[HIGH COURT OF AUSTRALIA.]

SIBLEY AND ANOTHER . . . . APPELLANTS;
PLAINTIFFS,

AND

GROSVENOR AND ANOTHER . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1916.

MELBOURNE, *Feb.* 28, 29; *March* 1, 24.

Griffith C.J., Barton, Isaacs, Gavan Duffy and Rich JJ.

Vendor and Purchaser — Contract — Rescission — Fraud — Misrepresentation — Materiality—Joinder of vendor and his agent as defendants—Remedy against agent—Damages for deceit.

The purchasers of farming land were induced to purchase it by a statement made by the agent of the vendor without the vendor's knowledge or authority, which, as the agent knew, was untrue, that he, the agent, was selling the land on behalf of mortgagees, and that for that reason the price asked was lower than it would otherwise be. In an action by the purchasers against the vendor and his agent based on that misrepresentation the plaintiffs claimed—(1) as against the vendor rescission, with consequential relief, and (2) as against both defendants damages for deceit.

Held, by the whole Court, that the statement was a material representation, and, being untrue, entitled the purchasers, as against the vendor, to rescission with consequential relief on the basis of restitution *in integrum*.

Held, further, by *Griffith* C.J., *Barton*, *Gavan Duffy* and *Rich* JJ. (*Isaacs* J. dissenting), that, in addition to being entitled as against the vendor to restitution *in integrum*, the plaintiffs were entitled, as against the agent, to recover by way of damages in an action for deceit any moneys which they had paid under the contract and of which they were entitled to restitution, and also any money uselessly expended in reliance upon the agent's representation in preparing to carry on business on the land purchased. The form of order against the agent with respect to any money not recovered from the vendor was reserved for further consideration.

H. C. OF A. 1916.

SIBLEY v. GROSVENOR.

By *Isaacs* J.—(1) The plaintiffs were entitled to an order that the agent should indemnify them against the vendor's inability to complete the restitution directed, and (2) in view of the rescission of the contract, damages *ultra* were not recoverable in respect of the representation inasmuch as the purchasers were not acting on the faith of that representation in expending the money.

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

APPEAL from the Supreme Court of Victoria.

In an action brought in the Supreme Court by John Sibley and Maxmillian George Newman against Alfred Ernest Grosvenor and Aubert W. Loughnan, the plaintiffs alleged that on 9th December 1914 they entered into a contract in writing with the defendant Loughnan, by his agent Grosvenor, whereby the plaintiffs agreed to buy and the defendant Loughnan to sell 482 acres 3 roods and 35 perches of land for the sum of £2,060 1s. 3d.; that during the negotiations for the sale the defendant Grosvenor made certain false representations including the following:—(*a*) That he was selling as agent for the mortgagees of the land, and that that was the reason why the price was, as he alleged, so cheap, and (*d*) that portion of the land had been valued at over £6 per acre for loan purposes; and that, relying upon such representations, the plaintiff entered into the contract and paid a deposit of £350 on account of the purchase money and expended labour and money in improvements on the land. Alternatively, the plaintiffs alleged that the defendant Grosvenor made each of the representations knowing them to be false, and by reason thereof the plaintiffs paid the £350, and expended labour and money in improvements and lost money upon live stock and plant required for working the land, and incurred expenses consequentially upon the contract. The plaintiffs claimed as against the defendant Loughnan rescission of the contract, with allowance for improvements £110, repayment of £350 with interest, and an injunction against negotiating promissory notes given under the contract; and against both defendants damages £700. The action was heard by *àBeckett* J., who gave judgment for the defendant Grosvenor without costs, and for the defendant Loughnan with costs.

From that decision the plaintiffs now appealed to the High Court.

Other material facts are stated in the judgments hereunder.

Hotchin, for the appellants. The representation that the sale was on behalf of mortgagees was a material one. The learned Judge found that in substance it was made. The plaintiffs are entitled to recover from the defendant Loughnan, on the footing of rescission of the contract, the amount of purchase money paid and also moneys expended for repairs and improvements on the land : *Dart's Vendors and Purchasers*, 7th ed., p. 517.

[RICH J. referred to *Williams on Vendors and Purchasers*, 2nd ed., p. 836 ; *Seton on Decrees*, 5th ed., p. 1927.]

They are also entitled to recover on the basis of an action for deceit, damages which might reasonably be expected to follow (*Newbigging* v. *Adam* (1)), including losses on stock purchased under circumstances which were in the contemplation of the parties at the time of the contract (*Godwin* v. *Francis* (2)). [He also referred to *Redgrave* v. *Hurd* (3).]

[RICH J. referred to *Whittington* v. *Seale-Hayne* (4).]

Dixon, for the respondent Grosvenor. On the authority of *Craine* v. *Australian Deposit and Mortgage Bank* (5) and *Dearman* v. *Dearman* (6), the decision should not be interfered with, for the materiality of the representations and the question what were the exact representations made are questions of fact depending on the credibility of witnesses. In the case of a contract induced by misrepresentation the remedies by rescission and by damages for deceit are alternative, and not cumulative : *Halsbury's Laws of England*, vol. xx., p. 720. The plaintiffs are at most only entitled to recover against Grosvenor in the event of their not bring fully compensated by Loughnan. Grosvenor was therefore improperly joined as a party. [He also referred to *Ship* v. *Crosskill* (7) ; *Burstall* v. *Beyfus* (8) ; *Spencer Bower on Actionable Misrepresentation*, pp. 160, 378.]

(1) 34 Ch. D., 582, at p. 589.
(2) L.R. 5 C.P., 295.
(3) 20 Ch. D., 1.
(4) 82 L.T., 49.
(5) 15 C.L.R., 389.
(6) 7 C.L.R., 549.
(7) L.R. 10 Eq., 73.
(8) 26 Ch. D., 35.

H. C. OF A. 1916.

SIBLEY v. GROSVENOR.

Brennan, for the respondent Loughnan. This Court will not, under the circumstances, interfere with the finding of fact by the primary Judge that the representation did not induce the contract.

Hotchin, in reply, referred to *Heatley* v. *Newton* (1); *Henderson* v. *Lacon* (2).

Cur. adv. vult.

March 24. GRIFFITH C.J. read the following judgment:—This was an action by a purchaser for the rescission of a contract for the sale of land on the ground of misrepresentation. A claim for damages for deceit was added against the agent by whom the contract was negotiated. The contract was made in December 1914. The defendant Loughnan was the vendor; the defendant Grosvenor was the agent who made the representations complained of, and who is alleged to have known of their falsity. Fraud was not alleged against Loughnan personally. The land was country land situated about 80 miles from Melbourne, and comprising two blocks, one of about 273 acres and the other of about 209 acres. The agreed price was £2,060, being at the rate of £6 per acre for the larger block and £2 per acre for the smaller.

The misrepresentations now relied on are two: (1) that Grosvenor was selling as agent for mortgagees of the land, which was the reason for asking so low a price, and that they were unwilling to take less than the price named; (2) that the 273 acres had been valued at over £6 per acre for loan purposes. Both representations, if made, were false within the knowledge of Grosvenor, who made them. With respect to the larger block, Loughnan, the vendor, had in November 1914 taken an assignment of a contract made in July 1914 by which mortgagees had sold the land for £900 to his assignors. The price to be paid by him to his assignors was at the rate of £3 15s. per acre—about £1,025. The smaller block had been purchased by Loughnan in November 1914 at the price of 25s. per acre —about £261.

à Beckett J., who tried the cause without a jury, said that he

(1) 19 Ch. D., 326. (2) L.R. 5 Eq., 249.

believed that Grosvenor substantially made the representation that he was selling the land on behalf of mortgagees and that that was the reason why the price asked, viz., £2,061, was so low, but he did not think that such a representation was material.

With great respect, I am unable to agree with him. The plaintiffs were inexperienced young men who desired to enter on the business of farming. I think that the representation would naturally operate on the minds of such intending purchasers in considering the price they would pay for the land. It cannot be doubted that if they had known the real truth as to the mortgagees' sales, they might have refrained from the purchase on the terms asked. It is true that the vendor was not bound to disclose to the purchasers what he had paid for the land, but, his agent having volunteered information which was material and false, he must take the consequences.

With regard to the other alleged misrepresentation a curious story is told. The plaintiffs say that in the course of the negotiations a type-written document, which may be described as a handbill, containing particulars of the block of 273 acres, was given to them by Grosvenor. This document, they say, stated that the price asked was £6 an acre, and that the property had been "valued at over £6 per acre for loan purposes." When the contract was concluded they returned this document to Grosvenor, but in the following April they asked him to return it to them, and Grosvenor told his clerk, one Taylor, to do so. Taylor says that he could not find the original document, and compiled, partly from memory and partly from the original instructions from which the handbill had been prepared, what he believed to be substantially a copy of it, which was given by Grosvenor's direction to the plaintiffs. This document contained the statements that the price asked was £6 an acre and that the property had been valued for loan purposes at £6 per acre, as stated by the plaintiffs. Strictly speaking, the document operates only as an admission by Grosvenor that the original document contained that statement. Taylor now says that this is a mistake, and that the original had £5 and not £6. No explanation was offered as to how he came to make the mistake, and

H. C. OF A. 1916.

SIBLEY v. GROSVENOR.

Griffith C.J.

the learned Judge did not take any note of his evidence. The improbability of a vendor who asks £6 an acre for land volunteering the information that it had been valued for loan purposes at £5 was insisted on by the plaintiffs. *à Beckett* J. believed that the plaintiffs were honest and truthful witnesses, but thought it possible that their recollection of the contents of the original had been coloured by what they saw in the supposed copy, and, with much hesitation, declined to refuse to accept Taylor's statement, which was corroborated by Grosvenor.

I am not sure that under the circumstances this Court is bound to accept the finding of the learned Judge, but it is not necessary to deal with the point, as the first representation is sufficient to dispose of the case.

The result is that the plaintiffs have established against Loughnan a case entitling them to rescission of the contract with consequential relief, and as against Grosvenor a case of deceit entitling them to damages. As the statement of claim does not allege a case of deceit against Loughnan, although it claims damages apparently on that basis, it is not necessary to consider the question (which I think is not free from difficulty) whether Loughnan is liable in damages for Grosvenor's deceit.

Some confusion seems to have arisen in argument from not distinguishing between the case of a purchaser who elects to disaffirm a contract for the sale of property which he has been induced to enter into by fraud and the case of a purchaser who elects to affirm it. If he affirms the contract he acquires the property, and must allow for all the advantages which he derives from the acquisition. The measure of damages is his loss on the whole transaction. If, on the other hand, he elects to disaffirm the contract, he acquires nothing, and is entitled to be put in the same position as if he had not made it. In many cases this result can be obtained by repayment of the purchase money, if paid, and return of the property. It may or may not be necessary to institute legal proceedings. If instituted, they would, under the old system, have been instituted at law or in equity according as the relief claimed was repayment of money or specific relief. But, if rescission of the contract will not completely indemnify the purchaser, he is entitled

to bring an action of deceit against any person who has knowingly made the false representation on which he acted. This remedy is entirely independent of and additional to the right to rescind. It may be against the vendor himself if he is responsible for the representation, or against the agent if he knew of the falsity, or against both. In such an action the plaintiff may recover any loss which is the direct and natural consequence of his acting on the faith of the defendant's representation (*Mullett* v. *Mason* (1)).

These are entirely distinct causes of suit. The first would, under the old system, have been cognizable only by a Court of equity, the second by a Court of common law in an action for deceit. But under the new system they may be joined in a single action.

Order XVI., r. 4, of the Victorian Supreme Court Rules, corresponding to Order XVI., r. 4, of the English Rules and Order II., r. 4, of the Rules of this Court, provides that :—" All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities, without any amendment."

The judgment to be given in such a case against each defendant is of course such judgment as is appropriate as against him, irrespective of the judgment given against any other defendant.

Interesting instances of the application of this rule are to be found in *Frankenburg* v. *Great Horseless Carriage Co.* (2) and *Compania Sansinena de Carnes Congeladas* v. *Houlder Bros.* (3).

In this case the plaintiffs are entitled as against Loughnan to restitution *in integrum*, which includes rescission of the contract and repayment with interest of the purchase money already paid, together with the amount expended in substantial repairs and lasting improvements effected on the land by them while in possession, from which must be deducted the value of their use and occupation until rescission, with set-off. An account must be taken if asked for.

As against Grosvenor the plaintiffs are entitled to recover by way of damages for the false representation any moneys which they

(1) L.R. 1 C.P., 559.
(2) (1900) 1 Q.B., 504.
(3) (1910) 2 K.B., 354.

H. C. OF A. 1916.

SIBLEY v. GROSVENOR.

Griffith C.J.

uselessly expended on the faith of its truth. These include the same sums as those payable by Loughnan and any further expenditure which was properly made by the plaintiff in preparation for performance of the contract and was wasted.

As to the first there is no reason to doubt that the plaintiffs will obtain complete restitution from Loughnan, and it is not necessary to consider the form in which relief in respect of that branch of the case should be awarded as against Grosvenor. As regards the other damages, they are not recoverable in an action for rescission, but are recoverable in an action of deceit (*Whittington* v. *Seale-Hayne* (1)).

In my opinion there is evidence of such damage, but the amount has not been ascertained, and there must be an inquiry if insisted on by either party.

I think that the formal order of the Court should be as follows :—

1. Agreement dated 14th December 1914 to be rescinded and delivered up to be cancelled.
2. Defendant Loughnan to be restrained from negotiating or suing upon the promissory notes given by the plaintiffs under the contract, and ordered to deliver them or procure them to be delivered up to the plaintiffs.
3. Account of purchase money and interest thereon at 5 per cent. per annum from times of payment.
4. Account of all sums expended by plaintiffs in substantial repairs and lasting improvements on the land together with interest thereon at 5 per cent. from the time of disbursement.
5. Inquiry as to the proper rent to be paid by the plaintiffs during the period of their occupation of the land.

The amount so found for occupation rent to be set off against the amounts found in taking the accounts Nos. 3 and 4.

6. Balance to be paid by defendant Loughnan to plaintiffs.
7. Reserve further consideration as to defendant Grosvenor's liability in respect of such balance in event of non-recovery from defendant Loughnan.
8. Inquiry against defendant Grosvenor as to the loss, if any,

(1) 82 L.T., 49.

sustained by plaintiffs in preparing to perform the contract and not included in the items of accounts already directed, and order for payment of the amount so found by defendant Grosvenor to plaintiffs.

9. Costs of action up to and including trial to be paid by defendants to plaintiffs.
10. Reserve further consideration.
11. Liberty to apply.
12. Respondents to pay costs of appeal.

BARTON J. read the following judgment:—In this action the defendants are Alfred Ernest Grosvenor and Aubert W. Loughnan, of whom the first mentioned carried out the impeached transaction for the sale of land on behalf of the last mentioned, who, although the principal, appears to have taken no part in the negotiation which resulted in the sale. The action is brought against both by reason of misrepresentations alleged to have been made by Grosvenor while treating with the plaintiffs. In respect of these the plaintiffs seek (1) a rescission of the contract with Loughnan, with consequential relief, and (2) damages against both defendants for deceit. As the appeal was conducted before us, I did not gather that damages for deceit were still pressed for against the principal. The first of these claims can be sustained by mere proof of the misrepresentations, if they or any of them were material inducements to the contract. The second claim requires for its maintenance proof of actual fraud. I am of opinion that the two causes are rightly joined in one action with appropriate distinctions as to the relief for each cause. See Order II., r. 4, of the Rules of the High Court.

The claim in the writ embraced seven representations, of which six, distinguished in the writ as (*a*), (*b*), (*c*), (*e*), (*f*) and (*g*), were verbal and the seventh, designated (*d*), was in writing.

At the trial it became evident that (*a*) and (*d*) formed the substance of the plaintiffs' case, and *à Beckett* J. confined his judgment to the consideration of those two representations.

The verbal representation (*a*) was "that Grosvenor was selling as agent of the mortgagees of the land in question, and that that

H. C. OF A. 1916.

SIBLEY v. GROSVENOR.

Barton J.

was the reason, as he alleged, that the price was so cheap." The written representation (*d*) was that "portion of the land had been valued at over £6 per acre for loan purposes."

In his judgment *à Beckett* J. found as to (*a*) that Grosvenor did lead the plaintiffs "to suppose, not perhaps in those precise words, but did give them to believe or lead them to suppose that he was selling as agent for the mortgagees, and that was why they could get it cheap." His Honor did not think it important "to come to a definite conclusion of the exact representation on that subject," because he thought "a statement of that sort would not be ground for setting aside the contract." His Honor pointed out that Grosvenor was in fact selling as agent, not for the mortgagees, but for a person who had acquired title from the mortgagees. This fact, which established the falsity of the representation, did not of course render it any the less material. That the sale was for the mortgagees would lead to a strong inference that the main object of it was to obtain repayment of the debt, and it is common knowledge that mortgagees' sales do often lead to cheap bargains. On the other hand, while a person may acquire land from the mortgagees cheaply, that affords no inference that his resale will also be cheap.

Loughnan had bought 273 acres, the more valuable part of the 482 acres in question, from Crowe and others, who had bought from the mortgagees. It was only in respect of the remaining and less valuable 209 acres that there had been a mortgagees' sale, Loughnan having purchased that portion through Grosvenor from C. G. Shaw, who held a mortgage over it. Now, while his Honor does not go further than to express the belief that some such representation as (*a*) was made, he does go that far. Therefore in finding, as I do, that the representation was made in so many words by Grosvenor to both the plaintiffs, I come to a conclusion more definite than the finding of his Honor. But his belief as expressed is to the same effect, though it extends only to the substance, not to the precise words, of the representation. Believing that the false representation was material and that it must have been a strong inducement to the purchase, I find in it a sufficient ground for the rescission of the contract as against the principal, who, though not

himself to blame, cannot be allowed to profit by his agent's conduct.

But the representation was not only false; it was false to the knowledge of the defendant Grosvenor. He was a party interested, because the larger the price obtained, the larger his commission, and I find nothing in the authorities which should save a fraudulent agent, under such circumstances as exist here, from the proper consequence of his fraud, which is, that he should make good to the plaintiffs the losses immediately and directly caused by the fraud.

With regard to the representation in writing, namely (*d*), it is not denied that if made it was most material. Nor is it denied that if made it was untrue. The contest as to its truth rests largely on the evidence of one Taylor, Grosvenor's clerk, who was examined and recalled.

His Honor has made no note of Taylor's evidence, and I hesitate to express an opinion on this part of the case in view of the fact that the claim for rescission of the contract and damages against the agent is established on grounds already stated.

I agree that the appeal must be allowed, and the proposed order made.

ISAACS J. read the following judgment:—The action is primarily for rescission of an executory contract to sell agricultural land, the appellants being purchasers, the defendant Loughnan the vendor, and Grosvenor the vendor's agent effecting the sale.

The ground upon which rescission is claimed is fraudulent misrepresentation by Grosvenor, and there emerge only two of the alleged misrepresentations which it is necessary to consider. They are: (1) that Grosvenor said he was selling as agent for the mortgagees of the land, and that that was the reason why the price was so cheap; and (2) that he said that portion of the land had been valued at over £6 per acre for loan purposes.

There is also what is pleaded as an alternative claim for damages as against both defendants for Grosvenor's representations, the loss sustained being stated to be for £350 deposit, for the purchase of seed, for wages, for railway freight on furniture and utensils, and for actual loss on cattle, horses, cart, harness and plough, and also a sum for the plaintiffs' own labour, &c.

H. C. OF A. 1916.

SIBLEY v. GROSVENOR.

Isaacs J.

The first representation *à Beckett* J. found was substantially made. That appears to me to be a correct finding. But the learned primary Judge thought the statement immaterial because it merely indicated the motive impelling Grosvenor to say the land was cheap. Learned counsel for the respondent Grosvenor properly conceded that to state to a proposed purchaser, who was urged to buy, that the vendor was the mortgagee of the land could not be universally said to be immaterial and, although untrue to the personal knowledge of the person making the statement, not to affect the contract. He contended that it might or might not be a material inducement in a given case according to the circumstances, and that as the primary Judge had come to the conclusion of fact that, in the circumstances of this case, the representation did not materially induce the appellants to purchase, the appellate Court ought not to disturb that finding.

A similar contention arose in respect of the second representation, but in a different way. The latter representation was admittedly material in every way, but was denied, and the learned Judge relying largely on the evidence of Taylor, who typed Exhibit A (the type-written document already referred to), declined on the whole to find in the appellants' favour.

So that we are asked to reverse two findings of fact by the primary Court—(1) that the first representation though made was not a material inducement, *dans locum contractui*, but only *incidens contractui*; and (2) that the other representation complained of was not made.

These two findings admirably illustrate the true position of an appellate Court in relation to a Court of first instance. In *Dearman* v. *Dearman* (1) I stated my view of that position, and have in later cases repeated it, and acted on it, sometimes to maintain, and in other instances to overrule, the conclusion of the primary tribunal. There is only one point I wish to emphasize here, and that is what is there said (2), that where the final result depends upon any inference based on common knowledge or on ascertained facts, and not upon circumstances appearing only in the primary Court, or as I there called it "unrecorded material," the appellate Court is bound

(1) 7 C.L.R., 549. (2) 7 C.L.R., at p. 561.

to bring to the decision its own opinion. This principle was acted on in *Owners of S.S. Draupner* v. *Owners of Cargo of S.S. Draupner* (1), and has still more recently been again made the subject of judicial observation. In 1914 the House of Lords had to reconsider the principle, or rather its application, in *Watson, Laidlaw & Co.* v. *Pott, Cassels, and Williamson* (2). Lord *Kinnear*, after putting aside credibility, says (3) :—" The learned Judges of the Inner House had thus no alternative but to consider the evidence for themselves, and give their own judgment on the facts as if they were judging in the first instance." Lord *Atkinson* also deals with the subject very fully, and this passage occurs in His Lordship's judgment (4) :—" Of course, the Judge who has had the great advantage of seeing and hearing the witnesses, who are examined before him, is in a far better position to judge of their credibility than anyone can be who has not had that advantage, and that consideration should never be lost sight of on appeal from the decision of a Judge so placed ; but, credibility apart, it by no means follows that he is in a better position to draw the correct inference from the evidence given, than are the Judges of the Court which has only the notes of that evidence before it."

I apply those considerations to the two questions of fact mentioned.

As to the first, it is quite uncomplicated. When property is sold by a mortgagee, it is well known that he is selling primarily to get paid his debt, which, according to human instinct and common practice, is probably more than covered by the property mortgaged. He is, of course, not to be understood as sacrificing the property, or selling merely so as to get back his own ; he owes some duty to the mortgagor, but yet his desire and his right to get paid, by means of a forced sale, undoubtedly constitute a factor which affects the mind of a proposed purchaser as to whether he is getting an advantageous bargain or not, and, at least, whether he is paying more than the fair value. Ordinarily, and in the absence of contrary circumstances, it would be likely to materially assist in inducing the purchaser to accede to the price asked.

(1) (1910) A.C., 450.
(2) 31 R.P.C., 104.
(3) 31 R.P.C., at p. 110.
(4) 31 R.P.C., at p. 113.

H. C. OF A. 1916.

SIBLEY v. GROSVENOR.

Isaacs J.

The Court has for this question all the materials before it which the learned Judge of first instance had, and in my opinion the appellants' case was proved as to this.

That would be sufficient to sustain the appeal, but the other point has been fully argued, and affects more than one question of law and practice, and so I express my views upon it.

The second representation is said to have been contained in a document now lost. The onus of proving the issue rested, undoubtedly, on the appellants. But when they produced Exhibit A and proved, as is acknowledged, that that document was handed to them by Taylor upon Grosvenor's direction, it was an admission by Grosvenor that Exhibit A reproduced the original document and that, consequently, the representation was made. The admission was not an estoppel, but the onus lay on Grosvenor of satisfactorily explaining it and proving its incorrectness. I take it to be a clear rule of law that although the burden of establishing a given fact rests initially on one party, yet once he shows an admission of that fact by the opposite party, then if there is no estoppel the latter has both the right and the burden of satisfying the tribunal that the admission was an error; otherwise the fact should be taken as established.

Whether that burden of explanation was properly discharged or not depends entirely on what Taylor said. Unfortunately, though the learned primary Judge manifestly listened to Taylor most attentively and weighed his testimony carefully, his attention was apparently so riveted on the witness that he did not trouble to write down what the witness said. One result is that Taylor's evidence — the crucial evidence — is part of the "unrecorded material" upon which the decision went. That may or may not be the appellants' misfortune, but it leaves us, as I conceive, unable to say the finding appealed from was wrong.

The appellants being entitled to succeed, however, on the first representation, the question is what is the proper order to make.

One observation I make at once as it settles one point effectually. Loughnan is not alleged or proved to have been personally fraudulent, and so, whatever his imputed liability might have been in the absence of rescission, he cannot, rescission being granted, be

held further responsible for the fraud of Grosvenor, the scope of whose authority was limited to contracting to sell the land, and whose representation only affected its intrinsic value. No doubt Grosvenor's misrepresentation in Loughnan's business is, in the first instance, imputable to Loughnan; but the point is, that its fraudulent nature only gives the plaintiffs a choice either of holding to the contract—and with that Loughnan's imputed responsibility for Grosvenor's fraud—or of disaffirming the contract entirely on the ground of material misrepresentation (whether fraudulent or innocent is in this case immaterial), and thereby ending Loughnan's connection with it. In other words, rescission implies complete restitution, which connotes the same result be the misrepresentation innocent or not. No further damages can then be given against Loughnan for a fraud which he did not commit, did not authorize, and which, as the only ground of imputation has been destroyed, cannot henceforth be imputed to him.

It remains to be seen how far Grosvenor himself is answerable for that in the circumstances.

Rescission is claimed as the primary relief, Loughnan being a party; and there is no reason for refusing it, since upon the facts substantial restitution is possible, on the one side, by means of handing back the property sold, the plaintiffs accounting for rents and profits and for deterioration and being allowed for improvements, and, on the other side, by accounting for the deposit paid, with interest, returning the promissory notes given for the balance or indemnifying the plaintiff in respect of them if already negotiated, and recouping all necessary expenses so far incurred in connection with carrying the contract on to completion,—the just balance being paid to the person entitled.

But restitution being made, the *status quo ante* is taken to be restored so far as the contract itself is concerned, and, where anything further is claimed, it is necessary, I apprehend, to bear in mind the essential distinction of such a position from that existing when apart from merely undoing the contract an additional remedy for the collateral fraud is sought either at common law, by way of damages in an action for deceit, or in equity, by way of compensation founded upon the same principles as at law.

H. C. OF A. 1916.

SIBLEY v. GROSVENOR.

Isaacs J.

Rescission assumes the whole bargain undone, and as regards Loughnan there is no difficulty. But as regards Grosvenor two questions arise, both of which are contested. First, can an order be made against him as to rescission? and, secondly, can he be made liable under the alternative paragraph for the damages claimed *ultra*?

As to rescission, the first objection made is that it is not claimed as against him. But that is met by the *Rules of the Supreme Court* 1906 (Order XX., r. 6), and there is nothing claimed inconsistent with that remedy—even if inconsistency not amounting to election would be an answer.

Then the solid question remains whether equity recognizes a right in the appellants to require Grosvenor to see that the terms of undoing the contract are carried out by Loughnan. In my opinion it does. It is not a mere question of making a person a party, because he is an agent or an arbitrator or a solicitor, for the purpose of discovery or costs. So far as that is concerned the case of *Burstall* v. *Beyfus* (1) settles the matter, at all events wherever the *Judicature Act* applies. I should personally be prepared to apply the rule stated and acted on there by the Court of Appeal. It does not differ materially from the reasoning of *Wigram* V.C. in *Marshall* v. *Sladden* (2); and see *Story on Equity Pleadings*, p. 228. But I found my opinion on the fact that Grosvenor led the appellants into the bargain, with its proximate consequences, and it is his misrepresentation which is the ground of escape from the bargain and those consequences, and that he was fraudulent in making that representation.

The jurisdiction of equity, as always exercised with respect to fraud, regards all persons directly concerned in the commission of a fraud as principals, no person being permitted to excuse himself on the ground that he was the agent of another. That is the first great principle laid down by *Westbury* L.C., in *Cullen* v. *Thomson's Trustees* (3). Another great principle the Lord Chancellor laid down was this:—"In cases of fraud the remedy should be co-extensive with the injury." The jurisdiction therefore extends

(1) 26 Ch. D., 35.

(2) 7 Ha., 428, at pp. 441-443.

(3) 4 Macq. H.L., 424.

in the first place to compelling Grosvenor to see that the appellants get rid of the contract and its attendant consequences, not by way of damages or compensation, but on terms of mutual restitution. That implies that Loughnan is a party, and that his rights are provided for; which is the case. A separate action against Grosvenor for rescission, or for relief founded on a right of rescission which had never been lawfully exercised at law by the party or on a rescission which had been decreed against Loughnan, would necessarily fail. That Grosvenor's responsibility in this respect might be enforced by declaring him liable to indemnify the appellants on the basis that Loughnan is bound by an order for rescission and restitution is established by what *James* L.J. says in *Clark* v. *Girdwood* (1). The passage is as follows :—" The Court has jurisdiction in cases of fraud, and where a person against whom no relief could otherwise be asked is made a party to a suit on the ground of fraud, it is because the Court has jurisdiction to indemnify the person injured at the expense of all persons, whether solicitors or not, who have been acting participators in the fraud, and it can, therefore, make any party to the fraud pay the costs of the proceedings which have been rendered necessary by the fraud in which he has taken part." This statement is broad and general, and there is no case which says that a fraudulent agent is not bound to make that full indemnity, and *Ship* v. *Crosskill* (2) is to the contrary.

But I do not think any of the damages claimed *ultra* should be awarded under the head of rescission.

Where there is rescission the assumption is that the contract is set aside, and, by means of the mutual allowance already mentioned, full restitution is made so far as relates to the making of the contract and its incidental expenses. There the matter stops. (See *Halsbury's Laws of England*, tit. " Misrepresentation," vol. xx., p. 744, note (*l*).)

Losses in working the property on the basis of its being the property of the appellants, cannot, as I conceive, come under the head of restitution upon rescission of contract which does not inquire whether the property was more or less valuable than the

(1) 7 Ch. D., 9, at p. 23.

(2) L.R. 10 Eq., 73.

H. C. OF A. 1916.

SIBLEY v. GROSVENOR.

Isaacs J.

price given for it; and as the contract is here rescinded those damages are not recoverable under that head.

Nor do I think the damages *ultra* are recoverable for the particular fraud proved. First, it must be remembered that at common law where the property is retained by the purchaser and he brings an action of deceit whereby he was induced to enter into the contract, such items as are now in question could not be taken by themselves, since on the whole the purchaser might have made a very profitable bargain. There is no evidence that he did not. Damages, no less than compensation, restitution or rescission, are in theory restoration.

Equitable compensation where there is no rescission proceeds on the same basis as damages at law.

I do not say such damages as those claimed could not, in a proper case, be recovered notwithstanding rescission, and either by a common law action for deceit or an equity suit for compensation. Damages recoverable for fraud are those sustained by *acting* on the fraudulent representation (*Smith* v. *Chadwick* (1)). The only misrepresentation proved, however, is that the vendors were the mortgagees. This goes no further than inducing the purchase. It is not like the purchase of shares which involves the purchase of an existing obligation to pay calls. Nor is it like a representation which induces independently some other action. Whatever was here done afterwards, was done for motives and reasons independent of the misrepresentation found, and in doing what they did the plaintiffs were *not acting on that representation*, and the moneys claimed *ultra* are not recoverable either as damages or compensation. A fraudulent representation in other terms, and extending to matters subsequent to the purchase, and inducing action on those matters, might have had other results.

In my opinion the appeal should be allowed as against both respondents on the basis of rescission, with appropriate declarations and orders as against both defendants on that basis, and not further.

GAVAN DUFFY J. I assent to the order proposed by the Chief Justice.

(1) 9 App. Cas., 187.

RICH J. I also assent to it.

H. C. OF A. 1916.

SIBLEY v. GROSVENOR.

Appeal allowed. Order appealed from discharged. Order as stated in judgment of Griffith C.J.

Solicitor for the appellants, *J. Birtwistle.*

Solicitors for the respondents, *Blake & Riggall*; *F. J. Hamilton Rowan.*

B. L.

[HIGH COURT OF AUSTRALIA.]

RYAN . . . . . APPELLANT;
PLAINTIFF,

AND

EDNA MAY JUNCTION GOLD MINING COMPANY NO LIABILITY . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1916.

ADELAIDE, *May* 25, 26. MELBOURNE, *June* 8.

Barton, Isaacs and Gavan Duffy JJ.

Company—Voluntary liquidation—Meeting—Resolution—Notice—Distribution of assets—Companies Act 1892 (*S.A.*) (*No.* 557), *secs.* 134, 152.

By an article of association of a company, the capital of which consisted partly of vendor's paid up shares and partly of contributing shares, it was provided that if the company should be wound up the assets remaining after paying the costs and expenses of and attending the liquidation and the debts of the company should be applied in the first place towards repaying to the members *pro rata* the amounts paid up, or deemed to be paid up, on their shares, and that the surplus (if any) should be distributed between all the members *pro rata* according to the number of shares held by them respectively, "provided, however, that if the company shall go into voluntary liquidation at any time within six calendar months after its incorporation by reason of the non-return