be said as to the fraud that the trial Judge had found and to the effect of the proceedings in the Supreme Court of Saskatchewan, a binding agreement was entered into between the parties that, upon payment by the appellant to the respondent of $6,000 and the appellant assigning to the respondent the Easton agreement and covenanting to make the payments that were to be made on it if Easton made default, the appellant should be released from his liability on the Blain agreement and that lot 18 should be transferred to the appellant.

The trial Judge found that a fraud was committed by the appellant in representing that the sale had been made to Easton on the 30th April, 1913, when in fact it had been made on the previous 30th November. In that finding the learned Chief Justice agreed, and he also agreed that it was a material misrepresentation entitling the respondent to rescind. McCallum (an agent of the respondent) was, no doubt, cognizant of and indeed a party to the fraud, but that fact did not help the appellant: Cameron v. Hutchinson (1869), 16 Gr. 526.

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

The defence of fraud, the fraud being then unknown to the respondent, was not set up in the statement of defence, and no amendment and no application for leave to amend was made at the trial.

It was argued for the appellant that the respondent was not in a position to rescind; that to entitle him to rescind he must offer to return the money he had received under the terms of the agreement and to reconvey the Easton lots and agreement to the appellant; that he had offered to do neither of these things, but insisted on the right to retain the money paid and apply it on the overdue instalment on the Blain agreement; and that he could not reconvey the Easton lots, because they had been sold for taxes.

The inability of the respondent to restore to the appellant the lots which were transferred to him, and his insistence on retaining the money that was paid to him under the provisions of the agreement, are a fatal barrier against his right to rescind. It is too late to rescind if, either from his own act or from misfortune, it is impossible for him to make restitution in integrum.

The Saskatchewan judgment was pronounced in an action in which the respondent is plaintiff and the appellant and Blain are defendants, and by it the appellant was ordered to pay into Court on or before the 27th July, 1916, $20,748.79, the amount found to have been due on the 10th October, 1914, for principal and interest on the Blain agreement, with interest from that date, and