

Liberty to apply; no order as to costs of this appeal in either of the first two events above provided for.

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SECOND DIVISIONAL COURT.

JANUARY 20TH, 1916.

GENTLES v. GEORGIAN BAY MILLING AND POWER CO.

*Fraud and Misrepresentation—Sale of Land—Promissory Note  
—Counterclaim—Rescission—Damages.*

Appeal by the plaintiff in the original action and defendants by counterclaim from the judgment of CLUTE, J., 8 O.W.N. 618.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

D. L. McCarthy, K.C., for the appellants, the plaintiff, and Albert Gentles, defendant by counterclaim.

W. L. Haight, for the appellant Hurlburt, defendant by counterclaim.

W. E. Raney, K.C., and H. E. Stone, for the defendant company and the defendant Sparling, respondents.

LATCHFORD, J., delivering the judgment of the Court, after setting out the facts, said that rescission was impossible, for a party can never repudiate a contract after, by his own act, it has become out of his power to restore the parties to their original positions: *Clarke v. Dickson* (1858), E. B. & E. 148. The only remedy open to the plaintiffs by counterclaim was an action for damages. If no damages were sustained, their claim failed. Damages were found by the trial Judge to have been sustained by them; but, with great respect, that was under a misapprehension of the evidence. Values should have been estimated as of the date of the transaction, and not as of the date of the trial. When the true value of the property at the time of the sale is taken into account, the parties counterclaiming sustained no damage; and there was no misrepresentation inducing the contract to purchase.

After a careful perusal of the evidence and consideration of all the circumstances, the learned Judge was of opinion that Moore and Sparling relied on their own judgment in buying the lots—a judgment which was right according to the conditions existing at the time—and that they were not misled by any party to this action, if at all, and were satisfied with their pur-