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INSTITUTE OF ADVANCED  
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No. 7... of 1956.

IN THE PRIVY COUNCIL.

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ON APPEAL.

FROM THE SUPREME COURT OF WESTERN  
AUSTRALIA.

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BETWEEN:

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

and

THE STATE OF WESTERN AUSTRALIA,  
*Respondent (Defendant)*

and

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

and

THE MIDLAND RAILWAY COMPANY OF  
WESTERN AUSTRALIA LIMITED, *Respondent*  
(*Plaintiff*).

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**CASE FOR RESPONDENT.**  
on Appeal

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C A S E for *Appellant?*  
on Cross-Appeal

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**IN THE PRIVY COUNCIL.**

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**ON APPEAL**

*FROM THE SUPREME COURT OF WESTERN AUSTRALIA.*

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**BETWEEN:**

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

*and*

THE STATE OF WESTERN AUSTRALIA, *Respondent (Defendant)*

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*and*

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

*and*

THE MIDLAND RAILWAY COMPANY OF WESTERN AUSTRALIA  
LIMITED, *Respondent (Plaintiff).*

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**CASE FOR RESPONDENT** *on Appeal*  
**CASE for APPELLANT** *on Cross-Appeal.*

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1. This is an appeal by The Midland Railway Company of Western Australia Limited, in this case called the "Appellant Company" and a cross appeal by the State of Western Australia, in this case called "the State," in each case by leave granted by the Supreme Court of Western Australia, against certain portions of the judgment and order of Dwyer, C.J. of the Supreme Court of Western Australia given and made on the 10th day of June, 1955, whereby he declared that the Petroleum Act (No. 36 of 1936) of the Parliament of the State of Western Australia and sections nine and ten thereof in particular did not apply to an area of 41,872 acres of land in the State of Western Australia granted to the Appellant Company by that State, after the coming into operation of the said Act, but did apply to other large parcels of land in the said State granted to the Appellant Company by the State prior to the coming into operation of the said Act.

**Record.**  
p. 23, l. 14.  
p. 14, l. 18.

The appeals are consolidated by order of the Supreme Court of Western Australia dated the 4th day of July, 1955.

2. The Appellant Company by its statement of claim sought a declaration that the said Petroleum Act, 1936, and in particular sections nine and ten thereof, had no application to any lands granted to it pursuant to and since the date of an indenture made between the then Governor of the Colony of Western

p. 6, l. 6.

**Record.** Australia and John Waddington, on the 27th day of February, 1886. The said indenture was called in the proceedings and is in this case called "the Waddington Agreement." Under the provisions of the Waddington Agreement, Waddington was to construct a railway between Guildford in the said Colony and the Greenough Flats in that Colony.

p. 12, l. 12. The rights and interests of the said Waddington in the Waddington Agreement were duly assigned to the Appellant Company by an agreement dated the 23rd day of June, 1890.

p. 6, l. 6. 3. The Appellant Company in its statement of claim also sought the declaration in respect of the other matters referred to in paragraph 11 of the Statement of Claim and the injunction therein referred to. 10

p. 15, l. 7. 4. His Honour the Chief Justice refused to make so wide a declaration in favour of the Appellant Company, limiting his order to those parcels of land as were granted to the Appellant Company by the State, after the coming into operation of the Petroleum Act, 1936.

p. 23, l. 15 to  
p. 24, l. 43. The Appellant Company appeals against the refusal of His Honour the Chief Justice, and the State appeals against the declaration in fact made by His Honour. 20

p. 9, l. 19. 5. The Appellant Company based its claim on section four of the Western Australia Constitution Act, 1890 (53 and 54 Vict., C. 26) and section two of the said Petroleum Act, 1936.

6. By the Western Australia Constitution Act, 1890 (53 and 54 Vict., C. 26) assented to on the 25th July, 1890, the Colony of Western Australia was granted self government, power to make laws for the peace, order and good government of its territory being conferred on the legislature referred to in the Scheduled Bill of the said Act. 30

Section 3 of that Act reads as follows:—

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;

and section five thereof reads—

It shall be lawful for the legislature for the time being of Western Australia to make laws altering or repealing any of the provisions of the scheduled Bill in 40

the same manner as any other laws for the good government of that Colony, subject, however, to the conditions imposed by the scheduled Bill or the alteration of the provisions thereof in certain particulars until and unless those conditions are repealed or altered by the authority of that legislature.

7. Section four of the Western Australian Constitution Act, 1890 (53 and 54 Vict., C. 26) Provided—

10 (1) Section seven of the Act of Session held in the eighteenth and nineteenth years of Her Majesty, chapter fifty-six, is hereby repealed, but 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; and for the purposes of this section the Acts of the Legislative Council of Western Australia, entitled the Goldfields Act, 1886, and the Goldfields Act Amendment Act, 1888, shall have effect as if they were such regulations as aforesaid.

20 (2) 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.

30 Section VII of Act 18 and 19 Victoriae, C. 56, was in the following terms:—

VII. It shall be lawful for Her Majesty, by Instructions under Her Signet and Sign Manual, or through One of Her Principal Secretaries of State, to regulate the Sale, Letting, Disposal, and Occupation of Waste Lands of the Crown in Western Australia, and the Disposal of the Proceeds arising therefrom, until Parliament shall otherwise provide.

40 8. The Constitution Act, 1899 (52 Vict., No. 23), to which the Royal Assent was given on the 15th August, 1890, was proclaimed to come into operation on the 21st October, 1890. Section 2 thereof provided—

There shall be, in place of the Legislative Council, now subsisting, a Legislative Council and a Legislative Assembly; and it shall be lawful for Her Majesty, by and with the advice and consent of the said Council and

**Record.** Assembly, to make laws for the peace, order and good government of the Colony of Western Australia and its Dependencies; and such Council and Assembly shall, subject to the provisions of this Act, have all the powers and functions of the now subsisting Legislative Council.

p. 26, l. 31. 9. Prior to the coming into operation of the Western Australia Constitution Act, 1890 (53 and 54 Vict., C. 26), and the Constitution Act, 1889 (52 Vict., No. 23), the Waddington Agreement had been executed whereby under the provisions to clause 49 of that Agreement in consideration of the premises the Government of Western Australia agreed to grant in fee simple to the said Waddington by Crown grants in the form prescribed by the Land Regulations of the Colony, a subsidy in land on the basis more particularly set out in that clause. 10

pp. 30-85. 10. At the date on which the Waddington Agreement was executed the Land Regulations then in force in the Colony of Western Australia were the Land Regulations, 1882, as reprinted in October, 1885, with amendments to that date.

p. 30, l. 7. These regulations revoked all other regulations heretofore in force affecting the waste lands of the Crown in Western Australia. 20

p. 30, l. 37. Regulation 3 of the regulations authorised the Governor to dispose of Crown lands in the manner and upon the conditions prescribed by the regulations or by any regulations amending or substituted for the same. The Governor was authorised to make such grants or other instruments upon such terms and conditions as to resumption of the land or otherwise, as to him shall seem fit.

p. 31, l. 30. 11. Under the provisions of regulation 8 of the Land Regulations, 1882, the Governor in Council was empowered from time to time to prescribe the form of Crown grants and until otherwise notified the Crown grants were to be issued in the form given in the Schedules to the said regulations. 30

p. 54, l. 25. Under regulation 108 of the said regulations, in addition to any reservation of mines of gold, silver and other precious metals ordinarily contained in Crown grants, the Governor in Council may, from time to time, by order under his hand, direct whether any of the precious metals existing in the form of alluvial deposits, or any inferior metals or any gems or jewels, shall be in like manner reserved to the Crown, in which case the forms of deeds of grant will be modified accordingly. 40

12. The relevant form of Crown grant in the Second Schedule to the Land Regulations, 1882, namely, Form of Crown Grant 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 reservations of petroleum or mineral oils. Record.  
p. 61, l. 35.

13. The Appellant Company's claim is that the promise made by the Government of Western Australia in the Waddington Agreement was to grant all lands to which the Appellant Company should thereafter become entitled pursuant to the terms of the Agreement, by Crown grants in all respects conforming to the relevant form of Crown grant in the Schedule to the Land Regulations, 1882, irrespective of any subsequent amendment of the said regulations, variation of the relevant scheduled form of Crown grant or legislative enactment of the State. p. 8, l. 25

14. The Appellant Company therefore claims that by reason of section 4 of the Western Australia Constitution Act, 1890 (53 and 54, Vict., C. 26), constitutional power is denied to the State to interfere with the rights acquired by the Appellant Company pursuant to and in conformity with the Waddington Agreement. p. 9, l. 13.

15. Crown grants of large parcels of land in Western Australia in the form prescribed by the Land Regulations, 1882, were made from time to time prior to the coming into operation of the Petroleum Act, 1936, of the Parliament of the State of Western Australia to the Appellant Company by Her Majesty and Her Successors, but no such grants were made prior to the coming into operation of the Constitution Act, 1889 (52 Vict., No. 23), namely, the 21st October, 1890. p. 12, l. 31.  
p. 111, l. 39.

After the coming into operation of the said Petroleum Act, 1936, namely, the 1st day of May, 1937, certain Crown grants of land totalling approximately 41,872 acres were issued by the Crown to the Appellant Company in the form of Crown grant prescribed by the Land Regulations, 1882. p. 21, l. 43.

The last of such Crown grants was issued on the 20th May, 1953.

Other lands granted to the Appellant Company were dealt with and granted to the said Appellant Company as set out in paragraphs 5 to 9 inclusive of the Statement of Claim, but no Crown grants of such land were made before the said 21st October, 1890. p. 4, l. 26 to  
p. 5, l. 33.

**Record.**

16. It is provided by section 9 of the Petroleum Act, 1936 (No. 36 of 1936), of the Parliament of the State of Western Australia as follows:—

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

17. Section 10 of the said Petroleum Act, 1936, is as follows:—

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. 20

18. Section 2 of the said Petroleum Act, 1936, is as follows:—

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

19. The Appellant Company did not by its pleadings or in its evidence assert that there was any breach by the State at any time of the Waddington Agreement, nor that it had not been carried out by the making of Crown grants in accordance with the terms of the agreement; but the Appellant Company claimed in effect that the said Petroleum Act, 1936, in so far as it purported to affect any land of the Appellant Company, the title to which was derived by Crown grants issued in pursuance of the Waddington Agreement, was beyond the constitutional power of the State. 30

p. 9, ll. 1-31.

p. 19, l. 13 to  
p. 20, l. 7.

20. With respect to this claim of the Appellant Company, His Honour the Chief Justice said—

“Section 9 of the Petroleum Act, the meaning and intention of which is clear, must be regarded as affecting confiscation by the State without compensation and a preliminary question which seems to arise is whether 40

10 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 the 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.

20 The plaintiff, however, asserts that the general power of resumption is limited in the particular case by the provisions contained in the Waddington Agreement viz: that the State should grant title to lands with a reservation confined to precious metals only, leaving petroleum and mineral oils and base metals generally in the ownership of the grantee; and that section four (2) of the Imperial Act prevents any interference by the State with the mineral rights so acquired by the plaintiff under its Crown grants.

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 four (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 21. Consequently, His Honour the Chief Justice refused to make the declaration which the Appellant Company claimed. p. 20, l. 1.

22. (a) The Appellant Company also claimed that the State had at all times accepted and adopted the view that on the proper construction of the Waddington Agreement and the relevant legislation, the right of the Appellant Company was to receive grants under the Land Regulations of 1882 which entitled it to p. 9, l. 41.



**Record.** all minerals and mineral oil (except gold, silver and other precious metals) on the lands granted to the Appellant Company pursuant to the Waddington Agreement and that the State has consistently acted in accordance with such view.

p. 10, l. 1 to  
p. 11, l. 20.

The Appellant Company set up the above course of conduct by the State which it particularised in its pleadings and evidence, as supporting its claim to the declaration sought by it.

(b) His Honour the Chief Justice was not prepared to accept the Appellant Company's claims in respect of such conduct and of them Dwyer, C. J. said—

10

p. 20, l. 45 to  
p. 21, l. 1.

"I cannot regard them as being an agreed adoption of any special interpretation of the plaintiff's rights under the 1886 Agreement affecting future cases. The transactions are mere examples of paying the price of peace without prejudicing either party in the future."

p. 8, l. 25.

23. The Appellant Company contended that on a proper construction of the Waddington Agreement and the Guildford-Greenough Flats Railway Act, 1886, the Appellant Company when entitled to call for grants of land had the right to receive and the State was bound to issue or procure the issue to it of Crown grants in the form prescribed by the Land Regulations of 1882.

20

With regard to this contention, His Honour the Chief Justice states—

p. 17, ll. 12-32.

"The agreement of 1886 which was made before the above mentioned Act of the Imperial Parliament, provided for the construction and working of a railway (now known as the Midland Railway) on the land grant system, and for Crown grants to be issued by the State Government to it as construction proceeded (see clauses 45, 46 and 49). The form of Crown grant was prescribed by regulation, the then existing reservation being of gold, silver and precious metals in the form then usual. In my opinion the plaintiff became entitled to Crown grants in that form.

30

Section four (2) of the Imperial Act mentioned is as follows:—

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.

40

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."

Record.

24. Having decided to reject the Appellant Company's claim as pleaded and argued, His Honour the Chief Justice turned to a consideration with respect to which there had been no argument by either party before His Honour, and he concluded that  
 10 the Appellant Company was entitled to a declaration that the Petroleum Act, 1936, did not affect any land granted to it by the State after the passing of the Petroleum Act for the following reasons expressed by His Honour the Chief Justice:—

"Section nine of the Petroleum Act is confiscatory  
 and therefore should be construed with strictness . . . .

p 21, l. 10.

But I think rights claimed by the Plaintiff under Crown grants in respect of lands granted after 1936 stand on another footing for the following reasons:—

p. 21 l. 31 to  
 p. 22, l. 28.

20 (a) Section nine declares that petroleum in land alienated is and shall be deemed always to have been Crown property and section ten provides that grants and leases issued after the passing of the Act shall contain a reservation of petroleum.

30 The phraseology of section nine appears to me to be appropriate only to land already alienated, and is not appropriate to future grants, section ten making provision for these. It therefore should not be held to apply to the area of 41,872 acres the subject of later Crown grants issued to the plaintiff in 1951, in which there is no reservation of petroleum rights. The limited reservation in these grants was not the result of mistake or misrepresentation, and it is not suggested that the grant should be rectified; and in any case I have formed the opinion that the grant was properly issued in that form.

40 (b) As I think the plaintiff was entitled to such grant in its present form by reason of the provisions of the original agreement, and section four (2) of the Imperial Act and section two of the Petroleum Act, I am of opinion that sections nine and ten of the

Record.

latter Act should not be held applicable to the lands the subject of the 1951 grants, for if the Act were interpreted as applicable to Crown grants to which the plaintiff became entitled after 1936 such grants would not be in the form the 1886 Agreement required and would be in breach of the State's contract and engagement and an interference with Plaintiff's rights, and so *ultra vires* the Western Australian Legislature by reason of section four (2) of the Imperial Act. 10

For the reasons mentioned I conclude that the Plaintiff is entitled to the relief sought in respect of the lands the subject of the 1951 Crown grants mentioned containing 41,872 acres and any other lands the subject of Crown grants issued after 1936 but not further or otherwise."

p. 85, l. 23. 25. Prior to the passing of the said Petroleum Act, 1936, the Land Regulations of 1882 had been revoked by further Land Regulations which were proclaimed for the Colony on the 2nd March, 1887. 20

p. 87, l. 22. These regulations by regulation 3 authorised the Governor to dispose of Crown lands within the Colony in the manner and upon the conditions prescribed by the regulations or by any regulation amending or substituted for the same and the Governor is authorised to make such grants and other instruments upon such terms and conditions as to resumption of the land or otherwise as to him shall seem fit.

p. 87, l. 36. Under regulation 5 the Governor in Council may from time to time, by order to be notified in the *Government Gazette*, prescribe the forms of Crown grants. Until otherwise notified, the forms given in the Schedules hereto for Crown grants may be used with such variations as circumstances may render necessary in any particular case. 30

p. 89, l. 29. The relevant form of Crown grant for Rural Lands in the Second Schedule of the regulations 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 oil. 40

26. In 1893, The Homesteads Act, 1893 (57 Vict., No. 18) was passed in Western Australia. Under section four of that Act—

10 “every person, not being already the owner of land within the Colony exceeding an area of one hundred acres in fee simple or under special occupation, or conditional purchase from the Crown, who is the sole head of the family, or a male who has attained the age of eighteen years, who makes application in the form prescribed shall be entitled subject to the approval of the Minister, to obtain a homestead farm of not more than one hundred and sixty acres from lands set apart and defined as prescribed by this Act.”

Under section eleven of that Act, the selector after a certain period therein defined, and on compliance with certain conditions applicable to the land, was entitled to a Crown grant.

Under section forty-six of that Act—

“The Governor may from time to time make regulations for giving effect to this Act, and may prescribe the forms of Crown grants, leases and other instruments requisite for carrying out, and the returns to be made under, this Act.”

20 27. (a) On the 1st January, 1899, the Land Act, 1898 (62 Vict., No. 37) of Western Australia came into operation. Section fifteen of that Act provided, *inter alia*—

30 “15. An application for a Crown grant may be in the form or to the effect of the First Schedule, and all Crown grants issued under this Act shall contain a reservation of all gold, silver, copper, tin or other metals, ore, mineral or other substances containing metals, and all gems or precious stones, and coal, or mineral oil in or upon the land comprised therein, and shall be in the form or to the effect of the Second or Third Schedules, as the case may be, subject to the variations required to meet special circumstances.”

Section two of that Act repealed the several Acts and regulations therein specified dealing with the granting of Crown lands, including in the repeal so much of the Land Regulations proclaimed on the 2nd March, 1887, as were not already repealed.

40 (b) In 1933, the Land Act, 1933 (No. 37 of 1933), was passed in Western Australia. That Act, by section four, repealed the Land Act, 1898, and all Acts amending it up to and including the year 1932, together with several other Acts which affected Crown lands and which are specified in the First Schedule to the Land Act, 1933. Section seven of the said Land Act, 1933, provided—

(1) The Governor is authorised, in the name and on behalf of His Majesty, to dispose of Crown lands within the State, in the manner and upon the conditions prescribed by this Act or by regulations made thereunder.

Record;

(2) All grants and other instruments disposing of any portion of Crown lands in fee simple or for any less estate made in accordance with this Act shall be valid and effectual in law to transfer to and vest in possession in the purchasers the land described in such grants or other instruments for the estate or interest therein mentioned.

(3) The Governor is authorised to make such grants and other instruments upon such terms and conditions as to resumption of the land or otherwise as to him shall seem fit. 10

Section fifteen of the said Land Act, 1933, provides *inter alia*—

(1) All Crown grants issued under this Act shall contain a reservation of all gold, silver, copper, tin, or other metals, ore minerals, or other substances containing metals and all gems or precious stones, and coal, or mineral oil, and all phosphatic substances in or upon the land comprised therein, and shall be in the form or to the effect of the Second or Third Schedules, as the case may be, subject to the variations required to meet special circumstances. 20

(c) On the 1st day of May, 1937, the Petroleum Act, 1936, came into operation.

p. 110, l. 23.

28. On the 23rd October, 1952, a permit to explore was granted by the Minister for Mines to a company known as the West Australian Petroleum Pty. Limited, pursuant to the provisions of section thirty-two of the Petroleum Act, 1936, which permit applied to some of the lands which had been granted to the Appellant Company pursuant to the provisions of the Waddington Agreement. 30

p. 6, l. 36.

29. In the action brought by the Appellant Company as Plaintiff on the 16th June, 1954, the State and the West Australian Petroleum Pty. Limited were joined as Defendants and the Plaintiff as well as claiming the declaration set out in the Statement of Claim also sought an injunction restraining the said Defendant Company, its servants, agents or assignees from exercising any right purporting to have been given or conferred by the said permit to explore over any of the lands granted to the Plaintiff.

30. Because the term of the permit to explore expired shortly before the hearing of the said action commenced, further proceedings against the West Australian Petroleum Pty. Limited were stayed and it took no further part in the proceedings. 40

31. The issue for determination in this appeal is whether, on the correct construction of the Western Australia Constitution Act, 1890 (53 and 54 Vict., C. 26), the Petroleum Act, 1936, and the Waddington Agreement, the Appellant Company is entitled under the provisions of the Waddington Agreement to minerals, other than gold, silver, and precious minerals, in the lands granted to it pursuant to that agreement.

The determination of this issue involves the following considerations—amongst others:—

- 10           (a) Having regard to section four (2) of the Western Australia Constitution Act, 1890, are sections nine and ten of the said Petroleum Act, 1936, within the powers of the Parliament of Western Australia?
- (b) Having regard to section two of the said Petroleum Act, 1936, do sections nine and ten of that Act apply to the lands granted to the Appellant Company pursuant to the Waddington Agreement?
- 20           (c) Having regard to the provisions of the Waddington Agreement and sections nine and ten of the said Petroleum Act, 1936, is all petroleum on or below the surface of the lands granted to the Appellant Company the property of the Crown?

32. With respect to the decision of His Honour the Chief Justice so far as it relates to lands, the subject of Crown grants issued after the commencement of the Petroleum Act, 1936, the State would respectfully submit—

- 30           (1) that upon its right construction the Petroleum Act, 1936, by sections nine and ten precluded the grant of land without a reservation of petroleum, and that it applied to land to be granted to the Appellant Company pursuant to the Waddington Agreement;
- (2) that upon its right construction, that Act was effective to divest any petroleum which might have been granted or purported to be granted by any Crown grant whether made or issued before or after the commencement of the Act;
- 40           (3) that no authority existed in the Crown to make or issue any Crown grant which was inconsistent with the provisions of the laws currently governing the alienation of Crown lands or with the provisions of the Petroleum Act, 1936, itself;
- (4) that section two of the Petroleum Act, 1936, was not apt to make that Act inapplicable to the Appellant Company's land, which was granted to it pursuant to the Waddington Agreement, but after the commencement of the Petroleum Act, 1936.

**Record.**

33. The State, therefore, submits that the Appellant Company's appeal should be dismissed and that the order of the Supreme Court of Western Australia, in so far as it made a declaration as to 41,872 acres, ought to be set aside and judgment entered for the State in respect of the whole of the Appellant Company's claim for the following—amongst other reasons:—

Firstly, that the Waddington Agreement did not entitle the Appellant Company to anything more from the State than a grant of land in fee simple in the form for the time being in force prescribed by the laws of the Colony or the State of Western Australia as the case may be governing the alienation of Crown lands of the Colony of the State. 10

Secondly, that section four of the Western Australia Constitution Act, 1890 (53 and 54 Vict., C. 26) did not deprive the Colony or the State of Western Australia of the right of *emissat* domain, whether exercised as to the whole or part of the estate granted or to be granted by the State to the Appellant Company. 20

Thirdly, that the judgment of Dwyer, C.J., in so far as it rejected the claim of the Appellant Company was correct.

Fourthly, that on its right construction the Petroleum Act, 1936, was effective to divest the Appellant Company of all rights to all petroleum on or below the surface of land which may have been granted to it by Crown grant, whether such Crown grant was issued before or after the commencement of the Act. 30

Fifthly, that the Petroleum Act, 1936, precluded the effective creation of any rights to petroleum in any person by any Crown grant issued after the passing of that Act.

Sixthly, that a Crown grant in the form from time to time authorised by the laws of the Colony or State of Western Australia was not in breach of the Waddington Agreement.

Seventhly, that the judgment of Dwyer, C.J., in so far as he held that the Waddington Agreement entitled the Appellant Company to a form of Crown grant as prescribed by the Land Regulations, 1882, was wrong. 40

G. E. BARWICK.  
KEVIN G. WALSH.