IN THE HIGH COURT OF AUSTRALIA.

D'Arcy

v.

Greene

REASONS FOR JUDGMENT.

Judgment delivered at V

on 23rd November 1938.

H. J. GREEN, Government Printer, Melbourne.

C.5060.

80/1937

I'ANSON v. GREENE

Order.

Appeal allowed with costs. Decree of Supreme Court discharged and suit dismissed with costs. Cross appeal dismissed with costs.

I'ANSON v. GREENE.

Reasons for Judgment. The Chief Justice.

In 1931 the defendant Leonard Nourse I'Anson owed to the plaintiff William Pomeroy Crawford Greene £18,719 balance due on a mortgage of a property known as Mount Oriel which the defendant had purchased from the plaintiff under a contract made in 1926. The purchase price was £29,320.14.0 and the original amount of the mortgage debt was £23,456. In 1931 wool and wheat were at very low prices and a general depression affected the whole community. I'Anson had fallen into arrears in payments of instalments under the mortgage and of interest. He took a very gloomy view of his prospects and put his case before Mr. H.C.M. Garling who was the plaintiff's solicitor and attorney. He asked for a reduction of at least £6000 in the principal and also for a reduction in the rate of interest. He described his financial position and prospects in letters which he wrote to the plaintiff and to Garling, and he also had interviews with Garling upon the subject. The plaintiff, advised by Garling, made a substantial concession to the defendant, reducing the principal monies by £5500 and also reducing the interest rate and extending the time for repayment of the principal monies. The document effecting the reduction was executed on 24th July 1933 and was duly registered under the Real Property Act. Garling (in a letter of 5th April 1933) had already suggested to the

plaintiff (who was in England) some criticism of the defendant's conduct in relation to his application for a concession, and, after the document had been signed by Garling as plaintiff's attorney, the plaintiff came to share Garling's suspicion that the defendant had not been as frank as he had pretended to be and the result of the plaintiff's consideration of the matter was that these proceedings were instituted. The plaintiff claimed cancellation of the document effecting the reduction in principal and interest - founding his case on fraudulent misrepresentation and alternatively on innocent misrepresentation.

Nicholas J. found that certain representations were made by the defendant in order to obtain the concession, many of which were true, but that certain of them were untrue. He found that those which were untrue were untrue to the knowledge of the defendant when he made them, that they were intended to induce action by the plaintiff, that the plaintiff through Garling was induced by these misrepresentations to grant the reduction in principal and interest, and accordingly judgment was given for the relief claimed by the plaintiff. An appeal is now brought to this court.

It is not necessary/in to examine detail the other statements which admittedly were true ~~and~~ or which were found by the learned judge to be true or non-fraudulent. These other statements do not have any relation to the representations found to be false which would assist a tribunal in arriving at a conclusion as to whether or not the

representations found to be fraudulent were in fact made.

It is convenient to state at the outset the finding of the learned trial judge upon which his judgment depends. His Honour found that the defendant made the following untrue statements:-

> " That he and his sons had sold certain properties prior to the purchase by the defendant of Mount Oriel and that such sales were made hurriedly so as to enable the purchase of Mount Oriel to be made by the defendant, and that the said properties were sold at less than their cost. "

His Honour also found that the defendant knew the statements to be untrue, that they were material, ~~and~~ that they did induce the plaintiff to make the concession, and that they were intended so to induce him.] [Mount Oriel was part of a station owned by the plaintiff known as Iandra. The defendant had for many years been associated with the management of Iandra. When Iandra was sub-divided he wished to buy the portion now known as Mount Oriel. Defendant early in 1926 offered £10.10.0 per acre for Mount Oriel through Mr. Breden who was then plaintiff's attorney in Australia. The offer was not accepted and the property was offered to one Batkin at £11 per acre. The defendant then withdrew his offer but soon afterwards, in February 1926, cabled direct to plaintiff in England an offer of £14 per acre. This was a very high price. The offer was accepted and the mortgage already mentioned was taken to secure the balance of purchase money.

The defendant admits that he did represent that he and his sons had sold certain properties so as to enable the purchase of Mount Oriel to be made by the defendant. In a letter to Garling dated 1st May 1931, in which he first raised the question of a concession, he referred to his purchase of Mount Oriel and to the withdrawal of his offer of £10.0.0 per acre. He wrote - " After I withdrew we the two boys and myself decided to sell three small places we had and have a go for this" (that is, Mount Oriel). So also in a letter of 25th October 1931 from the plaintiff to the defendant (which Garling saw for the first time in 1934) the defendant wrote "the two boys and myself each had another property which we sold to go into this." On 11th December 1931 defendant wrote to Garling - " The boys and myself are quite £9000 to the bad with the places we sold to take this." On 20th February 1932 he wrote to Garling - " As I have told you before we have got to sit down and take our losses on the places we sold over £9000. We cannot even get a bit of interest." Accordingly it is not disputed that portion of the representation was made by the defendant. But he does not admit that he stated that the properties had been sold prior to the purchase by him of Mount Oriel or that the sales were made hurriedly or that they were sold at lower prices than those for which they were purchased. The three properties sold by defendant and his sons were Pinegrove, Fairview and Allandale Park. The sales were not made hurriedly in fact. The defendant's offer to purchase Mount Oriel was made

and accepted in February 1926. Defendant's own property Pinegrove was placed in an agent's hands for sale on 8th September 1925 - before and quite independently of any proposal by the defendant to buy Mount Oriel. Pinegrove was sold on 19th March 1926. Fairview was sold by defendant's son Cyril on 7th September 1926, just prior to the actual signing of the contract for the sale of Mount Oriel in October 1926. The third property Allandale Park belonging to his son Alfred was not sold until 8th October 1928 - two and a half years after the withdrawal of the offer to purchase Mount Oriel.

The defendant denies that he represented that the three properties mentioned were sold at less than their cost. In fact the properties were sold at higher prices than the prices paid for them by the defendant and his sons. Pinegrove was purchased on a freehold basis for £6 an acre and sold on a freehold basis in three blocks for ~~£8xxxxxxxxxxxxxxxxx~~ £7.17.6 an acre, £6.17.6 an acre and £6.5.0 an acre. Allandale Park was purchased by the defendant's son Alfred for £5.5.0 an acre on a freehold basis and was sold for £6.15.0 on the same basis. Fairview was purchased by defendant's son Cyril for £7.10.0 an acre on a freehold basis and was sold on the same basis for £10.10.0 an acre. Thus there is no doubt that any statement that the properties were sold at less than their cost was, if made, a false statement, and the defendant does not dispute that if he had made it (which he denies) it would

have been a fraudulent statement.

The defendant was applying for a concession, and it was explained to him by Garling that it was useless for him to complain that he had originally agreed to pay too much for Mount Oriel. As Garling pointed out, and as a letter of the defendant's written some years before any controversy arose (on 17th June 1926) shows, his purchase at the high price of £14 an acre was a deliberate act, though later, when the depression came, the defendant repented of it. Garling wrote to the defendant on 6th May 1931 emphasising that the basis of the defendant's plea for a concession must be that, without a reduction in the capital debt, he would not be able to carry on and clear himself, and stated "it is up to you to put your whole position (not only as regards Iandra but as regards your other ventures and dealings) before Mr. Greene and give him an opportunity of seeing for himself how you stand. " The discussions between Garling and I'Anson dealt mainly with I'Anson's losses as affecting his financial prospects. Any statement that I'Anson had lost a large sum of money because he had sacrificed properties in order to obtain money to purchase Mount Oriel must be regarded as a statement made for the purpose of inducing the plaintiff and Garling to consider his application favourably. He was essentially making an appeal to their sympathy. The discussion between the parties was not limited to the defendant's present financial condition or his future financial prospects. Much of the discussion was concerned with his alleged financial misfortunes in the past. All parties regarded his statements in these matters as an important element in the consideration of his application for a concession. The learned judge has found that the statements which he finds to have been made/

were intended to induce and did induce the making of the concession and, it appears to me to be clear that, if the statements were made, this must have been the case.

It has been argued for the appellant that it is necessary for the plaintiff to show that the representations were material as well as that they were intended to induce action by the plaintiff and did induce such action. It is put that inducement in fact and materiality (a tendency to induce) are "wholly distinct and separate matters" and that it is necessary for the plaintiff to prove both: Laws of England 2nd Ed. Vol.23 p. 47, Smith v. Chadwick 9 A.C. 187 being cited as an authority for this statement. In the present case certain correspondence between the solicitors showed that the defendant undertook not to take the point "that no proof had been given by the plaintiff that the representations induced the plaintiff to agree to the variation of the mortgage." It was argued by the defendant that this undertaking only prevented the defendant from commenting upon the fact that the plaintiff (who resides in England) did not give personal evidence that he was induced by the representations, and that it left open to the defendant to contend both that the plaintiff was not induced to act by the representations and that the representations were not material.

Upon the facts of this case it is, in my opinion, plain that any statements in fact made by I'Anson either to the plaintiff

or to Garling, the plaintiff's attorney, with respect to losses suffered by I'Anson were material in the sense stated, were intended to induce action, and did induce a ction. The whole argument between the parties was an argument as to what concession should or might be given to I'Anson in view of the losses which, he alleged, hd crippled him financially. Thus the legal question as to the separateness of the issues of materiality and inducement does not, in my opinion, arise in this case. If it did arise I would prefer to the statement in the Laws of England and other ~~trial~~ text books the considered opinion of Cussen J. in Nicholas v. Thompson 1924 V.L.R. 554 that in an action for rescission on the ground of misrepresentation, the plaintiff is not bound to prove the materiality of the representation by showing that it was such as would have been likely to induce a reasonable man to enter into the contract; and it is sufficient if it appears that, as between the parties to the contract, the representation was of such a nature as to be likely to induce the plaintiff to enter into the contract, or that it was made for the purpose of inducing and did induce him to enter into it. Cussen J. in his judgment in that case shows that what Smith v. Chadwick establishes in relation to this subject is, not the proposition asserted by the appellant, but the proposition that "the materiality of the statement is no doubt of great importance as evidence from which the inference may be drawn first, that it was made for the purpose of inducing, and secondly that it did

in fact induce." If other evidence establishes those facts then ~~xxxxxxx~~ materiality in any relevant sense is established - that is, materiality is not a separate issue from the issue of intention to induce and actual inducement.

The question which arises upon this appeal is a question of fact. If the representations in question were made and were intended to induce action by the plaintiff then they were fraudulent and they induced action by the plaintiff. The only question is whether they were actually made. The learned trial judge has examined the evidence in detail and has expressed his views of the credibility of the principal witnesses, namely, Garling for the plaintiff, and the defendant himself. He was not completely satisfied with either witness, but His Honour accepted the evidence of Garling as accurately stating what took place between him and I'Anson insofar as Garling deposed that I'Anson said that he and his sons had sold the properties hurriedly and at less than the prices paid for them.

Garling gave oral evidence as to what the plaintiff said in a conversation on 3rd November. He said that in a long conversation, all of which was naturally associated with the subject matter, namely, the requested reduction of I'Anson's liability, I'Anson said that the plaintiff's former attorney Mr. Breden had "put the terms up" on him so that he had to pay a larger deposit on Mount Oriel than had been proposed in the case of another

purchaser. (I'Anson denied in the box that he had ever said to Garling that Breden had put the terms up on him and denied that Breden had in fact put the terms up on him. But in a letter from the defendant to the plaintiff dated 17th June 1926 I'Anson had in fact complained to the plaintiff that Breden "put the deposit up on him".) Garling's evidence was that I'Anson said to him on 3rd November 1932 that the result of Breden insisting on so large a deposit was "that we had to get rid of our properties quickly because I had to arrange the necessary finance, and, selling them hurriedly, we had to take what we could get and the price we got for them was less than we gave. " In reply to Garling's question "What did you lose on that operation", I'Anson stated " It ran into thousands." This is the part of the evidence, which being accepted by the learned judge, established the plaintiffs case. Garling made a note of the interview on the same day and when giving evidence refreshed his memory by looking at his notes. Upon the appeal much argument was based upon the precise terms of Garling's notes and it was contended for the appellant that they could not be regarded as accurate. In fact, however, nearly the whole of the note is admitted to be accurate. At the trial Garling was hardly cross examined on his notes at all. What is challenged is the following portion of the notes - "asked as to losses alleged to have been made I'Anson said he and his sons had sold farms to purchase Mount Oriel - hurried sales - sold for

less than cost - loss ran into thousands - also loss on second mortgages about £9000 - mortgages worthless."

It is not disputed that I'Anson and his sons had sold farms in order to purchase Mount Oriel or that I'Anson said that the second mortgages were worthless and that the loss on the second mortgages was about £9000. That was in fact about their amount and tney were practically worthless. But Garling's note makes the loss on the second mortgages additional to another loss on the ~~sales~~ sales of the three farms.

On 3rd March 1932 Garling had another interview with I'Anson of which he also made notes. In these notes Garling ~~made~~ made the following record "losses referred to in letters etc. - self and sons over £9000 - mortgages - about £9000.

Upon the basis of these notes and also upon the basis of his recollection Garling declared that the defendant had represented that two losses each of £9000 had been made by him in connection with the sales of other land for the purpose of obtaining money to purchase Mount Oriel - namely, one loss of £9000 by reason of the reduced prices at which the sales were made, and secondly, another loss of £9000 by reason of the worthless mortgages given by the purchasers to secure balances of purchase money. In his oral evidence Garling insisted that the defendant's letters contained suggestions as to two such sums and that the defendant actually spoke to him of two separate sums of £9000. But the learned judge did not accept

this evidence of Garling. His Honour considered that Garling's recollection upon this point was confused, and consideration of the evidence supports His Honour's finding. Garling's letters themselves state that he (Garling) had difficulty in understanding what I'Anson meant even in his letters. It has been argued that if Garling is wrong on one point he may be wrong on other points. This is obviously the case - but it is so obvious that, as his reasons for judgment show, the learned trial judge naturally took ~~it~~ this consideration very carefully into account before he reached the conclusion that Garling's evidence on the other points in controversy was accepted.

The defendant denied that he had made the statement that a loss had been incurred upon the re-sale of the properties but he did not deny that he had represented that the properties were sold in order to get money to go into Mount Oriel and that the decision to sell the other properties was made after he withdrew his original offer for Mount Oriel, that is, about February 1926. In fact, as already stated, Pinegrove had been put in the agent's hands in 1925 and another property, Allandale Park, was not sold till 1928. Accordingly it was not true either that the decision to sell the properties was made after the withdrawal of defendant's offer to buy Mount Oriel or that all the properties were sold "to go into Mount Oriel." The defendant's evidence was regarded by the learned judge as unsatisfactory. His Honour said that the defendant was intentionally evasive in the box and that he relied

upon alleged failure of memory to an extent which was unconvincing. His Honour regarded Garling as being prejudiced against the witnesses and discounted his evidence accordingly, but, upon a consideration of the whole matter, accepted Garling's evidence in substance.

The appellant attacked the findings of fact made by the learned judge upon several grounds. In the first place it was contended that the evidence showed that Garling misunderstood what the defendant had said as to the losses on the sale of the three properties. Garling's honesty was not challenged, so that this was really the principal question which the learned judge had to decide. If His Honour had regarded Garling's evidence as not worthy of credit it would have been difficult to upset his finding. It appears to be equally difficult to upset his finding to the contrary effect. It was further contended that there were inconsistencies or unexplainable omissions in Garling's correspondence. A similar criticism can be directed against the defendant. It is but seldom that all the acts and statements of a witness are completely consistent when they relate to a business transaction of some complication extending over a period of many months. But it does not follow that none of the evidence, or of the important evidence, given by that witness can be believed. It was also argued that Garling was so biassed against the defendant that his evidence ought not to have been accepted. This again is essentially a matter for the learned trial judge. The correspondence shows

that Garling was very scrupulous in submitting to his principal the arguments placed before him by the defendant. Letters from Garling to the plaintiff dated 15th May,1931, 29th October 1931, and 9th December 1931 show, in my opinion, that Garling put I'Anson's case before the plaintiff in a very fair-minded manner.

A particular criticism of Garling was that the account given by him of the reasons for the institution of these proceedings was quite incredible and that this fact affected gravely his credibility as a witness. But the account given by Garling and the plaintiff of the reasons why the action was brought appears to me to be reasonable enough. At a very early stage in the correspondence (on 14th August 1931) before any difficulty or dispute of any kind had arisen between the parties the plaintiff wrote to Garling in the following terms - " I very fully approve your attitude to I'Anson. He is one of the wisest and slimmest men I have ever met and, I think, absolutely honest and truthful where <u>his</u> own interests are <u>not</u> concerned. He clearly has that perverted sense of honour common to many uneducated men who have had to battle for their very lives against the world. It may be summed up in these words:- ' I wouldn't steal a farthing from him to save my life but if he likes to be a fool and make a silly bargain (even at my suggestion, to the benefit of myself and to his own detriment) I would be a fool not to agree and, after all, it is not my job to tell him his own business or to give him information for which

he has not asked.' " This letter gives a starting point. It shows that both the plaintiff and Garling regarded I'Anson as an admirable person with some defects - like many other persons. This view of the character of I'Anson, expressed, I repeat, before any controversy had arisen between the parties, is identical with the view expressed in a letter from the plaintiff to Garling dated 9th August 1933 in which the plaintiff writes - " I notice your opinion of I'Anson's character. You are absolutely ~~write~~ right. He wants continual watching. In all your dealings with him you should be absolutely remorseless, as that is the line he always takes himself in business deals. Personally, I would not have written down the amount of his debt to me by one farthing had I not gathered from you that it was physically impossible for him to pay the full amount. " Thus there was no development of hatred of I'Anson as was suggested in argument by the appellant. The view of both plaintiff and Garling throughout was that I'Anson was a good man in many ways, but that one had to be careful in dealing with him.

Garling had written to the plaintiff stating that he did not think that I'Anson was quite frank and that he seemed to be holding things back. I'Anson had told what he himself describes in a letter of 10th June 1931 as a tale of woe. He had again and again presented a most doleful picture of his financial position and of his prospects. In October 1932 he was informed that a reduction of £5500 would be made in the principal monies owed under the mortgage by him to

the plaintiff. The effective document was executed in Australia in Australia in July 1933. It was on 19th September 1933 that the first complaint was made by Garling to I'Anson on behalf of the plaintiff. The substantial portion of the complaint (apart from a statement that I'Anson had been rather garrulous in talking to other people of the concession made to him by the plaintiff) was that while I'Anson had been professing to be in very grave financial straits he very soon afterwards (in March 1933) had purchased a property (Southwell's block) for £4000 upon which he had been able to find £1000 as a deposit. Garling had mentioned this fact to the plaintiff in a letter of 5th April 1933, with some criticism of I'Anson. What the plaintiff did was, not to call off the transaction, but to write in ironical terms to I'Anson on 11th August,1933 - " I was happy to hear that you have been able to buy more land near Greenethorpe although it seemed impossible for you to collect any cash with which to reduce your original indebtedness to myself." The matter was pursued by Garling in September and, after receiving a reply from I'Anson to the letter of 19th September 1933 already mentioned, Garling reminded him in a letter dated 25th September 1933, that immediately prior to the purchase of Southwell's block, ~~he~~ he had told Garling that he intended to pay off a balance owed by his wife to the plaintiff amounting to £1000 and that he (Garling) had so informed the plaintiff. Garling continued - "When I was with you about the end of March last you did not tell

me that you had changed your mind, and had decided to pay the money into the new purchase. Under the circumstances I think it is only reasonable to suggest that having so changed your mind it was 'up to you' to tell me so - as it would be but natural to assume that I might be relying on you to place the money at Mr. Greene's disposal in accordance with your expressed intention. I did not in my letter suggest (as your letter implies) that you should have consulted me about your purchase of Southwell's block, nor have I at any time been idly inquisitive as to any of your dealings. But what I do say is that, having changed your mind on the subject of the promised payment to Mr. Greene, and having decided to divert the money into another channel, you should have told me, and not left me to find the matter out for myself. If, by reason of your not taking me such a little way into your confidence as this matter would have required, I have drawn certain unfavourable conclusions, the fault, if any, lies with you." The plaintiff's view of the matter was put in a letter from him to defendant dated 17th August 1934 which concluded with the following - " I am more than sorry that all this has occurred. I had imagined that everything had been definitely and finally wound up. I have in my mind at this moment only two ideas. One is that I stick to my bond but the other is that, if my generosity has been misplaced and that I have been duped, I shall certainly want my own back."

It appears to me to be quite natural that the plaintiff should rather resent the conduct of I'Anson in representing his financial position as quite hopeless whereas in fact he was in a position to enter upon a purchase of considerable magnitude. All the criticisms directed against Garling's evidence were essentially matters for the consideration of the learned trial judge in determining the credibility of the witness. There is no satisfactory material upon which a court of appeal can rely in order to dissent from the learned judge's views as to the credibility of this witness. If there were some objective standard by which the truth of Garling's evidence could be tested the appellant would have an easier task, but I have been unable to discover or define any such standard in this case and I can see no reason for differing from the view expressed by the learned trial judge.

It may be added that the evidence of I'Anson is open to criticism which is more definite than any criticism that can be made of the evidence of Garling. I have already mentioned I'Anson's statement in the box that Breden did not put up the terms on him - which is inconsistent with a statement made in a letter written by him at the relevant time. An example of the unreliability of I'Anson where his own interests are concerned is to be found in statements in a letter written on 28th September. This letter was written to the plaintiff and it dealt with the

controversy which had arisen between the parties. In the course of the letter, after denying that he had made any false statements, he wrote - " (The Truth) I am down and out". This statement was made for the purpose of suggesting to the plaintiff that, in spite of some successful transactions in dealings in land and sheep, the defendant was still in a quite hopeless financial position. In fact at the time when he wrote this letter he had not only been able to find £1000 for a deposit on Southwell's block, but he had sold that block at a price showing a profit of about £1000 and he had bought another property known as Bowhay's. On the re-sale of Southwell's block he had only received (at the time when he wrote the letter) a deposit of £100. But he had £1500 on fixed deposit with a bank and his current accounts in other banks were in credit. It can hardly be said that he was dealing very honestly with the plaintiff when, his financial circumstances being as described, he told the plaintiff that he was "down and out". There is another incidental matter which indicates the attitude of the defendant in his own financial transactions. In November 1930 he applied for an advance to the Bank of New South Wales Koorawatha Branch on the security of his land. He set out his assets and included under the head of "free assets" an endowment life policy with the Mutual Life and Citizens Assurance Company "present worth £695." The document produced shows that the manager accepted defendant's

valuation. His application was refused. On 10th March 1931 he made another application, offering wheat warrants as security, but again placing the life policy among his free assets representing it as worth £695. In fact, as is shown by a letter from the Mutual Life and Citizens Assurance Company dated 8th May 1931 the policy was charged with an advance made to I'Anson. It was paid off on 26th May 1931 when I'Anson received in satisfaction of his rights under the policy a sum of £123.6.8 only. When the defendant was asked about this matter in the box he regarded it as a quite satisfactory answer to say that if the bank had made inquiries it would have found out that what he had said was wrong.

There was, in my opinion, ample material to justify the finding of the learned trial judge that the defendant did not scruple to give an untrue account of the transactions in land of himself and his sons in order to obtain the concessions which he so eagerly desired. In my opinion the appellant has not produced satisfactory reasons for setting aside a judgment which depends upon the opinion of the learned trial judge as to which of two witnesses was speaking the truth, there being no very marked improbability in either account, and there being room for some criticism of both accounts. It is, I think, not possible to point to any evidence which can be said to show that the witness Garling made any statement which he believed to be untrue, though he did in the end take

a prejudiced and hostile view of the defendant. The honesty of Garling was not attacked; the criticisms were directed to his clearness of understanding and recollection. The arguments for the appellant have not, in my opinion, shown that the learned trial judge was wrong in his findings of fact.

The appeal should be dismissed.

I'ANSON V. GREENE.

JUDGMENT. MR JUSTICE RICH.

I'ANSON V. GREENE.

JUDGMENT. RICH J.

This appeal represents the latest fruit if not the last of a slowly growing controversy between the attorneys under powerof the plaintiff and the defendant the seeds of which were planted in the early part of 1926. The plaintiff himself has dwelt far from the battleground and has adopted the role of a spectator impartial but not disinterested whose concern in the battle waxes or wanes according to its fortune. He resides in London and sits for Worcester in the House of Commons. His father owned a large area called Iandra in the Young district of New South Wales. The homestead upon the land took the form of a mansion house which was named Mt Oriel. The son inherited the estate in 1911 and began what is usually done in such cases viz to sell it in subdivision. The defendant is a man now 68 years of age long identified with the estate. He seems first to have served as a share farmer and then as the manager. At length when Mt Oriel and 2000 acres surrounding it in 1926 fell to be sold as the last of the subdivision he became the purchas-

er. The plaintiff viewed his purchase with satisfaction both on personal and more substantial grounds. As to the personal he wrote to ~~him~~ inform the defendant that he had always fully realised what skill and loyalty he showed all along especially during the early days of his mana-gement and the trying times during the war and that he would like to ~~say~~ say how much he valued the great kindness and friendship which he had al-ways received from the defendant's wife and family. As to the more sub-stantial grounds what happened was this. The defendant offered one Breden an attorney under power for the plaintiff £10 an acre. Breden offered the land elsewhere at £11 an acre the defendant having through some difference with Breden withdrawn his offer. The defendant seems to have been attached to the property perhaps as an ascriptus glebae and when he learnt that it was offered elsewhere promptly cabled to the plain-tiff making an offer of £14 an acre - a price admittedly extravagant. It was accepted and the purchase proceeded. The total purchase money was large and the greater part of it was left outstanding on first mort-gage. The times were prosperous and the defendant appears to have been

dabbling in land speculations and doubtless looked to high if not rising prices in land, stock and wheat to clear off the mortgage. Over the ~~last~~ terms the defendant seems to have been at odds with Breden and retained a grievance real or imaginary that because he hadsucceeded in buying the property from Breden's principal Breden had demanded a larger amount of the purchase money immediately than was just and fair. Time passed and Breden died and Garling a co-attorney undertook the active duties of managing Greene's affairs. Garling was a solicitor practising in Sydney who had once practiced in Young and remained a member of a partnership carrying on in that town under the name of Garling and Giugni. As the result of the sales no doubt the plaintiff had a large number of investments in the district and when the financial depression swept over Australia in 1930 these naturally formed a cause of anxiety and care to Garling. The defendant suffered in common with others from the disastrous fall in prices. He found himself faced with a mortgage debt to Greene for the balance of purchase money amounting to something like £20,000. The purchase price which had given rise to it was at least £3 an acre beyond the value of the land in 1926 and in 1930 neither the

defendant nor anybody else knew to what depths the value had fallen. All that could be said was that it was unsaleable. After a visit of Garling to the district for the purpose of looking into the position of Greene's mortgagors the defendant took his courage in his hands and petitioned Garling for a reduction of the mortgage debt. He is a man of no education and his petition was thrown into the form of an illiterate epistle, the substantial ground of which is shown by the following extract " I "have just come to the conclusion That my Indebtedness to Mr Greene on "this property seems a hopless task. I have gone into figuers which "seems to look,Out of the question to ever complete. Even if wheat did "happen to rise to say 3/- per bushell. And wool we cannot hope for "much better than say 10d flat rate. Indeed these figuers might easy "be an optimistic view of prices. Its quite on the cards these prices "may not be available for years to come. Even at those figuors I don't "see how I could meet interest alone. Much more instalments I would of- "course verymuch like to carry out the contract. But as I am sure you "will agree it look impossobl. Unless Mr Greene is prepared to make or

(or grant) me a revision of the contract I can see nothing left for me "but to eventually walk.out. The boys of course can see it look impos- "soble. So on the strength of a letter I got from Mr Greene year,s ago, "(which I will enclose) (Please return it after reading same) I would "ask you to submit to Mr Greene an application on my behalf for a writing " down of the purchas/ price to £11/0/- which is 10/-more than Mr Greens "own price on the block". It will be seen that the foundation of the request was the hopelessness of the future. Unfortunately for the defendant before he finished his letter his mind reverted to the past. He told of how he had bought the property, and went on:"Probly Mr Breden "thought my action in withdrawing my offer was to force his hand. which "was not the case. After I withdrew we, the two boys & myself desided "to sell three small places we had & have a go for this then finding the "other man had the offer.(I think I must have had a drop to much or some "-thing. I made the above offer". This letter was the beginning of a long correspondence in which Garling and the defendant addressed one another, the defendant and Greene addressed one another, and Garling and the plaintiff exchanged their views. The basal matter in it all was

always the hopelessness produced by the change wrought by the financial depression. But the defendant ever and anon would recur to the past and how he had bought the land at an overvalue. In this Garling disclaimed any interest and the plaintiff manifested none. But the defendant link -ed up the past with the present, because he had found the money, as he represented, to meet his payments for Mt Oriel with the help of the proceeds of the three small places, as he calls them in the extract, I have set out above, which he and his boys had sold. The balance of purchase money due to him or his boys upon these places had been secured by secon mortgage and he repeatedly introduced into his story the opinion that the the second mortgages had been rendered valueless owing to the depression At length after full consideration and many independent inquiries a recission of part of the mortgage debt was resolved upon. To anyone who recalls the state of affairs in 1930 and 1931 this will not seem surprising. Values had collapsed. It was difficult to work land so as to cover expenses. To realise it was even more difficult. Personal covenants of mortgagors had been barred by statute and the remedies against

the land had ceased to be exercisable without leave. Greene had been prepared to make a much greater concession than Garlingapproved. As the result of Garling's protests Greene limited the concession to £5,500 of principal and a reduction in the rate of interest and an extension of the mortgage. The final decision to make this reduction was announced to the the defendant on the 7th October 1932, but it was not carried into effect until the 24th July 1933, when a formal variation of the mortgage was executed. By that time as we now know the financial tide had turned in Australia. Throughout the defendant had pursued an active course and apparently had bought as many sheep, shorn as much wool, and cultivated as much wheat as he could. Before the execution of the document he had openly recommenced his speculation in land by buying a property which he quickly resold. He had dome it openly using the firm of Garling & the Giugniof Young as his solicitors. When his fortunes began to mend Garling's not over friendly attitude to him became positively hostile. In a letter to Greene as early as 7th April 1932 Garling had written "L.N. I'Anson
" This man rather tires me by the frequency of his complaints as to

"the burden he is carrying,and the dark outlook ahead. He is certainly "overloaded and it will be a relief to me to learn what your decision "is as to his request for a writing down". On the 5th April 1933,a few days after I'Anson had made his speculative purchase Garling wrote to Greene "I can- "not work up a liking for this man. His ways are devious,and not 'every "'man who runs may read' his character. He told me a few weeks ago that "he would pay off Mrs I'Anson's overdue instalments in full by the end "of March,but at the finish he contented himself by paying up the 1931 "instalment without comment,and without replying to my letter asking to "know his reason for changing his mind. And though I saw him at Iandra "a fortnight ago he said nothing about contemplating the purchase just "made,notwithstanding that I discussed the report of the land being for "sale,and suggested that,if it was not sold,Cecil Southwell might be able "to farm ~~out~~some of it 'on the shares'". This led Greene to reply on 9th August "I notice your opinion of I'Anson's character. You are abso- "lutely right. He wants continually watching. In all your dealings with "with him you should be absolutely remorseless,as that is the line he

"always takes himself in business deals. Personally, I would not have "written down the amount of his debt to me by one farthing had I not "gathered from you that it was physically impossible for him to pay the "full amount". This apparently changed state of feelings appears to have encouraged Garling in his hostility to I'Anson and at length he reached the conclusion that I'Anson had committed a gross fraud in obtaining the reduction. The suit out of which this appeal arises was instituted for the purpose of setting aside the instrument of reduction and thus no doubt vindicating morality. The first task for Garling was to determine by what precise misrepresentation the fraud had been perpetrated. A long list was elaborated. The elaboration went through stages beginning with a letter on the 12th December 1933 to the defendant not unpolitely expressed in which two representations were singled out as follows -

"(a) That after you withdrew the first offer which was made for Mt "'Oriel' you and your two sons decided to sell three properties "which you had in order to enable your to become the purchaser of "the first mentioned property.

"(b) That the result of the selling of these properties was that you

"and your sons lost over £9000". This letter calls for a particular comment which I shall postpone in the meantime. On 1st March 1934 Garling in answer to the defendant's solicitors formulated ten misrepresentations. This formulation represents the fullest and no doubt best attempt made out of Court to define the defendant's delinquencies. Needless to say when the pleading came it was found that the letter was not the definitive edition. But I think that the work of the witness is to be preferred to the work of the pleader. The striking feature of the representations thus formulated is that so far as they depend on the voluminous writings they have been found by the learned trial judge to be justifiable. That is to say in nothing that the defendant put forward in writing has he been convicted of falsehood. But Garling says that he had two conversations with him - one on 3rd November 1931 and the other on 3rd March 1932 in both of which, according tothe witness, I Anson made statements which cannot be justified. The findings of fact of the learned Judge in favour of the defendant by which he held that the substantial truth and honesty of the written material were made out

were attacked by the plaintiff on the hearing of this appeal, in an attempt to support the decree upon grounds other than those upon which it was founded. I think this attack completely fails. Indeed it serves to show how well an uneducated and unskilful man has performed the by no means easy task of making a fair representation of the actual position in which his affairs stood and the course they had taken. Skilled accountants, valuers, lawyers or other precisians could take exception to this or that detail or description or opinion. But to base a charge of fraud upon these inaccuracies or discrepancies, none of which has any substantial materiality to the real point, seems to me positively absurd. But where the charge of fraud succeeded was upon the oral statement which the learned trial judge attributed to the defendant as having been made in his conversations with Garling on the 3rd November and the 3rd March. I say the statements attributed by the learned judge to the defendant because they were not the misrepresentations to which Garling deposed. He deposed to a coherent but grossly improbable set of misrepsentations on the part of the defendant. He produced notes of which he

said he made soon after the interviews and in some respects they support -ed his evidence. The findings against the defendants were made as a sort of residuum of probability as His Honour saw the matter, after the rejection of the more substantial deceptions sworn to by Garling, which His Honour thought quite incredible in spite of some support which the notes seem superficially to give them. What Garling swore was in substance (stating the effect of the two interviews together) that the defendant represented to him that when he and his sons sold the properties the proceeds of which enabled him to find part of the purchase money for Mt Oriel they sold them at prices less than they gave for them, the deficiency amounting to £9,000. But in addition they had second mortgages securing the balance of purchase money which had become wholly valueless and that they thereby lost another £9,000; and further that a son named Cyril had advanced £3,000 which had also been lost. The transactions which are the subject of these connected misrepresentations are all canvassed in the letters and a perusal of the written material is enough to raise the strongest feeling of incredulity as to the truth of this

imputations upon the defendant. Nicholas J. took this view and was unfavourably impressed with the evidence of Garling whom he described as follows -"I regard Garling as a witness open to the criticism which defend-
"ant's counsel directed against him. Counsel did not question Garling's
"good faith,but claimed that in relation to the matters in question in
"thissuit he was so muddle-headed that he was liable to misunderstand
"what was said to him and could not be trusted to make an accurate record
" of what he did understand. I should add to this my own opinion that
"Garling was strongly biased against the defendant, that because of this
"bias he misinterpreted many of the defendant's actions,that he ignored
"the obligations which a solicitor owes to his client and gave explana-
"tions of his own statements,or expressions of opinion,which I can only
"regard as intentionally evasive". On the particular representations that two sums of £9,000 were claimed by the defendant to have been lost His Honour said "These notes were not read by Garling until some months after they
"were made. They embody Garling's recollections of the answers of a man
"who was ill-educated and expressed himself badly, and they were written
"down and read by a man who was confused both in his understanding of

"of what was said and in his manner of recording it. I believe that
"Garling's statement that two sums of £9,000 each were mentioned is at-
"-tributable to his mis-reading of his notes. When these notes are
"read in conjunction with the correspondence it appears to me that they
"were intended to record a statement by the defendant that he and his
"sons had lost on the sales of their farms sums which ran to over £9,000
"and of the total the loss on the second mortgages amounted to £9,000.
"If this is so, the defendant did say that the farms of himself and his
"sons were sold for less than the purchase price, that of that
"purchase price £9,000 remained on second mortgages and that this sum
"was lost. He did not say that the total loss was £18,000 made up of
"two sums of £9,000 each, nor do I think that Garling would have believ-
"ed him if he had said it". I think that Garling's evidence was not
only due to a misrepresentation of his own notes but the notes were a
misrepresentation of the defendant. The passage I have quoted from
the learned Judge's judgment discounts the face value of the notes and
the evidence almost to the full extent. But out of the interpretation

which His Honour put on the notes His Honour constructed against the defendant a representation which he held false to his knowledge to the following effect viz that he and his sons sold properties in order to go into Mt Oriel: that the sales were made hurriedly ; and that the prices received on the sales were less than the purchase prices. I may remark that as the proceeds of the properties sold were used to enable the defendant to go into Mt Oriel the substance of the first part of this representation is not far from the truth although the fact was that one property was sold earlier than the offer for Mt Oriel, one was made during the period covered by the making of the Mt Oriel purchase and the third was made considerably after it. But there could be no justification for stating that the prices obtained were lower than those given for for the three properties, in fact they were higher. I think it most unlikely that the defendant said it. Once Nicholas J. had rejected Garling-ing's version founded upon his notes I think it was a most unsafe course to base a finding of fraud on the secondary interpretation. The notes are far from clear. They could not be admitted in evidence as proof of the facts they state and in fact those of the 3rd March do state

facts which the trial Judge is not prepared to accept. Further I regard of great significance the formulation on the 12th December 1933 by Garling of the two representations which I have already quoted from the letter of that date. The second of these was quite true, for as the result of the selling of the properties the defendant and his sons lost over £9,000 because the second mortgages proved valueless. The first of the representations was not altogether accurate but the discrepancies were quite immaterial for the purposes of the reduction of the Mt. Oriel mortgage. The letter of the 12th Decr 1933, however, after stating them goes on as follows - "These two representations (without making mention of others) had a great "effect on the mind of Mr Greene, as you may suppose, and as was, of "course, intended." Apart from the significance of his early reliance on these two representations as the chief ones the evidence of Garling with reference to his last assertion which I have quoted is illuminating and I think worth setting out at some length. After reading the letter to him crossexamining counsel conducted the following cross examination "Will you show me any letter

"cable or other communication made to Mr Greene prior to the 24th July "1933, indicating that Mr Greene ever knew of any of these matters?A.Any "letters? Q.Anything at all - any conversation if there was one? A. When "Mr Greene came out here on that trip in October and November,1933, tho- "se were amongst the matters I discussed with him. Q. I know,but this is what "you told I'Anson on 12th December. 'These two representations, without "'making mention of others,had a great effect on the mind of Mr Greene "'as you may suppose and as was, of course,intended'? A. Well,mine was "the mind of Greene in that respect. Those representations had been "made to me, and affected my mind in determining what was finally done. "Q. There is no doubt about that - that is what you meant? A. That is "what I would imagine that to be, because those two representations had "not been formally placed before Mr Greene prior to his coming out here "Q. Do you say that when you wrote that you meant that it had a great "effect on your mind,and that you influenced Mr Greene? A.Yes,I do say "that. Q. In other words,you would not have deceived I'Anson by pre- "tending that your client's own mind had been directly affected, and

"that is what you meant to convey - that it was your mind? A. It was
"my mind,because those representations were made to me and Mr Greene's
"mind was affected by those same representations, after the event cer-
"tainly, but when he came out here in October .... (interrupted). Q. So
"that when you said that those two representations had a great effect on
"the mind of Mr Greene,as was intended,you meant they had a great effect
"on your mind,and you made certain recommendations? A. I think that
"would be a fair representation. Q. You would not have suggested what
"was not true when you had passed this information on to Mr Greene?
"First of all,did you pass this information on to Mr Greene? A. Did I
"pass those two representations on that you are referring to there? Q.
"Yes,did you pass it on to Mr Greene before the 24th July? A. The first
"one decidedly . I had forgotten that. The first one decidedly,because
"I sent him the defendant's letters that he had written to me in May.
"I sent those on to Mr Greene. Q. Is that the representation that you
"are referring to - what is in this letter? A. You mean - After you
"withdrew the first offer....? Q. Yes Is that what you are referring to?

"I want you to be careful. I sent the letter on to Mr Greene and the
"next one too,whatever letters were received by me.Q. Please listen to
"my question. You see what is set out 'After you withdrew the first of-
"'fer which you made for Mount Oriel,you and your two sons decided to
"'sell three properties which you had in order to enable you to become
"'the purchaser of the first mentioned property. That the result of the
"'the selling of these properties was that you and your sons lost over
"' £9000'? A.Yes. Q. Do you say that both these representations were in
"fact passed on to Mr Greene and they are both supposed to have influenc
"-ed his mind? A.The first letter distinctly went on. The letters
"that were written in May,1931, were sent to Mr Greene. The first dis-
"tinct representation with regard to losses of over £9,000on the selling
"of the place was made to me in November,1931, and I did not pass that
"representation on at all. Q. Were you or were you not referring to the
"written representations or the verbal representations in that letter? A
"The first one, decidedly, I should say the written representation. Q.
"What about the second one? A. In the second one I was construing that
" in the light of his explaination,or what I thought his explanation was

"in March 1932, that they had lost over £9,000, so that those would have "been two matters in my mind there which were representations, but at ~~the~~ "that particular time I do not think I was making a very great distinc- "tion between the attorney and his principal". These answers afford ample justifications for the conclusions (1) that it is quite unsafe to convict the defendant of any false representation ~~of~~ on the evidence of Gar -ling and his notes (2) that Garling attached no importance to the state -ments as matters which ought to affect Greene's judgmentor anybody ~~else~~ elses and (3) they did not in fact do so. Greene who made the decision had never heard of the statements. Indeed the plaintiff himself had always professed to defendant an attitude of impartial inquiry as to whe -ther he had been deceived not an indignant complaint of actual deception On the 30th Octr 1934 when the institution of the suit was contemplated Greene wrote to the defendant -"I have written to Mr Garling a letter "enclosing the cable from your solicitors. In that letter I told Mr Gar "-ling that at this distance it was impossible for me to interfere and "I looked to him to see that I was not let in for a law case where I

should be found to be in the wrong and which would put me to much ex-
"pense.
" I do hope that you will realise that what has occurred is not due
"to any lack of friendship or desire for gain on my part. It simply is
"that Mr Garling has told me that I have been deceived and I have said
"to him, 'If that is so, my feelings are that I do not wish to be fooled'."
It is at any rate quite clear that Greene was not fooled by anything the defendant said to Garling on the two occasions in question because he was never informed of it and made his decision without knowing that any such interviews had taken place. Greene was not called as a witness. It was his mind that made the decision and an action of fraud in which the defrauded party does not appear in the witness box can scarcely be viewed with satisfaction by a Court. But the journey to Australia is a long one. Greene had recently made it (when it may be incidentally stated that notwithstanding the pending charge of fraud he stayed the night with the defendant at Mt Oriel in apparent amity and without any attempt to unravel the difficulties that had arisen or obtain an explanation). From Greene's point of view I can quite understand that the

occasion did not call upon him to take the journey again. But unfortunately his absence has led to a very unsatisfactory position. To relieve him of the necessity to prove inducement the parties made an arrangement the like of which I have not seen before. They agreed that the defendant would not take the point that there was no inducement and if the trial Judge took it they would in effect tell him that they had so arranged. The parties, I feel sure, never had in mind that a representation to Garling might be found to have been made of which Greene had never heard. I am certainly not prepared in a case of fraud to hold because of this arrangement what I know positively to be contrary to fact viz that Greene was induced to reduce the mortgage debt because of what I'Anson said to Garling on the two interviews in question. But in any case I do not think that I'Anson made any fraudulent misrepresentations at all and I do not think that the inaccuracies in his statement were really material or calculated to operate as inducement. For these reasons I am of opinion that the appeal should be allowed. The decree for rescission should be discharged and the suit dismissed

and the plaintiff should pay the costs here and below.

I'ANSON v. GREENE

JUDGMENT STARKE J.

The plaintiff in this suit - the respondent here - has resided in England for many years and is a member of the House of Commons. On the death of his father in 1912 the plaintiff became the owner of a station property known as Iandra consisting of some 30,000 to 34,000 acres of land situated in the Young district of New South Wales. Mt. Oriel formed part of this property and included the homestead. For some years prior to 1911 the defendant - the appellant here - had been share farming on part of this property and on the 1st of January 1912 having given up share farming he became manager of it, a position which he retained until 1926. Between the years 1911 and 1926 a number of portions of Iandra were sold and in 1926 the process of subdivision was completed by the sale of Mt. Oriel and other blocks.

By agreement dated the 18th of October 1926 the defendant purchased from the plaintiff Mt. Oriel which consisted of a little over 2094 acres situate in the Young district. The price paid was £14 per acre or a total price of £29,230. The defendant went into possession on the 1st of March 1927 and on the same day gave a mortgage back to the plaintiff to secure repayment of the sum of £23,456 being the balance of the purchase money after payment of two sums of £733 and £5131. The terms of this mortgage were that the defendant should pay the sum of £2345 on the 1st of March of each of the years from 1928 to 1933 both inclusive and the balance on the 1st of March 1934, the rate of interest being 6% for punctual payment. At the beginning of the year 1932 the amount due on the mortgage was £18,719 and on the 24th of July 1933 the plaintiff and the defendant entered into a memorandum varying the mortgage under S. 91 of the Conveyancing Act 1919. By this memorandum the amount due on the mortgage was reduced to £13,000, the rate of interest to 5% and the time for payment of the balance of the purchase money was extended to 1943, the amount of the instalments being reduced accordingly. By the same deed the parties excluded the operation of the Moratorium Act

1930-1931 and the Moratorium Act 1932 in such a way that the defendant became bound by the personal covenant.

All these facts I have taken from the judgment of the learned trial judge.

The plaintiff sought to have this memorandum of variation set aside on the ground that he was induced to sign it by reason of certain representations on the part of the defendant. The trial judge found as follows :-

1. That the defendant had stated that he and his sons had sold certain properties prior to the purchase by the defendant of Mt. Oriel and that such sales were made hurriedly so as to enable the purchase of Mt. Oriel to be made by the defendant and that the said properties were sold at less than cost.

2. That the statement was untrue and untrue to the knowledge of the defendant.

3. That it was made with a view to inducing the plaintiff to reduce the amount of the mortgage debt owing by the defendant to him and

4. That it did so induce the plaintiff to reduce the amount of the mortgage debt etc. to the defendant.

All the other misrepresentations alleged against the defendant were found in his favour and indeed those mentioned in the Statement of Claim paragraph 5 sub paragraphs (d) (e) (f) (g) and (h) were abandoned before this Court. I see no reason for disturbing the findings of the trial judge in respect of representations found in favour of the defendant.

The statement of claim also alleged the representation found by the judge was made innocently and without fraud. This allegation was apparently mentioned at the trial but there seems to have been a consensus of opinion that as the memorandum of mortgage and variation had been executed and registered recission could only be obtained on the ground of fraud. Seddon v. N.E. Salt Co. 1905 1 Ch. 326; Brownlee v. Campbell 5 Ap. Ca. 937, 949; Soper v Arnold 37 Ch. D. at 102 14 App. Ca. 429; May v. Platt 1900 1 Ch. at p. 623; Angel v. Jay 1911 1 K.B. 666. The consideration of this matter may be postponed.

The primary consideration for this Court is whether the

attack made by the appellant upon the findings of the learned primary judge ought to succeed. The evidence is voluminous. But I think a broad treatment of the facts will throw more light upon the probabilities of the case than a detailed and meticulous examination of the evidence.

1. The defendant paid about £14 per acre for Mt. Oriel which it is now admitted was from £3 to perhaps £4 an acre above its value. It seems to have been a reckless purchase and surprised both Mr Mauldin and Garling his solicitor, but the defendant was attached to Iandra especially to that part on which the homestead stood, namely Mt. Oriel.

2. But the defendant was soon in trouble. A financial and economic crisis began to develope towards the end of 1929. One of the elements that contributed to the crisis was a fall in prices of commodities throughout the world. Thus in Australia the price of greasy wool had, according to the Statistician, fallen between 1926 and 1933 from 16½d. per pound to about 8½d; and the value of wheat in the Sydney market was during February and March 1926 5/11¾ per bushel but it fell during February and March 1931 to 2/1¾ and was in February and March 1932 3/1 and 3/2 respectively. Indeed the position became so critical that in May and June 1931 the Governments in Australia met in conference to consider the situation and what measures were possible to restore solvency and avoid default. A plan was adopted which is called the Premiers Plan. It embraced measures reducing by 20% all adjustable Government expenditure: a conversion of internal debts of the Government on a basis of 22½ per centum reduction of interest, further taxation, a reduction of Bank interest on deposits and advances and relief in respect of private mortgages. Earlier in the year the Federal Arbitration Court had made a reduction in the wages of industrials and other wage fixing bodies had more or less followed the Federal Court. All these facts are matters of public and general knowledge in Australia and judges are not obliged to shut their eyes to matters of this character. At all events a short summary of the history of the crisis and the steps taken for the resporation of credit in Australia may be found in the Commonwealth Year Book 1931 No. 24 Appendix Cap. 7

p. 757 et seq.

3. The defendant struggled on till 1931. A long correspondence took place. But I shall deal in the first place with that between the beginning of May 1931 and the beginning of January 1933. Letters were written between the defendant and the plaintiff, between the defendant and Garling and between Garling and the plaintiff. The defendant had in May 1931 received a friendly letter from the plaintiff in appreciation of his excellent and loyal services as manager of Iandra especially during the early days of his management and the trying times during the war. Encouraged by this letter the defendant on the 1st of May 1931 requested Garling to submit to the plaintiff an application on his behalf for the writing down of the purchase price of Mt, Oriel to £11 per acre or a sum of about £6000. About August 1931 some temporary relief in the way of interest was given to the defendant but a definite answer to the main application was held over. Garling made some enquiries as to the defendant's general financial position but I do not think that the information he obtained was wholly satisfactory to him. But in September of 1931 Garling suggested for the plaintiff's consideration that he might think it well, having regard to the defendant's position and the general economic conditions, that the Mt. Oriel transaction might be treated as though the defendant had purchased the property at £12.10.0 per acre and made all necessary adjustments as regards the balance of the purchase money to meet the situation so created.

At the end of October 1931 the defendant put forward another proposition to the plaintiff directly. It was that he should pay £1000 per annum for 24 years with a right to pay off at any time or to pay any amount off in advance with say three and one half per cent per annum discount. He also informed Garling of the proposal who investigated it and reported in April 1932 to the plaintiff the result of his examination and that of a firm of accountants of the proposal. In July of 1932 the plaintiff informed Garling that it was impossible without advice to reach any conclusion upon the proposals submitted to him. But he added that he thought the fairest thing that could be done was to wipe out the whole of the original bargain with the defendant and to

treat the situation as though the defendant had bought on exactly the same terms as other farmers who purchased at the same time and as though the price had been £11 per acre. "If you agree with this suggestion of mine" he said to Garling "please put it in hand at once."

But in September 1932 Garling informed the plaintiff that he would investigate his suggestion and he did so with the aid of a firm of accountants. Later towards the end of September 1932 he informed the plaintiff by cable and confirmed the cable by letter that he considered the proposed adjustments of the defendant's principal debt would reduce same from £18,700 to £10,700 and suggested a reduction by five or six thousand pounds not only generous but all that the circumstances justified. On the 5th of October the plaintiff replied to Garling "I agree to reduce I'Anson's (the defendant) debt by £5500 you to arrange terms." And on the 7th of October 1932 Garling so informed the defendant.

4. The dominant note of all this correspondence is that the defendant cannot carry on unless the plaintiff gives him substantial relief from the burden of debt upon Mt. Oriel. And it also appears that the plaintiff himself and particularly his solicitor Garling were fully alive to the economic conditions in Australia and the practical impossibility of the defendant discharging his burden to the plaintiff without relief. But in all the correspondence there is nothing which leads to the conclusion that any importance was attached to the representation found by the learned judge or in any way induced the variation of the mortgage. There are several references in the correspondence to the sale of certain properties so that the defendant and his sons might "go in" for Mt. Oriel and the probable losses that had been incurred in respect of the properties sold. These may be found in letters of 1st May 1931 defendant to Garling; 15th May 1931 Garling to plaintiff; 7th October 1931 defendant to Garling; 25th October 1931 defendant to plaintiff; 11th December 1931 defendant to Garling; 20th February 1932 defendant to Garling. But there is nothing in these references which, to my mind, establish the precise statement found by the trial judge namely that the defendant and his sons hurriedly sold properties so as to enable

the purchase of Mt. Oriel and that the properties were sold at less than their cost.

5. The trial judge however also relied upon two conversations between the defendant and Garling in 1931 and 1932. Garling gave oral evidence of these conversations but refreshed his memory from notes that he had made at the ~~krixk~~ time. The first note which is dated the 3rd of November 1931 is as follows :- "Refused to give crop lien. Will insist if in arrears next year. 250 bales of wool. Discussed writing down application and temporary relief as regards interest. I'A (defendant) not to assume that reduction in principal will be granted. Uncertain when he can pay interest. Refused to discuss original purchase price paid for Mt. Oriel: he bought with his eyes open. Asked as to losses alleged to have been made I'A (defendant) said he and his sons had sold farms to purchase Mt. Oriel - hurried sales - sold for less than cost. Loss ran into thousands. Also lost on 2nd. mortgages about £9000. Mortgages worthless. Cash sale proceeds put into Iandra. No hope of recovery. Son Cyril lent additional £3000 all of which had gone into Mt. Oriel. Probably would have to make good deficiency on first mortgages. I'A (defendant) considered Mt. Oriel would never be sold for debt even if written down to £6000."

The second which is dated the 3rd of March 1932 is as follows :- "Leased lands return practically nil after expenses. Iandra worst season experienced wheat and wool encumbered to meet 1931 interest paid in January - to borrow more to pay 1932 interest. Position hopeless. Unless full reduction of £6000 allowed would walk off prorerty - unsaleable at £12,700. Losses referred to in letters. Sales self and sons over £9000 Mortgages about £9000 Cyril loan over £3000. Referred me to Guigni for sales and position. Whole position placed before Mr G (plaintiff) in recent letters and that such sales were made hurriedly so as to enable the purchase to be made by the defendant and that the properties were sold at less than cost."

Garling's oral evidence was substantially in accordance with these notes. The trial judge found both the defendant and Garling unsatisfactory witnesses and added that Garling was strongly biassed against the defendant. Garling insisted in his oral evidence

~~xxxxx~~ that the defendant had stated that he and his sons had lost £18,000 in connection with the properties or farms which the defendant stated had been sold to go into Mt. Oriel : namely £9000 loss on sales and £9000 loss on second mortgages taken over the properties or farms for the balance of purchase money but the judge refused to believe this and added that Garling would not have believed ~~him~~ the defendant if he had so stated. But the trial judge as already mentioned nevertheless found that the defendant did say to Garling that he and his sons had sold properties to go into Mt Oriel, that the sales were made hurriedly and that the prices received on the sales were less than the purchase prices and that these statements were untrue to the knowledge of the defendant. It was conceded during argument that the statement if made was untrue and must have been known by the defendant to be untrue. The details of the sales may be found in the judgment of the trial judge. It is true that the amounts which the purchasers contracted to pay for the properties or farms were greater than the amounts paid for them by the defendant and his sons but it is equally true that a considerable part of the purchase money was not paid in cash but remained secured on second mortgages of the properties ~~or~~ and to some extent was unsecured. I understand that these moneys represented some £9000 and were as the defendant always asserted probably irrecoverable or lost. Despite the criticism of Garling the statement made by the defendant to Garling as found by the trial judge should be accepted and also that it was untrue to the defendant's knowledge.

6. But still the question remains whether the plaintiff relied upon the statement made by the defendant in reducing the amount of the mortgage debt. The question to my mind is not whether the statement was material or immaterial: The Bedouin 1894 P. 1 Nicholas v. Thompson 1924 V.L.R. 554 but whether it was relied upon. I agree that the duty is upon the defendant to demonstrate that the statement was not relied upon. It is not enough for him to say that there were other representations by which the transaction may have been induced. The question is whether the plaintiff's action might have been different if the misrepresentation had not been made. ~~Rawlinxxx~~ RAWLINS v. Wickham 3 D G & J 304; Smith v. Kay 7 H.L. Ca. 750. The question however is not an irrebutable

presumption but in all cases a question of fact. The plaintiff, it is clear, knew nothing about the statement: it was never communicated to him by Garling nor by anyone else. It is strange if Garling relied upon it, as he now says, that he did not specifically and specially report it to the plaintiff for his reports to his client are full and xxxxxxx precise. I take it however that a misstatement to the plaintiff's solicitor who was advising him in connection with the reduction of the mortgage is the same thing as a misstatement to the plaintiff himself. But it is desirable to follow the course of the case and the correspondence from the beginning of January 1933 until the commencement of the suit in 1935. In January 1933 Garling states the terms of the variation of mortgage to the defendant and the necessary documents are executed in July of 1933. In January 1933 also the defendant reports a good year at Iandra and in March intimates that he will be paying at least £1000 into the plaintiff's sales account at the end of the following wek on account of himself and Mrs I'Anson. But a letter of Garlings' dated the 25th of September 1933 suggests that he did not really want the money: it was well enough invested at good interest. In April of 1933 Garling's attitude towards the defendant changes. Up to this point Garling's conduct of the arrangement between the plaintiff and the defendant had been admirable. But in a letter to the plaintiff on the 5th of April 1933 he says as to the defendant :- "This man has evidently done well for the year just past in spite of all his talk of hardship and ruin. I have heard that he has just bought (in Mrs I'Anson's name) what used to be Amos Southwell's block about seven miles from Greenthorpe at £7.7.0 per acre. The total purchase price is about £4300 of which £1000 in cash is being paid..... The circumstances also suggest that I'Anson is making good use of your generosity in the matter of the writing down of his debt and he is not afraid when it suits him to add to his burden of mortgage obligations. At the same time I think that £11 per acre which is practically what you reduced the price of the homestead to is today definitely more than it would bring at any sale and was somewhere about its true market value. When I'Anson (defendant) bought it.....he told me a few weeks ago that he would

pay off Mrs I'Anson's overdue instalments in full by the end of March but at the finish he contented himself by paying up the 1931 instalments without comment and without replying to my letter asking to know his reason for changing his mind. And although I saw him at Iandra a fortnight ago he said nothing about contemplating the purchase just made....."

The defendant explained that he was a dealer pure and simple and that the purchase was only a land deal on which he expected to realise a profit within a short period of time. The learned judge accepted this explanation. Later in May of 1933 Garling complains to the plaintiff that the defendant had allowed the concession made to him to become known to other debtors which tempted them to look for like concessions. Despite Garling's dissatisfaction with the defendant he went steadily on with the preparation of the documents varying the mortgage and had them executed in July 1933. But in August of 1933, in a letter to Garling, the plaintiff remarked that he would not have written down the amount of his debt due by one farthing had he not gathered from Garling that it was physically impossible for the defendant to pay the full amount. This statement does little credit to the plaintiff. I take leave to doubt whether he would ever in fact have been so ungenerous to an old servant in the critical times of 1931-1933. At all events the plaintiff was, within two days, writing a friendly letter to the defendant in which he referred ironically to the purchase of Southwell's block. But Garling was now for war. In September 1933 he informs the defendant that "it is quite plain that the plaintiff considers that you were not justified in putting your case before him in the terms you employed - such for instance as appear in some of the letters which you wrote to me and asked me to send on to him and in some of which I wrote to you direct."

All this is conjured up from the plaintiff's letter of August 1933. It ignores as it seems to me the critical times of 1931-1933 with which Garling was familiar and is lacking in candour. Garling knew quite well that the defendant's position was hopeless on a capital value basis of more than £11 per acre for Mt. Oriel and in this he was supported by several highly

qualified men. He reported this view to the plaintiff and the risk to him if the defendant "walked off." Mt. Oriel as he had threatened unless some concession were made to him. On this aspect of the case the trial judge is favourable to the defendant. The statements of the defendant as to the hurried sales of the farms or properties to go into Mt. Oriel and of the losses sustained on the sales of these properties had little bearing upon the hopelessness of his financial position as regards Mt Oriel in 1931. That position had arisen from the financial crisis and from his inability to get in money from the farm and properties he had sold. But the statement might induce greater generosity on the part of the plaintiff than otherwise would have been the case. The plaintiff however knew nothing of the statement and Garling was not concerned with sentimental considerations but with the terms and conditions his client could enforce in the financial crisis which threatened the solvency of Australia. Later in September 1933 Garling pursues the matter and advises the defendant that if the plaintiff comes to Australia soon, as he expects, then he suggests that the defendant gets together in a convenient form the data upon which he arrived at his position being so hopeless as was represented during the negotiations with the plaintiff. The statement made by the trial judge is not mentioned.

In November 1933 Garling asserts that the variation of the mortgage was secured in the first instance by the defendant incorrectly and insufficiently stating material circumstances as to the position and in the next place by failing to disclose to plaintiff before he concluded the agreement certain transactions and matters happening in the interval which materially altered the defendant's position. Again the statement found by the trial judge is not mentioned or at all events is not mentioned in such a manner that the defendant or anyone else would appreciate the complaint.

In December 1933 Garling proceeds to interrogate the defendant about the lands he and his sons sold to go into Mt Oriel and in another letter in the same month intimates that the information asked is of importance to the defendant in establishing the

representation. (a) That after the defendant withdrew the first offer which he made for Mt. Oriel he and his two sons decided to sell three properties which they held in order to enable the defendant to become the purchaser of Mt. Oriel. (b) That the result of selling these properties was that the defendant and his sons lost over £9000. He added "these two representations (without making mention of others) had a great effect on the mind of Mr Greene (plaintiff) as you may suppose and as was, of course, intended. But the records of the dealings by you and your sons fail to support either of the statements made and in the absence of the information which I have asked you for I must assume that the records to which I have had access are correct and be guided accordingly." Garling is making a case that he never made before. He has probably found his memorandum of the 3rd of November 1931 and about September I think according to his evidence had either searched the records of his own office at Young or the public records. Moreover he made a distinctly false assertion when he said that the two representations stated in his letter to defendant "had a great effect on the mind of Mr Greene (the plaintiff) as you may suppose." Greene the plaintiff knew nothing of the matter: these important representations were not reported to him. By March 1934 Garling had apparently completed a meticulous examination of all the correspondence documents records and other matters in connection with the reduction of the defendant's mortgages and was in a position to state the misrepresentations upon which he relied with particularity to the defendant's solicitor. He does so in a letter of the 1st of March 1934 which contains about ten charges. The first three of these charges relate to the farms and properties sold to go into Mt Oriel. Strangely enough no reliance is placed upon a hurried sale which, in any case, is a matter of degree. And stranger still there is no definite statement that the farms and properties were sold at less than cost. All that is alleged is that the defendant and his sons lost over £9000 on these properties which seems true enough if the second mortgages for balance of purchase money were worthless and the sums were irrecoverable as is probably true. The rest of the charges are not supported by the trial judge.

So the matter proceeds in 1935 to this most unfortunate

litigation and the statement in the form found by the judge is made for the first time. Now I fully realise the importance that is attached to the findings of fact of a trial judge and the manifest risk of departing from them in cases depending upon the demeanour and credibility of witnesses. But a Court of Appeal cannot however under cover of this counsel of prudence refrain from considering and reaching its own considered conclusions on matters of fact as well as of law. Coghlan v. Cumberland 1898 1 Ch. 704. An appellate tribunal in the present case appears to me to be in as good a position as the trial judge in considering and making the conclusion or inference of fact. And I have reached a clear and definite conclusion after long and anxious consideration of the oral and documentary evidence that Garling did not rely upon the statement which the learned trial judge found that the defendant had falsely made. I think the difference between the trial judge and myself is in our approach to the question whether the plaintiff or his solicitor relied upon the statement. I think he regarded the conclusion as a necessary and irrebutable inference once fraud was established whilst I regard it as still a matter of fact for the determination of the Court difficult and onerous though it be for the person who has made the false statement to avoid the inference. But this case is quite exceptional. It did not matter whether the hopeless position of the defendant arose from the loss on the farms and properties which were sold or the excessive price he paid for Mt. Oriel or the supervening financial crisis. It existed in fact. It was the hopelessness of the defendant's position financially and no other reason that brought about an agreement to reduce the plaintiff's mortgage debt. The defendant had to be rescued or the plaintiff's interests would suffer. The statement found by the judge had no immediate bearing on that position and was unknown to the plaintiff himself. It was in my opinion an afterthought of Garlings' when he set to work to undo the agreement and searched about for plausible grounds of attack. It in no wise influenced the good and proper advice he had given to his client. Letters must be mentioned which passed between the solicitors in this case so as to avoid the costs of a commission to examine the plaintiff in

England. They were to this effect - that as regards any representations admitted by the defendant or found by the Court it was not the intention of the defendant to raise at the trial the point that no proof had been given by the plaintiff to agree to the variation of the mortgage. The arrangement was subject to the condition that the letters were not to be used in the suit unless the Court raised the point that no proof had been given as above mentioned and the defendant's counsel had then verbally intimated that the defendant did not take the point and the Court was not prepared to act upon such verbal intimation. The letters caused some embarrassment in the conduct of the trial but finally they were disclosed to the Court. I should think the arrangement was probably based upon some judicial remarks to the effect that a person who does not personally swear to the fact of inducement may incline a judge to find that he was not so induced. But whatever the purpose of the arrangement I agree with the trial judge that it does not prevent a Court from holding that the plaintiff was not induced by the representation to enter into the agreement if that were the correct conclusion on the evidence. Thus if the plaintiff had actually given the proof contemplated by the arrangement the trial judge might still have refused to give credence to it in the circumstances and the arrangement between the solicitors puts the plaintiff in no better position. It really excuses the plaintiff from giving evidence and prohibits comment upon his absence. It was comparatively unimportant on the findings of fact made by the trial judge for the plaintiff never knew of the misstatement made by the defendant.

The view I have taken of the facts makes it unnecessary for me to consider the question of innocent misrepresentation and the arguments based upon such cases as Seddon v. N.E. Salt Co. supra. The learned trial judge towards the end of his reasons expressed regret that his judgment should be as it was and agreed with Lindley L.J. that there might be a higher morality than that which is vindicated by a judgment on the legal rights of the parties. During the hearing he suggested a compromise which was found to be impossible. But he finally expressed a hope that the plaintiff would regard the judgment as an opportunity for showing that

generosity of spirit towards a less fortunate neighbour which was one of the privileges of wealth rather than as a means of satisfying avarice or of impoverishing an old friend. It is unfortunate that this wise counsel has not been heeded. I should have had the same regret as the learned judge had I felt compelled to reach the same conclusion as he did.

But in my judgment the appeal should be allowed and the judgment below set aside with costs here and below.

I'ANSON v GREENE

JUDGMENT

DIXON J.

The decree appealed from declares void and of no effect an instrument affecting two mortgages under the Real Property Act and orders that it shall be cancelled. The effect of the decree is to rescind the instrument ; the rescission is based upon a finding of fraudulent misrepresentation on the part of the mortgagor.

The instrument reduced the amount secured by the mortgages and the rates of interest and extended the currency of the mortgages. It took the form of a memorandum of variation made under the authority of sec.91 of the Conveyancing Act 1919-1932 and was registered with the Registrar-General, who presumably made such entries in the register and upon the memoranda of mortgage as appeared necessary.

Of the two mortgages one only, the first, was put in evidence. It was dated Ist March 1927. The covenants which it contained for the repayment of the mortgage moneys were, of course, invalidated by the Moratorium Act 1930-1931, as amended by Act No. 66 of 1931. The Moratorium Act 1932 repealed these provisions but, under sec. 34 of that Act, the protection of a mortgagor against personal liability for the mortgage moneys is

continued unless and until the mortgagor by an instrument under his hand confirms the covenant for repayment and his knowledge and approval of the confirmation is certified in the manner prescribed.

The statute also contains in a modified form the restrictions upon the enforcement of the mortgagee's remedies against the land. But one of the modifications authorizes the parties to a mortgage to exclude the operation of the protecting provisions by executing an instrument of variation : sec. 8 (f).

The memorandum of variation which the decree under appeal rescinded contained a confirmation, duly certified, of the covenants in the mortgages for the repayment of the mortgage moneys and also a clause excluding the application of the provisions which restrict the exercise of the mortgagee's rights , powers and remedies. It follows that the rescission of the instrument has the effect , on the one hand , of increasing the amount with which, according to the register, the land stood charged under the mortgage, and of increasing the rate of interest, and, on the other hand, of releasing the mortgagor from his personal obligation to repay the mortgage moneys and of placing the mortgagee's rights, powers and remedies against the land under the restrictions imposed by the Moratorium Act 1932 . The

parties are put in this situation as from the time when the instrument was first executed, though in the meantime no doubt, they had considered themselves respectively subject to and entitled to the full remedies ordinarily given by a mortgage, but in respect of the lesser amount of principal and interest, and had conducted themselves accordingly.

As fraud was found, these matters did not stand in the way of rescission. But, as that finding is attacked, I have thought it desirable to state in full the effect of the instrument and the consequences produced by setting it aside.

The mortgagor, who is the defendant in the suit, appeals from the decree.

The making of the instrument was the outcome of the financial depression. It was not actually executed until 24th July 1933 but the consent of the mortgagee to make the concession which it expresses had been communicated to the mortgagor in October 1932 and the mortgagor's application to him for a reduction in the amount of the mortgage debt had been made at the beginning of May 1931.

The mortgage debt consisted in the balance of purchase money payable under a contract of sale by which

the mortgagor acquired from the mortgagee 2,094 acres of pastoral and agricultural land on which had been built a homestead of unusual pretensions, called Mt Oriel. This had been the home of the mortgagee's father who had owned a large station, called Iandra, of which Mt Oriel formed only a part.

The mortgagee, Mr William Pomeroy Crawford Greene, who is the plaintiff in the suit and the respondent upon the appeal, succeeded to Iandra in 1911.

The mortgagor, Mr Leonard Nourse I'Anson, is an uneducated country man, who from being a share farmer rose to the position of manager of the property, a position which he took over at the beginning of 1912.

After his father's death, Mr Crawford Greene decided to subdivide Iandra and sell it in parcels, a process which occupied some years. In 1926 Mt Oriel itself came to be sold. Mr Crawford Greene resided in England and his affairs here were conducted by attorneys under power. At some time in or before April of that year I'Anson made an offer to them of £10 an acre for Mt Oriel. They or one of them offered the property elsewhere at £11. I'Anson then withdrew his offer of £10., but, afterwards on 26th April 1926, cabled an offer direct to Greene of £14. an acre, which was accepted.

It is not disputed that the price considerably exceeded the true value of the property and neither I'Anson nor anybody else has been able to explain why he made so high a bid, though doubtless he was anxious to obtain Mt Oriel to which he seems to have formed some sentimental attachment.

Five years later, in the midst of the depression when values had fallen in a manner unthought of and the returns from land and stock had become entirely insufficient to meet expenses, the price given by I'Anson must have seemed absurd in retrospect, and in prospect the burden imposed upon the land by the mortgage securing the unpaid balance doubtless gave Mt Oriel the appearance of a profitless, if not hopeless, enterprise. At all events I'Anson's petition for relief caused no surprise and Greene was prepared to believe that in the changed circumstances it was founded in fairness and reason. The grounds upon which I'Anson supported his application for a reduction of his debt to Greene consisted chiefly in the effects produced by the general financial depression and in the excessive price at which he had contracted to buy the land. But he is said also to have advanced reasons depending upon the minor circumstances attending his purchase of Mt Oriel and to have stated falsely the course of other transactions by which, according to the representations attributed to him, he found

part of the purchase money for Mt Oriel. A discussion of these representations will,I think,become clearer if it is preceded by a brief statement of the course I'Anson actually took in and about the time of his purchase of Mt Oriel.

About a year before his purchase of Mt Oriel I'Anson had bought a property,called Pinegrove, containing 1920 acres, at £6. an acre of which £3,500 was payable immediately and the balance £8,020 was to remain upon mortgage for four years. At or about the same time a son of I'Anson,named Alfred, bought a property, called Allandale Park, containing about 1190 acres at £5.5.0 an acre on a freehold basis,the title being conditional purchase. The property was subject to a mortgage to the Government Savings Bank. About two years earlier another son,named Cyril, had bought a property,named Fairview,containing about 628 acres at £7.10.0 an acre on a freehold basis,the title to this property also being conditional purchase. In 1926 I'Anson resold Pinegrove in three lots,each of 640 acres. Two lots he sold on 24th February 1926,one at £7.17.6 an acre,the other at £6.17.6 an acre. The respective purchasers were a father and son named Guthrie. The terms in each case were the same. Each purchaser was to raise £3,000 from the Government Savings Bank and pay it over to I'Anson,who,of course,would

be obliged to apply it towards the purchase money owing by him. Second mortgages were to be given to I'Anson by the Guthries to secure repayment by instalments of the balance of their purchase money ; in one case,£I,050 , in the other, £1,440. The third lot in Pinegrove I'Anson sold to one McIlhatton on 19th March 1926 at £6.5.0 an acre, a total of £4,000. The terms were £350 deposit, £2,925 to be raised from the Government Savings Bank on first mortgage and the balance (£725) payable by instalments secured by second mortgage. After the moneys payable by the Guthries and McIlhatton had been applied by I'Anson's solicitors in payment of the purchase money owing by him to his vendors and in costs,there remained a balance of £1.765,which roughly represented his profit on the transaction. His solicitors gave him a cheque for this amount on 30th August 1926. But of the amount of £3,500 which he had found in the previous year to make the purchase of Pinegrove,£3,215 remained unrecouped and was secured to him by the second mortgages given by the three purchasers. Before the financial depression,namely in March 1929,McIlhatton paid off his second mortgage,an amount of £725. But the Guthries paid off only two instalments of ~~XXXXXXXX~~ principal in respect of each of their respective second mortgages and,after the beginning of the financial depression,failed to pay even any interest.

On 7th September 1926 Fairview was sold by Cyril I'Anson to a purchaser named Cyril Atkins at £IO.IO.O an acre on a freehold basis, a total of £6,594 of which £676 represented what remained to be paid to the Crown,and £3,500 principal owing on the first mortgage. Of the balance, £1.217 was secured to Cyril I'Anson by second mortgage,various amounts were accounted for by interest in respect of the first mortgage and the residue was paid over to I'Anson,the defendant. The second mortgage was repayable by annual instalments of £150,of which two were paid. But,after February 1929,no further payments were made on account of interest or principal.

The third property,Allandale Park, was sold,but not until 27th September 1928. It was sold to one Irvine at £6.15.0 an acre on a freehold basis,an amount exceeding £760 being still payable to the Crown. The first mortgage to the Government Savings Bank seems to have stood at about £1,200. Of the net purchase money £4,600 was secured to Alfred I'Anson by second mortgage. Out of the balance of £1,400 or thereabouts,£543 was needed to discharge an amount still owing to the original vendor and was applied for that purpose.

From this summary but necessarily complicated account of the realizations of the three properties several points emerge which have assumed an importance in the case.

In the first place,as a matter of chronology,the contracts to sell Pinegrove precede the making of the offer of £14. an acre for Mt Oriel by a month or two. The preliminary deposit on the sale of Mt Oriel, a sum of £50, was not paid until more than seven weeks after the offer, namely on 23rd April 1926 and the full deposit, a sum of £733,was not paid until 18th October 1926. In the meantime I'Anson had received in August the cheque from his solicitors representing the net proceeds to him of his realization of Pinegrove. Fairview was sold a few weeks before the full deposit was paid. Allandale Park two years later.

In the second place,the sales were xxx all at prices which substantially exceeded the prices at which the properties had been acquired.

But,in the third place,the ultimate receipt of the profit depended upon the security of the second mortgages and if these proved worthless not only would there be no profit but on each property there would be a heavy loss. The aggregate amount of the principal sums secured by the second mortgages,excluding McIlhatton's ,was £7.867. Arrears of unpaid interest greatly increased this sum before I'Anson made his application for the reduction of his mortgage debt to Greene.

In the fourth place,the net cash received as a result of the sale was a relatively small amount when considered in

comparison with the heavy obligations which I'Anson undertook upon the purchase of Mt Oriel.

The net cash receipts from the sale of all three properties , Pinegrove,Fairview and Allandale Park,went into I'Anson's bank account. They enabled him to meet his obligations to Greene in connexion with the purchase of Mt Oriel,that is up to the depression,or they contributed to his capacity to do so.

Out of the proceeds of Fairview,including the sale of horses,plant and the like, I'Anson had received by Ist March 1927 about £370. This was debited to him in an account kept between himself and his son Cyril. At no material time was the balance shewn by this account as due to Cyril less than £3,000.

The date of the contract of sale by which I'Anson bought Mt Oriel was 18th October 1926. On that date he found the further deposit of £733. The date of possession was Ist March 1927 ; he then found £5,131 on account of the purchase money,the total amount of which was £29,320. A transfer was taken and the balance of purchase money, amounting to £23,456 was secured by a first mortgage to Greene,the mortgage afterwards varied by the instrument the rescission of which is now in question. Under the mortgage,£2345 or ten per cent of the balance of purchase money thereby secured was repayable annually on Ist March for the next

ensuing xxxxx six years. Then,on Ist March 1934,the residue was repayable in one sum. The rate of interest, if payment were punctual,was 6% p.a. The instalments for the three years 1928,1929 and 1930 were paid and interest at 6% was paid until Ist March 1930. It is unnecessary to go into the details of the account. It is enough to say that the memorandum of variation fixed the principal sum at £13,000 and that by doing so it relieved I'Anson of a liability of £5,500,because by the date it bore,viz. 24th July 1933,the principal indebtedness had been brought exactly to £18,500. The principal was made repayable by four yearly instalments of £800 and a balance of £9,800 on Ist March 1943. The rate of interest was reduced to 5 % p.a..

The execution of this instrument was the delayed consequence of a prayer for relief which I'Anson first made by two letters dated respectively Ist and 6th May 1931. One of these was addressed to Mr H.C.M.Garling, a solicitor who represented Greene and was his attorney under power, and the other to Greene himself.

The statements on the part of I'Anson,which are relied upon as fraudulent representations invalidating the memorandum of xxxxxxxx variation,were made or said to have been made in the course of the written communications

between I'Anson, on the one side, and Greene and Garling, on the other, which began with these two letters, and in two conversations with Garling.

Apart from transactions in buying and selling land or stock, I'Anson's source of income depended on wool and wheat. He necessarily felt the full effect of the collapse in values and prices and there is no reason to doubt that he took a very despondent view of his present and future position. The general financial condition of the country in 1931 should still remain fresh enough in the memory of all to make it unnecessary to discuss its immediate effect upon the fortunes of men in the situation of I'Anson and impossible to dispute the genuineness or reasonableness of the fears they professed.

In his first letter to Greene himself, I'Anson did no more than tell him that he had lost heart and had requeated Garling to place his position before Greene. In his letter to Garling, he asked that the purchase price of Mt Oriel should be written down to £II.IO.O an acre. He based his application primarily on what he described as the hopelessness of his indebtedness and of its being out of the question for him ever to complete his purchase at the prices of wool and wheat which might be expected. He referred to his own foolish conduct in offering £14 an acre and said that

£II.IO.O was IO/- an acre above Mr Greene's own price at the time. After giving some account of how he first made an offer and ~~LATER~~, owing to the conduct of Greene's then representative, withdrew it, he wrote that after the withdrawal he and his two boys decided to sell three small places they had and try Mt Oriel and that now it appeared that he had lost some capital represented by the second mortgages upon the places sold which he expected to put into Mt Oriel and he would not be surprised to have the places on his hands again.

The statement about deciding to sell three small places is laid hold of as a misrepresentation. It is said that it is not true that the decision was reached after I'Anson withdrew his first offer and that they were not small. The epithet " small " might appear just to many but, in any case, the justice of the description was quite immaterial. As to the statement of the stage when the decision was reached, in all probability this is incorrect though curiously enough there was no proof that the offer was made and withdrawn after 24th February 1926 which is the date of the first sale, that to the Guthries.

It is clear enough, I think, that, writing five years after the transaction, the picture in I'Anson's mind was that, by selling Pinegrove, Fairview and Allandale Park, he

had been enabled to buy Mt Oriel and this picture was a correct one. Probably I'Anson had always intended that the properties should be resold. If an exact,not to say minute,analysis of the causes for selling the three properties were instituted,it would probably be found that the actual sale of Pinegrove was not affected by the proposal to buy Mt Oriel,but that the proposal was a cause of the sale in fact made of Fairview and that the existence of the liability for purchase money was a cause for selling Allandale Park. But the point which I'Anson was making in his letter was that he had relied on the proceeds of those properties to enable him to meet his obligations upon Mt Oriel and that,owing to the anticipated loss of the second mortgages,he was deprived of the capital upon which he had depended. His point was well founded. Doubtless there was an inaccuracy in the statement that the places might come back on his hands if it meant each and every part of them, because the third part of Pinegrove had been fully paid for ; and in the same way it may be conceded that there was an inaccuracy contained in the statement as to the time of the decision to sell the properties. But the inaccuracies were upon details which could have no material influence upon his application for relief and the substance of his statements cannot be fairly impugned. Of the honesty of the letter I have no doubt.

In giving the effect of what I'Anson wrote, I have not adhered to the orthography or exact language of the text which is the laboured composition of an almost illiterate man. But the evident difficulty which he experienced in expressing his ideas would affect the value any intelligent reader would place upon the precise meaning of what he set down on paper.

Garling's response to the application for relief was, in effect, to say that the excessive price given by I'Anson was not a proper ground for reduction and that, as to his claim that he could not carry on, he ~~might~~ ought to place his whole position before Greene to enable him to see how I'Anson stood. This led I'Anson to set out in a letter to Garling some sort of account of his assets. The only complaints against it are that he omitted some horses, unless he included them under the head of plant, and that he adopted very low values. Alluding doubtless to the second mortgages given by the Guthries, I'Anson spoke of a mortgage for £2,500 and said it was not worth two pence. By this stage the Rural Bank had become first mortgagee and in fact the aggregate debt to it was £6,781. I'Anson expressed the view that the property would be back on his hands and said that he did not know whether he would be responsible to the Rural Bank, but that Garling might know. He

added that he had no liabilities himself except to his son, who had sold his place (scil. Fairview) to help him with Mt Oriel with the result that £3,000 of his was in it which until lately I'Anson had never regarded as a liability,but now it looked as if all might go and his son would not obtain his money.

All this is a compound of reasonable opinion and of facts truly stated. It conveyed clearly enough that Cyril had supplied £3,000 out of the proceeds of the sale of his property to assist in the purchase of Mt Oriel,that the father's ability to pay him depended on the fate of Mt Oriel, and that,in the opinion of I'Anson,no value remained in the second mortgages which he and his son had taken over the respective properties they had sold. It contains no misrepresentation.

Garling discussed I'Anson's application with Greene in London by correspondence and some time passed before anything further was done.

Meanwhile I'Anson was in occasional communication with Garling over matters of business. He wrote of his activities and prospects and bewailed prices and the condition of affairs. He ended a letter written on 9th October 1931 by saying that he was sure Garling would say that the depression had got I'Anson down. So it had : they had not had a bean

from any of the blocks they had sold,not even interest : he did not know what to do : there seemed no chance of ever getting any more from them. It is now said that this remark is to be understood,not as referring to the period of the existing depression,but to the whole period which had elapsed since the properties were sold, a period which according to the earlier representations relied on would be five years and a half. It is suggested that it actually amounts to a false statement that the purchasers as second mortgagees had paid nothing by way of principal or interest since the land was sold. Apart from the absurdity of so understanding a statement made,in and in reference to the depression, concerning sales of five years standing,the passage itself speaks of getting " more from them ". Further, in a letter written a fortnight later (25th October 1931) to Greene himself, I'Anson tells him that they had received payments of principal and interest up to the last two years but now receive none. In this letter,which is the first full statement made by I'Anson to Greene personally,he asked for a reduction of the mortgage by £6,000 payable by instalments over a period of a few years. He emphasized the fall in values and in returns and the unsaleable nature of property. He described the course he was pursuing in buying sheep, leasing land and working. But he began his letter by a

statement that he supposed that he had told Mr Greene before that he and his two boys had each another property which " they sold to go into this ". He went on to say that they did not get a big deposit but thought, as things were booming, payments of principal and interest would be paid regularly. Although they received payments up to the last two years, it now looked as if they would get no more and in fact would be glad to discount the mortgages at 50%. He stated the amounts outstanding in each case in round figures, making a total of £9,000. The figures with arrears of interest included were substantially correct and the opinion that the mortgages were worthless was far from unreasonable. In the statement that the properties were " sold to go into this " there is the same degree of inaccuracy as in the similar statement in the letter of Ist May 1931 to Garling. The points in which it is inaccurate do not appear to me to be of any importance. They do not affect the substantial correctness of the argument presented by I'Anson and so far as the facts which I have stated in detail are not correctly described by the phrase, the difference could not rationally influence the decision of Greene. Clearly the use of the expression by I'Anson was quite honest. The whole letter strikes me as a fair statement of I'Anson's case, although, owing to the writer's

illiteracy,it is badly expressed and requires study. The last remark is true of a separate letter of the same date sent at the same time putting forward a strange alternative proposal which fortunately may now be disregarded.

At the end of October 1931,Garling who practised in Sydney, decided that he would visit the district where Iandra was situated. The firm of solicitors of which he was a member had a branch at the principal town of the district. His purpose was to interview a number of persons liable as mortgagees to Greene. On 3rd November 1931 he had an interview at Mt Oriel with I'Anson. That evening he made a few scrappy notes of the interview,and with these before him at the hearing of the suit,nearly six years later,he deposed to a very full and graphic account of the conversation. A study of the evidence,on the one hand,and ,on the other hand,of the notes which were put in and the correspondence suggests that the witness,as might,in any event, be expected reconstructed the conversation from the notes aided by I'Anson's letters. The conversation as sworn to is too long to recount,but the chief matters are clear and unmistakable misrepresentations ascribed to I'Anson concerning his losses. They were :- (I) that on the sale of the three properties by I'Anson and his sons the price (or prices) obtained were less than the price (or prices) they had given. As if by way of explanation or perhaps circumstantial detail this significant representation was introduced with the statement that,a large deposit being required on Mt Oriel,the result was that the I'Ansons had to get rid of their properties quickly to obtain the money and selling them hurriedly they got less than they gave.

(2) that this loss had run into thousands (not giving a

figure).

(3) Not only that second mortgages securing the balance of purchase money amounting to £9,000 were worthless,but that by the letter of 9th October 1931,already referred to, he meant that I'Anson and his two sons had never received anything on account of principal or interest from the mortgagees.

(4) In addition to,and not as part of, the proceeds of the property sold by Cyril (scil,Fairview) the latter had lent him £3,000 which had gone.

Before dealing with the question what effect should be given to Garling's evidence of this interview,it is better to proceed to a further interview which took place on 2nd March 1932 at which,according to Garling,the misrepresentation received added strength. The most important part of this interview,notes of which also had been made by Garling and are in evidence,consists in statements made,according to him,in reference to two letters which I'Anson had written to him in the interval, the only two material letters of that period. In the course of the first,dated 11th December 1931, I'Anson, writing in support of a statement that he expected a big writing down said :- " The boys and myself are quite
" £9000 to the bad with the places we sold to take this.
" We would be very pleased to be sure of half of it. I
" doubt very much about getting a quarter of it,if any, I
" have set this out in a letter to Mr Greene. "

A very little consideration of this padsage will show that it refers to the loss of £9,000 by reason of the worthlessness of the mortgages - not to a loss consisting in the difference between the price at which the properties were bought and that at which they were sold. The reference to " getting a quarter of it " is enough in itself to show it. In a letter to Garling of 20th February 1932 I'Anson remarks " As I have " told you before we have got to sit down and take our " loss on the places we sold,over £9,000. We cannot " get even a bit of interest. " This again clearly enough refers to the mortgages.

Garling gave evidence that at the interview of 2nd March he said to I'Anson - " You wrote two letters "since I was here last on the subject of the losses " that you have made,referring to <u>two</u> sums of £9,000. " It shows how hard it is to understand how you are " setting out your position. At least I find it hard " to understand what you are referring to in those " letters. You told me that you had lost about " £9,000 on second mortgages,they having become " worthless. With regard to the sales made you said " your losses had run into thousands. Are you " prepared to tell me what the losses on the sold " lands amounted to ? " To this Garling says that I'Anson answered " It ran into over £9,000. " He again put to I'Anson the figures of losses - £9,000 on the second mortgages and £3,000 of Cyril's money and I'Anson confirmed them. Thus he makes I'Anson

definitely assert that £21,000 had been lost ; £9,000 as the difference between the cost and the selling price of the lands ; £9,000 because of the worthlessness of the second mortgages ; and £3,000 more, an advance by Cyril. In his letters to Greene,Garling makes no reference to the statement about his losses which I'Anson is supposed to have made at these two interviews. A study of the correspondence passing between I'Anson and Greene, I'Anson and Garling and Garling and Greene leaves the strongest impression not only that as to these matters I'Anson never intended to represent any more than that £9,000 of second mortgages taken on the sale of Pinegrove, Fairview and Allandale Park had proved worthless and that out of the proceeds of Fairview his son Cyril had provided him with £3,000 which he would,as things stood, be unable to repay,but also that no one ever understood him as doing so.

Nicholas J. found definitely that I'Anson did not represent to Garling that the two sums of £9,000 had been lost. He added that Garling would not have believed him had he said it. His Honour made observations concerning Garling's evidence which I think show clearly that he was not prepared to base any finding as to what occurred at these interviews upon the

personal reliability of his evidence and I think that in considering what representations were made by I'Anson on those occasions the credibility of the witnesses as witnesses cannot be regarded as an element. I'Anson's testimony,except in so far as it contains admissions, obviously must be put on one side now. Garling's elaborate testimony of the course of each interview was not accepted and,generally speaking,it is clear enough that Nicholas J. did not feel sufficient confidence in the correctness of the evidence given by him against I'Anson to make it the foundation of his findings. In any case it is difficult to suppose that any witness could do more than reconstruct from notes and other materials an account of converstions occurring so long ago.

The substantial question which,as I read his judgment, Nicholas J. put to himself in reference to these interviews was what weight and effect could be assigned to Garling's notes ; and this question now remains for us to form our opinion upon. The material part of the note of 3rd November 1931 is as follows :-

" Asked as to losses alleged to have been made I'A said
" he & his sons had sold farms to purchase Mt Oriel -
" hurried sales - sold for less than cost - Loss ran into
" thousands - Also lost on 2nd mtges about £9000 - Mtges
" worthless - Cash sale proceeds put into Iandra - No
" hope of recovery - Son Cyril had lent additional £3000

" all of which had gone into Mt Oriel "

The material part of the notes of 3rd March 1932 are :-

" Losses referred to in letters &c.
" Sales - self and sons over £9000
" Mortgages - about £9000
" Cyril's loan over £3000 "

The conclusions at which Nicholas J. arrived are expressed in the following extract from his reasons -

" I believe that Garling's statement that two sums of
" £9000 each were mentioned is attributable to his mis-
" reading of his notes. When these notes are read in
" conjunction with the correspondence it appears to me
" that they were intended to record a statement by the
" defendant that he and his sons had lost on the sales
" of their farms sums which ran over £9000, and of the
" total/loss on the second mortgages amounted to £9000. If
" this is so, the defendant did say that the farms of
" himself and his sons were sold for less than the
" purchase price, that of that purchase price £9000
" remained on second mortgages and that this sum was lost.
" He did not say that the total loss was £18000 made up
" of two sums of £9000 each. "

He found that I'Anson did represent that he and his sons sold properties in order to go into Mt Oriel, that the sales were made hurriedly and that the prices received on the sales were less than the purchase prices. As such a representation was untrue to the knowledge of I'Anson he found fraud against him. The decree of rescission rests entirely upon this foundation. It

will be seen that His Honour rejected not only the assertion that I'Anson had said that the two sums of £9,000 were lost, notwithstanding the support it receives from the note of 3rd March 1932,but also the assertion,which may fairly be said to be supported by the notes of 3rd November 1931,that Cyril had lent an additional sum of £3,000 - additional in the sense that it was over and above the proceeds of the sale of properties which had been applied in purchasing Mt Oriel. But apparently the learned Judge felt unable to suppose that the note " hurried sales - sold for less than cost - Loss ran " into thousands " could entirely misreport I'Anson. He regarded it as giving the result of two assertions made by I'Anson,viz. (I) that he had lost on the sales of the properties more than £9,000 ; and (2) that he had lost £9,000 on the second mortgages. The excess, or difference between these sums,must have been lost by selling below cost. Thus the note could mean nothing but that he had said,in effect, that he and his sons had sold the properties at some thousands below the sum at which they had been bought. It is important to notice that His Honour's view depends on treating the first of the two assertions ascribed above to I'Anson as meaning that a loss on the properties had been sustained larger than, but including,the loss of £9,000 on the second mortgages. Now I'Anson had maintained that the loss on the second mortgages

exceeded £9,000 : a view tenable if accumulations of interest were added. Further,he maintained that Cyril's £3,000,being part of the proceeds of Fairview,had gone into Mt Oriel,where it was not covered,so to speak,by the value of the equity of redemption. If either of these views were intended by the first assertion attributed to I'Anson the reasoning expressed in the passage cited from His Honour's reasons would fall to the ground. The difference between the £9,000 in the second assertion and the greater sum in the first would not represent a loss by selling below cost.

For myself I have formed the impression that the note " sold for less than cost " is the product of a misunderst-anding or misinterpretation of I'Anson ; it perhaps may be added,by one not unlikely to misinterpret him. On the one hand,I find it difficult to believe that I'Anson would suddenly have introduced this gratuitously untruthful departure from a story or statement that he had repeated again and again in his letters. The statement would hardly be credible to a reader of the letters. The note ends " referred me to " Giugni " (his partner) " for sales and position ".

Mr Giugni who practised at Young, although he might not have been in possession of the information, could scarcely have found much difficulty in obtaining enough to show the falsity of the statement that the land was sold below cost.

On the other hand, I am struck by the fact in his letters of IITh December 1931 and 20th February 1932 I'Anson describes the loss on the second mortgages in language descriptive of a loss on the sale of the lands. " The boys and myself are quite £9,000 to the bad with " the places we sold to take this. " " We have got to " sit down and take our loss on the places we sold, over " £9,000 ". It is significant that, in his account of the conversation of 3rd March 1932, Garling calls these two sums of £9,000 and complains of the confusion in identifying them. Moreover, when, on 12th December 1933, Garling first formulates any representations by way of challenge, he states two, which are founded on letters, as internal evidence shows. The first is founded on the passage in I'Anson's letter of Ist May 1931 and need not be repeated. But the second is founded on the two extracts made above. Garling expresses it as follows :- " That " the result of selling these properties was that you and " your sons lost over £9,000 ". Such a form of expression is more appropriate for a loss consisting in a difference between cost and selling price, than that which I'Anson actually meant in his letters, namely a loss

through the mortgages becoming worthless, It is,I think,not an unreasonable supposition that at both interviews I'Anson's mode of describing the latter loss brought about some confusion. I think that I'Anson had fallen into the way of speaking of his loss on second mortgages as a loss on the sale of the three properties. Further,he sometimes described it as a loss of £9,000 and sometimes as a loss exceeding that sum. I suspect that Garling did not take much trouble to obtain an exact understanding of what precise losses he claimed to have sustained. Apparently I'Anson was not always easy to follow. It seems to me probable that Garling, a confusion having arisen for some such reason as I have suggested,did not when,in the evening he made his rapid jottings,justly record the effect of what I'Anson had said. At all events,I feel certain that the note of the second interview on the very point is entirely wrong and I suspect that it originated from a misunderstanding that went back to the first interview and was of some such description as I have stated. It must be remembered that from Garling's point of view,or indeed from anybody else's,I'Anson's selling property at a loss in 1926 would not seem to have much bearing on a request for the reduction of a mortgage owing to the effects of the depression in 1930 and 1931.

On the other hand,for I'Anson intentionally to say that he sold at less than he gave would be to tell a foolish and needless lie.

Upon a charge of fraud the facts must be established with clearness,the proofs must be considered with care and the Court should not feel reasonably satisfied of the charge if some other not improbable explanation is fairly open.

I do not think that it is satisfactorily established that

I'Anson said that he or his sons had sold the properties, which were in fact Pinegrove, Fairview and Allandale Park, or any of them, at prices below those at which they were bought, or made any representations that he had made a loss in that manner. In fact my opinion inclines very much to the belief that he did not make such a statement. The presence in Garling's notes of the words " hurried sales " raises at least a presumption that something about selling quickly was said. A favourite grievance of I'Anson was that Greene's representative in 1926, whose name was Breden, had insisted on an unexpectedly high amount of cash. If, as is likely, he recurred to this theme, he would probably emphasize the difficulties of finance in which it involved him and it may be that in such a connexion he said that he was obliged to sell hurriedly. The statement could be, at best, justified on the facts in the case of Fairview only. But in itself it had no bearing upon the application for a reduction of the mortgage debt. The statement that the properties had been sold to go into Mt Oriel does not, for reasons I have already given, seem to me to include any material misrepresentation.

The note " loss ran into thousands " must reflect statements as to the total loss as resulting from the depression. In any case I do not think that it has been shown that I'Anson made any fraudulent statement at either of these interviews.

In forming the view of the facts which I have stated I have not placed any positive reliance on I'Anson's testimony. But some matters which were regarded as affecting his credibility as a witness were used for wider purposes. These should perhaps be mentioned together with one other matter which has more relevance to the issues. The latter is the fact that on Ist April 1933 at a mortgagee's sale he contracted on behalf of his wife to purchase a property, called Southwells, for a price of £4,330 of which £200 was payable as a deposit, £3,300 was to be secured by morfgage and the difference paid on ~~the~~ completion by transfer. He resold the land five months later at a profit of £540 on terms by which the mortgage of £3,300 was carried on and £I,000 was payable by Ist February 1924. The transaction was a piece of dealing but it is said that the discovery that he had been able to finance the purchase raised doubts as to I'Anson's honesty which led to the present proceedings. It is easy to understand that a land speculation of this kind would raise a question whether I'Anson had been so hardly hit as he said. But I'Anson did not conceal the purchase. On the contrary, he at once took the contract to Garling's firm at Young. Garling learnt

of the purchase within a week from some source or another. Nevertheless he went on with the preparation and execution of the memorandum of variation, which was not executed until 24th July 1933. In his letters to Greene he used the transaction to the prejudice of I'Anson, but he did not regard it as a ground for calling a halt in the carrying out of the reduction promised. Dealing in land and stock had been one of I'Anson's pursuits. By April 1933 there had been a great change in conditions and no doubt it was a suitable time for I'Anson to resume dealing if he could. The fact that he was able to do so might afford a general consideration of more or less weight upon the issue whether I'Anson had concealed assets, an issue upon which the plaintiff failed at the trial and I think properly failed. But I am unable to see its bearing upon what has become the main question, namely what did I'Anson represent to Garling at the two interviews of 3rd November 1931 and 3rd March 1932. Still less am I able to see the connexion with that question of the fact that a month after reselling Southwell's land, viz. on 30th October 1933, he embarked on another speculation by purchasing some land called Bowhay's.

After the validity of the reduction of the

mortgage debt was challenged some correspondence ensued in which I'Anson sought to justify himself and the transaction. In the course of a letter to Greene, dated 28th September 1934, a time when general conditions were improving and I'Anson's own position was beginning to falsify the gloomy prophecies of 1931, he wrote as follows :- " This law is no good but I supose we cannot " help it. I know one thing I have not misreprenented " my possition to you. There has not been any false " prentce. Although I am dabking in land, sheep, cattle " & Horses . If the seasons & prices do not favour me " even at the cut price I have very poor hopes of " success. And of course If this comes to a law case. " And I did happen to loose (Which I don't think there " is any fear of that) of course law is not alway " justis but it is always expencive And the one that " looses sometimes feels very embarressed. This would " look nice going through the Press. (The Truth) " ∅ I am down and out. There is no chance of settling " it under £1000 cist and you know that not much good, " I suppose it will be one thing or the other by the " time you get this. " The words " I am down and out " if they meant he was completely insolvent were quite untrue and if they meant that even with the mortgage debt reduced and in the absence of litigation he nevertheless looked with hopelessness upon his future are inconsistent with the general tone of the letter. The interjection of these words is relied upon as showing how untruthful I'Anson was prepared to

be. I am afraid that I can only regard it as an ejaculation of despair by a man labouring under manifold difficulties, possessing no very clear meaning or significance. Its lack of justification does not help me in discovering what I'Anson said to Garling on 3rd November 1931 or 3rd March 1932.

At the hearing of the suit I'Anson was recalled for further cross-examination. He was asked a number of questions about two unsuccessful applications to his bank for an overdraft made respectively on 7th November 1930 and 10th March 1931 in which he included an endowment policy among his free assets. The policy matured on his sixty-first birthday which occurred on 17th May 1931. It was put to him that in fact he had either surrendered the policy or borrowed £690 upon it and that this had taken place between October and December 1930, more probably between the two applications. The witness professed to be unable to explain the matter and the transcript reads as if, though he remembered that he had had a pplicy of £500 upon which he had borrowed and which ultimately had been paid off, he did not remember the part it had played in the applications for the overdraft. An attempt was afterwards made to elucidate the facts of the loan, but without complete success. It seems that at some date between 25th

October and 24th November 1931 he received a net sum of £690 from the insurance company as a loan on a policy of £500 carrying bonuses which calculated to 17th May 1931 amounted to £322. 4 . 0. Under the heading of free assets in the bank's form of application there has been typed in a reference to the endowment policy " present worth £695 ". That is really all that is known about the transaction. After much cross-examination on the matter,the witness stated his position as follows :-" All I can say to that is, " whether whatever I put in those letters I thought was " correct at the time. Further,I knew that they would " not advance me money on that policy without having " the policy and proving whether the thing was right " or not. They would not advance the money without " having the thing in their hands. If I put the thing " there wrongly,I am quite sure I knew at the time that " they would prove that before they would advance me " money. That is my reply to your question . "

I am unable to see what light this answer throws upon the witnesses general credibility,still less upon the issues to be decided. As to the applications themselves,the speculative view is fairly open that I'Anson was falsely stating his free assets. The speculation is also open that the figure £695 reflects the loan in course of being made at or about the time by the insurance office and that owing to the difficulty

in following I'Anson's account of the transaction, some confusion has occurred at the bank which at this date cannot be cleared up. But, assuming that I'Anson made false statements to his banker in 1931, the inference that he told lies to Garling is neither admissible legally nor sound as a matter of practical good sense. That his performances as a witness clothed his evidence with no special persuasiveness is sufficiently shown by the result. But Nicholas J. made a careful statement of his estimate of the man by which we may be content to abide, a statement which it is unnecessary to set out. It leaves I'Anson in the not uncommon position of a man whose conduct should not be viewed with suspicion but whose want of veracity when appearing should cause neither perturbance nor surprise.

One matter which is put forward on the part of the respondent as of special significance strikes my mind as no more than a common example of what witnesses of little education frequently do. Unfortunately for I'Anson he answered negatively a question put by his counsel whether he had ever had the pleasure of being in a Court before and said that he was just in the box to identify a man one time, that is all. In cross-examination his having given evidence before a Land Board twenty years earlier was recalled to him. Upon it

this appearing that he had stated what was wrong he took refuge in a failure to remember the Land Board , an evasiveness which was increased when it was suggested that the Chairman of the Board had criticised I'Anson's conduct. Nicholas J. referred to this matter as one upon which I'Anson appeared to be intentionally evasive. But I cannot see how the incident helps in deciding whether he made fraudulent misrepresentations to Garling. The question for us is whether any fraud or misrepresentation on the part of I'Anson as alleged has been affirmatively established and,in my opinion, it has not.

I have not discussed the communications passing between Garling and Greene and I have not described how and on what grounds Greene decided to make the reduction. It is enough to say that Garling obtained independent opinions and communicated them to Greene,together with his own which was not favourable to giving so full a measure of relief as Greene proposed.

I'Anson's letters to Garling or their contents were communicated to Greene,but none of the representations said to have been made orally was communicated to him directly or indirectly. On 28th July 1932 Greene wrote to Garling a letter containing a proposal,subject to Garling's approval, to give a greater reduction than

that ultimately made. Garling cabled and wrote opposing it as too generous and eventually on 5th October 1932 Greene cabled to Garling that he agreed to reduce I'Anson's debt by £5,500 and that he was to arrange terms. The only possible way, therefore, in which the representations which Nicholas J. found to have been made could have operated as an inducement was by influencing Garling in reference to his advice to Greene. An examination of what Garling actually wrote shows that no such considerations as I'Anson's sales of his own properties had weighed or were likely to weigh with him at all. Quite naturally and sensibly he regarded the matter altogether as depending on the state of affairs that had developed in the depression. I should have thought that as Greene never heard of the representations, as Garling opposed his preliminary decision and as Garling regarded them as relating to topics of no importance, as indeed they did, the representations found by Nicholas J., even if made, did not in fact form any part of the inducement of the transaction. To avoid calling Greene as a witness, the parties made an arrangement that they would not take the point that representations admitted or found to have been made did not induce the transaction. How far this

was meant to cover the situation that arose as a result of the findings of Nicholas J. was a matter of dispute between them.

But, apart altogether from the question of inducement, I am of opinion that the decree for rescission should be discharged.

The matters in which, according to the views I have already expressed, statements made by I'Anson did not strictly correspond with the facts were not material and there was no fraud. Rescission is an equitable remedy and it would be quite impossible to find in such inaccuracies any equity for tearing up such a transaction as that embodied in the memorandum of variation, an instrument producing the consequences I have described at the beginning of the judgment.

In my opinion the appeal should be allowed and the decree of the Supreme Court discharged and the suit dismissed with costs.

I'ANSON -v- GREENE

JUDGMENT McTIERNAN J.

In my opinion, the appeal should be allowed and the cross-appeal dismissed.

The misrepresentation charged consists of a number of statements and assertions, for the proof of which the respondent, who was the plaintiff in the action, relied upon voluminous correspondence extending over a period of years and upon interviews held some years before the trial and separated by long intervals. The interviews took place between the appellant, the defendant, and the respondent's attorney, Mr Garling, but neither of them impressed the learned trial judge as a reliable witness. Mr Garling's notes of the conversations, which were abbreviated from the lengthy interviews they purported to record, got into evidence. The judge, however, formed the opinion that, in giving evidence, Mr Garling misread his notes, and His Honour constructed from the notes a version of the conversations different in material matters from that given in evidence by Mr Garling. A finding of fraud was made, based on the inferences which the judge drew from the notes and the correspondence. A minor part only of the mass of misrepresentations charged was found to have been made. The appeal is brought against the decree of rescission based on this finding. There is a cross-appeal against the dismissal of the remainder of the charges of fraud, except in respect of a number of misrepresentations which the respondent abandoned during the argument.

The whole of the evidence has already been fully reviewed in the preceeding reasons for judgment. The cross-appeal cannot, in my opinion, succeed. The respondent asks us to convict the appellant of charges of fraud of which the judge below would not find him guilty. As Fry L.J. said, in Glasier v. Rolls 42 Ch.D. at p.459: "This could only be done in a very strong case." See also Angus v. Clifford (1891) 2 Ch. at p.473. This

is not such a case. The evidence does not afford sufficent ground for drawing the inference that the appellant made any of the misrepresentations upon which the charges of fraud dismissed depend. The numerous allegations of fraud attract comment of the character of that in which the Lord Chancellor indulged in Hallows v. Fernie L.R. 3 Ch. App. at 472. Lord Chelmsford said, in that case: "It has been said on the part of the defendants that the plaintiff had been raking up everything that could be possibly be urged against the company in order to escape from the contract, and that there was no more foundation for this remaining objection than for all the rest, on which he has failed. There is very little doubt that the plaintiff had been very industrious in searching for grounds to impeach the integrity of the prospectus; and charges of fraud and misrepresentation proved to be unfounded are likely to create a prejudice against others of a similar description which are to be examined. But I am bound to keep my mind free from such impressions in entering upon the inquiry into the only charge which deserves examination, and which must stand or fall on its own merits alone."

The representations found by the learned trial judge were that the appellant said that he and his sons sold three properties in order "to go into" Mount Oriel, that the sales were made hurriedly and that the prices received were less than the purchase prices. He held that there was a material discrepancy between the facts as stated and the actual facts, that the appellant knew that the statements were untrue, that they operated to induce the execution of the instrument varying the mortgage and that consequently the appellant was guilty of deceit. In Smith v. Chadwick 9 A.C. at p.194 Lord Blackburn said: "The Court of Appeal ought to give great weight, but not undue weight, to the opinion of the judge who tried the cause, and saw the witnesses and their demeanour. That gives him considerable advantages over those who only draw their informat-

ion from perusing the notes. But still, although the Court of Appeal ought not lightly to find against the opinion of the judge who tried the cause, I think that the Court of Appeal, if convinced that the inference in favour of the plaintiff ought not to have been drawn from the evidence, should find the verdict the other way." The oral testimony in the present case was regarded as of little assistance in proving what representations were made. The proof of fraud depends mainly upon documentary evidence, namely, the appellant's letters and Mr Garling's notes of the conversations he had with him in November 1931 and March 1932. In Angus v. Clifford (supra) at p. 479 Kay L.J. said: "It seems to me that it is impossible for any Court to assume anything to assist a plaintiff to make out his case of fraud. Every step- every material step- in the evidence which makes out a case of fraud it is incumbent on the plaintiff who alleges fraud to prove by sufficent evidence." Presumption will not supply the place of proof, and the facts constituting the fraud alleged must be clearly and indisputably proved: Mc Cormick v. Grogan L.R. 4 Eng. & Ir. App. Cas. at p.97. The representation found by the learned judge that the properties were sold in order to go into Mount Oriel might reasonably signify that the sales were made in order to finance the purchase of Mount Oriel or that the properties were all sold prior to the payment of the balance of the deposit. In the former sense it is not a substantially untrue statement, and in the latter sense it would be a misstatement of fact at least as regards one property. The representation that the properties were sold hurriedly is also not unequivocal. It might signify that the appellant, who was a dealer, did not wait as long as he ordinarily would wait for an improvement in values before selling or that he sold before the dated at which the sales were in fact made. It is not shown that, if the words were used in the former sense, they would be substantially untrue; but it is shown

that, in the latter sense, they would be a mis-statement. "If the meaning of the words is thus equivocal, the alleged falsehood of the representation (upon which the action(deceit) depends)is not made out with its proper certainty." per Lord Ellenborough C.J. East at p.637: 104 E.R.at 249. It is clear, too, that the passages in the letters and in Mr Garling's notes, upon which the finding that the prices received on the sales were less than the purchase prices is based, are reasonably capable of conveying to the representee that less had been got in from the sales of the properties than was paid for them. It is by no means substantially false to say that money was lost on the sales.

I am not convinced upon the whole evidence that the appellant did make a statement that the prices stated in the contracts for the sale of the properties were less than the prices for which they were bought. In my opinion the evidence does not warrant the conclusion that the appellant told lies- and that is the substance of the complaint found against him: Arnison v. Smith 41 Ch. D. at p. 368- about ~~the~~ his dealings with the three properties.