum.” It is to be noted that immediately after making this finding, Chief Justice Howson went on to state: “. . . no valid distinction has been made between the case at bar and the Barnard Argue case,” but nonetheless he proceeded to grant an injunction prohibiting the Respondents from interfering with the Appellant’s gas, a ruling which is in direct conflict with the decision of this Board in the Barnard Argue case.

p. 724, ll. 1 to 5

p. 724, ll. 3 to 5

p. 724, ll. 39 to 41

30.—The reasoning of all the learned Judges in the Barnard Argue case, at trial, in the Court of Appeal, and in the Judicial Committee, it is submitted, are of interest in the present appeal with reference to the true construction of the phrase “all petroleum” used in the reservation. On the point as to the true construction of the term “all petroleum,” it is respectfully submitted that Chief Justice Howson, in applying the Barnard Argue case, misinterpreted the reasoning of the learned Judges in that case. It is submitted that the reasoning in that case clearly shows that if the phrase to be interpreted had been “all petroleum” rather than “springs of oil,” the Court would have found that natural gas was included in petroleum. Chancellor Boyd, at p. 335, stated: “While the scientific world is of disputatious mood as to the ultimate origin (i.e. genesis) of petroleum, there is general consensus that its two valuable products, gas and oil, are compounds in different proportions of hydrocarbon . . . ,” and there are many other statements to the same effect in his Judgment. In a dissenting Judgment, Mr. Justice Meredith in the Ontario Court of Appeal, at p. 105 states clearly that in oil regions petroleum includes natural gas, and the majority Judgments agreed with Chancellor Boyd. In the Judicial Committee, Lord Atkinson found that natural gas and oil are different products, although both products were hydrocarbons. In light of the fact that the phrase to be interpreted, however, was “springs of oil,” he held that a reservation of “springs of oil” did not reserve natural gas. In considering the Barnard Argue case and the present appeal, it should also be noted that the land registration system in force in Ontario at that time was not similar to the Torrens system which must be considered in this appeal.

31.—The document sought to be interpreted is a Certificate of Title issued under The Land Titles Act of the Province of Alberta, which is based on the Torrens System. Under this Act a certificate of title is “conclusive evidence” that the person described as owner is entitled to the land. The Act further stipulates (Section 53) that “no instrument shall be effectual to pass any estate or interest in that land . . . unless the instrument

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“ is duly registered.” Another fundamental Torrens provision is contained in Section 189 of The Land Titles Act which provides that no person dealing with land shall be bound to enquire into or ascertain the circumstances in which an owner obtained title.

Ex. 5, p. 68, l. 30
Ex. 8, p. 79, l. 34

32.—Imperial, when registering its lease in 1949, would be entitled to rely on the title as it then existed. In 1949 an examination by Imperial of Certificate of Title No. 165-N-120 issued to Micheal Borys and of Certificate of Title No. C.P.R. 2687 issued to Canadian Pacific would disclose that “ all petroleum ” was excepted from the Appellants’ title and was owned by the Canadian Pacific. 10

Ex. 5, p. 68, l. 30

33.—Certificates of Title, which are the only documents relevant to title and ownership, are written by the Registrar of Land Titles or an official in his office appointed by the government. Land will be transferred from time to time and successive Certificates of Title issued by the Registrar. It therefore is not relevant to consider the particular meaning of a word such as “ petroleum ” in the vernacular or to fix a particular year in judging of the meaning of the word. It is to be noted that the Appellants’ Certificate of Title No. 165-N-120 was written and issued in December, 1947.

34.—Under the Torrens System, it is submitted, title to an interest in land expressed in identical language cannot vary in meaning from title to title or from time to time or from place to place. The whole land registration system would break down if a person could not rely on the title without making inquiries as to the state of knowledge or usage at the time the reservation first arose and the intention of the parties many years previously. It is therefore submitted that the inquiry to be made is to consider scientifically what part of the substances in the reservoir is “ petroleum.” Any other course would violate the fundamental principles of the Torrens System. 20

35.—Imperial contends that the reservation of “ all petroleum,” which is an interest in land constituting an exception, by necessary implication includes the right to win, work, and carry away such mineral. 30

p. 182, l. 42 to p. 183, l. 4
p. 637, ll. 41 to 47

p. 163, ll. 5 to 10
p. 256, ll. 18 to 20

36.—At all times relevant to the issues herein it was known that in the reservoir gas always accompanied oil, that gas was dissolved in oil and was a propulsive force bringing oil to the surface. Oil cannot be produced without the natural gas associated with the oil in the reservoir. The reservation of “ all petroleum ” would not be effective unless natural gas is used in the production of the oil, and in such circumstances, it is submitted, the law presumes that the reservation is to be effective. Therefore Imperial contends that inherent in the ownership of the petroleum is the implied right to work, win and carry away the petroleum and, without compensation, any gaseous hydrocarbons of which the Appellant is the owner. 40

37.—The majority Judgment of the Appellate Division upholding the above contention referred to *Barnard Argue Roth Stearns Oil and Gas Company v. Farquharson* (1912) A.C. 864. Imperial relies on the reasoning of Lord Atkinson at p. 871, where it was held that the Company in the Barnard Argue case was entitled to capture its oil, notwithstanding injury to the owner of another estate. It was the view of their Lordships that the Company would not be liable for loss occasioned to the other estate as a result of the production of oil.

p. 761, l. 35 to p. 762, l. 29

10 38.—In the present circumstances the right to win, work and carry away the petroleum is not affected by the Appellant's ownership of the surface of the said lands inasmuch as Imperial has obtained a right of entry under The Right of Entry Arbitration Act.

Ex. 136, p. 700

39.—Imperial adopts with respect the finding of the majority Judgment of the Appellate Division that the substance reserved by Canadian Pacific was petroleum in the earth and not a substance when it reached the surface. The liquid phase of petroleum includes natural gas in solution and natural gas present in the liquid. Imperial therefore contends that the Respondents are the owners of such natural gas by virtue of the reservation of "all petroleum."

p. 752, ll. 38 to 41

20 40.—The Judgment of Chief Justice Howson may be summarized as follows: His Judgment constituted a complete acceptance of the Appellant's claim. The evidence of Simon Borys as to his understanding of the meaning of the Contract, which was objected to when introduced, was discussed and relied on. He held that in 1906, the date of the Land Contract between Canadian Pacific and Simon Borys, natural gas was not regarded as a substance of commercial value, and also held that the useful function of natural gas in the production of petroleum was not known in 1906.

p. 707, ll. 14 to 19

p. 708, ll. 1 to 11

30 41.—His Lordship discussed the meaning of petroleum and concluded that petroleum does not include natural gas and that natural gas is regarded as a distinct and different product from petroleum. He quoted from various dictionaries all of which he said were authoritative and which he accepted. He stated that in no instance, even in the technical dictionaries, was petroleum defined so as to include natural gas, and also quoted as authoritative the definitions of the American Gas Association. He refused to accept definitions "appearing in a few only of the encyclopædias" and in articles by petroleum engineers.

p. 708, ll. 33 to 43

p. 710, ll. 7 to 10

p. 712, ll. 40 to 43

p. 713, l. 34

p. 714, ll. 28 to 33

40 42.—The learned Trial Judge held that the case should not turn on any technical, chemical or scientific signification of the term "petroleum," but on the meaning used by ordinary persons concerned with the subject, and especially as to the meaning understood and accepted by the parties. Since the reservation has been made by the Canadian Pacific, it was to be

p. 716, ll. 13 to 19

p. 716, ll. 21 to 30

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strictly construed against it. There was no reservation of natural gas, whether dry or wet or held in solution with the mineral oil.

p. 722, ll. 17 to 20

43.—His Lordship held the Respondents herein had no right to possess and enjoy the petroleum (oil) at the expense of the Appellant and use without the Appellant's consent his natural gas. He considered that the problem of the use of natural gas in the production of oil with separate ownerships in oil and gas was analogous to the destruction of the surface by the owner of minerals without power to work the same, and found that "destruction of the Appellant's estate in the natural gas may be likened " to the destruction of the surface estate."

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p. 721, ll. 35 to 38

pp. 748 to 763

pp. 763 to 772

44.—In the Appellate Division the majority Judgment was delivered by Mr. Justice Parlee and concurred in by O'Connor, C.J.A., F. Ford, J.A., and C. J. Ford, J.A. Mr. Justice Macdonald dissented. The majority Judgment held that the finding of the Trial Judge that petroleum and natural gas were, by common usage, two different substances, ought not to be disturbed, but reversed the learned Trial Judge in that the majority held that what was reserved to Canadian Pacific was petroleum in the earth and not a substance when it reached the surface. Changes during production were held not to affect the original ownership. It was held that the petroleum, which includes oil and any other hydrocarbons and natural gas existing in its natural condition in strata, is the property of the Respondents who are entitled to produce it, even if there was interference with and wastage of the gas belonging to the Appellant, so long as modern methods were reasonably used.

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p. 752, ll. 33 to 35

p. 752, ll. 38 to 41

p. 752, l. 46 to p. 753, l. 8

p. 752, ll. 19 to 24

p. 754, ll. 8 to 34

p. 754, ll. 40 to 42

p. 756, l. 32

p. 760, l. 32 to p. 761, l. 12

p. 761, ll. 14 to 28

45.—The majority referred to The Oil and Gas Resources Conservation Act, which is intended to prevent undue waste and to enable maximum production of both oil and gas to be obtained, and reference was also made to the Order granted to Imperial under The Right of Entry Arbitration Act which provides for the acquisition of such interest in the surface rights as may be necessary for the efficient and economical performance of producing operations. The majority held that destruction of the estate in natural gas was not analagous to destruction of the surface estate, and held that the mere reservation of mines and minerals implied the right to get them, and that the owner of gas could not hold the owner of oil "at his mercy." It was held that the reservation of petroleum enables the Respondents to use all reasonable means to extract the petroleum from the earth.

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pp. 763 to 772

46.—Mr. Justice Macdonald, of the Appellate Division, in a dissenting opinion, largely followed the reasoning of the learned Trial Judge.

It is submitted that the appeal of Imperial Oil Limited should be allowed for the following, amongst other,

REASONS

1. BECAUSE the reservation of "all petroleum" includes natural gas.
2. BECAUSE the inquiry is as to the true construction of "all petroleum" in a title under the Land Titles Act which cannot vary from title to title, or from place to place, or from time to time.
3. BECAUSE the words "all petroleum" are generic words and are not to be interpreted by common usage.
- 10 4. BECAUSE the words "all petroleum" are technical words and are not to be interpreted by common usage.
5. BECAUSE the evidence of Simon Borys as to the meaning attributed by him to the words "all petroleum" was inadmissible and irrelevant.
- 20 6. BECAUSE the phrase "all petroleum" has a comprehensive or limited meaning, depending on whether it refers on the one hand to what is reduced to possession and captured at the surface and dealt with as a commercial product, and on the other hand, in the meaning applicable to this case, to the substances in the reservoir, in which latter case it includes natural gas.
7. BECAUSE in the context in this reservation "all petroleum" includes both oil and gas.
8. BECAUSE the reservation of "all petroleum" should be given its comprehensive meaning so as to make it effective.
9. BECAUSE "all petroleum" is a comprehensive phrase and oil and gas each have the same constituents in different proportions.
10. BECAUSE oil and gas each contain a number of separate substances.
- 30 11. BECAUSE "all petroleum" includes petroleum in accordance with every meaning or usage, whether generic, technical, scientific or common.

If the appeal of the Canadian Pacific Railway Company and Imperial Oil Limited herein from the Judgment of the Appellate Division is dismissed, then, it is submitted, that the appeal of Micheal Borys should be dismissed for the following, amongst other,

REASONS

1. BECAUSE of the reasons hereinbefore set out in the Respondent's appeal herein.
2. BECAUSE even if petroleum refers to liquid hydrocarbons only, it is the liquid as it exists in strata including gas contained or dissolved in it, which has been reserved.
3. BECAUSE even if the Appellant is entitled to natural gas, he is not entitled to wet gas, gas in solution or gas contained in the liquid.
4. BECAUSE, in any event, the Respondents have the right to work, win and carry away the petroleum in its liquid phase, including all hydrocarbons in solution or contained in the liquid. 10
5. BECAUSE even if the Appellant is entitled to the natural gas the Respondents are entitled to extract all their substances from the earth notwithstanding that there is interference with and wastage of the Appellant's gas so long as modern methods are adopted and reasonably used and the Respondents are not liable for any inconvenience or loss caused thereby.
6. BECAUSE the reservation should be given such a construction 20 as will make it effective.
7. BECAUSE the reasons of the majority of the Appellate Division of the Supreme Court of Alberta with respect to the matters raised by the appeal of Micheal Borys herein are right.

H. G. NOLAN.

J. F. BARRETT.

In the Privy Council.

No. 17 of 1952.

No. 18 of 1952.

ON APPEAL FROM THE SUPREME COURT OF
ALBERTA.

(APPELLATE DIVISION).

BETWEEN

MICHEAL BORYS ... APPELLANT

AND

CANADIAN PACIFIC
RAILWAY COMPANY and
IMPERIAL OIL LIMITED RESPONDENTS

— AND BETWEEN —

CANADIAN PACIFIC
RAILWAY COMPANY and
IMPERIAL OIL LIMITED APPELLANTS

AND

MICHEAL BORYS ... RESPONDENT.

(CONSOLIDATED APPEALS).

CASE FOR THE RESPONDENT
IMPERIAL OIL LIMITED.

LAWRENCE JONES & CO.,

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Old Broad Street,

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