WESTERN MINERALS LTD. AND WESTERN LEASEHOLDS LTD. (PLAINTIFFS) ..... APPELLANTS; *June 13, 16, 17 1952

AND

JOSEPH ALBERT GAUMONT AND THE ATTORNEY GENERAL OF THE PROVINCE OF ALBERTA (DEFENDANTS) ..... RESPONDENTS. *Mar 18 1953

AND

FARMERS UNION OF ALBERTA .....INTERVENANT,

WESTERN MINERALS LTD. AND WESTERN LEASEHOLDS LTD. (PLAINTIFFS) ..... APPELLANTS;

AND

JAMES WARREN BROWN AND THE ATTORNEY GENERAL OF THE PROVINCE OF ALBERTA (DEFENDANTS) ..... RESPONDENTS.

AND

BEAVER SAND & GRAVEL LTD. .....(DEFENDANT);

AND

FARMERS UNION OF ALBERTA .....INTERVENANT.

Real Property—Ownership of Sand and Gravel—Whether reservation in Certificate of Title of mines, minerals and valuable stone, includes sand and gravel—The Land Titles Act, R.S.A., 1942, c. 205, s. 62.

Constitutional Law—Validity of The Sand and Gravel Act, S. of A., 1951, c. 77—Applicability to pending action.

The appellant, Western Minerals Limited, held a certificate of title as the registered owner in fee simple under *The Land Titles Act*, R.S.A., 1942, c. 205, and amendments thereto, of all mines, minerals, petroleum, gas, coal and valuable stone in or under two certain quarter sections of land of which the respondents Gaumont and Brown were the respective owners under the Act of the surface rights. The appellant, Western Leaseholds Limited, was lessee from its co-appellant. Both appellants sued for a declaration that they were the registered and equitable owners of all minerals and/or valuable stone including the

*PRESENT: Kerwin, Taschereau, Rand, Kellock, Estey, Locke and Cartwright JJ.

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sand and gravel within, upon or under the said lands and for certain other relief. The actions were consolidated and tried together and judgment was given in favour of the appellants. Following the filing of notice of appeal by the respondents, *The Sand and Gravel Act,* S. of A., 1951, c. 77, came into force providing that as to all lands in the Province the owner of the surface of land is and shall be deemed at all times to have been the owner of and entitled to all sand and gravel on the surface of that land and obtained or otherwise recovered by surface operations. By order of the Appellate Division, Gaumont and Brown were permitted to raise the terms of the Statute as a further ground of appeal. The Appeal Court allowed the appeal and dismissed the plaintiffs' action. On appeal to this Court.

Held: 1.—That the appeal should be dismissed.

Per Kerwin, Taschereau, Rand, Kellock, Estey and Cartwright, JJ.:— The appellants failed to establish that "mines, minerals, petroleum, gas, coal and valuable stone" in their Certificate of Title should be construed as including sand and gravel.

Per Locke, J.—Apart from the provisions of *The Sand and Gravel Act,* the only question to be determined was the meaning of the language employed in the certificate of title by reason of s. 62 of *The Land Titles Act* (R.S.A. 1942, c. 205) and on the proper construction of that instrument, sand and gravel were included. The appellants should, therefore, have their costs of the trial.

2. *Per Curiam*—That *The Sand and Gravel Act* is *intra vires* of the Provincial Legislature and is declaratory of what is and has always been the law of Alberta, and so applied to the present litigation and is fatal to the appellants' claim.

APPEALS from the judgments of the Appellate Division of the Supreme Court of Alberta (1) which allowed the Defendants' appeals from the judgments of Egbert J. (2) in favour of the Plaintiffs. The two actions were brought by the Plaintiffs for a declaration that they were the registered and equitable owners of all minerals and/or valuable stone including sand and gravel, upon or under certain lands the title to the surface of which was vested in the Defendants and for certain other relief. The two actions were consolidated and tried together. The Defendant, Beaver Sand & Gravel Ltd., took no part in the action. By leave of the Court, the Farmers Union of Alberta was permitted to intervene. Following the delivery of judgment by the trial judge *The Sand and Gravel Act,* 1951, S. of A., c. 77, came into force and the Defendants who, in the meantime had filed notice of appeal, applied for and were granted leave to amend and plead the Act as a further ground of appeal. The Plaintiffs then served the Attorney General for the Province of Alberta

(1) (1951) 3 W.W.R. (N.S.) 434. (2) (1951) 1 W.W.R. (N.S.) 369.

with notice that they intended to bring into question the constitutional validity of the Act and thereafter, by order of the Appellate Division, the Attorney General was added as a party Defendant.

H. W. Riley Q.C. and *H. Patterson* for the appellants.

W. G. Morrow for the respondents.

J. J. Frawley, Q.C. for the Attorney General of Alberta.

J. A. Ross for the Farmers Union of Alberta, Intervenant.

KERWIN J.:—On the argument the Court decided that *The Sand and Gravel Act,* c. 77 of the 1951 Statutes of Alberta was *intra vires.* That Act applies to the present litigation and on this point I agree with the reasons of my brother Cartwright. However, the statute was enacted after the judgment at the trial and if at the date of that decision the appellants were entitled to judgment in their favour as the trial judge held, they should have, at least, the very considerable costs of the action, including the trial.

I have come to the conclusion that the appellants were not so entitled. At the outset it should be emphasized that the plaintiff, Western Minerals Limited, was registered as owner pursuant to *The Land Titles Act* of the Province of Alberta of an estate in fee simple of and in all mines, minerals, petroleum, gas, coal and valuable stone in or under the lands in question in the two actions and the right to enter upon or occupy such portions of the lands as may be necessary or convenient for the purpose of working, mining, removing and obtaining the benefit of the said mines, minerals, petroleum, gas, coal and valuable stone. On the other hand, the respondent Gaumont has a certificate of title that he is the owner of an estate in fee simple in his lands "reserving thereout all mines and minerals. Subject to the exceptions, reservations and conditions contained in transfer of record as 6489 B.D." The reservation in this transfer, dated April 5, 1915, from a former owner, Western Canada Land Co. Limited, to one Bolster, reads:— "reserving to the transferor, its successors and assigns, all mines, minerals, petroleum, gas, coal and valuable stone in or under the said land and the right to enter upon and occupy such portions of the said lands as may be necessary or convenient for the purpose of working, mining, removing,

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and obtaining the benefit of the said mines, minerals, petroleum, gas, coal, and valuable stone." Similarly, the respondent Brown has a certificate of title dated November 16, 1945, as owner of an estate in fee simple in his lands "reserving thereout all mines and minerals and the right to work the same as set forth in transfer of record as 5755 F.V." This transfer from a prior owner to Brown is dated August 1, 1945, and the reservation is the same as that in the transfer of Gaumont's lands from Western Canada Land Co. Limited to Bolster.

While there is no evidence as to when the certificate of title was granted by which the appellant, Western Minerals Limited, is declared to be the owner of the mines, minerals, etc. its date is of no importance. The question for determination is whether under the terms of the three certificates of title the sand and gravel in the lands are owned by the respondents Brown and Gaumont respectively or by Western Minerals Limited. In *Attorney General for the Isle of Man* v. *Moore* (1), Lord Wright, speaking for the Judicial Committee, at page 267, states (referring to a statute): "The principles to be applied in determining such a question have now been established by decisions of the House of Lords dealing with words of reservation in the Railway Clauses Act and similar Acts." In the earlier case of *Attorney General for the Isle of Man* v. *Mylchreest* (2), the Judicial Committee had arrived at the same conclusion as the House of Lords, and it might be noted that in *Re McAllister* v. *Toronto Suburban R.W. Co.* (3), the Ontario Court of Appeal considered these decisions applicable in an expropriation under s. 133 of the then Ontario Railway Act. All of these decisions were as to the meaning of certain statutes and the effect of the decision of the Privy Council in the *Moore* case is that the same principles are to be applied to the construction of statutory provisions of an entirely different type. I see no reason that they should not also be applied to the construction of certificates of title under *The Land Titles Act* (R.S.A. 1942, c. 205). S. 62 of that Act provides that "every certificate of title . . . shall . . . be conclusive evidence . . . that the person named therein is entitled to the land included in the same

(1) [1938] 3 All E.R. 263. (2) (1879) 4 App. Cas. 294.
(3) (1917) 40 O.L.R. 252.

for the estate or interest therein specified." The point is whether the estate or interest of the parties includes the sand and gravel.

It was not contended that they fell within the term "mines" but it was urged that they were "minerals". The enumeration of "petroleum, gas, coal and valuable stone" affords a context to show that the word is not used in its widest sense: *Attorney General for the Isle of Man* v. *Mylchreest* (*supra*); *Barnard-Argue-Roth-Stearns Oil and Gas Co. Ltd.* v. *Farquharson* (1). Furthermore, I am quite sure that Gaumont and Brown, as holders of certificates of title, or any other purchasers of lands in Alberta would never imagine that sand and gravel were excluded from their estate or interest under "minerals": *Lord Provost* v. *Farie* (2). My brother Kellock has detailed the evidence adduced on behalf of the appellants and I therefore do not repeat it. It is quite apparent that that evidence falls far short of showing that in the mining and commercial world, and by land owners, sand and gravel were considered to be minerals. There can be really no question that, as held by the trial judge, sand and gravel do not come within the term "stone".

The appeals should be dismissed with costs payable by the appellants to the respondents Gaumont and Brown. There should be no order as to the costs of the Attorney General of Alberta or of the intervenant.

RAND J.:—Two questions are raised in this appeal: whether a reservation of "all mines, minerals, petroleum, gas, coal and valuable stone" contained in two conveyances of land in Alberta, includes sand and gravel, both of which will be embraced within the treatment of the latter; and whether a statute passed after judgment at trial, effects retroactively the exclusion of gravel from the scope of the reservation.

Evidence was adduced to show the place of gravel in the scientific and engineering classifications of minerals, which was undoubtedly pertinent to the issue; but as the question arises out of the sale and purchase of land, the understanding of persons who deal in land or its constituents is of primary importance; and in the circumstances here there are factors of special significance to that understanding.

(1) [1912] A.C. 864. (2) (1888) 13 App. Cas. 657.

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In Crown grants of lands in the colonies the reservation of mines and minerals was exceptional, but in western Canada from the early stages of its organization that was not the case. The uninhabited territory of what was later called the Northwest Territories, then little better than a wilderness, was transferred to the Dominion by an Imperial Order-in-Council in 1870. In the course of the subsequent administration, including a comprehensive immigration program, the Dominion Government in 1889 by an order authorized by the Dominion Lands Act, provided for the reservation of mines and minerals in grants made under that Act. There is not readily accessible the extent of land patented between that date and 1905; but the reports of the Commissions on Western Lands and Subsidies submitted to Parliament in 1935 show that between 1905, when Alberta and Saskatchewan were formed, and 1930, when the remaining public lands were transferred to them, approximately fifty million acres had been disposed of, the individual applications for which approached three hundred thousand in number. This was in addition to at least nine million acres granted after 1905 on commitments made before that time. From this uniform practice, the reservation became notorious throughout the West, and a matter of common knowledge in land dealings. Large areas had, it is true, been conveyed to the Hudson's Bay Company and to railway companies without reservation, but these were widely known as exceptions to the generality of titles.

Since 1931 the same policy has been continued by statutory provisions in all three provinces, Manitoba, Revised Statutes (1940) c. 48; Saskatchewan, Revised Statutes (1940) c. 37; and Alberta, statutes of 1949, c. 81; in all of them the expression "mines and minerals" is found.

From the commencement, also, of the Dominion administration, a form of the so-called Torrens system of land titles has been in force. By its effect the ownership of land is conclusively evidenced by an official Certificate of Title, and this system has, likewise, been continued by the provinces since their formation.

In this background of uniformity of public administration and of phraseology in relation to mines and minerals, and the formal establishment of title by certificate, it would,

I think, be difficult to attribute to that collocation of words any other than the same meaning throughout that western territory, certainly, on the record here, throughout Alberta; and, apart from questions, as between the immediate parties to a transfer, of rectifying the certificate, it would be a rare case in which an enquiry into the actual or presumed intentions of parties to a grant or transfer, where the same expression is alone in question, would be justified. What is to be sought, then, is the general sense of those words in the vernacular of engineers, business men and land owners, the latter of whom constitute a substantial fraction of the population in the prairie section. The recent decision of the Judicial Committee in *Borys* v. *Canadian Pacific Railway Company* (1), dealing with the word "petroleum", adopted that use as the determinant of its scope.

The vernacular is, in turn, a fact itself to be ascertained. There are varying degrees of appreciation of the meaning of words, and, apart from the opinions of individuals, positive data evidencing the common acceptation are not always at hand; but one of reliability is that of neutral conduct which indicates the assumption of such an acceptation.

It is, therefore, of some significance, that although gravel in general building and railway construction has long been used as material, and during the past thirty years, most extensively in road building, no case has been cited in which the question here has been directly raised before a Canadian court. That seems to be particularly noteworthy in relation to railways. By The Railway Act, 1903, as well as its revision of today, the sections which authorize expropriation of land do not entitle the company to the mines or minerals unless expressly purchased. On the other hand, the statute provides, as in s. 202 of the present Act, that "any stone, gravel, earth, sand, water or other material" required for the construction, maintenance or operation of the railway may, for any such purpose, be taken. The inclusion of the word "gravel" in this context points, at least in the understanding of Parliament, to a genus of materials forming part of land which embraces gravel but excludes minerals. In the first twenty years of

(1) [1953] 7 W.W.R. (N.S.) 546.

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this century, a vast network of railways was built in the West for which immense quantities of gravel were required for ballasting, a great deal of which must have been obtained from lands in which the minerals were reserved to the Crown; but nothing has been disclosed to suggest a claim for compensation ever asserted by the Dominion.

Geologically, the soil was formed by the disintegration of hard surface minerals plus the later ingestion of vegetable matter. Gravel is produced in the course of that disintegration by the attrition of rock fragments and contains all sizes from a grain of sand to stones of several inches in diameter. The difference, then, between the ordinary soil and gravel is a matter largely of gradation in physical refinement of a common substance, and that fact may explain the absence of previous controversy through the natural tendency to treat the latter as ordinary roughage of the soil rather than discrete mineral substance.

Viewing the evidential matters and opinions placed before the Court in the light of these considerations, I take the vernacular sense of the words "mines and minerals" not to extend to gravel.

But the reservation before us, by the additional words "valuable stone", itself evidences that exclusion. Stone, lacking any real use qua land, has, from the earliest times, been used for building all manner of structures, and so far has acquired a higher degree of distinctiveness from the soil than gravel: it was and is that utility that gives it special character and value. It is not seriously contended that "valuable stone" includes gravel, but its presence in the reservation implies that other stone is excluded, which, *a fortiori,* excludes material produced by a fragmentation of stone that basically changes its useful character.

Then is the legislation to be interpreted as a prospective alteration of the previous law or a retroactive declaration of what the law was prior to the judgment at trial? Here is a case in which the boundary between property rights, depending upon the scope to be given general words in common parlance, is somewhat vague and uncertain, and in which the determination by the legislature can safely be taken to express the general understanding of the language being interpreted. That in such a situation and by way of precaution the legislature should resort to a

declaration of pre-existing law arises from an apprehension of widespread disruption of what are thought to be settled interests. For that purpose the legislature has access to sources of relevative considerations not effectively available to a court of justice. The word "shall" in the context implies a conclusive effect to the words "be deemed" and, that, considering the recitals in the preamble, the expression was intended to operate upon the subject matter of these proceedings, I entertain no doubt. The Appeal Division was consequently concluded by it.

I would, therefore, dismiss the appeal with costs.

KELLOCK, J.:—These appeals raise the same question, namely, the proper construction of a reservation in certain certificates of title to lands in the province of Alberta of the following reservation: "all mines, minerals, petroleum, gas, coal and valuable stone in or under the said land and the right to enter upon and occupy such portion of the said land as may be necessary or convenient for the purpose of working, mining, removing and obtaining the benefit of the said mines, minerals, petroleum, gas, coal and valuable stone."

In the case of the respondent Gaumont the certificate is dated July 11, 1928, while that of the respondent Brown is dated August 1, 1945. These certificates are to be read in conjunction with s. 62 of *The Land Titles Act*, R.S.A. 1942, c. 205.

The appellants are entitled to the benefit of these reservations and claim title thereunder to the sand and gravel in, upon or under the lands. They contend that sand and gravel are "minerals" within the meaning of that term as used in the reservations. This contention was given effect to by the learned trial judge, but was rejected by the Appellate Division which also held that the respondents were, in any event, protected by *The Sand and Gravel Act* of Alberta, 15 Geo. VI, c. 77, passed on April 7, 1951, after delivery of the judgment at trial.

The word "minerals", standing alone, and considered in contradistinction to animal or vegetable substances, would no doubt include such materials as sand and gravel. In

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Darvill v. *Roper,* (1), Kindersley V. C. said at p. 299, in reference to a similar contention, that

> Every portion of the soil, not merely the limestone rock, but the gravel, the pebbles, all, even to the very substance of the loam or mould which forms the soil, would be included.

In *Attorney-General for the Isle of Man* v. *Mylchreest,* (2), Sir Montague Smith pointed out, in the Judicial Committee, considerations which enter into the question as to the sense in which the word may, in any particular case, have been used, as follows:—

> It was contended for the Crown that the word "minerals" used in the clause comprehended clay and sand. Doubtless, the word in its scientific and widest sense may include substances of this nature, and, when unexplained by the context or by the nature and circumstances of the transaction, or by usage (where evidence of usage is admissible), would, in most cases, do so. But the word has also a more limited and popular meaning, which would not embrace such substances, and it may be shewn by any of the above-mentioned modes of explanation that in the particular instrument to be construed, it was employed in this narrower sense.

It seems plain from the context in the case at bar that the word is not used in its widest sense. At page 308 of *Mylchreest's* case, Sir Montague Smith said with respect to the language there in question,

> If the word "minerals" were intended to be used in its widest signification, it was obviously unnecessary to make specific mention of flagg, slate and stone.

Similarly, in the case at bar there is an enumeration of substances which would be quite unnecessary if "minerals" were employed in the broad sense.

In *Barnard-Argue-Roth-Stearns Oil and Gas Co., Ltd.* v. *Farquharson,* (3), the Judicial Committee had to consider a conveyance which reserved to the grantor "all mines and quarries of metals and minerals and all springs of oil . . ." Lord Atkinson, delivering the opinion of the Board, expressed the same idea at p. 869 as follows:

> It is obvious, however, for several reasons, that in this clause of the grant the word "minerals" is not used in this wide and general sense. First, because two substances are expressly mentioned in the clause which would be certainly covered by the word "minerals" used in its widest sense, namely, "metals" and "springs of oil in or under the said land . . ."

(1) [1855] 3 Dr. 294. (2) [1879] 4 App. Cas. 294.
(3) [1912] A.C. 864.

Lord Gorell in *Budhill's* case, (1), put the matter as follows at p. 134:—

> The enumeration of certain specified matters tends to show that its object was to except exceptional matters.

If the broad meaning is not to be given to the word in the reservation here in question, the onus would appear to be on those who assert, in doubtful cases at least, that the word is inclusive of the substance in controversy: *Savill* v. *Bethell,* (2). It may very well be that such a substance as "lead" would obviously fall within the scope of such a reservation, but where, as here, "coal and valuable stone" are specifically mentioned, it is incumbent, in my opinion, upon those who assert that such ordinary materials as sand and gravel were intended to be included, to establish this.

In *Attorney-General for Isle of Man* v. *Moore,* (3), Lord Wright, delivering the opinion of the Privy Council, reaffirmed the principles to be applied as follows:—

> The principles to be applied in determining such a question have now been established by decisions of the House of Lords . . . that this type of question is an issue of fact to be decided according to the particular circumstances of the case, the duty of the court being to determine what the words meant in the vernacular of mining men, commercial men and land owners at the relevant time. Such an issue is necessarily an issue of fact because it must depend on evidence of the actual user of the words—that is, the way in which they were in practice used by the classes of persons enumerated.

The learned trial judge was of opinion that the sand and gravel question in the case at bar were "not separable either commercially or geologically" and dealt with them as forming one deposit. He referred to them throughout his judgment as gravel only. In his view, the deposit did not come within the word "mines" as used in the conveyances, as he was of opinion that it had been authoritatively determined by the decisions that a "mine" was limited to underground workings and that there was nothing in the evidence before him to indicate that the word should have any other meaning in the present instance. It is not necessary to consider this particular aspect of the matter as the appellants do not rely on the word "mines" but on

(1) [1910] A.C. 116. (2) [1902] 2 Ch. 523 at 537.
(3) [1938] 3 All E.R. 263.

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the word "minerals". The learned judge was also of opinion on the evidence that the words "valuable stone" in the conveyances in the case at bar were limited to cut stone and that they did not include "gravel".

With respect to the meaning of the word "minerals" in the present certificates, the learned judge concluded that the appellants had established on the evidence that it included gravel, although he expressed "a strong suspicion" that that was not the intention of the parties to the transactions but that if sand and gravel had been mentioned at the date of the original conveyances, they would have been excluded from the reservations. It is necessary to examine the evidence.

The appellants rely in the first place upon the testimony of a member of the engineering faculty of a university who, in addition to his academic duties, carries on a consulting practice in connection with the construction industry. This witness testified as follows:—

Q. In the phraseology or popular language of a mining man, is a commercial deposit of gravel surface or soil or minerals or what?

A. Well, in my opinion, it is a mineral. The reason for that is that in the general definition a mineral is anything that is not plant or animal.

Q. Yes?

A. The use of the "commercial" though, restricts it so that your mineral material as contained in a conveyance has to have some commercial value. Well, a gravel deposit that is being worked for profit obviously has commercial value, and by fundamental definition it is a mineral, and therefore it is a mineral substance.

This evidence is, of course, completely worthless in that it is pure argument and does not answer at all the relevant question as to the meaning of the word "minerals" in the vernacular of mining men. The witness made a similar attempt to include gravel within the meaning of "valuable stone." He said:—

Well, on the question of the definition of valuable stone as it is most commonly used or as it has most commonly been used, it probably has meant stone that was quarried; in other words, building blocks that were taken out or blocks of stone that were taken out and then faced off and so on and turned into building stone. On the other hand, you don't have to extend the definition any appreciable amount to include gravel as a valuable stone. It definitely is valuable and it is stone.

The appellants also rely on the evidence of a chemical engineer who is an officer of the appellant Western Minerals Limited. When asked the following question in chief:

Q. Now, sir, you and your companies are in the mining game in its various branches. In the phraseology, or, if you like, the popular language of the mining world, what is gravel? Mineral or surface?

he answered,

A. I would say it was a mineral.

It is not too clear what was intended by the question itself. The contrast is between "mineral" on the one hand and "surface" on the other, and in the case of a transfer of surface rights exclusively it may be that, in certain circumstances, gravel would not pass to the grantee. But such a question is not the relevant question. It is whether or not, when used in its ordinary sense by mining men, the word "minerals" would be understood as inclusive of gravel. That question was neither put nor answered. The following additional testimony of the same witness does not clarify matters:—

Q. If that sand could be sold today, would it be considered as a mineral?

A. If it was handled commercially at commercial rates I would say so.

Q. Is that your standard?

A. I believe that is what makes it commercial.

. . .

Q. Well, in a chemical sense there is no doubt that sand would be a mineral, is there? I am speaking in the commercial sense. If you could sell that sand today would it be a mineral?

A. Yes, it has value.

Q. And if you can't sell it then today, it isn't a mineral in the commercial sense? Correct?

A. Yes, I will answer that yes.

I do not think, therefore, that there is any evidence in the record at all on this aspect of the matter.

With respect to the understanding of land owners, the appellants called an employee of the Hudson's Bay Company who had been employed by that company since 1931. He described himself as a "land department representative" or "inspector". What the duties of this witness are, does not appear. He testified that the Hudson's Bay Company had originally owned two and a quarter million acres of land in the province of Alberta, of which there remained unsold approximately sixty thousand acres.

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Whether or not the witness had anything to do with the land sold or any part of it, or what sales were made since 1931, he did not say. The following evidence of the witness is relied on by the appellants:—

Q. Now, the Hudson's Bay Company granted a number of commercial gravel permits on lands from which they have parted with the surface?

A. Yes, sir.

. . .

Q. In these various gravel permit transactions which you have spoken about with the Hudson's Bay Company, are they all cases in which the Hudson's Bay Company owned minerals and valuable stone?

A. Yes, sir.

Q. All right, sir. In the understanding of land representatives is gravel a mineral or part of the surface?

A. I would say mineral.

The same infirmity appears in this evidence as in that of the previous witness to which I have just referred, the attention of the witness being directed to the contrast between "mineral" and "surface" and not to the real question. Moreover, his evidence is presumably based upon the dispositions of lands made by the Hudson's Bay Company, but his knowledge of such transactions or of the language of the conveyances does not appear. In my opinion, his evidence does not touch the question as to the meaning of "minerals" as ordinarily used by owners of land.

It was for the appellants to establish that the word "minerals" is here used in the sense of including either sand or gravel. I think they have failed to do so.

It is not without relevance to observe that the lands in question were sold on the one hand and bought on the other for agricultural purposes. So far as any vendor or purchaser knew at the time of the grants, it might have developed that the whole or the greater part of the lands were underlaid with gravel, to get at which would have destroyed the lands for the purposes for which they were purchased, in which event the grant would have been swallowed up by the reservation. In my view, as pointed out by Lord Gorell in *Budhill's* case, *supra,* the enumeration of the specific substances indicates that the intention was to reserve exceptional substances only. Sand and gravel deposits are no doubt less frequent in the Edmonton area than apparently they are in the neighbourhood of Calgary, but the specific exception of "valuable stone", in

my opinion, indicates that the parties intended that apart from building stone, other stone or allied substances such as sand or gravel were not reserved.

I would therefore dismiss the appeals with costs.

ESTEY, J.:—I agree that the appeal should be dismissed on the basis both, as the learned judges in the Appellate Division held, that the word "minerals," as used in the reservations, did not include sand and gravel and that, upon the principle underlying *Boulevard Heights* v. *Veilleux* (1), the provisions of *The Sand and Gravel Act* are applicable to this litigation.

LOCKE J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta setting aside the judgment delivered at the trial by Egbert J. in favour of the present appellants in these consolidated actions.

The issues concern the ownership of deposits of sand and gravel in the northeast quarter of Section 21 in Township 55 and Range 22 west of the 4th Meridian in the Province of Alberta and the southwest quarter of Section 21 in Township 57 and Range 21 west of the said Meridian, of which lands the respondents Gaumont and Brown are respectively the registered owners of what have been referred to in these proceedings, for the purpose of convenience, as the surface rights.

As against the respondent Gaumont the appellants claimed, in addition to a declaration of right, an injunction restraining him from removing either sand or gravel from the land and damages for trespass in respect of quantities of these materials theretofore taken from the land by this respondent. The respondent Brown had entered into an agreement with the respondent Beaver Sand and Gravel Limited, under which that company had removed and was continuing to remove gravel and sand from the property, and, as against them, the appellants claimed, in addition to a declaration of right, an injunction to restrain the removal of further material, an accounting and damages.

(1) (1916) 52 Can. S.C.R. 185.

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At the outset of the trial a written admission made by the solicitor for the respondents Gaumont and Brown was read into the record, this being that the plaintiff Western Minerals Limited was:—

> registered as owner pursuant to *The Land Titles Act* of the Province of Alberta of an estate in fee simple of and in all mines, minerals, petroleum, gas, coal and valuable stone in or under
>
> the said lands
>
> and the right to enter upon or occupy such portions of the lands as may be necessary or convenient for the purpose of working, mining, removing and obtaining the benefit of the said mines, minerals, petroleum, gas, coal and valuable stone.

Various transfers and agreements of sale evidencing dealing with these lands by the parties and others and the predecessors in title of the appellant Western Minerals Limited and the respondents Gaumont and Brown were filed and, in the reasons for judgment of the learned Chief Justice of Alberta delivering the unanimous opinion of the Appellate Division, various of these instruments have been referred to as an aid to the interpretation of the expressions "mines and minerals" in these several documents. From these it appears that in the year 1915 the Western Canada Land Company Limited transferred the northeast quarter of Section 21 of the surface rights of which the respondent Gaumont is now the registered owner to one Bolster, with a reservation of the mines and minerals and other named mineral substances and the right to enter and work the same, and thereafter a certificate of title for the said lands issued to Gaumont excepting the mines and mineral substances reserved in the transfer to Bolster. The respondent Brown had agreed to purchase the said southwest quarter of Section 21 from one of the predecessors in title of the appellant Western Minerals Limited by an agreement made in the year 1940, by which the vendor reserved the mines and mineral rights in similar, though not identical, terms to those expressed in the transfer to Bolster and it was shown that, as far back as 1919, the respondent Brown's father had agreed to purchase the land from the then registered owner in an agreement containing a like reservation and had thereafter entered into an agreement in similar terms for the purchase of the land in 1928. In the case of the respondent Brown, a certificate of title

under the provisions of *The Land Titles Act* had been issued in the year 1945, with an exception as to mines and minerals and the right to work the same in similar terms.

In addition to these documents, evidence was given which made it quite clear that both Gaumont and Brown purchased these lands for agricultural purposes and that they have lived there and farmed the lands for a long period of years prior to the commencement of these actions and to show that the gravel, and such sand as is intermingled with it, cannot be removed without destroying the surface and rendering that portion of the land thereafter worthless for farming purposes.

With respect for contrary opinions, I think none of this evidence was relevant to the issue raised by the pleadings and decided by Mr. Justice Egbert. That question was as to the interpretation to be placed upon the language of the certificate of title of the appellant Western Minerals Limited which is above referred to. It is so restricted, in my opinion, by the provisions of s. 62 of *The Land Titles Act* (c. 205, R.S.A. 1942) which, so far as relevant, reads as follows:

> Every certificate of title granted under this Act shall (except in case of fraud wherein the owner has participated or colluded) so long as the same remains in force and uncancelled under this Act be conclusive evidence in all courts as against His Majesty and all persons whomsoever that the person named therein is entitled to the land included in the same, for the estate or interest therein specified, subject to the exceptions and reservations mentioned in section 61, except so far as regards any portion of land by wrong description of boundaries or parcels included in the certificate of title and except as against any person claiming under a prior certificate of title granted under this Act or granted under any law heretofore in force relating to titles to real property in respect of the same land.

The reservations mentioned in s. 61, other than those which are irrelevant to the present considerations, are merely any subsisting reservations or exceptions contained in the original grant of the land from the Crown. These lands formed part of the lands originally granted by the Government of Canada to the Canadian Pacific Railway Company and there is no evidence that the grant contained any exceptions and there were none such in the conveyance of the said lands to the Western Canada Land Company Limited, one of the predecessors in title of the appellant Western Minerals Limited. There is no evidence that

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there was any prior certificate of title relating to the interest of the appellant Western Minerals Limited declared by the certificate of title in question in existence. The title of the said appellant to the mines, minerals and other mineral substances described in it is not in any way impeached.

S. 62 of *The Land Titles Act*, with a change which does not affect the matter to be considered, re-enacted s. 57 of *The Land Titles Act* (57-58 Vict. c. 28) enacted by the Parliament of Canada, dealing with titles to land in the Northwest Territories and the manner of its disposition. The system of landholding adopted by the Federal Act and by the Province of Alberta in 1905 was that which has come to be known as the Torrens system, the object of which was to provide a system of landholding where the root of the title was a certificate granted under governmental authority, which would declare an absolute and indefeasible title to realty or to some interest therein and to simplify its transfer. The first of the Acts providing for such a system was enacted by the South Australian Legislature, at the instance of Sir Robert Torrens, in 1858, and it was thereafter adopted in all of the States of the Commonwealth of Australia, the declared purpose of such statutes being as above stated (Hogg's Australian Torrens System, p. 1). It would, in my opinion, be directly contrary to the true intent and meaning of *The Land Titles Act* to allow the estate declared by the certificate of title to be cut down or limited in any manner by evidence as to the intention of the parties to earlier dealings with the land in question to be inferred from the language of agreements made between them or conveyances made pursuant to such agreements such as have been admitted in the present case. The extent of the rights of the appellant Western Minerals Limited is declared by the certificate of title and the first matter to be determined is the meaning of the language employed in that document as of the date from which the judgment at the trial was delivered.

The certificate of title declares Western Minerals Limited to be the owner of all mines, minerals, petroleum, gas, coal and valuable stone in or under the said lands. Grammatically, this means all mines, all minerals, all petroleum, all gas, all coal and all valuable stone, as is pointed out by Lord Russell of Killowen in delivering the judgment of the

Judicial Committee in *Knight Sugar Co.* v. *Alberta Ry. & Irrigation Co.* (1). In *Attorney General of Ontario* v. *Mercer* (2), in considering the interpretation to be placed upon the 109th section of the *British North America Act*, the Earl of Selborne, L.C. in dealing with the contention that the natural meaning to be assigned to the word "royalties" should be restricted, said (p. 778):—

> It is a sound maxim of law, that every word ought, primâ facie, to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context.

It is this principle that should be applied in construing the language of this certificate of title.

The material, the ownership of which is in dispute, consists of deposits which lay a short distance beneath the surface upon the lands in question. On Gaumont's land it was some 35 acres in extent and on Brown's some 8 acres. The expert witnesses called who dealt with the point agreed that these were glacial deposits and it is common ground that such material did not constitute the subsoil of the remaining portions of either quarter section or any material part of it. Mr. R. M. Hardy, the Dean of the Faculty of Engineering of the University of Alberta, speaking generally of the substance which is designated as gravel, said that it is largely composed of various types of rock and in this area of limestone rocks and contains felspar, silica and in some cases mica. The gravel on the Gaumont pit was estimated by the witness John E. Prothroe, a graduate engineer, to run about 40 per cent gravel and 60 per cent fines (without defining the latter term). The deposits on Brown's land were estimated at about 60 per cent gravel and 40 per cent fines. Sand was mingled with the gravel to some extent in both deposits. A sample taken from the pit on Gaumont's land and which is said to be representative shows the material to contain quantities of small stones, the largest of which is not more than an inch in diameter, quantities of much smaller stones and particles of stone as well as sand. A witness, D. S. Harvie, a chemical engineer who had examined the material in both pits, said that the quality was better than in other pits in the area and that in the Brown pit the stones or pebbles were very uniform in size which was uncommon

(1) [1938] 1 W.W.R. 234 at 237. (2) (1883) 8 App. Cas. 767.

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and made it what he described as a "premium" gravel. During the course of the examination-in-chief of Dean Hardy at a time when the learned trial judge was directing questions to the witness, counsel for the present appellants said that he did not think that the defendants challenged the "scientific fact that the gravel itself was a mineral" and counsel for the respondents then said: "From the straight geological standpoint we are not opposing that proposition" and later that the defendants did not suggest that it was not a mineral.

The date upon which the certificate of title in question was issued was not proven. The appellant Western Minerals Limited was, however, incorporated on April 18, 1944, and it is, in my opinion, a proper inference from the documents filed that the certificate was issued later in that year. I am unable to find in the record, whether in the evidence tendered on behalf of the present appellants or the present respondents, anything to support a contention that the word "minerals" or the expression "all minerals" conveyed at that time or thereafter any meaning other than their ordinary or natural meaning. The material in question is admittedly a mineral substance and was contained in deposits situate beneath the surface of the land differing entirely in their nature from the surrounding lands. The enumeration of petroleum, gas, coal and valuable stone following the word "minerals" in the certificate cannot restrict, in my opinion, the meaning to be assigned to the word. If the language was that of an agreement or conveyance, inferences as to the intention of the parties might restrict the meaning of the term. I think also if the word was contained in an Act of the Legislature the meaning of the term might be affected by circumstances from which it might be inferred that the intention of the Legislature was to give it other than its natural meaning. No such consideration, however, can affect the construction of the language of a certificate of title issued pursuant to the provisions of *The Land Titles Act*. Applying the principle stated in *Attorney General of Ontario* v. *Mercer*, which is not of course limited in its application to statutes, I can find nothing in the context in which the word is used, or in the nature of the subject matter, which requires the word to be construed in other than its primary and natural sense.

This, in my opinion, was the state of the law as of the date of the commencement of this action and as of the date of the judgment at the trial. The situation, however, appears to me to be materially altered by the enactment of *The Sand and Gravel Act* by the Legislature of Alberta following the judgment at the trial and before the appeal of the present respondents came on for hearing before the Appellate Division.

While the validity of this legislation was questioned, in consequence of which the Attorney General of the Province intervened in the litigation, this Court decided during the course of the hearing that the statute lay within the powers of the Provincial Legislature under head 13 of section 92 of the British North America Act. The preamble to the statute refers to the judgment given following the trial of the present action, and by section three it is declared that the owner of the surface of land is and shall be deemed to be and at all times to have been the owner of and entitled to all sand and gravel obtained by stripping off the overburden, excavating from the surface or otherwise recovered by surface operations. I am unable to construe this language, when read with the context, in any other way than as a declaration that this has always been the law. Accordingly, the word "minerals" in the certificate of title should have been construed as excluding the material in question and effect must be given to this direction of the Legislature.

In my opinion, this appeal should be dismissed with costs. As I think the present appellants were entitled to succeed at the trial and have lost the benefit of that judgment only by reason of the enactment of *The Sand and Gravel Act* I would allow them the costs of the trial. I think there should be no costs in the Court of Appeal.

CARTWRIGHT, J. (concurred in by Taschereau, J.):—The issue in these appeals is as to the ownership of certain sand and gravel situate in or under the lands of the respondents Gaumont and Brown. These respondents are the owners of what was, as a matter of convenience, referred to on the arguments as "the surface" of the lands in question. They appear to be the owners in fee simple of such lands subject to a reservation in favour of the appellant Western Minerals Limited and those claiming under it. It is

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admitted that, as a result of such reservation having been made, the said appellant is "the owner of an estate in fee simple in all mines, minerals, petroleum, gas, coal and valuable stone in or under such lands, together with the right to enter upon or occupy such portions of the said lands as may be necessary or convenient for the purpose of working, mining, removing and obtaining the benefit of the said mines, minerals, petroleum, gas, coal and valuable stone."

In or about the year 1942 the respondent Gaumont opened a gravel pit on his lands and has been disposing of gravel therefrom since that time. In 1948 the respondent Brown made an agreement with the respondent Beaver Sand and Gravel Limited pursuant to which that company had been taking gravel from his land. There are concurrent findings of fact, and I did not understand it to be questioned before us, that the gravel in both pits is covered by a black top soil about one inch in depth followed by from five to seven inches of light brown soil which is in turn followed by sand and gravel to a depth not exceeding eight feet and that it is not possible to remove sand or gravel from the pits without destroying the surface. It seems clear that any gravel or sand which has been taken or is proposed to be taken from the lands in question has been or will be recovered by surface operations.

The action against Gaumont was commenced in August 1949 and that against Brown in July 1950. In each action the plaintiffs claimed a declaration that they are "the registered and equitable owners of all minerals and/or valuable stone including the sand and gravel within, upon or under the said lands", an injunction, an accounting, and damages for trespass. The actions were consolidated for the purposes of trial and were tried before Egbert J. on October 11 and 12, 1950. That learned judge gave judgment on February 9, 1951 in favour of the plaintiffs. Judgment was entered on February 28, 1951. A notice of appeal was given on behalf of the defendants in each action on March 8, 1951. On April 7, 1951, *The Sand and Gravel Act* being Chapter 77 of the Statutes of Alberta, 1951, was assented to and came into force. By order of the Appellate Division of the Supreme Court of Alberta

the defendants were permitted to amend the notices of appeal by including the terms of the last-mentioned Statute as a further ground of appeal. On August 16, 1951, notice was given on behalf of the plaintiffs that they intended to question the constitutional validity of *The Sand and Gravel Act*. On September 24, 1951 by order of the Appellate Division the Attorney-General of the Province of Alberta was added as a party defendant.

The appeals were heard on September 24 and 25, 1951. Judgment was delivered on October 19, 1951, allowing the appeals, dismissing the actions, declaring the defendants to be the owners of the sand and gravel in or under the lands in question, declaring *The Sand and Gravel Act intra vires* of the Legislature of Alberta, and declaring that such Act "is and was retroactive and applicable to the issues between the present parties". On November 26, 1951, the Appellate Division granted special leave to appeal to this Court.

The unanimous judgment of the Apellate Division was delivered by the learned Chief Justice of Alberta, who first examined the matter without regard to *The Sand and Gravel Act* and reached the conclusion that on the evidence and the authorities, apart altogether from the provisions of the last-mentioned Statute, the judgment at trial should be reversed. The learned Chief Justice then considered the Statute and held that it was decisive in favour of the defendants.

I am in respectful agreement with the Appellate Division as to the effect of the Statute. In my opinion, *The Sand and Gravel Act* is declaratory of the law. A consideration of all its provisions indicates an intention not to alter the law but to declare what, in the view of the Legislature, it is and always has been. In Blackstone's Commentaries, Volume 1, on page 86, that learned author says:—

> Statutes also are either *declaratory* of the common law, or *remedial* of some defects therein. Declaratory, where the old custom of the Kingdom is almost fallen into disuse, or become disputable; in which case the Parliament has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever has been.

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In Craies on Statute Law, 4th Edition at pages 60 and 61 it is said:—

> For modern purposes a declaratory act may be defined as an act passed to remove doubts existing as to the common law, or the meaning or effect of any statute. Such acts are usually held to be retrospective. The usual reason for passing a declaratory act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes.

It is true that the word "declared" is not found in the statute, but there are many other *indicia* of the intention of the Legislature. In the preamble there is a recital of the judgment of the learned trial judge, of the doubts and uncertainties as to the ownership of sand and gravel in the Province resulting therefrom and of the desirability of resolving these doubts and uncertainties. Then it is enacted (by ss. 2 and 3) in regard to all lands in the Province that "the owner of the surface of land is and shall be deemed at all times to have been the owner of and entitled to all 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".

S. 4(1) of the Act may not be strictly necessary. It is the corollary of s. 3 and reads:—

> The sand and gravel referred to in section 3 shall not be deemed to be a mine, mineral or valuable stone but shall be deemed to be and to have been a part of the surface of land and to belong to the owner thereof.

The words in s. 3:—"is and shall be deemed at all times to have been" and those in s. 4(1):—"shall be deemed to be and to have been" appear to me, in the words of Blackstone quoted above, to declare what the law "is and ever has been".

With all respect to Mr. Riley's argument on this point, I think it clear that the word "deemed" as used in this Statute means "conclusively presumed". To construe it as meaning "deemed, *prima facie*, until the contrary is shewn" would be to revive those doubts and uncertainties which it was the expressed intention of the Legislature to remove.

There is, of course, no doubt of the general rule that unless the intention of the Legislature collected from the words of the Statute is clear and unequivocal we are to presume that an act is prospective and not retrospective. As it is put in the well-known maxim:—"*Omnis nova constitutio futuris formam imponere debet non praeteritis*". But it has often been held that where an act is in its nature declaratory the presumption against construing it retrospectively is inapplicable. (*vide* Craies on Statute Law op. cit. p. 341 and cases there cited).

Having concluded that the Act is declaratory of what is and has always been the law of Alberta in this regard, I do not find it necessary to decide whether, under the applicable Statutes and rules of Alberta, an appeal to the Appellate Division is—to use the words of Duff J., as he then was, in *Boulevard Heights* v. *Veilleux* (1)—"an appeal strictly so-called, not an appeal by way of re-hearing"; for even assuming it to be so, I think it clear that the Appellate Division would be bound to give effect to a Statute, passed after the judgment from which the appeal is taken but before the hearing or decision of the appeal, declaring what the law is and always has been and so, of necessity, declaring what it was at the time of the trial. This proposition appears to me to be so obvious as not to require authority to support it but if authority is needed it is, I think, to be found in the following passages in the judgments in *Boulevard Heights* v. *Veilleux* (*supra*):—

per Duff J. (as he then was) at pages 191 and 192:—

> There can be no doubt, I think, that if these amendments had been enacted before the hearing of the appeal by the Appellate Division of Alberta, that court would have been governed by them in the disposition of the appeal. The question we have to consider is another question. The Legislature of Alberta has no authority to prescribe rules governing this court in the disposition of appeals from Alberta; and the enactments invoked by Mr. Clarke, which do not profess to declare the state of the law at the time the action was brought, or at the time the judgment of the Appellate Division was given, can only affect the rights of the parties on this appeal to the extent to which the statutes and rules by which this court is governed permit them so to operate.

per Anglin J. (as he then was) at pages 193 and 194:—

> It is impossible to say that the provincial appellate court should have given effect to an amendment of the statute law which was not in force when it rendered judgment. Nor can an amendment not declaratory

(1) [1915] 52 Can. S.C.R. 185 at 192.

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in its nature, such as was that dealt with in *Corporation of Quebec v. Dunbar,* (1) cited by Mr. Clarke, enable us to say that the law was at the date of the judgment appealed from what the subsequent amendment has made it.

per Brodeur J. at page 196:—

> If it was a declaratory law that had been passed by the provincial legislature, of course we would be bound by it.

In *K.V.P.* v. *McKie et al* (2). This Court, applying the principles stated in *Boulevard Heights* v. *Veilleux* (*supra*), declined to give effect to an Ontario statute passed after the date of the judgment of the Court of Appeal for Ontario from which the appeal was brought. Kerwin J., who delivered the unanimous judgment of the Court said, at page 701:—

> The 1949 Act is not an enactment declaratory of what the law was deemed to be.

The case of *Eyre* v. *Wynn-Mackenzie* (3), relied upon by counsel for the appellants is distinguishable. In that case judgment had been given, and the time for appealing had expired before the passing of the Act there in question. An application was made to extend the time for appealing so as to enable the appellant to have the benefit of the provisions of such Act. In refusing leave Lindley L. J., speaking for the Court of Appeal, said:—

> If we give leave to appeal in this case, we should be re-opening all judgments of a similar kind which had been given prior to the passing of the Act. We cannot do that.

In my opinion the law is correctly stated in the following passage in Craies on Statute Law (op. cit.) at page 341, provided the words "cases pending" are understood as including actions in which, while judgment has been given, an appeal from such judgment is pending at the date of the declaratory act coming into force:—

> Acts of this kind, (i.e., declaratory acts), like judgments, decide like cases pending when the judgments are given, but do not re-open decided cases.

For the appellants reliance was placed on the judgment of the Court of Appeal for Ontario in *Beauharnois Light, Heat and Power Co. Ltd.* v. *The Hydro-Electric Power Commission of Ontario et al* (4), and particularly the

(1) 17 L.C.R. 6.
(2) [1949] S.C.R. 698.
(3) [1896] 1 Ch. 135.
(4) [1937] O.R. 796.

following passages in the judgment of Middleton J. A. who delivered the unanimous judgment of the Court of Appeal:—

> The rights of the parties had already passed into judgment, and the legislation has no effect upon this action. It is true the legislation was passed and was in effect when the appeal was heard in this Court, but the duty of an appellate Court is to reconsider the case and to correct any error made, in its opinion, by the trial Judge, and to pronounce the judgment that, in its opinion, the trial Judge ought to have pronounced: see Ontario Judicature Act, R.S.O. 1927, ch. 88, sec. 26.
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> . . .
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> The intention of the Legislature is embodied in the formal Act of Parliament and can only be gathered from the words used in that enactment. The Legislature, in matters within its competence, is unquestionably supreme, but it falls to the Courts to determine the meaning of the language used. If the Courts do not determine in accordance with the true intention of the Legislature, the Legislature cannot arrogate to itself the jurisdiction of a further appellate Court and enact that the language used in its earlier enactment means something other than the Court has determined. It can, if it so pleases, use other language expressing its meaning more clearly. It transcends its true function when it undertakes to say that the language used has a different meaning and effect to that given it by the Courts, and that it always has meant something other than the Courts have declared it to mean. Very plainly is this so when, as in this case, the declaratory Act was not passed until after the original Act had been construed, and judgment pronounced.

To understand what was before the Court in the *Beauharnois* case it is necessary to refer shortly to the facts. In 1935 the Ontario Legislature had passed an Act (c. 53) providing that a number of contracts to which The Hydro-Electric Power Commission of Ontario was a party "are hereby declared to be and always to have been illegal, void and unenforceable as against the Hydro-Electric Power Commission of Ontario" and further providing that:—

> No action or other proceeding shall be brought, maintained or proceeded with against the said Commission founded upon any contract by this Act declared to be void and unenforceable, or arising out of the performance or non-performance of any of the terms of the said contracts;

S. 6(4) of *The Power Commission Act* of Ontario, R.S.O. 1927, c. 57, read as follows:—

> Without the consent of the Attorney-General, no action shall be brought against the Commission or against any member thereof for anything done or omitted in the exercise of his office.

In the earlier case of *Ottawa Valley Power Co.* v. *The Hydro-Electric Power Commission* (1), which arose under the same statute, the Court of Appeal had held that the

(1) [1937] O.R. 265.

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substantive enactment declaring void the contracts in question in that action was *ultra vires* of the Legislature because it assumed to destroy civil rights outside the Province and that the Legislature could not, by enactment of adjectival law, preclude the courts of Ontario from so declaring.

In the *Beauharnois* case Rose C. J. H. C. delivered judgment on January 13, 1937, following the *Ottawa Valley Power Co.* case. An appeal was heard in April, 1937. In the meantime on January 29, 1937, c. 58 of the Ontario Statutes of 1937, I Geo. VI was enacted as follows:—

> The meaning and effect of subsec. 4 of sec. 6 of *The Power Commission Act* is and always has been that without the consent of the Attorney-General no action of any kind whatsoever shall be brought against The Hydro-Electric Power Commission of Ontario, and that without the consent of the Attorney-General no action of any kind whatsoever shall be brought against any member of The Hydro-Electric Power Commission of Ontario for anything done or omitted by him in the exercise of his office.

It was to this enactment that the passages quoted above from the judgment of Middleton J. A. were directed.

With the greatest respect, it seems to me that this enactment was merely a further attempt by enacting adjectival law to preclude the Courts from declaring that a substantive enactment of the Legislature was beyond its powers and was therefore rightly held ineffectual. If and insofar as the judgment in the *Beauharnois* case negatives the power of the Legislature to declare the law, retrospectively or otherwise, in regard to matters entirely within the ambit of its constitutional powers it ought not to be followed. The question of the constitutional validity of *The Sand and Gravel Act* was disposed of adversely to the appellants at the hearing of the appeal, and consequently I do not think that they are assisted by the judgment in the *Beauharnois* case.

I would dismiss the appeals for the reasons given above and would not have found it necessary to examine the other ground upon which the judgment of the Appellate Division proceeds if it were not for Mr. Riley's submission that if the appeals should be decided against his clients solely on the basis of *The Sand and Gravel Act* the costs in the courts below should be borne by the respondents.

In view of this submission I have considered the matter without regard to the provisions of the last-mentioned Statute and find myself in agreement with the reasons of my brother Kellock on this aspect of the case. I therefore do not think that the order as to costs made by the Appellate Division should be varied.

In the result the appeals should be dismissed. The respondents are entitled to their costs in this Court. While we are indebted to Mr. Ross, who appeared for the intervenant, for a most helpful argument, I do not think that the appellants should be ordered to pay costs to his client. There will therefore be no order as to the costs of the intervenant.

Appeals dismissed with costs.

Solicitors for the appellants: *Macleod, Riley, McDermid, Bessemer & Dixon.*

Solicitors for the respondents: *Morrow & Morrow.*

Solicitor for the Attorney General of Alberta: *R. J. Wilson.*

Solicitors for the Intervenant: *Lavell and Ross.*