McCOLL-FRONTENAC OIL COMPANY LIMITED (PLAINTIFF) ..... APPELLANT;

AND

HIRAM HAMILTON and LOUISE H. HAMILTON (DEFENDANTS) ..... RESPONDENTS.

1952
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ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION.

Homesteads—Dower Act—"Oil and Gas Mining Lease"—Whether a "contract for the sale of property" within meaning of the Act—When wife deemed to have consented to sale.

By an instrument in writing, designated as an "oil and gas mining lease", the owner of a homestead in Alberta comprising a quarter section of land, leased the same to the appellant for the purpose of drilling and operating for oil and gas for a term of ten years. The owner's wife with full knowledge of the contents of the instrument and without any compulsion by her husband, signed a consent thereto and acknowledged such consent in the presence of, and not, as required by s. 7(1) of *The Dower Act,* R.S.A. 1942, c. 206, apart from her husband. Subsequently the owner entered into an oil and natural gas lease with other parties as to the same land on more advantageous terms and undertook to commence proceedings to rid the title of the lease granted to the appellant on the ground of alleged non-compliance with the provisions of *The Dower Act.*

Held: (Kerwin J. dissenting) that the instrument was a good, valid and subsisting "contract for the sale of property". *Joggins Coal Co. Ltd.* v. *The Minister of National Revenue* [1950] S.C.R. 470 applying *Gowan* v. *Christie* L.R. 2 Sc. & Div. 273 at 284; Re *Aldam's Settled Estate* [1902] 2 Ch. 46. Whether construed with respect to the minerals as land, as in *Gowan's* case, or as a demise of the surface to which is super-added a *profit à prendre,* the result was the same. It provided for the sale of property and, under s. 9(1) of *The Dower Act,* there being an absence of fraud on the part of the purchaser, the wife was "deemed" to have consented to the sale "in accordance with the provisions of this Act."

Per: Estey J. When in s. 9(1) the Legislature used the general word "property", rather than "homestead" as in s. 3, it disclosed an intention that the provisions of s. 9(1) should apply in a manner other than to the homestead as a whole and used language sufficiently comprehensive to include, not only a portion of its acreage, but also some interest in the land or soil constituting the homestead. The words "a contract for the sale of property" in s. 9(1) are sufficiently comprehensive to include contracts for the sale of property generally and to include one such as here where it was not contemplated that a transfer under *The Land Titles Act* would be issued. The provisions of the lease in question constituted a sale of a *profit à prendre,* or an interest in land, and notwithstanding the consent was not acknowledged apart from the husband, a valid "contract for the sale of property" by virtue of s. 9(1).

*PRESENT: Kerwin, Taschereau, Kellock, Estey and Fauteux JJ.

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Per: Kerwin J., (dissenting). It was unnecessary to determine whether the document in question was a sale of the oil and gas which might be found, or merely a lease with a grant of a *profit à prendre* and Lord Cairn's remarks in *Gowan* v. *Christie, supra,* as to the nature of a mining lease, approved in *Coltness Iron Co.* v. *Black* 6 A.C. 315 at 335 and applied in the *Joggins Coal Co.* case *supra,* are irrelevant. If it was a sale, then it was not a "contract", and if it was a lease, then while it might be a contract, it was not one for sale. The document was not such a one as was envisaged by the Legislature in enacting s. 9(1) and not within its terms.

APPEAL by the plaintiff-appellant from a judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming on an equal division the judgment of Howson, Chief Justice of the Trial Division, (2), dismissing the action with costs.

H. W. Riley, Q.C. and *M. H. Patterson* for the appellant.

G. M. D. Blackstock for the respondent.

KERWIN J. (dissenting):—This is an appeal by McColl-Frontenac Oil Company Limited against a decision of the Appellate Division of the Supreme Court of Alberta (1), affirming, on an equal division, the judgment of the Chief Justice of the Trial Division (2). The respondents are Hiram Hamilton and his wife, the former of whom is the registered owner of a quarter-section of land in Alberta containing 160 acres less 2 acres for a road, upon which land is a house occupied as his residence. In March, 1947, what is designated an "oil and gas mining lease" from Hiram Hamilton to the appellant was signed by the former.

By it he leased to the appellant all of the said land for the purpose of drilling and operating for, producing and storing oil, gas and casinghead gas, laying and maintaining pipe lines, erecting and maintaining tanks, power stations, telegraph, telephone and power lines and all structures thereon necessary or useful to test for, drill for, produce, save, treat, store, transport, and take care of such products and for housing and boarding employees, to be held by the lessee for a space of ten years, renewable and to be renewed for successive renewal terms of ten years each, each of such successive renewal terms to commence forthwith upon the

(1) (1952) 5 W.W.R. (N.S.) 1; 2 D.L.R. 637.

(2) (1952) 4 W.W.R. (N.S.) 77.

expiration of the then preceding term, for so long as gas, oil, casinghead gas or any of them are being produced from the said lands, or are being prospected or drilled for thereon, at the rental thereinafter set forth, subject to the covenants and conditions thereinafter contained. The appellant as lessee covenanted and agreed *inter alia*: to pay as rental a royalty of one-eighth of all oil and gas produced and saved from the lands and in the case of gas, used off the said lands or in the said lands or in the manufacture of casinghead gasoline; to pay in addition a cash rental of $3 per acre for the first year of the term; if the drilling of a well upon the lands should not have been commenced during the first year, to pay half-yearly in advance a "delay rental" of $1 per acre; to commence, within twelve months, the drilling of a well for oil or gas either upon the lands or within five miles from some point in the boundary thereof.

The cash rental of $474 provided for was paid at the time of the execution of the document. While during 1947 and 1948 a well, which turned out to be a "dry hole", was drilled within the five miles specified, at a cost in excess of $100,000, there appears to be no doubt that the appellant had intended and had prepared to drill such well even before the execution of the lease. The "delay rental" of $79 was paid regularly half-yearly. In the meantime, in March 1947, the appellant had filed a caveat; in October, 1950, Hiram Hamilton entered into a lease with other parties for the same purposes upon more advantageous terms; in November, 1950, notice was given the appellant requiring it to take proceedings on its caveat. In December, 1950, the appellant registered the document of March, 1947, in the Land Titles Office as a lease and then commenced the present action for a declaration that the lease is valid and subsisting and for an order continuing the caveat; and, in the alternative, for judgment for the total of the rentals paid, with interest and five percentum per annum on each amount from the date of its payment.

The respondents did not allege fraud but claimed that the lease was null and void for all purposes on the ground that, relating as it did to the Hamilton homestead, it was not "made with the consent in writing of the wife", as

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provided in s. 3 of *The Dower Act,* R.S.A. 1942, chapter 206. By s. 2 of that Act:—

2. In this Act, unless the context otherwise requires,—

(*a*) "Disposition" means any disposition by act *inter vivos* which is required to be executed by the owner of the land disposed of, and includes every transfer, agreement of sale, lease or other instrument intended to convey or transfer any interest in land and every mortgage or incumbrance intended to charge land with the payment of a sum of money (and requiring to be so executed) and every devise or other disposition made by will; and includes every mortgage by deposit of certificate of title or other mortgage not requiring the execution of any document.

(*b*) "Homestead" means,—

(i) land in a city, town or village, consisting of not more than four adjoining lots in one block, as shown on a plan duly registered in the proper Land Titles Office, on which the house occupied by the owner thereof as his residence is situated;

(ii) land other than that referred to in paragraph (i) of this definition on which the house occupied by the owner thereof as his residence is situated, consisting of not more than one quarter section.

Then comes s. 3:—

3. Every disposition by act *inter vivos* of the homestead of any married man whereby the interest of the married man shall or may vest in any other person at any time during the life of the married man or during the life of the married man's wife living at the date of the disposition, shall be absolutely null and void for all purposes unless made with the consent in writing of the wife.

Ss. 6, 7 and 9, so far as material, are as follows:—

6. (1) Any consent required for the disposition *inter vivos* of the homestead, or for the purpose of establishing a change of residence under this Act shall, whenever any instrument by which the disposition is effected is produced for registration under the provisions of *The Land Titles Act,* be produced and registered therewith.

(2) The consent may be embodied in or indorsed upon the instrument effecting the disposition.

(3) The execution by the wife of any such disposition shall constitute a consent under this Act.

7. (1) When a wife executes any instrument concerning any disposition or consent under this Act she shall acknowledge it, apart from her husband, to have been executed by her of her own free will and accord and without any compulsion on the part of her husband.

(2) The acknowledgment may be made before any person authorized to take proof of the execution of instruments under *The Land Titles Act,* and a certificate thereof in Form B shall be indorsed on or attached to the instrument executed by her.

9. (1) When any woman has executed a contract for the sale of property, or joined in the execution thereof with her husband, or given her consent in writing to the execution thereof, and the consideration

under the contract has been totally or partly performed by the purchaser, she shall, in the absence of fraud on the part of the purchaser, be deemed to have consented to the sale, in accordance with the provisions of this Act.

(2) When any subsequent disposition by way of transfer of the property is presented for registration under *The Land Titles Act*, the consent previously given, or the agreement executed, shall, if produced and filed with the Registrar be sufficient for the purposes of this Act.

Hamilton's wife was not a party to the lease and did not execute it but did sign the following Consent at the end thereof:—

CONSENT

Wife of Hiram Hamilton, the lessor herein I, LOUISE H. HAMILTON, of Calmar, in the Province of Alberta, do hereby give my consent to the within mentioned disposition of the said premises.

"Louise H. Hamilton"

Edward P. Lamar, a Commissioner for Oaths in and for the Province of Alberta, but who also was the agent of the appellant for the purpose of securing oil and gas leases signed a "Certificate of Acknowledgment by Wife", which follows Form B referred to in subsection 2 of s. 7:—

This document was acknowledged before me by Louise H. Hamilton apart from her husband to have been executed by her of her own free will and accord and without any compulsion on the part of her husband, and she has further acknowledged that she was aware at the time of such execution of the contents thereof.

DATED at Calmar, in the Province of Alberta, this 10th day of March, A.D. 1947.

"Edward P. Lamar"

A Commissioner for Oaths in and for The Province of Alberta.

The lease is undoubtedly a "disposition" under s. 2(*a*) and in view of the definition of "homestead" in s. 2(*b*) (ii) and particularly the last phrase thereof, Hamilton's homestead is not confined to the buildings thereon and the land immediately surrounding them. This is so notwithstanding these clauses in the document:—

When required by the Lessor, the Lessee will bury all pipe lines below ordinary plough depth and no well shall be drilled within two hundred (200) feet of any residence or barn now on the said lands, without the Lessor's consent . . . .

The Lessee shall use only that portion of the surface of the said lands from time to time required in its operations, and shall pay compensation for damage by such operations to growing crops of the Lessor, and shall, when necessary to protect live stock of the Lessor, fence in all wells, and upon abandonment of any well, shall properly close the same and restore the site thereof to its condition prior to the commencement of drilling operations insofar as may be reasonably practicable.

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It has been held in Alberta that, notwithstanding that the wife of the owner of a homestead may sign the consent, such consent must be given in accordance with s. 7. Considering the objects of *The Dower Act,* there would seem to be no doubt that this is the correct construction. At one time there was a difference of opinion as to the effect of non-compliance but, in 1942, s. 3 was amended by inserting the word "absolutely" before "null and void" and the words "for all purposes" immediately thereafter, so that it now appears as extracted above.

Subsection 1 of s. 9 refers to a contract for the absolute sale of property. It is unnecessary to determine the exact nature of the document before us, that is, whether it is a sale of the oil and gas which may be found, or merely a lease with a grant of a *profit à prendre.* Lord Cairns' remarks as to the nature of a mining lease in *Gowan* v. *Christie* (1), approved by Lord Blackburn in *Coltness Iron Co.* v. *Black* (2), "as a perfectly accurate statement" and applied by this Court in *Joggins Coal Company* v. *Minister of National Revenue* (3), are not, in my opinion, relevant to this document. If it is a sale, then it is not a "contract" and, if it is a lease, then, while it may be a contract, it is not one for sale. If the specified conditions are met, then the married woman has consented "in accordance with the provisions of this Act" and I quite agree that subsection 2 merely provides for the occasion when a transfer is presented for registration under the *Land Titles Act.* However, a comparison of the words "contract for the sale of property" in subsection 1 with "any subsequent disposition by way of transfer" in subsection 2 supports the view that the Hamilton document is not one contemplated by the former. The object of the Act was to preserve the wife's life estate in the homestead which she has contingent upon her surviving her husband. If, however, the latter contracts to sell all his interest in the homestead, the wife may be assumed to know that by consenting thereto she is agreeing to forego the protection afforded her and therefore the legislature has declared that if the other conditions in subsection 1 are fulfilled such consent will be sufficient. On the other hand, it is an entirely different matter if the husband enters into

(1) (1873) L.R. 2 Sc. & Div. 273 at 284.

(2) (1881) 6 App. Cas. 315 at 335.

(3) [1950] S.C.R. 470.

a relationship such as that with which we are concerned. In short, my view is that the document is not such a one as was envisaged by the legislature in enacting subsection 1 and is not within its terms. There is no basis for the argument that there was an estoppel since, if *The Dower Act* was not complied with, the disposition is absolutely null and void for all purposes.

All the members of the Appellate Division held the views expressed in the last three paragraphs but only two agreed with the trial judge that the wife's execution of the consent in the presence of her husband is not an acknowledgment "apart from her husband" and that, therefore, subsection 1 of s. 7 had not been complied with. The other two members proceeded on the basis of a presumption in favour of official acts. Particularly bearing in mind that the Commissioner was also the agent of the appellant, I agree with the first two that any such presumption is met when all the parties present at the transaction gave evidence before the Court and that nothing has been shown to cast doubt upon the soundness of the trial judge's finding of fact.

The appeal should be dismissed with costs but the judgment at the trial should be amended by providing that in addition to Hiram Hamilton paying the appellant the sum of $948, he should also pay interest at the rate of five percentum per annum upon each amount making up that sum from the time of its payment to him by the appellant.

The judgment of Taschereau, Kellock and Fauteux, JJ. was delivered by:

KELLOCK, J.:—In this case the appellants claim under an oil and gas lease of March 9, 1947, executed by the respondent Hiram Hamilton in favour of the appellant and consented to by the respondent Louise H. Hamilton. By this instrument the first named respondent, described as "lessor," doth "hereby lease exclusively" to the appellant, described as "lessee," all the land of the lessor "for the purpose of drilling and operating for, producing and storing oil, gas and casing-head gas, laying and maintaining pipe lines, erecting and maintaining tanks, power stations, telegraph, telephone and power lines and all structures thereon necessary or useful to test for, drill for, produce, save, treat,

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store, transport and take care of such products and for housing and boarding employees," to be held by the lessee for ten years, renewable for successive terms of ten years so long as gas or oil is being produced or prospected for on the lands. The instrument provides for an annual rent to be paid on an acreage basis, as well as for a royalty on all oil and gas produced. It is also stipulated that the lessee shall use only the portion of the lands required for its operations and shall pay damages caused by such operations to growing crops.

Subsequently, on or about October 27, 1950, the respondents entered into an oil and natural gas lease with other parties in consideration of a cash payment of $10,000, and undertook with these parties to commence proceedings to rid their title of the lease granted to the appellant on the alleged ground of non-compliance, in the taking of the appellant's lease, with the provisions of *The Dower Act,* R.S.A. 1942, c. 206. In the present proceedings the respondents therefore claimed that the appellant's lease was void for non-compliance with s. 7 (1) of the statute, in that, as alleged, the consent of the respondent Louise Hamilton was not acknowledged "apart" from her husband within the meaning of that section. No fraud or overreaching on the part of the appellant is suggested, it being admitted in fact that the consent of the wife was given of her own free will and accord and without any compulsion on the part of the husband, which, of course, is alone the object of the statute.

The respondents adduced evidence that when the lease was executed and the consent of the respondent wife given, the husband and wife were together. The witness Lamar, who had obtained the lease on behalf of the appellant and before whom the acknowledgment was made, was unable to remember the particular circumstances. He testified that he had taken similar documents covering some 2,000,000 acres of land and that it was impossible for him to remember the circumstances of each case. He said, however, that he knew the requirements of the statute at the time, that he understood that "apart" meant "out of sight" and "out of hearing" and that it was his invariable practice to take the acknowledgment of a wife in accordance with these requirements. The learned judge, however, accepted

the evidence for the respondents, and in the view he entertained of the statutory provisions, set aside the lease.

On appeal the court was equally divided. Parlee and Macdonald JJ.A. agreed with the learned trial judge, while Frank Ford J.A. and Clinton Ford J.A. would have allowed the appeal on the ground that the learned trial judge did not give effect to the onus which, in their opinion, rested on the respondents to prove that the acknowledgment of the consent by the respondent wife was not made "apart." Frank Ford J.A., the only member of the court to mention the section, was also of opinion that s. 9(1) of the statute could not be availed of by the appellant as, in his opinion, the section applies only to contracts for the sale of land "which are to be and can be followed by transfers capable of registration as transfers of the interest coming within the description required for purposes of registration." The learned judge appears to have assumed that the instrument here in question was not of such a character.

The relevant sections of the statute are as follows:

2. In this Act, unless the context otherwise requires,—

(*a*) "Disposition" means any disposition by act *inter vivos* which is required to be executed by the owner of the land disposed of, and includes every transfer, agreement of sale, lease or other instrument intended to convey or transfer any interest in land and every mortgage or incumbrance intended to charge land with the payment of a sum of money (and requiring to be so executed) and every devise or other disposition made by will; and includes every mortgage by deposit of certificate of title or other mortgage not requiring the execution of any document;

3. Every disposition by act *inter vivos* of the homestead of any married man whereby the interest of the married man shall or may vest in any other person at any time during the life of the married man or during the life of the married man's wife living at the date of the disposition, shall be absolutely null and void for all purposes unless made with the consent in writing of the wife.

7. (1) When a wife executes any instrument concerning any disposition or consent under this Act she shall acknowledge it, apart from her husband, to have been executed by her of her own free will and accord and without any compulsion on the part of her husband.

9. (1) When any woman has executed a contract for the sale of property, or joined in the execution thereof with her husband, or given her consent in writing to the execution thereof, and the consideration under the contract has been totally or partly performed by the purchaser, she shall, in the absence of fraud on the part of the purchaser, be deemed to have consented to the sale, in accordance with the provisions of this Act.

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(2) When any subsequent disposition by way of transfer of the property is presented for registration under *The Land Titles Act*, the consent previously given, or the agreement executed, shall, if produced and filed with the Registrar be sufficient for the purposes of this Act.

With respect to s. 9 (1), the first question which arises is as to whether or not the instrument here in question is "a contract for the sale of property." That a lease is a contract which includes a demise is perfectly clear; Hill & Redman, 10th edition, p. 1; *Whitehall Court Ltd.* v. *Ettlinger* (1), per Lord Reading C.J. at 687. In my opinion, the lease to the appellant is a "contract for the sale of property." In *Joggins Coal Company* v. *Minister of National Revenue* (2), we had occasion to apply to the facts of that case the statement of Lord Cairns in the course of his judgment in *Gowan* v. *Christie* (3):

> . . . for although we speak of a mineral lease, or a lease of mines, the *contract* is not in reality, a lease at all in the sense in which we speak of an agricultural lease . . . What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil.

In *Re Aldam's Settled Estate* (4), Collins M.R. expressed a similar view at p. 56:

> . . : mining lease, which is really in its essence rather a sale at a price payable by instalments than a demise properly so called.

At p. 58, Stirling L.J. said:

> The rent reserved by a mining lease rather resembles an instalment of purchase-money for the demised minerals than what is understood by rent reserved on an ordinary demise of the surface.

Cozens-Hardy L.J., at p. 63, said:

> The use of the word "rent" in the case of a mining lease is somewhat misleading. It is really purchase-money for coal worked . . .

In *Gowan's* case the lease was of "the freestone and minerals . . . lying in and under" certain lands "with power to search for, work and carry away" the same at a rent of £200 per annum. As already pointed out, the instrument here in question is a demise of the whole quarter-section for the purpose of producing oil and gas, with a covenant on the part of the appellant to use only such portion thereof as may be necessary for its operations. Whether the proper construction of the instrument is that, with respect to

(1) [1920] 1 K.B. 680.
(2) [1950] S.C.R. 470 at 475.
(3) L.R. 2 H.L. Sc. 273 at 284.
(4) [1902] 2 Ch. 46.

minerals, it is a grant of the minerals as land, as in *Gowan's* case, or a demise of the surface to which is super-added a *profit à prendre,* the result is, in my opinion, the same. The instrument provides for the sale of property, and under the first subsection, there being an absence of fraud on the part of the purchaser, the respondent wife is "deemed" to have consented to the sale "in accordance with the provisions of this Act."

In my opinion, the words quoted can only mean in this statute "taken to have so consented whether or not she did so in fact"; *Lawrence & Sons* v. *Willcocks* (1), per Lord Esher and Lopes L.J. at 699 and 701 respectively. In the language of Fry L.J. in the same case at 700:

> We are bound to give the words of the section their natural meaning unless some absurdity or injustice arises.

See also *Shepheard* v. *Broome* (2).

In my view, the language under consideration would be meaningless unless so construed, as the mere production of the instrument would entitle it to be accepted prima facie for what it is. It is only if fraud be shown that that defence is left open to a wife.

I do not think, with respect, that subsection (2) of s. 9 affects this conclusion. That subsection merely provides that "when" any subsequent transfer is presented for registration, the consent already given to the contract for sale is sufficient and no consent is necessary to the transfer itself, as would be the case under s. 3 but for the provisions of subsection (2) of s. 9. I do not think that the subsection goes any farther than this or restricts the meaning of the word "contracts" in subsection (1). It is therefore not necessary to consider whether or not the interest covered by the instrument here in question could be the subject of a "transfer" under the statute.

I would allow the appeal with costs throughout.

ESTEY J.:—The respondent Hiram Hamilton, under date of March 9, 1947, entered into an oil and gas mining lease under which he leased to the appellant the "North West Quarter of Section Twenty-five (25) Township Forty-eight (48) Range Twenty-seven (27) West of the Fourth Meridian in the Province of Alberta containing 158 acres, more or less, . . . for the purpose of drilling and operating for,

(1) [1892] 1 Q.B. 696.
(2) [1904] A.C. 342.

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producing and storing oil, gas and casing-head gas, . . . for a space of ten (10) years from the date hereof, renewable and to be renewed for successive terms of ten (10) years . . . for so long as gas, oil, . . . are being produced from the said lands . . .” The respondent Louise H. Hamilton is the wife of the said Hiram Hamilton. The appellant registered a caveat as No. 7503, notice of which the Registrar, under date of April 19, 1947, forwarded to Hiram Hamilton. On January 6, 1951, it commenced this action asking a declaration that the lease is valid and subsisting and that caveat No. 7503 be continued, or, in the alternative, judgment against the respondent for the rentals paid in the sum of $948 with interest at 5 per cent.

The appellant drilled a well in accordance with the terms of the lease which turned out to be a “dry hole” and paid to the respondent Hiram Hamilton the sums payable in accordance with the terms of the lease from 1947 to September, 1950, in the sum of $948.

The respondents admit the foregoing, but contend that the said oil and gas mining lease was null and void and, therefore, they had a right to enter into a further and more advantageous agreement with another party in 1950. This contention is based upon the provisions of an act respecting the interests of a wife in her husband's homestead and cited as *The Dower Act,* R.S.A. 1942, c. 206.

The above-described quarter section is the homestead of the respondent Hiram Hamilton within the meaning of *The Dower Act* and the contract is a “disposition by act *inter vivos* of the homestead” within the meaning of s. 3 thereof.

The Dower Act was passed for the purpose of protecting the wife against a disposition by her husband of the homestead without her consent. The Legislature, in order to ensure the consent would be voluntary on the part of the wife and, therefore, without any undue influence or compulsion on the part of her husband, has provided she must acknowledge this consent, in the manner required by s. 7(1), before a party duly appointed to take proof of the execution of instruments under *The Land Titles Act* (s. 7(2)). The relevant portions of s. 3 read:

> 3. Every disposition by act *inter vivos* of the homestead of any married man . . . shall be absolutely null and void for all purposes unless made with the consent in writing of the wife.

Then in s. 7 the Legislature specifies how this consent shall be acknowledged. The relevant portions of s. 7 read:

> 7. (1) When a wife executes any . . . consent under this Act she shall acknowledge it, apart from her husband, to have been executed by her of her own free will and accord and without any compulsion on the part of her husband.
>
> (2) The acknowledgment may be made before any person authorized to take proof of the execution of instruments under *The Land Titles Act*, and a certificate thereof in Form B shall be indorsed on or attached to the instrument executed by her.

These provisions are imperative and, therefore, only the consent made in compliance therewith is valid within the meaning of the enactment.

Mr. Lamar, on March 9, 1947, as agent for the appellant, called at the home of Mr. and Mrs. Hamilton and advised them that Mr. Hamilton was the owner of the mineral rights in the homestead, a fact which apparently neither he nor his wife had previously appreciated. Then followed a discussion which resulted in Mr. Hamilton's agreeing to give the lease here in question to the appellant. This discussion took place in the kitchen while the parties were seated around the kitchen table. It was there the lease was prepared and executed as well as Mrs. Hamilton's consent and her acknowledgment. Throughout, all three parties took part in the discussion and it is clear that Mrs. Hamilton appreciated all that was there taking place. Mr. Hamilton also heard and understood all that took place. The acknowledgment of Mrs. Hamilton's consent was taken while the parties remained seated around the table. Whatever the precise meaning of the phrase "apart from her husband" may be, an acknowledgment taken in the presence and hearing of the husband, as in this case, is not a compliance with s. 7 and, therefore, the disposition by way of the oil and gas mining lease between the parties hereto under the terms of s. 3 is "absolutely null and void for all purposes" unless it comes within the exception contained in s. 9(1) to be hereinafter discussed.

In arriving at the foregoing conclusion, I have not overlooked the view expressed by some of the learned judges in the Appellate Division that in taking Mrs. Hamilton's acknowledgment, Lamar was acting in an official capacity, and that the presumption that in doing so he acted in a regular and proper manner has not been rebutted by the evidence here adduced.

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The force of this presumption is explained in Taylor on Evidence, 12th Ed., p. 105:

> In this mode *the law* . . . defines the nature and amount of the evidence which is sufficient to establish a *prima facie* case, and to throw the burthen of proof on the other party; and if no opposing evidence is offered, the jury are bound to find in favour of the presumption.

Such is a rebuttable presumption. Am. & Eng. Encyc. of Law, 22, 2nd Ed., p. 1266; Broom's Legal Maxims, 10th Ed., p. 642. In this case Mr. and Mrs. Hamilton and an independent witness deposed to facts that clearly establish that Lamar did not properly perform his official duties in the taking of Mrs. Hamilton's acknowledgment. Lamar himself had no recollection of the occasion and went no further than to state that he always took such acknowledgments separate and apart from the husband. The learned trial judge, referring to this evidence, stated that Lamar's "evidence does not assist in making any definite finding. I accept the evidence of Hamilton and his wife in preference to Lamar." He had previously accepted the evidence of the independent witness who corroborated Mr. and Mrs. Hamilton.

The position, therefore, is quite different from that in *Jackson* v. *Chabillon* (1), where at p. 615 the learned trial judge came to the conclusion

> In my view the evidence is not sufficiently impressive to rebut the presumption in favour of the proper execution of the mortgage as well as compliance with the requirements of *The Dower Act* . . .

In these circumstances I agree with Mr. Justice Parlee, with whom Mr. Justice W. A. Macdonald agreed, that any presumption in favour of the regularity of official acts is rebutted when, as here, the trial judge accepts the evidence of the wife, her husband, and that of an independent witness, all of whom depose that the acknowledgment was made in a manner contrary to the statute.

The appellant contends that notwithstanding the foregoing, the oil and gas lease here in question is a valid "contract for the sale of property" by virtue of the provisions of s. 9(1), the relevant parts of which read as follows:

> 9. (1) When any woman has executed a contract for the sale of property . . . or given her consent in writing to the execution thereof, and the consideration under the contract has been totally or partly performed by the purchaser, she shall, in the absence of fraud on the part of the purchaser, be deemed to have consented to the sale, in accordance with the provisions of this Act.

(1) [1943] 2 W.W.R. 612.

There is no suggestion of fraud on the part of Mr. Lamar and it is clear that he was a party authorized to take the acknowledgment.

The provisions of s. 9 would make valid "a contract for the sale of property" where the consideration, as here, has been partially performed and where the consent in writing by the wife has not been acknowledged separate and apart from her husband. Its provisions, therefore, constitute an exception to the requirements of s. 7, enacted for the protection of the wife, and ought not to be given a wider application than that which is clearly intended by the Legislature as expressed in the language there adopted.

It is the contention of the respondents that the phrase "a contract for the sale of property" ought not to be construed to include the oil and gas mining lease here in question. As ordinarily used and understood, the word "sale" in such a phrase would not include a lease. It is, however, pointed out that Lord Cairns in *Gowan* v. *Christie* (1), at 284, stated:

> . . . a mineral lease is really, when properly considered, a sale out and out of a portion of land.

Lord Cairns is here again stressing that it is not the name or words by which the parties describe their contract, but rather the substance thereof, as determined from a study of its provisions, that determines its true nature and character. The contract here in question, though styled a lease, gives to the appellant the exclusive right to search for oil and gas and, if found, then, by virtue of the renewal clauses, to take possession thereof until such time as the supply is exhausted. If the contract had provided but a right to search that would have created but a licence or privilege which would not have constituted an interest in land. The contract, however, goes further and gives the additional right to take the gas and oil as and when found, which, until it is removed, is a part of the soil and passes with the fee. This contract, therefore, gives to the appellant the right to take a part of the soil and is a *profit à prendre,* which, in itself, is an interest in land. 11 Hals., 2nd Ed., 387, para. 680; *McIntosh* v. *Leckie* (2); *Canadian Ry. Accident Co.* v. *Williams* (3).

(1) (1873) L.R. 2 Sc. & Div. 273 at 284.
(2) (1906) 13 O.L.R. 54.
(3) (1910) 21 O.L.R. 472.

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McCOLL-FRONTENAC OIL CO. LTD. v. HAMILTON

Estey J.

The agreement or contract for the sale of a homestead or other parcel of land is a well known instrument in Alberta. When, therefore, in the phrase "a contract for the sale of property" in s. 9(1) the Legislature used the general word "property," rather than "homestead" as in s. 3, it disclosed an intention that the provisions of s. 9(1) should apply in a manner other than to the homestead as a whole and has used language sufficiently comprehensive to include, not only a portion of its acreage, but also some interest in the land or soil constituting the homestead.

The respondents contend that when sub-secs. 9(1) and 9(2) are read together the words "a contract for the sale of property" in sub-sec. 9(1) must be construed to refer only to a contract to be followed by a transfer registerable under The Land Titles Act. Sub-sec. 9(2) reads as follows:

> 9. (2) When any subsequent disposition by way of transfer of the property is presented for registration under The Land Titles Act, the consent previously given, or the agreement executed, shall, if produced and filed with the Registrar be sufficient for the purposes of this Act.

Sub-section 9(2) is restricted in its application to transfers registerable under The Land Titles Act. A construction of the phrase "a contract for the sale of property," as used in sub-sec. 9(1), that would limit it to contracts which contemplate, when carried out, the delivery and registration of a transfer under The Land Titles Act, would be to add words that the Legislature has not seen fit to insert. It is the duty of the court to interpret rather than to legislate and, therefore, to give effect to the language adopted. *Blyth* v. *Lord Advocate* (1). The words "a contract for the sale of property" in sub-sec. 9(1) are sufficiently wide and comprehensive to include contracts for the sale of property generally and to include one such as here under consideration where it is not contemplated that a transfer under The Land Titles Act will be issued.

No particular words are required in order to create a *profit à prendre* and where, as here, the contract gives to the appellant the exclusive dominion and control and the right to take all the gas and oil, then, even if the word "grant" be not found in the contract, it will be so construed. 11 Hals., 2nd Ed., 388, para. 684, and cases already cited.

(1) [1945] A.C. 32 at 43.

It follows that the provisions of the oil and gas lease here in question constitute a sale of *profit à prendre,* or an interest in land, and, notwithstanding that her consent was not acknowledged by Mrs. Hamilton apart from her husband, is a valid "contract for the sale of property" by virtue of the provisions in sub-sec. 9(1).

The appeal should be allowed and judgment entered that the lease is a good, valid and subsisting "contract for the sale of property" and that caveat No. 7503, registered against the land on the sixteenth day of April, 1947, should be continued. The appellant should have its costs throughout.

Appeal allowed with costs.

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