JOHN Y. COLE (DEFENDANT).....APPELLANT; 1898

AND *Nov. 7.
*Dec. 14.

RUFUS H. POPE (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Contract—Rescission—Innocent misrepresentation—Common error—Sale of land—Failure of consideration.

An executed contract for the sale of an interest in land will not be rescinded for mere innocent misrepresentation.

But where, by error of both parties and without fraud or deceit, there has been a complete failure of consideration a court of equity will rescind the contract and compel the vendor to return the purchase money. Thus where, on the sale of a mining claim, it turned out that the whole property sold was included in prior claims whereby the purchaser got nothing for his money the contract was rescinded though the vendor acted in good faith and the transaction was free from fraud.

APPEAL from a decision of the Supreme Court of British Columbia (1) reversing the judgment at the trial in favour of the defendant.

In June, 1896, the defendant and others had taken up a gold mining claim in the neighbourhood of Rossland, British Columbia, of which he claimed and represented himself to be the owner of one-half. This claim was designated as the "Eldorado." The plaintiff, through his agent, Oscar G. Laberee, believing the representations of the defendant to be true and relying entirely on such representations, became the purchaser of the undivided half of the claim for the sum of $5,250, which Laberee paid to the defendant in cash,

*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

(1) 6 B. C. Rep. 205.

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who therefore executed an assignment of his undivided half to the plaintiff. Soon afterwards it turned out that the greater part of the "Eldorado" plot was included within the limits of the prior claim called "Mascot," and that a strip which remained containing an area of some ten or fifteen acres was included in other claims. The plaintiff therefore got nothing for the money he paid. The defendant made the sale in perfect good faith, and his representation which turned out to be untrue was innocently made and the transaction was free from fraud. Both parties dealt upon the mistaken belief that the "Eldorado" was an actually existing mining right, whereas in truth, owing to other claims which were entitled to priority having been previously made, the whole of the "Eldorado" was included in pre-existing claims.

The plaintiff brought his action for rescission of the contract and return of the purchase money. Mr. Justice McColl who tried the case held that rescission would not be decreed for mere innocent misrepresentation and dismissed the action. His judgment was reversed by the full court and judgment entered for the plaintiff. The defendant then took an appeal to this court.

Clute Q.C. for the appellant. To obtain rescission of an executed contract fraud must be proved; *Bell* v. *Macklin* (1); even when there has been a mistake by which the party seeking relief has suffered injury; *Allen* v. *Richardson* (2); *Clare* v. *Lamb* (3); *Ducondu* v. *Dupuy* (4).

Travers Lewis and Hamilton for the respondent referred to *Granger* v. *Fotheringham* (4); *Huddersfield*

(1) 15 Can. S. C. R. 576.
(2) 13 Ch. D. 524.
(3) L. R. 10 C. P. 334.
(4) 9 App. Cas. 150; 6 Can. S. C. R. 425.
(5) 3 B. C. Rep. 590.

Banking Co. v. *Henry Lister & Son* (1); *Cooper* v. *Phibbs* (2); *Hart* v. *Swaine* (3).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The facts of this case are few and simple. In June, 1896, the appellant and others had taken up a gold mining claim in the neighbourhood of Rossland, British Columbia, of which claim the appellant claimed and represented himself to be the owner of one-half. This claim was designated as the "Eldorado." The respondent, through his agent, Oscar G. Laberee, believing the representations of the appellant to be true and relying entirely on such representations, became the purchaser of the appellant's undivided half of the claim for the sum of $5,250, which Laberee paid to the appellant in cash, who thereupon executed an assignment of his undivided half to the respondent. Soon afterwards it turned out that the greater part of the "Eldorado" plot was included within the limits of a prior claim called the "Mascot," and that a strip which remained containing an area of some ten or fifteen acres was included in other claims. The respondent therefore got nothing for the money he paid. There can be no doubt on the evidence that the appellant represented himself to be the owner and made the sale in perfect good faith; that his representation which turned out to be untrue was innocently made and that the transaction was free from fraud. In short both parties dealt upon the mistaken belief that the "Eldorado" was an actually existing mining right, whereas in truth, owing to other claims which were entitled to priority having been previously made, the whole of the "Eldorado" was included in pre-existing claims.

(1) [1895] 2 Ch. 273. (2) L. R. 2 H. L. 149.
(3) 7 Ch. D. 42.

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The respondent brought this action to have the contract rescinded and to obtain repayment of the money which he had paid for a consideration which had entirely failed. The action was tried before the present Chief Justice of British Columbia (then Mr. Justice McColl), and that learned judge acting upon what he considered to be the law applicable to the case, dismissed the action. On appeal to the full court (Walkem and Drake JJ.), this judgment was reversed and a judgment entered for the respondent. The learned trial judge considered the respondent's right to rescission dependent entirely on the misrepresentation, and held that in the present state of the law an executed contract—and especially an executed contract for the sale of an interest in land—will not be rescinded for mere innocent misrepresentation. That this was a correct view of the law as administered by Courts of Equity up to the date of the amalgamation of jurisdictions effected by the judicature Acts, and as it has existed down to the present time, I am not upon the authorities able positively to controvert. Strange as it may seem that there should be dearth of authority upon such a point I find that with the exception of one case, that of *Legge* v. *Croker* (1), there is no direct authority upon the point. That case of *Legge* v. *Croker* (1) supports the judgment of the chief justice, as Lord Manners there held that to entitle a party to have rescission of an executed contract for the sale of land upon the ground of misrepresentation there must be fraud. There are no doubt *dicta* the other way emanating from judges, some of great authority, for we find Sir Edward Sugden, Lord Justice Turner and Sir George Jessel, all stating the law to be that such a contract would be rescinded for innocent misrepresentation, provided, of course, that it formed the basis

(1) 1 Ball & B. 506.

of the contract. It would not, however, be safe to act on these *dicta*. Mr. Dart in the 6th edition of his work on Vendors and Purchasers (1), has this passage which I think a fair statement of the law. The learned writer says:

A Court of Equity would not only refuse its discretionary remedy of specific performance, but would go further and restrain a vendor from asserting his legal right to claim damages in a court of law, on the ground that it was unconscientious in him to do so. But the principle would not be extended to the taking away after completion the price of the property, which at law had become absolutely the vendor's, without advancing the interference of the Court of Equity further than has yet been authorized by judicial decision. In other words it seems that misrepresentation is no ground for setting aside an executed contract, unless such misrepresentation would be not only sufficient to afford ground in equity for rescission of an executory contract, but also is deceitful in contemplation of a court of law. Whether or not this limitation of the jurisdiction of Courts of Equity is satisfactory, either in practice or in principle, the present state of the authorities justifies its enunciation.

Sir Edward Fry in his treatise on Specific Performance (2 ed.) p. 295, commenting on *Edwards* v. *M'Leay* (2), says:

But it must not thence be inferred that every representation that the vendor has a good title will enable a purchaser to set aside an executed contract or successfully resist specific performance.

I conclude therefore in favour of the proposition that mere innocent misrepresentation will not warrant the rescission of an executed contract for the sale of an interest in land.

There is, however, another principle which I think may be invoked in the respondent's favour and which is quite open to him on the pleadings and evidence before us.

It has been determined by several authorities and is well established law that where by the mutual mistake of the parties to a contract of sale the subject of the

(1) P. 900. (2) G. Cooper, 308.

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sale turns out to be non-existent or is already the property of the purchaser, both parties having fallen into error merely, and there being no fraud or deceit in the case, the purchaser who has paid his purchase money and taken a conveyance will be relieved and the contract rescinded by a Court of Equity. In such a case where there is a complete failure of consideration as in the present case it would be unjust and unconscientious that the vendor should retain money paid to him for a supposed consideration which has utterly failed.

In *Bingham* v. *Bingham* (1) Fortescue, M. R. holding that where it appeared that the estate for which the purchase money had been paid already before the sale belonged to the purchaser decreed rescission and said that

> though no fraud appeared and the defendant apprehended he had a right, yet there was a plain mistake such as the court was warranted to relieve against, and not to suffer the defendant to run away with the money in consideration of the sale of an estate to which he had no right.

Sir Edward Fry in the work already quoted from at page 337 (2 ed.), says:

> Further, where both parties to a contract are at the time of the contract in mistake or error as to the matters in respect of which they are contracting, this will not only furnish a ground for resisting specific performance but enable the court to rescind the contract.

Dart (6 ed. p. 907) has this passage:

> If it appear that the estate belonged to the purchaser, he can in equity, and probably at law, recover his purchase money, although he might have discovered his right from the abstract of title; nor is it clear that the absence of fraud in the vendor will bar the relief. And it has been held that a purchaser who, although without any fault on the part of the vendor, buys an estate which in fact has no existence, (e. g. a remainder expectant on an estate tail which has been barred), can obtain relief in equity; but it is of course otherwise if the purchaser buys an estate the existence of which he knows to be doubtful. The principle has been doubted by Lord St. Leonards,

(1) 1 Ves. Sr. 126.

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but it has been decided that, even at law, an action lies in such a case to recover the purchase money as money paid without consideration ;—as where a life annuity is sold after the death of *cestui qui vie.*

In *Cooper* v. *Phibbs* (1), Lord Cranworth and Lord Westbury both recognized the authority of *Bingham* v. *Bingham* (2) and acted on it in decreeing rescission in a case in which the facts were essentially the same. The observations of Lord Cranworth leave no doubt as to the principle that where there is by reason of a mistake of this kind an entire failure of consideration, the completion of the contract by conveyance and payment of the purchase money will constitute no bar to relief by a court of equity.

In *Cochrane* v. *Willis* (3), Lord Romilly M.R., in the court below, and Lord Justice Turner in the Court of Appeal, acted upon the authority of *Bingham* v. *Bingham* (2). Further in *Jones* v. *Clifford* (4). Vice Chancellor Hall, a very high authority on such a question, says speaking of *Cooper* v. *Phibbs* (1).

> Nothing can be clearer than this, that Lord Cranworth recognized the principle that the court would, even in the case of a completed contract, give relief against a common mistake in the same way as it would against fraud.

Lord Westbury in *Cooper* v. *Phibbs* (1), says:

> If the parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake.

See also Webster on Conditions of Sale (5), and Clerke & Humphrey on Sales (6).

The result is that the evidence in this record being clear that the consideration for the money paid by the

(1) L. R. 2 H. L. 149.
(2) 1 Ves. Sr. 126.
(3) 34 Beav. 359 ; 1 Ch. App. 58.
(4) 3 Ch. D. 779, 792.
(5) 2 ed. p. 64.
(6) P. 527.

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respondent to the appellant utterly failed, as indeed appears from the admission of the appellant himself, the respondent upon the authorities referred to was entitled to the relief the court below has given him and the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *John S. Clute, Jr.*

Solicitor for the respondent: *Charles R. Hamilton.*