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BAKKER v. WINKLER

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME  
COURT OF ALBERTA

1930

\*Feb. 6.

\*Apr. 10.

*Real property—Oil and natural gas rights—Agreement for sub-lease of—  
Right to rescission—Head lease made part of sub-lease—Misrepresentation—Finding of trial judge.*

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Tweedie J. (2), by which the appellant had been given the relief claimed by him.

The appellant was the holder of a lease of 240 acres of oil lands and entered into an agreement with the respondents to grant what is called a sub-lease of 80 acres of such lands, for the consideration of \$40,000 payable \$1,000 on the signing of the agreement which was made on the 4th of March, 1929, \$10,000 on the 19th day of March, \$10,000 on the 1st of April and \$10,000 on the 15th of April and \$9,000 on the 1st of May. The appellant did not personally appear; all the negotiations and acts on his behalf having been performed by W. M. Davidson, barrister, his

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\*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Cannon JJ.

(1) (1929) 24 Alta. L.R. 253.

(2) (1929) 4 D.L.R. 107.

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attorney. The down payment of \$1,000 was made but no further payment, though the trial judge finds that on the 15th of April the balance in full was offered and that actual tender of the amount was waived; and on the next day this action was begun, asking for rescission of the contract. The statement of claim alleges that "the sub-lease was to be subject to the covenants, conditions, stipulations and agreements in the said head lease contained" and that the head lease provided for the commencement of the drilling of a well upon the said premises by the 15th of April, 1929, and that the consideration for the granting of the said lease was "the agreement on the part of the respondents to carry out the above mentioned terms of the head lease and in addition thereto the sum of forty thousand dollars" and that the respondents have paid only \$1,000 and "have failed to carry out the terms of the said agreement which required the commencement of drilling upon the said leased premises before the 15th day of April, 1929." It further alleges that the agreement was induced by the fraudulent misrepresentations by the respondents that they were possessed of the means of carrying out the said agreement.

The trial judge gave judgment for the appellants, finding the fraudulent misrepresentation established and holding the contract was induced by them.

The Appellate Division held that, on the facts of the case, even accepting the finding of the trial judge as to misrepresentation, it was too late, when the action was begun, for the appellant to rely on that ground and that, not until then, was any attempt made by the appellant to repudiate on that ground.

On the appeal to this court, the judgment of the court, allowing the appeal with costs, was delivered by Lamont J., who held that there was evidence before the trial judge upon which the latter could find fraudulent misrepresentation and that, he having found it, this court was bound by his finding.

*Appeal allowed with costs.*

*R. S. Robertson K.C. and S. B. Smith for the appellant.*

*J. E. A. Macleod K.C. for the respondents.*