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*May 11, 14.
*June 22.

BAWLF GRAIN COMPANY (PLAINTIFF) APPELLANT;

AND

T. W. ROSS (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Contract—Validity—Ratification—Drunkenness—Void or voidable contract.

The contract entered into by a man whilst in a state of drunkenness is not void but only voidable, and is therefore capable of ratification by him, when he becomes sober; and the failure to repudiate such contract within a reasonable time, where the circumstances are such that in justice the right of option should be exercised with promptness, should be deemed tantamount to an express ratification. Duff J. dissented.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, reversing the judgment of the trial judge, by which the plaintiff's action was maintained with costs.

The issues raised on the present appeal are stated in the judgments now reported.

Symington K.C. for the appellant.
Chrysler K.C. for the respondent.

THE CHIEF JUSTICE.—There appears to have been considerable divergence of opinion in the courts at different times as to the validity of a contract entered into by a man whilst in a state of intoxication. This is pointed out in a note to the case in the House of Lords of *Butler* v. *Mulvihill*(1).

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 1 Bligh 137.

The law as laid down in the Co. Litt. 247*a* is that

as to a person who, by his own vicious act, depriveth himself of his memory and understanding, as he that is drunk,—that kind of *non compos mentis* shall give no privilege or benefit to him or his heirs.

But in *Cooke & Clayworth*(1), the Master of the Rolls said, he apprehended that a deed obtained from a man in such extreme state of intoxication as to deprive him of his reason would be invalid at law. This was followed in other cases.

However, I think the law must be taken now to be as laid down in *Matthews* v. *Baxter* (2), that the contract of a drunken man is not void but voidable only.

What is only voidable and not void cannot be held as invalid until it has been rescinded. It is not enough to avoid the contract, that nothing is done to affirm it, it must be disaffirmed. In *Deposit Life Assurance Co.* v. *Ayscough*(3), the defence was that the contract was induced by fraud and Lord Campbell C.J. said:—

It is now well settled that a contract tainted by fraud is not void, but only voidable at the election of the party defrauded. There is nothing on this record to shew that the defendant has avoided the contract by which he became a shareholder. He had a right, if he pleased, notwithstanding the fraud, to keep the shares and receive the dividends: and he may have intended to do so. The plea, therefore, should go further and shew, not only that he was induced to become a shareholder through fraud, but that on discovering the fraud he disaffirmed the transfer of the shares to him. In *Newry and Enniskillen Railway Co.* v. *Coombe* (4), the plea was infancy, and that the defendant, whilst an infant, disaffirmed the transfer. It was held that, if the defendant, after coming of age, affirmed the transfer, that would be a matter for replication, and need not be negatived in the plea; but there, the plea shewed the transfer void, unless an affirmative act were done to render it valid; here it shews the transfer valid, unless an act was done to avoid it."

In *Oakes* v. *Turquand* (5), which was also a case of fraud, it was held that a party defrauded may

(1) 18 Ves. 12 at page 16.
(2) L.R. 8 Ex. 132.
(3) 6 E. & B. 761.
(4) 3 Ex. 565.
(5) L. R. 2. H. L. 325.

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rescind the contract, but he must do so within a reasonable time.

The courts can look with no favour on the defence of incapacity through drunkenness, and will certainly extend to the defendant in such case no greater privilege than to one induced to enter into the contract through fraud.

The respondent, if he meant to avail himself of the privilege allowed him by the law of avoiding the contract by pleading "his own vicious act," was bound to disaffirm and to do so promptly. The fact is that he did nothing for more than a month. He was not entitled to wait and see whether the price of wheat went up or down, and disaffirm or affirm the contract accordingly.

The appeal should be allowed with costs.

DAVIES J.—Ever since the case of *Matthews* v. *Baxter*(1), in 1873 was decided, the law has been settled that the contract of a man too drunk to know what he was about when entering into it, is voidable and not void, and therefore capable of ratification by him when he becomes sober.

Such a contract is on the same footing as a contract made by a person of unsound mind, whose mental incapacity, in order to avoid the contract, must be known to the other of the contracting parties. *Imperial Loan Co.* v. *Stone*(2).

In the case before us the respondent entered into a contract with the appellants for the sale to them of a quantity of wheat for future delivery at a certain price, and it was found by the trial judge as a fact that, when he did so, he was drunk to the knowledge of the

(1) L.R. 8 Ex. 132.

(2) [1892] 1 Q.B. 599.

agent with whom he made the contract in the sense of not being capable of fully appreciating the transaction.

The question on this appeal therefore was whether he had elected not to repudiate the contract within a reasonable time after he became sober and had full knowledge of his contract.

The contract being voidable only and full knowledge of its nature and terms, and that he had entered into it being brought home to him the day after he entered into it when he was perfectly sober, he was bound, in my opinion, within a reasonable time thereafter to repudiate it if he desired to do so, or at any rate if he delayed making any election with regard to it to do so at his peril if such delay causes loss or damage to the other party.

The contract was one relating to the sale of grain, a commodity varying in price from day to day, and this necessarily constitutes an important element in determining what would be an unreasonable time for him to wait before attempting to repudiate. He had knowledge on the third or fourth of October, some days after he entered into the contract, that the plaintiffs considered the contract a good and binding one. He knew all about wheat, its varying price in the market, and what a speculative contract he had entered into.

Later in the month of October he was again advised by the plaintiffs as to the shipment of the grain he had agreed to sell. He took no action for delivery, evidently awaiting to see what the market price would be. If the price of grain fell, he stood to win by holding to the contract. If it rose in price he stood to lose. He waited till the sixth of November, when the price had

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gone up substantially, and then he took his first step towards repudiating.

In my opinion, looking to the speculative character of the article he had agreed to sell and deliver at a future date, he was then too late. By his continued silence during the whole month of October, and up to the sixth of November, he must, in my opinion, under the facts as proved, be taken to have affirmed the contract originally voidable.

If the market had fallen I cannot entertain a doubt that he would have elected to affirm and claim the price his contract called for.

He waited an unreasonable time under the circumstances before repudiating, and will be held therefore to have affirmed.

But it is contended that the defendant, having been found to have entered into the contract while drunk, with the knowledge of the plaintiffs' agent, the contract must be held to have been obtained by fraud and had not been affirmed.

In cases of contracts obtained by fraud it was held by the Exchequer Chamber in *Clough* v. *London and North Western Railway Co.*(1), at p. 35, that:—

> the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election?

They go on to say:——

> We think that so long as he 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.

Now I cannot doubt in this case that even if it was held that defendant's conduct up to the time of the

(1) L.R. 7 Ex. 26.

sale by the plaintiffs did not amount to an election one way or the other the consequence of his delay seriously affected and prejudiced the plaintiffs, who, in the ordinary course of business, sold the grain which the defendant had agreed to sell, and deliver to them, at a loss which they now seek to recover, and that this consequence of defendant's delay precluded him from afterwards exercising his right to rescind.

I would allow the appeal with costs here, and in the court appealed from, and restore the judgment of the trial judge.

IDINGTON J.—I think this appeal should be allowed with costs.

The condition of the respondent, when he signed the agreement of the 30th of September, to sell appellant his wheat, was such (to the knowledge of the latter's agent) as to entitle him upon the receipt of the appellant's confirmation thereof, to repudiate the contract.

The contract bound appellant from the moment respondent received that confirmation and he alone having the option, could not hold the other an unreasonable length of time in such suspensory condition.

There is ample authority that lapse of time with full knowledge of the facts such as the learned trial judge has found herein that the respondent had, may furnish such evidence of acquiescence on the part of him entitled to repudiate a voidable contract as an election not to exercise his option and deprive him thereof.

Each case must be determined upon a due consideration of what is reasonable in the circumstances.

The argument that there must be some affirmation or ratification communicated to the other party by him having such an option, seems to be quite untenable.

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If the surrounding facts and circumstances are such as render prompt repudiation a duty resting upon him who desires to exercise his option in such a case then an unreasonable length of time taken to communicate his decision when there is nothing in the case excusing him from doing so, binds the court, I think, in law, to hold him to have determined to abide by his contract.

I think, in this case, no fair minded man could have refrained from responding to the confirmation received, and read when sober, unless upon the hypothesis that he had decided not to exercise his option.

A month's consideration was far more than necessary, and but for the rising market, I suspect the respondent never would have had any hesitation, and would not have needed the appellant's letter of the 20th October, reminding him of his duty.

Why did he not answer that communication? Was it because he felt he could sell for a higher price? Possibly in fact he did and realized a handsome profit exceeding appellant's loss.

Fair dealing between men is what I think the law aims at in such cases as this.

To infer acquiescence from respondent's failure early in October, upon reading the communication of appellant, to exercise his option, proceeds upon that view.

Unfortunately the development of the law upon the subject has been of that misleading character, that though great lawyers held that a contract by a man so drunk as to be incapable of understanding what he was about was void, as shewn (in 1845) by *Gore* v. *Gibson* (1), and earlier cases yet in *Molton* v. *Camroux*(2), the results of a contract with a lunatic were treated differ-

(1) 13 M. & W. 623.

(2) 4 Ex. 17.

ently and then (1873) in *Matthews* v. *Baxter*(1), on a demurrer to a replication which affirmed that after the defendant became sober, and able to transact business, he ratified and confirmed the contract, the replication was held good and the learned judges tried to explain away the prior judicial expressions relative to the like contract, and held it was only voidable at the option of the drunken man.

I have assumed this latter decision to express the law as existing now, but that is very far from supporting the proposition, seemingly assumed below, that some overt act of ratification communicating to the other party to the contract the decision or election of the drunken man is necessary.

All that was decided in *Matthews* v. *Baxter*(1) was that actual ratification as pleaded was a good answer. It did not decide the converse that ratification was necessary.

It simply implies that as you cannot ratify a void contract, it must be now held as result of the decision that the contract of a drunken man is not void, but merely voidable. And to avoid it repudiation is necessary.

And hence it must be treated as other voidable contracts of a like nature in law. The cases of fraud which enable one party to a contract to repudiate it are analogous, and in such cases the necessity for exercising the right of repudiation within a reasonable time after discovery of the fraud has been many times affirmed.

There so frequently occur circumstances excusing delay that no other rule can be laid down than to insist upon a reasonable course of conduct and that implies regard for the rights of others.

(1) L.R. 8 Ex. 132.

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To maintain the judgment appealed from herein, would enable the drunken man to practise in such like cases the grossest fraud with impunity.

To bind him, as I submit the law requires, to repudiate if he desire within a reasonable time on discovery protects both and promotes fair dealing.

A due observance of such principles requires the allowance of this appeal.

DUFF J. (dissenting)—After a good deal of doubt on the question whether the respondent is entitled to succeed for the reasons stated in the judgment of Mr. Justice McCarthy, with which Mr. Justice Stuart concurred, I have come to the conclusion that those reasons ought to be given effect to, and, although I think the appeal fails on other grounds which do not depend upon those reasons, I think it is right to state the fact of my concurrence in them. Voidable, as applied to contracts, is not unambiguous. Among common lawyers it is used indifferently to express the fact that a contract or transaction *ex facie* valid, which somebody, nevertheless, is entitled, at his option, to treat as not binding, is in truth valid until the person so entitled has done what amounts in law to an election to treat it as null; and to express the fact that a contract or transaction *ex facie* subsisting is, *vis à vis* one of the apparent parties to it, of no legal effect until he does something which amounts to an election on his part to adopt it as binding upon him or to enforce it against somebody else.

And, therefore, when it is said that a contract between a person of unsound mind or drunk and being in such a condition as not to appreciate what he is doing, and another who knows his condition, is voidable at the option of the former, the statement is

ambiguous. The rule of the Roman law appears to have been that where incapacity arising from infancy or unsoundness of mind existed, there was no contract of which the law could take notice because of the absence of *assensus*.

The course of development in the English law of the rule governing the rights of a person entering into a contract or going through the form of entering into a contract while insane is very clearly traced in the judgment of Fry L.J. in *The Imperial Loan Co.* v. *Stone*(1). Under the old rule the incapable person was by law precluded from setting up his incapacity in answer to an action on the so-called contract. Under the modern rule this disability is removed where it is shewn that the other party had at the time of the transaction knowledge of the incapacity of the other.

The rule thus stated is consistent with two diverse theories concerning the true juridical character of the act or acts upon which the action is based. The law may regard the seeming contract as having no legal effect as against the party having the right to deny its validity until such party ratifies it, but as becoming, on such ratification, a binding contract. On the other hand, what occurred may be treated as a contract capable of being invalidated at the option of the person entitled to dispute it, but valid unless and until rescinded by him.

There is no decision which authoritatively sanctions either of these two conflicting theories to the exclusion of the other. The more logical view would appear to be, however, that, there being an absence of capacity to assent and consequently no assent, there is no contract at all until assent is supplied by something

(1) [1892] 1 Q.B. 549.

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amounting to ratification. This view is not inconsistent with that branch of the rule which enables the temporarily incapable person, once he has recovered his capacity, to hold the other party to the apparent bargain, because this may be regarded as a just consequence of the unconsciencious conduct of the latter in attempting to bring about a contract with a person knowing him to be incapable of understanding what he was doing, and indeed this is the plight in which, as a general rule, a person contracting with an infant finds himself or may find himself, though ignorant of the fact of non-age and having no reason to suspect it. The language of the judges who decided *Matthews* v. *Baxter*(1), as well as the language of text writers (see, *e.g.*, Anson on Contracts, p. 151), points to this as the more generally held theory.

The distinction is plain, of course, between cases where there is no consent because of no capacity to consent and cases in which there is true consent, but consent brought about by such means or arising under such circumstances as to entitle one of the parties to disaffirm the transaction; and in the case, it may be observed, of the temporary lunatic or the drunkard, the above-mentioned considerations have even greater force than in the case of the infant, for in the former cases absence of assent is a fact, the incapacity is an incapacity in fact, while in the case of the infant there may be and in most instances there is, no doubt, a real assent in fact. In *Oakes* v. *Turquand*(2), at p. 375, the judgment of Lord Colonsay points to the distinction existing between the force of the word voidable as applied to contracts entered into by a person

(1) L.R. 8 Ex. 132.

(2) L.R. 2 H.L. 325.

sui juris but procured by fraud and as applied, on the other hand, to the contracts of incapable persons. I quote the passage:—

> A contract obtained by fraud is voidable, but not void; does it mean void till ratified, or valid till rescinded? The latter is the rule where the rights of a third party intervene. That I hold to be clearly the import of the doctrine that a contract induced by fraud is not void but voidable. I hold that the appellant did agree to become a member of the company. He may not have been induced to agree by fraud, but, having regard to the language of the statute, what we have to look to is this, whether he has agreed to become a member or not. It might be a different case, and would be a different case, in regard to a party who had no power, no will, to give an assent, such as an insane person or a pupil.

It is no answer to this to say that the law regards as actual fraud the conduct of a person who procures a seeming contract from a drunken person or a person temporarily insane, to such a degree as not to know the nature or effect of the transaction he is purporting to take part in. It has been held, and, in my judgment, rightly held, that conduct such as that of the agent of the appellant company disclosed by the evidence before us is fraud in fact—and fraud indeed of a very odious kind—not in contemplation of law merely. The argument presented on behalf of the appellant company is that because the conduct of the other party in acting with knowledge of the incapacity of the person sought to be charged is an essential element in the latter's defence, therefore the transaction, which in fact never was a contract, because the hypothesis is that there never was any assent in fact, must be treated in law as belonging to the class of true contracts resting upon an actual *assensus ad idem*, but capable of disaffirmance by reason of fraud. But what justification can there be for erecting this fiction of assent? I can see no reason for it and there is certainly no authority for it. On the other hand, the

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view which has found acceptance in the court below can be rested on grounds which are simplicity itself—the knowledge possessed by the capable person of the other's incapacity entitles the temporarily incapable person to set up the temporary incapacity and at the same time precludes the capable party from denying that there was a contract in fact if the other, after he has recovered his capacity, chooses to affirm it. That is a view which appears to be consonant not only with sound theory but with justice and convenience as well.

But I propose to consider the appellant company's rights upon the hypothesis also that the so-called contract of the drunkard or of the person temporarily insane falls within the other class of voidable contracts, namely, contracts which are capable of being disaffirmed by one of the parties, but until disaffirmed are valid. On behalf of the appellant company it is contended that the so-called contract of a drunkard, the other party having knowledge of his condition, are binding upon the drunkard unless disaffirmed by him, and that the rules governing this right of disaffirmance are the same as those which govern the right to rescind a contract on the ground that it was obtained by fraudulent misrepresentation, and I shall consider the grounds upon which the appeal is based on that hypothesis.

The respondent, it is said, first in fact elected to affirm the contract, and secondly, by his conduct, precluded himself from disaffirming the contract, because (*a*) he delayed his disaffirmance for an unreasonable time, (*b*) by his conduct he led the appellant company reasonably to believe that he intended to affirm the contract, upon which belief they acted to their prejudice, (*c*) by reason of his delay the position of the

appellant company was prejudicially affected in a substantial degree.

These contentions raise questions of law and of fact. First, as to the law. The common law doctrine on the subject is explained and discussed in several cases. I shall refer in particular to the judgments of the Exchequer Chamber in *Clough* v. *London and North-Western Railway Co.*(1); *Morrison* v. *The Universal Marine Ins. Co.*(2), which must be read with the judgment of Lord Blackburn in *Scarf* v. *Jardine*(3), at page 361; the judgment of the Privy Council in *The United Shoe Machinery Co.* v. *Brunet*(4); and the judgments of the Law Lords in *Aaron's Reefs* v. *Twiss*(5). I shall deal first with the contention that the proper conclusion from the evidence is that the respondent, before the action was brought, elected to affirm the so-called contract.

Election is something more than the mere mental operation; choice in itself is not sufficient, as Lord Blackburn said in *Scarf* v. *Jardine*(3), at pp. 360 and 361,

> where a party in his own mind had thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him.

The choice must be expressed by words or by unequivocal act.

> The determination of a man's election shall be by express words or by act:

Clough v. *London and North-Western Railway Co.*(1), at p. 34; "act" is explained in the same judgment to mean unequivocal act, and in *Scarf* v. *Jardine*(3), at

(1) L.R. 7 Ex. 26.
(2) L.R. 8 Ex. 197.
(3) 7 App. Cas. 345.
(4) [1909] A.C. 330.
(5) [1896] A.C. 273.

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p. 361, Lord Blackburn explains unequivocal act to mean

> An act which would be justifiable if he had elected one way and would not be justfiable if he had elected the other way.

Election, therefore, involves the determination to adopt a given course and the manifestation of that determination by words or by act "under circumstances which bind" the person alleged to have made his election (*Clough* v. *London and North-Western Railway Co.*(1), at p. 35). Lord Blackburn does indeed say, in his judgment in *Scarf* v. *Jardine*(2), at p. 361, that,

> whether he intended it or not if he has done an unequivocal act * * * the fact of his having done the unequivocal act to the knowledge of the persons concerned is an election.

On the other hand, the Court of Exchequer Chamber, in *Morrison* v. *Universal Marine Ins. Co.*(3), at page 207, held that

> if there really was no election, it is wholly immaterial whether the plaintiff understood or had a right to understand the conduct of the defendant as amounting to an election unless under that belief he altered his position.

It appears that this was not the view of Bramwell B., see *Croft* v. *Lumley*(4), at page 705, and *Morrison's Case*(3), at page 206, or, as already intimated, of Lord Blackburn. In the view I take of this appeal it will not be necessary to consider whether the opinion expressed by the Exchequer Chamber in *Morrison's Case*(3) on this point is part of the *ratio decidendi* and binding upon us because the appellant company has quite failed to shew either words or anything which in any view could be described as an unequivocal act evidencing the existence of a determination on part of the respondent to affirm the contract.

(1) L.R. 7 Ex. 26.
(2) 7 App. Cas. 345.
(3) L.R. 8 Ex. 197.
(4) 6 H.L. Cas. 672.

The conduct of the respondent relevant to the point now under discussion—was there in fact an election to affirm—may be briefly described: The so-called contract is found in a document signed by the respondent and witnessed by the appellant company's agent Simpson, on the 30th September, by which the respondent undertook to sell certain wheat to the appellant company. The document was signed in duplicate, one of the duplicates being handed to the respondent by the agent and afterwards discovered by himself or his wife in his pockets. The document does not in itself evidence a contract because it contains no evidence of assent on part of the appellant company; that, however, was supplied some days after the appellant had recovered from his spree by a letter from the appellant company, which in fact was the first communication to the respondent, so far as the evidence shews, of any declaration on behalf of the appellant company that they were contracting with him to purchase what he was promising to sell. The respondent took no steps to carry out the contract. On the 20th October (the wheat had been sold for October delivery) the appellant company wrote him saying that he was probably too late for October delivery, and was too late in fact unless the cars were already *en route*, and suggested that the sale should be transferred to November delivery. The respondent made no reply. In the meantime the respondent had learned of the fact that he had signed some paper while he was in a state of drunkenness, but there is no evidence to shew when he learned (and there was no cross-examination on the point) that his state of drunkenness was of such a character as to make it apparent to the appellant company's agent that he was unable to understand what he was about.

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I pause here to point out that the appellant company down to the conclusion of the trial insisted, in the first place, that the respondent was capable of understanding what he was about, and, in the second place, if he was not, that the agent Simpson believed and properly believed that he was not incapable of transacting business. In these circumstances it was strictly incumbent upon the appellant company to ascertain by cross-examination of the respondent when he became aware of the fact essential to his right of rescission that Simpson, the appellant's agent, knew he was unfit to transact business; for the appellant company's plea of election cannot succeed unless it is at least shewn and affirmatively shewn that the conduct relied upon as constituting election or evidencing election was pursued in light of precise cognizance by the respondent of the material facts entitling him to disaffirm. *Wilson* v. *Thornbury*(1); *Jarrett* v. *Kennedy*(2); *Lachlan* v. *Reynolds*(3). I am assuming that knowledge of facts being proved a knowledge of the right to rescind resting on the common law rule abovementioned may be presumed, but knowledge of all the essential facts is necessary, and, in view of the position taken by the appellant company, it was incumbent, as I have said, upon them to shew this essential fact by cross-examination if necessary: see Lord Davy's judgment in *Aaron's Reefs* v. *Twiss*(4), at page 295.

Is there, then, evidence of an actual determination by the respondent not to exercise his right of rescission? This is a question of fact. What must be proved is conduct which clearly establishes that the respondent did in fact determine to affirm the con-

(1) 10 Ch. App. 239.
(2) 6 C.B. 319, 326.
(3) Kay 52.
(4) [1896] A.C. 273.

tract after he had learned the material facts entitling him to disaffirm it. The evidence to the effect that he had casually remarked that he had sold his wheat may be rejected (if for no other reason) because it is altogether too vague to be of any value. I shall have something to say presently as to the legal effect of such a casual remark made to a stranger. Nothing remains but delay. Upon that a certain amount of precision is necessary in justice to the respondent. It is quite plain that some time before the 20th October, that is to say, within three weeks after the signing of the so-called contract and probably within two weeks after the receipt of the so-called confirmation, and one may reasonably surmise not more than a week or ten days after the respondent had obtained any kind of definite information as to the circumstances of the signing of the document relied upon by the appellant company (one must at least presume this against the appellant company, on whom the onus of proof lay, and whose counsel deliberately refrained from cross-examining on the point) the respondent had decided not to carry the so-called contract into execution. The appellant company has refrained from giving evidence on the point, although their agent Simpson was called, and it is impossible to suppose that he was not aware of the facts, but the company's own letter of the 20th October is sufficient evidence that, in order to fulfil the terms of the contract (time was, of course, of the essence of it), it was necessary that the respondent should begin his preparatory steps some days, at all events, anterior to that date. "Of course," they say, "you will not be able to make October delivery unless you have the cars on the road now." The tenor of the letter makes it quite plain that the appellant company had no doubt whatever that October delivery would not be made,

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that is to say, delivery in execution of the contract, and, in the absence of evidence to the contrary, it must be assumed against them that they, through their agent, were perfectly aware that the cars were not *en route* and that the respondent had taken no steps to that end.

In these circumstances it seems to be idle to suggest that there is any proof of an actual determination by the respondent not to rescind. Such period as elapsed from the time when the respondent became aware, on the receipt of the so-called letter of confirmation, that the appellant company were treating this piece of trickery as a matter of serious business down to the time when he must have known that failure to make preparations would involve default on his part if he was under a binding contract to deliver in October is reasonably accounted for by assuming that his attention was engaged during that period, first, in discovering the facts or endeavouring to discover them and the evidence available to prove them; secondly, in ascertaining what his rights were; and, again, in deciding, once having arrived at the conclusion that he could treat the document signed by him as a nullity, whether it would be more favourable to his interests to treat the transaction as binding on him or not.

That he was in fact waiting, before committing himself to affirm or disaffirm, to ascertain the course of the market is one of the contentions put forward on behalf of the appellant company. If he did so, that is, of course, conclusive against anything like election in fact to affirm.

Indeed, where a contract has been procured by fraud and the wrongdoer seeks to fasten the liability upon the person wronged on the ground that he has

elected against rescission and where the contract has remained executory, that is to say, where nothing has passed to the person defrauded which it would be his duty to give up on the exercise of his right to rescind, where nothing has been done by the wrongdoer in the execution of the contract, that is to say, nothing which he was bound by the terms of the contract to do, where these conditions are present the instances must be rare in which lapse of time *per se*, however great, would constitute sufficient evidence of an election not to rescind. What is there, in such circumstances, in the conduct of the defrauded person inconsistent with the exercise of his right (when the defrauder seeks the aid of the court to profit by his wrong) to declare that the contract is not binding because it was procured by fraud? *Ex hypothesi*, the defrauder knows that he is not entitled to enforce the contract, and that repudiation is one of the risks he must face. The victim of the fraud is assumed to know that also. Why should the victim not sit down and await attack? Why should it be inferred, from the fact that he has done so, that he has given up his right to repudiate?

The statement in the judgment of the Exchequer Chamber in *Clough* v. *London and North-Western Rly. Co.*(1), that lapse of time without rescinding will furnish evidence that the victim has determined to affirm the contract was used with reference to the case of a contract in part executed by the delivery of the goods on the one hand and by the payment in part of the price on the other, and I have found no case where it was a question of rescission on the ground of fraud of a contract which has remained wholly executory in which lapse of time alone has actually been held to amount to such evidence of the determination to affirm.

(1) L.R. 7 Ex. 26.

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I am inclined to think that the law is correctly stated in Mr. Spencer Bower's Actionable Misrepresentation, at p. 282, paragraph 321, in the following terms:—

> Delay, laches, and acquiescence are constantly referred to in connection with proceedings for rescission as if, of themselves, they constituted affirmative defences thereto. This is quite a mistake. And it is a still greater error to use these expressions (as the term "laches" in particular is frequently used) with an underlying suggestion that the representee owes a duty to the representor in the matter, the failure to discharge which renders him "guilty" of conduct which, of itself, raises a personal equity against him in favour of the representor. The only legal consequence of the representee's inaction is either to furnish some evidence, with other facts, in support of a plea of knowledge, or affirmation, against himself, or to give scope for the intervention of the *jus tertii*, or of the plea of inability to make specific restitution to the representor; but where the inaction, for however long a period it extends, is not sufficient to constitute such evidence, or where, notwithstanding the lapse of time, no innocent person has in fact acquired rights or interests under the contracts sought to be set aside, and the property to be restored to the representor, as the condition of rescission, can be so restored in the same plight as that in which it was received, the delay, laches, or so-called "acquiescence" goes for nothing—which is tantamount to saying that, *per se*, these matters constitute no defence.

It is true that in the treatise on Misrepresentation and Fraud, in Lord Halsbury's collection, of which Mr. Spencer Bower is the author, published in 1911, paragraph 1771, vol. 20, p. 752, it is stated that, with other facts or "even without them, delay, if very great, may constitute evidence of affirmation," but the authorities cited for the proposition are *Clough's Case*(1), *Lindsay Petroleum Co.* v. *Hurd*(2), and *Aaron's Reefs Case*(3), in every one of which the contract had at least in part been executed; and the observations of the law Lords in the last-mentioned case, and especially the observations of Lord Macnaghten and Lord Davey, seem to indicate that in their opinion where the obligation sued upon had assumed the form of a debt *simpliciter*,

(1) L.R. 7 Ex. 26. (2) L.R. 5 P.C. 221.
(3) [1896] A.C. 273.

the supposed debtor intending to rescind on the ground of fraud was entitled, in the absence of special circumstances, to sit down and await attack, and that consequently no inference could arise against him from failure to take active steps towards repudiation.

It is argued, however, that there are special circumstances here which, added to the respondent's inaction, support the suggested inference. It is said, first, that the respondent must have been aware of the practice of the appellant company making sales against their purchases as soon as the purchases were made and relying upon the purchases to enable them to fulfil their contracts of sale; and, moreover, that the letter of confirmation received a few days after the date of the so-called contract must have apprised the respondent of the fact that the appellant company were in this particular case relying upon the transaction as a genuine purchase. There is no evidence as to the respondent's knowledge, since counsel for the appellant company did not venture to cross-examine him on the point, and it seems an extraordinary thing to ask this court to presume such knowledge in the absence of any suggestion in the evidence. As to the letter of confirmation, here again the cross-examiner was too timid. Counsel for the appellant company suggests in his factum that the respondent must have known, when he received that letter, that the Winnipeg officials of the company were unaware of the trick that had been played upon him. That is a contention which, if it was to be insisted upon, should have been raised at the trial and pressed in cross-examination.

But it is surely extravagant to suggest that any inference can be founded upon the silence of such a man as this respondent in these circumstances, even granting the assumptions upon which the appellant

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company's counsel asks us to proceed. The respondent was at least aware of this, that the one person who was acquainted with the material facts was the appellant company's agent Simpson, the material facts, that is to say, not only of the impugned transaction itself, but touching the appellant company's business practice and the risks, if any, they were taking in treating this contract as an enforceable sale, and if we are to speculate as to what was passing in the respondent's mind, without the benefit of his own explanations, why should we suppose him to have assumed that their agent would not protect the appellant company by giving them full information?

The next subdivision of this topic concerns the question whether, assuming there is some evidence of a determination not to rescind, there is any evidence of expression by word or by act of that intention in such a way as to constitute an election within the meaning of the law. Expression by word there was none, since the casual conversation already referred to cannot be brought within that category. There was no communication to the other party concerned, and it is impossible to affirm that such a vague casual expression uttered in such circumstances was uttered, to use the language of Bramwell B. in *Croft* v. *Lumley*(1), "under circumstances which bind him." I have already said sufficient to shew that the respondent's inaction did not fall within Lord Blackburn's definition of unequivocal act in *Scarf* v. *Jardine*(2), at page 361, "An act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way," or within Baron Bramwell's language in the passage quoted in the judgment of the Exchequer

(1) 6 H.L. Cas. 672. (2) 7 App. Cas. 345.

Chamber in *Clough's Case*(1), with approval: "Act inconsistent with his avoiding."

This much the law makes clear, that the determination of the victim's choice alone does not in itself constitute election. The law does not, as I have already said, take note of subjective events in the stream of consciousness save in relation to or as manifested by some external word or deed. See *Clough's Case*(1), at pages 34 and 35; *Morrison's Case*(2), at pages 203, 204, 205 and 206. In what circumstances the expression of an actual intention to take one course or the other, adequate in itself, but not communicated to the other party concerned, is sufficient to constitute an election in such case as this does not concern us here. Nor are we concerned with the question suggested by a comparison of the judgment of Lord Blackburn in *Scarf* v. *Jardine*(3), with the judgment of the Court in the Exchequer Chamber in *Morrison's Case*(2), whether (there having been no intention in fact to elect) an election is constituted by an act unequivocal in the sense in which Lord Blackburn used the word in *Scarf* v. *Jardine*(3), at page 361, knowledge of which has been communicated to the wrongdoer; or whether, in addition to that, the wrongdoer must be shewn to have changed his position in consequence of the defrauded party's act, and to have done so reasonably on the faith of the victim having made an election in fact. (See *Morrison's Case*(2).)

I come now to consider whether, under the three alternatives above mentioned, the appellant company have shewn that the respondent has precluded himself from disaffirming.

(1) L.R. 7 Ex. 26. (2) L.R. 8 Ex. 197.
(3) 7 App. Cas. 345.

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First, then, has he so precluded himself because he delayed his disaffirmance for an unreasonable time?

The conclusion I come to is that there is no absolute rule of law that a party to a voidable contract entitled to avoid it on the ground that it was procured by fraud will be held to have elected not to do so by reason solely of the lapse of time without disaffirmance so long as the contract remains wholly executory.

I emphasize the fact that I am discussing only those cases where no property has passed, where possession of nothing has been obtained, that is to say, where the party seeking to avoid the contract has acquired nothing which it would be his duty to give up and where the party guilty of the fraud has done nothing in performance of the contract which the contract required him to do. Such cases must, of course, be distinguished from cases where the party defrauded has received some benefit under the contract which it would be his duty to give up on disaffirmance, or where, as in the case of an allotment of shares in a joint stock company, the party defrauded has, by acquiring the shares, at the same time acquired a status involving obligations or potential obligations to third persons.

I ought perhaps to mention that in *Aaron's Reefs Case*(1), Lord Watson and Lord Herschell pointed out that the defrauded person was not seeking the aid of the court to rescind the contract; "he is merely resisting its enforcement by the party guilty of the fraud"; and even in cases in which the actual interference of a court of equity is sought, as was laid down in *Erlanger* v. *New Sombrero Phosphate Co.*(2) (I refer to the judgment of Lord Penzance at page 1231), delay is only material, first, as affording evidence of waiver of the

(1) [1896] A.C. 273.

(2) 3 App. Cas. 1218.

right to rescind because in the circumstances it may imply acquiescence or seem as making it practically unjust to give a remedy.

In the elaborate discussion in *Clough's Case*(1), by Lord Blackburn, then Blackburn J., there is no suggestion of the existence of any such rule; and in *Morrison* v. *Universal Marine Ins. Co.*(2), in the Exchequer Chamber (Mr. Justice Blackburn, being one of the court), it is said, at page 205:—

> The learned judge further told the jury that they were to consider whether the election was exercised within a reasonable time, telling them that the party to elect must do so within a reasonable time. It is not necessary to consider whether this direction is correct or whether the party entitled to elect may not do so at any time, unless in the meantime he has elected to affirm the contract, or unless the rights of third parties have intervened, or the other party to the contract has altered his position, under the belief that the contract was a subsisting one; for, if the latter be the correct view, the direction of the learned judge was too favourable to the plaintiff, and of course he cannot complain of it.
>
> If, indeed, it had appeared that, in consequence of the delay and of the absence of protest by the defendants, the plaintiff's position had been altered, and he had thereby been induced to believe that the defendants intended to waive their right to avoid the contract of insurance, and had consequently abstained from effecting insurance elsewhere, we should probably have thought that, though there had been in fact no exercise by the defendants of their right of election, the case fell within the view taken in *Clough* v. *L. & N.W. Rly.Co.*(1), and that this question ought to have been submitted to the jury. But, in truth, although the plaintiff was examined as a witness on his own behalf, he did not assert that he was induced by the defendants' conduct to think the policy a binding one, and consequently abstained from effecting a fresh policy.

One must not overlook the fact that in *Morrison's Case*(2), as well as in *Clough's Case*(1), the Exchequer Chamber was dealing with a contract which had been in part executed. In *Morrison's Case*(2), indeed, not only had the insurance company received the premium, but, after knowledge of the misrepresentation giving them

(1) L.R. 7 Ex. 26. (2) L.R. 8 Ex. 197,

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the right to avoid the contract of insurance, they had actually delivered the policy to the plaintiff and in fact took no step to rescind the contract until after they learned of the loss of the risk.

In *Aaron's Reefs* v. *Twiss*(1), Lord Watson, at page 291, Lord Herschell, at page 291, Lord Macnaghten, at page 293, Lord Davey, at page 295, all expressed themselves in a manner which seems hardly consistent with the view that as applicable to executory contracts there is any such rule of law.

Although I think it very doubtful indeed whether cases of equitable election for or against an instrument under which a person is entitled to a benefit, but in circumstances in which the law requires him, if he accepts the benefit, to submit to some disadvantage in order that the instrument may take effect as a whole—although I think it very doubtful whether such cases and the principles governing them can usefully be applied except with a good deal of circumspection to cases involving the right to rescind a contract on the ground of fraud, still it may be worth while to point out that in such cases neither the right to elect nor the right to put another person to election is forfeited merely by delay in enforcing the right. (*Brice* v. *Brice*(2); *Butricke* v. *Broadhurst*(3); *Lord Beaulieu* v. *Lord Cardigan*(4); *Spread* v. *Morgan*(5); *Padbury* v. *Clark*(6).)

I have said sufficient to shew that, assuming there is such a general rule as that contended for, there was no delay which, according to any standard of reasonableness that could fairly be suggested, could be described as unreasonable.

(1) [1896] A.C. 273.
(2) 2 Molloy 21.
(3) 1 Ves. 171.
(4) Amb. 532; 3 Br. P.C. 277.
(5) 11 H.L. Cas. 588.
(6) 2 Macn. & G. 298.

The next ground upon which it is argued that the respondent is precluded from disaffirming the so-called contract is that by his conduct he led the appellant company reasonably to believe that he intended to affirm the contract and that upon this belief they acted to their prejudice.

I am unable to find any reason for thinking that the appellant company were in any way influenced by what the respondent did. Knowledge of Simpson's fraud must be imputed to the appellant company, or, to put it in another way, the respondent cannot be put in a worse position in relation to the appellant company than he would have been in if the Winnipeg employees of the company had been instantly informed by Simpson of the trick he had played on the respondent. On this assumption the sale which the appellant made against the respondent's purchase in consequence of Simpson's telegram of the 30th must either be regarded as a speculation upon the respondent's probable attitude with reference to the contract or as evidencing a determination to take the risk of fastening the transaction upon the respondent notwithstanding what occurred; and indeed it is sufficiently evident that this latter is the explanation in fact of their conduct after they became aware that Simpson was not shipping his wheat for October delivery.

But a fatal objection to this contention is that in order to maintain that it was incumbent upon the appellant company to shew affirmatively that the respondent's conduct had led them to act in a manner prejudicial to their interests; but their representative who gave evidence was not asked by the counsel for the appellant a single question upon the subject. The passage quoted above from the judgment in the Ex-

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chequer Chamber in *Morrison's Case*(1) plainly indicates the course the appellant's counsel should have taken.

But that is by no means all. It is abundantly evident that there was a considerable correspondence between Simpson and the Winnipeg office. This correspondence is not produced, and we may only guess of the light it would have thrown upon the motives and reasons which actuated the appellant company in not buying again to protect themselves at a time when prices may have been favourable to them; the onus being upon them, they cannot with any shew of plausibility, while withholding these communications, ask a court of justice to infer that what they did was the result of any belief upon the point whether the respondent was likely to affirm or disaffirm the sale which Simpson was trying to fasten upon him.

The next contention is that the respondent by his delay prejudiced the interests of the appellant company.

On the point of fact it seems reasonably clear that the appellant company, if prejudiced at all, was prejudiced by the failure on the part of Simpson to inform them of the real circumstances in which the alleged contract was procured.

The argument is, moreover, demurrable in point of law. It is quite true that in the judgment in *Clough's Case*(2), an expression is used which seems to indicate that prejudice owing to delay suffered by the wrongdoer may be a reason for disabling the defrauded person from setting up the fraud. But the expression is *obiter*, and when read in connection with the judgment in *Morrison's Case*(1) (the passage is quoted above) it is

(1) L.R. 8 Ex. 196. (2) L.R. 7 Ex. 26.

clear that the cases contemplated are those in which the conduct of the defrauded party constitutes an estoppel and those mentioned by Mr. Spencer Bower in the treatise on misrepresentation and fraud in Lord Halsbury's collection, namely, those cases in which some property has passed into the hands of the wronged person, some property, that is to say, which could have been restored in specie at the moment it was received, that had been lost, destroyed or affected in such a way as to make specific restitution on part of the victim impossible.

Sir Edward Fry (Specific Performance, page 369) points out that there is some ground for thinking that even in such cases the plea may be effective unless the destruction or deterioration of the property is caused by the conduct of the person wronged; and there is some support for this in the observations of the law Lords in *Adam* v. *Newbigging*(1).

There is, at all events, so far as I can see, neither authority nor principle in favour of the suggestion that in the case of such a contract as this the defrauded party may lose his right of rescission because the other wrongdoer chooses to make collateral arrangements on the chance that the former will uncomplainingly submit to be victimized.

ANGLIN J.—I doubt whether, upon the evidence in this case, I should have held that the defendant was so drunk when he signed the agreement in question that he was incapable of making a binding contract. But the learned trial judge has found that he was, and that his condition was known to the plaintiffs' representative who procured his signature and we must

(1) 13 App. Cas. 308.

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accept these findings. It follows that the contract so executed was, according to English law, not void, but voidable at the defendant's option. The question presented on this appeal is whether explicit affirmative ratification is necessary to render such a voidable contract unassailable or whether by standing by for an unreasonable length of time, with full knowledge of what he has done, and that the other party assumes the contract to be valid and binding, the erstwhile drunken man does not forego his right to elect to avoid it. The learned trial judge took the latter view; the Appellate Division of the Supreme Court of Alberta, the former.

Since the voidability of the contract depends not merely upon the intoxication of the party entitled to avoid it, but upon the knowledge of his condition by the other party, who is presumed to have taken advantage of it, the position and the respective rights of the parties are, in my opinion, the same as in the case of a contract procured by fraud. The duty of a person entitled to rescind for fraud is to exercise his option to do so promptly when he becomes aware of the circumstances which entitled him to repudiate liability. He cannot with knowledge stand by indefinitely until he has satisfied himself whether it will be to his advantage to repudiate rather than affirm the contract. Especially is this the case where the subject matter is of a highly speculative nature.

What is a reasonable time must always depend on the circumstances. Here the defendant on the following day acquired full knowledge of the contract which he had executed on the 30th of September. He knew on the third or fourth of October that the plaintiff regarded that contract as subsisting and binding. He knew that wheat was an extremely speculative

commodity, its market price varying from day to day. On the 20th of October, he was written to by the plaintiff as to the shipment of his grain, and thus again had express notice that they were relying upon his making delivery according to his contract. Yet it was not until the 6th of November, when the price of wheat had greatly advanced, that he took the first step towards repudiating liability. In my opinion this was entirely too late. By his conduct he had led the plaintiffs to believe that he did not intend to rescind and they had acted on that belief. I think he thus waived his original right to elect to avoid the contract and must be taken to have elected to affirm it, as he undoubtedly would have done had the market price declined instead of advancing. I find nothing in the decision in *Matthews* v. *Baxter* (1), at all inconsistent with the view that failure to repudiate within a reasonable time, where the circumstances are such that, in justice, the right of election should be exercised with promptness, should be deemed tantamount to an express ratification.

I am, with respect, of the opinion that this appeal must be allowed and the judgment of the learned trial judge restored. The plaintiffs are entitled to their costs in this court and in the Appellate Division.

Appeal allowed with costs.

Solicitor for the appellant: *H. W. Church.*

Solicitors for the respondent: *Charles F. Harris.*

(1) L.R. 8 Ex. 132.