Privy Council Appeals Nos. 17 *and* 18 *of* 1952

Micheal Borys - - - - - - - - - - *Appellant*

v.

Canadian Pacific Railway Company and Another - - - *Respondents*

Canadian Pacific Railway Company and Another - - - *Appellants*

v.

Micheal Borys - - - - - - - - - - *Respondent*

Consolidated Appeals

FROM

THE SUPREME COURT OF ALBERTA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH JANUARY, 1953

Present at the Hearing:

LORD PORTER
LORD TUCKER
LORD ASQUITH OF BISHOPSTONE
LORD COHEN
THE CHIEF JUSTICE OF CANADA (THE RIGHT HON. T. RINFRET)

[*Delivered by* LORD PORTER]

This is an appeal by Micheal Borys from a judgment of the Appellate Division of the Supreme Court of Alberta which partly reversed and partly affirmed a judgment of the Chief Justice. In the court of first instance Mr. Borys was plaintiff, and the two respondents were defendants, who not only resisted the claim but also counterclaimed against him and now cross-appeal against portions of the judgment of the Appellate Division.

The appellant owns an estate in fee simple in section 19 Township 50 Range 25 west of the 4th meridian in the Province of Alberta. He acquired it from the Canadian Pacific Railway Company (hereinafter referred to as the C.P.R.). That body, which was registered on the 2nd September, 1900, as owner of the property in question, transferred it to one Simon Borys on the 27th December, 1906; his title, however, does not appear to have been registered until the 19th November, 1920. By a series of transactions which their Lordships need not specify, the land was transferred to the present appellant, Micheal Borys, and on the 18th December, 1947, he was registered as owner of an estate in fee simple of the property in question.

In the original Conveyance the C.P.R. reserved to themselves all coal, petroleum, and valuable stone; and on the 21st September, 1949, in reliance upon this reservation, they leased to their fellow respondents the Imperial Oil Limited all petroleum that might be found within, upon or under the said land together with the exclusive right to work, win and carry away the same for a period of 10 years, subject to the right of renewal.

It will be observed that in terms this lease grants a right which was not specifically reserved in the original Conveyance, viz. the right to work the petroleum.

There is in fact under Mr. Borys' property and the lands adjoining it a large reservoir of petroleum the position and characteristics of which require description.

The petroleum, in so far as is material to the present case, is found in a bed of porous rock underlying the plaintiff's land and the surrounding property, which contains at the bottom water, then the petroleum and on top a layer of gas. The porous rock and the other substances are held in a container which is impervious and shuts them off from such of the surrounding land as lies outside it, but within the container itself they can move from place to place and therefore any withdrawal of water, petroleum or gas from one portion of the container normally results in the filling of the vacant space by one of these three substances. As has been stated, the bed stretches beyond the appellant's land and therefore any such withdrawal may cause the gap to be filled from those portions of the bed which lie outside the appellant's boundaries. On the other hand, the withdrawal of any of the contents may result in a partial filling of the space by the original substances under decreased pressure or partially in both ways. The substances are fugaceous and are not stable within the container although they cannot escape from it. If any of the three substances is withdrawn from a portion of the property which does not belong to the appellant but lies within the same container and any oil or gas situated in his property thereby filters from it to the surrounding lands, admittedly he has no remedy. So, also, if any substance is withdrawn from his property, thereby causing any fugaceous matter to enter his land, the surrounding owners have no remedy against him. The only safeguard is to be the first to get to work, in which case, those who make the recovery become owners of the material which they withdraw from any well which is situated on their property or from which they have authority to draw.

In the present instance the dispute between the parties is as to what is included under the reservation of petroleum, to what extent the respondents are empowered to work it in default of a reservation of a right to do so and how far they can interfere with the rights of Mr. Borys in things not reserved in the grant to him.

The particular substance of which Mr. Borys claims to be owner, and to interference with which he objects, is the gas contained in a cap situated on top of the petroleum (which may be called " free gas ") and also any gas which is in solution in the petroleum under his land or which may be withdrawn from under his land.

The problem arises in this way. The material in the container is subjected to high pressure and a high temperature with the result that what would be gas at a normal surface temperature and at such a pressure as would be met with at ground level becomes dissolved in the petroleum and is found in solution with it in liquid form. Petroleum, not gas, has been reserved, and the appellant claims that all the gas on his premises belongs to him whether it be found in solution in the petroleum or in a free state. The respondents, Imperial Oil Limited, who claim that the reservation of petroleum includes the gas in the cap as well as all gas in solution in it and also includes the right to work it, obtained a permit from the State dated the 28th November, 1949, giving them the right (upon providing security sufficient, in the opinion of the Board of Arbitration set up pursuant to the Right of Entry Arbitration Act 1947, to protect the rights and privileges of the appellant) to enter upon and use such portions of his property as might be required for the purpose of drilling for petroleum, subject to compensation.

They then entered upon the land and proceeded to bore for oil, but before they reached the container Mr. Borys, maintaining that their working would remove his gas, whether free or in solution, applied for

and obtained an interim injunction inhibiting them from penetrating into the chamber and at the same time brought an action claiming:

(*a*) a declaration that he is owner of the natural gas within his lands;

(*b*) an interlocutory and permanent injunction restraining the respondents from using, removing, wasting, interfering with or otherwise disposing in any manner of this natural gas;

(*c*) alternatively, damages.

At the hearing of the action the learned Chief Justice found (1) that petroleum and natural gas are two separate substances (2) that the appellant was the owner of all such gas whether free or in solution (3) that the second respondent's workings would interfere with his rights, and granted a permanent injunction. From this judgment the respondents appealed to the Supreme Court of Alberta, who agreed that petroleum and natural gas were two different substances, but held (1) that gas in solution in strata in liquid form in the petroleum was part of the petroleum and was therefore one of the products reserved under the lease (2) that the reservation of the substance included a right to work it (3) that all petroleum reserved is the property of the respondents and all gas not included in the reservation is the property of the appellant and (4) that the defendants were entitled to extract all of the substances belonging to them from the earth even if their action caused interference with and wastage of the gas belonging to the appellant so long as in the operation modern methods were adopted and reasonably used, and the provisions of any relevant statutes and regulations were observed.

Against this decision Mr. Borys has appealed to their Lordships' Board asking that the judgment of the learned Chief Justice be restored, and both the respondents have cross-appealed claiming that the free gas contained in the same chamber as the petroleum is part of the petroleum.

When petroleum is sold as a marketable substance no difficulty arises as to the material which is dealt with. The substance by that time has reached the open air and is no longer affected by the pressure and temperature to which it is subjected whilst underground. "Petroleum," says the appellant, "is that well-known commodity which is bought and sold under that designation and does not include gas whether in solution or retained in the cap above it."

Gas not found in the same container as petroleum may, say the respondents, be conceded to be gas and not to be included in the reservation, but the gas in solution is part of the petroleum and so is the gas which is enclosed with it in the same container. Both substances, as they point out, are hydrocarbons and contain the same elements.

A great deal of evidence tending to either conclusion was given on the hearing of the case but both Courts in Canada, after analysing the evidence, have come to the conclusion that petroleum and gas, though each is a combination of the same elements, are separate substances. In their Lordships' view there was evidence to justify this conclusion and there are therefore concurrent findings of fact which the Board would not be justified in disturbing. The substance which is found in the form of gas in situ is therefore not the subject of reservation and remains the property of the appellant. Gas, however, which exists in solution in the petroleum is a different matter and must be separately dealt with.

When endeavouring to ascertain the meaning which is to be attributed to "petroleum" in the original reservation, it becomes necessary to decide who are the persons whose use of the word is to determine the sense in which it is employed in the relevant document, inasmuch as the chemist and laboratory expert may attribute to it a meaning different from that which the lay mind would adopt. As has been said, the chemical contents of the petroleum and the natural gas found in the field are the same and regarded scientifically the substances are therefore the same. But a scientific similarity of substance does not establish that the materials are themselves

rightly to be described by the same name. The proper approach, says the appellant, is to ascertain the meaning of the word in the mouths of those non-scientific persons who are concerned with its use, such as landowners, business men and engineers, and to be guided by them as to the true construction of the reservation. The vernacular not the scientific meaning is, he maintains, the true one, and in support of this contention he calls attention to the observations of Lord Halsbury in *Lord Provost of Glasgow* v. *Farie* 13 App. Cas. 657 at p. 669, when he says of mines and minerals that in construing the expression it has to be determined what these words mean in the vernacular of the mining world, the commercial world and landowners at the time when the grant is made. This method of interpretation has been repeated and accepted more than once and their Lordships agree that where it can be ascertained that a particular vernacular meaning is attributed to words under circumstances similar to those in which the expression to be construed is found, the vernacular meaning must prevail over the scientific. But the distinction is not a rigid one to be applied without regard to the circumstances in which the word is used. It was said by Lord Watson in the same case at p. 675—"Mines and minerals are not definite terms, they are susceptible of limitation or expansion according to the intention with which they are used." In their Lordships' view the same observations are true of the meaning of petroleum. It may vary according to the circumstances in which it is used.

Inasmuch as the respondents claim all the material in liquid form, including gas in solution, and also all gas associated with petrol in the same container, much of the evidence was directed to a distinction between petroleum and gas. But this is a different problem from an enquiry whether gas in solution is included in a reservation of petroleum. No light on this matter is thrown by the recognition going back as far as 1906 of petroleum and gas as different substances. The question is not whether there are two separate substances, but what is included in each. Except, possibly, one witness, a Dr. Nauss, none dealt specifically with this topic and with that one exception those who may be thought to do so inferentially do not seem to have directed their minds to a consideration of what is included in a reservation of petroleum in the earth, but merely to have dealt with its meaning when recovered from the mine and put into condition for sale above ground. To discriminate between two substances, found in solution, one from the other is difficult enough in any case, but when changes of temperature and pressure can alter the respective relative quantities of one and the other, the difficulty is enhanced. In the ground there is a distinction, one is then liquid and the other gaseous and the liquid may naturally be called petroleum and the gaseous gas. Any other distinction must depend on a purely conventional assumption that liquid at a particular temperature and pressure corresponding more or less to that found on the surface of the earth is petroleum and the rest of the substance is gas. This is a purely chemical formula and in no way elucidates the meaning which the word bears on the lips of landowners, business men or engineers, and except as a convenient conventional formula has no logical basis.

The difficulty of distinguishing between what is gas and what is petroleum is most easily seen when the ratio of what is fluid in the untapped container to what is gaseous is compared with the ratio of one to the other when the substance is stabilized on the surface. But the difficulty goes deeper because as the oil is extracted from the reservoir the ratio almost inevitably changes, the gas increasing as the pressure and temperature are reduced. If, then, a question arose as to the right of Mr. Borys to tap and recover his gas, a difficult problem might arise as to how much of the substance belonged to each party. The solution might be that what emerged as liquid was petroleum and what emerged in gaseous form was gas. But the appellant has not tapped the gas and the question is what substance can the respondents withdraw and to what extent they can make use of the gas whether free or in solution.

The answer, say the respondents, is to be found in a wide interpretation of the word petroleum, which, it is maintained, includes all kinds of

hydrocarbons whether in liquid or gaseous form. On the other hand, the appellant contends that gas is gas whether in solution with oil in a liquid form or in a gaseous state. The test is what is liquid and what is gas at the conventional figure of 60° fahr. and 4.65 pressure, i.e. its state at what is a mean temperature and a mean pressure on the surface.

The learned Chief Justice took the latter view, the Court of Appeal adopted a compromise, viz. the condition of the substance as it emerges from time to time from the reservoir.

This conclusion, says the appellant, is wrong because it depends upon the scientific constitution of the material, and neglects the vernacular meaning.

If non-scientific people had ever had to consider what was included in a reservation of petroleum in a grant of land and the answer had been categorical, this view might well prevail. But as their Lordships have indicated there is no evidence of such an approach to the problem or, indeed, of any consideration of it. The ordinary man, when asked, What is petroleum? is only concerned with the substance which he can buy or sell after it is recovered and can be delivered as an article of commerce.

Their Lordships cannot find any clear evidence as to what the uninstructed mind would define as petroleum underground either in 1906, when the grant to Mr. Borys was first made, or, indeed, at any later date.

One may illustrate the attitude of the layman by quoting the evidence of Mr. Harvie, the Deputy Minister of Lands and Forests for Alberta, who had been entrusted with the task of drafting regulations in respect of mines and minerals. His first statement as to this matter was that, from the year 1919 and indeed possibly from 1905, his understanding was that petroleum was oil, and natural gas was a separate entity, but later on, when asked: "What about gas in the ground that is dissolved in solution", he explained that he was not a technician and that in his evidence he is not dealing with gas in the ground at all. Mr. Droppo, who had been engaged in the petroleum business for many years, gave evidence to the like effect. Similarly, when Mr. O'Connor, another of the appellant's witnesses, says that petroleum is a liquid or crude oil produced from the earth, he throws no light on the question at issue.

In their Lordships' opinion, none of the further non-scientific witnesses called on Mr. Borys' behalf assist the appellant's case on this point. On the other hand, Dr. A. W. Nauss, who is a geologist and has had wide experience in oil, explains that in the case of the petroleum in the Leduc field (which is the field under consideration), each barrel of oil recovered from the ground contains 100 cubic feet of gas in solution in the oil, and continues: "When we say 'a gas' we mean those substances which are a gas at atmospheric pressure and at room temperature". "Gas in solution", he states, "is the gas which is dissolved in the oil", but when it was suggested that it had then ceased to be gas, he replied: "It ceases to look like gas, yes. I would not say it ceases to be gas".

Dr. Nauss however is expressing the opinion of the expert, whereas, as the appellant insists and their Lordships agree, it is in the vernacular use that the true solution is to be found. The chemist may make a distinction between different contents of the liquid substance and resolve it into its constituent parts, but such treatment is purely scientific and in no sense based on the view of the ordinary man.

The finding of the learned trial judge—that gas in solution is not included in a reservation of petroleum in the earth, depends on Dr. Nauss' evidence and not upon vernacular usage.

In these circumstances their Lordships, with such assistance as is to be obtained from the facts as given in evidence, must form their own opinion purely as a matter of construction as to the meaning which the word "petroleum" bears when the substance referred to is in situ in a container below ground. In this matter they agree with the observations

of the majority in the Supreme Court of Alberta as expressed by Parlee, J. in his judgment, when he says: " The trial judge found that petroleum and " natural gas were, by common usage, two different substances, and that " conclusion ought not to be disturbed. I am, however, with respect, " unable to agree with him that the reservation ' petroleum ' did not include " gas in solution in the liquid as it exists in the earth. What was reserved " to the railway company was petroleum in the earth and not a substance " when it reached the surface. It is true that by change of pressure and " temperature, gas is released from solution when the liquid is brought to " the surface but such a change ought not to affect the original ownership.

" In my opinion, all the petroleum reserved, including all hydrocarbons " in solution or contained in the liquid in the ground, is the property of " the defendants who are entitled to do as they like with it, subject, of " course, to the observance of all relevant statutory provisions and " regulations."

In reaching this conclusion their Lordships have not taken into consideration the view or belief of either Mr. Borys or the Canadian Pacific Railway in 1906 or thereafter as to what was included in the term petroleum. Probably they had none, and, in any case, it has to be remembered that what has to be sought is the vernacular meaning of the word " petroleum " and not what opinion was held by the parties to the grant, but indeed their Lordships would observe that they find it difficult to believe that either landowners, business men or engineers, or, indeed, the staff of the Canadian Pacific Railway or Mr. Borys would at any time have differentiated between the oil and the gas in solution. They would, in the view of the Board, have included in petroleum all the liquid substance in the mine, and this view in no way conflicts with the testimony of the appellant's lay witnesses.

But even if it be conceded that petroleum means a substance formed from a hydrocarbon admixture in its liquid form when in position in its container under ground, the difficulty still arises as to the method by which it is to be recovered and the means by which it is to be brought to the surface. Three elements are normally made use of for this purpose and are perhaps well illustrated by a consideration of the conditions subsisting in the premises now under consideration. In the container in question are to be found three layers, (1) on top, the gas cap ; (2) the oil with gas in solution ; and (3) water. The petroleum is recovered by ensuring that the orifice into the container is neither at too high nor at too low a level. The object is (1) to take advantage of the pressure of the gas cap to push the oil upwards (2) to assist the oil to mount by the help of the gas in solution and (3) to make use of the upward surge of the underlying water to push up the intervening petroleum. Each plays its part in the recovery of the liquid oil.

Perhaps the most important element is the uprising of the water as the pressure above is released but all three are essential if the greatest recovery of oil is to be obtained.

The result, however, of tapping the reservoir in this way is to obtain with the oil the gas in solution to turn it into gas on the surface and to appropriate it. A further result is that some of the gas in the gas cap emerges with the petroleum and the gas-owner is thereby deprived of some of the unreserved property.

Whatever might be the consequence of a reservation of petroleum together with a right to work it, the grant in the present case contains no such right, and, says the appellant, gives no right in the respondents to interfere with the gas in the cap or to deprive him of his property in it.

In their Lordships' opinion the absence of a clause giving a right to work does not abrogate or limit the powers of the respondents. Inherently the reservation of a substance, which is of no advantage unless a right to work it is added, makes the reservation useless unless that right follows the grant. The true view is that such a reservation necessarily implies the

existence of power to recover it and of the right of working. *Rowbotham* v. *Wilson* (1860) 8 H.L.C. 348 states the proposition in plain terms in a case where no right to work was given, and though a right to work is to be found in *Ramsay* v. *Blair* [1876] 1 App. Cas. 701, Lord Hatherley states at p. 704: "In the case of the *Duke of Hamilton* v. *Graham* L.R. 2 H.L. Sc. & Div. App. Cas. p. 166 it was clearly pointed out what the exact right of a proprietor was in respect of a property excepted from a demise; and as to which, therefore, all the original rights of the demising proprietor remained, together with all the incidents to that property necessary to its working and enjoyment, that which the owner has reserved to himself being as much his as other parts of his land of which he has made no demise whatever."

So far as their Lordships know, the general proposition has never been controverted except in the case of interference with the surface of land which has been granted to another. In such a case there is, in general, no right to let down the surface.

In the present case however there is no suggestion that the withdrawal of the petroleum or gas will interfere with the surface in any way. But the contention that such a right gives no permission to interfere with the property of others or in the present instance to let the free gas escape requires further consideration and depends upon the legal position of the owner of land in which fugaceous matter is found.

The appellant maintained that the gas was his at any rate whilst in situ and that the true comparison was with the right of support. The respondents, he said, had no more right to pierce the container and allow the gas to escape than the Respondents had in *Trinidad Asphalt Company* v. *Ambard* [1899] A.C. 594, to withdraw the support which their land afforded to the pitch which formed the main ingredient of the appellant's land.

It was not suggested on behalf of the respondents in the present case that there existed any circumstances which might empower them to let down or interfere with the surface of the land except the right to enter upon the appellant's land, to sink a shaft and to recover the petroleum, nor was such a right denied by the appellant. The dispute centred round the contention raised on behalf of Mr. Borys that he must not be deprived of the benefit of his gas, a loss which would follow and be the result of opening the container and allowing the oil to escape.

To this contention the respondents reply that a distinction has to be drawn between a right to support and a right to property. A long series of decisions, they say, affirms that percolating water may be withdrawn from under the land of an owner by pumping operations on other land adjoining his and such operations give no redress to the person whose water is tapped: gas is even more fugaceous than water and must be treated on the same principles. This proposition is not denied, but does not conclude the matter. The respondents' contention is not that they are entitled to withdraw gas from their own land and to continue to withdraw gas from the same orifice though such gas may have flowed or percolated from under property which is now theirs. Their claim is to use gas which is in situ under the appellant's land or which percolates under it as a result of the normal method of recovering the petroleum by using the gas to assist in drawing it to the surface.

A good deal of authority in the American and Canadian Courts has been quoted showing the diverse view entertained in different countries and in the various States in the U.S.A. Some maintain that gases, oils and waters being fugaceous elements do not belong to the owner of the soil in which they are found, not even when in situ: like wild animals they are only the subject of ownership when reduced into possession. The other view is that so long as they remain in situ they belong to the owner of the soil but are subject, if one may use the expression, to defeasance in case they move elsewhere before the owner of the soil reduces them into possession.

For the purpose of their decision their Lordships are prepared to assume that the gas whilst in situ is the property of the Appellant even though it has not been reduced into possession, but the question is not whose property the gas is, but what means the respondents may use to recover their petroleum.

That the method which they are permitted to adopt under the judgment of the Appeal Court is the ordinary way of working today is of some assistance to their argument despite the fact that in 1906 the tendency was to regard gas as a danger and a nuisance rather than a help. But the main strength of the respondents' case is that they have a direct grant of the petroleum, whereas the appellant has merely such residual rights as remain in him subject to the grant to the respondents. In such circumstances their Lordships are not prepared to hold that the respondents are under an obligation to conserve the appellant's gas with the consequent denial of their right to recover the petroleum in the usual way. Even if it be conceded that the respective rights of the two parties are to work for and recover each his own property, (i.e. in the case of the respondents, the petroleum, and in the case of the appellant, the gas), it does not follow that neither can act without the consent of the other and that only by mutual agreement can they work at all.

It may well be that the appellant can recover his own substance by any usual and customary method but cannot prevent the respondents from following a similar course. It is not, however, necessary to come to any conclusion on this matter, since the claim is concerned only with the respondents' right to work and method of working and does not involve any decision as to how the appellant may deal with the gas.

As has been said, no question arises as to a right of support either of the surface or of a lower layer. Their Lordships accordingly refrain from analysing the many cases on subsidence which were quoted to them. The issue is rather as to the right of fortuitous abstraction of gas, leaving the surface as it was. Such a question, in their Lordships' view, gives rise to no consideration of the right of support but only involves the right of taking from an orifice, bored under express power given in that behalf, fugaceous material which makes its way to the surface as a result of natural effluxion.

They agree with the Appellate Division that there is no obligation upon the respondents to take steps to prevent its egress or to refrain from connecting the orifice with the oil bed.

Such a conclusion confirms the judgment appealed from, subject to one consideration, viz.:—Are the rights of the respondents in any way destroyed or curtailed by the fact that the reservation is a reservation only and does not in terms give a right to work?

It was suggested on the appellant's behalf that the case of *Barnard-Argue-Roth-Stearns Oil and Gas Company* v. *Farquharson* [1912] A.C. 864 was an authority for the proposition not only that petroleum and gas are different substances but that in working the reserved petroleum the respondents must take care to preserve the appellant's gas.

In that case the actual reservation was of springs of oil, and their Lordships are not prepared to decide that "springs of oil" and "petroleum" bear the same meaning but for the purpose of dealing with the argument will assume that they do. Nevertheless, though it is true that a distinction is drawn between oil and gas, that distinction was between the liquid substance and the gas as found in the earth. As Lord Atkinson said in delivering the judgment of the Board: "It is clearly established by the evidence that this gas is not volatilized rock oil, nor is rock oil condensed natural gas. The gas is not an exhalation of the oil, *nor is it held in solution by the oil to any considerable extent*." (*The italics are their Lordships'*.) "The gas and the oil are in their chemical composition no doubt both hydro-carbons, but they are distinct and different products, and it therefore could not be contended successfully, their Lordships think, that the words 'springs of oil' cover this natural

gas, simply because both are found, in some cases, to impregnate the same subterranean porous stratum, and that when this stratum is tapped by a pipe or boring leading to the surface the gas in its escape to the upper air helps to bring up to the surface with it some of the oil", and it is clear from the judgment as a whole that the question of the respective rights to the gas in solution was not a serious element affecting the ultimate decision. If it had been a different result might have followed.

The judgment goes on: "In some instances a stratum almost entirely impregnated with gas is found separated by a stratum impervious to both gas and oil from a stratum almost entirely impregnated with oil. Both the impregnated strata are then tapped by pipes so arranged that the gas performs the same function as in the other case, bringing, or helping to bring, the oil to the surface; but in both cases, when the pressure under which the gas is pent up in the earth is relieved, a pump has to be used to pump up the oil."

From those observations is appears that in some instances the appellant tapped oil sealed in a different container and used it to assist in bringing up the oil. In such a case it may well be said that the oil owners are not recovering their oil in the normal way but drawing Mr. Farquharson's oil from a separate receptacle. The result of merely using the gas in the same container in a normal working of their oil is dealt with at the end of the judgment, where it is said: "The company are clearly entitled to search and work for oil in these springs of oil, and to win and carry it away from them, provided they do so in a reasonable manner, and do as little injury as is practicable. While the point does not arise in this appeal for decision, their Lordships think that the company would not be responsible for any inconvenience or loss which might be caused to the respondent or to the owners of the estate of the grantee in the conduct of their operations in the manner mentioned": a statement which accords with the decision of the Appellate Court in Alberta, and in their Lordships' opinion expresses the true view.

In the circumstances of this case the absence of a clause giving a right to work does not, as their Lordships have intimated, affect the respondents' position. A reservation by a landowner of the mines and minerals or, indeed, in specific terms, of petroleum, is meaningless unless it is accompanied by the right to work and to recover the substance reserved. No question arises as to the right of tenant for life or remainderman. There has been an out-and-out reservation and an out-and-out transfer of the subject of the reservation.

Under these conditions, in their Lordships' view, the reservation must imply a right to work.

They are therefore of opinion that the judgment of the Appellate Division is right in all respects and will humbly advise Her Majesty to dismiss the appeal of both parties.

There will be no costs of the appeal.

(17702) Wt. 8096—1 110 1/53 D.L./PI/3

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