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EQUITY — ELECTION OF REMEDIES — DECEIT AFTER RESCISSION — Plaintiff purchaser rescinded a contract of sale on the ground of fraud and sued defendants in a deceit action, alleging as damages a payment made on the purchase price and special expense incurred by reason of making the purchase. *Held*, recovery for both items of damage will be allowed. *Copeland v. Reynolds*, (N. H. 1933) 164 Atl. 215.

The usual view is that the action of deceit is based on affirmance of the contract and therefore actions of assumpsit and deceit relating to the same contract can be brought;[1] that a rescission of the contract, therefore, bars a deceit action.[2] In the usual case a rescission of the contract is followed by an action for specific restitution or for benefits conferred, and this restores the plaintiff to his initial position. Hence, when in addition an action of deceit is brought the action cannot be maintained because of the inability to prove damage.[3] From this the notion has arisen that rescission and the bringing of an action of deceit are inconsistent, and mutually exclusive. There is, however, no inherent reason, either in practice or in logic, to support this view, and some relaxation of it can be found in the cases. In accord with the principal case, a deceit action has been allowed by various courts where the buyer has suffered special damages so that a rescission and the remedies based thereon do not make him whole. Thus it has been held that freight charges and the cost of installing a machine,[4] that expenses incurred

[1] Whittier v. Collins, 15 R. I. 90, 23 Atl. 47 (1885); Standard Sewing Machine Co. v. Owings, 140 N. C. 503, 53 S. E. 345 (1906); Oben v. Adams, 89 Vt. 158, 94 Atl. 506 (1915).

[2] Donovan v. Curts, 245 Mich. 348, 222 N. W. 743 (1929); Viking Refrigerators, Inc. v. McMeachin, 145 Okla. 76, 291 Pac. 521 (1930); Moore v. Roxbury, 85 N. H. 394, 159 Atl. 357 (1932).

[3] Fields v. Brown, 160 N. C. 295, 76 S. E. 8 (1912); Linderman Machine Co. v. Hillenbrand Co., 75 Ind. App. 111, 127 N. E. 813 (1920).

[4] Linderman Machine Co. v. Hillenbrand Co., 75 Ind. App. 111, 127 N. E. 813 (1920); United Engine Co. v. Junis, 196 Iowa 914, 195 N. W. 606 (1923).

in attempting to raise the hull of a ship,[5] that damages for injury to one's business,[6] that loss resulting to the buyer of a horse as a result of the spread of an infectious disease to others of his horses[7] could be recovered in an action of deceit after rescission of the contract. Damages in a deceit action have been allowed in several cases against a third person who induced plaintiff's entry into the transaction.[8] Under the view of the principal case an action in deceit of and by itself is ambiguous. It is important to determine the precise character of the action because of the bearing on damages. The deceit action is not necessarily an affirmance of the contract, but perhaps should be so taken unless it appears from the record to be based on rescission. In the principal case the plaintiff alleged the purchase price as an item of damage, and the court concluded from an examination of the whole record that the theory of the action was rescission.[9]

M. S.

[5] McRae v. Lonsby, (C. C. A. 6th, 1904) 130 Fed. 17.

[6] American Pure Food Co. v. Elliot & Co., 151 N. C. 393, 66 S. E. 451 (1909).

[7] Faris v. Lewis, 41 Ky. 375 (1842).

[8] Hedden v. Griffin, 136 Mass. 229 (1884); Nash v. Minnesota Title Ins. & Trust Co., 163 Mass. 574, 40 N. E. 1039 (1895); Kuechle v. Springer, 145 Ill. App. 127 (1908); Schelske v. Smith, 55 S. D. 502, 226 N. W. 734 (1929).

[9] Also see Kvedar v. Shapiro, 98 N. J. L. 225, 119 Atl. 104 (1922); Warren v. Cole, 15 Mich. 265 (1867). Compare with Donovan v. Curts, 245 Mich. 348, 222 N. W. 743 (1929); Adams v. Barber, 157 Mo. App. 370, 139 S. W. 489 (1911).