CLAUDE L. DE VALL (PLAINTIFF).... APPELLANT; 1919 *Feb. 11, 12. *Mar. 3.

AND

GORMAN, CLANCEY & GRINDLEY LIMITED (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Contract—Deceit—Ingredients of—Finding of trial judge—Principal and agent—Total purchase-price paid into bank—Right of agent to money.

A finding by the trial judge, that "the misrepresentations as to condition and capacity" of a log-hauler "which induced the plaintiff to purchase were at least made with reckless carelessness as to their truth" is a finding of fraud sufficient to sustain an action of deceit; and such finding brings this case within the rule laid down in *Derry* v. *Peek*, (14 App. Cas. 337). Brodeur J. dissenting.

G., as agent of C., sold to D. a log-hauler for $750 more than the price fixed by C.—D. deposited the total purchase-price in a bank to be paid to C. who disclaimed all right to the $750.

Held, that the $750 were the property of D. Brodeur J. dissenting.

Judgment of the Appellate Division, 13 Alta. L.R. 557; 42 D.L.R. 573; [1918], 3 W.W.R. 221, reversed. Brodeur J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing in part the judgment of the trial judge, Ives J., and dismissing the plaintiff's action.

The material facts of the case are fully stated in the judgments now reported.

C. C. McCaul K.C. for the appellant.

S. B. Woods K.C. for the respondent.

THE CHIEF JUSTICE.—I concur with Mr. Justice Anglin.

IDINGTON J.—The appellant complains that respondent, acting as agent for the owner of a steam log-

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 13 Alta. L.R. 557; 42 D.L.R. 573; [1918] 3 W.W.R. 221.

1919
DE VALL
v.
GORMAN, CLANCEY & GRINDLEY LIMITED.
Idington J.

hauler, had induced him by false and fraudulent representations to buy same at the price of $6,625. The learned trial judge held that he had been so induced and entered judgment accordingly directing an assessment of damages by a referee. That judgment the Court of Appeal for Alberta set aside and dismissed the action.

The owner had offered the outfit in question for $5,000, cash and then raised the price, owing to some slight addition of sleighs to the outfit as originally offered, to $5,875, which included a commission to respondent of 5% on the actual price the owner was getting on the basis of that increased price.

The purchase-money was to be paid into the Northern Crown Bank at Red Deer.

The respondent, not satisfied with such gain, conceived the idea of getting $750 more from the appellant as purchaser.

An involved history of negotiations with others brought about by respondent as part of the scheme I need not enter upon.

The result of the misrepresentations so found to have been false and fraudulent was that the appellant, before he ever saw, or had any one for him see, the outfit, agreed to pay and did pay, the $6,625 into the Northern Crown Bank, which was a condition precedent to the removal of the outfit from the place where situate.

The property in question was forty miles away from any railway. The appellant and respondent were dealing in Edmonton, a considerable distance further than the railway station nearest to the place where the property was. The appellant of necessity had to rely upon the knowledge of someone else, as respondent well knew, or go to the expense of going all that distance

with an outfit capable of testing the truth of the representations made by respondent.

Having deposited the said price as required, the appellant went with the necessary help to take possession of his purchase and, on attempting to drive it by means of the power it was represented to possess, found that he had been deceived not only in that regard but in many other respects as to the condition of the outfit.

Having been thus induced to go to the place where the machine and outfit were, and moved it part of the way before realising how badly he had been deceived, he had no alternative except to abide by his purchase or recover from the respondent the amount which he had by virtue of its misrepresentations been thus defrauded of. Such, at least, is the effect in plain language of the findings of the learned trial judge.

Under the peculiar circumstances in evidence the appellant had no right of action against the owner, who had never authorised such misrepresentations to be made as the learned trial judge finds *were* made.

I am not disposed to think that the law is so impotent that there is no remedy to be found for such a condition of things.

By no means do I think there is anything improper in an agreement between an owner of lands or goods and a sales agent providing for the latter getting all beyond a named price as his reward or part of his reward for bringing about a sale.

I do suggest, however, that when we find an agent given such an opportunity and he has availed himself of it to the extent of obtaining a bargain with a purchaser at a cash price exceeding by one-fifth that which the owner—to the knowledge of such agent—was willing to accept in cash, we naturally ask how that

1919
DE VALL
v.
GORMAN, CLANCEY & GRINDLEY LIMITED.
Idington J.

came about? And when a learned trial judge finds as a fact that the misrepresentations of such an agent respecting the quality and conditions of the article sold were an inducing cause of such remarkable success, and that they were made in such manner as to induce the belief that they were founded upon and made from the knowledge of those making them, we are bound to ask ourselves whether or not they had been honestly made.

When we find it distinctly stated that no such personal knowledge existed or had been procured on behalf of the agent, or any assurances of such a nature given by the principal, or authority given by him to make representations so false and fraudulent as found by the learned trial judge, what is the inevitable inference to be drawn but that of some dishonest representations having been made?

It is quite apparent from the absolutely conflicting evidence of the appellant with that of those he accuses who acted for respondent that the learned trial judge who alone had the best opportunity of deciding between them must, from what he has expressed, have found the former reliable and the latter not so reliable.

Are we to discard such an important finding of fact? Or must we not rather accept it and apply it so far as practicable to guide us in trying, if possible, to fit it into the other admitted surrounding facts and circumstances and apply the relevant law, even if he may have failed to state same as fully and accurately as we might desire? This is not the case of a trial where, as sometimes happens, there are ourstanding circumstances of evidential force which conflict with the finding and relying thereon we can say the learned trial judge must have failed to recognize the force thereof and set aside his finding of fact and its consequences.

The misrepresentations charged all bore directly or indirectly upon the value of the outfit offered for sale, and the findings of fact by the learned trial judge relative thereto cannot be attributable to anything else.

It seems to me the inevitable conclusion that to the extent at least of the $750 added to the price named by the owners, conversant as the respondent well knew with the value and condition of that offered at half its original cost, there was no possible justification for so adding to the price asked, and that there existed no foundation of fact for the misleading description given by respondent. How can such false representations made under such attendant circumstances be held as conceivably made in an honest belief in their truth?

And that seems amply confirmed by the refusal of the owner to touch the $750.

That also carries with it a finding that the money in the Northern Crown Bank was not money belonging to the respondent, but money fraudulently procured by it to be deposited in said bank by the appellant.

The result must be in that way of looking at the case presented, that there never was any ground for an issue; that the respondent should pay the costs of that issue, both of the Northern Crown Bank and of the appellant, throughout, and, as another consequence, I think should be made to bear the entire costs herein. The whole litigation has been caused directly or indirectly by reason of the devious course of conduct the respondent saw fit to pursue.

The appeal to that extent should be allowed and the costs paid by the respondent throughout.

ANGLIN J.—The plaintiff appeals from an adverse judgment in two actions—one, an action for deceit;

1919
DE VALL
v.
GORMAN, CLANCEY & GRINDLEY LIMITED.
Anglin J.

the other, an action to determine the ownership of a sum of $750 on deposit with the Northern Crown Bank which comes before us in the form of an interpleader issue. The judgment of the Appellate Division of the Supreme Court of Alberta is reported (1).

After carefully reading the entire evidence it is apparent to me that the learned trial judge intended by the opening paragraph of his judgment to inform an appellate court, without bluntly saying so, that he disbelieved the evidence given on behalf of the defendants and that his unfavourable opinion of their veracity was largely based upon his observation of them in the witness box. I need only say that the reading of their testimony—especially that of Gorman, Edwards and McPhee—is not calculated to lead one to think that the learned judge made a mistake.

He then proceeds, without putting his conclusion in a form unnecessarily harsh or offensive, to find that the plaintiff bought the log-hauler and sleighs in question on the faith and under the inducement of misrepresentations fraudulently made by Edwards, and strengthened by Gorman, in such a way as led, and, I take it, in his opinion was intended to lead

> the plaintiff to believe that they were made from the knowledge of Edwards and Gorman of themselves,

by which the learned judge no doubt meant knowledge gained from the inspection on their behalf which De Vall states they represented had been made. Several of the representations, most material in character, were false in fact. Admittedly neither Gorman nor Edwards had any personal knowledge of the condition or capacity of the log-hauler, nor had any inspection been made of it on their behalf. According to De Vall's testimony, accepted by the learned judge, he was induced to pur-

(1) 42 D.L.R. 573; (1918) 3 W.W.R. 221.

chase without making the personal inspection which he had contemplated by Edward's assurance that the time spent on such an inspection would be wasted—that the "outfit" was as he represented it.

The finding of fraud necessary to sustain an action of deceit might, no doubt, have been made more explicit. The success of the defendants before the Appellate Division indicates that in cases such as this it is probably better "to call a spade a spade" in plain language. Short, however, of stating in direct terms that the defendants had induced the plaintiff to purchase the log-hauler and sleighs by wilfully and dishonestly making material misrepresentations known to them to be untrue, the learned judge could scarcely have made more clear his intention to convict them of deliberate deceit. He adds that

> the misrepresentations as to condition and capacity, which induced him (the plaintiff) to purchase, were at least made with reckless carelessness as to their truth.

He obviously meant to make a finding which would bring this case within the alternative ground of liability pointed out in *Derry* v. *Peek* (1)—that the misrepresentations were made without real belief in their truth and with reckless indifference as to whether they were true or false. I cannot place any other construction on the phrase

> with reckless carelessness as to their truth.

With profound respect I am unable to accept what I understand to be the view of the learned Chief Justice of Alberta, concurred in by the other appellate judges, that the trial judge misdirected himself as to the essentials of the action of deceit or failed to make the necessary finding of absence on the part of the representors of an honest belief in the truth of their representations.

(1) 14 App. Cas. 337.

1919

DE VALL
v.
GORMAN, CLANCEY & GRINDLEY LIMITED.

Anglin J.

The learned judge allowed damages under two heads; as to the first—the difference between the actual value of the log-hauler and sleighs as they were and where they were when purchased and the sum of $6,625 paid for them by the plaintiff—I think it may not unfairly be assumed that the latter figure represents what would have been the saleable value of the property at Coal Camp if in the condition and of the capacity represented by the defendants, and that no substantial wrong will be done the plaintiff by allowing this portion of the judgment of the trial court to stand. In the second head of damage, however, there seems to be a duplication. When allowed the difference in value as above, the plaintiff is already awarded the reasonable cost of repairs necessary to put the engine into the condition represented. His recovery under this head should be restricted to the expenses of the first futile trip from Edmonton to Coal Camp, including wages of men and an allowance for his own time, except so much of them as were incurred in making repairs necessary to move the log-hauler and sleighs into Olds, *i.e.*, he is entitled to recover so much of these expenses as is not included in the cost of necessary repairs. They were thrown away as the direct result of the defendants' misconduct.

The earning of profits on the tie contract undertaken by the plaintiff, however, was too uncertain and speculative to afford a basis for a further allowance of special damages. The learned judge properly refused to entertain this claim.

The judgment of the trial court in the action for deceit should, in my opinion, be restored with the modification indicated.

As to the $750 involved in what has been termed the minor action it must be borne in mind that the

question at issue in it is not whether the plaintiff is liable to pay such an amount to the defendants as the price of their interest in the property which he purchased or otherwise, but whether the sum of $750 paid into the Northern Crown Bank by the plaintiff as part of the purchase price payable to the Great West Lumber Company is the property of the plaintiff or that of the defendants. The object of the interpleader issue on which the question is presented is to determine the ownership of this specific sum of money remaining on deposit—who is entitled to demand and receive it from the Northern Crown Bank? The issue as defined by the order directing it makes that clear. The statement of claim properly followed it. The statement of defence, in my opinion, improperly sought to alter and enlarge it. *Canadian Pacific Railway Co.* v. *Rat Portage Lumber Co.* (1).

This money forming part of a larger sum deposited with the bank was the money of the plaintiff. He parted with it to the bank solely for the purpose of its being paid to the Great West Lumber Company as the purchase-price of its property bought by him. The Great West Lumber Company might, no doubt, have taken the whole sum paid in from the bank and paid over $750 of it to the defendants, or it might have directed the bank to pay that sum to them. It declined to do either, and disclaimed all right to, or over the disposition of, the $750. The defendants have obtained no title to it either from the plaintiff or from the Great West Lumber Company. It seems clear that, whatever other legal rights (if any) the defendants may have against the plaintiff as a result of the transaction under consideration, the money now in question is not their property. On the issue ordered

(1) 5 Ont. W.R. 473, at page 476.

1919
DE VALL
v.
GORMAN, CLANCEY & GRINDLEY LIMITED.
Anglin J.

to be tried it should be declared to be the property of the plaintiff upon a resulting trust in his favour arising from the partial failure of the trust on which he deposited the larger sum, of which it formed a part, with the Crown Bank.

But, as the learned trial judge points out, in that event the $750 cannot be treated as part of the purchase-money paid by the plaintiff and his damages in the deceit action must be based on the payment of $5,875, not $6,625, as purchase-money. In the result it is really not material, except possibly on the question of costs of the minor action, whether the plaintiff recovers the $750 as his property in that action or as part of his damages in the deceit action, the fund being held to answer *pro tanto* the judgment in the latter. I therefore agree with the disposition made of this part of the case by the learned trial judge.

BRODEUR J. (dissenting).—I am satisfied that if there had been no dispute as to the $750 issue the action of deceit which has been instituted by the appellant would never have been taken.

It appears that the Great West Lumber Company were the owners of a log-hauling outfit for several years, and that they had used it only for a very short time (about four months) from 1912, when they bought it, until 1917, when it was sold to De Vall. In December, 1916, a man named McFee, who had a large tie contract with the Canadian Northern Railway Co., tried to acquire that outfit in order to carry out more expeditiously and more economically his tie contract. Those negotiations were carried out partly by him and partly by the respondent, which seemed to be a respectable firm doing business in Edmonton.

McFee went with an engineer and a boiler

inspector, to visit the outfit which was in a lumber camp at a great distance from Edmonton. He seemed to be satisfied that the price which was quoted for the machine was a reasonable one and, in fact, the Great West Lumber Company were willing to sell the machine for 50% of its original cost. McFee, however, did not seem to be able to raise the money.

It appears, however, at the same time, that Mr. Ewing, a reputed barrister of Edmonton, was interested in some way in McFee's contract; and as he had a case for De Vall he suggested to the latter the idea of purchasing the outfit or advancing the money to McFee to purchase it; and he advised him to go and see a man named Edwards, sales agent of the respondent company.

Edwards described to him the machine, told him the work it could carry out and told him that the machine had been recently inspected by the boiler inspector and by an engineer.

There is a dispute here as to whether Edwards stated that it was their own engineer, namely, the engineer of the respondent firm, or some independent engineer. De Vall, in his evidence, repeats frequently that Edwards represented to him that the inspection had been made by their own engineer. However, in cross-examination, he was asked:—

Q. When he (Edwards) talked to you about having their engineer or the boiler inspector there, you did not understand that by their engineer he meant himself, but you understood it meant someone else?

A. It sounded as if they had sent someone else, an engineer, down there, and the boiler inspector.

There is no doubt that an engineer had gone there with McFee and the boiler inspector to inspect the engine. There is no doubt either that this expedition was organized to a certain extent by the respondent company and it did not matter very much

1919
DE VALL
v.
GORMAN, CLANCEY & GRINDLEY LIMITED.
Brodeur J.

whether the engineer sent at that time was paid by the company itself or by McFee. There is one fact very sure and it is that an engineer had been sent and that his report seemed to be favourable.

There is also some statement made by Edwards in this conversation with De Vall to the effect that the hauling power of the engine could be increased by some dome being put on it.

Interviews then took place between the father of De Vall and De Vall himself with Mr. Gorman, the principal partner in the respondent company; but the latter did not say anything more than repeat what had been said by their sales agent, Edwards. The plaintiff was informed that the respondent company had an option upon the outfit; and the price mentioned was $6,625. Then De Vall saw McFee and they agreed to form a partnership for the purchase of the machinery.

It was agreed, however, that the machine would be purchased by De Vall himself and that when McFee would have made enough money out of his tie contract, and out of the use of the machine, to reimburse his share, then the machine would become the property of both. De Vall then discovered that the Great West Lumber Company were the real owners of the property, and on the 24th January, 1917, he deposited with the Northern Crown Bank, who were the bankers of the Great West Lumber Company, the sum of $6,650, which was to be handed over to the Great West Lumber Company when the delivery would have taken place and when the bill of sale would have been properly drawn and De Vall then started for the camp to view the machine and to take delivery of it, and he was accompanied by a representative of the Great West Lumber Company.

After much trouble he saw the machine, saw in

what condition it was, and as he had an engineer and man with him, he started to raise the steam and to make it run. It appears, however, that the horse-power did not seem sufficient to make it run, so he telephoned to Edmonton and got the authorization from the authorities to raise the steam pressure and he succeeded in loading up the machine at the next station and sent it to Edmonton to get it properly fitted up and absolutely repaired.

In the meantime, he seemed to be dissatisfied with the test which he had made, because he gave instructions to his solicitor to write the bank not to give the money; but later on he gave a release and gave permission to the bank to hand over the money and he began to work with the machine when, after a few days, a shaft broke.

In the meantime, it was discovered that the Great West Lumber Company did not sell the machine for $6,625, but only $5,875, leaving a balance of $750 which the Great West Lumber Company declined to claim as belonging to them. The respondent company wanted to have this sum and stated that as they had an option for the sale of that machinery that sum really belonged to them. The money then was deposited into court by the bank and the court directed an issue to have it determined to whom that money would belong, whether to De Vall or to Gorman, Clancey & Grindley.

It looks to me as if De Vall had been greatly dissatisfied on finding out that the respondent company were not only being paid a commission of 5% on the purchase-price but that they were also getting $750 above the purchase-price stipulated by the Great West Lumber Company. He thought, I suppose, that it was not very fair on the part of the respondent com-

1919
DE VALL
v.
GORMAN, CLANCEY & GRINDLEY LIMITED.
Brodeur J.

pany to get a sum of $750 above the purchase-price, so he entered an action to get that sum of $750, as he had been directed by the court to do, and started a big action in damages for $14,000 for deceit. He alleges that this sale was made through the false and fraudulent representations of Gorman, Clancey & Grindley and that they should be held liable to that extent.

The trial judge gave judgment in favour of the plaintiff on account of the false representations and he said in his judgment that

> the representations made to him (De Vall) as to the condition and capacity of that machine, which induced him to purchase, were at least made with reckless carelessness as to their truth,

and he maintained the action of deceit instituted by the appellant De Vall but dismissed plaintiff's action as to the $750 and declared that that money belonged to the respondents.

The Court of Appeal reversed that decision and dismissed the two actions.

A great deal depends in this case upon the construction of the findings of the trial judge. The law on the question is to be found in the case of *Derry* v. *Peek* (1), where it was held that:—

> In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shewn that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.
>
> A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement being made in the honest belief that it is true, is not fraudulent and does not render the person making it liable to an action of deceit.

The trial judge speaks of the carelessness with which some statements were made by the respondent company as to the truth of those statements. But it had to be also demonstrated that the statements were

(1) 14 App. Cas. 337.

made in the belief that they were not true. There is no such finding in the reasons of judgment of the trial judge. Besides, I do not see anything in the evidence, which I have read very carefully, to shew that there were such fraudulent statements as were required to maintain the action of deceit.

The machine was represented as having been in use only for a short time, and it is true. It was represented that it had been inspected by an engineer, and it is true; it does not matter very much by whom the engineer was paid. As a question of fact, it was inspected. It was represented that it had been visited by a government boiler inspector and it is true. The plaintiff says that it was represented to him that it was brand new, that there was no scratch. Well, he saw the thing himself and became aware himself of the condition in which it was.

Now, having himself inspected the machine, having seen it, having accepted and paid for it, I do not see how he could take this action for deceit. My conclusion is that it was the result of an afterthought when he heard that the company was making $750 above the price mentioned.

Now, as to this $750, I agree with the trial judge that this money belongs to the respondent company.

The appeal, therefore, should be dismissed with costs of this court.

MIGNAULT J.—With great respect I am of the opinion that the learned Chief Justice of Alberta has misconstrued the findings of fact of the trial judge. The latter said that he thought

> that the representations made to him (the plaintiff) as to the conditions and capacity of that machine which induced him to purchase it were at least made with reckless carelessness as to their truth.

This finding of fact, in my opinion, brings the

1919
DE VALL
v.
GORMAN, CLANCEY & GRINDLEY LIMITED.
Mignault J.

present case within the rule laid down by the House of Lords in *Derry* v. *Peek* (1), where it was held that in an action of deceit the plaintiff must prove actual fraud, and that fraud is proved when it is shewn that a false representation has been made knowingly, or recklessly without belief in its truth, or without caring whether it be true or false. (See also *Angus* v. *Clifford* (2)). The evidence here fully justifies the finding of the learned trial judge, and would even shew that the respondents made a false representation knowingly, to wit, that their engineer had examined the machine which they were endeavouring to sell to the appellant. This is emphatically a case where the appreciation of the oral testimony by the trial judge should not be lightly disturbed. I think, therefore, that the main action, by which I mean the action for deceit, should be maintained, and I concur in the opinion of my brother Anglin, concerning the damages which should be granted to the appellant.

In the other action, that for $750, I think the appellant should succeed. This sum, which the real vendors of the machine absolutely refused to accept as being in excess of the price for which they were selling the log-hauler, is the property of the appellant, and the attempt made by the respondents to have it paid over to them is on a par with their conduct in making the fraudulent misrepresentations of which the appellant complains.

The appeal should, therefore, be allowed with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *Geo. C. Valens.*
Solicitors for the respondent: *Griesbach, O'Connor & Co.*

(1) 14 App. Cas. 337. (2) [1891] 2 Ch. 449.