

Washington University Law Review

Volume 1951 | Issue 4

January 1951

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Recommended Citation

Ronald Cupples, *Personal Property—Gift of a Fur Coat Revoked—Contract for Its Sale Rescinded*, 1951 WASH. U. L. Q. 589 (1951).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol1951/iss4/9

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suggests the soundness of the Missouri and Florida decisions,²⁹ *i.e.*, one-half of the property should remain vested in the guilty party and the other half should go to the heirs of the decedent.

A. E. S. SCHMID

PERSONAL PROPERTY—GIFT OF A FUR COAT REVOKED—CONTRACT FOR ITS SALE RESCINDED.

On April 4, 1947, donor and donee went into Saks's fur salon. They looked over the selection of fur coats and finally found a mink coat that donee liked. The price of the coat was \$5,000. Donor told the salesman that he wished to buy the coat for donee but would pay no more than \$4,000 for it.¹ Saks rejected donor's repeated offers of \$4,000 for the coat. Donee wanted the coat very much, and without donor's knowledge she went to Saks and asked Saks to pretend to sell the coat to donor for \$4,000, promising to pay the balance of \$1,000 herself. Saks agreed and told donor that they would sell the mink coat to him for \$4,000. Donor signed a sales slip believing that \$4,000 was the full price of the coat. He received the coat and then gave it to donee saying that it was hers to keep. The following day donee returned to Saks, paid the additional \$1,000, and left the coat to be monogrammed. Later that day donor called Saks's and told them that he had revoked the gift and would pay the \$4,000 only if Saks delivered the coat to him. At the time of the revocation donor was unaware of any negotiations between Saks and donee and of the fact that donee had paid \$1,000 of the purchase price. A series of suits followed. First, donee refused to accept the \$1,000 reimbursement tendered by Saks, and sued Saks for the conversion of the coat. Saks then filed a cross-bill against donor and donee for the remaining \$4,000 due on the coat and also a separate complaint against donor on the contract of sale between donor and Saks. All of these actions and cross-bills were joined in one suit.

On the basis of these facts the California Court of Appeals found that the gift was complete, that donee should receive the

29. *Ashwood v. Patterson*, 49 So.2d 848 (Fla. 1951); *Grose v. Holland*, 357 Mo. 874, 211 S.W.2d 464 (1948); *Barnett v. Couey*, 224 Mo. App. 913, 27 S.W.2d 757 (1930).

1. *Earl v. Saks & Co.*, 226 P.2d 340 (Cal. 1951).

coat and that donor was liable for the purchase price.² The Supreme Court of California reversed the decision, holding that the sale and gift were induced by fraudulent misrepresentations and could be rescinded by donor.³

POWER OF A DONOR TO REVOKE A GIFT

Except in the case of a basic mistake, once a gift *inter vivos* has been perfected by sufficient delivery and acceptance, it cannot be revoked unless the donor has been induced to make the gift through fraud, duress or undue influence.⁴ In *Mott v. Iossa*⁵ a donor sought to have a conveyance to his stepson set aside because he was falsely and fraudulently led to believe that donee's mother, donor's wife, was a widow, when in fact she was still married to her first husband, who was still alive. A New Jersey equity court, in holding the gift valid, said that a gift may be set aside for fraud of the donee or a third person, but that the fact misrepresented must either affect the subject matter of the gratuitous contract, or if it is a misrepresentation of an extraneous fact, the fact must be such that the gift would not have been given except for the misrepresentation.

In *Earl v. Saks* the California court found that the donor could revoke the gift because of the fraudulent misrepresentation. The misrepresentation was not with regard to the subject matter, but, rather, to an extraneous fact. The donor was falsely and fraudulently led to believe that he was paying the full price of the coat, when in fact his intended donee was paying \$1,000 toward the purchase price. There was uncontradicted evidence presented by donor, that he would not have bought the coat and made the gift, had he known that he was not paying the entire price of the coat.

The decision of the Supreme Court of California in the *Earl* case is probably justified on the basis of the doctrine set out in *Mott v. Iossa*,⁶ that a gift may be set aside for fraud. In other cases, even where the misrepresentation was innocent and un-

2. *Earl v. Saks & Co.*, 210 P.2d 864 (Cal. App. 1949).

3. *Earl v. Saks & Co.*, 226 P.2d 340 (Cal. 1951).

4. *Mallet v. Hall*, 129 Me. 148, 150 Atl. 531 (1930); *Mott v. Iossa*, 119 N.J. Eq. 185, 181 Atl. 689 (Ch. 1936); *In re Anderson's Estate*, 157 Ore. 365, 71 P.2d 1013 (1937). See 28 C.J. 652 (1932). For basic mistake see RESTATEMENT, RESTITUTION § 26 (1937).

5. 119 N.J. Eq. 185, 181 Atl. 689 (Ch. 1936).

6. *Ibid.*

intentional,⁷ or where the misrepresentation did not amount to actual fraud,⁸ the courts have indicated that the misled donor may revoke his gift. Because the case at hand consisted of an intentional misrepresentation of a material fact, it is submitted that the Supreme Court of California rightly decided that the donor could rescind his gift to donee.

RIGHT OF A BUYER TO RESCIND A CONTRACT OF SALE

Since the question whether the gift induced by fraudulent misrepresentations could be rescinded has been disposed of, the only remaining question is whether the buyer could rescind the contract of sale entered into with Saks.⁹ It is almost universally accepted that a contract of sale may be avoided if it is induced by fraud. However, the American courts are not in complete agreement regarding the necessity of damages to entitle a person to rescind a sale induced by fraudulent misrepresentation. There are at least two divergent views.

One view, accepted by many states, is that in order to rescind a contract for fraud there must be proof of actual damage just as is required to maintain an action on a contract.¹⁰ In *Mason v. Madson*,¹¹ the Montana Supreme Court refused to allow a deceived buyer to rescind his contract of sale because he received the very thing for which he bargained, although deceived as to the source of supply. The court said:

Courts of Equity, like courts of law do not concern themselves with wrongs which do not produce injury.¹²

In a leading Georgia case, *Austell v. Rice*,¹³ the court found that there was deceit and intentional misrepresentation but no actual pecuniary injury. The court held that fraud without an

7. *Steffen v. Stahl*, 273 S.W. 118 (Mo. App. 1925) (dicta).

8. *In re Clark's Estate*, 233 App. Div. 437, 253 N.Y. Supp. 524 (4th Dept. 1931) (dicta).

9. *Earl v. Saks* is not a restitution case. The buyer had paid no money and was seeking no restoration of any property. This case was decided solely on the theory of rescission of an express contract, and there was no question as to damages. See on question as to damages: *McCleary, Damages as Requisite to Rescission for Misrepresentation*, 36 MICH. L. REV. (1937); Notes, 48 HARV. L. REV. 480 (1935); 16 HARV. L. REV. 509 (1903); 60 U. OF PA. L. REV. 205 (1911); 106 A.L.R. 125 (1937).

10. See, for example, *Hall v. Mitchell*, 59 Cal. App. 743, 211 Pac. 853 (1922); *Austell v. Rice*, 5 Ga. 472 (1848); *Mason v. Madson*, 90 Mont. 489, 4 P.2d 475 (1931).

11. 90 Mont. 489, 4 P.2d 475 (1931).

12. *Id.* at 500, 4 P.2d at 478.

13. 5 Ga. 472 (1848).

injury will not sustain an action or a defense. Both of these cases indicate that in order to maintain an action or defend against a claim on the grounds of fraud, there must be proof of actual pecuniary damages.

Another group of cases has held that proof of actual pecuniary damages is not necessary to rescind a contract for fraudulent misrepresentation. In a New York case, *Stuart v. Lester*,¹⁴ a seller represented to the buyer that he had never offered to sell his farm for less than \$8,500, when in fact he had offered it for sale several times for \$6,000. Allowing the buyer to rescind the contract because of the intentional misrepresentation even though no actual pecuniary damage was alleged or proved, the court said:

The rule that fraud without damages resulting therefrom never gives a right of action in favor of a defrauded party, applies to those cases where the injured party is seeking to recover damages from the wrongdoer in an action on the case *ex delicto*, as an indemnity against the injury which he has sustained by reason of the fraud and has no just application to a case like the one in hand, where the fraud is relied on as a defense to the enforcement of an executory contract. If the false statement relates to a material fact, the law implies that the defrauded party has suffered an injury sufficient to defeat recovery.¹⁵

In *J. I. Threshing Mach. Co. v. Webb*¹⁶ a salesman induced a man to enter into a contract for sale of an automobile upon the false and intentional representations by the salesman that the car had been shown to the man's wife, that she had driven in it, and asked the salesman to persuade her husband to buy it. The salesman brought an action on the contract, and by way of defense the defendant announced he was rescinding the contract because of fraud. There was no allegation of pecuniary damage, but a Texas appellate court allowed the deceived buyer to rescind the contract and declared:

Pecuniary damage is not necessary to entitle a person to relief by way of rescission; but it is enough for him to show that he has been induced by material, false, and fraudulent misrepresentations to enter into the contract he would not have entered into but for such representation.¹⁷

14. 49 Hun. 58, 1 N.Y. Supp. 699 (5th Dept. 1888).

15. *Id.* at 63, 1 N.Y. Supp. at 701.

16. 181 S.W. 853 (Tex. Civ. App. 1915).

17. *J. I. Threshing Mach. Co. v. Webb*, 181 S.W. 853, 855 (Tex. Civ. App. 1915). *Accord*: *Woods-Faulkner & Co. v. Michelson*, 63 F.2d 569 (8th Cir.

The court went on to say that the law implies that the defrauded party has suffered injury sufficient to defeat recovery.

In *Krinsky v. Title Guarantee and Trust Co.*,¹⁸ it was held that in an action for rescission for misrepresentation a plaintiff is not bound to show that pecuniary damage resulted from the misrepresentation. It is sufficient that the plaintiff received something different from that for which he contracted and that plaintiff might not have accepted the property if the facts had not been misrepresented to him. Another case implied that the deceived buyer might rescind the contract even though the property offered is of greater value than the thing contracted for, if the contract was induced by fraudulent misrepresentations and the buyer received something other than that for which he contracted.¹⁹

The *Restatement of Contracts* is in accord with the view that damages are not essential to rescind a contract for fraud. The *Restatement* proposes:

No legal effect is caused by either fraudulent or other misrepresentation unless it induces affirmative or negative conduct but it is not necessary that misrepresentation should be the only inducement for entering into a contract or for giving a discharge in order to make the contract or discharge voidable. It is enough that the misrepresentation is relied on as an inducement. It is immaterial whether damage is caused.²⁰

The view adopted by the *Restatement*, that damages are not necessary to rescind a contract for fraud, seems to be the opinion of a majority of the American courts today. Even in the states which cling to the view that damages are necessary the courts seem to go overboard to find damages. A view commonly adopted by such courts is found in *Russell v. Industrial Transp. Co.*²¹ There the court said that some damage must be shown in an

1933) (Damage is not the gist of an action for rescission); *Dunn v. Stringer*, 41 Cal. App. 2d 726, 107 P.2d 411 (1942) (in a suit for rescission of a contract on the ground of fraud, the contract may be cancelled even in the absence of actual pecuniary loss to plaintiff); *Brett v. Cooney*, 75 Conn. 338, 53 Atl. 729 (1902); *Fawkes v. Knapp*, 138 Minn. 384, 165 N.W. 236 (1917); *Stillwell v. Rankin*, 55 Mont. 130, 174 Pac. 186 (1918) (damages exist wherever fraud has induced a transaction which otherwise would not have occurred); *Varden v. Rudolph*, 145 N.Y. Supp. 55 (5th Dept. 1913); *RESTATEMENT, CONTRACTS*, § 476, comment *c* (1932).

18. 163 Misc. 833, 298 N.Y. Supp. 31 (1st Dept. 1937).

19. *Kirby v. Dean*, 159 Minn. 451, 199 N.W. 174 (1924).

20. *RESTATEMENT, CONTRACTS*, § 476, comment *c* (1932).

21. 113 Tex. 441, 258 S.W. 462 (1924).

action to rescind a contract for fraud, but the damage need not be a monetary loss. The defrauded party must merely show an injury to his property rights or an assumption of legal liabilities different from those contracted for, as distinguished from a mere injury to his feelings.

The Supreme Court of Nebraska, in *Jakoway v. Proudfit*,²² recognized that there were two views concerning the necessity of damages to entitle a person to rescind a contract for intentional misrepresentation. The Nebraska court contended that these two views, although seemingly contradictory, were actually reconcilable. The court said that to rescind a contract of sale, no actual damages need be shown if the buyer does not receive the particular thing for which he contracted. Where the buyer obtains the thing he has contracted for, he cannot rescind the sale unless he has suffered actual damage as a result of the misrepresentation. Be this as it may, other states tend to follow either the view requiring damages for rescission or the other making damages immaterial.

In the states which follow the majority view, that damages are unnecessary to rescind a contract of sale for fraudulent misrepresentations, the buyer under facts similar to the *Earl* case would be allowed to rescind the sale. Those states requiring damages probably would not allow a buyer to rescind. Even if these latter states followed the view that mere injury to property rights, as distinguished from injury to personal feelings, is sufficient damages for rescission, the buyer still would not be able to rescind the sale. Here, the buyer received the coat he bargained for, a coat worth \$5,000, for which he paid only \$4,000. It seems that the only real damage was an injury to the buyer's personal feelings, which would not be sufficient to satisfy the damage requirement. Therefore, in states which require some damage to entitle a buyer to rescind a sale, the buyer's defense in *Earl v. Saks* would not be allowed.²³

22. 76 Neb. 62, 109 N.W. 388 (1906).

23. In *Earl v. Saks & Co.* the buyer was a defendant and was setting up fraud as a defense. The question might arise in other cases whether or not there is any distinction between using fraudulent misrepresentations in an affirmative action of rescission and merely setting up fraud as a defense; in other words can fraudulent misrepresentations without actual damages be used as a shield, but not as a sword. There should be no distinction between the two. The theory upon which both pleadings rest is identical. Both rely upon the fact that the defrauded party is not trying to recover any money damages or even to get restitution here. Instead the defrauded

In Nebraska the buyer probably would not be able to rescind the contract of sale with Saks because he did obtain the thing for which he contracted, and could not show pecuniary damage, an essential element when the misrepresentation concerns an extraneous fact about something other than the article to be sold.

The holding in the instant case that no showing of pecuniary damage is necessary to rescind a transaction for fraudulent misrepresentation is in accord with the majority of American decisions. However, it is possible that neither the majority nor minority view ought to be applied uncritically in all cases. There are a great many policy considerations, not yet well defined by the courts, which should be extremely influential in helping the courts decide to allow or deny rescission. In the present case the donor was completely innocent, intentionally defrauded, and induced by the fraudulent misrepresentations to make a gift. In allowing the defrauded donor to rescind, the court was perhaps strongly influenced by the bad faith of Saks, a store with supposedly high integrity. Stronger and more definite policy considerations might govern other cases.²⁴

RONALD CUPPLES

REAL PROPERTY—"TO MY WIFE SO LONG AS SHE MAY REMAIN MY WIDOW"—DETERMINABLE FEE OR LIFE ESTATE?

Plaintiff's father devised to his wife his ". . . entire estate both real and personal . . . to have as long as she may remain my widow, in case my widow should remarry it is my will that she receive her lawful portion the same as if this will had never been written." The widow died testate without having remarried. She bequeathed the sum of \$100 to plaintiff and the residue of her estate to her other children, defendants, equally. Plaintiff

party merely wants to be relieved of his contractual obligations and should not be denied relief because he has not incurred damages.

24. For example, in *Brett v. Cooney*, 75 Conn. 338, 53 Atl. 729 (1902), plaintiff, who had sold his land to defendant as the result of fraudulent misrepresentations that the sale was to another person, was allowed to rescind. The defendant proposed to operate a boarding house, and the plaintiff had an understanding with his neighbors that none of them would sell for this purpose. Here the property of the plaintiff's neighbors might have been depreciated, leaving them without a right to sue anyone, and the plaintiff might at the same time have suffered in their esteem, although he had actually done his best to observe their agreement. It is submitted that the policy considerations in favor of allowing relief in this case are far stronger than they are in the principal case.