RESCISSION FOR INNOCENT MISREPRESENTATION

The existing law as to the application of the equitable remedy of rescission to cases where one of the parties to a contract has induced the other to enter into it by an innocent misrepresentation is in a state of confusion. It is, of course, possible to extract any number of rules from the decided cases and the dicta of the judiciary but it is not possible, without a grave distortion of the case law, to produce a principle which can be applied to all types of contracts.

The present unsatisfactory position has been recognised by the Law Reform Committee in its report on innocent misrepresentation.[1] However, it has wisely refrained from any attempt to unravel the Gordian knot and has confined its recommendations to the future scope of rescission, without concerning itself overmuch with its present application.

The purpose of this paper is to attempt an evaluation of the Committee's recommendations and it is felt that this can only be done after a review of the various causes which have given rise to the present unsatisfactory position. It is proposed, in the first place, to indicate certain factors which have made major contributions to the confusion, secondly to conduct a brief survey of the decided cases and, finally, to comment on the recommendations of the Committee.

SOURCES OF CONFUSION

1. THE JUDICATURE ACT, 1873.[2]

Prior to the Act rescission for innocent misrepresentation was a remedy which could only be granted by a court of equity, unless the effect of the misrepresentation was such as to induce a fundamental mistake common to both parties to the contract. In that case the contract could be avoided at common law, because there had been a total failure of consideration.[3]

1. Tenth Report — Command Paper 1782 — Presented to Parliament in July, 1962.
2. 36 & 37 Vict, c.66 see now Judicature Act, 1925 (15 & 16 Geo. 5, c.20).
3. *Kennedy* v. *Panama Mail Co.* (1867) L.R. 2 Q.B. 580.

There are two views as to the effect of the Act on equitable remedies. One is that it merely enabled courts of common law to grant equitable relief in those cases in which it would have been granted by a court of equity before the Act. The other view is that both courts of equity and of common law may now grant equitable relief in cases over which the common law courts formerly had an exclusive jurisdiction. Clearly the availability of rescission for innocent misrepresentation will largely depend upon which of the two views is favoured by any particular court.

2. RESCISSION AND REPUDIATION

Whichever view is taken of the effect of the Judicature Act, it has never been seriously contended that the Act has in any way deprived the equitable remedies of their discretionary quality. Although the term "rescission" has been applied indifferently, by judges and text-writers, to the equitable remedy for innocent misrepresentation and to the common law right to repudiate or avoid a contract for fraud, common fundamental mistake or breach of condition,[4] it must be borne in mind that the latter remedy, whilst it is available, may be demanded as a matter of right, whereas the former lies entirely in the discretion of the court. Therefore, some confusion can be avoided if the term "rescission" is reserved for the equitable remedy and "repudiation" or "avoidance" is used to indicate the common law right.

3. RESCISSION AND RECTIFICATION

These remedies are both equitable in origin but the failure to distinguish between the two is a fruitful source of confusion. Rescission entails the setting aside of a contract and the restoration of the parties to the positions which they would have occupied had there been no contract. It is a remedy which was, prior to the Judicature Act, within the exclusive jurisdiction of courts of equity. On the other hand, rectification entails the substitution of a new contract for the old contract between the parties. Although the less drastic of the two remedies, the application of rectification is more restricted than that of rescission and is confined to cases where a common law court could have avoided the contract on the ground of common fundamental mistake.[5]

4. The wider meaning is used in Cheshire & Fifoot's *The Law of Contract* (5th. ed. Part IV, Chapter II) and was used by Jessel M.R. in *Redgrave* v. *Hurd* (1881) 20 Ch. D. 1.

5. Lord Chelmsford, in *Fowler* v. *Fowler* (1859) 4 De G. & J. 250 at p. 265, said: 'There is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the court is virtually making a new agreement'. See also *per* Lord Thurlow in *Irnham* v. *Child* (1781) 1 Bro. C.C. 92 and *Vaudeville Electric Cinema* v. *Murisset* [1923] 2 Ch. 74.

Thus, equity could mitigate the severity of the only available common law remedy and re-write the contract so as to embody the true intention of the parties. Therefore, in granting rectification equity was acting in a sphere in which the common law courts already had jurisdiction.

It is submitted, with respect, that it was the failure to distinguish between these two equitable remedies that contributed to the mistaken assumption of Denning L.J., in *Leaf* v. *International Galleries,*[6] that the Court of Appeal in *Solle* v. *Butcher*[7] had overruled the first ground of the Divisional Court's decision in *Angel* v. *Jay.*[8] *Solle* v. *Butcher* was clearly a case of rectification for common fundamental mistake whilst in *Angel* v. *Jay,* the plaintiff had asked for rescission for innocent misrepresentation.

4. RESULTS OF MISREPRESENTATION

Innocent misrepresentation may have one of two effects. In the first place, it may induce a person to enter into a contract in a mistaken belief as to some aspect of the subject matter, the existence or non-existence of which does not render what he actually receives fundamentally different from what he had bargained for. Secondly, it may give rise to a mistaken belief, shared by both of the parties, as to some aspect of the subject matter, the presence or absence of which makes it fundamentally different from what the parties had bargained for. The second result occasions a total failure of consideration, enabling the contract either to be avoided at common law or[9] to be rectified in equity.

The decision in *Angel* v. *Jay*[10] was expressly based upon the first effect of misrepresentation, whereas Denning L.J., himself, based his judgment in *Solle* v. *Butcher* upon the second effect. Having indicated that, in his opinion, there had been an innocent misrepresentation, his Lordship went on to say[11] "But it is unnecessary to come to a firm conclusion on this point, because, as Bucknill L.J. has said, there was clearly a common mistake, or, as I would prefer to describe it, a common misapprehension, which was fundamental and in no way due to any

6. [1950] 2 K.B. 86 (C.A.), at p. 90.

7. [1950] 1 K.B. 671.

8. [1911] 1 K.B. 666.

9. *Rowland* v. *Divall* [1923] 2 K.B. 500, C.A. and see also *Karsales (Harrow) Ltd.* v. *Wallis* [1956] 1 W.L.R. 936; *Mason* v. *Burningham* [1949] 2 K.B. 545; *Butterworth* v. *Kingsway Motors* [1954] 1 W.L.R. 1286, and observations of Bucknill J., in *Angel* v. *Jay* [1911] 1 K.B. 666 at pp. 673-674.

10. [1911] 1 K.B. 666.

11. [1950] 1 K.B. 671 at p. 695.

fault of the defendant; and *Cooper* v. *Phibbs*[12] affords ample authority for saying that, by reason of the common misapprehension, this lease can be set aside on such terms as the court thinks fit."

Once this distinction between the two effects of misrepresentation is appreciated, it is clear that, whatever may be the demerits of the decision in *Angel* v. *Jay,* that case was not overruled by the Court of Appeal in *Solle* v. *Butcher.* Although there may be considerable difficulty in determining what constitutes a common fundamental mistake, the law relating to the voidability of contracts upon the ground that such a mistake existed, whether it was induced by a misrepresentation or not, is clearly established. Therefore, the observations in this paper are limited to cases where the misrepresentation did not induce that kind of misapprehension.

5. Innocence in Law and in Equity

For a misrepresentation to be fraudulent at common law the person who makes it must either be aware of its falsity or have no genuine belief in its truth; mere oversight or carelessness is not sufficient.[13] On the other hand, although the distinction between legal and moral fraud is no longer of any legal significance, equity is, in certain cases, more sensitive. Thus, where the person making the misrepresentation owes a fiduciary duty to the other, he is guilty of equitable fraud, if either he fails to disclose all the material facts within his knowledge or the falsity of the statement ought to have been known to him.[14] In such cases it is incorrect to talk of innocent misrepresentation, merely because the maker of the statement was not in fact aware of its falsity, and the cases where conveyances to companies have been rescinded are explainable on this basis[15]

6. Specific Performance and Rescission

It has been suggested that, because specific performance will be refused at the suit of a person who induced the contract by making an innocent misrepresentation, rescission of a contract on the ground of innocent misrepresentation should be available even after the contract has been executed.[16] Whatever moral or logical arguments might be produced to support this contention, it is clearly contrary to the principles

12. (1867) L.R. 2 H.L. 149.

13. *Derry* v. *Peek* (1889) 14 App. Cas. 337.

14. *Nocton* v. *Lord Ashburton,* [1914] A.C. 932.

15. *Infra, Erlanger* v. *New Sombrero Phosphate* (1878) 3 App. Cas. 1218; *Lagunas* v. *Lagunas Nitrate* [1899] 2 Ch. 393, C.A.

16. H. A. Hammelmann in (1939) 55 *L.Q.R.* 90.

upon which courts of equity proceeded. Indeed, on more than one occasion although specific performance has been refused to the plaintiff the court has refused to accede to the defendant's counterclaim for rescission. Once again it must be appreciated that rescission is the more drastic remedy and prior, to the Judicature Acts, would have entailed the issuing of a common injunction, forbidding the plaintiif to pursue his right at common law.[17] In contrast, a refusal of specific performance was not inevitably followed by the grant of a common injunction and, indeed, in some cases the plaintiff was expressly left at liberty to seek his remedy in a court of common law.

It appears to be self-evident that, if one of the parties to a contract is seeking specific performance, the contract is still executory.[17a] It is, therefore, difficult to follow the argument that considerations affecting the making of an order for specific performance can have any bearing upon the application of equitable remedies to executed contracts. It is true that all equitable remedies are discretionary but it does not follow that the factors influencing the exercise of the court's discretion will be identical in every case. Indeed, the whole history of the development of equitable jurisdiction indicates that equitable remedies were developed to fill remedial *lacunae,* not only in the common law, but also in equity. Consequently, some confusion can be avoided, by bearing in mind the particular nature and function of rescission, which distinguish it from other equitable remedies.

7. EXECUTORY OR EXECUTED

The arbitrary characterisation of all contracts as either executed or executory is a product of the one word one meaning fallacy and has resulted in some thoroughly muddled reasoning.[17b] The primary meaning of the word, "executed", as a legal term is that something has been carried out or performed. Thus, to say that a person has been executed is an ellipsis of "the sentence of the court has been executed or carried out." It is in this sense that the law regards execution of civil judgments.

In the sphere of trusts, however, a trust is said to be executed where the settlor has clearly delineated the interests to be taken by each of the beneficiaries and has left nothing to the discretion of the trustees.[18] In

17. *Mortlock* v. *Buller* (1804) 10 Ves. 292; *Coward* v. *Hughes* (1885) 1 K. & J. 443.

17a. *Redgrave* v. *Hurd* (1881) 20 Ch. D. 1 was an action for specific performance, yet Cheshire & Fifoot, *op. cit.* at p. 236 note 3 and H. A. Hammelmann, *op. cit.* at p. 102 described it as a case of rescission of an executed contract.

17b. For a full discussion see Dr. Glanville Williams's study "Language and the Law" 61 *L.Q.R.* 71, 179, 293; 62 *L.Q.R.* 387.

18. *Egerton* v. *Earl Brownlow* (1853) 4 H.L.C. 1; *Sackville-West* v. *Viscount Holmesdale* (1870) L.R. 4 H.L. 543.

such cases the trust is clearly not "executed", in the sense that it has been carried out, because the trustees have yet to carry out their duty of ensuring that each beneficiary receives his due entitlement. The paradoxical use of the word, in this context will be appreciated when it is remembered that the *Statute of Uses*[19] did not execute executory trusts but merely operated upon those trusts which were "executed", in the sense that the trustees' only duty was to vest the legal estate in the beneficiary.[20] Again, although a trust is technically executed, the interest of a beneficiary under that trust may, nevertheless, be executory, in that it is contingent upon the happening of an event, which may or may not happen.[21]

In the case of contracts, because consideration must move from each party, each party has something to execute or carry out. In consequence, it is inaccurate to state that a person has executed the contract when he has performed his part of it. What he has, in fact, executed is his promise, which constituted the consideration moving from him. In those circumstance it is also misleading to speak of the contract as partly executed because that expression could refer to the situation where each party has carried out part of his promise, but not the whole.

It is suggested that in the law of contract the term "executed" should be reserved for the situation, where each party has fully performed his fundamental obligations under the contract. In confining performance to fundamental obligations, a certain amount of difficulty can be eliminated with regard to contracts of continuing obligations. Indeed, this distinction between fundamental and subsidiary obligations was recognised in the case of leases by the courts of common law, which allowed forfeiture for breach of condition but not for breach of covenant, unless the right had been expressly reserved.[22] There are, of course, and this was recognised by the Law Reform Committee,[23] contracts where

19. (1535) 27 Hen. 8, c.10.

20. *Van Grutten* v. *Foxwell* [1897] A.C. 658; *Baker* v. *White* (1875) 20 L.R. Eq. 166.

21. The apparent paradox is explained in Snell's Equity (25th. ed. by R. E. Megarry and P. V. Baker) at p. 110: "The expressions 'executed' and 'executory' are often misunderstood. In this connection they refer to the creation of the trust, not to the carrying out of it."

22. *Doe d. Henniker* v. *Watt* (1828) 8 B. & C. 308. *Cf. Crawley* v. *Price* (1875) L.R. 10 Q.B. 302. The argument that a lease is always executory, because it is a contract of continuous obligation was rejected in *Angel* v. *Jay* [1911] 1 K.B. 666 at p. 671.

23. Tenth Report at p. 6, para. 10.

the fundamental obligations are continuous, in that they remain unperformed until the contract has been terminated. Service agreements, leases and partnerships are outstanding examples of this type of contract and for that reason alone cannot be treated on the same footing as other types of contract.

8. EXPRESS PLEADING OF FRAUD

It is a firmly established rule that, if the court is to make a finding of fraud against one of the parties to a civil action, fraud must be pleaded. Furthermore, it has been held that, even where there is an express pleading of fraud, it must be supported in the pleadings by full particulars of the facts and conduct which are alleged to be fraudulent.[24] Frequently the result is that, although the facts as found by the court clearly establish fraud, in the sense that the person who made the misrepresentation was fully aware of its falsity, the court must nonetheless proceed upon the basis that the misrepresentation was innocently made.[25] Labouring under this handicap, the court is often only able to effect a measure of justice between the parties by extending the law relating to innocent misrepresentation almost to the point of distortion.

SURVEY OF THE CASE LAW

It is, of course, not possible, without magnifying this paper into a thesis, to deal with every case on rescission. It is proposed, therefore, to confine the survey to those cases which are commonly cited in the context of rescission for innocent misrepresentation. This self-denying ordinance should achieve the dual purpose of eliminating selective support for the writer's views and demonstrating that cases which have been cited in support of certain contentions do not give unqualified support to those contentions and even, at times flatly contradict them.

Although all contracts must conform to certain initial requirements for their formation, the infinite varieties of contractual relationships which ensue militate against the formulation of a uniform set of legal rules, or for that matter equitable rules, which can be effectively applied to every kind of contract after its formation. Consequently, in reviewing the case law as to innocent misrepresentation, it will be convenient, without any pretence of an exhaustive classification, to group the cases under well known contractual heads.

24. See the observations of Jessel M.R., in *Redgrave* v. *Hurd* (1881) 20 Ch. D. 1 at p. 12.

25. For example *Adam* v. *Newbigging* (1888) 13 App. Cas. 308; *Redgrave* v. *Hurd, supra; Phillips-Higgins* v. *Harper* [1954] 1 Q.B. 411.

1. INTERESTS IN LAND

In a legal system, in which judicial precedent plays a major part in the formulation and the development of the law, the court must bear in mind other considerations besides that of effecting a just result purely as between the parties before it. A decision, effecting manifest justice as between the parties to an action, can often have the indirect result of unjustly disturbing parties, not before the court, in their enjoyment of long established rights. This conflict of interests is often described as the rival demands of justice and certainty, as if the two concepts were antithetical. Perhaps a better view is that certainty is an essential, although variable, element of justice.

However, whether certainty is viewed either as an integral part of justice or as a pragmatic brake on the ideal, its influence on judicial decisions increases or decreases in direct proportion to the temporal duration of the interests forming the subject matter of the action before the court. For this reason alone separate consideration should be given to contracts relating to freeholds and contracts relating to leaseholds.

(a) FREEHOLDS

In contracts for the sale of freehold estates in land there is some measure of agreement as to the availability of rescission for innocent misrepresentation. The cases clearly establish that an innocent misrepresentation, purely as to a matter of title, cannot be a ground for rescission of the contract after the legal estate, contracted for, has been conveyed to the purchaser.[26] The reasons for this rule were stated by Grove J. in *Clare* v. *Lamb.* [27] In delivering his judgment, in which the other members of the court concurred, his Lordship said, "In the case of a purchase of an interest in land, the person who sells, places at the disposal of the buyer such title deeds as he possesses and under which he claims. The purchaser has full opportunity for investigating the title of the vendor and when he takes a conveyance he is assumed to have done so. Considerable inconvenience might result if this were not the rule. Conveyancers may agree upon the title, and, long after the conveyance has been executed, the whole transaction completed, and the proceeds disbursed, the seller might be called upon to return the purchase money, by reason of some defect of which he had no notice at the time. But there is an ordinary and well known covenant which the purchaser may insist upon if he wishes to get more security than he gets by an investigation of the title; he may require a covenant for title; this additional security would probably increase the price. When the conveyance has been executed, all that the purchaser has to look to is the liability of the

26. *Wilde* v. *Gibson* (1848) 1 H.L.C. 605; *Thomas* v. *Powell* (1794) 2 Cox 395.

27. (1875) L.R. 10 C.P. 334, at p. 339.

vendor under the deed. If it contains no covenant for title,[28] the purchaser takes what the vendor gives him, or rather, what he is able upon his title to give him, and the vendor will only be responsible for his own acts and encumbrances." Later his Lordship made it quite clear that this doctrine applied both at law and in equity.[29]

Whether a conveyance of a freehold is a bar to rescission, where the representation is directed to matters other than title, does not appear to have been the subject of direct judicial decision. However, the setting aside of the transaction in such circumstances would cause the same inconvenience indicated by Grove J. in the case of defects in title. Indeed, this inconvenience will be aggravated where, as is frequently the case, the vendor has laid out the proceeds of sale in the purchase of another property. In *Wilde* v. *Gibson,*[30] Lord Campbell stated the rule without any restrictions as to the nature of the misrepresentation: "If there be, *in any way whatever,*[31] misrepresentation or concealment, which is material to the purchaser, a court of equity will not compel him to complete the purchase; but where the conveyance has been executed, I apprehend, my Lords, that a Court of equity will set aside the conveyance only on the ground of actual fraud." It is, of course, arguable that, because the question before the House was one of misrepresentation as to title, Lord Campbell's statement of the rule must be restricted accordingly.

Nevertheless, in the absence of direct authority, considerations similar to those set out in *Clare* v. *Lamb* apply to other types of misrepresentations. The procedure attendant upon the conversion of a contract for the sale of a freehold into a conveyance is leisurely enough to enable a reasonable purchaser to satisfy himself with regard to all aspects of the property. Indeed, in conveyancing matters time is never initially of the essence of the contract, unless it is expressly agreed between the parties that it shall be.[32] An inspection of the land, and premises thereon, by a qualified surveyor between contract and conveyance will certainly reveal any misrepresentations as to the quantity of the land and the structural or sanitary condition of the premises, which, on any view, would be serious enough to justify the drastic step of rescission. The cost of such an inspection is small in comparison with either the purchase price or the legal costs for investigation of title and, in practice, such an

28. Law of Property Act, 1925, s.76, which takes the place of s.7, *Conveyancing Act,* 1881 provides that certain covenants for title will be implied.

29. (1875) L.R. 10 C.P. 334 at p. 340.

30. (1848) 1 H.L.C. 605 at p. 632.

31. Italics supplied.

32. Law of Property Act, 1925, s.41.

inspection is invariably a condition precedent to the obtaining of mortgage finance for the purchase.[33] The Committee, in effect, recommends that Lord Campbell's statement of the rule should be adopted without qualification.

(b) LEASEHOLDS

Although the grant of a lease, especially where it is for a long term of years, is in many respects similar to a conveyance on sale of a freehold interest, there are variations of conveyancing practice that place leaseholds on a slightly different footing.

In the first place, the grant of a lease is seldom preceded by a formal contract and the contractual terms between the lessor and the lessee are set out in the lease itself. Secondly, the intending purchaser of a freehold has a statutory right to investigate his vendor's title, whereas the intending lessee has no such right unless he expressly contracts for it.[34] Furthermore, until the passing of the Law of Property Act, 1925,[35] the execution of the lease by the parties and the delivery of the counterpart to the lessee did not have the same effect as the execution and delivery of a freehold conveyance to the purchaser. Until he had actually entered into the possession of the premises, the lessee merely had an *interesse termini* and not a fully "executed" lease.[36] In the cases which appear to decide that there can be no rescission of a lease after "execution," the leases under consideration had been completed by the lessor's entry into possession.[37]

However, it is submitted that it is only upon questions of title that the grant of a long lease can be distinguished from the conveyance of a freehold. *Legge* v. *Croker*[38] clearly decided that a lease, which had been completed by the execution of the lease and the entry into possession of the lessee, could not be rescinded on the ground of innocent misrepresentation by the lessor, where that representation is as to a matter of title. Although *Legge* v. *Croker,* being an Irish decision, is not binding on them, the English courts have frequently cited it with approval. Of it Lord

33. Indeed, a survey is normally carried out before contract.

34. Law of Property Act, 1925, s.44.

35. 15 & 16 Geo. 5, c.20.

36. *Ibid.,* s.149.

37. *Angel* v. *Jay* [1911] 1 K.B. 666; *Legge* v. *Croker* 1 Ball & Beatty (an Irish case) 12 R.R. 49.

38. *Supra.*

Campbell said,[39] "The case decided by Lord Manners, a judge of very great experience and very great intelligence, whose opinion on such a question is to be regarded with high respect — that case is the guide on the other side, to show you what you ought to avoid. You may go as far as *Edwards* v. *McLeay;*[40] but then you are told how far you are not to go in the other case."

Angel v. *Jay,* a decision of a Divisional Court, approved *Legge* v. *Croker* and extended its application to misrepresentations not directed to matters of title. It is true that *Angel* v. *Jay*[41] has been doubted and criticised but it has never been overruled, and, in *Edler* v. *Auerbach,*[42] Devlin J., sitting as a judge of first instance, expressly stated that it was binding on him. On the other hand, it has been stated that the case (at first instance) of *Whittington* v. *Seale-Hayne*[43] is an authority for the proposition that a lease may be rescinded after completion on the ground of an innocent misrepresentation as to the sanitary condition of the demised premises.[44] The reports of that case do not support this contention. The Law Times reports Farwell J. as saying, "The suggestion was made that I should assume for the purpose of argument that innocent misrepresentations were made sufficient to entitle the plaintiffs to rescission."[45] As we have already observed, an innocent misrepresentation giving rise to a common fundamental mistake is a ground for rescission in equity and for repudiation at common law and there is nothing in the judgment to indicate that his Lordship envisaged anything else. The Times Law Reports state, " .... Mr. Hughes intimated that the defendant would *consent*[45a] to rescission of the lease, and would agree to pay the plaintiff £20 to cover what they had paid and expended under the lease."[46] In fact *Whittington* v. *Seale-Hayne* is direct authority for nothing at all and its sole interest lies in his Lordship's observations with regard to the extent to which the parties to a rescinded contract ought to be restored to the *status ante.*

39. *Wilde* v. *Gibson* (1848) 1 H.L.C. 605 at p. 636.

40. (1818) 2 Swanst. 287.

41. [1911] 1 K.B. 666 — Darling and Bucknill JJ.

42. [I950] 1 K.B. 359 at p. 373.

43. (1900) 82 L.T. 49; 16 T.L.R. 181.

44. See Cheshire and Fifoot, *op. cit.,* p. 236, note 3; (1950) 13 *M.L.R.* 365, note 5.

45. (1900) 82 L.T. at p. 50.

45a. Italics supplied.

46. (1900) 16 T.L.R. at p. 182.

As a matter of common sense, if it is accepted that in the case of long leases rescission on the ground of innocent misrepresentation cannot be obtained after completion on the ground of innocent misrepresentations as to matters of title, the argument in favour of rescission for other types of misrepresentation is considerably weakened. The grantee of a formal lease, although he has not the same opportunities for the investigation of title that are accorded to the purchaser of a freehold, has exactly the same opportunities to ascertain the structural, sanitary and other physical attributes of the property.

The foregoing considerations clearly do not apply to those leases, which are, and legally may be, granted without any conveyancing formalities. Leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can reasonably be obtained without taking a fine may be created purely by parol.[47] In such cases, especially where the lease is merely a periodic tenancy, it would be unreasonable to expect the intending lessee either to insist upon an investigation of the lessor's title or to incur the costs of a survey of the premises. In recommending that rescission of freeholds and long leases should not be possible after completion, the Law Reform Committee has substantially approved the decisions in *Wilde* v. *Gibson, Legge* v. *Croker* and *Angel* v. *Jay.* However, it has recognised the special considerations which distinguish the informal lease and has recommended that leases, which may be legally created by parol (whether they are so created or not), should be capable of being rescinded on the ground of innocent misrepresentation, even after completion.

2. SALE OF GOODS

Before the passing of the Judicature Act, contracts for the sale of goods were almost entirely within the exclusive jurisdiction of the courts of common law. It was well established that, unless there had been a common fundamental mistake, innocent misrepresentation, not amounting to a warranty, did not allow the contract either to be repudiated at common law or rescinded in equity.[48] Did the Judicature Act alter that position?

As we have already observed, there are two schools of thought with regard to the effect of the *Judicature Act.* However, whether the Act effected a complete fusion of law and equity or merely a fusion of administration, the fact is that there has been no case in England, since

47. Law of Property Act, 1925, s.54(2).

48. *Kennedy* v. *Panama Mail* Co. (1867) L.R. 2 Q.B. 580.

the passing of the Act, which decides whether or not rescission of a contract for the sale of goods may be ordered after it has been "executed".

It has been suggested[49] that, in *Whurr* v. *Devenish,*[50] Lord Alverstone C.J. ordered a contract for the sale of a horse to be rescinded, on the ground of an innocent misrepresentation, after the contract was "executed". The only available report of that case leaves much to be desired but it does contain a statement by Lord Alverstone which appears to indicate that the Lord Chief Justice did not himself wish his decision to be regarded as authoritative: "The Lord Chief Justice, in giving judgment, said that the point raised by the case was an important one, and if it had been argued on authorities and not on general principles he would have taken time to consider the matter. As, however the question had been dealt with on general principles, nothing could be gained by delay."

Indeed, in *Whurr* v. *Devenish,* the misrepresentation complained of appeared in the auctioneer's particulars of sale and was thus clearly a term of the contract of sale. The misrepresentation was as to the title of the vendor, who, in fact, had no title, and that defect occasions a total failure of consideration rendering the contract voidable, if not void, at common law. Indeed, a variety of reasons can be given for this decision but on the face of the report his Lordship gave none.[51]

Furthermore, it has been stated that, in *Schroeder* v. *Mendl,*[52] a case concerning the sale of a cargo of corn, "the Court of Appeal seems to have been of the opinion that if the plaintiff had claimed rescission instead of damages he could have succeeded."[53] With respect, a careful perusal of the judgments reveals nothing to support that statement and, indeed, rescission was completely out of the question because the purchaser had already re-sold the corn.[54]

49. Cheshire and Fifoot, *op. cit.* at p. 236, note 3; H. A. Hammelmann, *op. cit.,* at p. 103.

50. (1904) 20 T.L.R. 385 at p. 386.

51. Indeed, if the judgment was for rescission and not for money had and received on a consideration that had wholly failed, it must be regarded as having been *per incuriam* because the goods had been accepted within the meaning of the Sale of Goods Act, 1893, *infra.*

52. (1877) 37 L.T. 452.

53. H. A. Hammelmann, *op. cit.,* at p. 105.

54. At p. 454 Cotton L.J. said, "It is not an attempt to repudiate a contract made, but not acted upon, for here the corn was sold."

In *Leaf* v. *International Galleries*[55] the question of rescission of a contract for the sale of an oil painting, which had been misrepresented as a Constable, came before the Court of Appeal. The Court, whilst expressly refraining from deciding whether rescission was available, held that, even if it were, any claim to it had been lost by the plaintiff's delay in making his claim. The observations of Denning L.J. who, with respect, may be described as the leading proponent of the complete fusion of law and equity and the leading opponent of the decisions in *Angel* v. *Jay* and *Seddon's Case*,[56] are most illuminating. His Lordship said, "Although rescission may in some cases be a proper remedy, it is to be remembered that an innocent misrepresentation is much less potent than a breach of condition; and a claim to rescission for innocent misrepresentation must at any rate be barred when a right to reject for breach of condition is barred. A condition is a term of the contract of a most material character, and if a claim to reject on that account is barred, it seems to me *a fortiori* that a claim to rescission on the ground of innocent misrepresentation is also barred."[57]

Now, it is possible, without either distorting the case law or offending against the principles of logic, to extend his Lordship's argument to show that, since the passing of the Sale of Goods Act, 1893, rescission is no longer applicable to executed contracts for the sale of goods. A warranty is admittedly less potent than a condition but prior to the passing of the Act a breach of warranty was a ground upon which rescission could be granted. Under the Act the only remedy for breach of warranty is damages. Clearly before the passing of the Act a warranty was more potent than a representation and that is logical enough, because the former is a term of the contract whilst the latter is not. Therefore, it is arguable that, because the Act deprives the parties of any claim to rescission for breach of warranty, there can be no rescission for innocent misrepresentation.[58]

Indeed, it has been stated on two occasions, on each of which a different view of the effect of the Judicature Act was taken, that the remedies laid down in the Sale of Goods Act, may well be exhaustive and exclude all other remedies.

55. [1905] 2 K.B. 86.

56. [1905] 1 Ch. 326, infra.

57. [1950] 2 K.B. at pp. 90-91.

58. I am fortified (if not justified) in making this extension by Professor Gower's observations with regard to Denning L.J.'s unconscious volte-face in the *Leaf Case:* "In other words Denning LJ., having kicked *Seddon's Case* out of the front door, lets it in again through the back", 13 *M.L.R.* at p. 364.

In *Riddiford* v. *Warren,*[59] the New Zealand Court of Appeal was of opinion that the Judicature Act had not altered the law as to the effect of innocent misrepresentation in contracts for the sale of goods[60] and that the position is recognised and continued by the *Sale of Goods Act.* Williams J. said, "The Law Amendment Act, 1882, which contains provisions corresponding to those in the English Judicature Act, provides that in certain specified cases the rules of equity are to prevail, and by the 11th section enacts generally that 'In matters not hereinbefore particularly mentioned in which there is any conflict between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail.' Then in 1895 the Sale of Goods Act was passed. It is entitled 'An Act for codifying the Law relating to the Sale of Goods.' Section 61, sub-section 2, of that Act is as follows. 'The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, duress or co-ercion, mistake or other invalidating cause, shall continue to apply to contracts for the sale of goods.' If in this section the words 'the rules of the common law' are used as they are in the Law Amendment Act — that is in contradistinction to the rules of equity — the section can have but one meaning. So reading the section *it is an implied declaration by the Legislature that up to the time of the passing of the Act the rules of the law merchant and of the common law, and not the rules of equity, applied to the contracts for the sale of goods,*[60a] and applied particularly with respect to the effect of the causes there mentioned by which contracts could be invalidated .... If the 'rules of the common law' meant the rules of the existing law other than statute law, but including the rules of equity, the phrase would have been 'the existing rules of law' or words of that kind .... I should suppose that the corresponding section of the English Act was introduced for the express purpose of settling the doubt raised in *Benjamin on Sales.*[61] (4th ed. 394) as to whether the doctrine of *Kennedy* v. *The Panama, &c., Mail Company*[62] continued to

59. (1901) 20 N.Z.L.R. 572.

60. See also the observations of Denniston J. at pp. 579-580.

60a. Italics supplied. In view of this unambiguous statement it is difficult to justify Professor Fleming's statement: "Williams J. conceded that the equitable rule had, by reason of the residuary section of the Judicature Act, temporarily superseded the restrictive common law principle . . . .", (1951) 25 *A.L.J.* 443 at p. 446.

61. *Sic.*

62. (1867) L.R. 2 Q.B. 580.

apply to contracts for the sale of goods notwithstanding the provisions of the Judicature Act. The existence of this doubt can hardly have been absent from the mind of the draftsmen of the Act of 1893, and the object of the Act was to define and settle the law."[63]

The restricted interpretation of the words "common law" in *Riddiford* v. *Warren,* although adopted by the Supreme Court of Victoria in *Watt* v. *Westhoven,*[64] has been the object of some criticism from academic sources.[65] However, that interpretation derives some slight support from at least three sources. In the first place the phrase used in the Sale of Goods Act is "rules of common law, *including the law merchant,"* and this reference to the law merchant would be unnecessary had common law been intended to include all law other than statute law. Secondly, the Act does provide for one equitable remedy, namely specific performance and that refutes the argument that the draftsman's mind was not directed to equitable remedies. Thirdly, the Partnership Act[66] of 1890 expressly preserves the rules of *equity* and of common law except so far as they are inconsistent with the express provisions of the Act. Now, the jurisdiction of equity in partnership matters was always extensive so that there would have been more reason for giving "common law" an extended meaning in that Act, because there was no doubt as to existing applicability of equitable rules.

In *Re Wait,*[67] Atkin L.J. without considering *Riddiford* v. *Warren,* and although he appears to have favoured the 'complete fusion' of law and equity view, expressed the opinion that the Sale of Goods Act may have cut down any extension of equitable principles effected by the Judicature Act. His Lordship said, "Without deciding the point, I think that much may be said for the proposition that an agreement for the sale of goods does not import any agreement to transfer property other than in accordance with the terms of the Code ..... The Code was passed at a time when the principles of equity and equitable remedies were recognised and given effect to in all our Courts, and the particular

63. (1901) 20 N.Z.L.R. 572.

64. [1933] V.L.R. 458.

65. Fleming, "Misrepresentation and the Sale of Goods", (1951) 25 A.L.J. 443 at p. 446.

66. 53 & 54 Vict., c.39, s.46. In *A.-G.* v. *Prince of Hanover* [1957] A.C. 436 at pp. 460-461 Viscount Simonds stated that in matters of construction it is permissible to refer "to other statutes in *pari materia".* Both the Sale of Goods Act and the Partnership Act are commercial codes.

67. [1927] 1 Ch. 606 at pp. 635-636.

equitable remedy of specific performance is specially referred to in section 52. The total sum of legal relations (meaning by the word 'legal' existing in equity as well as in common law) arising out of the contract for the sale of goods may well be regarded as defined by the Code, It would have been futile in a code intended for commercial men to have created an elaborate structure of rules dealing with rights at law, if at the same time it was intended to leave, subsisting with the legal rights, equitable rights inconsistent with, more extensive, and coming into existence earlier than the rights so carefully set out in the various sections of the Code."

The Law Reform Committee appears to have had thought along the same lines as the New Zealand Court of Appeal and Atkin L.J. In recommending that the remedy of rescission should be available in cases of innocent misrepresentation, even where a contract for the sale of goods has been executed, it draws attention to the fact that some amendments to the Sale of Goods Act will be necessary for the avoidance of anomalies.[68]

3. HIRE PURCHASE AGREEMENTS

The modern concept of hire purchase did not crystallise until after the passing of the Judicature Act and the Sale of Goods Act and although it is possible for a hire purchase agreement to constitute an agreement for the sale of goods within the meaning of the latter Act,[69] the modern practice is to draw the agreement so as to exclude the Act in accordance with the decision of *Helby* v. *Matthews*.[70]

As a general rule three parties are concerned with the negotiations leading up to the agreement. The dealer, the original owner of the goods, sells them to a finance company, which then hires them out to the hirer. Normally all negotiations are conducted between the dealer and the hirer so that any misrepresentations as to the goods will be made by the dealer, who is not a party to the ultimate contract between the hirer and the finance company. By a slight extension of the rule in *Collen* v. *Wright*,[71] the dealer may be made liable to the hirer upon a collateral contract, the consideration for which is the hirer's entry into the hire purchase agreement.[72] However, dealers are all too frequently,

68. Tenth Report at pp. 14-15, para. (8).
69. *Lee* v. *Butler* [1893] 2 Q.B. 318.
70. [1895] A.C. 471.
71. (1857) 7 E. & B. 301, approved *Starkey* v. *Bank of England* [1903] A.C. 114, see Lord Halbury's observations at p. 118.
72. *Brown* v. *Sheen and Richmond Car Sales* [1950] 1 All E.R. 1102 appears to follow the reasoning in *Collen* v. *Wright,* although it was not referred to. See also *Shanklin Pier Ltd.* v. *Detel* [1951] 2 K.B. 854 and *Andrews* v. *Hopkinson* [1957] 1 Q.B. 229.

especially in the second hand car trade, men of little substance and a party suffering loss as a result of the dealer's misrepresentations will have more chance of recovering, if he is able to bring an action against the finance company. The position is that the finance company is not really a dealer in goods but deals in money and therefore the dealer who conducts negotiations with the hirer cannot be said to be the agent of the finance company for the purpose of making representations as to the goods. In fact, the comparatively recent development of the tripartite hire purchase agreement raises many problems that cannot be easily adapted to the established rules of the law of contract.[73]

The Law Reform Committee has attempted to solve some of the problems by recommending that the dealer, who conducts the negotiations, shall, notwithstanding any agreement to the contrary, be the agent of the finance company for the purpose of any representations in respect of the goods. It is interesting to note that the hire purchase legislation in the Australian States, has to some extent anticipated this recommendation.[74]

4. CONTRACTS FOR THE PURCHASE OF COMPANY SHARES

Contracts for the purchase of shares fall into two clearly defined groups. In the first place the shares may be purchased directly from the company either on its formation or when it makes a fresh issue of shares. In these cases the rights of the purchaser to rescind for innocent misrepresentation are to a large extent governed by the provisions of the Companies Act[75] and are therefore outside the scope of this paper. Secondly, the shares may be purchased from an existing shareholder and in that case the transaction is governed by the normal rules relating to choses in action.

Seddon v. *North Eastern Salt Co.,*[76] was a case dealing with the purchase of shares from an existing shareholder and it is stated to have laid down the rule that rescission will not be granted of an executed contract for the sale of a chattel or chose in action on the ground of innocent misrepresentation. This so-called rule is in fact a reproduction

73. As to this comparatively recent development in Hire-Purchase, see the observations of Goddard L.J., in *Menzies v. United Motor Finance Corporation* [1940] 1 K.B. 559 at pp. 567-570. See also E. K. Braybrooke, " The Inadequacy of Contract", 1962 *University of W. Australia L.R.* 515 and W. E. D. Davies, "A Further Comment", *ibid.,* 549.

74. Hire Purchase Acts: N.S.W. s.6: Vic. s.6: S.A. s.6: W.A. s.6: Tas. s.10: Qld. s.6.

75. (1948) 11 & 12 Geo. 6, c.38, s.116 and see also Gower: *Modern Company Law* 2nd. ed. at p. 299 *et seq.*

76. [1905] 1 Ch. 326.

of the headnote to *Seddon's Case* in the Law Reports. Like *Angel* v. *Jay* the rule has been the object of considerable criticism the most potent of which is that, because Joyce J. found as a fact that there had been no misrepresentation, it forms no part of the *ratio decidendi.* Be that as it may, there has never been a decision directly to the contrary and indeed the rule has been cited with varying degrees of approval.[77]

Clearly, because of the liability of shares to fluctuate in value, there must be some time limit imposed upon any claim to rescind and there is, as in the case of contracts concerning land, a pragmatic reason for drawing the line at the point of "execution". In the case of persons buying shares in a public company it would seem to be not unreasonable to expect them to seek the advice of a stockbroker or other person skilled in share dealings. In the case of the purchase of shares in a private company, which is in many respects little more than an incorporated partnership,[78] there is, on the analogy of partnership, a case for allowing rescission even after "execution".

The Law Reform Committee, whilst acknowledging the criticisms of the rule in *Seddon's Case,* recognises that it has stood and been acted upon for a considerable time and that, if it is to be altered, it is for the legislature to do so.[79] This constitutes a salutary warning to those who like to think of the doctrine of precedent as an arithmetical formula, having a strict hierarchy of courts as its basic constant. In fact an appellate court rarely, especially where property rights are involved, overrules a decision which has been acted upon over a long period by businessmen and their legal advisers.[79a] Indeed, it is arguable that, where a decision in a constantly litigated branch of the law, such as the sale of goods, remains unchallenged by action in the Courts for over fifty years, the legal profession as a whole has accepted its soundness and has advised its clients accordingly. Any other explanation would tend to make the doctrine of precedent dependent upon the litigious stamina and financial resources of each individual litigant.

77. *Hindle* v. *Brown* (1908) 98 L.T. 791; *Comp. Chemin de Fer* v. *Leeston* (1919) 36 T.L.R. 68; *Armstrong* v. *Jackson* [1917] 2 K.B. 822; *First National Insurance* v. *Greenfield* [1921] 2 K.B. at p. 272. (I am grateful to Mr. Hammelmann, *op. cit.,* for these references).

78. See the observations of Lord Halsbury, in *Daimler* v. *Continental Tyre and Rubber Co.* [1916] 2 A.C. 307 at p. 316 and the judgment of Cozens-Hardy M.R., in *Re Yenidje Tobacco Company* [1916] 2 Ch. 426. *Cp. Foss* v. *Harbottle,* (1843) 2 Hare 461, 491-492.

79. Tenth Report at p. 6, para. (8).

79a. *Van Grutten* v. *Foxwell* [1897] A.C. 658 is an outstanding case in point. See especially the judgment of Lord Macnaghten.

5. CONTRACTS UBERRIMAE FIDEI

Although each of the parties to a contract is under an obligation not to make misrepresentations, either wilfully or innocently, he is, as a general rule, under no obligation to make full disclosure of all the relevant facts within his knowledge. In the exceptional cases where full disclosure is required the contracts are said to be *uberrimae fidei.* There appears to be some difference of opinion as to what kinds of contracts fall into this category. However, it is reasonably clear that where the duty to disclose does exist, it is traceable to one of two sources.

In the first place, because disclosure is necessary to the business efficacy of a particular transaction, a term is implied in the contract that full disclosure and the truth of what is disclosed is of the essence of the contract. In such cases even an innocent misrepresentation constitutes a fundamental breach of the contract and enables it to be avoided even after it is executed. This is a common law principle and it appears to have been applied only in the case of contracts of insurance.[80] The reason is that the estimation of an insurance risk is an actuarial process which can only be based upon the information supplied by the person seeking insurance cover. If that information is inaccurate the insurer's consent to take the risk is given under a fundamental misapprehension as to the extent of the risk.[81]

Secondly, where one of the parties owes a fiduciary duty to the other, there is a duty in equity to make full disclosure and not to make misrepresentations. It is submitted that the pre-contract existence of a fiduciary duty is necessary and that the duty to make full disclosure is not imposed merely because the contract will result in a fiduciary relationship between the parties. There is, of course, a lot to be said for the proposition that persons, who are negotiating to enter into a relationship entailing mutual trust and confidence, should observe a high standard of good faith during those negotiations but the decided cases do not say it.

It is stated in *Lindley on Partnership*[82] that the obligation of good faith extends to persons who are negotiating for a partnership but

80. With regard to Marine Insurance this principle is now codified in the Marine Insurance Act, 1906.

81. See the observations of Lord Mansfield in *Carter* v. *Boehm* (1766) 3 Burr. 1905 at p. 1909.

82. 12th ed. by E. H. Scamell at pp. 342-343. The writer falls into this same error in his own book on Partnership in Australia and New Zealand and can only say with Baron Bramwell, "The matter does not appear to me now as it appears to have appeared to me then." *Andrews* v. *Styrap* (1872) 26 L.T. 704 at p. 706.

Fawcett v. *Whitehouse,*[83] the only partnership case cited, does not support such a wide proposition. In that case the intending partner who was held to be under a duty to disclose was also held to have been acting as agent for his intended co-partners. Thus, his fiduciary duty to them is attributable to the pre-existing agency and not to the intended contract of partnership. However, the Partnership Act now expressly provides that a partnership entered into as a result of fraud or *misrepresentation* may be rescinded.[84]

The cases, such as *Erlanger* v. *New Sombrero*[85] and *Lagunas* v. *Lagunas Nitrate,*[86] in which completed conveyances of land to corporations were set aside, are explainable on the basis that the person who made the representation owed a fiduciary duty to the company. Where a fiduciary duty is owed, it is not accurate to describe any material misrepresentation as innocent. Although such a representation is innocent at common law. where a fiduciary duty exists, *Nocton* v. *Ashburton*[87] decided that non-disclosure or misrepresentation constitutes fraud in equity. It follows, that, where a person under a fiduciary duty makes a false statement inducing another to enter into a contract, that contract may be rescinded, even if the contract itself is not *uberrimae fidei,* and the maker of the misrepresentation believed it to be true.

6. Contracts of Continuing Obligation

There are certain kinds of contracts which may be said to remain executory throughout, in so far as the fundamental obligations of the parties cannot be wholly performed during the subsistence of the contract. A lease at a rack rent is an example of this type of contract but, as we have already observed, there are special considerations applicable to leases which militate against rescission after the vesting of the lease in the lessee.

Another continuing contract is partnership and here the statutory provisions with regard to rescission for misrepresentation[88] are no more than a declaration of the pre-existing law laid down by the House of Lords in *Adam* v. *Newbigging,*[89] with the possible addition of the general

83. (1829) 1 Russ. & M. 132.
84. Section 41.
85. (1878) 3 App. Cas. 1218.
86. [1899] 2 Ch. 392.
87. [1914] A.C. 932
88. *Supra,* note 84.
89. (1888) 13 App. Cas. 308.

right of indemnity against partnership liabilities to third parties. However, the relations of partners *inter se* has always been the concern of equity and this, coupled with the fact that the agreement between the partners can be rescinded without affecting their common law liability to persons who have dealt with the firm, renders rescission easier to apply than in many other classes of contract. Indeed, this continuing liability is emphasised by the necessity for the statutory indemnity.[90]

Continuing guarantees, as for example those in respect of current banking accounts, might be said to remain executory throughout. Certainly this appears to be the case where, as in *Mackenzie* v. *Royal Bank of Canada,*[91] an hypothecation of the guarantor's shares is an inseparable element of the guarantee. Professor Sykes has clearly indicated the executory nature of an hypothecation: "There is probably little need to say anything further than was said in the opening chapter of this work concerning the *hypothecation* type, beyond saying that here the creditor never becomes more than an encumbrancee, the debtor throughout parts neither with the full ownership nor any ownership rights and that action by the creditor is purely dependent on the fact of default."[92] In fact the only action that the creditor can take is for the equitable remedy of foreclosure and no doubt an innocent misrepresentation inducing the hypothecation bars that remedy in the same way that it precludes an order for specific performance. The existence of this class of contract was recognised by the Law Reform Committee,[93] although it was not made the object of a specific recommendation.

The foregoing examples are by no means exhaustive but are selected to illustrate the difficulty inherent in any attempt to deduce from the decided cases a rule having a general application to all contractual relationships. As Lord Atkin said: "The difficulty illustrates the danger of seeking to conduct well established principles into territory where they are trespassers."[94]

THE RECOMMENDATIONS OF THE LAW REFORM COMMITTEE

(1) Contracts for the sale or other disposition of an interest in land should not be capable of being rescinded after execution. An

90. The question of a general indemnity was left open in *Adam* v. *Newbigging* but it is now conferred by the Partnership Act, 1890, s.41(c).

91. [1934] A.C. 468 cited as a case of rescission of an executed contract by Cheshire and Fifoot, *op. cit.,* p. 236, note 4, and H. A. Hammelmann, *op. cit.,* p. 105.

92. The Law of Securities at p. 641.

93. Tenth Report at p. 6, para. 10.

94. *Re Wait* [1927] 1 Ch. 606, at p. 635 (then Atkin LJ.).

exception should, however, be made for leases to which section 54(2) of the Law of Property Act, 1925, applies viz. those taking effect in possession for a term not exceeding three years, and these should be treated in the same way as contracts not affecting land.

This recommendation, whilst substantially adopting the decision in *Angel* v. *Jay,* does recognise that short informal leases are subject to different considerations. However, the important distinction between freeholds and leaseholds with regard to investigation of title has been ignored. It is difficult to justify the statutory exclusion of the investigation of the freehold title by an intending lessee. It appears to have been introduced[95] as a concession to the large land owning corporations which derived substantial incomes from ground rents. It savours of feudal notions of petit treason resurrected by the Victorian Gothic revival. Although the anomaly resulting from this exclusion revealed by *Patman* v. *Harland,*[96] was remedied by the Law of Property Act, 1925,[97] the anomalous position with regard to notice of land charges remains.[98] Surely, now that the larger land owning corporations are transferring their investments to the share market, the time is ripe for an amending clause to the Law of Property Act, enabling an intending lessee to investigate his landlord's title without having to make it a special term of the contract?[98a]

(2) All other contracts should be capable of being rescinded after execution but the other bars to rescission should remain as at present.

Paragraph 10 of the Report sets out the existing bars, namely delay in seeking rescission, the impossibility of *restitutio in integrum* and the operation of the statutory periods of limitation of actions.

It must be remembered that delay in seeking rescission is not synonymous with the equitable doctrine of laches. In the context of

95. Vendor and Purchaser Act, 1874, (37 & 38 Vict, c. 78).

96. (1881) 17 Ch. D. 353.

97. Section 44(5).

98. *White* v. *Bijou Mansions, Ltd.* [1937] Ch. 610, at p. 620 *per* Simonds J. Moreover, this exclusion of investigation is at the basis of the distinction between an Absolute and a Good leasehold title under the Land Registration Act, 1925.

98a. Presumably long equitable leases, under *Walsh,* v. *Lonsdale* (1882) 21 Ch. D. 9, will still be rescindable. However, the point is largely academic because such leases are usually converted into legal periodic tenancies, by payment of rent and the tenant can terminate by notice. If he induced the lease by misrepresentation the landlord cannot obtain specific performance.

misrepresentation the latter does not operate until the representee knew or ought to have known of the falsity of the representation whereas *Leaf* v. *International Galleries*[99] decided that mere delay, independent of knowledge, may bar the remedy.

The problem as to where restitution ends and damages begin was formerly one of some complexity and has provided the legal profession as a whole with considerable exercise in the fine art of line drawing. However, as Professor Gower has pointed out,[1] since the decision of the House of Lords in *Spence* v. *Crawford*[2] the requirement of *restitutio in integrum* seems to mean little more than that the court must be able to do substantial justice as between the parties.

The operation of the Limitation Act, 1939 [3] calls for more detailed consideration, because the recommendations as a whole leave untouched many of the existing distinctions between rescission for innocent misrepresentation and repudiation or avoidance of the contract for common fundamental mistake or fraudulent misrepresentation.

Section 26 of the Act provides: "Where, in the case of any action for which a period of limitation is prescribed by this Act, either: (a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or (b) the right of action is concealed by the fraud of any such person as aforesaid, or (c) the action is for relief from the consequences of a mistake the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it: . . . ."

Sub-section (c) appears to have been the subject of judicial consideration in only one reported case. In that case, *Phillips-Higgins* v. *Harper,*[4] Pearson J. decided that the sub-section operated only where the mistake is an essential ingredient of the action and that, although the accounts presented by the defendant to the plaintiff misrepresented her true entitlement, she could not recover any sums which had accrued due to her before the commencement of the statutory period of limitation. His Lordship said, "The right of action is for the relief from the consequences of a mistake. It seems to me that this wording is carefully chosen to indicate a class of actions where a mistake has been made which

99. [1950] 2 K.B. 86 (C.A.).

1. (1950) 13 M.L.R. at p. 363.

2. [1939] 3 All E.R. 271.

3. 2 & 3 Geo. 6, c. 21.

4. [1954] 1 Q.B. 411.

has had certain consequences and the plaintiff seeks to be relieved from those consequences. Familiar examples are, ... Secondly, where there may be a contract entered into in consequence of a mistake and the action is to obtain the rescission or, in some cases, the rectification of such a contract...."[5] Now it is clear that his Lordship did not intend to indicate that his decision would have been different had the plaintiff's case been differently pleaded. It is submitted that his Lordship was indicating that in cases of innocent misrepresentation the sub-section is not operative, unless the misrepresentation gives rise to a common fundamental mistake which enables the contract to be set aside even after execution. The contract upon which the plaintiff's cause of action was based, although of the continuing kind, was executed in that it had been terminated some considerable time before action. It appears, then, that although the extension of remedies recommended by the Committee goes some where towards diminishing the distinction between fraudulent and innocent misrepresentation the distinction remains in the sphere of limitation of actions.

(3) Where the Court has power to order rescission (whether before or after the execution of the contract) it should have a discretion to award damages instead of rescission if it is satisfied that damages would adequately compensate the plaintiff, having regard to the nature of the representation and the fact that the injury is small compared with what rescission would involve.

(4) Where a representation is made independently and is later incorporated in the contract the plaintiff should have the same right to rescission (or to damages in lieu of rescission) as he would have in respect of the original misrepresentation.

Recommendations (3) and (4) are complementary and by making damages alternative to and not additional to rescission perpetuate the distinction between innocent and fraudulent misrepresentation. We have already observed that this distinction is frequently merely one of pleading and it is doubtful whether it serves any useful purpose in the law of contract. Indeed it is of small moment to the injured party whether his damage has been caused by a fraudulent or an innocent misrepresentation. His loss is the same in either event and there seems to be no good reason against confining allegations of fraud to actions in tort and criminal prosecutions. It is true that fraudulent misrepresentation may well have been outside the Committee's terms of reference so that, short of allowing damages and rescission in all cases as a matter of right, it was impossible for it to equate the two kinds of misrepresentation. However, by excluding damages where rescission is granted [except possibly in cases coming within recommendation [5]] the highly

5. *Ibid.,* at p. 418.

artificial distinction between damages and *restitutio in integrum* is preserved.

Recommendation (4) is obviously aimed at eliminating the anomaly adumbrated by Denning L.J. in *Leaf* v. *International Galleries*[6] by extending the right of rescission to those cases where the right to repudiate for breach of condition (and presumably for breach of warranty) is excluded by the provisions of the Sale of Goods Act.[7] Some amendments to that Act will be necessary if the recommendations are adopted. Furthermore, the severance of rescission from damages leads to at least one other juristic absurdity not considered by the Committee.

The cases which have decided that an innocent misrepresentation made by A to B, inducing B to enter into a contract with C, gives rise to a cause of action by B against A can be justified without in any way distorting the underlying contractual principle of *Collen* v. *Wright.*[8] That is to say, in consideration of B entering into the contract with C, A warrants the truth of his representation to B. In approving the rule in *Collen* v. *Wright,* Lord Haldane, in *Starkey* v. *Bank of England,*[9] emphasised that the rule was essentially based on contract and was not an exception to the rule that there can be no damages awarded for innocent misrepresentation simpliciter.

However, it is difficult, if not impossible, in the face of decisions of such high authority as *Derry* v. *Peek*[10] and *Candler* v. *Crane Christmas*[11] to justify any extension of the rule to cases where B is induced to enter into a contract with C by a misrepresentation made by C, himself. The absurdity resulting from such an extension is clearly illustrated by the decision of the High Court of Australia in *Shepperd* v. *Municipality of Ryde.*[12] In that case, an application for an interlocutory injunction, it

6. [1950] 2 K.B. 86 at p. 90.
7. Section 11(l)(c). Although the Committee draws attention to the need for alteration of ss.34 and 35, *infra,* nothing is said about s.11. *Cp. Watt* v. *Westhoven* [1933] V.L.R. 458: "Much of the language, and the arrangement in which the Act has codified the common law, would have to be revised to accommodate a doctrine whereby every warranty would become a condition, and every inducing statement not warranted would be a condition also", *per* Mann A.C.J. at p. 463.
8. (1857) 7 E. & B. 301, supra.
9. [1903] A.C. 114, at p. 118.
10. (1889) 14 App. Cas. 337.
11. [1951] 2 K.B. 164 (C.A.). It has been suggested that the plaintiff could have succeeded against the vendor of the shares (he was bankrupt and not worth suing). This may be so but only if it could be shown that the accounts constituted a term of the contract of purchase and sale. It is submitted that if the duty of care is to be based upon contract then it must be either a term of that contract or of some other contract. *E.g.* in *Nocton* v. *Ashburton* the duty of care, in that case a fiduciary duty, arose out of the contractual relationship of solicitor and client and not out of the contract of mortgage.
12. (1951) 85 C.L.R. 1.

was held that the plaintiff had established a *prima facie* case in support of what on any view appear to be two antithetical contentions. His contentions were that the representation by the defendant constituted either a term of the contract between himself and the defendant or a separate collateral contract between them. Presumably, if at the trial of the action, the plaintiff's case had remained unrebutted the Court would have had no alternative but to hold that the one statement was and was not a term of the contract.

> (5) Where a person has, either by himself or his agent, induced another to enter into a contract with him (including a contract relating to land) by an untrue representation made for the purpose of inducing the contract he should be liable in damages for any loss suffered in consequence of the representation unless he proves that up to the time the contract was made he (or his agent, if the representation was made by him) believed the representation to be true and had reasonable ground for his belief.

It is not clear whether this recommendation intends that, subject to its requirements, damages should be awarded in addition to rescission, where that is ordered, or whether the recommendation is subject to recommendations (3) and (4) and therefore to be restricted to cases where rescission is refused.

The first requirement that the representor can only avoid damages if he proves that he believed the representation to be true seems to burden him with a heavier onus of proof than in cases of fraud where the onus would be upon the representee to prove knowledge of the falsity or lack of genuine belief in the truth of the representation. Apart from this shifting of the onus of proof the requirements are the same as for fraudulent misrepresentation at common law, where absence of genuine belief would render the statement fraudulent. In *Smith* v. *Chadwick*[13] Lord Bramwell said, "An untrue statement as to the truth or falsity of which the man who makes it has no belief is fraudulent; for in making it he affirms he believes it, which is false." However, although the unreasonableness of the belief may be evidence tending to show that there was no genuine belief, it is not conclusive.

The requirement that the defendant must prove that he had a reasonable ground for his belief not only places an evidential onus upon him but envisages a far reaching change in the existing law. For example, on the facts of *Derry* v. *Peek* it is arguable that the promoters

13. (1884) 9 App. Cas. 187 at p. 203. *Cf. Derry* v. *Peek* (1889) 14 App. Cas. 337 *per* Lord Herschell at pp. 374-375,

had no reasonable ground for belief in the false statements contained in the prospectus. Indeed, the Committee's recommendation appears to apply the main principles of the Directors Liability Act,[14] to all cases of contractual misrepresentation. The provisions of that Act are now contained in section 43 of the Companies Act. Of that section Professor Gower says, "In effect this section maintains most of the common law requirements but removes the need to prove fraud and alters the onus of proof in favour of the plaintiff. Once the plaintiff has proved that he has sustained damage by reason of an untrue statement in a prospectus his action will succeed unless the defendant disproves responsibility for the prospectus in one of the ways mentioned below, or unless he proves that he had reasonable ground to believe, and did up to the time of allotment believe, that the statement was true.[15]

Once again this recommendation, whilst preserving the distinction between fraudulent and innocent misrepresentation, tends towards an assimilation of the remedies for each. Legislation on these lines may very well create more problems of interpretation than it solves and this kind of recommendation underlines the necessity for a comprehensive review of the law relating to all classes of misrepresentation.

(6) In the case of any hire-purchase agreement to which a finance company is a party, where negotiations are conducted by a dealer he should, notwithstanding any agreement to the contrary, be deemed to be the agent of the finance company for the purpose of any representation in respect of the goods which are the subject matter of the agreement.

As we have already observed, the comparatively recent development of the tripartite form of hire purchase transaction has raised problems with which the pre-existing law of contract was not fully equipped to deal. Whilst the existing law gives a remedy against the dealer where he has made representations there is no remedy in respect of those representations against the finance company. In fact, for this limited purpose, it is proposed that the dealer should be constituted the agent for the finance company and that it should not be possible for this statutory agency to be excluded by the terms of the hiring agreement. This recommendation substantially follows the recent statutory developments in Australian hire purchase law.[16] The factual, as opposed to the legal position, in the tripartite hire purchase agreement is that the finance company is lending the hirer the money to enable him to buy the goods from the dealer. The preliminary sale by the dealer to the finance company is merely a device for vesting the property in the goods in the finance company as a security for the "loan". As a matter

14. (1890), 53 & 54 Vict., c. 64.

15. *Modern Company Law,* 2nd. ed., at p. 307.

16. Supra, note 74.

of general practice the finance company's forms are produced to the hirer by the dealer and all the negotiations are left to him. It is to be hoped that the instant recommendation will have the indirect effect of making finance companies more selective in their choice of dealers and thereby drive a few undesirables out of business for lack of finance.

(7) It should not be possible to exclude liability to damages or rescission for any misrepresentation made with the intention of inducing a contract unless the representor can show that up to the time the contract was made he had reasonable grounds for believing the representation to be true.

As the Committee had pointed out there is little doubt that the decision of the House of Lords in *Boyd & Forrest v. Glasgow Railway*[17] leaves parties free to contract out of liability for misrepresentations, unless it can be shown that the representation was fraudulent. Moreover, *L'Estrange* v. *Graucob*[18] extended the same freedom to exclusion of liability for breaches of terms of the contract. These two decisions have been confined as far as possible by the tendency of the judiciary to interpret such clauses strictly and if possible unfavourably with regard to the persons desiring to be relieved from liability. Indeed, the effects of *L'Estrange* v. *Graucob* have already been mitigated by the decision in *Karsales (Harrow) Ltd.* v. *Wallis,*[19] in which it was held that a clause purporting to exclude liability for misrepresentation, breaches of conditions and warranties, and errors of description did not operate to exclude liability where there had been a breach of a fundamental term of the contract. However, the difficulty remains, as in the case of rescission for common mistake, of determining precisely what is a fundamental term of any particular contract.

The recommendations of the Committee, if adopted, will considerably diminish the importance of the breach of fundamental term doctrine.

(8) It is suggested that some of the remedies under the Sale of Goods Act, 1893, are unsatisfactory and will become still more so if the foregoing recommendations are adopted; and it might therefore usefully be considered whether —

(i) acts amounting to acceptance within the meaning of section 35 of the Act of 1893 should not be held to do so until the buyer has had an opportunity of examining the goods as contemplated by section 34;

17. [1915] S.C. (H.L.) 20

18. [1934] 2 K.B. 394.

19. [1956] 1 W.L.R. 936.

(ii) the right to reject specific goods for breach of condition should not depend on the passing of the property in the goods to the buyer but on his acceptance of the goods.

In *Hardy* v. *Hillerns & Fowler*[20] it was held that section 34 is subject to section 35. Therefore, in the present state of the law a buyer may be deemed to have accepted the goods within the meaning of the latter section, although he has not had an opportunity of examining them under the provisions of section 34.

Subject to an apparent contrary intention, section 18, Rule 1, of the Act provides that where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed. Section 11, (1), (c), provides, in effect, that, where the buyer has accepted the goods or in the case of specific goods the property has passed to him, he can no longer repudiate for breach of condition. As we have already observed, unless an innocent misrepresentation, which is not a term of the contract, is to become more potent than a warranty included as a term, some alteration will have to be made to this section which as a necessary implication excludes rescission for breach of warranty.

CONCLUSIONS

It is submitted that the Committee was unduly fettered by its terms of reference and that as a result it was unable to give full consideration either to the anomalies arising out of the distinction between innocent and fraudulent misrepresentation or to the existing law under the *Sale of Goods Act.* Consequently the recommendations envisage a kind of 'make do and mend' alteration to the existing law. Such legislation more often than not creates more problems than it solves. At the moment, whatever doubts are entertained by the judiciary and academic lawyers, the general legal practitioner has accepted for nearly sixty years the broad proposition that there can be no rescission of an executed contract on the ground of innocent misrepresentation. Indeed, he has probably recognised that proposition for centuries, and advised his clients accordingly. To challenge the rule on the ground that it is based on the decision of a single Chancery judge[21] is to beg the question and to ignore the fact that there is no case, either before or after the decision in *Seddon's Case,* which can be fairly interpreted as being contrary to the so called rule.

20. [1923] 2 K.B. 490.

21. It is interesting to note that Sir Matthew Ingle Joyce also laid down the Rule in *Garner* v. *Murray* [1904] 1 Ch. 57 and that it has stood unconfirmed and unchallenged ever since then.

There appears to be one minor error in the Committee's report. At page 5, paragraph 8, it is stated, "Other cases are sometimes cited as authority for the rule..." Clearly this should read "as authority *against* the rule ..." *

P. F. P. HIGGINS. **

*ACKNOWLEDGMENT.— Although I find myself in disagreement with Mr. H. A. Hammelmann, I have found his article *"Seddon* v. *North Eastern Salt Co."* of the greatest value. Indeed, that article has been read to the Court of Appeal on at least two occasions, *Leaf* v. *International Galleries, supra* and *Long* v. *Lloyd* [1958] 1 W.L.R. 753, and was acknowledged by the Law Reform Committee, Tenth Report, at p. 6, para. 8. It has provided me with a basis for my survey of the case law. I have selected for discussion those cases which at first sight appear to favour Mr. Hammelmann's view. However, I feel that I should make a brief mention of the other cases cited in his article.

At page 95, *Cooper* v. *Joel* (1859) 1 D.G.F. & J. 240 and *Slim* v. *Croucher* are cases where there was a total failure of consideration.

At page 96, *Rawlins* v. *Wickham* (1858) 3 De G. & J. 304 was a case of fraud. At p. 316 Knight Bruce L.J. said, "There was not as I think any moral fraud, but there was legal fraud. . . . ."

At page 96, *Att.-Gen.* v. *Ray* (1874) L.R. 9 Ch. 397 was an insurance case and as such the contract was one demanding the utmost good faith.

At page 96, *Re Reese River Mining Co.* (1896) L.R. 4 H.L. 64 was a case of fraud.

At page 74, Lord Hatherley said, "Because it was the duty of the directors not to wait for the filing of the bill, if they knew, as we must assume them to have known, that the contract had been entered into under those fraudulent representations."

At page 103, *Re Glub* (1900) 1 Ch. 355 was a case of trust and not contract.

At page 105, *Harrison* v. *Knowles and Foster* [1918] 1 K.B. 608 was an action for damages and not for rescission.

At page 105, *Abram Steam Co.* v. *Westville* [1923] A.C. 773 was clearly an executory contract in that neither party had fully performed his part.

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