

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

J. H. Fraser, for the appellant.

A. R. Bartlet, for the plaintiff, respondent.

The judgment of the Court was read by FERGUSON, J.A., who said that a perusal of the whole evidence had convinced him that the testimony of the plaintiff as to the representations made was to be preferred to that of the defendant and his wife, and that the true reason for the defendant seeking to be relieved of his contract was to be found in the fact that the defendant realised, when too late, that he had undertaken more than, with his limited capital and facilities, he could hope to carry out successfully. It was admitted that the plaintiff represented to the defendant that the whole block of 240 acres, except about 15, was wheat-land and in that sense fit for crop; and that statement was not untrue. The plaintiff also represented that about 90 acres had been at some time broken and about 30 acres had been summer-fallowed in 1916. These representations were substantiated in evidence, except that the amount of fallow was somewhat less, and the work thereon had not been done in as thorough a manner as it might have been; but it could not be found that the fallow was not fit for crop or that the plaintiff represented that there were neither weeds nor thistles on the farm, or that the whole farm was in such a state of cultivation that all of it, except about 15 acres, might be cropped in 1917, or even 1918. The difference in the amount of fallow-land was not such a material difference as to justify the Court in refusing to order specific performance of the agreement; and the other alleged misrepresentations were not made out.

The defendant did not rely upon the plaintiff's statements, but went from Windsor, Ontario, to Manitoba, for the express purpose of seeing the property, verifying the plaintiff's statements, and judging for himself whether or not he would enter into the proposed contract; and, having done so, he caused the plaintiff to go to Winnipeg, and there entered into the contract sued upon.

The proper conclusion from the whole evidence was, that the defendant then knew—if he at any other time believed the contrary—that no part of the whole 240 acres, except what had been fallowed or cropped during 1916, was ready for crop or could be cropped before the season of 1918; and that he knew or ought to have known that there were both weeds and thistles on the farm.

A rescission of the agreement would leave the plaintiff in a position substantially different from and worse than he was in originally.

The judgment appealed from was right, and should be affirmed; but it was a case in which, in the interests of both parties, a settlement should be made.

*Appeal dismissed with costs.*