

1959
*Feb. 17
Apr. 28

REGINALD HAYES APPELLANT;

AND

MAUDE EDWARDS MAYHOOD, }
Executrix of the Will of John Wel- } RESPONDENT;
lington Hayes, Deceased (*Applicant*) }

AND

WESTERN LEASEHOLDS LIMITED ... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA,
APPELLATE DIVISION

*Wills—Trust estates—Oil lease granted by executrix approved by Court—
Opposition by beneficiary of 1/28 interest in minerals—Whether delay
in administration—Whether oil lease a lease of real property—The
Devolution of Real Property Act, R.S.A. 1955, c. 83—The Land Titles
Act Clarification Act, 1956 (Alta.), c. 26.*

The testator H died in 1938 and his executrix granted an oil lease to W.L. Co. in 1957. The Court approved the granting of the lease. The appellant, a beneficiary with a 1/28 interest in the minerals and who opposed the application for approval of the lease, appealed to the Court of Appeal where W.L. Co. was added as a party. The Court of Appeal dismissed the appeal and the beneficiary appealed to this Court. He contended that (1) the executrix had ceased to act as an executrix for

*PRESENT: Locke, Cartwright, Fauteux, Abbott and Martland JJ.

lapse of time, (2) neither s. 11 or s. 14 of *The Devolution of Real Property Act* empowered the execution of such a document as it was neither a sale of real property or a lease of real property, and (3) the agreement was not in the interests of the estate.

1959
HAYES
v.
MAYHOOD
et al.

Held: The appeal should be dismissed.

- (1) The executrix was a personal representative of the deceased within the definition of *The Devolution of Real Property Act*, and nothing in that statute precluded her from making the application at the time she did. The trial judge had the power to make the order. Furthermore, the registrar could, under s. 55 of *The Land Titles Act*, R.S.A. 1955, c. 170, have refused to accept a transfer to the individual beneficiaries of their respective undivided 1/28 interests in the mineral rights as being less than 1/20.
- (2) In view of s. 2 of *The Land Titles Act Clarification Act*, the agreement was a lease within the meaning of *The Land Titles Act* as it was a document of the kind defined in this section and related to lands for which a certificate of title had been granted under *The Land Titles Act*. The word "lease" is not defined in *The Devolution of Real Property Act*, but when the word is used in s. 14 of that Act it must have been intended to include in its application leases of real property under *The Land Titles Act*. If the meaning of the word in s. 14 is ambiguous then the two statutes are in *pari materia* and it is proper to look at the subsequent legislation to see what is the proper construction to put upon the earlier statute. The lower Court had, therefore, the authority to approve the agreement as being a lease of real property.
- (3) This Court had no jurisdiction to deal with this appeal in so far as it related to the manner in which the lower Court exercised the discretion conferred upon it by s. 14.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta, affirming a judgment of Egbert J. Appeal dismissed.

E. S. Watkins, for the appellant.

K. E. Eaton, for the respondent Mayhood.

J. R. McColough, for the respondent Western Leaseholds Ltd.

The judgment of the Court was delivered by:

MARTLAND J.:—By his will, dated June 26, 1937, John Wellington Hayes devised and bequeathed all petroleum and natural gas rights possessed by him, or in which he had an interest, at the time of his death, as to a one-quarter share thereof to Frederick L. Mayhood, as to a one-quarter share thereof to eight named beneficiaries (nephews and nieces of the testator) of whom the appellant was one, and as to the remaining one-half share in trust for Gertrude

1959
HAYES
v.
MAYHOOD
et al.

Evelyn Mattern (now Gertrude Evelyn Crosby). The testator died on February 9, 1938. One of the eight named beneficiaries had predeceased him and one died following his death.

Martland J.

Frederick L. Mayhood was the executor of the estate. He died on August 25, 1954, and the respondent Maude Edwards Mayhood, his widow, is his executrix and the sole beneficiary of his estate. Administration of the estate of John Wellington Hayes had been completed prior to the death of Frederick L. Mayhood, except as to certain mineral rights which he held; namely, all petroleum and natural gas and the right to work the same within, upon or under the North Half of Section Fifteen (15) in Township Twenty-five (25) Range One (1) West of the Fifth Meridian in the Province of Alberta, containing Three Hundred and Twenty (320) acres more or less; all mines and minerals and the right to work the same within, upon or under the North East Quarter of Section Sixteen (16) in Township Twenty-five (25) Range One (1) West of the Fifth Meridian in the Province of Alberta, containing One Hundred and Sixty (160) acres more or less, excepting thereout 4.95 acres for a roadway; all mines and minerals other than gold and silver within, upon or under the said 4.95 acres previously mentioned and all petroleum and natural gas and the right to work the same within, upon or under Blocks A and B according to a plan of record in the South Alberta Land Registration District as Calgary 2760-A.K.

With a view to realizing the only assets of the estate unadministered, the respondent executrix, on June 24, 1957, caused her solicitors to write to ten major oil companies, requesting offers to lease these mineral rights. Two offers were received. One was an offer to lease the mineral rights in all the lands for ten years, at an initial bonus, including first year's rental, of \$5 per acre. The other offer, made by the respondent Western Leaseholds Ltd., related only to the North Half of Section 15 and the North East Quarter of Section 16, Township 25, Range 1, West of the Fifth Meridian, and proposed a ten-year lease, at an initial bonus and first year's rental of \$25 per acre. This offer was dated August 5, 1957, and was open for acceptance only until

August 19, 1957. Following the receipt of this offer, the respondent executrix had made efforts to obtain other offers, but without success.

1959
HAYES
v.
MAYHOOD
et al.
Martland J.

The respondent executrix submitted this offer to Mrs. Crosby, who approved of it, and she herself also approved it. Between them they held a 75 per cent. interest in these mineral rights.

On August 19, 1957, as executrix of the will of John Wellington Hayes, deceased, she accepted the offer of the respondent company, subject to her securing approval by the Court under the provisions of *The Devolution of Real Property Act*, R.S.A. 1955, c. 83.

Application for approval of the proposed petroleum and natural gas lease to the respondent company was made before Egbert J. on September 30, 1957, and approval was granted. The application was opposed by the appellant, who is entitled to a 1/28 interest in the minerals involved. A petroleum and natural gas lease from the respondent executrix to the respondent company was executed, dated September 30, 1957, relating to the petroleum and natural gas in the lands, comprising some 480 acres. It was for a term of ten years and so long thereafter as the leased substances or any of them are being produced from the leased lands.

The lease required operations for the drilling of a well to commence within one year from its date, but subject to postponement for one year by payment of the sum of \$480. Further annual postponements could be obtained from time to time by like payments. The lease contained provision for its termination after the drilling of a dry well, unless further drilling was effected or delay rental was paid. Provision was made for the payment of a 12½ per cent. royalty in respect of the current market value at the well of petroleum oil produced, saved and marketed from the lands and for a 12½ per cent. royalty in respect of gas or other products obtained from the lands. The lease contained provisions for the payment of taxes, for the surrender of the lease and other terms.

The appellant appealed from the order of Egbert J. to the Appellate Division of the Supreme Court of Alberta.

1959
 HAYES
 v.
 MAYHOOD
 et al.
 Martland J.

The respondent company was added as a party to the proceedings prior to the argument of that appeal, in which it participated. The appeal, by a majority of four to one, was dismissed from the bench. The present appeal is from this judgment of the Appellate Division.

Three grounds of appeal were argued on behalf of the appellant, as follows:

1. That the respondent executrix had been in breach of her duty, under *The Devolution of Real Property Act*, to vest the mineral rights in question in the devisees in undivided shares and, in consequence, that at the time she executed the petroleum and natural gas lease to the respondent company she was only a bare trustee of the mineral rights and had no power to dispose of them save by way of a transfer to the devisees.

2. That *The Devolution of Real Property Act* did not empower the execution of a document such as she executed, as it was neither a sale of real property, pursuant to s. 11 of that Act, nor a lease of real property, pursuant to s. 14 of that Act.

3. That the agreement made with the respondent company was not in the interests and to the advantage of the estate and the persons beneficially interested therein.

The relevant provisions of *The Devolution of Real Property Act* are as follows:

2. In this Act,

(a) "Court means the Supreme Court of Alberta, or a judge thereof;

* * *

(c) "personal representative" means the executor, original or by representation, or administrator for the time being of a deceased person.

3. (1) Real property in which a deceased person was entitled to an interest not ceasing on his death

(a) on his death, notwithstanding any testamentary disposition, devolves upon and becomes vested in his personal representative from time to time as if it were personal property vesting in him, and

(b) shall be dealt with and distributed by his personal representative as personal estate.

* * *

(3) The personal representative is the representative of the deceased in regard to his real property to which he was entitled for an interest not ceasing on his death as well as in regard to his personal property.

* * *

4. Subject to the powers, rights, duties and liabilities hereinafter mentioned, the personal representative of a deceased person holds the real property as trustee for the persons by law beneficially entitled thereto, and those persons have the same right to require a transfer of real property as persons beneficially entitled to personal property have to require a transfer of such personal property.

1959
HAYES
v.
MAYHOOD
et al.

Martland J.

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9. (1) At any time after the date of grant of probate or letters of administration, the personal representative may convey the real property to a person entitled thereto, and may make the conveyance either subject to a charge for the payment of money that the personal representative is liable to pay, or without any such charge.

* * *

(3) At any time after the expiration of one year from the date of grant of probate or of letters of administration, if the personal representative has failed when requested by the person entitled to any real property, to convey the real property to that person, the Court if it thinks fit, on the application of that person and after notice to the personal representative, may order that the conveyance be made, and may in default make an order vesting the real property in that person as fully and completely as might have been done by a conveyance thereof from the personal representative.

(4) If, after the expiration of one year, the personal representative has failed, with respect to the real property or a portion thereof, either to convey it to a person entitled thereto or to sell and dispose of it, the Court on the application of a person beneficially interested, may order that the real property or portion be sold on such terms and within such period as appears reasonable, and on the failure of the personal representative to comply with the order may direct a sale of the real property or portion upon such terms of cash or credit, or partly one and partly the other, as is deemed advisable.

* * *

11. (1) Subject to the provisions hereinafter contained, no sale of real property for the purpose of distribution only is valid as respects any person beneficially interested, unless that person concurs therein.

(2) Where, in the sale of real property

(a) a mentally incompetent person is beneficially interested,

(b) adult beneficiaries do not concur in the sale,

(c) under a will there are contingent interests or interests not yet vested, or

(d) the persons who might be beneficiaries are not yet ascertained, the Court upon proof satisfactory to it that the sale is in the interest and to the advantage of the estate of the deceased and the persons beneficially interested therein, may approve the sale, and any sale so approved is valid as respects the contingent interests and interests not yet vested, and is binding upon the mentally incompetent person, non-concurring persons and beneficiaries not yet ascertained.

(3) If an adult beneficiary accepts a share of the purchase money, knowing it to be such, he shall be deemed to have concurred in the sale.

* * *

- 1959
HAYES
v.
MAYHOOD
et al.
Martland J.
14. (1) The personal representative may, from time to time, subject to the provisions of any will affecting the property, do any one or more of the following:
- (a) lease the real property or a part thereof for a term of not more than one year;
 - (b) lease the real property or a part thereof, with the approval of the Court, for a longer term;
 - (c) raise money by way of mortgage of the real property or a part thereof, for the payment of debts, or for payment of taxes on the real property to be mortgaged, and, with the approval of the Court, for the payment of other taxes, the erection, repair, improvement or completion of buildings, or the improvement of lands, or for any other purpose beneficial to the estate.
- (2) Where infants or mentally incompetent persons are interested, the approvals or order required by sections 11 and 12 in case of a sale are required in the case of a mortgage, under clause (c) of subsection (1), for payment of debts or payment of taxes on the real property to be mortgaged.

With respect to the first point, the argument was that the mineral rights in question had remained in the hands of the executor of the estate for nearly twenty years; that they should have been vested in the beneficiaries during that time and that the beneficiaries could then have dealt with their own interests as they thought fit. It was contended that the respondent executrix should not have been permitted to compel the concurrence of a dissenting beneficiary in the proposed disposition of the mineral rights. It was also submitted that, by virtue of the lapse of time, the respondent executrix had ceased to act as an executrix and was merely a bare trustee of the mineral rights on behalf of the beneficiaries.

I do not accept the contention that the respondent executrix had ceased to act as an executrix by reason of the lapse of time. I have examined the authorities cited by the appellant and, in my view, they do not support this contention. The respondent executrix was a personal representative of the deceased, within the definition of *The Devolution of Real Property Act*, and there is nothing in that statute which precluded her from making the application which she did make at the time she did.

It was open to the judge hearing the application to consider whether the delay in administration was such that the order should not be granted, but he elected, as I think he had the power to do, to make the order.

I will, when considering the third head of argument, discuss the question as to whether there should be any interference at this stage with the discretion which he exercised in making that order.

1959
HAYES
v.
MAYHOOD
et al.

Martland J.

It should, however, be noted, in relation to the submission that there ought to have been a transfer of the mineral rights in undivided shares to the various beneficiaries, that the seven beneficiaries of a one-quarter interest were each thereby entitled to a 1/28 interest in the mineral rights. Section 55 of *The Land Titles Act*, R.S.A. 1955, c. 170, empowers the registrar to refuse to accept for registration any instrument transferring an undivided interest in a parcel of land containing any mines and minerals or any mineral and being less than an undivided 1/20 of the whole interest in the mines and minerals or in any mineral contained in that parcel of land. The Registrar could, therefore, have refused to accept a transfer to the individual beneficiaries (of whom the appellant was one) of their respective undivided 1/28 interests in the mineral rights in question.

I turn now to the second argument of the appellant. It was contended that neither under s. 11 nor s. 14 of *The Devolution of Real Property Act* could an order be made approving the agreement between the respondents, because it constituted neither a sale of real property nor a lease of real property.

Reference was made to the decision of this Court in *Berkheiser v. Berkheiser*¹, in which consideration was given to the legal nature of the interest created by a petroleum and natural gas lease similar to the one in question here. In that case Rand and Cartwright JJ. held that the interest created was either a *profit à prendre* or an irrevocable licence to search for and win the substances named. Kellock, Locke and Nolan JJ. held that it 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 instrument provided.

¹[1957] S.C.R. 387, 7 D.L.R. (2d) 721.

1959
HAYES
v.
MAYHOOD
et al.
Martland J.

That was an appeal from the Court of Appeal in Saskatchewan. That Court had previously held, in *In re Heier Estate*¹, that a "lease" of petroleum and natural gas rights was not a lease within the meaning of s. 15(1) of *The Devolution of Real Property Act* of Saskatchewan, which is in similar terms to s. 14(1) of the Alberta Act.

The position in Alberta is, I think, different, however, in view of the enactment in 1956 of *The Land Titles Act Clarification Act*, 1956 (Alta.), c. 26, s. 2 of which provides as follows:

2. It is hereby declared that the term "lease" as used in *The Land Titles Act* and any Act for which *The Land Titles Act* was substituted includes, and shall be deemed to have included, an agreement whereby an owner of any estate or interest in any minerals within, upon or under any land for which a certificate of title has been granted under *The Land Titles Act* or any Act for which *The Land Titles Act* was substituted, demises or grants or purports to demise or grant to another person a right to take or remove any such minerals for a term certain or for a term certain coupled with a right thereafter to remove any such minerals so long as the same are being produced from the land within, upon or under which such minerals are situate.

In view of this provision, it is clear that the agreement in question here is a lease within the meaning of *The Land Titles Act*, as it is a document of the kind defined in this section and relates to lands for which a certificate of title has been granted under *The Land Titles Act*.

The word "lease" is not defined in *The Devolution of Real Property Act*, but I think that when the word is used in s. 14 of that Act it must have been intended to include in its application leases of real property under *The Land Titles Act*.

If the meaning of the word, as used in s. 14 of *The Devolution of Real Property Act*, is ambiguous, then I think that the two statutes are in *pari materia*, both having provisions relating to real property in the Province of Alberta. That being so, it is proper to look at the subsequent legislation to see what is the proper construction to put upon the earlier statute: *Cape Brandy Syndicate v.*

¹(1952) 7 W.W.R. (N.S.) 385.

*Inland Revenue Commissioners*¹, cited with approval by Lord Buckmaster in *Ormond Investment Company, Limited v. Betts*².

1959
HAYES
v.
MAYHOOD
et al.

Martland J.

I am, therefore, of the opinion that the Court had the authority, under s. 14 of *The Devolution of Real Property Act*, to approve the agreement made between the respondents as being a lease of real property. It is not necessary for me to consider whether the agreement in question constituted a sale of real property within the meaning of s. 11 of that Act, as was contended by the respondent company.

The third point relates not to the jurisdiction of the Court to make the order which was made, but as to whether, in the circumstances, it should have been made.

Counsel for the respondent company contends that this Court had no jurisdiction to hear an appeal in relation to this point, in view of the provisions of s. 44 of the *Supreme Court Act*, which read as follows:

44. (1) No appeal lies to the Supreme Court from a judgment or order made in the exercise of judicial discretion except in proceedings in the nature of a suit or proceeding in equity originating elsewhere than in the Province of Quebec and except in *mandamus* proceedings.

(2) This section does not apply to an appeal under section 41.

Subsection (2) has no application in this case, as no leave to appeal was granted by this Court pursuant to s. 41 of the *Supreme Court Act*.

In my opinion the contention of the respondent company on this point is correct. Section 14 of *The Devolution of Real Property Act* empowers a personal representative, subject to the provisions of the will, to lease the real property or a part thereof for a term longer than one year with the approval of the Supreme Court of Alberta. That approval was granted by Egbert J. and his decision was sustained by the Appellate Division. For the reasons already given, I think the Supreme Court of Alberta had jurisdiction to grant the approval which was given. Section 14 does not provide any directions or rules in relation to the exercise of the jurisdiction thereby granted. The approval of a lease under that section is left entirely to the discretion of the Court. I do not think, therefore, that this Court has juris-

¹ [1921] 2 K.B. 403.

² [1928] A.C. 143 at 156.

1959
HAYES
v.
MAYHOOD
et al.
—
Martland J.

diction to deal with this appeal in so far as it relates to the manner in which the Supreme Court of Alberta exercised the discretion conferred upon it by that section.

In my opinion the appeal should be dismissed. The appellant should pay to the respondent company its costs of this appeal. The respondent executrix, although represented, took no part in the appeal and took no position with respect to the points raised. For those reasons, I do not think she is entitled to costs on the present appeal as against the appellant, but she will be entitled to her costs in this Court out of the estate.

Appeal dismissed with costs.

Solicitors for the appellant: Tavender & Watkins, Calgary.

Solicitors for the applicant, respondent Mayhood: Mayhood & Cumming, Calgary.

Solicitors for the respondent Western Leaseholds Ltd.: Macleod, McDermid, Dixon, Burns, McColough, Love & Leitch, Calgary.
