Supreme Court of Canada
Robert v. Montreal Trust Co., (1918) 56 S.C.R. 342
Date: 1918-03-11

Edmund A. Robert (Defendant); Appellant;

and

The Montreal Trust Company (Plaintiff) Respondent.

1917: October 26, 27; 1918: March 11.

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

ON APPEAL FROM THE SUPERIOR COURT OF THE PROVINCE OF QUEBEC, SITTING IN REVIEW AT MONTREAL.

Company—Subscription of stock—Misrepresentations—Acquiescence—Delay—Estoppel—Stock "to be issued"—Proof.

Held, Fitzpatrick C.J. dissenting, that in case of alleged misrepresentations made by the promoter of an incorporated company, a subscriber for stock must clearly prove that he has in fact been induced by such representations to buy shares, especially if he has kept silent after receiving numerous demands of payment and has failed to repudiate his contract for a considerable period of time after he had knowledge of the falsity of the representations.

Per Idington J. and *Semble* per Anglin J.—A mere statement, at the head of an underwriting agreement, as to the capital to be issued, does not imply that the subscriber will be under no liability to pay for his shares unless and until the amount so stated had been issued.

Per Anglin J.—Delay in repudiation after knowledge of the falsity of an inducing representation, especially in the case of a subscription for shares, may give rise to a presumption of acquiescence or of an election not to rescind.

Per Fitzpatrick C.J. dissenting.—In the case of an agreement to take shares in an incorporated company, the capital issued, if not equal to that proposed, must not at least be so reduced as to render the company incapable of accomplishing the avowed object of its existence.

APPEAL from a decision of the Superior Court of the Province of Quebec, sitting in Review at Montreal[1], affirming the judgment of Lafontaine J. at the trial and maintaining the action with costs.

The appellant subscribed for and agreed to purchase from J. A. Mackay & Co. one hundred preferred shares of the Canadian Jewellers, Limited, at 95% of the par

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[1] Q.R. 52 S.C. 73.

value with 50% of the par value in bonus common stock of the company. It was also stipulated that the underwriting could be pledged or hypothecated with any banking institution or trust company as security for advances. Prior to the date of this agreement J. A. Mackay & Co. had borrowed from the respondent $131,103.10 and hypothecated the appellant's underwriting as collateral security for the advances already made and for further advances.

The action was brought by the respondent against the appellant to enforce payment by him of the amount of the shares subscribed and was accompanied by a tender and deposit of certificates.

The principal defence set up by the appellant was that his signature was procured by misrepresentations made to him by J. A. Mackay as to the amount of preferred shares and common shares "to be issued" and as to the jewellery businesses to be acquired by the new company.

J. E. Martin K.C. and Thibaudeau Rinfret K.C. for the appellant.

Geo. H. Montgomery K.C. and W. Chipman K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—The appellant agreed to take 100 shares of Canadian Jewellers, Limited, of the par value of $100 each at 95% of the par value with 50% of the par value in bonus common stock. The respondent sues in this action as assignee of the underwriting for $9,500 and interest.

The company was formed for the purpose of effecting a merger of jewellery businesses on a large scale but the promoters were unable to carry out their intentions.

The form of subscription signed by the defendant had the following heading:—

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Canadian Jewellers, Limited.

	Authorized Capital.	To be issued.
Preferred shares, ...	$2,500,000	$1,500,000
Common shares, ...	2,500,000	1,500,000

The amount of stock actually issued was $600,000 preferred and $671,000 of common.

Harry Timmis, the president of the company, who was the originator of it, says in his evidence:—

> We started out with the idea that we would make a very big company out of it, and that we would bring all the jewellery concerns that we could bring in on advantageous terms * * * The company unfortunately was not as strong as it should have been, because what I had originally planned had not been carried out.

> Q.—With all those concerns which I have mentioned to you which were to come in you would have had $1,500,000 preferred and $1,500,000 common? A.— Quite so.

It must be admitted that the purchaser is entitled to get substantially at any rate what he has bargained for by his contract. In the case of an agreement to take shares in a company, the capital issued, if not equal to that proposed, must at least be adequate for the purposes of the company. It would be impossible to enforce a contract entered into on the faith of the company having at least *primâ facie* a sufficient capital if this were so reduced as to render the success of the company's operations impossible and the loss of the purchaser's money certain.

Now the very nature of the scheme for the carrying out of which this company was organized called for a very large capital. Without it, it is obvious that whatever business they might be able to transact they could not be able to effect a consolidation of a number of the principal businesses in the jewellery trade.

The difference in this case between the capital to be issued and what was actually issued was not merely one of degree, did not merely involve the probability of the company being crippled for want of sufficient

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capital, it rendered the company incapable of accomplishing the avowed object of its existence.

The underwriting contained a clause agreeing that

> this underwriting may be pledged or hypothecated with any banking institution or trust company as security for advances.

The respondent's main contention is that the appellant is estopped as if the instrument were a negotiable security. I think, however, the doctrine of equitable estoppel which he invokes can have no application where the subject matter of the contract has never come into existence. It is not a question of the assignee being unaffected by equities between the vendor and purchaser. The purchaser cannot be expected to give his money for nothing; he is entitled to his part of the bargain and he is entitled to get substantially what he has agreed to purchase, not something essentially different and which may be of no value.

If I agree with a builder to put up a house for me for $20,000 and that he may pledge the contract for advances to enable him to carry out the work this does not mean that the builder can put the $20,000 in his pocket without doing any work and leave me to be sued for this amount by the lender of the money. It does mean, on the other hand, that I cannot, after the house has been built, claim to set off against the contract price a debt owing to me by the builder.

It would be difficult to lay down any general rules as to the rights and liabilities of the purchaser and the lender in these cases; they must, I think, depend upon the particular circumstances of each; that the effect of the pledge of the contract could ever be the same as the indorsement by the purchaser of a negotiable instrument cannot, I think, be maintained. The respondent's error is in regarding it as such and as being an absolute security regardless of the nature of the contract.

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The appellant's case has been prejudiced by his refusal or omission to answer the communications addressed to him by the respondent; but unless there was some obligation upon him to do so, his legal liability can hardly be altered in consequence. The respondent quotes from the case in this court of *Ewing* v. *Dominion Bank*[2], where it was said:—

> Where a man has kept silent when he ought to have spoken, he will not be permitted to speak when he ought to keep silent.

That is obviously assuming the obligation to speak or to keep silent.

Now what was the obligation in this case, if I am right in supposing that the company never offered the appellant, was never in a position to offer him, the shares which he had agreed to take? Was he not, strictly speaking, justified in doing nothing but waiting until this was done? Timmis, the president of the company, questioned as to the reduction of capital, says:—

> I don't know that we ever reduced. We have not yet carried out all our intentions.

And in respondent's factum it is said:—

[2] 35 Can. S.C.R. 133.

> The reason for issuing a smaller amount was that the plans of the organizers were changed to suit the situation subsequently arising. The promoters' intentions had not yet been all carried out. Nothing would prevent the issue of further shares.

The appellant, we must suppose, is and always has been ready and willing to carry out his part of the bargain when the vendors offer him the shares for which he has subscribed.

It is true that

> if a man claims to rescind his contract to take shares in a company on the ground that he has been induced to enter into it by misrepresentation he must rescind it as soon as he learns the facts,

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but that is not this case in which the appellant is not suing but only seeks to rescind his contract as matter of defence to the action, if and so far as he does seek to rescind the contract.

It is going a great deal too far to say that his (the appellant's) failure to say or do anything amounts to approval of the statement of his indebtedness to the respondent contained in the letters.

And then when it is complained that the appellant has done nothing why has the respondent done nothing all this time beyond writing three letters, the failure to obtain an answer to which was certainly notice to them that they ought to take some action to insist on such rights as they supposed they had against the appellant? Even if there be no excuse to be made for the appellant there were laches on the part of the respondent.

I am disposed to think that the pleadings sufficiently cover the defence of the appellant but if it were necessary they ought to be amended.

For these reasons I would allow the appeal.

DAVIES J.—I would dismiss the appeal with costs.

IDINGTON J.—Inasmuch as it has not been made quite clear that the respondent actually changed its position or did anything except procure the certificate of stock tendered by this action, and bring the action on the faith of the underwriting contained in the appellant's subscription for stock now in question, I am inclined to hesitate before adopting the

grounds of estoppel in the strict legal sense of the term used in the court below as entirely sufficient to rest the judgment upon.

In another and wider sense than the technical application of the term "estoppel" and which I will proceed

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to explain, the case may well be made to turn and the judgment be rested.

The appellant has entirely failed to make out any case of fraud or misrepresentation of an existing fact whereby he was induced to sign the contract in question. He merely, according to his own evidence, sets up that the thing he bargained for was not the thing that had been tendered him. In other words, he says he had been led to understand that the stock he was subscribing for was in a company of greater importance than the company that actually resulted from the promotion of Mackay and others. He says that because it was a company having only an issue of six hundred thousand preferred stock with an issue of six hundred and some odd thousand of common stock, instead of a company which had been hoped for of one million and a half preferred stock and one million and a half common stock, therefore he is relieved of his bargain.

I cannot accede to the proposition that as a matter of course the failure of realization of a man's expectations in this regard, apart from any express stipulation providing for such a condition of things as he expected, he can withdraw on account of a disappointment resting upon so little as appears in this case.

We have no such condition or stipulation existent as between the parties concerned but we are asked, as it were, to engraft same into or on to that form of contract which they chose to adopt. There is nothing to help in the form of contract except the words "to be issued" at the heading which I would read "authorized capital to be issued."

I cannot infer from the use of such terms in the place it occupies in the instrument and read in light of the attendant circumstances any such meaning as to

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imply that in default of that expectation being realized the subscription for stock should be null and void.

Then we have it made clear by the evidence that there were no persons present at the making and signing of the contract except the appellant and Mackay. The latter swears positively that the conversation did not last more than five minutes, and that he did not use any language properly giving rise to any such expectations.

The appellant failed to contradict this, or swear that it lasted longer. His memory fails, he admits, to serve him either as to that or the express language which passed between them.

Now I take it that in weighing evidence of that kind and determining which of these two parties is right, that the man who acts in the way the appellant acted towards Mackay and towards the respondent in failing to answer one single word calling attention at different times, spread over many months, demanding payment, is not in a position to ask any court to accept his version of the understanding reached or such a construction as he seeks to put upon the transaction to which he subscribes his name, when that document as I hold neither expressly nor by implication bears it.

Common fairness and a straightforward mode of dealing with other men as well as a proper regard for the rights of others on the part of a business man, renders it imperative, in my opinion, that under the circumstances detailed in the evidence herein the appellant should have spoken promptly and decidedly and explained why he was failing to pay.

It may not be estoppel *in pais* as usually understood, but it is the kind of thing that precludes a man from imputing to another conduct or expressions of a misleading character, which he absolutely denies, when

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there is nothing in the documents that passed entitling him to take that position. I think the effect of such denial stands good under such circumstances as presented by this case and deprives appellant of any effective support for his understanding on which he rests his appeal.

And as to the ground of illegality of the common stock which he presents in his evidence, I fail to find it made good by anything in the case.

I, therefore, think that the appeal should fail with costs, and the judgment below be sustained.

DUFF J.—I think that the appeal should be dismissed with costs.

ANGLIN J.—On or about the 30th December, 1911, J. A. Mackay, president of J. A. Mackay & Co., Ltd., procured the signature of the defendant Robert to the agreement sued upon, which is as follows:—

Canadian Jewellers, Ltd.

	Authorized Capital	To be issued.
Preferred shares	$2,500,000	$1,500,000
Common shares	2,500,000%	1,500,000

All shares of the par value of $100 each.

We, the undersigned, severally subscribe for and agree to purchase from J. A. Mackay & Co., Limited, preferred shares of the above company to the number and amounts set opposite our respective names. The price to be paid for said shares is 95% of the par value thereof with 50% of the par value thereof in bonus common stock of the company. The purchase price to be paid on the 15th day of September, 1912.

This underwriting may be pledged or hypothecated with any banking institution or trust company as security for advances. This agreement may be signed in counterpart and all counterparts taken together shall be deemed to be one original instrument,

Name of Subscriber.	Address.	No. of shares subscribed.	Total amount, of subscription.	Witness
(Sgd.)			$10,000.00	(Sgd.)
E. A. Robert	Montreal.	One hundred.		J. A. Mackay

The Canadian Jewellers, Limited, was incorporated by letters patent issued under the "Dominion Companies Act."

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Prior to the 30th December, 1911, Mackay, who attended to its "financing" and the underwriting of its stock for the new company, had borrowed for that purpose from the plaintiff, the Montreal Trust Company, $131,103.10. On the 6th January, 1912, he hypothecated the defendant's agreement to purchase stock with the trust company as collateral security for the advances already made to him and for further advances. Further advances appear to have been made to Mackay after the 30th December, 1911. But, so far as appears, no advance was made after the 19th of April, 1912.

This action was brought by the Montreal Trust Company against Robert on the 21st of January, 1915, to enforce payment by him of the amount of his underwriting ($9,500), with

interest thereon at 7% per annum from the 15th September, 1912, the action being accompanied by a tender and deposit of a certificate issued in the name of the defendant for 100 shares of the preferred stock and another certificate for 50 shares of the common stock of the Canadian Jewellers, Limited.

Apart from formal pleas, the defences set up are that the signature of the defendant was procured by misrepresentations made to him by Mackay as to the amount of preferred shares and common shares "to be issued" and as to the jewellery businesses to be acquired by the new company; that the shares tendered were part of a block of stock illegally issued by the Canadian Jewellers, Limited, without consideration, and for illegal secret profits and commissions and are not fully paid up and are of no value; and that the company has mortgaged its assets, with the assent of J. A. Mackay & Company, for $70,000 and has thus rendered its stock worthless.

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The last mentioned plea, probably demurrable, was not pressed.

The evidence does not support the plea of illegality in the issue of shares. J. A. Mackay & Company appear to have paid for those issued to them.

The company was in fact organized and has been carried on with a subscribed capital of only $600,000 in preference shares and $671,000 in common shares, and did not include two or three of the principal jewellery firms whose businesses the defendant claims it was represented to him would be acquired.

It may be noted that the defendant does not plead that it was a term or condition of his subscription that he should be liable thereon only in the event of and upon $1,500,000 in preference shares and $1,500,000 in common shares of the capital stock being subscribed for. The plea in this connection is solely one of misrepresentation. Had it been of the former character, however, in view of the provisions of the "Companies Act" (R.S.C. ch. 79) as to the commencement of business (sec. 26) and the allotment of stock and liability for calls thereon (secs. 46, 80, 132, 140), I should hesitate to hold that a mere statement at the head of an underwriting agreement as to the capital to be issued implies that it is a term or condition of the subscriber's contract that he should be under no liability to take or pay for shares unless and until the amount so stated has been subscribed for, or that his liability should cease if the scheme of issuing the amount of stock thus stated should be

changed and the issue of a smaller amount determined upon. *Ornamental Pyrographic Woodwork Company* v. *Brown*[3]; *Lyon's Case*[4]; Buckley's Law of Companies (1902), 569-70; but see *Elder* v. *New Zealand Land Improvement Company*[5].

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In the case of a company incorporated under that statute, a subscription contract intended so to restrict or qualify the subscribers' liability, must, I think, in view of its provisions above referred to, be couched in clear and explicit language. But it is unnecessary to pass upon a possible defence which has not been pleaded.

Neither is it pleaded that the shares for the price of which the defendant is sued are not the shares which he agreed to purchase, or that the company is not that a portion of whose stock he agreed to underwrite. That was the issue in *Windsor Hotel Co.* v. *Laframboise*[6].

Dealing with the case, therefore, purely as one of misrepresentation, it becomes material to consider the evidence given in support of that defence.

The testimony of the defendant is far from wholly satisfactory. Indefinite in his examination in chief, on cross-examination he probably deposed with sufficient distinctness and particularity to the making of the representation as to the amount of the stock to be issued, but he left quite vague and uncertain what he may have been told, if anything, as to the inclusion of the firms whose omissions he complained of. Mr. Mackay, called in rebuttal, distinctly denied having made the statement that the acquisition of the businesses of these firms had been or would be arranged for, but did not deny that he had made the representation as to capitalization. With Mr. Justice Martineau I am of the opinion that the latter is the only misrepresentation the making of which has been at all satisfactorily proved. The defendant, however, did not pledge his oath either that he had been induced to subscribe by this representation or that he would not have done so had it not been made. Under the circumstances of this

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case, especially having regard to the defendant's failure to disaffirm or repudiate his contract for at least two and a half years after he had full knowledge of the falsity of the misrepresentation he alleges, I think strict proof that he had in fact been induced by it to

[3] 2 H. & C. 63.
[4] 35 Beav. 646.
[5] 30 L.T. 285.
[6] 22 L.C. Jur. 144.

subscribe should be exacted. Art. 993 C.C.; 4 Aubry et Rau (1902), No. 343 bis. p. 504; Larombière, art. 1116, No. 3; 24 Demolombe, No. 175; *Morrison* v. *The Universal Marine Ins. Co.*[7]; *Smith* v. *Chadwick*[8]. His defence upon both the alleged misrepresentations, in my opinion, therefore fails.

But had he made a case which otherwise would clearly entitle him to avoid his contractual obligations *(Bwlch-Y-Plwm Lead Mining Co.* v. *Baynes*[9]), I incline strongly to the view that his delay in repudiating liability should, under all the circumstances, be taken to raise a presumption of acquiescence or confirmation—of an election not to avoid, which precludes his doing so. *Qui tacet consentire videtur.*

According to his own evidence, Mr. Robert made up his mind some time before the maturity of his underwriting on the 15th September, 1912, that he was not bound by it. He does not give more precisely the date when he learned of the falsity of the representations of which he complains. Although he was written to frequently—by the plaintiff, on the 14th September. 1912, the 13th December, 1912, and the 7th of August, 1913—and by J. A. Mackay & Company, on the 9th November, 1912, and the 5th of May 1914—pressing for payment of his subscription, he took no step to repudiate liability—he did not vouchsafe an answer to any of the letters so addressed to him. He simply allowed matters to rest in this position until after this

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action was begun in 1915. His first repudiation was that in his plea delivered on the 1st April, 1915. Under these circumstances he is, in my opinion, debarred from setting up the alleged misrepresentations as a defence. I think he would be so debarred if this action were brought by J. A. Mackay & Company or by the Canadian Jewellers, Limited, itself, as a transferee of his subscription; and his position is certainly not more favourable when sued by the plaintiff as pledgee for *bonâ fide* advances.

In the judgment of the Judicial Committee in *United Shoe Machinery Company of Canada* v. *Brunet*[10], (a case from the Province of Quebec, in which, however, the defence of misrepresentation was rejected because of positive acts implying acquiescence) it is formally laid down that in order to maintain a plea that he was induced by false representations to make the contract sued upon, a defendant must establish

[7] L.R. 8 Ex. 197 at p. 206.
[8] 9 App. Cas. 187 at pp. 195-200
[9] L.R. 2 Ex. 324.
[10] [1909] A.C. 330.

(1) that the representations complained of were made; (2) that they were false in fact; (3) that the person making them either knew that they were false or made them recklessly without knowing whether they were false or true; (4) that the defendant was thereby induced to enter into the contract; and (5) that immediately on, or at least within a reasonable time after, his discovery of the fraud which had been practised upon him he elected to avoid the contract and accordingly repudiated it. Lord Atkinson says:—

> Of these the last is the most vital in the sense that it is the condition precedent which must be fulfilled before the respondents can escape from the obligation of the contracts they have entered into, however fraudulent those contracts may be. A contract into which a person may have been induced to enter by false and fraudulent representation is not void but merely voidable at the election of the person defrauded after he has had notice of the fraud.

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This rule in regard to voidable contracts has always been held to apply *ratione subjectæ materiæ* with particular force to an agreement to take shares in a company.

Lord Davey, in his judgment in *Aaron's Reefs* v. *Twiss*[11], says:—

> Lapse of time without rescinding will furnish evidence of an intention to affirm the contract. But the cogency of this evidence depends on the particular circumstances of the case and the nature of the contract in question. Where a person has contracted to take shares in a company and his name has been placed on the register, it has always been held that he must exercise his right of repudiation with extreme promptness after the discovery of the fraud or misrepresentation, for this reason: the presence of his name on the register may have induced other persons to give credit to the company or to become members of it.

Mellor J. in delivering the judgment of the Exchequer Chamber in *Clough* v. *London and North Eastern Railway Co.*[12], so often quoted with approval said, at p. 35:—

> So long as he (the person on whom the fraud was practised) has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind.
>
> And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive to shew that he has so determined.

[11] [1896] A.C. 273 at p. 294.
[12] L.R. 7 Ex. 26.

We are not here dealing with an ordinary contract to acquire from a shareholder shares already issued in a company organized and carrying on business. The defendant's agreement was an underwriting contract. It is so characterized upon its face. He must have been fully aware that his subscription might operate as an inducement to others to take stock in the Canadian Jewellers, Limited, or to a company or person in the position of the plaintiff either to give credit to it or to a

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person holding towards it the relation which J. A. Mackay & Company occupied, or to extend the term of such a credit, if already given. His position was not materially different in that respect from what it would have been had he made application for his stock directly to the company itself.

> A person seeking to set aside a voidable contract to take shares in a company on the ground of misrepresentation must take steps for that purpose immediately on discovering the misrepresentation.
>
> He must proceed with the very utmost promptitude possible in such a case.

Ogilvie v. Currie[13].

> If a man claims to rescind his contract to take shares in a company on the ground that he has been induced to enter into it by misrepresentation, he must rescind it as soon as he learns the facts or else he forfeits all claim to relief.

Sharpley v. Louth and East Coast Rly. Co.[14].

> It is impossible,

said Lord Cranworth in *Oakes* v. *Turquand*[15],

> to allow a person who has taken shares and has gone on for nearly a year taking his chance of profit to turn round when the speculation has proved a failure and claim to be released on the ground that he was ignorant of something with which the least diligence must have made him acquainted.

Still more clearly must it be impossible where the case is one not merely of culpable ignorance, but of actual knowledge of the grounds of voidability.

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[13] 37 L.J. Ch. 541.
[14] 2 Ch. D. 663 at p. 685.
[15] L.R. 2 H.L. 325 at p. 369.

As put by Mr. Justice Riddell, delivering the majority judgment in the Ontario Appellate Division in *Morrisburg and Ottawa Electric Rly. Co.* v. O'*Connor*[16], holding that repudiation of liability on a subscription for shares on account of matter entailing voidability must be made promptly after discovery of the facts,

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> the subscriber is not bound, but may elect to approve or disaffirm—in short the contract is voidable and not void. It is wholly immaterial on what ground or for what reason it is voidable—the important matter is that it is so.

Compare the language of Lord Cairns in *Ogilvie* v. *Currie*[17], at the beginning of p. 546: See Art. 1000 C.C.

The man who has learned facts which entitle him to avoid a contract cannot be allowed to defer indefinitely the exercise of an election in which others are interested. The time must come when he will be taken either to have foregone that right or to have exercised it in favour of affirming. In the case of subscriptions for shares in a company, as in that of contracts of a speculative character, a comparatively short delay will ordinarily be conclusive: *Bawlf Grain Co.* v. *Ross*[18]; *Directors of Central Rly. Co. of Venezuela* v. *Kisch*[19].

Viewed as a case of election, actual or presumed, prejudice to the plaintiff, to the Canadian Jewellers, Limited, or to its creditors or other shareholders would seem to be immaterial and irrelevant to the answer to the plea of misrepresentation. If, on the other hand, that answer should be regarded as one of laches, such prejudice may be a material element. From this point of view it may be that if the subscriber's delay in repudiating after having acquired knowledge of grounds of voidability has caused no prejudice whatever to the company, to its shareholders or to its creditors, it would be excusable. But where, as in the case at bar, the circumstances give rise to a strong probability that some such prejudice must have been occasioned, I think the burden will be on him to make out that case—always difficult and under ordinary circumstances practically impossible. Or it may be that he will be required to establish that under the actual circumstances no such

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[16] 34 Ont. L.R. 161.
[17] 37 L.J. Ch. 541.
[18] 55 Can. S.C.R. 232.
[19] L.R. 2 H.L. 99, at p. 125.

prejudice could have arisen. Nothing of the kind has been attempted here. Other subscriptions were hypothecated by Mackay with the plaintiff after that of the defendant had matured—some of them as late as February, 1913. Having regard to what appears to have been the course of business between Mackay & Co. and the plaintiff it would seem altogether likely that these subscriptions were procured after September, 1912. The plaintiff's loan to Mackay & Co. was allowed to run on. At the time of the trial it was slightly larger than at the end of December, 1912. It is impossible to say that these later subscriptions and this extended term of credit may not to some extent have been influenced by the fact that the defendant allowed himself to continue to be regarded as an underwriter liable to contribute $9,500 to the company's capital. That fact may likewise have affected the loaning of $70,000 to the company of which the defendant has complained.

Where a clear and gross case of laches has been made, such as the evidence here discloses, I very much doubt that the courts can be called upon to enter on the inquiry whether prejudice has or has not in fact resulted in any of the many directions in which it might be possible—an inquiry necessarily prolonged and far-reaching and as to the exhaustiveness of which the attainment of certainty must usually be impracticable. While I fully appreciate the force of the introductory observations of Sir Barnes Peacock upon the doctrine of laches in delivering the judgment of the Judicial Committee in *Lindsay Petroleum Co.* v. *Hurd*[20], I rather incline to the view that, in a case like that at bar, as in the case of a contract made with an agent to whom a secret commission has been paid, which we have had

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occasion recently to consider fully in *Barry* v. *Stoney Point Canning Co*[21], the possibility of prejudice will itself be deemed conclusive. It was the obvious impossibility of any such prejudice that led to relief being given the defendant in *Aaron's Reefs* v. *Twiss*[22], the delay there alleged having occurred only after the company had declared his shares forfeited.

Lest it might be thought to have been overlooked, I should perhaps refer to *Farrell* v. *Manchester*[23], in which passages are to be found, notably one at p. 356, at first blush somewhat at variance with views I have expressed. That was a case where there had

[20] L.R. 5 P.C. 221, at pp. 239-240.
[21] 55 Can. S.C.R. 51.
[22] [1896] A.C. 273.
[23] 40 Can. S.C.R. 339.

been prompt repudiation followed by some delay in suing for rescission. There were special circumstances which were held sufficiently to account for and to excuse this delay—and the case, it is said, at p. 359:—

> presents few of those characteristics that differentiate the usual stock cases cited from others regarding fraud entitling to rescission, so as to render each day's delay strong evidence of (absence of) that promptitude justice in some cases demands.

Mere lapse of time may import acquiescence amounting to affirmation. If great, it may, without more, do so conclusively: *Clough* v. *London & North Western Railway Co.*[24]. Where the subject matter is highly speculative—where the possibility of others being affected is very great, a comparatively short time may suffice. A man entitled to avoid a contract cannot indefinitely withhold his election in order to exercise it as may ultimately prove advantageous to himself. Had the Canadian Jewellers, Limited, turned out a great success, as a subscriber for $10,000 worth of preference shares out of $600,000 worth issued, and of $5,000 worth of common shares out of an issue of $670,000 worth,

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Mr. Robert's position would have been much better than it would have been, with like success, had the issued capital been $1,500,000 preference and $1,500,000 common; and in that case we should have heard nothing of repudiation. He cannot be allowed to defer his repudiation for nearly three years, with full knowledge of the misrepresentation of which he complains, until satisfied that his interest lies in that direction, having meantime taken the full benefit of the chance of success of the venture.

Had the case at bar arisen in any of the other provinces of Canada, where English law prevails and there is no statutory prescription of the action of rescission for fraud, I should have been prepared to discard the defence of misrepresentation on the sole ground of delay under circumstances importing an election not to avoid, or the loss of the right to elect by acquiescence. The provisions of Art. 2258 C.C. (Art. 1304 C.N.),

> 2258.—The action (*s*) * * * in rescission of contracts for error, fraud, violence or fear are prescribed by ten years. This time runs * * * in the case of error or fraud from the day it was discovered

and the doctrine of the civil law as to the requisites of tacit confirmation (3 Baudry-Lacantinerie, "Des Obligations," Nos. 2024-5 and 2004-5) however are said to present obstacles to the application of this doctrine in the Province of Quebec. I assume Art. 2258

[24] L.R. 7 Ex. 26, at p. 35.

to be applicable at least by analogy to a defence of fraud. Yet we have the authority of the Privy Council in *United Shoe Machinery Co.* v. *Brunet*[25], that unreasonable delay in repudiation affords an answer to a defence of misrepresentation in Quebec. In *Guy on* v. *Lionais*[26], where Art. 2258 had been brought to their

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attention, their Lordships took the same view. At page 104, they say:—

> The transaction * * * was one which, upon a suit brought in proper time, Dame Marguerite Roy might successfully have impeached on the ground of fraud.

At page 107, they continue:—

> The action was no doubt commenced within, though only just within, the legal term of prescription. But that does not in such a suit relieve a party from the consequences of his own acts or laches. A Court of Justice will not give its aid to a person seeking to set aside his own solemn deed of sale, if it appears that he has acquiesced in it for years, lying by, until by circumstances, and the expenditure of capital, the subject matter of the sale has greatly increased in value and new interests have been created in it. He must sue promptly, or explain the delay.

Lemerle in his Treatise on *Fins de Non Reçevoir* says at page 186:—

> Quiconque aurait gardé le silence dans une circonstance où il devait parler, sur une action qu'il devait approuver, pourrait, dans certains cas, être réputé avoir donné un consentement, une approbation susceptible d'opérer fin de non reçevoir.

And at page 189:—

> A-t-on gardé le silence sur une exception d'incompétence, de nullité, ou sur une demande susceptible d'être formée en première instance, ce silence est réputé approbation et emporte renonciation aux moyens qu'on a négligés.

No doubt, as put by Lord Wensleydale in *Archbold* v. *Scully*[27].:—

> So far as laches is a defence, I take it that where there is a Statute of Limitations, the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing; it means more than laches.

It implies an election to affirm or an abandonment of the right to elect to avoid. See too the language of Turner L.J. in *Life Association of Scotland* v. *Siddal*[28].

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[25] [1909 A.C. 330].
[26] 27 L.C. Jur. 94.
[27] 9 H.L. Cas. 360, at p. 383.
[28] 3 De. G.F. & J. 58, at p. 72

Moreover it would seem eminently desirable that a subscription for shares in a company should entail similar obligations and that the right to avoid or repudiate

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it should be subject to the same conditions throughout Canada. All our companies are constituted and organized on a somewhat similar basis and shares in them are of the same nature in Quebec as elsewhere in Canada. Shares in the same company are very often underwritten or subscribed for in several provinces, including Quebec. The English idea as to the nature of the interest of the subscriber for shares or the shareholder and the incidents attached to it runs through all our companies' legislation. Many of the questions which arise in connection with the formation and administration of companies are determined in the Province of Quebec, as elsewhere in Canada, according to the principles established in the English courts. It would, I think, be most unsatisfactory if the right of a subscriber in Quebec for shares in a Dominion company to disaffirm his obligation to take or pay for them should endure for ten years after he had fully learned the facts which render that obligation voidable, whereas the like right of a subscriber in British Columbia or Ontario for shares in the same company would be unavailable to him should he fail to repudiate his obligation with the utmost promptitude reasonably possible after discovering its voidability. While I should deprecate any attempt to modify or affect any doctrine of the civil law of Quebec or an established construction of any legislation of that province by an introduction of English law or by adopting English views or practice merely for the sake of securing conformity, I incline to think that in regard to subscriptions for shares in companies, "in the absence of any legislation in force in Quebec inconsistent with the law as acted upon in England" and other provinces of Canada, and in the absence of any jurisprudence or established practice to the contrary, the courts of Quebec might well accept and apply

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the English rule imposing prompt repudiation as a condition of maintaining a plea of misrepresentation or granting the relief of rescission on that ground, and that while the right to repudiate on that ground may there be held not to be legally extinguished until the expiry of the limitation period prescribed by Art. 2258, the courts may decline to give effect to it in cases where that would be the attitude of courts administering English law. (*Cory* v. *Burr*[29]. The considerations which require the highest degree of diligence in the repudiation

[29] 9 Q.B.D. 463, at p. 469.

of voidable subscriptions for shares in companies under the English law apply with equal force in the Province of Quebec: *Préfontaine* v. *Grenier*[30].

I am, for these reasons, of the opinion that Mr. Robert could not have successfully defended this action had it been brought by J. A. Mackay & Co. or by the Canadian Jewellers, Limited, as assignee of his agreement to take shares. The position of the present plaintiff is, if anything, more favourable.

I would dismiss the appeal.

Appeal dismissed with costs.

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Solicitors for the respondent: Brown, Montgomery & McMichael.

[30] (1907), A.C. 101, 110.