ANNIE REDICAN AND KATIE REDICAN (DEFENDANTS) .... } APPELLANTS; 1923 *Nov. 7, 9. *Dec. 12.

AND

SADIE HARRISON NESBITT (PLAINTIFF) .... } RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Vendor and purchaser—Contract for sale—Completion—Cheque for purchase money—Stoppage of payment—Fraudulent misrepresentation—Instructions to jury—Misdirection.

A contract for the purchase and sale of property is completed when the purchaser receives an executed conveyance and then gives a cheque for the purchase price which the vendor accepts as cash though payment by the bank is stopped before it is presented.

In an action for the purchase money under such contract to which the purchaser pleaded fraudulent misrepresentations in respect to the property the trial judge misdirects the jury in telling them that proof of intention to deceive is essential to support such plea and in refusing to submit to them the question of whether or not the vendor made the representations without caring whether they were true or not, to induce the contract. A new trial was therefore necessary.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario maintaining the verdict at the trial in favour of the respondent.

The material facts are stated in the above head-note.

D. L. McCarthy K.C. and *Fraser Grant* for the appellants. The cheque given by an appellant was at most a conditional payment and when payment was stopped it was as though it had never been given; *Elliott* v. *Crutchley* (1); *In re National Motor Co.* (2).

The doctrine of *caveat emptor* is not applicable. See *Redgrave* v. *Hurd* (3).

The appellants were not getting what they contracted for and the doctrine applied in *Kennedy* v. *Panama, etc. Mail Co.* (4) and *Freear* v. *Gilders* (5) is applicable.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) [1903] 2 K.B. 476; [1904] 1 K.B. 565.
(2) [1908] 2 Ch. 228.
(3) 20 Ch. D. 1.
(4) L.R. 2 Q.B. 580 at p. 587.
(5) 50 Ont. L.R. 217.

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In any event there should, at least, be a new trial. The trial judge should have left to the jury the question submitted by the counsel for appellants.

Sheard and *A. C. Reid* for the respondent. In this country the usual custom is to make payments by cheque and the appellants having followed that custom cannot afterwards claim that it was not payment. See *Johnston* v. *Boyes* (1); *Downey* v. *Hicks* (2).

An executed contract cannot be set aside for innocent misrepresentation. *Milch* v. *Coburn* (3). Nor for any reason except fraud. *Wilde* v. *Gibson* (4); *Brownlie* v. *Campbell* (5).

No objection was made of non-direction at the close of the trial and it cannot be argued now. *Neville* v. *Fine Arts* (6).

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin I am of the opinion that this appeal must be allowed and a new trial granted with costs here and in the Appellate Division, the costs in the abortive trial to abide the result.

IDINGTON J.—The appellants made an offer in writing to the respondent to buy from her "premises" so described as if trying to buy the fee simple of lands therein described, contents of house to be included, for $3,100, and paid therewith to respondent's agent a deposit of $100.

The loose and unbusinesslike ways of the parties concerned throughout the whole of the negotiations in question is well illustrated by the very erroneous description in said offer of what was being bargained for. It clearly was an offer intended (as appears from late evidence) for the purchase of an assignment of a lease, but how long that had to run, or what building rights acquired thereby, or indeed anything relative thereto, was not presented in evidence.

I may infer from what counsel tells us that both parties understood something of what rights they were bargaining about, dependent on the terms made with the city of To-

(1) [1899] 2 Ch. 73.
(2) 14 How. 240 per McLean J. at p. 249.
(3) 27 Times L.R. 170.
(4) 1 H.L. Cas. 605.
(5) 5 App. Cas. 925.
(6) [1897] A.C. 68 at p. 76.

ronto. We are not supposed to know all these things as if we resided on the Toronto Island.

The island, we may infer, is, generally speaking, a place for summer residence. Why should a court, even one having headquarters in Toronto, be expected to take judicial notice of all such matters when trying a case like this?

This offer which was accepted and then slightly amended by respondent, apparently with appellants' assent, or that of one of them, was made on the 26th of January, 1923, and to be accepted by the 29th of January, 1923, and the sale to be completed on or before the 15th of February, 1923, and time was declared to be of the essence of the contract.

The 15th of February had come and gone before it was capable of completion. The date of respondent's acceptance is left a complete blank unless we try A.D. 192 as the true date thereof.

> This offer, if accepted, shall with such acceptance constitute a binding contract of purchase and sale

is among the last of the provisions.

The foregoing presents enough of loose methods, but the appellants (the purchasers) never, until after the execution of the assignment of lease by respondent, according to the verbal evidence, got the keys to visit and inspect the premises. The excuse for not doing that earlier is the condition of the approach.

It is said that in course of time ice grew on the lake and formed easy means of approach, not so serviceable when negotiations began.

Again it is said on one side that the keys for inspection had been offered but refused, and on the other side that later they were asked for and refused until assignment executed, and then delivered therewith.

All these peculiarities of this case are recited in order that the final act in respect of this case upon which the decision herein must turn may be properly and as accurately as possible appreciated if justice is to be done according to law.

The assignment in question is not in evidence in this case and all we have in regard thereto is verbal allusion thereto in course of the oral evidence by different witnesses from which it has been inferred that the lease was duly

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assigned and consented to by the city counsel after the 15th of February and an adjustment made as to taxes and insurance.

Then, upon being told all was completed in these respects, one of the appellants gave the following cheque,

Account No.
Toronto, Ont., February 23, 1923. 12085.

THE DOMINION BANK
City Hall Branch
Savings Department

PAY to the order of Russell Nesbitt
The sum of twenty-nine hundred and sixty-nine......74/100 Dollars.
$2,969.74.

Katie Redican

on a Friday when she got some papers, probably the assignment, and the keys of the house and, on the following Sunday, went over on the ice to inspect the house and contents.

She found much to disappoint the expectations she had entertained as result of the misrepresentations of the agent of respondent and on Monday morning stopped payment at the bank and telephoned the payee, who was the husband of respondent, what she had done and the reason therefor founded upon said misrepresentation.

The said Russell Nesbitt telephoned her that he would issue a writ in five minutes and seems to have lost no time in doing so as it was issued on the 26th of February, and she was handed the keys of said house along with the copy of writ served on her.

The indorsement of claim on the writ was as follows:—

The plaintiffs claim is against the defendants for the sum of two thousand nine hundred and sixty-nine dollars and eighty-four cents ($2,969.84) being the amount owing by the defendants to the plaintiff as balance of amount owing under an offer to purchase by the defendants from the plaintiff on lots 4 and 5, plan 336, in the city of Toronto.

The following are the particulars:—

The balance owing under a contract for the sale by the plaintiff to the defendants of lots 4 and 5, plan 336, in the city of Toronto, which said contract has been signed by the defendants.

At the opening of the trial after all the pleadings and usual proceedings in such a case had been taken, counsel for respondent asked the learned trial judge to allow the writ to be amended by adding to said particulars of claim the following

being the amount of a cheque given by the defendants to the plaintiff.

The appellants' counsel said he had no objection and supposed the like treatment would be afforded him in an amendment he desired, and then the matter was left to the learned trial judge to consider.

It is said now that the amendment never was made, yet it appears in the case before us.

All this would be quite immaterial but for the very narrow ground to be considered, as will presently appear upon which this case may have to be disposed of.

The trial proceeded and much evidence was given in presence of the jury hearing the case.

The learned trial judge at the close of this evidence and before counsel addressed the jury stated to counsel that he intended to submit to the jury questions which he then read to counsel. There ensued a long discussion but he could not agree with the counsel for appellant and persisted in presenting his own form of question, despite the protest of said counsel, in the course of his charge.

I most respectfully submit he should have adopted the amendment suggested by counsel and this case might have been much simplified.

The amended form of question suggested by appellants' counsel was as follows:—

> Mr. Grant: I would suggest that you put it: Were there untrue statements made by Wing, whether intentional or not, which induced the making of the contract?
>
> Were there any statements made by Wing that were untrue that he knew to be untrue, or which he made without caring whether they were true or false, to induce the contract?

Answers got to such questions would have solved both the question of simple misrepresentation vitiating or not, as the answers might have indicated, the contract if not completely executed, and alternatively if so executed, have determined the question of whether or not there was fraud or misrepresentation entitling appellants to rescission of the contract, even if completely executed.

Instead thereof we have got rather dubious results to deal with.

The questions actually submitted, and the answers returned by the jury thereto, are as follows:—

> 1. (a) Did Mrs. Nesbitt's agent, Wing, knowingly, make any untrue statement as to the house or its contents for the purpose of deceiving the

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defendants in any material way and inducing them to make the offer to purchase? and

(b) Did they make the offer relying upon such statements?

(a) A. No.

(b) A. Refer to question (a).

2. If you find there were any such statements, what were they?

A. (a) We find that there is no evidence that such statements were made knowingly.

3. Did Wing make any untrue statements without knowing they were untrue but relying upon which defendants signed, and without having such statements they would not have signed their offer to purchase?

A. Yes.

4. If so, what were such innocent misrepresentations?

A. (a) That the house was lighted by electricity.

(b) That there were five bedrooms.

Upon these answers the learned trial judge entered judgment for the plaintiff, against both defendants, for the sum of $3,005.53, and dismissed the counter-claim of the appellants, and ordered that they pay the respondent her costs of action and of the counter-claim.

From this judgment the defendants, now appellants, appealed to the Appellate Division of the Supreme Court of Ontario. That court dismissed said appeal with costs, the majority holding that the conveyance by the respondent herein having been executed there could be no rescission of the contract in the absence of actual fraud.

This was dissented from by Mr. Justice Magee who held that the action should be dismissed with costs upon defendants executing a reassignment of the property to the respondent herein.

The opinion of the majority of said court was written by the late lamented Chief Justice of Ontario, concurred in by Maclaren J.A. and Ferguson J.A. This appeal is taken therefrom and the argument has not been confined within the narrow limits upon which said judgment in appeal proceeded.

I will, however, deal with the latter first.

The cases cited by the late Chief Justice in support of said holding are, in not a single instance, on all fours with this case.

The case of *Wilde* v. *Gibson* (1), shews by the head-note, which does not misrepresent what follows, that the deed and payment of price had both preceded the suit seeking

(1) [1848] 1 H.L. Cas. 605.

to set aside same as based on fraud. Indeed the inference I draw is that such had been the case for many years.

The next case, *Brownlie* v. *Campbell* (1), turned upon features of that case none of which are apparent or possible of being so in this case.

Next is cited *Seddon* v. *North Eastern Salt Co.* (2), wherein payment would clearly seem to have been made, as well as execution of the deeds required, before the bill filed therein seeking relief. I submit that is not a case much like that in question herein and cannot help us.

The judgments in that case are well worth being perused to appreciate what is involved in such like cases.

The Irish case of *Lecky* v. *Walter* (3), is clearly the case of an executed contract, for the plaintiff was suing to recover the price he had paid for the bonds sold and delivered to him long before.

In the case of *Debenham* v. *Sawbridge* (4), the last cited in said judgment, to maintain same on the ground of the contract having been completely executed I find the sale was under the order of the court in 1897 and the purchase price paid in October following, of that year, and it was only in February, 1900, that the plaintiff commenced his action against the trustee.

Indeed, I most respectfully submit that, there is nothing in the decision of that case which should be held to support the dismissal of the appeal to the court below, though much worthy of consideration in other respects.

I am just now dealing with the single narrow point of whether or not a conveyance of property purchased, whether the purchase money had been paid or not, is a conclusive bar to relief founded upon the charge of misrepresentation made by the appellants under the circumstances herein.

If the purchase price had actually been received by the respondent from the appellants then the conveyance having been, I assume for argument's sake, duly made and received by appellants, though we are left in the dark as to much that should have been presented in evidence relative thereto, then the objection upon which the court below pro-

(1) [1880] 5 App. Cas. 925.
(2) [1905] 1 Ch. 326.
(3) [1914] 1 Ir. R. 378.
(4) [1901] 2 Ch. 98.

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ceeded might well have been maintained as insuperable for the appellants herein.

I have looked not only at all the cases cited herein but as well those cited below to find if there is any case wherein the execution of the deed of conveyance intending to carry out the contract has, in the absence of payment of the purchase price either in goods, lands or money, been held conclusively a bar to the vendee who has not paid, setting up other defences such as set up herein, and have been unable to find such a case.

When I consider that neat point herein it seems quite clear that it is because the purchase money has not been paid that the present action is brought, and it is founded on such fact.

How can a plaintiff so suing be heard to say the money price has been paid?

And again if she or her counsel had the courage to think so why did she not sue the party who made such cheque, instead of suing, as she has done, two people instead of one? Simply because Byles on Bills has taught counsel and us that only when a cheque is paid can it be said to be possible of being pleaded as payment. The form of this suit seems to me a most conclusive answer to all that is urged herein as to the contract being fully executed.

The attempt of the respondent to shift on to the cheque, calls for the remark that the suit and judgment are against two, and that the cheque was signed by one only. Another curiosity in a very queer case.

I have therefore reached the conclusion that this appeal must be allowed.

But is a new trial necessary? Thoroughly convinced, as I am, that appellants have much to complain of in the rulings and directions of the learned trial judge, I am inclined to hold that the answers to the questions submitted at the trial, read in light of the evidence in the case, furnish clear ground upon which this court can, as I submit most respectfully the learned trial judge should have done, proceed to enter judgment for the defendants, now appellants.

There is much in the way of misrepresentation vitiating the right to recover, though falling short of such fraud as must exist on which to found an action of deceit. And

within that class the findings of the jury, in answering questions three and four, seem to me to fall.

For the relevant law therein I may be permitted to refer those concerned to the 4th ed. of Leake on Contracts, pp. 229 *et seq.* and the cases cited therein. And illustrative of the law exemplified by cases therein, I may refer to the case of *Freear* v. *Gilders* (1), and cases cited therein.

I think a difference of a few acres, as therein, is no more important than the four rooms instead of five as misrepresented and electric light in this case to the appellants.

The only way in which the class of cases and legal propositions therein dealt with can escape from such findings of fact as made above, are by reason of the contract having been wholly executed and, as I have already said, I cannot so find in this case.

I may, in parting with this feature of the case and the exception thereby created, quote the following from Williams on Vendor and Purchaser, page 578:—

> Completion of the contract consists on the part of the vendor in conveying with a good title the estate contracted for in the land sold and delivering up the actual possession or enjoyment thereof; on the purchaser's part it lies in accepting such title, preparing and tendering a conveyance for the vendor's execution, accepting such conveyance, taking possession and paying the price.

I may also cite the disposition given in the case of *Kettlewell* v. *Refuge Assurance Co.* (2).

I would for the foregoing reasons allow the appeal with costs throughout and direct the action to be dismissed.

But if there is not a majority of the court holding this view I would allow the appeal with costs of this appeal and of the court of appeal below to the appellants in any event and direct a new trial, costs thereof to abide the event.

But in the event of a new trial, I submit that the holdings of the learned trial judge in refusing to frame the question relative to fraud in the way asked by counsel for the appellants at the trial there was grave error which ought to be avoided in any possible future trial, as there has, I fear, arisen much misapprehension of law and fact which has led, possibly, to unfortunate results arising from the jury not being properly instructed.

(1) 50 Ont. L.R. 217.

(2) [1908] 1 K.B. 545.

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DUFF J.—I shall first refer to the contention that the doctrine of *Redgrave* v. *Hurd* (1) applies and that consequently the appellants are entitled to rescission, even assuming the representations to have been innocent.

In the 14th edition of Sugden on Vendors and Purchasers, vol. 2, at p. 193, this passage appears:—

> If the conveyance has been actually executed by all the necessary parties and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase money either at law or in equity.

The principle appears to be that, save in exceptional cases to which reference will be made, the maxim *caveat emptor* applies, and that the purchaser, if he wishes to protect himself in respect of the absence of title or defect in the title or in the quantity or quality of the estate, must do so by covenants in the conveyance. *Legge* v. *Croker* (2); *Bree* v. *Holbech* (3); *Johnson* v. *Johnson* (4); *Clare* v. *Lambe* (5); *Seedon* v. *N.E. Salt Co.* (6); *Cole* v. *Pope* (7). The rule does not apply where there is error *in substantialibus,* where, for example, it turns out that the vendee has purchased his own property; nor does it apply where the transaction has been brought about by the fraud of the vendor. The law is summed up to that effect in the judgment of Lord Selburne in *Brownlee* v. *Campbell* (8).

The question whether the non-payment of the purchase money affects the operation of the rule is one upon which there is not very much explicit authority. The ratio of the rule being that the purchaser can and ought to protect himself except in the two cases mentioned by covenants in the conveyance, one naturally expects to find that the execution of the conveyance, the acceptance of it by the purchaser, and the vesting of the estate in him are in themselves sufficient to bring the rule into play. The payment of the purchase money and the preparation and settling of the conveyance, including the execution of the conveyance by some of the parties, are not in themselves

(1) 20 Ch. D. 1.
(2) 1 B. & B. 506.
(3) 1 Douglas 654 at p. 657.
(4) 3 B. & P. 162 at p. 170.
(5) L.R. 10 C.P. 334.
(6) [1905] 1 Ch. 326
(7) 29 Can. S.C.R. 291.
(8) 5 App. Cas. 925 at p. 937.

sufficient. *Cripps* v. *Reade* (1). This, however, is not logically decisive and it may be arguable on principle that until the purchase money is paid or secured by something which is accepted as the consideration for the transfer the transaction is still *in fieri*.

In *Hitchcock* v. *Giddings* (2), there was a grant of the supposed interest of the vendor in a remainder in fee expectant on an estate tail, of which it afterwards proved that the tenant in tail had suffered a recovery, both parties being ignorant of this until after the conveyance had been executed and a bond had been given for the payment of the purchase money. The Court of Exchequer, in exercise of its equitable jurisdiction, relieved the purchaser from the bond on the principle above mentioned that cases of error *in substantialibus* are outside the rule. Lord St. Leonards (Vendors and Purchasers, 14th edition, vol. 1, p. 376) expresses some doubt as to the validity of this decision, which, he says, was in a later case doubted by Lord Eldon thinking apparently that it was rather a simple case of absence of title. He observes, however, that there could be no distinction between the case in which the money is actually paid and that in which it is only secured. The decision, he says, must be the same in both cases. That is not the view which was taken by the Court of Common Pleas in *Clare* v. *Lambe* (3). Strangely enough, there, Mr. Justice Grove (p. 341) in discussing the case of *Hitchcock* v. *Giddings* (2) says that the vendor was there seeking to enforce performance of the contract by compelling the purchaser to pay for a thing that he had not got. But in fact the proceeding in *Hitchcock* v. *Giddings* (2) was a proceeding of a different character. The case arose on a bill for relief against a bond given by the vendee.

The interpretation of that case in *Clare* v. *Lambe* (3) must, I think, give way to the opinion expressed by Lord St. Leonards just referred to, and it must be taken, I think, that an executed conveyance containing covenants for payment of purchase money, for example, stands in precisely the same position as an executed conveyance where the

(1) 6 T.R. 606. (2) 4 Price 135.
(3) L.P. 10 C.P. 339.

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money has been actually paid in cash or where it has been secured by a bond or by a mortgage. Indeed the doctrine has more than once been applied to a lease. *Legge* v. *Croker* (1); *Angel* v. *Jay* (2). The question of substance is, of course, whether at that stage the vendee on the ground of mistake or innocent misrepresentation is entitled to rescind. If he is entitled to rescind, then he is entitled, under the system established by the Judicature Act, to set up in answer to a claim by the vendor for the purchase money the facts which entitle him to rescind.

Nor can it, I think, in principle make any difference that the conveyance has been executed on faith of a promise made by the vendee that he will pay the purchase money, or in exchange, for example, for a promissory note. In the present case, the cheque was accepted as conditional payment. There was an implied promise to pay arising out of the delivery and acceptance of the transfer, and the delivery of the cheque was a conditional performance of this promise. I do not think the subsequent repudiation of the promise can take away from the transaction its character as an executed transaction.

The whole point is: At what stage does *caveat emptor* apply?

The vendee may rely after completion upon warranty, contractual condition, error *in substantialibus*, or fraud. Once the conveyance is settled and the estate has passed, it seems a reasonable application of the rule to hold that as to warranty or contractual condition resort must be had to the deed unless there has been a stipulation at an earlier stage which was not to be superseded by the deed, as in the case of a contract for compensation. *Bos* v. *Helsham* (3), Representation which is not fraudulent, and does not give rise to error *in substantialibus*, could only operate after completion as creating a contractual condition or a warranty. Finality and certainty in business affairs seem to require that as a rule, when there is a formal conveyance, such a condition or warranty should be therein expressed, and that the acceptance of the conveyance by the vendee as finally vesting the property in him is the act which for

(1) 1 B. & B. 506. (2) [1911] 1 K.B. 666.
(3) L.R. 2 Ex. 72 at p. 76.

this purpose marks the transition from contract *in fieri* to contract executed; and this appears to fit in with the general reasoning of the authorities.

All this applies, I think, to a case like the present where the representation relates to the physical state of the property as well as to the case where the subject of the representation is the existence or non-existence of some encumbrance or legal burden, such as a right of way.

But I see no escape from granting the application for a new trial. The learned trial judge overlooked the settled doctrine based upon the plainest good sense that an affirmation of fact made for the purpose of influencing people in the transaction of business involves an affirmation of belief in the existence of the fact stated. If there is no belief, if the mind of the proponent has never been applied to the question and if he is in truth consciously ignorant upon the subject of his affirmation there is obviously a false statement and, if made with intent that it shall be acted upon in the way of business in a matter involving his own interests, a fraudulent statement. This ought to have been explained to the jury. Mr. Grant explicitly requested the learned trial judge to do so and his refusal was so decisive as to preclude the necessity of further reference to the matter. There should be the usual order as to costs.

ANGLIN J.—The defendants entered into a contract to purchase a leasehold property from the plaintiff represented by one Wing, her agent. In due course an assignment of lease executed by the plaintiff and assented to by the landlord (the city of Toronto) was delivered to the defendants' solicitor with the keys of the property, the cheque of one of the defendants for the purchase money being simultaneously handed to the plaintiff's solicitor. The defendants also took an assignment of insurance and paid some arrears of taxes. On inspecting the property two days later —which is said to have been their first opportunity of doing so—they discovered, as they allege, that it had been misrepresented to them by Wing in several particulars, which they claim are of such importance that, had they known the truth in regard to them, they would not have purchased. On learning of these matters they stopped payment of the cheque given for the purchase money having

first notified the vendor's husband that that would be done. An action by the vendor was at once begun, the writ bearing the following special indorsement:

The plaintiff's claim is against the defendants for the sum of $2,969.84 being the amount owing by the defendants to the plaintiff as balance of account owing under an offer to purchase by the defendants from the plaintiff on lots 4 and 5, plan 336 in the city of Toronto.

The following are the particulars:

To balance owing under a contract for the sale by the plaintiff to the defendants of lots 4 and 5, plan 336, in the city of Toronto, which said contract has been signed by the defendants (being the amount of a cheque given by the defendants to the plaintiff), $2,969.84.

Under the Ontario practice this indorsement constituted the plaintiff's statement of claim. The words in brackets were added by amendment at the trial.

The action was tried by a jury. The judgment of the trial court, affirmed by the Appellate Division, upheld the plaintiff's claim. The defendants appeal to this court.

That this is not an action on the cheque referred to in the amendment of the special indorsement allowed at the trial, as the plaintiff now seeks to maintain, is made clear by the facts that the claim and the judgment are not against the maker of the cheque alone but are against her and her co-purchaser jointly. The amendment made at the trial should not therefore be regarded as having changed the cause of action as originally stated. It merely added an allegation facilitating proof of the amount of the plaintiff's claim as a sum liquidated. The action remained one for money due and owing upon the contract.

It is, however, equally clear that it is in no sense the equitable action for specific performance. The plaintiff asserted a purely common law claim for payment of a sum of money due under a contract, perfectly valid, *Rutherford* v. *Acton-Adams* (1), subject to any defence to which such a claim is open. He did not require the aid of a court of equity to be relieved of the leasehold with its burdens; the defendants by taking the conveyance had assumed them. For the recovery of the purchase money the common law remedy was adequate and there was no ground for the plaintiff invoking the interference of a court of equity. *Ord* v. *Johnston* (2); *Bagnell* v. *Edwards* (3). It follows

(1) [1915] A.C. 866, 868. (2) [1855] 1 Jur. N.S. 1063.
(3) [1876] I.R. 10 Eq. 215.

that the defendants will not necessarily succeed by establishing a case which would have disentitled the plaintiff to specific performance in a court of equity. That remedy is so distinctly discretionary that the court may withhold it although a case for rescission has not been made out.

But innocent misrepresentation, such as will support a demand for rescission in equity, though unavailing at common law, will serve as a good equitable defence to a claim for payment under the contract as well as afford ground for a counter-claim for rescission. Rescission is, of course, destructive of the basis of the plaintiff's claim; the right to rescission when established is an effective defence. But whether misrepresentation is set up by way of equitable defence or as the basis of a counter-claim for rescission, the burden on the defendant is the same. If the case made by him would not warrant a decree for rescission it will not avail as a defence to the claim for payment. In preferring this defence a defendant assumes the role of actor and a plea which, if established, would defeat a counter-claim for rescission is equally effective by way of reply to the defence of misrepresentation if set up by the plaintiff. 20 Hals. Laws of Eng., pp. 756, 746, 750.

In the present case the defendants plead misrepresentation as a ground both of defence and of counter-claim. They assert that it was fraudulent and, alternatively, that if innocent it was so material as to afford ground for rescission.

The jury negatived fraud and on this branch of the case, if they are not entitled to have the action dismissed on the other, the defendants ask for a new trial on the ground of misdirection and refusal by the learned trial judge to submit an essential element of it to the jury. I defer dealing with that aspect of the appeal.

The jury found that innocent misrepresentations inducing the contract had been made by the plaintiff's agent, and upon them the defendants maintain they are entitled to rescission. The trial judge rejected this claim on the ground that the contract for sale had been fully executed by the delivery of the deed and the acceptance of the cheque in payment, and that rescission of a contract after execution cannot be had for mere innocent misrepresenta-

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tion unless it be such as renders the subject of sale different in substance from what was contracted for (*Kennedy* v. *Panama, etc.* (1)). The suggestion that the property differed so completely in substance from what the defendants intended to acquire that there was a failure of consideration is not borne out by the facts. Neither is there any foundation for a suggestion of mutual mistake as a basis for rescission. *Debenham* v. *Sawbridge* (2). The trial judge regarded the handing over of the cheque as absolute payment and as a completion of the contract by the defendants just as the delivery of the conveyance and possession constituted completion on the part of the plaintiff.

In the Appellate Divisional Court this judgment was sustained, the late Sir W. R. Meredith C.J.O. giving the judgment of the majority of the court, on the ground that the contract became "executed" upon delivery and acceptance of the conveyance, whether the giving and taking of the cheque should or should not be regarded as payment of the purchase money.

Although Mr. Pollock in his treatise on the Law of Contracts (9 ed. p. 593) would seem to imply the existence of some doubt as to the doctrine enunciated in Lord Campbell's dictum in *Wilde* v. *Gibson* (3), that

> where the conveyance has been executed * * * a Court of Equity will set aside the conveyance only on the ground of fraud,

pointing out that it has not been uniformly followed (see Fry on Specific Performance, 9th ed., p. 312) it is too well established to admit of controversy, assuming that his Lordship meant where the contract had been fully carried out. *Brownlie* v. *Campbell* (4); *Soper* v. *Arnold* (5); *Seddon* v. *North Eastern Salt Co.* (6); *Lecky* v. *Walter* (7).

But on the question when a contract will, for the purposes of this rule, be deemed to have ceased to be "executory" and to have become "executed" the authorities are not so clear. I have not found any reported case in which it has been determined whether or not after delivery and

(1) L.R. 2 Q.B. 580, at p. 587.
(2) [1901] 2 Ch. 98, 109.
(3) 1 H.L. Cas. 605, 633.
(4) 5 App. Cas. 925, 936-7.
(5) 37 Ch. D. 96, 102.
(6) [1905] 1 Ch. 326, 332-3.
(7) [1914] 1 Ir. Rep. 378.

acceptance of the conveyance and taking of possession a contract of sale remains " executory " until actual payment of the purchase money then due; nor indeed have I found any authority in which the contrary has been categorically determined. In many of the cases it is broadly stated, as it was by Lord Campbell, that after conveyance rescission will not be granted for innocent misrepresentation. But, on examination of the facts in such cases, it is clear either that payment of the purchase money had been made or as in the case of a contract for a lease, *Legge* v *Croker* (1); *Milch* v. *Coburn* (2), that all that the plaintiff seeking rescission was required by the contract to do had been done. On the other hand we find in the leading text books such statements as that

complete execution on both sides must be established—that the contract has been completely executed and exhausted on both sides;

17 Hals. Laws of Eng., p. 742 and note (*o*); that the doctrine of the court of equity is that a contract for the sale of land will not be set aside for innocent misrepresentation " after it has been completed by conveyance and payment of the purchase money;" Williams on Vendor and Purchaser (3rd ed.) p. 796; and again

completion of the contract consists, on the part of the vendor in conveying with a good title the land sold and delivering up the actual possession or enjoyment thereof; on the part of the purchaser's part it lies in accepting such title, preparing and tendering the conveyance for the vendor's execution, accepting such conveyance, taking possession and paying the price. Ibid pp. 545, 546.

After a conveyance has been executed, the court will set aside a transaction only on the ground of actual fraud;

Kerr on Fraud, 5 ed., p. 407. Mr. Dart's statement of the rule, however, is that the principle on which courts of equity rescind contracts for innocent misrepresentation

could not be extended to the taking away after completion the price of the property, which at law had become absolutely the vendor's. * * * Misrepresentation is no ground for setting aside an executed contract.

Vendors and Purchasers (7 ed.) 808. Mr. Snell (Principles of Equity (18 ed.), p. 436) says

the contract cannot be avoided after conveyance of property has taken place thereunder.

Morrison in his work on Rescission says (p. 143), that

the term " executed contract " is properly applied only when what has been performed is what was agreed to be performed.

(1) 1 B. & B. 506.

(2) 27 Times L.R. 170, 372.

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The foundation of the rule that an executed contract will not be rescinded for innocent misrepresentation appears to be somewhat obscure. In *Angel* v. *Jay* (1), Darling J. states, apparently without disapproval, the contention of counsel that "the foundation of the doctrine" is that

when property has passed the persons concerned cannot be placed in the same position as they were in before the estate became vested.

In numerous cases the vesting of the property has been referred to as a serious obstacle to rescission. In other cases the supersession of the contract for sale by the executed conveyance accepted by the purchaser and the resultant restriction of his rights to those assured by the latter instrument appears to be the ground upon which rescission of the contract after acceptance of conveyance is refused. So far does the court go in maintaining this doctrine that, where under a court sale the purchase money was still in court, the purchaser who had accepted the title and taken his conveyance was refused relief in respect of subsequently discovered incumbrances. *Thomas* v. *Powell* (2); *McCulloch* v. *Gregory* (3).

In the case now before us it is probably unnecessary to determine the effect on the right of a purchaser to rescission of his acceptance of a conveyance and taking of possession without making payment. What might have been a formidable obstacle to the granting of rescission to the defendants was suggested by the trial judge, namely, the inability of the court to compel the landlord's assent to a re-assignment of the leasehold to the plaintiff. The effect of the acceptance of the conveyance assented to by the lessor and of the taking of possession of the property by the defendants may have been to give to the lessor rights against them as tenants the relinquishment of which the court could not exact.

Although the execution of the contract does not afford an answer to a claim for rescission in cases of fraudulent misrepresentation, inability to effect *restitutio in integrum,* unless that has become impossible owing to action of the wrong-doer, will ordinarily preclude rescission. Kerr on Fraud (5 ed.) 387-90. *A fortiori* is this the case where inno-

(1) [1911] 1 K.B. 666, 671.
(2) [1794] 2 Cox 394.
(3) [1855] 1 K. & J. 286, 291.

cent misrepresentation only is relied upon. See, however, *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (1) for an instance of circumstances under which the court will grant relief in a case of fraud which it would withhold if fraud were not established. But

> the court has full power to make all just allowances * * * the practice has always been for a Court of Equity to give relief by way of rescission whenever by the exercise of its powers it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract.

Hulton v. *Hulton* (2).

Here, however, neither the impossibility of *restitutio in integrum* nor the intervention of a *jus tertii* has been pleaded by the plaintiff, as it should have been if she meant to rely upon it either by way of reply to the defence or of defence to the counter-claim. Had that issue been raised on the pleadings the defendants might have produced at the trial and tendered for the plaintiff's acceptance a re-assignment of the lease duly assented to by the landlord or other satisfactory assurance that such assent would be forthcoming; or, if not, a judgment might have been pronounced in terms similar to those of the decree made in *Lindsay Petroleum Co.* v. *Hurd* (3); *Twigg* v. *Greenizen* (4).

But I strongly incline to the view that, while the acceptance of the cheque as payment was in this sense conditional that, if it should be dishonoured, the right to sue for the money due under the contract would revive, the transaction was, nevertheless, intended to be closed and the contract completely executed so far as the purchasers were concerned by their taking of the deed and the keys and handing over the cheque. They had obtained the full consideration for which they contracted and, if the vendor saw fit to accept the cheque they tendered in payment in lieu of cash, they should not be heard to say that the contract had not been fully executed. I cannot think that the vendor's right to have the contract treated as executed and completed can be defeated by the fact that she took a cheque as the equivalent of a cash payment, and still less by the accident that the cheque was not presented for pay-

(1) [1899] 2 Ch. 392, 433.
(2) [1917] 1 K.B. 813, 821.
(3) [1874] L.R. 5 P.C. 221, 245.
(4) [1922] 63 Can. S.C.R. 158.

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ment during the two days which intervened between the closing of the sale and the stopping of payment. Bearing in mind the well established custom of solicitors with regard to the closing of sales of real estate, when delivery of conveyance and possession was given and accepted and a cheque (then good) for the purchase money was tendered and taken, what was performed was what the parties intended should be done when they contracted.

Without, therefore, necessarily affirming the position taken in the judgment of the majority of the learned judges of the Appellate Divisional Court, I am of the opinion that, under all the circumstances of this case, the contract for sale was executed and that, according to a well settled rule in equity, rescission for innocent misrepresentation is not an available remedy for the defendants.

I am clearly of the opinion, however, that a new trial must be directed because the issue of fraud was not properly presented to the jury. In substance the learned trial judge charged that, in order to establish fraud, the defendants must show that Wing actually knew his representations were false. He did not tell the jury that the representations would be fraudulent if they were false and were made without belief in their truth, or recklessly, careless whether they were true or false. *Derry* v. *Peek* (1); *Angus* v. *Clifford* (2). Wing denied having made the statement that the house was lighted by electricity and added that he "did not know how it was lighted." The jury found that he had made the statement. If adequately instructed, or if a properly framed question had been submitted to them, they might have found that it had been fraudulently made. The only questions put on this branch of the case read as follows:

> Did Mrs. Nesbitt's agent, Wing, knowingly make any untrue statements as to the house or its contents for the purpose of deceiving the defendants in any material way and inducing them to make the offer to purchase? And did they make the offer relying upon such statements?

In charging the jury the learned judge said to them

> was there a deliberate lie told by Wing? * * * You have to decide whether Wing deliberately told an untruth in order to earn a commission.

There was no qualification of this direction. He added,

(1) [1889] 14 App. Cas. 337, 374. (2) [1891] 2 Ch. 449, 464.

what the defendants are entitled to will depend on your answers to the questions as to whether there was deliberate intention to defraud or innocent misrepresentation. The word "innocent" is used in law to convey "not knowingly," and it may be that she should not be relieved from her bargain, but if there was intent, and an untrue statement made, there might be relief.

At the close of the charge to the question of a juror,

the one question we have to decide is whether the mis-statements that it is claimed were made, were made intentionally or not?

the learned judge replied "Yes."

The Appellate Divisional Court refused the defendants relief on this branch of the case because "no objection was made to the charge" on this ground, and because

the finding that the misrepresentations were innocent implies that they were not made recklessly careless of whether they were true or false.

Had the jury been properly instructed upon the distinction between innocent and fraudulent misrepresentation their finding that the misrepresentations had been innocent would, no doubt, cover the ground. But how can that be said in view of the explicit instruction given them that "the word 'innocent' is used in law to convey 'not knowingly'" and that only a deliberate and intentional lie would justify a finding that the misrepresentations had been fraudulent?

At the close of the evidence the trial judge handed to counsel the questions he proposed to submit to the jury. Thereupon the following discussion ensued, Mr. Grant representing the defendants:

Mr. Grant: They were made intentionally, my Lord, but whether they were intentionally fraudulent or wrong is another question.

His Lordship: I will leave out those words. I have divided the case first as to whether there was intention to deceive the defendants, and secondly, innocent misrepresentations, which may have the effect of giving the defendant what you want, or may not.

Mr. Grant: I would suggest that you put it: "Were there untrue statements made by Wing, whether intentional or not, which induced the making of the contract?"

Then: "Were there any statements made by Wing that were untrue, that he knew to be untrue, or which he made without caring whether they were true or false, to induce the contract?"

I think that would be a better form in which to put the questions, if I may so suggest, my Lord.

His Lordship: No; there must be intention in an action for deceit.

Mr. Grant: No, my Lord; there need not be intention. If he makes the statements recklessly, not caring whether they were true or false, it is as fraudulent as though he knew they were false. Perhaps after your Lordship has charged the jury on that point, we may have something to say.

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His Lordship: In the meantime I think I have covered the case.

Mr. Grant: Your Lordship is putting the first question as to whether the statements were fraudulent or not?

His Lordship: Yes.

Mr. Grant: And, secondly, whether they were innocently made, although untrue?

His Lordship: I do not use the word "fraudulently" because the jury does not know the exact meaning of "fraudulently" but they do know the meaning of "intentionally."

The attention of the trial judge was thus pointedly drawn to the feature of fraudulent misrepresentation which his question did not cover. Counsel expressly asked that it should be covered. The learned judge distinctly stated his view that intention to deceive was essential and impliedly that a false statement made with reckless carelessness as to its truth or falsehood would not be fraudulent. He declined to amend the questions as suggested, stating that he had "covered" the case.

Counsel is not obliged to quarrel with the judge or to press an objection *ad nauseam*. Having stated his position and his request for the submission of a proper question having been refused Mr. Grant had, I think, sufficiently discharged his duty and was not called upon to renew the same objection at the close of the charge. The learned judge had definitely expressed his purpose to adhere to an adverse view of the law. *Lex neminem coget ad vana seu inutilia.* The refusal to put to the jury the question whether Wing's statements were made without caring whether they were true or false coupled with the instruction that, although so made, they were innocent and not fraudulent, unless there was an intention to deceive—to tell a deliberate lie—was clearly misdirection and entitles the defendants to a new trial. *Lynam* v. *Dublin United Tramways Co.* (1); *Brenner* v. *Toronto Railway* (2).

While the costs of the abortive trial may properly abide the result, I see no good reason why the appellants should not have their costs in this court and the Appellate Division.

MIGNAULT J.—I am of opinion that a new trial must be ordered in this case for the reasons fully stated by my

(1) [1919] 2 I.R. 445.

(2) 15 Ont. L. R. 195, 198.

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brother Anglin, whose carefully prepared judgment I have had the advantage of reading.

The point to be determined in the new trial is whether Wing, the respondent's agent, was guilty of fraudulent misrepresentation of material facts in connection with the purchase by the appellants of the respondent's cottage on the island in Toronto bay. These misrepresentations would be fraudulent if made

knowingly, or without belief in their truth, or recklessly, careless whether they be true or false.

Per Lord Herschell in *Derry* v. *Peek* (1). See also the distinction made by Lindley L.J., in *Angus* v. *Clifford* (2), between a representation made carelessly and a representation made recklessly.

Unfortunately the learned trial judge left the jury under the impression that to be fraudulent the misrepresentations had be to be made wilfully and without belief in their truth, in other words that Wing deliberately lied when he made them. Where misrepresentations are made recklessly, with indifference whether they be true or false, they are fraudulent and this was not explained to the jury. On the contrary, there was, if I may say so with great respect, a confusion between innocent and fraudulent misrepresentation, of a nature to mislead the jury, when the learned trial judge said to them:

What the defendants are entitled to will depend upon your answer to the questions as to whether there was deliberate intention to defraud, or innocent misrepresentation. The word "innocent" is used in law to convey "not knowingly," and it may be that she should not be relieved from her bargain, but if there was intent, and an untrue statement made, there might be relief. However, that is not for you to say. We will deal with that problem when you return with your answers.

The questions put to the jury were also misleading. The first question was whether Wing had knowingly made an untrue statement as to the house and its contents, and the answer was no. The third question was whether Wing had made untrue statements without knowing that they were untrue, and the answer was yes. The fourth question was: "If so, *what were such innocent misrepresentations?*" This was assuming that unless Wing knowingly made an

(1) 14 App. Cas. 337 at p. 374. (2) [1891] 2 Ch. 449, at p. 465 *et seq.*

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untrue statement as to the house and its contents, his misrepresentation was an innocent one.

In my opinion, the transaction was a fully completed one, and therefore rescission cannot be granted unless the misrepresentations were fraudulent, but the burden of the appellants was unduly increased when the jury were told that they must find that " there was a deliberate intention to defraud " to prevent the misrepresentations from being innocent. This was misleading because if the jury were of opinion that Wing had recklessly, that is to say with indifference to the truth or falsity of his statements, misrepresented the facts which the jury found were misrepresented, they could not answer that these misrepresentations were innocent.

I therefore conclude that the issue in the new trial must be whether Wing's misrepresentations were fraudulent in the sense I have explained. If, properly instructed, the jury still find that Wing's misrepresentations were innocent the appellants cannot succeed in their demand for rescission. If, on the contrary, the appellants succeed because the jury find that the misrepresentations were fraudulent they will have to reconvey the property and obtain the lessor's consent to the reconveyance.

I would allow the appeal with costs here and in the appellate court, the costs of the abortive trial to abide the event.

Appeal allowed with costs. New trial granted.

Solicitors for the appellant: *Johnston, Grant,Dods & Grant.*

Solicitor for the respondent: *D. W. Markham.*