

he can, instead of suing for damages, repudiate the contract and hold himself discharged from further performance. If it is merely a warranty¹, that is a term of lesser significance, he is limited to suing for damages.

The distinction between terms of the contract (i.e., conditions or warranties) on the one hand and representations on the other is basic. If a term of the contract is involved, the remedies given are common law remedies and they are given whether the promise which forms the condition or warranty as the case may be is made fraudulently or innocently. The distinction between fraudulent and innocent misrepresentation is one pertaining to the case where the statements are *representations* only and not *contractual promises*.

Fraudulent Misrepresentation

Fraud exists "when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, carelessly whether it be true or false". (*Derry v. Peek* (1889) 14 App. Cas. 337, at page 374.) Fraud may also exist where there is a partial statement of fact in such a manner that the withholding of what is not stated "makes that which is stated absolutely false" (*Peek v. Gurney* (1873) L.R. 6 H.L. 377.)

For an action for fraud to succeed, or for the other party to have the remedies given to a person induced to enter into a contract by means of a fraudulent misrepresentation the following six elements must be established:—

1. The representation must be one of fact.
2. The representation must be untrue.
3. The party who makes such representation must know that what he is stating is false or he must have no belief in its truth or not care whether it be true or false.
4. The party who makes the representation must intend the other party to the contract to act upon such representation.
5. The representation must, in fact, have been acted upon by the other party.
6. The person claiming must have suffered damage.

The presence of *each* element is necessary in order to constitute the grounds for an action for fraud, or to afford those remedies to the other party to the contract.

1. *Statement of fact.* There must be a statement of fact, not one of law. The statement, furthermore, must not be a *mere* expression of opinion (a statement of opinion can be held to involve a mis-

¹ The distinction between conditions and warranties is explained in detail in Chapter 9.

representation when the man really did not hold that opinion or a reasonable man could not have held the opinion. (*Smith v. Land and House Property Corporation* (1884) 28 Ch. D. 7).)

2. *Falsity.* This is obviously a necessary ingredient of liability. It is a question of fact in each case whether the representation is false or not.

3. *Known to be false, or without belief in its truth, or recklessly careless whether it be true or false.* This is a further element of fraud. The representor need not actually know that what he is representing is in fact untrue; he is liable if he makes the false statement when he has no knowledge whether it is true or false, and also when he does not trouble to verify the truth of what he says. If on the other hand he genuinely believed the statement to be true, there is no fraud even though his belief was formed negligently¹.

4. *Intended to be acted upon.* This means, for example, intending that the other party shall enter into a contract or do any other act in reliance on the statement.

5. *In fact acted upon.* If the person to whom the false representation is made knows it is untrue, he obviously is not acting upon it. It does not induce him to do anything.

A representor is liable for its falsity. Similarly, even if the representation is believed, but is not relied upon by the person to whom it is made, there is no liability.

The owners of a pastoral property, in offering it for sale, made false statements as to the numbers of the stock upon it. The purchaser refused the offer, and afterwards, having been informed of the inaccuracy of the statements made in the original offer, negotiated for a sale upon a totally different basis as regards the stock, inspected the property and stock, and as a result of the inspection, decided to purchase and entered into a contract of sale on the new basis. It was held that the purchaser could not afterwards say that he relied upon the misrepresentations made by the vendors in the first instance. (*Holmes and Others v. Jones and Others* (1907) 4 C.L.R. 1692.)

6. *Resulting in damage.* If no damage is suffered from the false representation, no action lies.

As indicated above, in order to constitute fraud all the elements must be present. The following is another illustration of a case where, although misrepresentation has existed, the person suffering has not been able to claim damages because of the lack of one of the material factors above-mentioned.

¹ Although it strictly does not fall within the scope of this book to deal with liability for *negligent statements* or for *negligent advice*, the subject is of such importance to people in commerce that there is included as an Appendix at the end of this book a short excursus on the subject.

A prospectus was issued to the public by the promoters of a company and in it were misrepresentations of facts known to the promoters. X bought shares on the open market on the faith of the prospectus; he was not an original allottee of the shares but bought from an original allottee. It was held that the prospectus was only issued for the purpose of obtaining members of the company on the original allotment of shares and that a purchaser of shares on the open market upon the faith of a prospectus which he has not received from those answerable for it cannot, by acting upon it, so connect himself with them, as to render them liable to him for the misrepresentations contained in it as if it had been addressed personally to himself. (*Peck v. Gurney* (1873) L.R. 6 H.L. 377.)

Remedies for Fraudulent Misrepresentation.

A person who has been induced to enter into a contract by reason of a fraudulent misrepresentation is in the following position :—

1. he may refuse to be bound by the contract, and bring an action for its rescission where such a course is necessary, e.g., in the case of contracts under which the defrauded party has given some benefit before the fraud was discovered;
2. he may take advantage of the contract to the extent of retaining what benefits he may have received and sue for fraud, claiming such damages or loss as he has sustained;
3. he may successfully defend any attempts to enforce the contract against him.

In cases (1) and (3) he is repudiating the contract. In case (2) he is affirming the contract, that is allowing the contract to stand, but is claiming damages for the loss he has suffered through the misrepresentation.

As the remedy of rescission is an equitable one and available also in the case of innocent misrepresentation, certain remarks will be made about it later.

It can be seen that where fraud is present the contract is not void but merely voidable. However, the general rule that the effect of fraud is to render the contract voidable at the option of the party defrauded is subject to one important exception. Where the fraudulent misrepresentation has been of such a nature that it has resulted in no true agreement between the parties, then the contract may be void on the grounds of *mistake*. For a consideration of those cases where such has been the effect see earlier in this Chapter.

Innocent Misrepresentation

An innocent misrepresentation is an incorrect statement of fact made without an intention to mislead or deceive or made without realization of its untruth. It can also arise from a non-disclosure of facts where such non-disclosure occurs without the intention of

deceiving. It is a misrepresentation of facts or circumstances which operate as an inducement to the making of the contract.

Difference between Innocent Misrepresentation and Fraud.

An innocent misrepresentation occurs when a person makes an untrue statement in good faith and without knowing that he has made a false statement or created a wrong impression, even though his belief in the truth of the statement was negligently arrived at. Fraud, or fraudulent misrepresentation, occurs where a person makes an untrue statement either (1) knowing it is untrue, or (2) without a belief in its truth, or (3) recklessly without caring as to whether it is true or not.

Examples of Innocent Misrepresentation.

As examples of innocent misrepresentation the following may be taken :—

In *Redgrave v. Hurd* (1881) 20 Ch. D. 1, the defendant was induced to enter into a contract to purchase from the plaintiff a house and together with it the latter's practice as a solicitor, on the faith of a mis-statement as to the value of the returns from the business. The Court held that there was no statement made which was false to the knowledge of the plaintiff; hence damages were refused to the defendant but the plaintiff was refused specific performance and the contract was rescinded.

In *Whittington v. Seale-Hayne* (1900) 82 L.T. 49, the plaintiff had been induced to take a lease of premises by a misrepresentation that the premises were in a sanitary condition. The defendant genuinely believed they were sanitary. It was held that the plaintiff was entitled to rescission of the lease, and to obtain an indemnity for the cost of rates paid and repairs effected pursuant to the covenant in the lease, but not to a refund to cover loss of profit on sales, loss of breeding season, etc., as these were damages which could be recovered only if there was fraud.

Remedies for Innocent Misrepresentation.

Common law disregarded innocent misrepresentation where it was not made a term of the contract; it neither awarded damages nor regarded the contract as void or liable to be rescinded.

There are three exceptions to this :—

- (1) Where an agent wrongly represents that he has authority to sell property where in fact he has not, he is liable for damages even though his misrepresentation was innocent. (This is known as "breach of warranty of authority".)
- (2) If the representation becomes more than a representation and is made a term of the contract, either as a condition or a warranty. (This has been earlier mentioned and is not really a true exception.)
- (3) If the representation is so basic that the subject matter as actually existing is so different from what it would have been if the representation had been true as to amount to a difference