*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Barnard-Argue-Roth-Stearns Oil and Gas Company, Limited, and others* v. *Alexander Farquharson, from the Court of Appeal for Ontario; delivered the* 31*st July* 1912.

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PRESENT AT THE HEARING:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD ATKINSON.
SIR CHARLES FITZPATRICK.

[DELIVERED BY LORD ATKINSON.]

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This is an Appeal from a Judgment of the Court of Appeal for Ontario, dated the 20th November 1911, affirming the Judgment of the Chancellor of Ontario and dismissing the Appeal of the Appellants.

The Canada Company, the principal Appellant, the other Appellants being merely its licensees, was incorporated by a Charter of King George the IVth, dated the 19th of August 1826, granted in exercise of the powers vested in His Majesty by a Statute of the Imperial Parliament passed in the sixth year of his reign, entitled "An "Act to enable His Majesty to grant to a Company "to be incorporated by Charter to be called The "Canada Company certain lands in the Pro- "vince of Upper Canada, and to invest the "Company with certain powers and privileges "and for other purposes." By Patent issued by the Province of Canada dated the 12th of October

1841 the Crown granted to this Company a large tract of land in what now has become the Province of Ontario, comprising, amongst others, lot No. 6 in the eighth concession of the township of Tilbury East in the County of Kent, saving and reserving to the Crown all gold and silver that might be found on the lands granted. By deed dated the 22nd of January 1867 this Company granted to one Charles Farquharson the fee simple in the southern half of the lot No. 6 comprising 100 acres more or less.

This deed contained an excepting clause which ran as follows :—

"Excepting and reserving to the said Company their "successors and assigns, all mines and quarries of metals "and minerals, and all springs of oil in or under the said "land, whether already discovered or not, with liberty "of ingress, egress, and regress to and for the said "Company, their successors, lessees, licensees, and assigns, "in order to search for, work, win, and carry away the "same, and for those purposes to make and use all needful "roads and other works, doing no other unnecessary "damage, and making reasonable compensation for all "damage actually occasioned."

The sole question for the decision in the present case is what is the true construction of this clause. Does it or does it not except from the grant the natural gas which impregnates certain under-lying strata of these lands? The case does not require that their Lordships should lay down a definition of minerals, nor even draw the line between what are, and what are not minerals, the only question for decision is, what, having regard to the time at which this instrument was executed, and the facts and circumstances then existing, the parties to this deed intended to express by the language they have used, or in other words, what was their intention touching the substances to be excepted as revealed by that language. In one sense

natural gas is, as rock oil also is, a mineral, in that it is neither an animal nor a vegetable product, and all substances to be found on, in, or under the earth must be included in one or other of the three categories of animal, vegetable or mineral substance. It is obvious, however, for several reasons, that in this clause of the grant, the word "minerals" is not used in this wide and general sense. First, because two substances are expressly mentioned in the clause which would be certainly covered by the word "minerals" used in its widest sense, namely "metals," and "springs of "oil in or under the said land." Secondly because the words "all mines and quarries of metals and "minerals," coupled with the words "search for, "work, win, and carry away the same," do not seem to be applicable to a thing of the nature of this gas, obtainable in the way it is obtained; thirdly, because of the nature of the relation which exists between this gas and rock oil, or "the springs of oil in or under the said land," excepted in the grant and of the function which the gas performs in winning, working, or obtaining the oil from these springs; and fourthly because of the state of knowledge at the date of this deed and the way in which gas of this kind was then regarded and treated. As Lord Watson said in *The Lord Provost and Magistrates of Glasgow* v. *Farie* 13 A. C. 657, 675, "the words 'mines' and 'minerals' are "not definite terms, they are susceptible of limita- "tion or expansion according to the intention "with which they are used." It is clearly established by the evidence that this gas is not volatilized rock oil, nor is rock oil condensed natural gas. The gas is not an exhalation of the oil, nor is it held in solution by the oil to any considerable extent. The gas and the oil are in their chemical composition no doubt

both hydro-carbons, but they are distinct and different products, and it therefore could not be contended successfully, their Lordships think, that the words "springs of oil" cover this natural gas, simply because both are found, in some cases, to impregnate the same subterranean porous stratum, and that when this stratum is tapped by a pipe or boring leading to the surface the gas in its escape to the upper air helps to bring up to the surface with it some of the oil. In some instances a stratum almost entirely impregnated with gas is found separated by a stratum impervious to both gas and oil from a stratum almost entirely impregnated with oil. Both the impregnated strata are then tapped by pipes so arranged that the gas performs the same function as in the other case, bringing, or helping to bring, the oil to the surface; but in both cases, when the pressure under which the gas is pent up in the earth is relieved, a pump has to be used to pump up the oil. Again, it was proved at the hearing before the Chancellor by the Chief Commissioner, that oil mining leases only began to be made by the Canadian Company in the year 1863. At the date of this deed, the 22nd of January 1867, the winning of mineral oil through wells was a comparatively new industry. This natural gas, according to the witness Mr. W. H. Dowd, did not become commercially valuable till the year 1880. And, according to the evidence of Mr. Coste and others, the accuracy of which does not appear to have been questioned, though gas might be found without the presence of oil, some gas was always found where oil was found, but the gas was regarded as a dangerous and destructive element to be got rid of as it best could. It did not begin to be utilised till the year 1890, over 20 years after the date of the deed. The inference to be drawn from this

evidence appears to their Lordships to be that the idea of preserving the ownership of this product, whose presence was regarded in the year 1867, and for many years after, as a dangerous nuisance, never occurred to the parties to the deed of the 22nd of January 1867.

If, in the attempt to exclude from the grant and preserve to the granting Company what was then esteemed a valuable subject of property believed to be in the soil parted with, namely oil, a term was used which in its wide sense would cover this then worthless product, gas, the parties never intended, their Lordships think, to use that term in this wide sense.

It has been strongly insisted upon in argument on behalf of the Appellants that it will be impossible for the Company to take advantage of this exception, and win and carry away oil from these springs unless they are held to be entitled to the gas also. The gas is now separated from the oil where they well up together, by a drip tank, and conducted into some receptacle from which it can, when needed, be drawn, but they contend that this could not be done if the ownership of the two substances was divided. No doubt some inconvenience might be caused. That, however, can hardly affect this question of construction. The Company are clearly entitled to search and work for oil in these springs of oil, and to win and carry it away from them provided they do so in a reasonable manner, and do as little injury as is practicable. While the point does not arise in this Appeal for decision, their Lordships think that the Company would not be responsible for any inconvenience or loss which might be caused to the Respondent or to the owners of the estate of the grantee in the conduct of their operations in the manner mentioned. But however that may be, their Lordships are on

the whole of opinion that on the only question raised for their decision, the construction of the excepting clause in the Company's deed of the 22nd of January 1867, the decision appealed from was right and should be affirmed, and this Appeal should be dismissed, and they will humbly advise His Majesty accordingly. The Appellants must pay the costs of the Appeal.

# In the Privy Council.

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**THE BARNARD-ARGUE-ROTH-STEARNS OIL AND GAS COMPANY. LIMITED, AND OTHERS**

*v.*

**ALEXANDER FARQUHARSON.**

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DELIVERED BY LORD ATKINSON.

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