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DOMINION OF CANADA

In the Supreme Court of Canada
OTTAWA

On Appeal from the Court of Appeal for Ontario.

BETWEEN:—

HARRY REEDER,

(Plaintiff), **APPELLANT,**

— and —

GEORGE E. SHNIER & CO.,

(Defendant), **RESPONDENT.**

APPELLANT'S FACTUM

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(Defendant), **RESPONDENT.**

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APPELLANT'S FACTUM

40 This is an appeal by Plaintiff-Appellant to the Supreme Court of Canada from an order of the Court of Appeal for Ontario dated the 23rd day of April, 1948, setting aside the judgment in the action on the ground that it was obtained by the fraud or perjury of the Plaintiff. The judgment of the trial Judge, Smily J., dated the 19th day of March, 1947, awarded Plaintiff \$3,431.16 for the price of goods; an appeal by the Defendant to the Court of Appeal was unanimously dismissed by Hogg, Fisher and Hope, JJ., on the 18th day of June, 1947. A Motion by Defendant for an order under Rule 523 to set aside the judgment on the ground that it was obtained by the fraud or perjury of the Plaintiff was dismissed by Smily, J., on the 31st day of

October, 1947. On appeal, the Court of Appeal, Robertson, C.J., Hope and Aylesworth, reversed the judgment of Smily, J., on the 23rd day of April, 1948.

PART I

10

THE FACTS

This action, instituted in the Supreme Court of Ontario on the 23rd August, 1946, was for the balance of price of a contract dated 20th February, 1946, entered into between The Colorgraphic Company and George E. Shnier & Co., in the City of Toronto.

20

Reeder, who carries on business under the firm name and style of The Colorgraphic Company, is a manufacturer of creative window displays, advertising signs and other similar merchandise. Shnier, who is the sole proprietor of George E. Shnier & Co., is a manufacturer's agent and also a distributor of polaroid glass. Both parties to this litigation have their principal place of business in the City of Toronto.

30

By contract dated 20th February, 1946 (Exhibit 1, page 151), Reeder agreed to manufacture and deliver to Shnier approximately 2000 display stands at \$3.00 each, plus sales tax. These stands or polaroid demonstrators were for the purpose of displaying polaroid glass visors for use in automobiles. The visor was the essential part of the device which included a certain amount of cardboard and an electric light. The visor protected the eyes of a driver from the glare of the roadway. The contract is part read:—

40

<i>Quantity</i>	<i>Description</i>	<i>Price</i>
2000	Display stands as per sample submitted to Canadian Standards Association and approved by The Canadian Standards Association	at 3.00 each

1000 immediately, 1000 as required within the next three months.

The above are to be packed in corrugated cartons all ready for shipment.

THE ABOVE PLUS SALES TAX

10

10%

THE PURCHASER WILL PLEASE READ THE FOLLOWING, THAT NO MISUNDERSTANDING MAY OCCUR:—

20

After acceptance of sketch any alteration in engravings or drawings will be charged to the purchaser. THE COLORGRAPHIC COMPANY may deliver within a margin of ~~twenty five per cent.~~ over or under the amount ordered and the purchaser will on demand pay for the amount delivered pro rata to the purchase price. Unless otherwise ordered, cases are to be paid for by the purchaser. No charge is made for designing distinct labels, and the copyright on the design thereof on which trade marks separably appear is vested in THE COLORGRAPHIC COMPANY, who hereby give a free license to users thereof whose trade marks appear thereon and which labels are produced by this Company. No charge is made for the stones upon which engravings or drawings are made and all stones, cuts and dies remain the property of THE COLORGRAPHIC COMPANY. Proposals submitted to be subject to change without notice. The Company shall not be responsible for delays caused by failure to get material, by strikes, fires or other causes not fully within its power or control.

30

40

All conditions and agreements relating to the above order are declared to be embodied herein and all previous communications, either written or verbal, between the parties, or their representatives are hereby abrogated.

George E. Shnier & Co.,
67 Yonge St.

Salesman Purchaser Toronto, Canada.
George E. Shnier.”

By the contract the Colorgraphic Company undertook to furnish Shnier with 2000 display stands. One thousand were to be delivered immediately and the remainder "as required within the next three months." The stands were to be packed in corrugated cartons all ready for delivery, and terms were "net cash." It was agreed that delivery of 10% over or under the amount ordered would be considered as a fulfilment of the contract.

10 Reeder was not to be responsible for delays caused by failure to get materials, by strikes, fires or other causes not fully within his power or control. It was also provided that "all conditions and agreements relating to the above order are declared to be embodied herein. . . "

Reeder then proceeded to manufacture and deliver the display stands. He engaged several sub-contractors for the making of the component parts. The entire order "was run at one time." (Case, Reeder page 17). The first part of the order

20 was delivered to Shnier between the 22nd and 30th of April, 1946 and paid around the end of May, 1946.

Each display bore a label of approval of the Canadian Standards Association. The labels were supplied to Reeder by the Defendant Company, it being a subscriber to the Association.

On the 5th of June, 1946, Shnier wrote Reeder (Exhibit 9, page 167) that he had been advised by the Canadian Standards Association that certain features of the delivered stands did not

30 meet with Canadian Standards Association requirements. Shnier, then, purported to cancel the contract for the balance of the order of the display stands. He said (Exhibit 9, page 167):—

"In view of the above we are cancelling the balance of our order pending satisfactory disposition of the first thousand."

However, later, on the 17th June, 1946 (Exhibit 14, p. 172) Shnier wrote to Reeder, in part as follows:—

40

"In view of the fact that we have already paid you \$3240.00 on the first thousand units, we would like the following information immediately:

1. How soon can you definitely deliver the balance of 1,000 on order?
2. How soon can you correct the demonstrators we have in stock?

3. How do you propose to rectify this seven or eight hundred demonstrators that in the hands of our dealers from coast to coast.

10 4. How much would it cost to have these demonstrators that have been shipped all over Canada, fixed up to meet C.S.A. approval? We might send our customers the money and request that they have them fixed by their local electricians.”

On Shnier's refusal to deliver the visors, Reeder took action on the contract.

20 The Appeal Court, in its judgment of 18th June, 1947, interpreted this letter as showing clearly “that any attempt to cancel the contract had been withdrawn and that the Appellant (Shnier) did not consider the contract at an end.” (Page 188).

30 The action, in the trial court and Court of Appeal, centered around the remaining 1059 stands which Reeder had made and which Shnier refused to accept. The essential part of the device was a polaroid visor to be supplied by Shnier (Case Shnier page 72). He obtained 2000 from the United States for this purpose. Reeder received the visors for the first thousand but did not receive them for the balance of the order. Reeder, both before and after the attempted repudiation, repeatedly requested the visors from Shnier (Exhibit 3, p. 164; Exhibit 7, p. 166; Exhibit 13, p. 170; Exhibit 15, p. 174). The device was built about the visor and could not be assembled without it.

On the 23rd August, 1946, Reeder, accordingly, instituted action against Shnier for the contract price of the 1059 stands which he had ready and which Shnier had refused to accept.

40 After dismissing Defendant's contention that the stands were not to C.S.A. specifications, and that the Plaintiff failed to make delivery of the stands within the stipulated time, the trial Judge, Smily, said, (Page 183:—

“The only question remaining is as to the balance of the order which is some one thousand and fifty-nine display stands for which the Plaintiff is now claiming. I might say that the contract contains a provision that the vendor may deliver within a margin of so many over or under the amount ordered, so that they apparently had

the right to deliver an odd number. No question seems to be raised, particularly, as to the odd number.

10 Before the last thousand were delivered it appears that an inspector of the Canadian Standards Association noticed one of those stands and noticed that it was sub-standard; that is, that the electrical equipment did not meet with their standards, and they so notified the purchaser, the purchaser, as I have said, being the one who dealt with the association, and who had obtained the approval labels. The Defendant in the action then purported to cancel the balance of the contract, or at least suggested a cancellation which does not seem to have been a complete cancellation but calls for some further consideration of the matter as appears in the last paragraph of the letter respecting cancellation, dated June 5th, 1946.

20 It would seem from the evidence that the Plaintiff as vendor was prepared to rectify the stands to meet the objection of the Canadian Standards Association and made some suggestions in this regard.

30 The main defence of the Defendant is that the time of delivery of the balance of the order was not in keeping with the provisions of the contract which was that the stands were to be delivered as required within the next three months. It would seem from the evidence that this provision was really for the benefit of the Plaintiff as the Defendant apparently did not require more than one thousand at the time and only wanted the balance when he could make use of them. But the Plaintiff wanted a limitation put upon delivery in order that he might obtain payment without waiting too long inasmuch as he was making them all up at the one time. Whatever the reason for the postponement of the delivery of the balance of the order under the contract I do not think it is very important because there is nothing in the evidence to indicate that the Defendant considered the delivery of the balance of the order as urgent other than the suggestion in the letters when he was attempting to repudiate the contract. The facts do not suggest that the Defendant was in any way prejudiced as it would appear that there were two-hundred stands still in his possession, of the first thousand.

40

I find, therefore, that the delay in delivery of the second thousand — or having the stands ready for deliv-

ery — did not entitle the Defendant to repudiate the contract. It is suggested that the Plaintiff accepted repudiation or cancellation and proposed a new arrangement or new contract which wasn't completed. I do not think this is the effect of the correspondence. In view of the stand being taken by the Defendant, the Plaintiff wanted some assurance that the Defendant would accept the additional thousand and pay for them. At any rate, the Plaintiff proceeded to obtain the necessary material to complete the balance of the order, and part of the material necessary was some further polaroid screening which the Defendant was to supply and which had not been supplied. The balance of the order could not be completed until it had been supplied. There is nothing very definite regarding the polaroid material. I think it was in the contemplation of both parties that it would be supplied by the Defendant, and that would seem to be borne out by the facts disclosed in the evidence.

As far as the bulbs are concerned — which point I might mention now — there is nothing in the contract which requires bulbs to be furnished or to indicate that it was in the contemplation of the parties that light bulbs would be supplied by the Plaintiff, but there is some evidence that such was not to be the case.

So far as the right of the Plaintiff to the price of the balance of the order or damages, it would not seem to make any substantial difference because the amount would be the same. At any rate, I think the Plaintiff is justified in not delivering the balance of the order which in fact he could not very well do because he had not been supplied with the polaroid material by the Defendant. As I said before, there is nothing to indicate that the Defendant was really prejudiced by not having these stands during the early summer of 1946, notwithstanding that he said these display stands were being obtained for summer advertising. The evidence suggests to me that the only number of stands required for 1946 summer advertising, at any rate up until the middle of the summer, were the thousand which he had already received.

I believe I have mentioned previously that the plaintiff offered to make the stands comply with the Association standard requirements in whatever regard they failed to do so, and the evidence suggests that steps were taken to that end.

10 It may be rather significant also that the Defendant paid for two thousand of the light bulbs and does not seem to have asked for delivery of the one thousand which would suggest that he anticipated that they could be used for the balance of the order, although he says that the Plaintiff, Mr. Reeder, said he wanted payment for the bulbs because if the contract was going to be cancelled the bulbs were of no use to him. If that were so, I would think the Defendant would expect that if he were paying for them he should have the bulbs. The Defendant does not ask for delivery which would suggest that he contemplated that they might be put in the balance of the display stands.

20 For these reasons the Plaintiff is entitled to succeed. There will be judgment for the amount claimed but upon delivery of the completed stands to the Defendant, provided the polaroid material is supplied, or if it is not supplied, then completed without the polaroid material.

The Plaintiff should have the costs of the action.”

30 Shmier was accordingly condemned to pay Reeder the sum of \$3,341.16 “payable upon delivery of the 1059 Display Stands referred to in the pleadings herein by the plaintiff to the defendant fully completed (if the defendant shall within 15 days from the date hereof deliver to the plaintiff the Polaroid sheeting required to complete the visor or screen of the said stands) or upon delivery of the said 1059 stands completed without the Polaroid visors or screens if the defendant shall fail to deliver the Polaroid sheeting therefore within the said period of 15 days from the date hereof.”

40 This judgment was delivered on the 19th March, 1947. Defendant appealed this decision and on the 18th day of June, 1947, the Court of Appeal unanimously confirmed the holding of the lower Court. Hogg, J. A. rendered judgment for the Court (pages 187, 188). He agreed with the findings of the learned trial Judge and concluded:—

“I am of the opinion that there was no right in the part of the appellant to endeavour to rescind the contract

and also that the letter from the appellant to the respondents of the 17th June after the purported cancellation, shows clearly that any attempt to cancel the contract had been withdrawn and that the appellant did not consider the contract at an end.

10 I agree with the finding of the learned trial Judge, that the time for delivery of the second 1000 stands was not of serious importance to the appellant as there is nothing in the correspondence between the parties indicating that the delivery of the balance of the order was urgent. It is apparent that the remainder of the stands could not be completed until the balance of the polaroid material had been supplied to the respondents by the appellant. There is nothing in the contract making the time of the essence. I can find no grounds for concluding that
20 the appellant have a right to repudiate the contract. The appeal should be dismissed with costs.”

Pursuant to the judgment, Shnier delivered polaroid visors to Reeder on the 23rd June, 1947. However, he did not deliver the entire 1059, but only 923.

Shnier had supplied the containers for the first thousand and the 26th June, 1947, Attorneys for Reeder wrote Attorneys for Shnier (page 127) as follows:—

30 “Your client has delivered certain polaroid visors to our client, referring to them in a letter of June 23rd as being 1,000 visors. In fact the parcel contained 923 visors. The amount should be 1059.

The 1,000 electric light bulbs should be delivered to 205 Yonge Street.

40 You will recall that in connection with the first 1,000, our client was unable to get containers and your client was able to arrange this. It would appear that the shortage of shipping containers is more acute now than it was a year ago and our client says that he will not be able to get the necessary containers for several months. The demonstrators will, of course, be assembled shortly and we should be obliged if your client would consider what steps should be taken in view of the inability of our client to obtain containers.”

Having obtained containers from Shnier for the first thousand stands, Reeder, when testifying before the Court, had no reason to doubt that the same source of supply would be open to him for the second thousand. However, Shnier seized upon the statement contained in the letter of Counsel and made it the basis of an application under Rule 523 for an order to set aside the judgment against him on the grounds that the said judgment was obtained by fraud or perjury of Reeder and because of matters arising subsequent to the giving of the said judgment. In his affidavit dated 9th September, 1947 (page 113) filed in support of the application, Shnier concluded:—

“8. I verily believe that in view of the facts hereinbefore set out that the plaintiff is not now and never has been ready and willing to deliver the balance of the demonstrators referred to in the Judgment in this cause.”

On the 31st October, 1947, Smily, J. dismissing the motion of Defendant said (page 191):—

“The basis of the application is substantially that the plaintiff made untrue statements with respect to certain goods (the subject-matter of a contract for purchase and sale in question in the action) having been manufactured and ready for delivery.

It would seem that certain statements which were made with respect to the said matter were at least inaccurate, but I am of opinion that the inaccuracy does not go so far as to amount to fraud. A good deal of the trouble in this matter has been caused by the defendant's repudiation of the contract in question, and he should not be allowed to take advantage of that, in fact, this was the real issue at the trial, namely, as to whether the defendant was justified in repudiating the contract. If there had been no repudiation and consequent litigation, no doubt the defendant would have received all of the goods in question by the summer or autumn of last year, and the evidence at the trial indicated that he did not require them before that time.

In any event the defendant should have been able to discover the evidence now relied upon before the trial, and in this connections I would refer to the cases of *Mason v. Seney*, 12 Grant's Ch. R. 143, and *Varette v. Sainbury* (1928) S.C.R. 72, at p. 76 where Rinfret J. (now Chief Justice Rinfret) stated as follows:—

10 “On an application for a new trial on the ground that new evidence has been discovered since the trial, we take the rule to be well established that a new trial should be ordered only where the new evidence proposed to be adduced could not have been obtained by reasonable diligence before the trial and the new evidence is such that, if adduced, it would be practically conclusive.”

I do not feel that I can say, with certainty, if I had known of the facts now alleged, that I would have rendered a judgment more favourable to the defendant.

20 There has been an evident desire on the part of the defendant to avoid having to take the balance of the goods under the said contract because he does not want them. I think there should be an end to litigation between these parties over the matters in question, and in my opinion the application should be refused.”

The defendant appealed from this judgment and the Court of Appeal, on the 23rd April, 1948, maintained the appeal and set aside the judgment of the trial court on the grounds that the “plaintiff knowingly gave false evidence at the trial.”

30 It is from this judgment in appeal that Plaintiff-appellant now seeks relief from this Honourable Court.

THE PLEADINGS

1. *Statement of Claim*:—

In his statement of claim of the 10th January, 1947, Reeder outlined the contract of the 20th February, 1946, that he manufactured 2059 stands, 1000 of which were delivered and paid for. Paragraphs 5 and 6 read as follows:—

40 “5. The Defendant has neglected and refused to pay for the balance of the Display Stands ordered by the Defendant as per the said Contract.

6. The Plaintiff therefore claims:

(a) To amount owing for	
1059 Display Stands—	\$3177.00
8% Sales Tax	254.16
	<hr/>
	\$3431.16

(b) Such further and other relief as the nature of this case may require and to this Honourable Court shall seem just.

(c) The costs of this action.”

2. *Statement of Defence*:—

10

In his defence, Shnier contended that Plaintiff failed to make the stands in accordance with the specifications of the Canadian Standards Association and that Plaintiff had failed to make delivery in accordance with the contract. Paragraphs 7 and 8 state:—

20

“7. Due to the default of and breach of the conditions of the said contract by the plaintiff as aforesaid the defendant on or about the 5th of June, 1946 rescinded the said contract by giving notice to the plaintiff to that effect.

8. The defendant therefore submits that this action be dismissed with costs.”

3. *Reply*:—

30

For Reply Plaintiff joined issue with Defendant and stated that by contract he was not responsible for delays caused by failure to get materials that he undertook to repair or replace any defect or omission in the first thousand stands and that he did everything possible to correct the 200 stands which Defendant still had in his warehouse, but that Defendant neglected and refused to return the said 200 stands for repair.

PART II

ERRORS OF JUDGMENT

40

With great respect it is submitted that the Court of Appeal erred in holding that — page 202:—

1. “. . . the Plaintiff knowingly gave false evidence at the trial, and that false evidence was not only material, but was essential to recovery of the judgment that the trial Judge awarded him.”
2. in admitting as evidence, the evidence produced by Defendant-Respondent in support of his application for an order under Rule 523 to set aside the trial judgment.

3. In reversing the judgment of Smily J. dated 31st October 1947.

PART III

ARGUMENT

10 The Colorgraphic Company manufactures decalcomania transfers, advertising signs and counter and window displays. Early in February, 1946, Reeder learned that George E. Shnier & Co. had polariod visors which they wished to incorporate in demonstrators. Reeder sent Mr. Henderson, who was then his production manager, to see Shnier, and Henderson as Reeder's representative, negotiated the contract involved in this dispute.

The evidence is (Henderson, pages 92 and 93) that Shnier was at first interested in procuring 5000 of these demonstrators, 20 and Henderson submitted a quotation accordingly. Subsequently, Shnier reduced this amount and decided that 2000 would be more in accordance with his demands. The contract was, therefore, executed for 2000. It was dated the 20th February 1946, but was signed by Shnier about the 26th of February.

It was agreed that 1000 stands would be delivered immediately and the balance as required within the next three months. Even though the contract called for deliveries at different times, Reeder and Henderson decided that the displays would be more 30 efficiently and economically manufactured, if produced all at the same time. The terms of payment were "net cash" and Shnier undertook to pay as soon as they were ready for delivery and Reeder was to keep them until required. (Henderson, page 94).

In discussing this feature of the contract, the trial Judge, at page 184, held as follows:—

40 "It would seem from the evidence that this provision was really for the benefit of the Plaintiff as the Defendant apparently did not require more than one thousand at the time and only wanted the balance when he could make use of them. But the Plaintiff wanted a limitation put upon delivery in order that he might obtain payment without waiting too long inasmuch as he was making them all up at the one time."

FIRST ERROR—*That Reeder knowingly gave false evidence at the trial.*

The false evidence that the Court of Appeal held was given by Reeder concerned the “state of completion” of the 1059 display stands which Shnier, by his repudiation of the 5th of June, 1946 (Exhibit 9, page 167) had refused to accept and which refusal led to the present action.

10 Robertson, C.J.O. (page 197) lays particular stress on the evidence given by Reeder at page 31 in his examination-in-Chief:

“Q.—Then have you received from the defendant any money in respect of the undelivered polaroid demonstration? A.—None.

Q.—Your statement of claim says you have 1059 on hand. A.—Yes.

Q.—Are they available to be delivered on request? A.—We can deliver at once, yes, provided the visor is supplied to us.”

20

Comparing this evidence with that produced in support of the motion, Smily, J. dismissed the motion and stated:—

“It would seem that certain statement which were made with respect to the said matter were at least inaccurate, but I am of the opinion that the inaccuracy does not go so far as to amount to fraud. . .

30

I do not feel that I can say with certainty, if I had known of the facts now alleged, that I would have rendered a judgment more favorable to the defendant.”

(Pages 191 and 192)

This is the opinion of Smily, J. who also presided at the hearing in the trial court.

40

However, Chief Justice Robertson, in appeal, concluded otherwise, (page 201):—

“It is impossible to believe, in view of these facts, that the plaintiff did not know, when giving evidence at the trial of the action in March, 1947, that the display stands were not in condition for delivery, and that substantial sums would require to be expended by him to complete them. The invoice of the Schaefer-Ross Company of July 26th, 1946 indicated a sum of \$127.08 for assembling alone. There were other items, such as the

‘corrugated cartons’ for 1,059 display stands, which he had not been able to buy, and new cardboard parts for 350 display stands damaged in December 1946.’

The Chief Justice enumerates three examples which he states are indicative that the stands “were not in condition for delivery” at the time of the trial of the action in March, 1947:—

10

A.—Assembling.

A.—The damaged cardboard parts.

C.—Corrugated cartons.

— A —

Assembling:—

20 The alleged deficiency with respect to assembling was based on a letter dated 16th August, 1946 (page 133) from Reeder to Schaefer-Ross Co., one of the sub-contractors. Schaefer-Ross were instructed to return the unassembled material which they had on hand. These parts were then kept in storage at Reeder’s warehouse until the summer of 1947 and were there at the time of the trial.

30 But how could Reeder assemble the demonstrator when the most important part, and the part for which it was designed, the visor, had not been supplied by Shnier who, at pages 70 and 72 of his cross-examination, candidly admits that he did not deliver the visors even though he had previously undertaken to do so?

— B —

The Damaged Cardboard Parts:—

40 While this material was in storage at the Small Arms Plant at Long Branch, awaiting the delivery of the visors, in the early part of December 1946, some of the cardboard sides were damaged by water when a toilet controlled by the Small Arms Plant engineering system, overflowed. The damaged parts had not been replaced at the time of the trial.

But there is no reason to believe that these parts could not have been made available at the time when the stands were to be completely assembled. As a precaution Reeder ordered 500 extra cardboard parts. They were not difficult to replace; one man made 500 parts in a little over a week. (Reeder page 146).

The Corrugated Cartons:—

10 In respect to the corrugated cartons, the Court relied on a letter dated 26th June, 1947, from the Attorneys of Reeder to the Attorneys of Shnier. This letter (page 127) reads as follows:

“Dear Sirs:

Re — *Reeder vs. Shnier.*

20 Your client has delivered certain polaroid visors to our client, referring to them in a letter of June 23rd as being 1,000 visors. In fact the parcel contained 923 visors. The amount should be 1059.

The 1,000 electric light bulbs should be delivered to 205 Yonge Street.

30 You will recall that in connection with the first 1,000, our client was unable to get containers and your client was able to arrange this. It would appear that the shortage of shipping containers is more acute now than it was a year ago and our client says that he will not be able to get the necessary containers for several months. The demonstrators will, of course, be assembled shortly and we should be obliged if your client would consider what steps should be taken in view of the inability of our client to obtain containers.

Yours truly,

(sgd.) Mason, Foulds, Davidson & Gale,
per: ‘J. D. Arnup’.”

40

But Shnier had supplied the cartons for the first thousand and Reeder had no reason to believe that his source of supply would fail when it came time to complete the assembling of the second thousand. At least he had received no notice from Shnier.

The Supreme Court of Canada, in *Nesbitt, Thomson & Co. Ltd. vs. Pigott* (1941) S.C.R. p. 520, at p. 530, on hearing an appeal from the Supreme Court of Ontario, held that fraud or

a false statement has to be made knowingly or without belief in its truth or with reckless disregard of whether it is true or false. The essential difference between a fraudulent statement and one that is not, is that the former is made "knowingly" or with intent, for the purpose of achieving some end that could not otherwise be obtained.

10 With great respect, it is submitted that Reeder's acts and words do not come within the ambit of fraud. Reeder may have made some inaccurate statements and indeed, as we have seen, that is exactly what Smily, J. held in his judgment on the application (page 191). But before declaring them fraudulent, all the circumstances of time, place and point of view must be taken into consideration. To form an accurate appraisal of Reeder's testimony, consideration should be given the situation of the parties at the time of the purported cancellation by Shnier.

20 Reeder undertook to provide Shnier with display stands. The nature of their construction was such that they could only be economically produced, if manufactured all at the same time in one operation. But Shnier did not require them all at the same time. He wanted 1000 immediately and the rest as required within the next three months. Reeder was, therefore, to hold the balance till Shnier required them. It was agreed that Shnier would pay as soon as the merchandise was ready for delivery. The contract was executed five months after the termination of hostilities. Consequently, materials were still very scarce. The
30 parties, therefore, decided that the vendor was not to be responsible for delays caused by failure to obtain materials. The purchaser also agreed to assist in procuring supplies which were difficult to obtain (Shnier, page 63). He obtained cartons for the first thousand. He undertook to provide all the visors as noted before.

40 Between the 22nd and 30th April, 1946 Reeder delivered the first part of the order. On the 28th May, 1946 (Exhibit 3 page 164) he advised Shnier that the balance of the order was ready save for the visors which Shnier was to supply. Then on the 8th of June 1946 Reeder received a letter from Shnier which purported to cancel the remainder of the order. The result was that at the time of the attempted cancellation, Reeder had on hand 1059 unassembled stands which were practically completed. But, owing to Shnier's negligence and refusal of delivery, he lacked the visors which precluded him from assembling the completed product.

It was the refusal of Shnier to respect the law between the parties that gave rise to this litigation and that was the dominating point in controversy when Reeder testified.

Viewed in this light, it is submitted that Reeder's statements are those of an ordinary, honest business man whose difficulty in making delivery centered in the fact that an essential
10 part had not been supplied by Shnier in accordance with the later's undertaking. The fact that Shnier, having failed and refused to deliver an essential part, making delivery impossible, should attempt to avail himself of his own turpitude to dissolve the contract, was naturally uppermost in Reeder's mind.

This entire dispute, and all the resulting litigation, can be attributed to Shnier's failure to deliver and his attempted repudiation of the balance of the order. It is submitted that Reeder has executed his obligations to the full. Shortly after the
20 delivery of the first thousand, the second thousand were ready for delivery but for the visors which Shnier refused to supply. Reeder has been put to no end of trouble and cost as a result of this purported cancellation of contract. Had Shnier accepted the balance as and when he should have, during the summer of 1946, the carboard sides would not have been damaged while in storage during December 1946. One hundred of the new electrical assemblies which had been purchased would not have been stolen in August while in storage (p. 137).

30 The almost irresistible inference is that Shnier was consistent in his attempts to escape the terms of the contract. He first of all thought of 5000 stands. Then he reviewed his requirements and decided he only needed 2000 and ordered accordingly. Then in June 1946, after the first thousand had been delivered, he decides that he has over-estimated his needs and attempts to cancel the contract. He has distributed 800 demonstrators; 200 still remain in his warehouse. These demonstrators are good only for the summer trade. He comes to the conclusion that not even the remaining 1000 will be required. This is borne out by Reeder's
40 testimony at page 147, which was not directly contradicted. Shnier himself suggests that the remaining stands were only of "salvage" value to him (Page 117). Faced with the predicament of having too many stands on hand, Shnier looked for an excuse to repudiate the order. This is what, in effect, Smily, J. held in his judgment on Shnier's motion to quash the original judgment:—

“There has been an evident desire on the part of the defendant to avoid having to take the balance of the goods

under the said contract because he does not want them. I think there should be an end to litigation between these parties over the matters in question, and in my opinion the application should be refused.”

True, there may have been inaccuracies regarding certain statements, but as Judge Smile stated:—

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“ . . . the inaccuracy does not go so far as to amount to fraud. A good deal of the trouble in this matter has been caused by the defendant’s repudiation of the contract in question, and he should not be allowed to take advantage of that, in fact, this was the real issue at the trial, namely, as to whether the defendant was justified in repudiating the contract. If there had been no repudiation and consequent litigation, no doubt the defendant would have received all of the goods in question by the summer or autumn of last year, and the evidence at the trial indicated that he did not require them before that time.”

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This, Appellant submits, is a true and more accurate appraisal of his testimony given at the trial.

SECOND ERROR. — *In admitting as evidence the evidence produced in support of the motion.*

Without prejudice to Appellant’s stands that he had fulfilled his obligations, Appellant submits that the Court of Appeal erred in admitting as evidence in this case, the evidence relied upon by Respondent in support of his motion to set aside the original judgment.

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Attention is drawn to the Supreme Court case of *Varetté vs. Sainbury* (1928) S.C.R., p. 72, at p. 76 where Rinfret, J., (now Chief Justice) stated as follows:—

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“On an application for a new trial on the ground that new evidence has been discovered since the trial, we take the rule to be well established that a new trial should be ordered only where the new evidence proposed to be adduced could not have been obtained by reasonable diligence before the trial and the new evidence is such that, if adduced, it would be practically conclusive.”

This action was for specific performance of an alleged agreement of sale. It was dismissed at trial. The plaintiff ap-

pealed and alternatively asked for a new trial on the ground of discovery of new evidence. The Appellate Division, Ontario, without passing on the main appeal, granted a new trial. The defendant appealed and this Honourable Court held that the trial should not have been granted on the ground that the proposed new evidence could have been ascertained with reasonable diligence before the trial. As an additional reason, it was also
10 held that the evidence in question could not conclusively establish the plaintiff's case.

It is submitted, with great respect, that the appeal now before this Court is exactly the same as the one cited above and admits of the same interpretation. The evidence produced subsequent to the trial and in support of the motion could have been produced with a minimum of "reasonable diligence" at the time of the trial. The information contained in the various affidavits and letters was available at the time of the hearing of the trial
20 Court. Smily, J., in his judgment on the motion, dismissed the motion also for this very reason. Some of the letters produced were even written during the summer before the trial. Neither Reeder nor Henderson or Taylor, his employees, were cross-examined regarding the state of completion of the stands. Schaefer-Ross, the subcontractors who made the frames and were responsible for assembling the completed stands, did not appear at any stage of the trial to give testimony.

It is therefore submitted with great respect that the Court
30 of Appeal erred in admitting the evidence produced by Respondent in support of his motion to set aside the trial judgment.

THIRD ERROR — *Reversing the Judgment of Smily, J.
of 31st October 1946.*

With great respect it is submitted that the Court of Appeal erred in reversing the judgment of Smily, J. of 31st October 1946. Viewed in the light of all the circumstances of this case, of the attempted repudiation of the contract by Shnier, and his
40 consistent refusal to deliver the most essential part, the part for which the demonstrator was designed, it is submitted that Reeder's testimony did not constitute fraud.

Plaintiff-Appellant also submits that, in any event, the evidence produced by Defendant-Respondent in support of his motion to set aside the trial judgment, should not, in keeping with the decision of the Supreme Court of Canada in *Varette vs. Sainbury*, have been admitted by the Court of Appeal. This new

evidence could have been “ascertained with reasonable diligence” before or at the time of the trial; nor did it “conclusively establish” the issue involved.

CONCLUSIONS

10 For these reasons Plaintiff-Appellant respectfully asks that the judgment of the Court of Appeals for Ontario be reversed and that his action, as maintained by the trial Court on the 19th March, 1947 and confirmed by the Court of Appeal on the 18th of June, 1947, be maintained with costs.

The whole respectfully submitted.

Ottawa, January 14th, 1949.

20 JOHN T. HACKETT,
Counsel.

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DOMINION OF CANADA
IN THE SUPREME COURT OF CANADA
OTTAWA

On Appeal from the Court of Appeal for Ontario.

BETWEEN:—

HARRY REEDER,
(Plaintiff), **APPELLANT,**

— and —

GEORGE E. SHNIER & CO.,
(Defendant), **RESPONDENT.**

APPELLANT'S FACTUM

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