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*May 25
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PRUDENTIAL TRUST COMPANY LIMITED AND CANUCK FREEHOLD ROYALTIES LIMITED (*Plaintiffs*) ..... APPELLANTS;

AND

EDMOND G. CUGNET AND RAYMOND A. CUGNET (*Defendants*) .. RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contracts—Validity and binding effect—Non est factum—Circumstances supporting plea—Whether plea may be asserted against subsequent assignee for value of other party's rights under contract.

H, acting as agent for A. Co., persuaded C to sign what was represented to be a mere grant of an option of mineral rights, but was in fact an assignment and transfer of a share in those rights. A. Co. later assigned all its rights of this nature to one of the plaintiff companies (the other company being a bare trustee for it). In an action brought to establish the plaintiffs' rights under the agreement, the defendants (C and his son, the purchaser under an agreement for sale), pleaded *non est factum*.

Held (Cartwright J. dissenting): The defendants were entitled to succeed, and the assignment should be held void *ab initio*.

Per Taschereau, Fauteux and Nolan JJ.: The representation having been as to the nature and character of the document, and not merely as to its contents, the mind of the defendant did not go with his hand, although he knew that he was dealing with his mineral rights. *Carlisle and Cumberland Banking Company v. Bragg*, [1911] 1 K.B. 489, applied; *Howatson v. Webb*, [1907] 1 Ch. 537; [1908] 1 Ch. 1, distinguished. The document was void *ab initio*, and any option contained therein and which, admittedly, the defendant agreed to grant and for which he received payment, could not be severed and must fall with the rest of the transaction.

Per Locke J.: The plea of *non est factum* would clearly have been available to the defendants if the action had been brought by A. Co., on whose behalf H was acting. Negligence on C's part would not estop him from setting up that defence as against the plaintiffs, since a person signing a document other than a negotiable instrument owed no duty to the public at large, or to other persons unknown to him who might suffer damage by acting upon the instrument on the footing that it was valid in the hands of the holder. *Carlisle and Cumberland Banking Company v. Bragg, supra*, followed. In any event the proximate cause of the damage was the fraudulent act of H.

Per Cartwright J. (*dissenting*): Even if the misrepresentation could be said to have been as to the nature of the deed, the negligence (*i.e.* lack of reasonable care) of the defendant in signing and sealing it without reading it prevented him from asserting the defence of *non*

*PRESENT: Taschereau, Locke, Cartwright, Fauteux and Nolan JJ.

est factum as against the plaintiffs which gave valuable consideration on the strength of the deed. The rule is that, generally speaking, a person who executes a document without taking the trouble to read it is liable on it and cannot plead that he mistook its contents, at all events as against a person who acting in good faith in the ordinary course of business has changed his position in reliance on such document. The defence operates in the case of a blind or illiterate person as an exception to that rule, but does not extend to a case such as the present.

In so far as the *Bragg* case decides that the rule that negligence excludes a plea of *non est factum* is limited to the case of negotiable instruments and does not extend to a deed such as the one at bar, it should not be followed.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Saskatchewan (1), affirming the judgment at trial (2). Appeal dismissed.

J. L. McDougall, Q.C., for the plaintiffs, appellants.

D. G. McLeod, for the defendants, respondents.

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

NOLAN J.:—This is an appeal from the judgment of the Court of Appeal for Saskatchewan (1), unanimously affirming the judgment of the learned trial judge (2).

The appellant Prudential Trust Company Limited (hereinafter referred to as the appellant Prudential) is a trustee on behalf of the other appellant Canuck Freehold Royalties Limited. The respondent Edmond Cugnet is a retired farmer who emigrated in 1902 from France to the Weyburn district in Saskatchewan. The respondent Raymond Cugnet is his son.

On October 31, 1949, the respondent Edmond Cugnet granted petroleum and natural gas leases to Rio Bravo Oil Company Limited in respect of the south-east quarter of section 27 and to Bandy Lee in respect of the north-west quarter of section 27, both in township 7, range 13, west of the second meridian.

On November 1, 1950, the appellant Prudential entered into an agreement with one Lamarr, whereby the company agreed to act for him as trustee of such mineral rights in petroleum, natural gas and related hydrocarbons as he

(1) 15 W.W.R. 385, [1955] 4 D.L.R. 18. (2) 11 W.W.R. 634.

1956

PRUDENTIAL TRUST CO. LTD. *et al.* *v.* CUGNET

Nolan J.

might purchase or lease from owners in Saskatchewan and agreed to file caveats in its own name in the various land titles offices against the titles of the registered owners to protect such interests as he might acquire.

Subsequently Lamarr incorporated Amigo Petroleums Limited, in which he owned all the shares, which company sent out agents to purchase petroleum rights and to obtain oil leases from the owners, the documents being taken in the name of the trustee, the appellant Prudential.

One Nickle acquired, by assignment, the beneficial interest of Amigo Petroleums Limited in the petroleum rights so purchased or leased and, in turn, assigned his interests so acquired to the appellant Canuck Freehold Royalties Limited.

On May 1, 1951, an agreement was entered into between the appellant Canuck Freehold Royalties Limited and the appellant Prudential, whereby the latter agreed to hold in trust properties which had already been acquired.

It is not in dispute that the appellant Prudential is a bare trustee for the appellant Canuck Freehold Royalties Limited.

On January 26, 1951, one Edward W. Hunter, acting as an agent of Amigo Petroleums Limited, called upon the respondent Edmond Cugnet at his home in Weyburn, Saskatchewan. At the time of this visit the respondent was playing cards in the sitting room and Hunter told him that he wanted to talk about mineral rights, whereupon they both went into another room. Hunter then told the respondent that he wanted an option in respect of the mineral rights on the north-west quarter and the south-east quarter of section 27 and offered to pay $32 on each of the quarter-sections for an option to take a petroleum and natural gas lease, such lease to take effect upon the expiration of the leases previously granted to Rio Bravo Oil Company Limited and Bandy Lee, and $32 yearly rental for each of the quarter-sections when the option was exercised and the petroleum and natural gas lease granted.

After a short conversation between them, the respondent Edmond Cugnet signed a document entitled "assignment", wherein he assigned and transferred to the appellant Prudential an undivided one-half interest in all petroleum,

natural gas and related hydrocarbons in and under the said lands, subject to the terms and conditions of the petroleum and natural gas lease covering the said lands, and agreed to deliver to the appellant Prudential, as assignee, a registrable transfer of such interest. The respondent also granted to the appellant Prudential an exclusive option to acquire a petroleum and natural gas lease covering the said lands for a term of 99 years, to be computed from the date of the assignment, upon the termination of the current petroleum and natural gas lease. At the same time the respondent Edmond Cugnet executed a transfer, in favour of the appellant Prudential, of an undivided one-half interest in all of the mines and minerals within, upon or under the lands in question, reserving thereout all coal.

After the execution of the documents by the respondent Edmond Cugnet, Hunter left, taking the documents with him, and on January 29, 1951, the respondent Edmond Cugnet received from the appellant Prudential a copy of the assignment and also a cheque for $64. The respondent Edmond Cugnet did not read the assignment or the transfer when they were executed by him, nor did he read the copy of the assignment when it was returned to him by the appellant Prudential.

On February 2, 1951, the appellant Prudential registered a caveat against the lands in question in the land titles office at Regina as instrument no. F.C. 2281.

On September 21, 1951, a letter was sent by the solicitors of the respondent Edmond Cugnet to the appellant Prudential, complaining about the transaction and requesting that the assignment and transfer be returned to them. On April 3, 1952, the respondent Raymond Cugnet, a son of the other respondent, filed a caveat against the titles of the lands in question, based upon an agreement for sale between his father as vendor and himself as purchaser, which agreement was entered into on November 12, 1945. On January 22, 1953, the registrar of land titles at Regina, pursuant to a requirement directed to him by the respondent Raymond Cugnet, gave notice to the appellant Prudential that the caveat of that company would lapse unless there was filed with him within 30 days a judge's order providing that

1956

PRUDENTIAL TRUST CO. LTD. *et al.* *v.* CUGNET

Nolan J.

the caveat continue beyond that period. The appellant Prudential obtained a judge's order continuing the caveat for an additional period of 30 days and providing for further continuance if, within the said 30 days, it brought an action to establish its rights under the caveat and filed with the registrar a certificate of *lis pendens* issued in the same action. In the result, this action was commenced and the certificate of *lis pendens* filed.

At trial it was contended on behalf of the appellants that the evidence adduced on behalf of the respondents did not establish a plea of *non est factum* as to the documents in question and that the transaction between Hunter, in the name of the appellant Prudential, and the respondent Edmond Cugnet was voidable and not void and that the appellant Canuck Freehold Royalties Limited was a *bona fide* purchaser for value without notice and was entitled to the interest in the lands in question specified in the assignment and to a transfer of an undivided one-half interest in the petroleum and natural gas within, upon or under the said lands. In the alternative, the appellants contended that the appellant Canuck Freehold Royalties Limited was entitled to the option as specified in the assignment.

The respondents took the position that the transaction was not merely voidable, but void *ab initio,* and that a plea of *bona fide* purchaser for value was of no assistance to the appellant Canuck Freehold Royalties Limited. They further contended that in any event, irrespective of misrepresentation, there was no *consensus ad idem* between the parties and no agreement between them, or that the agreement, if any, was void for uncertainty.

The learned trial judge, who was favourably impressed with the evidence of the respondent Edmond Cugnet, found that he never intended to complete the assignment and transfer, as they now appear in the record, and relied on the misrepresentation of Hunter that the documents he was asked to sign constituted only the granting of an option. Hunter was not called as a witness at the trial, his whereabouts being unknown. The learned trial judge further found that the respondent Edmond Cugnet was mistaken as to the nature and character of the assignment and transfer and that this mistake was induced by the fraudulent

misrepresentation of Hunter, the agent of the appellant Prudential. In the result, the learned trial judge held that the plea of *non est factum* was established and that the documents were void.

With respect to the submission on behalf of the appellants that Canuck Freehold Royalties Limited was a purchaser for value without notice of the fraud inducing the signing of the documents, the learned trial judge held that, while the evidence supported this submission, the rights of Canuck Freehold Royalties Limited were invalid and unenforceable because the documents were void. Further, the learned trial judge refused to give effect to the submission on behalf of the appellants that in any event Canuck Freehold Royalties Limited was entitled to the rights under the option granted by the respondent Edmond Cugnet and contained in the assignment, on the ground that the whole transaction, as evidenced by the documents, was void and the documents themselves were in a like position. The judgment of the learned trial judge, dismissing the action of the appellants, declared that the assignment and transfer were void and of no effect and ordered that they be delivered up to the respondent Edmond Cugnet for cancellation, and directed that the caveat and certificate of *lis pendens* be vacated.

From that judgment an appeal was taken to the Court of Appeal and by a unanimous judgment the appeal was dismissed on the ground that the plea of *non est factum,* as found by the learned trial judge, must be sustained. The Court of Appeal granted special leave to appeal from that judgment to this Court.

In the Courts below the appellants relied on *Howatson v. Webb* (1), affirmed on appeal (2). In that case the defendant Webb, who was formerly the managing clerk to one Hooper, acted as his nominee in a building speculation relating to certain property of which Hooper was the owner. Shortly after leaving Hooper's employment he was requested by Hooper to execute certain deeds, and, on asking what those deeds were, he was told by Hooper that they were deeds transferring the property in question, and the defendant thereupon signed them. One of the deeds

(1) [1907] 1 Ch. 537. (2) [1908] 1 Ch. 1.

1956

PRUDENTIAL TRUST CO. LTD. *et al.* *v.* CUGNET

Nolan J.

so signed was a mortgage between the defendant, as mortgagor, of the one part, and one Whitaker, of the other part, and contained the usual covenant by the mortgagor for payment of principal and interest. In an action by the transferee of the mortgage for payment of the principal debt and interest the defendant pleaded *non est factum*. It was held that the misrepresentation being only as to the contents of a deed known by the defendant to deal with the property, the plea failed and that the defendant was liable on the covenant. Warrington J. at p. 549 said:—

> What does the evidence in the present case shew? I may go so far in the defendant's favour as to say that Webb, having regard to his knowledge of Hooper, when Hooper said that the deeds were "deeds for transferring the Edmonton property," was justified in believing that they were deeds such as a nominee could be called upon to execute either in favour of a new nominee or for the purpose of putting an end to his own position of nominee, and certainly not a deed creating a mortgage to another person. But in my opinion that is not enough. He was told that they were deeds relating to the property to which they did in fact relate. His mind was therefore applied to the question of dealing with that property. The deeds did deal with that property. The misrepresentation was as to the contents of the deed, and not as to the character and class of the deed. He knew he was dealing with the class of deed with which in fact he was dealing, but did not ascertain its contents. The deed contained a covenant to pay. Under those circumstances I cannot say that the deed is absolutely void. It purported to be a transfer of the property, and it was a transfer of the property. If the plea of *non est factum* is to succeed, the deed must be wholly, and not partly, void. If that plea is an answer in this case, I must hold it to be an answer in every case of misrepresentation. In my opinion the law does not go as far as that. The defence therefore fails.

The appellants contend, on the authority of *Howatson v. Webb*, that, while the respondent Edmond Cugnet was indifferent and careless as to what he signed, nevertheless he is bound by what he did sign and cannot successfully maintain a plea of *non est factum*.

The respondents rely on *Carlisle and Cumberland Banking Company v. Bragg* (1), where the facts were that the defendant, who pleaded *non est factum*, signed a document which purported to be a continuing guarantee by him, up to a certain amount, of the payment by one Rigg of any sum which might, at any time thereafter, be or become due from Rigg to the plaintiff, a banking company, on the general balance of his banking account with them. In fact the defendant had been induced by the fraud of Rigg

(1) [1911] 1 K.B. 489.

to sign the document, without reading it, and not knowing that it was a guarantee, but believing it to be a document of a different character; namely, an insurance paper. Buckley L. J. said at p. 495:—

> The true way of ascertaining whether a deed is a man's deed is, I conceive, to see whether he attached his signature with the intention that that which preceded his signature should be taken to be his act and deed. It is not necessarily essential that he should know what the document contains: he may have been content to make it his act and deed, whatever it contained; he may have relied on the person who brought it to him, as in a case where a man's solicitor brings him a document, saying, "this is a conveyance of your property," or "this is your lease," and he does not inquire what covenants it contains, or what the rent reserved is, or what other material provisions in it are, but signs it as his act and deed, intending to execute that instrument, careless of its contents, in the sense that he is content to be bound by them whatsoever they are. If, on the other hand, he is materially misled as to the contents of the document, then his mind does not go with his pen. In that case it is not his deed. As to what amounts to materially misleading there is of course a question. *Howatson v. Webb* was a case in which the erroneous or insufficient information was not enough for the purpose.

Kennedy L.J. said at p. 497:—

> The principle involved, as I understand it, is that a consenting mind is essential to the making of a contract, and that in such a case as this there was really no consensus, because there was no intention to make a contract of the kind in question.

In order to determine the effectiveness of the plea of *non est factum* as applied to the facts of this case, it is necessary to examine the authorities.

The old cases on misrepresentation as to the contents of a deed were based upon the illiterate character of the person to whom the deed was read over, and on the fact that an illiterate man was treated as being in the same position as a blind man. Sheppard's Touchstone, 8th ed. 1826, p. 56.

An early instance of the application of the plea is to be found in *Thoroughgood's Case* (1), where it was held that a deed executed by an illiterate person does not bind him, if read falsely either by the grantee or a stranger; (2) that an illiterate man need not execute a deed before it be read to him in a language which he understands, but if the party executes without desiring it to be read, the deed

(1) (1582), 2 Co. Rep. 9a, 76 E.R. 408.

1956

PRUDENTIAL TRUST CO. LTD. *et al.* *v.* CUGNET

Nolan J.

is binding; (3) that if an illiterate man execute a deed which is falsely read, or the sense declared differently from the truth, it does not bind him.

It appears in more recent cases that the application of the plea has been extended beyond the earlier cases, which turned upon the question of illiteracy or blindness.

This extension is well illustrated in *Foster v. Mackinnon* (1), where the facts were that the defendant had been induced to put his name upon the back of a bill of exchange, making himself liable as indorser, on the fraudulent representation of the acceptor that he was signing a guarantee. The bill got into the hands of a *bona fide* holder for value, who sued the defendant as indorser, and the result of the action was that the defendant, having signed the document without knowing it was a bill and under the belief that it was a guarantee, and not having been guilty of any negligence in so signing it, was held not liable on the indorsement. Byles J. at p. 711 said:—

> It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.

In *Bagot v. Chapman* (2), a married woman, entitled to a reversionary interest, was induced by her husband to execute a document which he represented to be a power of attorney enabling him to raise money at some future time. It was, in fact, a mortgage for £12,000 of a reversionary interest to which she was entitled, containing a personal covenant for payment by the wife. The wife knew that if her husband did eventually raise money under the document it would be raised out of her reversionary interest. She did not intend to create a present charge or incur any personal liability. In an action brought by

(1) (1869), L.R. 4 C.P. 704. (2) [1907] 2 Ch. 222.

the mortgagees against the husband and wife for foreclosure and judgment on their covenants the wife pleaded, amongst other defences, *non est factum,* which was upheld. Swinfen Eady J. said at p. 227:—

> It is well settled that where a person is induced to execute a deed by a false representation as to the nature and character of the document he is signing—where the document is of a totally different character from what he was told it was—such a deed does not bind him.

The learned judge distinguished *Howatson v. Webb* at p. 227:—

> The present case is different from the recent case of *Howatson v. Webb,* where the grantor was told that the deeds signed by him related to the property to which they did relate, and were deeds transferring that property, and his mind was applied to the question of dealing with that property.

The principle that ignorance of the contents of a deed will not support a plea of *non est factum* was applied in *L'Estrange v. F. Graucob, Limited* (1). In that case the buyer of an automatic slot machine alleged that when she signed the order form she had not read it and knew nothing of its contents and that the clause excluding warranties could not easily be read owing to the smallness of the print. There was no evidence of any misrepresentation by the sellers to the buyer as to the terms of the contract. Scrutton L.J. said at p. 403:—

> When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

In *Marks v. The Imperial Life Assurance Company of Canada* (2), affirmed on appeal (3), the facts were that the wife of an insured, named as beneficiary in certain insurance policies, signed with the insured a borrowing agreement in respect of each policy. It was found as a fact that the insured misrepresented to his wife the nature of the documents she was signing, telling her that they were merely for the purpose of changing, to her advantage, the scheme of payment of the insurance moneys. It was held that the wife was entitled to succeed upon the plea of

(1) [1934] 2 K.B. 394. (2) [1949] O.R. 49, [1949] 1 D.L.R. 613.
(3) [1949] O.R. 564, [1949] 3 D.L.R. 647.

1956

PRUDENTIAL TRUST CO. LTD. *et al.* *v.* CUGNET

Nolan J.

non est factum, since it was clear that the two documents signed by her bore no relation in class or character to the documents described to her by the husband when she signed them. McRuer C.J.H.C., after a valuable review of the authorities, said at p. 68:—

> It would appear to be clear from these authorities that where a person signing a document is misled by the misrepresentation of another as to its true nature and character, as distinct from the purport and effect of its contents, it is invalid and the plea of *non est factum* is a good plea.

In *Curtis v. Chemical Cleaning and Dyeing Co.* (1), the dispute was as to whether or not the plaintiff, who had taken a dress to the defendants' shop to be cleaned and had signed a paper headed "receipt", was bound by a condition that the cleaners accepted no liability for any damage however arising. It was held that the defendants could not rely on the exemption clause because their assistant, by an innocent misrepresentation, had created a false impression in the mind of the plaintiff as to the extent of the exemption and thereby induced her to sign the receipt. Denning L.J., referring to the *L'Estrange* case, *supra,* said at p. 808:—

> If the party affected signs a written document, knowing it to be a contract which governs the relations between them, his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation.

and again at p. 808:—

> In my opinion any behaviour, by words or conduct, is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough. If the false impression is created knowingly, it is a fraudulent misrepresentation; if it is created unwittingly, it is an innocent misrepresentation; but either is sufficient to disentitle the creator of it to the benefit of the exemption.

The question for determination is whether the principle contained in *Carlisle and Cumberland Banking Company v. Bragg, supra,* or that contained in the earlier case of *Howatson v. Webb, supra,* should be applied to the facts of this case.

It is to be observed, as was pointed out by the Court of Appeal in the present case, that in *Howatson v. Webb, supra,* the misrepresentation was made by a solicitor and that the defendant, also a solicitor, should have realized

(1) [1951] 1 K.B. 805.

that he was signing a mortgage and not a transfer. Halsbury, 3rd ed. 1955, Vol. 11, p. 360, note (*o*), also makes reference to the fact that the defendant was a solicitor and could not have been misled if he had read the document, but chose to execute it without doing so. When the defendant Webb asked what the deeds were that he had been asked to sign he was told that they were just deeds transferring the Edmonton property. In fact one deed was a mortgage, but it is to be remembered that in England a mortgage operates as a conveyance and is a transfer of property by way of mortgage. The Court may have been influenced by the fact that the document signed by Webb was not of a character "wholly different" from what was represented to him.

The principle contained in *Carlisle and Cumberland Banking Company v. Bragg, supra,* was approved in this Court in *Minchau v. Busse* (1). Sir Lyman Duff C.J.C. said at p. 294:—

> The law is stated in the most satisfactory way in the judgment of Buckley L.J. in *Carlisle & Cumberland Banking Co. v. Bragg,* [1911] 1 K.B. 489 at p. 495.

In my view, while the respondent Edmond Cugnet knew that he was dealing with his petroleum and natural gas rights, the representation made to him was as to the nature and character of the document and not merely as to its contents. It was represented to be an option to grant a petroleum and natural gas lease, when, in fact, it was an assignment and transfer to the appellant Prudential of an undivided one-half interest in the petroleum and natural gas rights of the respondent Edmond Cugnet in the lands in question in the action.

Applying the principle contained in *Carlisle and Cumberland Banking Company v. Bragg, supra,* as I do, I have come to the conclusion that the mind of the respondent Edmond Cugnet did not go with his hand and that the plea of *non est factum* has been established.

It was contended on behalf of the appellant Prudential, in the alternative, that, in any event, the appellant Canuck Freehold Royalties Limited was entitled to the option con-

(1) [1940] 2 D.L.R. 282.

1956

PRUDENTIAL TRUST CO. LTD. *et al.* *v.* CUGNET

Nolan J.

tained in the document in question, which, on the evidence, the respondent Edmond Cugnet agreed to grant and for which he received payment.

With this contention I am unable to agree. The option is predicated upon the assignment and transfer to the appellant Prudential of an undivided one-half interest in the petroleum and natural gas upon or under the lands in question. It is an option given jointly by the respondent Edmond Cugnet and the appellant Prudential to grant a petroleum and natural gas lease to the appellant Prudential or its nominee.

Moreover, the option provided that, in addition to the share of the production to which the appellant Prudential, or its nominee, would become entitled as lessee under the terms of any lease obtained under the option, the appellant Prudential should be entitled to its share of production reserved by the respondent Edmond Cugnet and the appellant Prudential as lessors under such lease.

In my view, if the assignment of the one-half interest is void, then that portion of the document granting the option cannot be severed and falls with the rest of the transaction.

Having come to the conclusion that the plea of *non est factum* has been established and that the whole transaction is void, it is unnecessary to consider the other points raised in argument on the appeal.

I would dismiss the appeal with costs.

LOCKE, J.:—The question as to whether the respondents in the present matter are entitled to rely upon the plea of *non est factum* is not determined by deciding whether that plea would succeed if this action had been brought by the principals on whose behalf Hunter acted in obtaining the signature of Edmond Cugnet to the disputed documents: there remains the further and, to my mind, the more difficult question whether they are entitled to assert that defence as against the present appellants.

Hunter, at the time, appears to have been acting on behalf of Amigo Petroleums Limited, for which company the trust company was simply a bare trustee. Considering the matter, first, from the standpoint as to whether the agreement would have been enforceable if the action had been brought by the latter company, it is my opinion that

either a defence of *non est factum*, or that Edmond Cugnet had been induced to sign the documents by fraudulent misrepresentation made to him by Hunter would have defeated the claim, though the first would have rendered the agreement void *ab initio* while the latter would merely render it voidable. Despite statements in some of the decided cases such as *Howatson v. Webb* (1), which would suggest that the plea *non est factum* cannot succeed if the person signing the document is aware that the instrument he is asked to sign disposes of some interest in his property, where as here documents represented as being simply an option on mineral rights to be operative in the event of an outstanding option being dropped, include in fact an out and out sale of an undivided half interest in the mineral rights, the defence is, in my opinion, an answer.

The question as to whether the respondents are entitled to rely upon the defence is raised by the plea of estoppel by conduct in the reply to the statement of defence. The basis for the contention is that Edmond Cugnet having, by his conduct, enabled Hunter and his principals to sell what appeared on the face of it to be a half interest in the mineral rights to a purchaser for value acting in good faith, he cannot dispute the validity of the instruments as against the latter. The estoppel, it is said, arises by reason of the negligence of Edmond Cugnet. The question is the same as that referred to by Buckley L.J. in *Carlisle and Cumberland Banking Company v. Bragg* (2), in the following terms:—

> There has been so much discussion during the argument as to the plea of *non est factum*, and the relevance of negligence in relation to it under the circumstances of this case, that I wish to say a few words expressing my view of the law on the subject. In an action upon a deed, the defendant may say by way of defence that it is not his deed, *non est factum*. If it is found to be his deed, the plaintiff gets judgment and there is an end of the case. But suppose that it is found not to be his deed, and he succeeds on *non est factum*, the case is not necessarily over, because the plaintiff may say, "True you have established that this is not in fact your deed; but you are estopped by your conduct from saying that it is not your deed, and I can recover against you, although it is not your deed." It is only in this latter case that the question of estoppel comes into action. Negligence has nothing to do with the question whether the deed is in fact the deed of the defendant. Negligence has only to do with the question of estoppel.

(1) [1907] 1 Ch. 537, affirmed [1908] 1 Ch. 1.

(2) [1911] 1 K.B. 489 at 494.

1956

PRUDENTIAL TRUST CO. LTD. *et al.* *v.* CUGNET

Locke J.

That negligence of the nature suggested would preclude a person from relying upon the defence *non est factum* if the document were a negotiable instrument appears to have been suggested, if not decided, in *Foster v. Mackinnon* (1). The instructions to the jury in that case which were approved by the unanimous decision of the court said in part:—

> If the defendant's signature to the document was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if he was not guilty of any negligence in so signing the paper, he was entitled to the verdict.

In the earlier case of *Swan v. The North British Australasian Company* (2), a decision referred to by Byles J. when delivering the judgment of the court in *Foster's Case,* there is a review of the earlier authorities to be found in the judgment of Martin B. at pp. 644 *et seq.* At p. 649 that learned judge said in part:—

> I think it may be said with certainty that there is not one of them which is an authority for the proposition that, where a deed is not the deed of the party, he may be estopped by negligence or carelessness on his part from being permitted to aver that it is not.

Channell B. who agreed with Martin B. said at p. 658:—

> It would seem that an estoppel may arise out of circumstances having reference to a bill of lading or negotiable instrument taking effect by virtue of the law and custom of merchants, where no estoppel could arise from nearly similar circumstances with respect to a document not operating by virtue of the law and custom of merchants.

and referred to what had been said by Lord Chancellor Cottenham in *William M'Ewan and Sons v. James and Archibald Smith et al.* (3).

In *Bragg's Case,* Vaughan-Williams L.J. and Kennedy L.J. expressed the opinion that what had been said in *Foster's Case* as to the possible effect of negligence was applicable only to the case of a negotiable instrument.

In *France v. Clark* (4) where the question was as to the effect of a transfer of shares signed in blank which had been fraudulently made use of by the person with

(1) (1869), L.R. 4 C.P. 704.
(2) (1862), 7 H. & N. 603, 158 E.R. 611.
(3) (1849), 2 H.L. Cas. 309 at 325, 9 E.R. 1109 at 1115.
(4) (1884), 26 Ch.D. 257.

whom they had been deposited as security, Selborne L.C., at p. 262, referred to the rule relating to negotiable instruments in these terms:—

> The person who has signed a negotiable instrument in blank, or with blank spaces, is (on account of the negotiable character of that instrument) estopped by the law merchant from disputing any alteration made in the document, after it has left his hands, by filling up blanks (or otherwise in a way not *ex facie* fraudulent) as against a *bonâ fide* holder for value without notice.

That reason has no application to documents such as those signed by Edmond Cugnet in the present case.

It is my opinion that the result of the authorities was correctly stated in *Bragg's Case*. To say that a person may be estopped by careless conduct such as that in the present case, when the instrument is not negotiable, is to assert the existence of some duty on the part of the person owing to the public at large, or to other persons unknown to him who might suffer damage by acting upon the instrument on the footing that it is valid in the hands of the holder. I do not consider that the authorities support the view that there is any such general duty, the breach of which imposes a liability in negligence. I think the validity of the contention may be tested by asking whether, in a case such as this, an action for damages would lie at the suit of Canuck Freehold Royalties Limited against Edmond Cugnet. The answer to that question must, in my opinion, be in the negative: *Bank of Ireland v. Evans Trustees* (1), Parke B. at p. 410; *Swan's Case, supra,* at p. 650. If, indeed, there were such a duty, I think, for the reason pointed out by Channell B. in *Swan's Case,* that such an action would fail since the proximate cause of the damage was the fraudulent act of Hunter.

For these reasons, it is my opinion that the appeal should fail and be dismissed with costs.

CARTWRIGHT J. (*dissenting*):—The question raised for decision in this appeal is which of two innocent parties is to suffer for the fraud of a third.

The relevant facts and the view of the Courts below are fully set out in the reasons of my brother Nolan and I propose to give only a brief summary of the salient points on which the rights of the parties depend.

(1) (1855), 5 H.L. Cas. 389, 10 E.R. 950.

1956

PRUDENTIAL TRUST CO. LTD. *et al.* *v.* CUGNET

Cartwright J.

On January 26, 1951, the respondent Edmond G. Cugnet, hereinafter called "Cugnet Senior" signed and sealed a document whereby he conveyed an undivided one-half interest in all petroleum, natural gas and related hydrocarbons in and under two quarter-sections owned by him to Prudential Trust Company Limited, hereinafter called "Prudential", and granted to that company an option to acquire upon the termination of an existing petroleum and natural gas lease a petroleum and natural gas lease covering the said lands for a term of 99 years from January 26, 1951, on the same terms as those contained in the existing lease except that the cash rental was to be 25 cents per acre. Cugnet Senior was induced to sign this document by the fraudulent representation made to him by one Edward Hunter that it contained only the grant of an option. Cugnet Senior is literate, has had experience in buying and selling properties, has been successful, and, in his own words, has "lots of money". He signed the document without reading it. He does not suggest that anything was done to prevent him reading it but appears to have been anxious to return without delay to the game of cards which had been interrupted by Hunter's arrival. He had not met Hunter previously. Hunter took the document away with him but two or three weeks later Cugnet Senior received a copy of it together with a cheque for $64 the amount of the consideration which he had agreed to accept. He did not read this copy until some months later when his son, the respondent Raymond A. Cugnet, called his attention to its contents. In the meantime the copy had been hanging up on a spike in the kitchen at the home of Cugnet Senior. Prudential in taking the conveyance was acting as bare trustee for Amigo Petroleums Limited. During February 1951, the last-mentioned company transferred the one-half interest and the option to one Nickle who, in turn, transferred them for value to the appellant Canuck Freehold Royalties Limited, hereinafter called "Canuck", for which Prudential holds as bare trustee. Canuck had no notice or knowledge of the fraud practised by Hunter.

In upholding the respondent's plea of *non est factum* the learned trial judge distinguished the case at bar from *Howatson v. Webb* (1), on the ground that the misrepresen-

(1) [1907] 1 Ch. 537, affirmed [1908] 1 Ch. 1.

tation was in the latter as to the contents of the document and in the former as to the nature and character of the document. I must confess that I find difficulty in discerning a difference between a conveyance of a half interest in the oil and gas under specified lands and the grant of an option to obtain a 99-year lease of such oil and gas which is greater or more fundamental than the difference between a reconveyance by a bare trustee of the legal estate in specified land to the beneficial owner thereof and a mortgage of such land containing a personal covenant to pay. The following words of Warrington J. at the trial (1), might well be applied in the case at bar:

> . . . but it seems to me that these dicta contained in the judgments clearly point to this, that if a man knows that the deed is one purporting to deal with his property and he executes it, it will not be sufficient for him, in order to support a plea of *non est factum*, to shew that a misrepresentation was made to him as to the contents of the deed. The deed in the present case is not of a character so wholly different from that which it was represented to be as to come within the principle within which Lord Hatherley held that the case before him did not fall.

It is clear that Cugnet Senior knew that the deed which he was executing was one purporting to deal with the petroleum and natural gas under two correctly specified quarter-sections owned by him. On the assumption that a distinction can validly be drawn between the facts in *Howatson v. Webb, supra,* and those in *Carlisle and Cumberland Banking Company v. Bragg* (2), it is my view that on its facts the case at bar falls within the class of cases of which the former is an example.

If, however, it be assumed that the Courts below were right in holding that the document of January 26, 1951, was entirely different in nature from what Cugnet Senior believed it to be, it is my opinion that in signing and sealing the document without reading it he was guilty of such negligence that as between himself and Canuck, which gave valuable consideration on the strength of the deed which he had in fact signed and sealed, he must bear the loss.

The general principle was stated as follows by Lord Halsbury sitting in the Court of Appeal in *Henderson & Co. v. Williams* (3):—

> I think that it is not undesirable to refer to an American authority, which, I observe, was quoted in the case of *Kingsford v. Merry, Root v. French* in which, in the Supreme Court of New York, Savage C.J. makes

(1) [1907] 1 Ch. at p. 547. (2) [1911] 1 K.B. 489.
(3) [1895] 1 Q.B. 521 at 528-9.

1956

PRUDENTIAL TRUST CO. LTD. *et al.* *v.* CUGNET

Cartwright J.

observations which seem to me to be well worthy of consideration. Speaking of a bona fide purchaser who has purchased property from a fraudulent vendee and given value for it, he says: "He is protected in doing so upon the principle just stated, that when one of two innocent persons must suffer from the fraud of a third, he shall suffer, who, by his indiscretion, has enabled such third person to commit the fraud. A contrary principle would endanger the security of commercial transactions, and destroy that confidence upon which what is called the usual course of trade materially rests."

In *Farquharson Brothers & Company v. King & Company* (1), Lord Halsbury L.C. presiding in the House of Lords reaffirmed the above passage and pointed out that in the case then before the House the Court of Appeal had fallen into error through disregarding the words "who, by his indiscretion".

A branch of the principle so stated is the rule that, generally speaking, a person who executes a document without taking the trouble to read it is liable on it and cannot plead that he mistook its contents, at all events, as against a person who acting in good faith in the ordinary course of business has changed his position in reliance on such document. But it is said that the plea of *non est factum* operates as an exception to this salutary rule. That this is so in the case of a blind or illiterate person may be taken to be established by *Thoroughgood's Case* (2), but whether the exception extends to an educated person who is not blind is a question which was treated by Mellish L.J. in *Hunter v. Walters* (3) and by Warrington J. and the Court of Appeal in *Howatson v. Webb, supra,* as being still open. In the former case at pp. 86-7, Mellish L.J. says:—

> Now, I am of opinion that there is evidence that both Hunter and Darnell were induced by the fraud of Walters to execute that deed; but the mere circumstance that they were induced to execute it by fraud does not make it a void deed in point of law. But it is said that there is something more than this, and that where a deed is procured by an actual false representation respecting the contents of the deed itself, or respecting the legal effect of the deed, there the deed is not only voidable, but is actually void at law, and, being void, the parties are in the same position as if it had never been executed at all. Thence, no doubt, it would follow, that Mr. Walters never got any estate in these premises at all, and therefore that an equitable mortgage by him would be altogether invalid.
>
> Now, in my opinion, it is still a doubtful question at law, on which I do not wish to give any decisive opinion, whether, if there be a false representation respecting the contents of a deed, a person who is an educated person, and who might, by very simple means, have satisfied him-

(1) [1902] A.C. 325 at 331, 332. (2) (1582), 2 Co. Rep. 9a, 76 E.R. 408.
(3) (1871), L.R. 7 Ch. 75 at 87.

self as to what the contents of the deed really were, may not, by executing it negligently be estopped as between himself and a person who innocently acts upon the faith of the deed being valid, and who accepts an estate under it.

This passage is quoted by Warrington J. in *Howatson v. Webb* and in the Court of Appeal (1), Farwell L.J. says:—

I think myself that the question suggested, but not decided, by Mellish L.J. in that case will some day have to be determined, viz., whether the old cases on misrepresentation as to the contents of a deed were not based upon the illiterate character of the person to whom the deed was read over, and on the fact that an illiterate man was treated as being in the same position as a blind man: see *Thoroughgood's Case,* and Sheppard's Touchstone, p. 56; and whether at the present time an educated person, who is not blind, is not estopped from availing himself of the plea of *non est factum* against a person who innocently acts upon the faith of the deed being valid.

While he does not refer specifically to the question suggested by Mellish L.J., Buckley L.J. gives an answer to it in *Carlisle v. Bragg, supra,* at p. 496, where, speaking of the plea of *non est factum,* he says:—

I do not think myself that cases of this kind are to be confined to the blind and illiterate. Blindness and illiteracy constitute a state of things of which the equivalent for this purpose may under certain circumstances be predicated of persons who are neither blind nor illiterate. If a document were presented to me written in Hebrew or Syriac, I should for the purposes of that document be both blind and illiterate—blind in the sense that, although I saw some marks on the paper, they conveyed no meaning to my mind, and illiterate as regards the particular document, because I could not read it. It seems to me that the same doctrine applies to every person who is so placed as that he is incapable by the use of such means as are open to him of ascertaining, *or* is by false information deceived in a material respect as to, the contents of the document which he is asked to sign.

With the greatest respect, it appears to me that instead of the word "or" which I have italicized in this passage the word "and" ought to have been used. In a case where the deed in question has in fact been executed by the person raising the plea it is of the essence of the plea of *non est factum* that such person shall have been deceived as to its contents. I do not, of course, suggest that Buckley L.J. used the word "or" by inadvertence, for it seems clear

(1) [1908] 1 Ch. 1 at 3, 4.

1956

PRUDENTIAL TRUST CO. LTD. *et al.* *v.* CUGNET

Cartwright J.

that Bragg was capable by the use of such means as were open to him of ascertaining the contents of the document which he was asked to sign. All that he had to do was to read it.

An anxious consideration of all the authorities referred to by counsel and in the Courts below has brought me to the conclusion that, in so far as *Carlisle v. Bragg* decides that the rule that negligence excludes a plea of *non est factum* is limited to the case of negotiable instruments and does not extend to a deed such as the one before us, we should refuse to follow it. I do not read the judgment of Sir Lyman Duff C.J. in *Minchau v. Busse* (1) and particularly his reference at p. 294 to the judgment of Buckley L.J. as binding us to follow everything that was decided in *Carlisle v. Bragg*.

In my view the effect of the decisions prior to *Carlisle v. Bragg* is accurately summarized in Cheshire and Fifoot on Contract, 4th ed. 1956, at pp. 206-7, as follows:—

> The rule before 1911 was that if A., the victim of the fraud of C., was *guilty of negligence* in executing a written instrument different in kind from that which he intended to execute, then he was estopped as against innocent transferees from denying the validity of the written contract.

That rule was, I think, laid down by Byles J. delivering the unanimous judgment of the Court in *Foster v. Mackinnon* (2) as being applicable to all written contracts. It appears to me that the Court of Appeal in *Carlisle v. Bragg* misinterpreted the following passage in the judgment of Byles J. at p. 712:—

> Nevertheless, this principle, when applied to negotiable instruments, must be and is limited in its application. These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary to protect innocent transferees for value. If, therefore, a man write his name across the back of a blank bill-stamp, and part with it, and the paper is afterwards improperly filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent indorsee for value before maturity, and liable to the extent of any sum which the stamp will cover.
>
> In these cases, however, the party signing knows what he is doing: the indorser intended to indorse, and the acceptor intended to accept, a bill of exchange to be thereafter filled up, leaving the amount, the date, the maturity, and the other parties to the bill undetermined.

(1) [1940] 2 D.L.R. 282.

(2) (1869), L.R. 4 C.P. 704.

> But, in the case now under consideration, the defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and, if he were guilty of no negligence, it was not even his fault that the instrument he signed turned out to be a bill of exchange.

This does not say that the rule, that the signer if guilty of negligence will be estopped from denying the validity of a document as against a purchaser for value in good faith, is confined to the case of negotiable instruments; but rather that a person who knows he is signing a negotiable instrument cannot deny its validity to a holder in due course although he was guilty of no negligence in affixing his signature.

It may be said that the term negligence is inappropriate because it presupposes a duty owed by Cugnet Senior to Canuck, but in the passages quoted the term is, I think, used as meaning that lack of reasonable care in statement which gives rise to an estoppel. As it was put by Sir William Anson (1) in an article on *Carlisle v. Bragg*:—

> And further, there seems some confusion between the negligence which creates a liability in tort, and the lack of reasonable care in statement which gives rise to an estoppel. Bragg might well have been precluded by carelessness from resisting the effect of his written words, though the Bank might not have been able to sue him for negligence.

On the facts in the case at bar it cannot be doubted that Cugnet Senior failed to exercise reasonable care in signing the document in question. He executed a deed which he knew dealt with the oil and gas under his property without reading it, relying on the statements as to its contents made by Hunter who was a stranger to him. It does not appear that anything was done to prevent his reading the document. He chose to sign it unread rather than to absent himself for a few more minutes from the game of cards. His conduct, in my opinion, precludes him from relying on the plea of *non est factum* as against Canuck which purchased relying on the deed, in good faith, for value, and without notice or knowledge of any circumstance affecting the validity of the deed.

The terms of the deed appear to me to be sufficiently clear and I think that the plea that it is void for uncertainty must be rejected.

(1) (1912), 28 L.Q.R. 190 at 194.

1956

PRUDENTIAL TRUST CO. LTD. *et al.* *v.* CUGNET

Cartwright J.

In the result I would allow the appeal with costs throughout and direct that judgment be entered for the relief claimed in the amended statement of claim.

Appeal dismissed with costs.

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