Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Barrette v. Le Syndicat Lyonnais du Klondyke, from the Supreme Court of Canada; delivered the 9th May 1907.

Present at the Hearing:

LORD MACNAGHTEN.
LORD ROBERTSON.
LORD ATKINSON.
SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

This Appeal arises out of a transaction which took place in 1901, by which the Appellant sold to the Respondents certain gold mining claims, and shares in claims, with other properties in Yukon.

The questions in issue between the parties to the present Appeal came before the Courts below, and come before their Lordships, in a somewhat unusual form, being raised by way of counter-claim between two Defendants to the original suit. But it is unnecessary to dwell upon this point. The case has to be dealt with exactly as if it were an action of deceit, brought by the Respondents against the Appellant.

The Respondents, the purchasers, were a French Syndicate, and were represented in the transactions in question by Louis Paillard, their Manager and a Civil Engineer, who had as his subordinate one Tarut. Both of those gentlemen appear to have had some experience in mining matters, and had spent some time in the Yukon Territory.

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The subject-matters of the purchase were as follows: (1) Creek claim No. 32. below Upper Discovery on Dominion Creek; (2) Creek claim No. 12, above Lower Discovery, on Dominion Creek; (3) Hillside placer mining claim opposite the upper half of No. 12 above Discovery, on the left limit of Dominion Creek; (4) Creek claim No. 9, above Lower Discovery, on the same Creek; (5) Creek claims, upper and lower halves of No. 2, Cariboo Creek; (6) Hillside opposite the upper half of 28, on the left limit of Eldorado Creek; (7) A one-fifth interest in about 150 claims on Barlow Creek. Also a road-house or hotel on mining claim No. 36, below Upper Discovery on Dominion Creek, and a stock of provisions and liquors.

The counterclaim set forth a long series of misrepresentations, alleged to have been fraudulently made by the Appellant, with regard to several of the properties included in the sale. It said that the purchasers had entered into the contract in reliance upon those representations, and it asked for damages. The controversy has now become limited to certain misrepresentations said to have been fraudulently made, respecting claim No. 32 and claim No. 12 respectively.

The case was heard before Craig J. in the Territorial Court of the Yukon Territory. And that learned Judge held that the representations now relied upon, as having been falsely and fraudulently made by the Appellant, were established, and he awarded damages to the Respondents. Against this Judgment there was an Appeal to the Territorial Court *en banc*, consisting of the Trial Judge and two other Judges. The Trial Judge adhered to his original view, but the other two learned Judges were of a different opinion, and dismissed the counter-claim. The Respondents appealed to the Supreme Court of Canada, and the majority of the learned

Judges in that Court, Girouard, Davies, and Nesbitt JJ. (the Chief Justice and Idington J., dissenting), reversed the Judgment of the Court *en banc*, and restored that of the Trial Judge with a small variation. Against that decision of the Supreme Court the present Appeal has been brought.

The first and main question to be determined upon this Appeal is whether the alleged fraudulent misrepresentations have been established. That is a question of fact, as to which the natural inclination of their Lordships is to be guided largely by the opinion of the learned Judge who tried the case; and the majority of the Judges in the Supreme Court seem to have been influenced by a similar feeling. But there are circumstances in the present case which seem to their Lordships to detract from the weight which they would ordinarily give to the opinion of the Trial Judge.

Early in his Judgment the learned Judge, in speaking of the principal witnesses on each side, said :—

"The witnesses Paillard and Tarut impressed me as being "particularly cautious and conservative in their statements, "very deliberate and calm, and not given to exaggeration. I "cannot say that Barrette's manner of giving his evidence was "dishonest at all; he was much more voluble than the other "men."

This sentence is enough to show that the conclusion arrived at by the learned Judge was not influenced, to any serious extent, by the demeanour of the witnesses.

On one very important point the learned Judge was under a serious misapprehension, that is with regard to the contemporary notes made by Paillard of the statements made to him by the Appellant, a document which will have to be mentioned again later. As to these notes the learned Judge said,—

"While I cannot myself follow the notes clearly, yet "Mr. Paillard, in his evidence, pointed out that he had made

" these notes, and no attempt was made by Counsel to show " that the notes did not correspond with the evidence which " he was giving in regard to the representations, and I take it " that the notes correctly conform to the evidence which he " gave."

It is now admitted that those notes afford no confirmation to Paillard's evidence as to any of the statements said to have been falsely and fraudulently made.

In dealing with one of the alleged misrepresentations as to Claim No. 32 the learned Judge says, " On this point there is the " evidence of two against one, and I must " believe the two." This is a very unsafe way of dealing with evidence. With regard to the alleged misrepresentation as to Claim No. 12 the learned Judge's finding is far from being a confident one. He says, " I am inclined to " think that the weight of evidence is with the " Defendants on this matter."

The result is that their Lordships are unable in this case to give to the opinion of the Trial Judge the same preponderating weight which they are usually anxious to give upon questions of fact. They think that the Territorial Court *en banc* and Idington J., in the Supreme Court of Canada, were fully justified in examining independently the evidence bearing upon the charges of fraudulent misrepresentation.

The evidence relating to the alleged fraudulent misrepresentations has been so fully examined and set forth in so much detail in the judgments in the Courts below, that their Lordships think it unnecessary to repeat that examination; it will be sufficient to indicate broadly the considerations which have led their Lordships to the conclusion at which they have arrived.

The misrepresentations relied upon, as to Claim No. 32, were, first, that the Appellant said that the unworked portion, the claim from rim to rim, contained as much pay as the portion

worked out, and that he had ascertained this by prospecting; secondly, that the Appellant understated the amount which had been taken out of a certain drift on the claim. As to Claim No. 12, the complaint was that the Appellant pointed out a certain drift as the only one worked, and omitted to point out or mention another drift, which had been worked by a layman named Cassidy.

All the representations are alleged to have been made in the course of oral conversations, during the discussions which resulted in the purchase, and certainly not later than June 1901. The oral evidence consisted of the conflicting recollections of Paillard and Tarut on the one side, and of the Appellant on the other, as to what was said, each side being confirmed in some particulars, by other witnesses. And this evidence was given more than a year after the conversations took place. It is obvious that such evidence requires to be tested with care before holding it sufficient to establish a charge of fraud.

In the present case there is one test of extreme importance which is easily applied. Paillard made a contemporary memorandum in writing, in which he says that he recorded everything of moment stated by the Appellant. That memorandum is before their Lordships. It contains notes of many statements, none of which has been shown to be untrue. And it affords no confirmation of the making of any of the representations said to have been falsely and fraudulently made.

On that state of the evidence their Lordships are of opinion that the charges of fraud have not been established, and that the counterclaim ought to have been disallowed.

From the view which their Lordships take of the first and principal question arising on the

Appeal, it becomes unnecessary that they should express any opinion upon the question relating to damages, as to which there has been some difference of opinion in the Courts below.

Their Lordships will humbly advise His Majesty that the Judgment of the Supreme Court should be discharged with costs, and the Judgment of the Territorial Court *en banc* restored. The Respondents will pay the costs of this Appeal.