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ARNOLD LARSON (DEFENDANT).....APPELLANT;

*Feb. 20, 21.
*Mar. 3.

AND

GEORGE D. BOYD AND ANDREW N. BOYD (PLAINTIFFS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Procedure — Evidence — Irrelevancy — Objection — Proper time — New trial.

When irrelevant evidence has been received by the trial judge, though subject to objection, if he has not disclaimed its having had any influence on his mind, a new trial must be had, because such evidence may have adversely influenced his opinion. Idington J. dissenting.

Per Idington J. dissenting.—Under the circumstances of this case, the failure by the respondent to object to the evidence promptly and at the proper time is fatal to any application for a new trial.

Judgment of the Court of Appeal (11 Sask. L.R. 324; 42 D.L.R. 516; [1918], 2 W.W.R. 1069), affirmed, Idington J. dissenting.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of Bigelow J. and ordering a new trial.

The material facts of the case and the questions in issue are fully stated in the judgments now reported.

George A. Cruise for the appellant.

J. A. Allan K.C. for the respondent.

THE CHIEF JUSTICE.—I think this appeal must be dismissed and the judgment of the Appeal Court granting a new trial confirmed with costs.

The wrongful evidence admitted at the trial, relating to the sale by the respondent plaintiffs of the Tuxedo lands and of the representations made by the

*Present:—Sir Louis Davies C.J. and Idington, Anglin and Mignault JJ. and Cassels J. *ad hoc*.

(1) 11 Sask. L.R. 324; 42 D.L.R. 516; [1918], 2 W.W.R. 1069.

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respondents to the Tuxedo purchasers, was to my mind clearly inadmissible and should have been rejected by the trial judge. It is impossible to say what weight that evidence may have had on the mind of the trial judge in delivering his judgment in a case where the plaintiff and the defendant gave directly conflicting evidence as to the material representations alleged by the defendant to have been made to him and which induced him to enter into the contract now sought to be specifically enforced.

IDINGTON J. (dissenting).—The appellant was induced on the 12th July, 1912, to enter into an agreement for the purchase of two lots described therein as lots "Nos. 39 and 40 in block two in Tuxedo sub-division in North Battleford."

In the statement of claim the respondents sue for the balance of price of "lots 39 and 40 in block two in the City of North Battleford."

The counsel for appellant admitted the agreement, and also by another admission admitted that the respondent had title to the land mentioned in the statement of claim, but seemed to avoid any express admission that the land named in the agreement was the identical land referred to in the statement of claim.

At the close of the plaintiff's case thus assumed to be established, appellant's counsel took the objection that there was nothing to shew that the land described in the statement of claim was the land mentioned in the agreement.

Instead of counsel for plaintiff at once asking leave to amend his statement of claim or adduce proof of identity he did nothing, but allowed the learned trial judge to so reserve the point without objecting.

I cannot say that that was a very satisfactory dis-

position of the point. Nor can I say that I should have reached the same conclusion as the learned trial judge without giving an opportunity to amend or adduce further proof.

The court below having taken the view that it did of that part of the trial, and found from what, to my mind, is not quite unreasonable, the inference of identity, though I might not have drawn it, I certainly should not disturb that part of the judgment appealed from.

The whole question is only worth considering as illustrative of the course of the trial.

The main ground of appeal is that the court below erred, as I think it did, in granting a new trial on the ground of improper reception of evidence.

The appellant had pleaded as a distinct defence the following:—

3. In the alternative the defendant says that on or about the 12th day of July, 1912, the plaintiffs falsely and fraudulently represented to him that the plaintiffs were the owners of lots 39 and 40, in block 2, in a certain sub-division in North Battleford known as Tuxedo Park, that the said lots were good city lots, that the town was built to within two blocks of them, that the Canadian Pacific Railway was building on the section just beyond the said lots, and that the said lots were worth more than the price of $825.00 which the plaintiffs were asking for them, and were within one-quarter of a mile of the Canadian Northern Railway station in the city of North Battleford.

His own evidence, if believed, established these allegations of fact. Then, hoping no doubt, to prove the fraudulent intent of such misstatements, he called Mrs. Tracksell, who had been present at a sale to her deceased husband by the defendants, in January, 1912, of a lot in same survey, and next or near to the lots in question. Counsel for respondent at once, upon her being sworn, objected to her evidence. No ground for the objection was stated or appears in the case.

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Her evidence really amounts to nothing more than that there was such a sale, and it seems to me inconceivable how or why its admission can be made ground for a new trial.

This was followed by evidence of another Tracksell relative to another sale of a lot in same survey by respondents to him in November, 1912. This witness testified to representations made to him on that occasion very similar in character to those charged in the above paragraph from the appellant's statement of defence.

His evidence was given, not as the court below in error states, under or subject to objection.

Not a word of objection thereto was uttered till after it had all been given, and then counsel for respondents said: "I have the same objection to this evidence." And then he proceeded to call his clients in reply to the defence made.

I cannot understand why such an utter disregard of the established principles governing the conduct of parties at a trial requiring them promptly and properly to object, if they have any reason to complain of the conduct thereof, should be tolerated as a basis of granting a new trial.

I observe from the respondents' factum that the appellant was not represented at the hearing of the appeal in the court below, and suspect this feature of the case was not observed by the members of that court.

Apart from any other considerations I think the failure to object at the proper time should have been held fatal to any application for a new trial upon the ground it is rested upon.

In the view I take relative to the possibility of such like evidence being admissible in support of a

charge of fraud of such a character as set up, there is absolutely no ground for granting it.

Assume that the defendant had in mind the purpose of establishing a highly fraudulent scheme of the kind, in which beyond a doubt, as illustrated by the judgments in the case of *Blake* v. *The Albion Life Assurance Co.* (1), and *The Queen* v. *Rhodes* (2), and cases cited therein, evidence of what had transpired between him accused and others than those immediately concerned, would be admissible and the attempt to do so failed by reason of the evidence falling short of what was expected, would that be any ground for granting a new trial?

The charge made, which I am for purposes of illustration thus assuming to have been of such a nature as to permit the evidence to go so far as to have been highly prejudicial to the party attacked and then failed, how could he, who lost on another ground other issues entirely, claim as the defendant does by reason thereof a new trial?

I incline to think the pleading I have quoted wide enough to let in evidence of any fraudulent scheme unless limited by specific particulars which should have been demanded if any limitation claimed to be put upon the inquiry.

There is in the next paragraph of the defence a charge of representation of the same facts in a way entitling appellant to relief which did not in order to get same necessarily involve such gross fraud as first charged.

On this the court below seemed to think, if the learned trial judge saw fit to proceed thereon he could rightly have found, as he did, but because he did not expressly repudiate being affected by the evidence

(1) 4 C.P. D. 94. (2) [1899] 1 Q.B. 77.

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adduced on the other issue, therefore there must be a new trial.

I must respectfully submit that is not a proper ground upon which to grant a new trial.

To hold so implies, that in every case wherein other issues may have been tried than those in which the plaintiff succeeds, the learned trial judge must by express language exclude all possibility of his mind having been prejudicially affected by having heard evidence on the other issues and in default of his doing so a new trial must be granted.

The presumption surely is that a learned trial judge has not misdirected himself unless he gives some indication of it other than apparent herein.

The evidence of George Boyd seems to me far from satisfactory and may have appeared more so to the learned trial judge.

I think the appeal should be allowed with costs and the learned trial judge's judgment be restored.

ANGLIN J.—The evidence of similar misrepresentations made by the plaintiff to other prospective purchasers might have been admissible if his intent in making the misrepresentations to the defendant on which the latter relies in answer to this action of specific performance had been material to any issue in it which the court was called upon to determine. *Blake* v. *Albion Assurance Society* (1), chiefly relied on by the appellant, was such a case. See too *Brunet* v. *The King* (2).

The issues in the present action were whether the alleged misrepresentations had in fact been made, their truth or untruth, their materiality, and whether the defendant had been induced by them to purchase. To

(1) 4 C.P.D. 94. (2) 57 Can. S.C.R. 83; 42 D.L.R. 405.

none of these issues could the proof of false representations by the defendant made months afterwards to other persons, however similar in character, be relevant. It would not tend to establish the probability of the defendant's case upon any of them. It would be quite as relevant to attempt to prove that the plaintiff's reputation for veracity was bad with a view to establishing that he was a person likely to make false representations when it should be to his interest to do so. The unnecessary and immaterial allegation of the defendant in his plea that the misrepresentations on which he relied had been made fraudulently cannot, in my opinion, render relevant evidence otherwise irrelevant to the real issues presented for trial. I agree with the view of the Court of Appeal that the testimony here in question was improperly received.

While without it there may have been sufficient evidence to warrant the judgment dismissing the action, it is impossible to say that the testimony objected to may not have adversely influenced the trial judge's opinion as to the credibility of the plaintiff and thus occasioned a substantial wrong in the trial. Having received it, though subject to objection, and not disclaimed its having had any effect upon his mind, it is not unreasonable to assume that the learned judge treated it as admissible and that it, in fact, had what would seem to be its probable effect upon his decision. *Allen* v. *The King* (1); *Loughead* v. *Collingwood & Co.* (2); *Hyndman* v. *Stephens* (3).

In view of the absence from the statement of defence of any allegation that the land described in the agreement for sale was not the same as that described in the statement of claim and of the unqualified

(1) 44 Can. S.C.R. 331. (2) 16 Ont. L.R. 64; 12 Ont. W.R. 697.
(3) 19 Man. R. 187.

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admission of the plaintiff's title to the latter made by counsel for the defendant at the opening of the trial, which the learned judge appears to have then accepted as conclusive on that branch of the case, the action should not, in my opinion, afterwards have been dismissed because of an unexplained discrepancy between the two descriptions.

I would affirm the judgment directing a new trial and dismiss this appeal with costs.

MIGNAULT J.—The Court of Appeal of Saskatchewan has decided that the appellant introduced irrelevant evidence of false representations made by the respondent to other persons to whom he endeavoured to sell lots. It ordered a new trial because, in its opinion, such evidence may have influenced the trial judge in deciding that the respondent had made to the appellant (which he denied) false representations concerning the lots sold to the appellant. The learned counsel for the appellant has not convinced me that the judgment appealed from is clearly wrong. The evidence complained of was certainly irrelevant and it may have influenced the result. I would, therefore, dismiss the appeal with costs.

CASSELS J.—I concur with Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitors for the appellant: *Cruise, Tufts & Lindal.*
Solicitors for the respondents: *Gold, Stockan & Company.*