

MACLAREN, J.A., dissenting, was of opinion that it was not in the interest of the child that she should be at present removed from the custody of the mother; the statute having placed the welfare of the infant in the foreground as being of prime importance.

Appeal dismissed; MACLAREN, J.A., dissenting.

FIRST DIVISIONAL COURT.

JANUARY 10TH, 1916.

*MILK FARM PRODUCTS AND SUPPLY CO. LIMITED v.
BUIST.

*Contract—Sale of Land and Business—Mistake—Rescission—
Executed or Executory Contract—Failure of Consideration
—Municipal By-law—Validity.*

Appeal by the plaintiffs from the judgment of MIDDLETON, J., 8 O.W.N. 491.

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

S. F. Washington, K.C., and A. M. Lewis, for the appellants.
D. Inglis Grant, for the defendant, respondent.

GARROW, J.A., delivering judgment, said that the action was brought for the rescission of an agreement of the 24th April, 1914, made between the plaintiffs and the defendant, for, among other things, the sale by the defendant to the plaintiffs of premises in the city of Hamilton, upon which the defendant was then carrying on a dairying business, and for the return of \$8,500 which had been paid on account of the purchase-money, upon the grounds: (1) that the agreement had become impossible of performance; (2) that the object and purpose were frustrated, and the consideration had failed; (3) that the agreement was illegal; and (4) that the parties to the agreement were mutually mistaken as to the existence of a certain by-law of the city which rendered their contemplated enterprise, under the agreement, illegal.

The by-law referred to was passed on the 27th October, 1913; it included the defendant's land in a residential area, and prohibited the erection within it of any "factory."