THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU CANADIEN

VOL. XL SEPTEMBER 1962 SEPTEMBRE NO. 3

THE RESERVATION OR EXCEPTION OF MINES AND MINERALS

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I

In England for over a century and in the United States and Canada for somewhat lesser periods respectively, the courts have attempted, with varying degrees of success, to characterize the interest that remains in the hands of a person who grants an interest in land subject to a reservation or exception of all mines and minerals. It is a paradox that words as simple as "reserving and excepting all mines and minerals" should generate such conflict of views and such confusion of concepts. Indeed, Lord Loreburn was moved to remark in *Caledonian Railway Company* v. *Glenboig Union Fireclay Company* that ". . . no definition of 'minerals' is attainable, the variety of meanings of which the use of the word 'minerals' admits of being itself the source of all the difficulty".[1] And since the stakes are usually high in any dispute concerning the ownership of mines and minerals, it is not surprising that litigation thereon has proliferated over the years.

The dictionaries are of only limited help to the courts on the subject of mines and minerals. In the third edition of the *Shorter Oxford English Dictionary,* the noun "mine" is said to mean "An excavation made in the earth for the purpose of digging out metallic

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[1] [1911] A.C. 290, at p. 299.

ores, or coal, salt, precious stones, etc. Also the place yielding these". The word "mine", when used in a verbal sense, means "to dig in the earth . . . to make subterranean passages . . . also to make a hole, passage, etc. underground . . . to obtain from a mine . . . to dig for minerals".

The same dictionary defines the word "mineral" as "Any substance which is obtained by mining . . . . Any natural substance that is neither animal nor vegetable . . . having the nature of a mineral obtained by mining".

The fourth edition of *Black's Law Dictionary* defines the word "mine" as "an excavation in the earth from which ores, coal or other mineral substances are removed by digging or other mining methods, and in its broadest sense it denotes the vein, lode or deposit of minerals. It may include open cut, strip or hydraulic methods of mining".

A "mineral" is "Any valuable inert or lifeless substance formed or deposited in its present position through natural agencies alone, and which is found either in or upon the soil of the earth or in the rocks beneath the soil".

Other dictionaries contain substantially similar definitions of the terms "mine" and "mineral". It is obvious that the dictionaries alone cast only the glimmer of a candle upon what these terms might mean in any controversy over the ownership of mines and minerals. The law that has developed upon the subject is not simple, consistent or precise, and even to this day the great many decisions of the courts clarify but a few of the possible ramifications of the ownership of mines and minerals.

II. *The English Concept.*

Halsbury has this to say by way of a general proposition concerning the meaning in law of the word "mine":

> The word "mine" is not a definite term, but is one susceptible of limitation or expansion according to the intention with which it is used. The original or primary meaning of the word is an underground excavation made for the purpose of getting minerals. In particular contexts, however, the word has been given a number of differing secondary meanings. Thus it has been interpreted so as to include a place where minerals commonly worked underground are in the particular case being worked on the surface, as in certain iron mines and in opencast coal workings . . . .
>
> A further meaning of the word "mine" comprehends not only the mineral deposits but also so much of the adjoining strata, whether superjacent or subjacent, as it may be necessary to remove for the purpose of working the mineral in a proper manner. The word has

> even been given, in some cases, a meaning which includes not only the mineral itself but also the space created as the mineral is being worked, and the space left when the mineral has been worked out.[2]

This general statement concerning the legal meaning of the word "mineral" is also of more than passing interest:

> It is a question of fact, whether in a particular case a substance is a mineral or not, and for this purpose instruments between private persons are subject to the same rules of construction as statutes. Regard must be had not only to the words employed to describe the substance in question, but also to the relative position of the parties interested, and to the substance of the transaction or arrangement which the instrument or statute embodies.[3]

The cases in England upon the ownership of mines and minerals have certainly not lacked for diversity of conclusions. For instance, asphalt, bog earth, brick clay, brick earth, coal, common clay, China clay, London clay, terra cotta clay, coprolites, fire clay, flints (under the surface), gravel, granite, limestone, marl, marble, peat earth, pitch, red rock, salt, sandstone, sand and stone have all been held in some decision to be minerals. Most of the substances mentioned in this rather impressive list have also been held at one time or another to be other than minerals, thus again proving, if any further proof is necessary, that even judicially, variety can be the spice of life.

Whether or not a particular substance is a mineral is a matter the proof of which apparently lies with the person asserting that it is a mineral. Halsbury cites the well-known cases of *North British Railway* v. *Budhill*[4] and *Barnard-Argue-Roth-Stearns* v. *Farquarson*[5] in support of the following statement of the law on the point:

> The onus of proof that a particular substance was, at the date of the document to be construed, or is at the present day, regarded as a mineral is upon those raising the contention, and it will be assumed that the meaning of the word "minerals" at the date of the document in question was the same as it is at the present day, unless there is evidence to the contrary. Where, however, there is a contract, the meaning to be applied will be the meaning at the date of the contract, even though a considerable period elapses before the formal conveyance is executed.[6]

The English cases on this subject have not belaboured the distinction between an "exception", which is always part of the thing granted, and a "reservation", which is a benefit in respect of the subject matter of the grant that is kept by the grantor for himself.

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[2] Halsbury's Laws of England (3rd ed., 1959), Vol. 26, p. 317.
[3] *Ibid.*, p. 320.
[4] [1910] A.C. 116.
[5] [1912] A.C. 864.
[6] *Op. cit.*, footnote 2, p. 324.

However, this distinction has been recognized and respected by the courts in the cases hereafter commented upon.

The very early English cases were heard by courts that dealt with the terms "mines" and "minerals" in a manner which exhibited their confidence in the inherent simplicity of the semantics of these terms. He who reserved or excepted "mines" or "minerals" to himself retained full ownership in everything which was beneath the surface of the ground, so long as it was neither animal nor vegetal. For example, in 1855, Kindersley V.C. held in *Darvill* v. *Roper* that "mining is when you begin only on the surface, and, by sinking shafts or driving lateral drifts, you are working so that you make a pit or tunnel, leaving a roof overhead".[7] He was convinced that the physical characteristics of mining were safe criteria of what was a mine and what was not.

In *Bell* v. *Wilson*, Turner L.J. defined "mines" as "underground workings", as opposed to a "quarry" which he defined as "a place upon or above, and not under, the ground".[8] Again, only the physical characteristics of the operations were considered by the court as useful in determining the issue of ownership of the mines.

Questions concerning the extent of an exception or reservation to the grantor of an interest in mines were also handled unhesitatingly by the English courts of an earlier day. In 1865, Wood V.C. held, in deciding *Proud* v. *Bates:* "There is no doubt that the whole containing chamber which has the minerals is the mine."[9] This was to be a prophetic statement indeed.

In *Bellacorkish* v. *Harrison*, Lord Penzance, speaking for the Privy Council, held: "It is not a mere liberty to work the mines which the lord has; but the Act affirms that he has excepted out of the grant not only the minerals but that portion of the soil which contains the minerals and which constitutes the 'mine'."[10]

Three years later when *Ramsay* v. *Blair*[11] came before the House of Lords, Lord Selborne held that: ". . . coal and coal mines mean, I apprehend, when unopened mines are spoken of, nothing more nor less than the veins or seams of coal underlying the surface."[11] Lord Chelmsford, in the same case, added that, contrary to a mere grant of coal and coal mines, ". . . upon a grant or reservation of minerals, *prima facie* it must be presumed that the minerals are to be enjoyed, and therefore that the power to get them must also be granted or reserved as a necessary incident".

[7] (1855), 3 Drew 294, 61 E.R. 915, at p. 918.
[8] (1866), 35 L.J. Ch. 337, at p. 340. [9] (1865), 34 L.J. Ch. 406.
[10] (1873), L.R. 5 P.C. 49, at p. 62. [11] [1876] 1 A.C. 701, at p. 705.

A reservation or exception of mines was therefore, at that time at least, an interest of considerable proportions, including as it did not only the minerals themselves but also the chamber containing the minerals, as well as a right to disturb the surface and intrude into the subsoil and ordinary rock to the extent necessary to get the minerals.

A significant number of the early English cases that dealt with the ownership of mines and minerals were brought before the courts on the principle of "outstroke", a term in mining parlance which was and still is used to refer to the right, in searching for and mining a prime mineral, to mine out so much of the surrounding rock as may be necessary to build adequate passageways for the transportation of the prime mineral to the surface. A right of "outstroke" may in some cases include a right to carry not only the prime minerals mined from the property in question, but also to carry along these passageways for removal to the surface other minerals mined from other lands.

The leading early decision on "outstroke" is *Bowser* v. *Maclean*.[12] In this case, the plaintiff was the owner of a certain copyhold estate called Cockton Hill. The defendant owned a colliery called the Woodhouse Close Colliery, and held a lease of all mines beneath Cockton Hill as well as beneath certain adjoining properties, together with a right to work all of the same. While working his mines, the defendant made a tramway beneath the Cockton Hill estate, along which he hauled coal which he dug from beneath that estate, as well as coal dug by him from beneath adjoining properties. The plaintiff sued for, *inter alia*, an injunction to prevent a continuance of the hauling of coal from these adjoining properties by the defendant along this tramway. The injunction was refused at the trial before Stuart, V.C. and on appeal, Lord Campbell L.C. observed that since the plaintiff was seized of Cockton Hill estate in copyhold, with only the surface let to one Hutchinson, then:

> . . . *prima facie*, the soil from the surface to the center of the earth belongs to the plaintiffs, and the possession of the whole, except the surface so let, remains in the plaintiffs. This being copyhold, the property in the minerals is in (the plaintiffs) and they have let all the minerals within the manor of Bondgate to the defendant. For the working of these mines the defendant has the right to make a tramway through the subsoil of the Cockton Hill estate, and to carry along this tramway any coals which he may dig within the manor. But the defendant has

[12] (1860), 17 English Ruling Cases 452.

> no right to drive carriages along this tramway for any other purpose .. besides working the minerals, etc. within the manor.[13]

Lord Campbell therefore found that the plaintiff was still in possession of the subsoil. However, the most interesting part of the judgment, insofar as this examination is concerned, was an *obiter dictum* which followed the finding against the defendant. The Lord Chancellor felt constrained to add:

> I am inclined to think that a mistake has been made in not distinguishing between a copyhold tenement with minerals under it, and freehold land leased with a reservation of the minerals, or freehold land, where the surface belongs to one owner and the subsoil, containing minerals, belongs to another, as separate tenements divided from each other vertically instead of laterally. If this had been such freehold land, the owner of the surface could not have complained of the making or of the excess in using a tramway through the subsoil.[14]

The case of *Eardley* v. *Granville*[15] followed by some sixteen years the decision in *Bowser* v. *Maclean*, and implemented and approved the strong *obiter dictum* of the Lord Chancellor. The rule established in *Bowser* v. *Maclean* and *Eardley* v. *Granville* has been aptly stated in *English Ruling Cases* as follows:

> Where the owner of the freehold of inheritance grants the mines (opened as well as unopened) under his land to one, and the land excepting the mines to another, the effect is to carve out the land in superimposed layers; the grantee has the property and exclusive right of possession in the whole space occupied by the layer containing the minerals; and after the minerals are taken out, is entitled to the entire and exclusive user of that space for all purposes.
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> But in the case of copyhold land held under the usual copyhold tenure, the lord of the manor, although entitled to the minerals and to have access to work them, is not entitled to the possession of the chamber or space from which they have been taken, for the purpose of carrying away minerals taken from land outside the manor.[16]

This very important rule was applied in *Proud* v. *Bates*.[17] That case involved a certain tract of waste land which had been demised to Proud, but from which demise there was reserved ". . . the mines and quarries lying and being within and under the same, with full power to . . . work the same".

Bates, to whose benefit this reservation enured, worked certain mines adjoining the tract in question, and by means of "outstroke", made use of the passageway between the lands demised to Proud to evacuate the coal from the adjoining mines. Wood V.C. found for the defendant without any difficulty, applying

[13] *Ibid.*, p. 452.
[14] *Ibid.*
[15] (1876), 3 Ch. D. 826.
[16] *Supra*, footnote 13.
[17] *Supra*, footnote 9.

Bowser v. *Maclean*[18] as his authority for so doing. He reasoned as follows:

> Whether the word "mines" be used in the sense of minerals, the thing dug out of the mines, or that which contains the minerals, that which contains cannot be less than the thing contained; and therefore there is no doubt that the whole containing chamber which has the minerals is the mine; and so far as the mines are concerned, there is no question that they are altogether out of the demise. And as regards any right of using the mines, they never having been demised at all or parted with, the defendants are, of course, at liberty to use them as they think fit; and the case of *Bowser* v. *Maclean* completely explains what the right view is.[19]

The Vice-Chancellor then introduced a consideration which had not previously influenced English courts in deciding cases involving "outstroke", or for that matter, involving a determination of the ownership of mines and minerals in general, a concept portentous of much that followed. While it seemingly attracted little notice at the time, this was the first reported decision, to my knowledge at least, in which a court directed its attention to the state of mind of the parties to the transaction in question at the time it was entered into, as a guide in reaching a decision. The Vice-Chancellor said:

> The lessor was entitled to the property and the whole manor, of which this is part; *and if you look at the probable intent and purpose of the parties*, it confirms and strengthens the view that what is expressed to be absolute here is meant to be absolute and that the lessor has reserved to himself the full, complete and absolute right of going through this property with carriages and horses for any purpose whatever, and for any unlimited object he may think fit.[20]

Consideration of the state of mind of the contracting parties did not apparently concern the court in the next significant case on the question of "outstroke". This was the *Duke of Hamilton* v. *Graham*,[21] a Scottish case which came on before the House of Lords. The Duke of Hamilton had reserved to himself from a disposition of an interest in certain lands called Cambuslang, all coal and limestone and the right to work the same. Graham became the owner of the interest granted by the Duke of Hamilton, and commenced this action to prevent the Duke from conveying along passageways beneath Cambuslang, minerals mined by him from beneath other lands from which he had reserved to himself the coal and limestone.

With Lord Chelmsford dissenting, the House of Lords held

[18] *Supra*, footnote 12.
[19] *Supra*, footnote 9, at p. 411.
[20] *Ibid.* Italics mine.
[21] (1871), L.R. 2 Sc. Ap. 166.

that Graham could not interfere with the manner in which the Duke worked his own interests, and that the Duke had committed no trespass against Graham. The words of Lord Westbury, speaking for the majority of the House of Lords, are as follows:

> You cannot possibly say that the whole *plenum dominium* reserved in the mines, and belonging to the Duke, was qualified and restricted by virtue of a thing which was reserved out of the grant for the very purpose of rendering more complete, in point of facile enjoyment, that ownership which never entered into the grant, and which is not to be converted into a mere right of entering within the lands to win the minerals, but remains an absolute estate, to which all the privileges and all the incidents of the ownership of an estate belong . . . . The undiminished, undeteriorated, absolute estate in the mines is not and never was intended to be affected by the grant to the Pursuer's author [Graham's predecessor in title]; and therefore the subject of the estate may be enjoyed in every way in which it was competent or fit to enjoy it antecedently to the grant . . . . The same thing would take place in England . . . .[22]

The House of Lords considered the relevant documents only, in reaching its decision in favour of the Duke of Hamilton. The Vice-Chancellor's inquiry into the state of mind of the parties in *Proud* v. *Bates* either went unnoticed, or was purposely ignored by the House of Lords. Thus, the law as of 1871 seems to have been fairly well established that the holder of an interest in mines and minerals had an absolute right to recover the same in any reasonable manner, including exercise of the right of "outstroke".

Thirty-six years later, when *Batten-Pooll* v. *Kennedy*[23] was decided, the law relative to "outstroke" and to minerals located well below the surface, appears to have remained unchanged from 1871, notwithstanding the fact that the courts were gradually establishing new and significantly different tests for ascertaining the ownership of other mines and minerals during that interval of years, upon which further comment is made later in this article. In the *Batten-Pooll* case, the predecessors of the defendants in title formerly owned the entire title to the surface and the mines and minerals. In 1768 they granted to the predecessors of the plaintiffs a full fee simple interest, excepting and reserving "all mines and veins of coal in and under the said closes, pieces and parcels of land, and premises hereby released or any part or parcel . . .". The defendants had built an underground roadway through certain coal veins, which roadway was somewhat larger than the veins themselves, and along this roadway had hauled coal from other mines adjoining the lands owned by the plaintiffs. The plaintiffs brought action

[22] *Ibid.*, at p. 178, *et seq.* [23] [1907] 1 Ch. 256.

to prevent the defendants from continuing to haul coal mined from the adjoining mines along this roadway, also claiming that the road had been unduly enlarged.

Warrington J. held that the expression "mines of coal" obviously meant more than merely "coal". He stated that "where the owner of the whole grants away the surface excepting the mines, it is reasonable to suppose that he intends that exception to cover all that may fairly and properly be included in the expression 'mines' . . .".[24] The court further elaborated that: "If a freeholder grants lands excepting mines, he severs his estate vertically, *i.e.* he grants out his estate in parallel, horizontal layers, and the grantee only gets the parallel layer granted to him, and does not get any underlying mineral layer or stratum. The underlying stratum remains in the grantor."[25] The court therefore concluded that "mines" unquestionably included not merely the bed of coal but the workings of the coal and the cavity remaining after the coal had been removed.

After 1871, the winds of change began to blow. Aside from considerations of "outstroke", the standards set by the courts in England for the establishment of the ownership of mines and minerals began to change markedly. The new trend was ushered in in the year 1872 in a somewhat left-handed manner by the decision of the Court of Appeal in *Hext* v. *Gill*.[26] Opinions are still sharply divided as to what this controversial decision really decided. But there can be no doubt that *Hext* v. *Gill* marked the commencement of a succession of inquiries by the courts into what was in the minds of the parties to any transaction involving mines and minerals. The courts were no longer prepared to accept the language of the grant or transfer in question as a conclusive determination of the rights of the parties thereunder.

The facts in *Hext* v. *Gill* were quite simple. In 1799 the Duke of Cornwall, as lord of the manor, granted a freehold title, reserving "all mines and minerals within and under the premises, with full liberty of ingress, egress and regress to dig and search for, and to take, use and work the said excepted mines and minerals". Beneath the lands existed a bed of China clay, but this was an unknown fact at the time of the conveyance. China clay was a substance of value, but did not constitute the ordinary subsoil of the district, and in fact could not be removed without totally destroying the surface above it. Although the court held that

[24] *Ibid.*, at p. 261.
[25] *Ibid.*, at p. 264.
[26] (1872), L.R. 7 Ch. Ap. 699.

China clay was a mineral included within this reservation of mines and minerals and that the power to work was not sufficiently wide to entitle the owner to get it in such a way as to destroy or seriously injure the surface, there were two apparently conflicting judgments in the case. Mellish L.J. preferred to follow the weight of authority existing to 1872 in favour of an examination of the documents as a complete determination of the ownership of the mines and minerals. He stated as follows:

> But the result of the authorities, without going through them, appears to be this: that a reservation of "minerals" includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning.[27]

On the other hand, James L.J., admitting that the preponderance of authority favored the view expressed by Mellish L.J., but refusing to add his voice to that chorus, in a very short judgment stated his beliefs in part as follows:

> But for these authorities, I should have thought that what was meant by "mines and minerals" in such a grant was a question of fact what these words meant in the vernacular of the mining world and commercial world and landowners at the end of the last century; upon which I am satisfied that no one at that time would have thought of classifying clay of any kind as a mineral.[28]

Ironically, it is the few words expressed by James L.J. rather than the rather lengthy (and incidentally decisive) judgment of Mellish L.J. in *Hext* v. *Gill* that the courts in subsequent years have seized upon as expressing the true test of whether or not a given substance, not specifically mentioned in a conveyance, should be considered a mineral. It brings to mind the extremely long and somewhat pretentious oration of Edward Everett, consecrating the Gettysburg cemetery after the Civil War in the United States, a speech now long forgotten and completely overshadowed by the few sentences uttered by President Lincoln in what has since become world famous as "The Gettysburg Address". It is seldom indeed that a brief and deferential expostulation upon what the law should be, has ultimately overpowered a lengthy judgment heavily supported by judicial authority on what the law is, but this is the paradox that has resulted from *Hext* v. *Gill.*

Then followed a succession of cases before the English courts that turned upon the meaning of certain language in the Waterworks Clauses Act, 1847, and in the Railway Clauses Act then in

[27] *Ibid.*, at p. 712. [28] *Ibid.*, at p. 719.

force in England, as such language affected grants of land within which mines might be found to exist. Two of the better known of such cases are *Midland* v. *Haunchwood*[29] and *Miles* v. *Midland*.[30] Since these cases were decided entirely upon the language contained in the statutes and in the grants, the conclusions reached therein contain no surprises.

In 1879 the Privy Council decided *Attorney General for Isle of Man* v. *Mylchreest*,[31] a decision of interest mainly for the reason that the law lords hearing the case applied the language of Mellish L.J. in *Hext* v. *Gill* as a proper statement of the law concerning the role played by custom in determining the ownership of mines and minerals. This is not to say that the court disapproved of the judgment of James L.J. in *Hext* v. *Gill*, because, as an examination of the case will indicate, habit or custom had an important place in the minds of the learned law lords, a factor which would probably have been of meagre if any significance before *Hext* v. *Gill*.

The case involved the right of the Crown to the clay and sand in the customary estates of inheritance in the Isle of Man, where it was shown that by laws and customs, the owners of customary estates of inheritance, without consent from Her Majesty, had taken sand and clay from the lands for their own purposes for years. Sir Montague E. Smith found that, though the Crown was entitled to mines and minerals of all descriptions within the island, a custom had arisen that clay and sand were not minerals, and that therefore the Crown did not own them. The law lords quoted Mellish L.J. in *Hext* v. *Gill*, to the following effect:

> . . . the lord of the manor is beyond all question entitled to the minerals in the most general sense of the word under a copyhold tenement, and that there is nothing the copyhold tenant is entitled to get out of the soil and sell for a profit . . . in the absence of special custom.[32]

The Privy Council found that in fact a special custom to the contrary had grown up on the Isle of Man, and therefore the Crown was denied the clay or sand.

In 1888 the House of Lords decided *Glasgow* v. *Farie*,[33] a very important decision which marked the beginning of the rise to ascendancy of the views expressed by James L.J. in *Hext* v. *Gill*. Because of its importance, I believe extra attention to the facts and the decisions is justified.

It appears that one Farie, the respondent's predecessor in

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[29] (1882), 20 Ch.D. 552.
[30] (1885), 30 Ch.D. 634.
[31] (1879), 4 A.C. 294.
[32] *Ibid.*, at p. 307.
[33] (1888), 13 A.C. 657.

title, granted certain lands to the appellants, subject to a reservation in favour of himself which was worded as follows:

> . . . excepting always and reserving to me and my foresaids, the whole coal and other minerals in said lands in terms of the clauses relating to mines in the Waterworks Clauses Act, 1847.

In March of 1885 the respondent, in working a seam of clay which was found to be very valuable for brickmaking purposes, had approached to within thirty feet of the boundary of the land which he had sold to the appellants, subject to the aforementioned exception. The respondent obviously intended to work the clay within the appellants' land, but the appellants contended that common clay was purchased by them and not included in the reservation of minerals because it was a part of the surface or subsoil of the land. By a majority, the House of Lords allowed the appeal, holding that clay did not fall within the reservation to the respondent's predecessor.

Lord Halsbury stated that the decision of James L.J. in *Hext* v. *Gill* properly established the true test of what are mines and minerals, adding that "more accurate scientific investigation of the substances of the earth and different modes of extracting them have contributed to render the sense of the word 'minerals' less certain than when it originally was used in relation to mining operations".[34] He refused to accept the definition of "mines" given by Mellish L.J. in *Hext* v. *Gill*, because he believed it was wrong to relate the question of whether or not a substance could be got at a profit to the question of whether or not that substance was a mineral. This, Lord Halsbury felt, would change the character of the substance as markets appeared or disappeared. He stated that the known usage of the language employed in distinguishing rights to land and to mines and minerals in Scotland should be employed in construing the meanings of the words "mines and minerals". He also said that such known usage commended the view that clay did not form a part of the mineral estate reserved to the respondent's predecessor. He added that a statutory reservation of minerals meant nothing different from a reservation of minerals in a private deed.

Lord Watson considered *Hext* v. *Gill* of very little help in determining the issue before him in *Glasgow* v. *Farie*. He felt that the expression, "other minerals", in the reservation, ". . . must necessarily include all minerals which can reasonably be said to be *ejusdem generis* with any of those enumerated".[35] He concluded

[34] *Ibid.*, at pp. 669, 670.

[35] *Ibid.*, at p. 679.

that the appellants, as owners of the land, should be held to own ". . . the upper soil including the subsoil, whether it be clay, sand or gravel; and that the exceptional depth of the subsoil, whilst it may enhance the compensation payable at the time, affords no ground for bringing it within the category of excepted minerals".[36]

Perhaps the most often cited speech in *Glasgow* v. *Farie* was that of Lord Macnaghten, who considered "mines" to mean, very plainly, underground excavations or workings, and that "minerals" are "part of mines" or "contained in mines".[37] He felt that to rule that "surface minerals" (as he called sand, clay, stone and gravel) are not included in a grant of land to a railway would produce an intolerable result because the railway company would thereby lose all right of support for its right of way, thus making railway construction absurd. He chose an answer of expediency, concluding that the land purchased by the appellants included the clay in the subsoil, which placed him effectively in agreement with the decision reached in the case by Lord Halsbury, but for quite different reasons. From a reading of his speech in *Glasgow* v. *Farie*, Lord Macnaghten appears quite indifferent to the state of mind of the parties at the time of the transaction involving the lands in question, and therefore *Hext* v. *Gill* cannot be said to have influenced Lord Macnaghten in this case.

Years later the case of *Great Western Railway* v. *Carpalla* passed through the courts, and the judgments of the Court of Appeal[38] and of the House of Lords[39] are all worthy of some note in tracing the gradual re-casting of the standards used to determine the ownership of mines and minerals. This was another case involving "surface minerals" as Lord Macnaghten called them. The Court of Appeal, found that in 1896 the appellants became the owners of the property, railway and works of Cornwall Minerals Railway Company, constructed in part across two and one half acres of land in two parishes in Cornwall. The conveyance contained no reference to mines and minerals. The respondents and their predecessors had for many years previous to 1896 been digging in the lands immediately adjoining the lands sold to the Railway Company for China clay by surface or open workings, and at one point approached very close to the boundary of the Railway Company's lands. On April 17th, 1907, the respondents gave the appellants statutory notices under section 78 of the Railway Clauses Consolidation Act, 1845, of their intention to dig for

[36] *Ibid.*
[37] *Ibid.*, at p. 691.
[38] [1909] 1 Ch.D. 218.
[39] [1910] A.C. 83.

China clay under the railway and works within a distance of forty yards from the railway. The appellants did not agree to this step and commenced an action against the respondents to enjoin and restrain the respondents from excavating upon the lands in such a way as to let down or injure the railway right-of-way and its attendant works, and from entering upon the appellants' lands.

The appeal from the trial judgment for Carpalla[40] was heard by a very strong Court of Appeal,[41] before which the appellants cited *Glasgow* v. *Farie* in support of their claim to the China clay, and therefore the latter case was carefully examined at the appeal.

Cozens-Hardy M.R. stated that *Glasgow* v. *Farie* held only that where the alleged mineral formed a part of the ordinary soil of the district, even though it might elsewhere be a mineral, it is not to be considered a mineral within the exception in section 77 of the Railway Clauses Consolidation Act, 1845,[42] if it formed the very substance of the ground which had been purchased. He therefore ruled that the appeal should be dismissed.

Fletcher Moulton L.J. also held for the respondents. He stated that in his view the definition of a "mineral" was:

> . . . any substance that can be got from within the surface of the earth which possesses a value in use, apart from its mere possession of the bulk and weight which make it occupy so much of the earth's crust.[43]

He then added that he had never heard of,

> . . . any case which has decided that a rare and valuable substance, obtained exceptionally from under the surface of the earth by means of mining and manufacturing operations such as these is not a mineral within the meaning of these reservations.[44]

Fletcher Moulton concluded that *Glasgow* v. *Farie* held only that brick earth was not within the reservation in the grant because that which was proposed to be removed from the soil was generally regarded in the area as mere soil, and that therefore the appellants were obliged to purchase the minerals in question from the person from whom they had purchased the land.

Farwell L.J. concurred in dismissing the appeal and felt con-

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[40] *Supra*, footnote 38, pp. 220-226.

[41] Cozens-Hardy M.R., Fletcher Moulton and Farwell LL.J.

[42] (1845), 8 Vict., c. 20. S. 77 provided as follows: "The [railway] company shall not be entitled to any mines of coal, ironstone, slate or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands unless they have been expressly named therein and conveyed thereby."

[43] *Supra*, footnote 38. [44] *Ibid.*

strained to say that in his view Lord Halsbury, in *Glasgow* v. *Farie*, had been a "little hard" on the judgment of Mellish L.J. in *Hext* v. *Gill*. Farwell L.J. felt that Mellish L.J. had simply meant that the profit motive was important in determining whether or not a substance was a mineral because minerals are "usually worked with the object of making a profit, not because a profit is made, but because the object is to make a profit . . .".[45]

In its appeal to the House of Lords, the Great Western Railway was again unsuccessful.[46] Lord Macnaghten, speaking for the court in a judgment well worth careful consideration, adverted to section 77 of the Railway Clauses Consolidation Act, 1845, holding that it meant that:

> . . . all mines and minerals not expressly purchased by a railway company that purchases lands within or under which minerals may be found, may in case the company has not agreed to pay compensation, be worked by the owner, lessee or occupier thereof, complying with the statutory provisions applicable to the case, even though such working may interfere with the interests of the railway and absolutely destroy the surface.[47]

He added that the only condition to which the working is made subject is that it must "be done in a manner proper and necessary for the beneficial working of the mines". This was a complete reversal of his own conclusion in *Glasgow* v. *Farie*, where he held that to deprive a railway company from "surface minerals" under similar circumstances would produce an unconscionable result. Lord Macnaghten concurred with the decision of the trial judge in the case, that China clay was not part of the ordinary composition of the soil in the district because its presence was rare and exceptional.

A much easier task was imposed upon the House of Lords in 1910 when *North British Railway* v. *Budhill*[48] came before them from Scotland for determination. In that case, the statute in question provided a very powerful guide for the deliberations of the law lords. The action was brought against the respondents as lessees to prevent their working certain sandstone deposits in lands in which the appellants operated railways and other works. The case turned upon whether or not sandstone was a mineral within the meaning of section 70 of the Railways Clauses Consolidation (Scotland) Act of 1845.[49]

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[45] *Ibid.* [46] *Supra*, footnote 39. [47] *Ibid.*, at p. 85.
[48] *Supra*, footnote 4. See also *supra*, footnote 6.
[49] 8 and 9 Vict, c. 33. S. 70 corresponds to s. 77 of the English Act, *supra*, footnote 42.

Lord Gorell made one observation of keen importance to the outcome of this appeal, and in my opinion of real significance to a settlement of the problem generally. He said:

> The enumeration of certain specified matters tends to show that its [the Act's] object was to except exceptional matters and not to include in its scope those matters which are to be found everywhere in the construction of railways, such as clay, sand, gravel and ordinary stone.[50]

The appeal was allowed by the House of Lords on the basis of their conclusion that in the circumstances of the case before them, sandstone was of no special value or unusual occurrence, and therefore should not be considered a mineral.

One year after the decision in *North British Railway Company* v. *Budhill*, Lord Loreburn spoke for the Privy Council, when the case of *Caledonian Railway Company* v. *Glenboig Union Fireclay Company* was appealed to this body,[51] confirming that, in dealing with the "ownership of surface minerals", the task of the courts had become much more difficult since the halcyon years of *Bowser* v. *Maclean* and *Duke of Hamilton* v. *Graham*, when such a determination would have been relatively uncomplicated. His rather penetrating observation upon the resolution of these complexities which I mentioned at the beginning of this article, will bear repeating as follows:

> . . . no definition of "minerals" is attainable, the variety of meanings of which the use of the word "minerals" admits of being itself the source of all the difficulty . . . .[52]

The state of mind of the parties to a transaction at the time it was entered into had become a question into which the courts were obliged to inquire, using the language of the documents supporting the transaction as a guide in their deliberations. Quite predictably, the choice of language in many documents that became the subject matter of litigation provided precious little assistance to the courts in these exercises in telepathy.

Up to this time, the law in England had developed some considerable sophistication in dealing with interests in what have been called "hard minerals". In 1912, the Privy Council applied the same general principles in dealing with a case involving oil and gas rights. In *Barnard-Argue-Roth-Stearns Oil and Gas Company Limited* v. *Farquarson*,[53] the appellants had by deed granted to the respondent's predecessor in title all their right, title and interest in the land in question, and every part thereof, ". . . excepting

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[50] *Ibid.*, at p. 134.
[51] *Supra*, footnote 1.
[52] *Ibid.*, at p. 299.
[53] *Supra*, footnote 5.

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 to the company to search for, win and carry away the same. The question posed to the Privy Council was whether or not the right to search and bore for natural gas was excepted from the grant to the grantee.

Lord Atkinson held, in searching for the true construction of the grant, that it must be construed ". . . having regard to the time at which this instrument was executed, and the facts and circumstances then existing . . .".[54] He stated that it was obvious that the word "minerals" in the grant was not used in its widest and most general sense. He felt that "springs of oil" could not include natural gas, chiefly because oil was a substance of value even then, while gas was at that time considered to be worthless at best, and a dangerous nuisance as well. In fact, it did not have any commercial value for twenty years after the date of the grant. The court therefore held that the idea of preserving an interest in natural gas never occurred to the parties to the deed involved in this matter, and that therefore since the language of the deed did not expressly reserve it, the natural gas passed to the grantee.

More recently, it was held by the Court of Appeal in *Waring* v. *Foden*,[55] that the meaning of the word "minerals" in both "private deeds and in statutory provisions will yield to the expressed or implied intention of the parties". The court applied the decisions in *Great West Railway Company* v. *Carpalla* and in *Hext* v. *Gill* in deciding that a conveyance of land made in 1925 which contained a reservation of "all mines, minerals and mineral substances", did not include sand and gravel, since the evidence disclosed that sand and gravel were not rarities in the area.

An examination of the very few English decisions on this subject since 1932 indicates that the principles established by the courts up to that time are still the common law. In recent years, though there has been a considerable amount of litigation upon matters involving mines and quarries, this litigation has turned almost totally upon the interpretation of a plethora of new statutory provisions and has not altered or in any way compromised the theories of ownership of interests in mines and minerals in England.

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[54] *Ibid.*, at p. 869.

[55] [1932] 1 Ch. 276.

III. *The Canadian Concept.*

The development of the contemporary legal concept of a reservation or exception of mines and minerals in Canada seems to have followed a course closely parallel to that steered by the courts in England. It is apparent that English decisions were heavily relied upon as guides by Canadian courts and it is therefore not surprising that they have profoundly affected Canadian jurisprudence on the subject.

One of the earliest Canadian decisions which is germane to this discussion was *Gesner* v. *Gas Company*,[56] an appeal heard by the Supreme Court of Nova Scotia in 1853, in an action for trover of a quantity of asphaltum. The grant in question was of the land with all profits, commodities, hereditaments and appurtenances, reserving to the King "all coals, and all gold and silver, and other mines and minerals". The plaintiff claimed ownership of the asphaltum. Haliburton C.J. held that the words "mines and minerals" should be understood in their popular and ordinary meaning, and no attempt to strain that meaning beyond the sense in which they were ordinarily understood should be countenanced. He concluded, after hearing much scientific evidence, that asphaltum is a mineral and as such was excepted to the King, and that therefore the appellant's claim failed.

In concurring with the dismissal of this appeal, Bliss J. developed the rather novel theory that since a mineral in its popular sense is matter which is dug out of a mine, and since a mine was understood to be below the surface of the ground, the grant of land with the exception of mines and minerals thus coupled together, appeared to him to refer only to minerals obtained by excavation. Bliss J. found comfort in the early English case of *Harris* v. *Ryding*[57] decided on similar facts, wherein Parke B. said:

> By reasonable intendment, therefor, the grantor can be entitled, under the reservation, only to so much of the mines below as is consistent with the enjoyment of the surface, according to the true intent of the parties to the deed.[58]

In the absence of a reservation to the King of the right to work the mineral interests reserved, this conclusion was probably consistent with the theory of ownership of interests in mines and minerals then prevalent in England, but the narrowness of the theory obviously portended a sowing of the wind, from which the whirlwind could certainly be expected to follow.

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[56] (1853), 2 N.S.R. 72.
[57] (1839), 5 M. & W. 60, 151 E.R. 27.
[58] *Supra*, footnote 56, at p. 87.

The problem of relating interests in oil and gas to interests in other minerals arose early in the development of Canadian law, perhaps anticipating the developments in the law of mines and minerals in Canada which the still unborn oil and gas industry would bring about. *Ontario Natural Gas Company* v. *Smart et al.*,[59] was heard by the Common Pleas Division in 1890, by which time the decisions of the English courts in *Bowser* v. *Maclean*, *Bell* v. *Wilson*, *Hext* v. *Gill* and *Glasgow* v. *Farie*, gave notice to the Ontario court which considered them in this case, that the whirlwind was beginning to make itself felt in English thinking on this subject. This action was brought for a motion to restrain the defendants from sinking a well on a township road to obtain natural gas. A by-law had been passed by the municipal council authorizing the granting of a lease of a portion of the highway "for the purpose of boring for and taking therefrom, oil, gas or other minerals in, upon or under the said part of said land or highway". It was contended that natural gas was not a mineral and that therefore the council had no right under the Municipal Act to pass the by-law authorizing the lease. Section 565 of the Municipal Act in question specifically allowed any township or county to sell or lease the right to take minerals found under any roads over which the township or county might have jurisdiction, so long as the recovery thereof did not interfere with the public travel.

Street J. felt obliged, under the rule in *Glasgow* v. *Farie*, to give to "minerals" its widest signification. Applying the words of Lord Watson in the Scottish appeal, he ruled that a mineral substance should be considered in law to be a mineral so long as it was *ejusdem generis* to other minerals referred to in a document or statute. He concluded that natural gas was a mineral and quashed the motion to set aside the by-law.

Shades of *Hext* v. *Gill* appear in another oil and gas case of importance, *The Dome Oil Company* v. *The Alberta Drilling Company*.[60] Anglin J. of the Supreme Court of Canada found that:

> Rock oil is admittedly a mineral within definitions of that word well established and generally accepted. The word "minerals" in a statute bears its widest signification unless the context or the nature of the case requires it to be given a restricted meaning. Here the use of the word "minerals" in juxtaposition with, but in contrast to "metallic substances" affords a strong reason for giving to the former its widest meaning.[61]

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[59] (1890), 19 O.R. 591. See also *Cavana* v. *Tisdale Township*, [1942] 1 D.L.R. 465 (Ont. C.A.) on the same point.

[60] (1915-16), 52 S.C.R. 561.

[61] *Ibid.*, at p. 582.

This statement received approbation in the very recent decision of the same court in *The Crow's Nest Pass Coal Co.* v. *Her Majesty the Queen.*[62]

Chronologically, the next decision of importance to this subject was *Re McAllister and Toronto and Suburban Railway Company*,[63] an appeal heard by the Court of Appeal of Ontario. This case turned upon whether rock in a certain quarry was the ordinary rock of the district, or was a "mineral" within section 133 of the Ontario Railway Act of 1913.[64] The respondent contended that the quarry consisted of "minerals" within the meaning of section 133. In a very sententious judgment, the court held that the rock in the quarry was the same as the other rock in the neighborhood and, again relying on the English cases on the point, particularly *Great Western Railway* v. *Carpalla*,[65] concluded that the rock under consideration was not a mineral within section 133 of the Act in question.

Ten years later a decision was rendered by an Alberta court which is certainly a milestone. This was *Creihgton* v. *United Oils Limited*, decided by Walsh J. of the Supreme Court of Alberta.[66] The patent to the lands in question contained the following expression:

> . . . reserving all mines and minerals which may be found to exist within, upon or under such lands, together with full power to work the same and for this purpose to enter upon and use and occupy the said lands . . . as may be necessary for the effectual working of the said minerals . . . .

The certificate of title issued upon the registration of this patent, reserved ". . . unto His Majesty, his successors or assigns all mines and minerals and the right to work the same", and the plaintiff's certificate of title, when the lands were transferred to him, contained a reservation identical with that last mentioned. The defendant had meanwhile acquired a lease from the Crown covering petroleum and natural gas within these same lands. The plaintiff sued for a declaration that the petroleum and natural gas beneath these lands

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[62] (1961), 36 W.W.R. 513 (S.C.C.) discussed *infra*.

[63] (1917), 40 O.L.R. 252. See also *Bucke* v. *Macrae Mining Company*, [1927] 3 D.L.R. 1 (S.C.C.), on the same point.

[64] S.O., 1913, c. 36. This section provided as follows: "The company shall not, unless the same have been expressly purchased, be entitled to any mines, ores, metals, coal, slate, mineral oils, gas or other minerals in or under any land purchased by it or taken by it under any compulsory powers given it by this Act except only such parts thereof as are necessary to be dug, carried away or used in the construction of the works."

[65] *Supra*, footnote 38.

[66] [1927] 2 W.W.R. 458.

belonged to him, on the theory that the reservation to the Crown did not include petroleum or natural gas.

Walsh J., quoting with approval from the judgment of Lord Watson in *Glasgow* v. *Farie*, held that whether or not a substance is a mineral in any given case depends upon the facts and circumstances. It was argued rather ingeniously before the court that since section 32 (4) of The Dominion Lands Act, as it then read, stated ". . . a stone or marble quarry or coal or other mineral having commercial value" was reserved to the Crown from all grants made thereunder, and since section 47 of the same Act referred to "coal or other minerals", the petroleum and natural gas were not intended to be included in the minerals reserved to the Crown because the "other minerals" mentioned in that Act were *ejusdem generis* with the minerals specifically named, all of which were solid minerals.

Per curiam, the rule that general words following specific words are limited to substances *ejusdem generis* with the specifically named substances, is not an inflexible rule. The court further held that if: "Parliament intended the homesteader to get only land that was purely agricultural, it follows that it did not intend him to take any minerals at all, an intention which was given effect to by the use of the comprehensive expression 'other minerals'."[67] Walsh J. concluded by stating:

> For the purpose of this decision the reservation may properly be read as one of all minerals which may be found to exist within, upon or under this land. I can see nothing even remotely suggestive of any restricted meaning to the word "minerals" as here used.[68]

Later the same year, the Appellate Division of Alberta confirmed the decision of the trial court in a judgment given without reasons.[69] It is interesting and perhaps sad to note that the conclusions reached by Walsh J. respecting the rather common language of the reservation that he was considering were not heeded, if they were considered at all, by the courts in some later decisions of considerable importance to the development of Canadian law on the subject of mines and minerals,[70] although they were referred to in another very recent case upon similar facts which held to a like effect.[71]

The right to work minerals reserved from a transfer was carefully considered by the Supreme Court of Canada in *Fuller* v.

[67] *Ibid.*, at p. 462.
[68] *Ibid.*, at p. 463.
[69] [1927] 3 W.W.R. 463.
[70] See *infra*, footnotes 111 and 115.
[71] *Supra*, footnote 62.

Garneau.[72] This case involved a grant of lands from the Crown from which was reserved:

> . . . all mines and minerals which may be found to exist within, upon or under such lands together with full power to work same and for this purpose to enter upon and use or occupy the said lands or so much thereof or to such an extent as may be necessary for the effectual working of the said minerals or the mines, pits, seams and veins containing the same.

Duff J. ruled that such a reservation does confer wider rights than a simple reservation of "all mines and minerals" contained in a subsequent agreement between the plaintiff and the defendant. He stated that it was established doctrine that the right to work in such a way as to let down the surface (of a colliery) does not arise under an exception of "mines and minerals" unless there is something in the terms of the deed which expressly or by necessary implication gives such right. However, he went on to say that the rule was also established that if there is an express right to work, in terms even less explicit than those in the instant case, such right may be exercised notwithstanding the consequence of subsidence of the surface, if it is shown that the minerals cannot be worked without this consequence.[73]

The doctrine in *Fuller* v. *Garneau* was further elaborated upon in *Little* v. *Western Transfer and Storage Company Limited*, a decision of the Appellate Division of the Supreme Court of Alberta.[74] Here we encounter a Canadian court considering the principle of "outstroke", with which principle the courts in England grappled in a number of cases discussed earlier in this article, including *Proud* v. *Bates*,[75] and *Duke of Hamilton* v. *Graham*.[76] The plaintiff had leased to the defendant the coal within a defined area,

> . . . together with the right to work the same and together with such portion of the surface rights as may be necessarily interfered with in the working of the mine.

The defendant proposed to use a shaft sunk upon the land subject to the lease to evacuate not only the coal within the leased lands, but also coal owned by the defendant within adjoining lands. The

[72] [1921] 1 W.W.R. 857.

[73] In this connection, it is interesting to note that, with respect to operations for the recovery of oil and gas in Alberta, a purported grant of a right to work the surface for this purpose under the terms of a petroleum and natural gas lease or other type of grant, is ineffective unless separate and special consideration is paid to the grantor for this right, by virtue of s. 12 (2) of The Right of Entry Arbitration Act, R.S.A., 1955, c. 290.

[74] [1922] 3 W.W.R. 356.

[75] *Supra*, footnote 9.

[76] *Supra*, footnote 21.

court held that the defendant had secured from the plaintiff not just a mere right to take away the coal, which would have resulted in a refusal of the right of "outstroke" under the authority of *Batten-Pooll* v. *Kennedy*,[77] but a lease of so much of the surface as came within the description of the leased lands. Armed with these rights, the court held that the defendant was entitled to carry "foreign" coal from adjoining properties by "outstroke" in the coal stratum leased to it and on the surface of the lands subject to the lease.

Another Alberta decision of keen importance is *Stuart* v. *Calgary & Edmonton Railway Company, et al.*[78] In this case an agreement was made in 1905 for the sale of certain lands, subject to the following exception:

> . . . excepting therefrom all minerals in or under the said land and the right to use so much of the said land or the surface thereof as the vendors or their assigns may consider necessary for the purpose of working and removing the said minerals.

The agreement further provided that upon performance of his obligation under the agreement, the purchaser would be entitled to a conveyance of the said land, ". . . reserving all mines, minerals, coal or valuable stone in or under the said land". In 1912 a transfer was issued to the plaintiff, who had acquired the purchaser's rights to the lands, such transfer containing an exception which differed from that in the agreement, in that it reserved or excepted to the transferors, "all minerals within, upon or under the said land, and the right to use and occupy so much of the said land and the surface thereof as may be necessary for the purpose of effectually working and removing the same . . .". The plaintiff accepted and registered this transfer without protest. The defendants ultimately acquired the vendor's interest in the lands subject to the transfer.

Boyle J. held, in answer to the plaintiff's claim to the oil and gas beneath the said lands, that if the agreement was looked to for the purpose of establishing whether or not the oil and gas was reserved to the plaintiff, the reservation failed on that count because:

> . . . the words "mines, minerals, coal or valuable stone in or under the said land", cannot be reasonably held to mean the same thing as the word "minerals" standing alone. "Minerals" is a very comprehensive term, and in 1905, I think was generally understood to be wide enough to include oil and gas. It is preceded by the word "mines", which has a more limited meaning than "minerals", for giving the term "mines" its widest interpretation, and can scarcely be intended to mean anything more than minerals capable of being mined . . . . But we find

[77] *Supra*, footnote 23.

[78] [1927] 1 W.W.R. 639.

> the word "minerals" followed immediately by the words "coal or valuable stone in or under the said land", and are obliged to consider why the specific minerals are mentioned, and it seems to me that when words such as these describing specific kinds of minerals are used in connection with the word "minerals", they have a decided tendency to narrow the meaning of the term "minerals".[79]

Boyle J. adverted to the judgment of Lord Atkinson in *Barnard-Argue-Roth-Stearns* v. *Farquarson*,[80] wherein it was stated that where the word "minerals" was not used alone, but in conjunction with the words "minerals" and "springs of oil", it was not intended to be used in its widest sense. Boyle J. held that there was no knowledge of any oil or gas in the area of the lands in question at the time of the grant, and that therefore oil and gas were not in the contemplation of the parties at the time the agreement was entered into. He added:

> In fact it can hardly be otherwise, because the term "minerals" is so comprehensive in itself that to try further to describe it is to modify its application and narrow its scope.[81]

He further held that, since the subsequent deed superseded the agreement to the extent of any conflict, and since the subsequent deed excepted or reserved all minerals and mines to the transferor, which in this usage must include oil and gas, the plaintiff transferee did not get any rights to the oil and gas.[82]

On appeal of this case to the Appellate Division of the Supreme Court of Alberta,[83] Hyndman J.A. agreed with the disposition of the case proposed by the trial judge, but stated that the agreement itself would, if referred to, result in a finding for the defendant also, which is not consistent with Boyle J.'s remarks upon the effect of the agreement. Moreover, after finding that oil and gas were undoubtedly minerals, under *Barnard-Argue-Roth-Stearns* v. *Farquarson*,[84] Hyndman J.A. then proceeded to the very opposite conclusion from that reached by Boyle J. as to the effect of adding words of elaboration to the word "minerals" in the exception. He said:

> In my opinion the inclusion of the words "coal and valuable stone" were intended, not for the purpose of restricting the general meaning of minerals, but for greater certainty only. This I venture to say may be due to the fact that, though there is no doubt coal and valuable stone are minerals, many people are either in doubt with regard to it or think they may not be minerals. Had the aforesaid clauses in this

[79] *Ibid.*, at p. 649.
[80] *Supra*, footnote 5.
[81] *Supra*, footnote 78, at p. 649.
[82] See *Duke of Hamilton* v. *Graham*, *supra*, footnote 23, and *Eardley* v. *Granville*, *supra*, footnote 15.
[83] [1927] 3 W.W.R. 678.
[84] *Supra*, footnote 5.

> agreement been transposed in the document, there would then possibly be much room for argument and doubt on the question. But the expression "all minerals" in the earlier portion of the document is of great significance and should not be restricted unless the context clearly shows that there was an intention to limit the meaning, and in my opinion, taking everything into consideration, one cannot clearly come to the conclusion that there was such intention.[85]

These remarks propound a theory which appears eminently reasonable for the settlement of the issue in question, having regard for the juxtaposition of the words in the exception, since they take into account what was apparently in the minds of the parties to the agreement in question when it was prepared, a consideration that was recognized by the English courts only after many years of concern for the language of the instrument exclusively.

In 1935 the case of *Knight Sugar Company Limited* v. *Alberta Railway and Irrigation Company* was tried before the Supreme Court of Alberta.[86] This case involved an agreement between the plaintiff and the defendant to transfer a substantial amount of land to the defendant, upon payment of the purchase price on instalments, ". . . subject to the conditions and reservations expressed in the original grant thereof from the Crown", which grant reserved ". . . all coal mines and the right to work the same". When the transfers were drawn, they excepted all coal and other minerals and the right to work the same. The transfers were completely registered by March 12th, 1913, and the plaintiff acted upon the titles held by it as a result of such transfers as though the same read: "Reserving unto His Majesty all coal and unto the Alberta Railway and Irrigation Company all other minerals", at least until 1925. Then it brought suit to obtain a declaration that what it should have received was "all minerals except coal", as set out in its agreement with the defendant. Ford J., in refusing to accept this contention, held that while it was open to the plaintiff to claim rectification of the titles in conformity with the agreement directly after the transfers were made in its favour, the plaintiff had long since lost this right through its actions which recognized the defendant's claim to all minerals except coal. He stated that only the transfers could be relied upon at the time of the action to establish the interests of the plaintiff, on the authority of *Carroll* v. *Provincial Natural Gas & Fuel Co.*[87] The court further found that the exception of all other minerals included petroleum and natural gas rights, and, applying *Glasgow* v. *Farie*, held that al-

[85] *Supra*, footnote 78, at p. 681.
[86] [1935] 3 W.W.R. 86.
[87] (1896), 26 S.C.R. 181.

though "other minerals" are "susceptible of limitation or expansion according to the intention with which they are used", the plaintiff's acceptance of the registrar's interpretation of the exception clearly indicated that "other minerals" were intended to have a wider ambit than is covered by or *ejusdem generis* of the word "coal".

Of great interest in the decision of the Privy Council, when this case was appealed to that body,[88] was the judgment of Lord Russell of Killowen. He agreed with the decision of Ford J., holding that upon registration of the transfers in question, the provisions of the contract merged in the conveyance, thereby satisfying all the rights of the purchaser. The Privy Council refused to accept the claim that the appellant was entitled to all minerals that were not minerals of the same class as coal, on the basis that what was excepted was "all minerals", and not any genus of minerals.

Clearly the Alberta court and the Privy Council were primarily interested in determining, from the language used in the documents and from the conduct of the parties, what was the real understanding between these parties, and once having done so, neither court had any particular difficulty in reaching a decision. Without attempting to belabour the obvious, I feel it necessary, in the light of subsequent legal evolution on this point in Canada, to emphasize that the courts that heard this case quickly disposed of the suggestion by the plaintiff that the *ejusdem generis* rule be applied to the word "minerals" when it was found in collocation with the word "coal", as soon as it was apprehended that acceptance of this suggestion would have frustrated what the courts found to be the intention of the parties. Put another way, the *ratio decidendi* of this case seems to me to be that if the intentions of the parties to a transaction can be implemented by the courts in a manner consistent with the language expressed in the documents upon which the transaction is founded, the courts will uphold the transaction on that basis and will not be swayed by possible alternate interpretations of the documents that spring from a preoccupation with the words of the documents, to the sacrifice of the intent of the parties.

Then in 1951 the much-discussed, much-maligned and much-misapplied case of *Borys* v. *Canadian Pacific Railway Company and Imperial Oil Limited* appeared centre-stage. The trial before Howson C.J.T.D. of the Supreme Court of Alberta,[89] elicited considerable comment upon whether or not a reservation of coal, petroleum and valuable stone from a disposition by the Canadian

[88] [1938] 1 W.W.R. 234.

[89] (1951), 2 W.W.R. (N.S.) 145.

Pacific Railway Company in favour of the plaintiff, included the natural gas that might be found to exist beneath the land then owned in fee simple by the plaintiff. Significantly, Howson C.J.T.D. quoted directly from *Barnard* v. *Farquarson*,[90] to characterize the question for decision, as follows:

> Having regard to the time at which the documents between the parties were executed and the facts and circumstances then existing, what did the parties to the documents intend to express by the language which they have used, or in other words, what was their intention touching the substances to be excepted as revealed by that language?[91]

Further on the learned trial judge added:

> I am strongly of the view, which cannot be over-emphasized, that the present case should not turn on any technical, chemical or scientific signification of the term but rather on the meaning of "petroleum" and "natural gas" at all relevant times as used by ordinary persons concerned with the subject and especially as to the meaning understood and accepted by the parties.[92]

The trial judge was also impressed with the fact that the Canadian Pacific Railway Company had drafted both the agreement for sale and the transfer to Borys, holding that it was thus for the transferor to make it plain what had been reserved from the transfer. After reaching the decision that by definitions then known to the parties and still recognized, petroleum does not include natural gas, Howson C.J.T.D. concluded that there had been a valid reservation of petroleum (that is, mineral oil), but no reservation of natural gas, whether wet or dry, or held in solution with the oil. He felt that since it was quite within the power of the Canadian Pacific Railway Company to employ language that would reserve the right to work the lands in question in any way to recover the oil and gas, and since no such language had been used, no intent to protect the right to recover the natural gas with the oil had been evidenced. He could not imply a right to use the natural gas as a means of recovering the oil.

When the *Borys* case was appealed to the Alberta Appellate Division,[93] that court agreed that petroleum is a substance separate from natural gas, but held that the reservation of "petroleum" included gas in solution in the liquid in the earth. The Appellate Division felt that the plaintiff was really contending that, notwithstanding the reservation, the defendants should not be permitted to interfere with his gas rights, thus making the reservation worthless. This contention was answered to the satisfaction of the

[90] *Supra*, footnote 5.
[91] *Supra*, footnote 89, at p. 150.
[92] *Ibid.*, at p. 158.
[93] (1951-52), 4 W.W.R. (N.S.) 481.

Appellate Division by applying the words of Lord Penzance in *Bellacorkish Mining Co.* v. *Harrison*,[94] who, while referring to a similar implied contention by the owners of the surface of land above a mine, confounded it by stating that ". . . the owners of the surface would hold the owner of the mines at his mercy . . .", thus producing an intolerable result. The Appellate Division allowed the appeal to the extent of stating that the petroleum in the ground, including everything then dissolved in it, was reserved; that the plaintiff owned the gas not in solution with the liquid in the ground; that, applying *Fuller* v. *Garneau*,[95] (and going further than any Canadian court had previously gone), the defendants should be permitted to recover the liquids reserved, even though the agreement contained no "win, work and carry away" clause in the reservation, and to withdraw all of the substances belonging to them from the earth even if to do so would cause interference with and wastage of the gas belonging to the plaintiff, so long as modern and reasonably scientific methods of production were used.

The plaintiff then appealed to the Privy Council, where Lord Porter delivered the judgment of the law lords, in favour of dismissing the appeal and affirming the judgment of the Appellate Division of the Supreme Court of Alberta.[96] He agreed that petroleum and natural gas are separate substances, but felt that gas existing in solution with petroleum in the ground is a special case which must be specially dealt with. Applying *Glasgow Corp.* v. *Farie*, Lord Porter agreed that in determining what an expression means, one must refer to the vernacular of the mining world, the commercial world and landowners at the time the grant was made, but that the meaning of "petroleum" may vary "according to the circumstances in which it is used".[97] He rejected the possibility of a categoric definition of the term in question on a scientific basis, and expressed himself that little, if any, guidance had been given by witnesses at the trial of the action on the subject of what was in the minds of the parties at the time of the transaction, thus leaving the Privy Council to form its own opinion of the meaning of "petroleum" in situ below ground.

Confirming the relatively daring forward step taken by the Appellate Division concerning the right to work minerals, Lord Porter found that the absence of a clause in the agreement in question giving a right to work "does not abrogate or limit the powers of the respondents". He applied *Rowbotham* v. *Wilson*[98]

[94] *Supra*, footnote 10.
[95] *Supra*, footnote 72.
[96] (1952-53), 7 W.W.R. (N.S.) 546.
[97] *Ibid.*, at p. 553.
[98] (1860), 8 H.L. Cas. 348.

in support of the proposition that such a reservation as that contained in the agreement implied the right to recover and work the substance reserved, so long as there is no interference with the surface of land granted to another party. Lord Porter stated that the Privy Council would not hold the respondents to an obligation to conserve the appellant's gas if as a consequence thereof, they were to be denied the right to recover the petroleum that had been directly granted to them. He carefully distinguished the decision in *Barnard* v. *Farquarson*,[99] (which held that in working "springs of oil", care must be taken to preserve the gas) on the ground that it did not deal with gas held in solution by the oil.

Obviously, the principle of the right to work an interest in mines and minerals had undergone a transmogrification in Canada in the hundred years since *Gesner* v. *Gas Company*.[100] Although the traditional tests were being applied by the courts to settle the more routine disputes arising out of reservations of mines and minerals,[101] the Canadian courts and the Privy Council had shown themselves willing to extend the law, where new situations produced by business developments in Canada made it appear reasonable and advisable to do so. However, there then followed two closely related cases, the results of which seem to me to generate cross-winds upon this trend. Due to their relevance to the subject matter of this article, an examination in some detail of the decisions in these cases is probably warranted.

The first of these two cases is *Western Minerals Limited* v. *Gaumont*, tried before Egbert J. of the Supreme Court of Alberta.[102] This case turned upon the question of whether or not "sand and gravel" were reserved to the transferor in a reservation of ". . . all mines, minerals, petroleum, gas, coal and valuable stone in or under the said lands . . .". The court held that the deposits of gravel in question did not constitute "mines" within the reservation because the gravel was recovered simply by removing a thin layer of surface soil, rather than by underground excavations, citing in support of this conclusion a number of the well-known English cases already discussed in this article, including *Darvill* v. *Roper; Midland Railway Company* v. *Haunchwood;* and *Bell* v. *Wilson.* He further held that gravel was not "valuable stone", within the meaning of the reservation, because expert evidence led him to believe that "valuable stone" was ordinarily regarded as stone that

[99] *Supra*, footnote 5. [100] *Supra*, footnote 56.

[101] See *Algoma Ore Properties Ltd.* v. *Smith*, [1953] 3 D.L.R. 343 (Ont. C.A.).

[102] (1951), 1 W.W.R. (N.S.) 369.

was recovered through quarrying operations. He felt that the real issue was whether or not gravel was such a mineral as was to be included in the term "minerals" in the reservation. After a very comprehensive review of the English and Canadian authorities, he concluded that the term "minerals" must be considered according to the well-established test, "in the vernacular of the mining world, the commerical world and landowners at the time of the transaction, or indeed at any time". He found as a fact that the occurrence of sand and gravel was rare and exceptional in the area in question, existing in only a few places in a very large district, and that therefore these substances were "minerals" within the reservation to the transferor.

Egbert J. admitted that he reached his decision in favour of the plaintiff reluctantly, since he suspected that it was not the intention of the original parties to the transaction to reserve sand and gravel, and that if these substances had been considered at all, they would not have been excluded from the transfer. He distinguished *Waring* v. *Booth Crushed Gravel Co.*,[103] which held to the contrary, on the ground that in that case it was found that sand and gravel was the common subsoil of the district. He also found that, on the basis of abundant authorities, the meaning to be attributed to words of reservation at the present time is deemed to be the meaning attributed to them at the time of the transaction in question, in the absence of evidence to the contrary.

As a result of the sensation created by this decision, the legislature of Alberta enacted the Sand and Gravel Act,[104] five weeks after the decision of the trial court. Section 3 of this Act provides as follows:

> The owner of the surface of land is and shall be deemed at all times to have been the owner of and entitled to sand and gravel on the surface of that land, and all sand and gravel obtained by stripping off the overburden, excavating from the surface, or otherwise recovered by surface operations.

However, the Sand and Gravel Act was to be prospective in effect only, leaving undisturbed those rights existing prior to April 7th, 1951.[105]

The case was appealed to the Appellate Division of the Supreme Court of Alberta and heard by that court after the Sand and Gravel Act had been passed.[106] O'Connor C.J.A., speaking for the court,

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[103] [1932] 1 Ch. 276.
[104] S.A., 1951, c. 77, now R.S.A., 1955, c. 296.
[105] See s. 5, *ibid.*
[106] (1951), 3 W.W.R. (N.S.) 434.

stated that, upon examining the terms of the relevant documents, he had concluded ". . . that sand and gravel were not understood to be minerals by the parties".[107] He relied upon *Errington* v. *Metropolitan District Railway*,[108] to the effect that gravel pits were not "mines", and *Midland Railway Company* v. *Robinson*,[109] to the effect that mines may only be worked in such a manner as to leave the surface undisturbed. Both of these decisions dealt with "mines", and therefore on that ground alone, they seem rather academic to the settlement of the issue in question, since it was not contended at any point that sand and gravel fell within the term "mines", and since the trial judge had categorically stated that sand and gravel in the instant case were not "mines". O'Connor C.J.A. was also much impressed with the fact that the lands in question were originally sold in a large-scale land settlement scheme, and expressed himself as of the view that it would have been a most improvident bargain, tantamount to a fraud, to sell the surface of the land subject to a requirement that it be cultivated, while at the same time reserving the sand and gravel as a part of the "mines and minerals", which could only be recovered through destroying the surface of the land. Considered on this narrow basis, I would suggest that if the documents are susceptible of an interpretation that would deprive the owners of the surface of the land of the use thereof, thereby lessening the value of the land sold, it would not be the first or the last time that an improvident sale had been arranged, against which the courts have traditionally refused to give relief.

The Appellate Division was on much stronger ground in allowing the appeal, when it applied the provisions of the Sand and Gravel Act to deprive the respondents of the sand and gravel in the case. O'Connor C.J.A. cited the judgment of Duff J. of the Supreme Court of Canada in *Veilleux* v. *Boulevard Heights*,[110] which clearly established the jurisdiction of the Appellate Division of Alberta to apply a statute enacted before the hearing of the appeal, even if after the cause of action arose, in determining the rights of the parties to the action under appeal.

The Supreme Court of Canada upheld the judgment of O'Connor C.J.A., stating that the Sand and Gravel Act could and should have been applied by the Appellate Division in reaching its decision.[111] Both Rand J. and Kerwin J., as he then was, concurred that in the vernacular of the mining and commercial world, "mines

[107] *Ibid.*, at p. 439.
[108] (1882), L.R. 19 Ch. 559.
[109] (1889), 15 A.C. 19.
[110] (1916), 9 W.W.R. 742.
[111] [1953] 1 & 2 S.C.R. 345.

and minerals" did not extend to gravel. Kellock J. agreed, and, applying *North British Railway* v. *Budhill*,[112] he stated:

> The word "minerals", standing alone, and considered in contradistinction to animal or vegetable substances, would no doubt include such material as sand and gravel.[113]

Citing the remarks of Lord Gorell in the same case, Kellock J. ruled that:

> . . . the enumeration of the specific substances indicates that the intention was to reserve exceptional substances only.[114]

Bearing in mind that Kellock J. had ruled that sand and gravel were not minerals in this case, we must conclude that he did not accept the views of the trial judge that sand and gravel were exceptional substances in the general area of the lands in question. Estey J. agreed that the provisions of the Sand and Gravel Act were relevant to the determination of the rights of the parties to this litigation, and preferred to found his decision to dismiss the appeal on that fact alone. I am of the opinion that Estey J. was entirely right in treating the appeal as he did upon these narrow grounds. I would suggest that since the provisions of the Sand and Gravel Act were completely decisive, they form the *ratio decidendi* of the case, and the other remarks of the learned members of the court were quite unnecessary to a settlement of the issue and should therefore be considered *obiter dicta.*

Much was said by the Appellate Division of Alberta and by the Supreme Court of Canada as to whether sand and gravel were thought of as "minerals" by the parties to the documents in question at the time that they were executed. Clearly the trial judge had to adopt this test, because he did not have the Sand and Gravel Act to direct him. However, as I have already opined, once the Sand and Gravel Act was enacted, no consideration of the state of mind of the parties to the transaction was necessary or justifiable in deciding the appeals. But even apart from this criticism, it seems to me that there are other reasons for preferring the judgment of Estey J. Members of the Alberta Appellate Division and of the Supreme Court of Canada expressed themselves aghast at the thought of a grant of agricultural land being subject to an obligation to maintain cultivation, while at the same time being subject to a reservation of mines and minerals which, if applied to sand and gravel, would have the effect of frustrating the efficacy of the grant by destroying the surface of the land. *Ergo*, they con-

[112] *Supra*, footnote 48.
[113] *Supra*, footnote 111, at p. 353.
[114] *Ibid.*, at p. 358.

cluded that sand and gravel could not have been thought of as "minerals". The weakness in this argument is demonstrated in the documents themselves, wherein it is expressly stated that the transferor was to have "the right to enter upon and occupy such portion of the said lands as may be necessary or convenient for the purpose of working, mining and obtaining the benefit of the said mines, minerals, petroleum, gas, coal and valuable stone". Let us suppose that valuable stone rather than gravel existed beneath the lands in question, for the recovery of which an open quarry would be necessary, thereby resulting in a disfigurement of the surface at least the equal of a gravel pit. Clearly the transferor could have insisted upon his right to destroy the surface in such a case, thus convincing me at least, that destruction of the surface of the land should have formed no part of the test of whether or not in the contemplation of the parties, sand and gravel were considered "minerals".

I am left with the feeling, after examining the judgments of the various courts, that if a grant or transfer should be prepared for use outside the Province of Alberta, where the Sand and Gravel Act would have no application, and such grant or transfer included a reservation of "mines and minerals" only, without further elaboration or modification, the ownership of the sand and gravel beneath the lands subject to such grant or transfer would still be an entirely moot point, notwithstanding the decisions in the *Gaumont* case. It is my view that the courts in both appeals of this case should have restricted themselves to the statutory reason for finding as they did, and that the results of their embarking upon a more venturesome course are consistent neither with logic nor with developments in the common law of Canada.

The second case which I have suggested is closely related to *Western Minerals Limited* v. *Gaumont*, is *Williamson* v. *Hudson's Bay Company*,[115] a decision which is an outgrowth of the conclusions reached by the Supreme Court of Canada in the *Gaumont* case. In the *Williamson* case, the Hudson's Bay Company had excepted and reserved to itself, in a "Farm Land Agreement",

> . . . all gravel and valuable stone and all mines and minerals (which without restricting the generality thereof shall be deemed to include all gas, petroleum and related hydrocarbons and gypsum) in, upon or under the said lands together with full power unto the Company . . . to search for, work, get, store, refine, transport and carry away the same . . . .

[115] (1956), 19 W.W.R. (N.S.) 337.

The plaintiff was also required, under the "Farm Land Agreement", to cultivate the said lands. After the plaintiff had paid to the Hudson's Bay Company the full purchase price under the agreement, a transfer was drawn in his favour and the certificate of title issued to him contained substantially the same language to express the reservation.

The question for determination by Egbert J. of the Supreme Court of Alberta, was whether or not the reservation in question included certain shale found to exist in the said lands. Egbert J. referred to his review of the authorities in the *Gaumont* case, saying that the same authorities should apply in the instant case. He found as a fact that shale was an ordinary substance composed of compacted clay, and that since it was quite unexceptional in the area in question, the onus was on the defendants to prove that in the vernacular of the mining world, the commercial world and among landowners, the word "shale" fell, at the time of the grant, within the meaning of the word "minerals". In a lengthy judgment, Egbert J. reluctantly decided that the addition of the words "all gravel and valuable stone" to the expression "all mines and minerals", indicated that the word "minerals" was not intended to be used in its widest sense, and that the enumeration of four substances after the words "mines and minerals", which would have been quite unnecessary had the words been intended in their widest sense, made it additionally clear that the word "minerals" was used in a restricted sense.

In support of this conclusion, the court held that the words "without restricting the generality thereof shall include . . .", were immaterial in the agreement for sale, and, based upon the conclusions reached by the Supreme Court of Canada in the *Gaumont* case, really meant nothing more nor less than "all minerals". Egbert J. felt that what really had to be ascertained, notwithstanding the use of this phrase, was the intention of the parties, and one way of making this determination was to see whether by including the names of other substances that were included in the document, the parties showed an intention to exclude from the scope of the word "minerals", certain substances not expressly enumerated.

Obviously, the ghost of the decision of the Supreme Court of Canada in the *Gaumont* case loomed large before Egbert J. in his deliberations. He borrowed from the judgment of Kellock J. in the *Gaumont* case in adverting to the fact that the purpose of the sale of the land to the plaintiff was to serve agricultural needs, a fact which moved Kellock J. to conclude that gravel could not

have been reserved from the transfer in the *Gaumont* case because to get at the gravel would have destroyed the lands for the purposes for which they were purchased. Egbert J. interwove this principle into his judgment, stating:

> This land having been sold as a farm, it seems unlikely that the intention of the parties was that all the plaintiff was buying was the layer of topsoil, with a right remaining to the Hudson Bay Co. any time it saw fit to destroy that topsoil by removing what has been described by some of the witnesses as the subsoil of the land.[116]

My comments upon a similar conclusion in the *Gaumont* case apply equally to this reasoning. Since the Hudson's Bay Company had reserved the right to enter upon the said lands and work such minerals as it had incontestably reserved to itself, that is gravel, even at the expense of totally desecrating the surface for agrarian purposes, I cannot conceive of any valid reason why the fact that the lands were granted as farm lands should diminish the right of the Hudson's Bay Company to recover any minerals reserved to it from the transfer, if in fact such minerals were so reserved. In other words, I submit that the so-called "agricultural purpose" should have formed no part of the test made by Egbert J. in deciding whether or not shale was a reserved "mineral".

I have already cited the language of Hyndman J.A. in *Stuart* v. *Calgary & Edmonton Railway Company*,[117] to the effect that the inclusion of further words in addition to "mines, minerals", were included for the purpose of greater certainty, and not for the purpose of restricting the general meaning of "minerals", since the expression "all minerals" was used in the earlier portion of the document. Apparently, the attention of the Supreme Court of Canada was never directed to this decision when the appeal of the *Gaumont* case was heard by that court. Perhaps Egbert J. in deciding the *Williamson* case, would have adopted the principles of Hyndman J.A., but for the decision in the *Gaumont* case which he felt binding upon him. This is, of course, pure speculation. A similar hypothesis may be also constructed if reference is made to the decisions in *Creighton* v. *United Oils Limited*,[118] and in *Knight Sugar Company Limited* v. *Alberta Railway and Irrigation Company*.[119]

Feeling as I do that the *Gaumont* case really settled nothing more than that the Sand and Gravel Act completely established the ownership of the gravel in question, and that the remaining remarks of the Supreme Court of Canada were largely *obiter*

[116] *Ibid.*, at p. 372.
[117] *Supra*, footnote 83.
[118] *Supra*, footnote 66.
[119] *Supra*, footnote 86.

dicta, it follows, in my opinion, that Egbert J. was free to follow the dictates of his own judgment in the *Williamson* case. If this be true, the court in the *Williamson* case could have found strong authority for a conclusion that shale did come within the meaning of the word "minerals". To begin with, Maxwell makes the following statement which is germane to a determination of the meaning of the language of the reservation in the *Williamson* case:

> In the abstract, general words, like all others, receive their full and natural meaning though they should not be extended so as to confine matters to which they are also obviously not germane . . . but the general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words. In other words, it is to be read as comprehending only things of the same kind as those designated by them, unless, of course, there be something to show that a wider sense was intended, as, for instance, a provision specifically excepting certain classes clearly not within the suggested genus.[120]

That rules of interpretation of statutes may be applied in construing a private document is now beyond question.[121]

The construction of general words is further discussed in Chitty *on Contracts*, in which it is stated:

> The rule which is laid down with reference to the construction of statutes, namely, that where several words preceding a general word point to a confined meaning, the general word shall not extend in its effect beyond subjects *ejusdem generis*, applies to the construction of contracts. The rule depends on the assumed intention of the writer, *i.e.* that the general words were only intended to guard against some accidental omission in the objects of the kind mentioned and were not intended to extend to objects of a wholly different kind.[122]

It has been held in a number of cases, notably *Salisbury* v. *Gladstone*,[123] that clay, of which shale is composed, may be a mineral. Lord Macnaghten, in *Glasgow* v. *Farie*, stated that the word "minerals" when used in a legal document or in an act of Parliament must be understood in its widest signification, unless there be something in the context or in the nature of the case to control its meaning. Are not mines and minerals a particular genus, of which gas, petroleum and related hydrocarbons and gypsum are several species? Is it not true that the very language of the document itself indicated that the genus of mines and minerals

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[120] Interpretation of Statutes (10th ed., 1953), p. 337.

[121] See *Glasgow* v. *Farie*, *supra*, footnote 33, or *Great West Railway* v. *Carpalla*, *supra*, footnote 38.

[122] (21st ed., 1955), Vol. 1, p. 155.

[123] (1860), 6 H. & N. 123, at p. 127, upheld on appeal to the House of Lords (1861), 9 H.L. Cas. 692.

was not to be restricted by the enumeration of several species deemed to be included therein? Was not Egbert J. attempting to make the *Williamson* case fit the procrustean bed of the decision in the *Gaumont* case, when he held that the words, "which without restricting the generality thereof", indicate an intention to restrict the generality of "minerals"? I believe that all these questions may be answered in the affirmative.

It should also be noted that the *ejusdem generis* rule is not a rigid one, as some of the decisions discussed in this article point out.[124] As Chitty says, ". . . where the language of the contract clearly shows that the parties intended to exclude its operation, it will not be applied".[125] Even if Egbert J. considered the *ejusdem generis* rule confining, having regard to the expressed intention of the parties, he could have rejected its application to the facts before him.

It might be argued that in the *Williamson* case, the specific words followed rather than preceded the general words "all mines and minerals". In answer to this argument, precisely these facts existed in *Ambaticlos* v. *Anton Jurgens Margarine Works*,[126] wherein it was held by the Privy Council that the form of the contract that was under consideration indicated an intention that the generality of the earlier words should not be restricted by the insertion of subsequent words, the subsequent words being merely examples of what was meant by the general words. Furthermore, Chitty dealt with this very situation as follows:

> In the construction of all instruments, it is the duty of the court not to confine itself to the force of the particular expressions, but to collect the intention of the parties from the whole instrument taken together; but where by the use of general words such intention is clearly and unequivocally expressed, every court is bound by it, however capricious it may be, unless it be plainly controlled by the other parts of the instrument.[127]

It is my submission that Egbert J. need not have hesitantly embarked upon what he termed a destruction of "that staff and mainstay of the modern conveyances", the phrase, "which without restricting the generality thereof shall include, etc.".[128] The feature

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[124] See *Fuller* v. *Garneau*, *supra*, footnote 72 and *Creighton* v. *United Oils Limited*, *supra*, footnote 66.

[125] *Op. cit.*, footnote 122, pp. 156, 157.

[126] [1923] A.C. 175.

[127] *Op. cit.*, footnote 122, p. 158. See also *Hume* v. *Rundell* (1824), 6 Madd. & Geld 331, at p. 337, *per* Leach V.C.; *Lloyd* v. *Lloyd* (1837), 2 My & Cr. 192, at p. 202, *per* Lord Cottenham L.C.; and *Re Wellsted's Will Trust*, [1949] Ch. 296, *per* Cohen L.J.

[128] *Supra*, footnote 115, at p. 371.

of his decision in the *Williamson* case which I find most distressing is his preference for the proposition that the naming of any specific substances in addition to the general words "mines and minerals" must of necessity mean that the genus of "mines and minerals" is thereby intended to be restricted, over the proposition laid down in *Hext* v. *Gill* and almost unwaveringly followed by English and Canadian courts ever since, that the intention of the parties must be discerned from the documents, if it can be. In the *Gaumont* case, the reservation did not bespeak an intention to give to the words "mines and minerals" their widest signification, and therefore there was some reason for some members of the Supreme Court of Canada concluding that the intention of the parties, in introducing the names of various specific minerals into the reservation, was to restrict the generality of "mines and minerals". But in the *Williamson* case, the intention of the parties vis-à-vis the generality of "mines and minerals" was manifest from the language of the reservation, and consequently the court was not obliged to seek for it, but merely to implement it. I would therefore like to feel that this decision is an exception to the trend of the law of Canada relative to mines and minerals, a mutation from the days of *Duke of Hamilton* v. *Graham*, when words were examined to the exclusion of all else in determining rights under a reservation of mines and minerals.

The last case which I believe justifies comment in this article is the very recent decision of the Supreme Court of Canada in *Crow's Nest Pass Coal Company Limited* v. *Reginam, et al.*[129] This case involved a grant of certain lands to the appellant from which was reserved to the Crown ". . . any minerals precious or base, [other than coal] . . .". The appellant asserted that it was entitled to the petroleum and natural gas which might be found within the said lands, on the theory that all that was reserved to the Crown was the right to minerals of a metallic nature, having regard for the modifying words "precious or base" which followed the word "minerals" in the reservation.

Locke J., speaking for the court, reviewed in comprehensive fashion the various statutes which were alleged by the appellant to have a bearing upon the meaning of "minerals" in the grant, and concluded that the definitions in these statutes should have no application to the words of the grant. He concluded, after considering the decisions in a large number of the ruling cases already discussed in this article, that ". . . petroleum and natural

[129] *Supra*, footnote 62.

gas were prior to and at the time the grants were made, and are now regarded . . ." as "minerals".[130] He agreed with the contentions expressed in the judgments of the lower courts in the case that ". . . the words 'precious or base' in their context, [were not] words of limitation but that they applied to minerals generally, including substances of organic origin as well as metals".[131]

This decision while in no way surprising, is nevertheless reassuring to me that the monument that has been labouriously shaped in Canadian law through the application of our own and English decisions to signify a fundamental interest in the intentions of the parties at the time a grant of land is made subject to a reservation of mines and minerals, still stands erect, although this monument seems to have been chipped by some of the reasoning in the *Gaumont* and *Williamson* cases.

IV. *Conclusion.*

Before embarking upon the somewhat hazardous undertaking of drawing conclusions from the closely interwoven, and yet at times strangely contradictory decisions that have been discussed in this article, it might be well to emphasize the limits within which this examination has been confined. No attempt has been made to discuss, to distinguish or to apply the different theories of ownership of mines and minerals in situ that apply in various jurisdictions, that is, absolute ownership; ownership of a profit à prendre; capture of *ferae naturae;* and so on. Such considerations are better examined within other terms of reference, and have been carefully, and I think competently commented upon in other studies.[132] Furthermore, I have not attempted to deal in any way with the tortious or contractual liabilities that do or may arise through the recovery of mines and minerals from a given estate in land, a subject of great breadth and complexity in itself. The scope of this article and of the conclusions herein drawn is restricted to the rather narrow ground of the rights, and to some extent the duties that are retained by the grantor of an interest in land, who reserves or excepts to himself some interest in mines and minerals.

A long line of authority, starting at least as early as *Proud* v. *Bates*[133] and approved as recently as 1953 by the Supreme Court

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[130] *Ibid.*, at p. 522. [131] *Ibid.*, at p. 519.

[132] See Laycroft and Head, Ownership of Oil and Gas (1953), 31 Can. Bar Rev. 382.

[133] *Supra,* footnote 9.

of Canada,[134] indicates that in Canada, a reservation or exception of nothing more nor less than "mines and minerals" from a grant of lands would probably vest in the party for whose benefit the reservation or exception is made, all that is not animal or vegetable within those lands, so long as it was beneath the surface of the ground and possessed some intrinsic value, apart from its bulk.[135]

As we have seen, substances that are of a mineral character and are found at the surface of the ground belong to that mutable class which may be adjudged within or without the reservation or exception, depending upon what the courts may find to be in the minds of the parties to the transaction.[136] This rule would apparently also obtain in the case of substances of a mineral character that are located so close to the surface of the ground that they can be recovered by merely stripping off the overburden.[137] Efforts have been made by some governments to establish the ownership of some "surface minerals" (as Lord Macnaghten called them in *Glasgow* v. *Farie*), through the enactment of declaratory statutes,[138] but this move is one of questionable merit, since such statutes could never be exhaustive in their coverage, and also because they always smack of confiscatory legislation that is bound, sooner or later, to deprive some owner of his "mineral" estate without redress of any kind.

Some conclusion should also be reached concerning the labours of the courts to determine whether or not a given substance is a "mineral" within a reservation or exception, depending upon whether or not such substance has a "value", either intrinsically or as a result of its rarity in the area where it is found. There seems little doubt that if a substance of mineral character is so common in an area as to be only a part of the ordinary soil, it will probably not be included in a reservation or exception of "mines and minerals".[139] On the other hand, if such a substance should be rare or unusual in the area in which it is discovered, the courts will then attempt to determine whether or not, in the minds

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[134] *Western Minerals Limited* v. *Gaumont*, *supra*, footnote 102, *per* Kellock J., at p. 353.

[135] See *Great Western Railway Co.* v. *Carpalla*, *supra*, footnote 38, *per* Fletcher Moulton L.J., at p. 231.

[136] See *Glasgow* v. *Farie*, *supra*, footnote 33; *Great Western Railway Company* v. *Carpalla*, *ibid.*; *Western Minerals Limited* v. *Gaumont* and *Williamson* v. *Hudson's Bay Co.*, *supra*, footnote 102.

[137] *Glasgow* v. *Farie* and *Western Minerals Limited* v. *Gaumont*, *ibid.*

[138] See The Clay and Marl Act, S.A., 1961, c. 14; The Mineral Declaratory Act, S.A., 1961, c. 48.

[139] *Great Western Railway Co.* v. *Carpalla*, *supra*, footnote 38; also *Western Minerals Limited* v. *Gaumont*, *supra*, footnote 102.

of the parties claiming ownership of such substance, it was considered a "mineral".[140]

But what conclusions may be drawn concerning the ownership of, and the right to encroach on, substances of a mineral character located well below the surface of the ground (which I shall call "deep minerals" for convenience), and which have no particular value in themselves except for their bulk or weight? This question has often been considered in connection with claims to the right of "outstroke". The English courts have taken a very sanguine view of the rights of the owner of mines or minerals to all "deep minerals". As we have seen, the rule in *Bowser* v. *Maclean* and *Eardley* v. *Granville*[141] established that the grantee of an interest in mines owned not only the layer in which the minerals were contained, but also the space remaining after the minerals were evacuated. Both *Proud* v. *Bates*[142] and *Duke of Hamilton* v. *Graham*[143] affirmed the absolute nature of the ownership of mineral substances below the ground by the holder of the right to mine, and then *Batten-Pooll* v. *Kennedy*[144] crystallized the theories expressed in these cases into a principle which still exists in the law of England, to the effect that the owner of a freehold estate who grants it away, subject to an exception of all mines, has granted out his estate in "parallel horizontal layers",[145] with the grantee receiving only the parallel layer at the surface which is granted to him. From a basis such as this, it is not surprising that the right of "outstroke" was secured to any owner of "deep mineral" substances.

Perhaps the reason for the dearth of Canadian cases dealing with the right of "outstroke" and with the ownership of "deep minerals", is the emphatic and unqualified language of the English courts on these subjects. The fact that the Alberta Appellate Division in *Little* v. *Western Transfer and Storage Company Limited*,[146] referred to and applied the English principles relative to "outstroke", would indicate that English law is identical with the law in Canada on the ownership of "deep minerals".[147] If this be true, one may conclude that an owner of the "deep mines and minerals" in Canada will be entitled not only to the minerals of value within his estate, but also to the right to encroach into the base rock surrounding and containing these minerals within his

[140] *Western Minerals Limited* v. *Gaumont*, *ibid.*
[141] *Supra*, footnote 16.
[142] *Supra*, footnote 9.
[143] *Supra*, footnote 21.
[144] *Supra*, footnote 23.
[145] *Supra*, footnote 25.
[146] *Supra*, footnote 74.
[147] See Anger and Honsberger, Canadian Law of Real Property (1960) p. 639.

lands to whatever extent he considers necessary in the furtherance of "outstroke", or for other purposes. Since presumably, such an owner is also entitled to the space remaining after the minerals of value have been extracted and removed,[148] perhaps we have at least a partial answer to some imminent problems in Canada.

The use of underground facilities for the storage of natural gas, liquid petroleum products and condensate has been an accomplished fact for some years in various parts of the world,[149] although it is still in a relatively incipient stage in Canada. Underground caverns have also been used for the storage of many other things, and these uses will multiply rapidly as technology advances. Once ownership of the cavern has been determined, the parties desiring to make a storage use of it will at least know with whom they must bargain, respecting such things as royalties or rentals for the use of the cavern; liabilities for loss from storage of the material in question; liabilities arising from escape of the material stored to the prejudice of third parties; liabilities for shrinkage as a result of storage of the material in question.

Although one might conclude that the owner of the "mines and minerals" within a certain tract of land is legally entitled to the profits that may result from the use of an underground cavern beneath such lands, this would apparently only follow if the cavern should exist in the "deep minerals". A cavern mined in close proximity to the surface could well give rise to the same question regarding ownership as is encountered in settling the ownership of "surface minerals", that is, what was in the minds of the parties at the time of the transaction? In such cases, it is always for the courts to determine the rights of the parties.

In this connection, some pressure has apparently been exerted by representatives of some provincial legislatures to have a "Model Form Underground Storage Act" drafted and approved at one of the forthcoming annual Mines Ministers' Conferences, with a view to establishing by more or less uniform legislative action within the provinces, a statutory panacea to this problem. As to whether this recommendation has grown from a misapprehension or an incomprehension of the complexity of the problems of settling the ownership of underground minerals, or from an impatience with the length of legal proceedings to resolve the question, or

[148] *Ibid.*

[149] In the United States, this use has attained some sophistication. See Kulp, Oil and Gas Rights (1954), p. 525 *et seq.* See also *Central Kentucky Natural Gas Co.* v. *Smallwood* (1952), 252 S.W. 2d 866, which cited *Bowser* v. *Maclean* and *Batten-Pooll* v. *Kennedy*, *supra*, footnotes 12 and 23, and *Strain* v. *Cities Service Gas Co.* (1938), 83 P. 2d 124.

from a combination of both, I cannot say. Certainly, some statutory enactments which would have the effect of compelling the use of certain underground facilities for storage purposes and which would establish controls over such storage may have considerable merit. But the arbitrary establishment of the ownership of underground storage facilities by means of statutory enactment is another thing, which, if brought into existence, will have the obvious effect of confiscation of many property interests without reward or redress, and I would venture to say, will prove to be much less of a panacea than its promoters prophesy.

It is much more difficult, as the cases discussed in this article have adequately demonstrated, to reach conclusions as to the extent of the interest retained from a grant of land from which is reserved or excepted, not just "mines and minerals", but "mines" alone; or certain "minerals"; or "mines and minerals" along with other substances named; or "petroleum and natural gas". Whereas authority exists for the proposition that the addition of words elaborating upon the expression "mines and minerals" in a reservation or exception are merely for the purpose of greater certainty;[150] other authorities hold that such an addition has the opposite effect of indicating that something less than "all mines and minerals" are reserved or excepted,[151] and it is for the courts to determine which have been retained by the grantor. Suffice it to say that any qualification of a reservation or exception of "mines and minerals" from a grant of lands will likely have an effect upon the extent of the interest retained, and in the absence of a situation "on all fours" with a decided case that will determine the issue, the only conclusions upon which one could rely in these circumstances are those reached after one's day in court. It is the estate of less than all "mines and minerals" and the qualifications which have been placed upon the expression "mines and minerals" in a reservation or exception, that are the substance of practically all of the litigation referred to in this article.

In considering a reservation or exception of less than all "mines and minerals" as it might apply to the question of underground storage, one might ask what conclusions could be drawn respecting the rights of a grantor who has parted with his land but has excepted "all petroleum and natural gas" from the transfer. (This assumes that petroleum and natural gas are substances capable of ownership in situ in Canada rather than substances in respect of

[150] *Stuart* v. *Calgary & Edmonton Railway Company*, *supra*, footnote 85.
[151] *Western Minerals Limited* v. *Gaumont*, *supra*, footnote 102.

which rights of recovery may be granted, but of which no ownership is possible, due to their fugacious characteristic). After the petroleum or natural gas has been exhausted from his lands to the extent that modern engineering practices will permit, who owns what is left in the reservoir? Further, does such an owner have any right to reimbursement if the reservoir from which he has withdrawn all the petroleum and natural gas of which he is capable, is to be used for the storage of natural gas that is not indigenous to the lands in which his interest is retained? It would seem that, since the grantor in this case excepted to himself "all petroleum and natural gas", this estate will continue in his name, whether or not it is recovered, and that, therefore, if what is not recovered can ever be put to any use in situ, the profits from that use should logically accrue to the grantor. However, in line with the authorities upon the ownership of "deep minerals",[152] since the grantor parted with his entire mineral estate, excepting only "petroleum and natural gas", it would seem to follow that under the law of Canada, the owner of the mineral estate surrounding the petroleum and natural gas would be entitled to the exclusive possession and ownership of the cavity remaining after the petroleum and the natural gas have been evacuated, and that he alone could claim reimbursement for its use for storage purposes, albeit that such "cavity" would consist only of microscopic holes or interstices in the rock.

The general law of the United States appears to differ from the law of Canada and England in the approach taken to the question of the ownership of the cavity within which petroleum or natural gas are or have been contained. Professor Summers points out that, quite surprisingly, the courts in the United States have not dealt directly and strictly with the ownership of petroleum and natural gas in the ground, but rather with the rights to recover them from the ground.[153] He indicates that some courts in the United States have rejected the analogy between the ownership of solid minerals and the ownership of petroleum and natural gas, for the reason that, though both are a part of the land, the owner of the solid minerals is not necessarily also the owner of the petroleum and natural gas within such lands, because the latter substances, being fugacious, may migrate freely from these lands to other lands. As a consequence of the application of the rule of capture to all interests in petroleum substances in the ground, it

[152] *Batten-Pooll* v. *Kennedy* and *Little* v. *Western Transfer and Storage Company, Limited, supra*, footnotes 23 and 74.

[153] Summers, The Law of Oil and Gas (1938-55), Vol. 1A, pp. 290-303.

becomes difficult to conceive of a theory of ownership of a separate estate in petroleum and natural gas in the ground, although such a theory is sometimes propounded by courts in the United States. Where such a concept is recognized, it has been ruled that the owner of the petroleum and natural gas will own all rights to these substances within the lands subject to his interest, whether such petroleum and natural gas are indigenous to these lands, or arrived there through injection or otherwise.[154] Such a vigorous application of the rule of capture would have the effect of substituting the owner of the petroleum and natural gas rights for the owner of the remaining mineral estate (if these two owners happened to be different), as the party with whom a person must bargain for the underground storage of natural gas in a depleted gas reservoir. Whether or not Canadian courts would subscribe to such a doctrine, is difficult to say at this time.

Some conclusions may also be drawn concerning the right to work mines and minerals reserved or excepted from a grant of lands. The old English cases of *Bellacorkish* v. *Harrison*[155] and *Ramsay* v. *Blair*[156] held that a grant or reservation of minerals presumed the right to enjoy them, and that therefore the power to get them must be implied as a necessary incident to the ownership of them. The later English case of *Great Western Railway* v. *Carpalla* held that "surface mines and minerals" reserved from a transfer of land may be worked by the owner, even in the absence of a specific reservation of a right to work, and even if such working would seriously interfere with the rights of the railway company to which the surface of the lands in question had been transferred, so long as the work was conducted in a manner which was proper and necessary to the working of the mines and minerals.[157] Duff J. in the Canadian case of *Fuller* v. *Garneau* held that the right to work minerals did not extend to a right to let down the surface of a colliery under an exception of "mines" and "minerals", unless the terms of the deed by necessary implication gave such right,[158] but he vouchsafed that explicit terms in the deed were not necessary to grant the right to work, even at the expense of a subsidence of the surface, if the minerals could not be worked without such a result. The Appellate Division of Alberta expanded upon this principle in *Borys* v. *Canadian Pacific Railway Company, et al.* by stating that the right to work an interest in minerals, even if the reservation contained no reference to such right in the reservation,

[154] *Gray-Mellon Oil Co.* v. *Fairchild* (1927), 292 S.W. 743 (Ky.).
[155] *Supra*, footnote 10.
[156] *Supra*, footnote 11.
[157] *Supra*, footnote 47.
[158] *Supra*, footnote 73.

was nevertheless guaranteed so long as modern production methods were used.[159]

It would therefore appear from both the English and the Canadian cases dealing with reservations or exceptions of "mines and minerals" which do not expressly reserve or except the right to work, that this right may be implied, even if the inevitable consequences of the full enjoyment of the right are damage to or destruction of the surface of the lands from which the mines and minerals have been reserved or excepted, so long as the damage or destruction is a necessary consequence, rather than the result of operations that are convenient or expedient to the owner of the mines and minerals.[160] In reaching this conclusion, I am mindful of the remarks made by some members of the Alberta Appellate Division and of the Supreme Court of Canada in the *Gaumont* case, to the effect that a grant of land with a covenant to cultivate for agricultural purposes, but nevertheless subject to a reservation of "all mines, minerals, etc.", should not be construed as reserving the right to work the lands in search of minerals in such a way as to destroy the surface and render impossible of performance the covenant to cultivate the surface. As I have mentioned, both of these courts were bound by statutory enactment to find that the substances being sought after by the transferor were not minerals. Therefore, I believe that their remarks relative to the right to work in this case were prompted by inductive reasoning from that axiom, and as such, were unnecessary to the decisions reached, and inconsistent with the legal concepts of the right to work in both England and Canada.

The last conclusion which I would advance is that, although the courts have supplied answers to many of the problems of determining the rights arising from a reservation or exception of mines and minerals, they are going to have to supply answers to many more. The dynamic nature of the mining and the petroleum industries is bound to precipitate further litigation upon facets of the problem not yet dealt with and in some instances not yet even dreamed of. Indeed, there are already before us some novel situations which developments in these industries have precipitated, that are bound to strain the presently existing jurisprudence in Canada concerning the rights of a party who has reserved or excepted to himself all mines and minerals from a transfer of land.

[159] *Supra*, footnote 93, *per* Parlee J.A., at p. 503.

[160] The same rule appears to apply in the United States. See Summers, *op. cit.*, footnote 153, p. 229; and see also *Jenkins* v. *Depoyster* (1945), 186 S.W. 2d 14 (Ky.).

If these situations are to be decided in a manner in keeping with the rapidly changing and developing pattern of our mining and petroleum industries, the courts in Canada will have to maintain a dynamic approach to the variegated problems which these changes and developments will present.