HEDLEY SHAW (DEFENDANT).....APPELLANT;

AND

A. L. MASSON (PLAINTIFF).....RESPONDENT.

1922
*Nov. 2.
*Dec. 19.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Action—Specific performance—Contract—Fraud—Money paid under contract—Right to rescission.

The court will not decree specific performance of a contract obtained by fraud of the plaintiff even when the defendant has not offered to return money received under the contract.

Per Duff J. In this case the money was paid on account of an admitted debt and the debtor could not impose conditions.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment at the trial in favour of the defendant.

In an action for specific performance of a contract the trial judge held that it was obtained by fraud and dismissed the action. The Appellate Division concurred in the finding as to fraud but decreed performance of the contract on the ground that defendant had not offered to return money paid as required by its terms and could not therefore obtain rescission nor restore land transferred to him which had been sold for taxes. The defendant appealed to the Supreme Court of Canada.

H. J. Scott K.C. for the appellant.

W. L. Scott K.C. for the respondent.

IDINGTON J.—The respondent bought from one E. S. Blain lot 18, block 176, according to a plan of record in the Land Titles Office for the Saskatoon Land Registration District as plan Q-3, for the sum of $45,000.

Thereafter, on the 16th November, 1912, by an agreement of that date made between the said Blain of the first part, said Hedley Shaw of the second part and the said respondent of the third part (which recited said purchase and

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

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that there was then still owing and unpaid under the articles of agreement, witnessing said purchase, the sum of $22,500, with interest thereon at the rate of 8 per cent per annum from the 10th day of October, 1912, to said Blain and that he had agreed to assign all his interest therein and in the said lands and all moneys still owing and unpaid under said purchase agreement, to the said Hedley Shaw) the said Blain assigned the said agreement for purchase and all moneys owing thereunder and said lands to the said Shaw.

The said Blain covenanted thereby that in default of said respondent Masson paying said balance of purchase money, he, Blain, would pay same and the interest as specified.

The respondent also by said tripartite agreement covenanted therein with said Shaw to pay him the said balance of purchase money and interest as aforesaid.

The said security was thus acquired through the firm of McCallum and Vannatter, brokers in Saskatoon, acting for said Blain.

Shaw resided in Toronto and, when an instalment of $11,250 of said principal, and interest on the whole for six months, was about to fall due, forwarded his said security through the Imperial Bank to Saskatoon for collection by it. When doing so he wrote Mr. McCallum of said firm of brokers a brief note, dated 29th March, 1913, in regard thereto and another security of the like character, stating the amounts respectively due, the one on the 12th of April and the other on the 10th of April, and that he was notifying the said parties of his sending said documents to the Imperial Bank for collection. And then, by the last sentence of his said letter, said:

> I would like if you would also notify them that these payments must be met, and if you should have any good agreements offered you about that time you might advise me.

On the 29th they replied that they had notified said parties, and ended by saying that they would try and get an agreement of about the "right size to submit to you as soon as the money is paid."

On the 7th of April they wrote Shaw that they had a letter from Masson stating that he expected to be in Saskatoon early in April "and would be prepared to make his payment on the Blain agreement."

Meantime they had submitted another investment to him and in regard thereto he replied by saying

> I will do nothing with this until the agreements that are now due are paid.

On the 19th April, 1913, Shaw wrote McCallum as follows:

> I received your letter of the 7th instant, also your wire of the 11th. I have had no word from the Imperial Bank that either one of the agreements has been paid, and the parties interested have not even written about them.
>
> I will notify the bank that if these agreements, also Irving's Mortgage are not paid by the 1st May, to take the necessary proceedings immediately to collect same.

And on the 1st of May, 1913, McCallum & Vannatter, writing in regard to other matters, say as follows:—

> Mr. Masson from Ottawa has not arrived yet, but in talking to a friend of his he stated that he expects Mr. Masson daily, and understand he expects to make his payment as soon as he reaches here, which will also be turned over to you.
>
> As soon as we collect some more money for you, will submit an agreement, but will not do so until we get the money out of your Saskatoon agreements, when we hope to put up something to you which you will consider favorably.

When Masson did arrive a few days later he does not seem to have been quite as prepared to pay as his evidence pretends he was, if another letter from McCallum, on the 6th May, 1913, to Shaw is to be relied upon, amongst other things announcing arrival of Masson, but saying:

> He is not positive whether he will be able to make the full payment or not as he is expecting some money and has not received it yet. In any case he will be able to pay a goodly portion of it.

Such was the situation when the following telegrams passed between McCallum and Shaw:—

May 6th, 1913.

Hedley Shaw,
c/o Maple Leaf Milling Co.,
Toronto, Ontario.

Have interviewed Masson, and he wishes to obtain title to Lot 18, Block 176. To do this he offers agreement for sale covering 50 feet of

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good business property south side of river sold April 30th to good eastern parties for $25,000. On this there was a cash payment made of $6,250, leaving a balance due of $18,750 in three equal payments in six, twelve and eighteen months with interest at eight per cent. In addition to this agreement he will pay $5,750 cash. Can recommend security in property offered and all parties good. This pays 23 per cent without deducting any bonus on October payment due by Masson to you. Wire at once if can accept.

D. J. McCallum.
Toronto, Ont., May 7th, 1913.

D. J. McCallum:—

To-day's value Masson agreement twenty-three thousand five hundred and fifty, with twelve thousand, two hundred and fifty now due, balance due in five months. Prefer getting money as can use to good advantage elsewhere. However, if Masson will pay six thousand and you say agreement and parties are as good security as agreement giving up, you may close.

Hedley Shaw.
May 8th, 1913.

Hedley Shaw, Esq.,
Toronto, Ontario.

Arranged proposition according our wire excepting cash will be $6,000. Consider new agreement good and you will still hold Masson's covenant. Will write you fully to-morrow.

D. J. McCallum.

So far from agreement of Easton offered in exchange being, as stipulated by Shaw in his said telegram of 7th May, 1913, as good security as agreement he was asked to give up, it seems to me quite clear that was not the case.

The agreement he was asked to give up (of which I have set forth above the facts it evidences) was for only half the purchase price of the land securing it, whilst that Easton agreement was for three-quarters of the purchase price of the land.

How such an audacious misrepresentation came to be made (if made in the sense respondent contends for) by the parties making it passes my comprehension, unless moved by a fraudulent purpose.

It turned out that the Easton contract which was tendered was not in fact the real contract which then existed between Easton and Masson.

That had been entered into between Masson, as vendor, and Easton, as purchaser, and was negotiated for Masson by the said McCallum & Vannatter in the previous October when the cash payment of $6,250 was made, and interest on the balance of $18,750, at 8 per cent per annum

had fallen due with an instalment of $6,250 of principal, on the 30th of April, 1913, when it was well known to both Masson and said firm that Easton could not meet his payment then due.

Under such circumstances they were driven to substitute another contract as if entered into on the 30th of April, 1913, at which date instead of in the previous October, the cash payment was pretended to have been made, and this substituted contract was executed by Masson but not by Easton until some time after appellant Shaw had become suspicious and had repudiated the transaction set forth in above quoted telegrams.

Exactly when it was executed by Easton does not appear in evidence. He was unable through illness to attend the trial.

Ingram who is supposed to have attested his signature was not called as a witness.

But we have in the correspondence a letter from McCallum & Vannatter, dated 7th June, 1913, to Shaw trying to induce him to reconsider his determination not to carry out the proposal, in which they tell him they had sent the papers to Renfrew, where Easton resided, to be completed.

I think this is much more cogent evidence than what counsel before us, driven to despair apparently, suggested was to be found in some remarks of Mr. McCarthy when arguing one of the many points discussed at the trial, happened to refer to it as if it had been executed in May.

He was neither intending to make an admission of that kind nor, in what he was arguing then was the exact date of execution by Easton an essential feature—so long as the matter he was referring to indicated the signing by Easton was after what had transpired and was being put forward as a completed contract, when in fact it was not.

It was this pretended Easton agreement of 30th of April, 1913, that was made the basis of the assignment by Masson to Shaw, and is sought herein to be made the material part of the basis of this action for specific performance.

But curiously enough (though one of the reasons which McCallum, or MacCallum & Vannatter, persistently

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pressed on Shaw in their letters trying to induce him to accept this assignment and thus carry out the alleged agreement to exchange the Easton agreement for that of Blain, was the value of Masson's covenant for due payment by Easton) Masson now pretends herein that such a covenant was a fraud upon him and ought to be deleted from said assignment.

The existence of such a covenant binding Masson for the due payment by Easton, is the only respectable excuse for the said firm assuring Shaw that the one security might be taken as the equivalent of the other, but even that could not justify it, for Masson's means of payment seems to have been dependent on his wife's will and means to pay.

Even if otherwise, I am unable to see how an exchange of securities, which in their essential feature depended on the value of the land, securing either, such misrepresentations as impliedly made relative to their being of equal value, can be in any way justified or in any respect held to have been a due fulfilment of the express condition of Shaw's reply: "And you say agreement and parties are as good security as agreement giving up, you may close."

It was clearly expected McCallum could say so honestly. Indeed, curiously enough, McCallum did not in his reply expressly venture so far. The parties never were in fact *ad idem* when telegrams duly scrutinized.

It seems to me absurd to call the securities that would be afforded for payment of the $17,500 balance on land, bought only for $25,000, as the equivalent of $18,500, or even $23,400 on land bought for $45,000. I assume, as no evidence to the contrary, these prices represent what was then believed to be respective value of each.

I have no hesitation in holding that an assurance given Shaw to that effect was not given in good faith, or within the terms of the conditions he had imposed as basis for such temporary and conditional assent as he gave.

I agree with the finding of the learned trial judge that the whole dealing was vitiated by the fraud carried out in the substitution of the actual Easton agreement by another fabricated transaction.

Indeed I cannot help coming to the conclusion that the whole transaction was so saturated with fraud that even if

McCallum & Vannatter could be held to have been agents of Shaw whilst so deceiving him, the case would fall within the rule laid down in *Mortlock* v. *Buller* (1), and followed by many cases since, and hence no relief by way of specific performance can be properly founded thereon.

But it seems clear beyond any doubt that the firm of McCallum & Vannatter was the agent of respondent Masson, and merely, so far as Shaw was concerned, a means of communication used by respondent in his dealings in question herein with the said Shaw, who was in Toronto, whilst Masson and his agents were in Saskatoon. What was said in the telegram by Shaw to said agents might as well have been said direct to the party making the proposal, and if he receiving it had so replied, and thereby falsely assured the other of the facts as to value, there would be no basis thus furnished for a binding contract.

McCallum, the senior member of said firm, had died in November, 1915, and hence the only actual witness who could speak to the relations between Masson and said firm was Vannatter, and he swears distinctly that they got two hundred dollars from Masson as commission for their services in bringing about the alleged agreement now in question and never got nor pretended to claim from Shaw any commission.

It was suggested in argument that said firm had been acting as agent for Shaw in other matters, and hence an inference might be drawn as to the actual relation between them. In like manner they had been acting previously for Masson in bringing about the sale to Easton.

A perusal of the entire evidence including the correspondence leads me to the conclusion that they were, so far as Shaw was concerned, merely brokers selling securities of the class in question and looked to their clients, offering securities such as those in question herein, for their commission.

Of course such a relationship would naturally give rise to much correspondence between them and investors like Shaw, tending to give their relation another colour.

(1) 10 Ves. 292.

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We have a fairly good test in this very case of how Shaw looked upon their relations.

Although he had bought the Blain security now in question from Blain through them, when it came to a question of collecting same he entrusted that to, and sent the documents to, the bank, and at the same time writing to them respectively and acquainting their agents of his having done so, and asking that they call and pay what was due.

At the same time, as I infer, it was by way of mere courtesy to the brokers that he notified them of what he had done.

Be all that as it may if there was anything beyond what I suggest there was no evidence adduced directly bearing upon the point, except that of Vannatter who seems to have given his evidence fairly and without prejudice.

I cannot see how Masson can escape the consequences of what was done on his behalf and to which he was an actual party in the framing up of the deceptive substitution of the Easton agreement by another which was, I hold, fraudulent.

For these reasons alone I submit the judgment of the learned trial judge is correct and the Appellate Division in error in setting same aside.

In deference to what is said in the said appellate court's judgment, I respectively submit that there being fraud, which is not denied therein, no relief should have been given by way of specific performance.

What seems to me, I most respectfully submit, to be undoubted law is the statement of the relevant law in Fry's Specific Performance, 4th ed. at page 306, par 703, that where there is fraud in the obtaining of the contract or in the course of its performance, there is ground for the cancellation of the contract and, *a fortiori,* that it presents to the party defrauded a complete defence to an action for specific performance.

This aspect of the law seems, I most respectfully submit, to have been overlooked by the majority in the Appellate Division, which treated the action as one for rescission and reversed the learned trial judge's judgment, although Mr. Justice Middleton in his brief dissenting

judgment, pointed out how he deemed the fraud to be an impossible barrier to relief sought.

Notwithstanding the fact that Shaw had in his letter to McCallum, c/o McCallum & Vannatter, of the 29th May, 1913, pointed out some reasons for suspecting the value of the Easton agreement as a security, and after getting their explanations, on the 11th of June, 1913, had sent the following telegram to them,

Toronto, Ont., June 11th, 1913.

D. J. McCallum,
care McCallum & Vannatter,
Saskatoon.

Your letter June 7th received, don't consider property new agreement good security, don't care to take new agreement unless substantial payment say twenty-five hundred dollars made on property, please advise. Hurst balance money due must be paid immediately.

H. Shaw,

and that he had thus distinctly refused to carry out the alleged arrangement unless so modified as therein required the respondent failed to bring any action until this one, on the 17th November, 1917. Four years and a half seems, under such circumstances, rather a long time to wait before bringing an action such as this.

Meantime the Easton property was sold for taxes apparently in 1915 and 1916, and Easton had failed entirely to meet his payments according to the terms of his agreement in question, and the respondent had failed to meet his obligations under his covenant in the assignment by him to Shaw on Easton's default, or to tender Shaw payment of same.

That presents rather a remarkable case of non-observance of the rule laid down by Lord Alvanley in *Milward* v. *Earl Thanet* (1), that

a party cannot call for specific performance unless he has shown himself ready, desirous, prompt and eager

which has in substance remained good law to the present day.

Then if we try to apply herein common law to this alleged contract its fraudulent character still remains a good defence.

(1) 5 Ves. 720n.

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And if there were no such defence available damages would be the only relief, in which case the duty of the respondent would have been to minimize the damages by such other steps as available to him in way of reselling the thing he alleges he had sold, to say nothing of his express covenant to pay on Easton's default.

Not the least curious of the many features presented by this case is the attempt to delete that covenant although the evidence is that such is the usual form of contracts in Saskatchewan, in transferring such like securities as the Easton agreement.

Indeed that was brought home to the respondent, if he never knew before, by the assignment of his own contract with Blain by the latter, to which he was a party, and wherein Blain had to give his covenant to pay on Masson's default.

The printed forms are identical except for a few immaterial words.

That covenant of the respondent was part of the agreement tendered by his agents McCallum & Vannatter in execution of the alleged agreement now sued on and is thus part of the foundation of this action.

Yet the judgment appealed from retains for respondent the right to insist, in a modified way not clear, on his peculiar contention when before the Master in Ordinary.

I need not pursue this matter further than to point out that Shaw uniformly adhered to his imperative condition that there must be at least $2,500 added to the original proposal for exchange in order to bring the Easton security up to the standard of equality he had insisted on in his telegram giving a conditional assent to the respondent's proposition.

The correspondence, after his refusal to carry out the proposal as made by respondent through his agent McCallum & Vannatter, does not seem to me to help or hinder either party.

It discloses that respondent's said agents hoped to secure such further payments by Easton as would reduce the amount of his liability and thereby induce Shaw to look upon the securities sought to be exchanged as nearly equivalent in substantial value.

I am of the opinion that for the foregoing reasons this appeal should be allowed with costs here and in the appellate division and the judgment of the learned trial judge be restored.

DUFF J.—The appeal turns upon two telegrams in the following terms:—

May 6th, 1913.

Hedley Shaw,
c/o Maple Leaf Milling Co.,
Toronto, Ont.

Have interviewed Masson, and he wishes to obtain title to Lot 18, Block 176. To do this he offers agreement for sale covering 50 ft. of good business property on south side of river sold April 30th to good Eastern party for $25,000. On this there was a cash payment made of $6,250, leaving a balance due of $18,750 in three equal payments of six, twelve and eighteen months with interest at 8 per cent. In addition to this agreement he will pay $5,750 cash. Can recommend security in property offered and all parties good. This pays 23 per cent deducting any bonus on October payment due by Masson to you. Wire at once if can accept.

D. J. McCallum.

Toronto, Ont., May 7th, 1913.

D. J. McCallum:—

To-day's value Masson agreement twenty-three thousand, five hundred and fifty, with twelve thousand, two hundred and fifty now due, balance due in five months. Prefer getting money as can use to good advantage elsewhere. However, if Masson will pay six thousand and you say agreement and parties are as good security as agreement giving up, you may close.

Hedley Shaw.

The authority given to McCallum was an authority to accept the terms of May 6th. McCallum professed to enter into an arrangement of a very different character. In fact he attempted with Masson's approval to use his authority in a manner which both of them must have known was not consistent with good faith towards Shaw. Shaw on discovering this was entitled to repudiate the whole thing as a fraud upon him, which he did. In the circumstances the agreement was not an enforceable one.

The point chiefly insisted upon was that Shaw could not retain the moneys paid by Masson and at the same time repudiate the agreement which McCallum professed to make with Masson. This argument plainly fails of effect when the relations between Shaw and Masson are remembered. Masson was the debtor to Shaw who held as

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security a lien upon lands which Masson had purchased from him. Masson proposed that Shaw should accept in exchange for this security a lien upon other lands and certain additional payments. Shaw consented subject to the condition that Masson's debt to him should be reduced by a named amount. The debt was overdue. The moneys paid by Masson were paid in performance of his obligation to Shaw and were applied in reduction of the debt.

Shaw's right to retain the moneys paid was an unconditional right on two grounds, in the first place, and this of course is quite conclusive, it was paid in reduction of the existing debt, in performance of the existing obligation and not in execution of any fresh obligation to be undertaken by Masson. In the second place, the common law rule is quite plain that the general principle *solvitur in modo solventis* is subject to an exception in cases in which the money paid is admitted by the payer to be due. The authorities are conclusive that a debtor paying an admitted debt cannot lawfully attach conditions to the payment; and that the creditor receiving the money does nothing wrongful in retaining it, although he disregards the conditions. *Miller* v. *Davies* referred to by Lord Esher in *Day* v. *McLea* (1) at page 612; *Ackroyd* v. *Smithies* (2); *Day* v. *McLea* (1). The retention of the money in such a case is not a trespass; a count for money had and received would not lie because the view of the law is that where the money is admitted to be due there is nothing *contra equum et bonum* in retaining it.

The appeal should be allowed and the action dismissed with costs.

ANGLIN J.—The plaintiff sues for specific performance of a contract whereby, in consideration of making a cash payment of $6,000 and transferring to the defendant all his interest in a sale agreement whereby one Easton had purchased from him certain property in Saskatoon, the defendant, who had acquired the interest of one Blain, as vendor, under an agreement for the sale of certain other property, agreed to convey such latter property to the plaintiff and to relieve him from liability for payment of

(1) 22 Q.B.D. 610. (2) 54 L.T. 130.

the purchase price thereof. The plaintiff also claimed that the contract sued upon should be reformed by the excision from it of a personal guarantee by him of the Easton payments. The defendant denied the making of the contract sued on and, by amendment, pleaded that, if given, his assent thereto had been procured by fraud.

The learned trial judge found that a condition upon which the defendant had, by his telegram of the 7th of May, 1913, authorized acceptance of the plaintiff's offer—namely, that McCallum and Vannatter, agents at Saskatoon, should assure him that the Easton agreement and parties were as good as the Blain agreement and the parties to it—had not been fulfilled; and he also maintained the charge of fraud. As stated by Meredith, C.J.O., the defendant

> had no knowledge of the true nature of the transaction between the plaintiff and Easton until it was divulged by the plaintiff in giving his testimony at the trial.

The action was accordingly dismissed in the trial court.

The Appellate Divisional Court agreed that the fraud alleged by the defendant had been established. It found, however, that there had been a binding acceptance of the plaintiff's proposal and that, inasmuch as the defendant retained and made no offer to refund $5,000 of the $6,000 cash payment which he had received and the Easton property had been sold for taxes in the interval, the defendant was not entitled to rescission of the contract and should be ordered to carry it out. The reformation asked by the plaintiff was not granted. Specific execution of the contract as drawn was accordingly decreed at the instance of the party held to be chargeable with fraud in procuring it. Such a result is startling, to say the least.

While disposed to agree with the construction put by the Appellate Court on the telegram of the 7th of May and to regard what took place as a fulfilment of any conditions it imposed, I am inclined to think that the plaintiff's real difficulty in regard to the making of the contract sued upon lies deeper—that it consists in the non-existence of the subject matter in respect to which the defendant intended to contract. The proposition made to him and of which

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acceptance was authorized by his telegram of the 7th of May was for the transfer to him of an agreement by Easton for the purchase of land dated the 30th of April, 1919, already made. There was in fact no such agreement at that time. The plaintiff never contemplated the taking of an agreement which was yet to be made, and was in fact made only on the 8th of May.

But the finding of fraud imputable to the plaintiff, confirmed by the Appellate Divisional Court, rests upon evidence quite adequate to ensure its not being disturbed in this court, and upon that finding this action in my opinion must fail. It would indeed be an extraordinary case in which specific execution of a contract so tainted could be decreed. It may be that as a pre-requisite to seeking rescission the defendant would have been obliged to proffer restitution of the money paid him by the plaintiff. But fraud is a personal bar to specific performance which may be set up by a defendant not entitled to rescission. Fry on Specific Performance (5 ed.) section 749. The defendant is not seeking the aid of the court either to obtain rescission or for any other purpose. He is merely resisting a demand for specific performance. The plaintiff owed him more than $11,000 upon a contract still in his hands. I cannot see that the application by the defendant in reduction of that indebtedness of the $5,000 paid him precludes his contesting the plaintiff's claim in this action. I am rather inclined to take the view that commended itself to Mr. Justice Middleton as to the essence of the transaction between the parties and the nature and effect of the fraud perpetrated. But in any aspect of the matter the plaintiff is not entitled to the relief for which he sues.

There is no counter claim. The judgment must therefore be confined to a dismissal of the plaintiff's present action leaving either party to assert such further rights and claim such other remedies as he may be advised.

BRODEUR J.—I concur in the result.

MIGNAULT J.—Both the learned trial judge and the Appellate Divisional Court found that a fraud was committed by the respondent in representing to the appellant

that the agreement of sale between the respondent and Easton was made on April 30, 1913, whereas it had really been made on October 30, 1912, and Easton had failed to meet the payment on account of capital which became due on April 30, 1913, to wit, $6,250. Easton had applied for an extension of time to effect this payment, and McCallum and the respondent conceived the idea of making a new sale agreement between the respondent and Easton, dated six months after the real one, in order to induce the appellant to accept it and to agree to "switch" the Blain agreement of sale to Masson, which had been transferred to the appellant, for the Masson agreement of sale to Easton. I think this fraud has been brought home to the respondent, whether or not McCallum was his agent, for the learned trial judge believed the statement of Vannatter, McCallum's partner, that the respondent was aware of the contents of McCallum's telegram to Shaw of May 6, 1913, wherein the false and fraudulent representation as to the date of the Easton agreement was made.

The appellant thus deceived had authorized McCallum to accept the Easton agreement for the Blain agreement, subject to the payment by the respondent of $6,000. McCallum obtained a cheque for $5,200 from the respondent, and sent to the appellant $5,000 to be credited on the proposed exchange of agreements, retaining $200 for commission. He subsequently collected $1,000 from Easton, to wit, $750 for interest due Masson and $250 paid by Easton for a time extension, and this $1,000 he held to be paid to the appellant when the latter would have signed (which he never did) a transfer of the land covered by the Blain agreement.

Notwithstanding that the Appellate Divisional Court concurred in the trial judge's finding of fraud, it appears to have looked at the case as if the appellant had asked for the rescission of the agreement on which the respondent's action was based. And for the reason that the appellant could not obtain rescission without returning the $5,000 he had received from the respondent, and which he did not offer to return, and without also returning the land the respondent had agreed to sell to Easton, and which had been sold for taxes, the appellate court granted specific

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performance of the agreement between McCallum and respondent.

The respondent had indeed prayed for the specific performance of this agreement, but the defendant did not counterclaim and was content to ask for the dismissal of the action. There was therefore no demand for rescission, but only one for specific performance, which was met by a denial of the alleged agreement. The appellant discovered the fraud only at the trial and amended his statement of defence by setting up that by reason of this fraud the respondent was not entitled to ask for specific performance of the agreement.

The question is therefore whether the respondent can obtain specific performance of an agreement procured by fraud. The only answer in my opinion should be in the negative. The respondent's action therefore fails. Whatever other rights the respondent may have in view of the appropriation of the $5,000 by the appellant for a purpose other than that for which it was paid to him, it is clear that he cannot come before the court and ask that it exercise its equitable jurisdiction by decreeing specific performance of an agreement tainted by fraud.

I would therefore, with respect, allow the appeal and restore the judgment of the learned trial judge which dismissed the action, leaving to the parties such other remedies, if any, to which either of them may be entitled. The appellant should have his costs here and in the Appellate Divisional Court.

Appeal allowed with costs.

Solicitors for the appellant: *Millar, Ferguson & Hunter.*

Solicitors for the respondent: *Ewart, Scott, Kelley & Kelley.*