RUSSELL SHORTT (*Defendant*) .....APPELLANT;

AND

MARGARET MacLENNAN AND JEAN MacLENNAN (*Plaintiffs*) ..... } RESPONDENTS.

1958

*Nov. 3, 4

Dec. 18

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Sale of land—Innocent misrepresentation by vendor—Contract affirmed by purchaser—Whether contract can be rescinded.

The plaintiff, as purchaser of a farm, sued for rescission of the contract for sale on the ground of alleged fraudulent misrepresentation by the vendors. The agreement was entered into in May 1954 and the deed and a mortgage were duly executed. The plaintiff went into possession in June 1954 and did not bring his action for rescission until January 1956.

The trial judge found that there had been an innocent misrepresentation by the vendors concerning the quantity of water which might be obtained from a disused well on the farm, and maintained the action. On appeal, the action was dismissed by the Court of Appeal.

Held: The appeal should be dismissed; the plaintiff was not entitled to rescission.

It is well-settled law that rescission of an executed contract for the sale of land will not be granted because of innocent misrepresentation—nothing short of fraud will suffice. Furthermore, the whole course of the plaintiff's conduct established on his part an election to affirm the contract. The long lapse of time without complaint or repudiation, and his acts in working the farm and drilling two new wells, showed an intention to affirm the contract and were strong indications that he was not really persuaded by whatever was said by the vendors, and these conversations did not therefore amount to misrepresentation inducing the contract.

APPEAL from a judgment of the Court of Appeal for Ontario[1] reversing a judgment of Spence J. Appeal dismissed.

W. J. S. Knox, for the defendant, appellant.

G. W. Ford, Q.C., and *W. S. Pearson,* for the plaintiffs, respondents.

The judgment of the Court was delivered by

JUDSON J.:—Under an agreement in writing dated May 5, 1954, the plaintiff became the purchaser of a 200-acre farm. He took possession in June 1954 and the transaction was duly completed by the execution of a conveyance from the vendors with the usual convenants, a mortgage

*PRESENT: Taschereau, Cartwright, Abbott, Martland and Judson JJ.

[1] [1957] O.W.N. 1, 6 D.L.R. (2d) 431.

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back from the plaintiff for a substantial part of the purchase price and the payment of the balance in cash. It was not until January of 1956 that the plaintiff brought an action for rescission, alleging a number of fraudulent misrepresentations by the vendors. The learned trial judge rejected all of these allegations with one exception. He found that there was an innocent—not a fraudulent misrepresentation by the vendors concerning the quantity of water which might be obtained from a disused well on the farm. In spite of his finding against fraud, the learned trial judge granted rescission. On appeal[1], this judgment was set aside and the action dismissed on two grounds: first, because there could be no rescission of an executed contract for innocent misrepresentation, and second, because the plaintiff had elected to affirm the contract. The plaintiff now appeals to this Court, seeking the restoration of the judgment at trial. In my opinion the appeal fails and I would confirm the judgment of the Court of Appeal on both grounds.

As pointed out by the Court of Appeal, the judgment at trial overlooks the decisions of this Court in *Cole v. Pope*[2], and *Redican v. Nesbitt*[3], that an executed contract for the sale of an interest in land will not be rescinded for an innocent misrepresentation. Nothing short of fraud will suffice. Even on the facts, *Redican v. Nesbitt* is indistinguishable from the case at bar. In both cases the misrepresentation complained of and alleged to be fraudulent related to the physical state of the property and not to title or encumbrances. In *Redican v. Nesbitt* fraud was rejected by the jury on what this Court held to be a defective charge according to the rule laid down in *Derry v. Peek*[4]. In consequence a new trial was necessary but the necessity arose from inability to grant rescission of a completely executed contract for misrepresentation short of fraud except where there was error *in substantialibus*. It was expressly stated that the principle applied not only to matters of title but also to cases involving the physical state of the property.

[1] [1957] O.W.N. 1, 6 D.L.R. (2d) 431.
[2] (1898), 29 S.C.R. 291.
[3] [1924] S.C.R. 135, 1 D.L.R. 536, 1 W.W.R. 305.
[4] (1889), 14 App. Cas. 337 at 374.

The starting point of the rule enunciated in *Redican v. Nesbitt* is usually taken to be the dictum of Lord Campbell in *Wilde v. Gibson*[1]. This case held that a vendor's silence concerning a right-of-way over property was not a ground for rescission of an executed contract when it was not shown that the vendor knew of its existence. This was a reversal of the decision of Knight-Bruce V.C., who had held that the silence of the vendor together with the physical condition of the property amounted to an assertion that no right-of-way existed. Obviously the case was concerned with matters of title—the extent of the duty of a vendor of land to know his own title, to produce documents of title in his possession and to disclose what he knew about his title. A complicating factor was an allegation of fraud in the pleadings which was abandoned during the course of the argument. On the inferences drawn from the facts and on the principles applied, the decision was severely criticized as early as 1849 by Sugden in his Law of Property, p. 614. Doubts of the authority of the case were expressed in Pollock on Contracts and Fry on Specific Performance from the earliest editions of these works.

In spite of this, the application of the principle was significantly extended in *Seddon v. North Eastern Salt Company, Limited*[2] and *Angel v. Jay*[3]. What had begun as a rule of conveyancing was applied to matters unrelated to title. In *Seddon* rescission was refused of a completed contract for the sale of the controlling shares in a limited company where there was an innocent misrepresentation of the extent of previous trade losses, and in *Angel v. Jay* it was held that there could be no rescission of an executed lease where the misrepresentation related to the physical state of the property. These last two decisions have recently been criticized in the Court of Appeal in England but the criticism formed no part of any *ratio decidendi* and was not concurred in by the majority of the Court.

These doubts and criticisms may indicate an insecure foundation for the rule in England but to the extent that they had been expressed, up to the year 1924, they were considered and rejected in *Redican v. Nesbitt*. Anglin J.

[1] (1848), 1 H.L. Cas. 605, 9 E.R. 897.
[2] [1905] 1 Ch. 326.
[3] [1911] 1 K.B. 666.

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at p. 150 stated that the doctrine was "too well established to admit of controversy" and it is clear from the judgments that its extension to matters outside the field of conveyancing was not overlooked. The rule has a rational foundation and this was stated in the clearest terms by Duff J. at p. 146:

> The whole point is: At what stage does *caveat emptor* apply?
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> The vendee may rely after completion upon warranty, contractual condition, error *in substantialibus,* or fraud. Once the conveyance is settled and the estate has passed, it seems a reasonable application of the rule to hold that as to warranty or contractual condition resort must be had to the deed unless there has been a stipulation at an earlier stage which was not to be superseded by the deed, as in the case of a contract for compensation. *Bos v. Helsham,* L.R. 2 Ex. 72 at p. 76. Representation which is not fraudulent, and does not give rise to error *in substantialibus,* could only operate after completion as creating a contractual condition or a warranty. Finality and certainty in business affairs seem to require that as a rule, when there is a formal conveyance, such a condition or warranty should be therein expressed, and that the acceptance of the conveyance by the vendee as finally vesting the property in him is the act which for this purpose marks the transition from contract *in fieri* to contract executed; and this appears to fit in with the general reasoning of the authorities.

The second ground upon which the Court of Appeal found error in the judgment at trial was that the plaintiff had affirmed the contract. Everything in the evidence subsequent to completion pointed to this conclusion. Immediately after taking possession, the plaintiff cleaned out the well and failed to get water. In August and September 1954, he drilled two new wells and again failed to get water. Nevertheless, he remained in possession of the farm and carried on farming operations and not a word was heard from him about the alleged misrepresentation until the institution of this action in January 1956. He was still in possession at the date of the trial. Affirmation of the contract is the irresistible inference from this conduct and also a strong indication that this purchaser, an experienced farmer who had made at least four inspections of the property before he made his contract, was not really persuaded by whatever was said between him and the vendors and that these conversations did not amount to a misrepresentation inducing the contract.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the defendant, appellant: W. J. S. Knox, Sarnia.

Solicitors for the plaintiffs, respondents: MacEwen & Pearson, Sarnia.

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*PRESENT: Taschereau, Rand, Fauteux, Abbott and Judson JJ.