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SPOONER OILS LIMITED, AND ARTHUR GILLESPIE SPOONER (PLAINTIFFS) ..... APPELLANTS;

*April 26, 27.
*Oct. 3.

AND

THE TURNER VALLEY GAS CONSERVATION BOARD AND THE ATTORNEY GENERAL OF ALBERTA (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Constitutional law—Statutes (construction, validity)—Turner Valley Gas Conservation Act, Alta., 1932, c. 6—Competency, in so far as it affects leases from Dominion Government under Regulations of 1910 and 1911 (made under authority of Dominion Lands Act, 1908, c. 20)—Agreement between the Dominion and the Province of Alberta respecting transfer to Province of public lands, etc. (confirmed by B.N.A. Act, 1930)—B.N.A. Act, 1867, ss. 91, 92.

Appellant was holder of a lease from the Dominion Government, granted under the regulations of March, 1910 and 1911 (made under authority of the *Dominion Lands Act,* 1908, c. 20), of a tract of land in the Turner Valley gas field, in the province of Alberta, for the purpose of mining and operating for petroleum and natural gas. Sec. 2 of the agreement between the Dominion and the Province, dated December 14, 1929 (respecting transfer to the Province of public lands, etc.; and which agreement was confirmed and given "the force of law" by the *B.N.A. Act, 1930,* c. 26) provides that "the Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise" except with consent or "in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province * * *." In 1932 (c. 6) the Province passed the *Turner Valley Gas Conservation Act,* the broad purpose of which was to reduce the loss of gas in the said field by burning as waste, and which subjected a lessee's operations to the control of a Board whose duty it was to limit the production of natural gas, in the said field, and from any particular well by reference to the amount of naphtha the well ought, in the Board's opinion, to be permitted to produce.

Held: The said Act of the Province "affected" the "terms" of the lease and of similar leases made under said regulations, within the meaning of s. 2 of said agreement (and did not come within the exceptions in said s. 2), and was, in so far as it affected such leases, incompetent.

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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(Judgment of the Appellate Division, Alta., [1932] 3 W.W.R. 477, [1932] 4 D.L.R. 750, reversed in this respect).

The Act "affected" the lease, notwithstanding that the lease required the lessee to work the mines "in such manner only as is usual and customary in skilful and proper mining operations of similar character when conducted by proprietors themselves on their own lands.". Conforming to such standard of working did not require following methods dictated by considerations of public policy, as contradistinguished from the interests of proprietors as proprietors.

Sec. 29 of the Dominion regulations of 1928 (published in 1930), which (among other provisions) required a lessee to take precautions against "waste" of natural gas, did not apply to the lease in question. The rule that a legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" (*Main* v. *Stark*, 15 App. Cas. 384, at 388), unless the language in which it is expressed requires such a construction, operated against such application; the Order in Council bringing s. 29 into force contained nothing in its language to indicate that s. 29 was intended to take effect upon the mutual rights of lessors and lessees arising under the terms of leases granted pursuant to the regulations of 1910 and 1911. Neither the terms of the lease itself, nor the regulations of 1910 and 1911, justified a construction by which s. 29 was made to constitute a part of the contract. But even assuming that s. 29 applied, it afforded no escape from the conclusion that the terms of the lease were disadvantageously "affected" by the provincial Act; whatever might be the exact effect of such a requirement against "waste" (if it applied to the lease), the provincial Act, limiting arbitrarily the gross production of the field, and subjecting the lessee, in respect of the production of gas, to the "uncontrolled discretion" (s. 13 of the Act) of an administrative Board, in this respect radically altered the status of the lessee under the terms of his lease.

Sec. 2 of said agreement between the Dominion and the Province precluded the Province from legislating in such a way as to "alter" or "affect" any "term of any such lease," irrespectively of any possibility that such legislation might be of such a character as to fall under powers of legislation possessed by the Province prior to the agreement. But, further, had the provincial Act in question been passed prior to the agreement, and while the public lands were still held by the Dominion, it would have been inoperative, as regards such leases as that in question, on the grounds (1) that it was repugnant, in so far as it affected tracts leased under the regulations of 1910 and 1911, to those regulations, and the Dominion statute under which they were promulgated; and (2) that, in so far as it authorized the Board to make regulations (taking effect by orders of the Board which were given statutory force) concerning the production of natural gas and naphtha from lands held under lease from the Dominion for the purpose of working them for the production of those minerals, it was legislation strictly concerning the public property of the Dominion (reserved for the exclusive legislative jurisdiction of the Dominion by s. 91 (1) of the *B.N.A. Act, 1867*).

Held also (agreeing in this respect with the judgment of the Appellate Division, *supra*): The Act of the province could not be said to be invalid on the ground that, as a whole, it dealt with matters falling strictly under s. 91 (2) (regulation of trade and commerce), or, at all

events, with matters outside the scope of s. 92, of the *B.N.A. Act, 1867*. *(Union Colliery Co. of British Columbia Ltd.* v. *Bryden,* [1899] A.C. 580, at 587, cited). The Act was, in substance, legislation providing for the regulation of the working of natural gas mines in the Turner Valley area from a provincial point of view and for a provincial purpose; nothing had been shown to indicate that the working of the mines (excepting the wells upon lands leased from the Dominion) was a matter which, by reason of exceptional circumstances, had ceased to be, or had ever been, anything but a matter "provincial" in the relevant sense.

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Alberta (1).

The plaintiff Spooner was the holder of a lease of land dated August 31, 1912, from His Majesty the King, represented therein by the Minister of the Interior of Canada, for the "sole and only purpose" of mining and operating for petroleum and natural gas, and of laying pipe lines, etc. The lease was granted under the Regulations of March, 1910 and 1911, made under the authority of the *Dominion Lands Act,* 1908, c. 20, s. 37. The appellant company was the owner in fee simple of certain lands, and held a sub-lease of sixty acres of the tract leased to the plaintiff Spooner. All the lands were in the Turner Valley gas field in the province of Alberta. The plaintiffs brought an action, attacking an order made by The Turner Valley Gas Conservation Board as being illegal and unauthorized (The plaintiffs' contention below that the Board's order was not authorized by the provincial Act in question was not argued in the present appeal); attacking the *Turner Valley Gas Conservation Act,* Statutes of Alberta, 1932, c. 6, as being contrary to the terms of s. 2 of the agreement dated December 14, 1929, made between the Government of the Dominion of Canada and the Government of the Province of Alberta (respecting transfer to the Province of public lands, etc.), and set out as a schedule to c. 26 of the Imperial Statutes of 1930 (the *British North America Act, 1930,* which confirmed said agreement and gave it "the force of law"); and attacking the said Act of the Province as being legislation in regard to the "regulation of trade and commerce" (*B.N.A. Act, 1867,* s. 91 (2)), and therefore *ultra vires;* and attacking s. 20 of the said Act of the Province as imposing indirect taxation and being, therefore, *ultra vires.*

(1) [1932] 3 W.W.R. 477; [1932] 4 D.L.R. 750.

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Ewing J. dismissed the action (1). The Appellate Division (2) varied his judgment so as to declare that ss. 20, 21 and 22 of the said Act of the Province were *ultra vires* (as imposing indirect taxation. Ewing J., for reasons stated in his judgment, did not make a declaration on this point), and in all other respects affirmed his judgment. The plaintiffs appealed (by leave of the Appellate Division) to the Supreme Court of Canada. (There was no cross-appeal against the declaration that ss. 20, 21 and 22 were *ultra vires,* and this matter was not in issue in the present appeal).

The material facts, and the questions in issue on the present appeal, are more fully set out in the judgment now reported.

The appeal was allowed with costs, and judgment was directed declaring that the impeached legislation was invalid as respects the leasehold properties of the appellants.

H. S. Patterson, K.C., for the appellants.

W. S. Gray, K.C., for the respondents.

The judgment of the court was delivered by

DUFF C.J.—The appellant Spooner is the holder of a "lease" of a tract of land in the Turner Valley gas field, which gives him the right to work the tract for petroleum and natural gas. The term of the lease is twenty-one years and is renewable at its expiration. The lease was granted under the Regulations of March, 1910 and 1911, and it will be necessary to consider the provisions of it with some particularity.

The Turner Valley gas field is what is known as a "wet field"; one, that is to say, where the natural gas coming to the surface holds crude naphtha in suspension. The practice of the operators in that field was, up to the time the impugned legislation was enacted, to extract the naphtha from the natural gas by passing the gas through separators, and thereby effecting a liquefaction of the naphtha.

For the natural gas produced in this field there is no sufficient market, and, since, to allow it to escape into the atmosphere (after the extraction of the naphtha) might

(1) [1932] 2 W.W.R. 454; [1932] 4 D.L.R. 729.
(2) [1932] 3 W.W.R. 477; [1932] 4 D.L.R. 750.

endanger the health of people living in the vicinity, it is for the most part burned as refuse. Some of it is transported to Calgary and Lethbridge for consumption there in the production of light and heat; and some is used in refineries; but, while the ratio of the volume of gas consumed as waste to that which is usefully consumed varies from month to month, it may be stated, without substantial inaccuracy, that very little more than ten per cent. of what passes out of the wells is, except for the recovery of naphtha, applied to any useful purpose.

In 1932 the Legislature of Alberta passed a statute, *The Turner Valley Gas Conservation Act* (1932, c. 6); the broad purpose of which is to reduce the loss of gas in this field by burning as waste. A Board is constituted, The Turner Valley Gas Conservation Board, the general function of which, the statute declares, is to take measures for the conservation of gas in the Turner Valley field.

The appellant company are the owners, in fee simple, of several tracts in the field, and hold a sub-lease of sixty acres of the tract leased to the appellant Spooner. The appellants, who are plaintiffs in the action, seek a declaration that the legislation of 1932 is *ultra vires,* as a whole, on the ground that it deals with matters falling within the ambit of s. 91 (2) of the *British North America Act,* or, at all events, with matters outside the scope of s. 92. They contend, in the alternative, for a declaration that, in so far as the legislation affects the rights of the appellants under the lease mentioned (as well as of other holders of similar leases), it is an invasion of the legislative sphere reserved to the Dominion by s. 91 (1) of the *B.N.A. Act* in respect of "The Public * * * Property", and consequently, to that extent (if not in its entirety), *ultra vires,* and further that the legislation "affects" the provisions of such leases within the meaning of s. 2 of the compact between the Province and the Dominion, to which the *B.N.A., 1930,* gives "the force of law", and is, therefore, incompetent. Article 2 of the compact is in these words:

> The province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all the parties thereto other than Canada or in so far as any legislation may

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apply generally to all similar agreements relating to lands, mines or minerals in the province or to interests therein, irrespective of who may be the parties thereto.

We have come to the conclusion that the first of these contentions fails, and we shall postpone the discussion of that for the present. We are unable, however, to agree with the decision of the courts below with regard to the second contention.

We think that the legislation of 1932 does "affect" the "terms" of the appellant's lease, and of similar leases, within the meaning of the article quoted, and that it is, therefore, incompetent in so far as it does so "affect" such leases.

Contrasting the rights of the appellant Spooner and of any lessee, as lessee, under the provisions of a lease, granted under the Regulations of 1910 and 1911, and under the Regulations, a copy of which is annexed to Spooner's lease, with the position of a lessee under a lease of identical terms, but brought under the dominion of the provincial statute, there can, we think, be no dispute that the terms of leases governed by the regulations alone and the rights of the lessee under such terms are "affected" in a substantial degree by the legislation; if the legislation can take effect upon such leases.

We quote textually two clauses of Spooner's lease which are the only provisions immediately pertinent:

NOW THEREFORE THIS INDENTURE WITNESSETH that in consideration of the rents and royalties hereinafter reserved and subject to the provisos, conditions, restrictions and stipulations hereinafter expressed and contained, His Majesty doth grant and demise unto the lessee, for the sole and only purpose of mining and operating for petroleum and natural gas, and of laying pipe lines and of building tanks, stations and structures thereon necessary and convenient to take care of the said products,

the tract demised for the term defined, and renewable as stipulated.

By article 8 it is agreed,

That the lessee shall and will during the said term, open, use and work any mines and works opened and carried on by him upon the said lands in such manner only as is usual and customary in skilful and proper mining operations of similar character when conducted by proprietors themselves on their own lands, and when working the same shall keep and preserve the said mines and works from all avoidable injury and damage, and also the roads, ways, works, erections and fixtures therein and thereon in good repair and condition, except such of the matters and things last aforesaid as shall from time to time be considered by any inspector or other person authorized by the Minister to inspect and report

upon such matters and things to be unnecessary for the proper working of any such mine, but so that no casing placed in any mine shall be removed or impaired, and in such state and condition shall and will at the end or sooner determination of the said term deliver peaceable possession thereof and of the said lands to His Majesty.

The lessee has, under the terms of the lease, the right, during the currency of the term, of "mining and operating for petroleum and natural gas" subject only to the conditions and restrictions prescribed by the provisions of article 8. Under that article, the standard by which the lessee is to govern himself in opening, using and working "any mines and works opened and carried on by him" is the standard set by the manner of doing so "in skilful and proper mining operations", which is "usual and customary" among proprietors working their own lands. This involves two things: the lessee's manner of working the demised property is to conform to that which is "usual and customary" with proprietors working their own lands; but that again is qualified by the condition that the manner of working must conform to what is "usual and customary" in "skilful and proper mining operations" carried on by such persons in such lands.

There is no suggestion here that, in working his property conformably to the standard of "skilful and proper mining operations", the proprietor is supposed to be aiming at any object other than exploiting his own property in a profitable way. Any method of working lands for gas and petroleum which is "usual and customary" among proprietors exploiting their own property, for their own profit, and which, from that point of view, is "skilful and proper", could not be condemned, as in contravention of article 8, merely because considerations of public policy, as contradistinguished from the interests of proprietors as proprietors, might dictate a different course.

Turning now to the enactments of the statute of 1932. The Act (s. 13) requires the Board to

proceed to reduce the production of gas from all the wells in the area to an aggregate amount of not more than two hundred million cubic feet of gas per day, and to prescribe the daily rate of permitted production for each of every such well, * * *

It is also enacted that, for this purpose, the Board

may by order prescribe the periods during which any specified well or wells may be permitted to produce, and the total amount of the production which may be permitted during any such period from any such well or wells, and the working pressure at which all wells or any specified well

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shall be operated, and may by subsequent order and from time to time increase or reduce the amount of the permitted production of any well as the Board in its uncontrolled discretion deems proper.

The Board is further directed, (after certain tests provided for have been made) to determine the total amount of daily production which ought to be permitted for the time being from all wells and from each well in the area.

The operations of the lessee are subjected, by the statute, to the control of a Board whose duty it is to limit the production of natural gas in the whole of the Turner Valley field; and to limit the production of natural gas, from any particular well, by reference to the amount of naphtha the well ought, in the opinion of the Board, to be permitted to produce. The effect of the Order of the Board, of which the appellants complain (and this we mention by way of illustration only), upon the operations of the appellant company has been to reduce its production of naphtha by something like 95%.

On the 4th of May, 1932, the Board issued an order known as Order No. 1 in which, *inter alia*,

* * * the Board does order and prescribe that on and after the ninth day of May, 1932, the amount of gas permitted to be produced daily from the respective wells set out in (the schedule to the Order) shall not be greater than is required to produce the amount of naphtha set out opposite the description of each such well in said schedule following * * *

The Order further requires that every person operating a well set out in the schedule to the Order

shall so operate it so as not to permit such well to produce a greater daily flow of gas than will produce the number of barrels of naphtha set in said schedule opposite the description of such well.

It may be observed, although our conclusion is in no way dependent upon it, that it seems to be conceded that, as a rule, proprietors in the Turner Valley field carried on their operations in the manner above described; and that there really is no evidence to show, nor indeed is there any suggestion, that such a method of working a well of the type found in that field, which prevailed prior to the coming into force of the Order of the Board, was a method not permitted by article 8 of the appellant's lease. There is nothing pointing to the conclusion that such a manner of working is not a manner

usual and customary in skilful and proper mining operations of similar character when conducted by proprietors themselves on their own lands.

By the terms of the lease, the lessee undertook certain obligations therein defined. What the legislation professes to do is to substitute for these obligations a discretionary

control by an administrative body which is governed, in the exercise of its discretion, by general principles and rules laid down in the statute, pursuant to a policy of conserving natural gas in the entire field in the general public interest; with no regard (or at all events only in a very subordinate degree) to the standards, or the rules governing proprietors acting in the usual and customary manner in skilfully and properly working their own land for their own profit.

The respondents advance the argument that this reasoning is met by reference to s. 29 of the Regulations of 1928 which were published in 1930. That section contains this provision:

> In case natural gas is discovered through boring operations on a location, the lessee shall take all reasonable and proper precautions to prevent the waste of such natural gas, and his operations shall be so conducted as to enable him, immediately upon discovery, to control and prevent the escape of such gas.

The respondents rely upon that part of the provision which relates to "waste". Several points are involved in the examination of this contention.

First (assuming s. 29 to apply to leases granted under the regulations of 1910 and 1911) the provision quoted does not afford to the respondents a way of escape from the conclusion that the terms of the lease are disadvantageously "affected" by the legislation of 1932. The obligation under s. 29, upon which the argument is founded, is to "take all reasonable and proper precautions to prevent the waste" of natural gas. Whether the use of the natural gas for the purpose of recovering the naphtha held in suspension is "waste" within the meaning of this provision would, in a controversy between the Crown and the lessee, be a question to be determined by the courts.

The application of gas to the useful purposes of creating light and heat necessarily involves the destruction of it. The production of gas for the purpose of recovering from it the naphtha in suspension necessarily (necessarily, that is to say, in a practical business sense) involves the loss of the gas for which there is no market as gas. From the point of view of the proprietor there is no evidence that this loss of gas is not more than compensated for by the value of the naphtha recovered; and, as already observed, there are no facts before us justifying the conclusion that the obligation to "take all reasonable and proper precautions to prevent waste" imports a prohibition upon

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production for such a purpose. The legislation of 1932 limits, but does not prohibit, such production and neither the enactments of the statute nor the orders of the Board go to the length of declaring, that such production necessarily involves waste, which, from any point of view, ought to be prohibited.

Whatever be the exact effect of this provision of s. 29, it is quite clear that, while if, in the opinion of the Minister, the lessee infringes it, the Minister may call upon him to answer for his delinquency in the courts, yet, under the provision, such appeal to the courts is, apart from the cancellation of the lease, his only remedy. The enactments of the provincial statute, limiting arbitrarily the gross production of the field, and subjecting the lessee, in respect of the production of gas, to the "uncontrolled discretion" of an administrative Board, in this respect radically alter the status of the lessee under the terms of his lease. This appears to have been, in substance, the view of the Apellate Division.

The next point for consideration is whether s. 29 applies to leases granted under the Regulations of 1910 and 1911. It must be examined from two aspects. The first aspect is that under which it was envisaged by the learned trial judge (who held that the rights of the lessee are governed by the section), in which s. 29 is regarded simply as a regulation made under the regulative authority conferred upon the Governor in Council by s. 35 of the *Dominion Lands Act* (c. 113, R.S.C. 1927) (which does not in any pertinent sense differ from s. 37 of the Act of 1908). The appropriate rule of construction has been formulated and applied many times. A legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" (*Main* v. *Stark* (1)), unless the language in which it is expressed requires such a construction. The rule is described by Coke as a "law of Parliament" (2 Inst. 292), meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.

(1) (1890) 15 App. Cas. 384, at 388.

On the construction of this paragraph of s. 29 for which the respondents contend, the paragraph, if applicable, imposes *ab extra* by the force of law new terms, as broad, in scope, as the statute of 1932, which, as already observed, radically alter, to his prejudice, the rights and duties of the lessee under the stipulations of the existing contract of lease. The same thing could properly be stated of any construction which would leave it to the Crown to determine in its "uncontrolled discretion" what is and what is not "waste" within the meaning of the section. Moreover, the argument seems to involve the proposition that the whole of s. 29, and not alone the particular paragraph relating to "waste", applies to the leases in question; and there are still other provisions of s. 29, which, if operative, would, apart altogether from that provision, most materially affect his contractual rights and obligations.

First, there is the provision reserving to the Minister the right to make additional regulations, as it may appear necessary or expedient to him, governing the manner in which the boring operations shall be conducted, and the manner in which the wells shall be operated.

Then, there is the further provision vesting in the discretion of the Minister the power of cancellation in the event of non-compliance with the requirements set out in the section in relation to boring operations, or with any requirement which the Minister may consider it necessary to impose with respect to boring or operating.

We think there is nothing in the language of the Order in Council bringing into force this section 29 which requires us to hold that it was intended to take effect upon the mutual rights of lessors and lessees arising under the terms of leases granted pursuant to the Regulations of 1910 and 1911.

The other aspect, from which this point must be considered, presents for examination the question whether s. 29 constitutes a part of the contract, between the Crown and the lessee, by force of the contract itself. We think this question must be answered in the negative.

The lease declares, in express terms, that it is granted by the Minister of the Interior, pursuant to regulations made for the disposal of petroleum and natural gas rights, by Orders in Council dated respectively the 11th days of

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March, 1910 and 1911, "a copy of which regulations is hereto appended".

The term is twenty-one years and the lease is renewable for a further term of twenty-one years provided the lessee furnishes evidence satisfactory to the Minister of the Interior to show that during the term of the lease he has complied fully with the conditions of such lease and with the provisions of the regulations under which it was granted.

Among the "provisos, conditions, restrictions and stipulations" of the lease there is this:

2. That the lessee shall and will well, truly and faithfully observe, perform and abide by all the obligations, conditions, provisos and restrictions in or under the said regulations imposed upon lessees or upon the said lessee.

The Regulations "appended" to the lease contain the following:

21. The lease shall be in such form as may be determined by the Minister of the Interior, in accordance with the provisions of these Regulations.

It appears that the lease is framed upon the view that the rights of the parties *inter se* are to be ascertained from the provisions of the lease, from the Regulations, a copy of which is appended thereto, and such further orders and regulations and directions as may be made from time to time during the currency of the lease under article 9 of the lease or sections 23 and 24 of the Regulations. The last mentioned sections are in these words:

23. No royalty shall be charged upon the sales of the petroleum acquired from the Crown under the provisions of the Regulations up to the 1st day of January, 1930, but provision shall be made in the leases issued for such rights that after the above date the petroleum products of the location shall be subject to whatever Regulations in respect of the payment of royalty may then or thereafter be made.

24. A royalty at such rate as may from time to time be specified by Order in Council may be levied and collected on the natural gas products of the leasehold.

But, it is argued that, notwithstanding the form of the lease itself, the concluding words of s. 1 of the Regulations of 1910 and 1911 have the effect of incorporating, as conditions of the lease, all subsequent regulations made during the currency of the term. The sentence in which these words occur is this:

The term of the lease shall be twenty-one years, renewable for a further term of twenty-one years, provided the lessee can furnish evidence satisfactory to the Minister to show that during the term of the lease he has complied fully with the conditions of such lease and with the provisions of the Regulations in force from time to time during the currency of the lease.

"The Regulations in force from time to time during the currency of the lease" should be read, it is argued, as embracing all subsequent regulations whether incorporated in the terms of the lease, by force of some provision of the lease or of the existing Regulations, or not.

We cannot agree with this view of the effect of these words.

We think the better view is that they extend only to regulations made in exercise of a right reserved by the regulations of 1910 and 1911 or of the lease itself. Sections 23 and 24 contemplate such regulations, while by stipulations in the lease itself, the terms of which are left to his discretion, the Minister may, of course, consistently with the existing regulations, reserve the right to make further regulations. Article 9 of the lease in question contains such a reservation.

The view suggested involves the result that the terms of the contract may in every respect be altered (as regards rental, as regards royalties, as regards the obligations of the lessee in respect to the working of the mine); and by one party to the lease acting alone, without consultation with the other; and with the result (a result which, as we have seen, actually follows in this case from the acceptance of the respondent's contention) that a contract radically new, in its essential terms, may be substituted for that explicitly set forth in the document executed by the parties and the specific regulations that it incorporates.

It will be observed that the proviso, in express terms, affects only the right of renewal. On the supposition that the proviso relates to this right of renewal, and to that right alone, we arrive (on the construction advocated by the respondents) at the truly extraordinary result, that, even under the renewed lease, the lessee is not bound by s. 29; although his right of renewal is dependent upon compliance with that section prior to the completion of the original term. It is difficult, no doubt, to think it could have been intended that the lessee's right of renewal should be conditioned upon the performance, during the term antecedent to its renewal, of obligations which the lessee was not required to observe as contractual terms of the lease. But to us it seems clear that, if it had been intended to incorporate, as one of the terms of the lease, a stipulation

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that all future regulations touching the working of the property should become part of the lease as contractual stipulations, that intention would have been expressed, not inferentially, but in plain language.

Reverting to the form of the lease itself, as distinguished from the Regulations, and to the evidence it affords as to the view of the Minister, that the existing Regulations alone, and not Regulations subsequently enacted, are embodied in the lease, as forming part of the contract between the lessor and the lessee; it is not immaterial to recall what has already been stated, that, admittedly, this lease was in the usual form. The practice of the Department based upon this view of the effect of the Regulations of 1910 and 1911 is not without weight in a controversy as to its proper construction (*Webb* v. *Outrim* (1)). It may further be observed that, on this point, neither the Appellate Division nor the trial judge expressed an opinion in the respondent's favour. On the contrary, the Appellate Division appears to have entertained the view we have now expressed.

We turn now to the question which the Appellate Division regarded as the question of substance on the appeal. That court has taken the view that article 2 of the Compact has not the effect of depriving the provinces of any power of legislation which they possessed anterior thereto. This view is challenged by the appellants.

The question which thus arises is strictly a narrow one. The legislation of 1932 provides for the regulation of mining operations, for the production of natural gas, having naphtha in suspension, with the object of conserving the natural gas in the Turner Valley field. By its terms, it extends to operations in lands which (but for the *B.N.A. Act, 1930*) would have been public lands of the Dominion, as well as lands owned in fee simple by private individuals. The question may be put thus: Would it have been competent to the provincial legislature, if these public lands had not been transferred to the province, to regulate or to authorize an Administrative Board to regulate such operations, in private lands as well as Dominion public lands (held under lease to private individuals), by orders having the force of statute in the manner directed or contemplated by this legislation. The lessees, in virtue of leases under

(1) [1907] A.C. 81, at 89.

the Regulations of 1910 and 1911, became, by force of Dominion statute, entitled to exercise the rights vested in them by the leases. Indeed, the public lands of the Dominion are vested in Parliament, in the sense that only by virtue of Parliamentary authority can such lands be disposed of or dealt with. The right of the lessee, in each case, is to take from a specified tract of land, which is leased to him for that purpose alone, certain substances and to convert them to his own use. Until so taken, they remain, subject to his right to take them during the specified term, the property of the Dominion—part of the public lands of the Dominion. To take away this right, or to prohibit the exercise of it, would be to nullify *pro tanto* the statutory enactment creating the right. It is obvious, of course, that the provincial legislature could not validly have passed the enactments of the *Dominion Lands Act,* or the Regulations of 1910 and 1911, under which the lessee became entitled to exercise his rights. The appropriate principle seems to be that expressed by Lord Haldane in *Great West Saddlery Co. Ltd.* v. *The King* (1) in the words:

> Neither the Parliament of Canada nor the provincial legislatures have authority under the Act to nullify, by implication any more than expressly, statutes which they could not enact.

The principle applies to such a measure of regulation as that which is attempted by the legislation of 1932. It is nothing to the purpose that the legislation is expressed in general terms, applying to all wells in the Turner Valley area. The regulation takes effect by orders of the Board constituted under it, having the force of statute, which may apply, not only to the field generally, but to each well *eo nomine.* Every such order constitutes in effect a statutory edict, governing the operations in, and connected with, each several well against which it is directed.

Nor is it material that, by the lease, an interest in the tract has passed to the lessee. The *Dominion Lands Act,* and the Regulations enacted pursuant to it, give statutory effect to plans for dealing with Dominion public lands, including lands containing petroleum and natural gas, which, it must be assumed, were conceived by Parliament, and the authorities nominated by Parliament, as calculated to serve the general interest in the development and exploitation of such lands and the minerals in them. It is

(1) [1921] 2 A.C. 91, at 116-117.

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not competent to a provincial legislature *pro tanto* to nullify the regulations, to which Parliament has given the force of law in execution of such plans, by limiting and restricting the exercise of the rights in the public lands, created by such regulations in carrying the purpose of Parliament into effect. Indeed, an administrative order, which the legislature has professed to endow with the force of statute, directed against a tract of public land, the property of the Dominion, held by a lessee under the Regulations of 1910 and 1911, and which professed to regulate the exercise, by the lessee, of his right to take gas and petroleum from the demised lands, would truly be an attempt to legislate in relation to a subject reserved for the exclusive legislative jurisdiction of the Dominion by s. 91 (1), "The Public * * * Property" of the Dominion.

On these two grounds, therefore, first, that the legislation of 1932 is repugnant, in so far as it affects tracts leased under the Regulations of 1910 and 1911, to those Regulations, and the statute under which they were promulgated; and, second, on the ground that, in so far as it authorizes the Board to make regulations concerning the production of natural gas and naphtha from lands held under lease from the Dominion for the purpose of working them for the production of those minerals, it is legislation strictly concerning the public property of the Dominion; on both of these grounds, the legislation of 1932 would, if these public lands were still held by the Dominion, be inoperative, as regards the leases with which we are concerned.

As respects tracts of land held in fee simple, totally different considerations apply. Such tracts have ceased to be the public property of the Dominion, and in the absence of some Dominion enactment relating to matters comprised within the subject of the public property, that would have the effect of limiting the jurisdiction of the provinces (under s. 92 (10), (13) and (16)), there is no ground on which such legislation could, as affecting such lands, be held to be *ultra vires*. (*McGregor* v. *Esquimalt & Nanaimo Ry.* Co. (1)).

(1) [1907] A.C. 462, at 468.

We have not considered it necessary to attempt the formulation of any general rule by which (apart from the enactments of the *B.N.A. Act, 1930*) the validity of provincial legislation affecting the holders of leases and other particular and limited interests in the public lands of the Dominion may be tested. Speaking broadly, it may be stated without inaccuracy that such legislation cannot lawfully take effect if it is repugnant to some statutory enactment by the Dominion passed in exercise of its powers to legislate in relation to its public lands. This is involved in the judgment of the Judicial Committee in the *Great West Saddlery Co.* case (1) already cited. The occupant of Dominion lands under a legal right may be taxed in respect of his occupancy. But it is necessary to be cautious in inferring from this that such taxation can in every case be enforced by remedies involving the sale or appropriation of the occupant's right, without regard to the nature of that right. Where the right is equivalent to an equitable title in fee simple, probably no difficulty would arise (*Calgary and Edmonton Land Co.* v. *Attorney-General of Alberta* (2)); but if the enforcement of a tax, imposed by provincial legislation, would involve a nullification in whole or in part of competent Dominion legislation under which the right is constituted, then it is, to say the least, doubtful, whether such provisions could take effect.

The judgment in the *Great West Saddlery Co.* case (1) discussed the matter of the enforcement of a provincial tax levied upon a Dominion company incorporated under the residuary clause of s. 91. Lord Haldane there adverts to some of the difficulties attendant upon holding that it is competent to a provincial legislature to enforce the payment of a tax upon a Dominion company by a penalty involving the abrogation of some capacity or power competently bestowed upon it by the Parliament of Canada. Similar questions may be suggested as arising in other connections; for example, the question whether it is competent to a legislature to sanction measures for the enforcement of a tax imposed upon a Dominion railway which would involve the dismemberment of the railway.

In *Smith* v. *Vermilion Hills* (3), the proceeding was an action against Smith, who was assessed as tenant. The

(1) [1921] 2 A.C. 91. (2) (1911) 45 Can. S.C.R. 170.
(3) [1916] 2 A.C. 569.

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sole question in the action was that of Smith's personal liability to pay the tax. He

> was duly assessed in respect of the land comprised in the two leases, and the question is whether the assessment was valid. (P. 573.)
>
> The real question is whether this restriction (the restriction in virtue of s. 125 of the *B.N.A. Act*) prevents (the legislature of Saskatchewan) from imposing the tax in controversy upon a tenant of Crown lands. (P. 572.)

No question arose as to any remedy by proceedings affecting the title to the lands or the lease. This point was adverted to in this Court in *Smith* v. *Vermilion Hills* (1).

In *City of Montreal* v. *Attorney-General for Canada* (2), Lord Parmoor points out that the remedy of the municipality was necessarily limited in such a way as to exclude the operation of the provisions of the Charter of Montreal giving recourse against the immoveable occupied by the tenant.

Once again, as regards the amenability of occupants of Crown property to provincial laws in respect of nuisances (such as, for example, legislative provisions for the suppression of noxious weeds, mentioned in the judgment) which, as a rule, impose upon occupiers generally duties enforceable against the occupier personally by penalty, it is not out of place to observe that the validity of legislation empowering an administrative board to prescribe rules in relation to such matters, having the force of statute, with respect to any individual tract of land, including tracts which are the public property of the Dominion, might possibly, as affecting such tracts, be subject to different considerations. Where the regulations, under which Dominion lands are leased, or the stipulations of such leases, contain provisions dealing with the very subject matter of the provincial legislation, then it is quite obvious that such regulations and stipulations must prevail in case of conflict. (*Madden* v. *Nelson & Fort Sheppard Railway Co.* (3); *Can. Pac. Ry. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (4); *Can. Pac. Ry. Co.* v. *The King* (5); *Great West Saddlery Co. Ltd.* v. *The King* (6).

(1) (1914) 49 Can. S.C.R. 563, at 573-4.
(2) [1923] A.C. 136.
(3) [1899] A.C. 626.
(4) [1899] A.C. 367, at 372-3.
(5) (1907) 39 Can. S.C.R. 476, at 482-3.
(6) [1921] 2 A.C. 91, at 116-7.

We think it desirable to say this much, in order to indicate the difficulty of drawing an abstract line, assigning boundaries to the provincial fields of the general powers vested in the provinces by s. 92, and marking them off from the sphere of the essential powers of the Dominion, under one of the enumerated heads of s. 91, and s. 91 (1) in particular, or from the larger sphere which includes the Dominion's ancillary powers as well.

It may be observed, in view of some observations made by the Appellate Division, that land held under an estate in fee simple in a province is not necessarily subjected to an unlimited control by the province in the field of "property and civil rights." Such is not the case, for example, where land so held is part of a Dominion railway. (*Wilson* v. *Esquimalt & Nanaimo Ry. Co.* (1)).

It may be proper also to utter a word of caution with regard to the authority of the provinces in relation to the "confiscation" of property.

The term "confiscation," of course, connotes, according to ordinary usage, something in the nature of *privilegium,* of a special law dealing with a particular case. Now, it might be difficult, in most cases, to hold that a statute specifically appropriating to the Crown in the right of the province the interest of a lessee in Dominion lands, was not legislation dealing with the subject of the public property of the Dominion; and apart from that, it would probably also be difficult, in most cases, to escape the conclusion that an attempt to substitute the Crown as lessee, in place of a lessee, for example, who has acquired his lease under the Regulations of 1910 and 1911, was repugnant to such regulations and to the statute by which they were authorized.

We are, therefore, unable to concur with the Appellate Division in the reasons which led them to dismiss the appellant's appeal from the learned trial judge. We agree with them that the legislation of 1932 does not come within the exception set out in s. 2 of the compact. The exception is in these words:

except either with the consent of all the parties thereto other than Canada or in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province or to interests therein, irrespective of who may be the parties thereto.

(1) [1922] 1 A.C. 202, at 207-8.

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Admittedly there was no consent, and it is hardly disputed that the legislation does not apply "to all similar agreements relating to lands, mines or minerals in the Province or to interests therein."

We cannot, however, agree with the Appellate Division that the governing consideration, in applying s. 2 of the agreement, is that upon which they base their judgment. That section deals in specific terms with specific things. The Province is not to "alter," nor is it to "affect," except under conditions which, as we have said, do not exist here, ("by legislation or otherwise") "any term of any such * * * lease" of "Crown lands, mines or minerals."

We think the natural reading of these words is that which precludes the province from legislating in such a way as to "alter" or "affect" any "term of any such lease," irrespectively of any possibility that such legislation might be of such a character that it would fall under the powers of the provincial legislature, even if the public lands of the Dominion had not been transferred to the province.

We have said something to indicate some of the difficulties in the process of ascertaining the precise limits of the powers of the province to enact legislation affecting the public property of the Dominion. We think that the limits of these powers, as exercisable after the transfer of the land, were intended to be fixed by the stipulations of the agreement, as regards the matters therein dealt with; and must now, in any particular case, be determined by reference to the true construction of those stipulations.

It follows from all this that the impugned legislation is invalid in so far as it affects leases under the Regulations of 1910 and 1911.

It was not contended before us that the effect of this is to invalidate the impugned enactments in their entirety. It was not argued that, on the grounds we have been considering, the legislation ought to be held invalid in so far as it provides for the regulation of wells held under a title in fee simple. On this point we express no opinion and our judgment will be limited accordingly.

We have still to consider the question whether the statute is invalid on the ground that, as a whole, it deals with matters falling strictly under s. 91 (2), or, at all events, with matters outside the scope of s. 92. The subject has been

discussed fully, and very ably, in the judgment of the Appellate Division, and we think it right to say that, in this respect, we are in complete agreement with that judgment.

In *Union Colliery Company of British Columbia Ltd.* v. *Bryden* (1), Lord Watson, speaking for the Judicial Committee, said, at p. 587, that the Coal Mining Regulations there in question might "be regarded as merely establishing a regulation applicable to the working of underground coal mines," and he added that if that had been "an exhaustive description of the substance of the enactments, it would be difficult to dispute that they were within the competency of the provincial legislature, by virtue either of s. 92, subs. 10, or s. 92, subs. 13." We think that is what this legislation now before us in substance is: legislation providing for the regulation of the working of natural gas mines in the Turner Valley area. It rests upon those who impeach the statute as *ultra vires* on the ground that it deals with matters outside the scope of s. 92, to adduce some reason for ascribing to it another character. In this we think the appellants have failed.

The statute provides for the regulation of the wells in that area from a point of view which is provincial and for a purpose which is provincial,—the prevention of what the legislature conceives to be a waste of natural gas in the working of them. In its substance it deals neither with "trade in general" nor with trade in any "matter of interprovincial concern"; nor is there anything before us to indicate that the working of these mines (excepting, of course, the wells situate upon lands leased from the Dominion) is a matter which, by reason of exceptional circumstances, has ceased to be, or has ever been, anything but a matter "provincial" in the relevant sense.

The appeal must be allowed with costs and judgment given for the plaintiffs in accordance with the views herein expressed.

Appeal allowed with costs. Judgment declaring that the impeached legislation is invalid as respects the leasehold properties of the appellants.

Solicitors for the appellants: *Patterson & Hobbs.*

Solicitors for the respondents: *W. S. Gray* and *J. J. Frawley.*

(1) [1899] A.C. 580.