

### **Fraud--Rescission--Innocent Misrepresentations--Actions at Law (Seneca Wire & Mfg. Co. v. A.B. Leach & Co., Inc., 247 N.Y. 1 (1928))**

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York on this point.<sup>4</sup> In that case it was held that since a polygamous marriage was void under the New York Domestic Relations Law, and since an action to annul such a marriage on that ground is expressly authorized, such a marriage being void and not voidable, could not be ratified under the weight of controlling authority;<sup>5</sup> the case further held that the fact that the parties lived together after it was competent for them to contract a legal marriage was no bar to an action for annulment.

As opposed to this doctrine there is a recent decision in which the Court of Chancery of New Jersey refused, on a very similar state of facts, to grant an annulment, on the ground that it would not permit one to thereby gain an unfair advantage over the other, and holding that the equitable doctrine of unclean hands was applicable.<sup>6</sup> It is of interest to note that while in the case under review the petitioner did not know of the existing marriage until after his marriage to the respondent, in most of the New Jersey cases cited in support of the *Keller* case there was such knowledge from the beginning.<sup>7</sup> However, the New Jersey decision is contrary in spirit to the New York cases above referred to and to the case first reviewed.

**FRAUD—RESCISSION—INNOCENT MISREPRESENTATIONS—ACTIONS AT LAW.**—The plaintiff purchased certain corporate notes from the defendant upon the latter's representation that they were, or were to be, listed on the New York Stock Exchange. This statement was in fact false, though innocently made. The plaintiff immediately upon ascertaining the facts rescinded the sale, offered to return the securities and demanded back the purchase price. The defendant refusing to comply with the plaintiff's request, the latter brought this action at law on the rescission to get its money back. The judgment of the Trial Term dismissing the complaint was affirmed by the Appellate Division, but the Court of Appeals reversed these rulings and held that the plaintiff made out a cause of action. *Seneca Wire & Mfg. Co. v. A. B. Leach & Co., Inc.*, 247 N. Y. 1 (1928).

The principal question in this case arose regarding the remedy sought by the plaintiff. It did not attempt to prove that the misrepresentations were fraudulently made, but sought relief by proving that the representations were false in fact and misled the plaintiff into making the purchase. This is the same ground for which an action might be maintained in equity.<sup>1</sup> But the plaintiff did not seek equitable relief, but rather only sought the return of its money, which constitutes a proper action at law.<sup>2</sup> The rule that it is not necessary that the misrepresentation should have been known to the party making it to be false, applies

<sup>4</sup> *Earle v. Earle*, 141 App. Div. 611, 126 N. Y. Supp. 317 (1910).

<sup>5</sup> *Petit v. Petit*, 105 App. Div. 312, 93 N. Y. Supp. 1001 (1905).

<sup>6</sup> *Keller v. Linsenmeyer*, 139 Atl. 33, *Advance Sheets of November 24, 1927*.

<sup>7</sup> *Edtl.*, N. Y. L. J., Feb. 14, 1928, at 2336.

<sup>1</sup> *Bloomquist v. Farson*, 222 N. Y. 375, 118 N. E. 855 (1918).

<sup>2</sup> *Bosley v. Nat. Machine Co.*, 123 N. Y. 550, 555, 25 N. E. 990 (1890); *U. S. v. Bitter Root Dev. Co.*, 200 U. S. 451 (1906); *Equitable Life Assurance Society v. Brown*, 213 U. S. 25, 50 (1909); *Curriden v. Middletown*, 232 U. S. 633 (1914).

to actions at law based upon rescission as well as to suits for rescission in equity.<sup>3</sup> Since the proof required in the action at law does not differ from that required in the equity suit, there is no reason for a distinction.<sup>4</sup> The rule in an action at law for damages based on fraud and deceit is that there must be proof of willful and fraudulent misrepresentation, knowingly made, resulting in damage.<sup>5</sup> But as above indicated, the plaintiff in this case did not seek damages, but only the return of his money. It is well settled now in the light of this decision that there is no distinction between an action at law based upon rescission and the equity action seeking rescission, but that in either of these actions an innocent misrepresentation gives rise to a cause of action.<sup>6</sup>

MUNICIPAL CORPORATIONS—STREETS—CONTRIBUTORY NEGLIGENCE—NUISANCE ORIGINATING IN NEGLIGENCE.—Plaintiff, walking in the City of Niagara Falls, stumbled as she was stepping from the driveway to the walk. She caught her heel upon a fan-like projection where the cement had melted and run. The projection jutted out about sixteen inches and was irregular and slanting with declivities and hollows. The same conditions had existed since the construction of the walk two or three years previous. The plaintiff lived in the neighborhood. She had noticed the projection at other times, though she paid no particular attention to it. The accident occurred during an afternoon in late December after darkness had set in. The case was tried upon the theory of nuisance. The jury was instructed that a nuisance existed if the city maintained the walk in a dangerous condition and if they so found, the contributory negligence of the plaintiff was not a defense. A verdict for the plaintiff was unanimously affirmed by the Appellate Division. *Held*, judgment reversed. If a nuisance has its origin in negligence, one may not avert the consequences of his own contributory negligence by affixing to the negligence of the wrongdoer, the label of a nuisance.<sup>1</sup> *McFarlane v. City of Niagara Falls*, 247 N. Y. 340 (1928).

The Court of Appeals distinguishes between a nuisance which is the consequent of an originally wrongful act and one, as in the principal case, where the original act is lawful but negligently performed. The distinction is clear<sup>2</sup> and worthy of note.

Nuisance, as a concept of the law, has more meanings than one.<sup>3</sup> Negligence is not an element of the term in its primary sense.<sup>4</sup> However,

<sup>3</sup> *Continental Ins. Co. v. Equitable Trust Co.*, 127 Misc. 45, 215 N. Y. Supp. 281 (1926); 2 *Williston on Sales*, 2d ed., § 632.

<sup>4</sup> *Schank v. Schuchman*, 212 N. Y. 352, 106 N. E. 127 (1914).

<sup>5</sup> *Reno v. Bull*, 226 N. Y. 546, 124 N. E. 144 (1919).

<sup>6</sup> *Edtl.*, N. Y. L. J., Feb. 6, 1928, at 2202.

<sup>1</sup> *Junkerman v. Tilyou Realty Co.*, 213 N. Y. 404, 408 (1915); *Ugla v. Brokaw*, 117 App. Div. 586, 591 (1907); *Tusk v. Peck*, 132 App. Div. 426, 432 (1909); 199 N. Y. 546 (1910); *Hartman v. Lowenstein*, 90 Misc. 686, 689 (1915).

<sup>2</sup> *McFarlane v. City of Niagara Falls*, *supra*, at page 343.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Heeg v. Ticht*, 80 N. Y. 579 (1880); In *McCarty v. Nat. Carbonic Gas Co.*, 189 N. Y. 40 (1907), it was held: "One who emits noxious fumes or