20, 1959

IN THE PRIVY COUNCIL No. 7 of 1959

55503

On Appeal from the Supreme Court of Canada

B E T W E E N PONOKA-CALMAR OILS LIMITED and AMERICAN LEDUC PETROLEUMS LIMITED . Appellants

- and -

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

C A S E for the RESPONDENTS EARL F. WAKEFIELD COMPANY

Record

1. This is an appeal by special leave by the Appellants Ponoka-Calmar Oils Limited and American Leduc Petroleums Limited from a judgment of the Supreme Court of Canada delivered on the 22nd day of April 1958. By the said Judgment the Supreme Court of Canada reversed a Judgment of the Appellate Division of the Supreme Court of Alberta pronounced on the 25th day of June 1957 by which the Supreme
10 Court of Alberta reversed a Judgment of the Honourable Chief Justice C.C.McLaurin entered

Record

on the 14th day of March, 1956.

2. The principal issues to be determined in this appeal are as follows:-

(i) Whether the first Respondents had a valid mechanic's lien (within the meaning of The Mechanic's Lien Act (Revised Statutes of Alberta, 1942, Chapter 236) as amended) against all mines and minerals within upon or under certain lands in the Province of Alberta.

(ii) Whether the Respondents were entitled to recover $30,000 from funds in the possession of a Receiver appointed by the Court.

(iii) Whether the Appellants were "owners" against whose interests in the produce of the said lands the said lien was enforceable by the first Respondents within the meaning of Sections 2 (g), 6 (1) and 43 of the said Act.

(iv) Whether after the appointment of the said Receiver by the Court as aforesaid it was necessary to file with the Court an affidavit verifying the interest of the lien holders in accordance with Section 24 (6) of the said Act and whether, in default of the filing of such affidavit as aforesaid, the said lien ceased to exist on the expiration of 6 years from its original registration.

(v) Whether by reason of the failure of the first Respondents to file such affidavit

Record

as aforesaid they ceased to have any claim against the said funds in the hands of the Receiver.

3. At the trial of this action before the Court of First Instance in Alberta an agreed statement of facts was filed by the parties together with the relevant documents referred to therein. The following, as appears from the said statement and from the said documents, are the principal material facts arising out of the case:- pp.33-78

(i) At all material times, the third Respondent was the registered owner of an estate in fee simple in certain lands in Alberta, 80 acres in extent, hereinafter called the said lands, subject to a reservation in favour of the Canadian Pacific Railway Company of all coal. p.33

(ii) On the 31st day of May, 1948, the third Respondent granted to five named individuals (including one Duitman and one Morrisroe) a lease of all petroleum, natural gas, natural gasoline and related hydrocarbons to be found within, upon or under the said lands. By the said lease the lessees were obliged to commence a well for petroleum and natural gas within two years of the date of the lease, and thereafter continuously to carry on the work until either petroleum, oil or gas should be struck in a quantity of at least 30 barrels per day or the lessees should be reasonably convinced that no such production would be reached. The p.33

Record

lessees were entitled to assign the lease.

p.33 (iii) On the 10th day of September, 1949, the first Respondents on the instructions of one Harding and one McMullen began to drill an oil well on the said lands. The said well had by the 23rd day of September, 1949, reached a depth of 2570 feet. The said drilling was commenced on the authority of a permit issued before drilling to the second Respondents.

p.35 (iv) On the 19th day of September, 1949, the second Respondents were incorporated. The said Harding and the said McMullen were the only shareholders in the said Company and the said Harding was President and the said McMullen Secretary and Treasurer of the said Company.

pp.33 and 70-77 (v) On the said 19th day of September, 1949, an agreement was made between the first Respondents as contractor and the second Respondents as owner, whereby the first Respondents undertook to drill a well for the production of oil and gas on the said lands. Drilling was to be begun on or before the 15th day of September, 1949, and for their work in carrying out the said drilling the first Respondents were to be remunerated as follows:-

p.73 (a) By a payment of $50,000

(b) By the payment of the cost of all

Record

materials purchased where, in accordance with the agreement, the owner was to supply such materials.

(c) By day work rates for coring and (pursuant to clause 13 of the said agreement) for periods when operations were suspended owing to the fault of the owner, at a rate of $25.00 per hour.

10 By Clause 18 of the said Agreement the first Respondents were to receive $10,000 when the well was spudded in and periodic payments on the 1st and 15th days of each month. In addition the second Respondents were to deposit with the Prudential Trust Company the sum of $40,000 upon which the first Respondents could draw as the work progressed. p.74

20 (vi) On the 21st day of September, 1949, the lessees from the third Respondent under the lease of the 31st day of May, 1948, assigned to the first Appellants all their right, title and interest in and to the oil and gas rights in the said lands. By the said assignment, the first Appellants assumed all the obligations of the lessees to the third Respondent under the said lease. pp.33 and 50-56

30 (vii) On the 23rd day of September, 1949, the first Respondents having by then drilled the said well to the depth of 2570 feet, informed the second Respondents that p.34

Record

they would drill no further until they were paid for the work which they had done in accordance with the said agreement of the 19th day of September, 1949.

(viii) On the 24th day of September, 1949, an agreement, hereinafter called the pooling agreement, was made between the Appellants (described therein as owners), the second Respondents (described therein as the operators), the Prudential Trust Company Limited and the said Harding and McMullen (described therein as agents) whereby the Appellants assigned to the Prudential Trust Company Limited all their rights in the said and certain other lands and all their rights in the production of natural gas and hydrocarbons from the said and the said other lands and it was provided that all the gross proceeds of any wells drilled in the said and the said other lands under the said pooling agreement were to be divided by the Prudential Trust Company Limited, subject to the payment of royalties and certain other expenses, in certain defined proportions between the first Appellants the second Appellants the said Harding and the said McMullen and the second Respondents.

pp.33 and 56-68

p.57

p.58

The pooling agreement recited (inter alia):-

p.57

(a) That the parties of the first part (that is to say the Appellants)

Record

"desire to have the party of the second part (that is to say the second Respondents) drill or have drilled wells for petroleum and/or natural gas on the said properties (that is to say the said lands)" and

(b) That the agents (i.e. the said Harding and the said McMullen) have assisted "in arranging for the drilling of the said wells". p.58

The pooling agreement provided (inter alia)

(a) By clause 3 thereof "On or before the 20th day of September A.D. 1949, the Operator (that is to say the second Respondents) shall at its sole expense commence to drill or cause to be commenced to be drilled one well on the said lands and will thereafter continuously and diligently prosecute and carry on or cause to be prosecuted and carried on the work of drilling and casing such well ....." and p.59

(b) By Clause 10 thereof in the event of the Operators failing to drill within the time limited (provided the Owners shall not be in default thereunder) they should be liable to the Owners for such default or the Owners would have the option p.62

Record

terminating the agreement in which event the first Appellants would have an undivided three-fourths interest in such lands as wells had not been drilled in and the second Appellants an undivided one-fourth interest.

The said agreement was executed on behalf of the first
p.68 Respondents by the said Duitman and the said Morrisroe.

(ix) On the 26th day of September, 1949,
p.34 the first Respondents received a cheque from the second Respondents for $3000, which cheque was dishonoured upon presentation. The first Respondents have received no payment whatsoever from any person for the equipment material and services supplied pursuant to the said agreement of the 19th day of September, 1949.

(x) On the 14th day of October, 1949, the
pp.34 and 78 first Appellants served notice on the second Respondents, pursuant to the pooling agreement, that they had failed continuously and diligently to prosecute and carry out or cause to be prosecuted and carried out the work of drilling the said well on the said land and that if such default was not remedied within 30 days from the receipt of the said notice the said pooling agreement should thereupon cease and determine.

Record

(xi) On the 16th day of October, 1949, the first Respondents applied to the Petroleum and Natural Gas Conservation Board of the Province of Alberta for a permit to plug the said oil well and abandon it. On the 22nd day of October, 1949, the said permit was duly received and the said well was plugged and abandoned. p.34

(xii) Between the 23rd day of September, 1949 and the 14th day of October, 1949, the first Respondents did not drill the said oil well though they were ready willing and able to do so and would have done so had they received payment from the second Respondents in accordance with the said agreement of the 19th day of September, 1949. p.34 pp.69-77

(xiii) During the month of January, 1950, the said oil well drilled by the first Respondents was deepened and producing horizons and was subsequently completed and has since produced a considerable quantity of oil. The work and services rendered by the first Respondents was competent and skilful and for the benefit of the Appellants and all the other Respondents. p.35

(xiv) The agreed value of the work done and the material supplied by the first Respondents, not including compensation for the period from the 23rd day of September, 1949 to the p.34

Record

p.35 16th day of October, 1949, was $30,000. The agreed value of day work was $14,075 and material purchased by the first Respondents for the account of the second Respondents was $1670.62.

p.33 (xv) There was no agreement between the first Respondents and the Appellants or any of the other Respondents that the first Respondents should not be entitled to a Mechanics' Lien under the provisions of the said Act.

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

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

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

x x x x x x x

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

(i) upon whose credit; or
(ii) upon whose behalf, or
(iii) with whose privity and consent; or
(iv) for whose direct benefit, -

Record

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

x x x x x x x

6. (1) Unless he signs an express agreement to the contrary and in that case, subject to the provisions of Section 4, a person who performs any work or service upon or in respect of or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving, demolishing, or repairing of any improvement for any owner, contractor or sub-contractor, shall by virtue thereof have a lien for so much of the price of the work, service or materials as remains due to him in the improvement and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work or service is performed, or upon which the materials are to be used.

x x x x x x x

(4) When a lienholder's claim is for work, service or material supplied, -

(a) for any mining or drilling operation; or

(b) to prospect for or recover any mineral;

Record

the lien given by sub-section (1) shall attach only to the mineral and shall not attach to the surface of the land.

x x x x x x

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

x x x x x x

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

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

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

Record

and twenty days) after the completion or abandonment of the contract or sub-contract, as the case may be.

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

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

x x x x x x

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

(2) Every registered lien shall absolutely cease to exist on the expiration of thirty days after notice has been either served as process is usually served or sent by registered mail in Form 5 of the Schedule, or to the like effect, to the lienholder at or to

Record

the address stated in the claim for lien registered in the Land Titles Office, or if a notice of a change of address for service has been registered in the Land Titles Office then at or to the address given in the last notice of change of address so registered, unless before the expiration of the said period of thirty days, the lienholder takes proceedings in court to enforce his lien and files or causes to be filed a certificate of lis pendens in Form 6 of the schedule, or to the like effect, in the proper Land Titles Office.

x x x x x x

(6) Every registered lien, whether a certificate of lis pendens has been filed or not, shall absolutely cease to exist on the expiration of six years from the date of registration of the lien unless before the expiration of that period and not more than two months before its expiration the lienholder, his assignee, agent or any person claiming through or under him, files in the office of the Registrar of Land Titles a statement verified by affidavit setting out the interest of the lienholder and the amount still owing for principal and interest, which statement may be in

Record

Form 7 in the schedule or to the like effect with such variations as the circumstances may require.

25. The Registrar shall, on receiving a certificate under the seal of the clerk of the court wherein any proceedings in respect of any lien registered in the Land Titles Office within the jurisdiction of the Registrar are pending, stating the names of the lienholders, parties to the proceedings, and that the amount due by the owner in respect of the liens has been ascertained and paid into court pursuant to an order of the court or judge, or that the property has been sold to realise the liens, or that a judgment or order has been made declaring that a lien has been improperly filed or that the lien has otherwise ceased to exist, or, on receiving a statement in writing signed by the claimant or his agent that the lien has been satisfied, cancel all liens registered by such parties.

26. (1) Upon application by originating notice, a judge having jurisdiction may allow security for or payment into court of the amount of the claim and such costs as the judge may fix, and may thereupon order that the registration of the lien be vacated or may vacate the registration upon any other proper ground and a certificate of the order may be registered.

Record

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

x x x x x x

30. (1) Proceedings to enforce a registered lien may be commenced either by a statement of claim, or by originating notice, and in either case by the filing of a certificate of lis pendens in Form 6 of the schedule in the proper Land Titles Office.

(2) The certificate may be granted by the Court or judge in which or before whom the proceedings are begun or by the clerk of the court.

x x x x x x

35. (1) Upon the hearing of the application the judge shall decide all questions which arise therein or which are necessary to be tried in order to completely dispose of the action and to adjust the rights and liabilities of all parties concerned, and shall take all accounts, make all enquiries and give all directions and do all other things necessary to try and otherwise finally dispose of all matters, questions and accounts

Record

arising in the proceedings and to adjust the rights and liabilities of and give all necessary relief to all parties concerned and shall embody all results in the judgment, which judgment may direct payment forthwith by the person or persons primarily liable to pay the amount of the claims and costs as ascertained by the judgment, and execution may be issued therefor forthwith.

x x x x x x

36. The Judge may at any time prior to the sale of the property, upon application of any lien-holder, appoint a receiver to take charge of the property and rent it on such terms and conditions as the receiver thinks fit, such rents to be applied, after deduction of all rates, taxes, insurance or other expenses necessary for the maintenance thereof, including the costs of management, as may be fixed by the judge at the time of the appointment of the receiver, and thereafter any balance remaining shall be applied as directed by the judge.

x x x x x x

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

Record

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

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

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

x x x x x x

46. It shall not be necessary to set out in the claim for lien set out in section 19 the name of the owner or alleged owner and the provisions in that regard contained in the forms in the schedule shall not be applicable in the case of oil and gas wells.

47. In appointing a receiver pursuant to

Record

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

5. On the 12th day of October, 1949, the first Respondents filed a mechanics' lien pursuant to the provisions of the said Act against the said lands for the sum of $28,849.33. On the 18th day of October, 1949, the first Respondents filed a further mechanics' lien charging the said lands with a further sum of $36,896.29. pp.5 & 6

6. The first Respondents' Statement of Claim to which all the other parties were Defendants was delivered on the 5th day of December, 1949. The Defendants Halwa, Davis, Matvichuk, Berg, Gauf and Pyrch were joined as Defendants by virtue of Caveats filed by them against the said lands, whereby they claimed to have an estate or interest or right in the oil and gas from the said lands when severed. The Statement of Claim recited the facts summarised in paragraphs 3 and 5 hereof and claimed (inter alia) a declaration that the Mechanics' Liens filed by the first Respondents against the said lands were good valid and subsisting liens, judgment against the second Respondents for $65,745.62 and the appointment of a Receiver pursuant to Section 36 of the said pp.1-7

Record

Act with all the powers permitted by the said Section and Section 47 of the said Act.

pp.8-18 7. The first Appellants delivered their Defence on the 15th day of December 1949. Therein they denied all the material allegations in the Statement of Claim and alleged:-

pp.8-13 (i) That if the first Respondents had given notice to the second Respondents to terminate the said Agreement of the 19th day of September, 1949, that notice was given improperly and without justification.

pp.11 & 12 (ii) That if the first Respondents had filed Mechanics' Liens against the said lands as alleged, such Liens had been improperly filed and were not valid and subsisting liens.

p.12 (iii) That any agreement between the first and second Respondents was not binding on the first Appellants and did not entitle the first Respondents to file liens against the first Appellants' interest and title in the said lands; and

p.12 (iv) That the first Appellants were not owners in "within the meaning of the said Act".

pp.13-15 8. That the second Appellants delivered a Defence whereby they denied all allegations in the Statement of Claim and alleged:-

Record

(i) That the pooling agreement had become null and void by its terms and that the second Appellants had no further interests in the said lands. p.13

(ii) That if the pooling agreement was still in effect, the first Respondents were not entitled to a lien against the said lands, because they had not employed proper or suitable equipment. p.14

(iii) That the first Respondents' failure to complete the said contract was due to their use of improper equipment; and p.14

(iv) That if the first Respondents were entitled to any lien against the said lands and if the second Appellants had any interest therein, the second Appellants were liable for only 15% of the consideration for the performance of the work; and p.14

(v) That the first Respondents were entitled to a lien, if at all, only for the cash equivalent of the amount of improvement they had made or the amount of labour and materials which they had actually used on improvements of the said lands; and p.14

(vi) That the lien filed on the 18th day of October, 1949, superseded and nullified that filed on the 12th day of October, 1949, and was itself improperly filed and null and void, p.14

Record

and they relied on the provisions of the said Act.

pp. 19 & 20

9. On the 22nd day of June, 1950, on the application of the first Appellants, made in the action, the Honourable Mr. Justice S.J. Shepherd made an order appointing the Prudential Trust Company Limited as receiver of all moneys from the sale of oil produced out of the said land, which monies were to be held, subject to the payment thereout of the costs of production and of operation of the well and a royalty of 12½% due to the third Respondent, to the credit of the action.

pp. 79-84

10. The action came on for trial before McLaurin, C.J.T.D. on the 2nd day of November, 1955, and the 14th day of March, 1956, when the agreed statement of facts was put in. The learned Chief Justice held

pp. 82-84

that the first Respondents had a valid lien for $30,000 against all mines and minerals within upon or under the said lands and ordered that the said sum be recovered from the funds held by the receiver. The effect of Section 24 (6) of the said Act was not raised before him.

pp. 22-25

11. The Appellants appealed to the Appellate Division of the Supreme Court of Alberta. Among the grounds of appeal in their respective Notices they alleged that the learned Chief Justice should have held that the first Respondents had no valid mechanics' lien and had erred in maintaining the lien notwithstanding the first Respondents' failure to comply with the provisions of the

Record

said Act and in particular with the provisions of Section 24 thereof. The first Respondents cross-appealed for a declaration that they had a valid lien for $65,745.62, and in the alternative that they were entitled to the payment of that sum from the monies held by the receiver. p.28

12. The said appeal was heard by Ford, C.J.A. and Macdonald, McBride, Porter and Johnson, JJ.A. on the 15th and 20th days of March, 1957, and judgment, allowing the appeal and giving the first Respondents judgment against the second Respondents for $51,670.62 was given on the 25th day of June, 1957. pp.103-104

13. The reasons of the majority, Ford C.J.A. and Macdonald and Porter J.J.A. were delivered by Porter J.A. The learned Judge declined to draw the inference that the pooling agreement merely recorded an antecedent arrangement made through the said Harding and the said McMullen with all the parties. He said that the first Respondents were claiming a lien for work begun on the 10th day of September, 1949 against a Company which was not incorporated until the 19th day of September, 1949, and that even under the pooling agreement neither the second Respondents nor the said Harding nor the said McMullen acquired any interest in the property but merely became entitled to a share of the proceeds of the production set out in that agreement. The pp.96-102 p. 99 l.21

Record

p.99 ls.30-33

learned Judge therefore concluded that from the beginning to the end of the drilling by the first Respondents they had not done any work "for an owner" as defined in the said Act.

pp.85-9;

14. The reasons of McBride J.A. and Johnson J.A. were delivered by McBride J.A. He held that there was a burden on the first Respondents to satisfy the Court that their liens had not ceased to exist and that the appeal could be disposed of on the ground that by reason of Section 24 (6) of the said Act the said liens had absolutely ceased to exist before the trial, the first Respondents not having filed a renewal statement of the said liens within six years of their original filing. He rejected the first Respondents' contention that on the making of the receivership order the liens had been terminated and there had been substituted for them a claim against the funds raised from the sale of oil by the receiver. The learned Judge held following Glebe Sugar Refining Company Limited v. Trustees of Port and Harbours of Greenock (1921) 2 A.C. 66 that the appeal must succeed on this ground notwithstanding that it had not been taken in the Court below.

p.31

15. The first Respondents appealed to the Supreme Court of Canada. The appeal was heard on the 5th and 6th days of February, 1958 by Kerwin, C.J. and Rand, Locke, Fauteux and Abbott, J.J., and judgment allowing the appeal, was given on the 22nd day of April, 1958. The judgment of the Supreme Court of Alberta was set aside save

pp.107-108

Record

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

16. The judgments in the Supreme Court were delivered by Rand J. (with whom the Chief Justice and Abbott, J. concurred) and Locke J. (with whom the Chief Justice and Fauteux concurred). pp. 107-123

17. Rand J. held that the sole purpose of the provision for the registration of liens was to bring the charge by way of lien into harmony with the law affecting land titles, but the lien arose from the beginning of the work and furnishing of materials and that registration was "essentially for the purpose of protecting the title to an interest in or against an estate in land". Under Section 26 of the said Act, a judge might allow security for or payment into Court of the amount of the claim and the lien was thereupon vacated. The effect of that was to bring the lien to an end and to replace it with a charge on the monies paid into Court. Failure to comply with Section 24 (6) of the said Act could not affect the new charge, which pp. 109-117 p. 111

Record

was not registrable. The learned Judge went on to consider the question whether
p.114 a lien ever arose and concluded that the effect of the agreement of the 19th day
p.115 of September, 1949, was that the second Respondent adopted all work done up to that time. Further the effect of the pooling agreement of the 24th day of
p.116 September, 1949, was that as a result of the interest in the proceeds acquired by the second Respondents the lien covering the entire work became effective. The Appellants by the pooling agreement had ratified and bound themselves to the second Respondents' recognition and inclusion of the work which had been done before the 15th day of September, 1949. They therefore clearly came within the definition of Section 43 of the said Act as being persons having "any interest or right in the oil or gas when severed notwithstanding that such person has not requested the contract work to be done .....". That Section, the learned Judge said, was by its exceptional terms undoubtedly passed to meet just such situations as occur in the present case, that is to say situations brought about by the urgency and exploiting natural resources, in which formal agreements could not keep pace with the actions of the parties and the rights of the parties could only be

Record

determined by relation back.

18. Locke J. held that there was an irresistible inference from the agreed facts that the Appellants knew of, and, by the pooling agreement, intended to approve the arrangements which had previously been made between the second Respondents and the first Respondents as work done under the contract. Although the second Respondents were not incorporated when Harding and McMullen on the 10th day of September, 1949, requested the first Respondents to do the work, nevertheless the pooling agreement recited that Harding and McMullen had "assisted in arranging for the drilling of the said wells", only one well, that on the land in question, had been drilled, and the circumstances indicated that the said Harding and McMullen had been authorised to make these arrangements with the first Respondents either on behalf of the lessees from the third Respondent or from the instructions of the first Appellants. The pooling agreement was signed on behalf of the first Appellants by the said Duitman and the said Morrisroe, two of the lessees from the third Respondent, and from these and other circumstances it was proper to draw the inference that the said Harding and the said McMullen had been authorised either by the individual lessees from the third Respondent or on behalf of the first Appellant to request the first Respondents to do the work, and that drilling done by the first Respondents from the 10th day of September onwards was done with the privity

pp.117-123

Record

and consent of the said lessees and the first Appellant. The learned Judge accordingly held that the said lessees and the first Appellant were owners within the meaning of the said Act. He added that he agreed with the Judgment of Rand J. on the question arising under Section 24 (6) of the said Act.

19. That the first Respondents humbly submit that the judgment of the Supreme Court of Canada is right and ought to be affirmed for the following among other

R E A S O N S :-

(i) Because it is an irresistible inference to be drawn from the full facts of the case that the said Harding and the said McMullen in requesting that the first Respondents do the work of drilling and the second Respondents in entering into the said agreement of the 19th day of September, 1949, were acting as agents for inter alia both Appellants.

(ii) Further or in the alternative because the effect of the drilling agreement of the 19th day of September, 1949, was that the second Respondents adopted and ratified the acts of the said Harding and the said McMullen in requesting the first Respondents to do the said work and the effect of the pooling agreement of the 24th day of September, 1949, was that the Appellants adopted and ratified the acts of the said Harding and the said McMullen

Record

and the second Respondents in requesting the first Respondents to do the said work.

(iii) Further or in the alternative because the further effect of the said pooling agreement was to give to both the Appellants an interest in oil from the said land when severed.

(iv) Because following the decision of the Court in Hager v. United Sheet Metal Limited (1954) S.C.R. 384, the word "owner" in the Mechanics' Lien in the said Act extends to both those who are registered as owners and to those whose interests are not registered.

(v) Because in the premises the Appellants were "owners" within the meaning of Section 29 and Section 43 of the said Act.

(vi) Because the effect of the Receiving Order of the 22nd day of June, 1950, was to terminate the said lien and/or merge the same in a charge on the fund of moneys thereby ordered to be brought into existence in the hands of the Receiver.

(vii) Because such charge was not vitiated, and did not fail by reason of any failure to file the statement verifying the lien under Section 24

Record

(6) of the said Act.

(viii) Because the first Respondents' claim against the said fund of money in the hands of the Receiver was not a lien for which registration was required under Section 24 of the said Act.

(ix) Because, in any event, the Defence under Section 24 (6) of the said Act was not pleaded by either of the Appellants and they ought not to have been heard to rely upon the same.

J. V. H. MILVAIN
R. A. MacKIMMIE
J. H. LAYCRAFT
W. PERCY GRIEVE
DAVID SMOUT

IN THE PRIVY COUNCIL

On Appeal from the Supreme Court of Canada

PONOKA-CALMAR OILS Ltd. and AMERICAN LEDUC PETROLEUMS Ltd.

v.

EARL F. WAKEFIELD COMPANY
OIL CITY PETROLEUMS (LEDUC) Ltd.
HARRY SZPILAK
KASPAR HALWA
ALVIN M. DAVIS
PETER MATVICHUK
ALVIN M. BERG
JACOB B, GAUF and
ALEX JOHN PYRCH

C A S E

- for -

the Respondents EARL F.WAKEFIELD COMPANY

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