[HIGH COURT OF AUSTRALIA.]

McDERMOTT . . . . . APPELLANT;
DEFENDANT,

AND

BLACK AND ANOTHER . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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Feb. 20, 21.
March 11.

Latham C.J., Rich, Starke, Dixon and McTiernan, JJ.

Misrepresentation—Fraud—Withdrawal of allegations—Conditional upon extending time for completion—Contract—Uncertainty—Accord and satisfaction at law—Release of cause of action in equity.

A purchaser was induced by fraudulent misrepresentations made by the vendor to enter into a contract of sale of shares. Prior to the date of completion, the purchaser by letter complained of the misrepresentations, but in a later letter he withdrew all allegations imputing anything improper to the vendor conditionally upon the vendor granting him an extension of time to complete the contract. This extension of time was granted, but the purchaser refused to complete on the extended date, whereupon the vendor rescinded the contract. The purchaser then sued the vendor for damages for deceit, relying on the misrepresentations which he had withdrawn.

Held that the withdrawal of the allegations in consideration of an extension of time for completion was not too vague to constitute a contract.

Held, further, by *Starke*, *Rich*, *Dixon* and *McTiernan* JJ. (*Latham* C.J. dissenting), that the withdrawal of the allegations amounted to a promise not to sue in respect of the misrepresentations or to a release of any cause of action in respect of them, and, accordingly, constituted a complete defence to an action for deceit based on the misrepresentations, either as an accord and satisfaction at law, or, since the *Judicature Act*, a release of the cause of action by an agreement, enforceable in equity, not to set up the cause of action.

Decision of the Supreme Court of Victoria (*Martin* J.) reversed.

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APPEAL from the Supreme Court of Victoria.

On 16th May 1937, by an agreement in writing, William Seymour McDermott agreed to sell to John Black four thousand shares in Younger Set Pty. Ltd. for the sum of £16,000, of which £2,000 was to be paid on or before 24th May 1937, and the balance on or before 31st May 1937, on which date the transaction was to be completed. At the same time, by another agreement in writing, McDermott agreed to sell to Francis Swann the balance of shares in Younger Set Pty. Ltd., namely, one thousand shares, for the sum of £4,000.

McDermott, who was the managing director of the company, held or controlled all the shares and managed the business of the company which consisted in conducting a dance hall known as the "40 Club." Swann was the floor manager of the dance hall prior to the signing of the above-mentioned agreements. McDermott had fallen into ill-health, and it was proposed that Swann should arrange a syndicate to take over the business of the company. On 14th May 1937 Swann, who was unknown to Black, called upon the latter to interest him in the venture and to obtain his assistance to arrange the finance to buy McDermott's shares. Black was at that time carrying on business as an estate and financial agent, and so attractive was the project shown to be by Swann, that Black decided to visit the place of business of the company. On Saturday night, 15th May, Black attended with a party, included amongst whom was one, Irvin, a business associate of Black. After having met Swann and been shown over the dance hall, Swann gave Black some information about the business of the company which later proved to be false. Swann then introduced Black to McDermott, and in the course of conversation which then ensued, McDermott made a number of statements of fact concerning the business; some of these subsequently also proved to be false.

Induced by these representations Black, on the next day, entered into the agreement above mentioned but was unable to pay the instalment of £2,000 on 24th May as required by the agreement. On 28th May 1937, however, he lodged with McDermott's solicitors Commonwealth bonds to the value of £2,000 and obtained an extension for completion till 26th June 1937 in lieu of 31st May as agreed.

On 24th June 1937 Black wrote to McDermott as follows :—" I agreed to purchase the 4,000 shares from you in the Younger Set Pty. Ltd. upon your representation that the company had made and is making £6,000 a year and that your manager, Mr. Swann, was purchasing 1,000 shares at £4 per share from you, also that you started with nothing and have now £50,000 in the bank to your credit, also that Stringer and Phillips were coming down (to your place) to-morrow, Monday May 17th to pay a deposit on the purchase price of all the shares for £25,000 cash and 10,000 shares in another company they would form out of their company yet when on the 22nd inst. I took an auditor to inspect the books of the company you declined to permit me to do so and said you would not provide me with an auditor's certificate showing the past three years' takings. I am now to call upon you to prove your representations by producing for my inspection the books of the company, the duplicate bank slips, bank pass book and all other documents and vouchers so that I may be satisfied or otherwise as to your representations. I am to notify you that until you comply with this request I will not pay any further money."

On 25th June McDermott's solicitors, in writing, denied the making of the representations as alleged, and on the same date Black, in a letter to the solicitors, reiterated his allegations. On 26th June McDermott's solicitors again wrote denying the making of the alleged " misrepresentations " and requiring Black to complete the transaction that day at 11.15 a.m. On the same day Black wrote pointing out that the solicitors had used the expression " misrepresentations " instead of " representations " but promised to complete if the representations were true. Negotiations then ensued between the solicitors for the parties, and on 15th July 1937 Black's solicitor wrote to McDermott's solicitors as follows :—" Mr. Black saw me to-day and has instructed me to withdraw all allegations imputing anything improper to Mr. McDermott. The accompanying letter will explain the whole matter."

The accompanying letter was as follows : " My letter herewith is conditional upon Mr. McDermott agreeing to three weeks' time from to-day in which to pay the balance of fourteen thousand pounds in order to complete the transaction."

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In reply, McDermott's solicitors, on 21st July 1937, wrote as follows :—"Further to our interview with you yesterday herein, we are instructed to notify you that in view of your client's withdrawal of his allegations made in earlier correspondence, our client will grant him an extension of time until August 6th 1937 for payment of the balance of purchase money under the contract, provided that a further payment by way of deposit (on account of purchase money) is made not later than 12 noon on Friday next, the 23rd inst. Such sum and also the £2,000 already paid, to be forfeitable by our client in the event of Black failing to complete his purchase by August 6th 1937."

On 23rd July 1937 Black's solicitor wrote to McDermott's solicitors as follows :—"Mr. Black saw me this morning and instructed me to state that my letter of the 15th inst. sets out definitely that the allegations were withdrawn conditionally upon Mr. McDermott granting three weeks further time to my client to find the rest of the money. Now Mr. McDermott wants to impose other conditions which are not provided for in the contract . . . Mr. Black assures me that the contract will be completed and the residue paid over on or about the 6th August."

On 24th July 1937 McDermott's solicitors wrote in reply: "In the circumstances he is prepared to accept the withdrawal and to grant three weeks further time as stated in your further letter."

On 28th July 1937 McDermott's solicitors wrote again to Black's solicitor as follows :—"Referring to our letter of the 24th inst. would you kindly let us have a note confirming your client's intentions as to completing his purchase, in accordance with the terms indicated in such letter. Our client desires the matter to be free from any uncertainty."

On 29th July Black's solicitor wrote in reply :—"I acknowledge receipt of your letter of the 28th inst. and saw Mr. Black this morning. That gentleman instructs me to inform you that he intends completing the purchase within the time mentioned in my letter to you of the 15th inst."

Black, however, did not complete at the expiration of three weeks from 15th July, or at all, and McDermott rescinded the contract.

Black commenced proceedings in the Supreme Court of Victoria, alleging that he had been induced to enter into the above-mentioned agreement by the false and fraudulent misrepresentations made by McDermott and Swann acting in concert, or, alternatively, by McDermott, or, alternatively, by Swann as agent for and on behalf of McDermott, or, alternatively, by Swann on his own behalf. He claimed as against McDermott (*a*) a declaration that the agreement was duly avoided by Black, and (*b*) an order for the return of the £2,000 Commonwealth bonds together with interest paid thereon, or repayment of £2,000 with interest thereon at eight per cent per annum, or, alternatively, rescission of the said agreement and an order for the return of the said bonds, together with the interest paid thereon, or repayment of the said £2,000 and interest thereon at eight per cent per annum. He also claimed damages against both McDermott and Swann and each of them.

McDermott, by his defence, generally denied Black's allegations. He also denied that Swann was his agent or that he had acted in concert with him, and he averred that by an agreement in writing contained in the correspondence set out above, in consideration of McDermott agreeing to extend the time for payment of the balance of purchase money due under the original agreement from 26th June 1937 till 6th August 1937, Black agreed to and did in fact withdraw all allegations imputing anything improper to McDermott in connection with the original agreement. McDermott also set up by way of counterclaim damages for the loss incurred by him on a resale of the said shares and claimed £8,400. Swann, in his defence, also denied Black's allegations.

The trial was heard by *Martin* J., who held that Swann made the following false and fraudulent misrepresentations:—(i) That he was prepared to put £5,000 into a proposed new company to take over the shares; (ii) that Stringer and Phillips wanted to buy and made an offer of £25,000 cash and £10,000 in fully paid shares in a company to be formed to take over the said shares; (iii) the net profits of Younger Set Pty. Ltd., excluding the profit from the cafe which was run as a separate business, were £6,000 per year; (iv) that the average attendance at the ballroom conducted by the company at the "40 Club" on a Saturday night was about 2,000

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people ; (v) that McDermott never let the floor of the said ballroom for less than £100 per night.

He held, however, that Swann was not the agent of McDermott. He also held that McDermott had made the following false and fraudulent misrepresentations :—(i) That the net profits of Younger Set Pty. Ltd., excluding the profit from the cafe which was run as a separate business, were over £6,000 per annum ; (ii) that Stringer and Phillips wanted to buy the said shares and had made an offer of £25,000 cash and £10,000 in fully paid shares in a company to be formed to take over the said shares ; (iii) that McDermott had started the " 40 Club " with nothing and now had £50,000 to his credit in the bank ; (iv) that the average attendance at the ballroom conducted by the company at the " 40 Club " on a Saturday night was about 2,000 people. (This last misrepresentation was marked *h* in the particulars of the misrepresentations alleged in Black's statement of claim and is so referred to by counsel in the argument reported hereunder.)

Martin J. in the course of his judgment stated that Black was a very confused witness and it was quite unsafe to accept him on any matter in which he was not corroborated in a material degree. Black gave evidence of the above-mentioned misrepresentations, and his Honour purported to find the corroboration thereof in the evidence of Irvin, whom he believed to be a witness of truth. *Martin* J. also held that the correspondence set out above was too vague and uncertain to constitute a contract and did not constitute any defence to McDermott. He therefore gave judgment for Black with costs and ordered the return by McDermott of £2,000 Commonwealth bonds with interest thereon at four per cent per annum. He reserved consideration as to Swann's liability in respect of damages in the event of non-recovery by Black from McDermott. Swann, who appeared at the trial by counsel, withdrew at an early stage of the trial and did not, at the trial, enter into any defence to Black's allegations.

It appeared, however, that Irvin did not give any evidence that McDermott had made the fourth representation set out above, namely, that the average attendance at the ballroom of the " 40 Club " on a Saturday night was about 2,000 people. It also appeared

that in his answers to interrogatories Black attributed this representation to Swann only, and not McDermott.

McDermott appealed to the High Court and, besides serving Black with notice of appeal, he also served Swann. Swann did not appear at the hearing of the appeal.

Hudson K.C. (with him *Moore*), for the appellant. The agreement not to sue or rely on representations set out in the letter of 24th June 1937 is for a valuable consideration and operates as a release in equity or an accord and satisfaction in law. It is clear on the correspondence what was being released, and the judge's finding that the agreement was too vague cannot be sustained. The agreement intended to effect legal relations; there was clearly a consideration in the extension of time with a consequential waiver of any rights. The obligations of the parties were clearly defined. "Withdrawal" of the misrepresentations means a permanent retraction. This is necessary if the agreement was to have any business efficacy. The judge's finding as to misrepresentation *h* in the particulars was founded on a misapprehension of the evidence. Further there is no finding that misrepresentation *h* was an inducement. It did not follow that the plaintiff would not have proceeded if the misrepresentation had not been made. [As to costs, counsel referred to the *Rules of the Supreme Court* (Vict.), Order LXV., rule 2; *Reid Hewitt & Co.* v. *Joseph* (1)]. Each of the representations alleged was a separate issue within the meaning of the above rule, and the defendant McDermott should have had his costs of those upon which he succeeded. *Howell* v. *Dering* (2) was wrongly decided (*Jelbarts Pty. Ltd.* v. *McDonald* (3)).

Ashkanasy, for the respondent Black. It is unnecessary for the representee to discuss the alleged agreement, as it cannot apply to undiscovered fraud (*S. Pearson & Son Ltd.* v. *Dublin Corporation* (4)). The findings of fact made by the trial judge as to the representations should not be disturbed. An examination of his reasons show that in dealing with representation *h* his language is

(1) (1918) A.C. 717, at p. 738, per Lord *Finlay*, and at p. 739, per Lord *Haldane*.
(2) (1915) 1 K.B. 54.
(3) (1919) V.L.R. 478.
(4) (1907) A.C. 351.

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so hesitant that doubts might have existed in his mind whether it was corroborated by Irvin, and in fact he did not rely on Irvin's corroboration for this representation. The court should be slow to infer that an error was made by the trial judge. Having rejected McDermott's evidence and found that the vital representations were denied by McDermott, he might have found the material corroboration in the false denial, in the circumstances. In any event the correspondence, when analyzed, does not constitute any contract in law. There is offer, counter-offer, then purported acceptance of the first offer. This, however, had lapsed by the counter-offer. Assuming that the contract was made, it falls far short of an accord and satisfaction or a release of Black's cause of action. The correspondence was between solicitors who, presumably, would be familiar with the distinction between "withdrawal" of an allegation and a release of a right of action. The tenor of the correspondence shows that both parties appeared to think that a postponement would be to their mutual advantage. McDermott would hardly be expected to grant any extension while allegations of fraud were being made against him. A trifling extension was granted by him for a withdrawal of allegations, everyone confidently assuming that if an extension were granted rights of action would never have to be considered. McDermott secured a withdrawal, and that is all he wanted. This should not be construed as a release, as Black had no knowledge at this stage of the fraud. At the most, he had his suspicions, but they may have been unfounded. When he made the withdrawal, the original fraud was still operative and it vitiated the agreement to withdraw. If the court accepts McDermott's view and allows the appeal, then there should be a new trial, as the trial judge only called on Black's counsel to address him on the form of order. His counsel should have had the opportunity to dissuade the trial judge from making any finding adverse to the credibility of the plaintiff.

Moore, in reply. The court should amend the order for costs as was done in *Woolf* v. *Burman* (1).

Cur. adv. vult.

(1) (1940) Unreported. [Noted, 13 A.L.J. 431.]

The following written judgments were delivered :—

LATHAM C.J. The plaintiff Black made an agreement with the defendant McDermott to purchase for £16,000 four thousand shares in a company which conducted a dance hall. He delivered to the defendant Commonwealth bonds to the value of £2,000 as an initial payment. Before he made any further payment he wrote to the defendant complaining that the defendant had made certain misrepresentations —four in number. The defendant in his subsequent correspondence admitted that if the alleged statements had been made they were misrepresentations, but denied that he had made them. After further correspondence between the solicitors for the parties the plaintiff withdrew the allegations of misrepresentation and the defendant agreed to allow an extension of time for completion of the contract. The plaintiff did not pay the balance of purchase money within the extended time, and the defendant determined the contract. The plaintiff sued the defendant for rescission of the contract, for restitution and, alternatively, for damages. One, Swann, was joined as a defendant, it being alleged that he also made material misrepresentations to the plaintiff which induced the plaintiff to enter into the contract.

The learned trial judge (*Martin* J.) found that certain of the misrepresentations alleged in the correspondence were made by McDermott, that they were false to his knowledge, that they were material, and that they induced the plaintiff to enter into the contract. He gave judgment for the plaintiff for the return of the bonds with interest at four per centum from the day on which they were handed over until judgment or, alternatively, for payment of £2,000 with the said interest. The liability of Swann was reserved for further consideration. Swann was served with a notice of appeal but did not appear upon the appeal.

The defendant contends that the arrangement for withdrawal of the allegations made by the plaintiff and for an extension of time constituted a bar to the maintenance of the action. It was argued that this arrangement amounted either to a release of any cause of action based upon these allegations or to an agreement not to sue in respect of them. The learned judge found that another misrepresentation was made, which was not mentioned in the correspondence,

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and the allegation of which therefore was not withdrawn by the plaintiff. As to this misrepresentation the defendant contends that the learned judge made his finding under the misapprehension that it was corroborated by a particular witness and that, as the finding was made upon the basis of this mistake, this court may properly set it aside.

The first question which arises relates to the character and legal effect of the arrangement (to use a relatively non-committal term) for the withdrawal of allegations of misrepresentation. The learned judge held that the alleged arrangement was " too vague a thing to be enforceable as a contract."

I am unable to agree that a withdrawal of damaging allegations is a matter so vague as to be incapable of being an element in a contract. Such a withdrawal, especially when, as in this case, the withdrawal is evidenced by writing, may be regarded as of real value and importance as an abandonment of serious imputations against the character of the person in respect of whom they are made.

It has been contended by the defendant that no agreement, vague or otherwise, was made, because an examination of the correspondence shows that at no point was there an acceptance of an offer which still remained open. The relevant correspondence begins on 9th July 1937 with a letter from the plaintiff's solicitor in which he refers to the difficulties which have arisen between the parties and, stating that he is endeavouring to arrange an amicable settlement, says : " I feel confident that matters can be arranged, and if so, I will induce Mr. Black to withdraw his allegations against Mr. McDermott." On 15th July 1937 the defendant's solicitor wrote the following letter to the plaintiff's solicitor :—" Referring to my letter of 9th instant herein written without prejudice to you Mr. Black saw me to-day and has instructed me to withdraw all allegations imputing anything improper to Mr. McDermott. The accompanying letter will explain the whole matter."

The accompanying letter was in the following terms : " My letter herewith is conditional upon Mr. McDermott agreeing to three weeks' time from to-day in which to pay the balance of fourteen thousand pounds in order to complete the transaction." The reply from the plaintiff's solicitor, dated 21st July, did not accept

this offer but required a further payment by way of deposit on 23rd July. This was plainly a counter-offer.

On 23rd July the plaintiff's solicitor wrote objecting to the endeavour "to impose other conditions which were not provided for in the contract," and said that his client wished to go on with the contract and to complete his payments on or about 6th August. On 24th July the defendant's solicitors wrote a letter in which they stated that their client had reconsidered the position and that in the circumstances he was "prepared to accept the withdrawal and to grant three weeks further time." The three weeks asked for on 15th July would expire on 5th August.

On 28th July the defendant's solicitors wrote asking for a note confirming the plaintiff's intention as to completing his purchase "in accordance with the terms indicated in such letter" (the letter of 24th July). On 29th July the plaintiff's solicitor sent such a note. The letter stated that the plaintiff "instructs me to inform you that he intends completing the purchase within the time mentioned in the letter to you of 15th instant"—that is, by 5th August.

This correspondence shows that on 28th July the defendant's solicitors asked the plaintiff to state whether or not he would complete his purchase in accordance with the term indicated in a particular letter, namely, the letter of 24th July which referred to the proposed three-weeks' extension of time. The correspondence showed that this extension of time, originally suggested by the plaintiff, was sought only upon the basis of a withdrawal of the allegations contained in the correspondence. On 29th July this proposal was accepted by the plaintiff. Thus, in my opinion, an agreement was made between the parties whereby the defendant agreed to extend the time for completion to 5th August in consideration of the plaintiff withdrawing the allegations of misrepresentation which he had made in his earlier letters and whereby the plaintiff withdrew the allegations in consideration of receiving that extension of time.

It is now contended that the withdrawal of the allegations (or the promise to withdraw the allegations) amounted to an agreement to release any cause of action based upon the misrepresentations or at least to an agreement not to sue upon them. This agreement was made for consideration, namely, an extension of time (which was in fact

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given), and therefore is binding upon the plaintiff and, it is urged, is accordingly a reply to the present action. In my opinion this contention seeks to attach a meaning to the word "withdraw" which it is not fairly capable of bearing. The withdrawal of injurious imputations has a plain and simple meaning. The imputations in question are withdrawn in the sense that they are retracted or taken back. If the other party concerned wishes to safeguard himself against any repetition, he may, if he can, obtain a release of any rights of action based upon the imputations or he may obtain an agreement not to sue. He may, on the other hand, be content with having the evidence of withdrawal which he will be in a position to produce if ever the allegations should be repeated. In a case where allegations are withdrawn and the parties accordingly expect a transaction to go through without further difficulty, they may be content to allow the matter to stand at a withdrawal without obtaining either a release of rights of action or an agreement not to sue.

In this case the plaintiff and defendant were content to rest upon the simple withdrawal of the allegations. The allegations were withdrawn, and the extension of time was duly given, and accordingly the contract which was actually made was in fact performed. I am of opinion that though the arrangement is not so vague as to be incapable of amounting to a contract, the agreement to withdraw the allegations and the actual withdrawal of the allegations did not amount to or imply any promise binding the plaintiff in the future never to rely upon the allegations as a cause of action—though the fact that he had withdrawn his statement that the misrepresentations were made would be a matter for consideration by a tribunal in determining whether the plaintiff was speaking the truth when he revived them. For the reasons which I have stated I am of opinion that the agreement relied upon by the defendant does not constitute an answer to the plaintiff's claim in the present case. It is therefore unnecessary for me to consider the argument for the defendant relating to the further representation which was not included in the correspondence and which therefore was not withdrawn. The judgment can be supported upon the basis of the representations

made in the correspondence, upon which, as I have already said, the plaintiff is not, in my opinion precluded from relying.

The judgment is framed upon the basis of rescission of contract and restitution. In fact the contract was determined by the defendant on the ground of breach by the plaintiff in failing to pay the purchase money. This had been done before the plaintiff renewed his allegations of misrepresentation, added other similar allegations, and claimed his money back. The judgment should, it is argued, have been for damages for deceit and not for the return of the bonds or for a sum of money with interest. It is not disputed, however, that upon any basis the amount recoverable by the plaintiff, if he is entitled to recover damages at all, would amount to the sum of £2,000 with interest. I think that the judgment should be amended so as to become a judgment for the plaintiff for damages, such damages to be calculated by adding to the sum of £2,000 interest at the rate of four per centum per annum from 28th May 1937 up to 30th August 1939 (the date of judgment), that is, for £2,180 12s.

Subject to this variation the appeal should, in my opinion, be dismissed.

RICH J. I have read the judgment of *Dixon* J. and agree with his reasons and conclusions and the order proposed by him.

STARKE J. The appellant (McDermott) sold to the respondent (Black) 4,000 fully paid one pound ordinary shares in the capital of Younger Set Pty. Ltd. for £16,000, of which sum £2,000 was to be paid on or before 24th May 1937, and the balance of the purchase money on or before 31st May 1937. The sum of £2,000 was not paid on or before 24th May, but, a few days later, Commonwealth bonds of the face value of £2,000 were delivered and accepted in satisfaction of the sum of £2,000 mentioned in the contract. The time for payment of the balance of the purchase money was extended to 26th June 1937.

When the respondent's attention was drawn to the fact that the balance of purchase money was payable on or before that day, he alleged that the agreement was procured by various representations

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which he called upon the appellant to prove. The appellant denied the representations and called upon the respondent to complete the contract. The respondent did not do so, but his solicitor intimated that he was instructed " to withdraw all allegations imputing anything improper to " the appellant, " conditional upon " the appellant " agreeing to three weeks time from " 15th July 1937 " in which to pay the balance of £14,000 in order to complete the transaction." Ultimately, the appellant agreed to accept the withdrawal and to grant three-weeks' further time as required by the respondent.

The respondent did not pay the balance of purchase money on the appointed day, and the appellant gave notice that he required payment on a day which he fixed, otherwise he would proceed to dispose of the shares elsewhere, and, in the event of any loss, hold the respondent responsible in damages to make good the loss. But the respondent did not pay on the day appointed (11th August 1937), and the appellant, about the same day, elected to rescind the contract for breach thereof and communicated his election to the respondent.

In November of 1937 the respondent issued his writ in this action. By his statement of claim he alleged that the agreement which he made with the appellant was procured by false and fraudulent representations and that upon discovering the falsity of the representations he had avoided the contract. And he claimed a declaration that the contract was so avoided, return of the Commonwealth bonds with interest thereon or, alternatively, rescission of the contract and damages.

His claim for a declaration that he had avoided the contract or, alternatively, for rescission, may be dealt with summarily. The respondent affirmed the contract when he withdrew his allegations of impropriety against the appellant and accepted an extension of time to complete it, and, in any case, the contract was rescinded in August 1937 by the appellant owing to breach on the part of the respondent. So the respondent's cause of action must be limited to damages for deceit.

At the trial *Martin* J., who tried the action, found that the appellant had made certain false and fraudulent representations to the respondent, which had induced him to enter into the contract, and he gave judgment in his favour. The judgment does not follow

the usual form and is rather inappropriate in a common-law action for deceit. It ordered delivery up of the Commonwealth bonds together with interest thereon or, if the bonds were no longer held by the appellant, that he pay to the respondent the sum of £2,000 and interest thereon.

The appellant denied that he had made the representations, but he also relied upon the withdrawal of all allegations imputing anything improper to him in return for the giving of three-weeks' extension of time to complete the contract. This agreement was relied upon as an accord and satisfaction or as an agreement for valuable consideration, absolute and unqualified, not to sue, which operates as a release. But the learned trial judge said that the language of the agreement was far too vague for that and afforded no defence. Vagueness, as has been said, is a misleading term. An agreement may be so vague in its terms that it cannot be understood, and in that case it is of no effect in law or in equity (per *Bowen* L.J., *In re Clarke*; *Coombe* v. *Carter* (1)). But an agreement is not vague because it is wide in its terms or presents difficulties in its interpretation (*Tailby* v. *Official Receiver* (2)). "If it is possible to discover" the meaning of the agreement "by construction . . . it cannot be said that it ought not to be enforced because it is too vague" (*In re Kelcey*; *Tyson* v. *Kelcey* (3)).

The meaning of the agreement is, I think, fairly clear. The respondent desired to go on with his contract if he could raise money to complete it, but he required further time in order to do so. The appellant did not require that all imputations upon his character should be withdrawn before he would negotiate about an extension of time. It was the respondent who suggested that he would withdraw all imputations upon the appellant if he were given further time. A business arrangement was proposed, and an interpretation should be given to it that best effects the intention of the parties and makes it efficacious. A withdrawal of allegations of false representations on the part of the appellant would be useless from a business point of view if it had only an evidentiary value or was but an affirmation of the agreement, still leaving the appellant open

(1) (1887) 36 Ch. D. 348, at p. 355. (2) (1888) 13 App. Cas. 523.
(3) (1899) 2 Ch. 530, at p. 533.

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to an action for damages for deceit. Consequently, the respondent's proposal that he would withdraw all allegations imputing anything improper to the appellant means, I think, that he would not bring any action against the appellant in respect of those allegations if an extension of time were granted to him of three weeks from a specified date so that he might complete the contract. And this proposal was accepted by the appellant.

The arrangement was, in effect, the release from an obligation to pay damages for deceit in return for a valuable consideration—an extension of time—which is in law an accord and satisfaction. "There is no doubt that the general principle is that an accord without satisfaction has no legal effect and that the original cause of action is not discharged as long as the satisfaction agreed upon remains executory. . . . If, however, it can be shown that what a creditor accepts in satisfaction is merely his debtor's promise and not the performance of that promise the original cause of action is discharged from the date when the promise is made" (*Morris* v. *Baron & Co.* (1); *British Russian Gazette &c. Ltd. and Talbot* v. *Associated Newspapers Ltd.* (2)). The satisfaction in the present case was the promise of the appellant to extend the time, but, whether this is so or not, the promise was actually performed.

Another view of the arrangement is that it operated in equity, if not at law, as a release of the cause of action for deceit. An absolute covenant not to sue amounts to a release, whilst a covenant not to sue for a limited time has no such effect (*Bullen and Leake* on *Pleading*, 3rd ed. (1868), pp. 669,670; *Walmesley* v. *Cooper* (3); *Ford* v. *Beech* (4); *Ray* v. *Jones* (5)). But for the common-law rule that the release of a cause of action once accrued must be by deed under seal (*Harris* v. *Goodwyn* (6)), the arrangement might, I apprehend, have been pleaded as a release at common law. A parol agreement, however, which amounts in terms to a release, made for consideration, can be pleaded as a defence upon equitable grounds (*Bullen and Leake* on *Pleading*, 3rd ed., p. 669)—Cf. *De*

(1) (1918) A.C., at p. 35.
(2) (1933) 2 K.B. 616.
(3) (1839) 11 Ad. & E. 216 [113 E.R. 398].
(4) (1846) 11 Q.B. 852 [116 E.R. 693].
(5) (1865) 19 C.B.N.S. 416 [144 E.R. 848].
(6) (1841) 2 M. & G. 405 [133 E.R. 803].

Pothonier v. *De Mattos* (1); *Keyes* v. *Elkins* (2); *Edwards* v. *Walters* (3). Consequently, the agreement in the present case might be so pleaded and sustained because the promise not to bring any action was an absolute covenant not to sue and therefore operated as a release. It was a promise for valuable consideration—an extension of time—and so binding in equity.

Some suggestion was made that this promise was procured, as well as the original contract, by the fraudulent statements found by the trial judge, but no evidence was adduced in support of the suggestion.

Another suggestion was that the arrangement only operated in respect of false statements of which the respondent was aware at the time of the arrangement: Cf. *S. Pearson & Son Ltd.* v. *Dublin Corporation* (4). But the respondent agreed to withdraw all allegations imputing anything improper to the appellant, and I see no equitable ground for relieving him of that promise, especially as in his answers to interrogatories he did not impute the statements now relied upon by him to the appellant and the trial judge did not explicitly find the appellant made those statements but only that he probably did so.

This appeal should, therefore, be allowed and the action dismissed as against the appellant.

DIXON J. This appeal is the product of an abortive sale of four thousand shares in a company called Younger Set Pty. Ltd., being four-fifths of its share capital. The contract was made on Sunday, 16th May 1937. The appellant, McDermott, agreed to sell the shares, the respondent, Black, to buy them. The price was £4 per share, £16,000, of which £2,000 was payable at the end of the week and the balance in a fortnight. At the same time the appellant entered into another contract to sell at the same rate the remaining one thousand shares in the company's capital. The purchaser was one Swann, an employee of the company. The appellant, who held or controlled all the shares, was its managing director. The business

(1) (1858) E.B. & E. 461 [120 E.R. 581].
(2) (1864) 5 B. & S. 240, at pp. 253, 254 [122 E.R. 820, at p. 826.]
(3) (1896) 2 Ch. 157, at p. 168.
(4) (1907) A.C. 351, at p. 365.

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of the company consisted in the conducting of a place of entertainment, under the name of the Forty Club, in a dance hall of which it was possessed. Swann was the "floor manager." The appellant, it is said, had fallen into ill health and, on that account, wished to dispose of the concern. A project of some description seems to have been formed for selling it to Swann and such co-adventurers as he could muster for the purpose of providing the necessary cash.

The respondent, Black, who at one time had been a bank manager and at another a farmer, was carrying on the pursuit of a land and financial agent. On Friday, 14th May 1937, Swann paid him a visit, laid before him all the attractions of the project, and sought his help in finding the money. As a result Black went on Saturday evening to witness for himself the spectacle at the Forty Club. The value, it is now suggested, of the proposal lay less in the business than in the company's title to the premises, a right to a Crown lease of land in the city. But the attendance at the box-office clearly was not regarded as irrelevant. Black did not go alone. His party included a friend named Irvin. They met the appellant, and before long negotiations had so far advanced that an appointment was made for the following morning in order to complete a sale to Black of four-fifths, and to Swann of one-fifth, of the shares. Next morning the appellant brought his solicitor and the contracts were made. Black had no intention of providing any part of the £16,000 from his own resources; he could not have done so. He believed or hoped that clients, actual or prospective, would take over the transaction. But when the day for paying the deposit came he had not the money. He obtained a few days time and arranged to lodge, in lieu of the £2,000, four Commonwealth bonds of £500 each. This he did, and the appellant agreed to vary the contract by extending the time for payment of the balance of purchase money to 26th June 1937. Black was not then in a position to complete. As that day approached he wrote to the appellant stating that he had been induced to enter into the transaction by some representations which he specified, and he called upon the appellant to prove the truth of the representations by the production of books and documents. Three of the representations which he set up were in fact

untrue, and the appellant denied making them. After some correspondence Black agreed to withdraw his allegations upon receiving an extension of time until 5th August 1937. When that date came he was still unable to complete, and, finally, about 11th August the appellant rescinded the contract, forfeiting the deposited bonds. After some further negotiations Black instituted the present action against the appellant and Swann. He sued in deceit for the recovery of the bonds or of their value as damages. *Martin* J., who tried the action, found that McDermott had himself made the three misrepresentations already mentioned and one other and that they were fraudulent. Against Swann he found additional misrepresentations, but he considered that Swann was not McDermott's agent. Swann defended the action and appeared when the trial began, but on the third day his counsel withdrew and no more was seen of the client. *Martin* J. did not pronounce a common-law judgment for the recovery of damages against both defendants. He made a special order for the return of the bonds by McDermott and in default the payment of £2,000 damages and reserved further consideration of Swann's liability in the event of McDermott failing to comply with the order. McDermott alone has appealed, but he served his notice of appeal on Swann, who, however, has ignored the proceedings.

McDermott's appeal is founded on two contentions. He says first that *Martin* J. did not really intend to find the fourth misrepresentation against him, that is, the misrepresentation not included in the allegations which the respondent Black had withdrawn, and did so only by a slip. Secondly he contends that Black's remedy in respect of the other three allegations is barred by his withdrawal.

In his reasons for judgment, which were orally given, his Honour found that McDermott had made the following false representations to the appellant:—(1) That the net profits of the company were £6,000 per annum, excluding the profits from a café forming part of the premises. (2) That a firm specified wanted to buy the shares and were prepared to give more than £20,000. (3) That he, McDermott, had started the Forty Club with nothing and now had £50,000 to his credit. (4) That the average attendance in the ballroom of a Saturday night was 2,000 persons.

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In stating his opinion that the fourth representation was made, the learned judge qualified it by the word "probably." But the tenor of his judgment makes it clear that he considered that he had definitely found it as a fact.

It is this finding which, according to the appellant's contention, the learned judge made under a mistake or misapprehension. His Honour refused to rely on the uncorroborated testimony of Black. He did not regard him as an untruthful witness but as one who showed so much confusion, forgetfulness and want of understanding that, as *Martin* J. said, it was quite unsafe to accept him on any matter in which he was not corroborated in a material particular. No less than fifteen misrepresentations were alleged against the defendants, and it became necessary to see what confirmatory evidence there was of the making of each representation by the defendants or one or other of them and which of them. The corroboration for the most part proceeded from Irvin. The judgment shows clearly enough that his Honour thought that Irvin had sworn that all four of the representations I have set out were made by McDermott. In fact he did not say that McDermott made the fourth of them. Moreover Black himself in his answers to interrogatories had attributed it to Swann and not to McDermott, and had done so in a manner showing that, according to his then view, McDermott had not personally made the statement. In these circumstances I think that the finding was made by mistake and that it cannot stand. We must proceed upon the footing that McDermott did not make the fourth misrepresentation. It is a matter for regret that the learned judge's attention was not drawn to the misapprehension, but with so many questions of evidence it is, perhaps, not surprising that judge and counsel should all fall into the same error.

The other three misrepresentations found were all relied upon by Black in the correspondence which took place when the time fixed for completion was at hand, and they formed the subject of his withdrawal on still further time being granted. The appellant's contention is that Black agreed to waive his complaint of misrepresentation in consideration of an extension of three weeks in the time for completion and that either his cause of action was thus discharged

by accord and satisfaction or he precluded himself, either at law or in equity, from afterwards reviving the allegation of these misrepresentations as the foundation, in whole or in part, of a suit. In order to deal with this contention it is necessary to state a little more fully what took place.

The question of misrepresentation was raised for the first time in a letter written by the respondent Black to the appellant on 24th June 1937. He wrote that he had agreed to buy the shares upon representations which he stated. They covered the three misrepresentations now in question. He went on to say that the appellant had refused to allow Black's auditor to inspect the company's books, and his letter concluded with a request for the production of the accounts so that he, Black, might be " satisfied or otherwise as to the representations " and with a statement that until compliance he would not pay any further money. This evoked from the appellant's solicitors an immediate denial of the representations and a threat to enforce the contract. The date fixed for payment was next day. Black replied :—" I again say that your client did make the representations mentioned to him in my letter of 24th inst. If they are not correct then I want my money back. If they are correct and Mr. McDermott will permit my auditor to examine the books and documents of the company and such audit supports Mr. McDermott's statements I will fulfil my part of the agreement and pay the balance of the money. If Mr. McDermott will not agree to this then I will have no alternative but to issue a writ against him for the return of my bonds for £2,000." To this the appellant's solicitors replied in a letter the effect of which was again to deny the making of the representations alleged, which the letter called " misrepresentations," to accuse the respondent Black of manufacturing grounds for delay, and to require him to complete on that day. On 28th June, two days after the date fixed for settlement had passed, Black in answer wrote an argumentative letter, in the course of which he said that as the appellant's solicitors called the representations " misrepresentations " he was led to believe that they were misrepresentations and made by their client. The letter ended with a statement that Black's own allegations were genuine and if McDermott would give him an audited statement covering

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three years and showing that his representations were substantially true he, Black, would go on. During these communications Black had consulted a solicitor, who now took up the correspondence. On 30th June he wrote a more conciliatory letter explaining Black's desire for the production of the books on the ground that he wished to enlist the financial support of others for the transaction and suggesting that further time be given. A week later an interview took place between the respective solicitors. No evidence was given as to what passed, but Black's solicitor wrote on 9th July saying that his client wanted a further week in order to make arrangements. He continued :—" I feel confident that matters can be arranged, and if so, I will induce Mr. Black to withdraw his allegations against Mr. McDermott. If a further week be given then I think that the parties will require further time not exceeding a month in which to finalize the whole matter. You will treat this letter as without prejudice but I am doing my best to arrange an amicable settlement and with a view to carrying out the original contract except in so far as time is concerned." Six days later Black's solicitor again wrote. He referred to his last letter and went on to say that Black had instructed him " to withdraw all allegations imputing anything improper to Mr. McDermott " and that an accompanying letter would explain the whole matter. The accompanying letter said : " My letter herewith is conditional upon Mr. McDermott agreeing to three weeks' time from to-day in which to pay the balance of £14,000 in order to complete the transaction. Please let me have an immediate reply." An interview or interviews then took place, and more letters followed. An attempt was made on the part of the appellant to impose a further condition that the deposit should be increased, but at length his solicitors wrote :—" In the circumstances he is prepared to accept the withdrawal and to grant three weeks further time as stated in your further letters " ; and on 29th July, in response to a request for confirmation, Black's solicitor wrote that his client instructed him to say that he intended completing the purchase within the time mentioned.

It will be seen from the foregoing that Black set up three representations on which his cause of action now depends, challenged their truth and threatened to sue to recover his bonds. McDermott

did not contest their want of correspondence with fact but denied making them; then Black agreed to go on with the contract and withdrew the allegations in consideration of receiving three weeks further time. The question for decision is whether Black can now rely upon the same allegations in order to maintain an action for deceit.

At the time when the plaintiff agreed to withdraw the allegations of misrepresentation which he had made, he was, on the findings of fact, in a position to disaffirm the contract and recover the Commonwealth bonds which he had deposited or their value. He might, of course, have elected to affirm the contract, and in that case his remedy would have been an action for deceit, an action in which it would be necessary to establish not only fraud on the part of the defendant McDermott but actual loss on his own part consisting in an excess in the amount which he had laid out in the execution of the contract over the value of what he had obtained. At the time when he issued his writ his cause of action was limited to deceit. For the contract had been rescinded by the defendant McDermott, and, even if the plaintiff's election had remained open, there was nothing to disaffirm.

The question for our consideration may be divided under two legal heads. First, did Black's agreement to withdraw the allegations of improper conduct operate to extinguish his cause of action in deceit? And secondly, if not, did it nevertheless disable him from relying in an action of deceit upon the specific misrepresentations to which his withdrawal related? That is to say, conceding that if he had been able to establish other fraudulent misrepresentations afterwards discovered, he might have maintained an action of deceit founded upon them, yet could he revive the allegations he had withdrawn and rely also on them?

An agreement not to sue upon particular allegations might give a defendant a good equitable plea, but at common law it would be necessary for him to show that it amounted to an accord and satisfaction discharging the cause of action or else that it gave rise to an estoppel.

The essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action. What he takes

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is a matter depending on his own consent or agreement. It may be a promise or contract or it may be the act or thing promised. But, whatever it is, until it is provided and accepted the cause of action remains alive and unimpaired. The accord is the agreement or consent to accept the satisfaction. Until the satisfaction is given the accord remains executory and cannot bar the claim. The distinction between an accord executory and an accord and satisfaction remains as valid and as important as ever. An accord executory neither extinguishes the old cause of action nor affords a new one. The decision of the Court of Appeal in *British Russian Gazette &c. Ltd. and Talbot* v. *Associated Newspapers Ltd.* (1), though doubtless some of the reasons display less zeal for principle than for reform, does not appear to me to be inconsistent with the received doctrine that no new cause of action is given by an accord executory. In that case, the agreement constituting the accord was made as a compromise of three several causes of action vested in three persons respectively. It was made by one of them purporting to act not only on his own behalf but also as agent for the other two. In fact he had no authority to do so, and he was held liable for damages for breach of warranty of authority. This result might perhaps be supported, even if the agreement were an accord executory, on the ground that, at all events, the opposite party had acted to some extent on his representation of authority, but the intention of the parties appears to have been that the agreement of compromise should itself have been accepted as in satisfaction of the causes of action, so amounting to an accord and satisfaction. The case, therefore, provides no more than a late illustration of the doctrine, finally established perhaps by *Flockton* v. *Hall* (2), that of accord and satisfaction there are two cases, one where the making of the agreement itself is what is stipulated for, and the other, where it is the doing of the things promised by the agreement. The distinction depends on what exactly is agreed to be taken in place of the existing cause of action or claim. An executory promise or series of promises given in consideration of the abandonment of the claim may be accepted in substitution or satisfaction of the existing liability. Or,

(1) (1933) 2 K.B. 616.
(2) (1849) 14 Q.B. 380 [117 E.R. 150]; 16 Q.B. 1039 [117 E.R. 1179].

on the other hand, promises may be given by the party liable that he will satisfy the claim by doing an act, making over a thing or paying an ascertained sum of money and the other party may agree to accept, not the promise, but the act, thing or money in satisfaction of his claim. If the agreement is to accept the promise in satisfaction, the discharge of the liability is immediate ; if the performance, then there is no discharge unless and until the promise is performed.

In the present case, an extension of time to the 5th August 1937 is the thing promised. From the nature of the concession, the extension consisted not so much in allowing time to elapse as in the waiver *de praesenti* of insistence on the plaintiff's observing the time named in the contract and of the consequences of non-observance, whatever they might be. What the plaintiff sought was a concession in the nature of a variation of the contractual terms fixing the time for completion. There is little difficulty, therefore, in regarding the defendant's agreement to postpone, and not the actual lapse of time, as the thing looked for by the plaintiff. The point of difficulty in the present case appears to me to lie elsewhere. The difficulty is to be sure of an intention on the part of the plaintiff to discharge the defendant from any liability, that is, an intention to take the agreement to extend the time in replacement or satisfaction of any existing right or claim against the defendant or, at all events, of the right or claim put in suit by the present action. The " withdrawal of all allegations imputing anything improper to " the defendant conditionally upon the latter's agreeing to three-weeks' further time for payment of the balance of purchase money clearly amounts to an election to affirm the contract. It does, I think, imply a promise not to revive the allegations. But it must be acknowledged that, standing alone, it would not be easy to spell out of it an intention to treat the extension as satisfying a claim. The correspondence, however, not only adverts expressly to misrepresentations, but on that ground Black threatened to sue to recover the bonds. An action for deceit is but the legal description of the remedy for misrepresentation which the respondent Black appears to have contemplated. Accordingly should it not be taken as a possible liability, among others, to which the withdrawal should be understood as putting an end ? On the whole I think that this

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question should receive an affirmative answer. The untechnical and inexact expression, "withdraw allegations," no doubt causes some difficulty. But it must be borne in mind that the purpose was to settle or compromise a very definite dispute. On the one side, the appellant McDermott, if time was of the essence as in such a contract it may have been, was in a position to rescind and forfeit the deposited bonds. On the other side the respondent Black had formulated a claim to disaffirm the contract and recover his bonds and he had threatened to issue a writ unless he was satisfied of the truth of the representations, the falsity of which, if made, had never been denied. It was at this stage that his solicitor suggested an amicable settlement based upon the withdrawal of his client's allegations. In these circumstances, it would be natural for the appellant McDermott to suppose that the proposal was that the contract should be completed on the footing that Black waived all claims based on the alleged misrepresentations. It would be futile for Black to withdraw allegations which he was to be at liberty to revive. The purpose of the withdrawal was not that of social amenity but to complete and close a business transaction. *Fias recantatis amicus opprobriis* is but an idle sentiment which could have no place in the moratory tactics of Mr. Black, and would be unheard by Mr. McDermott. The question propounded was whether the contract should be carried into effect and time be allowed to Black for that purpose or whether the latter should persist in his claim that it should be avoided and his bonds returned. The withdrawal of the allegations of improper conduct meant, in my opinion, that he would make no claim based upon misrepresentation but would accept the promise of further time instead. Estoppel can, I think, be put aside. But I think that, consistently with principle, the agreement to withdraw in consideration of a grant of time can be regarded as an accord and satisfaction. I am prepared to hold that on this ground the respondent Black's cause of action is answered, founded, as it is, on the three misrepresentations withdrawn.

But I am of opinion that in any case a good equitable plea is sustained by the agreement, that is, if the legal defence were not enough. The sufficiency of the facts to provide an answer in equity is determined by somewhat different considerations.

At law, "the only case in which a covenant or promise not to sue is held to be pleadable as a bar, or to operate as a suspension.

and by consequence a release or extinguishment of the right of action, is where the covenant or promise not to sue is general, not to sue at any time. In such cases, in order to avoid circuity of action, the covenants may be pleaded in bar as a release . . . for the reason assigned, that the damages to be recovered in an action for suing contrary to the covenant would be equal to the debt . . . or sum to be recovered in the action agreed to be forborne " (per *Parke* B., *Ford* v. *Beech* (1)).

But equity did not follow the law in its refusal to give effect to the agreement of the parties. At law an accord and satisfaction was not pleaded in bar of an action upon a specialty but in equity the debt was treated as discharged, and, before the *Judicature Act*, the creditor was restrained from proceeding at law for its enforcement (*Webb* v. *Hewitt* (2) ; *Steeds* v. *Steeds* (3)). In the same way a parol variation of a contract under seal obtains its effective operation from equitable doctrine (*Berry* v. *Berry* (4)). A release, though not under seal, if given for consideration, was enforced by injunction, and so, too, was an agreement by simple contract not to sue. Accordingly they now constitute good equitable defences to legal demands : Cf. *Edwards* v. *Walters* (5). There is no reason to doubt that in the same way equity would give effect to a simple contract not to set up or rely upon specific allegations of fact as part of a common-law cause of action or for that matter as a plea, or part of a plea, answering a cause of action. Before the *Judicature Act* the mode of relief was by injunction restraining the party from pleading the facts in his declaration or plea as the case might be and the foundation of the injunction was the promise of the party, negative in character, given for consideration. The promise, however the contract might be expressed, is in character negative, because, *ex hypothesi*, the stipulation to be enforced is that the party will not set up the specific allegations of fact. A negative stipulation gives the party a prima-facie equity to have a violation of the contract restrained because the legal remedy by way of damages is not sufficient to protect the party and secure the interest

(1) (1848) 11 Q.B. 852, at p. 871 [116 E.R. 693, at p. 700].
(2) (1857) 3 K. & J. 438, at pp. 444-446 [69 E.R. 1181, at p. 1183, 1184].
(3) (1889) 22 Q.B.D. 537, at p. 540.
(4) (1929) 2 K.B. 316.
(5) (1896) 2 Ch., at p. 168.

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for which he bargained. But like all other titles to equitable relief the prima-facie right to restrain the breach of an agreement not to sue or not to set up specified matters is subject to the well-known rules or principles upon which courts of equity act. Relief would not be granted if the agreement were unfairly obtained or oppressive. The stipulation, whether express or implied, must be sufficiently certain and not too vague and indefinite. The consideration must not be illusory or inadequate. There are two points at which these principles touch the plaintiff's agreement to withdraw the allegations of improper conduct. In the first place, though an implication against reviving the allegations appears to me quite certain, the extent and nature of the promise to be implied may be said to be too doubtful. It may be thought insufficiently clear that the parties intended to stipulate that the plaintiff should not be at liberty to include the misrepresentations referred to in an action of deceit. Conflicting views have been suggested of the nature and extent of the undertaking to withdraw the allegations of improper conduct. For instance, it has been said that it was directed only against aspersion on character, against further contumely or insult. Another view put forward was that its purpose was to destroy in advance the probative value of Black's assertions. It has also been explained on the ground that it was desired to fix Black with an affirmance as opposed to a disaffirmance of the contract. Notwithstanding these rival interpretations of the agreement to withdraw the allegations, I am of opinion that the parties should be understood as stipulating that the respondent Black would not base any cause of action upon the allegations he withdrew. But so to interpret their contract is one thing: it is another thing to say that the construction or implication is sufficiently clear and definite to form the ground of an injunction. Upon the latter question the opinion of *Martin* J. that the language of the agreement is far too vague and the difference in the views of the withdrawal that have been put forward must shake any confidence that otherwise might be felt. But it is necessary to distinguish between the difficulties that are encountered in interpreting the meaning of the parties to a negative stipulation and the vagueness or indefiniteness of the stipulation when interpreted. In the present case I think the

difficulties fall under the former head rather than the latter. It appears to me that, once it is determined that the parties intended that Black should not be at liberty to revive the allegations and rely upon them in legal proceedings in support of a claim, little difficulty remains in saying that their meaning was definite enough to warrant a court of equity restraining such an action at law as the present.

The other point at which the general principles of equity touch the question whether the agreement to withdraw the allegations provides an equitable defence, depends upon its fairness and justice. In the first place the reply of the respondent Black contains an averment that the agreement was induced by a false representation made by the appellant on 12th July. There is, however, nothing but the unconfirmed evidence of Black to support the averment; it is contradicted by McDermott, and there is no finding that the representation was made. In these circumstances I think that the making of the representation was not established. A court of equity would not, perhaps, have granted an injunction if it had appeared that further misrepresentations had been made the falsity of which Black had not discovered at the time of the withdrawal. But no such representations were established except some made by Swann. I agree with *Martin* J. that Swann was not McDermott's agent, and I do not think that his conduct can, in the circumstances of the case affect McDermott's equity. Nor do I think that the supposed inadequacy of the consideration given by McDermott, viz., the postponement of three weeks, is a valid answer. The whole thing was a compromise, and time was what Black wanted.

In my opinion the agreement to withdraw operates to prevent the respondent Black from maintaining this action.

The appeal of McDermott should, therefore, be allowed and judgment in the action should be entered in his favour.

Some difficulty arises as to Swann. Though he was guilty of other misrepresentations which McDermott did not make and though he and McDermott are not shown to have been acting in concert, it may be that there are no separate causes of action against them and their case is like that of joint tortfeasors. For the gist of the action is the damage, and the deceit is but the wrongful inducement. Black's reliance on the combined misrepresentations led him to

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incur but one loss, and that is the damage: Compare *Sudholz* v. *Withers Pty. Ltd. and the Tramway Board* (1). An accord and satisfaction with one joint tortfeasor discharges the liability of all. But I do not think that we are called upon to consider this interesting question. Clearly, in equity, Swann would have no answer. The common-law defence of accord and satisfaction he did not raise. Had he done so, an investigation might have been made of what passed between him and Black at the time of the agreement to withdraw the allegations against McDermott, and it may be that it would then appear that such a defence was not available to him. He has not appealed, and a judgment stands declaring him liable in default of satisfaction by McDermott. In effect the view I take would render satisfaction by McDermott impossible and make Swann's liability absolute. Swann, however, is a party to the appeal, and we can and should dispose of the whole case. In the result, therefore, I think that we should vary the judgment below by entering judgment for McDermott and against Swann for £2,000. McDermott should have his costs of this appeal, and in the action, where he failed on substantial issues of fact, he should pay the costs of those issues. Swann should pay the costs of the action.

McTIERNAN J. I concur in the reasons for judgment of my brother *Dixon* and agree with the order which he proposes should be made.

Appeal allowed with costs. Judgment of Supreme Court set aside. In lieu thereof judgment for defendant McDermott with costs of action except so far as they have been increased by the issue of fraud upon which the plaintiff succeeded which costs the plaintiff shall have. Such costs to be set off. Order that costs of pleadings interrogatories, discovery and shorthand notes be allowed as part of the costs dealt with by this order. Judgment against Swann for £2,000 *with costs of action including balance of costs of action ordered to be paid by plaintiff to defendant McDermott.*

Solicitors for the appellant, *W. B. & O. McCutcheon.*
Solicitors for the respondent, *Weigall & Crowther.*

O. J. G.

(1) (1918) V.L.R. 375.