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LONGUEUIL NAVIGATION CO. v. CITY OF MONTREAL.

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GWYNNE J.—I concur in allowing the appeal upon the ground of the tax imposed by the by-law not being authorized by the provincial act.

Appeal allowed with costs, but costs of the Attorney General to be paid by appellants.

Solicitor for appellants: *F. X. Archambault.*

Solicitor for respondents, The City of Montreal: *Roüer Roy.*

Solicitor for respondent, The Attorney General for the Province of Quebec: *P. H. Roy.*

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*Nov. 21.

*Dec. 20.

JOSEPH BELL (PLAINTIFF).....APPELLANT;

AND

JAMES CHARLES MACKLIN (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Rescission of—Setting aside conveyance of land—Misrepresentation—Matters of title—Fraud—Action for deceit—Evidence.

A party who seeks to set aside a conveyance of land executed in pursuance of a contract of sale, for misrepresentation relating to a matter of title, is bound to establish fraud to the same extent and degree as a plaintiff in an action for deceit.

B. bought land described as "two parcels containing 18 acres more or less," and afterwards brought an action for rescission of his contract, on the grounds that he believed he was buying the whole lot offered for sale, being some 25 acres, and that the vendor had falsely represented the land sold as extending to the river front. The evidence on the trial showed that B. had knowledge, before his purchase, that a portion of the lot had been sold.

Held, affirming the judgment of the court below, that even if B. was not fully aware that the portion so sold was that bordering on the river front, the knowledge he had was sufficient to put him on inquiry as to its situation, and he could not recover on the ground of misrepresentation.

PRESENT—Strong, Fournier, Henry, Taschereau and Gwynne JJ.

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APPEAL from a decision of the Court of Appeal for Ontario, reversing the judgment of the Divisional Court, by which a decree in favor of the plaintiff was affirmed.

The facts set up in the statement of claim and on the trial were that the defendant Macklin had offered for sale a portion of land, representing that it extended to the bank of the river Lynn; that it was bought by the plaintiff who discovered, before paying the purchase money, that the portion on the river front had previously been sold to other parties; that he then attemped to negotiate with Macklin with a view to obtaining a reduction of the price, and Macklin consented to an arbitration to fix the value of the land not so included; that the arbitration fell through and he brought an action for a rescission of the contract or compensation in the shape of reduction in the price of the land.

The misrepresentation as to the extent of the land was denied by Macklin, who claimed that a map was exhibited to plaintiff at the time of the sale showing the situation of the land; that he offered for sale 18 acres more or less, and the conveyance which he executed gave to plaintiff the same quantity; that if plaintiff supposed he was getting the river front he must have expected to get twenty-six acres instead of eighteen as offered in the advertisement; and that the arbitration was a farce, as he had never sold the land of which the arbitrators were to fix the value and they could award nothing for it.

The Chancellor, before whom the case was heard, decided in favor of the plaintiff, and ordered a reference to the master to take an account of the amount due the plaintiff on account of the misrepresentation by Macklin, giving, however, an option to the latter, to be exercised within ten days, of having the decree altered so as to

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direct a rescission of the contract. On appeal to the Divisional Court this judgment was confirmed, but on further appeal to the Court of Appeal it was reversed, the last mentioned court holding that the only relief that could be granted would be a rescission of the contract, and that there was nothing in the circumstances of the case to warrant the court in granting such relief as they would not support an action of deceit. The plaintiff then appealed to the Supreme Court of Canada.

W. Cassels Q.C. for the appellant.

This case depends entirely on questions of fact and the judge at the trial, the judges of the divisional court and the Chief Justice of Ontario in the Court of Appeal have all concurred in finding the facts in plaintiff's favor. Under such circumstances the Court of Appeal should not have reversed the judgment. *Smith* v. *Chadwick* (1); *Redgrave* v. *Hurd* (2); *The Picton* (3); *Grasett* v. *Carter* (4).

Mr. Justice Burton in the Court of Appeal has not considered the case as it was presented but treated it as if it was a case for compensation from the beginning, which has never been contended for. In fact, therefore, two judges of the Court ot Appeal have reversed the judgment of the court below.

The cases relied on by Mr. Justice Burton are not applicable. In *Brownlie* v. *Campbell* (5) there was a special agreement that errors of the character of those complained of would not entitle the purchaser to relief. *Wilde* v. *Gibson* (6) was treated as an action of deceit which would require evidence of a very different character from that required in a case like the present. *Petrie* v. *Guelph Lumber Co.* (7).

The following authorities also were cited: *Mathias* v.

(1) 9 App. Cas. 194.
(2) 20 Ch. D. 19.
(3) 4 Can. S. C. R. 654.
(4) 10 Can. S. C. R. 105.
(5) 5 App. Cas. 950.
(6) 1 H. L. Cas. 605.
(7) 11 Can. S. C. R. 450.

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Yetts (1); *Newbigging* v. *Adam* (2); *Hart* v. *Swaine* (3); *Arkwright* v. *Newbold* (4); *Allen* v. *Quebec Warehouse Co.* (5).

Robinson Q.C. for the respondent.

In *Hale* v. *Kennedy* (6) it was contended that the court should not interfere with the findings of the courts below on matters of fact it was held, following *Symington* v. *Symington* (7), that it was a question of the practice of the appellate court.

In order to succeed the appellant must show absolute fraud. Kerr on Frauds (8).

The defendant did everything possible to supply information to the plaintiff, and if the plaintiff would not take the trouble to make inquiries and find out what he was getting he must bear the consequences.

STRONG J.—The facts are very fully stated in the elaborate judgments delivered by the judges of the Court of Appeal, and need not be repeated here.

The plaintiff having taken a conveyance and having no contract entitling him to compensation for deficiency (9) is restricted to such relief as he may be able to obtain on the covenants for title contained in his purchase deed, or to relief by way of rescission for fraud. An action on the covenants for title was out of the question, for it is not pretended that the respondent had not a good title to all the land he assumed to convey (and which comprised all he ever contracted to convey also) that is to the two parcels of 13¼ acres and 13 acres respectively, less the land expressly excepted which had been sold to the railway company by Papps. There remained, therefore, no remedy open to the plaintiff (if any he was

(1) 46 L. T. N. S. 496.
(2) 34 Ch. D. 582.
(3) 7 Ch. D. 42.
(4) 17 Ch. D. 301.
(5) 12 App. Cas. 101.
(6) 8 Ont. App. R. 159.
(7) 2 Sc. App. 424.
(8) P. 488 and cases there cited.
(9) *Joliffe* v. *Baker*, 1 Q. B. D. 255.

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entitled to) but an action for rescission. Accordingly we find the statement of claim framed as making a case for rescission and the first claim for relief adapted to the case so made, though an alternative claim for compensation is added. The judgment, it is true, is for compensation, but I think we may accept the explanation of this given by the learned Chancellor in his judgment from which it appears that at the trial before Mr. Justice Proudfoot the learned judge offered the respondent the option of having a judgment against him for compensation instead of rescission, and that after deliberation the respondent accepted the first alternative. This option was, of course, given to the respondent with the assent of the plaintiff's counsel as it could not have been regularly offered otherwise, and having been accepted by the respondent no party can now complain of it. I must remark, however, that the offer of the option, with the assent of the plaintiff and its acceptance by the respondent, ought regularly to have been shown on the face of the formal judgment, and it is to be regretted that the proper practice in this respect was not observed.

In some of the learned judgments delivered in the court below much stress is laid on the form of the relief given being erroneous. Whilst I entirely agree that it would be so, apart from the assent of the parties, I also agree with Mr. Justice Osler, that if this were the only objection to the decision of the Chancery Division "there would be no difficulty in turning the judgment into one for rescission" which, also agreeing with the same learned judge, I hold "to be the only relief which the plaintiff can possibly be entitled to."

The question we have to determine is then reduced to this: Has the plaintiff made by his pleadings and evidence such a case as the well settled principles of law require to entitle him to have the conveyance of

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the 15th of June, 1882, by which the executory contract of sale of the 8th of the same month was carried into execution, rescinded and set aside?

In the late case of *Brownlie* v. *Campbell* (1) Lord Selbourne and Lord Blackburn both lay it down most distinctly that after a conveyance of land has been executed nothing in the way of misrepresentation, short of actual positive fraud, will warrant a judicial rescission between vendor and purchaser. What amounts to actual fraud in the way of misrepresentation is hardly susceptible of abstract definition. It certainly does appear from the authorities that, as regards executory contracts, innocent misrepresentation may be a ground for rescission (2); while an action for deceit is not maintainable unless there is actual moral fraud, as is well demonstrated in the judgment of this court in the case of *Petrie* v. *Guelph Lumber Co.* (3). As regards the defence to an action for specific performance, which depends on principles altogether different from an action for rescission, it has long been settled that honest misrepresentation free from all taint of fraud will constitute a defence. The case of *Brownlie* v. *Campbell* (1), however, warrants the proposition that whatever may be the rule applicable to other executed contracts a contract for the sale of land executed by a conveyance, and especially when the conveyance is preceded by a preliminary agreement in writing (4), is governed by different principles from those which regulate the same relief as applied to an executory contract requiring something to be established beyond mere innocent misrepresentation, namely, that there was either conscious falsehood on the part of the person making the

(1) 5 App. Cas. 925.

(2) *Arkwright* v. *Newbould*, 17 Ch. D. 320; *Reese River Mining Co.* v. *Smith*, L. R. 4 H. L. 64; *Redgrave* v. *Hurd*, 20 Ch. Div. 1.

(3) 11 Can. S. C. R. 450; *Smith* v. *Chadwick*, 9 App. Cas. 187.

(4) *McCulloch* v. *Gregory*, 1 K. & J. 286.

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representation, or that it was made by a person who ought to have known the fact, to one who had a right to rely on the accuracy of his statement, recklessly and without caring whether it was true or not (1). In other words, a party who seeks to set aside a conveyance of land executed in pursuance of a contract of sale for misrepresentation relating to a matter of title is bound to establish fraud to the same extent and degree as a plaintiff in an action for deceit. It is not pretended in the present case that the respondent when he made the statement which is charged as fraudulent, viz., that the land he had to sell in lot 10, the southerly or 13 acres parcel, extended to the edge of the river, was knowingly stating what was false; if, then, his representation is to be deemed fraudulent, it can only be because he recklessly made the statement without knowing or caring whether it was true or false. In addition to the falsehood of the representation something more must be proved. In the words of Sir W. P. Wood, V.C., in *Barry* v. *Croskey* (2), it must also be established "that such false representation was made with the intent that it should be acted upon," by the person to whom it is made. And, further, that such person did act upon it accordingly, and from so doing suffered an injury which was an immediate and direct, and not a remote, consequence of the representation. The plaintiff cannot, therefore, succeed in this action unless he brings himself within these conditions.

In *Redgrave* v. *Hurd* (3) the Master of the Rolls says:—

> If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it, and in order to take away his title to be relieved from the contract on the ground that the misrepresentation was untrue, it must be shown either that he had know-

(1) *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459.

(2) 2 J. & H. 1.

(3) 20 Ch. D. 1.

ledge of the facts contrary to the representation or that he stated in terms, or shewed clearly by his conduct, that he did not rely on the representation.

This passage, however, has in later cases (1) been unfavorably criticised, and in *Hughes* v. *Twisden* the court say that it is not a presumption of law that the party was induced to enter into the contract by the misrepresentation, but that the misrepresentation is

> To be regarded as an important piece of evidence from which, if there is nothing else, the court may draw the inference of fact that the plaintiff was induced by the statement to enter into the contract;

and in the case before it, the court declined to draw such an inference.

Next proceeding to apply these general principles of law to the facts of the present case, I think it can be shewn from the circumstances and documents in evidence, and that without transgressing any established rule of appellate procedure which requires us to consider the finding of the judge at the trial in whose presence the witnesses were examined conclusive as to their credibility, that the plaintiff when he entered into the contract of purchase, and at all events when he took his conveyance, must have had knowledge of facts which indicated to him that he could not safely rely on the representation, and further, that in point of fact the plaintiff did not rely on the representation in entering into the agreement for purchase and certainly not in completing the purchase by conveyance.

The case made by the statement of claim is that the whole of the two parcels were sold without exception or reservation, and that the exceptions were contained for the first time in the deed. The written agreement is not stated by the plaintiff, and the case is put forward as that of a sale in which there had been no written agreement preceding the conveyance. In

(1) *Hughes* v. *Twisden*, 34 W. R. 498; *Smith* v. *Chadwick*, 9 App. Cas. 187; *Smith* v. *Land and House Corporation*, 28 Ch. D. 16.

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pleading fraud parties are still, notwithstanding the laxity in pleading which seems now to some extent to be countenanced by the Judicature Act, bound to more than ordinary exactitude, (1) and if there were not more substantial grounds for maintaining the judgment under appeal it might be worth while to inquire whether a plaintiff could be entitled to relief in a case charging fraud, when his own statement on oath varies so materially from his pleading as we find it does here. The respondent, whilst he admits he did not know at the time he put the land up for sale at auction, nor until he examined the map on the evening of that day —the 7th of June—the locality of the piece of land part of the 13 acre parcel (X) which had been sold to the railway company, swears he did on that evening, by an examination of the map B made in the presence of the plaintiff, discover the exact quantity and situation of the piece of land, consisting of 2 acres and $\frac{29}{100}$, extending along the river front, which had been sold to the railway company. That he made this discovery on seeing the blue figures still remaining on the map (now before me) which plainly indicated these facts which, beyond doubt, they were intended to be a record or memorandum of. The exact quantity of land which the respondent had to sell in the two parcels was 18 $\frac{88}{100}$ acres, the pieces sold to the railway company being altogether 7 $\frac{87}{100}$ acres, viz.: 5 and $\frac{8}{100}$ acres, part of the 13 $\frac{1}{4}$ acres piece (Y) and 2 $\frac{29}{100}$, part of the 13-acre parcel (X). The advertisement of sale described the land to be sold as 18 acres, more or less. The respondent, in his evidence at the trial, gives the following account of what took place on the ground on the 7th June, when he put the land up for sale by auction:—

Q. Now did you offer this land for sale? A. I did.

Q. How many acres did you offer? A. 18 acres more or less.

Q. Did you announce the number of acres when you offered the land for auction on the 7th June? A. I did.

(1) See observations of Fry J. in *Redgrave* v. *Hurd*, 20 Ch. D. 1.

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Q. Was the map you see before you now produced at that time shown? A. It was.

Q. What did you represent to be the boundaries of the land that you were offering? A. Well, I had this map on the ground at the time of the sale, the time I offered it for auction I had this plan and stated that the quantity was in two parcels, and one contained 13¼ and the other 13 acres, and that the quantity I had for sale was 18 acres, $\frac{88}{100}$—18 acres more or less; that one portion had been sold to the railway and was marked off; I stated there was five acres sold to the railway, five and a fraction over, and that dotted lines showed the portion sold to the railway; I stated there must have been two acres sold off the other parcel, because the quantity I had for sale was 18 $\frac{88}{100}$, and there must have been some 7 acres sold, but I did not know on what part the two acres was.

Q. And there was no fence on it to designate it? A. No.

Q. And you never had examined the deed or plan of the railway company to ascertain what portion had been sold off? A. No.

Q. Were these figures, 5.08 in parcel D referred to on that day as designating the parcel which had been sold to the railway company on that date? A. Well, I do not know whether I pointed out the figures, but I stated positively that there was about five acres sold off this piece; I pointed out the land marked off and stated it was five acres.

Q. And off the other piece about two acres? A. Yes.

Q. And I understand you to say you did not know what portion had been taken by the railway company; A. No, but I knew that about two acres must have been taken off C, but I did not know what portion.

Q. Did you describe the boundary in reference to the river Lynn and lake Erie? A. Well, I described it two or three times on the ground; I stated there is 26 acres in the two parcels; there is five acres sold on one, I know about that five, and two acres sold off the other, but I did not know what two that was.

Q. Was there any sale made on that occasion when you tried to auction it? A. No, offers were made but I refused them.

Q. Then there was nothing further done in regard to selling the property till the evening? A. No.

The plaintiff and his witnesses Foster, Passmore, and Anderson all deny having heard these statements which the respondent swears to having made. They say he described the land as bounded by the river Lynn and the lake. If there was nothing more in the case it would be very difficult to say that these denials coupled with the finding of the learned judge ought

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not to have been considered conclusive. But even if we consider this evidence by itself, isolated from the documentary proof and the other facts and circumstances of the case, and apart from the account which we have of what afterwards occurred in connection with the sale, and from the conduct of the parties, I should, notwithstanding the direct contradiction of the respondent's testimony by the plaintiff and his witnesses, still consider that there were many surrounding circumstances to be taken into consideration as tending to confirm the respondent's account of what actually occurred. The respondent swears he only offered 18 acres and a fraction of an acre for sale; in this he must state the truth, for consistently with the hand bill, by which he had advertised the sale and which was of course before him and the other parties on the ground, he could not have offered more, for the land is described in this poster as "two parcels "containing 18 acres more or less." The plaintiff and his witnesses all state that the sale was without any restriction or specification as to the contents of the two parcels beyond the exception of the land enclosed by the railway company. That the respondent did, as he states, announce that there were some two acres to be excepted from the 18 acres as having been sold to the railway company is, to say the least, extremely probable. The parties were on the land itself, they had the plan B which showed distinctly enough that the area of the two parcels were 13¼ acres and 13 acres respectively. The railway fences which were before their eyes showed that a piece of the northerly parcel (Y) was in the possession of and belonged to the railway company. It would surely be most natural that seeing this the persons present taking an interest in the sale should have asked how much was included within these fences as belonging to the railway company. A very cursory examination of the

plan would have enabled the respondent to answer, or others to see, that it amounted to 5 $\frac{8}{010}$ acres; then the most simple process of calculation would have shown any one that there was in another part of the property some 2 acres more to be deducted to reduce the contents of the two parcels to the quantity of land for sale, 18 acres or thereabouts. Everything favors the inference that the statements the respondent swears he made were, in truth, made as, in the due course of what would most naturally have occurred, they would have been.

As regards the statement of the plaintiff and his witnesses that the respondent represented the river as the boundary, I think it very likely he may have done so, but not as the boundary of what he was actually proposing to sell, but as that of the parcel of 13 acres which he offered to sell, less a piece of some 2 acres or thereabouts sold to the railway company and the locality of which he could not determine. These considerations, if I had been dealing with this case on written evidence in a court of first instance, would have appeared to me of great weight, but as the evidence was taken in open court before a judge who has found adversely to all these probabilities after having seen and heard the oral testimony I should not, if the case had rested here, have been prepared to disturb the findings.

The case however does not stop here. There remains other evidence, of even greater importance than that relating to what took place at the sale, to be considered.

In the evening of the same day that the sale by auction had been attempted there was an interview between the plaintiff and the respondent, at which the negotiations which led to the sale now impeached were entered upon. It took place in a back room in the plaintiff's hotel, at Port Dover, at which the respondent was, at the time, staying.

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What then occurred is stated by the respondent in his deposition at the trial as follows:—

Q. You were staying at the plaintiff's hotel? A. Yes.

Q. Wae there any conversation regarding this land that evening between Mr. Bell and yourself? A. Yes.

Q. Where did it occur? A. Well, it occurred in Mr. Bell's; it was in his bar-room, and then we went into his back sitting-room.

Q. Was this map in question before you at this time? A. Yes, Mr. Bell said "well, let us look at the map," and we went into the sitting-room and I produced the map.

Q. Was it spread out before you on the table? A. Yes.

Q. And did you and Mr. Bell together examine it? A. Yes, we did.

Q. Was there any discussion or talk of the portion that had been sold off the parcel C, that is the parcel nearest the lakes? A. Oh, yes, it was about that, the object of examining the map was to ascertain where the two acres had been sold off.

Q. Will you tell us what took place between you and Mr. Bell? A. I then looked over the map with Mr. Bell and I noticed the figures 2.29 in the land, and says I "Mr. Bell, I can tell you now where the parcel is off," and so I made a memo. and I numbered the two parcels $13\frac{1}{4}$, and 13 altogether, and took 5.08 and 2.29 and added them together and deducted them from $26\frac{1}{4}$ and the remainder was $18\ \frac{88}{100}$, and I said that is the parcel that was sold, and I said that proves that this $2\ \frac{29}{100}$ is the portion that had been sold to the railway company.

Q. Is there any doubt that you gave Mr. Bell to understand that a portion had been sold to the railway company off this part C? A. No, not the slightest, and I made out a memo. in writing showing the result and handed it to Mr. Bell that evening.

Q. Did you come to an agreement that night? A. Well, no.

Q. And did he make you an offer? A. He did make an offer that he would give the $1,200; I did not accept it that night, but it was accepted the next morning.

Q. And you drew up and he signed this paper? A. Yes.

Q. Was there any discussion the following morning regarding the 2.29 parcel at all, and was the map taken out and examined the following morning? A. There was no discussion; I am not sure whether the map was taken out and referred to; I accepted the offer the next morning and drew up that agreement signed by Mr. Bell as already stated.

The account of what occurred at the interview as given by the plaintiff is less positive than his evidence respecting the events of the morning. Indeed, he gives varying, if not inconsistent, accounts of it in his ex-

amination before the trial and in his evidence at the trial. Being examined previously to the trial before an examiner, his statement is as follows:—

I didn't ask Mr. Macklin about parcel "X," I paid no attention to it. I had the map and examined it, and saw the figures 13 acres. I never gave it much of a thought; I thought Macklin owned the parcel, and thought the map to be correct; I had a conversation with Mr. Macklin on the evening of the day on which the land was offered for sale on the premises; it was in the back sitting room. I think we were there alone, the agreement for sale had not then been signed, the subject of the sale of this land was being talked of between us; I don't know if the map was referred to, I won't say whether it was or not. I think we made a bargain that night, we agreed on the price I think. I don't recollect my saying to him on his retiring to bed, "you had better take $1,200 for the parcels"; I did not make Mr. Macklin an offer during the day the land was offered on the premises; I did bid $1,200 at the sale, and he refused it, he was asking $1,400 for these two parcels, and I had made up my mind not to give it.

During the afternoon I had given up all idea of buying, and during the afternoon no negotiations had taken place between me and Mr. Macklin; until we met in the evening I had given up all idea of buying, as I supposed Macklin would not take less than $1,400.

The agreement "C" was signed by me on the evening of the day when the property was offered, or on the morning of the next day; before I signed this agreement I read it, after I signed the agreement I might have looked over the map, but cannot say.

In his cross-examination the plaintiff, speaking of the map and of what occurred at the interview in the evening, does not at first deny that he then saw the map, as the following extract from the deposition shews. Speaking of the map, he is asked:

Q.—Was it before you on the evening of the day on which the auction was held, did you see it then? A.—Well, I might, I do not recollect; I recollect him leaving it with me; he left it with me that morning he was going away; I suppose that was when the bargain was made about the land.

In a subsequent part of the cross examination the plaintiff makes the following statement respecting this interview in the evening:

Q. Did you bring along with you the little memo. in pencil or ink that Mr. Macklin gave you before the agreement was signed, showing you how this 18 acres was made up? A. No.

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Q. Will you swear he did not give you such a memo.? A. No.

Q. I refer to the memo. that my client says he gave you the night before the agreement was signed, showing how the land was made up, 18 $\frac{88}{100}$? A. I have no recollection of it.

And further on we have this evidence:

Q. After the auction sale was over Mr. Macklin was staying at your hotel? A. Yes.

Q. And you talked in the evening? A. Yes.

Q. What was the subject of your conversation? A. Well, he wanted to get $1,400 for the place and I told him I would not give more than I had bid for it.

Q. Where did you go that evening to discuss the matter? A. Well, I forget where it is.

Q. He says it was in the back room, but it was in some private room; have you any doubt that was so? A. Well, I think that must have been in some room, I do not think it was in the bar-room.

Q. Had you that map before you that evening? A. No, the map was never given to me till after I signed that agreement; that was the only time I saw the map on the day of sale till after I bought it, and he gave me the map and said this would show me what I had bought.

Q. Then you swear positively that map was not before you previous to the signing of the agreement? A. No.

Q. Were there any papers before you? A. Not any, I do not recollect any papers at all only we made the agreement and he said, I will let you have it for $1,200.

Now if the respondent did, previously to the signing of the agreement for sale, either point out to the plaintiff the actual locality of the 2 $\frac{29}{100}$ acres on the map, as he swears he did, or if he at any time before the conclusion of the contract told the plaintiff that 2 $\frac{29}{100}$ acres, part of the 13 acres, had been sold to the railway company, and that he was not able to specify the site, but that wherever it was it was to be considered as excepted from the sale, it is manifest that the action must fail, for in the first case the effect of any misrepresentation as to quantity or description would be neutralised by the disclosure of the truth, and in the second case, the plaintiff would have had before concluding his bargain ample notice that he was not to rely on any representation as to the water frontage

since the land (13 acre parcel) was sold subject to an exception of a piece of 2 $\frac{29}{100}$ acres, the locality of which was not ascertained and of which the plaintiff had to take the risk.

Is there then any evidence to be found in the case, apart from the testimony of the respondent himself, which warrants the inference that any such communications were made by the respondent to the plaintiff? Direct evidence, save that of the respondent, there certainly is none, but I think there are circumstances stated by the plaintiff himself which authorize the presumption that the facts as they now appear with regard to the locality of the land sold must have been brought to the notice of the plaintiff before he entered into the contract of purchase. In the plaintiff's examination before the examiner he made this statement:—

I thought I was buying piece marked "X" in which there was 13 acres marked. I didn't think there was 13 acres on it; I thought I was getting 8 acres, and a little less than 11 acres in the two parcels, in the neighbourhood of 18 acres altogether.

The time here referred to is, of course, that of making the agreement for sale. We have here then this most important admission from the mouth of the plaintiff himself, that at the time he made the contract to purchase he knew exactly the contents of the land he was buying, namely, "in the neighbourhood of 18 acres altogether", and he knew that he was getting 8 acres in one parcel and a little less than 11 acres in the other which was also almost exactly the truth, the fact being that the northern parcel (Y), after deducting the 5 acres $\frac{8}{100}$ sold to the railway, contained 8 acres $\frac{17}{100}$ and the southern parcel, that principally in question (X), after deducting 2 $\frac{29}{100}$ acres contained 10 $\frac{71}{100}$ acres, which the plaintiff was entitled to under his contract. All this the plaintiff swears he knew on the morning of the 8th June when he completed the bargain to purchase for $1,200 and the agreement was signed. Now, the plaintiff has sworn most positively that he did not

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know these particulars before the auction, and that he did not acquire the knowledge of them at that time. The plaintiff says nothing took place between the respondent and himself, and that nothing in the way of negotiations about the land passed until the evening interview already mentioned in the extracts given from the evidence of both the plaintiff and respondent. It is not and could not be suggested that there were any sources from which the plaintiff could have acquired this information in the interval between the date of the return from the ground after the attempted auction sale and the making of the agreement early the next morning, except from an examination of the map, or from the respondent. We are, therefore, irresistibly forced to come to the conclusion that when the plaintiff made the purchase he did so, either after an examination of the map which must have disclosed the exact position and boundaries of the excepted $2\frac{29}{100}$ acres, and therefore have entirely removed the effect of any misdescription previously made by the respondent, or the fact that $2\frac{29}{100}$ acres were to be excepted out of the 13 acres piece, as having been sold to the railway company, must have been communicated to him by the respondent, and, if so, it is to be presumed there must have been involved in that communication one or the other of three alternative explanations as to the locality of the piece so to be deducted as belonging to the railway company, for, 1st, it must either have been defined, as it actually appeared laid down in the map B; or (2) it must have been represented to have been in some other ascertained locality; or (3) it must have been stated by the respondent, that although the quantity of land to be excepted was ascertained he was not able to define its situation, and that consequently the purchase was necessarily subject to uncertainty and risk as regarded the *situs* of this piece previously sold by the respondent's authors in

title. The second alternative we must altogether reject since such a representation that the two and a half acres were in some other part of the land than the locality where it is shown on the map, would have been a distinct and independent fraud with which the plaintiff does not pretend to charge the respondent, and therefore one which cannot be presumed against him. Then the respondent's communication, if that was the source from which the plaintiff obtained his knowledge that 2 $\frac{29}{100}$ acres was to be excepted, must necessarily have been accompanied, either by a description of it according to the lines and marks on the map, or it must have involved a statement that the locality was uncertain and not within the knowledge of the respondent and so have been sufficient to give the plaintiff notice that he was running the risk which he actually took upon himself by the agreement he afterwards entered into of buying the land subject to the exceptions of the parts previously sold which remained undefined except as to quantity. Taking either of these alternatives, and one or the other of them must be true unless, indeed, the plaintiff got his knowledge from the map itself, the plaintiff cannot possibly say that he purchased on the faith of the representation that he was to get the whole 13 acres with the river for his boundary on the south; he must either have been informed of the exact truth that this frontage had been already sold, or he must have been warned, if not in express words yet by an intimation sufficiently direct for the purpose, not to rely on any representation as to the frontage which had been made at the auction by being to d that 2 $\frac{29}{100}$ acres had already been sold in some unknown situation, from which it must have been an obvious deduction to be made by any sensible man that this piece previously sold might include the river front which the plaintiff says it was his object to

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acquire in making the purchase. If, under these circumstances and in the face of either actual knowledge or of such a warning as I have mentioned, the plaintiff thought fit to conclude a bargain and enter into the contract which he signed for the purchase of the land, he did so with his eyes open and the maxim *caveat emptor* is the plain answer to the claim for relief which he now puts forward.

Another aspect in which we are, I think, entitled to view the case, by reason of this admission of the plaintiff that at the date of his purchase he knew with reasonable exactitude the quantity of land in each of the two parcels, is that taken in connection with the undeniable facts that his knowledge in this respect could only have been acquired by him at the evening interview, by a personal examination of the map, or from information which the respondent then gave him, it casts doubt and suspicion on the plaintiff's evidence as to what passed on that occasion. It will be remembered that the plaintiff in his examination before the trial says he does not know, and will not say, whether the map was referred to or not at the evening meeting in the back room, where it is to be remembered the parties were alone. Again, in the earlier part of his cross examination at the trial, he refuses to swear that the respondent did not give him the memorandum shewing the contents of the parcels and the deductions to be made, which the respondent had positively sworn to in his evidence, though later on he positively denies that he either saw the map or got the memorandum. These inconsistencies, however, when coupled with the unavoidable inferences already pointed out to be drawn from the important admission made by the plaintiff on the preliminary examination, as to the state of his knowledge at the time of the purchase, are I think sufficient

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wholly to discredit his evidence as regards what passed at the interview on the evening immediately preceding the agreement for the purchase. This leaves the respondent's account of that interview uncontradicted, and having regard to the intrinsic marks of truthfulness which the respondent's statement contains, and to the subsequent conduct of the parties which is strongly confirmatory of the respondent's evidence, I am of opinion that his testimony should be accepted as worthy of credit, which is of course conclusive of the case.

I do not consider that we are precluded from acting on this view of the evidence by the rule laid down in "The Picton," (1), and in *Grassett* v. *Carter* (2), as well as in other cases decided both here and in England. I have always considered that rule which recognises the finality of the finding of the trial judge who sees and hears the witnesses as limited to cases where questions of facts are entirely dependent on the credit to be given to one witness or set of witnesses over another or others proffering testimony directly contradictory, and when neither documentary evidence nor admitted or incontrovertible facts can be called in aid to turn the scale. I adhere to the rule as laid down in the Court of Appeal in the case of *Sanderson* v. *Burdett* (3), and as there propounded there is nothing in it which excludes an appellate court from drawing inferences from documentary evidence or admitted or incontroverted facts, or from any gross inconsistencies and self contradictions which may be found in the depositions of witnesses. I find nothing in the judgments of the Court of Appeal offending against the rule in question when thus limited and defined. They have dealt with the evidence in a way they were

(1) 4 Can. S. C. R. 648. (2) 10 Can. S. C. R. 105.
(3) 18 Grant 417.

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entirely justified in doing, by drawing inferences from the surrounding facts and circumstances of the case, from documents and from the conduct of the parties, and in doing this they have not, I think, invaded in the slightest degree the province of the trial judge to determine the degree of credit to be given to the witnesses so far as that is exclusively to be determined from their demeanor while under examination. And in the scrutiny to which I have submitted the evidence I venture to say that I am equally free from any offence against the rule in question.

Another rule which I consider altogether distinct from that just adverted to is propounded by the Privy Council in *Allen* v. *Quebec Warehouse Co.* (1), according to which a second court of appeal ought not to reverse the concurrent decision of two preceding courts on a question of fact. I do not regard this as applying to the Divisional Court and therefore it was open to the Court of Appeal to review the case on the facts, within proper limits, which having done they have reversed the decisions of the Chancery Division. It is not now proposed to reverse their decision, but to affirm it. *Allen* v. *The Quebec Warehouse Co.* (1) does not therefore apply.

I should have pointed out that the conduct of the parties immediately after the sale and up to the month of July, 1883, when the plaintiff for the first time advanced the claim which he afterwards made the subject of this litigation, was entirely consistent with the view I take that the respondent's evidence of what passed during the negotiations for the sale, on the evening of the 7th June, 1882, was truthful and entitled to credit. In the first place, the respondent left with the plaintiff the map shewing clearly, as it does to this day, by figures and letters written with a

(1) 12 App. Cas. 101.

blue crayon, the exact quantity and location of the $2\frac{29}{100}$ acres to be excepted from the sale of the 13 acres, and according to the plaintiff's own evidence the respondent said that he did this in order that the plaintiff might examine it and see what land he had bought. Now, it must be remembered that this was done whilst the sale was still in an executory stage, a week before the execution of the conveyance and two months before it was completed according to the contract, by the execution of the mortgage securing the purchase money. Can it be supposed that if the respondent had induced the plaintiff to become a purchaser by gross fraud and misrepresentation, as the plaintiff contends he did, that he would thus spontaneously put into the plaintiff's hands, with a recommendation to examine it, a document the slightest examination of which would have exposed his dishonest trick, and enabled the plaintiff to set aside the contract he had just entered into? Further, is it to be supposed that if the plaintiff had for the first time become aware in the month of April, the very latest date to which the information received from Anderson can be ascribed, of the fraud which he pretends the respondent had practised upon him he would have remained silent for more than three months before making any complaint and during that time have written the letters which we find in the correspondence of June, 1883? All this is entirely inconsistent with the plaintiff's evidence but entirely in keeping with the account given by the respondent.

The arbitration agreement has, I think, but little bearing on the case. As Mr. Justice Osler points out there is nothing like an admission on the part of the respondent involved in the submission to arbitration itself. The respondent does not admit his liability to make good to the plaintiff the value of the land sold to

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the railway company, and merely refers the amount of the indemnity which he was to pay to arbitration, but according to the submission which he proposed, and both parties signed, the whole question of liability as it is now raised in this action was made the subject of arbitration. There can, of course, be no admission involved in such a reference. It is said, however, that during the negotiations about the arbitration it was admitted by the respondent that he had actually sold the land as bounded on the river Lynn. It is scarcely possible that any such admission was made, as the written documents, the contract and conveyance by which the sale was carried out, directly contradicted any such statement as the respondent well knew. It is also said that the respondent at this time admitted that he had represented the land as extending to the river. This is denied by the respondent. It is asserted by the plaintiff, by Foster and Folinsby. As regards the plaintiff his evidence is entitled to little or no weight since the discredit cast upon his testimony in other respects for the reasons already fully discussed shows that he is an unreliable witness. Folinsby's deposition, as is pointed out by Mr. Justice Patterson, contains internal evidence of his untruthfulness, and shows that he was an instructed witness; he speaks of the dispute as to the place at which the arbitration should be held as having arisen at the interview at Port Dover when the submission was signed, when, in fact, it did not arise until some time afterwards and then not at any meeting between the parties but in the course of correspondence, so that he must have been told by others what he states about it and alleges to have taken place at this time; we must therefore put aside his evidence also. There remains Captain Foster whom I must, on the finding of the learned judges, accept as a candid and truthful witness; his statement is, how-

ever, entirely inconsistent with the document drawn up and signed by the parties at the time. Moreover, he gives his evidence with a lack of clearness and precision which greatly impairs its force. His memory is not good, as he himself admits, and in the case of a witness detailing a conversation this is, of course, of importance. But granting all he deposes to to have been admitted by the respondent, I think we may safely assume that it referred only to what passed on the day of the auction sale, which the evidence already adverted to shows was explained and rendered innocuous by the subsequent information given by the respondent to the plaintiff in the evening.

On the whole, I am of opinion that the action entirely failed on the evidence and that this appeal must be dismissed with costs.

FOURNIER and TASCHEREAU JJ.—Concurred.

HENRY J.—This is an action brought by the appellant against the respondent and one David Foster for the cancellation of a conveyance of lands made by the respondent to the appellant and Foster. The conveyance in question was in pursuance of an agreement previously entered into between the parties as the result of previous negotiations between the appellant and respondent. A mortgage for the amount of the purchase money ($1,200) was executed by the appellant and Foster; after which (on the 23rd of September, 1882,) Foster, for the consideration of $200, sold and conveyed his interest in the lands to the appellant, he, the appellant, agreeing to pay the mortgage.

The appellant concludes his statement of claim as follows:—

The plaintiff claims:—

1. That the agreement for sale of said lands may be set aside and cancelled and that said conveyance by the defendant Macklin to said plaintiff and defendant Foster, and the said mortgage from the

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plaintiff and Foster to the defendant Macklin may be set aside and cancelled, and the defendant Macklin ordered to repay to the plaintiff all moneys paid by him on account of said mortgage.

2. Or that an account of the value of said lands so excepted by said conveyance may be had and taken, and the amount thereof deducted from the amount due or accruing due on said mortgage, and that the said mortgage may be reformed accordingly.

The appellant, therefore, seeks in the first place the cancellation of the conveyance with the resulting legal consequences; or if he cannot establish his right to the cancellation he asks to have compensation awarded him for what he alleges to be a deficiency in the quantity of land purchased.

The learned judge (Mr. Justice Proudfoot) gave a judgment on the hearing for relief and "referred it to the master to determine the amount that ought to be deducted from the purchase money."

If the learned judge considered that the evidence was sufficient to justify a judgment for cancellation we should necessarily consider that his judgment would have taken that shape. We have, therefore, the right, and I think we are bound, to conclude that he considered that in that respect the appellant had failed.

There was an appeal to the divisional court resulting in a confirmation of the judgment and then an appeal was taken to the Court of Appeal for Ontario and judgment rendered by the latter court, allowing the appeal and dismissing the appellant's action. From the latter the case was removed by appeal to this court. It has been fully argued and we have to give judgment.

The law is well settled that if a party agrees by a binding contract to sell a certain ascertained lot of land he is bound to convey it all. If he afterwards tenders a conveyance of less land the purchaser is not bound to accept and no court would hold him bound to do so either in a suit for specific performance or otherwise but, on the contrary, specific performance

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would be decreed against the vendor. That, if his contention has any foundation, was the position of the appellant before the conveyance. It is naturally to be considered that a party selling land should know what his title to it is and the extent of it, of which the purchaser may be considered either to be wholly ignorant or, at all events, not to be so well informed. The purchaser may, therefore, be presumed to trust to his agreement and to its guarantee.

The duties and liabilities are, however, wholly changed after a conveyance is accepted. The case of *Hart* v. *Swaine* (1) has been cited and relied on by one or more of the learned judges in the courts below. It is, however, wholly inapplicable to this case. In that case a vendor sold and conveyed land as freehold, and the purchaser afterwards ascertained that the vendor had but a copyhold title. The sale was set aside with costs and expenses. The deed in that case conveyed by a title not held by the vendor. The decision in that case does not at all affect the rights involved here. The misrepresentation in that case was in the conveyance itself. In every county in Ontario there is a registry of titles and a purchaser has the right, and it is his duty, to ascertain from an inspection of the title of the seller how his title covers the lands purchased. In the written agreement for the lands in question certain portions of the two lots purchased are excepted as lands stated to have been conveyed by the original owner, Papps, who held as a trustee, to the Hamilton and North Western Railway Company. In the conveyance to the respondent of the lands sold by him to the appellant the same exception is made, so that by reference to the registry the exception to the portion would have appeared, and not only so but the description of the lands in the conveyance or conveyances

(1) 7 Ch. D. 42.

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to the railway company would have shown that the 2·29 acres, which is the subject of the present contestation, was one of the two exceptions referred to in the agreement and conveyance. If then before the acceptance of the conveyance the appellant did not avail himself of the means at his command to ascertain the extent of the portions so excepted the *laches* were his own and he cannot now be permitted to complain. The description in the agreement was of two parcels of land "saving and except thereout the portions sold, &c. The appellant was, therefore, informed that "thereout," meaning out of each parcel, a portion, if not portions, had been conveyed to the railway company and were not intended to be included in the lands sold and to be conveyed. He was thereby invited to ascertain for himself what the portions consisted of, and he had every opportunity of doing so. Besides, he lived near by; and, as far as can be gleaned from the evidence, knew really more about the land than the respondent, who lived at Toronto and had only recently got them, together with other lands in other places, for a lump sum.

I have read attentively all the judgments given, and I have no hesitation in declaring that those of three learned judges of the Court of Appeal who dismissed the action commend themselves to my judgment.

In those judgments the law is fully, and, as I think, properly stated, and the facts referred to. They are exhaustive and leave little to be added. I concur with them most fully, both as to the several questions of law involved and as to their conclusions as to the facts from the evidence.

The learned judge of first instance decided principally on the evidence of what took place at the unsuccessful attempt to sell at the auction and his decision is mainly based on what he considered the

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weight of evidence as to what then was said by the respondent and others; and the same consideration seems to have influenced the decision of the Divisional Court and the learned Chief Justice. It is not a pleasure to do so, but duty compels me to say that, according to the law as found in the most controlling authorities, what passed on that occasion cannot be considered as affecting the rights of the respondent. There is a contradiction in the evidence of what then took place, but, in my view, whoever may have stated truly what then took place it does not matter. It is a well established principle in regard to evidence in a case like the present one, that recourse cannot be had to preliminary statements without actual fraud after a written agreement is entered into as to the subject matter; besides, it is proved without contradiction that the terms and particulars were agreed upon after the abortive attempt to sell by auction and without reference to what took place thereat. It is shown that a plan was exhibited to the appellant—it was critically examined by him and left with him, and he had it from thence in his possession. He had, therefore, all the information that the respondent had. He knew then that fact. There was no secreting or keeping back by the respondent of any information he had as to the excepted portions of the two lots, but there is this further conclusive evidence. The respondent says that during the negotiation which resulted in the written agreement, he made a memorandum of the 18.88 acres he was selling, and that the appellant then offered $1,200 for the lots which he did not then accept but that next morning he did accept that offer. The memorandum as is follows:—

Parcel C,	13	acres,	reserved	2.25	acres,	for sale	10.71 acres.
" D,	13¼	"	"	5·08	"	"	8.17 "
	26¼			7			18.88

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The appellant was asked on the trial, when being examined, if he brought that memo. with him, to which he replied "no." He said he had no recollection of it, but declined to say he did not get it. He in that respect does not deny that the respondent's statement was correct. We must, therefore, conclude that the statement of the respondent was true. What then does it show? Nothing less than that the appellant well knew from the plan and the memo. that the 2.29 acres now in dispute had been sold to the railway company and formed no part of the land he was purchasing.

Then we have the letters written after the appellant made the discovery that the 2.29 acres were not included in the agreement and conveyance. In the statement of claim of the appellant the time of the discovery is put down as in the September following. In his examination he puts it down as in October or November, and said that it certainly was before December. In his evidence on the trial he puts the time as the April following. Why he was induced to finally postpone the time to the April following may be gathered from his letters to the respondent. In November, 1882, he writes to the respondent forwarding $55 on account of the mortgage, and expressing his belief that he would be able to make the first payment early in the spring.

On the 16th June, 1883, being subsequent to his admitted knowledge in April, he writes to the respondent:—

I received yours of the eighth of June and in reply I have to say that your money is ready for you when you want it, &c.

but no intimation of the alleged discovery is given. On the 23rd of the same June he wrote again about a matter of rent and interest, and about the boundaries of lot D not in question in this suit, but made no complaint about 2.29 acres. He wrote again on the 27th

of the same month in respect of the land conveyed to him, and there is no complaint or reference to the 2.29 acres. He must be a man of a very patient and angelic temperament, to write as he did after making the alleged discovery that the respondent had induced him by fraud and false representations to pay for land he did not own or from which there was, at least, to be deducted the most valuable part. Such praiseworthy conduct would place him far above the large majority of mortals, but as he has not been shown to occupy such an exceptionally high position, we are bound to conclude that when he wrote those letters he did not feel that he had equitably, legally or morally any cause of complaint.

Reference has been made to the fact that when about the time the second and last payment on the mortgage was falling due and the complaint now attempted to be made was started, but refused to be admitted by the respondent, he agreed to refer the matter to arbitration; and it is advanced as an argument to sustain the complaint. I cannot in deciding this case give that fact the slightest weight. The one party complained, the other denied there was any reason for it, and they agreed to refer the matter to arbitration. If admitted to have any weight in this case, why not in every other where a party resisting a claim agreed to a reference to settle the contest.

After reading the able and exhaustive judgments of the learned judges of the Court of Appeal before referred to, both as to the law governing the points in issue and as to the facts in evidence, I feel it wholly unnecessary to say more than that the declarations of the law made by them cannot by any recognised authorities be found incorrect, and I think that their estimate of the evidence is entitled to the approval of this court.

I will only add, and in general terms, that the rule

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referred to by the learned Chief Justice in regard to the finding of the judge of first instance only applies to cases where there is merely oral contradictory evidence and does not apply to a case like this where written evidence largely affecting the decision is adduced and the truth of which and its application to the issues can as well be decided by a court of appeal. In this case there is, however, more, for the learned judge admitted improperly, as we have the right to decide, evidence as to what took place at the time of the attempted and abortive sale by auction and founded his decision principally thereupon.

For the reasons given I am of opinion that the appeal should be dismissed, the judgment of the court below affirmed and the action dismissed with costs in all the courts.

GWYNNE J.—I entirely concur in the review of the evidence as made by my brother Strong and by the majority of the learned judges of the Court of Appeal for Ontario.

Too much stress appears to me to have been laid by the Court of Chancery upon the evidence as to the statements alleged to have been made by the defendant at the auction which fell through, and too little upon what took place subsequently, for those statements, assuming them to have been made at the abortive auction, cannot have had, or at least should not have had, in view of what took place subsequently, any influence in inducing the plaintiff to enter into the contract which he subsequently did enter into; and having entered into that contract the plaintiff has offered no sufficient excuse for his not having promptly taken measures to procure a rescission of the contract if he had had any confidence in the truth of those allegations of fraud which he has so freely made in his statement of claim and still insists upon.

The material points in the case appear to me to be,

that after the abortive auction and in the evening of that day the plaintiff and defendant entered into negotions for the purchase and sale of the 18 acres which the defendant had unsuccessfully offered for sale at auction they went together into a room at the plaintiff's house and the defendant produced a map, which he left with the plaintiff, and which showed the piece of land now in question as containing 2 $\frac{29}{100}$ acres; the defendant swears he then pointed out this piece to plaintiff as not being included in what the defendant was offering for sale, and as being one of two pieces previously sold to the railway company by the person from whom the defendant acquired title; the plaintiff says he does not recollect this, but he admits that the plaintiff left the map with him, at least from the time the contract was signed, which showed in blue pencil a piece of land upon the river described as containing 2 $\frac{29}{100}$ acres, which, being deducted from one of the pieces, together with 5·08 acres deducted from the other piece, which pieces together contained the 18 acres, more or less, which the defendant was offering for sale, made precisely 18 $\frac{88}{100}$ acres, whereas, if this piece should be included in what the defendant was offering for sale, the plaintiff, as it appears he well knew, would have got 26 $\frac{27}{100}$ acres for the 18 the defendant was intending and offering to sell.

Then the agreement is signed on the following morning, the map being still left in the possession of the plaintiff, and this agreement shews in express terms that at least two pieces were excepted from the description as given of the two pieces of land on which the eighteen acres the defendant was agreeing to sell were situate. The area of the excepted pieces being deducted from the whole area left the eighteen acres the defendant was agreeing to sell, and these two excepted pieces were spoken of as having been previously sold to the railway company. The plaintiff then, by

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this agreement, the existence of which he has suppressed in his statement of claim, had express notice of there being two pieces excepted, which notice rendered it incumbent upon him to find out where they were. Had he looked at the map, which he retained in his possession, that would have shewn him, or he could have ascertained their *situs* by reference to the railway company or to the registry office, if he did not already know it from what had taken place between him and the defendant on the occasion of their examining the map together the night before the contract was entered into. Then a week after the contract was signed a deed was executed by the defendant and delivered to the plaintiff, describing the land sold precisely as it was described in the contract of sale, and about two months after the plaintiff executes a mortgage back securing the purchase money. Then the plaintiff in his statement of claim, and subsequently on his examination upon his statement of claim, alleges that in the month of September or October following the execution of the deed to him he first acquired the information that the piece of land now in question containing the $2\frac{29}{100}$ acres above mentioned had been one of the pieces sold to the railway company, and therefore did not belong to the defendant at the time the contract of sale was entered into. Yet with this knowledge the plaintiff entered into possession of the land on December 1, and he wrote to the defendant the letters which have been sufficiently commented upon by the learned judges of the Court of Appeal for Ontario. Then in July, 1883, he pays the defendant $400 on account of the purchase money secured by the mortgage.

It is true that he did this when the defendant agreed to refer to arbitration a question as to whether the plaintiff should have any reduction made to him from the price agreed upon, but his paying that sum, what-

ever may have been his motive in paying it, was an express abandonment of all claim, if the plaintiff ever had any, for rescission of the contract. Upon the whole, not to repeat comments upon the evidence which has been so fully reviewed in the Court of Appeal for Ontario and by my brother Strong, in which review I entirely concur, I am of opinion that the plaintiff has completely failed in establishing the fraud alleged in his statement of claim, and that therefore the appeal must be dismissed with costs and his claim in the Court of Chancery dismissed out of that court with costs.

Appeal dismissed with costs.

Solicitor for appellant: *T. G. Matheson.*

Solicitors for respondent Macklin: *Ferguson, Ferguson & O'Brien.*

Solicitor for respondent Foster: *C. E. Barber.*