1959
*Nov. 5, 6, 9
Dec. 21

PRUDENTIAL TRUST COMPANY LIMITED AND CANADIAN WILLISTON MINERALS LIMITED (*Defendants*) ..... APPELLANTS;

AND

HARRY G. FORSETH AND EMMA JENSINA FORSETH (*Plaintiffs*) . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contracts—Non est factum—Mines and Minerals—Mistaken belief that option for oil lease given—Actual transfer with option—Alleged fraudulent misrepresentation—Document read to vendor—Subsequent bona fide purchaser—Homestead—Trading in securities—Rule against Perpetuities—Trial judge's findings on credibility reversed by Court of Appeal—The Homesteads Act, R.S.S. 1940, c. 101—The Security Frauds Prevention Act, R.S.S. 1940, c. 287.

In 1949, the male plaintiff, with the consent of his wife, granted an oil lease on his homestead to I Co. In 1951, the husband assigned, with his wife's consent, an undivided one-half interest in all oil rights in the land, subject to the terms of the existing lease, to the defendant trust company and its *bona fide* assignee W Co. The plaintiffs sued to have the assignment and transfer set aside on the ground, *inter alia,* of *non est factum*. They alleged that the defendants' agent B represented that the documents were only an option to lease. The evidence disclosed that the female plaintiff, in the presence of her husband and B, had read aloud the document assigning the minerals. The trial judge dismissed the action and stated that he accepted B's evidence. This judgment was reversed by the Court of Appeal which disagreed with the finding on credibility. The defendants appealed to this Court.

Held: The action should be dismissed.

The circumstances of this case were not such as to warrant the exceptional course of reversing the findings of fact of the trial judge. On the contrary, there was ample evidence to justify them.

A literate person who signs a document after reading it through, or hearing it fully read, must be presumed to know the nature of the document which he is signing. The plea of *non est factum* cannot be established in such a case, even though some of the terms of the document may be difficult to comprehend. It is only when there is a misunderstanding as to the nature of the document itself that a claim of nullity can be made against a *bona fide* purchaser for value. *Prudential Trust Co. v. Cugnet,* [1956] S.C.R. 914, distinguished.

On a consideration of the terms of the document, the submission that it did not entitle the *bona fide* purchaser to receive a one-half share of the royalties payable under the lease with I Co., failed.

The essential requirements of ss. 3(1) and 4(1) of *The Homesteads Act* were met in this case. The fact that the wife's signed consent inaccurately described the document signed by her husband as a lease

*PRESENT: Cartwright, Fauteux, Martland, Judson and Ritchie JJ.

could not vitiate her consent as against a subsequent *bona fide* purchaser for value. That purchaser was entitled to benefit of the provisions of s. 7(3) of the Act.

Section 17*a* of *The Security Frauds Prevention Act* had no application to the circumstances of this case. The purchase of an interest in mineral rights in land and the acquisition of an option to lease mineral rights do not constitute a trade in a security within the ordinary meaning of those words, nor do they fall within the extended meaning of s. 2(8) and (10) of the Act.

The submission that the provision regarding the option to lease was void as against the Rule against Perpetuities, could not be entertained. It could not be said that the document did not constitute a personal contract.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], reversing a judgment of Davis J. Appeal allowed.

E. D. Noonan, Q.C., and *A. W. Embury,* for the defendants, appellants.

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

The judgment of the Court was delivered by

MARTLAND J.:—The respondent Harry G. Forseth is the registered owner of section 7, township 4, range 5, west of the second meridian, in the Province of Saskatchewan. The respondent Emma Jensina Forseth is his wife. They resided on the northeast quarter of that section until June of 1956.

On April 28, 1949, Forseth entered into a petroleum and natural gas lease with Imperial Oil Limited in respect of all petroleum, natural gas and related hydrocarbons, except coal and valuable stone, within, upon or under those lands for a term of ten years and so long thereafter as the leased substances, or any of them, are produced from the said lands. The lease provided that if operations were not commenced for the drilling of a well within one year from its date the lease would terminate, but that this drilling commitment could be deferred for a period of one year on payment of the sum of $64 and that drilling operations could be further deferred from year to year by making like payments. There was no other drilling commitment except in relation to offset wells.

[1] (1959), 17 D.L.R. (2d) 178, 30 W.W.R. 25.

1959

PRUDENTIAL TRUST CO. LTD. v. FORSETH

Martland J.

It was not until January 19, 1953, that oil was discovered at Forget, Saskatchewan, which was about thirty miles away from Forseth's land. By the time of the trial in 1956, however, there were eight producing wells on that land.

On May 8, 1951, Forseth executed a document in the following form:

ASSIGNMENT

I, Harry G. Forseth, of the Hamlet of Kingsford (hereinafter called the Assignor), in the Province of Saskatchewan, being registered as owner of the Mines and Minerals, excepting Coal, of, in, upon or under that certain piece or parcel of land described as follows:

All of Section Seven (7) in Township Four (4) in Range Five (5) West of the Second Meridian, in the Province of Saskatchewan,

IN CONSIDERATION of the sum of One Dollar ($1.00) and other valuable consideration (the receipt whereof is hereby acknowledged), paid to me by the Prudential Trust Company Limited of the City of Calgary, in the Province of Alberta (hereinafter called the Assignee),

DO HEREBY assign, transfer and set over unto the said Assignee 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 agree to deliver to the Assignee herewith a registerable Transfer of such interest;

PROVIDED that notwithstanding such transfer the Assignor shall be entitled to collect and retain for his sole use and benefit the total amount of all future annual delay rentals payable to the Lessor under the terms of the existing Lease.

AND the Assignor hereby grants to the Assignee the exclusive option to acquire from the Assignor and the Assignee, in the name of the Assignee or its Nominee upon the termination of the current Petroleum and Natural Gas Lease covering the said lands a Petroleum and Natural Gas Lease for a term of Ninety-nine (99) years to be computed from the date hereof, subject to the same terms and conditions as contained in the current Lease, except that the cash rental payable thereunder shall be 25 cents per acre. The option is to be exercised within Ninety (90) days of the termination of the current lease by the Assignee tendering to the Assignor an executed Lease, and the first year's rental payable thereunder. In addition to the share of production to which the Assignee, or its Nominee, will become entitled as Lessee under the terms of any Lease obtained under the Option, the Assignee shall be entitled to its share of production reserved by the Assignor and Assignee as Lessors in such lease.

AND THE Assignor hereby covenants and agrees to execute any further or additional documents or agreements as may be required to grant a lease and for the purpose of assuring and securing to the above named Assignee the aforesaid share of production herein assigned to the Assignee, and in particular and without limiting the generality of the foregoing, upon the request of the Assignee and at the expense of the Assignee, the Assignor will execute and deliver (with the duplicate Certificate of Title therefor) a registerable Transfer of the Assignor's interest in the petroleum and natural gas, in, upon or under the lands hereinbefore described to the

Prudential Trust Company Limited, together with the duplicate of any existing lease of the same, and a duly executed Assignment thereto to such Trust Company with full authority to such Trust Company, to enforce the terms of any lease, provided that such Trust Company shall account to the Assignor for his share of the Petroleum and Natural Gas.

AND the Assignment shall be binding upon and enure to the benefit of the parties hereto and each of them, their respective heirs, executors, administrators, successors and assigns.

AND I hereby undertake and agree that I have good title to the said Mines and Minerals, and that I have unimpeded right to make the Assignment herein.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 8th day of May A.D. 1951

SIGNED, SEALED AND DELIVERED in the presence of } (Sgd.) Harry G. Forseth (Seal)
Assignor

(Sgd.) James Kenean
Witness to the signature of the Assignor.

On the reverse side of the paper on which this agreement appeared was a consent by Mrs. Forseth and a certificate under *The Homesteads Act* as follows:

I, Emma Jensina Forseth the wife of Harry G. Forseth the Lessor named in the within Lease, do hereby declare that I have executed this Lease for the purpose of relinquishing all my rights to the said homestead in favour of The Prudential Trust Company Limited of Calgary, Alta.

(Sgd.) Emma Jensina Forseth
Signature of Wife

CERTIFICATE UNDER THE HOMESTEADS ACT

I, Joseph Sinkewicz of the Village of Lampman in the Province of Saskatchewan DO HEREBY CERTIFY that I have examined Emma Jensina Forseth wife of Harry G. Forseth the Lessor in the within Petroleum and Natural Gas Lease separate and apart from her husband and she acknowledged to me that she signed the same of her own free will and consent and without any compulsion on the part of her husband and for the purpose of relinquishing her rights in the homestead in favour of The Prudential Trust Company Ltd. and further that she was aware of what her rights in the homestead were.

I FURTHER CERTIFY that I am not disqualified, under Section 3 of The Homesteads Act, from taking the above acknowledgment.

(Seal) (Sgd.) Joseph Sinkewicz
A Notary Public

1959

PRUDENTIAL TRUST CO. LTD. v. FORSETH

Martland J.

On the same date Forseth executed a transfer to the appellant Prudential Trust Company Limited (hereinafter referred to as "Prudential") of an undivided one-half interest in all the mines and minerals within, upon or under his lands, reserving all coal. Mrs. Forseth signed her consent on the transfer pursuant to *The Homesteads Act* and a certificate under that Act was signed, as a notary public, by Joseph Sinkewicz.

The transfer calls for more than is provided for in the assignment in that the latter relates only to petroleum, natural gas and related hydrocarbons, whereas the former relates to all mines and minerals other than coal. Counsel for the appellants explains this difference as resulting from the fact that in 1951, when these documents were executed in Saskatchewan, a transfer limited to petroleum, natural gas and related hydrocarbons would not be accepted in the land titles offices for registration. It is acknowledged by the appellants that they would not be entitled to obtain from Forseth any beneficial interest in any minerals other than petroleum, natural gas and related hydrocarbons.

Prudential was a bare trustee of any rights acquired under these documents on behalf of Amigo Petroleums Limited. The rights of the latter company were twice transferred and are now held by the appellant Canadian Williston Minerals Limited (hereinafter referred to as "Williston"). It is admitted that Williston was a *bona fide* purchaser for value of these rights.

The execution of the two documents mentioned was obtained by one Benson, who was an agent for Amigo Petroleums Limited. On May 8, 1951, he called at the residence of the respondents and obtained their agreement to the execution of the assignment and of the transfer. The main issue in this case is as to whether, in the light of what then occurred, it should be found, as is contended by the respondents, that the mind of Forseth did not go with his hand, so as to establish a plea of *non est factum,* or whether, as is contended by the appellants, Forseth is not entitled to rely upon that plea.

At the outset it should be pointed out that it was admitted that Mrs. Forseth, in the presence of her husband and Benson, read aloud the document described as an

assignment. The evidence of the respondents, supported by their son David, who was present when Benson visited his parents, is that Benson represented that the documents he presented to them would only grant to Prudential an option to lease the petroleum and natural gas and related hydrocarbons in the lands to be exercised within ninety days after the termination of the lease to Imperial Oil Limited and that this was their understanding when the documents were executed. The evidence of Benson is that he explained to the respondents that he was buying an assignment of mineral rights which had an option to lease in it.

Following the discussion at the Forseth's house, Benson drove Forseth and his wife to Lampman, Saskatchewan, to the office of Sinkewicz, a notary public, who was secretary-treasurer of the rural municipality of Browning, where the assignment and the transfer were both signed by Forseth and where Mrs. Forseth signed consents printed on the assignment and the transfer forms. Sinkewicz signed a certificate on each one pursuant to *The Homesteads Act.*

After the documents were executed, Benson paid Forseth $100. Benson took both the executed copies of the assignment, as well as the transfer, and later one copy of the assignment was mailed to Forseth at his house. A caveat was filed by Prudential against Forseth's land on May 18, 1951, in which Prudential claimed an interest in the lands by virtue of the transfer from the registered owner of an undivided one-half interest in all mines and minerals other than coal and in respect of the option. Forseth later received a notice that a caveat had been filed.

In April, 1953, one McNeil, an agent of Williston, came to Forseth's house and asked for his duplicate certificate of title for the lands for the purpose of registering the transfer of mineral rights under *The Land Titles Act.* Forseth refused to deliver up the certificate of title. He says that he had not read the copy of the assignment when it was returned to him, but that he did read it at this time and realized that it involved something more than an option to lease.

On August 17, 1953, Forseth commenced action against Prudential, asking for a declaration that the assignment and the transfer were null and void. The statement of claim

1959

PRUDENTIAL TRUST CO. LTD. v. FORSETH

Martland J.

was amended in November, 1955. Mrs. Forseth was added as a party plaintiff and Williston was added as a party defendant.

The learned trial judge gave judgment in favour of the appellants. On the main issue of *non est factum* he made certain important findings of fact as follows:

> I can find no reason for disbelieving Benson and I accept his evidence as to what in fact took place. I found him to be an honest and reliable witness. Regrettably, I cannot say the same for the plaintiffs. Apart from the obvious contradictions in their evidence, their demeanour in the box belied the story which they told. . . .
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> * * *
>
> I, therefore, find there was no fraudulent misrepresentation as alleged and that the plaintiff Harry Forseth executed the documents in question with full knowledge of the terms thereof. I find further that the documents contain the agreement entered into between Benson on behalf of his principal and the plaintiff Harry Forseth. There was no misunderstanding as to the terms of the assignment or option.

The judgment at the trial was reversed by the Court of Appeal[1], which refused to accept the findings of fact made by the learned trial judge. The appellants have appealed from that judgment.

The attitude to be taken by an appellate Court in respect of findings of fact by a trial judge has been defined frequently. I cite two expositions of the principle. In *S.S. Hontestroom v. S.S. Sagaporack*[2], Lord Sumner says:

> What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: Order LXVIII., r. 1. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone. In The Julia,

[1] (1959), 17 D.L.R. (2d) 178, 30 W.W.R. 25.

[2] [1927] A.C. 37 at 47-8.

(1860) 14 Moo. P.C. 210, 235, Lord Kingsdown says: "They, who require this Board, under such circumstances, to reverse a decision of the Court below, upon a point of this description, undertake a task of great and almost insuperable difficulty. . . . We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong." Wood L.J., in The Alice, (1868) L.R. 2 P.C. 245, 248, says: "The principle established by the decision in The Julia, 14 Moo. P.C. 210, 235, is most singularly applicable. . . . We should require evidence that would be overpowering in its effect on our judgment with reference to the incredibility of the statements made." James L.J. thus laid down the practice in The Sir Robert Peel, (1880) 4 Asp. M.L.C. 321, 322: "The Court will not depart from the rule it has laid down that it will not overrule the decision of the Court below on a question of fact in which the judge has had the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression."

In *Powell v. Streatham Manor Nursing Home*[1], Viscount Sankey L.C. says:

On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses: see Clarke v. Edinburgh Tramways Co., per Lord Shaw, 1919 S.C. (H.L.) 35, 36, where he says: "When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate Court? In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment."

[1] [1935] A.C. 243 at 249-50.

1959

PRUDENTIAL TRUST CO. LTD. v. FORSETH

Martland J.

The Court of Appeal in the present case, while clearly aware of these principles, considered that there were sound reasons to show that the learned trial judge failed to use the advantage afforded him of having seen the witnesses and observed their demeanour and concluded that he had failed properly to evaluate the evidence. These conclusions must now be considered.

The Court of Appeal considered that the finding as to credibility by the learned trial judge "was primarily based on the unwarranted opinion that the assignment was an 'uncomplicated document' ". With respect, it appears to me that the finding as to credibility was largely based upon his conclusion that there were contradictions in the evidence of the respondents and upon their demeanour in the witness box, as mentioned by the learned trial judge in the passage from his judgment previously quoted. As to the assignment document itself, it must be borne in mind that the primary issue is not as to whether Forseth understood all its terms, but as to whether Forseth, by reason of misrepresentations by Benson, was not aware that it involved a sale of an interest in mineral rights. Whatever may be said as to the complications in those clauses of the assignment which deal with the option to lease, the paragraph which deals with the transfer of mineral rights, which is the very first covenant by Forseth in the assignment, is obviously a transfer of a one-half interest in petroleum and natural gas rights. The nature of that covenant is clearly stated in the opening words of that paragraph in almost the same words as a transfer under *The Land Titles Act*.

The Court of Appeal also reaches the conclusion that, even if Benson was, as the learned trial judge found him to be, an honest and reliable witness, he completely misled the respondents as to the real nature and character of the documents which he presented to them. I have reviewed Benson's evidence. There is no doubt that the contents of the documents could have been more clearly and precisely described. Furthermore he was in error as to the legal consequences of at least one of the clauses relating to the option; but, granting all of this, if Benson's evidence be accepted, the respondents should have understood that the assignment was more than an option and that it did involve

a transfer of an interest in Forseth's mineral rights. In other words, if Benson's evidence is accepted, Forseth should not have misunderstood the nature of the document which he executed, even if there was some misunderstanding as to the contents of it. It is only if there was a misunderstanding as to the nature of the document itself that Forseth could claim that it was null and void as against a *bona fide* purchaser for value, as Williston is in this case.

Considerable weight is attached in the judgment of the Court of Appeal to the inherent improbability of Forseth's making the deal contained in the assignment if he had known what he was doing. Admittedly a consideration of $100 for a one-half interest in the petroleum and natural gas rights in a section of land which now has on it eight producing oil wells appears to-day to be absurdly low, but it must be recalled that when the deal was made in 1951 there had been no oil discovery anywhere in the vicinity of this land. It was not until 1953 that a discovery was made some thirty miles away. The lease with Imperial Oil Limited had no obligatory drilling commitment which could not be avoided by the payment of a delay rental and the delay rental fixed was only ten cents an acre. These various factors appear to have been considered by the learned trial judge in reaching his decision.

With respect, after reviewing carefully all of the reasons advanced in the judgment of the Court of Appeal, I am of the opinion that the circumstances of this case were not such as to warrant the exceptional course of reversing the findings of fact of the learned trial judge. On the contrary, I think there was ample evidence to justify them.

In my view the most important fact of all is the one which was not only admitted by the respondents, but was pleaded in their statement of claim; namely, that Mrs. Forseth actually read aloud the contents of the assignment to her husband. Counsel were unable to refer us to any case in which a plea of *non est factum* had been upheld where a literate person executed a document after having read it through, or after having heard its contents completely read. The fact that some of the terms may be difficult to comprehend, a matter which weighed heavily in the Court of Appeal, does not serve to establish such a plea. This goes

1959

PRUDENTIAL TRUST CO. LTD. v. FORSETH

Martland J.

only to the issue of a misconception as to the contents of the document and not as to its nature and character. A literate person who signs a document after reading it through, or hearing it fully read, must, I think, be presumed to know the nature of the document which he is signing.

This proposition does not conflict in any way with the judgment of this Court in *Prudential Trust Company Limited v. Cugnet*[1], a case which involved the same sort of documents as those in question here and in which a plea of *non est factum* was upheld. In that case the respondent had never read the assignment or heard it read. The agent who obtained his execution of the document was not called as a witness and the learned trial judge found in fact that the respondent had relied upon misrepresentations by the agent.

My conclusion, therefore, is that the learned trial judge was right in rejecting the plea of *non est factum* and that Williston, as a *bona fide* purchaser for value, is entitled to enforce the agreement.

The respondents contended that, even if the assignment were valid and enforceable by Williston, it did not entitle Williston to receive a one-half share of the royalties payable under the lease with Imperial Oil Limited. This involves a consideration of the terms of the document to determine its legal effect.

Forseth transferred to Prudential an undivided one-half interest in all petroleum, natural gas and related hydrocarbons in and under the lands in question, subject to the terms and conditions of the Imperial Oil Limited lease providing that Forseth would be entitled to retain all future, annual delay rentals payable under that lease. Forseth was the registered owner of those mineral rights. By virtue of the petroleum and natural gas lease, he had granted and leased those mineral substances to Imperial Oil Limited for a term of ten years and so long thereafter as the leased substances, or any of them, were produced from the lands in question. Imperial Oil Limited had agreed to pay a royalty of 12½ per cent. of the current market value at the point of measurement of the oil produced and of the natural gas marketed. The result is that Forseth transferred to Prudential one-half of the petroleum, natural gas and related

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

hydrocarbons which, by virtue of its lease, Imperial Oil Limited was entitled to produce from these lands. Imperial Oil Limited had agreed to pay a 12½ per cent. royalty in respect of those substances which it produced, saved and marketed from the lands. As one-half of those substances thus produced, by virtue of the assignment, had become the property of Prudential, it seems clear that Prudential would be entitled to one-half of the royalties paid in respect of their production and sale.

This view is reinforced by the proviso which assured to Forseth the full amount of the delay rentals paid by Imperial Oil Limited. This clearly implies that, without the proviso, Prudential would have been entitled also to share in those payments.

It is further reinforced by the covenant for further assurances contained in the assignment, which provides that Forseth agrees to execute any further or additional documents or agreements as may be required "for the purpose of assuring and securing to the above named Assignee the aforesaid share of production herein assigned to the Assignee". For this purpose Prudential could require from Forseth an assignment of the Imperial Oil Limited lease, in which event Prudential could enforce the lease, but "shall account to the Assignor for his share of the Petroleum and Natural Gas".

In my view the submission of the respondents on this point fails.

Another point urged was that, in respect of the north-east quarter of the section of land on which the respondents had resided, the assignment was void by virtue of the provisions of *The Homesteads Act* which, as then applicable, was R.S.S. 1940, c. 101, as amended, because it was the homestead quarter section. The relevant provisions of that statute are as follows:

3. (1) Every transfer, agreement of sale, lease or other instrument intended to convey or transfer an interest in a homestead to any person other than the wife of the owner, and every mortgage intended to charge a homestead in favour of any such person with the payment of a sum of money, shall be signed by the owner and his wife, if he has a wife who resides in Saskatchewan or has resided therein at any time since the marriage, and she shall appear before a district court judge, local registrar of the Court of Queen's Bench, registrar of land titles or their respective deputies, or a solicitor or justice of the peace or notary public and, upon

1959

PRUDENTIAL TRUST CO. LTD. v. FORSETH

Martland J.

being examined separate and apart from her husband she shall acknowledge that she understands her rights in the homestead and signs the instrument of her own free will and consent and without compulsion on the part of her husband:

* * *

4. (1) Every such transfer, agreement, lease, mortgage or other instrument shall contain or have annexed to or endorsed or written thereon a declaration by the wife (form A) that she has executed the same for the purpose of relinquishing her rights in the homestead.

* * *

5. (1) There shall be annexed to or endorsed on the transfer, agreement, lease, mortgage or other instrument a certificate (form B) signed by the officer taking the same, to the effect that he has examined the wife separate and apart from her husband, that she understands her rights in the homestead and that she signs such instrument of her own free will and consent and without any compulsion on the part of her husband.

* * *

7. (1) Every transfer, agreement of sale, lease or other instrument intended to convey or transfer an interest in land, and every mortgage, which does not comply with the provisions of sections 4 and 5, shall be accompanied by an affidavit of the maker (form C) stating either that the land described in such instrument is not his homestead and has not been his homestead at any time or that he has no wife, or that his wife does not reside in Saskatchewan and has not resided therein at any time since the marriage.

* * *

(3) No transferee, mortgagee, lessee or other person acquiring an interest under such instrument shall be bound to make inquiry as to the truthfulness of the facts alleged in the affidavit hereby required to be made or in the certificate of examination in form B, and upon delivery of an instrument purporting to be completed in accordance with this Act the same shall become valid and binding according to its tenor save as provided in section 11, R.S.S. 1940, c. 101, s. 7.

Section 11, which is referred to in subs. (3) of s. 7, has no application to the facts of this case.

The contention on this point is that there was no proper consent by Mrs. Forseth to the assignment, because that document is inaccurately referred to in the printed form of consent and in the printed certificate signed by Sinkewicz, the notary public, as a lease.

There is nothing in the evidence to suggest that the wording of the consent or of the certificate in any way influenced the consent which Mrs. Forseth gave. Furthermore, she also executed the consent to the transfer of mineral rights to Prudential and there is no error in relation to the description of that instrument in the consent form or the certificate form.

The essential requirements of ss. 3(1) and 4(1) of *The Homesteads Act* are that the wife shall sign the instrument; that, on separate examination by a proper officer, she shall acknowledge that she understands her rights in the homestead and signs the instrument of her own free will and consent, without compulsion by her husband, and that she has executed it for the purpose of relinquishing her rights in the homestead. All these various requirements were met. There is no question that Mrs. Forseth knew she was relinquishing her homestead rights in favour of Prudential in relation to the document which she had read to her husband and which he had signed. She contends that she misunderstood the nature of the document itself, but does not suggest that the wording of the two forms in any way contributed to that misunderstanding. I do not, therefore, think that the inaccuracy of the description of the document in those two forms is material in the circumstances of this case.

In my opinion Williston is properly entitled to the benefit of the provisions of subs. (3) of s. 7.

The effect of that subsection was considered by the Court of Appeal of Saskatchewan in *Bonkowski v. Cordillera Petroleums Limited*[1]. It was there held that the subsection means that a person acquiring an interest under an instrument intended to convey an interest in land is not bound to inquire into the truth of the facts alleged in the certificate of examination and that an instrument delivered, which purports to comply with the provisions of the Act, shall be valid and binding. The object of the subsection is to give a transferee in good faith protection where there has been a *prima facie* compliance with the provisions of the statute. With this I agree and I think, therefore, that the respondents' submission based upon *The Homesteads Act* fails.

The respondents further contend that the transaction was rendered void by reason of the provisions of *The Security Frauds Prevention Act,* R.S.S. 1940, c. 287, on the basis that Benson was trading in royalty rights. The relevant provisions of this Act, in effect at the time, are the following:

2. In this Act, unless the context otherwise requires, the expression:

* * *

[1] (1955) 16 W.W.R. 481, 5 D.L.R. 229.

1959

PRUDENTIAL TRUST CO. LTD. v. FORSETH

Martland J.

8. "Security" includes:

(a) any document, instrument or writing commonly known as a security;

(b) any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company;

(c) any document constituting evidence of an interest in an association of legatees or heirs;

(d) any document constituting evidence of an interest in an option given upon a security; and

(e) any document designated as a security by the regulations.

* * *

10. "Trade" or "trading" includes any solicitation or obtaining of a subscription to, disposition of, transaction in, or attempt to deal in, sell or dispose of a security or interest in or option upon a security, for valuable consideration, whether the terms of payment be upon margin, installment or otherwise, and any underwriting of an issue or part of an issue of a security, and any act, advertisement, conduct or negotiation directly or indirectly designated as "trade" or "trading" in the regulations. R.S.S. 1930, c. 239, s. 2.

3. (1) No person shall:

(a) trade in any security unless he is registered as a broker or salesman of a registered broker;

(b) act as an official of or on behalf of a partnership or company in connection with a trade in a security by the partnership or company, unless he or the partnership or company is registered as a broker;

(c) act as a salesman of or on behalf of a partnership or company in connection with a trade in a security by the partnership or company, unless he is registered as a salesman of a partnership or company which is registered as a broker;

and unless such registrations have been made in accordance with the provisions of this Act and the regulations; and any violation of this section shall constitute an offence.

* * *

17a. (1) No person shall call at any residence and:

(a) trade there in any security; or

(b) offer to trade there or at any other place in any security;

with the public or any member of the public.

This point was not pleaded by the respondents, nor was it raised at the trial of the action. It was argued before the Court of Appeal, but no conclusion has been expressed by that Court on this point.

In so far as the respondents rely upon subs. (1) of s. 3, there was no plea and no evidence adduced that Benson was not registered as a broker, or salesman of a registered broker. This being so, the only section on which the respondents can

rely is s. 17*a*, whose terms are equally applicable to a person who is registered under the Act as well as to one who is not. In my opinion, however, that section has no application to the circumstances of this case. The transaction in question here is the purchase of an interest in mineral rights in land and the acquisition of an option to lease mineral rights. This does not constitute a trade in a security within the ordinary meaning of those words, nor, in my opinion, does it fall within the extended meanings given to them by subss. (8) and (10) of s. 2. The extended meanings given to the words "trade" and "trading" in subs. (10) seem to contemplate the soliciting of subscriptions for or the making of sales of security by the person trading and do not contemplate the soliciting for or making of purchases of securities by such a person. Furthermore the extended meanings of the word "security" in subs. (8) contemplate a "document" of one of the kinds defined. In relation to royalties it means a document which is evidence of title to an interest in royalties. The only document, in this case, which related to royalties was the Imperial Oil Limited lease. There was no "trading" in that document. The assignment provided for a purchase of mineral rights subject to that lease and, solely to assure to Prudential its share of production of those minerals, gave it a right to obtain an assignment of the lease. In my opinion, therefore, Benson did not trade in any security or offer to trade in any security so as to fall within the provisions of s. 17*a*.

Finally it was contended that, in any event, the provision of the assignment regarding the option to lease was void as offending against the Rule against Perpetuities.

In view of the fact that there are eight producing oil wells on this property, it would seem to me that this issue is really academic, since the option can only be exercised after the termination of the Imperial Oil Limited lease. We are being asked, therefore, to determine questions of law which are unlikely to arise and which, if they arise at all, can only arise in the remote future.

1959

PRUDENTIAL TRUST CO. LTD. v. FORSETH

Martland J.

It is sufficient to say that at this stage I would not be prepared to hold that the option is void. The law regarding the subject of contracts relating to rights in the future has been well summarized in Halsbury's Laws of England, 2nd ed., vol. 25, at p. 109, as follows:

> A contract relating to a right of or equitable interest in property *in futuro* may be intended to create a limitation of land only, in which case, if the limitation is to take effect beyond the perpetuity period, the contract is wholly void and unenforceable; or the contract may, upon its true construction, be a personal contract only, in which case the rule does not apply to it; or it may, upon its true construction, be, as regards the original covenantor, both a personal contract and a contract attempting to create a remote limitation, in which case the limitation will be bad for perpetuity, but the personal contract will be enforceable, if the case otherwise admits, against the promisor by specific performance or by damages, or against his personal representatives in damages only. In all cases it is a question of construction whether the contract is intended to create a limitation of property only, or a personal obligation only, or both.

I am not prepared to say that the assignment did not constitute a personal contract by Forseth, especially when it is borne in mind that the agreement contemplates a future petroleum and natural gas lease to be granted, not by Forseth only, but by both Forseth and Prudential as co-owners. The real effect of his covenant was to give assent to a leasing of his share of the petroleum and natural gas rights along with the share of his co-owner Prudential.

I am, therefore, of the opinion that this appeal should be allowed with costs both here and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the defendants, appellants: Noonan, Embury, Heald & Molisky, Regina.

Solicitors for the plaintiffs, respondents: Pedersen, Norman & McLeod, Regina.