Supreme Court of Canada

Zwicker *v.* Feindel (1899) 29 SCR 516

Date: 1899-06-05

Edward Zwicker and Others (Defendants)

Appellants

And

Caleb Feindel (Plaintiff)

Respondent

1899: Feb. 21, 22; 1899: June 5.

Present:—Sir Henry Strong C J. and Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Sale of land—Misrepresentation by vendor Estoppel.

A vendor of land who wilfully misstates the position of the boundary line and thereby leads the purchaser to believe that he is acquiring a strip not included in the deed, is estopped from afterwards claiming such strip as his own property.

Appeal from a decision of the Supreme Court of Nova Scotia[[1]](#footnote-2) reversing the judgment at the trial in favour of the defendants.

The material facts of the case are fully set out in the judgment of the court delivered by Mr. Justice Gwynne.

*W. B. A. Ritchie Q.C.* and *McLean* for the appellants. In cases where false misrepresentation is made by a party to an agreement, the power of equity is extensive, and the contract itself may be set aside, or the person who made the assertion compelled to make it

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good. *Burrowes* v. *Locke[[2]](#footnote-3)*, at page 474; *Williams* v. *Williams[[3]](#footnote-4)*, at page 857; *Berry* v. *Peek*:[[4]](#footnote-5), at page 360; *Mills* v. *Fox[[5]](#footnote-6)*, at pages 162-166; *Hammersley* v. *De Biel[[6]](#footnote-7)*, at pages 87-88; *Hutlon* v. *Rossiter[[7]](#footnote-8)*, at page 18. Upon the authorities above referred to, the plaintiff is estopped from laying claim to any portion of the land in dispute, and from denying that the title thereto is vested in the defendant under the conveyance in question. Moreover, the court below dealt with the case as if all necessary amendments had been made. No amendments were necessary in this respect. *Sanderson* v. *Collman[[8]](#footnote-9)*; *Freeman* v. *Cooke[[9]](#footnote-10)*. The defendant Edward Zwicker relies on the ground that he is entitled to ratification of the conveyance from plaintiff to himself as claimed in the counter-claim. The findings of fact with respect to the terms of the contract have not been materially varied by the finding of the court on appeal. The majority of that court refused relief to the plaintiff on the ground that the secret fraudulent intention in the plaintiff's own mind enables him to repudiate his representation to the plaintiff, and to say that there was no mutual or common mistake. The plaintiff cannot take this position. He is estopped from denying the truth of his representation to the defendant. If he believed that representation to be true there was a common mistake. If he did not believe that representation to be true he was guilty of fraudulent conduct, and the court will not draw fine distinctions for the purpose of enabling him to benefit by that fraud. "No man can be heard to say that he is to be assumed not to have spoken the truth." Knight Bruce, L.J. in *Price*

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v. *Macaulay[[10]](#footnote-11)*, at page 346. As to the cases in which rectification will be granted upon oral evidence, see *Clarke* v. *Joselin[[11]](#footnote-12)*; Story, Equity Jurisprudence, sec. 153. Buller & Leake, Pleading, p. 693 *note.*

The court below have unduly extended the doctrine that reformation cannot be obtained unless a common mistake is clearly established. A secret fraudulent intention in the mind of the plaintiff cannot be invoked for the purpose of claiming on his behalf that there was not a mistake on his part. He is bound by his acts and declarations, even when these are inconsistent with his secret fraudulent intention. See Kerr, on Fraud and Mistake, p. 498. The language of the text writer is qualified by the expression "without fraud," the clear inference being that in a case where fraud existed the rule would be otherwise. In *Garrard* v. *Frankel[[12]](#footnote-13)*, Sir John Romilly M.R. at page 451 said, "the court will, I apprehend, interfere in cases of mistake where one party to the transaction, being at the time cognizant of the fact of the error, seeks to take advantage of it."

All the facts upon which the appellants mainly rely are supported by the finding of the judge of first instance as well as by the judgment of the Court of Appeal. Before that finding will be disturbed it must be shown with absolute clearness that it was wrong. *Allen* v. *Quebec Warehouse Co.[[13]](#footnote-14)*; *Schwerenski* v. *Vineberg[[14]](#footnote-15)*; *George Matthews Co.* v. *Bouchard[[15]](#footnote-16)*, at page 588 per Girouard J.

The defendant Edward Zwicker is entitled to specific performance of the plaintiff's agreements to sell to him the land in dispute up to the Grinton line, on the authorities already cited, and also on *Olley* v. *Fisher[[16]](#footnote-17)*.

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*Newcombe Q.C.* and *F. B. Wade Q.C.* for the respondent. The disputed strip has remained in the possession of respondent, showing the interpretation placed upon their contract by the parties themselves, and that there was no mutual mistake, and there has been no fraud pleaded or established by the evidence. The parties went upon the ground, measured it, and established the bounds; and the deed, which was drawn under their joint direction, comprised exactly what land was agreed, and what both parties understood, to be sold and purchased. Where the party purchasing knows exactly the limits of the land he is buying, and accepts a deed correctly describing it, he can never reform that deed, because there has been no mistake upon his part. How much greater the difficulty when the seller also claim she made no mistake. The plaintiff intended to sell only the land up to the pine tree, and the defendant thought that he was purchasing only up to that tree. If the Grinton line was to be the boundary, why did the defendant allow instructions to be given in his presence to insert in the deed the pine tree as the bound; why did he accept and record that deed; why was the pine tree blazed; why did the defendant mark the tree with his initials; why did he claim the land along the road to that tree, and why were the number of rods inserted in the deed. It would have been much simpler to have inserted the Grinton line as the boundary than to locate a fixed bound as was done.

As to rectification, see *Irnham* v. *Child[[17]](#footnote-18)*, Pollock on Contracts, (5 ed.) p. 495; Taylor on Evidence (9 ed.), sec. 1139; *Wright* v. *Goff[[18]](#footnote-19)*; *Cowen* v. *Truefitt[[19]](#footnote-20)*, at p. 554; *Llewellyn* v. *Earl of Jersey[[20]](#footnote-21)*; *Penrose* v.

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*Knight[[21]](#footnote-22)*; *Duke of Sutherland* v. *Heathcote[[22]](#footnote-23)*, at p. 486.

The deed cannot be rectified except for mistake, which must be mutual and established by the clearest and most satisfactory evidence *Bradford* v. *Romney[[23]](#footnote-24)*, at page 438; *Garrard* v. *Frankel[[24]](#footnote-25)*, at page 457; *Bloomer* v. *Spittle[[25]](#footnote-26)*; *Paget* v. *Marshall[[26]](#footnote-27)*; Fry on Specific Performance (3 ed.), p. 367; *Fowler* v. *Fowler[[27]](#footnote-28)*; *Dominion Loan Society* v. *Darling[[28]](#footnote-29)*; *Sylvester* v. *Porter[[29]](#footnote-30)*, at page 106 *et seq.* A deed cannot be rectified, but only set aside on account of fraud. *Walt* v. *Grove[[30]](#footnote-31)*; *Rawlins* v. *Wickham[[31]](#footnote-32)*, at pages 320, 321; *McNeill x. Haines[[32]](#footnote-33)*, at pages 481, 484 and 485.

The court cannot take notice of fraud unless it be pleaded. *Hardman* v. *Putnam[[33]](#footnote-34)*; *Wallingford* v. *Mutual Society[[34]](#footnote-35)*, at pages 701 and 709; *Lawrance* v. *Norreys[[35]](#footnote-36)*; *Redgrave* v. *Hurd[[36]](#footnote-37)*, at page 12; R. S. N. S. (5 Ser.), pages 849 to 851, rules 4, 6 and 15.

Estoppel has not been pleaded. Odgers on Pleading (2 ed.), pp. 190 and 191, and note on p. 190; Everest & Strode on Estoppel, pp. 391 and 392. Estoppel must be established with certainty. Bigelow on Estoppel (5 ed), p. 490; *Preble* v. *Conger[[37]](#footnote-38)*.

There being no pleading by way of reply, issue was joined on the defence to the counterclaim by virtue of the statute. R. S N. S. (5 Ser.) p. 867, rule 12.

There was no necessity to appeal from the trial judge's direction to amend as the appeal from the

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judgment on the merits raises the question as to the propriety of the amendment. And in any case the judge did not make any finding or amendment to cover estoppel as that question was not raised at the trial. *Laird* v. *Briggs[[38]](#footnote-39)*.

The judgment of the court was delivered by:

GWYNNE J.—This appeal relates only to a portion of the causes of action in the statement of claim mentioned, namely trespasses alleged to have been committed by the defendants upon a strip of land in the second paragraph of the statement of claim alleged to be the property of the plaintiff, which piece of land is there described as situate in or near New Germany, upon the main post road, and bounded on the northeast by the Bridgewater Road so called; on the southeast by property of the defendants; on the south-west by the LaHave River; and on the north-west by property of the defendants. The defendants in their statement of defence, besides denying that this piece of land is the property of the plaintiff, counterclaimed to the effect following: that the plaintiff agreed to sell to the defendant Zwicker all his, the plaintiff's, right, title and interest in a piece of land situate in New Germany, on the eastern side of the LaHave River, and on the western side of the road leading to Annapolis, and bounded as follows:

Beginning three rods from the line of John Chesley and running westerly parallel to said line until it strikes the LaHave River; thence up the said LaHave River by its several courses until it strikes the property of one Alexander Grinton; thence north-east wardly until it strikes the main road thence eastwardly along such road to the place of beginning.

This description includes the piece of land under consideration in this appeal. The counterclaim, in short

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substance, proceeds to allege that the plaintiff executed to the defendant Edward Zwicker a deed by which it was intended to convey the whole of the plaintiff's interest in the said piece of land to the defendant Edward Zwicker, and upon the execution of the deed the defendant Edward Zwicker in virtue thereof entered into possession and still is in possession of the whole of the land as above described up to the Grinton line, but the description inserted in the said deed was erroneous by reason of the plaintiff having represented that a pine tree mentioned in such description was on the western extremity of his, the plaintiff's, land, and on the boundary between the land of the plaintiff and that of Alexander Grrinton. The description so inserted is as follows:

Beginning three rods from the line of John Chesley and running west wardly parallel to said line until it strikes the LaHave River; thence up stream by the several courses of said river seventy-four rods *to a pine tree* marked "Bound" nearly opposite the pound; thence northeasterly until it strikes the main road aforesaid; thence easterly down along said road to the place of beginning.

That such description does not correctly state the true boundaries of the whole of the land purchased by said defendant from the plaintiff, but leaves a strip which is part of the land bought by said defendant from the plaintiff, and which is the portion of land described in the second paragraph of the statement of claim, and the use of which as part of the land purchased by said defendant, is the trespass of which the plaintiff complains. The counterclaim concludes with a prayer for a decree for the reformation of the deed from the plaintiff to the said defendant so as to include all the land bought and paid for by said defendant up to the Grinton line as described in paragraph one of the counter claim *or* a decree for specific performance of the sale of the land as described in said paragraph

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one of the counterclaim, and such further relief as the nature of the case may require.

It appeared in evidence that the defendant Edward Zwicker at the time of his agreement of purchase from the plaintiff being entered into contemplated acquiring a further piece from Grinton for piling grounds and with that in view it was a matter of importance to the defendant that his purchase from the plaintiff should extend to the Grinton line; and the learned trial judge has found as matter of fact

that the agreement was to purchase up to the Grinton line, that while the pine tree was marked and intentionally inserted in the deed it was done upon the representation of the plaintiff that the pine tree fairly indicated the locality of the boundary line between the plaintiff and Grinton, and that this representation was false in fact as the plaintiff well knew.

The plaintiff had in his evidence stated that he thought the line between him and Grinton to be six rods from the pine tree, but that he did not consider he was under any obligation to tell Zwicker where the true boundary was. The learned trial judge accordingly gave judgment on the counterclaim for reformation of the deed by the insertion therein of the true boundary up to the Grinton line according to the original agreement of purchase and sale. Upon appeal by the plaintiff the majority of the Supreme Court of Nova Scotia, Henry J. dissenting, have reversed that judgment. Ritchie J. pronouncing the judgment of the majority says:

After a careful consideration of the evidence I have come to the conclusion that the defendant Zwicker at the time he made the agreement to purchase the lot, and when he got the deed intended to purchase up to the *Grinton line* and believed that the deed he received conveyed to him the whole lot and that such belief was caused wholly by the misrepresentations of the plaintiff who induced him to complete the purchase under that idea, but I am unable to find that it was the intention of the plaintiff to convey the whole lot. The evidence as I view it points pretty conclusively to the fact that the plaintiff by

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taking the pine tree as marking the Grinton line which he knew at the time was untrue, and representing that to defendant, intended to defraud him and to retain for his own use a portion of the lot next the Grinton line, and at the same time to induce the defendant to purchase what he supposed was the whole lot, leaving no interval between it and the Grinton lot, which lot the defendant Edward Zwicker, as the plaintiff well knew, then contemplated purchasing and afterwards acquired. There is no allegation of fraud in the counter claim which proceeds on the ground of mutual mistake only. To rectify the deed in this case as claimed by defendant would not in my opinion carry out the real intentions of both parties *as I think the plaintiff at the time he gave the deed did not intend to sell the portion above the pine tree* although he had defrauded the defendant and had led him to believe that the deed covered the whole lot.

And he concludes saying

no doubt the defendant Edward Zwicker has a remedy against plaintiff for the fraud, but not I think in the form asserted in his counterclaim.

The Supreme Court of Nova Scotia were thus of opinion that the defendant Edward Zwicker was chiefly entitled to some measure of relief against the fraud practiced upon him by the plaintiff, but not by rectification of the deed upon the ground of mutual mistake. But by the statute law of Nova Scotia, 5th series, ch. 104, it is enacted that at any time during the progress of an action the necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings, and further that the court and every judge thereof shall recognise and take notice of all equitable estates, titles and rights, duties and liabilities appearing incidentally in the course of any cause or matter, and by the Supreme Court Act of 1880, 43 Vict. ch. 34, (R. S. C. c. 135, ss. 63-65.) this relief may and should be granted by this court in appeal if it should have been omitted to be granted in the courts below. Now the Supreme Court of Nova Scotia were of opinion that the error made in the description of

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the piece of land which Zwicker was intending to purchase and for which he had agreed to pay $650, was made by the plaintiff's procurement designedly false with intent to defraud the purchaser and to induce him to accept the deed containing an incorrect description as containing a true description of the piece of land he was purchasing, and that by such fraudulent means the plaintiff procured Zwicker to complete the purchase and pay the purchase money agreed upon. If there was any necessity for an amendment of the statement of claim by insertion therein of an averment that the plaintiff had fraudulently procured an erroneous description to be inserted in the deed which he induced the defendant Edward Zwicker to accept upon the faith and assurance that the description was correct such amendment could readily have been made by force of the Nova Scotia statute, and accordingly should have been made by the mere insertion of the words "falsely and fraudulently" after the words "owing to the plaintiff," and before the words "representing that" in the second line of the sixth paragraph of the counterclaim in the printed case, and such amendment if necessary can by force of the Dominion Statute 43 Vict. ch. 34 be still made so as to make the allegation in the pleadings accord with the facts as proved and found in the courts below and dealing with the facts as so found, I think it is clear that the defendant Edward Zwicker has established his right to the benefit of the well established principle of equity that where a person makes a false representation for the purpose of fraudulently influencing the conduct of another person who acts upon the representation, the person making the representation is estopped from denying the truth of the representation and may be compelled by the court to give effect to it upon the authority of *Jorden* v.

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*Money[[39]](#footnote-40)*; *Citizens Bank of Louisiana* v. *First National Bank of New Orleans[[40]](#footnote-41)*; *Hammersley* v. *DeBiel[[41]](#footnote-42)*, and many other cases to the like effect. I must, however, say that I do not think that the absence of an averment in the counterclaim that the representation of the plaintiff whereby he procured an erroneous description of the piece of land Zwicker was purchasing to be inserted in the deed was designedly false and fraudulent prejudiced in any respect the purchaser's right to relief upon the ground of estoppel because of the representation proving in point of fact to have been false and fraudulent. The appeal must therefore be allowed with costs, and the judgment of the learned trial judge restored with a declaration added thereto that the plaintiff is estopped from claiming as his own the piece of land in the pleadings mentioned which lies between the line at the pine tree and the Grinton line, and by the insertion of a clause rendering judgment for the defendants in the plaintiff's action as to so much thereof as relates to a claim against the defendants for trespass on such piece of land.

Appeal allowed with costs.

Solicitor for the appellants: A. K. McLean.

Solicitors for the respondent: Wade & Paton.

1. 31 N. S. Rep. 232. [↑](#footnote-ref-2)
2. 10 Ves. 470. [↑](#footnote-ref-3)
3. 37 L. J. Eq. 854. [↑](#footnote-ref-4)
4. 14 App. Cas. 337. [↑](#footnote-ref-5)
5. 37 Ch. D. 153. [↑](#footnote-ref-6)
6. 12 Cl. & F. 45. [↑](#footnote-ref-7)
7. 7 DeG. M. & G. 9. [↑](#footnote-ref-8)
8. 4 M. & G. 209; 4 Scott (N. R.) 638. [↑](#footnote-ref-9)
9. 2 Ex. 654. [↑](#footnote-ref-10)
10. 2 DeG. M. & G. 339. [↑](#footnote-ref-11)
11. 16 O. R. 68. [↑](#footnote-ref-12)
12. 30 Beav. 445. [↑](#footnote-ref-13)
13. 12 App. Cas. 101. [↑](#footnote-ref-14)
14. 19 Can. S. C. R. 243. [↑](#footnote-ref-15)
15. 28 Can. S. C. R. 580. [↑](#footnote-ref-16)
16. 34 Ch. D. 367. [↑](#footnote-ref-17)
17. 1 Bro. C. C, 93. [↑](#footnote-ref-18)
18. 22 Beav. 207; 25 L. J. Ch. 803. [↑](#footnote-ref-19)
19. [1898] 2 Ch. 551. [↑](#footnote-ref-20)
20. 11 M. & W. 183. [↑](#footnote-ref-21)
21. Cass. Dig. (2 ed.) 776. [↑](#footnote-ref-22)
22. [1892] 1 Ch. 475. [↑](#footnote-ref-23)
23. 30 Beav. 431. [↑](#footnote-ref-24)
24. 30 Beav. 445. [↑](#footnote-ref-25)
25. L. R. 13 Eq., 427. [↑](#footnote-ref-26)
26. 28 Ch. D. 255. [↑](#footnote-ref-27)
27. 4 DeG. & J. 250. [↑](#footnote-ref-28)
28. 5 Ont. App. R. 576. [↑](#footnote-ref-29)
29. 11 Man. L R. 9 8. [↑](#footnote-ref-30)
30. 2 Sch. & Lef. 492. [↑](#footnote-ref-31)
31. 3 DeG. & J. 304. [↑](#footnote-ref-32)
32. 17 O. R. 479 [↑](#footnote-ref-33)
33. 18 Can. S. C. R. 714. [↑](#footnote-ref-34)
34. 5 App. Cas. 685. [↑](#footnote-ref-35)
35. 15 App. Cas. 210. [↑](#footnote-ref-36)
36. 20 Ch. D. 1. [↑](#footnote-ref-37)
37. 66 111. 370. [↑](#footnote-ref-38)
38. 16 Ch. D. 440. [↑](#footnote-ref-39)
39. 5 H. L. Cas. 185. [↑](#footnote-ref-40)
40. L. R. 6 H. L. 352. [↑](#footnote-ref-41)
41. 12 Cl. &F. 45. [↑](#footnote-ref-42)