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# APPLICATION OF PAROL EVIDENCE RULE UNDER WISCONSIN FRAUD AND WARRANTY CASES

By IRVING PUCHNER\*

**A**N ANOMALOUS situation has arisen in Wisconsin with respect to the workings of the parol evidence rule as result of the law developed in the warranty and fraud cases decided by the Wisconsin Supreme Court. It appears that upon the same set of facts the substantive rights of the pleader may vary depending upon the form of his pleading.

The action on a warranty originally was regarded as an action in tort for deceit.<sup>1</sup> No reported decision records an action on a warranty being brought in *assumpsit* until 1778.<sup>2</sup> Under the Sales Act "any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."<sup>3</sup> Warranties, however, of quality are not limited under the decision of our Supreme Court to the sale of goods, but may attach to the sale of land,<sup>4</sup> or of a chose in action.<sup>5</sup> Whether an action on a warranty may sound in tort as well as contract, is at least doubtful under the decisions of our Supreme Court.<sup>6</sup>

To recover in Wisconsin in an action in tort for deceit the buyer must allege and prove (1) a representation of a fact by the seller relating to the thing sold, (2) the representation is untrue, (3) the buyer acted in reliance upon the representation, (4) the buyer suffered damage as the result of so relying.<sup>7</sup> It is not necessary to allege either an intent to deceive, or that the statement of fact was made in reckless indifference to the truth. Our Supreme Court has repeatedly held that

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<sup>1</sup> Ames History of *Assumpsit*; 2 Harv. L. Rev. 1.8.

<sup>2</sup> *Stuart v. Wilkins*, 1 Dougl. 18.

<sup>3</sup> Section 121.12 Wis. Stats.

<sup>4</sup> *Green v. Batson*, 71 Wis. 54.

<sup>5</sup> *Giffert v. West*, 33 Wis. 617.

<sup>6</sup> *White v. Hale*, 47 Wis. 424;

*Cameron v. Mount*, 86 Wis. 477;

*Rood v. Taft*, 94 Wis. 380;

*Klipstein v. Raschein*, 117 Wis. 248.

<sup>7</sup> *Helberg v. Hosmer*, 143 Wis. 620;

*Bank of Evansville v. Kurth*, 167 Wis. 43;

*Jones v. Brandt*, 173 Wis. 539.

in an action in tort for misrepresentation the one who makes the false representation of fact to induce another to enter into a contract whereby injury to the latter results because of such falsity, is liable for damages caused by his conduct, regardless of whether he knew, or in the exercise of ordinary care, might have known, the truth of the matter.<sup>8</sup> So also it is not required that the buyer in an action in tort for deceit prove that the representations are made with the expectation that the buyer shall rely on them.<sup>9</sup>

To recover in an action in contract on an express warranty, the buyer must allege and prove (1) a representation of fact or any promise by the seller relating to the thing sold having a tendency to induce the sale, (2) falsity of the representation, or breach of the promise, (3) the buyer acted in buying the thing upon the representation of fact or promise by the seller, (4) buyer suffered damage.<sup>10</sup>

From the foregoing it is at once apparent that in the sale of goods, of real estate or of a chose in action, upon the same set of facts, namely, (1) misrepresentation of a fact relating to the thing sold, (2) reliance by the buyer to his damage upon the truth of the fact misrepresented may be based a cause of action either in contract upon an express warranty, or in tort for deceit. The allegation and proof required in both actions are the same.<sup>11</sup>

The representation of fact relating to the thing sold may be either verbal or written, but where the written bill of sale contains an express warranty as to some particulars,<sup>12</sup> or where the contract of sale is in

<sup>8</sup> Bird v. Kleiner, 41 Wis. 134;  
Davis v. Nazum, 72 Wis. 439;  
Palmer v. Goldberg, 128 Wis. 103;  
Kathan v. Comstock, 140 Wis. 427;  
Jones v. Brandt, 173 Wis. 539;  
Ohrmundt v. Spiegelhoff, 175 Wis. 214.

<sup>9</sup> Helberg v. Hosmer, 143 Wis. 620;  
Woteshek v. Neuman, 151 Wis. 365;  
Jones v. Brandt, 173 Wis. 539.

<sup>10</sup> Section 121.12 Wis. Stats. note: In the case of Smith v. Reed, 141 Wis. 483, decided under the Sales Act, it was held that "if an express warranty had been given in express terms as a part of the contract of sale, no proof of reliance thereon would have been necessary. \* \* \* But where a mere representation of fact is proved \* \* \* it must be shown to have been relied on by the vendee in order to constitute a warranty."

<sup>11</sup> Helberg v. Hosmer, 143 Wis. 620;  
Jones v. Brandt, 173 Wis. 539;  
Section 121.12 Wis. Stats.;  
Smith v. Reed, 141 Wis. 483.

<sup>12</sup> Merriam v. Field, 24 Wis. 640;  
Boothby v. Scales, 27 Wis. 626;  
J. I. Case Plow Works v. Niles & Scott Co., 90 Wis. 590.

writing,<sup>13</sup> parol evidence to show a verbal warranty is inadmissible. The rule likewise is equally established that fraudulent misrepresentations relied upon by the buyer may be shown by parol as a defense to an action by the seller for the price, notwithstanding that the contract of sale is in writing.<sup>14</sup> Applying this rule of evidence to the requirements of pleading and proof in the Wisconsin fraud cases, the question instantly occurs where the action is brought in tort for deceit,—the allegations being simply (1) misrepresentation of a fact relating to the thing sold, (2) reliance by the buyer to his damage upon the truth of the representation made,—and the contract of sale is in writing whether or not the Wisconsin Supreme Court will sanction parol proof of the misrepresentation when on identical facts, had the action been in contract on a warranty, no parol evidence to vary the written contract of sale would have been admissible.<sup>15</sup> The writer can find in the Wisconsin Reports only two cases in which the foregoing problem has been before the Wisconsin Supreme Court.<sup>16</sup> The case of *Jones vs. Brandt*, 173 Wis. 539 was an action in which the assignees of the sellers brought a suit on notes given for the price of a dredge. The buyers of the dredge, who were made defendants, impleaded the seller company and served a cross-complaint upon it. The plaintiffs were held not to be holders in due course. For the purpose of this article the issue raised by the cross-complaint alone is important and will be considered solely.

The contract of sale in the case was in writing, and among other things contained a guaranty of good materials, workmanship and capacity, and provided expressly that the entire understanding between the parties was embodied therein. At the trial of the case evidence of oral representations made before and at the time of the sale was received over the objections of the seller. The jury, by a special verdict, found, (1) the seller made certain representations of fact relating to the dredge which were not contained in the written agreement, (2) the representations were false, (3) the buyer relied upon the representations. No finding was made that the seller knew that the representations were false, that the representations were made in reckless indif-

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<sup>13</sup> *Fox v. Boldt*, 172 Wis. 333;  
*Wis. Livestock Assn. v. Bowerman*, 198 Wis. 447.

<sup>14</sup> *Jones v. Brandt*, 173 Wis. 539;  
*Wulfers v. Clark Motor Co.*, 177 Wis. 497;  
*Creasey Corp. v. Dunning*, 182 Wis. 388;  
*Sherlock v. Bradley Poly. Inst.*, 184 Wis. 425.

<sup>15</sup> *Fox v. Boldt*, 172 Wis. 333;  
*Wis. Livestock Assn. v. Bowerman*, 198 Wis. 447.

<sup>16</sup> *Jones v. Brandt*, 173 Wis. 539;  
*Bank of Evansville v. Kurth*, 167 Wis. 43.

ference to the truth, or that the seller in the exercise of ordinary care ought to have known that the representations were false. The findings made would sustain a judgment for breach of warranty equally well as one for fraud.<sup>17</sup> The admission of the testimony as to the representations made at the time of the sale of the dredge was assigned by the seller as error. The court held that it was the well settled rule of the state that it was competent to show by parol that a contract was entered into relying on fraudulent representations, citing among other cases *Bank of Evansville v Kurth*, which in its facts is clearly in point.

The apparent import of *Jones vs Brandt* and *Bank of Evansville v Kurth* is that despite the existence of a written contract of sale verbal misrepresentations not made either knowingly, in reckless disregard of the truth, or without the exercise of ordinary care to ascertain the truth, may be proved by parol if such facts are made the basis of an action in tort for deceit. The result is the anomalous situation that on the same set of facts in one instance, if pleaded in an action in tort for deceit, parol representations may be proved, in another instance, if pleaded in a contract action for breach of warranty, the parol representations may not be received in evidence.<sup>18</sup>

There is no doubt genuine disagreement as to the soundness of the policy behind the parol evidence rule and to the extent a court should follow it. To some *Jones vs. Brandt* may be heralded as a definite step forward toward a total abrogation of the rule. The language of the decision does not clearly express on the part of the court an appreciation of the step it was taking, and of the authorities it cites not all are in point.<sup>19</sup> The impression from *Jones vs. Brandt*

<sup>17</sup> Section 121.12 Wis. Stats.;

*Smith v. Reed*, 141 Wis. 483;

*Helberg v. Hosmer*, 143 Wis. 620;

*Bank of Evansville v. Kurth*, 167 Wis. 43;

*Jones v. Brandt*, 173 Wis. 539.

<sup>18</sup> *Merriam v. Field*, 24 Wis. 640;

*Boothby v. Scales*, 27 Wis. 626;

*J. I. Case Plow Works v. Niles & Scott Co.*, 90 Wis. 590;

*Fox v. Boldt*, 172 Wis. 333;

*Wis. Livestock Assn. v. Bowerman*, 198 Wis. 447;

*Jones v. Brandt*, 173 Wis. 539;

*Wulfers v. Clark Motor Co.*, 177 Wis. 497;

*Creasey Corp. v. Dunning*, 182 Wis. 388;

*Sherlock v. Bradley Poly. Inst.*, 184 Wis. 425;

*Wis. Livestock Assn. v. Bomerman*, 198 Wis. 447.

<sup>19</sup> *Bank of Evansville v. Kurth*, 167 Wis. 43;

*Hannon v. Kelley*, 156 Wis. 509;

*Hurlbert v. Kellogg L. & M. Co.*, 115 Wis. 225;

*Gross v. Drager*, 66 Wis. 150.

and the other Wisconsin fraud and warranty cases, is that the anomalous situation herein referred to is the result of having lost sight of the historical developments of the common law actions of warranty and deceit. Originally, as has been pointed out, an action on a warranty was in tort.<sup>20</sup> Later it could be brought in *assumpsit*,<sup>21</sup> and the prevailing view today is that an action on a warranty may be brought either in tort or contract.<sup>22</sup> The Wisconsin Supreme Court has not clearly recognized that fact.<sup>23</sup> As the action of warranty developed it became unnecessary to prove a scienter<sup>24</sup> and in most jurisdictions, an intent,<sup>25</sup> and the majority rule has been codified in the Sales Act.<sup>26</sup>

Most jurisdictions, however, have held that to sustain an action in tort for deceit the misrepresentation must be made either knowingly or in reckless disregard of the truth.<sup>27</sup> Under the Wisconsin cases a mere misrepresentation of a fact relating to the thing sold, if relied on by the buyer to his damage, constitutes fraud.<sup>28</sup> In the writer's opinion it is going a long way to put the badge of fraud on a person who misrepresents facts neither wilfully nor in reckless disregard of the truth, and it should not make any difference under the code whether the action is in equity or in law.<sup>29</sup> In neither case ought the court hold out an innocent misrepresentation as fraudulent. It would seem to be better law to create a distinction between warranties and fraudulent misrepresentation, so as to include in the latter classification only misrepresentations of fact that are made either knowingly or in reckless indifference to the truth. It would seem also to be good law not to permit a contracting party to escape the penalty of his wilful or reckless misrepresentation by setting up a

<sup>20</sup> Ames History of Assumpsit, 2 Harv. L. Rev. 1.8.

<sup>21</sup> *Stuart v. Wilkins*, 1 Dougl. 18.

<sup>22</sup> Williston on Sales (2nd ed.) Par. 197 and cases cited in note 35.

<sup>23</sup> *Pierce v. Carey*, 37 Wis. 232;

*White v. Hale*, 47 Wis. 424;

*Cameron v. Mount*, 86 Wis. 447;

*Rood v. Taft*, 94 Wis. 380;

*Klipstein v. Raschein*, 117 Wis. 248.

<sup>24</sup> Williston on Sales (2nd ed.) Par. 196.

<sup>25</sup> Williston on Sales (2nd ed.) Par. 201.

<sup>26</sup> Section 121.12 Wis. Stats.

<sup>27</sup> 26 C. J. 1123 (Par. 49) et sequitur;

12 R. C. L. 239 (Par. 10).

<sup>28</sup> *Helberg v. Hosmer*, 143 Wis. 620;

*Woteshek v. Neuman*, 151 Wis. 365;

*Bank of Evansville v. Kurth*, 167 Wis. 43;

*Jones v. Brandt*, 173 Wis. 539.

<sup>29</sup> *Miner v. Medbury*, 6 Wis. 294.

written contract of sale. With respect to warranties the same rule of evidence ought to apply whether the action is in tort or in contract on the warranty. No attempt is made here to present a case for or against the parol evidence rule; but the form of the motion, the writer feels, where there is no difference in the facts, should not, as is apparently now the case in Wisconsin, govern the substantive right of the pleader.