Privy Council Appeal No. 42 of 1926.

Robert Hugh Bisset - - - - - - - - *Appellant*

v.

Thomas Vernon Wilkinson and another - - - - - *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

REASONS FOR THE REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 20TH JULY, 1926.

Present at the Hearing :

VISCOUNT DUNEDIN.
LORD ATKINSON.
LORD PHILLIMORE.
LORD CARSON.
LORD MERRIVALE.

[*Delivered by* LORD MERRIVALE.]

The appellant in this litigation brought his action in the Supreme Court of New Zealand to recover a sum of money payable to him under an agreement for sale and purchase of land. The defendants by way of defence and counterclaim alleged misrepresentation by the appellant in a material particular as to the character and quality of the land in question and claimed rescission of the agreement with consequential relief or alternatively damages for fraudulent misrepresentation or breach of warranty. Upon the trial of the action judgment was given for the plaintiff on the claim and the counterclaim. The Court of Appeal of New Zealand, by a majority, set aside the judgment of the trial judge and decreed rescission of the contract between the parties with consequential relief as prayed. The appellant claims to have the judgment of the Supreme Court reinstated.

The contract between the parties was an agreement in writing made in May, 1919, whereby the respondents agreed for the purchase by them of two adjoining blocks of land at Avondale,

in the Southern Island of New Zealand, called "Homestead" and "Hogan's," containing respectively 2,062 acres and 348 acres or thereabouts, for £13,260 10s.; £2,000 payable—and it was in fact paid—on the signing of the agreement, and the balance payable in May, 1924, interest to be paid half-yearly in the meantime. The lands in question formed parts of an area of 5,225 acres which the appellant had bought in 1907 and after sundry works of reclamation and improvement had in 1911 subdivided for sale. He sold lots containing 1,500 acres and upwards, 964 acres, 350 acres, and Hogan's block of about 348 acres, retaining the Homestead block of 2,400 acres which he used for his business of a sheep-farmer and sheep dealer until 1919—during the war under some difficulties with regard to labour. Hogan's block was thrown on the appellant's hands by failure of the purchaser to complete, and in September, 1918, on the breakdown of a provisional arrangement which the appellant had made with another intending purchaser, he resumed his occupation of it. During the spring and summer, September, 1918, to April, 1919, the appellant carried out renewal work and stocked part of Hogan's block with young sheep, and in May he made his agreement for sale of the combined areas to the respondents, who had agreed upon a partnership as farmers.

Sheep-farming was the purpose for which the respondents purchased the lands of the plaintiff. One of them had no experience of farming. The other had been before the war in charge of sheep on an extensive sheep-farm carried on by his father, who had accompanied and advised him in his negotiation with the appellant and had carefully inspected the lands at Avondale. In the course of coming to his agreement with the respondents the appellant made statements as to the property which, in their defence and counterclaim, the respondents alleged to be misrepresentations.

At an early period after the respondents went into occupation and commenced their farming operations they found themselves in difficulties. They sought and obtained extensions of time for payment of the interest which fell due to the appellant. Sheep-farming became very unprofitable and they changed their user of the land. One of them withdrew from the partnership. The other made an assignment of the valuable part of his property to his wife, and on being eventually pressed by the appellant for payments under the agreement disclosed this assignment as an answer to the practical enforcement by the appellant of his demands. The appellant brought his action for a half-year's interest on the unpaid purchase money and the respondents set up their case of misrepresentation.

By their defence and counterclaim the respondents alleged that the appellant had "represented and warranted that the land which was the subject of the agreement had a carrying capacity of two thousand sheep if only one team were employed in the agricultural work of the said land." It was common

ground at the hearing and in the Court of Appeal that the carrying capacity of a sheep-farm is its capacity the year round. As was said by Reed J., in the Court of Appeal:

> "The meaning of the representation as alleged was that the carrying capacity of the farm during the winter, with such special food and new pasture as could be grown by the proper use in ploughing of one team of horses regularly employed throughout the year was two thousand sheep." "It is also common ground," said the same learned judge, "that to bring a farm to its full carrying capacity skilled management is required. It is admitted that the appellants were not experienced farmers."

The appellant made these admissions at the hearing: "I told them that if the place was worked as I was working it, with a good six-horse team, my idea was that it would carry two thousand sheep. That was my idea and still is my idea." Further, he said: "I do not dispute that they bought it believing it would carry the two thousand sheep."

The learned judge who tried the action, Sim J., based his judgment in favour of the appellant upon conclusions at which he arrived upon his examination of the evidence, firstly, that the representation made by the defendant was a representation only of his opinion of the capacity of the farm, not a representation of what that capacity in fact was; and secondly, that this representation of opinion was honestly made by the appellant. "It seems to me," the learned judge said, "that the defendants were not justified in regarding anything said by the plaintiff as to the carrying capacity as being anything more than an expression of his opinion on the subject. I am satisfied that what he said was, and still is, his honest opinion on the subject." These conclusions—if warranted by the evidence—were sufficient to dispose of the whole case of misrepresentation, whether as grounding a claim for rescission or a claim for damages. By them the charge of fraud in the pleadings is also specifically negatived. The cause of action founded on alleged warranty which is set up in the defence and counterclaim was, it has been agreed, not asserted at the trial, and the fact is not without bearing on the true effect of the claims which were relied upon.

In the Court of Appeal, as is said in the judgment of Stout C.J., "the real question in dispute turned out to be whether the appellants were entitled to rescission of the contract. They did not rely upon the breach of warranty, but they asked for rescission of the contract, though their claim for damages for misrepresentation had not been formally withdrawn." The learned judges of the Court of Appeal differed in opinion. Reed J.—who thought the appeal failed—dealt with the case upon the contention of the defendants—the now respondents—that the representation made to them by the plaintiff was a representation of fact. He found it to be conclusively established by the defendants' own evidence that, given proper management,

the farm was fully capable of carrying at least two thousand sheep. Stout C.J. held that the statement relied upon was made and accepted as a statement of fact. "It would surely be improbable," the learned Chief Justice said, "that when a seller is asked to say what the carrying capacity of his farm is he should not answer the question, but volunteer his opinion or estimate." As to the truth of the representation, the learned Chief Justice said: "The evidence in my opinion is clear that this place never carried all the year round two thousand sheep." He added this, "The respondent allowed the appellants to purchase the farm from him believing that it would carry two thousand sheep, and, therefore, they were misled." Adams J. and Ostler J. alike held that the statement was a representation of fact and was proved to be untrue.

In an action for rescission, as in an action for specific performance of an executory contract, when misrepresentation is the alleged ground of relief of the party who repudiates the contract, it is, of course, essential to ascertain whether that which is relied upon is a representation of a specific fact, or a statement of opinion, since an erroneous opinion stated by the party affirming the contract, though it may have been relied upon and have induced the contract on the part of the party who seeks rescission, gives no title to relief unless fraud is established. The application of this rule, however, is not always easy, as is illustrated in a good many reported cases, as well as in this. A representation of fact may be inherent in a statement of opinion and, at any rate, the existence of the opinion in the person stating it is a question of fact. In *Karberg's case** Lindley L.J., in course of testing a representation which might have been as it was said to be by interested parties one of opinion or belief, used this inquiry—"Was the statement of expectation a statement of things not really expected?" The Court of Appeal applied this test and rescinded the contract which was in question. In *Smith v. Land and House Property Corporation*† there came in question a vendor's description of the tenant of the property sold as "a most desirable tenant"—a statement of his opinion, as was argued on his behalf in an action to enforce the contract of sale. This description was held by the Court of Appeal to be a misrepresentation of fact, which, without proof of fraud, disentitled the vendor to specific performance of the contract of purchase. "It is often fallaciously assumed," said Bowen L.J.:

"that a statement of opinion cannot involve the statement of fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is, in a sense, a statement of fact about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally well known to both sides, then a statement of opinion by one who

* L.R. 1892, 3 Ch. 1, at p. 11.

† L.R. 28 Ch. D. 7.

> knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion."

The kind of distinction which is in question is illustrated again in a well-known case of *Smith v. Chadwick.** There the words under consideration involved the inquiry in relation to the sale of an industrial concern whether a statement of " the present value of the turnover or output " was of necessity a statement of fact that the produce of the works was of the amount mentioned, or might be and was a statement that the productive power of the works was estimated at so much. The words were held to be capable of the second of these meanings. The decisive inquiries came to be: what meaning was actually conveyed to the party complaining; was he deceived, and, as the action was based on a charge of fraud, was the statement in question made fraudulently?

In the present case, as in those cited, the material facts of the transaction, the knowledge of the parties respectively, and their relative positions, the words of representation used, and the actual condition of the subject-matter spoken of, are relevant to the two inquiries necessary to be made: What was the meaning of the representation? Was it true?

In ascertaining what meaning was conveyed to the minds of the now respondents by the appellant's statement as to the two thousand sheep, the most material fact to be remembered is that, as both parties were aware, the appellant had not and, so far as appears, no other person had at any time carried on sheep-farming upon the unit of land in question. That land as a distinct holding had never constituted a sheep-farm. The two blocks comprised in it differed substantially in character. Hogan's block was described by one of the respondents' witnesses as " better land." " It might carry," he said, " one sheep or perhaps two or even three sheep to the acre." He estimated the carrying capacity of the land generally as little more than half a sheep to the acre. And Hogan's land had been allowed to deteriorate during several years before the respondents purchased. As was said by Sim J.:

> " In ordinary circumstances, any statement made by an owner who has been occupying his own farm as to its carrying capacity would be regarded as a statement of fact. . . . This, however, is not such a case. The defendants knew all about Hogan's block and knew also what sheep the farm was carrying when they inspected it. In these circumstances . . . the defendants were not justified in regarding anything said by the plaintiff as to the carrying capacity as being anything more than an expression of his opinion on the subject."

In this view of the matter their Lordships concur.

Whether the appellant honestly and in fact held the opinion which he stated remained to be considered. This involved examination of the history and condition of the property. If a reasonable man with the appellant's knowledge could not have

---

* L.R. 9, App. Cas. 187, 20 Ch. D. 27.

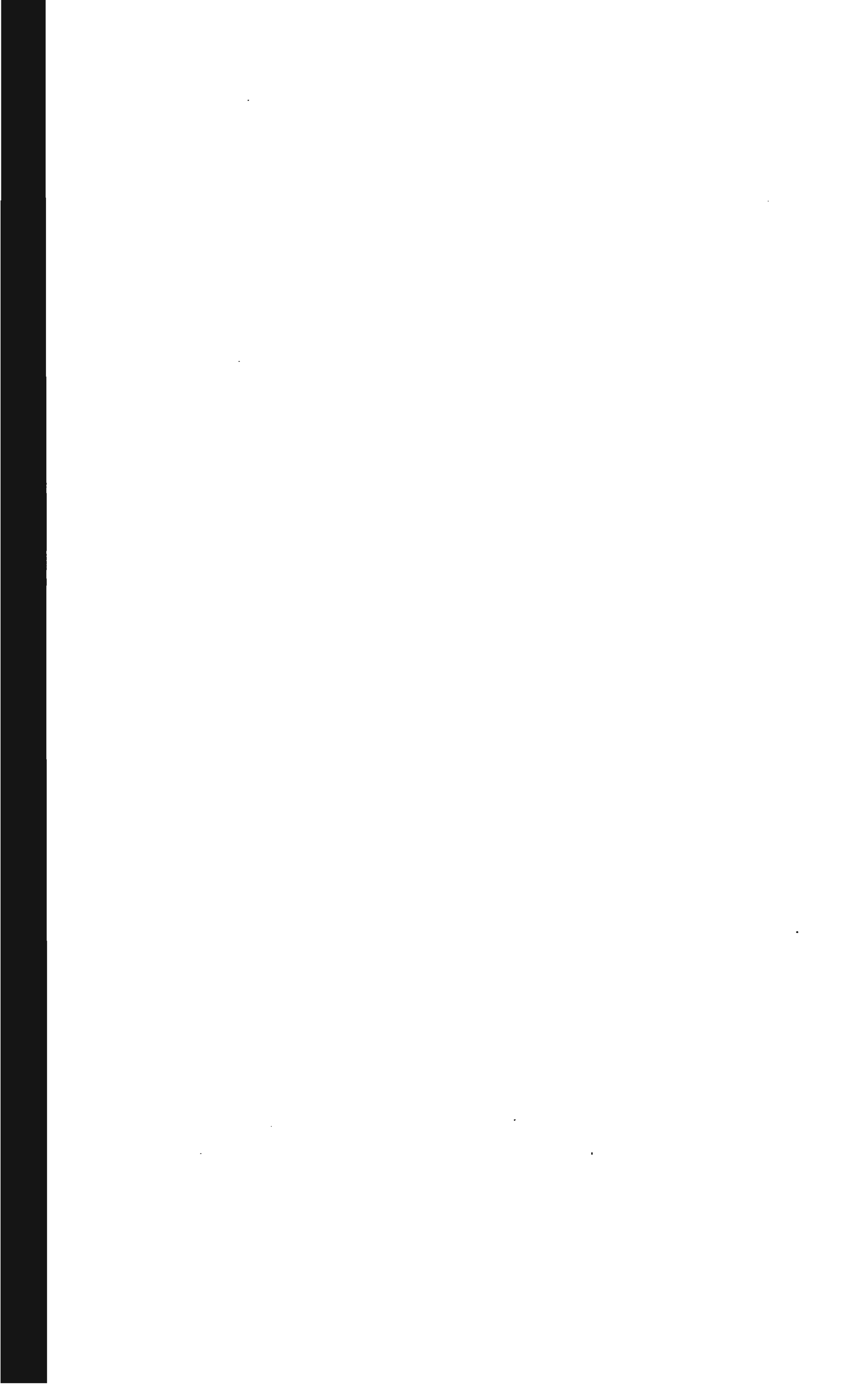
come to the conclusion he stated, the description of that conclusion as an opinion would not necessarily protect him against rescission for misrepresentation. But what was actually the capacity in competent hands of the land the respondents purchased had never been, and never was, practically ascertained. The respondents, after two years' trial of sheep-farming, under difficulties caused in part by their inexperience, found themselves confronted by a fall in the values of sheep and wool which would have left them losers if they could have carried three thousand sheep. As is said in the judgment of Ostler J.: "Owing to sheep becoming practically valueless, they reduced their flock and went in for cropping and dairy-farming in order to make a living."

The opinions of experts and of their neighbours, on which the respondents relied, were met by the appellant with evidence of experts admitted to be equally competent and upright with those of his opponents, and his own practical experience upon part of the land, as to which his testimony was unhesitatingly accepted by the judge of first instance. It is of dominant importance that Sim J. negatived the respondents' charge of fraud.

After attending to the close and very careful examination of the evidence which was made by learned counsel for each of the parties, their Lordships entirely concur in the view which was expressed by the learned judge, who heard the case. The defendants failed to prove that the farm if properly managed was not capable of carrying two thousand sheep.

Questions of laches and of affirmance of the contract on the part of the respondents which were argued at the hearing, are not material for further consideration, and in view of the course of the proceedings and the finding of Sim J. as to the honesty of the appellant in the statements he in fact made, it would be improper to accede to the application which was made at the Board on behalf of the respondents for leave to proceed anew upon the charge of fraudulent misrepresentation.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the judgment of Sim J. restored. The respondents must bear the appellant's costs here and below.



In the Privy Council.

ROBERT HUGH BISSET

v.

THOMAS VERNON WILKINSON AND ANOTHER.

DELIVERED BY LORD MERRIVALE.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1926.