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# Contracts of Sale of Merchandise--Fraud on the Vendor

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## CONTRACTS OF SALE OF MERCHANDISE. FRAUD ON VENDOR.

HON. LEVI T. GRIFFIN.

### LEGAL FRAUD.

This is an interesting topic to every jobbing house, and to every attorney concerned with mercantile collections. The law is pretty well settled on the general subject and the Treatises on Sales are plentiful. Among the best is that of Mr. Benjamin. Tiffany on Sales of the Hornbrook Series recently issued assumes also to state briefly the principles which control in these cases. At large commercial and metropolitan points, and among lawyers who have occasion to often deal with this question, there is perhaps not much difficulty in arriving at correct conclusions, and promptly enforcing the rights of a defrauded vendor client. In more restricted localities where questions of this character arise less frequently, and the test authorities are not always accessible, a review of some of the principal points involved may be of interest, and useful.

Perhaps the most important point at present in dispute may be stated thus ;

*Will a false representation by the buyer honestly made, without knowledge of its falsity and believed to be true, enable the vendor to avoid a sale, the other necessary requisites for this purpose being present?*

This doctrine was clearly laid down in 1844 in *Collins v. Evans*, 5 *Adolphus & Ellis*, p 804, by the Court of Queen's Bench, in an opinion delivered by Lord Chief Justice Denman. It is there said

that the allegation in the declaration that defendant knew the representation to be false, and of which there was no proof, is immaterial. That one of two persons has suffered by the conduct of the other, and the sufferer is wholly free from blame, but the party who causes his loss though charged with neither fraud nor negligence has been guilty of some fault when he made a false representation; that he was not bound to make any statement, nor justified in making any which he did not know to be true; he should therefore abide the consequences of his misconduct.

This decision seems to be so just and sensible in a civil case that it is surprising that it did not become established law, whatever may have been the previous current of authority. It is certain that it cannot apply to a charge of fraud in a criminal case where there must be a fraudulent intent to constitute a criminal offense. It is difficult however to see why, if a false statement is made by one party to another, inducing the latter to act, and who thus suffers damage, he should not be made whole by the party causing the loss. It is a course of conduct to which the law ought to attach the consequence of paying such damage as the false statement has occasioned, and indeed it may be said that there is a slight degree of what may be called moral delinquency.

See observations of Lopes L. J. in *Peek v. Derry*, 37 Chancery Division 585.

The term "legal fraud" has been somewhat criticised as we shall see hereafter, but the courts, and even eminent judges are not ordinarily guilty of such precision of language as to afford good grounds for it.

It is true however that this case went to the Exchequer Chamber on error from the Queen's Bench and was reversed the same year—*Evans v. Collins*, same volume p. 820. The Court in an opinion delivered by Tindal C. J. follows the early case of *Pasley v. Freeman*, 3 T. R. 51 and declares that the current of authority from that case downwards, has laid down the general rule of law to be that fraud must concur with the false statement in order to give a ground of action; that this doctrine has been upheld by many cases of later date, referred to in the argument and has been contradicted so far as the court is aware, by none; there can be no action therefore for fraud founded upon a false representation unless the party making it knows it to be false, and especially if he believes it to be true. *Haycraft v. Creasy*, 2 East 92.

In *Weir v. Bell* L. R. 3 Exch. Div. p. 238, decided in 1878 on

appeal from the judgment of the Exchequer Division, Bramwell L. J. criticises the use of the words "legal fraud" and substantially holds that there must be moral fraud to make a man liable for fraud—"I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well founded complaint of legal fraud, or of anything else except where some duty is shown and correlative right, and some violation of that duty and right. And when these exist it is much better that they should be stated and acted on, than that recourse should be had to a phrase illogical and unmeaning with the consequent uncertainty."

There is ground for saying that the Lord Justice is making too much of words. As long as the meaning of the words "legal fraud" is well understood in the profession it is hardly worth discussing whether some other words may not be more acceptable. The learned Lord Justice suggests none, unless made into a complete sentence.

It is very clear that "legal fraud" means fraud in contemplation of law, and as observed by Mr. Justice Campbell, *infra*, "these actions are not brought to teach moral lessons, but to redress actual grievances."

The question is very elaborately discussed with extended citations of the English authorities in *Joliffe v. Baker*, 11 Q. B. Div., 225, decided in 1883, in which the conclusion is reached that there is no such thing as "legal" fraud in the absence of moral fraud; and that a representation believed to be true does not afford a ground of action.

But these cases are much shaken and severely damaged by the later case of *Peek v. Derry*, 37 Ch'y Div., 541; decided in 1887, wherein Colton, L. J. and Sir J. Hannen and Lopes, L. J. all comment on "legal fraud." Lord Justice Colton referring to the observations of Lord Bramwell appearing above, disclaims entering into any discussion as to whether legal fraud is a happy expression and suggests that it is not one which he should adopt, but he continues; "The question is whether there is not a duty on the part of those who make statements to be acted upon by others, and whether there is not a right in these persons to whom the statements are made. In my opinion there is a duty," p. 567. So also Sir J. Hannen; "I apprehend it to be the rule of law, that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must in a civil point of view,

be held as responsible as if they had asserted that which they knew to be untrue," p. 581.

The observations of Lopes, L. J. seem to indicate that there is no fraud when there is no moral delinquency, but that there is some slight moral delinquency in making a representation for another to act upon which the party making it does not know to be true, and that it is sufficient to render such a representation fraudulent in contemplation of law; and he adds; "This is what I understand by the expression which is so often used in the authorities, and which has been referred to by Sir James Hannen; I mean the expression "legal fraud."

These observations of the learned Justices of the Chancery Division seem to indicate a drifting back close on to the borders of the opinion of the Queen's Bench. The remark of Lopes, L. J. is quite in accord with that of Lord Chief Justice Denman, *Supra*—that a party who causes a loss though charged with neither fraud nor negligence must have been guilty of some fault when he made a false representation.

This question must be regarded as settled in Michigan. Mr. Justice Cooley, the learned author of *Constitutional Limitations*, speaking from the Supreme Bench in *Converse v. Blumrich*, 14 Mich., 108 (1866); observes that the courts must look at the effect of untrue statements upon the person to whom they are made, rather than to the corrupt motives of the one making them; and that if one obtains the property of another, by means of untrue statements, though in ignorance of their falsity, he must be held responsible as for a legal fraud.

The question has not so often arisen in case of fraud on the vendor, as of fraud on the vendee. See *Ripley v. Case*, 86 Mich., 261, yet in *Mooney v. Davis*, where the vendor sought to retain the goods purchased, the court distinctly holds that neither the concealment or representation need be wilful or intended in order to constitute the fraud that will vitiate the contract.

In other cases the observations of the learned Justices indicate that the accepted doctrine is as stated by Mr. Justice Cooley, *Stone v. Covell*, 29 Mich., 359 is an action on the case for fraud in making false representations. Mr. Justice Campbell happily remarks that these actions are not brought to teach moral lessons, but to redress actual grievances. When a person sells his property upon the positive statements of another on facts, and those facts turn out to be falsely asserted, he is damaged by the falsehood, and the false

assertion has all the effect of actual fraud.

In that case however the trial court only held the defendant liable, if he knew or had reason to know or believe, the representation to be false; without requiring proof of actual knowledge.

In *Beebe v. Knapp*, 28 Mich., 52, often cited in support of the doctrine the trial judge in his instructions to the jury held the defendant liable only in case of an evil intent—if he intended to deceive the party; but not liable if he made the representations in the honest believe that they were true.

See also *Carter v. Glass*, 44 Mich., 154, where Judge Cooley refers to the case of *Beebe v. Knapp* as supporting the actionable character of false representations made by the vendor, though the vendor was not aware of the falsity of the representations when he made them; but that case shows as already stated, that the trial court instructed the jury that there must be an intent to deceive. Can such an intent be inferred merely from the falsity of representations not known to be such at the time of making them? Such an intent is conclusively presumed if the representations are known to be false. *Hudnut v. Gardner*, 59 Mich., 341.

In *Heineman v. Steiger* the defendant denied any wrong intent, but it appeared that a statement made by him was untrue, and that was held sufficient, 54 Mich., 232. In *Hudnut v. Gardner*, *supra*, the defendant had knowledge of the falsity of the representation. It is quite apparent that the doctrine laid down by Judge Cooley in *Converse v. Blumrich*, *supra*, is the accepted law of Michigan, and will be enforced in all cases when applicable.

The question can hardly be said to be settled in the Federal Courts. The case of *Southern Development Co. v. Silva*, 125 U. S., 247, decided in 1887, seems to support the doctrine that there must be knowledge of the falsity of the representations to constitute fraud. The transaction involved the sale of a mine and the facts were somewhat peculiar, and the action was in equity.

In an earlier case of *Turner v. Ward* involving a sale of personal property, where the question is distinctly raised, it is held in an opinion delivered by Chief Justice Waite that the representations were sufficient to set aside the sale as induced by false representations, although the defendant had himself been deceived as to the pecuniary condition of the firm and made the representations honestly and in the belief that they were true.

This case though decided in 1876 is only recently reported in Appendix 154 U. S., 618, 14 S. C. R., 1179.

Perhaps the weight of authority is against the Michigan doctrine, but it would seem that the tendency of later decisions is in its favor as supported by the better reasoning. It certainly ought to secure a firm lodgement in those jurisdictions where the question has not been already decided adversely.