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Ralph S. Bauer

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## CONTRIBUTORY NEGLIGENCE AS A DEFENSE TO AN ACTION FOR FRAUD

Judicial indifference to the perpetration of frauds seemed to be common during the early years of American jurisprudence. Here and there would be heard a voice, as of one crying in a wilderness of loose legal thought and absence of interest in the problems of the defrauded, bemoaning the existence making the defrauder immune to all actions for damages. Now and then there would be a decision showing sympathy with the defrauded and a genuine desire to help him by means of a truly reasonable judgment. Happily, as time has gone on, more and more courts have shown a willingness to help the defrauded by allowing cold-blooded legal principles to work their perfectly reasonable and logical results upon the defrauder.

Most clearly demonstrative of the calloused attitude of early courts toward fraud cases was the almost continual reciting of the "duty" of a person to keep himself from being defrauded. If courts had been accustomed to talk frankly of "contributory negligence" as a defense to actions for fraud and deceit, they would have brought themselves and their absurd attitude out into the open for the public criticism that they so richly deserved; but they commonly avoided any such patent approval of a rule that would have been grounded in a principle of immunity of a wilful wrongdoer in all cases in which it might be held that plaintiff might have prevented his loss by keeping out of defendant's way.

In contrast with the somewhat rigid governing of business under the earlier absolute monarchies of modern Europe and with the less rigid but still pronounced regulation and taxing of business by Europe's limited monarchies of about 1800, American liberals contended for and succeeded in getting, in the late eighteenth and early nineteenth centuries, a rather

high degree of what the French call *laissez-faire*,<sup>1</sup> a rather loose type of governing, characterized chiefly by scantiness of control of business by government. In the direction of easy-going government, the *laissez-faire* policy of government was probably, on the whole, more loose than the original Latin expression for *laissez-faire*, *laxare facere*, was intended to indicate, for it seemed to tend more and more to indicate, in the first half of the nineteenth century, an almost complete liberty in the American citizen to do whatever he would. Of course, on the whole, and especially in the cities and the portions of the country that had been settled for the longest time, the grosser crimes were usually punished by government through legal process; but, in rural and newly settled areas, while such crimes as murder and horse-stealing were usually punished, either by legal action or otherwise, there was often a strange and unreasoning apathy toward such wrongs as the commission of frauds, even where the facts were such as to show a very plain type of swindle.

It seems that the early American attitude toward the ordinary case of swindling was that of "rugged American individualism," *i.e.*, "Every man for himself and the devil take the hindmost." Apparently, if the poor plaintiff had been swindled out of his entire estate, popular opinion, as reflected in the courts of the time was: "He made one fortune, which he has now lost. Now let him make another fortune, especially considering the fact that he can simply move farther west and get some more land at a dollar and a quarter an acre. The plaintiff should have been more careful about looking into the facts before he fell for the talk of the defendant. Why should the court take care of the interests of a fool who has not the sense to take care of his own money and property?"

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<sup>1</sup> *Laissez-faire* — government abstention from interference with individual action, especially in commerce. — Concise Oxford Dictionary.

*Laissez-faire* — (Fr., to let alone, or let act; Latin, *laxare*, to relax, and *facere*, to do, act.) A letting alone; noninterference, applied to that policy of government which allows the people to govern themselves as much as possible, and without much interference from their rulers. Webster's Universal Unabridged Dictionary.

Many of the cases cited on this denial of rights have sought to put upon the defrauded person a "duty" to investigate and thus to avoid being defrauded. Only a few of such cases are reviewed in the appended footnote.<sup>2</sup> Thought-

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<sup>2</sup> The fact that the plaintiff had not exercised what the court regarded as proper diligence was considered material in *Schwabacker v. Riddle*, 99 Ill. 343 (1881).

Probably among the cases most offensive to a modern sense of justice is *Sherwood v. Salmon*, 2 Day (Conn.) 128 (1805), in which the court treated the case as a proper one for the application of the rule of *caveat emptor*, despite glowing accounts given by the defrauder to the defrauded, in regard to lands 500 miles away, which the court says the defrauded should have investigated, though, in 1794, when the facts arose, a trip to examine the land would have taken weeks and would have occasioned very great expense and difficulty. Of course, under more recent holdings, it is not usual to try to impose upon the defrauded a "duty" to examine lands at a great distance. *Dunn v. White*, 63 Mo. 181 (1876).

Some of the cases that seem, at first glance, to impose a "duty" to keep from being defrauded, may be sustained on other grounds. E. g., *Osborne v. Missouri Pacific Ry. Co.*, 71 Neb. 180, 98 N. W. 685 (1904), where it is decided that a person having both the capacity and the opportunity to read a release of claims for damages for personal injuries, signed by himself, and not prevented by any fraud from reading it, relying upon what the other party said about the writing and therefore failing to read it, is estopped by his own negligence from asserting that the release is not legal and binding upon him according to its terms. It is always to be remembered that one strong reason for a decision against the allegedly defrauded party in any such case is the powerful tendency of courts to endeavor to give something of finality to the signed contract of the parties, unless there be a clear and equitable reason for doing otherwise, especially where the parties are dealing at arm's length, as they are ordinarily doing in the effecting of a settlement of a claim for damages.

*Boddy v. Henry*, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769 (1901), which stresses the fact that plaintiff had means of knowledge by which he could have determined the falsity of the representations, is not strong authority for the proposition that the plaintiff must show that he has exercised due diligence in ascertaining the facts, for the reason that plaintiff failed to show that defendant himself had knowledge of the falsity of the representations.

*Whitman v. Seaboard Air Line Ry.*, 107 S. C. 200, 92 S. E. 861, L. R. A. 1917F, 717 (1917), mentions plaintiff's abundant opportunity to ascertain the truth, but stresses the fact that there was no proof that defendant's representations were fraudulently made.

In *Southern Development Co. v. Silva*, 125 U. S. 247, 8 S. Ct. 881, 31 L. Ed. 678 (1888), complainant sought to rescind a contract for purchase of real estate on the ground of fraudulent representation by seller, the court said: "Where the purchaser undertakes to make investigations of his own, and the vendor does nothing to prevent his investigation from being as full as he chooses to make it, the purchaser cannot afterwards allege that the vendor made misrepresentations." But, when one examines the case carefully, it appears that the principal ground for denying relief to complainant is that the necessary elements of fraud are not proved by the evidence.

*Pigott v. Graham*, 48 Wash. 348, 93 P. 435, 14 L. R. A. (N. S.) 1176 (1908), presents the somewhat unusual phenomenon of a case in which the decision for defendant is seemingly placed squarely upon the ground of plaintiff's failure to

ful textwriters have called attention to the weakness of the position of cases treating contributory negligence as being a valid defense to fraud cases.<sup>3</sup>

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investigate the facts, when he might have done so, but it also appears that such investigation would have been much easier than it would have been in many cases.

Held, that, where the buyer, who asserts that she was fraudulently charged \$1 more than the sum total of her purchases, made no effort to ascertain the correctness of the bill at the time when she paid it, but willingly paid sum charged, to secure evidence on which to base a suit for fraud against store and its employee, buyer could not recover for fraud, as a plaintiff cannot recover for fraud and deceit unless it is shown that she was deceived by false representations and relied upon them to her damage. *Shaw v. Great A. & P. Tea Co.*, 115 F. 2d 684 (CCA 4th, 1940).

<sup>3</sup> "Not only must there be reliance, but the reliance must be found to be justifiable under the circumstances. The plaintiff's conduct must not be so entirely unreasonable, in the light of the information open to him, that the law may properly say that his loss is his own responsibility. In some cases, of course, the unreasonableness of his conduct has been regarded as sufficient evidence that he did not in fact rely upon the representation — he may testify to his reliance, but the court or the jury is not compelled to believe him. But in many cases where the plaintiff's reliance and good faith are unquestioned, it may still be held that his conduct was so foolish as to bar his recovery. He may not put faith in representations which are so preposterous, or which are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid the discovery of the truth, and still compel the defendant to be responsible for his loss.

"There have been cases (citing *Dunn v. White*, and *Osborne v. Missouri Pacific R. Co.*, both cited supra, in note 2), in which it was said that such reliance is contributory negligence, and that the plaintiff must exercise the care of a reasonably prudent man for his own protection. Undoubtedly such language is appropriate if the defendant's misrepresentation itself is merely negligent; but where there is an intent to mislead, it is clearly inconsistent with the general rule that mere negligence of the plaintiff is not a defense to an intentional tort. The better reasoned cases have rejected contributory negligence as a defense applicable to intentional deceit, taking account of the effect which the representation is intended to have upon the plaintiff's mind. It is a sufficient indication that the person deceived is not held to the standard of precaution, or of minimum knowledge, of the hypothetical reasonable man, that people who are exceptionally gullible, ignorant or dim-witted have been allowed to recover when the defendant knew it, and deliberately took advantage of it. . . . Rather than contributory negligence, the matter seems to turn upon the knowledge which the plaintiff has, or the knowledge which may fairly be charged against him from the facts within his observation, and so to be something close to assumption of risk." *Prosser on Torts*, pp. 747-749.

"It is sometimes broadly stated that the failure of the plaintiff to use ordinary care to discover the falsity of the defendant's representation is a bar to legal relief. (Referring to *Sherwood v. Salmon*, cited supra, note 2.) 'The maxim *caveat emptor* applies forcibly to this case. The law redresses those only who use diligence to protect themselves; such diligence as prudent men ordinarily use.' Thus stated the rule is open to two just criticisms: (1) Since deceit is an intentional tort, it is illogical to allow what is practically contributory negligence to be a defense (*Steinmetz v. Kelley*, 72 Ind. 442 (1880), and (2) that it ought to be the policy of the law to protect the weak and credulous — to protect the fool against the knave.

Even today, some courts say that, where the facts are equally available to plaintiff and to defendant, plaintiff should have investigated.<sup>4</sup>

The modern tendency is rather distinctly away from holding contributory negligence to be a defense to an action in fraud and deceit,<sup>5</sup> which is an entirely logical development, when one considers the long recognized fact that there is no such defense to any action for a wilful tort.

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"There is a class of cases, however, where it is arguable that the plaintiff should be barred, not exactly because of contributory negligence, but on the ground that he cannot be believed when he says that he believed — namely, where the facts were open to his immediate observation, where the parties were on an equal footing and the plaintiff was not thrown off his guard. But even this suggestion is open to the criticism that if the defendant actually intended to deceive, he should not be allowed to say to the plaintiff that the latter was a fool to believe him even if the facts were obvious." Clark on Torts, 74.

<sup>4</sup> Kneer v. Baruch Corporation, 118 P. 2d 488 (Cal. App. 1941).

<sup>5</sup> Where title is fraudulently represented to be clear of all incumbrances, plaintiff was held not to be under a "duty" to investigate the public records in order to find that there was an incumbrance by trust deed. Brown v. Oxtoby, 114 P. 2d 622, 624 (Cal. App. 1941); Angers v. Sabatinelli, 293 N. W. 173 (Wis. 1940).

Held, that a vendor was not precluded from recovering for fraudulent representations by defendant that he had arranged with purchaser's administrator to loan to purchaser's estate the sum necessary to enable the estate to take advantage of a waiver provision in the contract of sale, which representations induced vendor to extend the time of the waiver provision and to sign the deed and assign contract to defendant, because vendor signed the deed on advice of counsel, where the attorney for the purchaser's estate represented in a letter that the defendant was lending money to the estate and defendant assured counsel of such loan, and hence counsel was not required to make an investigation as to the truth of the matter. Petersen v. Graham, 110 P. 2d 149 (Washington, 1941).

Held, that, where grantor, who was in a position to know the location of lots sold by him, sold specifically described lot to grantee and pointed out a certain lot as the lot sold and grantee without availing himself of information in public records built dwelling upon lot which was pointed out by grantor, but which was in fact property of another and not the one sold, grantor was liable for fraud notwithstanding grantee's negligence in failing to avail himself of public records. Pattridge v. Yourmans, 109 P. 2d 646 (Colorado, 1941).

"Contributory negligence is not a defense to an action based on fraud. If a false statement is made by one who may be fairly assumed to know what he is talking about, it may be accepted as true, without question and without inquiry, although the means of correct information are in reach." H. D. Sojourner & Co. v. Joseph, 191 S. W. 418, 422 (Mississippi, 1939), quoting Nash Mississippi Valley Motor Co. v. Childress, 156 Miss. 157, 125 So. 708, 709.

"Upon the question of fraudulent representation the rule is that when the statement of fact is assumed to be within the knowledge of the person making it (and the amended bill here so discloses), the other has the right to rely on its truth, and in the absence of anything to arouse suspicion is not bound to make inquiry or examine for himself." Franklin v. Nunnelley, 5 So. 2d 99, 101 (Alabama, 1941).

Today, as far as the courts are concerned, the principle of *laissez-faire* in fraud cases is almost dead. Undoubtedly a great majority of the general public would favor rather strict government control for the prevention of some of the larger frauds, such as have often been perpetrated by corporations and promoters — forms of fraud now sought to be prevented by the federal S.E.C. enactment giving special attention to stock exchange problems. How strong and how dangerous a hold too rugged an individualism and *laissez-faire* may still have upon many Americans is well indicated by the apparently moderately strong movement in Congress to repeal or emasculate the S.E.C. statute, which is mainly an act to prevent a repetition of some of the rank swindles of the past in the field of corporations, although this legislation had the approval of the national platforms of both major political parties in 1940. Apparently we have, even in Congress, a considerable element who would like to see reopened the old opportunities for various types of frauds upon uninformed ordinary members of the general public.

*Ralph S. Bauer.*

De Paul University.

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"A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth." *Sic v. Loup River Public Power District*, 286 N. W. 700, 704 (Nebraska, 1939) quoting *Perry v. Rogers*, 62 Neb. 898, 87 N. W. 1063.