

2016

20, 1959

No. 7 of 1959

IN THE PRIVY COUNCIL

INST  
- 7 MAR 1960  
25 PARLIAMENT SQUARE  
LONDON, W.C.1.

O N A P P E A L  
FROM THE SUPREME COURT OF CANADA

B E T W E E N :

- (1) PONOKA-CALMAR OILS, LIMITED and
- (2) AMERICAN LEDUC PETROLEUMS, LIMITED Appellants

55501

- and -

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- (1) EARL F. WAKEFIELD COMPANY,
- (2) OIL CITY PETROLEUMS (LEDUC) LIMITED,
- (3) HARRY SZPILAK,
- (4) KASPER HALWA,
- (5) ALVIN M. DAVIS,
- (6) PETER MATVICHUK,
- (7) ALVIN M. BERG,
- (8) JACOB B. GAUF and
- (9) ALEX JOHN PYRCH Respondents

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C A S E FOR THE APPELLANTS

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1. This is an appeal by special leave from a judgment, dated the 22nd April, 1958, of the Supreme Court of Canada (Kerwin; C.J., Rand, Locke, Fauteux and Abbott; JJ.), allowing in part an appeal from a judgment, dated the 25th June, 1957, of the Appellate Division of the Supreme Court of Alberta (Ford, C.J.A., Macdonald, McBride, Porter and Johnson, JJ.A.), allowing an appeal from a judgment, dated the 14th March, 1956, of the Trial Division of the Supreme Court of Alberta (McLaurin, C.J.T.D.), whereby it was declared that the first Respondents had a good, valid, binding and subsisting lien under the Mechanics' Lien Act against all mines and minerals within, upon or under certain lands in the

RECORD  
pp.107-123

pp.85-104

pp.79-84

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province of Alberta and the first Respondents were held entitled to recover \$30,000 from funds held by a receiver appointed by the Court.

pp.33-78

2. The facts, as agreed by the parties in the Trial Division of the Supreme Court of Alberta, were:

p.33,11.  
4-12.

(i) At all material times, the third Respondent was the registered owner of an estate in fee simple in certain lands in Alberta, 80 acres in extent (hereinafter called "the said lands"), subject to a reservation in favour of the Canadian Pacific Railway Co. of all coal.

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p.33,11.  
13-18;  
pp.37-49.

(ii) On the 31st May, 1948 the third Respondent granted to five individuals a lease of all petroleum, natural gas, natural gasoline and related hydrocarbons to be found within, upon or under the said lands, for five years and thereafter for so long as leased substances could be produced in paying quantities from the said lands. By the said lease the lessees were obliged to commence a well for petroleum and natural gas within two years of the date of the lease, and thereafter continuously to carry on the work until either petroleum, oil or gas should be struck in a quantity of at least thirty barrels per day or the lessees should be reasonably convinced that no such production would be reached. The lessees were entitled to assign the lease.

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p.39;1.33-  
p.40,1.14.

p.47;1.38-  
p.48,1.3.

p.33;1.41-  
p.34,1.6.

(iii) On the 10th September, 1949 the first Respondents, upon the instructions of one Harding and one McMullen, started to drill an oil well on the said lands, which well by the 23rd September, 1949 had reached the depth of 2570'. The first Respondents did this under the authority of a drilling permit issued, before drilling began, by the Petroleum and Natural Gas Conservation Board of Alberta to the second Respondents.

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p.35,11.6-  
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(iv) On the 19th September, 1949 the second Respondents were incorporated under the laws of Alberta, the said Harding and the said McMullen being the only shareholders.

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p.33,11.33-  
35; pp.69-  
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(v) On the same day (the 19th September, 1949) an agreement was made between the first

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- and second Respondents, by which the first Respondents agreed to drill for the second Respondents on the said lands a well for the production of oil and gas. This agreement is hereinafter called 'the drilling agreement'. The well was to be of such depth as the second Respondents might designate not exceeding 5,400', and the first Respondents agreed to begin drilling it on or before the 15th September, 1949. The second Respondents agreed to pay for the completed work \$50,000, the cost of any materials which they agreed to provide but the first Respondents in fact purchased, and for various operations the day work rate (defined in the agreement). \$10,000 was to be paid upon the spudding in of the well; on the 1st and 15th days of each subsequent month, \$7 for each foot drilled in excess of 1,000 feet, and the whole of any sums due for day work or materials purchased by the first Respondents; on completion, any balance owing; and on payment of the first \$10,000 the second Respondents were to deposit with the Prudential Trust Co., Ltd. at Calgary \$40,000, to be used in satisfaction of payments subsequently falling due. The second Respondents were to be entitled to direct discontinuance of drilling operations at any time, but subject to a liability to pay for a completed well 5,400' deep if the operations were discontinued before the well reached that depth. If the second Respondents were to make default in making any payment under the agreement, the first Respondents were to be entitled on 48 hours' notice to terminate the agreement and discontinue operations, and this was to be deemed a discontinuance of drilling operations by the second Respondents.
- (vi) On the 21st September, 1949 the lessees from the third Respondent under the lease of the 31st May, 1948 assigned to the first Appellants all their right, title and interest in and to the oil and gas rights in the said lands. By the said assignment, the first Appellants assumed all the obligations of the lessees to the third Respondent under the said lease.
- (vii) On the 23rd September, 1949 the first Respondents having by then drilled the well to the depth of 2,570', informed the second Respondents that they would drill no further
- p.70,11.17-20.  
p.70,11.31-37.  
p.73,1.5-  
p.74,1.5.  
p.74,11.6-37.  
p.74,1.38-  
p.75,1.3.  
p.75,11.25-32  
p.33,11.19-25;  
pp.50-51.  
p.50,11.34-39.  
p.33,1.42-  
p.34,1.11.

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until paid for work done in accordance with the drilling agreement.

p.33,11.26-32; pp.56-69.

(viii) On the 24th September, 1949 an agreement was made between the first and second Appellants, the second Respondents, the Prudential Trust Co., Ltd. and the said Harding and the said McMullen. This agreement is

p.57,11.10-28; p.58,11.11.-18.

hereinafter called 'the pooling agreement'. By it the first and second Appellants, who were severally lessees, or assignees from lessees, of the petroleum, natural gas and related hydrocarbons in certain lands, including the said lands, assigned to the Trust Co. all their

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p.58,1.19- p.59,1.16.

respective rights in all those lands and to all production of petroleum, natural gas or related hydrocarbons from those lands. All the gross proceeds of production of any wells drilled under the terms of the pooling agreement were to be divided by the Trust Co., subject to payment of royalties, rentals and certain other sums to the respective owners of the lands and to

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p.59,11.17-35.

repayment to the second Respondents of the reasonable expenses of maintaining the wells in production, in defined proportions between the first Appellants, the second Appellants, the said Harding and the said McMullen and the second Respondents. The second Respondents agreed to

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p.60,1.4- p.61,1.35. p.62,11.23-44.

drill, or cause to be commenced to be drilled, on or before the 20th September, 1949, a petroleum and natural gas well on the said lands, and diligently to prosecute the drilling and casing of the well until either petroleum, oil or gas should be struck and the well put in production at the rate of at least 30 barrels per day, or they (the second Respondents) should be reasonably convinced that no such production would be reached. The Agreement also provided for the drilling of further wells. If the second Respondents should fail to drill, or cause to be drilled, continuously any well due to be drilled by them under the agreement, the Appellants, or either of them, were to be entitled to give them written notice to remedy the default, and if the default were not remedied within 30 days the agreement was to cease and determine (except as to lands on which wells might already have been drilled and put into commercial production).

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p.34,11.12-18.

(ix) On the 26th September, 1949 the first Respondents received from the second Respondents

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a cheque for \$3,000, which was dishonoured on presentation. The first Respondents in fact received no payment from anyone under the drilling agreement.

10 (x) On the 14th October, 1949 the first Appellants gave written notice under the pooling agreement to the Second Respondents that they had failed to drill, or cause to be drilled, continuously the well commenced on the said lands, and the pooling agreement would cease and determine if the default was not remedied in 30 days. p.34,11.19-21;  
p.78

(xi) Between the 23rd September and the 14th October, 1949 the first Respondents did not drill the said well, but would have done so if they had been paid by the second Respondents in accordance with the drilling agreement. p.34,11.28-32.

20 (xii) On the 16th October, 1949 the first Respondents applied to the Petroleum and Natural Gas Conservation Board for a permit to plug and abandon the said well. They received the permit on the 22nd October, 1949, and plugged and abandoned the said well on that day. p.34,11.22-27.

30 (xiii) In January, 1950 and subsequently the said well was completed, and a considerable quantity of oil was produced from it. The work done upon it by the first Respondents was competently done and beneficial to the Appellants and the second Respondents. The fair actual value of the said work and the materials and services actually supplied by the first Respondents was \$30,000. p.35,11.11-16.  
p.34,11.33-39.

40 (xiv) If the first Respondents were entitled to payment as for the completed work under the drilling agreement (summarised in sub-paragraph (v) above), the amount due to them for materials purchased by them for the account of the second Respondents was \$1,670.72, and the amount due to them for day work was \$14,075. p.34,1.40-  
p.35,1.5.

(xv) There was no agreement between the first Respondents and any other party that the first Respondents should not be entitled to a lien under the Mechanics' Lien Act. p.33,11.36-40.

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p.35;1.17-  
p.36;1.4.

(xvi) On the 5th December, 1949, when the present proceedings were commenced, the title to the said lands, registered in the Land Titles Office for the North Alberta Land Registration District, was subject to ('inter alia') caveats filed by the fourth, fifth, sixth, seventh, eighth and ninth Respondents, and two claims for mechanics' liens filed by the first Respondents.

3. The following are the relevant provisions of the Mechanics' Lien Act (Revised Statutes of Alberta, 1942, cap. 236), as amended:

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2. In this Act, unless the context otherwise requires:-

(a) "Contractor" means a person contracting with or employed directly by an owner or his agent, to do work or perform services upon or in respect of, or to place or furnish materials to be used for, any improvement.

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x x x x x x x x

(g) "Owner" extends to every person, body corporate or politic (including a municipal corporation and a railway company), having any estate or interest in land, at whose request, express or implied, and, -

(i) upon whose credit, or

(ii) upon whose behalf, or

(iii) with whose privity and consent, or

(iv) for whose direct benefit, -

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any contract work is done and all persons claiming under him or it whose rights are acquired after the commencement of the work;

x x x x x x x x

6. (1) Unless he signs an express agreement to the contrary and in that case, subject to the provisions of Section 4, a person who performs any work or service upon or in

10            respect of or places or furnishes any materials to be used in the making, constructing, erecting; fitting, altering, improving, demolishing, or repairing of any improvement for any owner, contractor or sub-contractor, shall by virtue thereof have a lien for so much of the price of the work, service or materials as remains due to him in the improvement and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work or service is performed, or upon which the materials are to be used.

x x x x x x x x

7.            The lien shall arise at the date of the commencement of the work, or at the date of the first delivery of material.

x x x x x x x x

20            21.            (1) A substantial compliance with section 19 (which refers to registration of a lien) shall be sufficient and no lien shall be invalidated by reason of failure to comply with any of the requisites of the section unless, in the opinion of the judge, the owner, contractor or sub-contractor, mortgagee or other person is prejudiced thereby, and then only to the extent to which he is thereby prejudiced.

30            (2) Nothing in this section shall dispense with the making of a claim for the registration of a lien.

40            22.            (1) A lien in favour of a contractor or sub-contractor in cases not otherwise provided for, may be registered before or during the performance of the contract or sub-contract, or within thirty-five days (or in the case of oil or gas wells or oil or gas pipe lines within one hundred and twenty days) after the completion or abandonment of the contract or sub-contract, as the case may be.

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(2) A lien for materials may be registered before or during the furnishing thereof, or within thirty-five days (or in the case of oil and gas wells or oil or gas pipe lines within one hundred and twenty days) after the furnishing of the last material furnished.

(3) A lien for services may be registered at any time during the performance of the service or within thirty-five days after the completion of the service. 10

(4) A lien for wages may be registered at any time during the performance of the work for which the wages are claimed or within thirty-five days or in case of a lien for wages owing for work in, at or about a mine, within sixty days after the last work is done for which the lien is claimed.

x x x x x x x x 20

24. (1) Every lien which is not registered shall absolutely cease to exist on the expiration of the time hereinbefore limited for the registration thereof.

(2) Every registered lien shall absolutely cease to exist on the expiration of thirty days after notice has been either served as process is usually served or sent by registered mail in Form 5 of the schedule, or to the like effect, to the lienholder at or to the address stated in the claim for lien registered in the Land Titles Office, or if a notice of a change of address for service has been registered in the Land Titles Office then at or to the address given in the last notice of change of address so registered, unless before the expiration of the said period of thirty days, the lienholder takes proceedings in court to enforce his lien and files or causes to be filed a certificate of lis pendens in Form 6 of the schedule, or to the like effect, in the proper Land Titles Office. 30 40

x x x x x x x x



- 10 (6) Every registered lien, whether a certificate of lis pendens has been filed or not, shall absolutely cease to exist on the expiration of six years from the date of registration of the lien unless before the expiration of that period and not more than two months before its expiration the lienholder, his assignee, agent or any person claiming through or under him, files in the office of the Registrar of Land Titles a statement verified by affidavit setting out the interest of the lienholder and the amount still owing for principal and interest, which statement may be in Form 7 in the schedule or to the like effect with such variations as the circumstances may require.
- 20 25. The Registrar shall, on receiving a certificate under the seal of the clerk of the court wherein any proceedings in respect of any lien registered in the Land Titles Office within the jurisdiction of the Registrar are pending, stating the names of the lienholders, parties to the proceedings, and that the amount due by the owner in respect of the liens has been ascertained and paid into court pursuant to an order of the court or judge, or that the property has been sold to realise the liens, or that a judgment or order has been made declaring that the lien has been improperly filed or that the lien has otherwise ceased to exist, or on receiving a statement in writing signed by the claimant or his agent that the lien has been satisfied, cancel all liens registered by such parties.
- 30
- 40 26. (1) Upon application by originating notice, a judge having jurisdiction may allow security for or payment into court of the amount of the claim and such costs as the judge may fix, and may thereupon order that the registration of the lien be vacated or may vacate the registration upon any other proper ground and a certificate of the order may be registered.

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(2) Any money paid into court shall take the place of the property discharged and be subject to the claim of all persons for liens to the same extent as if the money was realised by a sale of the property in an action to enforce the lien.

x x x x x x x x

30. (1) Proceedings to enforce a registered lien may be commenced either by a statement of claim or by originating notice, and in either case by the filing of a certificate of lis pendens in Form 6 of the schedule in the proper Land Titles Office. 10
- (2) The certificate may be granted by the Court or judge in which or before whom the proceedings are begun or by the clerk of the court.

x x x x x x x x

35. (1) Upon the hearing of the application the judge shall decide all questions which arise therein or which are necessary to be tried in order to completely dispose of the action and to adjust the rights and liabilities of all parties concerned, and shall take all accounts, make all enquiries and give all directions and do all other things necessary to try and otherwise finally dispose of all matters, questions and accounts arising in the proceedings and to adjust the rights and liabilities of and give all necessary relief to all parties concerned and shall embody all results in the judgment, which judgment may direct payment forthwith by the person or persons primarily liable to pay the amount of the claims and costs as ascertained by the judgment, and execution may be issued therefor forthwith. 20  
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x x x x x x x x

36. The Judge may at any time prior to the sale of the property, upon application of any lienholder, appoint a receiver to take charge

of the property and rent it on such terms and conditions as the receiver thinks fit, such rents to be applied, after deduction of all rates, taxes, insurance or other expenses necessary for the maintenance thereof, including the costs of management as may be fixed by the judge at the time of the appointment of the receiver, and thereafter any balance remaining shall be applied as directed by the judge.

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x x x x x x x x

42. In addition to the other provisions of this Act, where the improvement consists of an oil or gas well, the provisions of sections 43 to 47 inclusive shall also be applicable.

43. The definition of "owner" as set out in paragraph (g) of section 2 shall include, in addition to the persons therein set out, every person having any estate, interest or right in the oil or gas in place or in the oil or gas when severed, notwithstanding that such person has not requested the contract work to be done, is only indirectly benefited thereby and has had no dealing or contractual relationship with the contractor or person claiming the lien:

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Provided, nevertheless, that where the oil or gas is held in fee simple, the holder of an interest in the first royalty in the oil or gas, up to twenty per cent thereof; shall not, by reason of this section, be deemed to be an owner.

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44. The lien provided by section 6 shall not only attach to the land, including the oil and gas therein, but also to the oil and gas when severed.

x x x x x x x x

46. It shall not be necessary to set out in the claim for lien set out in section 19 the name of the owner or alleged owner and

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the provisions in that regard contained in the forms in the schedule shall not be applicable in the case of oil and gas wells.

47. In appointing a receiver pursuant to section 36, the judge may, in addition to the powers therein conferred on such receiver, authorise him to take charge of the well and operate it and sell the production therefrom or, in the alternative, to take the oil and gas when produced and saved and sell the same and receive and pay into Court the proceeds of the oil and gas when sold. 10

pp.1-7.

4. The first Respondents' Statement of Claim; to which all the other parties were Defendants, was issued on the 5th December, 1949. They set out the facts summarised in paragraph 2 hereof, and alleged that they had stopped work under the drilling agreement on the 23rd September, 1949 because the second Respondents had failed to pay the sum of \$10,000 due to the first Respondents, and the sum of \$40,000 due to the Prudential Trust Co., Ltd., on spudding in. On the 12th October, 1949 they (the first Respondents) had filed a mechanics' lien against the said lands under the Mechanics' Lien Act for \$28,849.33. On the 14th October, 1949 they had, they alleged, given notice to the second Respondents under the drilling agreement that that agreement would be terminated by reason of the owner's default thereunder. On the 19th October, 1949 they (the first Respondents) had filed another mechanics' lien charging the said lands with the further sum of \$36,896.29. They alleged that \$65,745.62 was due to them under the drilling agreement. They claimed ('inter alia') a declaration that the mechanics' liens filed by them against the said lands were good, valid and subsisting liens, judgment against the second Respondents for \$65,745.62 and appointment of a receiver under s.36 of the Mechanics' Lien Act with all the powers permitted by that section and by s.47 of the Act. 20 30 40

pp.8-13.

5. The Defence of the first Appellants was delivered on the 15th December 1949. They denied all the material allegations in the Statement of Claim. They alleged that the two mechanics' liens, if they had been filed, had

10 been improperly filed having regard to the provisions of the Mechanics' Lien Act (hereinafter called 'the Act') and were not valid and subsisting liens; and, if the first Respondents had given notice to the second Respondents to terminate the drilling agreement, that notice had been given improperly and without justification. They alleged further that any agreement between the first and second Respondents was not binding on them (the first Appellants), and did not entitle the first Respondents to file liens against the first Appellants' interest and title in the said lands, and the first Respondents had no right under the Act to file liens against the first Appellants' interest and title in the said lands for any payments not based on the supply of material or equipment or the rendering of services by the first Respondents; and the second  
20 Respondents were not an 'owner' within the meaning of the Act.

6. The second Appellants by their Defence denied all the allegations in the Statement of Claim. Alternatively they alleged that the pooling agreement had become null and void by its terms, and they had no further interest in the said lands. If the pooling agreement was still in effect, the first Respondents were not entitled to a lien against the said lands,  
30 because they had not employed proper or suitable equipment, it was for that reason that they had failed to complete the drilling contract, and so they were in default thereunder. If the first Respondents were entitled to a lien against the said lands and the second Appellants had any interest therein, the Appellants were liable only for 15% of the consideration for the performance of the work; and the first Respondents were entitled to a lien only for  
40 the cash equivalent of the amount of improvements they had made, or the amount of labour and materials actually used on improvements, on the said lands. The second Appellants also pleaded that the lien filed on the 18th October, 1949 superseded and nullified that filed on the 12th October, 1949, and was itself improperly filed and null and void; and they relied on the provisions of the Act.

pp.13-15.

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pp.16-17.

7. The second Respondents delivered an amended Defence on the 23rd April, 1954. They admitted the lease of the 31st May, 1948, the assignment of the 21st September, 1949 and the pooling agreement. As to the drilling agreement, they pleaded certain defences which are no longer material; and also that any remuneration to which the first Respondents might be entitled could only be on a quantum meruit, and the first Respondents were entitled to no lien against the said lands, or alternatively to no lien except for the amount of a claim on a quantum meruit.

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p.18.

8. The third Respondent delivered a Defence, dated the 25th January, 1950, alleging that the agreement of the 31st May, 1948 and the assignment of the 21st September, 1949 did not create the relationship of landlord and tenant, he was not an owner within the meaning of the Act, and the first Respondents had not furnished any materials or services at his request, upon his credit, with his consent or for his benefit; and he was entitled to a first royalty on the oil and gas under the said lands, against which the mechanics' lien claimed could have no effect.

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pp.19-20.

9. The first Appellants applied to the Supreme Court of Alberta for the appointment of a receiver. On the 22nd June, 1950 Shepherd, J. ordered that the Prudential Trust Co., Ltd. be appointed receiver to collect, get in and receive all monies receivable from the sale of oil or other production from the well on the said lands to pay out of such monies the costs of production and operation of the well and the royalty of 12½% due to the third Respondent under the lease of the 31st May, 1948, and to pay the balance of such monies into a special trust account to be held to the credit of the action, subject to further order.

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pp.79-84.

10. The action came on for trial before McLaurin, C.J.T.D. on the 2nd November, 1955 and the 14th March, 1956. The agreed statement of facts was put in. The learned Chief Justice held that the first Respondents had a good, valid, binding and subsisting mechanics' lien in the sum of \$30,000 against all mines and minerals within, upon or under the said lands, not including the surface of the said lands or

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the royalty of 12 $\frac{1}{2}$ % due to the third Respondent. He ordered that the said sum of \$30,000 be recovered from the funds held by the receiver.

10 11. The Appellants appealed to the Appellate Division of the Supreme Court of Alberta. Their respective Notices of Appeal raised the grounds (among others) that the learned Chief Justice should have held that the first Respondents had no valid mechanics' lien, and he had erred in maintaining the lien in spite of the first Respondents' failure to comply with the provisions of the Act, and in particular with S.24. The second Respondents also appealed to the Appellate Division, and raised the ground that the first Respondents should have been held to have no valid mechanics' lien. The first Respondents cross-appealed, asking for a declaration that they had a valid lien for \$65,745.62, or alternatively were entitled to payment of that sum from the monies held by the receiver.

pp.22-25.

p.28.

12. The appeal was heard by Ford, C.J.A. and Macdonald, McBride, Porter and Johnson, J.J.A. on the 15th and 20th March, 1957. Judgment was given on the 25th June, 1957, allowing the appeal, holding the two mechanics' liens invalid, and giving the first Respondents judgment against the second Respondents for \$51,670.62.

pp.103-104.

30 13. McBride, J.A. delivered a judgment, in which Johnson, J.A. concurred. Having referred to the facts, he said the Appellants had argued that, under ss.6, 7 and 19 of the Act, no effective lien could be claimed by the first Respondents; the liens were not properly filed against the lands of an 'owner' as required by ss.2(g), 19 and 46; the first Respondents had never had a valid lien or liens; and if the liens had ever been valid, they had, by virtue of s.24(6), absolutely ceased to exist before the trial. The appeal could be decided on the last mentioned point. Before the commencement of the trial, viz. on the 13th October, 1955 and the 20th October, 1955 respectively, six years had elapsed from the respective dates of registration of both the liens; yet the agreed statement of facts made no reference to the filing of a renewal statement of either lien, as

pp.85-95.

pp.85-86.

p.86;1.38-

p.87;1.11.

p.88;1.13-18.

p.88;1.19-

p.89;1.32.

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p.90,1.9- p.91,1.20.	required by s.24(6). This point had apparently been overlooked at the trial, but the onus was on the first Respondents to establish that the liens had not absolutely ceased to exist by the passage of six years, and no application had been made to adduce further evidence about the filing of renewal statements. The language of s.24, 'shall absolutely cease to exist', was imperative and unambiguous, and left no room for judicial indulgence. The words, 'whether a certificate of lis pendens has been filed or not', shewed that the enforcement proceedings did not prevent the liens from absolutely ceasing to exist after six years, if no renewal statement had been filed. It was therefore irrational for the first Respondents, having failed to shew that the liens had been preserved by the filing of renewal statements, to ask for judgment declaring the liens to be valid and binding. The learned Judge then held, following <u>Glebe Sugar Refining Co., Ltd. v. Trustees of Port and Harbours of Greenock (1921)</u> , 2 A.C. 66, that this point, although not raised at the trial, could not be ignored on appeal. The first Respondents had submitted that Shepherd, J.'s order of the 22nd June, 1950 appointing a receiver had terminated their lien on oil, and transformed their claim into a claim against the funds received from the sale of the oil by the receiver; and (they had submitted) this order had amounted to a final judgment, after which no renewal statement could have been filed. McBride, J.A. rejected these submissions. Under the Act, some of the powers ancillary to the power to determine the validity of a lien might in special circumstances have to be exercised pending determination of the validity. These powers, however, were merely the mechanics of enforcement, and could not restore life to a lien which had been allowed to die through failure to file a renewal. The failure of the first Respondents to establish that the liens were valid and subsisting at the time of the trial was fatal. Under s.35(7), however, they could recover a personal judgment, and the learned Judge held them entitled under the drilling agreement to judgment against the second Respondents for \$51,670.62.	10
p.91,1.21- p.92,1.29.		20
p.92,11. 29-43.		30
p.93.		40
p.94,1.1- p.95,1.8.		50
pp.96-102.	14. Porter, J.A. delivered a judgment, in which Ford, C.J.A. and Macdonald, J.A. concurred. He	50



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10 first summarised the way in which the interests of the different parties in the lands, and in the oil and natural gas, had arisen. Harding and McMullen had apparently induced the first Respondents to begin drilling on the 10th September, 1949. Neither Harding nor McMullen nor the second Respondents had any interest in the land on which the well was drilled at that time. None of them obtained any interest either in the land, or in the proceeds of sale of the oil, until the 24th September, 1949 (the date of the pooling agreement). It had been suggested that the Court should infer that the pooling agreement only recorded an antecedent agreement made through Harding and McMullen with all the parties. The agreed statement of facts said nothing of any such antecedent agreement, so no such inference could be drawn. The first Respondents had started to drill the well at the request of two men, who then had no interest in the property. They claimed a lien for work begun on the 10th September against the interest of a company, not incorporated until the 19th September, which did not get any interest in the property until the 24th September, a day after drilling had stopped. Even then the interest acquired by the company (the second Respondents) was not in the property, but in the proceeds of sale of production. It thus appeared that from beginning to end of the drilling the first Respondents had never done any work for an owner, either as defined in s.2(g) of the Act or as defined in s.43. The claim for a lien therefore failed. The learned Judge considered the amount to which the first Respondents were entitled under the drilling agreement. He then said his opinion made it unnecessary to consider the effect of s.24 of the Act, and he wished to reserve that for future consideration. The first Respondents were entitled to judgment against the second Respondents for \$51,670.62.

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15. The first Respondents appealed to the Supreme Court of Canada. The appeal was heard on the 5th and 6th February, 1958 by Kerwin, C.J. and Rand, Locke, Fauteux and Abbott, JJ.; and judgment was given on the 22nd April, 1958. The appeal was allowed. The judgment of the Appellate Division of the Supreme Court of Alberta was set aside, but the first Respondents

pp.96-98.  
p.98;1.18-  
p.99,1.16  
  
p.99,1.17-  
p.100,1.8.  
  
p.100,1.9-  
p.101,1.28.  
  
p.101,1.29-  
39.  
  
p.102,1.3-25.  
  
p.107-108.

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were again held entitled to judgment for \$51,670.62 against the second Respondents. The judgment of McLaurin, C.J.T.D. was restored insofar as he held the first Respondents entitled to recover \$30,000 from the funds held by the receiver, but his declaration that the first Respondents had a good, valid, binding and subsisting mechanics' lien in the sum of \$30,000 was not restored.

pp.109-110.	16. Rand, J., with whom the Chief Justice and Abbott, J. concurred, having briefly set out the facts and the effect of the judgments in the Appellate Division of the Supreme Court of Alberta, said the interpretation of s.24(6) of the Act had first to be considered. The learned Judge said the lien arose from the beginning of the work or the furnishing of materials, and was an existing interest when registration was sought. Registration, in his view, was essentially for the purpose of protecting the title to an interest in or against an estate in land. Under s.26 of the Mechanics' Lien Act, a judge might allow security for, or payment into court of, the amount of the claim, and might thereupon vacate the registration of the lien. The money paid into court took the place of the property discharged, as if it had been realised by a sale under the Act. This provision, in Rand, J.'s view, made it clear that the purpose of the registration was simply to clear the title. That done, the lien on the land ceased and a charge on personal property arose, for which registration was not possible. The result of failure to comply with s.24(6), the learned Judge said, could not affect the new and non-registrable lien under s.26. The question thus arose of whether there was any such effect on the new non-registrable lien created against the fund in court arising from the receivership. Having considered sections 43 to 47 of the Act, the learned Judge concluded that the filing of a renewal statement, as required by s.24(6), had to be restricted to the lien as it was an encumbrance on the land. The view that the subsection was intended to extend to funds within the control of the court was not supported either by express language or by any warranted inference. The scope of the lien on the severed oil was by no means clear, but the purpose of registration was as completely irrelevant for the extension	10
p.110,1.33- p.111,1.21.		
p.111,11.22- 42.		20
p.111.1.43- p.113,1.15.		30
p.113,1.16- p.114,1.22.		40
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of lien to the proceeds under the control of the court, as it was in cases under s.26. S.24(6), the learned Judge held, meant that the lien against the land and the oil in place had come to an end, but not the charge on the money in court. He then dealt with the question of whether, in the circumstances, a lien ever arose. Having set out the facts, he held that the effect of the drilling agreement was that the second Respondents adopted the work done up to that time as having been done under its provisions. As a result of the interest in the proceeds acquired by the second Respondents under the pooling agreement, the lien covering the entire work then became effective between the first and second Respondents. The Appellants, the learned Judge held, came clearly within the provisions of s.43, and by the pooling agreement had ratified and bound themselves to the second Respondents' recognition and inclusion of the work done previously to the 15th September, 1949. Accepting \$30,000.00 as the amount due on a quantum meruit, Rand, J. said he would set aside the judgment of the Appellate Division of the Supreme Court of Alberta and restore the judgment at trial with the following modifications: by deleting the declaration that the first Respondents had a valid mechanics' lien against the mines and minerals within the lands described; by adding personal judgment against the second Respondents for \$51,670.62 with costs; by amending the judgment so as to declare that the first Respondents were entitled to a charge on the funds held by the receiver for \$30,000 and the total costs of the personal judgment.

p.114,1.23-  
p.115.1.31  
  
p.115,11.32-  
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p.115:1.47-  
p.116,1.20.

p.116;1.21-  
p.117,1.7.

17. Locke, J., with whom the Chief Justice and Fauteux, J. concurred, having summarised the course of the proceedings, the various relevant provisions of the Act, and the facts, said the question was whether there was evidence upon which McLaurin, C.J.T.D. could find that the first Respondents had performed the work of drilling the well in respect of which the lien was claimed for or on behalf of 'any owner, contractor or sub-contractor' within the meaning of s.6 of the Act or of any 'person having any estate, interest or right in the oil or gas in place or in the oil or gas when severed' within

pp.117-122.  
  
p.122,11.3-  
12.

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p.122,11.13-  
28.

p.122,11.29-  
35.

p.122;1.36-  
p.123,1.26.

p.123,11.26-  
36.

p.123,11.37-  
41.

the meaning of s.43, or with the privity and consent of any such owner. In the opinion of the learned Judge, no question arose as to the work done after the 19th September, 1949, since the Appellants, by the pooling agreement, had expressly authorised the second Respondents to drill the wells or have them drilled. The pooling agreement, while dated the 24th September, 1949, had specified a date four days earlier for the commencement of drilling; while it did not refer in terms to the drilling agreement, it appeared to the learned Judge an irresistible inference that the Appellants knew of and intended to approve the arrangement theretofore made between the first and second Respondents as work done under the contract. The second Respondents had not, however, been incorporated on the 10th September, 1949, when the first Respondents commenced drilling at the request of Harding and McMullen. The agreed statement of facts did not state whether Harding and McMullen, in making the arrangement with the first Respondents, had acted on behalf of the lessees from the third Respondent or upon instructions from the first Appellants; but the pooling agreement recited that Harding and McMullen had "assisted in arranging for the drilling of the said wells" (which clearly referred to the arrangement to start drilling on the 10th September, 1949), two of the lessees from the third Respondent had signed the pooling agreement on behalf of the first Appellants, and one of these lessees had signed a subsequent letter to the second Respondents on behalf of the first Appellants. From all the circumstances it was proper, in Locke, J.'s opinion, to draw the inference that Harding and McMullen had been authorised, either by the individual lessees from the third Respondent or on behalf of the first Appellants, to request the first Respondents to do the work and, further, that the drilling done by the first Respondents from the 10th September, 1949 onward was done with the privity and consent of the said lessees and of the first Appellants. The first Respondents therefore had an enforceable lien from the 10th September onwards against these lessees and the first Appellants, both of whom were 'owners' within the meaning of that term in sections 6 and 43 of the Act. Locke, J. added that he agreed with Rand, J. on the interpretation of s.24(6).

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18. The Appellants respectfully submit that, if the liens claimed by the first Respondents ever did exist, they absolutely ceased to exist on the 13th October, 1955 and the 20th October, 1955 respectively by virtue of s.24(6) of the Act. The view of Rand, J. was that the original lien, against the interests of the owners in the land on which the well was drilled, ceased on the making of Shepherd, J.'s order appointing the receiver on the 22nd June, 1950, and a new lien, against the money held by the receiver to the credit of the action, then came into existence. The Appellants submit that the Act does not give rise to such a series of liens, but to one lien which arises at the date of commencement of the work and, while the property against which it takes effect may change, continues to exist until it expires or is discharged under s.24 or s.25 of the Act, or by satisfaction of the debt. S.26, upon which Rand, J. relied by way of analogy, does not provide for the discharge of the original lien, but only for the vacation of the registration, and under s.26(2) the lien continues to operate against the money paid into court. The Appellants submit that the appointment of a receiver under s.36 has no effect upon the existence of a lien or its liability to extinction under s.24, but merely makes it possible for the profits of the land to be administered under the control of the Court, the lien still being effective subject to the provisions of the Act. Furthermore, if Rand, J.'s view be right, no provision is made by the Act for the termination of what he calls 'the new non-registrable lien'. The result would be that the Act would provide for a registered lien against an interest in land to expire by passage of time, but would allow a non-registered lien against money, or severed oil or gas, to continue indefinitely, in spite of the difficulties and uncertainties to which, as Rand, J. himself observed, liens of the latter type would give rise. The Appellants respectfully submit that the Act in fact gives rise in the case of each debt to one lien only, which is liable to expire after six years under s.24(6), whatever may have happened during that period to the property charged.

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19. The Appellants respectfully submit that in this case no lien under the Act ever arose, because the first Respondents never performed any work or service for any 'owner' as defined by the Act. The work done by the first Respondents was done first for Harding and McMullen, and subsequently for the second Respondents. Neither Harding nor McMullen nor the second Respondents was an 'owner' as defined in s.2(g), since none of them ever had any estate or interest in the land. None of the parties to the pooling agreement (with the possible exception of the Prudential Trust Co., Ltd.) became thereby an 'owner' as defined in s.43, since the interest of these parties (except the Trust Co.) under the pooling agreement was not in 'the oil or gas when severed', but in the proceeds of the oil or gas when severed and sold. The Appellants respectfully submit that the inferences drawn by the learned Judges of the Supreme Court of Canada are not justified by the agreed facts. Furthermore, since the case was decided on an agreed statement of facts explaining how the work came to be done, inferences leading to another explanation ought not in any circumstances to have been drawn.

20. The Appellants respectfully submit that the judgment of the Supreme Court of Canada was wrong and ought to be set aside, and the judgment of the Appellate Division of the Supreme Court of Alberta ought to be restored, for the following (amongst other)

R E A S O N S

1. BECAUSE the first Respondents never performed any work or service or furnished any materials for any 'owner, contractor or sub-contractor' within the meaning of the Act:
2. BECAUSE no lien under the Act ever arose:
3. BECAUSE the two alleged liens, if they did arise, were not replaced by a new and non-registrable lien on the appointment of the receiver:
4. BECAUSE the two alleged liens, if they did

arise, absolutely ceased to exist on the 13th October, 1955 and the 20th October, 1955 respectively:

5. BECAUSE the Supreme Court of Canada ought not to have made any addition to the statement of facts agreed by the parties, nor any modification thereof:
6. BECAUSE of the other reasons set out in the judgments of McBride and Porter, J.J.A..

W. G. MORROW

J. G. LE QUESNE.

No. 7 of 1959

IN THE PRIVY COUNCIL

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O N    A P P E A L  
FROM THE SUPREME COURT OF CANADA

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B E T W E E N :

PONOKA-CALMAR OILS, LIMITED and  
AMERICAN LEDUC PETROLEUMS, LIMITED  
Appellants

- and -

EARL F. WAKEFIELD COMPANY, AND  
OTHERS  
Respondents

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C A S E   F O R   T H E   A P P E L L A N T S

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CHARLES RUSSELL & CO.,  
37, Norfolk Street,  
Strand, London, W.C.2.

Solicitors for the Appellants.