JAMES T. PEPPER (*Plaintiff*) .....APPELLANT;

AND

PRUDENTIAL TRUST COMPANY LIMITED and CANADIAN WILLISTON MINERALS LTD. (*Defendants*) ..... RESPONDENTS;

AND

EDWARD P. LAMAR and BUENO OILS LTD. ..... THIRD PARTIES.

1964
*Nov. 5, 6
1965
Mar. 15

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contracts—Transfer of petroleum and natural gas interest—Non est factum—Second transfer with full knowledge and by way of compromise—Claim by mistaken party to have transactions set aside—Alternative Claim for deceit.

In 1949, the plaintiff, as owner of two quarter sections, had granted a lease of all petroleum, natural gas and related hydrocarbons to R, subject to the payment of a royalty. This lease was still subsisting at the time of the hearing of the present appeal and during its term oil was discovered and production obtained. In 1951, one M, representing himself as an agent of the defendant company P, approached the plaintiff to discuss an option for another lease if the first lease should fall in. The plaintiff was induced to sign certain documents which he had not read. One was an agreement by which, *inter alia,* he purported to assign to P an undivided half interest in the petroleum, natural gas and related hydrocarbons in and under the lands, and further agreed to execute and deliver to the said company a registrable transfer of the said interest. Another document was a transfer under *The Land Titles Act,* R.S.S. 1953, c. 108, of an undivided half interest in all mines and minerals under the said land. The plaintiff also signed a receipt for $64. He admitted that he signed all three documents but denied any contemporaneous knowledge of the Land Titles transfer and also denied receipt of any money.

M took all the documents away but did not ask for a certificate of title, without which the transfer could not be registered under *The Land Titles Act*. This certificate was not asked for until 1953 when another agent, one E, acting for the defendant company C, an assignee of the disputed interest, visited the plaintiff. The latter immediately consulted his solicitor and discovered what he had signed. Acting on his solicitor's advice, the plaintiff in 1954 executed another transfer under *The Land Titles Act* and made available his certificate of title for the purpose of registration of this transfer of an undivided half interest in all oil and gas.

*PRESENT: Cartwright, Judson, Ritchie, Hall and Spence JJ.

1965

PEPPER
v.
PRUDENTIAL TRUST Co. LTD. *et al.*

In 1958 the plaintiff brought an action for, *inter alia,* a declaration that everything that he had signed was null and void, and, in the alternative, for damages for deceit against the defendant P. The trial judge and a unanimous Court of Appeal held against both claims. The plaintiff appealed to this Court.

Held (Spence J. dissenting in part): The appeal should be dismissed.

Per Cartwright, Judson, Ritchie and Hall JJ.: At the time of signing the transfer in 1954 the plaintiff had full knowledge of what he had signed in 1951 and what he was then signing and why. As held by the Courts below, the second transfer, which was untainted by any fraud and was executed with full knowledge and by way of compromise of a real dispute, ruled out any declaration of nullity, rescission or any claim for damages.

Per Spence J., *dissenting*: In so far as the action for rescission was concerned, the judgment of the Court of Appeal refusing such remedy was correct. It was unnecessary to determine whether the 1951 agreement was altogether void or simply voidable. Since the agreement could only be attacked by the plaintiff and unless so attacked always bound the defendant P, it would appear to have been voidable, although once the plaintiff established his plea of *non est factum* thereto, the contract was avoided as of its inception. Therefore, the plaintiff upon having been fully informed of the fraudulent representation which caused his execution of that contract, and fully advised by his solicitor of his rights when he chose to affirm the agreement rather than void it, was bound by that election and could not now obtain rescission. On the other hand, if the 1951 agreement were altogether void and not merely voidable, the plaintiff made a new agreement, for which there was consideration, in 1954 when all of the information as to the fraud and as to his rights had been furnished him by his solicitor.

However, the right to take action for damages for deceit may still exist despite the loss of the right to take action for rescission. The issues upon which it was to be determined whether the plaintiff had lost this right were whether in executing the conveyance in 1954 and delivering the same to the defendant C he had entered into a compromise of that right or whether his conduct had estopped him from asserting it. On the evidence, it could not be concluded that any transaction between the plaintiff and the defendant C as represented by E and by its solicitors in 1953 and 1954 could have any effect as a compromise of a claim against P which arose in 1951 at the time the original documents were executed by the plaintiff.

The defendant P, when it permitted M to be armed with documents such as the assignment that he produced to the plaintiff, and when it undertook to have the titles to the petroleum and natural gas interest put in its name and caveats filed in its name, constituted M its agent for the purpose of obtaining such conveyances of petroleum and natural gas interests. Therefore, the defendant P was liable for the fraud or deceit of its agent.

[*Prudential Trust Co. Ltd. et al. v. Cugnet,* [1956] S.C.R. 914; *Clough v. London and North Western Railway Co.* (1871), L.R. 7 Ex. 26; *Barron v. Kelly* (1918), 56 S.C.R. 455, referred to.]

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], affirming the judgment of Thomson J. Appeal dismissed, Spence J. dissenting in part.

D. G. McLeod, Q.C., for the plaintiff, appellant.

A. M. Nicol, Q.C., for the defendant, respondent, Prudential Trust.

J. L. McDougall, Q.C., for the defendant, respondent, Canadian Williston.

J. Stein, for the third parties.

The judgment of Cartwright, Judson, Ritchie and Hall JJ. was delivered by

JUDSON J.:—The plaintiff-appellant, James T. Pepper, seeks in this litigation to set aside certain transactions entered into in 1951 and 1954 the result of which was that he parted with an undivided one-half interest in all petroleum and natural gas under his farm. There is an alternative claim for damages for deceit against Prudential Trust Company Limited. The trial judge and a unanimous Court of Appeal have held against both claims.

In 1949, Pepper, as the owner of two quarter sections, had granted a lease of all petroleum, natural gas and related hydrocarbons to Rio Bravo Oil Company Limited, subject to payment of a royalty. This lease is still subsisting and during its term, oil was discovered and production obtained on the land.

In 1951, one Macdonald came to Pepper to discuss an option for another lease if the first lease should fall in. According to Pepper this was the only subject-matter of any discussion at any time with Macdonald. On the second visit, however, Macdonald came back with certain documents ready for signature. This time Pepper signed the following documents:

(1) A document headed "Assignment". This document purported to

(*a*) give an immediate assignment to Prudential Trust Company Limited of an undivided half interest in all petroleum, natural gas and related hydrocarbons in and under the lands;

[1] (1963), 45 W.W.R. 275, 41 D.L.R. (2d) 583.

1965

PEPPER
v.
PRUDENTIAL TRUST CO. LTD. et al.

Judson J.

(b) promise that Pepper would execute a registrable transfer of this interest;

(c) give an option for a new lease if the first lease should fall in.

(2) A transfer under *The Land Titles Act* of an undivided half interest in all mines and minerals under the said land.

(3) A receipt for $64.

Pepper admits that he signed all three documents but denies any contemporaneous knowledge of the Land Titles Transfer and also denies the receipt of any money. Macdonald took all the documents away but did not ask for a certificate of title, without which the transfer could not be registered under the Saskatchewan *Land Titles Act*.

This certificate was not asked for until 1953 when another agent, acting for Canadian Williston Minerals Ltd., an assignee of the disputed interest, visited Pepper. Pepper immediately consulted his solicitor and discovered what he had signed. On instructions from his solicitor, he searched his private papers at home and found that the first agent, Macdonald, had sent him back an executed copy of the assignment. It had been lying unopened among his papers for some time. After some discussion with his solicitor, and some delay, he executed in 1954 another transfer under *The Land Titles Act* and made available his certificate of title for the purpose of registration of this transfer of an undivided half interest in all oil and gas. It did not include "related hydrocarbons" and it departed from the terminology of "all mines and minerals" contained in the first transfer that he had signed for Macdonald. Pepper made this compromise on the advice of his solicitor, who did not think that the dispute was worth the risk of litigation.

At that time he had full knowledge of what he had signed in 1951 and what he was then signing and why. I wish it to be understood that I am not in any way criticising the solicitor. His client had signed a lot of documents and it is clear that at this time the oil and natural gas were not regarded as being of any significant value. The discovery of oil came later.

It should also be remembered that the case of *Prudential Trust Co. Ltd. et al. v. Cugnet*[1], had not been decided at that

[1] [1956] S.C.R. 914, 5 D.L.R. (2d) 1.

time. What the result would have been if Pepper had stood his ground in 1953 and resisted any further claim for the transfer, it is difficult to say. The transfer that he had first executed was not in accordance with the assignment. It was for an undivided half interest in mines and minerals. What he had apparently agreed to transfer was an undivided half interest in oil, gas and related hydrocarbons. Such a transfer would not be registrable under the practice of the Saskatchewan Land Titles Office. But he had agreed to execute a registrable transfer.

Pepper brought an action for a declaration that everything that he had signed was null and void. The trial judge would have held in his favour had it not been for his execution of the second transfer on his solicitor's advice. He held that this was an affirmance of the transaction and that it precluded him both from setting it aside and claiming damages.

The Court of Appeal dismissed the appeal. They thought that the original documents were not a nullity, as found by the trial judge, but voidable on the ground of fraud. They were, however, in complete agreement with the trial judge that the second transfer ruled out any declaration of nullity, rescission or any claim for damages. With this I agree and I think that the appeal fails for the reasons given in both Courts on this aspect of the case.

The learned trial judge found that Pepper had established a plea of *non est factum*. The difference between the trial judge and the Court of Appeal concerned the consequences of such a successful plea—the trial judge held that the transaction was a nullity whereas the Court of Appeal said that it was voidable at the option of plaintiff. I cannot see that this distinction governs the decision of this case. Both Courts held that the deciding factor was the second transfer, which was untainted by any fraud and was executed with full knowledge and by way of compromise of a real dispute. To them this was a complete settlement of every item of dispute. Pepper cannot now assert that notwithstanding the unimpeachable second transfer, he somehow held back a claim for damages if oil and gas should be subsequently discovered. As the Court of Appeal made clear, the claim for damages is precisely the same as the value of the property which he transferred by way of settlement.

I would dismiss the appeal with costs.

1965

PEPPER v. PRUDENTIAL TRUST CO. LTD. et al.

Spence J.

SPENCE J. (*dissenting in part*):—This is an appeal from the judgment of the Court of Appeal for Saskatchewan[1] affirming the judgment of Thomson J. at trial.

The plaintiff was the registered owner in fee simple of all mines and minerals within, upon and under a certain quarter section of land. By a petroleum and natural gas lease dated October 28, 1949, he had granted all petroleum, natural gas and related hydrocarbons to Rio Bravo Oil Company Limited subject to the payment of a gross royalty of one-eighth of the oil produced and saved from the said lands, one-eighth of the market value at the sale of gas sold or used off the premises and one-tenth in kind or value at the well on all other materials mined and marketed. This grant was for an indefinite term and was to continue for so long as production continued. Production of oil and gas was obtained in late 1957 and continued up to the time of the hearing of this appeal. By the provisions of the said petroleum and natural gas lease, either party had the right to assign his interest under the said lease.

In May of 1951, the plaintiff was approached by one Claude Macdonald. The plaintiff swore that Claude Macdonald stated to him that he represented the Prudential Trust Company, oil developers, and explained that the company he represented desired a first chance to obtain from the plaintiff a lease of his petroleum and natural gas on the same terms as those existing under the Rio Bravo Oils lease above mentioned except that the rental would be 25 cents per acre instead of 10 cents per acre and, of course, the proposed lease should only come into effect when the existing lease should lapse or expire.

The plaintiff testified that he agreed to give to Macdonald's principal such first chance and after further conversations he signed two documents, without reading the documents because, as he alleged, he trusted the said Macdonald who "seemed to be a very nice man". The documents so produced and signed by the plaintiff were, however, of a totally different kind and character from those which he testified he had agreed to sign. One was an agreement by which, *inter alia*, he purported to assign to Prudential Trust Company Limited an undivided one-half interest in the petroleum, natural gas and related hydrocarbons upon the

[1] (1963), 45 W.W.R. 275, 41 D.L.R. (2d) 583.

lands, and further agreed to execute and deliver to the said company a registrable transfer of the said interest, and the other document was a transfer to the said company of an undivided one-half interest in all the mines and minerals within or upon the said lands except coal.

The trial judge found, as a fact, as follows:

> I am not overlooking his evidence, but after carefully reviewing all of the evidence I am convinced that when the plaintiff signed the documents which Mr. Macdonald produced to him for execution he had absolutely no idea that they were an agreement to sell or assign an interest in his petroleum, natural gas and related hydrocarbons and a transfer of an interest in his mines and minerals.

I agree with the learned trial judge that if the matter had rested there the plaintiff's plea of *non est factum* would have been a good plea and the plaintiff would have been entitled to claim rescission of the agreement and transfer on the basis that the same were invalid as not having been his act and deed. I need quote no further authority for that proposition than the decision of this Court in *Prudential Trust Co. Ltd. et al. v. Cugnet*[1]. However, in 1953, one Marty Erickson who stated himself to be, and who evidently was, a representative of the defendant Canadian Williston Minerals Ltd., attended the plaintiff and demanded from him delivery of the duplicate certificate of title to his land so that the aforesaid transfer of the one-half interest could be registered. The plaintiff then took the position that he had never entered into any agreement doing more than granting to the Prudential Trust Company a right to lease the lands upon the Rio Bravo lease lapsing. The plaintiff told Mr. Erickson that he wished to confer with his solicitor, a Mr. N. R. McDonald, Q.C., of Weyburn, and obtain his advice as to what he should do. The plaintiff immediately attended Mr. McDonald, Q.C., and on his arrival at the latter's office found Mr. Erickson there ahead of him.

The learned trial judge has found that the situation was then fully explained to Mr. McDonald by Mr. Erickson and that the plaintiff in turn was fully advised as to the nature and effect of the documents which he had delivered to Claude Macdonald, purporting to represent the Prudential Trust Company Ltd. in 1951.

Mr. N. R. McDonald, Q.C., then advised the plaintiff, and he has so admitted, that he, the plaintiff, would save

[1] [1956] S.C.R. 914, 5 D.L.R. (2d) 1.

1965

PEPPER v. PRUDENTIAL TRUST CO. LTD. et al.

Spence J.

trouble and expense if he complied with the demand that was made upon him. Mr. N. R. McDonald, Q.C., however, pointed out that the assignment dated May 2, 1951, purported to assign a one-half interest in all oil and gas and *related hydrocarbons,* and that it was then the prevailing legal opinion in Saskatchewan that a document referring to "related hydrocarbons" could not be registered under the Land Titles System. Mr. N. R. McDonald, Q.C., further pointed out that the transfer executed in 1951 by the plaintiff was of an interest in all mines and minerals except coal, and that therefore it did not comply with the agreement to assign in the assignment dated May 2, 1951, and last referred to. After a considerable interval of time and some correspondence between Mr. N. R. McDonald, Q.C., and the legal representatives of the defendant Canadian Williston Minerals Ltd., Mr. N. R. McDonald, Q.C., caused the plaintiff to execute a transfer dated August 4, 1954, which transfer purported to convey an undivided one-half interest in all petroleum and natural gas on the said lands. This transfer Mr. McDonald, Q.C., delivered to the defendant Canadian Williston Company.

The affidavit of value attached to the said transfer sets out the sum of $80 but it is admitted by the defendant Canadian Williston Minerals Ltd. that no such payment was made and that this amount of $80 was one and the same amount that they were advised had been paid to the plaintiff on the original transaction. The plaintiff had testified that he received no money whatsoever from Claude Macdonald at the time he executed the documents in 1951. A receipt produced at trial as Exhibit D-1 was shown to him and he acknowledged that the signature in pencil thereon appeared to be his signature but he swore that he had never used a pencil to sign a document. Mr. Claude Macdonald, however, in giving his evidence, had sworn that he did make in cash the payment evidenced by such receipt.

The plaintiff commenced this action in May of 1958, claiming therein, *inter alia,* a declaration that the transfer was void and for an order vesting the petroleum and natural gas in the name of the plaintiff, an order removing the caveat filed against the lands by the defendant Prudential Trust Company, and in the alternative, for damages for deceit against the defendant Prudential Trust Company Limited.

In so far as the action for rescission is concerned, I am of the opinion, with respect, that the judgment of the Court of Appeal for Saskatchewan refusing such remedy is correct. It would appear that it is unnecessary to determine whether the original agreement of May 2, 1951, was altogether void or simply voidable. Since the agreement could only be attacked by the plaintiff and unless so attacked always bound the defendant Prudential Trust Company, it would appear to have been voidable, although once the plaintiff established his plea of *non est factum* thereto, the contract was avoided as of its inception. Therefore, the plaintiff upon having been fully informed of the fraudulent representation which caused his execution of that contract, and fully advised by his solicitor of his rights when he chose to affirm the agreement rather than void it, is bound by that election and cannot now obtain rescission: *Clough v. London and North Western Railway Company*[1], at p. 34, and *Barron v. Kelly*[2], *per* Anglin J. at pp. 478-9, and Brodeur J. at p. 487.

On the other hand, if the agreement of May 2, 1951, were altogether void and not merely voidable, the plaintiff made a new agreement in 1954 when all of the information as to the fraud and as to his rights had been furnished him by his solicitor. The consideration for that new agreement may be found in the forbearance of the defendant Canadian Williston from engaging the plaintiff in litigation and further in the result of the new agreement that the plaintiff retained the related hydrocarbons and all mines and minerals except oil and natural gas. In so far as the mines and minerals except natural gas are concerned, it is probable that the transfer delivered in May 1951 not being in accordance with the assignment would have been subject to rectification but that in itself would have entailed litigation. The omission, however, of "related hydrocarbons" is a variation from the original alleged invalid assignment of May 1951 and even if a document containing those words had not been subject to registration under *The Land Titles Act*, the agreement, if valid, would have bound the parties thereto. We were informed during argument in this Court that there may well have been a value in such related hydrocarbons.

There is no doubt, however, that the right to take action for damages for deceit may still exist despite the loss of

[1] (1871), L.R. 7 Ex. 26.
[2] (1918), 56 S.C.R. 455.

1965

PEPPER v. PRUDENTIAL TRUST CO. LTD. et al.

Spence J.

the right to take action for rescission: *Barron v. Kelly, supra.* The issues upon which it must be determined whether the plaintiff has lost this right are whether in executing the conveyance of August 1954 and delivering the same to the defendant Canadian Williston Company he has entered into a compromise of that right or whether his conduct has estopped him from asserting it. In *Barron v. Kelly,* the plaintiff's solicitor, in forwarding further payments to the defendant after the plaintiff had discovered the fraud, wrote:

> I have further to advise you that although Mr. Barron is completing his purchase rather than lose the money already paid on the purchase price before he learned of the false and fraudulent representations made to induce him to purchase, he does not waive his right to insist on reparation for the deceit practised upon him, and proposes to bring an action on account thereof.

It may be argued that the plaintiff represented as he was by his solicitor, Mr. N. R. McDonald, Q.C., in 1953 and 1954, upon executing the transfer of August 1954 and causing it to be forwarded to the defendant Canadian Williston Company, should have had his solicitor advise the defendant in terms to the same effect as those used above. It may, of course, also be argued that the defendant Canadian Williston was effectively represented by legal advisers and had it been intended that the plaintiff upon executing the transfer should release all his claims of any kind, it was quite within that defendant's power to require the execution of a release in proper form.

Not only did the defendant Canadian Williston Company not require such release but the defendant Canadian Williston did not deliver to the plaintiff or to his solicitor the assignment of May 2, 1951, which had been acquired by the original alleged fraud. This document was produced by the defendant upon the examination *de bene esse* of the agent Claude Macdonald held in Toronto. It should be noted that that document had, in addition to the covenants granting a transfer of the mineral rights, *i.e.*, the covenants which were alleged to have been fraudulently inserted, an option to the defendant Prudential Trust Company of a 99-year petroleum and natural gas lease upon the plaintiff's lands when the existing lease should lapse, *i.e.*, the only covenant which the plaintiff has testified he thought he was executing. Although neither defendant has since 1954

asserted any right under that agreement of May 2, 1951, there has been no occasion to do so. I am of the opinion that counsel for the appellant (plaintiff) in this Court rightly argued that the failure to deliver that document to his client in August 1954 is evidence of considerable weight that no compromise was intended.

The evidence of Mr. N. R. McDonald, Q.C., on the question of a possible compromise or release of claims is enlightening. Mr. McDonald, Q.C., testified that the only reason for the variation in the form of the transfer between that executed by the plaintiff in 1951 and the one executed in 1954, was because he had pointed out to the plaintiff that the term "mines and minerals" included more than the term "petroleum and natural gas" and that his purpose was to make the transfer conform with the original agreement to that extent. This question was put to him:

> Q. Well, specifically, was there any discussion of a release for any claim that Pepper might have against the companies or either of them?

And Mr. McDonald replied: "Oh no." And to a further question:

> As I understand you then, Mr. McDonald, the sole purpose in executing and delivering a new transfer was to bring the transfer, the document of conveyance, in conformity with the original agreement, Exhibit P.2?

Mr. McDonald replied:

> That is right, to enable Canadian Williston to effect registration.

The plaintiff testified in cross-examination that when he executed the document in 1954 he was not thinking about claiming damages and did not consider that subject until he found that many other persons were similarly involved. It would appear that the plaintiff came to this opinion in November 1956 when he joined an association known as the Mineral Owners' Protective Association.

These questions and answers are relevant:

> *By Mr. Nicol:*
>
> Q. For better than two years you were sure that you had settled your own case? A. Yes, I knew I had settled that, I knew that, but then I wasn't satisfied with it after I had found out so many were in it.
>
> Q. When you talked to your friends in the Mineral Owners Protective Association, then you decided that the settlement you had made was no good, is that it? A. No, I didn't figure it was no good, but I didn't see that these men should go around through the country points and take what us old people had made during our lifetime.

1965

PEPPER
v.
PRUDENTIAL TRUST CO. LTD. et al.

Spence J.

Upon the whole of the evidence, I am of the view that even as between the plaintiff and the defendant Canadian Williston there was no discussion of any compromise or mutual release and no intention by either that this transaction should constitute a compromise or mutual release. Moreover, although Claude Macdonald in 1951 had represented himself as being the agent of the defendant Prudential Trust Company Limited, Mr. Erickson in 1954 only represented himself as agent for the defendant Canadian Williston. Mr. N. R. McDonald, Q.C.'s dealings were with Canadian Williston alone and the Prudential Trust Company did not know of the existence of either the 1951 assignment and transfer or the 1954 transfer until it was called upon to execute a transfer of all petroleum and natural gas rights which it held as trustee for the defendant Canadian Williston. This document was dated September 22, 1955. Mr. George Douglas Ash, the manager of the defendant Prudential Trust Company, Calgary Branch, in cross-examination, was asked:

> Q. Yes. And was there any suggestion made to you that in some fashion there had been some kind of a settlement made on behalf of the Prudential Trust Company by somebody? A. Not to my knowledge, no.
>
> Q. No. So that as far as your Company is concerned, you have never had—you had no knowledge of the matters in dispute in this action until the action was commenced? A. That's right.

I, therefore, am unable to conclude that any transaction between the plaintiff and the defendant Canadian Williston as represented by Mr. Erickson and by its solicitors in 1953 and 1954 could have any effect as a compromise of a claim against the defendant Prudential Trust Company which arose in May 1951 at the time the original documents were executed by the plaintiff.

The alternative claim for the damages for deceit is made against the defendant Prudential Trust Company Limited alone. One of the defences against such claim as submitted by counsel for the defendant Prudential Trust Company was that Claude Macdonald was never its employee or agent. It would appear that a group of persons and probably the third parties Edward P. Lamar and Bueno Oils Ltd. had entered into a plan for acquiring interests in lands which might have in or under them oil or natural gas, and that for that purpose it sent around the countryside various agents including the said Claude Macdonald. Edward P. Lamar

and the defendant Prudential Trust Company had entered into an agreement entitled Deed of Indemnity on November 1, 1950. This agreement was produced at trial as Exhibit D-3. Under that agreement the Prudential Trust Company covenanted to act as trustee for Lamar's interest and on Lamar's instructions and at his expense to file caveats in the name of a trustee to protect Lamar's interest and to take any and all proceedings necessary to protect or enforce his interests. Lamar covenanted in the said agreement to indemnify the Prudential Trust Company from all liability incurred by reason of its having acted on his behalf which might result from the filing of the caveats or accepting any registrable title or "by reason of all actions, suits, proceedings whatsoever". On September 22, 1955, when the Prudential Trust Company conveyed to Canadian Williston all the interests it had held as base trustee it obtained a similar covenant of indemnification from the latter. Although the Prudential Trust Company did not print the form of assignment which was tendered to the plaintiff for execution in May of 1951 by Claude Macdonald, it knew of the existence of that most deceptive form of document. It had had complaints prior to that date and in fact prior to that date had insisted on the drafting of a new form entitled not merely "Assignment" but "Assignment of an undivided one-half interest in mines and minerals". The form presented in May 1951, and produced at trial as Exhibit P-2, purports in the printed words to be an assignment to the "Prudential Trust Company Limited of the City of Calgary in the Province of Alberta (hereinafter called the "Assignee")".

The plaintiff swore that when Claude Macdonald came to him he said "I am representing the Prudential Trust Company, Prudential Trust Oil Company . . .". Claude Macdonald was examined *de bene esse* and testified that he would purchase petroleum and natural gas rights in the name of the Prudential Trust Company and that the documents were always taken in the name of the Prudential Trust Company.

I am ready to hold that the defendant Prudential Trust Company Limited, when it permitted Claude Macdonald to be armed with documents such as the assignment, Exhibit P-2, in form which I have outlined, and when it undertook to have the titles to the petroleum and natural gas interest

1965

PEPPER
v.
PRUDENTIAL TRUST CO. LTD. et al.

Spence J.

put in its name and caveats filed in its name, constituted Claude Macdonald its agent for the purpose of obtaining such conveyances of petroleum and natural gas interests. Therefore, the defendant Prudential Trust Company is liable for the fraud or deceit of its agent.

Kerr on Fraud and Mistake, 7th ed., at p. 492, said:

> A principal is liable to third persons for frauds, deceits, concealments, torts, and omissions of duty of his agent, when acting in the course of his employment, although the principal did not authorise or justify or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them.

I have therefore come to the conclusion that despite the fact that the plaintiff's action for rescission is barred, he is entitled to recover damages against the defendant Prudential Trust Company Limited for deceit.

Turning to the quantum of such damages, there is a sparsity of evidence in the record of the trial. A witness, Robert S. Blackett, was called by the plaintiff to give expert evidence as to the quantum of damages, and the defendant Prudential Trust Company Limited called another expert, Peter B. Watkins, for such purpose. It would appear from an examination of the evidence of each of them that they did not differ greatly in their estimate of the damages which, of course, must be the present value of the undivided one-half interest in the royalties payable under the Rio Bravo lease.

Taking the evidence of Mr. Watkins, which cannot be viewed as being unfavourable to the defendant who called him, that sum would appear to be $140,100. Such amount includes the royalties which were payable from the commencement of the drilling by Rio Bravo Oil Company in 1957 up to the date of the trial. It does not appear in the record whether the plaintiff received the full $12\frac{1}{2}$ per cent of the royalties during the whole or any part of that period, or whether he received only one-half, *i.e.*, $6\frac{1}{4}$ per cent.

I therefore am of the opinion that there should be judgment for the plaintiff for the sum of $140,100 but subject to the proviso that the defendant Prudential Trust Company may, at its option to be exercised within two months from the date of this judgment, proceed to a reference before the proper officer of the Court of Queen's Bench for the Province of Saskatchewan, the costs of such reference to be paid by

such defendant if it should result in an assessment of damages at or above the said sum of $140,100 but otherwise by the plaintiff.

Appeal dismissed with costs, SPENCE J. *dissenting in part.*

Solicitors for the plaintiff, appellant: Pedersen, Norman, McLeod, Miller & Bertram, Regina.

Solicitors for the defendant, respondent, Prudential Trust: Nicol, Keith, Armstrong, MacDonald and Cruickshank, Regina.

Solicitors for the defendant, respondent, Canadian Williston: McDougall, Ready & Hodges, Regina.

Solicitors for the third parties: MacPherson, Leslie & Tyerman, Regina.