
Torts - Misrepresentations of Prior Offers as Constituting Fraud

DePaul College of Law

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

DePaul College of Law, *Torts - Misrepresentations of Prior Offers as Constituting Fraud*, 2 DePaul L. Rev. 107 (1952)

Available at: <https://via.library.depaul.edu/law-review/vol2/iss1/15>

This Case Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

sioners¹⁹ that "an examination of these cases . . . discloses that in none . . . was this stated to be the rule of practice. But the true test is whether the contempt charged is civil or criminal."²⁰

The history of "purgation by oath" has come to an end in Illinois in the *Gholson* case when the court declared that the "doctrine . . . will no longer be adhered to by this court, and all previous decisions . . . upholding . . . that doctrine, in that respect, are hereby overruled."²¹

The doctrine has been abandoned by the United States Supreme Court,²² and, apparently, by most of the state courts.²³ The Illinois court, in stamping out the "dying embers" of this doctrine, stated that a court cannot adequately preserve its authority without "power to inquire and determine if contumacious acts . . . have been perpetrated against the court. . . . We believe that if the contemnor can deprive the court of authority to inquire into . . . his acts, that would tend to destroy rather than to uphold public confidence and respect in our courts."²⁴ This view seems sound and logical.²⁵ Little, if anything, remains to be added to the reasoning of the court in the light of this progressive opinion, which remains a milestone in the recent display of legal realism of the Illinois Supreme Court.

TORTS—MISREPRESENTATIONS OF PRIOR OFFERS AS CONSTITUTING FRAUD

Plaintiff leased defendant's premises at \$4,500 per year; he was told by his lessor that the latter had received a bona fide offer to lease the premises at \$10,000 per year. Plaintiff was informed that unless he could meet that offer, defendant would evict him at the end of their current lease. Relying on defendant's representations, plaintiff signed a twelve year lease with a rent of \$10,000 per year. After paying several monthly installments, he discovered that the lessor's representations had been completely false. Plaintiff brought an action for deceit and the trial court sustained defendant's demurrer. Reversing the lower court, the Supreme Judicial Court of Massachusetts held that the plaintiff had

¹⁹ 275 Ill. App. 387 (1934).

²⁰ *Ibid.*, at 391.

²¹ *People v. Gholson*, 412 Ill. 294, 303, 106 N.E. 2d 333, 338 (1952).

²² *Clark v. U.S.*, 289 U.S. 1 (1933).

²³ *Osborne v. Purdome*, 244 S.W. 2d 1005 (Mo., 1951). In 12 Am. Jur., Contempt § 73 (1938), it is stated that the oath of a contemnor is no longer a bar to a contempt citation.

²⁴ *People v. Gholson*, 412 Ill. 294, 302, 106 N.E. 2d 333, 337 (1952).

²⁵ A rather recent case assumed the doctrine of "purgation by oath" to be a preservative of an important right and concluded it to be logical merely because of the fact that it was a common law rule. See *Craft v. Culbreth*, 150 Fla. 60, 6 So. 2d 638 (1942).

a valid cause of action. *Kabatchnick v. Hanover-Elm Building Corporation*, 103 N.E. 2d 692 (Mass., 1952).

Although the parties in the instant case were lessor and lessee, it is interesting to note that the court treated them as vendor and vendee. Previously, Massachusetts courts had held that misrepresentations of prior offers by the vendor did not constitute fraud; they were merely "sales talk" or "puffing" on which the vendee had no right to rely.¹ Therefore, by the present decision, the highest court of Massachusetts reversed an old and long established rule in that state.

The *Kabatchnick* decision expressly overruled the leading Massachusetts case of *Commonwealth v. Quinn*,² where the court held:

In civil actions the rule of the common law long has been recognized that mere statements of the vendor concerning either real or personal property, where there is no warranty as to its value or the price which he has given or has been offered for it, are to be treated as mere "seller's talk;" that the rule of caveat emptor applies, and therefore they are not actionable even if the statements are false and intended to deceive.³

The court in the instant case, discussing the above rule, states, "It is not only opposed to the weight of authority, but it is difficult to justify on principles of ethics and justice."⁴

The general rule is that the value or financial worth of property is regarded as a matter of opinion on which each party must form his own judgment without trusting his adversary and as to which puffing and exaggeration are to be expected.⁵ Very little, however, is required to transform a statement of opinion as to value into a statement of fact.⁶

The authorities are in conflict as to whether facts such as those found in the *Kabatchnick* case are sufficient to take the case out of the realm of opinion and into the realm of misrepresentation of fact, for which the law affords a remedy.⁷

Some jurisdictions still follow the rule of *Commonwealth v. Quinn*⁸

¹ Shikes 1. Gabelnick, 273 Mass. 201, 173 N.E. 495 (1930); *Commonwealth v. Quinn*, 222 Mass. 504, 111 N.E. 405 (1916); *Boles v. Merrill*, 173 Mass. 491, 53 N.E. 894 (1899); *Way v. Ryther*, 165 Mass. 226, 42 N.E. 1128 (1896); *Cooper v. Lovering*, 106 Mass. 77 (1870); *Hemmer v. Cooper*, 8 Allen (Mass.) 334 (1864); *Brown v. Castles*, 11 Cush. (Mass.) 348 (1853); *Medbury v. Watson*, 6 Metc. (Mass.) 246 (1843).

² 222 Mass. 504, 111 N.E. 405 (1916).

³ *Ibid.*, at 512 and 407.

⁴ *Kabatchnick v. Hanover-Elm Building Corp.*, 103 N.E. 2d 692, 694 (Mass., 1952).

⁵ *Sacramento Suburban Fruit Lands Co. v. Melin*, 36 F. 2d 907 (C.A. 9th, 1929); *Bundeson v. Lewis*, 368 Ill. 623, 15 N.E. 2d 520 (1938); *Derdyn v. Low*, 94 Okla. 41, 220 Pac. 945 (1923); *Farr v. Peterson*, 91 Wis. 182, 64 N.W. 863 (1895); *Tretheway v. Hulett*, 52 Minn. 448 (1893); *Chrysler v. Canaday*, 90 N.Y. 272 (1882).

⁶ Prosser, *Torts* § 89 (1941).

⁷ 37 C.J.S., *Fraud* § 57(b) (2) (1943).

⁸ 222 Mass. 504, 111 N.E. 405 (1916).

and hold that such statements are mere representations of value and that there is no remedy available to the naïve purchaser.⁹ However, the trend of the authorities seems to be in accord with the principal decision.¹⁰

The line between statements of value and statements of fact, as can be seen from the conflict of authorities, is often hard to draw. A clue to the solution of the problem is given in many jurisdictions where the courts distinguish the cases on the basis of whether or not the purchaser could have, through the use of ordinary diligence, investigated for himself to ascertain the truth or falsify of the statements. If the facts are peculiarly within the seller's knowledge, the tendency is to allow recovery.¹¹ If, on the other hand, the purchaser could have investigated but failed to do so, recovery, generally, will not be allowed.¹²

In Illinois, the courts have not yet had occasion to decide squarely the question—that of misrepresentations by the vendor as to previous offers received. But the Supreme Court has decided that if, in addition to the vendor's misrepresentation, a third party, in collusion with the vendor, falsely represents that he had made the previous offer, there is fraud upon which recovery may be predicated.¹³

The Illinois courts have also decided on the very closely related issue of misrepresentations of the price the vendor had recently paid for the property. Originally, the rule was that unless there existed a fiduciary relationship between the parties, such misrepresentations would not amount to actionable fraud.¹⁴ Yet, the Illinois Supreme Court, in *Dunlap v. Pierce*,¹⁵ while citing the earlier cases as authority, seemed to ignore the requirement of a fiduciary relationship and held that a vendor, dealing at arm's length with a purchaser, is guilty of fraud where the vendor misrepresented the price he had recently paid for the property. From these cases, it would seem that Illinois would follow the rule of the instant case.

It would be erroneous to argue, relying on the present case, that the

⁹ *Dorr v. Cory*, 108 Iowa 725, 78 N.W. 682 (1899).

¹⁰ *German Bandesheim Soc. v. Schmidt*, 242 Mich. 139, 218 N.W. 824 (1916); *Caples v. Morgan*, 81 Ore. 692, 160 Pac. 1154 (1916); *Thompson v. Hoewing*, 79 N.J.L. 246, 75 Atl. 752 (S. Ct., 1910); *Johnson v. Gavitt*, 114 Iowa 183, 86 N.W. 256 (1901); *Strickland v. Graybill*, 97 Va. 602, 34 S.E. 475 (1899); *Ives v. Carter*, 24 Conn. 392 (1856); *Isman v. Loring*, 130 App. Div. 845, 115 N.Y. Supp. 933 (1909).

¹¹ *Rimling v. Scherfer*, 206 Wis. 532, 240 N.W. 159 (1932); *Dillman v. Nadlehofer*, 119 Ill. 567, 7 N.E. 88 (1886); *Medbury v. Watson*, 6 Metc. (Mass.) 246 (1843); *Isman v. Loring*, 130 App. Div. 845, 115 N.Y. Supp. 933 (1909).

¹² Authorities cited note 11 supra.

¹³ *Kenner v. Harding*, 85 Ill. 264 (1877).

¹⁴ *Tuck v. Downing*, 76 Ill. 71 (1875); *Plummer v. Rigdon*, 78 Ill. 222 (1875); *Banta v. Palmer*, 47 Ill. 99 (1868).

¹⁵ 336 Ill. 178, 168 N.E. 277 (1929).

rule of caveat emptor will now be ignored in this field. On the contrary, the court expressly limits the application of the rule to misrepresentations of the sort therein involved, that is, false statements of previous price offers. "The law recognizes the fact that men will naturally overstate the value and qualities of the articles which they have to sell. All men know this and a buyer has no right to rely on such statements."¹⁶ The *Kabatchnick* decision seems to mean only that misrepresentations of a prior offer by a seller to a purchaser are now classified as statements of fact rather than of value.

CONTRACTS—PARTIAL ENFORCEMENT OF COVENANTS UNREASONABLY RESTRICTING COMPETITION

Defendant sold his wholesale fruit and vegetable business, including good will, and leased the premises. The sales contract provided that defendant "was forever barred and prevented from engaging in any kind of business" in the county where the business was conducted. Claiming that the restriction was too broad and was an unreasonable restraint on trade, defendant re-entered the fruit and vegetable business and was met by an injunction. The court held that though the restrictive agreement was unreasonable and the terms thereof indicated no line of division, the agreement would be enforced only as to a reasonable amount of time and area. It was decided that defendant could not engage in the fruit and vegetable business in the county for a period of ten years, the duration of the lease. *Ceresia v. Mitchell*, 242 S. W. 2d 359 (Ky., 1951).

Any agreement is in restraint of trade when its performance would limit competition in any business.¹ Under the early common law, all such agreements were void because they were considered to be against public policy.² After a few centuries, English courts upheld agreements in partial restraint of trade when they were incidental to a sale of property or a business.³ Today, American jurisdictions hold that contracts not to compete are enforceable if they are ancillary to the sale of a business and are reasonably limited as to time and area.⁴ They are also in agreement that if a promise is a reasonable restraint of trade, it will be enforced unless it is part of a plan which tends to create a monopoly.⁵

¹⁶ *Kimball v. Bank*, 144 Mass. 321, 324, 11 N.E. 113, 114 (1887).

¹ Rest., Contracts § 513 (1932).

² 6 R.C.L. 785 (1929).

³ *Broad v. Jollyfe, Cro. Jac.* 596 (1620); 76 U. of Pa. L. Rev. 244, 245 (1928).

⁴ *Beit v. Beit*, 135 Conn. 195, 63 A. 2d 161 (1948); Rest., Contracts § 515 (1932).

⁵ *Harris Calorific Co. v. Marra*, 345 Pa. 464, 29 A. 2d 64 (1942); 5 Williston, Contracts § 1659 (rev. ed., 1937).