ATTORNEY GENERAL OF SASKATCHEWAN (*Defendant*) ..... } APPELLANT;

1954

*Mar. 10, 11, 12
*Nov. 16

AND

WHITESHORE SALT AND CHEMICAL COMPANY LIMITED AND MID-WEST CHEMICALS LIMITED (*Plaintiffs*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law—Crown land—Mining leases of Saskatchewan lands issued by Dominion prior to transfer of natural resources—Leases replaced before expiration by provincial leases—Whether previous leases surrendered—Whether present leases subject to Natural Resources Agreement, 1930.

In 1930, the respondents were the holders of sixteen alkali mining leases issued by the Dominion prior to the passage of the National Resources Agreement, 1930, between the Province of Saskatchewan and the Dominion providing for the transfer of the natural resources from the Dominion to the Province. Section 2 of the Agreement provided that the Province agreed to carry out the obligations of the Dominion under contracts such as the ones held by the respondents and not to alter any of their terms except with the consent of all parties other than the Dominion. The lease in question provided for a 20-year term with the right of renewal.

In 1931, prior to their expiration, the leases were replaced by two licences granted for eighteen years by the Province, which included some four hundred acres of new land, and which, in turn, were replaced in 1937 by two leases each for a term of twenty years. Both the licences and the new leases provided for the right of renewal.

The trial judge and the Court of Appeal held that the new leases were subject to s. 2 of the Agreement and that, consequently, the Province could not change the royalty payable under the leases.

Held: (Estey and Locke JJ. dissenting), that the appeal should be allowed.

Per Kerwin C.J., Kellock and Fauteux JJ.: The doctrine of surrender, which is not limited to cases of landlord and tenant and which does not depend upon intention, applies in the case at bar. The new licences which were accepted in 1931 could not have been granted by the Province unless the original leases had been surrendered. There could be no renewal of the terms of the original leases prior to the expiration of the existing terms, and the instruments did not purport to be renewals.

As to the intention of the parties, it cannot be contended that the four hundred acres of new land ever became subject to the terms of the old Dominion regulations or to the Dominion-Provincial agreement,

*PRESENT: Kerwin C.J. and Kellock, Estey, Locke and Fauteux JJ.

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if for no other reason than that the provincial Minister, who granted the new licences, had no power under the Mineral Resources Act to do so.

Nothing done in 1937 in the surrender of the 1931 licences and the granting of new leases can assist the respondents. Accordingly, s. 2 of the Agreement ceased to be applicable to the respondents whose rights became subject to the provincial law.

Per Estey J.(dissenting): The new licences issued in 1931 were but consolidations and renewals of the original leases and remained subject to the provisions of the Agreement. The changes and additions in the licences appear to have been made under s 2 of the Agreement without any intention to surrender or cancel the leases in the sense that the parties would not be subject to the Agreement. If the licences leave that issue in doubt, an examination of the circumstances supports the conclusion that the parties intended to consolidate and to make alterations and additions.

There was no surrender by operation of law as there was no basis for an estoppel and as the parties had no other intention than to consolidate and renew the former leases.

The 1937 leases cannot be construed as expressing the intention that Regulations adopted afterwards varying or fixing a new royalty should become part of such leases. Consequently, there was no consent within the meaning of the Agreement.

Per Locke J. (dissenting): The correspondence leading to the 1931 licences showed clearly that both parties intended that the licences were granted in the exercise of the right of renewal and that only the rights of the lessee in respect of the unexpired term of the previous leases were surrendered together with the instruments. There appears to be no room for doubt that this was the intention of the parties. The case of *Lyon* v. *Reed* ((1884) 13 M. & W. 285) does not support the contention that where a lessee accepts a renewal of a lease before the expiration of the term, not only is the right to the unexpired portion of the term extinguished but also the benefit of all other collatoral covenants, even though, as in this case, the parties intended and stated their intention that such rights should be preserved.

For the same reasons, all that was surrendered in 1937 were the unexpired terms of the 1931 licences and possession of the instruments.

By signing the 1937 leases, the respondents did not waive their right to insist that the rates of rentals and royalties could not be changed during the currency of the leases.

APPEAL from the judgment of the Court for Saskatchewan (1), affirming the decision of the trial judge and declaring that certain provincial legislation was not applicable to the respondents' leases.

M. C. Shumiatcher, Q.C., R. S. Meldrum, Q.C. and *M. H. Newman* for the appellant.

G. H. Steer, Q.C. and *E. C. Leslie, Q.C.* for the respondents.

(1) [1952] 4 D.L.R. 51.

The judgment of Kerwin C.J. and Kellock and Fauteux JJ. was delivered by:—

KELLOCK J.:—This is an appeal from the Court of Appeal for Saskatchewan (1) dismissing an appeal from the judgment at trial in an action brought by the respondents for a declaration that certain provincial legislation is ultra vires, or, in the alternative, inapplicable with respect to certain alkali mining leases held by them. As there is no question as to any rights as between the respondents, I shall not differentiate between them.

The respondents became the holders of sixteen mining leases granted by the Dominion at various dates between 1926 and 1930 prior to the Natural Resources Agreement between the Dominion and the Province of Saskatchewan, which became effective on October 1, 1930. These leases were (to use a neutral expression) given up by the respondents in 1931 and replaced by certain licences granted by the province, which, in turn, were replaced in 1937 by other leases. The respondents contend, and that contention has been upheld in the courts below, that by virtue of s. 2 of the Resources Agreement, the legislation in question is ineffective in so far as the royalties payable by the respondents are concerned.

Section 2 of the Agreement, in so far as material, is as follows:

> The province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals any interest therein as against the Crown and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all parties thereto other than Canada . . .

The effect of this legislation was to bring about a statutory novation under which the province became substituted for the Dominion; Re *Timber Regulations* (Manitoba) (2).

It is the contention of the appellant that what occurred in 1931, and again in 1937, was a surrender of all rights of the respondents under the instruments then existing, and that accordingly, s. 2 above ceased to be applicable, the rights of the respondents becoming, in all respects, subject to provincial law. The respondents take the position, in the first place, that there could be in law no surrender

(1) [1952] 4 D.L.R. 51. (2) [1935] A.C. 184.

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either in 1931 or 1937 and that, in any event, there was no surrender, all that occurred being the arranging of new terms to which the provisions of s. 2 still applied.

With respect to the first ground, the respondents contend that the relation subsisting under the original leases was not that of landlord and tenant, and that the operation of the doctrine of surrender is confined to such a relationship.

With respect to the second, McNiven J.A., who delivered the judgment in the court below, was of opinion that the operation of a surrender was limited to the term granted and that in all other respects,

> the question as to whether or not there has been a surrender of rights (all or any) under the initial leases depends upon the intention of the parties in entering upon the new agreement.

He was further of the opinion that any surrender of the respondents' rights to be effective "should be clearly expressed and should not be left to implication of either fact or law." It was accordingly held that

> It was the intention of the parties in 1931 to negotiate a consolidation of the Dominion leases and that any rights which accrued to Whiteshore under section 2 of the Natural Resources Agreement were not surrendered. The present leases are merely renewals of the 1931 leases.

The doctrine of surrender is not limited to cases of landlord and tenant as contended for by the respondents. As stated by Parke B. in *Lyon* v. *Reed* (1):

> This term is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender.

Merely as an example, the learned Baron referred to the case of a lessee for years accepting a new lease from his lessor, in which case, as the lessor could not grant the new lease unless the prior one had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former.

The doctrine of surrender by operation of law, as Baron Parke points out, does not depend upon intention:

> The surrender is not the result of intention. It takes place independently, and even in spite of intention. Thus . . . it would not at all alter the case to shew that there was no intention to surrender the particular estate, or even that there was an express intention to keep 'it unsurrendered'.

(1) (1844) 13 M. & W. 285 at 306.

Where a lease is validly surrendered "the lease is gone, and the rent is also gone," to employ the language of Bramwell L.J., as he then was, in *Southwell* v. *Scotter* (1). This principle is not affected by the fact that the lessee remains liable for breaches of covenant committed prior to the surrender; *Richmond* v. *Savill* (2); including rent then accrued due. The landlord similarly remains liable; *Brown* v. *Blake* (3).

In *ex parte Glegg* (4), the lessees of a brickfield, with liberty to dig and carry away the earth and clay in consideration of certain rents and royalties, became bankrupt. The trustees, who disclaimed the lease, claimed the right to remove the buildings and machinery erected by the lessees, pursuant to a clause in the lease enabling the lessees so to do "at any time or times during the continuance of the said term, or within twelve months from the expiration or other sooner determination thereof, but not afterwards."

S. 23 of the Bankruptcy Act, 1869, which authorized the trustees to disclaim, provides that the lease should, upon disclaimer, "be deemed to have been surrendered" from the date of the adjudication in bankruptcy. It was held that the right to remove the buildings and machinery had perished with the lease. Jessel M.R., at p. 16, said:

> A surrender of the lease must be a surrender of the whole lease, not merely of the demise, but also of the license to remove the buildings and fixtures, and of every provision in it, whether beneficial to the tenant or onerous. The whole lease is gone.

See also the same learned judge in *Ex parte Dyke* (5).

In my opinion this principle applies in the case at bar. The new licenses which were accepted in 1931 could not have been granted by the province unless the original leases had been surrendered. There could be no "renewal" of the terms of the original leases prior to the expiration of the existing terms, and the instruments did not purport to be renewals. They were for a new term of eighteen years from October 1, 1930, which bore no relation to anything for which provision was made in the original instruments.

(1) (1880) 49 L.J., Q.B. 356 at 359.
(2) [1926] 2 K.B. 530.
(3) (1912) 47 L. Jo. 495.
(4) (1881) 19 Ch. D. 7.
(5) (1882) 22 Ch. D. 410 at 425-6.

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As to the intention of the parties, it is to be observed that the new licences, which were issued on the 28th of September, 1931, included some four hundred acres of *new* lands which had never been included in the old Dominion leases. It cannot be contended that this new acreage ever became subject to the terms of the old Dominion regulations or to the Dominion-Provincial Agreement of 1930, if for no other reason than that the Minister of Natural Resources of Saskatchewan, by whom the new licences were granted, had no power under the *Mineral Resources Act,* 1931, c. 16, to do so; *Rex* v. *Vancouver Lumber Company* (1). To maintain the contrary is to say that the Minister had authority to subject any provincial lands to an arrangement which even the Legislature itself could not subsequently affect. The utmost authority which the statute gives to the Minister, is the provision in s. 6 authorizing the grant *under the provincial Act* of mineral lands to applicants who, at the time of the coming into force of the statute, had complied with the Dominion regulations and had an application pending with the Dominion.

The licences of 1931 make no attempt to differentiate with respect to any of the lands included therein. It is therefore impossible to sever any part of the lands from any other part and to say that while the old Dominion regulations did not apply to the one they nevertheless applied to the other. Moreover, the only authority vested in the Minister to deal with mineral leases formerly granted by the Dominion under the *Dominion Lands Act* and regulations was by the Provincial Lands Act, 1931, c. 14, s. 67(1). But the licences of 1931 were not and did not purport to be granted under that Act but by virtue of the authority vested in the Minister by "The Mineral Resources Act", which statute deals exclusively with mineral resources subject, in the hands of the province, to no outstanding interest created by the Dominion.

This being so, nothing done in 1937 in the surrender of the 1931 licences and the granting of new leases can assist the respondents.

When, therefore, in 1947, s. 27 of the *Mineral Resources Act* was amended by c. 21, s. 4, providing that notwithstanding anything contained in the amending Act or any other

(1) [1920] 1 W.W.R. 255.

Act or in any regulations, or in any lease or licence, whether granted by the Dominion or by the province, such lease or licence should be deemed to contain a covenant by the lessee or licensee that he should pay to the province such royalties as might from time to time be required by the regulations, this legislation was effective with respect to the leases held by the respondents.

I would therefore allow the appeal and dismiss the action with costs throughout.

ESTEY J. (dissenting):—The administration of the Crown's interests in the natural resources within Saskatchewan was transferred from the Government of Canada to the Government of that Province under the terms of the Natural Resources Agreement of March 20, 1930 (hereinafter referred to as the Natural Resources Agreement). This was ratified by the Legislature of Saskatchewan (S. of S. 1930, c. 87), by the Parliament of Canada (S. of C. 1930, c. 41) and by the Parliament of Great Britain (1930, 20-21 Geo. V. c. 26, Gr. Br.). By a subsequent agreement of August 7, 1930, this transfer became effective as of October 1, 1930 (S. of S. 1931, c. 85; S. of C. 1931, c. 51).

Upon the latter date (October 1, 1930) the respondent Whiteshore Salt and Chemical Company Limited (hereinafter referred to as the respondent) was lessee under sixteen alkali leases covering approximately 3130 acres granted by His Majesty, as represented by the Minister of the Interior of Canada, under the Alkali Mining Regulations established by Order-in-Council P.C. 1297 of April 20, 1921, and amended November 20, 1923, and January 5, 1926. These leases (hereinafter referred to as original leases) were not all made at the same time and under the provisions thereof would have expired at different dates in the years 1946 to 1950 inclusive.

After the resources were transferred, and under date of September 28, 1931, the sixteen leases, prior to the expiration of any of them, were replaced by two licenses granted by the Minister of Natural Resources of the Province of Saskatchewan to the respondent. These were numbered A1372 and A1373 and were each for a period of eighteen years from October 1, 1930. Then, before the date of their

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expiration, these latter licences were replaced, on April 16, 1937, by two leases each for a term of twenty years to be computed from the first day of October, 1936.

The Attorney General, as appellant, contends that the alkali mining leases A1372 and A1373 effected a surrender, by operation of law, of the original sixteen leases, or, in any event, by these two licences the parties disclosed an intention to and did effect a surrender or termination of the original sixteen leases, and that thereafter the two licences were now agreements between the parties hereto, unaffected by the provisions of the agreement under which the Province took over the administration of the natural resources and, therefore, subject only to provincial legislation.

The respondent contends that these new licences were but consolidations or renewals of the original sixteen leases and, therefore, remain subject to the provisions of the Natural Resources Agreement and that it was, therefore, beyond the competence of the Province, by legislation, to increase the fees and royalties provided for in the original sixteen leases.

The Natural Resources Agreement placed the Province of Saskatchewan "in the same position as the original Provinces of Confederation are in virtue of Section one hundred and nine of the British North America Act, 1867" with respect to "the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province . . . subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same . . ." In reality this agreement placed the administration of the interests of the Crown in the natural resources within the Province under the provincial government. The relevant portions of the agreement are paras. 2 and 3, which read as follows:

2. The Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all parties thereto other than Canada or in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province or to interests therein, irrespective of who may be the parties thereto.

3. Any power or right, which, by any such contract, lease or other arrangement, or by any Act of the Parliament of Canada relating to any of the lands, mines, minerals or royalties hereby transferred or by any regulation made under any such Act, is reserved to the Governor in Council or to the Minister of the Interior or any other officer of the Government of Canada, may be exercised by such officer of the Government of the Province as may be specified by the Legislature thereof from time to time, and until otherwise directed, may be exercised by the Provincial Secretary of the Province.

The sixteen leases granted by the Government of Canada to the respondent are described as "alkali leases" and provide in part:

His Majesty doth grant and demise unto the lessee, the full and free and sole, the exclusive license and authority to win and work all the alkali deposits and accumulations of alkali as defined in the said regulations on or in the said lands, that is to say,

The provincial licenses Nos. A1372 and A1373 dated September 28, 1931, are each entitled "alkali mining license" and provide in part:

. . . in consideration of the fees and royalties hereinafter reserved, grant unto . . . (Whiteshore) hereinafter called the licensee . . . full right, power and the sole, the exclusive license, subject to the conditions hereinafter mentioned and contained in the Mineral Resources Act and Regulations thereunder, and the amendments thereto, to win and work all the deposits and accumulations of Alkali on or in the following lands, that is to say:

In both the leases and the licenses the foregoing provisions are followed by a paragraph reading:

Together with full and exclusive license and authority for lessee and his agents, servants and workmen to search for, dig, work, mine, procure and carry away the said alkali wherever the same may be found in or on the said lands, and to construct and place such buildings and erections, machinery and appliances on the said lands as shall from time to time be necessary and proper for the efficient working of the said mines and accumulations of alkali and for winning, removing and making fit for sale the alkali on and in the said lands.

Under the original leases the lessee paid an annual rent and under the licenses an annual fee of 25 cents per acre and a royalty of 25 cents per ton of alkali taken from the leased lands with, in each case, a proviso not material hereto. The respondent has extracted quantities of alkali and performed all the covenants on its part under all of the leases and licenses, although since the increase in royalties by Order-in-Council 1303 dated August 20, 1947, and varied by Order-in-Council 1060 dated August 28, 1949, the payments of royalties have been made under protest.

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The general purpose of the leases and licenses was the same throughout. The terms of the original leases had not expired and, in fact, would have continued to various dates between 1946 and 1950 inclusive. The licenses were each for a period of eighteen years from October 1, 1930. Certain of the provisions were identical in language with those of the leases, while others, though expressed in different words, remained essentially to the same effect. The rent or fee and royalties were unchanged. The acreage of 3130 was varied by deleting 100 acres included under the original leases and adding 400 acres, making a total of 3430 acres under the licenses. The right of the lessee to recover the alkali in solution was not continued under the licenses. The lessor was given, under the licenses, the right to distrain for the arrears of fees and royalties and the lessee the right to remove his equipment within a period of six months from the termination of the leases.

The licenses differ in that they were granted by the Province and made subject to the provincial Mineral Resources Act and the Regulations thereunder, whereas the original leases were granted, as already stated, through the Minister of the Interior of Canada and under the Regulations of 1910 and 1911. After the Natural Resources Agreement a lessee such as the respondent could look only to the Province for the performance of obligations assumed on behalf of the Crown. Lord Asquith of Bishopstone, referring to that agreement and its statutory confirmation, stated: "These provisions have been described as constituting a 'statutory novation,' the province stepping into the shoes of the Dominion, and succeeding to its rights." *Huggard Assets Ltd.* v. *The Attorney-General of Alberta et al* (1); *Refund of Dues under Timber Regulations* (2).

Throughout the licenses no reference is made to the Natural Resources Agreement, confirmed as it was by the legislative bodies already mentioned. In the consolidation here effected, if the parties had intended that they would no longer be subject to the provisions of that agreement, it must be presumed that they would have expressed such an intention in the consolidated agreements.

(1) [1953] 8 W.W.R. (N.S.) 561 at 563.
(2) [1935] A.C. 184 at 198.

There are, throughout the licenses, no words of surrender, cancellation or consolidation. Therefore, when these changes and additions are considered in relation to the power given to the parties under para. 2 of the Natural Resources Agreement to effect alterations in the original leases, the changes and additions included in the licenses would appear to be made under that provision without any intention to surrender or cancel the original leases in the sense that the parties carrying on under the licenses would not be subject to the provisions of the Natural Resources Agreement. If, however, it be suggested that the agreements leave the issue so much in doubt that regard should be had to the circumstances under which the parties executed the leases, an examination of these circumstances, in my view, definitely supports the foregoing conclusion that the parties intended to consolidate the leases and to make alterations and additions thereto. The initial suggestion was made on June 20, 1931, by the respondent's solicitor's letter to the Department of Natural Resources, reading, in part, as follows:

> Under the circumstances it would be a great deal more convenient if the leases were consolidated, and one lease was issued for the full area. It would simplify payment of rent by the company, and simply the work in your office. I would suggest that a new lease be prepared of all of the area covered by the above leases, the new lease to be for a term of twenty (20) years from any date that would appear to be fair, the company to surrender all the leases now held by it.

The reply on behalf of the Department acknowledges the request for consolidation, accepts the fact that the sixteen leases would be cancelled and suggests two leases instead of one. The respondent then returns the sixteen leases "to be cancelled" and presumes "that the new leases will be in the same form or a similar form to the leases being cancelled." The words "surrender," as here used by the respondent, and "cancellation," as used by both the parties. when construed, as it seems they must be, in relation to the word "consolidation," mean no more than that the documents would be cancelled and their places taken by those embodying similar terms to be now styled licenses.

Then follows correspondence dealing, inter alia, with the term of eighteen years and the deletion and addition of acreage. Eventually the licenses were forwarded to the respondent for execution and were returned, duly executed,

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to the Department, under date of October 15, 1931. The solicitor for the respondent had, in the earlier correspondence, requested that it be recited in the licenses that the work required by the lessee under para. 12 of the original leases had been complied with. He now, however, requests that this certificate refer to Clause 1(i) of the licenses, rather than to para. 12 of the original leases. This supports the view that the parties were but consolidating the leases and it was, therefore, appropriate to refer to the clauses as included in the new licenses.

It may also be added that the witnesses on behalf of both parties made it clear that in the execution of the licenses they were but effecting a consolidation, with only such alterations and additions as were agreed upon.

The respective Governments, when adopting the language of the Natural Resources Agreement, had in mind all types of then current agreements with the Government of Canada in relation to the natural resources, and in particular the many leases that were for periods varying from one to many years. What is perhaps of even greater importance is that, because of the nature of the work and expenditures made by a lessee in developing a natural resource, it was usual to include in the leases a clause for successive renewals thereof. In these circumstances it ought not to be concluded that para. 2 of the Natural Resources Agreement would not apply to successive renewals.

Moreover, from time to time an enterprise, in the course of developing a natural resource, may find changes desirable or even necessary. No doubt for this reason there was included in para. 2 a provision that the parties might agree in a manner that would "affect or alter" the terms of any agreement. Certainly one of the likely possibilities would be that the lessee, finding an acreage of little or no use while another nearby acreage was desirable, would endeavour to acquire the latter. This was precisely the position which confronted the parties and they, in the licenses, have made the necessary adjustment in acreage.

The nature and character of respondent's business are equally important when construing the intent and purpose of the parties in effecting the consolidations and renewals of September 28, 1931.

The 400 additional acres in the licenses of September 28, 1931, were part of the lands transferred to the Province as of October 1, 1930, under the Natural Resources Agreement. In anticipation of this transfer, the Provincial Legislature enacted *The Administration of Natural Resources (Temporary) Act,* 1930, (S. of S. 1930, c. 12), effective as of April 10, 1930.

The following year the Provincial Legislature enacted both *The Provincial Lands Act,* 1931 (R.S.S. 1931, c. 16), and *The Mineral Resources Act,* 1931 (R.S.S. 1931, c. 14), effective as of March 11, 1931. Both of these statutes were in relation to the natural resources and enacted consequent upon the Province assuming the responsibility for the administration thereof on and after October 1, 1930. The licenses were made under the authority of the latter statute. It would appear that, by virtue of the Natural Resources Agreement and these statutes, the power of the Province was sufficiently wide and comprehensive to permit of it placing the additional 400 acres under the licenses upon the same terms as the lands originally and now remaining thereunder. Whether the Province could, upon the expiration of these licenses, have insisted that the 400 acres be no longer included need not here be considered.

With great respect to those who hold a contrary opinion, the parties hereto set out to consolidate and renew the original leases. In the course of their negotiations they agreed upon certain changes which were no more than that contemplated by para. 2 of the Natural Resources Agreement. In fact, and again with great respect, it would seem that, throughout, the parties consistently intended no more than to consolidate and renew these original leases, which they accomplished by the execution of the two licenses of September 28, 1931, and, as already intimated, these licenses remained subject to the provisions of para. 2 of the Natural Resources Agreement.

That consolidations and renewals do remain subject to para. 2 of the Natural Resources Agreement would appear to have been the decision of this Court in *Anthony* v. *The Attorney-General for Alberta* (1). That is a decision after the transfer of the natural resources to the Province of

(1) [1943] S.C.R. 320.

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Alberta under an agreement in all material respects to the same effect as that with Saskatchewan. At p. 330 it is pointed out that

> The appellants after the transfer each year for nine successive years applied for, received and accepted licenses from the Provincial Government and thus formally and definitely accepted its jurisdiction and agreed to abide by its regulations and paid the fees imposed by the Provincial Government.

Mr. Justice Hudson, writing the judgment of the Court, stated at p. 331:

> I do not think that the plaintiffs' acceptance of the licenses can be taken as a consent to any alteration in the agreement which would vest in the province a right to destroy or nullify indirectly the contract which he had with the Dominion Government.

The appellant, however, contends that by the execution of the licenses of September 28, 1931, being A1372 and A1373, irrespective of whether the parties intended to consolidate and renew, the original leases were surrendered by operation of law. This contention is largely based upon certain statements of Baron Parke in *Lyon* v. *Reed* (1):

> It takes place independently, and even in spite of intention . . . it would not at all alter the case to show that there was no intention to surrender the particular estate, or even that there was an express intention to keep it unsurrendered.

This language must be read and construed in relation to its context, the material portion of which reads:

> . . . what is meant by a surrender by operation of law. This term is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. . . . an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says, that the act itself amounts to a surrender. In such case it will be observed there can be no question of intention. The surrender is not the result of intention. It takes place independently, and even in spite of intention.

The respondent does not contest the validity of any act such as the execution of the licenses of September 28, 1931. The original leases have, in the respondent's view, been consolidated and renewed. This the appellant does not dispute either in pleading or proof. In its defence it is alleged that these original leases were surrendered with the "concurrence

(1) (1844) 13 M. & W. 284 at 305.

and consent" of the respondent and that consequent upon the surrender and termination of the original leases the licenses of September 28, 1931, were issued granting "new and modified rights" to the respondent. The evidence does not suggest that the respondent, by act, word, or other conduct, has either misled or caused the appellant to suffer any prejudice. There can, therefore, be no basis for an estoppel and as, in the circumstances of this case, that is the only basis suggested for a surrender by operation of law, it cannot be concluded that such a surrender has been effected.

Moreover, the rule of surrender by operation of law was not developed to effect ends in opposition to the intention of the parties, but rather to defeat contentions contrary to their presumed intention. No authority has been cited where it has been applied in a case such as this where the essential problem is to determine whether the parties, by the licenses of September 28, 1931, entered into entirely new agreements. If the latter is the true construction of what the parties effected, the licenses are not subject to the Natural Resources Agreement. No express provision to that effect is contained in the licenses and such must, therefore, be determined from the language adopted as construed in relation to the circumstances in which they were prepared. When regard is had to the nature and character of an undertaking with respect to natural resources, the importance of the renewal provisions, the manner in which the negotiations were initiated, the similarity of the provisions in the licenses with those of the leases and the provisions of the Natural Resources Agreement which contemplated alterations, it would appear, with great respect to those who hold a contrary opinion, that the parties had no other intention than to consolidate and renew the former leases.

The position is here, in principle, the same as in the *Anthony* case, *supra*. There they were renewing under renewal clauses, while here they were consolidating and renewing the leases, with such changes as were within the contemplation of para. 2.

In *Mathewson* v. *Burns* (1), the lessee for a term expiring April 30, 1913, in March of that year accepted and

(1) (1914) 50 Can. S.C.R. 115.

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signed a new lease for a year from May 1, 1913. The former contained an option to purchase at any time before the expiration of the lease, but this provision was omitted in the second lease. Before the expiration of the old lease the lessee accepted the option. It was contended that the acceptance of this new lease was an acknowledgment of an absolute title in the lessor and that the new lease for a year without the option was inconsistent with her right to accept the option and thereby defeat the second lease. It was held by a majority of this Court that her acceptance of the option was valid, notwithstanding her acceptance of the new lease. Sir Charles Fitzpatrick C.J. at p. 117 stated:

> There is no evidence that in consideration of the new lease she agreed to abandon her option, and taking a new lease in anticipation of a possible failure to exercise an option to purchase is not conduct evidencing an intention to abandon the right to the option when, as in this case, the lease was to begin to run only at the expiration of the option period.

Mr. Justice Idington and Mr. Justice Duff (later C.J.) adopted the reasons of Chancellor Boyd who stated:

> There is no evidence of any waiver by the plaintiff of the option to purchase. The taking of a new lease to begin at the termination of the other was merely a provident act in case she did not think fit to purchase. Had she elected to purchase during the former lease, that would ipso facto have determined the relation of landlord and tenant, and a new relation of vendor and purchaser would have arisen. None other follows in regard to the second lease; it did not become operative, on the plaintiff electing to purchase at the end of the first term. (1).

These authorities would appear to support the view that when there has been no estoppel that which has been effected by the parties must be determined by the ascertainment of their intention as expressed in their agreement.

That the two leases of April 16, 1937, were renewals of the two licenses of September 28, 1931, and were so accepted by both parties does not appear to admit of any doubt. The initial request for the renewal in 1937 came from the respondent and for a reason that so often happens in the development of natural resources—that the company was now prepared to invest a large sum of money in plant and equipment and desired to know its position over a longer period of years than the term of the existing leases. It was for that reason, under date of February 22, 1937, the respondent applied to the Department for a "renewal of

(1) 30 O.L.R. 186 at 190.

Alkali Mining Licenses Nos. A1372 and A1373" and in support thereof set out "that these leases have been running since 1926" and that the respondents "have not had any revenue from the leases" but were now prepared "to build a plant at a cost of about $200,000.00 and enter into a contract for the supply of sodium sulphate under a contract extending over a term of years." As a result of this request renewal leases (the Province now adopting the word "lease" instead of "license") were prepared and signed by the parties for a term of twenty years from the first day of October, 1936. These 1937 leases were forwarded to the respondent under date of April 16, 1937, together with "a copy of the Regulations under which these renewals were issued."

The Regulations here referred to are those passed by Provincial Order-in-Council 198 dated February 18, 1936, and are the first Regulations passed by the Province under The Mineral Resources Act, 1931.

These Regulations reduced the royalties and under the leases of April 16, 1937, the respondent was given the advantage thereof. This Court, in the *Anthony* case, *supra,* decided that the Province may, within certain limits, by regulation, change the royalties effective in respect to renewals made after the adoption of such regulations. Their Lordships of the Judicial Committee, in *Attorney-General for Alberta* v. *West Canadian Colleries Ltd.* (1), pointed out that under the legislation ratifying the Natural Resources Agreement "the terms of pre-1930 Dominion leases and grants shall be scrupulously honoured by the Province," but, in declaring s. 8 of the Alberta legislation (S. of A. 1948, c. 36) ultra vires because it constituted "a naked assertion that the terms of such instruments can be wholly disregarded," did not overrule the decision in the *Anthony* case.

The contention of the appellant that because the 1936 Regulations, as did the Dominion Regulations adopted by the Province which they superseded, provided that "The term of the lease shall be twenty years, renewable for a further term of twenty years . . . " the Province could not effect the renewals of 1937, suggests an interpretation that restricts the power of the Province in a manner that would

(1) [1953] A.C. 453.

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not be expected and the language used is capable of a more liberal construction. *Rex* v. *Vancouver Lumber Company* (1), cited by the appellant in support of the foregoing, is quite distinguishable in that there, before the alterations agreed upon were binding, an Order-in-Council was required which was not produced and the evidence did not establish it had ever existed.

The leases of 1937, being but renewals of the licenses of 1931, and but for the provisions relative to royalties were to the same effect, continued subject to the terms of the Natural Resources Agreement.

In 1947 the *Mineral Resources Act* (R.S.S. 1940, c. 40) was amended (S. of S. 1947, c. 21) under s. 4 of which s. 27 of the 1940 statute was repealed and the following, so far as relevant, enacted in lieu thereof:

> 27(1) Notwithstanding anything contained in this or any other Act or in any regulations under this or any other Act or in any lease or license whereby the Crown whether in the right of Canada or Saskatchewan has granted any mining right to any person, every such lease or license whether it was made or issued before, on or after the first day of October, 1930, shall be deemed to contain a covenant by the lessee or licensee that he will pay to the Crown in the right of Saskatchewan at the times and in the manner required by the regulations such royalties as may from time to time be required by the regulations to be paid by persons to whom mineral rights of the kind mentioned in the lease or license are granted.
>
> .....
>
> (3) If and in so far as any of the provisions of this section are at variance with any of the provisions of the agreement between the Government of Canada and the Government of Saskatchewan, set forth in the schedule to chapter 87 of the statutes of 1930, as amended, the provisions of the said agreement, as amended, govern, but this section shall nevertheless stand and be valid and operative in all other respects.

This amendment was assented to on April 1, 1947, and on August 20 of that year, by Order-in-Council 1303, s. 18 of the 1936 Regulations was cancelled and a new s. 18 passed, providing for a royalty to vary with the market value of the products subject to such royalties. This Order-in-Council 1303 was, on May 28, 1949, cancelled and a further new s. 18 passed by Order-in-Council 1060, which continued the principle that the royalty should vary with the market value of the products subject thereto.

The effect of these two Orders-in-Council (1303 and 1060) was to substantially increase the royalties and thereafter the respondent made payment thereof under protest

(1) [1920] 1 W.W.R. 255.

and expressly asks in this litigation that s. 4 of C. 21 of the Statutes of 1947 be declared either ultra vires of the Province or inapplicable to respondent's leases and that Orders-in-Council numbered 1303 and 1060 be also declared ultra vires or inapplicable to the respondent's leases and licenses. On the basis that the 1937 leases are renewals and subject to the Natural Resources Agreement, counsel for the appellant contends that the parties in these leases consented, within the meaning of para. 2 of the Natural Resources Agreement, to provisions under which the Minister of Natural Resources might, in his discretion, change the royalties.

Each of the 1937 leases provides that it is "subject to the conditions hereinafter mentioned and contained in the Mineral Resources Act and regulations thereunder, and the amendments thereto . . . " The words "the amendments thereto" in that collocation would ordinarily mean the amendments already made. In this instance neither the *Mineral Resources Act* nor the Regulations had been, at that time, amended. However, that in itself would not justify a construction of these words which would include amendments made after the date of the leases. That the parties did not intend these words should include future amendments to the Regulations is supported by the omision of these, or words to the same effect, in para. 1(c) of the lease, which provides: "this lease is granted upon and subject to the additional provisos, conditions, restrictions and stipulations, that is to say, that the lessee will: . . . (c) observe and perform all obligations and conditions in the said The Mineral Resources Act or Regulations, imposed upon such lessee." It is also pointed out that each of these leases contains provisions for renewals thereof and provides that this right of renewal is subject to the lessee complying "fully with the conditions of such lease and with the provisions of the said Mineral Resources Act and regulations and such amendments thereto as shall have been made from time to time . . ." A similar provision was construed in *Spooner Oils Limited and Spooner* v. *The Turner Valley Gas Conservation Board and The Attorney General of Alberta* (1). In that case Sir Lyman Duff, after pointing

(1) [1933] S.C.R. 629.

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out that the view the appellant here suggests would permit one party, without consultation with the other, to alter and, indeed, to substitute new terms for those "explicitly set forth in the document executed by the parties," goes on to point out that, as the provision is restricted to the renewal clause, the extraordinary result is arrived at that, while in the body of the lease the lessee is not bound by regulations adopted after the date of the lease, it would be when it came to the question of a renewal, which would be a situation the parties could not have intended to create. Then at p. 641 Sir Lyman Duff continues:

> But to us it seems clear that, if it had been intended to incorporate, as one of the terms of the lease a stipulation that all future regulations touching the working of the property should become part of the lease as contractual stipulations, that intention would have been expressed, not inferentially, but in plain language.

The foregoing are the clauses in the lease upon which the appellant based its contention. It follows, therefore, that the parties have not, in the language of the lease, expressed an intention that Regulations adopted after its date varying or fixing a new royalty should become part of the lease.

The foregoing is sufficient to dispose of the appellant's contention that by the provisions of the 1937 lease the parties had consented that the Minister of Natural Resources might, in his discretion, change or alter the royalties as fixed in the lease. However, the view here expressed finds further support by reference to the provisions of para. 18 of the Regulations which the appellant relied upon as giving the Minister of Natural Resources authority to alter or change the royalty. In para. 18 the royalty is fixed at 12½ cents per ton. Notwithstanding that fact, this provision is expressly embodied in the lease. Para. 18 also provides that "the royalty shall be payable quarterly from the date on which operations commence . . ." Upon this point instead of repeating words to the same effect in the lease it is therein provided that the "royalty shall be payable in the manner in the said regulations provided . . ." Para. 18 further provides: "The lessee shall furnish the department with sworn returns quarterly . . ." This provision is expressly set out in para. 1(*b*) of the lease. Indeed, the only portion of para. 18 which is not either

embodied in the lease or specifically referred to and adopted therein is the concluding sentence thereof reading: "The royalty shall be subject to change in the discretion of the minister." When regard is had to how the other provisions of para. 18 were incorporated in the lease, the omission of any reference to this last sentence leads only to the conclusion that the parties did not intend that it should be a term of the lease.

If the parties had intended that any such provision should apply to the lease it would surely have been expressed in clear terms. In my view the language of Mr. Justice Hudson, speaking on behalf of the Court, is appropriate:

> The real question in the appeal is whether or not the provisions of the patent were such as to reserve to the Crown a right to impose new royalties in the future. I think that if the Crown, like any other vendor, wishes to reserve such rights, such reservations must be expressly stated.
>
> Parliament and the Legislature within its jurisdiction, of course, have power to impose new taxes, but the imposition of a royalty on lands or goods of a subject by Executive order could be justified only by the clearest and most definite authority from the competent legislative body.

Attorney-General for Alberta v. *Majestic Mines Ltd.* (1).

In view of the foregoing it is unnecessary to consider what, if any, is the effect of the fact that the provision permitting the Minister, in his discretion, to change the royalties was not carried forward in the new para. 18, as passed by Order-in-Council 1303 or 1060, in both of which the royalty is fixed as therein set out.

When full effect is given to the provisions of the 1937 leases, the appellant's contention that the parties therein agreed that the Minister might, in his discretion, change the royalties cannot be maintained.

Para. 3 of s. 4 in the 1947 legislation would appear to protect a party in the position of the lessee. However, upon the basis that the leases of 1937 were not subject to the terms of the Natural Resources Agreement, the Department sought to collect from the respondent the increased royalties fixed under Orders-in-Council 1303 and 1060, which justifies the respondent's request that s. 4 be declared inapplicable to its leases.

(1) [1942] S.C.R. 402 at 405.

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The judgment of the Court of Appeal, affirming the judgment of the learned trial judge, declaring "that Section 4 of the Statutes of Saskatchewan 1947, Chapter 21, the Order-in-Council of the Lieutenant-Governor of Saskatchewan in Council No. 1303 of 1947, and the Order-in-Council of the Lieutenant-Governor of Saskatchewan in Council No. 1060 of 1949, are inapplicable to the Leases and Licenses issued to the Plaintiffs or either of them," should be affirmed.

The appeal should be dismissed with costs.

LOCKE J. (dissenting):—By the terms of what were described as alkali leases granted by the Crown in the right of Canada to the Whiteshore Company and to various lessees whose interests were by assignment vested in that Company, the full and free and sole licence and authority to win and work all the alkali deposits, as defined in regulations made theretofore by the Governor General in Council, were granted and demised unto the respective lessees, together with a full and exclusive licence to mine and carry away the said alkali and to construct such buildings and appurtenances on the land as should be necessary and proper for the efficient working of the mines and accumulations of alkali and removing the same. The term of each of the said leases was twenty years from its date:—

> renewable for a further term of twenty years, provided the lessee will furnish evidence satisfactory to the Minister to show that he has complied fully with the conditions of such lease and with the provisions of the said regulations and such regulations in amendment thereof as shall have been made from time to time by the Governor in Council and subject to renewal for additional periods of twenty years on such terms and conditions as may be prescribed by the Governor in Council.

The rental reserved was 25 cents per acre and a royalty at the rate of 25 cents per ton on all products, raw or refined, taken from the property leased, subject to a reduction under certain defined circumstances and if the product was shipped in solution a royalty of 2 cents per gallon in lieu of the aforementioned rate per ton. A term of the leases required the lessees to observe and abide by all the provisions of the regulations referred to.

The Alkali Mining Regulations were established by Orders-in-Council made under the provisions of the *Dominion Lands Act* in the years 1921, 1923 and 1926 and

applied, inter alia, to all Dominion lands in the Province of Saskatchewan. These provided for the privilege of renewal and successive renewals for additional periods of twenty years in the manner stated in the leases. The maximum area of an alkali mining location was declared to be 1920 acres and the regulations provided generally for the manner in which such locations might be made and applied for and the rental and royalty were fixed in the amounts stipulated for in the leases. Regulation 16 provided that the Minister might permit a lessee who had acquired by application, assignment or otherwise more than one lease comprising adjoining locations and containing a total area of 9 square miles or less, to consolidate his operations and expenditure on one or more of the locations described in the leases affected. Regulation 17 required the lessee to expend in actual development or improvements upon the leased property, or, with the consent of the Minister of the period, in experimental work for the benefit thereof, the sum of $10,000 for each lease or group of leases, not less than $2,500 of this amount to be expended in each of the first two years and $5,000 during the third year.

The Whiteshore Company had either leased or acquired the interest of the various other lessees in all of these properties prior to March 20, 1930, when the agreement for the transfer of the Natural Resources was entered into between the Government of the Dominion of Canada and the Government of the Province of Saskatchewan.

The terms of the agreement which provided, inter alia, that Canada shall not be liable to account to the Province for any payment made in respect of any lands, mines, minerals or royalties before it came into force, read in part as follows:—

> And whereas the Government of the Province contends that, before the Province was constituted and entered into Confederation as aforesaid, the Parliament of Canada was not competent to enact that the natural resources within the area now included within the boundaries of the Province should vest in the Crown and be administered by the Government of Canada for the purposes of Canada and was not entitled to administer the said natural resources otherwise than for the benefit of the residents within the said area, and moreover that the Province is entitled to be and should be placed in a position of equality with the other Provinces of Confederation with respect to its natural resources as from the fifteenth day of July, 1870, when Rupert's Land and the North-Western Territory were admitted into and became part of the Dominion of Canada:

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And whereas it has been agreed between Canada and the said Province that the said section of the Saskatchewan Act should be modified and that provision should be made for the determination of the respective rights and obligations of Canada and the Provinces as herein set out.

The agreement was ratified by the Dominion and the Province and by the British North America Act 1930 (c. 26, 20-21 Geo. V) was confirmed by the Parliament of Great Britain and declared to have the force of law, notwithstanding anything in the *British North America Act 1867* or any Act amending the same or any Act of Parliament of Canada, or in any Order-in-Council or conditions of Union made or approved under any such Act.

The effect of the legislation was to substitute the Crown in the right of the Province for the Crown in the right of Canada as the lessor under the leases in question, as of the date the legislation became effective.

As it is the contention of the appellant that whatever rights the Whiteshore Company had under the Dominion leases, which were preserved to it by the agreement and the legislation in question, were either surrendered by operation of law or waived by its conduct at the time that new licences or leases were entered into in respect of the property in question between the Province and that company, it is necessary to consider closely the nature of those rights. By paragraph 2 of the agreement, the Province agreed to carry out the obligations of the Crown under contracts of this nature and not to alter any term of any such arrangement, except with the consent of all the parties thereto other than the Dominion or, in so far as any legislation might apply generally to all similar agreements relating to minerals. The respondent was, therefore, entitled to renewals of these leases for further terms of years upon the conditions defined, upon furnishing evidence that the conditions of the lease and the applicable regulations had been complied with. Since these mineral properties would thereafter be subject to the general jurisdiction of the Province, paragraph 3 provided that the power to make regulations relating to them reserved to the Governor in Council or the Minister of the Interior or other officer of the Government of Canada, might be exercised by such officer as might be specified by the Legislature from time to time.

The leases in question had been granted on various dates and accordingly the respective terms would end at different times. The regulations required the lessee under each of the leases to expend a sum of $10,000 for development work or improvements or experimental work within a period of three years from its date and the privilege of consolidation given by Regulation 16 was accordingly a valuable concession to a lessee such as the respondent.

It was apparently for these reasons that the negotiations were opened by the solicitor for the company, Mr. Alder Brehaut, Q.C. with the Department of Natural Resources of the Province in the year 1931 which, the Province claims, resulted in a surrender of all of the rights of the respondent under the Dominion leases and the legislation. At the outset, Mr. Brehaut wrote to the Department on June 20, 1931, referring to sixteen of the existing leases from the Dominion, saying that the Whiteshore Company had arranged to give to a company then in process of formation operating rights under the leases, with an option to purchase the rights of the lessee, and further that:—

> Under the circumstances it would be a great deal more convenient if the leases were consolidated, and one lease was issued for the full area. It would simplify payment of rent by the company, and simplify the work in your office. I would suggest that a new lease be prepared of all of the area covered by the above leases, the new lease to be for a term of twenty (20) years from any date that would appear to be fair, the company to surrender all the leases now held by it.
>
> The application is made to simplify bookkeeping matters for the company, and for your department. It does not make any particular difference whether this application is granted or not, except for the convenice of all parties.

The correspondence then ensued which is set out at length in the judgments of the learned trial Judge and of Mr. Justice McNiven, who delivered the unanimous judgment of the Court of Appeal, and it is unnecessary to repeat it. I respectfully agree with the conclusion of the learned judges who have considered this matter that this correspondence carried on in the year 1931 showed clearly that both parties intended that the instruments referred to as licences which the Province granted to the Whiteshore Company, in which the properties described in the sixteen leases were consolidated, were granted in exercise of the right of renewal to which the Whiteshore Company would have become entitled at the time the respective terms expired under its leases

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from the Dominion, paragraph 2 of the agreement and the legislation and that, while the word "surrender" was used in some of the letters written by Mr. Brehaut and by the Supervisor of Mines and the latter informed the solicitor that the former leases had been "cancelled" in the records of the Department, all that was meant by this was that, in consideration of the renewal of the leases granted, any rights of the lessee in respect of the unexpired term of the various leases from the Dominion were surrendered together with the written instruments granted by the Dominion.

That this was the understanding of the Supervisor is, in my opinion, made perfectly clear by the letters written by him before the new licences were delivered. Thus, on June 30, 1931, he advised the solicitor that the Department was agreeable to permit the consolidation of the claims and that when the present leases were returned for cancellation new leases would be prepared and forwarded for the term of eighteen years. Mr. Brehaut asked that in the new leases there be an acknowledgment that the Whiteshore Company had complied with the requirements of the Dominion leases as to expenditures for development work and this was subsequently done. When the Dominion leases had been received by the Department, the Supervisor wrote to say that they had been "cancelled in the records of this office" and that:

> a new lease is being issued for the rights comprised therein.

Thereafter, on July 17, 1931, he wrote explaining why the new licences were to be for eighteen years rather than the twenty year period of renewal provided for in the Dominion leases, the reasons assigned being that since the old leases expired at various dates the eighteen years was considered a fair compromise. The licences when granted, however, while, expressed to be for the term of eighteen years provided, as in the case of the Dominion leases, for renewals for the term of twenty years. It is further the case that there was no mention made of the question of further renewals of the licences or leases to be granted, it being taken as a matter of course by both parties that this right given by the Dominion leases and preserved by the agreement and the legislation persisted.

The appellant, however, contends that not merely the unexpired portion of the terms of each of the Dominion leases was surrendered but, as well, all other rights of the Whiteshore Company as lessee under them, and this apparently irrespective of the intention of the parties. If this position could be sustained, it would, of course, follow that the respondents could not rely upon paragraphs 2 and 3 of the agreement and the legislation referred to.

As to what was the intention of both parties to the transaction, there appears to be no room for doubt. The respondent was entitled to renewals of its leases for successive twenty year periods upon the conditions of those leases, subject to this that the terms to be imposed at the time of such renewals and the regulations governing the working of the property were to be those prescribed by the Province rather than the Dominion, and further to the extent such rights might be affected by legislation which applied generally to all similar agreements relating to lands, mines or minerals in the Province, irrespective of who might be the parties thereto. As the correspondence shows, the Province recognized this right in the respondent without discussion and agreed in the correspondence to the consolidation of the claims into two licences and to the granting of the term of eighteen years with the right to further renewals for twenty year periods and formally incorporated this in the agreement. Far from intending that these rights of the respondent were being surrendered or waived, both parties recognized that such rights continued unaffected, the position being the same as if the Whiteshore Company had waited until the expiration of the terms of the various leases and demanded renewals of each for the twenty year period to which it was entitled.

Certain passages from the judgment of Parke B. in *Lyon* v. *Reed* (1), are relied upon to support the appellant's contention. In that case, the acts relied upon as amounting to a surrender by operation of law of the rights of a lessee, within the meaning of section 3 of the Statute of Frauds, were those of a lessee in possession who was not the lessee named in the particular lease which, it was contended, had been surrendered and it was held that this did not amount

(1) (1844) 13 M. & W. 284.

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to a surrender by operation of law. In the course of dealing with this issue, however, Baron Parke made certain general statements as to what amounts to a surrender by operation of law, in which the following passages appear: (p. 306)

> This term is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former (13 M. & W. 306).

As to this, it may be said that this amounts to nothing more than to state the long established principle that a tenant is estopped from denying his landlord's title by the taking of the lease and that, since the new term and the unexpired portion of the prior term could not conceivably co-exist, the latter is deemed to be extinguished or surrendered by operation of law. Continuing, Baron Parke said that:

> . . . all the old cases will be found to depend on the principle to which we have adverted, namely an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says, that the act itself amounts to a surrender. In such case it will be observed there can be no question of intention. The surrender is not the result of intention. It takes place independently, and even in spite of intention. Thus, in the cases which we have adverted to of a lessee taking a second lease from the lessor, . . . it would not at all alter the case to show that there was no intention to surrender the particular estate, or even that there was an express intention to keep it unsurrendered. In all these cases the surrender would be the act of the law, and would prevail in spite of the intention of the parties.

In Williams on Landlord and Tenant (2nd Ed.) p. 420, the learned author dealing with the meaning in law of the term "surrender" thus defines it:—

> A surrender is the yielding up of an estate for life or years to him who has the immediate estate in reversion or remainder wherein the estate for life or years may drown by mutual agreement; it may be express—that is by act of the parties—or implied—that is by operation of law.

This is a restatement of the definition in Coke upon Littleton, 337b. In the present matter, the surrender of the right to the unexpired portion of the respective terms was

express and made upon the terms disclosed by the correspondence and the new licences granted as renewals of the sixteen leases. Since the licensee's right to the terms created by these licences could not co-exist with its right to the unexpired portions of the terms of the respective leases, the latter was, to adopt Coke's term, "drowned" in the reversion but this was by agreement of the parties. Had there been no discussion as to the terms upon which the surrender was made and a renewal licence taken before the expiry of the term of the former leases, the right to the unexpired portion of the term would, of necessity, be extinguished for the reasons stated in the first of the passages from *Lyon* v. *Reed* above quoted—and this by "operation of law", which is merely another way of saying that, as a matter of law, that was the necessary consequence of the lessee accepting the new estate.

The appellant's argument, put bluntly, is this, that where a lessee accepts a renewal of a lease before the expiration of the term limited by the lease, not only is the right to the unexpired portion of the term extinguished but the benefit of all other collateral covenants of the lessor contained in the instrument, and this even though, as in this case, the parties intend, and state in writing their intention, that such rights should be preserved. *Lyon* v. *Reed* does not, of course, support any such contention.

By chapter 16 of the Statutes of Saskatchewan for the year 1931 the Legislature enacted the Mineral Resources Act to provide for the administration of the rights obtained by the Province under the agreement of 1930. By this Act the Lieutenant Governor in Council was authorized to make such regulations not inconsistent with the Act as were necessary to carry out its provisions. The first of such regulations by the Province were established by an Order-in-Council made on February 18, 1936, and were designated Alkali Mining Regulations. These contained provisions very similar to those enacted by the Dominion prior to the transfer of these rights. The annual rental to be paid under leases of alkali rights was fixed at 25 cents an acre, as in the case of the Dominion Regulations, but by Regulation 18 the royalty was fixed at $12\frac{1}{2}$ cents per ton

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of products taken from the leased property, in place of 25 cents, the amount stipulated in those of the Dominion. Regulation 18 concluded with the following sentence:—

the royalty shall be subject to change in the discretion of the Minister.

The Whiteshore Company, which had apparently continued to operate the leased properties in the manner required by the Dominion Regulations since the year 1931, no doubt desiring to take advantage of the reduced royalty applied for further renewals of their existing licences for a term of twenty years. The term of these licences would not have expired until the year 1948 and the lessee was not under their terms entitled to renewals until that time. The reason for the request was stated in a letter from Mr. Brehaut to the Supervisor of Mines dated February 22, 1937, as follows:—

. . . for the reasons discussed with yourself and the Ministers in Regina last week, namely—that these leases have been running since 1926, that since the commencement of the leases we have spent a great deal of money in making experiments and in building plants and have not had any revenue from the leases, and we are now prepared to build a plant at a cost of about $200,000.00 and enter into a contract for the supply of sodium sulphate under a contract extending over a term of years.

In the reply from the Supervisor dated March 24, 1937, it is made clear that what had been discussed between the parties was a renewal of the existing leases for a period of twenty years. A passage in the letter from the Supervisor reads:—

By separate letter you have requested on behalf of Whiteshore Salts & Chemicals Limited that a renewal of Alkali Licences A1372 and A1373 be issued for a period of 20 years, at the rental mentioned of 25c. per acre, and 12½c. per ton on production, which items are covered by the present Alkali Mining Regulations.

When the new documents which were designated as leases rather than licences were forwarded by the Supervisor to Mr. Brehaut on April 16, 1937, a copy of the regulations "under which these renewals were issued" were enclosed and Mr. Brehaut was asked to return the original copies "of the leases which these are replacing".

It is to be remembered that the provision for renewals contained in the leases from the Dominion and in the Dominion Regulations was that they would be granted for additional periods of twenty years on such terms and conditions as might be prescribed by the Governor in Council.

This, in my opinion, enabled the Crown to stipulate for higher rentals and royalties at the time the leases were renewed, though not to alter the amount of either during the term of the lease, as was decided by the judgment of this Court in *Spooner Oils Ltd.* v. *Turner Valley Gas Conservation Board* (1). By paragraph 3 of the transfer agreement, any power or right reserved to the Governor in Council or to any other officer of the Government of Canada might be exercised by such officer of the Government of the Province as might be specified by the Legislature thereof from time to time. In accordance with this arrangement, the Mineral Resources Act of 1931 authorized the regulations to which I have referred above, which enabled lessees from the Dominion to obtain successive renewals upon certain conditions. The licences of 1931 contained a provision regarding renewal similar to that of the Dominion leases, namely that further renewals for twenty year periods would be granted on such terms and conditions as might be prescribed.

For the reasons which lead me to the conclusion that the only rights which were surrendered by the Whiteshore Company in 1931 were to the unexpired terms of the various Dominion leases and the possession of the written leases, it is my opinion that all that was surrendered by that company when the new leases were taken in 1937 were the unexpired terms of the 1931 licences and possession of the written instruments which evidenced them. This was manifestly the intention of both parties.

While the terms of the agreement amounted in effect to a limitation of the Province's jurisdiction to legislate made effective by the amendment to the *British North America Act,* and accordingly the Province could not by legislation have deprived the Whiteshore Company of its rights to the successive renewals of its leases, this does not, of course, mean that the rights of that company could not be bargained away. The difficult question to be determined in this matter is as to whether by entering into the leases of 1937 the Whiteshore Company has not waived the right which it had under the Dominion leases and regulations to insist that the scale of rentals and royalties could be changed only when renewals of the leases or licences were granted.

(1) [1933] S.C.R. 629.

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The question is one of construction of the lease granted by the Province on April 16, 1937, and which was executed and delivered by the Whiteshore Company, and of the regulations to the extent that they are by reference incorporated in that document. In the recital it is said that the grant is made:

> subject to the conditions hereinafter mentioned and contained in the Mineral Resources Act and Regulations thereunder and the amendments thereto.

The provision for the renewals is included in the same paragraph which fixes the rentals, the lessee being obligated to pay during each year of the term .25cts per acre of the land comprised in the grant and .12½cts per ton on all products taken from the property, with a provision for a reduction of this amount in certain circumstances. Nothing is said in this paragraph as to any increase either in rental or royalty. Paragraph 1 provides that one of the conditions upon which the lease is granted is that the lessee shall pay to the Minister at Regina the fees and royalties thereby preserved. A further condition is that the lessee shall:

> observe and perform all obligations and conditions in the said the Mineral Resources Act or Regulations imposed upon such lessee.

At the time this lease was made, the rental and the royalties prescribed by the 1936 Regulations were those stated in the lease.

In 1947, by chapter 21, the Legislature enacted an amendment to the *Mineral Resources Act* which provided that, notwithstanding anything contained in that Act or any other Act or in any lease or licence whereby the Crown, whether in the right of Canada or Saskatchewan, has granted any mining right to any person, every such lease or licence, whether issued before or after October 1, 1930, shall be deemed to contain a covenant by the lessee that he will pay to the Crown such royalties as may be prescribed by the regulations. To this was added what was apparently intended as a saving clause, providing that, in so far as any of the provisions of the section were at variance with any of the provisions of the transfer agreement, the provisions of that agreement should govern.

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regulation when read together with the lease. I consider there was no power effectively reserved by the Province to alter the scale of royalties during the term.

I would dismiss this appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Shumiatcher and McLeod.*

Solicitors for the respondents: *MacPherson, Leslie and Tyerman.*