1955

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Robert A. Palmer

University of Kentucky

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Recommended Citation

Available at: https://uknowledge.uky.edu/klj/vol44/iss1/9

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system of justice could be developed without serious administrative difficulties by requiring the committing officer at the preliminary hearing to inform the defendant of his right to counsel and to appoint counsel on the same basis that the trial judge now does in the federal courts. To supplement this appointment at the preliminary hearing, it would be necessary to strictly enforce the present requirement that an arrested person be brought before the committing officer without unreasonable delay. These two provisions, presentment before a committing officer without unreasonable delay and appointment of counsel at the preliminary hearing, would virtually abolish the injustices of pre-trial procedure to the indigent defendant. A persistence in following our current practice of handling the right to counsel in the pre-trial period can only lead to further disrepute of our criminal law administration.

C. Gibson Downing Jr.

MISREPRESENTATION—BASIS OF LIABILITY—DAMAGES AT LAW AND EQUITABLE RESCISSION IN KENTUCKY

From a historical point of view, the law in regard to misrepresentation has shown a gradual but unmistakable trend toward granting relief more readily to those whose interests have been prejudiced because of the breach of a confidence justly reposed. At common law, the remedy for misrepresentation, or fraud, as it has been usually called, was an action on the case for deceit.\(^1\) To secure relief in this action, the plaintiff had to prove either that the defendant knew his representation to be false, or that he made the statement recklessly, without caring whether it was true or false.\(^2\) However, equity courts were not bound by the common law definitions of fraud in granting relief. For instance, where there was an innocent misrepresentation by a vendor, the vendee was allowed to return his purchase, rescind the transaction, and recover his consideration without proving the element of intent which was required in actions at law.\(^3\) Courts

\(^2\) Id. at 773. In Kentucky, see Smith v. Barton, 266 S.W. 2d 317 (Ky. 1954); Southern Express Co. v. Fox & Logan, 131 Ky. 257, 115 S.W. 184 (1909).
\(^3\) Prosser, Torts, 708 (1941). See also for equitable estoppel, equitable defenses, etc., Id. at 712-718.
of law, jealous of the expanding power of these chancery courts, sought to broaden legal jurisdiction into equitable fields. The common law action of assumpsit was extended by the use of a legal fiction, and where misrepresentation was involved in a transaction, the plaintiff was permitted to waive the tort and sue in assumpsit, rescinding the transaction and recovering his consideration. This was called "restitution." In some instances, this rescission at law was allowed even though the misrepresentation was made through honest mistake, the court basing the right of recovery on the equitable idea of preventing unjust enrichment.

The law also recognized that an equitable defense might be set up against a common law action. If a person were induced by a misrepresentation to enter into a contract, he could set up this misrepresentation as an equitable defense to an action at law on the contract. Modern codes of procedure, merging law and equity, allow a defendant to plead a defense based on equitable principles.

Today, in a growing minority of jurisdictions in the United States, scienter and fraudulent intent are no longer elements of actionable fraud even in a suit at law, and damages may be awarded although the misrepresentation was made innocently and the defendant honestly believed his statements to be true. Although most jurisdictions still require intent to deceive as an element of an action at law for fraud, they generally recognize the doctrine of equitable rescission, whereby the transaction may be avoided, and the consideration returned to the purchaser, without proof of intent to deceive. Kentucky, however, still requires proof of fraudulent intent in actions for misrepresentation whether based on legal or equitable theories. While this is in

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4 Id. at 710.
5 Id. at 711-712.
6 Id. at 713.
10 Miles v. Profitt, 268 S.W. 2d 333 (Ky. 1954); Livermore v. Middlesborough Town-Lands Co., 106 Ky. 140 at 163, 50 S.W. 6 at 13 (1899).
agreement with the majority view regarding actions at law, Kentucky is practically the only state which requires proof of an intent to deceive before an equitable rescission can be secured.

The majority rule, requiring fraudulent intent in a legal action for deceit, is followed by Kentucky, and is stated, in general terms, in *McGuffin v. Smith*.

In order to establish actionable fraud it is necessary:

1. That defendant made a material representation;
2. that it was false;
3. that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth, and as a positive assertion;
4. that he made it with the intention that it should be acted upon by the plaintiff;
5. that plaintiff acted in reliance upon it; and
6. that he thereby suffered injury.

The intentional concealment of material facts may also constitute actionable fraud, because a false impression is created upon the mind of the other party to a transaction. Deception is present, regardless of the fact that no positive assertion is made, and the deception is intended by the party who remains silent.

The Kentucky rule also recognizes what amounts to inferred or presumed fraud, as opposed to actual fraud. Under this doctrine, a plaintiff must prove scienter in order to recover for a misrepresentation, but the intent to deceive may be established from the facts proved by appropriate inference or presumption. The Kentucky court expressed the requisite for this type of fraud in the case of *Bunch v. Bertram*:

But when the vendor makes a positive statement of something which is alleged by him to be true, and vendee is misled by such positive statement, and when the vendee did not know of its falsity, and could not have ascertained its falsity by the exercise of ordinary care, the vendor can be held responsible in damages, although he did not know that

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33 Id. at 612, 286 S.W. at 886.
34 Crescent Grocery Co. v. Vick, 194 Ky. 727, 240 S.W. 388 (1922).
35 Combs v. Poulos, 241 Ky. 617, 44 S.W. 2d 571 (1931); 37 C.J.S. 210-212 (1943). This is called "constructive" fraud by some courts, and is defined as a breach of legal or equitable duty which is deemed to be fraudulent because of its tendency to deceive.
his positive statement was untrue at the time he made it. When a party asserts that something is true, when he does not know whether it is true or untrue, he is practicing a fraud on the party with whom he deals.\textsuperscript{17}

Intent may be inferred from the acts of a party, but it cannot be predicated on mere mistake or negligence. Fraud is synonymous with bad faith or dishonesty, and is distinguishable from mistake or negligence.\textsuperscript{18}

Under the majority rule, when fraud is involved in the making of a contract, the person who is injured has an election of remedies. He may seek to recover his damages, or he may elect to repudiate the transaction and be restored to the status quo, but, he cannot do both.\textsuperscript{19} \textit{Kentucky Electric Development Company's Receiver v. Head}\textsuperscript{20} held where fraud has induced a contract, the plaintiff may either sue for damages, or rescind the transaction, recovering the consideration.

Equity also will grant relief when false representations are made with knowledge of their falsity, or where statements are made recklessly, without regard to their truth or falsity. In most jurisdictions, equity will also allow recission of a contract when it appears that there were misrepresentations which actually did mislead the person to whom they were made, even though such statements were made innocently, as a result of misapprehension or mistake. No intent to deceive need be shown.\textsuperscript{21} This type of relief is granted because the mistake operates as a surprise and an imposition, and the agreement is actually unadvised and entered into without a real meeting of the minds, since the party misled had no actual intent to enter into the contract upon the terms which in fact did exist. Equity intervenes to protect those of whom undue advantage is taken.\textsuperscript{22}

\textsuperscript{17} 219 Ky. 848, 852, 294 S.W. 805, 807-808 (1927).
\textsuperscript{18} Commonwealth v. Smith, 242 Ky. 365, 46 S.W. 2d 474 (1933).
\textsuperscript{19} Ades v. Wash, 199 Ky. 687, 251 S.W. 970 (1923); Sellars v. Adams, 190 Ky. 723, 228 S.W. 424 (1921); 87 C.J.S. 354 (1943).
\textsuperscript{20} 252 Ky. 656, 68 S.W. 2d 1 (1934). In this case, recission of a transaction involving the trade of stock was permitted. The plaintiff was allowed to return the stock which she received, and the defendant was required to send back the stock or market value thereof, which passed as consideration, because of false representations concerning dividends which the plaintiff was to receive.
\textsuperscript{22} 1 Story, \textit{Commentaries on Equity Jurisprudence}, Sec. 239 (3rd ed. 1842).
In Kentucky, however, the rule is well settled that scienter is required both at law and in equity. To secure rescission of a contract, it must appear that there was an intent to deceive, and that the misrepresentation was made with knowledge of its falsity, or under circumstances which did not justify a belief in its truth.

The Kentucky rule was not always so strict. At least one of the early Kentucky cases on this point held that actionable fraud need not be proved to secure rescission of an executed contract. In *Waters v. Mattingly*, the sale of a horse was avoided, and the contract set aside, because the animal was unsound. Recission was granted even though the vendor was ignorant of any defect, and though the vendee did not prove an intent to deceive.

Later cases deviated from this holding. A clear statement of the present Kentucky rule is found in the leading case of *Livermore v. Middlesborough Town-Lands Co.* The vendors of some lots sued to enforce payment for the property. The vendee filed an answer and counterclaim, alleging that promissory representations by the vendors, concerning industries and public improvements which were to be developed, had failed to materialize. The Court of Appeals refused to allow rescission of the contract, making the following statement:

> To establish actionable fraud, or fraud against which equity will relieve—and, as we have seen, the same rule applies in Kentucky to both classes of cases—it must appear that the misrepresentation was of a matter of material fact (as distinguished from opinion), at the time or previously existing, (and not a mere promise for the future); must be relied upon by the person whose action is intended to be influenced; and must be made with knowledge of its falsity, or under circumstances which did not justify a belief in its truth. This is the doctrine deducible from the Kentucky decisions.

This opinion states that *Waters v. Mattingly* had been overruled, relying on the decisions in *Lightburn v. Cooper* and *Stewart v. Daugherty*, but a close inspection of these decisions makes this assertion somewhat questionable, and the cases them-

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23 4 Ky. 244 (1808).
24 106 Ky. 140, 50 S.W. 6 (1899).
25 *Id.* at 163, 50 S.W. at 13.
26 31 Ky. 273 (1833).
27 33 Ky. 479 (1835).
The Lightburn case involved the sale of a clock, and the vendor’s assignee sued at law on a promissory note which the vendee had given as consideration. The vendee had previously tendered the clock, and asked rescission, on the grounds that it had been misrepresented as a good time piece. He now stated these facts as an equitable defense, but the court gave judgment for the plaintiff because there was no proof of fraudulent intent on the part of the vendor. No mention was made of the previous decision of Waters v. Mattingly.

The case of Stewart v. Daugherty was an action of trover at law, where a dissatisfied horse-trader claimed the right to rescind and recover the horse he had given as consideration in the transaction. The court denied the right to rescission without proof of fraud and said:

The old case of Waters v. Mattingly which seems to have been relied on by the Circuit Judge, as conclusive authority, is inconsistent with the well-established doctrine of the law, and has been repeatedly disregarded and overruled by this Court. The true doctrine is that an innocent misrepresentation—not being fraudulent—furnishes no cause of action nor any sufficient ground for rescinding a contract. Unless the party who makes the misrepresentation knows, when he makes it, that it is false, he is not deemed guilty of fraud, however erroneous or untrue it may happen to be.28

It is submitted that the court erred in the Lightburn case, in refusing to allow the equitable defense of innocent misrepresentation to prevail. And in the Stewart case, the plaintiff’s tender of the horse he received should have operated as a rescission under equitable principles of unjust enrichment, though there was no proof of fraudulent intent on the defendant’s part. In addition, the court in stating, in the latter case, that Waters v. Mattingly had been repeatedly overruled did not cite any authority for that proposition. Its inconsistency with “the well-established doctrine of the law (of deceit)” is of no significance, since the Waters case was brought in equity.

The case of Livermore v. Middlesborough Town-Lands was the final step in establishing the Kentucky rule, which has been consistently reaffirmed and quoted with approval in subsequent

28 Id. at 480.
Kentucky cases up to the present date. The latest one, *Miles v. Prott*, was decided at the 1954 term. Recission of the sale of a motor court was denied in part because the court found no evidence of any misrepresentation on the part of the vendor. However, the statement was made in the opinion that actionable fraud must be proved to secure recission of a contract.

It is submitted that the Kentucky rule, denying recission of a contract when there has been an innocent misrepresentation, is contrary to the fundamental principles of equity, which grant relief where the law affords an inadequate remedy, and which prevent the injustice of allowing plaintiff to retain what he had received. Under the Kentucky rule, equitable relief is no significance, since the party seeking recission must prove all the elements of fraud necessary in a legal action for damages. Thus, equity affords a mere duplicate remedy, and unless recission is allowed under less rigorous conditions, justice may not always be attained. Kentucky law regarding misrepresentation follows the majority view and affords an adequate remedy against fraud, but the Kentucky doctrine of equitable relief should be overruled.

**Robert A. Palmer**

**OIL AND GAS—WASTE OF OIL AND GAS AS BETWEEN ADJACENT LANDOWNERS**

The preservation of our natural resources is one of the most important conservation problems of modern times. The waste of

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29 Miles v. Profitt, 266 S.W. 2d 333 (Ky. 1954) and Hargis v. Hargis, 252 Ky. 198, 66 S.W. 2d 59 (1933) (Attack on a judgment by consent of the parties, in a divorce proceeding; fraud was alleged.) Coons v. Bank of Commerce, 233 Ky. 457, 26 S.W. 2d 15 (1930) (Action by a holder and endorsers of a note on an absolute guaranty of payment; defense was that the holder fraudulently represented that the security was worth the debt); Electric Hammer Corporation v. Deddens, 206 Ky. 232, 267 S.W. 207 (1924) (Action on a note due for the purchase of stock; defense alleged false representations in the transaction); Towels et al. v. Campbell, 204 Ky. 591, 264 S.W. 1107 (1924) (Action on a covenant of general warranty of property bought by the pl. from the def.; alleged misrepresentation of title); Bewley v. Moreman, 162 Ky. 32, 171 S.W. 996 (1915) (Action for recision of the sale of land alleging misrepresentation on the part of the vendor); Taylor v. Mullins, 151 Ky. 597, 158 S.W. 774 (1913) (Counterclaim alleging fraud, which induced the making of a contract to haul logs); Chicago Bldg. & Mfg. Co. v. Beaven, 149 Ky. 267, 148 S.W. 37 (1913) (Action to set aside a contract for subscriptions to the stock of a corporation to be organized, on the ground that misrepresentations were involved in the making of the contract).

30 266 S.W. 2d 333 (Ky. 1954).

31 Id. at 336.