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Abstract
The question can be easily put: Is a representee entitled to rescind an executed contract for an innocent misrepresentation? Where the contract relates to the conveyance of land, the answer is clear: the contract can only be rescinded if the misrepresentation is fraudulent. The authority for this undisputed proposition is Wilde v Gibson. Surprisingly, in most Australian jurisdictions, the answer to the question in relation to other kinds of contracts is not so simple.

Keywords
contract law, rescission, innocent misrepresentation, Seddon v The North Eastern Salt Co Ltd

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RESCISSION OF AN EXECUTED CONTRACT AT COMMON LAW FOR AN INNOCENT MISREPRESENTATION

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Introduction

The question can be easily put: Is a representee entitled to rescind an executed contract for an innocent misrepresentation? Where the contract relates to the conveyance of land, the answer is clear: the contract can only be rescinded if the misrepresentation is fraudulent. The authority for this undisputed proposition is *Wilde v Gibson*.[1] Surprisingly, in most Australian jurisdictions, the answer to the question in relation to other kinds of contracts is not so simple. In 1939 HA Hammelmann wrote, in relation to *Seddon v The North Eastern Salt Co Ltd*[2], a case in which the principle in *Wilde v Gibson*[3] was extended to an executed contract for the sale of shares:

> It is to be hoped that when the question arises in the Court of Appeal, the Court will give a clear ruling, restrict the rule in *Wilde v Gibson* to the sphere of real property law, and dispel the legend that an executed contract for the sale of a chattel or chose in action cannot be rescinded for innocent misrepresentation.[4]

In the United Kingdom it took the *Misrepresentation Act* 1967 (UK) to clear the air. In Australia, apart from certain statutory reforms there is still uncertainty as to whether, apart from land, there can be rescission of an executed contract for an innocent misrepresentation.[5] *Seddon's* case is authority which is said to answer the question in the negative. However, as recently as 1996 Justice Young of the New South Wales Supreme Court observed:

> In my view, the Court should no longer apply the mistaken view of the law set out in *Seddon's* case…. Where one gets this plethora of instances of a case being distinguished, remembering the reticence of earlier judges to come out and say that a decision of a former generation of judges was wrong, one gets to the position without too much difficulty of coming out and saying that the case should no longer be followed.[6]

1 (1848) 1 HL Cas 605; 9 ER 897.
2 [1905] 1 Ch 326.
3 (1848) 1 HL Cas 605; 9 ER 897.
4 Hammelmann HA 'Seddon v North Eastern Salt Co' (1939) 55 *LQR* 90 at 105.
5 The authors recognise that if the contract comes within the terms of the *Trade Practices Act* 1974 (Cth) or the State Fair Trading Acts then rescission will lie for statements that amount to misleading or deceptive conduct.
6 *Baird v BCE Holdings Pty Ltd* (1996) 40 NSWLR 374 at 380.

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Some say that, apart from cases concerning land, the rule concerning rescission of a contract for innocent misrepresentation is not good law.[7] Others say the rule is longstanding and should continue to be applied.[8] Some judges distinguish *Seddon's* case for a variety of reasons including fine points of distinction as to whether a contract is executory or executed.[9] We believe there is a need for consistency here; we believe that the circumstances giving rise to the remedy of rescission are still a matter of topical concern and we suggest that the matter is best resolved by statutory reform, consistent across Australia.

Seddon's case and contracts for the conveyance of land

There is little doubt that neither law nor equity will provide relief to a purchaser on the grounds of misrepresentation in relation to an executed contract involving the conveyance of land unless the misrepresentation is fraudulent. *Wilde v Gibson*[10] is often cited as grounding the rule. This was a case where the purchaser of land sought to set aside a conveyance on the ground of fraudulent concealment of a right of way. Lord Campbell, after noting the distinction between executory and executed contracts, said:

> With regard to the first: If there be, in any way whatever, misrepresentation or concealment, which is material to the purchaser, a court of equity will not compel him to complete the purchase; but where the conveyance has been executed, I apprehend, my Lords, that a court of equity will set aside the conveyance only on the ground of actual fraud.[11]

Since that time judges have not doubted the correctness of this decision.[12] However, in some places *Seddon's* case has been cited as authority for the same proposition.[13] With respect, we disagree. In *Seddon v The North Eastern Salt Company Ltd*,[14] the plaintiff purchased the business of The North Eastern Salt Company Pty Ltd by acquiring all of the shares in the company. He later sought to have the contract of purchase set aside on the basis of a misrepresentation allegedly made before the purchase as to the net trading loss of the company. In refusing to order rescission of the contract, Joyce J noted:

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7 *Baird v BCE Holdings Pty Ltd* (1996) 40 NSWLR 374 per Young J at 380 and *Leason Pty Ltd v Princes Farm* [1983] 2 NSWLR 381 per Helsham CJ at 387.

8 *Vimig Pty Ltd v Contract Tooling Pty Ltd* (1987) 9 NSWLR 731 at 736.

9 *Grogan v 'The Astor' Ltd* (1925) 25 SR (NSW) 409; *Senanayake v Cheng* [1966] AC 63; *Mihaljevic v Eiffel Tower Motors Pty Ltd* [1973] VR 545.

10 (1848) 1 HL Cas 605; 9 ER 897.

11 (1848) 1 HL Cas 605 at 633; 9 ER 897 at 909.

12 *Deane v Gibson* [1958] VR 563 at 569; *Svanosio v McNamara* (1956) 96 CLR 186 at 198-199 and 209-211 (adopted by the High Court more recently in *Krakowski v Eurolynx Pty Ltd* (1994) 183 CLR 563 at 585); *Krakowski v Eurolynx Pty Ltd* (Supreme Court of Victoria, Appeal Court) (1995) ATPR 41-419 at 40,715; *Baird v BCE Holdings Pty Ltd* (1996) 40 NSWLR 374 at 380.

13 See, for example, *Krakowski v Eurolynx Properties Pty Ltd* (1995) 183 CLR 563 at 585. See also *Wilson v Brisbane City Council* [1931] StRQd 360 at 384, a case concerning rescission of a contract for the sale of land, where *Seddon's* case was cited as representing the law in relation to setting aside a contract for innocent misrepresentation. See also Gillies, *Concise Contract Law*, The Federation Press (1988) 142.

14 [1905] 1 Ch 326.

> Now, in the first place, there is no allegation of fraud, and, in point of fact, the imputation of fraud upon the defendants has been expressly disclaimed, and properly so. Well, then, it is a claim to rescind or set aside for an innocent misrepresentation a contract for the sale of property, not executory, but executed, and under which nothing whatever still remains to be done.[15]

After accepting Lord Campbell's statement of the law from *Wilde v Gibson*[16] Joyce J concluded:

> It appeared to me from the first, upon this case, that this fact - the absence of fraud and the absence of any allegation of fraud - was a fatal objection to the action, and I should be perfectly justified in disposing of it on those grounds alone, and saying no more about the facts of the case. [17]

However, the fact is that *Seddon's* case involved the sale of shares, not the conveyance of land. This is one reason why later cases involving contracts for the sale of land have distinguished it. For example, in *Svanosio v McNamara*,[18] a case involving a transfer of land, McTiernan, Williams and Webb JJ, after indicating that *Seddon's* case held that the court will not grant rescission of an executed contract for the sale of a chattel or chose in action on the ground of an innocent misrepresentation, noted: 'We should certainly reserve our opinion on this point as it does not arise directly in the present case.'[19] The Justices then went on to consider the law regarding available relief in cases concerning the sale of land. Similarly, Dixon CJ and Fullager J noted that it was not necessary to consider the effect of *Seddon's* case because it did not involve a contract for the sale of land, as did the case before the court.

It is not the purpose of this article to consider further the rule as enunciated in *Wilde v Gibson*[20] as it relates to contracts for the sale of land, or to argue for its correctness. Although the writers do take the view that such a rule is sustainable on common sense grounds taking into account the fact that searches and checks as to the status of the property and matters of title should, and invariably are, undertaken by the buyer before the balance purchase price is paid to the seller. Further, in the case of a sale of land, to use the words of Dixon CJ and Fullagar J in *Svanosio v McNamara*: '… the conveyance effects a radical alteration in the position of the parties, new express or implied covenants generally taking the place of the obligations imposed by the contract.'[21] Notwithstanding the valid basis for treating contracts for the sale of land differently, we note that the *Misrepresentation Act* 1972 (SA) and the *Law Reform (Misrepresentation) Act* 1977 (ACT) do give the statutory remedy of rescission where there has been a misrepresentation (including an innocent misrepresentation) even where the contract is for the sale of land and the conveyance has been registered.[22]

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15 Ibid, at 332.
16 (1848) 1 HL Cas 605; 9 ER 897.
17 [1905] 1 Ch 326 at 333-334.
18 (1956) 96 CLR 186.
19 Ibid, at 209.
20 (1848) 1 HL Cas 605; 9 ER 897.
21 (1956) 96 CLR 186 at 199.
22 *Misrepresentation Act* 1972 (SA), s 6 and the *Law Reform (Misrepresentation) Act* 1977 (ACT), s 3. See also the *Misrepresentation Act* 1967 (UK), s 1, the equivalent legislation in the United Kingdom.

The conclusion of the writers on this point is that *Seddon's* case should not be cited as authority to support the view expressed by Lord Campbell in *Wilde v Gibson*,[23] even though Joyce J used that case in dicta when deciding whether the contract for the sale of shares could be rescinded for innocent misrepresentation. In *Krakowski v Eurolynx Properties Pty Ltd*, a case concerning the purchase of shop premises, Brennan, Deane, Gaudron and McHugh JJ noted: 'Absent fraud, equity would not order rescission of the contract of sale after conveyance.'[24] Their Honours cite *Svanosio v McNamara*[25] and *Seddon's* case in support of that proposition. *Svanosio v McNamara* is clear authority for that view; however the apparent correctness of *Seddon's* case in support of that proposition is, in the view of the writers, misplaced. As noted above, the High Court Justices in *Svanosio v McNamara* declined to use *Seddon's* case for that point.

Seddon's case and other contracts

By applying *Wilde v Gibson*[26] in the context of an executed contract for the sale of shares, Joyce J in *Seddon's* case extended the principle in *Wilde v Gibson* beyond the case of a sale of land. Over the years, the comments of Joyce J have received considerable judicial and academic criticism.[27] However, before the rule was abolished in the United Kingdom in 1967[28] it represented the legal position for contracts other than land. In Australia, only a small number of decisions has considered the rule in *Seddon's* case.

Cases where *Seddon* has been applied

In relation to contracts other than for the sale of land, there is only one reported Australian decision in which the rule in *Seddon's* case has been applied so as to prevent a person from rescinding an executed contract induced by innocent misrepresentation. That case is *Vimig Pty Ltd v Contract Tooling Pty Ltd*.[29] The facts of *Vimig* are comparable to that of *Seddon's* case. The business of precision engineering which was carried on by two corporations was purchased. After the contract was executed, the purchaser wished to rescind the contract alleging that it had been induced to make the purchase on the basis of misrepresentations made to it before entry into the contract.

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23 (1848) 1 HL Cas 605; 9 ER 897.

24 (1995) 183 CLR 563 at 585.

25 (1956) 96 CLR 186.

26 (1848) 1 HL Cas 605; 9 ER 897.

27 See, for example, *Armstrong v Jackson* [1917] 2 KB 822 at 825; *Solle v Butcher* [1950] 1 KB 671 at 695-696; *Leaf v International Galleries* [1950] 2 KB 86 at 90; *Leason Pty Ltd v Princes Farm Pty Ltd* [1983] 2 NSWLR 381 at 387; *Baird v BCE Holdings Pty Ltd* (1996) 40 NSWLR 374 at 379; *Kerr on Fraud and Mistake*, (7th ed) Sweet & Maxwell (1952) 535; Meagher, Gummow and Lehane, *Equity Doctrines and Remedies* (3rd ed) Butterworths (1992) para [1317]; Greig and Davis, *The Law of Contract*, Law Book Co (1987) 882; Hammelmann HA, 'Seddon v North Eastern Salt Co' (1939) 55 *LQR* 90 at 90; Birks P, 'No Consideration: Restitution After Void Contracts' (1993) 23 *Western Australian Law Review* 195 at 215 . The criticisms of the rule were also referred to by the New South Wales Court of Appeal in *Akron Securities Ltd v Iliffe* (1997) 143 ALR 457 at 471.

28 *Misrepresentation Act* 1967 (UK)

29 (1987) 9 NSWLR 731.

The issue before the court was whether the contract for sale could be rescinded if it was found that the misrepresentations were made innocently. In a comprehensive examination of the position, Wood J noted that the rule in *Seddon's* case was not entirely supported by earlier English authorities and that the decision had subsequently been the subject of criticism both by the judiciary and academic writers. Nevertheless, his Honour considered that, 'with one recent exception, the rule had been recognised and applied in Australian courts'.[30] After reviewing the Australian decisions, Wood J concluded that he should not, as a judge at first instance depart from the rule. Accordingly, the purchaser in the case was held not able to rescind the executed contract. Given the considered nature of the judgment of Wood J, this decision appeared to be a strong endorsement of the rule.

However, in respect of all the Australian authorities Wood J relied upon, only one case concerned a contract *not* involving land and, in respect of land, we have no doubt as to the correctness of the rule - albeit based on *Wilde v Gibson*[31] and not on *Seddon's* case. In the first case relied upon, *Kramer v Duggan*,[32] McLelland J said:

> I do not think that anything which their Lordships said in *Mackenzie v Royal Bank of Canada*[33] can be taken as overruling the doctrine that innocent misrepresentation is not sufficient to afford a ground in equity for rescission of a contract for the *sale of land* [our emphasis], where such contract has been completed by conveyance.

In the second case, *Dean v Gibson*,[34] Monahan J stated:

> Mr Griffith, for the defendant, submitted that insofar as the plaintiff's claim for rescission based on innocent misrepresentation on the part of the defendant was concerned, such a claim must fail because of the completion, by settlement, of the contract for the *sale of land* [our emphasis]. In this regard, the law appears to be well settled and I am of the opinion that his argument is sound.

Thirdly, in *Wilson v Brisbane City Council*[35] involving the sale of land, Henchman J noted in reference to *Seddon's* case: 'It merely decides what has never been disputed - that, after completion, neither equity nor common law will set aside a contract on the ground of innocent misrepresentation'. Only in *Grogan v 'The Astor' Ltd*[36] is there a reference to support the rule as it applies to contracts other than land. In that case, Long Innes J observed:

> There is abundance of authority for the proposition that the Court will not grant rescission of an executed contract for the sale of a chattel or chose in action on the ground of an innocent misrepresentation; I need only refer to *Seddon v The North Eastern Salt Company Ltd*.[37]

30 The exception was the case of *Leason Pty Ltd v Princes Farm Pty Ltd* [1983] 2 NSWLR 381.
31 (1848) 1 HL Cas 605; 9 ER 897.
32 (1955) 55 SR(NSW) 385 at 390.
33 [1934] AC 468.
34 [1958] VR 563 at 569.
35 [1931] St R Qd 360 at 384.
36 (1925) 25 SR(NSW) 409.
37 Ibid, at 410.

While there were English cases which supported this application of the rule, apart from cases involving land, at the time of this decision, there was no Australian authority to support this contention of Long Innes J.

It also appears to be reasonably settled that the rule in *Seddon's* case extends to leases. Authority for this proposition is the English case of *Angel v Jay*,[38] a decision regarded as representing the Australian position.[39] That case concerned an action for damages for an innocent misrepresentation made during negotiations for the taking of a lease. The defendant, who let the house to the plaintiff, represented that the drains were in good order, when in fact they were defective. After the lease had been signed, the plaintiff went into possession and held the lease for some six months. On these facts, the judge at first instance ordered rescission of the lease.

On appeal the defendant argued that the county court judge could not rescind an executed, as opposed to an executory contract, and that a completed lease followed by the taking of possession fell into the former category. The plaintiff argued that this rule concerning rescission applied only to contracts for the sale of freehold estates executed by conveyance and did not apply in the case of a lease where there were recurrent obligations.

Darling J referred to *Seddon's* case as authority for the defendant's view noting 'the plaintiff had gone into possession under the lease, and nothing remained to be done. That being so ... we must come to the conclusion that the county court judge was wrong'.[40] The court concluded that the remedy of rescission could not be granted for an executed lease which was entered into on the basis of an innocent misrepresentation. Two comments can be made about this decision. First, it is evident from the above quotation that the basis for not granting rescission turned on the complex question of whether the contract has been executed. Darling J considered the lease to be executed because the plaintiff had gone into possession and nothing remained to be done.

However, as examined in some detail later in this article, this reasoning does not sit comfortably with other cases involving recurrent obligations. The weight of authority, which is examined later, suggests that where the contract imposes ongoing obligations on the parties, the contract is more appropriately classified as an executory rather than an executed contract. As such, the rule in *Seddon's* case should not apply.

Secondly, although *Angel v Jay*[41] is a case concerning land and the rule in *Seddon's* case is clearly correct in the context of a sale of land, it must be queried whether the rationale for the rule can sensibly be extended to contracts for the lease of land. As

38 [1911] 1 KB 666.

39 *Grogan v 'The Astor' Ltd* (1925) 25 SR (NSW) 409 at 410; *Kramer v Duggan* (1955) 55 SR (NSW) 385 at 389; *Mihaljevic v Eiffel Tower Motors Pty Ltd and General Credits Ltd* [1973] VR 545 at 564; *Vimig Pty Ltd v Contract Tooling Pty Ltd* (1987) 9 NSWLR 731 at 733.

40 [1911] 1 KB 666 at 672.

41 [1911] 1 KB 666.

mentioned earlier in this article, the rule can be justified where entry into a contract for sale of land is followed by conveyance.

After entry into the contract, searches can be made by the buyer to satisfy himself or herself as to issues such as title. Also, after conveyance, generally speaking the contract itself ceases to govern the relationship between the parties. The same is not the case for a contract of lease. It is therefore open to question whether, just because a contract of lease relates to land, it is logical to extend the rule in *Wilde v Gibson*[42] to such cases.

42 (1848) 1 HL Cas 605; 9 ER 897.

Cases where *Seddon* has been distinguished

Given the degree of criticism that the rule in *Seddon's* case has received, the reluctance of the judiciary to decline to follow the decision is perhaps surprising. Nevertheless, the impact of the rule has diminished to a certain extent over the years because of the extent to which *Seddon's* case has been distinguished. This has occurred even where the contract sought to be rescinded has involved shares, the subject of the dispute in *Seddon's* case. A review of the case law shows that the most common basis for distinguishing *Seddon's* case is by classifying the relevant contract as executory rather than executed. On a technical level, the meaning of 'executory' can be stated with some clarity. *Chitty on Contracts* defines the term to mean 'where neither party has performed the whole of his obligations under it'.[43]

However, the case law does not reveal an entirely consistent approach to the issue of classification. Illustrative perhaps are the comments of Lord Morris in *Senanayake v Cheng*:[44] 'In truth the words executed and executory have in argument been given a measure of significance and a rigidity that they need not bear.' This difficulty in establishing a consistent view as to when a contract is to be regarded as executed and when it is to be regarded as executory is evident in the following cases. It has also provided the courts with a means to avoid the consequences of the rule in *Seddon's* case.

The first category of contract where the rule has been held not to apply on the basis of the contract being executory is a contract for the taking of shares in a company followed by the allotment of shares and registration of the purchaser as the owner on the company register. *Grogan v 'The Astor' Ltd* [45] involved an agreement for the allotment of shares. Before the agreement to allot the shares was entered into, certain misrepresentations were made. There was no allegation that such misrepresentations were fraudulent. The issue before the New South Wales Supreme Court was whether an executed contract for the allotment of shares could be rescinded because of an innocent misrepresentation.

Long Innes J considered *Seddon's* case to be settled authority in Australia as it relates to chattels. However, his Honour proceeded to distinguish contracts for the taking of shares followed by the allotment of those shares, and the placing of the purchaser's name on the register. Citing from the English decision of *First National Reinsurance Company Ltd v Greenfield*,[46] Long Innes J observed the abundance of authority that fraud is not required for an allotment of shares to be set aside or the share register rectified.

In other words, if the prospectus contains an innocent misrepresentation which induces a person to take up shares in the company, that contract could be set aside even after execution. His Honour justified the different legal position on the basis of

43 *Chitty on Contracts* (25th ed) Sweet & Maxwell (1983) 1482. This definition was cited with approval in *Baird v BCE Holdings Pty Ltd* (1996) 40 NSWLR 374 at 378.

44 [1966] AC 63 at 83.

45 (1925) 25 SR (NSW) 409.

46 [1921] 2 KB 260.

what he described as the 'essential difference' between the types of contracts. Long Innes J described a contract for the sale of shares which has been followed by a transfer as an 'executed contract which has passed into the realm of conveyance or completion'[47], while a contract for the taking of shares followed by an allotment and the placing of the applicant on the register cannot be so regarded. In other words, the rationale underpinning the decision was that a contract for the taking of shares, followed by an allotment, was executory in nature and outside the ambit of *Seddon*.

It is the view of the writers that the distinction drawn between these two kinds of transactions is not persuasive. Clearly, a contract for the sale of shares followed by a transfer should be regarded as an executed contract. However, it is not entirely clear why a contract for the taking of shares followed by an allotment should not be so regarded. Long Innes J refers to the editions of *Buckley on Companies*[48] stating that such a contract is 'not one of sale but of contract which remains in contract after registration of the allottee's name'. His Honour then suggests that such a contract would remain on foot until the company goes into liquidation. Until this point the contract could not properly be regarded as executed.

With respect to his Honour, this approach is not a sensible one. Once a shareholder has paid for the relevant shares and been registered as the holder of those shares, there is no logical basis for finding that such a contract is executory. Nothing remains to be done by either the shareholder or the company to effect registration of those shares in the name of the shareholder. Such a contract should properly be classified as executed.

Another interesting aspect of the judgment of Long Innes J is his reliance on the comments of McCardie J in *First National Reinsurance Company Ltd v Greenfield*.[49] In this English decision, the court had to determine whether a shareholder was entitled to rescind his contract to take up shares in a company on the basis of misrepresentations contained in the prospectus. After citing the rule in *Seddon's* case, McCardie J stated that 'the effect … of the company decisions is to show that contracts for the taking of shares, even though followed by allotment and the placing of the application upon the register, are not contracts which fall within the principle of *Seddon's* case.'[50]

In a less than convincing explanation of why such contracts do not fall within that principle, McCardie J continued: 'It might well have been thought that they fell within that principle, but in fact they do not …'.[51] To support this proposition, his Honour cites two earlier English decisions. However, these decisions pre-date *Seddon's* case. McCardie J did not explain why the principle enunciated in *Seddon's* case should have no application to contracts for the allotment of shares. Reliance on authorities which were decided before the development of the rule in *Seddon's* case would seem to beg

47 (1925) 25 SR (NSW) 409 at 411.
48 *Buckley on the Companies Acts* (10th ed) Butterworths (1924) 92.
49 [1921] 2 KB 260.
50 Ibid, at 272.
51 Ibid.

the question. The reasoning appeared to be that, before *Seddon's* case, the law regarding setting aside an allotment of shares was settled and satisfactory.

An allotment of shares could be set aside even in the absence of fraud. Apparently for this reason alone, McCardie J considered that such contracts could not be regarded as falling within the principle in *Seddon's* case. Whether this reason, or the basis for distinction given by Long Innes J in *Grogan v 'The Astor' Ltd*[52] concerning the executory nature of a contract for the taking of shares as contrasted with the executed nature of a contract for the sale of shares are valid, is debateable.

Secondly, the executed versus executory distinction was considered relevant in relation to a contract for the purchase of shares in a business where the purchaser, along with the seller of the shares, became a partner in that business. In *Senanayake v Cheng*,[53] the purchaser bought five shares in the seller's business of stock and share brokers for $20,000. The agreement to purchase the shares also contemplated that the purchaser be admitted to the business partnership. During negotiations, the purchaser was told that the business was 'a gold mine'. This did not turn out to be the case and the purchaser sought to rescind the agreement.

After referring to the limitations on the right to rescind imposed by *Seddon's* case, the Privy Council proceeded to distinguish that case on the facts. In *Senanayake v Cheng*,[54] although the purchaser had become a partner in the business and the money for the shares had been paid, the Privy Council did not consider that the contract was executed. The main reason for this was that the purchaser and seller were to have a 'continuing contractual association as partners'.[55]

In distinguishing *Seddon's* case on its facts, the Privy Council commented that the facts before it were more akin to cases such as *Adam v Newbigging*[56] and *MacKenzie v Royal Bank of Canada*.[57] The facts of *Adam v Newbigging*[58] were certainly analogous to those of *Senanayake v Cheng*.[59] In *Adam v Newbigging*,[60] a person was induced by a misrepresentation to become a partner in a business.

The House of Lords allowed the purchaser to rescind the contract and recover his capital, although the contract was executed and the misrepresentation was not fraudulent. While the facts of the two cases are similar, it must be queried whether reliance on this case which was decided before *Seddon's* case, is a legitimate basis for distinguishing *Seddon's* case. If *Adam v Newbigging*[61] had been decided after *Seddon's* case, the House of Lords may have been persuaded by the dicta of Joyce J not to grant the relief sought. Perhaps reliance on *MacKenzie v Royal Bank of*

52 (1925) 25 SR (NSW) 409.
53 [1966] AC 63.
54 Ibid.
55 Ibid, at 83.
56 (1888) 13 App Cas 308.
57 [1934] AC 468.
58 (1888) 13 App Cas 308.
59 [1966] AC 63.
60 (1888) 13 App Cas 308.
61 Ibid.

Canada[62] is more understandable. *MacKenzie's* case involved a contract of guarantee which the court set aside on the basis of innocent misrepresentations made to the guarantor before entry into the guarantee. The Privy Council in that case did not refer to the rule in *Seddon's* case as a possible bar to rescission, so it is not entirely clear why the rule was considered inapplicable. It may be that the case simply was not argued as a bar to rescission. Alternatively, it may be that the court did not consider it applicable because the contract of guarantee was still on foot and, as such, could not be regarded as executed. Although the Privy Council in *Senanayake v Cheng*[63] relied on *MacKenzie's* case, there is no clear statement as to why it was more persuasive than *Seddon's* case. It must be presumed that the continuing nature of the parties' obligations under the respective contracts was the reason for distinguishing *Seddon's* case.

Interestingly, in that part of the judgment in *Senanayake v Cheng*[64] which examines whether the contract can properly be regarded as executory or executed, Lord Morris expresses concern about the legal ramifications of finding that the contract was executed upon the purchaser becoming a partner, namely the loss of the right to rescind the contract. As his Lordship stated, 'the respondent's discovery of the facts on which she could claim to rescind was not possible until after she had, in a formal sense, become a partner. Only then had she the right and the opportunity to see the books.'[65]

With respect to his Lordship, this should not have influenced the decision of the court as to whether the contract should be classified as executory rather than executed. The same concern arises regardless of the nature of the contract. In a contract for the sale of a chattel, it is unlikely that a purchaser would discover the untruth of a representation made until after title has passed and money handed over. Nevertheless, in such a case, the contract can only properly be regarded as executed with the attendant loss of right to rescind for innocent misrepresentation.

Finally, the strained distinction between an executed and executory contract is even more starkly illustrated by contrasting the Victorian decision of *Mihaljevic v Eiffel Tower Motors Pty Ltd and General Credits Ltd*,[66] a case involving a hire purchase contract for a car where the contract was induced by misrepresentation, with *Angel v Jay*,[67] a case discussed earlier involving a lease of land. In *Mihaljevic v Eiffel Tower Motors Pty Ltd and General Credits Ltd*,[68] despite the fact that the hirer already had possession of the car, the Victorian Supreme Court considered that 'the hire-purchase agreement was unquestionably a contract of an executory character which was not executed by the bailment commencing'.[69] Gillard J noted:

62 [1934] AC 468.
63 [1966] AC 63.
64 Ibid.
65 Ibid, at 83.
66 [1973] VR 545.
67 [1911] 1 KB 666.
68 [1973] VR 545.
69 Ibid, at 564.

> True, a right to possession was given but that possession was to be regulated subsequently by the terms of the contract, and the prime intention of the parties was the subsequent bailment of the vehicle and the hire-purchase agreement were only to come to an end on the future sale of the vehicle by the owner to the hirer. The delivery of the motor truck by way of a bailment was but one of the incidents under the hire-purchase agreement.[70]

The decision of the court in this case (as well as the other cases discussed above concerning concurrent obligations) does not sit comfortably with *Angel v Jay*[71] where, because the lessee had gone into possession and nothing else remained to be done under the lease, the lease was regarded as being executed.[72]

In summary, it appears to be the case that the weight of authority indicates that where a contract involves ongoing obligations between the parties, whether that contract is for the taking of shares followed by an allotment (so that the shareholder continues to have a contractual relationship with the company), buying of shares in a business where the parties to the contract continue as partners in the business, a guarantee under which the guarantor undertakes obligations to the creditor over a period, or a contract for the hire purchase of a chattel, the contract should be regarded as being executory. The legal consequence of such a classification is, of course, that the rule in *Seddon's* case will not be a bar to rescission for innocent misrepresentation.

In addition to the executed/executory issue, *Seddon's* case has been distinguished where the relevant contract is between parties who are in a fiduciary relationship. In *Armstrong v Jackson*,[73] the defendant sought to set aside a contract for the purchase of certain shares. The plaintiff seller was the defendant's stockbroker who, in the course of the transaction, made various misrepresentations to the defendant. Coincidentally, McCardie J (who distinguished *Seddon's* case in *First National Reinsurance Company Ltd v Greenfield*[74]) was the presiding Judge in this case. Once again, *Seddon's* case was considered to represent the settled law which imposed limitations on rescinding an executed contract.

Once again, his Honour was able to distinguish *Seddon's* case. The reason given on this occasion was that while in *Seddon's* case 'the dispute was between vendor and vendee',[75] in the case before the court, the sale was between the principal and his agent.[76] His Honour was of the view that the parties were in a fiduciary relationship and, in those circumstances, 'the rule [*in Seddon's* case] is infinitely stricter and more

70 Ibid, at 564-565.
71 [1911] 1 KB 666.
72 Note also in this regard the comments of Long Innes J in *Grogan v 'The Astor' Ltd* (1925) 25 SR (NSW) 409 at 411-412 where he doubted that such a lease could be regarded as being executed.
73 [1917] 2 KB 822.
74 [1921] 2 KB 260.
75 Ibid, at 825.
76 The court also distinguished *Angel v Jay* [1911] 1 KB 666 because the dispute was between a lessor and lessee and *Wilde v Gibson* (1848) 1 HL Cas 605; 9 ER 897 because that case involved a seller and purchaser. In neither case were the parties in a fiduciary relationship.

severe.'[77] The result was that even if fraud could not be proved, rescission was available to the plaintiff notwithstanding execution of the contract.

There is a number of difficulties in this approach. First, the nature of the relationship between the parties was never any part of the rule. It makes no sense to say that the rule in *Seddon's* case, a rule preventing rescission of an executed contract on grounds of innocent misrepresentation, 'is infinitely stricter and more severe' as it applies to fiduciaries.

Secondly, confusion arose because of the apparent merging of the remedy of rescission for innocent misrepresentation with the same remedy for breach of a fiduciary obligation. It is true that obligations between a stockbroker and client can be fiduciary in nature.[78] It is also true that there exists well entrenched limitations on the extent to which a fiduciary is entitled to sell his or her own property to a principal.[79] Where such a sale occurs, the principal's remedy is either rescission, or to take account of the fiduciary's profit.

If the principal elects the former, the rule in *Seddon's* case, which applies only where rescission is on the basis of an innocent misrepresentation, does not constitute a bar to rescission. Thus, while the decision in *Armstrong v Jackson*[80] to allow rescission of the contract is no doubt correct, it cannot be regarded as a case which distinguishes the rule in *Seddon's* case. The remedy was available on account of the stockbroker's breach of his fiduciary duty to his principal. There was no need to distinguish *Seddon's* case.

Finally, while not strictly a case in which *Seddon* was distinguished, *Morris v Smith*[81] is also relevant here. This was a decision of the District Court of Western Australia in which a purchaser was entitled to rescind a contract for the sale of a business following an innocent misrepresentation by the seller. The rule in *Seddon's* case was raised by the seller as a bar to rescission. The very brief judgment was unsatisfactory on a number of grounds.

First, it is unclear whether the contract under consideration was considered by the court to be executed or executory. There was an indication in the judgment that a contract for the sale of a business could not be considered executed where registration of the business name had not been effected. It appears that Ackland J equated 'registration' of a business name with a 'conveyance' of real property.

With respect, the legal consequences of registering a business name cannot be equated with those of conveyance.

77 Ibid, at 826.
78 *Daly v The Sydney Stock Exchange* (1986) 160 CLR 371 at 377 and 385.
79 *Bentley v Craven* (1853) 18 Beav 75; 52 ER 29.
80 [1917] 2 KB 822.
81 [1981] 1 SR (WA) 280.

Secondly, although the sale concerned a business rather than real property, the court turned to the principles set out in *Svanosio v McNamara*[82] which justified setting aside a contract for sale of land even after conveyance. In particular, Judge Ackland noted that a conveyance could be set aside if there had been 'a total failure of consideration or what amounts practically to a total failure of consideration'.[83]

As the buyer in *Morris v Smith*[84] was not lawfully entitled to sell the products of the business, the District Court held that this amounted practically to a total failure of consideration which justified rescission of the contract. No authority other than *Svanosio v McNamara*[85] was cited to support this proposition. It must be queried whether, in a contract for the sale of a business (not involving the sale of real property), rescission on the basis of 'practically a total failure of consideration' represents good law. More probably, it represents an attempt by the court to circumvent the rule in *Seddon's* case so as to allow rescission of the contract.

Cases where *Seddon* has not been followed

In 1974 Sutton expressed the view that:

> On the present state of the authorities, it is an open question whether the rule that there can be no rescission for innocent misrepresentation in the case of an executed contract applies to a contract for the sale of goods or not.[86]

This statement was referred to by Helsham CJ in *Leason Pty Ltd v Princes Farm Pty Ltd*.[87] In that case the plaintiff sought an order for the return to the defendant of a horse which the plaintiff had bought at auction and in respect of which there had been an innocent misrepresentation as to pedigree.

Helsham CJ, after noting that the matter had never been determined authoritatively, considered that the observations of Joyce J in *Seddon's* case were *obiter*. Furthermore, he supported the view of Lord Denning in *Leaf v International Galleries*[88] where his Lordship said:

> I agree that on a contract for the sale of goods an innocent material misrepresentation may, in a proper case, be a ground for rescission even after the contract has been executed. The observations of Joyce J in *Seddon v North Eastern Salt Co Ltd* … are, in my opinion, not good law. Many judges have treated it as plain that an executed contract of sale may be rescinded for innocent misrepresentation .

82 (1956) 96 CLR 186.
83 [1981] 1 SR (WA) 280 at 282.
84 [1981] 1 SR (WA) 280.
85 (1956) 96 CLR 186.
86 Sutton K, *The Law of Sale of Goods in Australia and New Zealand*, Law Book Co (1974) 10.
87 [1983] 2 NSWLR 381.
88 [1950] 2 KB 86 at 90.

While agreeing with the view taken by Lord Denning, the writers believe that the authority relied upon to support the proposition is less than convincing.[89] Rather, we support the view because we believe *Seddon's* case was wrongly decided and cannot be supported as a matter of principle.

89 In *T & J Harrison and Others v Knowles and Foster* [1918] 1 KB 608 there is no reference to *Seddon's* case and the statements by Warrington LJ and Scrutton LJ which are referred to by Lord Denning are statements of general principle in the context of comparing contractual terms with pre-contractual statements. *Bell v Lever Bros Ltd* [1932] AC 161 was a case about a termination payment made under a mistake. The statement relied upon by Lord Denning was in terms of when rescission might apply, not when such relief would be excluded. To reinforce this view Lord Atkin gave the example of a horse which was purchased following a misrepresentation as to its soundness. His Lordship noted that if there was fraud then the contract could be rescinded but if there was no fraud the purchaser could not return the horse unless there was a condition to that effect. In that case also, there is no reference to *Seddon's* case or any implication that it should not be regarded as good law. Finally, on this point Lord Denning refers to *L'Estrange v Graucob* [1934] 2 KB 394 which concerned whether an exclusion clause was to be regarded as part of a contract between the parties. Again there is no reference to *Seddon's* case. The reference by Scrutton LJ which Lord Denning relies upon was to agreement concerning fraud. The reference to the possibility of a contract not being binding because of an innocent misrepresentation was a contention made by the plaintiff but not endorsed by the court. Maugham LJ noted that the plaintiff might have been induced to sign the agreement by a misrepresentation; however his Lordship did not conclude from this that the sale might be rescinded.

In *Leason* Helsham CJ concluded:

> I propose by this judicial determination to hold that the remedy of rescission for innocent misrepresentation is available in the case of an executed contract for the sale of goods. I believe that is right in principle and there is nothing to preclude me from so doing.[90]

The writers agree. The 'principle' is the ability of the purchaser to identify the misrepresentation. As Greig and Davis have pointed out:

> If a sale of goods is for cash, it is normally executed and fully performed within a very short time of being made, and before the buyer has any opportunity of testing the truth of any representation. The buyer would, on the application of *Seddon's* case, lose his right to rescind before he had any opportunity of knowing that he had such a right.[91]

Baird v BCE Holdings Pty Ltd[92] is the only other reported Australian decision in which the court chose not to follow *Seddon's* case. *Baird* concerned the transfer of shares which came about as a result of certain advice from an accountant. The parties to the transfers would not have entered into the transaction were it not for their belief in the accuracy of the accountant's advice. They sought rescission of the transaction in order that the transfers be rendered void. Young J indicated that there were three matters in need of consideration.

First, whether a transfer of shares is considered to be an executory contract; secondly, whether the rule in *Seddon's* case precludes rescission of the contract; and thirdly, if a contract is 'rescinded' by agreement, is it determined as from the time of that agreement to rescind or set aside ab initio? It is only the second issue which is relevant here.[93]

His Honour referred to the extensive criticisms of the rule in *Seddon's* case and concluded that there was no principle behind the rule at all. While acknowledging the relevance and correctness of the rule in relation to land, Young J concluded that the case should no longer be followed in so far as it related to contracts other than those for the sale of land.

In the course of his judgment, Young J noted that at least three eminent judges in New South Wales had followed the rule and regarded it as binding. There was a reference to Long Innes J in *Grogan v 'The Astor' Ltd*[94]*;* McLelland J in *Kramer v Duggan*[95] and Wood J in *Vimig Pty Ltd v Contract Tooling Pty Ltd*[96]*;* all of which were discussed

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90 [1983] 2 NSWLR 381 at 387.

91 Greig and Davis, *The Law of Contract*, Law Book Co (1987) 885.

92 [1976] 40 NSWLR 374.

93 The issue of whether a contract for the transfer of shares, as occurred in *Seddon's* case, should be regarded as executed or executory was discussed earlier. Consistent with the cases discussed above, Young J concluded at 379: 'as there has been a transfer of shares registered and all parties have done all they are bound to do under the contract, the contractual regime is at an end. Thus there is no executory contract that can now be rescinded'.

94 (1925) 25 SR (NSW) 409.

95 (1955) 55 SR (NSW) 385.

96 (1986) 9 NSWLR 731.

earlier in this article. In coming to the view that the court should no longer apply the mistaken view of the law as set out in *Seddon's* case, Young J said he was 'fortified in this view' by the large number of cases which had distinguished it 'on almost all possible grounds'. He also considered that single Supreme Court judges should be more resolute in the nineties than they were in the past about the matter.

Conclusion

It is the view of the authors that the law in respect of rescission for an innocent misrepresentation is in an unsatisfactory state. The basis for this can be traced back to the inappropriate extension of the rule in *Wilde v Gibson*[97] to contracts other than for the sale of land.

In this sense we believe that there are really two rules and that part of the confusion evident in the cases is because courts have failed to recognise this fact. In the first place there is the rule of *Wilde v Gibson*[98] which appears never to have been challenged and which must still be said to represent the law in Australia, except in so far as it has been abrogated by statute.[99] This rule states that apart from fraud, a contract involving the sale and conveyance of land cannot be rescinded for an innocent misrepresentation. Apart from being common law of long standing, the rule is soundly based in reason, for the whole nature of land transactions is such that the purchaser is given the opportunity by law to conduct such checks as to title, description and encumbrances as may be necessary in order to be satisfied that what is being contracted for conforms to what has been described.

In this sense agreements for the sale of land are different to sales of chattels where the contract is complete after the exchange of promises or payment. Further, in relation to land, the doctrine of merger operates so that new covenants take the place of those obligations imposed by the particular contract. This is not the case for the sale of chattels.

Seddons case is sometimes (incorrectly we would say) used to support what was said in *Wilde v Gibson.*[100] *Seddon's* case did not involve land and the principle or rule which is attributed to that case went well beyond what was said in *Wilde v Gibson.* In this article we have given examples of how the courts have sought to apply the rule from *Wilde v Gibson* to other contracts, not because there is any rationale for so doing, but rather, because of the comments of Joyce J in *Seddon's* case.

The second rule is that in cases other than those involving land, a contract cannot be rescinded for an innocent misrepresentation. This is the rule which has attracted the judicial and academic criticism and we believe rightly so. The continuation of the rule on the grounds that it represents the law (*Seddon's* case) is an example of a bad decision being given credibility by passage of time.

97 (1848) 1 HL Cas 605; 9 ER 897.
98 Ibid.
99 See below n 103.
100 (1848) 1 HL Cas 605; 9 ER 897.

Support for the view that in fact there are two rules can be found in comments of Dixon CJ and Fullagar J in *Svanosio v McNamara*[101] and Young J in *Baird v BCE Holdings Pty Ltd*.[102]

This *two rule* view provides an explanation for much of the confusion and criticism. Thus we have judges who have gone to great lengths to distinguish *Seddon* in respect of contracts not involving land - focusing on the question as to whether the contract was executed or executory. Examples include the drawing of distinctions between the sale of shares (said to be executed) and the allotment of shares (said to be executory); the sale of a business (executed) compared with a sale of a business coupled with a partnership agreement between the buyer and seller (executory); the granting of a lease (executed) compared with the giving of a guarantee (executory).

In our view one of the most strained distinctions between executed and executory contracts as a means of distinguishing *Seddon's* case is classifying a hire purchase contract where the hirer has possession of the car, as a contract which is executory in nature while classifying a lease where the tenant enters into possession as an executed contract.

Other grounds upon which *Seddon's* case has been distinguished include situations where the sale is to a party in a fiduciary relationship to those where they are not; or simply saying it does not apply where there has been a total failure of consideration.

Other judges have been more forthright and have simply taken the view that the second rule is not good law and should not be followed. This can be supported to the extent that much of the authority for the supposed 'rule in *Seddon's* case' involves cases dealing with land. Nevertheless, such rejection has not been consistent. In New South Wales for example we have seen a 1983 case reject the rule in *Seddons* case followed in 1987 by an acceptance of the rule as it applies to contracts other than land, followed by another rejection of it in 1996.

What follows from all this? Parliaments should put in place consistent legislative provisions to remedy the current common law position which has been resoundly criticised by the judiciary and has resulted in questionable distinctions being drawn insofar as the rule relates to contracts other than contracts for the sale of land.[103]

In the event that legislatures do not remedy the situation, we hope that judges follow the lead of Young J in *Baird v BCE Holdings Pty Ltd*[104] and take the bold approach of recognising the absurdity of the current position, return to the rationale for having the rule and then declare that in contracts not involving the sale of land, the rule as expressed by Joyce J in *Seddons* case in not good law.

In this sense we are echoing the words of Hammelmann who in 1939 hoped that:

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101 (1956) 96 CLR 186 at 198.

102 (1996) 40 NSWLR 374 at 380.

103 In some jurisdictions there has already been legislative reform which allows for the rescission of an executed contract for an innocent misrepresentation: *Misrepresentation Act* 1972 (SA) s 6; *Law Reform (Misrepresentation) Act* 1977 (ACT) s 3.

104 (1996) 40 NSWLR 374.

> When the question arises in the Court of Appeal, the court will give a clear ruling, restrict the rule in *Wilde v Gibson* to the sphere of real property law and dispel the legend that an executed contract for the sale of a chattel or chose in action cannot be rescinded for innocent misrepresentation.[105]

105 Hammelmann HA 'Seddon v North Eastern Salt Co' (1939) 55 *LQR* 90 at 105.