ANNIE HAYDUK (*Plaintiff*) .....APPELLANT;

AND

MARY WATERTON and KATE FLICHUK, Executrices of the Estate of Kost Sereda, and ELIZABETH SEREDA, Executrix of the Estate of Andrew H. Sereda, and JOHN SEREDA, and ANNA SEREDA, and TOBY SEREDA, and ISABELLE L. McCLAIN, and KATHERINE FLECHUK (also Flichuk), and MARY WATERTON and JAMES WATERTON and PRUDENTIAL TRUST COMPANY LIMITED (*Defendants*) .....RESPONDENTS.

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KATHERINE FLECHUK (otherwise known as KATE FLICHUK), MARY WATERTON and JAMES E. WATERTON (*Plaintiffs*) .....APPELLANTS;

AND

MARY WATERTON and KATE FLICHUK, Executrices of the Estate of Kost Sereda, ELIZABETH SEREDA, Executrix of the Estate of Andrew H. Sereda, JOHN SEREDA, ANNA SEREDA, TOBY SEREDA, ISABELLE L. McCLAIN and PRUDENTIAL TRUST COMPANY LIMITED (*Defendants*) ..RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Real property—Father transferring land to son—Encumbrance executed by son—"Liferent" to father and on death of father equal remainder interest to each of three daughters and son—Son leasing petroleum and natural gas rights with consent of father and daughters—Whether father entitled to receive royalties paid pursuant to lease as his own income during his lifetime.

In 1943, K, the registered owner of a quarter section of land reserving coal, transferred this land to his son A. At the same time A executed an encumbrance which gave K and his wife and the survivor of them a "liferent" in the land, with an equal remainder interest to each of their three daughters (the female appellants) and A. A petroleum and natural gas lease which A entered into with C S Co., following the discovery of oil in the area in 1947, provided that the lessor was to receive a royalty of 12½ per cent on production. K consented to the lease but no consent thereto was obtained by A from his three sisters. They contested the validity of the lease but later a settlement was effected and they ratified the lease. In 1948 K assigned various

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*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Spence JJ.

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portions of the royalty to his son J and members of J's family and A, and, later in the same year, he entered into a royalty trust agreement with a trust company. In 1952 K made assignments to two of his daughters.

Drilling on the land was successful and oil and gas came into production. The royalties were paid to the trust company and were disbursed by it to K and to his various assignees, according to their interests, until June 14, 1957, when K purported to revoke the assignments which he had made in favour of J and members of J's family. Thereafter, no payments were made to them and the moneys were accumulated, until April 20, 1959, in a fund known as Fund 1. The trust company obtained an interpleader order on March 13, 1958, respecting the moneys affected by the purported revocation. Pleadings were filed but the action was not proceeded with to judgment.

The other moneys received by the trust company, not affected by the revocation, were paid out until April 20, 1959. At that time the trust company was advised of a dispute as to K's right to receive or dispose of the royalties. An interpleader order was obtained on June 9, 1960, and this gave rise to two actions which were tried together. Since April 20, 1959, the trust company ceased all payments, and the entire royalty payments received by it were all accumulated in a second fund, known as Fund 2.

K died in 1961, having been predeceased by his wife in 1945.

The submission of the appellants was that K never, at any time, had the right to receive or dispose of the 12½ per cent royalty payable under the C S lease. It was contended that, under the provisions of the encumbrance, he had only a "liferent", thereby being in the position of a tenant for life. As such, he was not entitled to the proceeds, received by way of royalty, from the lease of the petroleum substances, because such receipts were capital and not income, and, therefore, rightly belonged to the remaindermen.

The trial judge, while acknowledging that the term "liferent" conveys the conception of a life tenancy and that normally the proceeds of a royalty would not be included, found as a fact that K's family had agreed that K should be entitled to receive the royalties paid pursuant to the lease as his own income during his lifetime. Accordingly, he dismissed both actions. The Appellate Division of the Supreme Court of Alberta held that he was justified in making this finding and agreed with his reasons. Appeals in the two actions were then brought to this Court.

Held (Cartwright C.J. dissenting): The appeals should be dismissed.

Per Martland, Judson, Ritchie and Spence JJ.: In essence what had occurred here was the creation of a trust by K, with A as trustee, of which the beneficiaries were K and his wife, A and the three appellants. K, the settlor, reserved to himself a "liferent" and some additional benefits. The meaning of the word "liferent" in the encumbrance was ambiguous and in determining what the parties meant by that term it was proper to consider the evidence as to what had subsequently occurred. As held by the Courts below, the members of K's family had agreed as to his right to the royalties. This was not, therefore, a matter of acquiescence by a beneficiary in a breach of

trust by a trustee. It was a matter of agreement by all parties as to the intention of a settlement agreement which provided for their interests in the land.

Campbell v. Wardlaw (1883), 8 App. Cas. 641; *Gowan v. Christie* (1873), L.R. 2 H.L. Sc. & Div. 273; *McColl Frontenac Oil Co. Ltd. v. Hamilton*, [1953] 1 S.C.R. 127; *Berkheiser v. Berkheiser and Glaister*, [1957] S.C.R. 387; *Watcham v. Attorney-General of East Africa Protectorate*, [1919] A.C. 533, referred to.

Per Cartwright C.J., *dissenting*: It was the duty of the trustee to hold the proceeds of the royalties as forming part of the capital of the trust, to invest them, to pay the income from the investments to K during his lifetime and on his death to distribute the capital amongst the remaindermen. It was not proved that the appellants had entered into a binding agreement the effect of which was to alter the rights of the parties so that K became entitled to receive as his own the whole of the royalties so long as he lived. The evidence established only that after the discovery of oil, the parties were in doubt as to what were the true rights of K in respect of the royalties, that he took the view that he was entitled to receive them as his own and that the three appellants acquiesced in this primarily because they "did not wish to disturb or upset their father".

The payments of the royalties to K as if he was entitled to them for his own use were breaches of trust but breaches in which each of the appellants acquiesced. A beneficiary who has consented to a breach of trust may retract the consent so given at any time before the consent has been acted upon. In regard to the money in the two funds, whatever consent had been given by the three appellants was withdrawn before it was acted upon and those moneys remained in the hands of the trust company.

APPEALS from judgments of the Supreme Court of Alberta, Appellate Division, affirming the decision at trial dismissing two actions which arose out of the same facts and were tried together. Appeals dismissed, Cartwright C.J. dissenting.

J. C. Cavanagh, Q.C., and *R. J. Biamonte*, for the plaintiff, appellant, Annie Hayduk.

Terence Sheard, Q.C., and *Gordon S. D. Wright*, for the plaintiffs, appellants, Katherine Flechuk *et al.*

W. A. Stevenson, for the defendant, respondent, Elizabeth Sereda.

J. T. Joyce and *J. A. Hustwick*, for the defendants, respondents, John Sereda *et al.*

J. J. Stratton and *G. A. I. Lucas*, for the defendant, respondent, Prudential Trust Co. Ltd.

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THE CHIEF JUSTICE (*dissenting*):—The relevant facts, the course of the proceedings in the Courts below and the questions raised in these appeals are set out in the reasons of my brother Martland which I have had the advantage of reading.

I agree that the appellants cannot successfully question the payments made by Andrew Sereda and later by the Prudential Trust Company Limited out of the proceeds of the royalties derived from the sale of the oil found in the land described in the "encumbrance" dated August 24, 1943, executed under seal by Andrew Sereda. Each of the appellants was well aware that these payments were being made and acquiesced therein.

I have, however, reached a different conclusion as to the rights of the parties in regard to the two funds held by the Trust Company pending the result of the proceedings in relation thereto.

As a matter of construction, it is my opinion, as it was that of the learned trial judge, that the legal effect of the "encumbrance" was as follows: Andrew Sereda remained the owner in fee simple of the legal estate in the lands which Kost Sereda had conveyed to him and held the same in trust for the benefit of Kost Sereda and Eva Sereda as life tenants with remainder in fee of one-quarter share each for himself, the appellant Annie Hayduk, the appellant Katherine Flechuk and the appellant Mary Waterton. Whatever meaning the draftsman or Andrew Sereda intended should be given to the word "liferent" I am unable to find any ground for holding that it conferred on Kost Sereda rights higher than those of a tenant for life.

The "encumbrance" also contained provisions for additional payments for the support of Kost Sereda and Eva Sereda during their lifetime but these provisions do not require further consideration. It is established that the proceeds of oil extracted from land form, as between the life tenants and the remaindermen, capital and not income. I find nothing in the words of the "encumbrance" to justify a departure from that rule. It was therefore the duty of the trustee to hold the proceeds of the royalties as forming part of the capital of the trust, to invest them, to pay the income from the investments to Kost Sereda during his lifetime and on his death to distribute the capital amongst the remaindermen.

The difficult question is whether the appellants entered into a binding agreement the effect of which was to alter the rights of the parties so that Kost Sereda became entitled to receive as his own the whole of the royalties so long as he lived. If such an agreement were in fact entered into between Kost Sereda, Andrew Sereda and the three appellants, the Courts would, in my opinion, give effect to it as a family arrangement, the agreement by each of the remaindermen to give up his or her share of the royalties being a sufficient consideration for the similar agreement made by the others. For this reason, I do not think that if the making of such an agreement was proved the argument that the appellant Annie Hayduk received no consideration would avail.

However, on a consideration of the evidence and of the reasons of the learned trial judge, I have reached the conclusion that it was not proved that any such agreement was made. It seems to me that the evidence establishes only that, after the discovery of oil, the parties were in doubt as to what were the true rights of Kost Sereda in respect of the royalties, that he took the view that he was entitled to receive them as his own and that the three appellants acquiesced in this primarily because they "did not wish to disturb or upset their father".

The Court of Appeal disposed of the matter at the conclusion of the argument of counsel for the appellants without calling on counsel for the respondents, as follows:

> The learned trial judge found as a fact that there was an agreement among the members of the family that the proceeds from the lease should belong to the father for his lifetime.
>
> We all agree that the learned trial judge was justified on the evidence in coming to the conclusion which he did. We have come to the same conclusion and concur in his reasons.

It is therefore necessary to examine the findings of fact in this regard made by the learned trial judge. These are contained in the passage in his reasons quoted by my brother Martland and which, as a matter of convenience, I shall repeat:

> Now, I think one must now bear in mind a situation that existed in fact. At the time this happened it is clear, I think, that the parties who in 1943 when this family arrangement was arrived at and who were not thinking of oil and gas rights, now in 1947 know that such rights do exist and that they are valuable, and it was wondered just what would be done about it, the family, I am sure, feeling that father was entitled to the natural income from the land, and which was all they had been thinking

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about to start with, reached the conclusion that during his lifetime he would be equally entitled to the proceeds of the royalty to deal with as he saw fit during his lifetime in the same fashion as he would deal with and was entitled to deal with the normal farm income that had been thought of in the original instance. This I think happened.

and in the following passage:

> In this case it is obvious that Kost and Andrew certainly, that is the trustee and the donor under the original trust, treated the royalty as if it fell within the conception of income, and therefore available to Kost during his lifetime. The documentation they entered into makes that clear. It seems to me clear too from the documentation that the plaintiffs Mary Waterton and Katherine Flechuk entered into bear this same concept out. The plaintiff Annie Hayduk has not signed documentation to this effect. Her evidence, however, is before us from discoveries that were read and from them it appears abundantly clear that she was aware from the outset or virtually so that her father was dealing with the royalty as something in which he himself had a life interest, and she explains not having taken exception by saying that she did not want to disturb or upset her father. From the evidence of the other daughters that was put in this same idea is conveyed in addition to the documents they signed that "Well, we are not going to disturb father". Now, to me this conveys what I think to be and find to be the fact, that this whole family had agreed to the proposition, and the reason why Mrs. Hayduk would not want to kick up a row and not hurt father is that, having agreed to a proposition as a family deal, it would certainly hurt father to find that members of the family were now trying to break it down. I am, therefore, of the conclusion that though an explanation is now given, that it was only because "We didn't want to hurt father", that no action was taken contrary to his, was because in fact the family were in agreement and understood the situation to be, that Kost understood it to be such and acted upon that understanding.

The first of these passages does not appear to me to be a finding that the appellants agreed to give up their rights under the trust document but rather that they had concluded, mistakenly, that their father was entitled to the royalties for his own use during his lifetime.

The second passage goes farther than this and is, I think, a definite finding by the learned trial judge that an agreement was made.

It is with hesitation that I differ from a finding of fact made by the trial judge and concurred in by the Court of Appeal but the finding which he has made does not rest on the evidence of any witness who says that an agreement was reached. It is an inference which he draws from all the evidence; but that evidence does not appear to me to amount to more than this, that for several years none of the appellants objected to their father receiving the royalties as his own. This is not in my opinion sufficient to

support a finding that they must have agreed that he was going to be entitled to receive the royalties for the rest of his life.

The only basis on which the judgment can be supported is that there was a concluded agreement in the nature of a family settlement. For such an agreement to be binding it must appear that all of the parties to the settlement are bound. In my opinion, the evidence does not warrant an inference that the appellant Annie Hayduk agreed, even if it could be said that it was sufficient to support an inference that the appellants Mary Waterton and Katherine Flechuk did agree.

In my view, the payments of the royalties to Kost Sereda as if he was entitled to them for his own use were breaches of trust but breaches in which each of the appellants acquiesced. The law is clear that a beneficiary who has consented to a breach of trust may retract the consent so given at any time before the consent has been acted upon. In regard to the moneys in the two funds, whatever consent had been given by the three appellants was withdrawn before it was acted upon and those moneys remain in the hands of the Trust Company.

For these reasons, I have reached the conclusion that the appeal should be allowed and that judgment should be entered declaring that each of the appellants is entitled to a one-quarter share in the two funds held by the Prudential Trust Company Limited except such parts thereof as represent interest on the investment of the moneys received by way of royalties.

As the other members of the Court do not share my view, it is not necessary for me to consider what order should be made as to costs or whether any directions for an accounting are necessary.

The judgment of Martland, Judson, Ritchie and Spence JJ. was delivered by

MARTLAND J.:—These two actions, which arise out of the same facts, were tried together. The plaintiffs in both actions are appealing from judgments of the Appellate Division of the Supreme Court of Alberta, which affirmed the decision at trial dismissing both actions.

The facts giving rise to these proceedings are as follows: Prior to August 24, 1943, Kost Sereda, the father of the three female appellants, who are hereinafter referred to as

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"the appellants", was the registered owner, in fee simple, of the South-East Quarter of section 19, township 50, range 26, West of the Fourth Meridian, in the Province of Alberta, reserving to the Canadian Pacific Railway Company all coal. This land is hereinafter referred to as "the land".

On August 24, 1943, he transferred the land to his son, Andrew. Prior to that time he and his wife had farmed the land. He had previously also owned another farm, which had been transferred, some years before, to his son, John. At the time of the transfer of the land to Andrew, Kost was over 83 years of age.

On the same date that the land was transferred, Andrew executed an encumbrance of the land and of a lot in the townsite of Calmar. It provided as follows:

> I, Andrew H. Sereda, of the City of Prince Albert, in the Province of Saskatchewan, Fur Trader, being the owner of an estate in fee simple in the following lands and premises, namely:
>
> (1) The South East Quarter of Section Nineteen (19) in Township Fifty (50) Range Twenty six (26) West of the 4th Meridian in the Province of Alberta containing 160 acres more or less Reserving all coal on or under the said land to the Canadian Pacific Railway Company;
>
> (2) Lot Twelve (12) in Block One (1) Plan 4250 E.O. of the Townsite of Calmar registered in the Land Titles Office for the North Alberta Land Registration District;
>
> And desiring to render the said land available for the purpose of securing to and for the benefit of:
>
> (1) Kost Sereda of Calmar in the Province of Alberta and Eva Sereda his wife and the survivor of them of the liferent of the said lands;
>
> (2) The said Kost Sereda and Eva Sereda and the survivor of them such moneys in addition as they and the survivor may require to support them in comfort during the lifetime of both and the survivor;
>
> (3) Kate Flechuk, Mary Waterton and Annie Hayduk, the natural and lawful daughters of the said Kost and Eva Sereda equally three fourths of the said lands or their equivalent value after deduction of the moneys referred to in the next paragraph;
>
> (4) From the encumbrance in favour of the said daughters there shall be deducted three fourths of any moneys with interest at 6% per annum in addition to the said lands liferents the said Andrew H. Sereda may have expended or paid out to or on behalf of the said Kost Sereda and Eva Sereda, and also a further sum of Three hundred ($300.00) Dollars;
>
> The said Andrew H. Sereda doth encumber the said lands with the liferent of the said Kost Sereda and Eva Sereda and the survivor;

The said Andrew H. Sereda doth further encumber the said lands with such moneys as during the lifetime of the said Kost Sereda and Eva Sereda in addition to the said liferent of lands they may require to support them in comfort;

The said Andrew H. Sereda doth further encumber the said lands so that on the death of the said Kost and Eva Sereda the said Kate Flechuk, Mary Waterton and Annie Hayduk shall receive equally between them each a one fourth interest in the said lands as owners in fee simple, subject to a charge against the said of any moneys with interest at 6% per annum paid out by me the said Andrew H. Sereda in addition to the said liferent for the maintenance in comfort of the said Kost & Eva Sereda; and a sum of Three hundred ($300.) Dollars payable to me the said Andrew H. Sereda by the said Kate Flechuk, Mary Waterton and Annie Hayduk out of the interest in the said land now encumbered in their favour.

And subject as aforesaid the said Incumbrancees shall be entitled to all the powers and remedies given to an Encumbrancee.

Kost and his wife filed a caveat, giving notice of their interest under the encumbrance.

It would appear that Kost, feeling that he could not, at his age, continue to farm the land, disposed of it in favour of his son, Andrew, and of his three daughters, at the same time making provision for the support of his wife and himself, while they lived.

Kost's wife, Eva, died in 1945.

At the time the transfer and the encumbrance were made, it seems clear that no one then contemplated the possible value of the minerals underlying the land. Oil production in the Leduc area, where the land is situate, did not occur until 1947.

In that year, on February 8, Andrew entered into a petroleum and natural gas lease with The California Standard Company (hereinafter referred to as "California Standard"), and on February 11 Kost executed a consent to the lease. The term of this lease was for ten years and if, within that time, drilling operations were commenced, thereafter until all the petroleum, natural gas and other hydrocarbons, other than coal, or any of them, had been fully recovered. A "royalty and rental" of 12½ per cent of gross production of petroleum and natural gas, or its market value equivalent, was provided to be paid to the lessor.

On April 16, 1947, Andrew reconveyed the surface of the land to his father.

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No consent to the lease had been obtained by Andrew from his three sisters, the appellants. On October 23, 1947, they commenced an action contesting the validity of the lease.

On November 7, 1947, the appellants entered into an agreement with George Cloakey, under which they received from him the sum of $5,000. He was granted an option to acquire a lease of the appellants' interest in the petroleum, natural gas and other hydrocarbons, other than coal, (hereinafter referred to as "petroleum substances"). It was also agreed that, if he could make a settlement with California Standard, the appellants would affirm the existing lease to that company in consideration of their receiving $75,000 in cash, and a further $75,000 out of production from the land.

This agreement stipulated that

> neither the consent, approval, ratification or affirmation of the said Standard Lease nor anything done or received by the Optionors under the provisions of this Agreement shall operate in any way to hinder, defeat, delay or prejudice the rights, remedies and powers of the Optionors against the said ANDREW H. SEREDA to claim, take or receive a share or interest in the royalty to be payable to the said ANDREW H. SEREDA under the said Standard Lease or any other lease affecting the optioned area under and by virtue of the encumbrance annexed as Schedule "A" hereto.

A settlement was effected on September 22, 1948, by an agreement made by the California Standard Company, the appellants, and three other oil companies, which companies acquired one-half of the lessee's interest in the California Standard lease. The appellants ratified that lease. They agreed to the obtaining of a consent judgment in the proceedings which concerned the validity of that lease, declaring the lease to be valid "and to be a first charge upon all the interest of the said Andrew H. Sereda, the said Kost Sereda and the Claimants (the appellants) in the petroleum and natural gas underlying the said lands".

This agreement also contained a saving clause, much less broad in its terms than the one quoted above from the Cloakey agreement, and containing no reference to any interest in royalty under the California Standard lease. It read:

> Nothing herein contained shall operate in any way to hinder, delay, defeat or prejudice any rights the Claimants may have against the said

Andrew H. Sereda with respect to the lands, the subject of this Agreement, or the petroleum and natural gas underlying the same.

The appellants duly received from the three oil companies the two sums of $75,000 provided for in their agreement with George Cloakey.

The following month, Kost Sereda, on October 30, executed four documents, each called an "Assignment of Life Interest in Oil Royalty", which granted to each of the four assignees a portion of the royalty payable under the California Standard lease. Reference was made in the recitals to the encumbrance, dated August 24, 1943, and to the lease.

Each assignment also recited that:

> AND WHEREAS it was further provided in the said Incumbrance that on the death of the Assignor and his said wife, Kate Flechuk, Mary Waterton and Annie Hayduk, natural and lawful daughters of the Assignor, shall receive equally between them each a one-fourth (1/4th). interest in the said lands as owners in fee simple, subject to certain cash payments therein set forth, the remaining one-fourth (1/4th) interest to be held by the said Andrew H. Sereda.
>
> . . .
>
> AND WHEREAS the Assignor is by virtue of the provisions of the said Incumbrance entitled to all income which may be derived from the said lands during the remaining years of his life and therefore is entitled to all of the said royalty payable under the said Indenture of Lease and is accordingly possessed of and the owner of the gross royalty of twelve and a half percent (12½%), of the total production from any well or wells that may be drilled upon the said lands or any part thereof for life,

By these assignments Kost Sereda assigned, out of the 12½ per cent royalty, to his son, John, 3 per cent; to John, in trust for John's son, Toby, 1½ per cent; to John's wife, Anna, 2 per cent; and to his son, Andrew, 3 per cent, making a total, in all, of 9½ per cent.

On November 23, Kost Sereda entered into a royalty trust agreement with the Prudential Trust Company, Limited (hereinafter referred to as "the Trust Company"), under the terms of which the Trust Company assumed the obligation of receiving payment of the royalties paid pursuant to the lease, and of disbursing the same to the parties interested. This agreement was afterwards ratified by the assignees under the four assignments abovementioned.

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On September 22, 1956, Anna Sereda assigned $\frac{1}{2}$ of 1 per cent royalty to her daughter, Isabelle L. McClain, and on the same date Toby Sereda assigned $\frac{1}{4}$ of 1 per cent royalty to the same assignee.

In 1952, Kost Sereda made an undated assignment of 1 per cent to his daughter, the appellant Mrs. Waterton, and on July 28 of that year also made a like assignment in favour of his daughter, the appellant Mrs. Flichuk.

Mrs. Waterton, on September 8, 1952, directed that half of her share be paid to her son, James Waterton.

Each of the assignments to Mrs. Waterton and to Mrs. Flichuk was signed by the assignee as well as by Kost Sereda, and each provided that:

> I the Transferee hereby agree to accept the said Royalty subject to the terms, conditions and provisions set forth in the Trust Agreement under which the same is issued.

Drilling on the land was successful and oil and gas came into production. The royalties were paid to the Trust Company and were disbursed by it to Kost Sereda and to his various assignees, according to their interests, until June 14, 1957, when Kost Sereda purported to revoke the assignments which he had made in favour of John Sereda, John's wife, Anna, and son, Toby. Thereafter, no payments were made to them or to persons claiming through them. The moneys were accumulated, until April 20, 1959, in a fund known as Fund 1.

The Trust Company obtained an interpleader order on March 13, 1958, respecting the moneys affected by the purported revocation. Pleadings were filed, but the action has not been determined.

The other moneys received by the Trust Company, not affected by the revocation, were paid out until April 20, 1959. At that time the Trust Company was advised of a dispute as to Kost Sereda's right to receive or dispose of the royalties. An interpleader order was obtained on June 9, 1960, which is the basis of the present proceedings. Since April 20, 1959, the Trust Company ceased all payments, and the entire royalty payments received by it have all been accumulated in a second fund, known as Fund 2.

Andrew Sereda died on September 4, 1959. His wife, Elizabeth, is the executrix of his estate.

Kost Sereda died on September 28, 1961, at the age of 101. The appellants, Mrs. Waterton and Mrs. Flichuk, are the executrices of his estate.

The learned trial judge made the following findings of fact, which are fully supported by the evidence:

> In this case it is obvious that Kost and Andrew certainly, that is the trustee and the donor under the original trust, treated the royalty as if it fell within the conception of income, and therefore available to Kost during his lifetime. The documentation they entered into makes that clear. It seems to me clear too from the documentation that the plaintiffs Mary Waterton and Katherine Flechuk entered into bear this same concept out. The plaintiff Annie Hayduk has not signed documentation to this effect. Her evidence, however, is before us from discoveries that were read and from them it appears abundantly clear that she was aware from the outset or virtually so that her father was dealing with the royalty as something in which he himself had a life interest, and she explains not having taken exception by saying that she did not want to disturb or upset her father. From the evidence of the other daughters that was put in this same idea is conveyed in addition to the documents they signed that "Well, we are not going to disturb father."

The submission of the appellants is that Kost Sereda never, at any time, had the right to receive or dispose of the $12\frac{1}{2}$ per cent royalty payable under the California Standard lease. It is contended that, under the provisions of the encumbrance, he had only a "liferent", thereby being in the position of a tenant for life. As such, he was not entitled to the proceeds, received by way of royalty, from the lease of the petroleum substances, because such receipts were capital and not income, and, therefore, rightly belonged to the remaindermen.

The learned trial judge, while acknowledging that the term "liferent" conveys the conception of a life tenancy and that normally the proceeds of a royalty would not be included, found as a fact that the Sereda family had agreed that Kost Sereda should be entitled to receive the royalties paid pursuant to the lease as his own income during his lifetime. Accordingly, he dismissed both actions.

The Appellate Division of the Supreme Court of Alberta held that he was justified in making this finding and agreed with his reasons.

On the appeal before this Court, the position taken by the appellant Mrs. Hayduk differed from that taken by the appellants Mrs. Waterton and Mrs. Flichuk. On behalf of the former, it was contended that she was entitled to

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recover from the respondents 25 per cent of all the royalties realized from the lands. Counsel for the latter two appellants conceded that, while there had been acquiescence by the beneficiaries, properly entitled, in the payments of royalty disbursed by the Trust Company, any consent to the alleged breach of trust had been retracted. Therefore, he said that these appellants were entitled, together, to one-half of the moneys held by the Trust Company in Funds 1 and 2, after allowance of whatever sums should have been paid out as income, and one-half of the income thereon since the death of Kost Sereda.

In my opinion there is no doubt, on the evidence, that there was acquiescence by all the appellants in the disbursement of royalties by the Trust Company to Kost Sereda and to those persons holding assignments from him, and, accordingly, they are not entitled to recover from the Trust Company, or from anyone else, the amounts of the moneys so disbursed. The serious issue in this appeal is as to the argument raised by the appellants Mrs. Waterton and Mrs. Flichuk respecting the disbursement by the Trust Company of Funds 1 and 2.

The position of Kost Sereda under the terms of the encumbrance was that he, along with his wife, had a "liferent". In addition, they were entitled to be provided, by the appellants and Andrew Sereda, with such moneys, in addition to the liferent, as they required to support them in comfort.

The use of the word "liferent" in this document was unusual. It is a term used in the law of Scotland. It is defined in Stroud's Judicial Dictionary, 3rd ed., as follows:

> "Liferent" is used in Scotland to denote an estate or beneficial interest for life in moveables as well as realty; a liferenter, at least of realty is, as nearly as may be, the same as a tenant for life.

What was its meaning, as used in a somewhat roughly drawn encumbrance, drafted in Leduc, Alberta, in 1943? Did it necessarily have the same meaning as it would receive if used in a family settlement in Scotland drawn by a Scottish solicitor?

The position of the appellants is that the word "liferent", as used in this document, must be given the meaning ascribed to it by Scots law, and that the liferenter is not entitled to destroy any part of the substance of the land.

The appellants rely upon the judgment of the House of Lords in *Campbell v. Wardlaw*[1]. In that case, a testator had directed his trustees to pay to his wife "the whole annual produce and rents of the residue and remainder of my means and estate, heritable and moveable, during all the days and years of her life". Before his death, coal and iron mines had been leased by the testator. After his death, the trustees leased others. The issue was as to the widow's right to receive the rents from these latter leases, there being no question as to her right to receive the rents from the leases made prior to the testator's death. It was held that she was not entitled to the rents from the later leases.

The words used in the will were considered to be equivalent to the gift of an interest as a liferentrix. The widow's rights in respect of mines opened before her husband's death are based upon a presumed intention that the person with the limited interest would be at liberty to work the opened mines. (*Per* Lord Blackburn, at p. 646.)

At p. 655, Lord FitzGerald says:

> I think that the laws of both countries are in this respect substantially the same; that is to say a tenant for life in England, and a liferenter, as he is called in Scotland, namely, the person to benefit under the trust deed, stand in the same position; each is entitled to the whole produce and profits derivable from that life estate whatever they are; but in both countries equally he is subject to this limitation, that in England, he must not destroy the corpus of the estate, or, as it is more correctly expressed in Scotland, the substance of the estate is to be preserved and not destroyed; and in both countries it is subject to this also, that the settlor may in either case expressly indicate a contrary intention—he might have said in this case that his widow should, if she had the rents derivable from opened mines, equally have the rents derivable from mines which were unopened.

At p. 650, Lord Watson makes this statement, which is, I think, of some significance:

> Had this deed contained an express or implied provision by the late Sir George Campbell that these minerals should be or might be worked by the trustees in the course of their administration, I should have been prepared to hold that it was his intention that when they were so worked his widow was to enjoy the rents or lordships arising from their working, as part of her usufructuary right.

In the present case, which does not involve a will, the settlor and all beneficiaries lived for some years after the encumbrance was made. In essence what occurred was the creation of a trust by Kost Sereda, with Andrew as trus-

[1] (1883), 8 App. Cas. 641.

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tee, of which the beneficiaries were Kost and his wife, Andrew and the three appellants. Kost, the settlor, reserved to himself a "liferent" and some additional benefits.

The encumbrance did not give to the trustee any specific power to work minerals underlying the land, or to grant leases in respect of the same. He did, however, acquire that power by the consent of all the beneficiaries. Andrew, the trustee, executed the lease to California Standard on February 8, 1947. On February 11, 1947, Kost approved the lease in writing. The three appellants contested the validity of such lease, but later, for a substantial consideration, involving the payment to the appellants by three oil companies of $150,000 and the transfer to those companies by the lessee, California Standard, of half of its lessee's interest under the lease, recognized the validity of the lease. Therefore, after the execution of the settlement agreement of September 22, 1948, the position was that the trustee, Andrew, by consent of all beneficiaries, had validly leased the petroleum substances under the land. This situation was, therefore, comparable to that mentioned by Lord Watson in the passage above quoted.

It is also significant, as the learned trial judge points out, that a little more than two months after the lease was granted to California Standard by Andrew, the land was transferred back to Kost, by transfer dated April 14, 1947, and registered on April 16, but reserving to Andrew all mines and minerals, other than coal. Kost, therefore, became owner of the surface of the land and Andrew owned the petroleum substances. However, the encumbrance continued, and it was now an encumbrance providing for a liferent to Kost in respect of the petroleum substances underlying the land.

There is no evidence to show that in making this transfer Andrew was acting on his own. The transfer was drawn by the same solicitor who drafted the encumbrance and the fact of this transfer being made was specifically recited in the agreement which the appellants made with George Cloakey.

When the settlement agreement was made the appellants convenanted to join with California Standard in ob-

taining a consent judgment that the lease to that company by Andrew was "to be a first charge upon all the interest of the said Andrew H. Sereda, *the said Kost Sereda* and the Claimants in the petroleum and natural gas underlying the said lands". (The italicizing is my own.)

It is, I think, at this point of time that we must consider what the interested parties to the settlement must be taken to have meant by "liferent", in relation to the question of whether or not it was intended to include receipts obtained by way of royalty from the leasing of petroleum and natural gas. The trust property now consisted of the petroleum substances in respect of which a lease had been granted authorizing their production by a lessee in consideration of payment by the lessee of a share of production.

Prior to and at the time of the execution of the settlement agreement, the rights of the appellants as remaindermen in respect of the land were obviously a matter of their serious consideration. After obtaining legal advice, they had challenged Andrew's right to make the lease, which was virtually certain to continue after Kost's death. They had recognized the validity of that lease, which called for royalty payments to be made to Andrew.

Unfortunately, we do not have the benefit of Andrew's evidence, he having died in 1959. We do, however, know that no demand was made upon him by any of the appellants for payment to her of any part of the royalties. We also know that it was only a little over a month after the appellants executed the settlement agreement that Kost effected assignments of royalty to members of the John Sereda family and to Andrew. Clearly Kost and Andrew were under the impression, following the execution of the settlement agreement, that Kost was entitled, during his lifetime, to receive the royalties.

All of the appellants became aware of these assignments soon after they were made. None of them challenged Kost's right to receive the royalties until the year 1959. In fact, two of them, Mrs. Waterton and Mrs. Flichuk, were themselves recipients of a share of the royalty from Kost.

As I see it, the situation is, therefore, that in 1943, when the encumbrance was executed, we have a document which defines an interest by using a word from a system of law other than that which applies in Alberta. The view of the

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interested parties as to what they meant to accomplish is probably summarized in an answer of Mrs. Hayduk, on discovery. Asked whether the term "liferent" was discussed, she said:

> We said that everything must go to the parents during their lifetime and if that wasn't sufficient then the brother (Andrew) was to add what was necessary and then all of us would then settle it between us.

Clearly no one was giving specific consideration to oil royalties at that time, but the evidence which I have summarized, as to what occurred subsequently, in my view, does establish a common understanding among the parties that "liferent" should include a right to royalties during Kost's life, and an agreement that this should be so.

I think it is proper in the present case to consider that evidence in determining what the parties meant by the word "liferent". It has already been pointed out that it is not a term of English common law, which is in force in Alberta. In the case of *Campbell v. Wardlaw*, previously mentioned, where the words of the will were considered to give the widow the equivalent of a liferent, reference was made, in the judgment of Lord Watson, at p. 649, to a statement of Earl Cairns, in *Gowan v. Christie*[2], in respect of mineral leases:

> There is no fruit; that is to say, there is no increase, there is no sowing or reaping in the ordinary sense of the term; and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out-and-out of a portion of land. It is liberty given to a particular individual for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and take them away just as if he had bought so much of the soil.

The judgment of Earl Cairns was mentioned in the case of *McColl Frontenac Oil Company Limited v. Hamilton*[3], (an Alberta case), but it was found unnecessary in that case to decide whether the oil lease there in question constituted a grant of the minerals. In *Berkheiser v. Berkheiser and Glaister*[4], (a Saskatchewan case), the oil lease under consideration was held by three members of the Court to be a grant of a *profit à prendre* for an uncertain term. The other two members of the Court said

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2 (1873), L.R. 2 H.L. Sc. & Div. 273.
3 [1953] 1 S.C.R. 127, 1 D.L.R. 721.
4 [1957] S.C.R. 387, 7 D.L.R. (2d) 721.

it created either a *profit à prendre* or an irrevocable licence to search for and win the named substances. In 1956, in Alberta, *The Land Titles Act Clarification Act,* 1956 (Alta.), c. 26, declared, retroactively, that the term "lease", as used in *The Land Titles Act,* includes an agreement of the kind made between Andrew Sereda and California Standard. In view of this, it is not possible to assume that the use of the word "liferent" necessarily debarred the life-renter from a right to receive the "rent and royalty" covenanted to be paid by California Standard. The meaning of the word in the encumbrance is ambiguous.

In *Watcham v. Attorney-General of The East Africa Protectorate*[5], a decision of the Privy Council, Lord Atkinson said, at p. 538:

> The principle of the above-mentioned decisions, so far as it is based on the probability of a change during the lapse of time in the meaning of the language used in an ancient document, cannot of course have any application to the construction of modern instruments, but even in these cases extrinsic evidence may be given to identify the subject-matter to which they refer, and where their language is ambiguous the circumstances surrounding their execution may be similarly proved to show the sense in which the parties used the language they have employed, and what was their intention as revealed by their language used in that sense.
>
> The question, however, remains whether in such instruments as these proof of user, or what the parties to them did under them and in pursuance of them, can be used for the like purpose. In *Wadley v. Bayliss,* (1814) 5 Taunt. 752, it was decided that the user of a road described in an ambiguous way in an award made under an Enclosure Act by the owner of a holding by the award allotted to him, might be proved in evidence in order to ascertain the meaning of those who worded the award. In *Doe v. Ries,* (1832) 8 Bing. 178, 181, Tindal C.J., in delivering judgment, the document to be construed being modern, said: "We are to look to the words of the instrument and to the acts of the parties to ascertain what their intention was: if the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties." The fact mainly relied upon in that case to show that the document to be construed was a legal demise, and not a mere agreement for a lease, was this: that the person who claimed to be the tenant or lessee had been put into possession and remained there. In *Chapman v. Bluck,* (1838) 4 Bing. N.C. 187, 193, was practically to the same effect. Tindal C.J., in giving judgment, said: "Looking only at the two first letters between the parties, on which the tenancy depends, I think this falls within the class of cases in which it has been held that an instrument may operate as a demise, notwithstanding a stipulation for the future execution of a lease. But we may look at the acts of the parties

[5] [1919] A.C. 533.

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also; for there is no better way of seeing what they intended than seeing what they did, under the instrument in dispute." Park J. said: "The intention of the parties must be collected from the language of the instrument and may be elucidated by the conduct they have pursued."

The learned trial judge has found, as a fact, the existence of an agreement among the parties as to Kost's right to the royalties. He says:

> Now, I think one must now bear in mind a situation that existed in fact. At the time this happened it is clear, I think, that the parties who in 1943 when this family arrangement was arrived at and who were not thinking of oil and gas rights, now in 1947 know that such rights do exist and that they are valuable, and it was wondered just what would be done about it, the family, I am sure, feeling that father was entitled to the natural income from the land, and which was all they had been thinking about to start with, reached the conclusion that during his lifetime he would be equally entitled to the proceeds of the royalty to deal with as he saw fit during his lifetime in the same fashion as he would deal with and was entitled to deal with the normal farm income that had been thought of in the original instance. This I think happened.

His conclusion has been adopted by the judgment of the Appellate Division, with which I agree.

This is not, therefore, a matter of acquiescence by a beneficiary in a breach of trust by a trustee. It is a matter of agreement by all parties as to the intention of a settlement agreement which provided for their interests in the land.

I would dismiss the appeals in both actions, with costs.

Appeals allowed with costs, CARTWRIGHT C.J. *dissenting.*

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