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UNIVERSITY OF LONDON  
No. 7 of 1956. FEB 1957  
INSTITUTE OF  
LEGAL STUDIES

# In the Privy Council.

46046

## ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

BETWEEN

THE MIDLAND RAILWAY COMPANY OF  
WESTERN AUSTRALIA LIMITED (Plaintiff) *Appellant*

AND

10 THE STATE OF WESTERN AUSTRALIA  
(Defendant) . . . . . *Respondent*

AND BETWEEN

THE STATE OF WESTERN AUSTRALIA  
(Defendant) . . . . . *Appellant*

AND

THE MIDLAND RAILWAY COMPANY OF  
WESTERN AUSTRALIA LIMITED (Plaintiff) *Respondent*  
(Consolidated Appeals)

### Case

20 FOR THE APPELLANT COMPANY ON THE APPEAL AND FOR THE RESPONDENT  
COMPANY ON THE CROSS APPEAL.

RECORD.

30 1. These are consolidated appeals, by special leave, from a judgment and order of the Supreme Court of Western Australia (Dwyer, C.J.) dated the 10th June, 1955, whereby the said Supreme Court dismissed in part the claim of the Appellant Company (hereinafter called "the Appellant") against the State of Western Australia (hereinafter called "the Respondent") but as to a further part of the Appellant's claim granted a declaration in favour of the Appellant. The Appellant appeals against so much of the said judgment and order as dismissed its claim in part. The Respondent appeals against so much of the said judgment and order as granted the said declaration.

pp. 13-22.  
p. 15.  
p. 14, l. 14-p. 15, l. 6.

2. The principal questions which arise for decision on these appeals are as follows :—

(A) Whether the effect of the Petroleum Act, 1936, of the Respondent, on its true construction and in the circumstances of the case, is to deprive the Appellant of rights to the petroleum on or below the surface of land granted to the Appellant as hereinafter set out before the commencement of the said Act.

(B) Whether the effect of the said Act, on its true construction and in the circumstances of the case, is to deprive the Appellant of rights to the petroleum on or below the surface of land granted to the Appellant as hereinafter set out after the commencement of the said Act. 10

(C) Whether, if the said Act has the effect described in (A) or (B) above, Sections 9 and/or 10 thereof are within the powers of the Legislature of Western Australia.

3. In 1886 the Legislature of the Colony of Western Australia consisted of the Governor and a Legislative Council established under the following Imperial Acts, namely, The Australian Constitutions Act, 1842 (5 & 6 Vict. c. 76), the Australian Constitutions Act, 1844 (7 & 8 Vict. c. 74), and the Australian Constitutions Act, 1850 (13 & 14 Vict. c. 59). 20  
None of these Acts empowered the Governor or the Legislative Council to dispose of Crown lands in the said Colony, and in 1886 disposal of such lands was regulated by the Australian Waste Lands Act, 1855. Pursuant to that Act, Land Regulations had been made for the said Colony authorising the Governor, in the name and on behalf of Her Majesty, to dispose of the Crown lands within the said Colony in the manner and upon the conditions prescribed by the Regulations. The Land Regulations in force in 1886 were those issued under a proclamation by the Governor of Western Australia on the 11th October, 1882, and reprinted with amendments to that date in October, 1885. 30

pp. 29-85.

4. These Regulations empowered the Governor, inter alia, to make Crown Grants, that is a deed of grant issued in the name of Her Majesty, conveying to the grantee some portion of Crown Lands in fee simple. The Governor was further authorised to make such grants upon such terms and conditions as to resumption of the land or otherwise as to him should seem fit. By Regulation 8 of the said Regulations it was provided that the Governor in Council might from time to time by order under his hand, published in the Government Gazette, prescribe the form of Crown grants and other instruments requisite for carrying the said Regulations into effect. It was further provided that until otherwise notified, Crown Grants would be issued in the forms given in the relevant Schedules to the said Regulations, with such variations as might be necessary to meet the circumstances of any particular case. The scheduled forms of Crown Grants for Rural Lands saved and reserved to Her Majesty her heirs and successors all mines of gold silver and other precious metals in and under the land granted but did not contain any reservation of petroleum or mineral oils. 40

pp. 30-31.

pp. 31-32.

pp. 60-61.

p. 61, ll. 35-39.

5. The aforesaid Land Regulations were revoked by further Land Regulations proclaimed on the 2nd March, 1887, but Regulation 1 of the said Regulations provided that—

10 “ nothing herein contained shall affect or be construed to affect any contracts, or to prevent the fulfilment of any promises or engagements made by or on behalf of Her Majesty, under such Regulations, with respect to any lands situate within the said Colony, in cases where such contracts, promises or engagements have been lawfully made before the time at which these Regulations shall take effect therein.”

The material portions of the said further Regulations were in substantially similar terms to those contained in the 1882 Regulations, and the scheduled form of Crown Grant annexed to the said further Regulations contained a reservation of all mines of gold, silver, and other precious metals, but contained no reservation of petroleum or mineral oils.

6. In 1886 a railway line ran between Fremantle, the chief port of Western Australia, and Guildford, a town about 7 miles north of Perth, the capital. The first port north of Fremantle was Geraldton (230 miles north of Perth) and the Government of the Colony proposed to construct a railway from Geraldton to Greenough Flats, some 19 miles to the south. In these circumstances one Waddington approached the said Government and put forward proposals (inter alia) for the construction, management and working of a railway from Guildford to Greenough Flats. On the 27th February, 1886, an indenture (hereinafter called “ the Waddington agreement ”) was entered into between the said Waddington and the Governor of Western Australia acting for and on behalf of the Government of the Colony whereby Waddington agreed to construct a railway between Guildford and Greenough Flats. In return, the Government agreed to grant to Waddington in fee simple by Crown Grants in the form prescribed by the Land Regulations of the Colony, a subsidy in land on the basis of 12,000 acres for every mile of the railway duly completed and opened for traffic. The Waddington agreement was confirmed by the Western Australian Act 50 Vict. No. 24. Subsequently, by deed dated the 23rd June, 1890, Waddington’s rights and interest under the Waddington agreement were assigned to the Appellant.

7. No Crown Grants in pursuance of the Waddington agreement were made prior to the 21st October, 1890. On the 25th October, 1890, the Western Australia Constitution Act, 1890, was proclaimed in Western Australia. The said Act granted responsible government to the Colony and enabled Her Majesty by and with the advice and consent of the Legislative Council and Legislative Assembly of the Colony to make laws for the peace order and good government of the Colony. Section 3 of the said Act provided that :—

40 “ The entire management and control of the waste lands of the Crown in the Colony of Western Australia, and of the proceeds of the sale, letting and disposal thereof, including all royalties, mines and minerals, shall be vested in the legislature of that Colony.”

Section 4 (1) of the said Act repealed Section 7 of the Australian Waste Lands Act, 1855 (which section related to waste lands of the Crown in Western Australia), but provided that—

“ all regulations made under that section, and in force at the commencement of this Act, shall continue in force until altered or repealed in pursuance of the powers conferred by this Act . . . ”

Section 4 (2) of the said Act of 1890 provided further that :—

“ Nothing in this Act shall affect any contract or prevent the fulfilment of any promise or engagement made before the time at which this Act takes effect in the Colony of Western Australia on behalf of Her Majesty with respect to any lands situate in that colony, nor shall disturb or in any way interfere with or prejudice any vested or other rights which have accrued or belong to the licensed occupants or lessees of any Crown lands within that colony.” 10

8. Prior to June, 1893, the Appellant encountered financial difficulties and work on the railway ceased. In these circumstances the Appellant requested the Government to guarantee repayment by the Appellant of the principal and interest of bonds to the full value of £500,000 to be created and issued by the Appellant for the purpose of raising moneys for the completion of the railway. By the Midland Railway Loan Act, 1893 (56 Vict. No. 19), the Western Australia Legislature authorised the Colonial Treasurer, subject to the execution by the Appellant and all necessary parties of a certain agreement, to guarantee debentures to the amount of £500,000 to be issued by the Appellant. 20

pp. 89-92.

9. The agreement (hereinafter called “ the debenture agreement ”) contemplated by the said Act was entered into on the 29th June, 1893, between the Government of Western Australia, the Appellant and other parties. It provided that certain lands (called “ the mortgaged lands ”) in respect of which the Appellant was or might be entitled to a Crown grant in fee simple under the Waddington agreement should be vested in nominees of the Government to be held (subject to a first charge given in favour of the Government by the Appellant) in trust for the Appellant, its successors and assigns. 30

10. In 1898 a Land Act (No. 37 of 1898) was enacted by the Western Australia Legislature. This Act repealed inter alia the existing Land Regulations, including the Land Regulations of 1887 so far as not already repealed. Section 2 of the Act provided that such repeal should not affect any right, interest or liability already created, existing or incurred. By Section 15 of the said Act it was provided that Crown Grants issued under the Act should contain a reservation of inter alia mineral oil. 40

pp. 106-108.

11. From time to time after the 20th October, 1890, Crown Grants pursuant to the Waddington agreement were made to the Appellant of various lands in Western Australia between Perth and Geraldton. All such grants were made in the form prescribed by the Land Regulations, 1882, and were in the same form as the specimen grant at Exhibit “ N ” of the Record. The grants contained no reservation of petroleum or mineral oil.

The last such grant was issued on the 20th May, 1953, and grants of a total of approximately 41,866 acres were made to the Appellant after the commencement of the Petroleum Act, 1936.

12. Further from time to time prior to 1911 Crown Grants of various lands in Western Australia between Perth and Geraldton were made, in the form prescribed by the Land Regulations, 1882, pursuant to the Waddington agreement and the debenture agreement, to the Commissioner of Crown Lands and the Minister for Lands as nominees of the Government.

10 13. From time to time portions of the lands granted to the Appellant as set out in Paragraph 10 above were sold by the Appellant, and portions of the lands granted to nominees of the Government as set out in Paragraph 11 were sold by the Appellant with the consent of the Government. When the lands so sold were transferred to the purchasers the transfers (save in a few isolated instances in the case of transfers by the Appellant) excepted and reserved to the Appellant or to the Commissioner of Crown Lands or the Minister of Lands (as the case might be) all metals ores and minerals (including petroleum and mineral oil) in upon and under the land so transferred.

20 14. By a transfer dated the 22nd February, 1911, and registered in p. 94. the Lands Titles Office, Perth, on the 11th March, 1911, and numbered 1286/1911 all lands granted in accordance with the debenture agreement to the Commissioner for Crown Lands or the Minister for Lands (except such lands as had been transferred to purchasers as above mentioned) were transferred to the Appellant by the Minister for Lands. By a further pp. 92-94. transfer dated the 22nd February, 1911, and numbered 4296/1911, the Minister for Lands, as the registered proprietor of the metals ores and minerals reserved on the transfers to purchasers made as set out in Paragraph 13 by the Government nominees under the debenture agreement, transferred to the Appellant all metals ores and minerals in upon and 30 under the lands which had been so transferred to purchasers subject to such reservation.

15. Sections 9 and 10 of the Petroleum Act, 1936, provide as follows :—

40 “ 9. Notwithstanding anything to the contrary contained in any Act, or in any grant, lease or other instrument of title, whether made or issued before or after the commencement of this Act, all petroleum on or below the surface of all land within this State, whether alienated in fee simple or not so alienated from the Crown is and shall be deemed always to have been the property of the Crown.

10. All Crown grants and leases under any Act relating to Crown land issued after the passing of this Act shall contain a reservation of all petroleum on or below the surface of the land comprised therein, and also a reservation of the right of access, subject to and in accordance with the provisions hereinafter contained, for the purpose of searching for and for the operations of obtaining petroleum in any part of the land.”

16. When the Bill which was subsequently enacted as the Petroleum Act, 1936, was introduced into the Legislature of the Respondent, the Appellant protested to the Government of the Respondent that the Bill constituted an infringement of its rights under the Waddington agreement and the Western Australia Constitution Act, 1890. The Government thereupon introduced into the Bill the provision which was enacted as Section 2 of the Act and which provided as follows :—

“ This Act shall be read and construed subject to the provisions of Section 4 of the Western Australia Constitution Act, 1890 (Imperial), so far as the same may be applicable.”

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p. 97.

17. In 1947 for the considerations therein mentioned and paid by the Respondent the Appellant transferred and surrendered to His Majesty its rights to minerals and mineral oil over certain lands more particularly described in various transfers from the Appellant to His Majesty in the same form as transfer No. 8815/1947.

pp. 98-99.

pp. 99-104.

p. 105, l. 27.

p. 106.

18. On the 12th May, 1950, the Respondent by notice in the Government Gazette resumed for housing purposes four half-acre blocks of land at Moora over which the Appellant held the mineral rights. After correspondence between the Appellant and the Under Secretary for Works representing the Respondent, it was agreed that the Appellant should sell its rights to the minerals and mineral oils in the said lands to the State Housing Commission for a consideration of £1. Such consideration was duly paid and a transfer dated the 25th May, 1951, was executed.

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p. 95.

p. 96.

pp. 103-105.

19. In December, 1951, the Appellant applied for Crown Grants to 41,872 acres of land to satisfy its claims under the Waddington agreement. Approval Notices were issued by the Under Secretary for Lands for grants to be issued in the form prescribed by the Land Act, 1933-1948, which reserved to the Crown (inter alia) mineral oil. The Appellant protested and the Under Secretary for Lands thereupon admitted that the Appellant was entitled to a grant only reserving to the Crown all mines of gold, silver and other precious metals. The Crown Grants were subsequently made to the Appellant in the form prescribed by the Land Regulations of 1882 and in the form of Exhibit “ O ” in the Record.

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20. On the 23rd October, 1952, the Respondent issued to West Australian Petroleum Pty. a Permit to Explore for Petroleum over inter alia lands granted to the Appellant as aforesaid.

21. In these circumstances the Appellant brought an action in the Supreme Court of Western Australia against the Respondent and against West Australian Petroleum Pty. By its Statement of Claim, dated the 16th July, 1954, the Appellant claimed a declaration that—

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(A) the said Petroleum Act, 1936, and in particular Sections 9 and 10 thereof has no application to the lands granted to the Appellant ;

(B) all minerals (other than gold, silver and other precious metals), including petroleum and mineral oil in, under or on the lands granted to the Appellant (whether since alienated by the

Appellant or not) belong to and are the exclusive property of the Appellant and that the Appellant has the sole right to explore and search for and remove such minerals; and

10 (c) any permit, licence, lease or other authority granted by the Minister under the authority of the said Petroleum Act or any other Act of Parliament of the State of Western Australia in so far as it purports to authorise any person or company to explore, search for, or take minerals (other than gold, silver or other precious metals) in, under or on the lands granted to the Appellant is void and of no effect.

The Appellant also sought a declaration that the permit to explore granted to West Australian Petroleum Pty. was void and of no effect. In the circumstances which arose, this declaration became no longer material.

22. In the said Statement of Claim the phrase "lands granted to the Appellant" meant—

20 (A) the lands granted to the Appellant in fee simple by the Crown in pursuance of the Waddington agreement, and either still held by the Appellant or sold and transferred by the Appellant subject to a reservation of mineral rights (including petroleum and mineral oil) in favour of the Appellant; and

(B) the lands granted by the Crown in fee simple to nominees of the Government in pursuance of the Waddington agreement and the debenture agreement in trust for the Appellant and—

(i) subsequently transferred to the Appellant by the Minister for Lands, and either still held by the Appellant or sold and transferred by the Appellant subject to such reservation as aforesaid; or

30 (ii) sold by the Appellant and transferred at the request of the Appellant by the Government nominees to the purchasers subject to such reservation as aforesaid in favour of the Government nominees, the rights so reserved being subsequently transferred to the Appellant.

23. The said action came on for hearing before the Supreme Court of Western Australia (Dwyer, C.J.) on the 8th and 9th November, 1954. At the hearing it appeared that the permit to explore granted to West Australian Petroleum Pty. had expired and all proceedings against such company were accordingly stayed.

40 24. In the said action the facts were not in dispute. The Respondent admitted the facts alleged in the Statement of Claim and certain other facts, including the facts referred to in paragraphs 16 to 19 inclusive hereof and alleged by the Appellant in Reply to the Defence of the Respondent, were admitted by the Respondent subject to their admissibility in evidence.

25. In his judgment delivered on the 2nd June, 1955, His Honour held that the Appellant was entitled to the relief sought in respect of the

lands the subject of Crown grants issued after the commencement of the Petroleum Act, 1936, but was not entitled to relief in regard to lands the subject of Crown grants issued prior to that date.

p. 17, ll. 18-22.

26. His Honour held that under the Waddington Agreement the Appellant became entitled to Crown grants in the form prescribed by the then existing Land Regulations and containing a reservation only of gold silver and precious metals. He then considered Section 4 (2) of the Western Australia Constitution Act, 1890, and continued :—

p. 17, l. 33.

“ In my opinion the State was bound by the agreement to fulfil its engagement which was to issue Grants in the form agreed, and it would have been *ultra vires* the State to alter or extend its reservation without the Plaintiff’s assent.” 10

He added :—

p. 18, l. 38.

“ As a fact the State Government has in practice conceded the right of the Plaintiff to have its Crown grants in substantially the original form and has issued them in that form. In my opinion the Defendant State has fulfilled its contract with the Plaintiff and not acted in contravention of Section 4 of the Imperial Act.”

p. 19, l. 13

27. His Honour then referred to Section 9 of the Petroleum Act, which, he said, must be regarded as effecting confiscation by the Respondent without compensation. He continued— 20

p. 19, l. 15.

“ a preliminary question which seems to arise is whether the State has the general constitutional power by appropriate legislation, and not by arbitrary administrative act, to resume land within its boundaries. That such general legislative power exists has not been contested. If it exists the purposes of resumption and questions of compensation are irrelevant for there are no such limitations as are present in the Federal Constitution, and if there is power to retake the fee simple, there must be power to retake any lesser estate or interest. If it does not exist I should be forced to conclude that all State legislation authorising resumptions of land for public works is invalid ; but it is, I think, impossible to place such a limitation on the constitutional powers of the State Legislature. 30

If this contention is correct, then it would seem that all land owners who had entered into agreements before 1890 to acquire Crown lands would have similar rights, and, furthermore, that if the State is so precluded from acquiring by resumption such a restricted interest in the mentioned land, it would follow that it is also precluded from resuming either the entirety or any less estate or interest therein and presumably permanently. In my opinion no such limitation or abrogation of the powers of the State is to be implied from the agreement or otherwise. Section 4 (2) goes no further than to require the State to carry out its contractual obligation which is to issue Crown grants in the proper form, with this qualification implied, that they are to be effective in that form when issued.” 40



28. His Honour then proceeded to consider the contention that the rights of the parties were to be construed according to the manner in which they had interpreted such rights, as evidenced by their conduct. He came to the conclusion that such conduct was neutral and not such as could be regarded as an agreed adoption of any special interpretation of the Appellant's rights under the Waddington agreement affecting future cases. p. 20, l. 8-p. 21, l. 5.

29. The Appellant submits with regard to the foregoing portions of His Honour's judgment that His Honour, having correctly concluded that the Appellant became entitled under the Waddington agreement to grants in the form prescribed by the then existing Land Regulations and containing a reservation only of gold, silver and other precious metals, and that by virtue of Section 4 (2) of the Western Australia Constitution Act, 1890, it would have been *ultra vires* the Respondent to alter or extend such reservation, failed to appreciate that there was no difference in substance between altering or extending such reservation and withdrawing rights from the Appellant by Section 9 of the Petroleum Act. The learned judge, it is submitted, failed to appreciate the true ambit and effect of Section 4 (2) of the 1890 Act, and never brought his mind to bear on the important question of the proper construction of the Petroleum Act in the light of Section 4 (2) of the Act of 1890 and of the Waddington agreement. The learned Judge appears to the Appellant to have fallen into error by pursuing considerations of a general nature and by dwelling upon consequences which, even if they would have resulted from a decision contrary to that reached by His Honour, were irrelevant to the questions which he had to consider.

30. In relation to grants made after the commencement of the Petroleum Act, 1936, His Honour held that the Appellant was entitled to the relief sought for the following reasons:— p. 21, l. 31.

30 (A) The phraseology of Section 9 was appropriate only to land already alienated and was not appropriate to future grants, for which Section 10 made provision. Section 9 should not therefore be held to apply to grants made to the Appellant after the commencement of the Act and properly issued in a form containing no reservation of mineral rights.

40 (B) The Appellant was entitled to grants made after the commencement of the Petroleum Act, 1936, in the form in which they were in fact made, by virtue of the Waddington agreement, and of Section 4 (2) of the Western Australia Constitution Act, 1890, and of Section 2 of the Petroleum Act.

(C) If the Petroleum Act, 1936, were interpreted as being applicable to Crown Grants to which the Appellant became entitled after 1936 such grants would not be in the form required by the Waddington agreement and would be in breach of the Respondent's contract and engagement and an interference with the Appellant's rights, and so *ultra vires* the Western Australia Legislature by reason of Section 4 (2) of the Act of 1890.

pp. 22-24.

31. On the 15th December, 1955, the Supreme Court of Western Australia granted the Appellant final leave to appeal to Her Majesty in Council against so much of the said judgment as dismissed its claim in part, and granted similar leave to the Respondent to appeal against so much of the said judgment as granted a declaration to the Appellant.

32. The Appellant humbly submits that its appeal should be allowed and the Respondent's cross-appeal dismissed for the following among other

### REASONS

- (1) BECAUSE under the Waddington agreement the 10  
Appellant was entitled to receive from the Crown grants  
of the said lands in the form prescribed by the Land  
Regulations then in force and containing a reservation  
only of gold, silver and other precious metals.
- (2) BECAUSE Section 4 (2) of the Western Australia  
Constitution Act, 1890, preserved to the Appellant its  
rights under the Waddington agreement and its rights  
under the Crown Grants issued or to be issued pursuant  
to the said agreement.
- (3) BECAUSE on the true construction of the Petroleum 20  
Act, 1936, and in the circumstances of the case, Sections 9  
and 10 thereof do not apply to the lands granted to the  
Appellant.
- (4) BECAUSE, alternatively, Sections 9 and 10 of the  
Petroleum Act, 1936, are *ultra vires* the Legislature of  
Western Australia.
- (5) BECAUSE in relation to the lands granted to the  
Appellant after the commencement of the Petroleum  
Act, 1936, the Respondent, having granted such lands  
subject to a reservation only of gold, silver and other 30  
precious metals, cannot be heard to contend that the  
said grants did not effectively pass to the Appellants  
the right to the petroleum and mineral oil upon, in and  
under the said lands.
- (6) BECAUSE so much of the judgment of the Supreme  
Court of Western Australia as dismissed the Appellant's  
claim is wrong.
- (7) BECAUSE so much of the said judgment as granted a  
declaration to the Appellant is right.

HARTLEY SHAWCROSS. 40

R. I. THRELFALL.

**In the Privy Council.**

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**ON APPEAL**

*from the Supreme Court of Western  
Australia.*

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**Case**

**FOR THE MIDLAND RAILWAY COMPANY  
OF WESTERN AUSTRALIA LIMITED.**

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