main line, is used as an emergency route when there are breakdowns in the main line. It is a branch line and is not entitled to exemption from taxation.

I would dismiss the appeals with costs.

Appeals dismissed with costs.

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TOWN OF ESTEVAN *et al.*
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Solicitor for the plaintiff, appellant: E. H. M. Knowles, Regina.

Solicitors for the defendants, respondents: MacPherson, Leslie & Tyerman, Regina.

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*Dec. 15, 19
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Apr. 12

ELVEN J. BERKHEISER (*Defendant*) ..APPELLANT;

AND

GLADYS BERKHEISER AND FLORENCE GLAISTER (*Defendants*) .. } RESPONDENTS;

AND

LEONARD B. THOMSON, RAY NEWSON AND DOUGLAS CAMPBELL (*Plaintiffs*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Mines and minerals—Petroleum and natural gas "lease"—Terms and effect of document—Ademption of legacy.

A document whereby the owner of land "doth grant and lease . . . all the petroleum and natural gas . . . within, upon or under the lands . . . together with the exclusive right and privilege to explore, drill for, win, dig, remove, store and dispose of, the leased substances", with special terms as to duration, operations and payments, is not an out-and-out conveyance of the minerals *in situ*, and does not have the effect of adeeming *pro tanto* a devise of the land. *McColl-Frontenac Oil Company Limited v. Hamilton et al.*, [1953] 1 S.C.R. 127, distinguished.

Per Rand and Cartwright JJ.: The document under consideration in this case had the effect that the title to the oil and gas remained in the owner subject to the incorporeal right of the "lessee", which right was extinguished on the termination of the lease. The rents and royalties were obviously profits and, like rent from a leasehold, were embraced in the devise. The instrument created either a *profit à prendre* or an irrevocable licence to search for and to win the substances named. It was unnecessary in this case to decide whether petroleum and natural gas *in situ* were to be classed as corporeal hereditaments and sold as land.

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*PRESENT: Rand, Kellock, Locke, Cartwright and Nolan JJ.

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Per Kellock, Locke and Nolan JJ.: While it was quite competent for an owner of land so to convey minerals lying in or under it that thereafter there were two separate estates in fee, that was not the result of the instrument here in question. Reading all the terms of the "lease", they were quite inconsistent with any conception of a grant in fee, whether of the minerals *in situ* or of a *profit à prendre*. The instrument was to be construed as a grant of a *profit à prendre* for an uncertain term which might be brought to an end upon the happening of any of the various contingencies for which the "lease" provided.

APPEAL by the defendant Elven J. Berkheiser from the judgment of the Court of Appeal for Saskatchewan (1), affirming the judgment of Graham J. (2), on an originating notice of motion.

E. C. Leslie, Q.C., for the defendant, appellant.

J. P. Nelligan, for the defendants, respondents.

The judgment of Rand and Cartwright JJ. was delivered by

RAND J.:—The facts in this appeal are these. By will dated May 2, 1947, a testatrix devised to the appellant a quarter-section of land in Saskatchewan; under date of December 18, 1951, with an incorporated company, she entered into what is called a "lease" of all petroleum and natural gas "within, upon or under" the quarter-section for a term of 10 years "and so long thereafter as the leased substances or any of them are produced" from the land; on July 9, 1953, she died. The lease called for a down payment of $320; it provided, in the event of deferred operations, for an annual acreage rental of $160, for certain royalties related to the oil and gas as they were produced, and for other matters mentioned later. Following the death of the lessor a payment of the rental was made to the executors which deferred drilling to December 18, 1954. Under a clause headed "Surrender", the lease was terminated by notice given after the death but before April 15, 1955, when these proceedings were launched. The respondents are the residuary beneficiaries under the will, and the substantial question raised is whether the interest of oil and gas is now vested in them or in the appellant.

(1) 16 W.W.R. 459, [1955] 5 D.L.R. 183 (*sub nom. re Sykes Estate; Thomson et al. v. Berkheiser et al.*)

(2) 16 W.W.R. 172.

In the Courts below the transaction was treated as an out-and-out sale or agreement of sale of minerals *in situ*, the sale of a corporeal hereditament; the title to the minerals in fee simple was thereby severed from the rest of the fee; this worked an ademption of the devise to the extent of the oil, gas and royalties, and on termination the title fell into the residue. Apart from any question of the effect of a "termination" by notice of an estate, legal or equitable, in fee simple, or any question of a determinable fee or a fee on condition, the controversy hinges on the validity of that interpretation of the lease and it becomes necessary to examine its terms.

The operative words in the premises are:

> THE LESSOR . . . DOTH HEREBY GRANT AND LEASE . . . all the petroleum and natural gas . . . within, upon or under the lands . . . together with the exclusive right and privilege to explore, drill for, win, take, remove, store and dispose of, the leased substances and . . . to drill wells, lay pipe lines, and build and install such tanks, stations, structures and roadways as may be necessary . . . .

Provisos were stipulated, (a) in effect, that if the drilling of a well was not commenced within the second year (the first year having been carried over by the down payment) the lease should terminate unless the lessee should pay the rental which would defer the work for a further year, with like payments for like deferred periods thereafter; (b) that if, at any time within the 10-year period and prior to discovery, a dry well or wells should have been drilled, or if after the discovery, during that term, production should cease, the lease should terminate at the next anniversary date unless operations for further drilling had been commenced or the rental paid, in which event thereafter the rental proviso would continue in force; and (c) that if at any time after the 10-year period production had ceased but the lessee had begun further work, the lease should remain in force so long as the operations were prosecuted and, if successful, so long thereafter as production continued. In any case, the time of any cesser of drilling, working or production from any cause beyond the lessee's control should not be counted against it. Royalties were provided, (1) on crude oil, of $12\frac{1}{2}$ per cent. of the current market value at the point of measurement; (2) on natural gas, of $12\frac{1}{2}$ per cent. of the current value at the point of measurement, and on gas treated in a plant, that percentage

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of the residual gas therefrom marketed; (3) on plant products, related to the current market-price at the plant where produced on a basis, the details of which are not material. The lessor might, in lieu of the cash royalty, on notice, take one-eighth of the oil, for collecting which the lessee would provide free of cost tanks for not more than 10 days' accumulation. The lessee agreed to drill offset wells whenever and wherever they might be required by reason of production on lands laterally adjoining the quarter-section and not owned by the lessor.

The language of the provision for surrender read:

> Notwithstanding anything herein contained, the Lessee may at any time or from time to time determine or surrender this Lease and the term hereby granted as to the whole or any part or parts of the leased substances and/or the said lands, upon giving the Lessor written notice to that effect, WHEREUPON this Lease and the said term shall terminate as to the whole or any part or parts thereof so surrendered and the annual acreage rental shall be extinguished or proportionally reduced as the case may be, but the Lessee shall not be entitled to a refund of any such rent theretofore paid.

If within 90 days of notice of default given by the lessor for breach, non-observance or non-performance by the lessee of any covenant, proviso, condition, restriction or stipulation, the default was not remedied, the lease would thereupon terminate.

Whether petroleum and natural gas *in situ* are to be classed as corporeal hereditaments and sold as land has been the subject of a great deal of consideration by Courts, particularly in the United States, and the application of common law conceptions to substances of such character, whose utility was little appreciated before this century, has produced a wide variance of opinion; but for the reasons following, the determination of that question here becomes unnecessary.

A corporeal hereditament was looked upon at common law as property of a permanent and indestructible character. When land was spoken of there was in mind not only the substances of the soil but also the space in which the substances were contained. To the ownership of land applied the maxim *cujus est solum, ejus est usque ad coelum.* In this conception of space filled with substance there is, for the purposes of law, an indestructible base to which incorporeal rights can be related.

But as stated in Challis's Real Property, 3rd ed. 1911, at p. 54, the classification of minerals—and the illustration there given of coal indicates the kind of mineral in mind—as corporeal hereditaments, is, in the foregoing respect, an anomaly; the use of minerals has, as its primary object, their removal from the soil and to that extent, their destruction as part of it. *A fortiori* would that consideration operate in respect of the fugacious minerals we are dealing with.

What as a practical matter is sought by such a lessor is the undertaking of the lessee to explore for discovery and in the event of success to proceed with production to its exhaustion. Neither presence nor absence of the minerals was here known, and the initial task was to verify the existence or non-existence of the one or the other. The fugitive nature of each is now well known; a large pool of either, underlying many surface titles, may in large measure be drained off through wells sunk in one of them; tapping the reservoir against such abstraction may, then, become an urgent necessity of the owner.

In that situation the notion of ownership *in situ* is not the likely thing to be suggested to the mind of any person interested because primarily of the difficulty of the factual conception itself. The proprietary interest becomes real only when the substance is under control, when it has been piped, brought to the surface and stored. Any step or operation short of that mastery is still in the stage of capture. To the ordinary producer that course of action is compatible with the risk of discovering nothing, but an initial grant of a title to something that may prove to be non-existent can scarcely be said to be so.

The language of the lease confirms this. The word "grant" is no more significant to a fee title than to an easement or a *profit à prendre* or, apparently, under the land law of Saskatchewan, an irrevocable licence to take. Indeed it is more appropriate to incorporeal than it is to corporeal rights. At common law a grant of a freehold title was ineffectual unless accompanied by livery of seisin, and, in the case of a tenement, attornment. Livery in relation to mines involves difficulties and, in later conveyancing, a transfer of minerals of an open mine appears to have been limited in practice to a bargain and sale under the statute

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of uses, or a lease of the surface and a release of the minerals, or by a statutory deed: *Challis, op. cit.*, p. 58. An unopened mine has been referred to as an incorporeal hereditament, but that is considered by Challis to be an unsound view. The word "lease" in its ordinary meaning implies in relation to land the possession of an indestructible substance (although at common law the lessee for years held the seisin or possession for the freeholder). For oil or gas, livery would seem to be out of the question and for the reasons mentioned other modes of conveyance appropriate to a corporeal hereditament would not accord with the notion of ownership of those substances.

The idea suitable to the partial use of the surface of lands as a necessary means of seeking for and drawing off these fluid substances, apart from the influence by analogy of existing concepts related to different substances, is that of operations to reduce to possession something by its nature generally ready for flight, which, as embodying a property interest, is adequately symbolised by the general term incorporeal right. The word "grant", then, not being significant of title and the word "lease" not carrying with it the possession with which it is ordinarily associated, we look to the detailed description of the acts authorized for the true intendment of the instrument and doing that here I interpret it as either a *profit à prendre* or an irrevocable licence to search for and to win the substances named.

This view is strengthened by the provision for payment of taxes. The lessor is to pay "all taxes, rates and assessments" levied directly or indirectly against her by reason of her interest in production or *her ownership of mineral rights,* as well as those assessed against the surface of the land. On the other hand, the lessee is to pay all taxes levied in respect of the undertaking and operations and of the lessee's interest in production. The effect of this is not modified by the stipulation that the lessee shall reimburse the lessor for seven-eighths of any taxes imposed on the latter by reason of being the registered owner of the leased substances. This treats the legal title to the substances as remaining in the lessor and the interest of the lessee as analogous to that of an ordinary lessee of land, that is, as having only an interest in relation to them.

Rights of this nature have long been recognized in coal and other minerals and profits. In *Muskett v. Hill et al.* (1), the instrument was construed to be a licence coupled with a grant and the interest of the assignee held to be assignable. Tindal C.J. quoted the following language from *Thomas v. Sorrell* (2):

> But a licence to hunt in a man's park, and carry away the deer kill'd to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down the tree; but as to the carrying away of the deer kill'd and tree cut down, they are grants.

In *Wilkinson v. Proud et al.* (3), the decision went on the distinction between such a right and title; in the language of Parke B.:

> This is not a claim of a prescriptive right to take coal in the plaintiff's close, but a prescription for all the strata and seams of coal lying under it, that is, for a part of the soil itself, and not for the right to get the coal, which would be the subject of a grant.

In *Martyn v. Williams* (4), a licence was granted to the defendant "to dig, work, and search for china clay, and to raise, get, and dispose of the same . . . for the term of 21 years". The grantee covenanted, among other things, that at the expiration of the term he or his assigns would deliver up the works to the grantor in good repair. The grantor assigned and an action was brought by the assignee against the grantee on the covenant. It was held that the grant created an incorporeal hereditament, the covenants relating to which under 32 Hen. VIII, c. 34, ran with the land. Martin B., in delivering the judgment, made observations which are of special interest here:

> These cases [*Doe d. Hanley v. Wood* (1819), 2 B. & Ald. 724, 106 E.R. 529, and *Muskett v. Hill et al., supra*] establish that it is an incorporeal hereditament, a property, and an estate capable of being inherited by the heir, and assigned to a purchaser, or otherwise conveyed away. It is in truth "a tenement" within the definition of Lord Coke in the First Institute, 20 a., who says that the word "tenement includeth not only corporate inheritances, but also all inheritances issuing out of them, or concerning or annexed to, or exerciseable within them, as rent, estovers, common, or other profits whatever, granted out of land." . . . The statute in express terms therefore extends to incorporeal hereditaments and tenements, and is not confined merely to lands. If, therefore, there had been an estate in fee of the right or interest created by the indenture

(1) (1839), 5 Bing. N.C. 694, 132 E.R. 1267.
(2) (1673), Vaugh. 330 at 351, 124 E.R. 1098 at 1109.
(3) (1843), 11 M. & W. 33, 152 E.R. 704.
(4) (1857), 1 H. & N. 817, 156 E.R. 1430.

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mentioned in the declaration, and the owner in fee of the right had demised it for twenty-one years, and there had been a covenant such as that secondly declared on, we should have been of opinion, that the assignee of the reversion could have sued upon it for a breach committed in his own time. But in the present case no estate in fee in the right to take the china clay has been created. The owners of the fee simple merely granted the right for a term of years, and after the expiration of this term, the plaintiff, who was then the owner of the land, was entitled to do all which the defendant was authorised and licensed by the indenture to do, not by virtue of the same estate which the defendant had, having reverted and continuing an existing estate, but by virtue of his ownership of and dominion over his own land; (for the owner of land exercises his right over it, not by virtue of any licences or liberties or easements, but by virtue of his ownership in which all interests of this kind merge: *Greathead v. Morley,* 3 M. & G. 139); and the question is, whether the conveyance or assignment of the land to the plaintiff, during the existence of the term in the incorporeal tenement, was an assignment of the reversion within the statute of 32 H. 8. We think that it was. There is in reality the relation of reversioner and ownership of particular estates between them; there is exactly the same privity of estate as exists between reversioner and tenant properly so called, and upon the determination of the term the entire interest in the land reverted to the plaintiff, as upon the expiration of an ordinary lease.

In *Hooper et al. v. Clarke* (1), an exclusive right and licence to take and kill game on certain land with the use of a cottage was similarly treated: Blackburn J. at pp. 202-3 said:

> The first question is, this being the demise of an incorporeal hereditament, do convenants which would run with a demise of land, run with it? *Martyn v. Williams* [*supra*] decides that they do.

To the like effect was the decision in *Lord Hastings v. North Eastern Railway Company* (2), where a covenant to pay for the privilege of a way-leave on which to make and use a railway, based on a rate on the coal carried to a certain port, was held to run with the reversion.

In such cases the title to the substances as part of the land remains in the owner and upon it is imposed the incorporeal right which the termination of the lease, as in this case, extinguishes. As stated in Jarman on Wills, 8th ed. 1951, p. 939 (vol. 2), an immediate devise of land in fee to a person *in esse,* carries the rents and profits of the land from the death of the testator. The rents and royalties here are obviously profits and like rent from a leasehold, in the absence of a specific bequest of them, which, if an assignment of the lessor's interest in the lease, would require a grant of the minerals themselves, are embraced in the

(1) (1867), L.R. 2 Q.B. 200. (2) [1898] 2 Ch. 674.

devise. It follows that both the right to the payment of $160 and the reversionary interest in the petroleum and gas enured to the appellant.

The interpretation given the instrument is not at all affected by the judgment of this Court in *McColl-Frontenac Oil Company Limited v. Hamilton et al.* (1). In the majority reasons written by Kellock J. at pp. 136-7, dealing with that question, he says:

> Whether the proper construction of the instrument is that, with respect to minerals, it is a grant of the minerals as land, as in *Gowan's* case (2), or a demise of the surface to which is super-added a *profit à prendre,* the result is, in my opinion, the same.

The finding that the agreement was a sale of property within the Act there being examined was satisfied by the transfer of title as the oil or gas was obtained in production; but that piecemeal sale and acquisition is the completion of the exercise of the right to win them, in contrast to the out-and-out conveyance of them *in situ.*

I would, therefore, allow the appeal, set aside the judgment below by declaring the petroleum and natural gas rights to be vested in the appellant and that the appellant is entitled to the sum of $160 received by the executors. The costs in this Court will be according to the terms on which leave to appeal was granted; those in the Courts below will be as directed by their judgments respectively.

The judgment of Kellock, Locke and Nolan JJ. was delivered by

KELLOCK J.:—It is quite competent for an owner of land so to convey mineral lying in or under the land that thereafter two separate estates in fee exist, the one in the mineral conveyed and the other in that which is retained. The respondents contend that this is the result of the instrument here in question.

Under the instrument the late Esther Elizabeth Sykes (described as "Lessor") "doth hereby grant and lease" to the Canadian Devonian Petroleums Limited (described as "Lessee")

> . . . all the petroleum and natural gas and related hydrocarbons except coal and valuable stone, (hereinafter referred to as the *"leased* substances"), within, upon or under the lands hereinbefore described and all the right,

(1) [1953] 1 S.C.R. 127, [1953] 1 D.L.R. 721.

(2) *Gowan v. Christie et al.* (1873), L.R. 2 Sc. & Div. 273.

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title, estate and interest of the Lessor in and to the *leased* substances or any of them within, upon or under any lands excepted from, or roadways, lanes, rights-of-way adjoining the lands aforesaid, together with the exclusive right and privilege to explore, drill for, win, take, remove, store and dispose of, the leased substances and for the said purposes to drill wells, lay pipe lines, and build and install such tanks, stations, structures and roadways as may be necessary, and, insofar as the Lessor has the right so to grant, and for the said purposes, the right of entering upon, using and occupying the said lands or so much thereof and to such an extent as may be necessary or convenient.

TO HAVE AND ENJOY the same for the term of Ten (10) years from the date hereof and so long thereafter as the *leased* substances or any of them are produced from the said lands, subject to the sooner termination of *the said term* as hereinafter provided.

(The italics are mine.)

The document further provides that if operations for the drilling of a well are not commenced within one year from its date the lease shall thereupon terminate unless the lessee shall have paid or tendered to the lessor $160, called "annual acreage rental", which payment shall "confer the privilege" of deferring the commencement of drilling operations for a period of one year. There may be further extensions upon "like payments or tenders", but, so far as this provision is concerned, the lease would terminate, at the latest, at the expiration of the 10-year term.

It is also provided that if at any time during the 10-year term and prior to "discovery of production" on the lands, the lessee should drill a dry well or wells, or if at any time during the term and after the discovery of production, such production should cease, the lease shall terminate "at the next ensuing anniversary date" unless drilling operations for a further well have been commenced or unless further tender of the annual acreage rental is made, in which latter event the earlier provision as to payment or tender of such rental is to be deemed to have continued in force. Again, there is nothing in this provision which, in my view, would allow the extension of the term beyond the 10-year period.

It is further provided, however, that if at any time after the expiration of the 10-year term the "leased substances" are not being produced but the lessee is then engaged in drilling or working operations on the land, the lease shall remain in force for so long as such operations are prosecuted and for so long as any resulting production continues. Provision is also made for payment of a royalty to the lessor upon any and all production.

The instrument also contains a clause that the lessee may, at any time, terminate or surrender the lease "as to the whole or any part or parts of the leased substances and/or the said lands" upon written notice to the lessor to that effect. Provision is also made for termination of the lease by the lessor upon notice to the lessee of any default on its part under the instrument and failure to remedy such default within a period of 90 days from receipt of such notice.

In Armour on Real Property, 2nd ed. 1916, the following is stated on p. 47:

> . . . a grant of all the coal or other mineral in or upon certain land, is a grant of part of the land itself, and passes complete ownership in the mineral to the grantee.

But the learned author continues:

> But a grant of the right to enter, search for and dig coal, and carry away as much as may be dug, is a grant of an incorporeal right to enter and dig, and passes the property in such coal only as shall be dug.

As stated in 11 Halsbury, 2nd ed. 1933, p. 386, s. 678:

> A *profit à prendre* may be created for an estate in perpetuity analogous to an estate in fee simple, or for any less period or interest such as a term of years . . . .

In the case at bar the Courts below have construed the instrument as a conveyance in fee. The basis of this view is sufficiently indicated in the following extracts from the judgment of Martin C.J.S., speaking for the Court of Appeal (1):

> Authorities are to the effect that petroleum and natural gas leases in the form of the one under review are sales of a portion of the land with liberty to enter upon the land for the purpose of searching for and carrying away the petroleum and natural gas within, upon or under the land. . . .
>
> Applying these authorities the testatrix disposed of an interest in the land when she entered into the petroleum and natural gas lease and the lease was in effect at the time of her death on July 9, 1953, but came to an end on December 18, 1954. The will of the testatrix spoke from her death, namely July 9, 1953, and as the sale of the petroleum and natural gas was then in effect just as she had made it on December 18, 1951, the devise of the interest in the land consisting of petroleum and natural gas was adeemed. Where there is a specific legacy and the subject-matter does not remain the property of the testator at his death the legacy is said to be adeemed. . . .
>
> . . . I cannot agree that the testatrix, so far as petroleum and natural gas are concerned, had anything left at the time of her death which she could dispose of. Section 19 of *The Wills Act*, R.S.S. 1953, ch. 120, cannot be

(1) 16 W.W.R. at pp. 461-2.

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applied because the testatrix had no estate in the petroleum and natural gas which she had "power to dispose of by will at the time of her death." . . . I am unable to distinguish the sale of minerals—an interest in land—from the case where a testator in his will makes a specific devise of land but subsequently sells the land under agreement for sale.

While what is referred to as a "mining lease" commonly amounts to a "sale of land", so to characterize any given instrument does not necessarily equate it with either a grant in fee simple of the mineral in place or of a *profit à prendre*. For example, the grant in question in *Gowan v. Christie et al.* (1), was only for a term of 21 years. Nevertheless, the oft-quoted citation from the judgment of Lord Cairns, on pp. 283-4, was quite properly applicable to it. Lord Cairns was there differentiating a mineral from an agricultural lease in that the agricultural lessee, while entitled to "fruits", is not entitled to either a corporeal or an incorporeal interest in the lands.

The words of Lord Cairns were also cited in *Joggins Coal Company Limited v. The Minister of National Revenue* (2), but the decision of the issue there arising did not require the Court to determine anything more with respect to the instrument before the Court than that the appellant had such an interest in the mineral that it was entitled to claim a share in depletion allowance as a "lessee" within the meaning of the *Income War Tax Act*.

The question which arose in *McColl-Frontenac Oil Company Limited v. Hamilton, et al.* (3), was whether the instrument before the Court was "a contract for the sale of property" within the meaning of the Alberta *Dower Act*. Whether the agreement was one for the sale of the mineral in place or of a *profit à prendre* was immaterial. In either case the Court considered the language of the statute to apply.

In the case at bar it is necessary to decide whether the interest in the mineral created in favour of the grantee was of such a nature that the devise to the appellant was, *pro tanto*, adeemed. In my opinion, this is not so. The provisions of the instrument as analyzed above are, in my

(1) (1873), L.R. 2 Sc. & Div. 273.
(2) [1950] S.C.R. 470, [1950] 3 D.L.R. 1, [1950] C.T.C. 149.
(3) [1953] 1 S.C.R. 127, [1953] 1 D.L.R. 721.

opinion, quite inconsistent with any conception of a grant in fee whether of the minerals in place or of a *profit à prendre*. In my opinion, the instrument is to be construed as a grant of a *profit à prendre* for an uncertain term which might be brought to an end upon the happening of any of the various contingencies for which it provides. It did not bring about that separation of the estate in the minerals from the estate in the land apart from the minerals which is the necessary basis for the operation of the doctrine of ademption.

In *Martyn v. Williams* (1), a *profit à prendre* in certain minerals had been granted to the defendant for a term of years by the owner in fee, who subsequently conveyed all his estate to the plaintiff. Martin B., delivering the judgment of the Court, said, at p. 829:

> But in the present case no estate in fee in the right to take the china clay has been created. The owners of the fee simple merely granted the right for a term of years, and after the expiration of this term, the plaintiff, who was then the owner of the land, was entitled to do all which the defendant was authorised and licensed by the indenture to do, not by virtue of the same estate which the defendant had, having reverted and continuing an existing estate, but by virtue of his ownership of and dominion over his own land; (for the owner of land exercises his right over it, not by virtue of any licences or liberties or easements, but by virtue of his ownership in which all interests of this kind merge: *Greathead v. Morley*, 3 M. & G. 139); and the question is, whether the conveyance or assignment of the land to the plaintiff, during the existence of the term in the incorporeal tenement, was an assignment of the reversion within the statute of 32 H. 8. We think that it was. There is in reality the relation of reversioner and ownership of particular estates between them; there is exactly the same privity of estate as exists between reversioner and tenant properly so called, and upon the determination of the term the entire interest in the land reverted to the plaintiff, as upon the expiration of an ordinary lease.

Accordingly, upon the termination of the interest of the grantee under the lease here in question, the estate of the appellant in the lands was no longer subject to it. The doctrine of ademption does not apply. Equally the appellant is entitled to the amount paid for acreage rental by the lessee following the death of the testatrix.

(1) (1857), 1 H. & N. 817, 156 E.R. 430.

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The appeal should, therefore, be allowed. I agree with the order as to costs proposed by my brother Rand.

Appeal allowed.

Solicitors for the defendant Elven J. Berkheiser, appellant: MacPherson, Leslie & Tyerman, Regina.

Solicitors for the defendant Glaister, respondent: McIlraith & McIlraith, Ottawa.

Solicitors for the plaintiffs: Donnelly & Polley, Swift Current.