THE LOGICAL BASIS OF THE DOCTRINE OF ELECTION IN CONTRACT

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It has frequently been stated by the courts and the writers that where the law of contract gives the right to a contracting party to repudiate by reason of fraud, misrepresentation or breach committed by the other contracting party, the one having that right must elect whether to affirm the contract or to repudiate, and that once he has elected (except in the case of a continuing or repeated breach) he is irrevocably bound by his election.[1]

It is said that one cannot "approbate and reprobate" at the same time, or that one cannot "blow hot and cold". It is not the intention of this article to collect together all the authorities. Rather, I intend to suggest that, while logical, this principle is not always reasonable or practical in its operation. It is also my intention to provide illustrations from a number of cases, some of them from the Alberta courts, of an approach which may be more practical.

As an exercise in mental discipline, or abstract logic, the principle that one should not elect to continue a contract which he has the right to repudiate, then later repudiate it, cannot be criticized. But since contract law must also afford a reasonable means of settling commercial disputes, one is constrained to ask whether the law need give such conclusive force to a choice by the contracting party who later wishes to change his mind if no other person will be affected by this inconsistency or indecision.

An examination of a hypothetical case simply applying the rule that one cannot blow hot and cold, will show that the rule can work a hardship upon the innocent party (i.e. the one with the right to repudiate) to the benefit of the guilty party (i.e. he who has misrepresented, breached or committed fraud). A. agrees to purchase from B. a plot of land upon B.'s representation that a large shopping centre is to be built on adjoining land, which will greatly increase the value of the land B. is selling. A. agrees to pay the purchase price of $10,000.00 (well above the present market value) by a down payment of $2,000.00 and the balance in monthly instalments of $500.00. A. files a caveat to protect his purchaser's interest under the agreement for sale, hires a surveyor and subdivides the land, and publishes advertisements offering lots for sale. A. then learns that B's story about the adjoining land was untrue and that no shopping centre is proposed for it. After so learning, A. makes two further monthly payments upon the purchase price to B., registers the subdivision plan, and continues to publish his ad daily offering lots for sale. For $10.00 A. grants an option on one lot, but otherwise finds the lots unsaleable. He then consults his solicitor who advises him that he has a right to rescind the agreement for sale on the ground of B.'s misrepresentation. A.'s solicitor commences an action claiming rescission. The trial Judge finds that A. had a right to rescind

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1 In an article in 38 Can. Bar Rev. 509, D.M. Gordon, Q.C. gathers together a great number of the authorities on this point, and argues and illustrates this proposition extensively.

for innocent misrepresentation, but that by paying two monthly instalments, remaining in possession, and continuing to deal with the land by completing his subdivision and advertising lots for sale, and granting an option (which was not taken up), A. had elected irrevocably to affirm the agreement for sale and has lost his right to rescind.

No doubt it is logical that A. should not conduct himself in a manner indicating affirmation of his contract, and then decide to repudiate. Looking practically at the respective positions of the parties, however, on the one hand A. who has been wronged, has no remedy. B. who caused A.'s loss, has suffered nothing by A.'s "election", but escapes liability.[2]

In the hypothetical example given, the conduct of the plaintiff was of a kind which has frequently been held to be an election to affirm. It may have arisen simply from ignorance or inadvertence of the duty which the above principle imposes. Or it may have arisen not merely through inadvertence but through necessity or business convenience. For example, A. agrees to purchase B.'s hardware business. B. has seriously misrepresented the business to A. When he discovers this, A. confronts B. and demands his money back for the return of the business to B. B. refuses to return the money, and refuses to go back into possession. A. is faced with the choice of closing down the business, and doing nothing which might conceivably be taken to show approbation of the transaction, before and during the time he exercises his right to sue, even though this may destroy the business or leave A. without an income. Not only may A. face those prospects, but he must be presumed to have the wisdom of Solomon in ascertaining that B.'s misrepresentations are sufficient to justify his repudiating.

It is not the intention of this article to suggest that there is not a strong weight of authority in support of the simple proposition that the party with a right to repudiate once he has elected to affirm cannot then exercise his right to repudiate. It is intended to suggest, however, that some of the authorities relied on most strongly in the numerous cases which have adhered to the proposition without examination, do not really offer strong support for it.

The case generally considered to be the leading Canadian authority on the subject is *United Shoe Machinery Co. of Canada* v. *Brunet*.[3] The action was one in which the plaintiff sought an injunction to restrain the defendant from using shoe-making machines leased by the plaintiff to the defendant in conjunction with other machines not leased from the plaintiff, in breach of the terms of "the leases sued on" (the term used by the court to distinguish the leases directly in issue from certain others). By the leases sued on, the defendant agreed that it would not use the machines leased from the plaintiff in the leases sued on in conjunction with any machines not leased from the plaintiff. This provision was referred to as "the tying clause". In addition to the

2 A few random examples of cases where it is suggested the eventual position of the parties is much like that in the hypothetical case above described are:
Wolfe v. *McArthur* (1908) 18 Man. R. 30.
Webb v. *Roberts* (1907) 16 O.L.R. 279.
Schrader v. *Manville* (1915) 7 W.W.R. 1376.
Barron v. *Kelly* (1918) 56 S.C.R. 455.
Hughes v. *Ojibway Realty* (1924) 55 O.L.R. 611.
Doran v. *McKinnon* (1916) 53 S.C.R. 609.

3 (1909) A.C. 330.

machines covered by the leases sued on, other machines had been obtained by the defendant from the plaintiff under lease, and were referred to in the judgment as "the allied machines".

On May 15, 1905, the defendant wrote to the plaintiff advising that the defendant had discontinued the use of the allied machines, and asking the plaintiff to remove them. The plaintiff did not remove them, and the defendant wrote in the same vein on June 5 and June 19. The plaintiff's action for an injunction to restrain the breach of the tying clause was brought by the plaintiff in July, 1905. The defence to the action was, first, that the plaintiff had falsely represented that the plaintiff was a patentee of the machines, inducing the defendant by this representation to enter into the leases; and second, that by reason of the plaintiff's "practical monopoly" in such equipment in Canada, the covenants in the leases were void as being in restraint of trade.

The first of these defences is relevant on the matter of the application of the doctrine of election of remedies, for the Privy Council to whom the case finally came for decision, applied the doctrine in their decision.

The judgment of their Lordships was delivered by Lord Atkinson. The operative part of the judgment on the matter of election reads in its entirety as follows:

> A contract into which a person may have been induced to enter by false and fraudulent representation is not void, but merely voidable at the election of the person defrauded, after he has had notice of the fraud. Unless and until he makes his election, and by word or act repudiates the contract, or expresses his determination not to be bound by it (which is but a form of repudiation), the contract remains as valid and binding as if it had not been tainted with fraud at all: *Clough* v. *London and North-Western Ry. Co.* (1871) L.R. 7 Ex. 26, approved by Lord Blackburn in *Erlanger* v. *New Sombrero Phosophate Co.* (1878) 3 App. Cas. 1218, at pp. 1277-1278 and by Lords Watson and Davey in *Aaron's Reefs* v. *Twiss* (1896) A.C. at pp. 290 and 224. In the first mentioned case Mellor, J. says L.R. 7 Ex. at p. 34:
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> > 'The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment, when his tenant has committed a forfeiture. If with knowledge of the forfeiture he, by the receipt of rent or other unequivocal act, shows his intention to treat the lease as subsisting, he has determined his election forever, and can no longer avoid the lease.'
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> In the present case it was proved in evidence, and not disputed, that, though the respondents had on May 15, 1905, if not before, so satisfied themselves that they had been defrauded that they called upon the appellants to remove the 'allied machines', yet they retained in their hands, and continued to work, the machines demised by the 'leases sued on' up to July 21, 1905, the date of the interlocutory injunction, and paid in respect of this period the royalties reserved by these leases. In no more emphatic, or unequivocal, way could the respondents have shewn their intention to treat the leases as subsisting. In the face of this evidence it is natural that the plea does not contain an averment that the respondents repudiated the 'leases sued on'. That matter is, however, obviously disposed of by the finding of the jury in answer to questions Nos. 7 and 8 left to them.
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> These answers run as follows: Answer to question 7: Between May 15 and July 15, 1905, the defendants did use the machines named (i.e. demised by the leases sued on) in connection with other machinery not leased from the plaintiffs. —Unanimous.
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> Answer to question 8: The defendants proved by their acts that they did not intend to be bound by this clause (i.e. the tying clause).
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> These answers taken together amount, at the least, to a finding that the respondents did not, before action brought, avoid the contract, if not to a finding that they affirmed it. For the party defrauded cannot avoid one part of a contract and affirm another part, unless indeed the parts are so severable from

each other as to form two independent contracts. Nothing of the kind exists in the present case, for the covenant in the lease which is objected to merely prescribes the mode in which the thing demised is to be used.

For these reasons their Lordships are clearly of opinion that the respondents have failed to sustain their first defence, and they therefore think it is unnecessary to consider the question of the alleged misdirection by the learned judge at the trial as to the party on whom rested the burden of proving that the machines demised by the leases sued on were not patented.

It will be noted that it is not suggested in Lord Atkinson's judgment that the defendants had ever alleged that they had repudiated the leases sued on. It will also be noted that in the concluding portion of that part of the judgment quoted, Lord Atkinson refers to the findings of the jury at trial and points out that the findings of the jury amount at least to a finding that the contract was not avoided, but there is no decision by Lord Atkinson that the defendant had repudiated or purported to repudiate.

Thus, while the case may be authority for the proposition that a contract is binding until repudiated (where there is a right to repudiate), it is no authority for the proposition that a party cannot blow hot and cold, that is that he cannot first conduct himself as if he were affirming, and then later exercise the right to repudiate.

Two English authorities often cited in favour of the doctrine are *Gray* v. *Fowler*[4] and *Warde* v. *Dixon*.[5] These authorities were cited and applied in *Public Trustee* v. *Pearlberg*.[6] The rule applied in all three of these cases is well set out by Slesser, L.J. The defendant Pearlberg had agreed to purchase lands from a deceased now represented by the Public Trustee, had given a deposit, but had failed to complete according to the contract. The vendor had sued for specific performance upon the failure to complete. He subsequently had decided to give notice under the agreement terminating it and forfeiting the deposit, but had not discontinued the specific performance action before doing so. In the light of these facts, Slesser, L.J. said at page 9:

Had the action been started by bill in the Court of Chancery before the Judicature Act, it can scarcely be doubted that, in the circumstances of the case, the notice served on Mr. Pearlberg under clause 27 of the contract of January 29 would be inoperative so long as the bill was on the file of the court. Authority for this proposition is to be found in the case *Gray* v. *Fowler* (Supra) approving *Warde* v. *Dixon* (Supra), to that effect, a doctrine now found in all current text books. A vendor may rescind notwithstanding a bill to have been filed, if and when the bill is dismissed. As Kelley C.B. points out in *Gray* v. *Fowler* (Supra) at 272, speaking of the practise of the Court of Chancery:

> 'The seller cannot, while his bill for specific performance is pending, put an end to the contract; he must first dismiss his bill with costs. But the whole meaning and essence of that rule, (which is a very reasonable rule) is this:
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> "You cannot be acting on the contract and assuming it to exist, and at the same time exercising a right to put an end to it by rescinding it."

But in the present case the respondent has done nothing to have the writ taken off the record; nor has the purchaser in any way waived his rights to say that the vendor cannot rescind while he still has on record a writ claiming specific performance against him on the basis that the contract still exists; and that consequently he is entitled to say that he is not now out of time, and therefore, not in default under clause 27 of the contract.

4 L.R. 8 Ex. 249.
5 28 L.J. (Ch.) 315.
6 (1940) 2 K.B. 1.

Thus, the Court of Appeal dismissed the action, but only because at the time when the vendor purported to rescind, he still had on record a subsisting action claiming specific performance of the contract. The same rule was applied in the *Gray* and *Warde* cases relied on. From all three cases it is clear that all that needed to be done to give the vendor in each case the right to repudiate after all, was to discontinue his previous action. It would seem that nothing could be a clearer election to affirm than to begin an action for specific performance, and yet the court in each of these three leading cases states that the vendor can change his mind and elect to repudiate by the simple act of discontinuing the first action.

But it might be suggested that the later right to rescind was not a change of mind and a choice of a new remedy for the same default, but rather the exercise of a new remedy based upon a continuing default. However, it is clear from the judgment in the *Pearlberg* case that the court did not consider the matter in this way, for both Slesser L.J. and Luxmoore L.J. go to some lengths to make clear that the position of the parties at the time of the action was that by having on file a subsisting bill for specific performance, the vendor had given to the purchaser the renewed right to complete the purchase if he so desired. Thus at the time when the court was delivering its judgment, the purchaser was no longer in default. It is not suggested in any of the judgments that by discontinuing his action, the vendor could put the purchaser back into default creating a new breach or re-instituting the old.

What these cases really seem to be authority for is not the proposition that once there has been an election, there can never be a change of that position, but rather that you cannot be conducting yourself in inconsistent ways at the same moment. The words quoted from *Gray* v. *Fowler* by Slesser L.J. are significant:

> You cannot be acting on the contract and assuming it to exist, and *at the same time* exercising a right to put an end to it by rescinding it. (Italics supplied)

Before going on to consider those cases which suggest that in deciding whether the innocent party is prevented from repudiating by conduct suggesting affirmation, the court will look at the position of the guilty party and whether he has altered it, it will be useful to look, for comparison, at the rule which applies where the right of repudiation has arisen, but the party having the right to repudiate has done nothing either to affirm or disaffirm. The rule is stated as follows in the leading case of *Clough* v. *London and Northwest Railway Company*[7] by Mellor J. at page 35:

> In such cases (i.e. of fraud) the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? Or has he elected to avoid it? Or has he made no election?
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> We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay, the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind.
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> And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it

7 (1871) L.R. 7 Ex. 26.

probably would in practise be treated as conclusive evidence to show that he has so determined.[8]

Thus in determining whether a party by delaying a decision has lost his right to repudiate, the court applies the sensible procedure of looking, not only at the words and conduct of the innocent party, but at the effect upon the guilty party and third parties of the lack of action by the innocent party.

I will now consider whether, in cases where there are words or conduct which the court holds to be an election, it should concern itself only with the conduct of the innocent party. There are some cases which suggest that the courts may adopt the same approach in both types of situation, that is, to ascertain whether any person has been prejudiced by words or conduct which may indicate a choice by the innocent party to affirm and not repudiate.

A well known case in which at one stage at least, the court considered the position of the guilty party in determining whether conduct of the innocent party which looked like a clear decision to affirm should deprive the innocent party of a right to repudiate is *Morrison* v. *The Universal Marine Insurance Company*.[9] The final judgment in The Court of Exchequer Chamber restored the judgment of Blackburn J., sitting with a jury. He had allowed the defence of the defendant insurer that the plaintiff had failed to disclose material information, so that the defendant was not compelled to pay under a policy of insurance in respect of the loss of the plaintiff's ship. The facts were that the plaintiff in good faith failed to disclose, in placing insurance upon his ship with the defendant, information which would have been sufficient to indicate to the defendant that the ship might have been lost. After "initialling the slip", an underwriting practice similar to the modern cover note, but before executing and issuing the formal policy, the defendants learned the information which the plaintiff had failed to disclose, but they nevertheless executed and delivered the policy without any protest or notice that they would treat it as void. Then when they received notice of the loss of the vessel, the defendants advised the plaintiff that they would treat the policy as void. Blackburn J. at trial, in directing the jury, advised them that if the defendants had elected to go on with the contract after learning of the non-disclosure, they would be prevented from subsequently repudiating. He also pointed out to the jury that the insurer had learned the facts before issuing the formal policy. However, he stated his belief that the issuing of the formal policy was not a matter of significance, and the jury expressly found in answer to one of the four questions put to them that the conduct of the defendant in so issuing the formal policy did not constitute an election to treat the policy as subsisting.

In the Exchequer Court[10] upon appeal from the judgment of Blackburn J., Martin B. held that the direction to the jury by Blackburn J. should have been that if the defendants, by delivering the policy to the plaintiff and retaining the premium, would naturally lead the plaintiff

[8] (1917) 1 W.R. 1426 at 1427 (Alta C.A. and see also *Consolidated Investment Ltd.* v. *Acres*, and *Bawlf Grain Co.* v. *Ross*, (1917) 37 D.L.R. 620 at 623 (S.C.C.).

[9] (1873) L.R. 8 Ex. 197.

[10] (1873) L.R. 8 Ex. 40.

to suppose that the policy was delivered to him as a binding contract, that would preclude them from afterwards averring the contrary. His reasoning for this was that:

> The question is, whether they (the defendants) are now at liberty to say that they are not bound by the policy, on the ground of concealment; and my impression is that they are estopped. If the underwriter, after having acquired a knowledge of the fact of the concealment, gives out a policy without notice, and as if it were binding on him, he does that which would induce the assured to think that he had a valid policy, and to seek no further for insurance. He cannot be allowed to wait until a loss has occurred, and then elect to rescind, when his own act has put the assured in a condition in which he can no longer insure himself anywhere.[11]

Bramwell B. agreed in the result with Martin B. that the judgment should be reversed, but not upon the ground of estoppel, rather on the basis that the defendant did not repudiate within a reasonable time, and therefore must be found to have elected to affirm.

Cleasby B. dissented, finding that the delivery of the policy was not an election because the real contract was made when the slip was initialled, and the giving out of the policy was merely a formal act done as a matter of course.

In the Court of Exchequer Chamber, on further appeal, the judgment of Blackburn J. was restored. The court found that the Judge correctly directed the jury on the question of election, and that if he went too far in directing the jury that election to repudiate could be precluded if not done within a reasonable time, this was too favourable to the plaintiff, so that he could not complain of it. Then the court pointed out that there was no evidence that the plaintiff had refrained from taking other insurance because of the conduct of the defendant in leading him to think that this insurance would not be avoided, so that neither by delay in repudiating nor by estoppel following election, could the judgment properly go against the defendant. However, although reversing the judgment of Martin B. the court expressed no disapproval of his finding on estoppel, merely holding that there were no facts found which could give rise to an estoppel.

In *Diett* v. *Reynolds*,[12] Diett and Reynolds agreed to exchange properties, Reynolds conveying to Diett his interest in an apartment building. Reynolds had agreed with a real estate agent who was employed by Diett to dispose of Diett's lands that Reynolds would pay the agent $2,000.00 "if the deal with Diett went through". The agent negotiated the deal and was paid the $2,000.00 by Reynolds. The transaction was concluded on November 14, and on November 15 Diett learned that the agent had received the $2,000.00 from Reynolds, but he did not know it had been arranged before the sale was made. When he learned of this fact, Diett commenced an action for rescission on December 6. But he remained in possession of the lands acquired from Reynolds and collected the rental from the apartment building until trial. As a further ground of complaint by Diett an amendment at trial permitted him to set up that a default by Reynolds under the terms of a previous agreement for sale under which Reynolds was purchasing the lands had caused the former vendor to foreclose, so that Reynolds had nothing left to convey to Diett.

11 *Id.*, at 53.
12 (1923-24) 55 O.L.R. 103, aff'd (1925) 4 D.L.R. 1015 (S.C.C.).

At trial, Mulock C.J.O. found fraud and that there was a right to rescind. In connection with the argument of Reynolds that by remaining in possession and continuing to receive rents until the trial, Mulock C.J.O. said:

> The Defendant's counsel also argued that the conduct of the Plaintiff in remaining in possession and collecting the rent of the Detroit property after action begun, was a re-affirmation of the contract. The issue of the Writ was an election to repudiate it. An election once determined is determined forever. (*United Shoe Machinery Co. of Canada* v. *Brunet* (1909) A.C. 330); and, therefore, the Plaintiff's conduct subsequent to the issue of the Writ cannot undo their previous election to repudiate the contract.[13]

The judgment was affirmed in the Supreme Court of Canada.

There is nothing in the judgments in *Diett* v. *Reynolds* to state specifically that the court considered the position of the guilty party and third parties, and, finding that there had been no alteration of position, ignored the inconsistent conduct of Diett. But the result of the decision is that Diett did in fact have the opportunity of saving the loss of rents pending completion of the action which would have resulted had he been put in the position which the classic statement of the rule would suggest, that is, giving up possession and refusing to collect rents.

In two Alberta cases there was a similar result. In *Ingleson et al* v. *Wedl*[14] the plaintiff agreed to purchase from the defendant a half section of land, with a cash down payment and a balance to be paid in five yearly instalments. The vendor agreed to convey title to the purchaser upon payment in full, and the wording of the agreement stated that it would be title in fee simple free from encumbrances, but subject to conditions and reservations expressed in the original grant from the Crown. There were no reservations in the original grant from the Crown.

The agreement was made on November 20, 1917, and on September 13, 1919, the plaintiff's (purchasers) solicitors wrote to the defendant stating that the plaintiff had discovered that a third party owned the mines and minerals, and that the plaintiff would not go through with the transaction unless the price were abated by the amount which would be required to purchase the mines and minerals from the third party, and failing this, the plaintiff would call off the agreement and ask for the return of his purchase money. No answer was received to the letter, so on October 30, 1919, the plaintiff began an action for rescission.

Pending trial of the action, the plaintiff entered into a grazing lease to a fourth party, and later in 1920 gave the fourth party an option to purchase. At trial, the defendant raised the lease and the option as affirmations of the original agreement for sale and a complete defence to the plaintiff's action.

Simmons J. first referred to the evidence of the plaintiff which was that there was no consideration for either the lease or the option, that he had told the person leasing and taking the option that he had no right to the land which he could convey, but was willing to grant the lease and the option to the fourth party if this would give the fourth party the appearance of color of right to use the lands for grazing cattle and to prevent other ranchers in the vicinity from doing this. Simmons J. goes on at page 110:

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[13] *Id.*, at 118.
[14] (1922) 1 W.W.R. 708.

In my view the bringing of the action was a sufficient repudiation of the contract. *Innis* v. *Costello*, 11 Alta L.R. 109 (1917) 1 W.W.R. 1135; *Universal Land Co.* v. *Jackson*, 11 Alta L.R. 483, (1917) 1 W.W.R. 1352.

The defendants claim that the action of the plaintiff should be construed as sufficient grounds for holding that the issuing of the Statement of Claim was not a real repudiation and cannot in my view succeed.

The plaintiffs had no dealings with the Defendants, directly or indirectly, after the commencement of the action, *so that there cannot be any waiver entering into the issue.* (Italics supplied)

Pemberton v. *Cole* (1918) 1 W.W.R. 269, is cited in favour of the defendants contention. I do not find very much difficulty in distinguishing that case from the present one. In that case the defendant remained in possession after learning of the defect in the title, and made some improvements after he had ascertained that the title was defective, and he did not raise the question of defective title until pressed for payment and an action actually threatened to enforce the agreement. Stuart J. in delivering judgment said:

> 'The intention to continue in possession, in my opinion, must be taken to show that the defendant was still insisting upon some rights under the agreement, that is, a right of possession.'

In the action now under consideration the plaintiff never entered into physical possession of the lands. The lands were unimproved and it is common knowledge that ranchers and stock owners avail themselves of the opportunity when it is afforded to occupy such lands for grazing purposes. Elwood wished to obtain some color of right which he could assert in opposition to these common users of these lands and the plaintiff gave us an explanation of the circumstances under which he gave him the grazing lease and in any case he was only in transitory occupation of the land and the lessee took such risks as obtained.

With regard to the option to purchase given by the plaintiff I think that the same reasons will apply. The grounds which are raised in this action have been before the courts in the three provinces of Western Canada very frequently, and it is obvious that there has been a good deal of misconception in regard to owners who sell lands, with respect to the ownership of the mineral rights, and with respect to the enforcement of contract when the subject matter of mineral rights is raised.

The plaintiff has brought an action which I have already indicated was a sufficient declaration of repudiation. The mere fact that he dealt with a third party granting him the right to purchase under an option, does not constitute such a declaration of right to possess as would disentitle him to the remedy which he asks for.

In *Cobb* v. *Schatner* (1919) 3 W.W.R. 1019, Walsh J held that the payment of taxes was not an act or should not be construed as a declaration or an assertion of right of possession or ownership which would deprive the purchaser of his right to rescission. It seems to me that is a stronger case than the present one where the lands in question were bought for speculative purposes with the probability of a sale being made, and *unless the dealings with the defendant or with someone representing him or it having in some way affected the defendant so far as the contract is concerned*, I am not able to say that the plaintiffs had denied themselves of the remedy which they ask for by giving the option in question. (Italics supplied)

Two considerations appear to have led Simmons J. to his decision. One was that the actions of the defendant in granting the grazing lease and later the option were apparently designed to prevent unauthorized third parties from coming onto the land and using it, so that Simmons J. considered the actions of the plaintiff necessary for the protection of the land, and presumably for the plaintiff's own protection should he have lost the action. The second consideration was that "there cannot be any waiver entering into the issue", that is there was nothing done by the defendant which misled the plaintiff into believing that the defendant had waived his right to repudiate. As Simmons J. said, in the portion of the judgment italicized above, there was nothing which affected the defendant.

Similarly, the Appellate Division of the Supreme Court of Alberta upheld the counterclaim of the defendant for rescission in *Barber* v. *Shell.*[15] There the plaintiff sued for payment of certain promissory notes and for rectification of an agreement for sale of land, and the defendant counterclaimed for rescission of the agreement on the ground that the plaintiff had misrepresented that he owned the mines and minerals and was conveying them, when in fact they were owned by a third party. Clarke J.A. said at page 685:

> It is urged that the defendant has waived his right to repudiate by reason of his accepting a share of proceeds of the crop of 1922 after the notice of repudiation on August 10 of that year. I do not see how that can be so. It is not a case of electing to affirm after knowledge of a misrepresentation, the land had been rented for the year and the crops were probably ready for harvest or nearly so when the defendant discovered the condition of the plaintiff's title, it was in the interest of all parties that the grain should be realized upon and full justice can be done by an accounting. It is not suggested that there is any possibility of the plaintiff's being able to give title according to their agreement and there was no waiver of objections to title.

Thus in *Barber* v. *Shell* the court would not deny the right of repudiation to the defendant merely because he had taken steps to preserve the crop on the land pending the outcome of the trial.

Even in some of the cases relied on as authorities for the general proposition, there are statements which treat the effect of the innocent party's conduct upon the guilty party as relevant. For example, in *Ashley's case*[16] where false statements were made in a company prospectus which were set up by Ashley as grounds for striking his name off the register of shareholders, Romilly M.R. stated at page 269:

> This is a simple case of a shareholder who knows that 19 other shareholders of the company dissent, and that the company has suspended legal proceedings until it is determined whether these shareholders are entitled to dissent; but he does not make up his mind whether he will assent or dissent until the question is decided; and in the meantime the company are buying estates and carrying on business.

It would appear that Romilly M.R. considered the position of the company, in carrying on its business, as a relevant consideration. It is in *Ashley's case* that there is cited as a footnote at page 266 the case of *Scholey* v. *Central Railway of Venezuela,* another case of a false company prospectus. This latter case is cited by some of the textbooks as a leading authority.

Thus there is some authority, particularly in Alberta, for suggesting that the courts have not been oblivious to the plight of the innocent party, and on occasion they have looked at the effect of his conduct on the guilty party or third persons in deciding whether the right to repudiate was lost. They have on occasion, too, looked at the reasons for the conduct of the innocent party, before deciding whether it constituted a binding election.

Comparing the desirability of a simple black letter application of the rule that election to affirm bars repudiation in every case with the more practical approach of considering the effect of the innocent party's alleged affirming conduct upon innocent third parties and upon the guilty party, the former approach can and has worked hardship. The latter approach keeps in sight the fact that the right of repudiation has, after

15 (1923) 2 W.W.R. 675.
16 (1870) L.R. 9 Eq. 263.

all, been brought about by improper conduct on the part of the guilty party, that the innocent party may not be fully aware of his rights, and that he may be seriously penalized by having to give up his property or position upon the gamble that he will succeed in rescission proceedings. These undesirable practical effects of a simple application of the rule could be partially avoided if the courts were to adopt a narrow definition of conduct constituting an election, so that only in cases where there was no doubt about the intention of the innocent party to affirm would it apply.

Also, there have been principles enunciated in some earlier cases which would help to limit the application of the rule. In *Webb* v. *Roberts*[17] Riddell J. found that the purchaser of a cottage who made a further instalment payment upon the price and a quarterly interest payment after learning of misrepresentations had elected to affirm his contract. But at page 28 he listed several cases which spelled out in varying terms the ingredients which are required to constitute election to affirm a contract procured by fraud. In *Sandeman* v. *McKenzie*[18] one of the elements was said to be that the electing party must have full knowledge of his rights at the time of the affirmation. And in *Earl of Darnley* v. *London etc. Railway*,[19] it was said that to constitute a waiver of the right of repudiation, there must be an intentional act with knowledge of its effect.

In *Moxon* v. *Payne*[20] the court stated that to constitute an affirmation, there must be full knowledge of the facts, full knowledge of the equitable rights flowing therefrom, and absolute release from the undue influence by means of which the frauds in question were practised. Similarly, in *Cockerell* v. *Cholmely*[21] the court stated that the elector must be aware ". . . not only of the facts upon which the defect of title depends, but of the consequence in point of law". And in *Dunbar* v. *Tredennick*[22] the court stated the requirements as being that the elector must be fully acquainted with his rights, must know that the transaction is impeachable, and must then freely and spontaneously have elected the deed constituting the affirmation.

If the courts were to apply the rule as stated in those decisions, it would be much less open to objection. One would be less inclined to say that the rule worked an unnecessary hardship upon the innocent party if, in making the statements or doing the acts claimed to be an affirmation, the innocent party knew that his words or conduct would have the effect of precluding him from exercising in future his right to repudiate. However, in none of the leading cases referred to earlier, nor in the number of cases mentioned as examples of a simple application of the rule, does the court appear to have made any examination of the state of knowledge of the innocent party or the effect of his words or acts upon his legal position. Even in *Webb* v. *Roberts*[23] itself, the court does not appear to have considered whether the defendant was conscious

17 (1907) 16 O.L.R. 279.
18 (1861) 30 L.J. Ch. 838.
19 (1867) 36 L.J. Ch. 404.
20 (1837) L.R. 8 Ch. 881.
21 (1830) 1 Russ. & M. 418.
22 (1813) 2 Ball & B. 304.
23 *Supra*, n. 17.

of the effect of his acts when he made the payments which were held to constitute affirmation.

However, if it were to be made the subject of inquiry in every case where a contracting party endeavoured to rescind and was met by the plea of election whether he knew of the legal effect of his conduct or words, the courts would be making a serious break with the general rule that a man is presumed to know the law. It is suggested that the better approach is, as suggested above, for the court to consider the effect of the innocent party's words or conduct upon the guilty party before deciding whether they constitute a binding election.

In conclusion, it has not been the purpose of this article to review exhaustively all of the many hundreds of cases on the subject of election of remedies in contract, or to reach definitive conclusions as to whether it is open to the courts to apply a doctrine of estoppel or acquiescence in determining whether a binding election has been made. Rather, it has been intended to show that the rule stated in its simple form may be unnecessarily harsh on the innocent party, to examine whether any practical limitation of the harsh effects of the rule can be found, and to look at some cases which suggest means of effecting such a limitation.