Supreme Court of Canada
Barron v. Kelly, (1918) 56 S.C.R. 455

Date: 1918-04-15

Elizabeth Barron, Administratrix Ad Litem of Josephs. Barron, Deceased *(Plaintiff) Appellant;*

and

Robert Kelly and Others *(Defendants) Respondents.*

1918: February 25, 26; 1918: April 15.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Anglin and Brodeur JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Contract—Sale of land—Inducement to purchase—Fraudulent misrepresentation—Rescission—Waiver—Action for deceit.

B. purchased some lots in land laid out for a town site having been assured by the agent of the real estate brokers who had charge of the sales that residents of an adjoining town had bought largely and a firm of railway contractors had also purchased lots. Having discovered that the first statement was untrue he, through his solicitor, wrote to the brokers enclosing money for payment on his purchase, and stating that he was completing it in order not to lose what he had already paid but that he did not waive his right to reparation for deceit and intended to bring action therefor. Later he discovered that the statement of purchase by the railway contractors was also false. In an action claiming rescission and, in the alternative, damages for deceit.

Held, Idington J. dissenting, that by the above-mentioned letter, and by making subsequent payments, and offering to exchange some of the lots purchased for others B. had elected not to rescind and the discovery later of the second false representation did not entitle him to rescission as it was of the same nature as, and a fact of, the first.

Held, also, Fitzpatrick C.J. dissenting, that he was entitled to damages for deceit. *Campbell* v. *Fleming* (1 A. & E. 40) and *Boulter* v. *Stocks* (47 Can. S.C.R. 440) discussed.

Judgment of the Court of Appeal (24 B.C. Rep. 283) reversed.

APPEAL from a decision of the Court of Appeal for British Columbia[1], affirming the judgment on the trial in favour of the defendants.

*[Page 456]*The material facts are stated in the above headnote.

[1] 24 B.C. Rep. 283; 37 D.L.R. 8.

Geo. H. Ross K.C. and *Barron* for the appellant. As to misrepresentation and the effect of a false statement on the contract, see *Smith* v. *Chadwick* [2], *Nash* v. *Calthorpe*[3], *Shepheard* v. *Bray*[4], and *Macleay* v. *Tait* [5].

The court may reverse on matters of fact even against the findings of two courts below. *Bloomenthal* v. *Ford*[6], *Hood* v. *Eden*[7], at page 483, and *Polushie* v. *Zacklynski*[8].

Deceit is established and if rescission cannot be ordered the plaintiff is entitled to damages. *Derry* v. *Peek*[9].

S. S. Taylor K.C. for the respondents.

THE CHIEF JUSTICE (dissenting).—The appellant in the year 1898 was resident in Dawson City, where he carried on "the clothing business, the jewellery and optician business, the pawn shop business, lending money too;" in fact, making money any way he could. His attention was first called to the townsite of New Hazelton by the usual flaming advertisements by which a land boom is started. Through the local agent in Dawson he eventually selected and purchased the lots in respect of which he now claims damages, on the ground that he was induced to purchase them by misrepresentation.

The record is a terribly voluminous one, but I have read through all the evidence. The purchase,

[2] 20 Ch.D. 27.
[3] [1905] 2 Ch. 237.
[4] [1906] 2 Ch. 235.
[5] [1906] A.C. 24.
[6] [1897] A.C. 156.
[7] 36 Can. S.C.R. 476.
[8] 37 Can. S.C.R. 177; [1908] A.C. 65.
[9] 14 App. Cas. 337.

I have no doubt, was a speculative one. It is true that the appellant says that on account of his health he was obliged to leave Dawson City and was looking for a place where he could set up business and make his home, but I do not think he ever regarded New Hazelton as other than the merest possibility of such. Perhaps if the town had grown up with the phenomenal rapidity of Dawson City he might have moved there as well as to Calgary, where he went some three or four years later, or to any other place.

Really the only substantial misrepresentation put forward in the statement alleged to have been made to him is that many lots in the townsite had already been sold when as a matter of fact they had not been. He has got hold of a nice expression of which he makes repeated use to the effect that he wanted to buy lots in a town and not a piece of prairie at all. This, however, does not accurately represent the facts, because all that he contracted to buy was land within the site of a projected town and he only thought that he had good reason to hope that a town was going to spring up on this site.

I agree with the trial judge that even on the plaintiff's evidence, which is all that was heard, there is no proof of any intentional misrepresentations made to him and further that any such misrepresentations, if made, were not the inducements which caused him to buy. But, in any event, this, in my opinion, is not a case in which a court of appeal would be justified in reversing the judgment of the trial judge unless upon some clear ground of error shewn. A mere opinion, formed as it must be without the advantages of hearing the evidence of the plaintiff and his witnesses ought not to prevail against the conclusion at which the trial judge has arrived without the least hesitation. It is purely a

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question of fact that is involved; no one could do more than form an opinion and no one can be in as good a position as the trial judge to draw a fair conclusion from the evidence given before him. The present appeal being from a decision of the provincial Court of Appeal confirming the judgment, its reversal in this court would be the more open to objection.

It is perhaps immaterial to point out that a judgment for the plaintiff in this case would involve a good reason for setting aside quite innumerable similar transactions. It seems only common knowledge that those entering on such speculations cannot expect the sober accuracy of expression to be looked for in ordinary and proper business dealings. Enterprises which are held out as promising great fortunes in brief time and with no trouble must always have their attendant risks and uncertainties. It is not for the courts to scrutinize such contracts closely with a view to trying to find a ground for affording relief to those who have lost their money recklessly embarking it in such wild speculation.

I would dismiss the appeal.

DAVIES J.—After hearing the arguments of counsel and reading the evidence to which they called our attention I have reached the conclusion that this appeal should be allowed and the case should be remitted back to the court to have the damages for deceit assessed. This conclusion is the same as that reached by the dissenting judge, McPhillips J., in the Court of Appeal.

The action was one brought by the plaintiff appellant, to rescind certain agreements made by him with the defendants (respondents) for the sale to him of certain lots of land and in the alternative for damages in respect of misrepresentations made by the defendants

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to the plaintiff which induced him to agree to purchase the lots.

The specific misrepresentations alleged were that certain lots in the business section of the townsite of New Hazelton, in which townsite the lots the plaintiff agreed to purchase were situated, were sold to residents of the town of Hazelton which nearly adjoined the townsite of New

Hazelton and that certain blocks of lots in the same townsite were sold to Foley, Welch & Stewart, well known as large railway contractors. That as a fact these representations were false and known to the vendors to be so and that they were inducing causes of the plaintiff's purchase.

The conclusions I have reached after the argument and reading of the evidence called to our attention were that these representations were false to the knowledge of the plaintiff's agent who carried out the sale and were inducing causes of the plaintiff agreeing to purchase.

On this branch of the case I did not entertain any doubt. The only doubt which arose in my mind was whether or not the plaintiff, after learning of the fraud practised upon him, had deliberately elected not to rescind the contract but to claim damages for the deceit which had induced him to purchase.

I think the letter of plaintiff's legal adviser of the 6th of March, 1914, and the payments of the purchase money made concurrently with that letter and afterwards conclusive evidence that the plaintiff with full knowledge of the gross fraud practised on him had elected to affirm the bargain and confine his claim to damages for the deceit.

But it is argued by the appellant's counsel that though the plaintiff should be held to have had knowledge of the gross fraud practised upon him in the false

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representations made to him as to the sales of other lots knowledge of the full extent of that fraud was not known to him and was not discovered till afterwards. In other words, that while he ought to be held to have known when the letter was written and his election made not to rescind, that the representations as to the purchase by the residents of Old Hazelton of the lots they were represented to have purchased were false and fraudulent, he did not then know and did not

discover till after the letter was written that the representations as to the purchase by the railway contractors, Foley, Welch & Stewart, were also false and fraudulent.

His conclusion was that the discovery of the fact that Foley, Welch & Stewart had not purchased when made by him entitled him to withdraw his previous election and to rescind.

I am not able, however, to accept this argument. The false representation as to the purchase made by Foley, Welch & Stewart was only one of several incidents comprising the fraud, and it is not necessary, as Lord Denman says in *Campbell* v. *Fleming* [10], that a party

> must know all the incidents of a fraud before he deprives himself of the right of rescinding.

As Patteson J. says at p. 42 of the report of that case:

> This new discovery can only be considered as strengthening the evidence of the original fraud and it cannot revive the right of repudiation which has once been waived.

It is obvious, I think, that whether a new discovery of false representations after the purchaser has elected to affirm the contract must be treated as a mere incident in the fraud or may be determined as justifying revival of the right of repudiation must depend upon the facts of each case and that it is impossible to lay

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[10] 1 Ad. & E. 40.

down any definite rule which should govern every case. Much will depend upon whether the several misrepresentations were inter-related or connected. See *Ex parte Hale*[11]. In the case of *Boulter* v. *Stocks* [12], decided by this court some years ago, in which the case of *Campbell* v. *Fleming* [13], was distinguished, it was held that an act which, under ordinary circumstances, would be held to amount to an affirmance of a contract to purchase a farm, did not under the circumstances of that case disentitle the plaintiff to rescission. The discovery that the acreage of the farm was very greatly less than the acreage represented by the seller when the contract was entered into was not related to, or connected with certain other representations as to the farm being free from noxious weeds, and as to there being a certain number of apple trees in the orchard. After the representations as to the absence of noxious weeds had been made, and the purchaser knew of their falsity he nevertheless gave a lease of the orchard and thus affirmed his contract to purchase the farm. Afterwards he discovered an enormous discrepancy between the acreage of the farm as represented to him when he purchased it and its actual acreage (some 46 acres), and sought on this ground to rescind the contract. The court held he was not estopped from doing so by his lease of the orchard and its affirmance of his contract to purchase. There was no inter-relation or connection between the representations as to the noxious weeds and the orchard trees and the acreage of the farm and it by no means followed that knowledge of the falsity of the representations as to the noxious weeds and the orchard trees would necessarily have led the purchaser to a

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positive assurance that he had been the victim of a fraud and that the whole contract had been a deception.

Now with respect to the appeal before us it does appear to me that there is a direct connection between the representation that some of the lots in the townsite had been sold to a number of the inhabitants of Hazelton and other blocks of the land to Foley, Welsh & Stewart. It was the fact of

[11] 55 L.T. 670.
[12] 47 Can. S.C.R. 440; 10 D.L.R. 316.

the sales that was the controlling factor and I do not think it can be successfully argued that after discovery that none of the lots represented as having been sold to the residents of Hazelton were so sold and the deliberate affirmance notwithstanding of his contract of purchase by Barron that he should be permitted, because he later discovered that another alleged purchaser of part of the townsite represented as having purchased blocks of land therein had not done so, can now enable him to repudiate his election to seek compensation by way of damages for deceit and instead obtain rescission of the contract.

That conclusion does not affect, of course, the plaintiff's right to recover damages for deceit, and I would therefore allow the appeal and remit the case to the court in British Columbia for the assessment of such damages as plaintiff may have sustained by reason of the deceit practised upon him, with costs in all the courts.

IDINGTON J.—The appellant is the administratrix of the estate of her late husband Joseph D. Barron, who in his lifetime claimed that he had been induced, by material misrepresentations, to buy from respondent Kelly, town lots in a subdivision by him of a section containing six hundred and forty acres which he named

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Hazelton, and sought herein for the rescission of each of the contracts so induced, or alternatively, for damages.

There had long been established a Hudson Bay Company trading post known as Hazelton, some few miles from this section.

The line of the Grand Trunk Pacific Railway did not touch Hazelton, but passed through said section.

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[13] 1 A. & E. 40.

As the work of construction of that railway developed it seemed to tempt different sets of speculators to try and found new towns in the district. The respondent Kelly called his subdivision "New Hazelton."

Some of those interested in the said railway company made another subdivision a few miles further west and called it "South Hazelton." Another adjoining respondent's was projected by someone who called his the "Hammond Townsite of Hazelton."

These rival projects developed a struggle for the establishment on each site of the railway station to serve that district.

The respondent Kelly brought the claim on behalf of his subdivision before the Railway Commission, and won out. That Board directed, in December, 1911, that a station should be established on his said section 882.

The subdivision thereof shewed only two streets of a hundred feet in width. Both ran from east to west. One called 9th Avenue was near the centre of the section and hence likely to become the more important one. It was thus made clear that he planning the townsite expected one or both to be leading thoroughfares in the place.

Respondent Kelly had at an early stage entrusted the entire management of the selling of lots in New

Hazelton thus planned (except some blocks to be presently referred to) to his co—respondents Clements & Heyward, real estate brokers in Vancouver.

Immediately the decision of the Board was published the firm of Harvey & McKinnon telegraphed from Hazlewood to Clements & Heyward to have a large number of the lots on said Ninth Avenue reserved for them.

It is not now pretended in argument or evidence, that they had bought all the lots so reserved, or were supposed to have done so. Yet all the lots so reserved, and many more reserved for other agents elsewhere to sell, were marked on plans distributed for the information of prospective purchasers, by a pencil stroke intended to represent them as sold.

The firm of Foley Bro., Welch & Stewart, prominent railway contractors, occupied three blocks of the subdivision whilst carrying on their work of railway construction. It is not explained upon what terms they so occupied them but no one seems to pretend that they had ever in fact purchased them, yet they were all marked off by the pencil stroke as sold.

These blocks were never given Clements & Heyward for sale and Heyward says he really did not know what the arrangement with Kelly was under which they were so occupied or why so marked off. One Firth, a general broker in Dawson, in the Yukon, applied to Clements & Heyward for information, and by their reply of 5th February, 1912, was offered the agency in Dawson for selling lots in the subdivision. He responded on the 23rd February, 1912, by telegraph, accepting the agency as follows:—

> Letter fifth received. Agency accepted. Reserve Blocks Ninety, Ninety—one, Hundred two. Forward blue print, literature, full instructions, information business section.

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They replied same day by letter which contained the following:—

Reply to your wire of even date, we are mailing you a B-P of New Hazelton, Sub-division 882, Section Two, with all the lots sold to date marked off. We are unable to reserve for you the blocks you name in your telegram, but you can look over the B-P and it will give you an idea what lots you can sell and upon receipt of your application we will immediately confirm same if not already sold.

The merchants and residents of "Old" Hazelton are grouping along 9th Avenue in such blocks as 93, 92, 91, 90, 89, 104, 102, 101, 100 and 99. The blocks 119, 120 and 121, are where the Foley, Welch & Stewart Company have their headquarters located. This will give you an idea of how the town is being formed. The station we fully expect will be erected on the south side of the railway, very close to the centre, somewhere near Templeton or Laurier Streets.

On the back of this letter there was written as follows:—

Blocks marked off with an X are B.C. Government Reserves and not on the market. Lots marked with a stroke thus / are sold. Blocks 119, 120 and 121 are held by the Foley, Welsh and Stewart Company, Railway Contractors' headquarters.

The advertisement sent by them to Firth for distribution carried on these misrepresentations by such statements as the following:—

Nearly all the business men and residents of the old town of Hazelton and vicinity are investing in the "KELLY" Townsite, and they are well pleased with the decision of the Commissioners. Read this telegram, which we assure you is genuine, and the number of lots since sold to them, who know what they are buying, proves its sincerity:

"Hazelton, B.C., Dec. 20, '11.

"Clements & Heyward,

"Vancouver, B.C.

"Old Hazelton people delighted Railway Commissioners' decision. Will wire long list of sales tomorrow.

"HARVEY & MCKINNON."

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BIG LOCAL SALE.

During the past week practically every person in town has purchased lots in New Hazelton. Every day Harvey & McKinnon have wired sales to Vancouver. The business men have taken from one to six lots in what will be the business district, and they are now taking lots in other parts of the town for residential and speculation purposes.

The latter will be a strong feature here in the summer and many

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lots will be turned over at a good profit. The old town is very enthusiastic now that the Railway Commission has settled on the one town.

Armed with such authority and adequate means and methods of carrying out by fraudulent misrepresentation the sale of lots Firth, at that time I think innocent thereof, approached the deceased Barron, who then and for twelve years or more had carried on business in Dawson, made money and come to desire a less severe climate, and negotiated with him on the basis of the representations he had been thus instructed to contain the truth. He explained to deceased and other possible purchasers the several kinds of marks on the plans, and assured them that those marked with the stroke which stood for sold had already been sold. He succeeded in selling to him by virtue thereof and the respective isolations of Dawson and New Hazelton being such as to render investigation impossible if prompt action was to be taken.

The picture of so many actual sales and that so rapidly and especially to many of the people of Old Hazelton who alone of all men must know best the possibilities and probabilities of this newly-founded centre of trade and commerce, indicated that it was prompt action the situation demanded, or nothing.

The prompt result as designed and hoped for by means of said misrepresentations was got in the several agreements, now in question, alleged to have been thereby induced.

The facts were clearly proven by the books of the respondent Kelly that there had, when the deceased Barron made his first purchase, only been sold some 30 lots out of one hundred and fifty–five represented in manner aforesaid as sold.

The learned judge, during the cross-examination of the first witness called for the defence, an-

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nounced that he saw no use prolonging the trial inasmuch as he had come to the conclusion that the deceased Barron was not induced by any of said misrepresentations to make the purchases he did, and dismissed the action accordingly.

The learned judge credited him with being honest in giving his evidence but presumed to find that

> the inducements which led Mr. Barron to buy were the rosy inducements held out as to the future.

I am unable to accept such a theory: Not only is it expressly controverted by the sworn testimony of deceased but it is quite inconsistent with the ordinary judgment of men of business, such as deceased was, in venturing to buy that of which they know little or nothing. The rosy inducement of a real estate advertisement counts for little with them compared with alleged concrete facts as they were in this instance assured to have taken place.

Deceased had been in Dawson since 1898, without once getting out of the Yukon and was dependent, for aught one can see in the evidence, solely upon the general intelligence of men he met there, or newspapers, and upon the representations of the respondents. To assume that such a man would be so foolish as to discard the express statements by respondents of what many other men, including those on the spot, thought of the future, and evidenced by their actual purchases, and rely solely upon the airy nothings put forward at the same time, in the publications

of these same respondents, is not, I respectfully submit, a correct method of reasoning or one upon which to found a judicial judgment.

Perhaps the most potent factor governing the conduct of men in every walk of life, and especially in regard to subjects respecting which they know or can

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know but little, is their information of what other men, confronted with the like problems they have to solve, have done or are doing relative thereto. Even Firth, whose later conduct relative to the matters in question is not entirely commendable in some respects, discloses in his correspondence how highly improper he thought it would be to represent to possible purchasers lots as sold when they were not in fact sold, in his evidence testifies as follows:—

> Q.—At that time Mr. Barron had a great deal of faith in the townsite? A.—Yes, we all had.
>
> Q.—And was enthusiastic about it, from the information he had and from the literature which you supplied him? A.—Yes.
>
> Q.—And from the sales which were apparently taking place there? A.—Oh, yes, I presume, everything.
>
> Q.—If a town is selling rapidly it is a great inducement to purchasers to invest? A.—It is, it has its influence, yes.

He certainly had the commonsense view of the influence and inducement of previous rapid sales. The callous indifference of respondent Heyward to the consequences of such an act as marking, on the maps which he put in Firth's hands to be used in procuring purchasers, blocks as sold when not a lot therein sold, is well illustrated by his evidence given in examination for discovery as follows:—

> Q.—That would be misleading to an intending purchaser, to find a block marked sold, when it was not sold? A.—That is up to them, I don't know how misleading it might be to somebody, but we never intended it to be misleading.

This attitude, of the man directly responsible for the wrong done by issuing such misrepresentations to catch possible purchasers, is not in my view improved by his swearing to the incredible statement that he did not intend it to be misleading. Why did he use such methods? He pretends in such explanation as given elsewhere in his examination that these markings were mere reservations which might possibly result in

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future sales. But his instructions quoted above, to Firth as a new agent when an entire stranger to the whole business, and to him, were unqualifiedly positive that the lots so marked were sold. It seems to me impossible to justify or excuse in law such conduct.

I see no reason to doubt the story of the deceased that he accepted as true the gross misrepresentations in question and that but therefor he would not have made a single one of the purchases in question.

The only difficulty in the case I have ever had during or since the argument herein, is whether or not the deceased should be held to have elected by the letter of Mr. Congdon to respondents Clements & Heyward, dated 6th March, 1914, wherein he enclosed a post office order for $196.00 on account of purchase price of lots named and said:—

> I have further to advise you that although Mr. Barron is completing his purchase rather than lose the money already paid on the' purchase price before he learned of the false and fraudulent representations made to induce him to purchase, he does not waive his right to insist on reparation for the deceit practised upon him, and proposes to bring an action on account thereof.

They in reply of 23rd March, 1914, point out that he had evidently made a mistake by including all the lots named and assumed he only intended to pay on lot 11, block 144, due March 21st, 1914, and add:—

> This is as per a/c mailed from here to Mr. Barron on Feb. 17th last.

They proceed to apply the money accordingly to the one lot so named and ask "Is this correct?"

The account so referred to is not in the case. Nor do I find therein any reply to this letter.

The letter proceeds to reply to the charge of "fraudulent representations" by saying it had been answered by a letter to Mr. Firth of the 17th, and asking him and Mr. Barron to see that letter.

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I think it is not possible in light of the construction thus put upon Mr. Congdon's letter to those to whom it was addressed to hold it as any election relative to the numerous other contracts in question herein.

So far as the exact expression of the letter goes it is to be observed that it uses the singular number both as to "purchase" and "purchase price" and hence cannot, in any view, by itself be taken as a definite election as to other contracts. And by reason of its ambiguous character when closely examined and illuminated by the respondent's reply, does not seem of as much value in way of election as at first blush I was disposed to attach to it; even as to any single lot.

Moreover, turning to respondents' pleadings I find the only claims made thereby in respect of waiver or election are as follows:—

(23) The plaintiff has waived the said alleged misrepresentations and has elected to retain the said lots and each of them. Particulars of said waiver and election are as follows:

(a) He paid money on account of the purchase price after having knowledge of the alleged misrepresentations.

(b) He offered the said lots for sale after knowledge of the alleged misrepresentations.

(c) He applied to the defendants to exchange the said lots for others in the said New Hazelton Townsite after he had knowledge of the alleged misrepresentations.

The defendants therefore ask that this action be dismissed with costs.

Obviously the pleader did not attach much importance to the Congdon letter by itself as containing any definite election, and I do not think we should invest it with an importance he failed to find in it. Of course as a piece of such evidence as there may be supporting the pleading it is entitled to due weight. I cannot find that deceased ever had that knowledge, charged in the pleading, of the fraud practised upon him by the misrepresentations which I have referred to above, until after he had made his payment on account, by

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the remittance of $840 as third payment on lots 1, 2, 3, and 4, Block 97, New Hazelton, on 31st March, 1914. That was the last payment he made. The times for payment extended over four years from the date of each purchase. Then and prior to that time of said remittance he had nothing more that a shrewd suspicion derived from newspaper intelligence as to the progress or rather want of progress in way of building on the lots which had been marked as sold, and a possible purchase from or offer by respondents to sell two or three of the numerous lots which had been marked as sold.

No prudent man would think of repudiating contracts as fraudulent, and launching into a sea of litigation, upon such slender basis as deceased had up to then been furnished with. The case of two or three lots sold since he bought might have been susceptible of many explanations when

the facts were investigated which would dispel all suspicion of fraud and want of progress in way of building might also have had another explanation.

What deceased did was, in October, 1913, to draw Firth's attention to the fact that he was desirous of obtaining a site on Ninth Avenue to build upon, and proposed exchanging therefor some of what he had bought from respondents.

Firth wrote on the 7th October, 1913, making them the suggestion, but got no reply. They pretended it never was received but there is reason to doubt the truth of such denial. But if true, then that proposal of exchange can hardly be counted in support of the pleading. There is nothing in the evidence of his complaining then of his suspicions.

On the 30th December following he wrote the

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respondents Clement & Heyward again proposing an exchange and at the same time telling them as follows:—

> It was represented to me, and to others in Dawson through your agent and literature that 9th Avenue, from Laurier to Pugsley Street, was all sold, but Block 97; so I bought that and more.
>
> Had the truth been told me, I would not have bought a dollar's worth of property in New Hazelton. On October 7th I called on your agent and told him that I wanted to exchange some lots and to write to you.
>
> I am positive that he wrote. I have never heard anything from you since.
>
> Now, I do not want to get into litigation, I will try and settle it between ourselves.

These seem to be the proposals for exchange referred to in the above quoted pleadings.

I am unable to understand why such a proposal so framed as this and avowedly to avoid litigation should be held a definite election to retain what the deceased had been entrapped into buying.

Even then he had no more than suspicion to go upon. On the 3rd March, 1914, Firth wrote them two letters, one dealing briefly with some other matters besides the Barron business, and at length in regard to that, in which he closes as follows:—

> Now I certainly would like to have you try and arrange some satisfactory deal with Mr. Barron, as he is determined that if this is not done he will commence suit to recover the money paid on the grounds of misrepresentation, and this, as you know, would stir up a lot of trouble and harm, and if it can be avoided within reason I certainly would advise it to be done.

The other letter marked "confidential" dealt at length with Barron's claim. He begins by intimating Barron was preparing a case against them and warning them against giving information to a party he named, and said was a confidential adviser of Barron. This is very suggestive of the confidence Firth had that Barron was far from being possessed of any actual knowledge of the real facts. Later in same letter he says:—

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> Personally, I do not believe that Mr. Barron has any case at all, for I cannot bring myself to imagine that a firm of your standing would deliberately mark off any portion of a townsite map as being sold when such was not so.

In passing I may remark what a commentary this expression furnishes of Firth's opinion, as a business man, of the worthless nature of the argument put forward that seeks to justify or excuse the fraudulent course of conduct pursued.

He urges a settlement. He ends by suggesting the reply should be of a duplex character. One sheet he wants to be confidential and the other so worded that, if necessary, it could be shewn to Mr. Barron.

He evidently was suspicious like Barron of what might be disclosed. He also was ignorant as he of the actual facts. He had not the callous courage of respondent Heyward who could answer as he did in evidence quoted above.

If Firth was ignorant and groping in the dark, even at that late date, how can we impute to Barron greater knowledge and say that the Congdon letter was written with that knowledge which would make it an effectual election? That was written only three days later. I see no reason to doubt the evidence of the deceased that it was not until he had, within a month thereafter, received a reply dated 30th March, 1914, to an inquiry of his dated 4th March from the publisher of the Omineca "Herald," published at New Hazelton, telling that on Ninth Avenue, so far as he could learn, there had been no lots sold between Pugsley and Laurier Streets until recently, that he really became possessed of some actual reliable information of the magnitude of the misrepresentations conveyed by the respondents' plans, marking as sold the central properties so marked. Then he was told by Mr. Congdon that if he had known what was thus disclosed he should

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have advised against his sending the remittance above mentioned. He seems accordingly to have decided to pay nothing more.

In short he seems thereafter to have awaited results. I can see nothing, therefore, in support of the grounds pleaded as defence set forth above. And the advertisement and its reason as explained by deceased is in itself not worth labouring with.

The respondents took no action to recover the next payment when due.

In August, 1915, he left the Yukon and on his way out learned that none of the lots in the three blocks partly occupied by Foley Bros., Welch & Stewart, as above mentioned, had been sold though as already stated marked off on the plans as sold.

This action was started shortly afterwards. I think he has sufficiently answered the plea of having waived the right to rescission or (perhaps more correctly designated) of having made an election to abide by his purchases.

Indeed it rested upon the respondents to prove knowledge on his part of the fraud when doing anything such as they charge as an election in order to entitle them to succeed in such defences as set up under that head. This they have failed to establish.

Mere delay or laches as has been often said short of falling within the Statute of Limitations is no bar to an action for rescission. It may be and often has been found so coupled with acts which have induced the vendor to change his position, or with circumstances, which in themselves evidence knowledge and election, as to disentitle him seeking rescission to claim such relief.

It was in substance said in the judgment of the Judicial Committee of the Privy Council in the case of

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the *Lindsay Petroleum Co.* v. *Hurd* [14], and in like manner re-affirmed by the judgment of Lord Penzance in the case of *Erlanger* v. *New Sombrero Phosphate Co.*[15], that the contract having been induced by fraud and he defrauded, having the right to repudiate it when, if ever, it became a question in defence against the assertion of such a right, whether or not his refraining from

[14] L.R. 5 P.C. 221.
[15] 3 App. Cas. 1218, at p. 1230.

doing so, had noc waived his right or elected to abide by the contract, that the burden of proof of knowledge of the fraud and time of acquiring same rested upon the party setting up such a defence.

Lord Cairns who doubted the decision of the majority in the latter case did not dissent from such proposition but pointed out these things on the surface, as it were, which might be held to constitute knowledge at the outset or shortly after.

In like manner a shareholder in *Whitehouse's Case*[16] having observed a discrepancy between the articles of association and the prospectus and withdrawn, yet paid thereafter a call, could not be held entitled on later discovering another discrepancy, to claim relief, because evidently the whole means of knowledge lay in the documents which he had first relied on and must have read.

Again in this case the respondent Kelly counterclaimed for specific performance and was adjudged so entitled.

I am of the opinion that the courts below erred both in the refusal to rescind and in directing specific performance.

I cannot assent to the view of the law taken below, except by Mr. Justice McPhillips who held deceased was entitled to damages.

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[16] L.R. 3 Eq. 790.

Derry v. *Peek* [17], had, I respectfully submit, when relied upon herein, been misapprehended. *Derry* v. *Peek* [18], clarified the law of deceit and obliterated some judicial refinements. Fraud, however, still remains fraud. That decision neither changed the moral law nor enabled men who deliberately or recklessly committed a fraud to free themselves from the charge by swearing they did not intend to mislead, nor yet did it absolve from liability the honest and ignorant principal whose trust had been such as to enable him he trusted as his agent to succeed in bringing into their respective coffers the money of others.

If I could not see my way to granting rescission I should certainly hold the appellant entitled to damages.

I need not pursue that inquiry for the claim to damages is made only alternatively and not cumulatively as it was and maintained in the recent case of *Goldrei, Foucard & Son v. Sinclair*[19].

I think the appeal should be allowed with costs throughout, the contracts be rescinded and the money paid by deceased repaid with interest.

ANGLIN J.—A plaintiff claiming relief in respect of a contract on the ground that he was induced to enter into it by fraudulent misrepresentation, who has failed to convince either the trial judge or a majority of the judges of a provincial appellate court that he is entitled to judgment, can rarely hope to succeed on a further appeal to this court. The difficulty of demonstrating in such a case that there has been clear and manifest error in the findings of both the lower courts—the *sine qua non* of a reversal—is always very great and usually insuperable. Nevertheless, when convinced that such

[17] 14 App. Cas. 337.
[18] 14 App. Cas. 337.
[19] [1918] 1 K.B. 180.

error has been demonstrated, our duty to reverse and to give the judgment which the provincial appellate court should have given is unquestionable. The right of appeal to this court is upon questions of fact as well as upon those of law. *Hood* v. *Eden*[20].

[20] 36 Can. S.C.R. 476.

In the present case the evidence of the making of the representations that practically all the lots on 9th Avenue for half a mile had been sold to residents of Old Hazelton, and that lots on Pugsley Street for a like distance and the blocks 119, 120 and 121 had also been sold is so overwhelming, their misleading effect is so obvious and their materiality so clear that—I say it with all due respect—upon none of these points does there seem to be the slightest room for doubt. That there was actual dishonest intent is, I think, abundantly proved; that there was "what in the view of a Court of Equity amounts to fraud" *(Dimmock v. Hallett*[21], is beyond question. No good purpose would be served by detailing or discussing the proof. I would merely remark that if one were disposed to question the plaintiff's story, notwithstanding its corroboration in material particulars by other witnesses, Firth's letter of the 3rd of March, 1914, the materiality of which the learned trial judge appears to have been unable to appreciate, would remove all scepticism.

That the representations complained of in fact operated on the mind of the plaintiff as inducements would be a fair inference from their manifest materiality. His explicit testimony that but for them he would not have made the impugned purchases, credible in itself, is certainly not weakened by the trial judge's statement that he

> would not suggest that Mr. Barron is not honestly telling his belief.

I find nothing in the evidence to support the opinion

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that "he (Barron) would have bought just the same" and that he had "honestly argued himself into that idea (that he would not have purchased had he known the truth) years after the event." Indeed I am at a loss to account for this view of the learned judge, unless it should be ascribed to the influence upon his mind of his attitude towards actions such as this, expressed by himself to be that "of a doubting Thomas." Perhaps one should not be surprised, however. The learned judge also felt himself

[21] 2 Ch. App., 21, at p. 29.

inclined to think there was no intentional misrepresentation.

The two learned appellate judges who upheld the judgment dismissing the action appear to have given to the findings of the trial judge what I cannot but think was, under the circumstances, undue weight.

No doubt in making his purchases the plaintiff took into account other matters such as his idea as to the probable location of the railway station. But, having regard to the fact that, if the defendants' representations as to sales had been true, he would have been buying desirable building lots in a town of assured prosperity and immediate growth, whereas if false (as they were), his purchases would be practically on the prairie, their materiality is so palpable and their influence would ordinarily be so preponderating that it is almost impossible to conceive that they had not some effect as inducing causes. It is trite law that it is not necessary that other inducements should be wholly excluded. *Beckman v. Wallace*[22].

It is also elementary that a party misled by such misrepresentations as the evidence here establishes has, upon discovery of their falsehood, the choice of repudiating his contract—and (if *restitutio in integrum* be

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practicable) he may thereupon claim the equitable relief of rescission with reimbursement—or of affirming it and pursuing the common law remedy of damages in an action of deceit. The present plaintiff seeks rescission. He claims damages only alternatively, *i.e.,* if not entitled to rescission. His right to this alternative relief, although he should have lost his right to rescission, is, in my opinion, incontestible.

[22] 29 Ont. L.R. 96; 13 D.L.R. 540.

The defendants assert that, with knowledge of the falsity of the misrepresentations on which he relies, the plaintiff definitely elected to affirm the contracts in question and to claim damages and is, therefore, disentitled to rescission. This feature of the case has occasioned me some trouble. The evidence of the alleged election to affirm consists in a letter written by the plaintiff's solicitor at Dawson to the defendants Clements & Heyward, on the 6th of March, 1914, accompanied by a payment of $196 on account of moneys due under the contracts, and other acts about the same time—a further payment of $840 on account, a proposal to exchange the lots purchased for others on 9th Avenue, and the publication of an advertisement asking offers for the lots. These other acts are less distinctly unequivocal than the letter, and if, owing to the circumstances under which it was written, it should be held not to afford conclusive evidence of a binding election not to seek rescission, they probably might be disregarded. In the letter it is stated that the plaintiff

> in completing his purchase rather than lose the money already paid on the purchase price before he learned of the false and fraudulent representations made to induce him to purchase, *** does not waive his right to insist on reparation for the deceit practised upon him, and proposes to bring an action on account thereof.

If the plaintiff, when this letter was written, had full knowledge of all the material facts entitling him to

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rescission, I regard it as conclusive evidence of an election on his part to forego rescission and to rely upon his remedy in damages for deceit. Whatever might be said had it been written by the plaintiff himself without professional advice, such a letter written with full knowledge by a solicitor imports affirmance of the contracts involving a deliberate choice between the two remedies which he must be taken to have known were open.

But the extent of the plaintiff's knowledge of the material facts is challenged. His story is that when his solicitor's letter was written, while he more than gravely suspected, he had no direct evidence that most of the lots on 9th Avenue had been unsold when he was induced to purchase. See 20

Halsbury's L. of E., page 749, note (b); Bower on Misrepresentation, page 269; and *Carrique v. Catts*[23]. The letter, however, is written not on a basis of suspicion but of actual knowledge and I incline to think the plaintiff's rights may not unfairly be determined on the footing that when he instructed the writing of it, he had such knowledge that the representation in regard to the sale of the 9th Avenue lots was false at the time it was made. *Whitehouse's Case*[24]. He swears, however, and his evidence is uncontradicted, that while he then believed it probable that the 9th Avenue lots had not been sold when he made his purchases, he was at the date of the solicitor's letter still under the impression that they had been subsequently sold. If that had been the fact of course the lots held by him would have been more desirable and of greater value, and his willingness to keep them and seek damages only may have resulted from his belief that it was so. According to his. story, which seems not improbable*[Page 481]*

and stands uncontradicted, he learned positively that many of the 9th Avenue lots still remained unsold only in the middle, or towards the end, of April, on receipt of Mr. C. H. Sawle's letter of the 30th of March, 1914, written in answer to inquiry. This, however, was rather a fact which would influence him in making his election, than a fact which would give rise to his right to make it. Ignorance of it would not suffice to render revocable an election otherwise binding. See Ewart on Waiver Distributed, pages 72-76. The last payment made by the plaintiff was of $840, on the 31st of March, 1914. He says he made it because his solicitor had told him he would have a better chance to sue if he made prompt payments. He apparently had no suspicion throughout 1914 that blocks 119-121 had been unsold when he made his contracts of purchase. His letters of complaint and inquiry contain no reference to them. His testimony is that he first learned that these blocks had not been sold in August, 1915, when *en route* from Skagway to Vancouver returning from Dawson. This action was begun on the 7th of October, following.

While the reading of the evidence left an impression on my mind that the plaintiff was much more affected in making his purchases by the alleged sales of the 9th Avenue lots to Old Hazelton

[23] 32 Ont. L.R. 548, at p. 559.
[24] L.R. 3 Eq. 790.

people than by the misrepresentation as to the sale of blocks 119-121, yet I have found neither explicit testimony, nor anything to warrant the inference that his sworn testimony is untrue when he swears that, had he known that those blocks were not actually sold to, but were merely temporarily occupied by Foley, Welch & Stewart, he "would have stopped there" and would not have bought in New Hazelton. In other words, there is nothing to justify a conclusion that his belief that

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blocks 119-121 were actually sold did not in itself influence his conduct in making the purchases as *an* inducing cause. Fraudulent misrepresentation in a matter *primâ facie* material and likely to operate as an inducement having been shewn by the plaintiff, the onus of satisfying the court that it did not in fact so operate is certainly cast upon the defendants. They have not discharged that burden. Had they done so in regard to the representation as to blocks Nos. 119-121, the present case would have been clearly distinguishable from *Boulter v. Stocks*[25].

On the other hand, the appellant's case is put by his counsel, at the beginning of their factum, in this form:—

> The specific misrepresentation alleged is that the defendants represented that certain lots in the business section of the townsite of New Hazelton were sold, when in point of fact such lots were not sold, thereby inducing the plaintiff to purchase eight lots in the said townsite.

[25] 47 Can. S.C.R. 440; 10 D.L.R. 316.

Viewed thus it was substantially a single misrepresentation of development in the business section that induced the appellant to purchase. If so, the reason which led him to believe that the representation as to the sale of the 9th Avenue lots had been untrue, and satisfied him that he had been the victim of false and fraudulent misrepresentations, as his solicitor's letter asserts, should have made him realize that the whole scheme was one of deception. His own letter of the 30th December, 1913, and his solicitor's letter of the 6th of March, 1914, are susceptible of an interpretation indicating that he did so. If he did, the present case is brought within *Campbell v. Fleming* [26], distinguished by this court in *Boulter v. Stocks* [27], and the misrepresentation in regard to blocks 119-121 should be regarded not as a distinct fraud, but merely as "a new incident in the fraud." That, said Patteson J.,

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> can only be considered as strengthening the evidence of the original fraud and it cannot revive the right of repudiation which has been waived.
>
> "There is no ground" says Lord Denman, "for saying that a party must know of all the incidents of a fraud before he deprives himself of the right of rescission."

See too *Whitehouse's Case* [28].

I have found some difficulty, however, in distinguishing this case from *Boulter v. Stocks*[29]. The fact, had it been true, that three entire blocks had been purchased by such large railway contractors as Foley, Welch & Stewart might well indicate to a man like Barron that large railway "shops" would probably be located permanently on them and would contribute materially to the rapid growth and prosperity of the new town. If so it would almost seem that the misrepresentation as to that purchase might be deemed of a distinctive character, quite as much so as was that as to the acreage in *Boulter v. Stocks*[30]. While I bow to the authority of that

[26] 1 A. & E. 40.
[27] 47 Can. S.C.R. 440; 10 D.L.R. 316.
[28] L.R. 3 Eq. 790.
[29] 47 Can. S.C.R. 440; 10 D.L.R. 316.
[30] 47 Can. S.C.R. 440; 10 D.L.R. 316.

decision, I am not satisfied that, if a member of the court, I should have concurred in it. It appears to rest upon the view expressed by Mr. Justice Davies that (before the lease there relied upon as evidencing an election to affirm the contract had been executed)

> the facts brought to the plaintiff's knowledge from time to time as he began cultivating the land in the spring, as to the dirty condition of the soil and the presence of large quantities of noxious weeds, would (not) of themselves be sufficient to satisfy the plaintiff that the sale of the farm to him was a fraud and a deception. The evidence was of a character, no doubt, to raise grave and serious doubts in his mind as to whether he had not been deceived in the transaction, but nothing more;

and, as put by Mr. Justice Duff,

> He (the plaintiff) may have had his suspicions as to Boulter's entire honesty, but it is quite clear that the possibility in shortages in acreage had not then occurred to him and he had no suspicion that the

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> whole transaction had been on Boulter's part the swindle that it ultimately proved to be. It would probably seem to him to be most unlikely that the misrepresentations as to the number of apple trees—so easy to expose—had been made deliberately and as to the prevalence of noxious weeds that is a matter respecting which he may well have thought some exaggeration was to be expected. I think the evidence is quite consistent with the view that his discoveries in regard to these matters did not bring home to his mind a conviction that a fraud had been practised upon him such as would entitle him to impeach the sale.

Here, on the contrary, the plaintiff in his own letter of the 30th December, 1913, after stating the representations made to him, says:—

> Had the truth been told me I would not have bought a dollar's worth.

In Firth's confidential letter of March 3rd to the defendants, Clements & Heyward, so much relied upon by the plaintiff for other purposes, it is stated

> As intimated, Mr. Barron is positively preparing a case against you for misrepresentation on account of marking off all the 9th Avenue lots as being sold when in reality they were not.

The nature of the charge made is indicated in these words:

> Personally I do not believe that Mr. Barron has any case at all, for I cannot bring myself to imagine that a firm of your standing would deliberately mark off any portion of a townsite map as being sold when such was not so.

In the plaintiff's solicitor's letter of March 6th', he speaks of "the false and fraudulent representations made to induce him to purchase" and of "the deceit practised upon him." That Barron then believed he had been the victim of a fraud is scarcely open to question. The case at bar therefore may probably be distinguished on this ground from *Boulter v. Stocks*[31].

Having regard to all the circumstances I have, not without some hesitation, reached the conclusion that the defendants have sufficiently shewn an election by

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the plaintiff which is a bar to his exercising the right of rescission.

I have not taken the evidence of the witness Quinn into consideration at all. That, in my opinion, was the only proper course to follow since the learned trial judge saw fit to close the case before the cross-examination of that witness had been completed and thereupon delivered judgment dismissing the action.

The appeal should be allowed with costs throughout and judgment should be entered for the plaintiff (by revivor) for recovery of damages, to be assessed in the Supreme Court of British Columbia upon a reference to the proper officer according to the usual practice of that court, for

[31] 47 Can. S.C.R. 440; 10 D.L.R. 316.

the deceit practised upon the original plaintiff in inducing him to purchase the properties described in the several agreements mentioned in the statement of claim.

BRODEUR J.—This is an action for the rescission of a certain agreement for sale of lots of land in New Hazleton or, in the alternative, in damages for deceit.

New Hazelton is a new townsite which was subdivided during the construction of the Grand Trunk Pacific. It was expected that a railway station would be erected at that place and Robert Kelly, the respondent, bought a large tract of land which he subdivided into lots and offered for sale. Clement & Heyward, a firm of real estate agents in Vancouver, were instructed by Kelly to make the sale of those lots and they, in their turn, appointed different Sub-agents in different towns of the West.

The Sub-agent they appointed in Dawson City was a man named Firth and they sent him a map shewing the townsite and several lots were marked on this map with a stroke. It is claimed by the plaintiff,

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Barron, who asks for rescission, that it was represented falsely to him that these lots so marked were sold and that he bought the nearest ones on the strength of those misrepresentations.

On the other hand, the defendants (respondents) claim that it was not represented that those lots were sold but simply reserved for sale or selected by some intending purchaser.

The trial judge found that there was no intentional misrepresentation and his judgment has been affirmed by a majority in the Court of Appeal. This is an appeal from that decision. The main point in the case is whether or not there has been misrepresentation.

The appellant has proved, not only by himself but by some other witnesses, that the agent, Firth, has represented to him that the lots on 9th Avenue nearest to the station had been taken. That representation is confirmed by the written evidence which was presented in the case. Firth had received a map of the townsite from his principals, Clement & Heyward, and it was stated on that map that the lots in question had been sold. Then, it is no wonder that the agent, in selling those lots to the plaintiff, would have represented that those lots had been actually disposed of.

It is in evidence, on the other hand, that, as a question of fact, they had not been sold. Proposals of sale might have been made but no actual agreement for sale had taken place. We all realize that such a representation might have induced the plaintiff to purchase some other lots in the neighbourhood when he saw that within a very short time so large a number of lots had been taken up by purchasers living in the neighbourhood, and consequently better posted as to the prospects of the place. The plaintiff was then living very far from there, could not very easily com-

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municate with the place and had no other information than what was conveyed to him by the respondent's representative.

It cannot be claimed that those representations were not of a fraudulent nature because why should the respondent state that those lots had been sold when, as a question of fact, they were still under their control? Why not represent the facts as they were, if they had simply reserved those lots for being sold by their agent at New Hazelton?

The only conclusion which I can reach is that there were misrepresentations and that those misrepresentations were fraudulent and induced the plaintiff to purchase the lots in question. There would be then no question as to the rescission, if the plaintiff, after being apprised of those

misrepresentations, did not find it advisable to make some payments and to waive the right which he had for rescission.

By a letter which his counsel wrote to the respondent on the 6th March, 1914, he declared himself ready to complete his purchase; but did not waive his right to insist on reparation for the deceit practised upon him and proposed to bring an action on account thereof. If it were not for such a letter I would not hesitate to grant his action for rescission, but he should be all the same entitled to damages for deceit.

The judgment appealed from should be set aside; the appeal should be allowed and there should be judgment for the appellant for damages for deceit and an inquiry should be had to assess those damages.

Appeal allowed with costs.

Solicitors for the appellant: Bowser, Reid, Wallbridge, Douglas & Gibson.

Solicitors for the respondents: Russell, Macdonald & Hancox.