

The judgment of the Chancellor, as entered, did not carry out the underlying idea to be found in the opinion expressed at the close of the case. It would be unfair to the appellant company if the mortgage were vested in the plaintiff for the benefit of creditors upon the basis existing at the date of the assignment (the 5th January, 1915), if in fact the appellant company had not then received its right proportion in reduction of its claim.

It should be declared that the respondent will hold the mortgage, in the first place, to equalise the claims of creditors as existing on the 21st July, 1914, having regard to the foregoing and excepting the small creditors who may have been paid in full, taking into account the payments made, but excluding from consideration goods supplied after that date and payments specifically applied thereon, and then for the general benefit of all creditors who file claims with the assignee. His allowance of the claims as far as this security is concerned will depend on their accounting for their due proportion of overpayment, if any.

The creditor proposed may be added as a party plaintiff on filing his consent.

There should be no costs of this appeal.

MEREDITH, C.J.O., and MAGEE, J.A., concurred.

FERGUSON, J.A., read a dissenting judgment. He was of opinion that the action should be dismissed with costs.

Judgment below varied.

FIRST DIVISIONAL COURT.

JUNE 12TH, 1917.

FOX v. DEBELLEPERCHE.

*Fraud and Misrepresentation—Sale of Land—Statements of Vendors
—Action for Rescission—Misrepresentation of Material Fact—
—Failure to Shew—Findings of Trial Judge—Appeal.*

Appeal by the plaintiff from the judgment of MIDDLETON, J., 11 O.W.N. 224, dismissing an action brought by the purchaser to rescind, on the ground of misrepresentation, two agreements for the sale by the defendants to him of certain building lots in the township of Sandwich West, and to recover back the money paid.