St. John's Law Review

Volume 14
Number 1 *Volume 14, November 1939, Number 1*

Article 7

August 2013

Award of Damages in Addition to Rescission in Sale of Goods

William F. Podesta

tion of the privity rule is not the only solution, for a more liberal interpretation of pure food statutes so as to include foods with foreign deleterious substances within the meaning of adulteration would have the same effect. True, the manufacturer would virtually be an insurer of the wholesomeness of the food. But if this is the way a manufacturer's vigilance can be stimulated, then the safeguarding of the public health requires it.

LOUIS J. GUSMANO.

AWARD OF DAMAGES IN ADDITION TO RESCISSION IN SALE OF GOODS.

I.

The vendee's right to rescind for breach of warranty is governed in New York by Section 150, subdivision I(d), of the Personal Property Law[1] which reads:

> "* * * Where there is a breach of warranty by the seller, the buyer may at his election, * * * (rescind) the contract or the sale and refuse to receive the goods, or if the goods have already been received, return them to the seller and recover the price or any part thereof which has been paid."

This section codified the New York common law rule which limited the rescinding vendee's recovery to the return of the purchase price.[2]

---

manufacturer, deny the consumer the right to recover if damage results from the absence of those qualities when such absence is not readily noticeable"); see dissenting opinion of Clarkson, J., in Thomason v. Ballard & Ballard, 208 N. C. 1, 179 S. E .30 (1935) ("It is of the greatest importance to the health of the general public that, when they purchase food or drink, it should be pure, wholesome and fit for use. It is a hard measure and almost impossible to prove negligence, and by the weight of authorities this rule under modern conditions is fast growing obsolete. The true rule, in more recent decisions, is that there is an implied warranty from the manufacturer to the consumer, the general public, where there is no opportunity to inspect, that the food or drink is pure, wholesome, and fit for consumption"); Catani v. Swift & Co., 251 Pa. 52, 95 Atl. 931 (1915); Hertzler v. Manshum, 228 Mich. 416, 200 N. W. 155 (1924).

[1] N. Y. PERS. PROP. LAW § 150, subd. 1(d); note 11, *infra*.

[2] Apex Chemical Co. v. Compson, 171 N. Y. Supp. 60 (1918); Oetjen v. Whitehead Metal Co., 126 Misc. 369, 213 N. Y. Supp. 600 (1926); Bennett v. Piscitello, 170 Misc. 177, 9 N. Y. S. (2d) 69 (1938); Loader v. Brooklyn Chair Co., 64 App. Div. 615, 72 N. Y. Supp. 297 (2d Dept. 1901); Joannes Bros. Co. v. Czarnikow-Rionda Co., 121 Misc. 474, 201 N. Y. Supp. 409 (1923), *aff'd*, 209 App. Div. 868, 205 N. Y. Supp. 930 (1st Dept. 1924); Weigel v. Cook, 237 N. Y. 136, 142, 142 N. E. 444, 446 (1923) (the court modified judgment of the lower court by deducting damages, including general expenses

In many cases the vendee's actual damages are far in excess of the contract price, and consequently, mere rescission does not afford him a complete remedy.[3] It is submitted that this seemingly harsh rule is the result of the New York courts' misapplication of the election of remedies doctrine.[4]

II.

Although rescission is a comparatively modern remedy, still its short history is marred by doubt and indecision on the part of courts as to its application. By far the greatest doubt has arisen in cases involving a vendee's right to rescind on the ground of breach of warranty. It was settled early in English law that no such right existed in favor of a vendee.[5] In the United States, however, the question was not so conclusively settled. The views taken by the courts of the various states were divided between the English rule [6] and the Massachusetts rule [7] which allowed rescission.

A review of cases handed down by the New York courts reveals that even *within* this state there was an apparent lack of harmony as to a vendee's right to rescind for breach of warranty.[8] Prior

---

in operation and installation of machinery, and labor paid, stating that "a buyer cannot recover both damages and purchase price when a case has been tried on the basis of rescission"); Sorenson v. Keesey Hosiery Co., 244 N. Y. 73, 80, 154 N. E. 826, 829 (1926) ("The party who rescinds can claim nothing beyond restitution"). *Contra:* Waldman Produce, Inc. v. Frigidaire Corp., 175 Misc. 438, 284 N. Y. Supp. 167 (1935). See 3 WILLISTON, CONTRACTS (Rev. ed. 1937) § 1464; MARIASH, SALES § 349; 55 C. J. (1931) p. 296, § 281; Note (1909) 23 HARV. L. REV. 141. *Cf.* Waldman Produce, Inc. v. Frigidaire Corp., 157 Misc. 438, 284 N. Y. Supp. 167 (1935); 3 BLACK, CANCELLATION AND RESCISSION (2d ed. 1929) § 695.

[3] In Kimball & Austin Mfg. Co. v. Vroman, 35 Mich. 310, 326 (1877), the court stated: "It might easily happen that the expense and trouble to which a purchaser is put by reason of the failure of his purchase to meet his expectations will exceed the purchase price so much as to render its reembursement an insufficient compensation, while the obligation to retain the article would be more burdensome." See Rogge, *Damages Upon Rescission for Breach of Warranty* (1929) 28 MICH. L. REV. 26.

[4] See note 29, *infra.*

[5] See Williston, *Rescission for Breach of Warranty* (1903) 16 HARV. L. REV. 465.

[6] Trumbell v. O'Hara, 71 Conn. 172, 41 Atl. 546 (1898); Hutchinson Lumber Co. v. Dickerson, 127 Ga. 328, 56 S. E. 491 (1907); Crabtree v. Kile, 21 Ill. 180 (1859); H. W. Williams Transportation Line v. Darius Cole Transportation Co., 129 Mich. 209, 88 N. W. 473 (1901); Voorhees v. Earl, 2 Hill 288 (N. Y. 1842); Eshleman v. Lightner, 169 Pa. St. 46, 32 Atl. 63 (1895); Hoadley v. House, 32 Vt. 179 (1859).

[7] Whalen v. Gordon, 95 Fed. 305 (C. C. A. 8th, 1898); Thompson v. Harvey, 86 Ala. 519, 5 So. 825 (1889); Hoult v. Baldwin, 67 Cal. 510, 8 Pac. 440 (1885); Rogers v. Hanson, 35 Iowa 283 (1872); Tainter v. Wentworth, 107 Me. 439, 78 Atl. 572 (1911); Smith v. Hale, 158 Mass. 178, 33 N. E. 493 (1893); Sherrill v. Coad, 92 Neb. 406, 138 N. W. 567 (1912).

[8] Muller v. Eno, 14 N. Y. 597 (1860); *cf.* Rust v. Ekler, 41 N. Y. 488 (1869).

to 1869, our courts were in accord that mere breach of warranty did not give rise to an action for rescission.[9] A statement made by the court in *G. B. Shearer Co.* v. *Kakoulis,*[10] clearly indicates the unsettled state of the common law in New York on the point. The court therein stated that Section 150[11] "gives to the buyer a remedy unknown to the common law of this state namely the right to rescind the contract and return the goods." The court was mistaken in its views on this point for subsequent to 1869 the courts clearly recognized a vendee's right to rescind on the ground of breach of warranty.[12] It must be said, however, that Section 150, subdivision 1(d), of the Personal Property Law[13] has greatly extended a vendee's right to rescind. In 1869, though the court in *Rust* v. *Eckler*[14] recognized breach of warranty as a ground for rescission, it restricted a vendee's right to rescind to executory contracts, and left a vendee who had executed the contract of sale to his action for damages.[15] With the passage of Section 150 of the Personal Property Law,[16] however, this situation was remedied, for by the express language of the statute, a vendee is now entitled to rescind *a contract to sell or,*

[9] Voorhees v. Earl, 2 Hill 288, 291 (N. Y. 1842) ("Where there is a warranty on the sale of goods but no fraud, and no stipulation that the goods may be returned, though the warranty be broken, the vendee cannot rescind the contract without the consent of the vendor"); Muller v. Eno, 14 N. Y. 597 (1860).

[10] 144 N. Y. Supp. 1077 (1913).

[11] N. Y. PERS. PROP. LAW § 150 reads in part:

"1. Where there is a breach of warranty by the seller, the buyer may at his election,

"(A) Accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminition or extintion of the price;

"(B) Accept or keep the goods and maintain an action against the seller for damages for breach of warranty;

"(C) Refuse to accept the goods if the property therein has not passed, and maintain an action against the seller for damages for breach of warranty;

"(D) Rescind the contract or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and *recover the price or any part thereof which has been paid.*

"2. When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted." [Italics ours.]

[12] Rust v. Eckler, 41 N. Y. 488 (1869); Parks v. Morris Axe & Tool Co., 54 N. Y. 586 (1874); Dounce v. Dow, 57 N. Y. 16 (1874); Brigg v. Hilton, 99 N. Y. 517, 3 N. E. 51 (1885); Fairbanks Canning Co. v. Metger, 118 N. Y. 260, 23 N. E. 372 (1890).

[13] See note 11, *supra.*

[14] 41 N. Y. 488 (1869), wherein the court stated: "On *an executed present sale* of an article with warranty, * * * it is neither necessary or allowable to rescind the sale." [Italics ours.]

[15] Brigg v. Hilton, 99 N. Y. 517, 3 N. E. 51 (1885) (damages for breach of warranty, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the article at the time of delivery to the vendee and the value it would have had if it answered to the warranty); N. Y. PERS. PROP. LAW § 150.

[16] See note 11, *supra.*

a sale of goods, on the ground of breach of warranty.[17] In fact, subdivision 1(d) of the enactment is apparently the only inroad the section has made upon the common law. The remedies provided for in subdivisions 1(a), (b) and (c) have always been open to a vendee for breach of warranty.[18] Indeed, the usual remedy selected by a vendee at common law was either to counterclaim against the seller in an action for the price as provided for in subdivision 1(a),[19] or to bring an action against the vendor for damages as provided for in subdivision 1(b).[20]

Though these various remedies have long been available to an injured vendee, both at common law [21] and under present statutory provisions,[22] an action for rescission and an action for damages have been held to be mutually exclusive, and consequently, it has been incumbent upon the vendee to elect between these two remedies. It has been consistently held that an action for rescission denies that a contract ever existed and is, therefore, inconsistent with an action for damages, since the latter necessarily affirms the existence of a contract.[23]

---

[17] See Fairbanks Canning Co. v. Metger, 118 N. Y. 260, 23 N. E. 372 (1890); note 11, *supra.*

[18] Brigg v. Hilton, 99 N. Y. 517, 527, 3 N. E. 51, 55 (1885) ("Nor can it be material whether the liability for breach of warranty is enforced by a direct action for damages, or by any way of counterclaim, or when sued for the price * * * by way of recoupment"); see Back v. Levy, 101 N. Y. 511, 5 N. E. 345 (1886); WHITNEY, LAW OF SALES (2d ed. 1934) § 210.

[19] In Ames v. Norwich Light Co., 122 App. Div. 319, 106 N. Y. Supp. 952 (3d Dept. 1907), the court sustained a counterclaim for damages for breach of warranty, as to full economy, in an action for the price of a power plant. See Bloom v. Reisman, 76 Misc. 524, 135 N. Y. Supp. 547 (1912); Nash v. Weidenfeld, 41 App. Div. 511, 58 N. Y. Supp. 609 (1st Dept. 1899), *aff'd,* 166 N. Y. 612, 59 N. E. 1127 (1901).

[20] Plumb v. J. W. Hallauer & Son, Inc., 145 App. Div. 20, 130 N. Y. Supp. 147 (3d Dept. 1911); Staats v. Byers, 64 App. Div. 634, 73 N. Y. Supp. 893 (1st Dept. 1902), *aff'd,* 174 N. Y. 508, 66 N. E. 1117 (1903) ("An action always lies for breach of contract of sale unless it is waived"); Tompkins v. J. & R. Lamb, 121 App. Div. 366, 106 N. Y. Supp. 6 (3d Dept. 1907), *aff'd,* 195 N. Y. 518, 88 N. E. 1133 (1909).

[21] William A. Thomas v. Holst, 120 N. Y. Supp. 747 (1910); Whiting v. Derr, 121 App. Div. 239, 105 N. Y. Supp. 854 (2d Dept. 1907); Norton v. Dreyfuss, 106 N. Y. 90, 12 N. E. 428 (1887).

[22] Miller v. Zander, 85 Misc. 499, 147 N. Y. Supp. 479 (1914); Kaufman v. Levy, 102 Misc. 689, 169 N. Y. Supp. 454 (1918); Waldman Produce, Inc. v. Frigidaire Corp., 157 Misc. 438, 284 N. Y. Supp. 167 (1935); Putnam v. Interior Metal Mfg. Co., 169 App. Div. 248, 154 N. Y. Supp. 464 (1st Dept. 1915); Uflang v. McMahon, 215 App. Div. 267, 213 N. Y. Supp. 519 (4th Dept. 1926); Schmelzer v. Winegar, 217 App. Div. 194, 216 N. Y. Supp. 507 (4th Dept. 1926); Joannes Bros. Co. v. Lamborn, 237 N. Y. 207, 142 N. E. 587 (1923), *aff'g,* 206 App. Div. 792, 200 N. Y. Supp. 569 (1st Dept. 1923).

[23] See notes 21, 22, *supra.*

Novel judicial opinion was expressed on this point by the court in Abramson v. Leo, 240 App. Div. 343, 357, 269 N. Y. Supp. 814, 829 (3d Dept. 1934), when in effect it denied any inconsistency between an action for rescission and an action for deceit. The court in the *Abramson* case in allowing the plaintiff vendee to maintain an action for deceit after he had sued for rescission stated:

The strict application of the election of remedies doctrine has been the direct cause of the inadequacy of rescission as a complete remedy. The New York courts' strict adherence to the doctrine has mainly been the cause of limiting the vendee's recovery in an action for rescission to the recovery of the purchase price,[24] for, any claim the vendee may assert over and above the purchase price, in the eyes of the court, assumes the form of a distinct action for damages as well as an action for rescission,[25] and the claim is consequently denied on the ground that it is inconsistent with an action for rescission.

It is chiefly for this reason that the doctrine has been severely criticized by legal writers who have questioned the legal justification of the doctrine,[26] as well as commented on the injustice which often results from its application.[27] It is submitted that the logic underlying the basis of the doctrine, in so far as it applies to actions for rescission,[28] cannot be questioned; grounds for criticism, however, do

---

"In the present case the plaintiff did not take an inconsistent position. The basis of both actions was fraud."

[24] The New York common law rule represented the minority view. The view taken by the majority of state courts allowed the buyer to recover damages, over and above the purchase price, in an action for rescission. McRae v. Lonsby, 130 Fed. 17 (C. C. A. 6th, 1904); Olson v. Brison, 129 Iowa 604, 106 N. W. 14 (1906); International Filter Co. v. Ice Co., 84 Kan. 704, 115 Pac. 635 (1911); Beal v. Threshing Machine Co., 84 Mo. App. 639 (1900); Hart-Parr Co. v. Duncan, 75 Okla. 59, 181 Pac. 288 (1919); Houser and Haines Mfg. Co. v. McKay, 53 Wash. 337, 101 Pac. 894 (1909) ("The right to rescind being equitable, if damages as well as rescission is necessary to complete justice, both will be allowed"); 3 BLACK, *loc. cit. supra* note 2; see Rogge, *loc. cit. supra* note 3; Note (1938) 38 COL. L. REV. 888.

[25] Oetjen v. Whitehead Metal Products Co., 126 Misc. 369, 213 N. Y. Supp. 600 (1926) (refused to allow vendee cost of testing metal purchased); Joannes Bros. Co. v. Czarnikow-Rionda Co., 121 Misc. 474, 201 N. Y. Supp. 409 (1923), *aff'd*, 209 App. Div. 868, 205 N. Y. Supp. 930 (1st Dept. 1924). In Sorenson v. Keesey Hosiery Co., 244 N. Y. 73, 154 N. E. 826 (1926), the court refused plaintiff vendee's claim for damages, including freight charges, insurance and carting, stating that the damages sought by the vendee were inconsistent with an action for rescission, and could only be recovered in an action for damages.

[26] Hines, *Election of Remedies and Criticism* (1913) 26 HARV. L. REV. 707; Rothchild, *A Remedy for Election of Remedies: A Proposed Act to Abolish Election of Remedies* (1929) 14 CORN. L. Q. 141; Davidson, *A Proposal to Abolish the Doctrine of Election of Remedies* (1934) 13 ORE. L. REV. 298; Legis. (1939) 14 ST. JOHN'S L. REV. 206; Notes (1923) 23 COL. L. REV. 380; (1938) 38 COL. L. REV. 888; (1923) 36 HARV. L. REV. 393; (1925) 34 YALE L. J. 665. For a complete discussion of the application of the doctrine of remedies see LEG. DOC. No. 65F (1939).

[27] See (1923) 23 COL. L. REV. 380, wherein the writer states: "If the election of remedies is an outgrowth of substantive rights it is evident that the basic principle of the original doctrine has been forgotten, for the former is constantly applied in favor of defendants who have been guilty of inequitable conduct against innocent plaintiffs."

[28] Recently statutory changes have been made in the doctrine of election of remedies. These amendments are found in N. Y. CIV. PRAC. ACT § 112, subds. A, B, C, D. Section 112, subd. (A) will apparently be effective, to at least a limited extent, in alleviating the harsh effects of the election of remedies doctrine on the rescinding buyer. The statute reads: "Rights of action against

exist in the New York courts' application of it. The courts have apparently overlooked the purpose of the doctrine, namely, the prevention of double recovery by a plaintiff for a single wrong.[29]

There can be no doubt that double redress would be had by the plaintiff (vendee) were he allowed to recover the purchase price in an action for rescission and then be allowed to recover the difference between the value of the article as warranted and the value of the article as received. For example, assume that *R* sells *E* a horse for $500, expressly warranting it to be sound. After delivery and payment of the price, *E* discovers that the horse is latently defective, and therefore, worth only $300. *E* seeks to rescind and recover the purchase price ($500) and also damages, in the sum of $200, the difference between the purchase price and the actual value of the horse. If *E's* claim were allowed he would be receiving $700, which would result in a recovery of $200 over and above the purchase price. However, in view of the fact that in rescinding the contract *E* would be allowed to return the horse and free himself of title, it is evident that he suffers no damage because of its lessened value and therefore, no reason can be assigned to the award of the additional $200. In an instance such as this the doctrine should be invoked.[30] It should, however, have no application when in an action for rescission the plaintiff sues not only for the return of the purchase price but also, *as a supplementary remedy in the same action,*[31] seeks to recover damages proximately resulting from the vendor's breach, for in such a case the question of double recovery does not arise as the plaintiff is merely suing for damages which he actually sustained.[32]

The court in *Waldman Produce, Inc.* v. *Frigidaire Co.,*[33] recog-

several persons; no election of remedies. Where rights of action exist against several persons, the institution or maintenance of an action against one, or the recovery against one of a judgment which is unsatisfied, shall not be deemed an election of remedies which bars an action against the others." The language of the statute seemingly allows a vendee to sue one of several joint vendors for damages and if he recovers judgment which is not satisfied, still sue the remaining vendors for rescission of the contract; see Legis. (1939) 14 ST. JOHN'S L. REV. 206; LEG. DOC. No. 65F (1939).

[29] 18 AM. JUR. (1938) p. 131, § 4 reads: "The purpose of the doctrine of election of remedies is not to prevent recourse to any remedy, but *to prevent double redress for a single wrong.*" [Italics ours.] See First Nat. Bank of Osakis v. Flynn, 190 Minn. 102, 250 N. W. 806 (1933).

[30] Tilton v. Schwartz, 199 App. Div. 607, 191 N. Y. Supp. 862 (1st Dept. 1922); Joannes Bros. Co. v. Lamborn, 237 N. Y. 207, 142 N. E. 587 (1923), *aff'g,* 206 App. Div. 792, 200 N. Y. Supp. 569 (1st Dept. 1923).

[31] See Note (1938) 38 COL. L. REV. 888.

[32] See notes 22, 25, *supra.*

[33] 157 Misc. 438, 284 N. Y. Supp. 167 (1935). In this case, the plaintiff purchased a refrigerator in reliance on the defendant seller's representation that the refrigerator would maintain a specified temperature. The refrigerator failed to maintain the specified temperature and as a result plaintiff suffered damage to its produce. The plaintiff vendee brought an action for rescission and claimed, in addition to the return of the purchase price, the value of the produce lost as the result of the vendor's breach of warranty. See Note (1936) 45 YALE L. J. 1313.

nized this fact, when in an action for rescission it allowed the plaintiff not only the return of the purchase price, but also damages to its produce due to the defendant's breach of warranty. In its decision, the court stated: "Plaintiff merely seeks to recover what it had paid and the damage it sustained by the loss of its produce. Of course, plaintiff could not recover the amount it had paid on the purchase price, and also by way of damages the difference between what the refrigerator was worth as installed and what it would have been worth had it been as represented. *Those two actions would be inconsistent.* * * * But again we may say that plaintiff here does not make any such claim. * * * What plaintiff is seeking here is to be placed in the position it was in before it made the contract with the defendant. It has called the deal off by rescinding the contract and merely asks to be made whole." (Italics ours.) It is submitted that the decision reached by the court in the *Waldman* case, though not indicative of the law in New York,[34] was ideal, for it granted the vendee a complete remedy.[35]

A factual situation similar to that presented in the *Waldman* case,[36] was again presented in *Bennett* v. *Piscitello*.[37] The court in the *Bennett* case, however, in refusing to allow the vendee to recover *actual* damages caused by the vendor's breach of warranty, severely criticized the decision reached in the *Waldman* case, on the ground that it was contrary to the provisions of the New York Personal Property Law, stating that, "Section 150 Subd. 1(d), is both clear and explicit. It provides that where the buyer has met the requirements for rescission he may 'recover the price or any part thereof which has been paid'. This language needs neither clarification nor comment. It both creates and limits the seller's obligations." [38] It is to be noted, however, that the New York Personal Property Law [39] was taken literally from the Uniform Sales Act [40] and that courts in

---

[34] Golisano v. Crisafulli, 190 N. Y. Supp. 24 (1921); Oetjen v. Whitehead Metal Products Co., 126 Misc. 369, 213 N. Y. Supp. 600 (1926). See notes 2, 25, *supra*.

[35] The decision of the *Waldman* case gave the vendee corporation complete relief in that it placed it in the position it was in before it entered the contract by (1) allowing it to free itself of title to the refrigerator and (2) by awarding it the *full and actual damages* it had suffered because of the vendor's breach.

[36] See note 33, *supra*.

[37] 170 Misc. 177, 9 N. Y. S. (2d) 69 (1938). In this case, the plaintiff seller brought an action to recover the price of an oil burner. The defendant vendee counterclaimed for rescission on the ground of plaintiff's breach of warranty as to the amount of oil the burner would consume. In his counterclaim for rescission the defendant asked for damages, over and above the purchase price, to the extent of the value of the oil used in excess of the amount specified by the plaintiff vendor.

[38] *Id.* at 186, N. Y. Supp. at 77.

[39] N. Y. PERS. PROP. LAW § 150.

[40] UNIFORM SALES ACT § 69.

other jurisdictions,[41] as well as a few in New York,[42] have, in allowing rescission under the section referred to in the *Bennett* case, permitted the vendee to recover damages over and above the contract price. This apparent diversity of opinion alone would seem to justify considerable comment as to the true intent of the statute [43] in so far as it concerns the extent of recovery in actions for rescission for breach of warranty. In fact, there has already been much discussion on both sides of the question.[44] Those who support the interpretation placed upon the section by the court in the *Bennett* case,[45] however, readily concede that the majority rule in the United States is more equitable.[46]

It has been suggested [47] that the vendee has a right to damages over and above the purchase price under Section 151 of the New York Personal Property Law [48] which reads "Nothing in the Sales Act *shall affect the right* of either party to * * * recover special damages." (Italics ours.) It is submitted that no such right is given to the buyer under this section, for the words *"shall affect"* apparently presuppose the existence of the right to special damages at common law, a right which did not exist in favor of the rescinding buyer in New York.[49]

---

[41] United Engine Co. v. Junis, 196 Iowa 914, 195 N. W. 606 (1923) (moneys expended in installing an engine); Granette Products Co. v. Neuman, 120 Iowa 572, 205 N. W. 205 (1925) (expenses incurred in sorting and loading rejected stone); International Harvester Co. of America v. Olson, 62 N. D. 256, 243 N. W. 258 (1932) (freight charges); National Sand and Gravel Co., Inc. v. Beaumont Co., 156 Atl. 441 (N. J. 1931) (moneys expended by vendee in supplying bin and wiring); R. C. N. Mfg. Co. v. Whitaker, 49 R. I. 449, 144 Atl. 158 (1929) (cost of dyeing and processing).

[42] Waldman Produce, Inc. v. Frigidaire Corp., 157 Misc. 438, 284 N. Y. Supp. 167 (1935).

[43] N. Y. PERS. PROP. LAW § 150, subd. 1(d).

[44] See Rogge, *loc. cit. supra* note 4, wherein the writer expresses the view that special damages are recoverable by a rescinding vendee under §§ 70, 73 of the UNIFORM SALES ACT; 5 WILLISTON, CONTRACTS (Rev. ed. 1937) 4097 ("There is not inconsiderable authority to the effect that the buyer is entitled to be restored to the *status quo* upon rescission as well as the seller and, therefore, where such damages are contemplated by the parties, the buyer may recover what damages are necessary to put him in that position, * * *"). The *Waldman* case is, however, the only authority for the proposition in New York cited by Professor Williston. See note 49, *infra.*

[45] See Note (1938) 38 COL. L. REV. 888, 900, wherein the writer states: "However, despite the failure of the act to codify the [majority] common law rule that the buyer may obtain his *status quo* damages in an action for rescission many courts have wisely allowed him to do so."

[46] See notes 44, 45, *supra.*

[47] Waldman Produce, Inc. v. Frigidaire Corp., 157 Misc. 438, 284 N. Y. Supp. 167 (1935); see Rogge, *loc. cit. supra* note 3.

[48] N. Y. PERS. PROP. LAW § 151.

[49] It is submitted, however, that in those states which followed the majority common law rule, allowing special damages, the vendee even under the Sales Act has a right to special damages, for the right to special damages where it existed at common law has seemingly been preserved by § 70 of the UNIFORM SALES ACT, which is identical with § 151 of the N. Y. PERS. PROP. LAW. See note 44, *supra.*

III.

Since an action for rescission is allowed on the theory that one of the contracting parties, through the fault or misconduct of the other, has not obtained that which he bargained for, it follows as a necessary conclusion that rescission may be had on the ground of fraud [50] or misrepresentation.[51] A detailed discussion of fraud as a ground for rescission is not required, for the problems concerning the application of the doctrine of election of remedies [52] and the extent of a defrauded vendee's recovery [53] are identical with those presented in actions for rescission for breach of warranty.

Concerning the extent of damages recoverable by a defrauded vendee, however, it is interesting to note that though the Personal Property Law [54] preserves the vendee's common law right to rescind on the ground of fraud,[55] it does not in express language limit the defrauded vendee's recovery to *the price or any part thereof which has been paid,* as does the section allowing rescission for breach of warranty. The legislature, however, has accomplished the same effect in New York, by basing the right to rescind for fraud upon common law principles, for though there is some authority to the contrary,[56] the New York courts at common law made no distinction, in respect to a vendee's recovery, between rescission actions based on fraud or breach of warranty. As in the case of breach of warranty,[57] however, convincing authority can be cited for the proposition that the election

---

[50] Angersosa v. White Co., 248 App. Div. 425, 290 N. Y. Supp. 204 (4th Dept. 1936); see WHITNEY, CONTRACTS (3d ed. 1937) § 129; 5 WILLISTON, CONTRACTS (Rev. ed. 1937) § 1525; 27 C. J. (1931) §§ 125, 128.

[51] In Hanley Co. v. Bradley, 145 Misc. 285, 259 N. Y. Supp. 278 (1927), the court held that a contract of sale may be rescinded if consummated through unintentional misrepresentation of material facts. See WHITNEY, *loc. cit. supra* note 50; 5 WILLISTON, CONTRACTS (Rev. ed. 1937) §§ 1500, 1501.

[52] "The doctrine of election of remedies is not peculiar to actions based upon fraud, but it is, perhaps, most frequently discussed in connection therewith. The defrauded party has the alternative, but inconsistent rights and remedies of affirmance of the transaction and recovery of damages for the deceit, or of disaffirmance and restitution where restitution is available." 5 WILLISTON, CONTRACTS (Rev. ed. 1937) 4279; see Note (1923) 36 HARV. L. REV. 593.

[53] Loader v. Brooklyn Chair Co., 75 App. Div. 621, 78 N. Y. Supp. 156 (2d Dept. 1902); Dougherty v. Neville, 108 App. Div. 89, 95 N. Y. Supp. 806 (3d Dept. 1905), *aff'd,* 186 N. Y. 578, 79 N. E. 1103 (1906); H. Muller & Co. v. Effangee Tobacco Co., 190 App. Div. 808, 180 N. Y. Supp. 344 (1st Dept. 1920), *aff'd,* 229 N. Y. 594, 129 N. E. 922 (1920). See notes 2, 25, *supra.*

[54] N. Y. PERS. PROP. LAW § 154. The section reads: "In any case not provided for in this article, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods". See Portfolio v. Rubin, 196 App. Div. 316, 187 N. Y. Supp. 302 (1st Dept. 1921). See note 44, *supra.*

[55] See notes 50, 51, *supra.*

[56] Fuller v. Cameron, 209 S. W. 711 (Tex. Civ. App. 1919); Alexander v. Walker, 239 S. W. 309 (Tex. Civ. App. 1922). See note 24, *supra.*

[57] See notes 2, 25, 53, *supra.*

of remedies doctrine should have no application when the rescinding vendee claims, in addition to the price paid, damages which he actually sustained because of the vendor's fraud. Justice Crane advanced this proposition in *Clark* v. *Kirby* [58] when he stated that, " * * * plaintiffs were seeking to recover the purchase price, also the actual moneys spent by them * * *. Damages arising from the difference in the value and the amount paid was not the relief sought. Therefore, there was nothing * * * which justified the trial court in deciding that the plaintiffs, as a matter of law, had waived and abandoned rescission."

The view expressed by the court in the *Clark* case has not, however, effectuated any change in the application of the doctrine, for later decisions continue to deny the rescinding vendee recovery beyond the return of the purchase price.[59]

IV.

Though the vendee has the alternative right to rescind or to sue for damages for fraud or breach of warranty, he has under the present state of the law in New York, no adequate relief, for none of the remedies afforded him is in itself complete. If the vendee elects to rescind, though he may rid himself of title and recover the purchase price, he cannot assert any claim for damages over and above the purchase price.[60] On the other hand, if he elects to maintain an action for damages, though he may recover full damages, still he cannot rid himself of title to the article for which he often has no use.[61]

This unfavorable situation has provoked considerable comment on the part of legal writers,[62] most of whom advance, as possible solutions to the problem, theories tending toward the abolition of the doctrine of election of remedies. It is submitted that though legislative enactment is required to remedy the situation, enactment so drastic as to abolish completely the election of remedies doctrine is not required, nor has it been deemed advisable by the legislative committee.[63]

A codification of the majority common law rule would, in the

---

[58] 243 N. Y. 295, 302, 153 N. E. 79, 82 (1926).

[59] Oetjen v. Whitehead Metal Products Co., 126 Misc. 369, 213 N. Y. Supp. 600 (1926); Bennett v. Piscitello, 170 Misc. 177, 9 N. Y. S. (2d) 69 (1938); Sorenson v. Keesey Hosiery Co., 244 N. Y. 73, 154 N. E. 826 (1926).

[60] See notes 2, 25, 34, 53, *supra.*

[61] Bond Electric Corp. v. Gold Seal Electric Co., 244 App. Div. 206, 278 N. Y. Supp. 969 (1st Dept. 1935); Ellen v. Heacock, 247 App. Div. 476, 286 N. Y. Supp. 740 (4th Dept. 1936); P. H. & F. M. Roots Co. v. Simmons Mach. Tool Corp., 260 N. Y. 633, 184 N. E. 124 (1932), *aff'g,* 234 App. Div. 814, 253 N. Y. Supp. 981 (4th Dept. 1931).

[62] Rothchild, *A Remedy for Election of Remedies: A Proposed Act to Abolish Election of Remedies* (1929) 14 CORN. L. Q. 141; Davidson, *A Proposal to Abolish the Doctrine of Election of Remedies* (1934) 13 ORE. L. REV. 298; Note (1938) COL. L. REV. 888; see note 26, *supra.*

[63] See LEG. DOC. No. 65F (1939).

opinion of the writer, place the rescinding vendee in a position where he could obtain complete relief.[64]

WILLIAM F. PODESTA.

THE FORMATION OF PARTNERSHIPS WITH THE MOTIVE OF EVADING THE WORKMEN'S COMPENSATION LAW.

> "One of the methods used by this unscrupulous group has been the creation of fictitious partnerships designed to mask the relationship of employer and employee."
>
> Governor Herbert H. Lehman.[1]

A great number of entrepreneurs have recently adopted the partnership form of business organization avowedly for the purpose of evading their obligations under the Workmen's Compensation Law. Some of these partnerships have been upheld by the courts, while certain others have not. It will be the scope of this article to analyze the cases on the subject and provide a touchstone to which the lawyer may bring his problem.

Associations formed to conduct a business contrary to law or to public policy are clearly illegal.[2] Associations formed for the pursuance of an illegal method of conducting an otherwise legal business

---

[64] "Rescission will bar a recovery of damage when the only damage sustained is not getting what was bargained for, and no special damage has been sustained. According to the weight of authority, if special damage has been sustained, so that the * * * [rescinding] party is damaged, notwithstanding the rescission, his rescission of the contract will not bar a recovery of such special damage." American Pure Food Co. v. G. W. Elliott & Co., 151 N. C. 393, 396, 66 S. E. 451, 452 (1909).

[1] Address of Governor Herbert H. Lehman to the New York Legislature Jan. 4, 1939. New York Herald Tribune, Jan. 5, 1939, p. 15, col. 8.

[2] "An indispensable element of every partnership is a contract between the parties for the sharing as common owners of the profits of a lawful business." 47 C. J. (1929) p. 643, § 1, n.5(B). A partnership may be illegal on the ground that it was formed for a purpose forbidden by the current notions of morality, religion or public policy. 1 LINDLEY, PARTNERSHIPS (5th ed. 1888) 111. There are jurisdictions which go so far as to hold that: "In contemplation of law an association of persons formed for an illegal purpose, or one against public policy, is not a partnership." Jackson v. Akron Brick Ass'n, 53 Ohio St. 303, 41 N. E. 257 (1895). And a "partnership cannot be legally formed to carry on any illegal or fraudulent scheme". Sampson v. Shaw, 101 Mass. 145 (1869); Dunhan v. Presby, 120 Mass. 285 (1876). The court, in such cases, reasons that since an illegal contract is void, and a partnership must result from a contract, the partnership contract is in effect a contract to form an illegal contract and therefore void and the partnership never begins to exist. This does not seem to be the law in New York; see note of Commissioners of Uniform State Laws to corresponding provision (Section 6) of the Uniform Partnership Act. PRASHKER, CASES AND MATERIALS ON THE LAW OF PARTNERSHIP (1st ed. 1933) 7n.