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*Mar. 11, 12, 13.

*Mar. 28.

EDMUND BARNARD (DEFENDANT)....APPELLANT;

AND

HORMISDAS RIENDEAU (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Vendor and purchaser—Artifice—Misrepresentation—Consideration of contract—Error—Laches—Possession and administration—Ratification—Waiver—Estoppel—Art. 992, 993, 1053, 1054 *C. C.*

B having a hotel scheme under promotion, agreed to purchase an old building from R in order to prevent it falling into the hands of persons who might use it for a brewery and thereby cause a nuisance and ruin his enterprise. R by falsely representing that he had a serious offer for the purchase or lease of the property for the purpose of a brewery, induced B to close on his agreement and take a deed of the property, the payment of the price being deferred. On discovery of the falsity of these representations B notified R that he repudiated the contract and invited him to bring an action to test its validity if he was unwilling to give a release and take back the property. The vendor delayed some time in taking action for the recovery of the price and, in the meantime, B remained in possession and collected the rents.

Held, that, under the provisions of the Civil Code, as the vendor had made false representations which deceived the purchaser as to the principal consideration for which he contracted, he could not recover; that the purchaser had a right to have the contract rescinded on the ground of error; that, under the circumstances, the delay in bringing the action could not be imputed as laches of the defendant, nor waiver of his right to have the contract set aside, and that defendant's administration of the property in the meantime could not be construed as ratification of the contract.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, reversing the judgment of the Court of Review, at Montreal, and restoring the judg-

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

ment of the Superior Court, District of Montreal, by which the plaintiff's action had been maintained with costs.

The defendant was interested in a hotel enterprise at Chambly, in connection with which he was attempting to organize a joint stock company, the proposed site for the building being close to old barracks belonging to plaintiff which had at one time been used as a brewery, but had fallen into ruin without any real saleable value. For the purpose of preventing the re-establishment of a brewery, which might prove a nuisance in the immediate vicinity of the proposed summer hotel and ruin his important enterprise, the defendant secured from the plaintiff a right of pre-emption or option to purchase the barracks property in case any offer should be made to buy or rent it by persons likely to use it again as a brewery. Some time afterward three strangers visited Chambly and looked over the property, making remarks about its suitability for brewing lager beer if the water in the river could be used for that purpose, but they made no definite offer either to rent or purchase. The plaintiff immediately instructed his solicitor to insist upon the defendant exercising his option at once, otherwise that he would deal with the strangers who were offering to buy or lease for a long term and utilize the barracks as a brewery. The defendant was pressed to close upon this representation and purchased the property at a price considerably above its actual market value, receiving a conveyance and becoming a party to the deed covenanting to pay the price at a subsequent date therein stated. On discovering that he had been led into error, in thus purchasing, through misrepresentations, the defendant refused to carry out his bargain, invited the plaintiff to take back the property or to sue upon the covenant, if he wished

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to test its validity, and in the meantime collected the rents and looked after the administration of the property of which he had received possession. After some considerable delay the action was taken, to which it was pleaded that the defendant had been induced to purchase through fraudulent misrepresentations, and that his obligation was vitiated by error as to the moving consideration and by the artifices used to mislead him into making the bargain when there was not any chance of the strangers either buying or renting the property for the purpose of using it as a brewery.

The Superior Court, (Davidson J.) maintained the plaintiff's action, but this judgment was reversed unanimously by the Court of Review (Sir Melbourne Tait A. C J. and Mathieu and Gill JJ.) The present appeal is from the judgment of the Court of Queen's Bench reversing the Court of Review and restoring the trial court judgment, Würtele and Ouimet JJ. dissenting.

Atwater K.C. and *Beauchamp K.C.* for the appellant. Error was the determining cause of the contract, induced by misrepresentations made by the plaintiff as to a serious offer having been made. No want of diligence can be imputed to the defendant, for he notified the plaintiff of his repudiation of the contract as soon as he was made aware of the falsity of the representations and as the plaintiff would not take back the property and give a release he put him *en demeure* to enforce specific performance by suit to test the validity of the obligation. It was through no fault of the defendant that plaintiff hesitated and delayed the action. The administration of the property in the meantime was no waiver or ratification, but a duty legally imposed on the defendant who was

obliged to hold possession and collect the rents until the questions in difference were determined.

The contract was entered into as the result of manœuvres without which the other party would not have contracted and it should be annulled at the demand of the party who has been deceived, even though there is no fraud. We refer to arts. 992, 993, 1053, 1054, C. C.; 10 Duranton, *nn.* 171, 181, 188; 6 Toullier, *nn.* 37, 38, 41, 87, 88, 92; 24 Demolombe, *nn.* 12, 165–172, 187; Larombière, art. 1116 *nn.* 7, 10; Solon "Nullité," *nn.* 227, 228, 229; 4 Boileux, art. 1116, p. 362; Pothier, Obl. 2; Pand. fr. "Obligations" t. 11, *nn.* 7149, 7293, 7311, 7312, 7313, 7314; 7 Huc *n.* 36; Beaudry-Lacantinerie "Obligations" *n.* 71 (1); 26 Laurent, *n.* 281; vol. 15, *nn.* 500, 528: *Belhumeur* v. *Massé* (1); *Lighthall* v. *Chrétien* (2); *Halde* v. *Richer* (3); Pollock on Torts, 277, 278; 267-8; Cooley on Torts, 474-6, 497, 499. *Murray* v. *Jenkins*, (4); *Cole* v. *Pope* (5); *Malzard* v. *Hart* (6); *Demers* v. *Montreal Steam Laundry Co.* (7); *Lefeuntéum* v. *Beaudoin* (8); *Peek* v. *Gurney* (9); *Derry* v. *Peek* (10); *Lindsay Petroleum Co.* v. *Hurd* (11); Jour du P., Rep. "Erreur," *nn.* 13, 19, 20. The solicitor acted on the plaintiff's instructions in misleading defendant and the fraud thus practiced by the agent may be set up against the principal, in the sense that the nullity of the contract by reason of fraud could be demanded as against the principal. 1 Bédarride, "Dol. et Fraude," *nn.* 78–81.

Fitzpatrick K.C. (Solicitor General of Canada) and *Lafleur K.C.* for the respondent. It is clear that there was no fraud contemplated by plaintiff, nor was there

(1) 34 L. C. Jur. 294.
(2) 11 R. L. 402.
(3) 19 R. L 260.
(4) 28 Can. S. C. R. 565.
(5) 29 Can. S. C. R. 291.
(6) 27 Can. S. C. R. 510.
(7) 27 S. C. R. 537.
(8) 28 Can. S. C. R. 89.
(9) L. R. 6 H. L. 377.
(10) 14 App. Cas. 337.
(11) L. R. 5 P. C. 221.

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even a false statement made. The plaintiff was convinced that the strangers who had visited the property seriously intended to buy or lease, and fearing the loss of a market for the property, called upon the defendant either to exercise or abandon his option. The consideration inducing defendant to purchase was good and sufficient and he ratified his bargain by many subsequent acts, held possession, interested himself to secure exemption from taxes, collected rents and so forth, from the date of his purchase, 20th April, 1896, till suit, 9th September, 1897. This is a waiver and operates to estop defendant from having the contract annulled. This long delay was allowed to elapse although defendant was aware of all the facts material to his defence in June, 1897. The facts have been found in the plaintiff's favour by the trial judge who saw and heard the witnesses, and cannot be reconsidered on appeal.

We refer to *Paradis* v. *Municipality of Limoilou* (1); *The Village of Granby* v. *Ménard* (2); *Campbell* v. *Fleming* (3); *Morrison* v. *Universal Marine Ins. Co.* (4); *Clough* v *London and Northwestern Railway Co.* (5).

The judgment of the court was delivered by:

TASCHEREAU J.—Il serait inutile de relater ici au long les faits nombreux que ce dossier présente. Monsieur le juge, Sir Melbourne Tait, en a fait une analyse détaillée et si complète qu'il me suffit d'y référer. Nous en sommes venus, avec la Cour de Revision, à la conclusion que l'appelant n'a acheté la propriété en question que parce que l'intimé lui avait dit ou fait dire que Cummings avait offert de l'acheter ou de la louer pour en faire une brasserie. Or il ressort clairement de la preuve que Cummings n'a jamais fait une telle offre.

(1) 30 Can. S. C. R. 405
(2) 31 Can. S. C. R. 14.
(3) 1 Ad. & El. 40.
(4) L. R. 8 Ex. 40, 197.
(5) L. R. 7 Ex. 26.

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L'intimé ne pourrait pas soutenir que si l'appelant n'eut pas acheté, la propriété serait passée entre les mains de Cummings, ni alors, ni en aucun temps depuis. Cummings et ses associés jurent positivement qu'ils n'ont jamais fait d'offres à l'intimé lors de leur visite à Chambly, et n'ont jamais eu l'intention d'en faire depuis.

L'intimé a mis l'appelant en demeure quand il n'y avait pas le moindre danger que la propriété passe en d'autres mains, bien plus, avant même qu'il ait vu Cummings. Qu'il ait été coupable de fraude dans le sens vulgaire de ce mot, il a droit au bénéfice du doute. Mais qu'il fût de bonne foi ou non, ne peut affecter la question. Il est peut-être possible qu'il n'ait pas eu le dessein de tromper l'appelant, mais il l'a trompé tout de même, et forcé à acheter de suite dans la crainte que s'il n'achetait pas, Cummings acheterait. Il l'a mis dans l'erreur et c'est cette erreur qui a été, pour l'appelant, la *causa contractui*, la considération principale qui l'a déterminé à acheter pour me servir des termes mêmes du Code, art. 992. Son consentement a été surpris.

Sans doute l'erreur sur le motif d'un contrat n'est pas généralement une cause de nullité. Mais ce n'est pas sur son motif que l'appelant a été induit en erreur dans l'espèce, mais bien sur le seul fait que l'a déterminé à acheter, le fait d'une offre sérieuse de Cummings.

Et d'ailleurs, quand l'erreur dans le motif, dans la cause impulsive d'un contrat, résulte de l'artifice, dol, ou des fausses représentations d'une des parties contractantes, la partie trompée a le droit de demander la resolution du contrat. La lettre écrite par l'intimé à Monsieur Sicotte le seize mars n'est pas justifiée par la preuve. Son imagination était sans doute surexcitée. Il s'est fait illusion et a pris pour accompli ce qu'il pensait devoir arriver et pouvoir prévoir.

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Tant qu'à Monsieur Sicotte, personne n'a songé, devant nous du moins, à mettre sa bonne foi en doute. Et l'appelant n'avait pas raison d'être injuste à son égard, comme il l'a été dans les questions qu'il lui a posées comme témoin.

Tant qu'à l'engagement que l'intimé avait pris envers l'appelant de lui donner l'option d'acheter, ou ce qui est appelé au dossier le droit de préemption, ou la préférence (*the refusal,*) la preuve en est si claire, que tant en Cour Supérieure et en Cour de Revision, qu'en Cour d'Appel, il ne semble pas y avoir eu le moindre doute à ce sujet. L'intimé d'ailleurs dans sa déposition a dû l'admettre Mais ce fait n'est peut-être pas essentiel. Si sans cet engagement l'intimé eut obtenu de l'appelant son consentement à ce contrat par la fausse représentation que Cummings avait offert d'acheter de suite les prémisses pour en faire une brasserie, le consentement de l'appelant aurait tout de même été obtenu sous de faux prétextes.

Tant qu'à la prétendue ratification par l'appelant nous adoptons l'opinion de Monsieur le juge Tait sur ce point comme sur tous les autres. L'Appelant a répudié son achat aussi promptement qu'il lui a été possible de le faire. Au lieu de prendre une action lui-même, il a sommé l'intimé de prendre l'initiative ; et si celui-ci a retardé de ce faire, l'appelant ne peut en souffrir. Il a administré la propriété, c'est vrai, mais, sous les circonstances, c'était son devoir de le faire en attendant que la justice prononce sur le différend entre lui et l'intimé.

Nous sommes unanimement d'avis d'allouer l'appel avec depens et de rétablir le jugement de la Cour de Revision avec frais dans toutes les cours contre l'intimé.

Appeal allowed with costs.

Solicitors for the appellant: *Beauchamp & Bruchési.*

Solicitors for the respondent: *Lafleur & Macdougall.*