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ELECTION OF REMEDIES- CONTRACTS INDUCED BY FRAUD

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ELECTION OF REMEDIES — CONTRACTS INDUCED BY FRAUD — In 1939, plaintiff brought an action alleging in his complaint that defendant became indebted to him on December 17, 1928, for \$13,400, for money had and received by defendant to the use of plaintiff. In a bill of particulars plaintiff pointed out that the indebtedness arose from the purchase of certain bonds and the subsequent rescission of the contract of purchase prior to the commencement of this action, basing his right to rescind upon misrepresentations made by, and the fraud of, defendant in inducing the purchase of said bonds. When defendant moved for a summary judgment on the ground that an action for money had and received was barred under the six-year statute of limitations, plaintiff introduced affidavits alleging that the fraud was not discovered until March, 1938. *Held*, this action must be treated as one for money had and received and is therefore extinguished by the six-year statute of limitations. The question whether an action for damages due to the alleged fraud is barred by the present action is not before the court.¹ *Cohen v. City Company of New York*, 283 N. Y. 112, 27 N. E. (2d) 803 (1940).

Where a purchaser is fraudulently induced to enter into a contract of purchase by the misrepresentations of the vendor, three remedies are available to him. First, he may bring an action at law for damages resulting from the fraud; second, he may sue in equity for rescission of the contract and for restitution of the consideration, or the court may award damages if rescission be impracticable; or third, he may rescind and, tendering a return of his consideration, sue quasi-contractually for restitution.² The last method was attempted in

¹ Plaintiff carried this action to judgment on the theory that it was to be treated as an action for damages, not barred by the statute of limitations. The court felt that fraud, being alleged in the manner it was here, was not the gravamen of the action but only incidental thereto and was only the ground for rescission. Thus they could not disregard the quasi-contractual nature of the complaint.

² 4 WIS. L. REV. 33 (1926); 13 N. C. L. REV. 226 (1935).

the principal case and resulted in judgment for defendant due to the statute of limitations. The court itself posed the question whether an action for damages for fraud might now be brought, citing cases to indicate, but not deciding, that the problem of election of remedies is involved.³ Since plaintiff himself has already rescinded the contract, a bill in equity for rescission would probably be barred by the present suit, but that result would be due to the doctrine of election of rights and not election of remedies.⁴ Rescission of the contract by plaintiff has been a disaffirmance which operates to fix his substantive rights. There is no longer need for relief which is peculiarly equitable, and the mere presence of fraud would not enable plaintiff to come into equity.⁵ Plaintiff's right to bring an action for damages for the fraud, however, would involve a consideration of the doctrine of election of remedies. Stated broadly, the actions are inconsistent, money had and received being based on disaffirmance of the contract, damages on the theory that the contract still exists.⁶ If only special damages are requested, however, there is no point of inconsistency.⁷ There is authority that the mere filing of the quasi-contract action is a final election precluding all other remedies, if two or more remedies actually exist.⁸ But if the one attempted is barred by the statute of limitations there is no choice and consequently no election.⁹ It would then appear, taking even a strict approach to the doctrine, that a suit for damages after the present action would be successful. However, it is to be noted that the courts are more and more tending to disfavor the doctrine of election, especially where by plaintiff's mere mistake he is deprived of a substantial right, and they tend to apply it only in the strictest cases, analogous to estoppel or *res adjudicata*.¹⁰ In the principal case it appears that there has been no detrimental change of position by defendant and no estoppel. There has been no adjudication of plaintiff's right, the action being barred from hearing. Thus, there really being no double vexation of defendant, and the first action being in effect non-existent because of the bar of the statute, the action for damages might be permitted.¹¹

³ *Schenck v. State Line Telephone Co.*, 238 N. Y. 308, 144 N. E. 592 (1924); *Clark v. Kirby*, 243 N. Y. 295, 153 N. E. 79 (1926).

⁴ 23 WASH. UNIV. L. Q. 527 (1938).

⁵ *Seneca Wire & Mfg. Co. v. A. B. Leach & Co.*, 247 N. Y. 1, 159 N. E. 700 (1928); 95 A. L. R. 1000 at 1003 (1935).

⁶ In these actions, however, purchase-money paid prior to the discovery of the fraud was included in plaintiff's damages for the deceit. *Kvedar v. Shapiro*, 98 N. J. L. 225, 119 A. 104 (1922); *Steele v. Scott*, 192 Cal. 521, 221 P. 342 (1923); *Houze v. Blackwell*, 144 Ga. 700, 87 S. E. 1054 (1915); *Way v. Siddall*, (Tex. Civ. App. 1927) 299 S. W. 313; *Copeland v. Reynolds*, 86 N. H. 110, 164 A. 215 (1933).

⁷ 32 MICH. L. REV. 113 (1933).

⁸ *Donovan v. Curts*, 245 Mich. 348, 222 N. W. 743 (1929).

⁹ *Schenck v. State Line Telephone Co.*, 238 N. Y. 308, 144 N. E. 592 (1924).

¹⁰ *Nuveen v. Board of Public Instruction*, (C. C. A. 5th, 1937) 88 F. (2d) 175, writ of certiorari denied, 301 U. S. 691, 57 S. Ct. 794 (1937); 38 COL. L. REV. 292 (1938).

¹¹ On the general problem of election of remedies, see annotation in 35 A. L. R. 1153 (1925), and continuing in 123 A. L. R. 378 (1939).