

CANADA / JUDGMENT

Saskatchewan Minerals v. Keyes

[1972] SCR 703

COURT

Supreme Court of Canada

DECIDED

20 December 1971

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Saskatchewan Minerals v. Keyes

Collection

Supreme Court Judgments

Date

1971-12-20

Report

[1972] SCR 703

Judges

Martland, Ronald; Judson, Wilfred; Hall, Emmett Matthew; Spence, Wishart Flett; Laskin, Bora

On appeal from

Saskatchewan

Subjects

Evidence

Mines and minerals

Decision Content

Supreme Court of Canada

Saskatchewan Minerals v. Keyes, [1972] S.C.R. 703

Date: 1971-12-20

Saskatchewan Minerals (Defendant) Appellant;

and

Thomas E. Keyes (Plaintiff) Respondent.

1971: March 22; 1971: December 20.

Present: Martland, Judson, Hall, Spence and Laskin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Mines and Minerals—Alkali mining leases—Option to acquire lessee's interest claimed by respondent—Whether option valid in absence of Minister's written consent—Agreement to transfer option—Royalty clause—Whether royalty binding on appellant as subsequent assignee—Alkali Mining Regulations, O.C. 1357/43 (Sask.), s. 11.

Evidence—Alleged option agreement—Respondent giving evidence as to contents of lost agreement—Whether properly admissible—No evidence of attempt to locate agreement or as to existence of copy thereof.

The appellant acquired two alkali leases by assignment from A, which, in turn, had acquired the leases by assignments from the original lessee H. The required approval of the respective assignments was obtained in accordance with the provisions of s. 11 of the Alkali Mining Regulations of Saskatchewan which read: "The lessee shall not assign, transfer or sublet the rights described in his lease or any part thereof, without the consent in writing of the Minister being first had and obtained."

The case of the respondent (K) as pleaded and argued before the trial judge was that he had obtained an option from H in the latter part of 1943 to purchase the rights under the two leases; that he had tried, without success for some years, to interest various persons in developing the properties; and that early in 1948 he interested A in them, and in the result reached an agreement with A dated June 3, 1948. This agreement, which related to other mining interests held by K, as well as the option, recited, among other things, that K had arranged to transfer to A his option to take over one of the two leases and provided for a consideration of a royalty of twenty-five cents (250) per ton on all anhydrous salt produced and sold from the said leasehold property. No assignment of the option was ever made from K to A. Subsequently the lease was assigned directly from H to A on terms different from those contained in the option from H to K. The respondent contended that the royalty covenant in his agreement with A created an interest in the leased land which continued after the assignment of the lease by A to the appellant. Although no option was produced, nor was there any evidence of an acknowledgement of it by H, the trial judge found that K had the option that he claimed and that it gave him rights in the land of which he disposed for consideration that included the royalty which was the subject of these proceedings.

The Court of Appeal affirmed the finding at trial that K had the option alleged by him; but it concluded, contrary to the trial judge, that there had been no assignment thereof in respect of the second lease and no reservation of royalty in respect of that lease. This conclusion turned on its construction of the terms of the agreement of June 3, 1948, as not covering the second lease.

The Court of Appeal held further that, whatever oral arrangement or agreement there was between K and A for the payment of a royalty in respect of the second lease, it was not binding on the appellant because the oral transaction rested in contract only and gave no interest in land. In this Court the appellant urged that the claim for royalty should be denied as to both leases and the respondent sought restoration of the judgment at trial.

Held (Hall and Laskin JJ. dissenting): The appeal should be allowed and the respondent's action dismissed.

Per Martland, Judson and Spence JJ.: The evidence of the respondent as to the option was not properly admissible. After testifying that he had turned the document over to the solicitor for A in 1948, and that he had not kept any copy of it, the respondent proceeded to give evidence as to its contents, without first having given any evidence as to any attempt to locate it, or as to his having made any inquiry from the grantor of the option as to the existence of a copy of it. He was unable to give the date of the option or its duration.

In any event, the option was invalid in the absence of a written consent by the Minister of Mineral Resources, as required by s. 11 of the Alkali Mining Regulations. The option would create an equitable interest in the lease, similar to that in *Frobisher Ltd. v. Canadian Pipelines and Petroleums Ltd.*, [1960] S.C.R. 126, and the regulation prohibited the lessee from transferring any part of the rights described in the lease, without the required consent. No such consent was given.

The respondent had contended that the royalty clause in its agreement with A created an interest in him in the land covered by the first lease, and that the appellant, when it took an assignment of the lease from A, took it subject to that property interest. It was unnecessary to state a final opinion as to whether the use of the word "royalty" implied an intention by A to create an interest in land in the respondent because, if it was intended to create any interest in the lands comprised in the lease, A was prohibited from creating it, by virtue of s. 11 of the Regulations, unless the written consent of the Minister had first been obtained.

The only interest in land which the respondent could acquire from A, pursuant to the agreement, in relation to the first lease, would be a part of the interest in land acquired by A when it obtained the assignment of the lessee's interest under that lease. To the extent that the respondent acquired such an interest from A, A's interest in land would be correspondingly diminished. The respondent's interest could only arise as a result of a transfer by A to him of a part of the rights described in A's lease from the Crown. Such a transfer was expressly forbidden by s. 11 unless the consent of the Minister had first been obtained.

That being so, the royalty provision could only be legally effective by way of contract, as between the respondent and A, and such a right was enforceable only as against A and not as against the appellant.

Agreement was expressed with the reasons of the Court of Appeal in respect of the second lease.

Per Hall and Laskin J.J., dissenting: The respondent became entitled to an overriding royalty in respect of the lessee's interest in the first lease, whether that interest was a leasehold in the strict sense or a profit à prendre for a term; and the royalty, unaccrued, was an interest in land analogous to a rent-charge, and, in the circumstances, binding on the appellant as subsequent assignee of the lease.

As held by the Court below, the option granted by H to K fell outside the words of s. 11 of the Alkali Mining Regulations; it was only when the option was exercised and was consummated by a transfer or assignment that consent would be required. Consent in this respect was given when H assigned to A and, again, when A assigned to the appellant. Also, s. 11 did not apply to the gross overriding royalty stipulated in the agreement between A and K, and hence the issue of fact and the question whether the appellant could invoke s. 11 did not arise.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], allowing in part an appeal from a judgment of Bence C.J.Q.B. Appeal allowed, Hall and Laskin JJ. dissenting.

G.L. Gerrand, Q.C., for the defendant, appellant.

D.G. McLeod, Q.C., and E.F.A. Merchant, for the plaintiff, respondent.

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

MARTLAND J.—The facts which give rise to the present appeal are stated in the reasons of my brother Laskin. As he has pointed out, it is common ground that the respondent cannot succeed unless the royalty which he claims by virtue of his agreement with Astral Mining & Resources Limited (hereinafter called "Astral"), dated June 3, 1948, is an interest in land. In his reasons, the relevant parts of that agreement are set out in full. The agreement recites, among other things, that the respondent has arranged to transfer to Astral an option to take over a lease dated January 30, 1948, entered into between the Minister of Natural Resources of the Province of Saskatchewan and Eric Lafferty Harvie. This is lease No. A-4010, covering accumulations of alkali on or in the lands described in the lease, together with the power to mine and carry the same away.

The option, to which reference is made, was not produced at the trial. The respondent testified that he had turned the document over to the solicitor for Astral in 1948, and that he had not kept any copy of it. He proceeded to give evidence as to its contents, without first having given any evidence as to any attempt to locate it, or as to his having made any inquiry from the grantor of the option as to the existence of a copy of it. He was unable to give the date of the option or its duration. In these circumstances I do not think that the evidence of the respondent as to the option was properly admissible.

In any event, the option was invalid, in the absence of a written consent by the Minister of Mineral Resources. Section 11 of the Alkali Mining Regulations of Saskatchewan provides:

The lessee shall not assign, transfer or sublet the rights described in his lease or any part thereof, without the consent in writing of the Minister being first had and obtained.

In *Frobisher Ltd. v. Canadian Pipelines and Petroleums Ltd.*[2], this Court held that an option to acquire mining claims created an equitable interest in the claims and that it was rendered void because it was taken against the express prohibition contained in s. 9(1) of the regulations made under the Saskatchewan Mineral Resources Act, the relevant parts of which provided that:

... no person, mining partnership or company not a holder of a Prospector's, Developer's and Miner's licence shall acquire by transfer, assignment or otherwise howsoever any mineral claim or any right or interest therein ...

The option in question here would create a like interest in the lease, and the regulation prohibits the lessee from transferring any part of the rights described in the lease, without the required consent. No such consent was given.

The reasons given by the Court of Appeal for holding s. 11 not to be applicable to the option, i.e., that the consent would only be required when the option was exercised and the lease assigned, are similar to the submissions which were made, unsuccessfully, by the appellant in the *Frobisher* case.

There is no evidence that any assignment of the option was ever executed by the respondent in favour of Astral. Astral took an assignment of the Harvie lease directly from him, under an agreement which contained no reference to such option and on terms substantially different from those which the respondent said had been contained in the option.

The agreement between the respondent and Astral also related to a salt lease to the respondent from Hudson's Bay Company, and a Crown reservation granted to the respondent in respect of oil and gas covering some 460,000 acres.

Clause 3 of the agreement provided:

3. The consideration to be paid by Astral Mining & Resources Limited to Keyes for the sale and assignment of all of the above property, rights and concessions shall be,—
 - (a) the sum of Eighty-seven Thousand Five Hundred Dollars (\$87,500.00) to be paid and satisfied by the issue and allotment to

or his nominees in writing named

Keyes / of Three Hundred and Fifty Thousand (350,000) shares of the capital stock of Astral Mining & Resources Limited, fully paid and non-assessable; and

- (b) a royalty of twenty-five cents (25¢) per ton on all anhydrous salt produced and sold from the said leasehold property; and
 - (c) a base production royalty of one per cent (1%) on all oil and gas won or derived by Astral Mining & Resources Limited from any of the said leasehold premises or lands.

The respondent contends that cl. 3(b) of the agreement created an interest in him in the land covered by lease No. A-4010, and that the appellant, when it took an assignment of the lease from Astral, took it subject to that property interest. The respondent claims that the clause created only a contractual right enforceable against Astral, but not as against the appellant.

If the clause had used the word “payment” instead of “royalty” I would doubt whether the respondent’s position would be arguable. Does the use of the word “royalty” imply an intention by Astral to create an interest in land in the respondent?

I would doubt that it does. Astral’s commitment under the clause is to make money payments in relation to salt which has been both produced and sold. It is similar to the provision contained in the agreement under consideration by this Court in *St. Lawrence Petroleum Ltd. v. Bailey Selburn Oil & Gas Ltd. and H.W. Bass & Sons, Inc.*[3], under which the appellant in that case was entitled to receive a percentage of net proceeds of production from an oil well. “Net proceeds of production” were defined as proceeds of the sale of a share of production from a well after various deductions were made. The appellant’s rights under this provision were considered to be “as a matter of contract” (p. 488). The case was chiefly concerned with the effect of a further provision giving to the appellant a defined interest in the petroleum and natural gas within, upon, or under certain lands. There is no such provision in the present case.

However, in my opinion, it is not necessary to state a final opinion upon this point because, if it was intended by cl. 3(b) to create any interest in the lands comprised in the lease, Astral was prohibited from creating it, by virtue of s. 11 of the *Alkali Mining Regulations of Saskatchewan*, previously cited, unless the written consent of the Minister of Mineral Resources had first been obtained.

The only interest in land which the respondent could acquire from Astral, pursuant to the agreement, in relation to lease No. A-4010, would be a part of the interest in land acquired by Astral when it obtained the assignment of the lessee’s interest under that lease. To the extent that the respondent acquired such an interest from Astral, Astral’s interest in land would be correspondingly diminished. The respondent’s interest could only arise as a result of a transfer by Astral to him of a part of the rights described in Astral’s lease from the Crown. Such a transfer is expressly forbidden by s. 11 unless the consent of the Minister has been first obtained. No such consent was obtained in this case.

That being so, the provision concerning royalty contained in cl. 3(b) could only be legally effective by way of contract, as between the respondent and Astral, and, as has already been pointed out, such a right is enforceable only as against Astral and not as against the appellant.

I agree with the reasons of the Court of Appeal in respect of lease No. A-163.

I would allow the appeal and dismiss the respondent’s claim against the appellant. The appellant is entitled to costs in this Court, and in the Courts below.

The judgment of Hall and Laskin JJ. was delivered by

LASKIN J. (dissenting)—The appellant before this Court is a Crown corporation and as such an agent of the Crown under the Crown Corporations Act, R.S.S. 1965, c. 39. By an assignment of September 6, 1961, from Astral Mining & Resources Limited, an Ontario company, it acquired (in the words of the assignment) “[two] alkali leases [being Nos. A-4010 and A-163] issued pursuant to the Alkali Mining Regulations under the Mineral Resources Act of the Province of Saskatchewan”. The assignment was endorsed with a certificate of consent given under s. 11 of the Alkali Mining Regulations which was as follows:

The lessee shall not assign, transfer or sublet the rights described in his lease or any part thereof, without the consent in writing of the Minister being first had and obtained. Astral acquired these leases from one E.L. Harvie (who held them on behalf of himself and two others) under an agreement in writing of June 30, 1948, which was followed by assignments of even date. The required approval was given when fresh assignments were executed by Harvie on August 3, 1955. Harvie had obtained the mining rights, reflected by the two leases, prior to 1930 when the title to the land was in the Crown in right of Canada. His rights were renewable, and were preserved when the surface title passed to the Crown in right of the Province. The immediate source of his rights, prior to the assignment to Astral, was under an indenture of January 30, 1948, in respect of lease A-4010 and under an earlier indenture of January 31, 1944, in respect of lease A-163.

The two indentures were for twenty-year periods, renewable for additional periods of twenty years “on such terms and conditions as may be prescribed by the Lieutenant-Governor in Council”. Under each indenture an annual rent of twenty-five cents per acre was prescribed; and also, under the earlier indenture a prescribed royalty, and under the later indenture “such royalty ... as may from time to time be prescribed by or pursuant to the Mineral Resources Act or the Regulations made thereunder”. I shall return to these indentures and to the specification of the royalties later in these reasons.

The issues in this litigation arise from the claim of the respondent that he is entitled to a royalty of twenty-five cents per ton on all anhydrous salt produced and sold from the two leases. Anhydrous salt is the deposit covered by the leases. The claim was sustained in toto after trial before Bence C.J.Q.B., but on appeal it was held that the plaintiff was entitled to the royalty only in respect of lease A-4010. In this Court, the appellant urges that the claim for royalty should be denied as to both leases and the respondent seeks restoration of the judgment at trial. The basis of the plaintiff respondent’s claim was alleged to be in certain transactions between him and Harvie and between him and Astral as a result of which Astral agreed to the royalty, as evidenced by a contract in writing with the respondent dated June 3, 1948; and the liability of the defendant Saskatchewan Minerals was asserted on the footing that it took an assignment of the two leases from Astral with actual notice of the plaintiff’s claim. The appellant admits that it took with such notice, which was first given by Keyes orally in July 1961, to certain government officials and then in a letter of July 28, 1961, to the provincial Department of Mineral Resources; Keyes later reaffirmed his claim in other letters to the provincial government.

It is common ground that the respondent cannot succeed unless the royalty which he claims is an interest in land. The appellant Saskatchewan Minerals takes the position that if the respondent has any interest in one or both of the leases, it is as holder of a chose in action against Astral. Two other defences are raised even if it be concluded that the royalty agreement gave the respondent an interest in land. They are, first, that s. 11 of the Alkali Mining Regulations, already quoted, is a bar to the respondent's claim and that the appellant as an agent of the Crown in which the surface title is vested, is entitled to assert that bar against the respondent; and, second, that there was a surrender of the lease by operation of law when Astral assigned to the appellant, it being an agent of the Crown, which was the holder of the reversion, and hence the royalty interest in the leasehold was extinguished.

There are, accordingly, four questions to be determined in this appeal and I state them shortly as follows:

1. Does Keyes the respondent have a royalty claim as he alleged?
2. If so, or if his claim is sustainable only in respect of lease A-4010, is the royalty therein an interest in land? 3. Is s. 11 of the Alkali Mining Regulations a bar to the relief sought by Keyes?
4. Is he barred on the theory of a surrender of the lease and the consequent vesting of all interests in the Crown?

Before considering these questions I wish to deal with a submission by appellant's counsel in reply when he asked leave to raise the Statute of Frauds as a further defence. Although pleaded in the statement of defence, it does not appear to have been considered in the judgment at trial, it was not argued (so we were told) on appeal, nor did the appellant mention it in its factum filed in this Court. In so far as the respondent's right to royalty rests on the terms of the agreement of June 3, 1948, between him and Astral, and is an interest in land thereunder, the Statute of Frauds is satisfied. The appellant as a subsequent purchaser with actual notice cannot be in any better position in this respect than Astral would be. The Saskatchewan Court of Appeal concluded that although there was a royalty right under the agreement of June 3, 1948, in respect of lease A-4010, that agreement did not cover lease A-163; and that in so far as there was any oral agreement between Keyes and Astral for a royalty in respect of lease A-163, it did not bind the appellant. Since I agree, for reasons set out below, that the trial judge ought not to have found in Keyes' favour in respect of lease A-163 I need say no more about the Statute of Frauds.

Keyes' case as pleaded and argued before the trial judge was that he had obtained an option from Harvie in the latter part of 1943 to purchase the rights under the two alkali leases; that he had tried, without success for some years, to interest various persons in developing the properties; and that early in 1948 he interested Astral in them, and in the result reached the agreement dated June 3, 1948. The negotiations related to other mining rights held by Keyes as well as to the alleged option. Although no option was produced, nor was there any evidence of an acknowledgement of it by Harvie (who was not called as a witness), the trial judge found that Keyes had the option that he claimed and that it gave him rights in the land of which he disposed

for consideration that included the royalty which is the subject of these proceedings. On these findings, it is of no consequence that Harvie and Astral dealt directly with each other without intermediate transfers to and from Keyes. Equally, on these findings, it is immaterial that the agreement of June 3, 1948, between Keyes and Astral preceded the formal agreement between Harvie and Astral; the right of Keyes to royalty would rest on his reservation thereof as optionee of the mining leases. Implicit in this conclusion is, of course, a holding that a mere optionee may reserve a royalty against a subsequent purchaser from him of the option rights, effective on the latter's acquisition of those rights.

The Saskatchewan Court of Appeal, albeit with some hesitation (which is understandable in the light of the record), affirmed the finding at trial that Keyes had the option alleged by him; but it concluded, contrary to the trial judge, that there had been no assignment thereof in respect of lease A-163 and no reservation of royalty in respect of that lease. This conclusion turned on its construction of the terms of the agreement of June 3, 1948, as not covering lease A-163. The Court of Appeal held further that, whatever oral arrangement or agreement there was between Keyes and Astral for the payment of a royalty in respect of lease A-163, it was not binding on the appellant because the oral transaction rested in contract only and gave no interest in land.

The agreement of June 3, 1948, between Keyes and Astral contains the following three recitals:

WHEREAS the said Keyes is entitled to a twenty-one year lease from the Hudson's Bay Company covering 160 acres at the north end of Lake Ingebright, Saskatchewan, known as the south-east quarter of Section 26, Township 16, Range 25, West of the Third Meridian, subject to an annual rental of \$660.00, and the payment of a base production royalty of 12½¢ per ton for salt removed from the concession.

AND WHEREAS the said Keyes has arranged to transfer to Astral an option to take over a lease dated the 30th day of January, 1948, entered into between the Minister of Natural Resources and Industrial Development for the Province of Saskatchewan and Eric Lafferty Harvie, of the City of Calgary, in the Province of Alberta, the said Harvie representing himself and Messrs. Leo H. Miller and C.J. Ford, the said lease being for a term of twenty years renewable for similar periods at a rental of 250 an acre per year with a royalty clause reading as follows:

"AND ALSO RENDERING AND PAYING therefor unto the Lessor such royalty at such times and in such manner as may from time to time be prescribed by or pursuant to The Mineral Resources Act or the Regulations made thereunder."

AND WHEREAS the said Keyes also owns or has the right to acquire a lease or drilling permit under Oil and Gas Regulations of the Province of Saskatchewan covering reservations now known as Nos. 123 and 172, comprising roughly 460,000 acres in all.

Then come six substantive clauses of which four are germane to the issues in this appeal.

The four clauses in question are in these terms:

1. Keyes hereby agrees to assign and doth hereby assign all his right, title and interest in the Hudson's Bay Leasehold and the salt and other deposits therein to Astral Mining & Resources Limited, as Purchaser;
2. The said Keyes has, in accordance with his agreement, caused a permit to be issued by the Government of the Province of Saskatchewan to Astral Mining & Resources Limited [relating to 250,000 acres, less 50,000 acres to be sold by Astral to a trustee for Keyes]...
3. The consideration to be paid by Astral Mining & Resources Limited to Keyes for the sale and assignment of all of the above property, rights and concessions shall be,— (a) the sum of Eighty-seven Thousand Five Hundred Dollars (\$87,500.00) to be paid and satisfied by the issue and allotment to

or his nominees in writing named

Keyes / of Three Hundred and Fifty Thousand (350,000) shares of the capital stock of Astral Mining & Resources Limited, fully paid and non-assessable; and

- (b) a royalty of twenty-five cents (25¢) per ton on all anhydrous salt produced and sold from the said leasehold property; and
 - (c) a base production royalty of one per cent (1%) on all oil and gas won or derived by Astral Mining & Resources Limited from any of the said leasehold premises or lands.
6. This agreement shall enure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns.

Although the second recital refers to lease A-4010 there is no recital reference to lease A-163 nor is either lease expressly mentioned in the substantive clauses of the agreement. However, the consideration clause 3 does speak of “all of the above property, rights and concessions”, and para. (b), which prescribes the royalty, does so in respect of “the said leasehold property”. Both Courts below have held that this must be regarded as a reference to more than the Hudson's Bay Company lease; that upon a construction of the agreement as a whole, and having regard to surrounding circumstances, it included lease A-4010 as well. I support this conclusion.

I also support the view of the Court of Appeal that there is no enforceable royalty claim against the appellant in respect of lease A-163. The trial judge found for Keyes on this issue by relying on a prospectus issued by Astral under date of March 25, 1952. That prospectus referred to the two alkali leases acquired by Astral; and, in respect of each, the prospectus stated that “a further royalty of 25 cents per ton is payable to Thomas E. Keyes on all anhydrous salt produced and sold from the said land”. Bence C.J.Q.B. treated the prospectus as confirmatory of a prior agreement, prior to that of June 3, 1948, for a royalty, and as being a sufficient memorandum in writing to satisfy the Statute of Frauds.

This does not, however, establish the royalty as an interest in land enforceable against the appellant, assuming for this purpose that a royalty may be created so as to amount to an interest in land. The prospectus is not an instrument under which there was either a reservation of royalty by Keyes or a grant of a royalty to him by Astral. It was a mere assertion of the existence of a royalty which of itself would have no force against the appellant unless otherwise proved to have been created as an interest in land.

I turn now to the question whether the royalty in respect of lease A-4010 gave Keyes an interest in land. The relevant language of the agreement of June 3, 1948, is as follows, as found in cl. 3 (b):

The consideration to be paid by Astral... shall be ...a royalty of twenty-five cents (250) per ton on all anhydrous salt produced and sold from the said [lease A-4010]...

This royalty as a burden on Astral's interest was to come out of Astral's right to "the naturally occurring accumulations of alkali, as defined in the Alkali Mining Regulations under the Mineral Resources Act, on or in [described land] together with the full and exclusive liberty, power and authority ...to search for, dig, work, mine, procure and carry away the said accumulations of alkali wherever the same may be found within the limits of the said land". These quoted words are from the grant to Harvie of January 30, 1948, of the interest which Harvie assigned to Astral.

An examination of that grant discloses a difference in the formulation of the interest thereby conveyed as compared with that conveyed by the earlier grant of January 31, 1944, covering lease A-163. Under this earlier grant the Crown as lessor granted and demised to Harvie as lessee "the sole and exclusive licence and authority to win and work all the deposits and accumulations of alkali... together with the sole and exclusive licence and authority... to search for, dig, work, mine, procure and carry away the said alkali" for the renewable twenty-year term mentioned earlier in these reasons. In addition to an annual acreage rental of twenty-five cents per acre, this indenture provided for a royalty in the following words:

AND ALSO RENDERING AND PAYING therefor unto the lessor a royalty of twelve and one-half cents per ton of two thousand pounds on shipping weight as determined from transportation returns at the first point of shipment on all products, raw or refined, taken from the demised lands, provided that when the said products are shipped in solution the royalty shall be two cents for each gallon shipped; which royalty shall be due and payable on the 31st day of March, the 30th day of June, the 30th day of September and the 31st day of December in each year;

What was granted in respect of lease A-163 was a profit à prendre for a term of years only. There is no provision for continuation of the interest so long as production continues, but, of course, the transaction did not involve fugacious substances. I note also that the royalty was fixed not in respect of the mineral in place but as a sum which depended on its prior extraction from the soil and determinable on the basis of its chattel character.

The grant in respect of lease A-4010 is by the Crown as lessor to Harvie as lessee, demising and leasing for a twenty-year renewable term "the naturally occurring accumulations of alkali... together with full and exclusive liberty, power and authority for the lessee... to search for, dig,

work, mine, procure and carry away the said accumulations of alkali wherever the same may be found within the limits of the [defined] land". The grant does not here, as it did not in respect of lease A-163, stipulate for any extension of the term according to continuing production. As previously stated, there is an annual rental of twenty-five cents per acre, and the royalty is flexibly described as such as may from time to time be prescribed by or pursuant to the Mineral Resources Act or the regulations thereunder. This grant appears to be more than one of a profit à prendre for a term of years; it is couched in language of a leasehold of the mineral in place, with a right of extraction. In *Berkheiser v. Berkheiser and Glaister*[4], a so-called lease of all petroleum and natural gas within, upon or under certain land for a ten-year term, "and so long thereafter as the leased substances or any of them are produced", was held to be, in the light of all the provisions thereof, a profit à prendre only. This Court reversed the Court below which had held that, having regard to the form of the lease, a sale of a portion of the land had been effected, with liberty to enter, search for and carry away the substances mentioned. There is, of course, a difference between the fugacious subject-matter in the *Berkheiser* case and the solid mineral involved in respect of lease A-4010, but the present case does not compel a decision on whether the interest of the appellant is a leasehold or a profit à prendre for a term. Being in either case an interest in land, I see no reason to differentiate on this ground the characterization of a royalty whether mounted by the holder of the interest upon assigning it to another or imposed by such holder upon his interest in favour of a third person. There is no decision of this Court which either pronounces upon or examines royalties under so-called mining leases on the question whether they are or in what, circumstances, if any, they can be interests in land. I speak here of royalties not in the sense of a vested interest in mineral deposits, or in oil or gas, as the case may be, in situ (which is a sense that has been sometimes attributed to them, particularly in a line of American cases, and see *Gowan v. Christie*[5]), but rather in the sense of a share in or a return on production for permission to exploit certain property or in respect of such exploitation: see *Re Dawson and Bell*[6], at pp. 838, 842. This is the sense in which it is spelled out in the agreement of June 3, 1948, between Keyes and Astral.

The present case is not one where the royalty has been reserved by and to a reversionary owner who has granted a mining lease and where it is sought to enforce the royalty against an assignee of the lessee. Rather, it is one where a mining lessee (either as a lessee in the strict sense or as the holder of a profit à prendre), who is himself subject to a royalty in favour of the lessor or his assignee, has in turn created a further royalty in his own favour upon assigning his leasehold or his profit to a third person. Alternatively, it is a case where the assignee of a lessee has granted a royalty to another, thus becoming subject to two royalty obligations. That such a second or overriding royalty can be created is not open to doubt. The question remains whether it is invariably a contractual benefit or may be, and in the present case is, an interest in land.

I do not think that anything turns on the fact that Keyes was, at best, an optionee of a mining lease. The issue would be exactly the same if, for consideration, as, for example, for management services, Astral had granted an overriding royalty to Keyes in respect of a mining lease acquired by Astral from someone else. This was the situation which existed in *Emerald Resources Ltd. v. Sterling Oil Properties Management Ltd.*[7], affirmed by this Court on December 17, 1970,

without passing on the question in issue here. The Alberta Appellate Division in the foregoing case doubted, without expressly deciding the point, that an overriding royalty granted by a mining lessee to a management firm was an interest in land within the meaning of the Statute of Frauds. The royalty clause in the agreement with which that Court was concerned provided for a certain royalty of the lessee's share of specified substances "produced, saved and sold from each property acquired by [the lessee] after the date hereof and during the term of this agreement". At the time of the execution of the agreement, any interest in land created by this provision would, of course, be equitable only.

It is convenient to say at this point that in the present case the fact that the royalty to Keyes was prescribed in an agreement which preceded Astral's acquisition of lease A-4010 would not alone affect his right to enforce it against the appellant. Astral's subsequent acquisition of the leasehold or of the profit à prendre fed the grant to Keyes so as to preclude Astral from denying legal effect in that respect to the agreement of June 3, 1948.

Just as a profit à prendre may be incident to another interest or may exist in gross, so may a royalty. As an interest in gross, which is the case here, it is freely assignable, unless assignment is validly restricted. This feature of a royalty is as consistent with it being a contractual benefit as it is with it being an interest in land. At common law, whether a royalty could be classified as rent, and hence enjoy in its unaccrued state the character of an interest in land, depended on whether it issued out of a "corporeal" interest, as, for example, out of an estate in fee of minerals in place, or whether it was incident to a reversion upon a true lease which also gave a right to extract minerals. In the former case it would be in effect a rent-charge; in the latter, a rent service. Rent could not at common law issue out of an "incorporeal" interest, as for example, a profit à prendre in gross; and whatever it might be called, it would not be an interest in land.

The language of "corporeal" and "incorporeal" does not point up the distinction between the legal interest and its subject-matter. On this distinction, all legal interests are "incorporeal", and it is only the unconfronted force of a long history that makes it necessary in this case to examine certain institutions of property in the common law provinces through an antiquated system of classification and an antiquated terminology. The association of rents and royalties has run through the cases (as in *Re Dawson and Bell*, supra, the *Berkheiser* case, supra, and cf. *Attorney-General of Ontario v. Mercer*[8], at p. 777) but without the necessity hitherto in this Court to test them against the common law classifications of interests in land or to determine whether those classifications are broad enough to embrace a royalty in gross.

In the *Berkheiser* case, Rand J. carried the parallel of royalty with rent to the extent of referring to them as "obviously profits". The case involved a contest between a devisee of land and the residuary beneficiaries where the testatrix, following the devise, had entered into the oil and gas lease mentioned above. The transaction also provided for an acreage rental and for royalties. In construing the transaction as the grant of a profit à prendre rather than an out-and-out transfer of the substances in situ and rather than the grant of a profit in fee, the Court held that the profit was for an uncertain but terminable term under the provisions of the lease. This meant, quite clearly, that title to the substances in situ remained in the devisee and that he was also entitled to

the rents and royalties. In short, there was no ademption of the devise.

The rents and royalties referred to by Rand J. as profits would be interests in land in the particular case under common law doctrine as incident to the devisee's possibility of reverter in respect of the profit à prendre, that interest itself being considered as in the nature of a defeasible fee. That the unaccrued royalty in such case is regarded as an interest in land, and remains so although transferred separately from the fee simple in the surface and the "reversionary" interest in the minerals or in the oil and gas, appears to be the prevailing view in the United States: see 3A Summers, *Oil and Gas* (1958), p. 9. I agree with this characterization because I do not think that there should be any distinction between the foregoing situation and that which would exist if the devisee had an interest in reversion in the strict sense.

It is said in 23 Hals., 3rd ed., at p. 537, that "a royalty, notwithstanding that it is reserved in respect of substances which are taken from the land so as to cause its permanent diminution, is a true rent". The leading case cited for this proposition is *Regina v. Westbrook*[9], which was a rating case that proceeded on the view that there a true landlord and tenant relationship existed, with the tenant being entitled under his lease to take clay for the purpose of making bricks. This was more clearly so in *Barrs v. Lea*[10], also cited for the foregoing proposition; and hence the further statement in 26 Hals., 3rd ed., at p. 430, that "rents and royalties are true rents in the sense that they are incident to the reversion". These statements of the English position do not assist in the present case which, on its facts, does not fall within the *Berkheiser* frame of reference, let alone within that exhibited in the foregoing two English cases. Neither is it a case where a royalty originally exacted in respect of a leasehold to which a profit à prendre was incident, or in respect of a defeasible profit à prendre alone, has been assigned without assignment of the remaining interest of the grantor of the lease or of the profit.

In principle, a mining lessee whose holding is an interest in land in respect of which he has a royalty obligation should be able to grant or submit to an overriding royalty in respect of that interest to take effect as itself an interest in the lessee's holding. This is well recognized in the American judicial experience with mining leases, which has been more extensive than the Canadian. Thus, it is said in a recent article, Sullivan, "All About Royalties", (1971) 16 *Rocky Mountain Mineral Law Institute* 227, at p. 240: "If the lessee grants or reserves a fractional interest over and above that payable to the lessor under the terms of the lease, it is designated overriding royalty and is analogous to rent charge". The writer goes on to say (at p. 273, and citing authority) that "overriding royalties have been construed to be personal property and as interests in land"; and he continues: "In their nature they are properly rents, as that term was used at common law, and therefore interests in land". This same conclusion is stated by 3 Summers, *Oil and Gas* (1958), pp. 685-686, as being the law of such States as California, Texas and Oklahoma. What remains to consider on the matter under discussion is whether or not the formulation of the royalty to Keyes shows, as a matter of its language, that an interest in land was created. The formulation accords with language that has been held sufficient for the creation of an interest in land: see (1971) 16 *Rocky Mountain Mineral Law Institute* at pp. 242-243. I refer also to the judgment of the Ontario Court of Appeal in *Re Dawson and Bell*, *supra*, where the oil and gas

lease, a profit à prendre, stipulated for royalty in the following terms in the case of oil, namely, “one barrel of every ten barrels, or its equivalent in cash, of petroleum obtained or produced on the premises herein leased”; and, in the case of gas, “if found in sufficient quantities to utilize... one hundred dollars per annum for each well yielding gas in paying quantities, or capped... and the privilege of using enough to heat dwelling, if any, on said premises...” Both Laidlaw J.A. and McRuer J.A. (with whom Henderson J.A. agreed) referred to these royalties as in essence rent. McRuer J.A. put the matter as follows (at p. 838):

The money paid is the consideration for the right to enter upon the land and drill for oil or gas and take away the same when it is recovered, as distinct from the purchase price of oil or gas reduced to possession.

This is not to say that every reservation or grant of a royalty creates an interest in land. The words in which it is couched may show that only a contractual right to money or other benefit is prescribed. However, if the analogy is to rent, then the fact that the royalty is fixed and calculable as a money payment based on production or as a share of production, or of production and sale, cannot alone be enough to establish it as merely a contractual interest. The grant of royalty in respect of lease A-163, mentioned earlier in these reasons, is an illustration of this point of view. On the other hand, *Fuller v. Howell*[11], may be explicable (in the absence of explanation by the Court) as a case where the royalty language was taken literally, without reliance on the analogy of rent. There a judge of the Ontario High Court held, in a flat conclusion, that an assigned oil royalty which the assignee sought to enforce against a subsequent purchaser, who acquired the title to the land and to the profit à prendre as well, gave merely a contractual claim. The facts related in the reasons revealed that the royalty clause obligated the original grantee of the oil rights to deliver in tanks or pipelines upon the premises one-seventh of all oil produced and saved on the premises. A further point that arises in respect of *Fuller v. Howell* is whether the royalty obligation was imposed upon the then lessee only so as to indicate a personalization of that obligation. I have already drawn attention to cl. 6 of the agreement of June 3, 1948, between Keyes and Astral which states that the agreement shall enure to and bind, inter alia, assigns. In any event, I am not to be taken as endorsing the result reached in *Fuller v. Howell*.

St. Lawrence Petroleum Ltd. v. Bailey Selburn Oil & Gas Ltd. and H.W. Bass & Sons, Inc.[12] provides a clearer illustration of a contractual result. There the issue of assignable interest in land or contractual money right arose in a context mentioned in 3 Summers, supra, at p. 686, namely, that “conveyances by an oil and gas lessee of an undivided fractional interest or per cent of his share of the future production from the lease was perhaps one of the first and simplest methods of raising capital for the drilling and equipping of oil and gas wells”. Simplifying the facts in the case, it arose out of a farm-out agreement by which an oil lessee granted to the Bailey company the right to earn an undivided 25 per cent interest in its lease by drilling a test well in accordance with the terms of the agreement. The Bailey company in turn entered into an agreement with the appellant St. Lawrence, designated in the agreement as a “participant”, whereby the latter, by participating in the cost of drilling a producing well to a prescribed percentage of the total cost, would be entitled to a prescribed percentage of the “net proceeds of

production”, which were defined to mean the proceeds from the sale of Bailey’s share of the production after certain deductions. This participating agreement also contained a clause by which Bailey assigned to the participant such an undivided interest in the oil and gas as would, upon exploitation of the land and production therefrom being sold, yield to the participant its specified net proceeds of production. Bailey further agreed to hold its interest in the oil and gas in trust for the purposes of the agreement, and the participant agreed to reassign to Bailey such portion of the undivided interest as may be necessary to revest it in Bailey in so far as it related to any portion of the land in which the participant ceased to be entitled to a share in the net proceeds of production.

St. Lawrence contended that it obtained under the agreement an assignable interest in land, capable of registration, with a right to receive and sell its share of production. It was held, however, that it did not become owner of a fractional interest in land, but rather that it had a contractual right to money, being its prescribed portion of the proceeds of sale of production, and that the undivided interest spoken of in the agreement was in the nature of an equitable interest to secure its contractual right to those proceeds.

I conclude that the first two questions posed at the beginning of these reasons should be answered in Keyes’ favour. He became entitled to an overriding royalty in respect of the lessee’s interest in lease A-4010, whether that interest was a leasehold in the strict sense or a profit à prendre for a term; and the royalty, unaccrued, was an interest in land, analogous to a rent-charge, and, in the circumstances, binding on the appellant as subsequent assignee of lease A-4010.

The next question is whether the Minister’s consent in writing to the creation of the overriding royalty was required, pursuant to s. 11 of the Alkali Mining Regulations, and if so whether it was in fact given. An allied point brought into contention was whether it was open to the appellant to take the objection that the consent was not obtained. These issues are distinct from the matter of consent arising under cl. 13 of the lease of January 30, 1948, to Harvie, and which provided that “the lessee will not transfer or assign these presents or sublet the said premises, or any part thereof, without the written consent of the Minister [representing the Crown lessor] first had and obtained”. I need not pursue this provision because, whatever be the thrust of the clause, it is not, as the trial judge held, one upon which the appellant can rely: see *McKillop & Benjafield v. Alexander*[13]. The trial judge made no ruling on the effect of s. 11 of the Alkali Mining Regulations although it was pleaded in defence. In the Court of Appeal, the reference to this section was limited to its effect upon the option which Harvie (as the two Courts below held) had granted to Keyes. The Court concluded that the option fell outside the words of the section; it was only when the option was exercised and was consummated by a transfer or assignment that consent would be required. Consent in this respect was given when Harvie assigned to Astral and, again when Astral assigned to the appellant. I am of the opinion that this conclusion is plainly right. I am of the opinion also that s. 11 does not apply to the gross overriding royalty stipulated in the agreement between Astral and Keyes, and hence the issue of fact and the question whether the appellant can invoke s. 11 do not arise. My reasons for these views follow.

The term “lessee” used in s. 11 has not been given any extended meaning in the Alkali Mining Regulations, as promulgated by Order in Council 1357/43 of December 6, 1943, and as amended from time to time; nor have these regulations given any extended meaning to the terms “assign, transfer or sublet” in s. 11. “Lessee” is defined in the Regulations simply as meaning “the holder of a lease in good standing, acquired under the provisions of these regulations”; the other terms mentioned above are not defined at all. Nor is there any definition of any of the terms in question in the Mineral Resources Act, as it stood at the time of the promulgation of the Regulations or later, or as it now stands (see R.S.S. 1965, c. 50).

The granting of an option is not an assignment, transfer or subletting, at least not where there has been no take over of the rights under the lease by the optionee. Again, although an optionee for a lease of mining rights may have an interest in land, he is not a lessee, either in law or in equity while the option remains unexercised. Harvie was the lessee from the Crown at the time that Astral and Keyes made their agreement, and it was the consent to Harvie’s assignment to Astral that alone was required by s. 11. That consent was given.

The fact that Keyes, under his option, could command the assignment by Harvie to Astral involved no circumvention of s. 11. The distinctions between an assignment and a contract to assign, between a transfer and a contract to transfer, between a sublease and a contract to sublet are too well established to need any comment. There is nothing in the Alkali Mining Regulations nor in the Mineral Resources Act, on which they are founded, that impels a meaning to the words of s. 11 other than their ordinary meaning in order to expand its restrictions in favour of the Crown in right of Saskatchewan.

Frobisher Ltd. v. Canadian Pipelines and Petroleums Ltd.[14] turned on a different regulation differently formulated from s. 11. It forbade acquisition “by transfer, assignment or otherwise howsoever [of] any mineral claim or any right or interest therein” (the italics are mine). Section 11 is limited to assignment, transfer or subletting of “the rights described in the lease or any part thereof”; and I construe the last quoted words as referring to the rights in the whole lease or in any part of the lease. When to this is added the fact that only the lessee is thus enjoined, I cannot agree that s. 11 forbids a lessee to enter into contracts respecting his lease rights unless he first obtains Minister’s consent. It would, in my opinion, be untenable to urge that a lessee, while remaining such, would be precluded without the Minister’s consent under s. 11, from entering into a working or management agreement with another person in return for a royalty. Section 11 must speak more clearly before being construed as a bar to common arrangements of the kind suggested.

Turning to the second point upon which s. 11 is invoked, namely, the lack of consent to the overriding royalty, the question is simply whether the Minister’s consent was a prerequisite to the arrangement for royalty between Astral and Keyes. What Astral, as lessee, was precluded from assigning were the “rights described in [the] lease”, that is the rights as between lessor and lessee, set out in the grant to Harvie of January 30, 1948. There is nothing in the agreement of June 3, 1948, between Astral and Keyes, under which the overriding royalty arises, that involves any transfer to Keyes of any of Astral’s rights from the lessor under lease A-4010. Nor did Astral

interfere, in its agreement with Keyes, with any of the rights of the lessor, whether to royalty or otherwise. I have already set out the rights that were vested in the lessee under lease A-4010. They remained undisturbed by the agreement of June 3, 1948. Astral simply assumed an additional burden in respect of its leasehold; charging it did not amount either to a transfer or assignment or sublease. The language of s. 11 does not comprehend the assumption of a burden by way of the creation of an overriding royalty any more than it comprehends an option.

The final point is that of an alleged surrender by operation of law, resulting, according to the submission of the appellant, in an extinguishment of the royalty to Keyes. The contention is untenable. The appellant is a corporation, as it admits in its statement of defence; and, although it is an agent of the Crown and its property is that of the Crown under relevant legislation, it exercises its powers in its own name. No surrender occurred when it took an assignment from Astral in its own name. Moreover, an outstanding interest of a third party in a holding whose owner is subject thereto is not obliterated when that holding comes into the hands of an assignee with notice merely because the assignee is also the holder of the reversion or reverter in the land and as a result purports to claim the entire title by way of merger. A present interest, such as the royalty in this case, remains unaffected. The argument to the contrary is reminiscent of the common law rules as to the destructibility of contingent remainders, long ago overcome by statute. I do not think that the fact that the Crown and an agent of the Crown are involved calls for special consideration to them to the prejudice of a private citizen.

I would dismiss the appeal with costs, and I would dismiss the application to vary with costs.

Appeal allowed with costs, HALL and LASKIN JJ. dissenting.

Solicitors for the defendant, appellant: Goodall, Gerrand, Gerein & McLellan, Regina.

Solicitors for the plaintiff, respondent: Pedersen, Norman, McLeod & Todd, Regina.

[1] (1968), 12 D.L.R. (3d) 637.

[2] [1960] S.C.R. 126, 21 D.L.R. (2d) 497.

[3] [1963] S.C.R. 482.

[4] [1957] S.C.R. 387.

[5] (1873), L.R. 2 Sc. & Div. 273.

[6] [1945] O.R. 825.

[7] (1969), 3 D.L.R. (3d) 630.

[8] (1883), 8 App. Cas. 767.

[9] (1847), 10 Q.B. 178, 116 E.R. 69.

[10] (1864), 33 L.J. Ch.437.

[11] [1942] 1 D.L.R. 462.

[12] [1963] S.C.R. 482.

[13] (1912), 45 S.C.R. 551.

[14] [1960] S.C.R. 126.

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Prepared on 29 October 2026 · Esheria