Volume 35
Issue 1 *Dickinson Law Review - Volume 35, 1930-1931*

10-1-1930

Misrepresentation of Intention to Pay

Herbert Horn

and insignia are painted on the side windows of a friend's pleasure vehicle, a custom which is becoming increasingly popular—will our courts arbitrarily denominate such vehicles "commercial" ones and penalize the shrewd merchants who seek advertisement by such methods? Suppose an indulgent employer has permitted his employees to use his truck to convey their families to a picnic on a Sunday, or to conduct a night "straw-ride"—will our judges search for a trade name on the panels of the truck and raise the presumption of ownership and use in the employer's business as an inexorable rule of law? If they do, employers will undoubtedly curb their generosity when they discover that their altruism is a costly virtue.

Gilbert Nurick

MISREPRESENTATION OF INTENTION TO PAY —Commerce and efficient business methods have always necessitated the giving of credit. Ordinarily where the debtor has failed to fulfill his promise to pay at the date stipulated, the creditor's action is in contract.[1] Too often it appears that the debtor is insolvent or had the preconceived intention not to pay for the goods received or both. In such a case an action of trespass in trover or replevin is the most efficient action since the recovery is a judgment for the full value of the goods or the restoration thereof.

In dealing with this subject we must distinguish false representations from concealment of an intention not to pay. False representations justifying the recission of a contract of sale and a concealment of an intention not to pay are separate and distinct wrongs. The first is complete without an intention not to pay and no such intention need be shown, while the second is complete without false representations other than such as are implied from the purchase or may expressly be made directly concerning the intention. Both may be present in a given case, but each is complete without the other.[2]

Generally in the United States it is found that one who purchases goods with a preconceived intention not to pay, is guilty of fraud.[3] One of the earliest Pennsylvania cases[4]

[1] 12 R. C. L. 266 and cases therein cited. See Williston on Sales p. 1071. The purchase of goods implies a representation that the buyer intends to pay for them.

[2] 12 R. C. L. 266.

[3] 12 R. C. L. 263; 35 Cyc. 80.

[4] McKinley v. McGregor, 3 Whart. (Pa.) 369 (1838).

on this subject is strictly in accord with this general rule, holding that where a person purchased goods with a preconceived design of not paying therefor, it is a fraud, the property not passing to the purchaser; and that replevin or trover would lie by the seller against the purchaser, but not against an innocent purchaser for value without notice.

A year later this decision was followed by the court in *Knowles v. Lord*[5] in which it appeared that the defendants had bought six cases of goods "without intention to pay for them".

The most celebrated case on this subject is *Smith v. Smith, Murphy and Co.*[6] which completely changed the previous doctrine of the Pennsylvania courts. In that case one Snodgrass bought goods of the plaintiffs, Smith, Murphy and Co. costing $676.22. It appeared that at the time the purchase was made Snodgrass knowingly was insolvent and unable to pay for the goods and concealed his inability to pay from the plaintiffs. The lower court charged that this would render the contract fraudulent and void, and that the plaintiffs might rescind it and recover the goods or their value. The mere fact that the purchaser was at the time insolvent, and did not know of his insolvency, would not render the contract void, but the purchase must have been made "with a design not to pay for the goods".

The Supreme Court reversed the decision of the lower court and said, per Lowrie, J. "Our own case of *McKinley v. McGregor, 3 Whart. 370,* would seem to be more important; but its influence for this case may be overestimated if we do not read it with reference to the extraordinary character of the cause, and to the fact that this question was not raised in the bill of exceptions. No question was raised on the charge of the court or the sufficiency of the evidence for the case was submitted without a charge".

This court then proceeded to lay down the doctrine which has been followed and is the law of Pennsylvania today, much, perhaps, to the distaste and dissatisfaction of later judges. The rule, as stated therein, is that there *must have been actual artifice, intended and fitted to deceive, before a man can claim that he has been defrauded.*

The reasons for this doctrine seem to be that in the opinion of the judges sitting, "an intention not to pay is dishonest, but it is not fraudulent: *9 Watts 34; 6 Wend. 81.* The law provides an action on the contract for just such dishonesty. It is no more fraudulent to have such an in-

---

[5] 4 Whart. (Pa.) 500 (1839).

[6] 21 Pa. 367, 60 Am. D. 51 (1852).

tention at the time of the purchase than at the time when payment ought to be made. Such intention by itself is disregarded by the law for it can be set aside by the usual contract remedies".

The whole theory upon which the decision is based is the fact that the act of purchase is not an element in the fraudulent conduct but rather the object and consequence of it, and hence that there is merely a fraudulent intent, not accompanied by an overt act, which does not constitute actionable fraud.[7]

Connecticut[8] is the only other state, to the writer's knowledge, which follows the doctrine laid down in the above case.

Naturally the question of misrepresentation of intention arises most frequently in cases where the defendant was insolvent at the time when he purchased the goods and failed to reveal his insolvency. *Backentoss v. Speicher*[9] was such a case. Here the court relied entirely on the leading case of *Smith v. Smith, supra,* declaring per Woodward, J. in a discussion of the right to reclamation where the condition of a conditional sale had not been compiled with: "Where there is a sale of goods and delivery of possession, even though the buyer intends, at the time, not to pay for them, and conceals his insolvency from the seller, it is not a cheat that will avoid the sale. There must be artifice practiced such as was intended and fitted to deceive, to constitute a cheat". The court then goes on to state that the New York courts have a different doctrine than that of Pennsylvania, in that, there, an intention on the part of the purchaser not to pay the goods prevents title from passing out of the seller.

Illustrating the character of trick or artifice necessary to vitiate the contract of sale, in a later case[10] a creditor employed an agent to buy a horse of his debtor, as if for the agent himself. He gave the agent ten dollars to pay on the account and instructed him to promise to pay the balance in a few days. By an understanding between the agent and the principal, he, the agent, was to pay by handing over the claim of the creditor—but nothing was to be said of the claim when buying the horse. This was done by the agent and when he handed over the claim, the debtor refused it and sued the creditor in replevin. Recovery was

---

[7]As to the necessity of overt acts, see 12 R. C. L. 241 Sec. 11.
[8]44 L. R. A. (N. S.) 28.
[9]31 Pa. 324 (1855).
[10]Harner v. Fisher, 58 Pa. 453 (1868).

allowed.

Where goods were sold to an insolvent purchaser who had failed to reveal his financial embarrassment, it was held[11] that the mere insolvency of a purchaser of goods and his knowledge of it are not alone such fraud as will set aside a sale and enable the seller to rescind the contract and replevy the goods after they had come fairly and fully into the possession of the purchaser. Repeating the words of the court, "The law of this state is not that insolvency and the mere knowledge of it are such a fraud as to set aside the sale and enable the seller to rescind, and to replevy the goods after they have come fully and fairly into the possession of the purchaser. It requires artifice, trick or false pretence, as a means of obtaining possession to avoid the purchase. * * * * * Insolvency and a knowledge of it at the time of the sale are evidence to go to the jury with other facts to show the intended fraud, but standing alone will not operate to rescind after a possession fully and fairly acquired. There must be bad faith—an intent at the time to defraud the seller".

Glancing at the essential elements required to sustain an action for deceit, namely: 1. A representation made as a statement of fact. 2. Untrue. 3. Known to be untrue by the maker (scienter) or else recklessly made. 4. Made with intent to deceive. 5. Other relied upon the statement. 6. Was deceived. 7. Injury or damage,[12] we find therein that the intent of the purchaser is an important factor in deciding the insolvency cases. A case[13] discussing this problem occurred in 1893. Here one of the purchasers of some goods of the plaintiffs expressly stated at the time of the purchase that he was solvent. He was really insolvent. The court held that this false statement was not trick or artifice sufficient to warrant a finding for the plaintiff since the defendant had stated what he thought was his financial condition in good faith, basing his statement on reasonable expectations that he would make a profit on the logwood he was buying.

Although *Smith v. Smith, Murphy and Co.*, supra, is still followed by present cases, it is done so with the dissatisfaction of some of the judges—to such a degree that the Supreme Court will not extend this rule a step beyond what the authorities require. In *Bughman, Trustee v. Cent-*

---

[11]Rodman v. Thalheimer, 75 Pa. 232 (1874).

[12]12 R. C. L. 240.

[13]Wessels v. Weiss Bros., 156 Pa. 591 (1893).

ral Bank,[14] the court, per Mitchell, J., agreed that *McKinley v. McGregor*, supra, expressed the sounder doctrine and declared that the departure made by *Smith v. Smith*, supra, is "much to be regretted. * * * * It was not made by an unanimous court, nor has it ever received the unmixed approbation of the bench or the bar". However, in this case, regardless of the disapproval of the rule, the court deemed it wise not to unsettle the law regarding the subject as laid down by the Smith Case forty years earlier. They seemed to take some little satisfaction in declaring that "any additional circumstance which tends to show trick, artifice, false representation, or in the language of *Smith v. Smith*, supra; conduct which reasonably involves a false representation will be sufficient to take the case out of the rules of these authorities".

By the absolute convictions of this court that the New York rule[15] agreeing with *McKinley v. McGregor*, supra, is the sounder, we can conclude that any act involving the slightest taint of artifice will be taken as sufficient trick or artifice to take the case out of the rule in Pennsylvania.[16]

In still another case[17] two years after the above, the purchase of a large number of beer kegs was made by the defendant from the plaintiffs, after the defendant, on being questioned as to his financial responsibility, replied, "I am in better condition than ever I was". In reality he was insolvent at the time. Here it was held that the defendant and his knowledge of it when he made the purchase were not alone sufficient to invalidate the sale or support an action by the seller in rescission of it. They "are mere evidence to go to the jury with other facts to show the intended fraud".[18] However the insolvency of the defendant and his knowledge of it, coupled with a representation of solvency which induced the plaintiffs to part with the possession of the goods was sufficient trick or artifice to enable the latter to recover possession of it by a suit in rescission of the sale.

A few words may be added concerning lack of reasonable expectation of ability to pay. There is a conflict of authority as to whether the fact that a purchaser of goods

---

[14]159 Pa. 94, (1893).

[15]Van Neste v. Conover, 20 Barb., (N. Y.) 547.

[16]Read dicta in Allen v. Sarshik, 299 Pa. 261, (1930) inferring that the rule of Smith v. Smith, 21 Pa. 367, is followed only on ground of stare decisis.

[17]Cincinnati Cooperage Co. v. Gaul, 170 Pa. 545 (1895).

[18]Rodman v. Thalheimer, 75 Pa. 232 (1874).

has no reasonable expectation of being able to pay for them is equivalent to an intention on his part not to pay for them; some courts holding it is equivalent to such an intention, and others directly to the contrary.[19]

The Maryland rule that in an action of replevin, insolvency and lack of reasonable expectation of paying for the goods were sufficient to invalidate the sale on the ground of fraud[20] was recognized in two Pennsylvania cases which passed upon Maryland contracts.[21]

However, under the Pennsylvania rule, since the gist of the offense is the overt act, neither the intent not to pay nor lack of reasonable expectation of paying would be sufficient.[22]

In summarizing it may be said that the present Pennsylvania rule is that the mere misrepresentation of intention to pay is not actionable without proof of trick or artifice intended and fitting to deceive.[23] Most of the states agree that the mere failure of a purchaser to disclose his insolvency is not fraudulent[24] in absence of intention not to pay for the goods; but the circumstances may show that concealment of insolvency by a purchaser of goods was fraudulent evincing an intention not to pay for them.[25] However, this is contra in Pennsylvania.[26]

Massachusetts is the only state, to the writer's knowledge, which has passed a statute making a preconceived intention not to pay, fraudulent.[27] In that state a purchase of goods without intention to pay for them is punished criminally by imprisonment.[28]

Herbert Horn

---

[19]44 L. R. A. (N. S.) 11 et seq.; 6 L. R. A. (N. S.) 556 et seq.

[20]Powell v. Bradlee, 9 Gill. and J. (Md.) 220.

[21]Mann v. Salsberg, 17 Pa. Super. Ct. 280 (1901); Perlman v. Sartorius, 162 Pa. 320 (1894).

[22]6 L. R. A. (N. S.) 560 notes.

[23]Smith v. Smith, 21 Pa. 367; 60 Am. D. 51 (1852).

[24]Williston on Sales p. 1072.

[25]14 L. R. A. 265 notes.

[26]Smith v. Smith, 21 Pa. 367, 60 Am. D. 51 (1852); Rodman v. Thalheimer, 75 Pa. 232 (1874); Backentoss v. Speicher, 31 Pa. 324 (1855), holding there must be trick or artifice practiced.

[27]Dow v. Sanborn, 3 Allen (Mass.) 181 (1861).

[28]Gen. Stat. c. 124, secs. 5, 34; Rev. Stat. c. 98, secs. 31, 36.