JOHN C. SCHULTZ.....APPELLANT;

AND

EDMUND BURKE WOOD .....RESPONDENT.

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*Mar. 10.

*Nov. 14.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, MANITOBA.

Verbal agreement—Subsequent deed—Vendor and purchaser—Alleged fraudulent representation by vendor—Refusal of Judge to postpone hearing.

W. (the plaintiff) being desirous of securing a residence, entered into negotiations with *S.* (defendant) to purchase a house which defendant was then erecting. *W.* alleged that the agreement was, that he should take the land (2½ lots) at $400 a lot of fifty feet frontage, and the materials furnished and work done at its value. In August, 1874, a deed and mortgage were executed, the consideration being stated in both at $5,926. The mortgage was afterwards assigned to the *M.* and *N. W. L. Company*. *W.* alleged in his bill, that *S.*, in violation of good

*PRESENT—Sir William J. Ritchie, Knt., C.J., and Strong, Fournier, Henry and Gwynne, JJ.

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faith, and taking advantage of *W.'s* ignorance of such matters, and the confidence he placed in *S.*, inserted in the mortgage a larger sum than the balance due as a fair and reasonable market value of the lands, and of what he had done to the dwelling house and other premises, and he prayed that an account might be taken of the amount due.

S. repudiated the allegation of fraud, and alleged that *W.* had every opportunity to satisfy himself, and did satisfy himself, as to the value of what he was getting; that he had told the plaintiff he valued the land at $2,000, and that in no way had he sought to take advantage of the plaintiff. *S.* was unable to be present at the hearing, and applied for a postponement, on the grounds set forth in an affidavit, that he was a material witness on his own behalf, and that it was not safe for him, in this state of health, to travel from *Ottawa* to *Winnipeg*.

Dubuc, J., refused the postponement, on the ground that the court was only asked now to decree that the account should be opened and properly taken, and the amount ascertained, which would be done by the master if the court should so decide, and that the defendant would then have an opportunity of being present, and that he was not necessarily wanted at the hearing: and, as the result of the evidence, made a decree in accordance with the contentions of the plaintiff, and directed an account to be taken.

The Chief Justice of the Supreme Court, under sec. 6 of the Supreme Court Amendment Act of 1879, allowed an appeal direct to the Supreme Court of *Canada*, it being known that there were then only two judges on the bench in *Manitoba*, the plaintiff (Chief Justice) and *Dubuc*, J., from whose decree the appeal was brought.

Held, that under the circumstances, the case ought not to have been proceeded with in the absence of appellant, and without allowing him the opportunity of giving his evidence.

Per *Ritchie*, C.J., and *Strong* and *Gwynne*, JJ., that on the merits there was no ground shown to entitle the plaintiff to relief.

Per *Ritchie*, C.J., and *Strong*, J., that the bill upon its face alleged no ground sufficient in equity for relief, and was demurrable.

THIS was an appeal from a judgment pronounced and a decree made by Mr. Justice *Dubuc*, of the Court of Queen's Bench, in the Province of *Manitoba*, on the 12th day of April, 1879.

By an order made on the 13th day of September last,

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by the Chief Justice of the Supreme Court of *Canada*, an appeal was permitted on behalf the defendant *Schultz* to the said Supreme Court of *Canada* without any appeal from the said judgment to any intermediate Court of Appeal in the Province of *Manitoba*. The facts and pleadings sufficiently appear in the judgments hereinafter given.

Mr. *Bethune*, Q.C., for appellant.

There was no completed contract until the 12th August, 1874, when the arrangement was reduced to writing in the shape of a deed and mortgage, the consideration being stated at $5,926 in both, that being the amount or balance due upon the accounts between the plaintiff and the defendant at the time the mortgage was executed.

Now, what we complain of is that the decree says in terms there has been no contract, and in fact, makes a new contract for the parties, and proceeds to enforce it upon the same principle as that on which the plaintiff recovers upon a *quantum meruit* in an action at law. In a case of the kind alleged by the plaintiff, the only possible course was to have set aside the contract *in toto*, but that could not have been done in this case, as the plaintiff had acted upon it for so long a time as to make it inequitable now to decree a cancellation of it.

Now, the ground taken for re-opening the accounts was, as alleged in the bill, that plaintiff was to pay the fair and reasonable value of the land, of the materials, and the work then done, and that the mortgage was executed by plaintiff, relying on the honesty and fairness of defendant, reposing confidence in him and being ignorant of the value of the matters; and that defendant had been guilty of fraud throughout the whole transaction. As to the land, the plaintiff says that he should take the land at $400 a lot of 50 feet

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frontage, whilst the defendant says that the plaintiff agreed to pay him at the rate of $800 per lot. Now, the plaintiff states in one of his letters that "the land was valued at $800." This is precisely what the defendant says the land was to be per lot.

The question naturally arises, what put this amount of $800 into the plaintiff's mind at the time he was writing, and the natural answer is that that amount was mentioned in the negotiation, and it is impossible that it should have been mentioned in any other way than as $800 per lot.

When the mortgage was presented to the defendant for execution he saw the amount, and thought "it pretty large." He had then the building before him and all the material he had to pay for. If he thought it too high a valuation, then was his time to question it. He had asked *Corbett* what the building would cost and he told him about $6,000, and here was a mortgage presented to him for execution for $5,926, and he had paid $500 before, making $6,426; and the land, according to his story, was only to be $1,000, leaving $5,426 for the building, and only left $574 to complete the house, according to *Corbett's* estimate. Could he have thought that amount would complete the house? could he have been under the impression for about two months afterwards that the building was only going to cost him some $574 more or $6,000 in all; or could he have felt that he had not been taken in, taking his own figures as a basis? He also says he felt, as a result of this conversation with *Corbett* that he had been taken in.

On the other hand, the plaintiff undertakes to pledge his oath "that the arrangement with *MacArthur*, of the *Merchant's Bank*, was merely a collateral arrangement. It really had no substance, as the bank never took an assignment of the mortgage, and never advanced any

money on it. It was simply a contrivance of *Schultz*." The same may be said of this statement as the plaintiff says of the defendant's.

The judge who heard the case seems not to have looked upon the defendant's answer, which is under oath, as evidence, but merely as a statement of his case. The learned judge is clearly in error when he says the difference or amount charged for the land would be either $1,853.50 or $2,853.50.

The learned judge seems to have overlooked those portions of the plaintiff's evidence which were most strongly against him. He does not refer to that part of it which states that "I made an arrangement with you and Mr. *MacArthur* in good faith, supposing that he alone was the person to whom I was responsible, notwithstanding I was satisfied the mortgage was for double the sum it should be." "Whatever may have been my convictions on this point—a matter even now susceptible of demonstration—I intended to carry it out faithfully, but it seems circumstances have prevented me." It is altogether likely, if the learned judge had not overlooked the above quotation from the plaintiff's letter, he would not have come to the conclusion that the plaintiff had not any knowledge of the fraud which he says the defendant perpetrated upon him.

I contend, therefore, 1st. That the plaintiff's evidence is not entitled to prevail against the defendant's without corroboration, and that his evidence is not corroborated as to the agreement made, or as to the settlement or non-settlement of the account, at the time the mortgage was executed.

2nd. The evidence as to value of works and land cannot be considered corroborative, because it does not touch the question as to what the agreement was between the parties, and is only matter of opinion, so far as the land

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is concerned, and the same may be said of the material, as a great part of the building was burned before the valuation was made by *Blackmore* and *Woods*.

Counsel for the defendant *Schultz* applied before the hearing to have the hearing postponed until after said defendant's return from *Ottawa* in April or May then following, and read a doctor's certificate stating that in the then state of said defendant's health, it was not safe for him to make the journey from *Ottawa* (where he was then) to *Winnipeg*, and an affidavit of the defendant to the same effect, and that he was a necessary and material witness on his own behalf, and an affidavit of his solicitor that he was a necessary and material witness on his own behalf; but the plaintiff and his counsel pressed the presiding judge so strongly to proceed with the case in the defendant's absence that he decided to do so; and, even if this court was to hold that a *primâ facie* case is made, which the appellant denies, the cause ought now to be sent back to be re-heard, after the evidence of the appellant shall have been heard.

Another ground on which appellant relies is, that if there was any irregularity or fraud in making up the amount inserted in the mortgage, the plaintiff confirmed and acquiesced in the transaction after he had obtained knowledge of the facts and the value of the premises. In this connection see *Clanricade* v. *Henning* (1); *Patterson* v. *Osborne* (2).

The plaintiff thought, when he signed the mortgage, that it was for too large an amount; and yet, notwithstanding the plaintiff's knowledge of all this, he voluntarily prepared in his own handwriting the agreement and power of attorney, and executed them, intending, as he says he did, to carry out the arrangement in good faith. See *Villiers* v. *Beaumont* (3).

(1) 30 Beav. 180. (2) 5 Russell, 232.

(3) 1 Ves. 101.

The plaintiff in this case is known as a very clever man, not liable to be imposed upon or unfairly dealt with; but, if the portions of his evidence which he would have the court believe are to be believed, he is the most credulous man in the universe; but this cannot be believed by anyone who is acquainted with him or with his reputation. Anyone who believes that he is the credulous babe he pretends to be in his evidence believes an impossibility.

Mr. *Boyd*, Q. C., for respondent:

There is no appeal from the order of the judge at the trial to proceed with the evidence. All that we know of this refusal is what appears in the judgment. The counsel called his witnesses. He could have refused to continue, and the proper practice would have been to appeal from that order. If appellant had intended to appeal from this ruling, he should have printed in this case all the materials upon which the order was given. Not having seen them, I cannot argue this point.

The evidence substantiates all the allegations of the bill, most fully and explicitly, and the same evidence shows the untruth of all the material grounds of defence set up in the answer. The learned judge, who saw and heard the witnesses, has found upon the facts and law in favor of the respondent. It was said the learned judge did not take into account the sworn answer of the defendant, but this the learned judge has done. In his judgment, he specially refers to the sworn answer as follows:—"While the defendant, in his sworn answer, states, &c.," and comes to the conclusion that the defendant has failed to prove his assertion. The real point, however, in this case, is whether there was any deception practiced upon the respondent.

The representation of the appellant was in effect in this case that the market value of land was $800 per

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lot, and it is impossible to think that he could have believed this upon the evidence given. He also, in effect, represented that what the building and materials cost him was $5,426, as he stated he did not want to make any profit on them, and this is also substantially the meaning of his answer. But in fact this was more than double their real value, as he must inevitably have known from the accounts kept by him and otherwise. Now, had such misrepresentations of value been made and their falsity discovered, while yet the contract was executory, it would have been a valid ground for resisting completion of the contract. *Wall* v. *Stubbs* (1) ; *Codman* v. *Horner* (2).

And such falsity of representation (even as to matters of value) would be ground for avoiding an executed contract or requiring the party to make good his representations. *Ingram* v. *Thorp* (3) ; *Story* Eq. Jur. (4) ; *Smith* v. *Gunteyman* (5).

The rule is that even when the parties deal at arm's length, the seller must do or say nothing to deceive or mislead, even a single word is enough to avoid a transaction. *Twiner* v. *Harvey* (6).

A multo fortiori is this the rule when, as in this case, the parties were not dealing at arm's length, but the purchaser relied upon the skill and judgment of the seller, accepted his statements and representations, and, as the appellant well knew, forbore to inform himself elsewhere. The very fact of there being no going into accounts and items and details as to the work done upon the building and the values thereof, in the strongest way indicates the reliance the respondent placed on the word of the appellant.

The defence of laches or acquiescence suggested by the answer herein (though not expressly pleaded) does

(1) 1 Madd. 18.
(2) 18 Ves. 10.
(3) 7 Hare 67, 72.
(4) S. 197.
(5) 3 Tiff 655 (30 N. Y. R.)
(6) Jac. 178.

not avail, because it appears that the respondent did not delay after being aware of the fraud committed on him, and such dealings as are mentioned in the answer without a competent knowledge of the facts which entitle to relief are no evidence of acquiescence (see *Lindsay Petroleum Co.* v. *Hurd*) (1), as compared with the same case before the privy council (2), where it is laid down that fraud being established against a party, it is for him, if he allege laches in the other party, to show when the latter acquired a knowledge of the truth and prove that he knowingly forbore to assert his right.

The bill proceeds upon the theory of the accounts never having been gone into or settled; that apart from the formal execution of the mortgage there is no stated account, and that the specific error charged and proved in regard to the price of the land, justifies and demands the opening up of the whole sum claimed on the footing of that mortgage.

In this aspect of the case the authorities cited in the court below are sufficient to justify the decree. Reference may be made especially to the following:—

De Montmorency v. *Devereux* (3); *Davis* v. *Sparling* (4); *Allfray* v. *Allfray* (5); *Breckridge* v. *Walley* (6).

The case may also be viewed and supported in another aspect. The evidence shews misrepresentations or false statement of facts on the part of the appellant, which would justify a rescision of the contract. There is evidence of fraud which would have entitled the respondent to avoid the transaction had he not changed his position, before knowing of the imposition practised upon him. But by going on and completing the building, matters were so changed that it was not open to the respondent to avoid the whole transaction as the parties could not be placed in *statu quo*. But the rule

(1) 17 Grant 115.
(2) L. R. 5 P. C. 221.
(3) 1 Dr. & Walsh 119.
(4) 1 R. & M. 64.
(5) 1 Mac. & Gord 87.
(6) 12 W. R. 593.

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of equity is that the person deceived can elect which course he will take: whether to set aside the transactions, or to recover compensation for the misrepresentations, or to require the person deceiving to make good his statements.

If the person deceived has not changed his position he can elect to disaffirm the whole contract. *Rawlins* v. *Wickham* (1). If his position has been changed he can claim reparation. *Mixers* case (2).

And in such a case as the present the person deceived has an equity to be placed in the same situation as if the matter represented was *bonâ fide* carried out, that is (in the present case) to retain the property on paying the fair and reasonable and market value thereof. *Blair* v. *Bromley* (3); *Burrows* v. *Lock* (4); *Ellis* v. *Coleman* (5); *Palsford* v. *Richards* (6); *Slim* v. *Croucher* (7).

RITCHIE, C. J.:—

In this case the bill was filed 20th December, 1879; answer, the 19th January, 1880; replication, the 10th February, 1880; hearing, 28th February, 1880.

It appears that counsel for the defendant *Schultz* applied, before the hearing, to have the hearing postponed until after said defendant's return from *Ottawa* in April or May then following, and read a doctor's certificate stating that in the then state of said defendant's health, it was not safe for him to make the journey from *Ottawa* (where he was then) to *Winnipeg*, and an affidavit of the defendant to the same effect, and that he was a necessary and material witness on his own behalf, and an affidavit of his solicitor that he was

(1) 3 DeG. & J. 323.
(2) 4 DeG. & J. 586.
(3) 2 Ph. 360, 361.
(4) 10 Ves. 475.
(5) 25 Beav. 673.
(6) 17 Beav. 87, 96.
(7) 1 DeG. F. & J. 518.

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a necessary and material witness on his own behalf; but the plaintiff and his counsel pressed the presiding judge so strongly to proceed with the case in the defendant's absence, that he decided to do so.

The learned judge thus states the matter:

At the hearing, before the merit of the case was gone into, Mr. *Monkman* applied, on behalf of defendant *Schultz*, to have the trial put off until May or June, on the ground that the said defendant is absent attending his parliamentary duties at *Ottawa*, and because he is in a delicate state of health. He read an affidavit from defendant *Schultz*, in support of said facts, and a certificate from Dr. *Grant*, of *Ottawa*.

Mr. *Howell* resisted the application, and said that defendant was served with the bill on the 20th December, and could have had the case tried before the session which commenced only the 12th February, had he filed his answer at once instead of on the 19th January, the last day allowed him for filing it. The principal fact of the case is admitted by plaintiff, viz: that the plaintiff has purchased the house and land, and that he was to pay a fair valuation for the same. They only differ as to the amount of the said valuation. An account was stated by defendant, but without plaintiff examining it. It can be ascertained now. The Court is only asked now to decree that the account should be opened and properly taken, and the amount ascertained, which will be done by the master, if the court so decide. The defendant will have an opportunity of being present when the account will be taken. He is not necessarily wanted now.

The plaintiff is here with his witnesses ready to go on.

Mr. *Monkman* replies that the defendant is charged with fraud and should be here to contradict the charge.

I decided that as the merit of the case by the decree to be made, if it should be made, as it will only be to re-open the account stated in his mortgage, and as I intended to see that the defendant should have an opportunity of being present at the taking of the account, if necessary, the defendant could not be prejudiced, and as the plaintiff was ready with his witnesses, and was pressing his right to go on with the hearing, I did not see that according to the rules of practice, I could properly refuse to proceed with the taking of the evidence.

I think this cause was forced on with unjustifiable haste, and this is the more apparent when the untenable

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reasons assigned by the learned judge for refusing delay are considered. The learned judge assumes and prejudges against the defendant the very point in issue between the parties, viz.: that the defendant is bound to account to plaintiff, and that, as he should have an opportunity of being present at the taking of the account, he concludes he could not be prejudiced by the hearing going on without his presence or testimony. The very point in controversy to be determined at the hearing being, not the amount in dispute, but whether plaintiff was entitled to any account, or to re-open the matter of the sale, or to have the mortgage in any way interfered with, and the learned judge seems entirely to have overlooked the fact that delay could only be injurious to defendant, the plaintiff having nothing to gain by a speedy adjudication. If plaintiff was ready to go on with his witnesses, and would have been damnified by not having them then examined (which does not appear to have been the case), I can see no possible reason why they should not have been examined and the further hearing postponed; but, independent of and in addition to this, a perusal of the proceedings on the hearing shows that the plaintiff was permitted, when being examined as a witness, to make most objectionable statements, and statements he knew not to be evidence, to use most intemperate language, and generally to give his evidence and act in a most unbecoming manner, wholly inconsistent with the due and proper administration of justice; and, therefore, if the plaintiff's bill disclosed a case entitling him to relief, and the facts proved made out a *primâ facie* case, I think, for the irregularities referred to, this court should, in the interest of justice, hold that there had been a mis-trial, and that the case should go down to another hearing, when the defendant would have an opportunity of being present and testifying, and when the proceeding should be

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conducted in a manner more consistent with the usages and practice of British courts of justice.

But, as for the reasons I am about to give, I think the plaintiff has failed to set out or establish a case entitling him to the relief he claims, the case and the litigation must end here.

I think the bill in this case is clearly demurrable; admitting all the facts stated in the Bill to be true, the plaintiff is not entitled to the relief he seeks, and therefore the bill should have been dismissed at the hearing.

The transaction between the plaintiff and defendant as detailed in the bill appears to have been an extremely simple one.

The bill, after stating that plaintiff, on or about the month of June, 1874, went to the province of *Manitoba* to reside, having been previously appointed Chief Justice, sets forth that:

Prior to the plaintiff accepting the office he now holds, and removing to *Winnipeg*, he became acquainted with the defendant, *Schultz*, as a member of the House of Commons, of which the plaintiff was also a member, and the defendant, *Schultz*, and the plaintiff were on intimate and friendly terms, and on the plaintiff arriving in *Winnipeg* the defendant, *Schultz*, manifested kindness to the plaintiff in many ways and interested himself in looking up a dwelling place for the plaintiff and the plaintiff's family, which were to come up from *Ontario* in the month of August or September following, and in this way and by various other acts of kindness the defendant, *Schultz*, quite won the confidence of the plaintiff.

The bill then sets out the contract entered into between plaintiff and defendant in these words:

The defendant, *Schultz*, had commenced to erect a dwelling house in the city of *Winnipeg*, on the south side of *Notre Dame* street, and had the foundation thereof laid and had erected thereon the frame thereof, and had certain material on hand to go on with the completion of the same, and had workmen engaged thereat when it was arranged between the plaintiff and the defendant, *Schultz*, that the plaintiff should take the foundation and frame and other the promises as it then stood, and go on at his own expense and finish the same for a dwelling for himself, and should pay the defendant,

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Schultz, the fair and reasonable value of the work then done, and of the material then on hand in respect of the said dwelling house, and the fair and reasonable value of the land to be taken therewith, and in pursuance of such arrangement the plaintiff went on and at his own expense completed the said dwelling house, into which he then moved with his family, and has ever since resided and now resides.

And the consummation of this agreement is set out in these words:

Shortly after the above arrangement, and on the twelfth day of August, 1874, it was proposed that the said arrangement should be consummated by the defendant, *Schultz*, giving to the plaintiff a deed of conveyance of the said property, and taking from the plaintiff a mortgage thereon to secure the defendant, *Schultz*, in the payment for the land and the fair and reasonable value of what he had done towards the construction of the said dwelling house as aforesaid, and a deed of conveyance of the lands consisting of what the defendant called two and one half lots of fifty feet frontage each, was executed by the defendant, *Schultz*, to the plaintiff, and contemporaneous therewith, the defendant, *Schultz*, presented to the plaintiff for execution on the same lands a mortgage to himself to secure the payment of the price of the said lands and of the balance due him for the reasonable and fair value of what he had done to the said dwelling house, which, together, he alleged to be the sum of five thousand nine hundred and twenty-six dollars, but he presented no account of items showing in what manner, or on what valuation, or how that sum was made up, and the plaintiff relying on the honesty and fairness of the defendant, *Schultz*, and reposing confidence in him for the reasons aforesaid, and being entirely ignorant and unacquainted with the value of said matters, executed the said mortgage.

And after stating that plaintiff has been informed and believes that the mortgage has been assigned to "*The Manitoba and North-West Land Company (Limited)*" who hold the same subject to any equities, &c., and after alleging that payments have been made from time to time "on account of the said indebtedness, but that the payments by the terms of the mortgage are in arrear and the said mortgage is in default," proceeds (paragraph 7) thus to set forth his charges on which he grounds his claim for relief:

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The plaintiff charges that the defendant *Schultz* in violation of good faith and fraudulently made up and caused to be inserted in the said mortgage a much larger sum than was the balance due on the fair and reasonable market value of the said lands, and of what he had done to the said dwelling house and other the premises, and very recently the defendant *Schultz* in justification of that amount to the plaintiff has asserted that the price of the lots aforesaid was eight hundred dollars each, making two thousand dollars for the land alone, whereas in truth and in fact the defendant *Schultz* told the plaintiff at the time of the transaction that they were only four hundred dollars each, making a difference in the land alone of one thousand dollars, of which fact the plaintiff was ignorant until a few days ago, and since then the plaintiff has made the most careful inquiry into the residue of what must form the defendant *Schultz's* account, and he is informed and fully believes the charges for what the defendant *Schultz* did towards the construction of the said dwelling house is by its excess in estimate fraudulent, and that to require the plaintiff to pay the same, without investigation, would be contrary to justice and good conscience, the excess in these respects in the particulars thereof the plaintiff is unable to state with particularity having never seen or been furnished with an account or any particulars thereof.

The Bill then alleges that:

The plaintiff has demanded from the defendant *Schultz*, an account of the items which make up the amount inserted in the said mortgage, but the said *Schultz* has not furnished the plaintiff with the same, or offered any excuse for failing to do so, and the plaintiff submits that under the facts aforesaid he is entitled to have an account taken of what is the indebtedness now due for principal and interest so secured by the said mortgage as aforesaid, and that if any of the said indebtedness shall appear to be outstanding and unpaid, then upon payment by the plaintiff into this honorable court to the credit of this cause of what shall, on the taking of such account, be found due, the defendants may be decreed to discharge the said lands covered by the said mortgage from the said mortgage, free from all incumbrances done by them or either of them, and deliver up to the plaintiff the said mortgage and all deeds of assignment thereof and writings relating thereto, and the plaintiff prays

(1). That the defendants may be ordered to make a full discovery and disclosure of and concerning the matters hereinbefore stated.

(2). That an account may be ordered to be taken of what was the real indebtedness of the plaintiff to the defendant *Schultz* at the

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date of the said mortgage, and of what is now due thereon for balance of principal and interest.

(3). That upon payment of the balance so found due for principal and interest, if any, into court to the credit of this cause the defendant may be ordered to discharge the said mortgage and deliver up the same with all deeds and writings relating thereto to the plaintiff.

(4). That the defendant *Schultz* may be ordered to pay the costs of this suit.

(5). That the plaintiff may have such further or other relief as the nature of the case may require.

Now, what does all this amount to, but that plaintiff and defendant, being on terms of friendship and intimacy, the one agreed to buy and the other agreed to sell certain properties, that is to say, as to the unfinished house, for "the fair and reasonable value of the work then done and the materials then on hand in respect of the said dwelling house," and as to the land, "the fair and reasonable value of the land to be taken therewith."

That shortly after this arrangement was entered into, it was consummated by defendant giving plaintiff a deed of the property, and plaintiff giving defendant a mortgage to secure the payment of the balance due him therefor, which was alleged by defendant to be $5,926, which amount the plaintiff accepted as the fair and reasonable value by executing and delivering to defendant a mortgage for that amount. No account of items (as the bill alleges) showing in what manner or on what valuation, or how that sum was made up, was presented, nor requested by plaintiff, nor does any information appear to have been sought by him from defendant as to how that amount was arrived at, or in reference thereto; on the contrary, the bill says, that the plaintiff relying, not on any false or fraudulent representation made by defendant to him, whereby he was deceived and fraudulently induced to sign the mortgage, but, relying on the honesty and fairness of

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the defendant *Schultz*, and reposing confidence in him for the reasons aforesaid (viz., the intimate and friendly terms existing between them) and being entirely ignorant and unacquainted with the value of such matters, executed the said mortgage.

Now, it is too clear to admit of a moment's argument, that this, as set forth in the bill, was an ordinary business transaction of bargain and sale between parties dealing upon equal terms, that there was between this Chief Justice and this Member of Parliament no peculiar financial, fiduciary or other relationship or confidence recognized by law as imposing special duties or obligations. There was no confidence existing that enabled the defendant to exert influence over the plaintiff, no relation existed which put the plaintiff in the power of the defendant; there was not, in other words, the existence between them of any relationship which withdrew the contract between them from the considerations affecting contracts between strangers, or to adopt language used in course of the argument in *Pike* v. *Vigers* (1),

> The present is a case in which the parties stand in no situation of confidence; a case in which the law imposes no duty or obligation; a case, in which the law, so far from imposing mutual duties, places by its maxims the parties at arm's length, telling each they are to act upon their own judgment, and to exercise their own power of enquiry.

The price then to be paid being, as alleged in the bill, the fair and reasonable value, this was in every sense of the term purely a matter of opinion, and as to which the means of information were equally open to both parties, each could make enquiries, each could get estimates, each could have had the property valued; in fact each could have done what I think it may be presumed every prudent reasonable man would have done before

(1) 2 Dr. & W. 232.

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either selling or buying a property, viz: satisfy his own judgment that in the one case as vendor he was not selling his property below its value, or in the other as purchaser, that he was not paying more for the property than its value, unless indeed in an exceptional case, either might think it for his interest to do one or the other.

The only breach set out is that defendant in violation of good faith fraudulently made up and inserted in the mortgage a much larger sum than was the balance due on the fair and reasonable market value of said lands, and of what he had done to the said dwelling house and other premises, and the only allegation of misrepresentation, if misrepresentation it can be called, is that "very recently *Schultz* (defendant), in justification of that amount (amount in mortgage), has asserted that the price of the lots aforesaid was $800 each, making $2,000 for the land alone, whereas in truth and in fact defendant told plaintiff at the time of the transaction that they were only $400 each, making a difference in the land alone of $1,000, of which fact the plaintiff was ignorant until a few days ago," and then simply alleges as the grounds of his charge "that defendant falsely and fraudulently caused to be inserted in the mortgage a much larger sum than was the balance due on the fair and reasonable market value of the said lands, and of what he had done to the said dwelling house," and that he is informed and believes the charges for what defendant did towards the construction of the dwelling house is by its excess in estimate fraudulent, and that to require plaintiff to pay same without investigation, would be contrary to justice and good conscience."

The fair and reasonable market value was matter of opinion as to which each party had a perfect right to put forward their own view, and which, when agreed

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on by both parties and inserted in the deed and mortgage, was, as between the vendor and purchaser, the fair value; supposing defendant did assert as alleged, and did, in the course of the negotiations, tell plaintiff the value of the lots was only $400, how can that possibly affect the case? It was plaintiff's duty to have ascertained what the fair value was and to have seen that no more than the fair value was inserted in the mortgage before executing it; and as to what defendant may have expended, under the contract set out in the bill, it matters not, the then fair market value of the building according to the bill was to be the price. But the bill simply says that he is informed that charges for what defendant had done to the house were, by their excess, fraudulent, and that to pay the sum without investigation, would be contrary to justice, which simply amounts to this: having chosen to assent to this amount as the fair value without investigation, but having, years after, heard that it is in excess of such value, he has desired an investigation; but as to excess in estimate the bill says there was no account, and the contract as set out was based on no estimate but on the fair value, so that I think it may be safely affirmed that on this record, in this bill, there is no allegation of any false and fraudulent representation, misrepresentation or concealment, on which the contract was founded on the part of the defendant, establishing any ground for rescinding or altering the contract as indicated by the deed and mortgage, still less to justify any court in making an entirely new contract, even if this court had power to do so, which it clearly has not; nor is there any allegation of any undertaking, obligation or duty unperformed on the part of the defendant, nor any allegation whatever that I can discover, which the defendant was bound to answer.

Supposing, however, that this bill is not demurrable,

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and that we ought to look at the evidence and so from it establish a case against defendant, we are met at the outset with the fact that the whole case, as set out in the bill, is departed from, and the claim put forward on the trial is based on a contract entirely different from that set out in the bill, instead of a contract, the consideration of which was to be the fair and reasonable value of the improvements and of the land. The plaintiff says in his evidence that "the arrangement which amounts to a contract, was simply a very fair and reasonable proposition that I should have the place at the value of the work and material, and *that I should pay him* $400 *a lot.*" Then again we have it put forward that the price of the improvements was to be the actual amount expended by defendant, and that that was to be and was established by defendant and *Corbett*, and that defendant misrepresented the amount, or falsely represented that the amount had been established by himself and *Corbett*, when such was not the case, and that in signing the mortgage plaintiff relied on the honesty of defendant and *Corbett*, and on plaintiff's representation, and that as to the land, the price was not its fair and reasonable value, but was absolutely fixed at $400 a lot. On the contrary, while the bill alleges no misrepresentation or concealment, it sets out that no account of items showing in what manner or on what valuation or how that sum was made up, was presented by defendant, and as to the land no such contract as an absolute sale for $400 a lot. Surely the plaintiff should not have been permitted to depart from his bill, and defendant condemned on a case and on evidence of which the bill gave him no notice, and which he was never called on to answer. But supposing it possible that plaintiff could have a right thus to change his base, it seems to me, the evidence on the new case

entirely fails to establish a right to the relief claimed, if it was true that plaintiff signed the deeds on the representation that *Corbett* had been a party to the establishment of the fair value of the improvements. Six weeks after, plaintiff had, if his statement is correct, undeniable evidence from the mouth of *Corbett* himself that such was not the case, and surely this was the time at which he should have complained and sought redress, if he thought he had been imposed on or wronged; but his conduct indicates the exact opposite of any such idea, asking no explanation and uttering no complaint or remonstrance whatever from that time till the 27th June, 1875, when, instead of complaining, he writes plaintiff:

MEMO. FOR DR. *SCHULTZ.*

I am trying to make arrangements in *Ontario* to meet the first payment and hope to succeed, but may not. I need not say, contrary to my expectation, I can only make out with difficulty to pay debts incurred on the building and live. What discount will you make on the whole mortgage, for cash down? As money is needed in *Manitoba*, it should be considerable.

E. B. WOOD.

June 27th, 1875.

And plaintiff again writes:

Winnipeg, 31st July, 1876.

DEAR DOCTOR,—At your request, I repeat the substance of my private note to you of some days ago, which, by-the-way, I have no objection you should show Mr. *Macarthur*.

Since writing that note, and after conversation with you, I have thought over the whole matter again and again. In fact, it has seldom been from my mind. I really do not see how I can, in so far as I am concerned, with a reasonable hope of carrying it out, change or modify what I in that note proposed. But what I there proposed, I think I can carry out, and I will do my best to accomplish it. Angels can do no more. My proposition was to enter into an arrangement to pay $100, to be taken out of my salary every month until the mortgage is paid. The principal outstanding to bear interest at 8 per cent. To secure this I would give an irrevocable power of attorney so to draw and apply the $100. First payment to be made on the 1st of September.

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Or I would leave the premises and surrender them to you at once, your paying what any disinterested person or persons might say, under all the circumstances, was fair and right.

Mr. *Macarthur* will from this understand what this asset is, and in any arrangement or calculation he may make with you, he may count upon my being ready to enter into the necessary writings giving effect to my proposition in either form.

Most sincerely yours,

E. B. WOOD.

On the 3rd of August a statement is made up of the

Assignment of mortgage of Hon. *E. B. Wood*, dated 3rd August, 1876.

JOHN C. SCHULTZ, Assignor.

To *DUNCAN MACARTHUR*, Assignee.

Now owing principal money, $5,926, and interest at the rate of 12 per cent. amounting to the sum of $7,326.84, and also the sum of $55.25, paid by the said assignor for insurance.

Consideration, $7,382 09.

(Signed) *John SCHULTZ.*

Witnessed by *J. T. Bain.*

Memo. interest at 12 per cent. on $5,926 for 2 years	$1,422	24
Less 11 days	21	40
	1,400	84
Principal	5,926	00
	7,326	84
Insurance	55	25
	$7,382	09

Here then, plaintiff, with full knowledge from *Corbett* as to his not having made any estimate of the value of the improvements, negotiates for a new arrangement, and on the 19th September, 1876, a memorandum of agreement, plaintiff says written by himself, is executed by the parties to it, (plaintiff, defendant and *Macarthur*,) and is in these words:

AGREEMENT BETWEEN *WOOD, SCHULTZ* AND *MACARTHUR.*

Memorandum of agreement made this 19th day of September, 1876, between *Edmund Burke Wood* of the first part, and *John C. Schultz* of the second part, and *Duncan Macarthur* of the third part:

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Whereas, the said *Schultz* is the mortgagee, and the said *Wood* is the mortgagor of certain premises in the city of *Winnipeg*, whereby by a certain mortgage, dated on or about the fourth day of August, 1874, the said *Wood* covenanted to pay the said *Schultz* $5,926 and interest on the outstanding principal at twelve per cent. per annum at the time and in the manner therein mentioned, which said mortgage is registered in the registry office for the county of *Selkirk*, on or about the fourteenth day of August, 1874, at 12.10 o'clock in the afternoon; and whereas, the said *Wood* has made default in the payment of said mortgage, and the said *Schultz* has assigned the said mortgage, to the said *Macarthur*, who now holds the same; and whereas, it has been agreed by the parties hereto, that for and notwithstanding anything in the said mortgage contained, the said *Wood* shall pay the same, and the same shall bear interest as follows: One hundred dollars to be taken out of the salary of the said *Wood* every month until the said mortgage is paid, the principal outstanding to bear interest at eight per cent. per annum, instead of twelve per cent. per annum, as provided in said mortgage, and to secure such payment the said *Wood* agrees to give an irrevocable power of attorney to the said *Macarthur*, to draw and apply the said one hundred dollars per month out of his salary as Chief Justice of *Manitoba*, the first payment to be made on the first day of October, 1876. Now, therefore, this indenture witnesseth, that for and in consideration of the premises it is mutually and irrevocably agreed by and between the parties to these presents, their respective heirs, executors, administrators and assigns, as follows: The said *Wood* shall pay to the said *Macarthur* one hundred dollars per month, to be taken out of the salary of the said *Wood*, payable to him as Chief Justice of *Manitoba* until the said mortgage is paid,—the principal of the said mortgage outstanding to bear and be computed at eight per cent. per annum instead of twelve per cent. per annum, as provided in said mortgage.

The said payment of one hundred dollars to be made on or before the first day of every month.

2. The said *Wood* shall forthwith give and execute to the said *Macarthur* an irrevocable power of attorney to draw out of the said salary of said *Wood* the said sum of one hundred dollars per month, in the manner aforesaid, to be applied on the said mortgage as aforesaid.

3. When and as soon as the said mortgage is paid in the manner aforesaid, the said *Schultz* and *Macarthur* shall discharge the said mortgage according to law.

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In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

(Signed), *E. B. WOOD*, [S.]
(Signed), *J. C. SCHULTZ*, [S.]
(Signed), *D. MACARTHUR*, [S.]

On the same day plaintiff executed a power of attorney in these words:—

POWER OF ATTORNEY—*WOOD* TO *MACARTHUR*.

Know all men by these presents, that I, *Edmund Burke Wood*, of the city of *Winnipeg*, in the province of *Manitoba*, the Chief Justice of *Manitoba*, constituted and appointed, and by these presents do nominate, constitute and appoint *Duncan Macarthur*, of the said city of *Winnipeg*, the agent and manager of the Merchant's Bank of *Canada* at *Winnipeg* aforesaid, my true and lawful attorney, irrevocable for me and in my name, place and stead, to demand, take and receive one hundred dollars every month from the Receiver General of *Canada*, and from and out of the salary payable to me by *Canada* as Chief Justice of *Manitoba*, and to apply the same on a certain mortgage, of which the said *Duncan Macarthur* is assignee, made by me to one *John Christian Schultz*, and mentioned in a memorandum of agreement this day made between myself and the said *John C. Schultz* and *Duncan Macarthur*, until the said mortgage according to the terms of the said agreement is fully paid and satisfied.

In witness whereof, I, the said *Edmund Burke Wood*, have hereunto set my hand and seal this nineteenth day of September, 1876.

Signed, sealed and delivered in the presence of (Signed) *C. B. Daly.* } (Signed) *E. B. WOOD.* [S]

Thus giving an entirely different character to the whole transaction, and this agreement was made, as we shall see, by his letter of 22nd November, 1879: "Notwithstanding I was satisfied the mortgage was for double the sum it should be," and he adds, whatever his convictions were on this point, he "intended to carry it out faithfully." And on 2nd December, 1879, plaintiff wrote to the party representing the holders of the mortgage, as follows:

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Winnipeg, 2nd Dec., 1879.

G. A. Muttlebury, Esq.

DEAR SIR,—Enclosed find cheque for $100 payment on account of the *Schultz-Macarthur* mortgage.

Yours truly,

(Signed) *E. B. WOOD.*

Plaintiff also says :

After the defendant had transferred the mortgage to the loan society, or about that time, he wrote me a note asking for the payment of some arrears under the arrangement made in the assignment to *Macarthur*, and was rather pressing. The note was in pressing terms. In reply I wrote him on the 22nd November, 1879:

Winnipeg, Saturday,
Nov. 22, 1879.

DEAR SIR,—As I presume you know, I was not at home yesterday, but was absent holding the court at *White Horse Plains*.

Your note came in my absence, and it was handed me on my return in the evening.

I must say its contents surprise me. I made an arrangement with you and Mr *Macarthur* in good faith, supposing he alone was the person to whom I was responsible, notwithstanding I was satisfied the mortgage was for double the sum it should be. Whatever may have been my convictions on this point—a matter even now susceptible of demonstration—I intended to carry it out faithfully, but it seems circumstances have prevented me.

I mentioned in this connection that I hoped to be able to overtake the arrears. You told me not to think of it.

It seems now you have thought fit to assign this mortgage to some company of which one *Muttlebury* is manager. To this, of course, I could have no objection ; but I did object to giving a new mortgage for the sum claimed, as under the terms of the arrangement I made with you and Mr. *Macarthur*, it was simply monstrous—quite in keeping with the making up of the original sum.

If my refusal to give a new mortgage for such a sum as he said you claimed has occasioned your note, so unlike the tenor of your conversation, I have only to say, I regret it.

I shall pay no insurance in the past or for the future. I shall pay only eight per cent. on the principal from the date of the mortgage; but I shall endeavor to overtake the arrears as speedily as I can.

If this will not suit you, I have but one course to pursue, and that is to surrender up to you your property.

The land was valued at $800, your building charges were $5,126;

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making the mortgage $5,926. I paid in building, etc., upwards of $5,000.

I propose, in giving the property up, you should give me what, under the circumstances, is fair. If on this score there should be any difficulty, it can be arranged by arbitration. If it should be thought I am not entitled to anything, so be it. I shall at all events be freed from a most disagreeable and humiliating position.

I speak plainly, as I always do when I have anything to say. I think I am underst od.

Before you leave be good enough to let me know distinctly what you claim as a balance on the mortgage, bearing in mind what I have said about rate of interest and insurance; also your views on the other parts of this note.

Yours truly,

(Signed) *E. B. WOOD.*

Dr. SCHULTZ,
Winnipeg.

Therefore, it is obvious that plaintiff had notice that *Corbett* had taken no part in making up any estimate, long before he drew up with his own hands the new arrangement, by which he secured such a modification of the original agreement as not only extended the time of payment, but reduced 33⅓ the rate of interest, that is, from 12 to 8 per cent. Surely, having obtained knowledge of all of which he now complains, if he wished to take advantage of any misrepresentation as to *Corbett*, he should not have drawn up and signed the new contract and induced plaintiff to accept it in lieu of the original.

Lord *Brougham*, in *Irvine* v. *Kirkpatrick* (1), says:

In order that the misrepresentation or the concealment, I care not which, may be of any avail whatever, it must be to the *dolus clarus locum contractui*, it must inure to the date of the contract. If one party misrepresents or conceals, however fraudulently, however wrongly, and however wickedly to another, with whom he is treating, and if that other, notwithstanding the misrepresentation, discovers the truth, notwithstanding the concealment gets at the fact concealed, before he signs the contract, the misrepresentation and the concealment go for just absolutely nothing, because it must be

(1) 17 H. L. 32.

dolus clarus locum contractui. It is of no avail if the party has, in whatever way, become acquainted with the truth at the time.

The Master of the Rolls in *Marquis of Clanricarde* v. *Henning* (1):

Until the fraud is discovered, the term does not operate; but the fraud is considered to be discovered at the time when such reasonable notice of what has happened has been given to the person injured, as to make it his duty if he intends to seek redress, to make inquiry, and to ascertain the circumstances of the case.

Campbell v. *Fleming* (2) establishes:

If a party induced to purchase an article by fraudulent misrepresentations of the title respecting it, and after discovering the fraud, continue to deal with the article as his own, he cannot recover back the money from the seller.

Per Lord *Denman*,, C.J., *Littledale*, J., and *Patteson*, J., the right to repudiate the contract is not afterwards revived by the discovery of another *incident in the same fraud.*

Littledale, J.:

It seems to me that this non-suit was right. No doubt there was, at the first, a gross fraud on the plaintiff. But after he had learned that an imposition had been practiced on him, he ought to have made his stand. Instead of doing so, he goes on dealing with the shares; and, in fact, disposes of some of them. Supposing him not to have had, at that time, so full a knowledge of the fraud as he afterwards obtained, he had given up his right of objection by dealing with the property after he had once discovered that he had been imposed upon.

Parke, J.:

I am entirely of the same opinion. After the plaintiff, knowing of the fraud, had elected to treat the transaction as a contract, he had lost his right of rescinding it; and the fraud could do no more than entitle him to rescind.

Patteson, J.:

No contract can arise out of a fraud; and an action brought upon a supposed contract, which is shown to have arisen from fraud, may be resisted. In this case the plaintiff has paid the money, and now demands it back on the ground of the money having been paid on a

(1) 30 Beav. 180.
(2) 1 Ad. & E. 40.

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void transaction. To entitle him to do so he should, at the time of discovering the fraud, have elected to repudiate the whole transaction. Instead of doing so, he deals with that for which he now says that he never legally contracted. Long after this, as he alleges, he discovers a new incident in the fraud. This can only be considered as strengthening the evidence of the original fraud; and it cannot revive the right of repudiation which has been once waived.

Lord *Denman*, C J.:

I acted upon the principle which has been so clearly put by the rest of the court. There is no authority for saying that a party must know all the incidents of a fraud before he deprives himself of the right of rescinding.

Then as to the lands, in letter of the 22nd November, 1879, he says: "The land was valued at $800, your building charges were $5,126, making the mortgage $5,926."

In reply to this, defendant, on 22nd November, 1879, writes plaintiff, and *inter alia*, says:

The $5,926 for which you gave the mortgage was made up, you say, of land, $800, and the building charges, $5,126. Your memory is faulty in this. The land was to be $800 per lot, the lots being four of the present ones, or 50 feet front each. You got two and a-half of these or ten (?) of the present, and the land came to twice and a-half as much as you state it.

It was this statement, the plaintiff gives us to understand, was what induced him to institute the present suit. Now, it is obvious, from his own showing, if the statement in his letter is correct, that the amount of the mortgage, $5,926, was not made up of the land valued at $800 and the building charges at $5,126; his idea that he was only to pay $400 a lot, being $1,000 for two and a-half lots, must be wrong, because a month before the mortgage was executed, according to his own statement, he "gave *Schultz* a cheque for what (he says) I supposed to be the land I wanted for $500 on the Merchants' bank here. Have the cheque endorsed by *Schultz*. It seems it was not dated, but that it was

filled in by the bank when deposited by *Schultz*, and that was the 7th July. I produce the cheque."

Paid 7 July.

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To the Merchants' Bank of Canada,
Pay to *John C. Schultz* or order Five Hundred Dollars.
$500

E. B. WOOD.

(Endorsed) *John Schultz.*

Therefore, by his own showing he was to pay $1,300, $500 by the cheque and $800 included in the mortgage, a state of facts entirely inconsistent with his present contention. This shows how loose and unsatisfactory and wholly irreconcilable is his bill with his evidence, and both with the claim now put forward. Taking the whole case together the difficulty would seem to me to have arisen in plaintiff's mind, in respect to the land, rather to the quantity taken being more than he originally contemplated, than to a misunderstanding as to the price.

When a party comes before a court to seek to set aside a deed duly and solemnly executed, and to have substituted therefor another, and a different contract, the case he puts forward should be clearly and distinctly stated and should show, if sustained by evidence, undoubted right to the relief claimed, and to support such a claim and justify a court in ignoring a solemn instrument, and rescinding a contract under seal and substituting another therefor, the evidence should be unequivocal and conclusive, for no court would rescind a contract without the clearest proof of the fraudulent misrepresentations, and that they were made under such circumstances as to show that the contract was founded upon them. Lord Justice *Turner*, in delivering the judgment of the Privy Council in *Osborne* v. *Eccles* (1), says:

(1) 2 Moo. P.C.N.S. 158.

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A court of equity ought not, as we think, to interfere with a legal right upon the assertion of a mere doubtful equity. It ought, we think, before it interferes in such a case to be satisfied that there is an equity calling for its interference as clear as the legal right which it is called upon to control.

No attempt is made to repudiate this mortgage until the 16th December, 1879—five years and four months after its date, and three years and two months after an entirely new arrangement had been entered into, whereby plaintiff sought and obtained such, to him, favorable modifications of the original terms, both as to the mode of payment and rate of interest. To rescind this mortgage on such meagre and unsatisfactory evidence as has been produced, would, in my opinion, be nothing less than a perversion of law and justice.

It is a delusion on the part of the plaintiff to suppose that any relationship or confidence existed between himself and the defendant which the policy of the law specially protects, or to justify him in assuming, as he does in his evidence, that they were not acting in this matter as vendor and purchaser at arms' length, each bound to look after his own interests, failing to do so, neither having any claims to invoke the interposition of a court of equity.

It may be that the land was over-valued, and, in the opinion of the witnesses called by the plaintiff, it no doubt was, but its value was mere matter of opinion; if so, can the plaintiff blame any person but himself? Called upon to settle the business, lest, as he says, death should intervene, he names his own son to draw up the papers, accepts the amount inserted, if his statement is correct, without inquiry, without discussion, where the materials were at hand and information could be had for the asking, apparently making not the slightest attempt to obtain any materials whatever to enable him to form even an approximated estimate or opinion of the correctness of the indebtedness he was about to

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assume, if the bargain he has made is a bad one could he reasonably expect it to be otherwise? It is not easy to understand how a man who describes himself as "entirely ignorant and unacquainted with the value of such matters" should undertake (without assistance from persons acting in his interest, or at any rate from disinterested parties) the negotiating and concluding such a large purchase, or that he should accept from his vendor an amount as the value of the property without having even the curiosity to ask how that amount was made up or on what it was based. If parties will so act and not attempt to protect themselves when they can so easily do so, it is impossible for courts to relieve them from the effect of their own negligence, recklessness or folly. Is it possible that a man, who has been engaged in the active business of life for any length of time, can be ignorant of the fact that as a general rule sellers put a high estimate on the value of their estates, and can any buyer in dealing with the owner of property be so simple minded and innocent at this day as to believe that it is not the seller's aim to secure a good price, and the man who is not aware of his position towards his vendor in these respects must be a singular exception to the general run of mankind.

If the plaintiff has been as credulous, as confiding, as innocent, as inexperienced, or as ignorant of everything connected with the value of property as he in his evidence so prominently puts forward, or so careless, negligent and regardless of his interests as his evidence might lead some to conclude, it may be his misfortune or his fault. The law, however, provides no special protection for such cases.

In deciding this case in the court below, the doctrine of *caveat emptor*, as applicable to affirmations and representations in regard to sales of real estate, has been entirely ignored, as is the idea that it is a man's own

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folly not to use his own sense and discretion in matters of this sort, that it is his own folly and laches not to use the means of information within his reach, and that any loss or injury, as is said in the books in such a case, is to be attributed to his own negligence and indiscretion from which it is not the province of the courts of equity to relieve parties who neglect or refuse to exercise a reasonable diligence and discretion.

Defendant in his evidence says:

The building was there and the material, and I could have inquired what the cost would be.

In *Pike* v. *Vigers* (1), the Lord Chancellor says:

Now the very able counsel for the defendant felt that they could not press for a reference to the master to inquire into the fair value. If I had directed such an inquiry, it would have been a false issue; it would have implied that a report of inadequate value would have justified an inference of fraud. But mere inadequacy of value, even in a case capable of an exact measure, in an ascertained subject, would not justify such an inference. The principles (unless in extravagant cases, which are to be judged of rather by uplifted hands and exclamations of astonishment at the disproportion between price and value) are well established as applicable to cases at law, and equally so, where the contracts have been executed, to cases in equity; but I cannot better illustrate the doctrine as applicable to the principles of a court of equity, than by reference to the observations of Lord *Lyndhurst* in the case of *Small* v. *Attwood* (2), when the case came before him in the Court of Exchequer. He there says: "I have seen so much of its flexible character, and of its means of adapting itself to the interest of the party on whose behalf the evidence is given, that I confess I place very little reliance on evidence of this nature. But if it were otherwise, and I was compelled to decide between the evidence, I should come to the conclusion that the value of the mine is greatly indeed below the sum that was stipulated to be given for it, namely, £600,000. But that alone is not a ground on which the contract could be set aside, although it is some evidence to show that the representations made with respect to the productive power and character of the mine were fallacious."

* * * * * * *

In *Walker* v. *Symonds* (3) there was concealment by the defendant

(1) 2 Dr. & W. 251. (2) 1 Younge, 491.

(3) 3 Swanst. 1.

of a material fact; and that, too, accompanied by their having given information, but not the whole information. The information they gave was true, that *Donnithorne* had been guilty of a breach of trust, but it was imperfect, inasmuch as the fact. that they themselves had been guilty of a breach of trust, was concealed; and yet there, though the plaintiff was helpless and without the advice of any friend, and under the influence of a hard pressure from her father, and her whole fortune was involved in it, it was held that the imperfectness of the communication did not constitute fraud; and Lord *Eldon* rested his judgment on the character of the defendants as trustees, and the duty of trustees, as I have already stated. That case, therefore, as far as the question of concealment or imperfect information is concerned, is rather an authority for the plaintiff here; for Lord *Eldon* expressly negatives the inference of fraud arising from the imperfection of the information, and rests his decree solely on the confidential relation of the parties. Here Lord *Audley* stood in the situation of the vendor, desirous of getting the best price he could for his property, and the vendee in the ordinary situation of purchasers, anxious to give the lowest price that the vendor may be prevailed on to take. What are the respective rights and duties of parties so circumstanced? If, on either part, they enter into covenants, they are bound by them to that extent and no further. The vendor is at liberty to state, in the strongest terms, his opinion of the high value of the thing to be sold, and the purchaser to state equally the opinion of the worthlessness of it. If the vendor is so giddy as to trust to these representations, and to sell his property at a gross undervalue, and executes a deed for the purpose, and hands over the possession to the purchaser, he has no claim either at law or in equity to be restored to his former rights; neither has the purchaser, if the price is excessive, any ground to be relieved from his bargain, or to be compensated for his loss. If the purchasers had been in possession of important facts, calculated to increase the value of the mine, they would not have been bound to disclose them nor could Lord *Audley*, on the subsequent discovery of such increased value, have any ground to be relieved from his contract.

As to misrepresentation *Story* says (1):

It must not be of a mere matter of opinion equally open to both parties for examination and inquiry, when neither party is presumed to trust to the other, but to rely on his own judgment.

And again:

(1) Eq., sec. 197.

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But ordinary matters of opinion between parties dealing upon equal terms though falsely stated are not relieved against because they are not presumed to mislead or influence the other party where each has equal means of information. Thus a false opinion expressed intentionally by the buyer to the seller of the value of the property offered for sale, where there is no special confidence, or relation, or influence between the parties and each meets the other on equal grounds, relying on his own judgment, is not sufficient to avoid a contract of sale; in such a case the maxim seems to apply *scientia enim utrinque par pares contrahentes facit.*

And again, sec. 195:

Nor is it every wilful misrepresentation even of a fact which will avoid a contract upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it and it was his own folly to give credence to it, for courts of equity like courts of law do not aid parties who will not use their own sense and discretion upon matters of this sort.

Again, as to false and fraudulent representations on a treaty of sale of property such as would induce a court of equity to rescind the contract entered into upon such treaty, Mr. *Story* says:

But then in all such cases the court will not rescind the contract without the clearest proof of the fraudulent misrepresentations and that they were made under such circumstances as show that the contract was founded upon them.

And continuing, sec. 200:

On the other hand, if the purchaser choosing to judge for himself does not avail himself of the knowledge open to him or his agent he cannot be heard to say that he was deceived by the vendor's misrepresentations, for the rule is *caveat emptor.* It is his own folly and laches not to use the means of knowledge within his reach, and he may properly impute any loss or injury in such a case to his own negligence and indiscretion. Courts of equity do not sit for the purpose of relieving parties under ordinary circumstances who refuse to exercise a reasonable diligence or discretion.

From *Attwood* v. *Small* (1), the same principle is clearly deducible.

In *Sugden* on Vendors:

Our law adopts the rule of the civil law *simplex commendatio*

(1) 6 Cl. & F. 232.

non obligat. If the seller merely made use of those expressions which are usual to sellers who praise at random the goods which they are desirous to sell, the buyer could not procure the sale to be dissolved; an action of deceit cannot be maintained against a vendor for having falsely affirmed that a person bid a particular sum for the estate, although the purchaser was thereby induced to purchase it and was deceived in the value * * * Neither can a purchaser obtain any relief against a vendor for false affirmation of value, for value consists in judgment and estimation in which many men differ.

In *Duke of Beaufort* v. *Nellds* (1) Lord *Campbell* says:

Equity will not interfere in favor of a man who wilfully was ignorant of that which he ought to have known, a man, who without exercising that diligence which the law would expect of a reasonable and careful person, committed a mistake in consequence of which alone the proceedings in court have arisen.

It is said American cases carry the doctrine still further as to representations, and further than is warranted by our law. The doctrine as held in the American courts will be found in *Medbury* v. *Watson* (2), before Chief Justice *Shaw*, and three other judges. This case was followed by *Hemmer* v. *Cooper* (3).

If I have not referred at all to the defendant's answer, parts of which were read by plaintiff, and which entirely and unequivocally contradicts the whole case as put forward by plaintiff in his evidence, but agrees with the case put forward in the bill in stating that the sale was for the fair value of the building and improvements and land, and explains the whole transaction and denies and rebuts all pretention of fraud on the defendant's part, claimed by plaintiff, it is not because I am not keenly alive to the very obvious result that would naturally flow from allowing a party to break down or reform his own solemn deed, under seal, and free himself from the obligations he has thereby imposed on himself on his own uncorroborated verbal testimony, directly, positively and unequivocally con-

(1) 2 Cl. & F. 248, 286. (2) 6 Metcalf, 246.
(3) 8 Allen (Mass.), 334.

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tradicted by his opponent, who claims, under such an instrument, viz.; to place in jeopardy, if not to destroy, all security in written, sealed instruments, but because I am of opinion that the plaintiff's bill sets out no case entitling plaintiff to any relief, and that his evidence, even assuming he should have been permitted to have gone into a case not put forward in his bill, makes out no sufficient case for re-opening the transaction, either as to the land or the improvements. But when this is taken in connection with the fact of plaintiff's uncorroborated evidence being directly contradicted by the oath of the defendant, how can he expect to obtain a decree, for the plaintiff declares in the strongest possible language that defendant's statements are false, it is only the plaintiff's oath against the defendant's.

In *Grant* v. *Grant* (1) the Master of the Rolls says:

In the first place there is a rule constantly acted on in Chambers in Equity, that the unsupported testimony of any person on his own behalf cannot be safely acted on. * * * The court cannot act on the mere unsupported testimony of a claimant. * * * In this case I could not act on the uncorroborated testimony of the wife, the alleged donor.

In *East India Company* v. *Donald* (2) Lord *Eldon* says:

If relief is prayed, the rule is laid down here (and it is much too late now to discuss the principle of it) that if there is nothing more than positive assertion, unqualified in the terms of it, by one witness, and a positive denial by the defendant, the plaintiff shall not have a decree, and this court giving relief beyond the law will not give it on such terms, and that has been laid down and acted upon.

Lord *Eldon* in *Evans* v. *Bicknell* (3) says:

A defendant in this court has the protection arising from his own conscience in a degree, in which the law does not effect to give him protection. If he positively, plainly and precisely denies the assertion, and one witness only proves it as positively, clearly and precisely, as it is denied, and there is no circumstance attaching credit to the assertion over-balancing the credit due to the denial, as a positive denial, a court of equity will not act upon the testimony of that witness.

(1) 34 Beav. 623.

(2) 9 Ves. Jr. 283.

(3) 6 Ves. 183*a*.

The Master of the Rolls in *Pilling* v. *Armitage* (1) says :

> As far as the testimony of one witness can go, this witness distinctly proves all the allegations of the bill as to the agreement. But it is objected that this is but the evidence of one witness; and the agreement is denied by the answer, and, therefore, according to the established rule of the court, a decree cannot obtained.

In my opinion the appeal should be allowed

STRONG, J. :—

With two exceptions I concur in the judgment of the Chief Justice. I am not able, however, to agree that the rule which formerly prevailed in courts of equity requiring two witnesses to outweigh a positive denial of the defendant in his answer is in force where the evidence is taken, as it is under the practice existing in *Manitoba, vivâ voce* in open court. Further, I am of opinion that misrepresentation by a vendor as to the price which he himself paid for the property, which is the subject of the contract of sale, invalidates the contract. There are, I am aware, American authorities to the contrary, but the case of *Lindsay Petroleum Co.* v. *Hurd* (2) is, I think, conclusive the other way. I have nothing further to add, for in all other respects my opinion accords with that just pronounced by the Chief Justice.

FOURNIER, J. :—

Was also of opinion that the case ought not to have been proceeded with in the absence of appellant, and without allowing him the opportunity of giving his evidence.

HENRY, J. :—

The respondent, who is the plaintiff in this suit, alleges substantially that the appellant in July, 1874,

(1) 12 Ves. 79. (2) L. R. 5. P. C. 22.

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sold him a lot of land at *Winnipeg*, together with a house in course of construction upon it, and some materials provided on the ground for it. That the respondent was, by a parol agreement entered into between them, to pay the appellant the fair and reasonable value of the work then done to the house, and of certain materials which he provided for it, and also the fair and reasonable value of the land to be taken therewith. That in August (about six weeks afterwards) the appellant requested that the negotiations for the property should be completed by written documents, to which the respondent agreed. It was agreed further that the appellant should convey the land to the respondent in fee simple, and that the respondent should give a mortgage on the property to the appellant for the balance due, after deducting a payment of $500, for which the respondent had given the appellant a cheque on the *Merchant's Bank*, and which was paid to the appellant on the 7th July previous. At the suggestion of the respondent, his son was selected to make out the deed and mortgage, and the amount of the consideration in both to be furnished by the appellant.

The respondent alleges that the deed and mortgage were brought to him by his son, and that trusting to the good fath he had in the appellant, he executed the mortgage, believing that the amount of the consideration had been correctly stated in it. That, at the time, he thought the amount high, but nevertheless executed the mortgage, trusting in the correctness of the amount furnished by the appellant. That, previous thereto, he had never in any way ascertained what the correct amount should have been; nor had he got from the appellant or otherwise any statement of the amount he had expended towards the erection of the house, nor had he any means of knowing what proportion of the

consideration money was made up for the house, or what amount was included for the land. That some short time thereafter, from information received from the appellant's foreman *Corbett*, he became suspicious that all was not right, and that he had been overcharged, but that until very shortly before the commencement of the suit he had nothing sufficiently definite to enable him to seek legal redress. That until the receipt of a letter from the appellant, dated the 22nd November, 1879, he never knew or had reason to suspect that the consideration of the mortgage covered more than $1,000 for the land, but when he found by that letter that he had been charged $2,000, he felt that he had been charged at least double what he should have been.

The answer to the respondent's bill admits the original contract as stated in it—denies anything like fraud, misrepresentation, concealment, error or mistake on the part of the appellant as to the amount he caused to be inserted as the consideration money of the mortgage. It denies the allegations contained in the seventh clause of the bill amongst which is a statement that the lots (two and a-half) were not worth more or to have been higher in price than at the rate of four hundred dollars each, but that, on the contrary, the land was to be two thousand dollars, or at the rate of $800 each lot; and that the appellant based the estimate of that value "on the selling value of such land."

In the sixth paragraph of the answer the appellant admits the contract as stated in the bill, and that the respondent was, by it, to pay the value of the work done on the house so far as it had progressed and of the material on the ground. The appellant alleges that the value of the work and materials was ascertained in the presence and with the co-operation of the respondent. When the work was being carried on. He says:

We had the plan in our hands to refer to and compare with what

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had been done on the ground in carrying it out, and by these means and by reference from time to time to the foreman and otherwise, the calculations were made and placed on sheets of paper as data on which our agreement was to be based, which papers, I believe, are now in the plaintiff's possession as he retained the same.

The defence rests largely on the proof of those allegations. The respondent positively denies that he had ever seen the sheets of paper alluded to before the execution of the mortgage or afterwards, or, indeed, any other statement, paper or estimate. There is no evidence outside the allegation in the answer that he did. The only witness who spoke about them was the appellant's book-keeper (*Fulthorpe*), who says that it was he that made them out, and says he made them "from time-books and other data in the office at the time." In his direct testimony, he says:

I was told to make them out for the Chief Justice, and to the best of my knowledge and belief they were given to the Chief Justice.

In his cross-examination, he says:—

I suppose the other account referring to the one just mentioned, was given to the Chief Justice at the time, but do not know this.

Again:

I did not deliver these papers or a copy of them to the Chief Justice, and do not recollect of any one delivering them. I have no means of recollecting the circumstances at all, except the sight of these papers. I remember only that I made copies for the Chief Justice, but do not know whether he got them. The Chief Justice himself never came to me that I recollect to make any remark about these items.

The allegations of the respondent in his bill and his sworn statements on this point are not contradicted or affected by any evidence adduced by the appellant, and they must be taken as sustained.

But if the statement contained in the four sheets put in evidence (exhibit 2) just referred to was correct, and that the value of the land was really $2,000 as claimed by the appellant, the aggregate would only amount to

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$6,172.50, from which to deduct the $500 paid by cheque would leave a balance of, but $5,672.50 while the mortgage was taken for $5,926, or for the sum of $253.50 more than was due. By the most favorable view of the evidence on the part of the appellant the mortgage was taken for that amount in excess of what it should have been. But there are fundamental objections to the statement in question as evidence of the value of the work and materials. It was prepared merely, as I understand it, as a basis, upon, or as one of the means by, which an estimate of the value was to have been subsequently made and agreed upon. There is nothing in the evidence to connect the work and materials stated in it with the work done and materials provided for the house. It was made by a book-keeper from data that might have been largely inaccurate. Without such connection being shown it proves nothing. The agreement was not to reimburse the amount expended, but to pay the then value of the work which might or might not have been an advantage to the appellant. If he had got some of the work done for half value he would, *pro tanto*, be the gainer, or, if he had paid over the value for the work or materials, he would be the loser, when the value was ascertained. At all events, we have only to give effect to the contract as we find it entered into.

The appellant admits that the selling value of the land was to be the criterion to fix the amount to be paid for it, and in the ninth paragraph of his answer he, as I before quoted it, says he based his estimate of $2,000 on the selling value of the land. If that was the contract it seems to be shown by nine apparently competent and disinterested witnesses that the value of the land was not over $1,000. The appellant admitting the contract was bound to show that the sum of $2,000 was the fair selling value of the land, which has not been

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attempted. No court or jury under the evidence would be justified in rejecting the evidence of value put on it by the evidence of so many competent witnesses, and unless other reasons can be found to deny it, the respondent is, in my opinion, entitled to have that view entertained. As far as I can see the respondent is not estopped by anything shown to have been done by him previous to the execution of the mortgage. I will hereafter consider the effect of what he did afterwards.

As to the contract about the house and materials, the appellant was to be paid for their value; and when evidence of value was given by several competent witnesses of the respondent, the appellant could not expect any court to reject their sworn estimates, unless, indeed, those estimates were impeached by substantial and reliable evidence. None such was, however, given. The necessary conclusion is, therefore, that the estimates of the respondent's witnesses are reliable. One of them (*Blackmore*, a contractor for buildings, who had been 18 or 20 years in that business—eight years of the time at *Winnipeg*) states the value of the work at the house and materials to be $2,351.15, for which he made a detailed written statement.

Another (*Woods*, a carpenter for 26 years, the last seven years of which he worked at his business in *Winnipeg*) estimates, by a detailed statement, the value of the work and materials at $2,452.69, or about $100 above the estimate of *Blackmore*. *Corbett*, the foreman, proved that he compared and verified the estimate of *Blackmore* in which he found one or two unimportant errors which operated both ways, but that it was substantially correct, and that he knew it to be so from his own personal knowledge of the work when being done, and of the materials on the ground. If such uncontradicted evidence is not to be entirely ignored, the value of

the building and materials was not over $2,452 according to the higher of the two estimates, while it is charged at $4,426, an excess of $1,972. This may be all wrong and the estimates may be far too low, but the appellant has not impeached them, and so far they must be taken to be correct. According to the evidence on the trial, which is our only guide, the land should be $1,000, on account of which the respondent paid $500, leaving a balance due of $500. To this add the value of the building and materials $2,452, which makes due, when the mortgage was taken, $2,952. The mortgage for $5,926 would therefore be in excess of the value of the land, building and materials to the extent of $2,974. If the case were here for a final judgment, I think we, under the evidence, would be justified in deciding that the appellant should pay that amount to the respondent, or cause it to be deducted from the amount due on the mortgage, but as the question is merely one of a reference to a master we have only to ascertain whether the decree for that purpose can be sustained. The other matters of defence to the bill as set up are contained in allegations in the answer. 1st. That the respondent made payments on the mortgage, and the appellant claims that such payments are evidence of a ratification and adoption of the consideration money in the mortgage. That defence cannot, however, be available unless it be both alleged and proved that they were made after the knowledge of the respondent of the alleged fraud for which he now seeks redress. In this case there is neither such allegation or proof.

In the fourth paragraph of the answer an agreement is alleged to have been entered into on the 19th Sept., 1876, between the respondent, the appellant and *Duncan MacArthur*, who became the assignee of the mortgage, by which arrangements were made for the payment to

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MacArthur of the balance due on the mortgage. The object of setting it out does not plainly appear. There is no allegation of any knowledge by the respondent of the alleged fraud at that time, and the only object for setting it out as stated in the introductory part of the paragraph appears to have been to show the leniency of the appellant in regard to the payment due on the mortgage. In that way it is no bar to the respondent's right to an account. If a case of fraud were shown it would vitiate the mortgage, but the respondent does not seek relief in that way, but to obtain a proper account from the appellant. The mortgage being in the hands of the loan company and held as a collateral security for the appellant, the latter is the real and only party interested as a defendant in the action. Under all the circumstances hereinbefore referred to and shown by the allegations and proof of the parties, I am of opinion that as to them the decree was right.

But another objection was taken to it of a much more serious character. From the judge's minutes it appears that the bill herein was served on the appellant on the 20th of December, 1879, and the answer filed on the 19th of January following. The learned judge reports that "at the hearing, before the merits of the case were gone into, Mr. *Monkman* applied on behalf of the defendant (*Schultz*) to have the trial put off till May or June on the ground that the defendant is absent attending to his parliamentary duties at *Ottawa*, and because he is in a delicate state of health. He read an affidavit from defendant (*Schultz*) in support of said facts and a certificate from Dr. *Grant* of *Ottawa*." The hearing took place on the 28th of February, being about 40 days after the filing of the answer, and 18 days after the cause was at issue by the filing of the replication. The report does show when the appellant left *Winnipeg* for *Ottawa*, nor if the notice of the

hearing was served before he left *Winnipeg*. If it were not, a reasonable continuance should have been granted. The learned judge, however, thought it unnecessary that his evidence should be heard on the merits at the hearing, and refused the motion for a continuance, and in the concluding paragraph of his judgment says, that

> If it is thought necessary by the defence that the defendant (*Schultz*) should be present when the account will be taken sufficient time will be given him to come from *Ottawa* and appear before the master when the account will be taken.

From the bill and answer and the evidence of the respondent and others at the hearing the conclusion is irresistible that, not only in respect of the matter of taking the account before the master, but also as to the main facts of the case upon which rest the respondent's claim that an account should be taken, the evidence of the appellant under the peculiar circumstances in evidence was most important; and before a decree against him to account was passed, he should have had reasonable opportunity of being heard in his defence. Absence at a great distance from the place of hearing and detention by sickness at *Ottawa* were legitimate and sufficient reasons for the postponement of the hearing. It would be contrary to natural justice that a man should have a judgment against him during his temporary absence when he desired to be heard and showed himself unable to be present.

From the respondent's own evidence and otherwise he appears to have acted in the most careless and negligent manner as regards his own interests, and allowed a long time to elapse before taking any action towards obtaining redress. Still, if there was no express or implied ratification after knowledge of what he complains of, and no actual acquiescence, the matter of the effluxion of time short of the statutory period will not bar his remedy. I cannot find in any

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of his subsequent dealings or conduct, as shown by the evidence, any such ratification or acquiescence. There are cases wherein a party, to avoid a contract *in toto*, must, on notice or knowledge of fraud, take measures at once to avoid it, but in such cases he must remit the other party to the position he had previously occupied. Here, however, the rights and positions of the parties had materially changed at the time the respondent alleges he first discovered the fraud he complains of. His bill is not to avoid the contract but to reform the mistake or fraud as to the amount of the consideration money stated in the mortgage. He prays for adjudication as to that matter and for the necessary relief. I think the evidence shows him entitled to it, but for the objection I have last considered.

I think the decree cannot be upheld under the circumstances and for the reasons I have stated, and that our judgment should be to allow the appeal with costs and remit back the case to the position it occupied before the hearing. At a second hearing the appellant's evidence will be heard as well as that of the respondent, and the important facts more fully investigated to the end that justice may be done between the parties.

GWYNNE, J. :—

In his bill the plaintiff alleges that the verbal agreement which was made between him and the defendant, and which was made in the month of June or July, 1874, was that the plaintiff should purchase the foundation and frame of the house the defendant was then erecting, as it then stood, and go on and finish the same at his own expense for a dwelling for himself, and should pay the defendant the fair and reasonable value of the work then done and of the material then on hand in respect of the said dwelling house, and the fair and reasonable value of the land to be taken

therewith, and that in pursuance of such agreement that plaintiff went on and at his own expense completed the house. In one part of his evidence he says that on the 4th July he gave the defendant a cheque for $500, which he says was to pay for the land he required; in another that the price of the land was agreed to be $400 per lot, which for two and a-half lots taken would make the price of the land to be $1,000. In a letter dated November 22nd, 1879, addressed to the defendant, he says: "the land was valued at $800, your building charges were $5,126, making the mortgage $5,926."

Now the contract, whatever it was, remained verbal until the 12th August, 1874, when the defendant executed to the plaintiff, who accepted, a deed in fee simple of the property agreed to be sold, and executed to the defendant a mortgage on the property so conveyed, securing the payment of the sum of $5,926 with interest thereon at 12 per cent. per annum, as the amount due to the defendant for the land and building thereon with the material so agreed to be sold, and so sold and conveyed to the plaintiff. The plaintiff, in his evidence, says that at the time of the conveyance to him, and the mortgage by him being executed, he thought the amount pretty large, but that he signed the mortgage supposing it was all right. It is to be observed here that the relation then existing between the plaintiff and the defendant was that of vendor and vendee; there was no relationship of trustee and *cestuique trust*; nor is it alleged that the defendant by any device or contrivance prevented the plaintiff from exercising his judgment in determining what was the amount which, under the verbal agreement, should have been inserted in the mortgage. When he gave the mortgage for $5,926, that must be taken to be his own act determining the price to be paid by him, and, upon the completion of the deed to him and the execution of

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the mortgage by him, the contract, which had up to that time been *in fieri*, was wholly completed and executed; and if the plaintiff was then willing to accept, as he says he did, the defendant's statement of the value as the amount for which the mortgage should be executed, that was his own act, and if that was imprudently done, or was not done with sufficient deliberation, the plaintiff had only himself to blame. Then two years afterwards, and after the plaintiff had, as he says in his evidence he had, discovered that he had made a bad bargain, and after he had reason to suspect, from information given to him by *Corbet*, that the defendant had taken an unfair advantage of the confidence reposed in him by the plaintiff, the latter executes the agreement of the 19th September, 1876, whereby, after reciting the mortgage, and that it bore interest at 12 per cent., he accepts a reduction of the interest to 8 per cent., and he agreed to pay the principal secured by the mortgage, with interest at 8 per cent., by monthly instalments of $100, and he agreed to give an irrevocable power of attorney to one *Duncan McArthur*, assignee of the mortgage, securing such payment. The indenture witnesseth that in consideration of the premises, it is mutually and irrevocably agreed between the parties thereto, namely, the plaintiff, the defendant and *McArthur*, as follows:

> The said *Wood* shall pay to the said *McArthur* $100 per month to be taken out of the salary of the said *Wood*, payable to him as Chief Justice of *Manitoba*, until the said mortgage is paid, the interest on the said mortgage to be computed at 8 per cent. per annum instead of 12 per cent., as provided in said mortgage.

In the above letter of the 22nd November, 1879, the plaintiff says that he made this agreement of September, 1876 "notwithstanding that he was satisfied the mortgage was for double the sum it should be." Now, up to this re-affirmation of the correctness of the

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amount secured by the mortgage, there is no allegation of any contrivance of the defendant to prevent the plaintiff ascertaining what should have been the amount for which the mortgage should have been given in accordance with the plaintiff's view of the verbal agreement; nor was there any fiduciary relation whatever existing between the plaintiff and defendant. If therefore it be true, as the plaintiff now wishes to establish, that his confidence in the defendant was misplaced when he accepted, as he says he did, his representation of the value of the premises to be inserted in the mortgage, the plaintiff has only himself to blame, and he cannot expect that any court shall now assist him to set aside the contract completed and ratified with such circumstances of formality, upon the allegation that—for this is really what the equity stated by him in his bill, and his evidence amounts to—he was altogether too confiding and acted very foolishly in adopting the defendant's representation of the value of his property as the amount which the plaintiff was willing to pay for it. The plaintiff has, with his eyes open, abstained from making inquiries which he might have as readily made prior to the execution of the mortgage as now, and it is not the province of a court of equity to interfere to set aside contracts completely executed, and indeed, as here, deliberately ratified and confirmed, long after (as the plaintiff alleges) his suspicions were aroused, simply because the vendee, who was not entitled to regard the vendor as in fiduciary relation with him, has placed more confidence in the statements of the vendor as to the value of the property he was selling than the vendee now finds to have been prudent.

Vigilantibus non dormientibus leges subserviunt is a maxim recognized in courts of equity as well as in courts of law, and under the circumstances of this case, as detailed by the plaintiff himself, he must abide the

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consequences of his own imprudence. A court of equity cannot set aside his own completed contract and make a new and more favorable one for him. I agree, therefore, that the appeal must be allowed, with costs, and the bill in the court below be dismissed with costs.

Appeal allowed with costs.

Solicitor for appellant: *A. Monkman.*

Solicitor for respondent: *H. M. Howell.*