

representation. My findings of fact have not been in the least modified by argument or further consideration. The engine is and was as represented by Tomelty; and I am unable to accept the statement of the plaintiff or his witness as to what representations were made. And the engine was in a good state of repair, remembering that it was second-hand and not new. Tripp's standard of repair is quite too high—involving as it does rebuilding. In case of further proceedings, my findings at the trial may be looked at, but I do not think it necessary to say more at the present time on the question of fact.

Nor do I see how any fraud was perpetrated upon the Court in the proceedings in the former action. The action must fail, therefore, on these grounds. In respect of the previous action the plaintiffs could not succeed even if these difficulties were overcome.

With full knowledge of all the alleged defects, the plaintiffs went on and paid the balance of the first payment of purchase money upon the engine, and received back the old notes. There was no right to do this unless the present contract was valid; they therefore and thereby ratified the contract. I am not forgetting the form of the second receipt, but I find as a fact that the \$100 was not expenses, etc., in respect of the first engine (though the amount may have been fixed at \$100 in view of the amount of such expenses), but that it was, precisely as stated in the order, a payment on account of the \$700 purchase money.

The contract being valid, the notes given in pursuance thereof are also valid; and as to the \$50, the plaintiffs here cannot set up the non-shipping or non-delivery of the engine, as that was prevented by their own act in first requesting delay and then repudiating the purchase: *Steen v. Steen*, 9 O. W. R. 65, 10 O. W. R. 720, and cases cited. This would not, of itself, perhaps, prevent an action of deceit, but I have held that such an action cannot succeed.

The action must be dismissed with costs payable to both defendants; the sheriff cannot deduct his costs from the money on hand, but must look to the plaintiffs for the same.

In the view I have taken of the facts, it has not been necessary to consider whether relief in respect of the former action should have been sought and would be given in this.