THE ATTORNEY GENERAL OF ALBERTA AND THE MINISTER OF LANDS AND MINES OF ALBERTA *(Defendants)* ..... APPELLANTS;

AND

HUGGARD ASSETS LIMITED *(Plaintiff)* ..... RESPONDENT,

AND

THE ATTORNEY GENERAL OF CANADA ..... INTERVENANT.

1950
*May 4, 5
*June 9
*Oct. 16, 17, 19

1951
*Feb. 6

ON APPEAL FROM THE SUPREME COURT OF ALBERTA APPELLATE DIVISION

Crown (Dom.) grant—In fee simple of surface rights including petroleum and natural gas—Reservation of royalty "from time to time prescribed"—No royalty existing at time of grant—Interest of Crown transferred to Alberta by statute—Whether province can impose royalty—Rent service—Condition subsequent.

In 1913, by a grant authorized by Order in Council, respondent's predecessor in title acquired from His Majesty in the right of Canada, the surface rights to certain lands in Alberta including the petroleum

*PRESENT: Rinfret C.J. and Kerwin, Rand, Kellock, Estey, Cartwright and Fauteux JJ. On Jun. 9, the Court ordered a rehearing which took place on Oct. 16, 17 and 19. Judgment was delivered on Feb. 6, 1951.

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and natural gas rights. The habendum clause of the patent read: ". . . to have and to hold the same unto the grantee in fee simple" while the reddendum provided for the payment of "such royalty upon the said petroleum and natural gas, if any, from time to time prescribed by regulations . . ." At the time of the grant there was no specific royalty existing. In 1930, by the Alberta Natural Resources Act, 1930, c. 3 (Can.), transfer of the then remaining lands and interests, including royalties, of the Dominion was made to the province.

Held: the Chief Justice, Kerwin and Fauteux JJ. dissenting, that the reddendum is ineffective as a basis for subjecting the petroleum and natural gas taken from the said lands to a royalty imposed subsequent to the patent and is void as being a rent service lacking in certainty. Neither can a provision, void as a reservation, constitute a valid condition subsequent.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), affirming, on an equal division of opinion, the decision of the trial judge granting respondent a declaration that the Government of Alberta had no right to impose any royalty with respect to the petroleum and natural gas found under his lands.

G. H. Steer K.C. for the Attorney General of Canada.

H. J. Wilson K.C. and W. Y. Archibald for the appellants.

S. W. Field K.C. for the respondent at the first hearing.

Christopher Robinson K.C. for the respondent at the second hearing.

The dissenting judgment of the Chief Justice and of Kerwin and Fauteux JJ. was delivered by

KERWIN J.:—The respondent, Huggard Assets Limited, commenced an action in the Supreme Court of Alberta against the Attorney General and the Minister of Lands and Mines of Alberta for a declaration that the Lieutenant Governor in Council of the Province is not entitled to exact any royalty with respect to petroleum and natural gas produced from certain lands. The trial judge granted the respondent's claim and his judgment was affirmed by the Appellate Division (1) on an equal division of opinion. The defendants now appeal and on a reargument in connection with certain points directed by the Court, the

(1) [1950] 1 D.L.R. 823; 1 W.W.R. 69.

Attorney General of Canada was allowed to intervene when he supported the position taken by the appellants.

The lands in question are included in a Crown patent, dated August 25, 1913, issued on behalf of the Deputy Minister of the Interior at Ottawa to Northern Alberta Exploration Company, Limited, the respondent's predecessor in title. After reciting that the lands are Dominion lands within the meaning of *The Dominion Lands Act,* and that the Company had applied for a grant and, after due investigation, had been found entitled thereto "in the terms herein embodied", the patent proceeds to grant to the Company the surface rights in 1296·3 acres, including petroleum and natural gas rights, and the under rights in 1320.5 acres (the additional 24.2 acres being land covered by the waters of the Horse and Hanging Stone Creeks), reserving certain rights in, over and upon navigable waters, rights of fishery, and all mines and minerals except natural gas and petroleum,

TO HAVE AND TO HOLD the same unto the grantee in fee simple. Yielding and paying unto Us and Our Successors such royalty upon the said petroleum and natural gas, if any, from time to time prescribed by regulations of Our Governor in Council, it being hereby declared that this grant is subject in all respects to the provisions of any such regulations with respect to royalty upon the said petroleum and natural gas or any of them, and to such regulations governing petroleum and natural gas as were in force on the First day of September in the year of Our Lord one thousand nine hundred and nine, and that Our Minister of the Interior of Canada may by writing under his hand declare this grant to be null and void for default in the payment of such royalty or for any cause of forfeiture defined in such regulations, and that upon such declaration these presents and everything therein contained shall immediately become and be absolutely null and void.

The lands were part of Rupert's Land and the North West Territories, which, as of July 15, 1870, had been transferred to the Dominion by Imperial Order in Council of Her Majesty, dated January 23, 1870, passed in pursuance of the provisions of the *British North America Act, 1867.* By section 5 of the *Dominion North West Territories Act* (c. 3 of the Statutes of 1869) "all the laws in force in Rupert's Land and the North Western Territory, at the time of their admission into the Union shall, so far as they are consistent with 'the British North America Act, 1867' . . . remain in force until altered by the Parliament of Canada or by the Lieutenant Governor

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under the authority of this Act." At the date of the Crown patent, the *North West Territories Act* was R.S.C. 1906, c. 62, and sections 12 and 13 thereof are as follows:

12. Subject to the provisions of this Act, the laws of England relating to civil and criminal matters, as the same existed on the fifteenth day of July, in the year one thousand eight hundred and seventy, shall be in force in the Territories, in so far as the same are applicable to the Territories, and in so far as the same have not been, or are not hereafter, as regards the Territories, repealed, altered, varied, modified, or affected by any Act of the Parliament of the United Kingdom or of the Parliament of Canada, applicable to the Territories, or by any ordinance of the Territories.

13. All laws and ordinances in force in the Territories, and not inconsistent with this Act, or repealed by the operation of the Act passed in the third year of His Majesty's reign, chapter sixty-one, and intituled An Act respecting the Revised Statutes of Canada, shall remain in force until it is otherwise provided or ordered by the Parliament of Canada, or by the Governor in Council or the Commissioner in Council.

The Crown in right of the Dominion was the allodial owner of all the land in the Territories and by the law of England as it existed on July 15, 1870, and in so far as it was applicable to the Territories, there was nothing to prevent the Crown granting lands in free and common socage whereby the estate granted might either be created or be defeated upon a certain event. This statement requires amplification and the matter will be adverted to later. However, in accordance with constitutional practice and law, the Crown could only dispose of the land, or any interest in it, upon being authorized by statute. The first question therefore is whether there was any such authority for the Crown Patent.

At the date of the patent, August 25, 1913, *The Dominion Lands Act*, referred to in one of the recitals in the patent, was chapter 20 of the Statutes of 1908. Sections 37 and 76(*k*) thereof read as follows:

37. Lands containing salt, petroleum, natural gas, coal, gold, silver, copper, iron or other minerals may be sold or leased under regulations made by the Governor in Council: and these regulations may provide for the disposal of mining rights underneath lands acquired or held as agricultural, grazing or hay lands, or any other lands held as to the surface only, but provision shall be made for the protection and compensation of the holders of the surface rights, in so far as they may be affected under these regulations.

76. The Governor in Council may—

* * *

(*k*) make such orders as are deemed necessary to carry out the provisions of this Act, according to their true intent, or to meet any cases which arise, and for which no provision is made in this Act; and further make any regulations which are considered necessary to give the provisions of this section full effect;

Subsequent to the enactment of *The Dominion Lands Act of 1908,* no relevant regulations were made dealing generally with the sale of lands containing petroleum or natural gas, but prior thereto there had been several made under the authority of the *Dominion Lands Acts of 1886 and 1906,* put in at the trial as Exhibit 7. The case has proceeded on the basis that the regulations appearing in this office consolidation fall within the very words of the patent, which states it is subject to such regulations governing petroleum and natural gas as were in force on September 1, 1909.

It is admitted that at the date of the patent no royalty had been prescribed by regulation and the respondent contends that, while the office consolidated regulations were in force as of September 1, 1909, they are not relevant to the determination of this appeal in view of a certain order in council of March 21, 1913. Before turning to that and two others referring specifically to one Israel Bennetto or his assignee Northern Alberta Exploration Company, Limited, it will be convenient to set out the substance of the consolidated regulations.

While the earlier paragraphs mention only petroleum, the final one provides that regulations for the reservation and sale of petroleum lands shall apply also to the reservation and sale of lands for natural gas purposes. Paragraph 1 provides that unappropriated Dominion lands shall be open to prospecting for petroleum, with power to the Minister to reserve for an individual or company who has machinery on the land to be prospected, an area of 1920 acres for such period as he may decide. By paragraph 2, this tract may be selected as soon as machinery has been placed on the ground but the length of such tract shall not exceed three times the breadth thereof. Where the circumstances of the case appear to be exceptional, the Minister may permit the selection to be made in areas of not less than a quarter-section or a fractional quarter-

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section. By paragraph 4, the Minister is empowered to make a preliminary reservation of an area of 1920 acres for a period of four months for the purpose of allowing an applicant sufficient time to install on the land the required machinery.

Paragraphs 5 and 6 provide:

5. Should oil in paying quantities be discovered by a prospector on any vacant lands of the Crown, and should such discovery be established to the satisfaction of the Minister of the Interior, an area not exceeding 640 acres of land, including the oil well, will be sold to the person or company making such discovery at the rate of $1.00 per acre, and the remainder of the area reserved, namely, 1,280 acres, will be sold at the rate of $3.00 per acre. The patent for the land will convey the surface and the petroleum but will exclude all other minerals.

6. A royalty at such rate as may from time to time be specified by Order in Council will also be levied and collected upon the sales of the petroleum, and it will be necessary for the person operating the location to furnish the Agent of Dominion Lands within whose district it is situated, with sworn returns monthly, or at such times as the Minister of the Interior may direct, accounting for the full quantity of oil obtained and sold, and pay the royalty thereon at the prescribed rate.

By paragraph 8:

8. The patent which may be issued for petroleum lands will be made subject to the payment of the above royalty, and provision will be made therein that the Minister of the Interior may declare the patent to be null and void for default in the payment of the royalty on the sale of the petroleum.

It should next be noted that by order in council of March 11, 1910, for the disposal of petroleum and natural gas rights, the regulations included in the Office Consolidation of 1906 were rescinded and that, under paragraph 17 of the new regulations which came into force May 2, 1910, it was provided that should oil or natural gas in paying quantity be discovered in the leasehold to the satisfaction of the Minister, the lessee will be permitted to purchase, at the rate of ten dollars an acre, whatever area of the available surface rights of the tract described in the lease the Minister may consider necessary for the efficient operation of the rights granted him.

It was under these circumstances that Order in Council P.C. 1263 was passed on May 31, 1911. From this it appears that the Minister stated that on January 1, 1906, reservation was made under the *late* petroleum regulations of a certain tract of land to enable Israel Bennetto to carry on prospecting operations thereon; that this reservation,

which was extended from time to time would expire June 17, 1911; that active boring operations were carried on upon the location in the summer of 1910; that there had been filed an assignment of Bennetto's rights to the Northern Alberta Exploration Company, Limited, and that an application had been submitted by the latter asking for a renewal of the reservation. The Minister observed that the lands included within the tract reserved were, as to surface rights, claimed by a number of bona fide squatters upon the river lots and that it was not felt that the Department would be justified in continuing the reservation but, in view of the large expenditure incurred, the Minister recommended that reservation be made for a period of two years from June 17, 1911, in favour of the Company of the available petroleum and natural gas rights upon certain lands, and that reservation be also made of the available surface rights over the entire area for a period of one year, and that the available surface rights of a certain portion be reserved for two years from the same date. It continues:

> Should oil or natural gas be discovered in paying quantities within the period of one year from the 17th of June, 1911, the Minister also recommends that he be authorized to sell to the company, *under the provisions of the old petroleum regulations,* all the lands contained within the entire area above-mentioned both as regards the surface and petroleum and natural gas rights, and that if oil in paying quantities is discovered after the expiration of the first year, but before the 17th of June, 1913, he be authorized to sell to the company the petroleum and natural gas rights under the entire area reserved and the surface rights of that portion lying between the southerly boundary of the McMurray Settlement and Horse Creek.

The words in italics indicate the intention to give the Company the benefit of and subject it to the old petroleum regulations.

By Order in Council P.C. 627, dated March 2, 1913, relied upon by the respondent, the Acting Minister of the Interior submitted that the *old* petroleum regulations provided that the Minister might reserve for an individual or company who had machinery on the land to be prospected, an area of 1920 acres, and in case oil in paying quantities were discovered, an area not exceeding 640 acres would be sold to the discoverer at the rate of $1.00 an acre and the remaining 1,280 acres at $3.00 an acre, the

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patent to convey the petroleum and natural gas but to exclude all other minerals; the activities of Bennetto and the Company were then set out as in the order in council of May 31, 1911. In view of the very large expenditure of at least $75,000 which the Company had incurred for the purpose of demonstrating the existence or otherwise of petroleum, which demonstrations must be of very great public benefit, and in view of the fact that the location first reserved for the application was lost to the applicant through the encroachment of squatters, the Minister recommended "that the above company be permitted to purchase the petroleum and natural gas rights under the entire area reserved for them by the Order in Council dated the 31st of May, 1911, together with the available surface rights thereof, at the rate of $3.00 an acre, subject, however, to such rights as may be established under the provisions of the Dominion Lands Act and the regulations, by any persons in a position to show that they have in the meantime squatted upon these lands."

The only other order in council referred to by the parties is one of June 6, 1914, which after reciting the order in council of March 21, 1913, and the granting of a patent thereunder for the petroleum and natural gas rights and the available surface rights, and the representation that a portion of the surface of the tract so acquired was covered by a deposit of tar-sand or asphalt, proceeded to state that the Minister recommended that, as asphalt would appear to be a product of petroleum and there appeared to be some ground for the contention that it formed a portion of the surface of the land, he be authorized to issue supplementary letters patent conveying the right to the asphalt which might be upon those lands. The circumstance, relied upon by the respondent, that this order in council made no provision for a royalty has no significance.

P.C. 1263 (May 31, 1911) and P.C. 627 (March 2, 1913) must be read together and in the light of section 76(*k*) of the *Dominion Lands Act of 1908*. So read, the Crown Patent was issued under the old regulations as they appeared in the 1906 Office Consolidation but varied as

to the purchase price. If the new regulations of March 1910 applied, the price per acre would be materially increased but, after taking into consideration the substantial sums expended for exploration by the Company, it was considered fair and equitable that the price should be $3.00 per acre throughout instead of $1.00 per acre for the first 640 acres and $3.00 per acre for the remainder of the area reserved. The old regulations (para. 6) provided for a royalty "at such rate as may, from time to time, be specified by order in council" and hence the reddendum in the Crown Patent. In my opinion there was statutory authority for the patent.

Chapter 24 of 12 Car. II (1660), requires attention. At page 47 of the first edition of Armour on Real Property, which was based on Leith and Smith's edition of the second volume of Blackstone's Commentaries (in a chapter omitted in the second edition to make room for more practical matter), the author points out that the effect of this statute was to destroy the military tenures with all their heavy appendages, and in Challis's Real Property, 3rd edition, pp. 59-60, it is pointed out that by that statute all tenures, with irrelevant exceptions, were reduced to free and common socage but that from certain modifications which the law permitted to be imposed upon it were derived determinable fees, conditional fees. In the second edition of Armour, at page 159 (which is the same as on page 161 of the first edition), an estate on condition expressed in the grant itself is dealt with as follows:

> 3. Express Conditions.
>
> An estate on condition expressed in the grant itself, is where an estate is granted either in fee simple or otherwise, with an express qualification, annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition. Or, as defined in the Touchstone (P.117), "it is a modus, a quality annexed by him that hath estate, interest, or right, to the land, etc., whereby an estate, etc., may either be created, defeated, or enlarged, upon a certain event. And this doth differ from a limitation, which is the bounds or compass of an estate, or the time how long an estate shall continue." Or, "a condition is a qualification or restriction annexed to a conveyance of land, whereby it is provided that, in case a particular event does or does not happen, or in case the grantor or grantee does, or omits to do, a particular act, an estate shall commence, be enlarged, or defeated" (Cru. Dig. Tit. 13, s. 1).

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In Cheshire's Modern Real Property, 6th edition, at page 29, it is stated:

> a grantor exhausts his powers of alienation when he grants a fee simple, for the law is ignorant of any greater estate, but he may annex a condition to the grant, so as to make the estate come to an end on the occurrence of a certain event.

And at page 515:

> An interest upon condition subsequent arises where a qualification is annexed to a conveyance, whereby it is provided that, in case a particular event does or does not happen, or in case the grantor or the grantee does or omits to do a particular act, the interest shall be defeated.

As defined by the pleadings, the precise issue to be determined is whether or not the Crown had the right to impose a royalty and not whether the Crown had the right to declare the grantee's estate forfeited for failure to pay the royalty. Yet these two matters are interwoven and the general rule may be taken to be that expressed by the maxim *id certum est, quod certum reddi potest.* Coke upon Littleton, 96*a*., puts it thus:

> It is a maxim in law, that no distresse can be taken for any services that are not put into certaintie, nor can be reduced to any certainty; for, id certum est, quod certum reddi potest; for oportet quòd certa rès deducatur in judicium: and upon the avowry, damages cannot be recovered for that which neither hath certainty, nor can be reduced to any certainty. And yet in some cases there may be a certainty in uncertainty; as a man may hold of his lord to sheere all the sheepe depasturing within the lord's manor; and this is certaine enough, albeit the lord hath sometime a greater number, and sometime a lesser number there; and yet this incertainty, being referred to the manner which is certaine, the lord may distrain for this uncertainty. Et sic de similibus.

This is quoted with approval by Lord Denman in *Daniel* v. *Gracie* (1).

In *Cooper* v. *Stuart* (2), the Judicial Committee had to deal with a clause in a Crown grant in New South Wales "reserving to His Majesty, his heirs and successors . . . any quantity of land not exceeding ten acres in any part of the said grant as may be required for public purposes." Although the precise point was not argued, their Lordships had no difficulty in deciding that the reservation was valid. In my view the royalty reserved in the present case is certain within the meaning of the rule. Before leaving the case of *Cooper* v. *Stuart* (2), it should be noted that the

(1) (1844) 6 Q.B. 145 at 152. (2) (1889) 14 A.C. 286

decision is authority for the proposition that the rule in *Forbes* v. *Git* (1), that if in a deed an earlier clause is followed by a later one which destroys altogether the obligation created by the earlier clause, the latter is to be rejected as repugnant and the earlier clause prevail, does not apply where the reservation takes effect in defeasance of the estate previously granted and not as an exception.

The judges in the Courts below who decided in favour of the respondent considered that, on construction, the case was determined by the decision of this Court in *Attorney General of Alberta* v. *Majestic Mines Limited* (2). The wording in the patent in question in that case, however, is quite different from the one before us. Here, the words are "Yielding and paying unto us and our successors such royalty upon the said petroleum and natural gas, if any, from time to time prescribed by regulations of Our Governor in Council." The words "from time to time prescribed" do not appear in the grant considered in the *Majestic Mines Case* (2) and I agree with Mr. Justice Parlee, speaking on behalf of himself and Mr. Justice Ford, that they are prospective.

This is a power or right which by a contract, lease or other arrangement was reserved to the Governor in Council within the meaning of clause 3 of the Agreement for the Transfer of the Natural Resources of Alberta, scheduled to the *Alberta Natural Resources Act,* chapter 3 of the Dominion Statutes of 1930 and therefore transferred to the Province. As stated by Sir Lyman Duff, speaking on behalf of the Court, in *Reference re Refund of Dues paid under Section 47(f) of Timber Regulations* (3), with reference to clause 2 of the same agreement:

> The subject of the clause comprises two classes of arrangements, (1) contracts "to purchase or lease any Crown lands, mines or minerals," and (2) "every other arrangement whereby any person has become entitled to any interest therein as against the Crown."
>
> It is quite impossible, of course, to contend that the second class includes only arrangements which are strictly contracts, because if that had been the purpose of the clause, the word "contract" would have been used, instead of "arrangement," to describe the kind of transactions falling within it.

(1) [1922] 1 A.C. 256.
(2) [1942] S.C.R. 402.
(3) [1933] S.C.R. 616.

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The decision of this Court in that case was affirmed by the Judicial Committee (1), and Lord Wright, at page 197, states:

> The word "arrangement" is as Parke B. said in *Manning* v. *Eastern Counties Ry. Co.* *"a very wide and indefinite one"*.

In Re Timber Regulations for Manitoba (1), the Judicial Committee decided that the Transfer Agreement with Manitoba amounted to a statutory novation and that case was followed as to the Province of Alberta, by this Court, in *Anthony* v. *Attorney General for Alberta* (2). Leave to appeal to the Judicial Committee was refused.

It is alleged that the present respondent took title without notice of the reddendum in the patent but this cannot avail it in view of the provisions of section 61 of *The Land Titles Act,* R.S.A. 1942, chapter 205:

> 61. (1) The land mentioned in any certificate of title granted under this Act shall by implication and without any special mention therein, unless the contrary is expressly declared, be subject to,
>
> (*a*) any subsisting reservations or exceptions contained in the original grant of the land from the Crown:

The certificates of title relied upon by the respondent have an endorsement stating that the land or mines and minerals are subject to this implied provision. The word "reservation" is wide enough to include the provision for royalty.

Finally, as Mr. Justice Parlee points out, there is no evidence that would entitle the plaintiff to rectification of the patent. The appeal should be allowed, the action dismissed and the appellants entitled to judgment on their counter-claim. By arrangement, there are to be no costs.

RAND J.:—This appeal raises the question whether the Lieutenant Governor in Council of Alberta is entitled to exact a royalty in respect of petroleum and natural gas produced from certain lands owned by the respondent in that province. They were granted in fee simple in 1914 by Letters Patent under the Great Seal of Canada. The grant was authorized by orders-in-council made under the *Dominion Lands Act,* R.S.C. (1886) c. 54, as amended in

(1) [1935] A.C. 184. (2) [1943] S.C.R. 320.

1892 by c. 15. Section 100 of c. 55, R.S.C. (1906) provided generally for the disposal of the western Crown lands:

100. Dominion lands, as the surveys thereof are duly made and confirmed, shall, except as otherwise herein provided, be open for purchase, at such prices, and on such terms and conditions as are fixed, from time to time, by the Governor in Council; but no purchase shall be permitted at a less price than one dollar per acre, and, except in special cases in which the Governor in Council otherwise orders, no sale to one person shall exceed a section, or six hundred and forty acres.

Section 6(i) authorized regulations:

6. The Governor in Council may,

(i) make such orders as are deemed necessary, from time to time, to carry out the provisions of this Act, according to their true intent, or to meet any cases which arise, and for which no provision is made in this Act; and further make and declare any regulations which are considered necessary to give the provisions in this section contained full effect; and, from time to time, alter or revoke any order or orders or any regulations made in respect of the said provisions, and make others in their stead;

Section 159 dealt with mineral lands:

159. Lands containing coal or other minerals, including lands in the Rocky Mountains Park, shall not be subject to the provisions of this Act respecting sale or homestead entry, but the Governor in Council may, from time to time, make regulations for the working and development of mines on such lands, and for the sale, leasing, licensing or other disposal thereof.

The first regulation governing petroleum was approved by His Excellency on August 6, 1898; it provided for the reservation for a period of six months of an area not exceeding 640 acres for prospecting purposes, and that if oil was found in paying quantities, the land and mineral might be sold at the rate of $1.00 per acre, reserving a royalty of 2½ per cent upon the sales; its application was confined to lands situated south of the Canadian Pacific Railway in the district of Alberta. This was replaced by one of May 31, 1901 extending the application to unappropriated lands in Manitoba, Northwest Territories and Yukon Territory; providing a royalty at such rate as might from time to time be specified by order-in-council on the sales of the petroleum and for sworn monthly returns; and stipulating that the patent would be made "subject to the payment of the above royalty", and to forfeiture on default in payment. Further amendments were made in 1902, 1904, 1905 and 1906, but, except as they were extended to natural gas, they do not affect the question before us.

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In 1908 c. 55 R.S.C. 1906 was repealed and replaced by c. 20 of the statutes of that year. In 1910 new regulations restricted the disposal of mineral lands to leasehold interests.

Application for the lands was made by Israel Benneto on January 1, 1906, and in the course of the next five years substantial work was done by way of exploration and the sinking of a well. By 1911 approximately $75,000 had been expended, and by an order-in-council of May 31 of that year special provisions were made. The order recited the application and reservation, the operations carried on, the assignment of rights to the Northern Alberta Exploration Company Limited, and the request for a further renewal of the reservation; but that it had appeared that within the original tract squatters had acquired rights which, in the opinion of the Department, presented an obstacle to the renewal as requested. In view, however, of the large sum expended, the order provided for a reservation for two years to expire on June 17, 1913 of petroleum, natural gas and surface rights over another area of 1920 acres which embraced a portion of the former tract; that should oil or gas be discovered in paying quantities within one year from June 17, 1911 the Minister was empowered to sell the entire acreage under the earlier regulations; but that if the discovery should not be made until after that date though before June 17, 1913, to sell the available oil and gas rights in the tract and the surface rights of a described portion of it. Following this, and under the authority of a further order-in-council of March 21, 1913, by patent dated the 18 of March, 1914, the available surface rights to the extent of 1296 acres, and the available mineral rights for 1320 acres, were conveyed to the company at the rate of $3.00 an acre. The difference in acreage resulted from the retention of the surface area of a creek running through the tract. The grant is seen to have been made on the authority of and subject to cumulative and modified provisions of orders-in-council, all of which had been advertised in the *Canada Gazette* as required by sec. 8 of the Act.

The patent reserved certain rights in and over navigable waters, certain rights of fishery with incidental privileges,

all mines and minerals except gas and petroleum, and all rights acquired by squatters. Then followed a reddendum clause:

> YIELDING and paying unto Us and Our Successors such royalty upon the said petroleum and natural gas, if any, from time to time prescribed by regulations of Our Governor in Council, it being hereby declared that this grant is subject in all respects to the provisions of any such regulations with respect to royalty upon the said petroleum and natural gas or any of them, and to such regulations governing petroleum and natural gas as were in force on the First day of September in the year of Our Lord one thousand nine hundred and nine, and that our Minister of the Interior of Canada may by writing under his hand declare this grant to be null and void for default in the payment of such royalty or for any cause of forfeiture defined in such regulations, and that upon such declaration these presents and everything therein contained shall immediately become and be absolutely null and void.

I construe that language to describe a royalty that from time to time after the issue of the patent might be provided by regulations: there was no specific royalty so existing at the time of the grant.

As of July 15, 1870, Rupert's Land and the Northwest Territories were transferred to the Dominion. By sec. 21 of the *Alberta Act of 1905*, creating the province, all public lands and real interests were retained by the Dominion. In 1930 by the *Alberta Natural Resources Act* the then remaining lands and interests of the Dominion were transferred to the province, the effect of which, as to rights and obligations, was to establish a statutory novation: *In re Timber Regulations for Manitoba* (1). Up to that moment, the retained proprietary rights were within the administration of the Dominion for the purposes of the Dominion and in all respects subject to the jurisdiction of Parliament: *In re Natural Resources of Saskatchewan* (2); *A.G. Alberta* v. *A.G. Canada* (3). But from the creation of the province it is clear that any interests disposed of by the Dominion would automatically come under its exclusive jurisdiction through the force of sec. 92 of the *Confederation Act*.

By sec. 11 of the *Dominion Lands Act, 1906*, the administration of the lands was entrusted to the Minister of Interior, to be carried out subject to the provisions of the Act and regulations made by order-in-council. What was

(1) [1935] A.C. 184.
(2) [1932] A.C. 28.
(3) [1928] A.C. 475.

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the nature of these regulations? They were intended, clearly, to be administrative and so far legislative in character; but in relation to grants, I am unable to discover any power to introduce by them new incidents of land ownership by reservation or otherwise in the ordinary instrument of conveyance. Conceivably they might regulate from time to time royalties payable on leases or even patented lands prior to the establishment of the province; but as legislation, from and after that time they could have no application to granted lands or interests; nor could any such sub-legislation authorize grants creating reservations which, under the existing law of real property, would be invalid.

Interpreting the patent, then, in the light of that law, I am forced to the conclusion that the reservation of royalties purporting to be made is void for uncertainty. As the statute of Quia Emptores did not apply to the Crown, such a reservation is strictly a rent service, that is "a retribution" made to the Crown by the beneficiary of the grant. But by the statute of 1660, c. 24, all tenures, with minor exceptions not relevant here, were converted into that of free and common socage, a provision of law which, by the *Northwest Territories Act of 1875* as amended in 1886, became law for the western lands; and under that tenure it was essential that the service should be certain. Blackstone, in Book II, cap. 5 of Lewis's Edition, emphasizes this special necessity in socage tenure: after contrasting the uncertainties of knight-service, and after dwelling somewhat on the scutage, or "escuage", which had it "been a settled invariable sum, payable at certain times, it had been neither more or less than a mere pecuniary rent; and the tenure, instead of knight-service would have been of another kind, called socage, of which we shall speak in the next chapter," describes socage as denoting a tenure by any "certain and determinate service." This he illustrates by the examples of "fealty and 20s. rent" or "homage and fealty without rent" or "certain corporal service as ploughing the Lord's lands for three days;" and observes: "It was the certainty, therefore, that denominated it a socage tenure, and nothing sure could be a greater liberty or privilege than to have the service ascertained

and not left *to the arbitrary calls of the lord* as the tenures of chivalry." He observes that the "grand criterion and distinguishing mark of this species of tenure are the having its renders or services ascertained; it will include under it all other methods of holding free lands by certain and invariable rents and duties;" of a "certain established rent;" and finally, in his summary, at page 86, that "in the military tenure, or more proper feud, this was from its nature uncertain, in socage, which was a feud of the improper kind, it was certain, fixed and determinate (though perhaps nothing more than bare fealty) and so continues to this day." The reservation here, by leaving the rate in money or in kind at which the royalty from time to time should be levied, in the discretion of the Crown, embodies the essence of the evil which led to the legislation of 1660.

Assuming this, Mr. Steer argues that the patent itself was void on the ground that as the regulations stipulated for such a reservation, a patent could issue only if it carried out effectively their terms. The *Dominion Lands Act* doubtlessly exhausts the prerogative power to dispose of Crown lands. That is clear whether we treat the statute of 1702, which limited the disposing power of the Crown over lands in England, to have been introduced into the Northwest Territories by the Act of 1875 or not. The circumstances in which the statute of 1702 was enacted are not at all comparable with those of a colony, the initial development of which must necessarily be one of the main functions of executive government; and certainly it was not observed by the colonial administration prior to Confederation. But sec. 100 recognizes that residual power so far as the provisions of the statute do not fetter it; and secs. 6(i) and 159 neither require the regulations to be of any particular or general nature nor exclude special provisions for special cases where no prohibition is infringed. The patent was, undoubtedly, issued as the conclusion of an application made under the regulations; but assuming the incorporation of the latter in the transaction as a whole, if, so far as they professed to provide for novel incidents of property in the patent, they were

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beyond the power of the Governor-in-Council to make they must be disregarded, and the conveyance, otherwise within the statutory authority, held valid.

The lands, including the oil and gas rights, then, having been conveyed, nothing remained to pass to the province in 1930 except the right of escheat; and since the claim for royalty under the provincial order-in-council is based on a reservation, transferred in 1930, that failing, the claim fails.

I do not understand the statement of claim to allege an intention on the part of the province to seek by order-in-council to subject the lands to a condition based on the language of the reservation of royalty, but taken apart from its effectiveness as such. As contained in the grant, the condition obviously assumes a valid reservation and it would fall with the latter. But considered even as detached from the reservation, it is fatally defective. That conditions must be certain, precise and ascertainable from the terms of the instrument is a rule with ancient roots in the common law; it was applied by this Court as late as last year in *Noble* v. *Alley* (1); and a condition, the substance of which lies within the will of the grantor, is outside of that requirement.

I would, therefore, dismiss the appeal. There will be no costs.

KELLOCK J.:—The patent here in question was granted subsequent to 7-8 Ed. VII, c. 20, by s. 37 of which it is provided that

> lands containing salt, petroleum, natural gas . . . may be sold or leased under regulations made by the Governor in Council.

This legislation replaced s. 159 of R.S.C. 1906, c. 55, which read:

> Lands containing coal or other minerals . . . shall not be subject to the provisions of this Act respecting sale or homestead entry, but the Governor in Council may from time to time make regulations for the working and development of mines on such lands and for the sale, leasing, licensing or other disposal thereof.

By s. 6 of the same *Act*, the Governor in Council was authorized to

> (i) make such orders as are deemed necessary from time to time to carry out the provisions of this Act according to their true intent or to meet any cases which arise and for which no provision is made in this Act . . .

(1) [1951] S.C.R. 64.

S. 76(*k*) of the Act of 1908 reproduces this provision. Regulations which had been passed under earlier legislation were in force at the time of the passing of the Act of 1908, and the order-in-council authorizing the patent had reference to these regulations. The patent itself is an express grant in fee simple, and it contains the provision relied upon by the appellant which in turn is in conformity with the regulations.

While Parliament, as the unitary legislature for the territory in question, could, doubtless, have created estates not then known to the law, it is plain that, apart from such legislation, "the King cannot make law or custom by his grant;" Chitty on Prerogatives of the Crown, p. 386. I find nothing in the above legislation which contemplates disposal of mineral lands so as to create estates therein of a novel character. The question, therefore, in the case at bar is as to whether the provision in the patent, authorizing the grantor to exact "such royalty . . . from time to time prescribed by regulations of our Governor in Council" upon the petroleum and natural gas, was a valid provision under which an interest remained in the Dominion and passed to the province by virtue of the *Natural Resources Act of 1930*. The case for the appellant is exclusively rested on this basis and not upon any legislative jurisdiction in either the Dominion or the province apart from the terms of the patent. In my opinion, the provision in question is not effective for such a purpose but is void as repugnant to the grant.

Anciently, according to Blackstone Vol. 2, p. 60 ff., there were four principal species of lay tenures, the grand criteria of which were the nature of the several services or "renders" that were due to the lords from their tenants. These services in respect of their quality were either free or base, and in respect of their quantity and the time of exacting them, were either certain or uncertain. Free services were such as were not unbecoming the character of a soldier or a freeman to perform, while base services were such as were only fit for peasants or persons of a servile rank. "Certain" services, whether free or base, were such as were stinted in quantity and could not be exceeded on any pretext; for example, to pay a stated annual rent or

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to plough such a field for three days. "Uncertain" services depended upon unknown contingencies; as, in the case of free services, to do military service in person or pay an assessment in lieu of it when called upon; or, in the case of base services, to do whatever the lord should command. Where the service was free but uncertain, as military service with homage, the tenure was called tenure in chivalry, or knight service. Where the service was not only free but also certain, as by fealty only, by rent and fealty, etc., that tenure was called free socage. Tenure by knight service was abolished by the statute of 12 Car. II, c. 24, and turned into free and common socage. This statute expressly extended to the Crown. At p. 78 Blackstone, in speaking of the services in the case of free socage, says that they were

> such as were liquidated and reduced to an absolute certainty. And this tenure not only subsists to this day, but has in a manner absorbed and swallowed up (since the statute of Charles the Second) almost every other species of tenure.

The author goes on at p. 80 to state that

> It was the certainty, therefore, that denominated it a socage tenure; and nothing sure could be a greater liberty or privilege, than to have the services ascertained, and *not left to the arbitrary calls of the lord,* as the tenures of chivalry.

At p. 81:

> As therefore the grand criterion and distinguishing mark of this species of tenure are the having its renders or services ascertained, it will include under it all other methods of holding free lands by certain and invariable rents and duties.

As the statute Quia Emptores did not apply to the Crown, of whom the tenant in fee simple holds his lands, rent payable to the Crown in such cases is a rent service which, as distinguished from a rent charge, requires a tenure to support it.

It has been held that royalties of the nature of that here in question are true rents; *Reg.* v. *Westbrook* (1); *Daniel* v. *Gracie* (2); *Barrs* v. *Lea* (3); *Edmonds* v. *Eastwood* (4); 20 Halsbury, 2nd Edition, 158. Being rent, it is essential in every case that the element of certainty exist in order to its enforcement. As stated in Halsbury Vol. 20, 2nd Edition, at p. 160:

> The rent must be certain, or must be so stated that it can afterwards be ascertained with certainty. For this purpose it is sufficient if by

(1) (1847) 10 Q.B. 178, 203.
(2) (1844) 6 Q.B. 145.
(3) (1864) 33 L.J. Ch. 437.
(4) (1858) 2 H. & N. 811 at 819

calculation and upon the happening of *certain events* it becomes certain; and provided it can be so ascertained from time to time, it is no objection that the rent is of fluctuating amount.

Apart from authority, it is difficult to see on principle how a rent, dependent upon nothing but the will of the grantee, can be said to be certain. No authority has been cited which supports the appellant's position, and I think there is authority to the contrary. Halsbury, in a note to the citation last mentioned above, refers to what is said in Coke upon Littleton at 96*a*, namely,

> It is a maxim in law, that no distresse can be taken for any services that are not put into certaintie, nor can be reduced to any certainty; for, *id certum est, quod certum reddi potest* . . . And yet in some cases there may be a certainty in uncertainty; as a man may hold of his lord to sheere all the sheepe depasturing within the lord's manor; and this is certain enough, albeit the lord hath sometime a greater number, and sometime a lesser number there; and yet this incertainty, being referred to the mannor which is certaine, the lord may distrain for this uncertainty. *Et sic de similibus.*

This is cited by Lord Denman in *Daniel* v. *Gracie, ubi cit.*, in which, under a demise of a marl pit and brick mine, the tenant to pay 8d. per solid yard for all the marl he got and 1s. 8d. per thousand for all the bricks he made, it was held that the rent was certain as it was capable of being ascertained with certainty. At p. 153, Lord Denman said:

> In the present instance, however, the rent is reserved in money; and the amount is, according to the criterion of Lord Coke, capable of being ascertained, "*certum reddi potest*", by the number of cubic yards of marl and slack got in the one case, and of bricks made in the other.

There is nothing in this case which suggests that rent at a rate not stated may be made certain by the exercise of the will of the grantor or lessor. Nor in my opinion, with respect, does the illustration given by Lord Coke go so far. The number of sheep would be determined each year by the number actually depasturing on the land at the relevant date. I think it is clear upon the authorities that the certainty must be capable of ascertainment by reason of some collateral event apart from the mere will of the grantor. As put in 10 Halsbury, 2nd Edition, at p. 446:

> But the rent is certain if by calculation and upon the happening of certain events, it becomes certain.

Reference is made in the text to *Ex parte Voisey* (1). In that case, Brett L.J., as he then was, said at p. 458:

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> Now it is true that, if that which is agreed upon as the payment is uncertain, it is not a rent. It must be certain. But the rent is certain if, by calculation and upon the happening of certain events, it becomes certain . . . But here it seems to me that, upon the happening of the condition named, the rent *fixes itself* and is therefore a certain rent.

The point is made very clear, it seems to me, by Lord Chief Baron Gilbert in his treatise on rents at p. 9, where he says:

> When the services are expressed in the contract, the *quantum* must be either certainly mentioned, or be such, as *by reference to something else* may be reduced to a certainty.

The same idea is expressed in Woodfall, 24th Edition, at p. 307, as follows:

> The reservation of rent, however, ought to be certain as to the amount and the time when payable; although if there be anything *in the reservation* by which the amount of the rent may be ascertained, this will be as good as if the sum itself were clearly specified, in accordance with the maxim *Id certum est quod certum reddi potest.*

In my opinion, therefore, the provision here in question lacks the necessary certainty. It is in effect a throwback to the old days of tenures by knight service which permitted rent services based on the "arbitrary calls of the lord."

The appellant, however, seeks to support the clause in question on the ground of common law condition subsequent. Counsel referred to a number of definitions, all to the same effect, and it will be sufficient to refer to that contained in Cheshire's Modern Real Property, 6th Edition, at p. 515:

> An interest upon condition subsequent arises where a qualification is annexed to a conveyance, whereby it is provided that, in case a particular event does or does not happen, or in case the grantor or the grantee does or omits to do a particular act, the interest shall be defeated.

I am content to take it that the provision in the patent here in question falls within the words of this definition. By the express terms of the patent, the grant may be declared void for default in payment of

> such royalty upon the said petroleum and natural gas, if any, from time to time prescribed by regulations of Our Governor in Council.

(i.e., default in payment of royalty at any rate which may in future be imposed).

However, if the reservation of future royalty is void for uncertainty, as in my opinion it is, it must follow that the

(1) (1882) 21 Ch. D. 442.

forfeiture for breach of a condition which is founded upon such a reservation, must fall with the latter.

The appellant relies upon the decision of the Privy Council in *Cooper* v. *Stuart* (1), which was concerned with a Crown grant of land in New South Wales containing a right to resume any quantity of the lands granted not exceeding ten acres as might be required for public purposes. This was held valid.

What was actually decided in that case is thrown into relief when contrasted with the decision in *Pearce* v. *Watts* (2) which was concerned with a contract for the sale of an estate, the vendor reserving "the necessary land for making a railway" through the estate to Prince Town. The suit, which was for specific performance, failed, it being held that the reservation was void for uncertainty. In his judgment, Sir George Jessel M.R. considers the situation which would have existed had there been a conveyance, in the following language at p. 493:

> If the conveyance were executed in this form, it is obvious, according to the present law, the whole land would pass to the purchaser, the reservation being void for uncertainty.

It may well be that the reservation in the above case was not a true reservation but rather an exception, but in either view it is essential that the parcel which is the subject of the reservation or exception should have certainty. In *Cooper's case,* it was fixed in amount, namely, ten acres, whereas in *Pearce's case* there was complete uncertainty and it could not be rendered certain by the grantor's election to have what he considered necessary for a railway.

I think, therefore, that it does not assist the appellant to invoke the doctrine of condition subsequent. In my opinion, the purported reservation of royalty in the patent is void, and the grant is absolute in the hands of the grantee. The principle is very old and is stated in Blackstone at p. 156 as follows:

> These express conditions, if they be . . . contrary to law, are void. In any of which cases, if they be conditions subsequent, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant.

I would dismiss the appeal. It was agreed there should be no costs.

(1) (1889) 14 A.C. 286.

(2) (1875) L.R. 20 Eq. 492.

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ESTEY J.:—I am in agreement with the reasons expressed by my brothers Rand and Kellock.

The appeal should be dismissed without costs.

CARTWRIGHT J.—For the reasons given by my brothers Rand and Kellock I would dismiss the appeal, without costs.

Appeal dismissed; no costs.

Solicitor for the Attorney General of Canada: *F. P. Varcoe.*

Solicitor for the appellants: *H. J. Wilson.*

Solicitors for the respondent: *Field, Hyndman, Field and Owen.*