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Sales: Recision for Fraud--Injury Requirement

T. Marsh

itive for you to exercise it." The price set was the full commission on all the accounts, which was far more than any damage he would have sustained. The contract in effect contemplated a single definite performance with a penalty stated as an alternative to force that performance.

Freeman's primary right was to have Columbia fully perform, and Columbia was under a duty to perform. Freeman had a remedial right to sue for breach of that duty. The proposition that a promisor has a legal right to break his contract, and can bargain away that right because legal remedies are ordinarily ineffective to prevent him from so doing is said to be both historically and analytically unsound.[10] An alternative contract is one in which a *free* power of choice exists. Its determination cannot depend on the form of the transaction but rather on its substance. If one alternative is a penalty there is no option to perform either of the alternatives, but a duty to perform the one bargained for or be liable for breach of contract.[11] If the nature of the contract made it specifically enforceable, Columbia could not have prevented it by a tender of the penalty.[12] In the principal case the court lacked the tools which would have given it a proper insight with which to judge. In this respect an adoption of the rule of the Restatement would make for more complete justice and fair play.

Jack Levine.

SALES: RECISION FOR FRAUD—INJURY REQUIREMENT.—In the recent California case of *Earl* v. *Saks & Co.*, 36 A. C. 565, 226 P. 2d 340 (Jan. 19, 1951), a customer in a store, was induced to purchase a fur coat by the sellers false representation that the price was $4,000. The price was actually $5,000. The customer desired the coat to preserve his relationship with a lady friend, but refused to pay the price of $5,000. His lady friend, as prospective donee of the coat, conferred privately with the seller and arranged to pay the balance if they would sell the coat to the purchaser for $4,000. This was done, and the purchaser signed a sales slip for the coat for $4,000. The next day, before the price was paid, the purchaser had a change of heart (his lady friend had failed to live up to his expectations and cease "running around"), and informed the seller that he had decided not to purchase the coat. In the meantime the lady friend had contributed the balance of the price. The seller brought suit against the purchaser for the agreed price, which was successfully defended on the ground that the seller's fraud precluded his recovery.

It is settled that in an action for fraud and deceit in tort, damages are a necessary element and are required for relief.[1] In England a distinction is drawn between tort and contract actions, and it is held that damages because of the fraud are unnecessary to rescind a sale or to defend an action for the purchase price. There is some conflict in the United States, but the weight of authority holds that damages are not required to rescind a sale for fraud.[2] The reason damages must be shown to recover for tortious misrepresentation is so that the injured party may be compensated. Damages must be shown to prove the extent of the injury, and thus the amount of recovery The purpose

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[10]Barbour, "The Right to Break a Contract," Selected Readings in the Law of Contracts (1931), 550: 16 Mich. L. Rev. 106.

[11]The Restatement of Contracts, sec. 325, comment b.

[12]*Accord*; California Civil Code, sec. 3389.

[1]Pasley v. Freeman (1789), 3 Term. 51.

[2]106 A. L. R. 130.

of allowing recision of a sale induced by fraud is to make the parties whole, not to give awards to the injured party. When a party has shown his injury resulting from the seller's fraud, he has shown its extent as evidenced by the disparity in what he bargained for and what he received. Whatever technical requirement there may be for damages is impliedly satisfied. Earlier California cases seemed to require damages to rescind a sale for fraud,[3] but the later cases have taken the position that a party injured by a fraudulent representation may rescind the sale without proof of damages.[4] The purchaser in the principal case could not affirm this agreement and recover damages from the seller in a tort action for fraud and deceit. The reason is that he has suffered no damages.[5] The question here is whether he had suffered a sufficient legal injury by the seller's false representation which will allow him to rescind and successfully defend an action for the price. It is submitted that he had not.

It is stating no more than a truism to assert that a party seeking informal recision by defending a suit for the price, or formal recision by an affirmative action, must be injured or prejudiced. The injury is merely the effect of the wrong, if it be a wrong. Whether or not the party attempting to get recision will prevail is predicated on the cause of the injury, i.e., a failure to receive what was bargained for. This is usually evidenced by receiving something substantially different, either in quality or value, from what was bargained for. Only then has he been injured, and only then may he rescind the transaction for fraud. Very seldom do courts recognize fraud in the abstract,[6] i.e., unproductive of injury. Money damages might be of incidental importance by using them to measure the material difference in the article bargained for and the article received. However, money damages are not a prerequisite to the right to rescind.

There have been many California cases on recision for fraud. In the following representative cases California has allowed recision because of fraud: *Kelly* v. *Cent. Pac. R. R.* (1888), 74 Cal. 557; *Wainscott* v. *Occidental Assn* (1893), 98 Cal. 253, 33 P. 88; *Davis* v. *Butler* (1908), 154 Cal. 623, 98 P. 1047; *Munson* v. *Fishburn* (1920), 183 Cal. 206, 190 P. 808; *Aycock* v. *Carr* (1930), 105 C. A. 675, 288 P. 448; *Fuhrman* v. *Am. Nat. Bldg. & Loan Assn.* (1932), 126 C. A. 202, 14 P. 2d 601; *Rodriguez* v. *Bullotti* (1932), 123 C. A. 624, 11 P. 2d 9; *Wood* v. *Bixley* (1938), 29 C. A. 2d 294, 84 P. 2d 204; *Dunn* v. *Stringer* (1940), 41 C. A. 2d 638, 107 P. 2d 411; *Hefferan* v. *Freebairn* (1950), 34 Cal. 2d 715, 214 P. 2d 386; *Spreckles* v. *Gorrill* (1907), 152 Cal. 383, 92 P. 1011; *Menefee* v. *Oxnam* (1919), 42 C. A. 81, 183 P. 379; *Calif. Credit & Collection Corp.* v. *Goodin* (1926), 76 C. A. 785, 246 P. 121; *Denovan* v. *Golden State Woolen Mills* (1930), 104 Cal. 2d 506, 38 P. 2d 897. In each of these cases the injury caused by the fraud was a failure to receive what was bargained for. There was a material misrepresentation as to either the quality or value of the subject matter of the sale.[7]

Many of the cases in which recision was refused, despite the false representations of the seller, illustrates that California has followed the correct rule in determining when

[3]Morrison v. Lods (1870), 39 Cal. 381.

[4]Hefferan v. Freebairn, *Infra.*

[5]But see Stewart v. Lester (1888), 49 Hun. 58, 1 N. Y. S. 699, 702, where the court holds that if the party is seeking affirmative relief for fraud, either legal or equitable, he must prove damages; but that damages are not necessary to successfully defend.

[6]Many courts allow a party to rescind where he has misrepresented his principal's identity. These cases take no account of what was bargained for and what was received. See cases collected in 36 Mich. L. Rev. 246.

[7]Spreckles v. Gorrill, *supra,* "That fraud which has produced and will produce no injury will not justify a rescision, nor support an action for damages is an established principle of law and equity . . . but there is no rule that the injury must be accurately measured in money."

such injury exists. In *Farmers and Merchants Bank* v. *Richards* (1898), 6 Cal. Unrep. 19, 53 P. 439, the defendant was induced by the plaintiff's false representation to give a note in payment of a preexisting debt. It was held that the defendant could not rescind because there was no injury. In *Darrow* v. *Houlihan* (1928), 205 Cal. 771, 272 P. 1049, the vendor of land falsely represented that the land was encumbered by a $2,000 mortgage, payable in six months. Actually it was encumbered by a $1,000 trust deed, payable at $25 per month. The court said, at page 774: "Fraud unproductive of injury will not justify a recision, nor support an action either for recision or damages." In *Neet* v. *Holmes* (1944), 25 Cal. 2d 447, 154 P. 2d 854, the defendant falsely represented that plaintiff's mining claim was of little or doubtful value, and thereby induced plaintiff to lease his claim on a royalty basis of so much per ton extracted. The mining claim became very valuable and plaintiff tried to rescind. The court said, "In order to enforce their attempted recision of the lease they must show the lease was unfair to them and resulted in damage to them." In the last three cases it will be noted that while the court spoke chiefly of injury, the facts indicate that recision was denied because the false representation was not material, and that the one seeking recision received substantially what he bargained for.

In the principal case the false representation of the seller was not material because the purchaser received what he bargained for. Concededly, there is no injury to receive a $5,000 coat for $4,000. It is equally untenable to state that the purchaser received less than he bargained for because he bargained for a coat fully paid for by himself, not a coat in which another paid a part of the price. There is no force in the reasoning that the coat can no longer be a complete gift because the donee and the seller conspired to deceive the purchaser as to the price. Granting it to be fraudulent, it still remains unproductive of injury, because he received what he bargained for. Having received what was promised, he cannot complain because a stranger to the transaction[8] failed to live up to his expectations. So long as the value and quality promised are received, the purchaser has not been deceived and has suffered no injury.[9] The seller's representation that the price was $4,000 was not a misrepresentation under the circumstances. When one is told the price of an article, he assumes he is being told the price *as to him,* the purchaser. From custom and usage, "price" must refer to the sum the seller expects to receive from the party to whom he is speaking.[10] As a general rule the price paid by the purchaser, and the price received by the seller are the same. When they differ, the purchasers only concern is that his pocketbook is not called upon to make up the deficiency. The purchaser is willing to allow a stranger to the transaction to pay the balance of the price, so long as he receives what he bargained for at the price he agreed to pay. At best, in the principal case, it was only incidental that the party contributing the balance of the price was also the prospective donee of the coat, instead of a stranger to the purchaser. The court submits that the price was lowered with the intent to deceive the purchaser and induce him to purchase the coat, laying great stress on the fact that he otherwise would have refrained from buying. It is difficult to imagine a stronger and more legitimate motive for price reduction than to overcome buyer's resistance. Especially is this true when the prospective buyer indicates an unwillingness to buy at the stated price. As pointed out above he could not have been deceived when

[8]It is submitted that the facts indicate two transactions. One was the donee's agreement to pay the balance if the store would sell the coat to the purchaser for $4,000. The other was between the seller and the purchaser, and is the one with which we are concerned.

[9]Bailey v. Fox (1889), 78 Cal. 389, "In order to entitle a party to rescind on the ground of fraud, he must not only show the fraud, but as a result thereof some damage has resulted to him."

[10]Ara V. Rutland (Tex. Civ. App.), 172 S. W. 993.