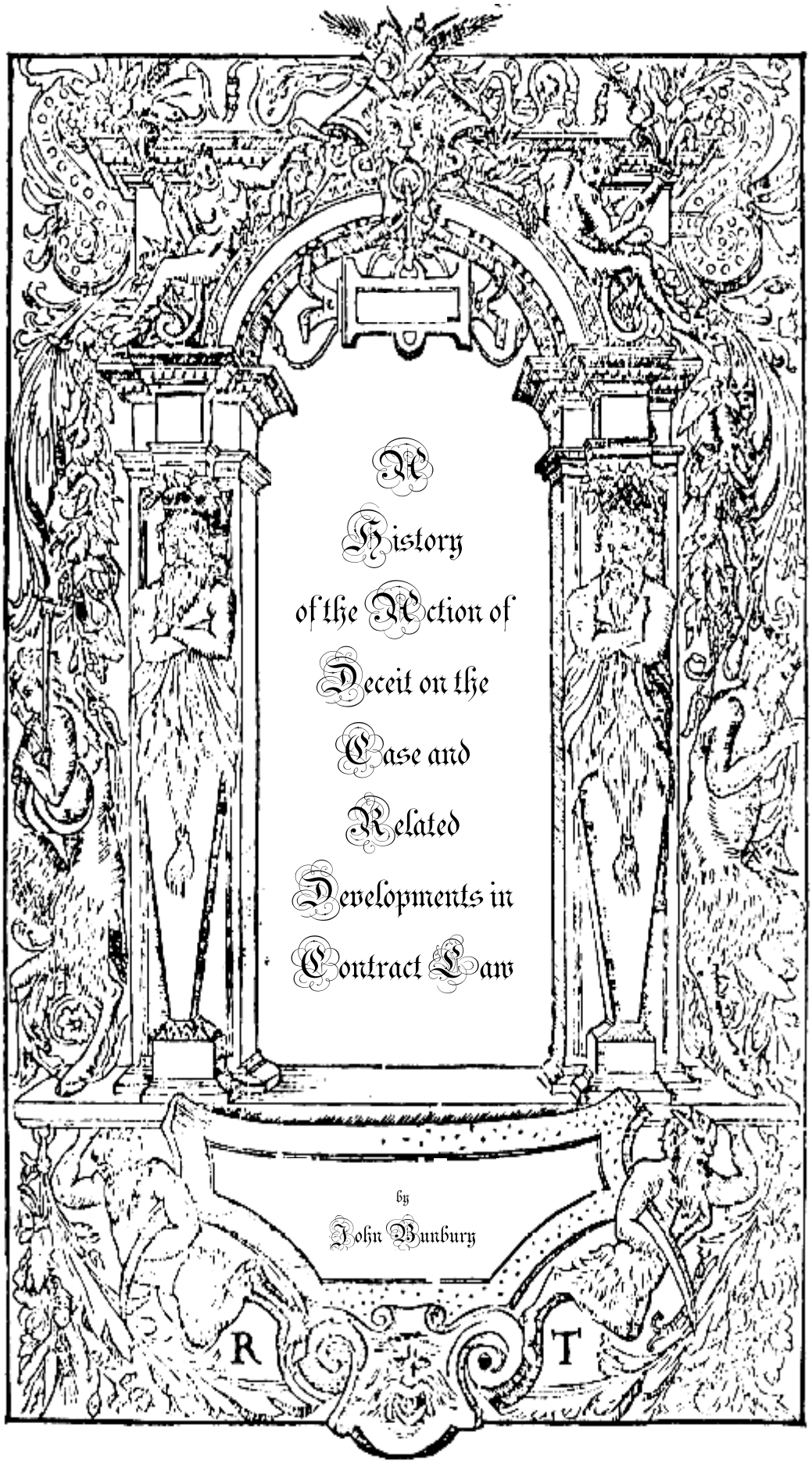
A
History
of the Action of
Deceit on the
Case and
Related
Developments in
Contract Law
by
John Bumbury
R
T

A History of the Action of Deceit on the Case and Related Developments in Contract Law

By
John Christian Bunbury
Barrister & Solicitor, Gisborne.

A thesis submitted in partial fulfilment of the requirements
for the degree of Doctor of Philosophy in Law,
The University of Auckland, 2005.

ABSTRACT

My thesis traces the common law's initial inability to provide a remedy for fraudulent contract-making other than that provided in the action of deceit on the case for a breach of warranty. By and large this was the result of an evidential rule in covenant that a contract had to be evidenced in a sealed instrument (ie. a specialty). This test for an assumption of contractual obligation prevented the courts from receiving inferior oral evidence of fraud in defence to the contract. A limited remedy for fraud was provided in the form of the action of deceit on the case where liability was based on tricking another person into contracting on the basis of a false warranty. Evidence of fraud in the action of deceit on the case was reduced to proving a breach of warranty. Any injustice created by the common law's inability to provide a defence or remedy for other types of fraudulent contract-making was either relieved in equity, or through the passage of time and gradual common law development, by new common law actions, rules of evidence and methods of trial. By far the most significant development in this regard was the establishment of a remedy for fraud in money had and received in the late seventeenth century, which led to the common law rule allowing for rescission of a contract for fraud. Any money passed under the fraudulently induced contract could be recovered in money had and received following rescission. Likewise, the value of any personal property transferred under the fraudulently induced contract could be recovered in trover following a rescission. Related developments saw warranties become actionable in special assumpsit (ie. contract), and a generic remedy for actual fraud develop in the modern tort of deceit.

CONTENTS

fraudster named Glanvill resulted in King James I confirming the Chancellor's jurisdiction to intervene and do equity after there was a judgment at law.

Chapter 5 **The Chancellor's Jurisdiction over Fraud** p. 52

Chapter five includes a discussion of the ambit of the Chancellor's jurisdiction in relation to contracts induced by fraud, the application of precedent to matters of fraud in equity, and an account of seventeenth, eighteenth & early nineteenth century cases involving 'equitable fraud', that are categorised on the basis of Lord Hardwicke's classification of 'equitable fraud' in *Chesterfield v Janssen* (1750-51) and Peere William's notes to *Osmond v Fitzroy* (1731), to give the reader a feel for the extent to which the Chancellor intervened to do equity in matters of fraud. This chapter also includes a discussion of the extent to which equity intervened on the basis of 'inadequate consideration'.

PART TWO
"A HISTORY OF BREACH OF WARRANTY AND RELATED DEVELOPMENTS IN CONTRACT LAW"
(Circa 1200 – 1850)

Overview p. 83

Part one is essentially a history of how the early common law developed rules of evidence and methods of trial that prevented any legal recognition of fraud as an invalidating factor, and how this gap in the law was partially filled by the Chancellor intervening to do equity. Part Two is a history of how the common law overcame these obstacles, which eventually gave rise to remedies for contracts induced by fraud in the action of deceit on the case, money had and received, and trover.

Chapter 6 **Trespass** p. 88

Chapter six includes a note on the remedies provided in 'local courts' that operated outside of the jurisdiction of the royal courts of England (circa 1270 – 1400), a brief history of the writ of trespass to provide context for understanding later developments (circa 1200 – 1300), a discussion of fictions on the face of the record to explain why 'breach of warranty' was not within the original ambit of trespass (circa 1300 – 1320) and a discussion of an interesting exception from 1307.

trover. The doctrine of *restitutio in integrum* was also applied to cases involving contracts induced by fraud. In this context, there was no substantive justification for the application of doctrine. Its application to cases of fraud related to an inherent deficiency in the common law in that the common law did not provide for an account of profits, or an allowance for deterioration, in relation to assets passed under the contract before any act of rescission at common law had taken place. As the common law already had another remedy (ie. the action of deceit on the case, where an award of damages could do complete justice between the parties by effectively providing restitution through an award of damages), the common law opted out of rescission for fraud where *restitution in integrum* was not possible. Equity, which could take an account of profits and make allowances for deterioration, did intervene to provide practical restitution where possible. When equity intervened in this manner, the court of equity operated to confirm or validate the contracting party's own act of rescission at common law, which the common law itself could not accept or act on, because the common law lacked the necessary machinery to effect practical restitution following a rescission of a contract where specific restitution was not possible.

Chapter 16 Summary p. 238

The dissertation ends with a summary linking together the various threads and strands of the history of the action of deceit on the case and related developments in contract to show how early rules of evidence and methods of trial set the common law off on a unique path, and traces the same through to the beginning of our modern understanding of contract, warranty and deceit. The summary concludes with three general observations of some interest that I made during the course of tracing the history set out above; namely, that in the absence of an institution of contract, there is no obvious basis to distinbguish between breach of contract and other forms of 'dishonesty', that the test used to determine whether or not there is deceit in the modern tort of deceit (ie. post *Pasley v Freeman*) had remarkable similarities with the test used in the old tort of deceit on the case, and that there was no concept of a sound price at common law or an adequate price in equity.

Appendix – Stuart v Wilkins (1778) Hill MSS, Lincoln's Inn Library, MS. 13, fo 258.

Bibliography

TABLE OF CASES

Selden Society Cases

428. Richardson & Sayles (ed) plea 55 94
429. Richardson & Sayles (ed) plea 58 95
430. Richardson & Sayles (ed) plea 59 96
431. Richardson & Sayles (ed) plea 60 95
432. Richardson & Sayles (ed) plea 61 96
433. Sayles (ed) *Select Cases in the Court of King's Bench* vol. 57 (London: Selden Society , 1938) plea no. 6 112
434. Sayles (ed) plea no. 11 112
435. Sayles (ed) *Select Cases in the Court of King's Bench* vol vii (London: Selden Society, 1971) case no. 6 (1414) 130, 135

Year-book Cases

436. YB 21 & 22 Edw. I 25
437. YB 32 & 33 Edw. I 31
438. YB 2 & 3 Edw. II 27
439. YB 4 Edw. II 31, 33
440. YB 17 Edw. III 28
441. YB 22 Edw. IV 26
442. YB 3 Hen IV 161
443. YB 27 Hen. VIII 27

ABBREVIATIONS

B&M	Baker & Milsom *Sources of English Legal History* (London: Butterworths, 1986)
Barbour	Barbour *The History of contract in Early English Equity* printed in *Vinogradoff* (ed) *Oxford Studies in Social and Legal History* vol. iv (New York: Octagon Books, 1974)
Baker	Baker *An Introduction to English Legal History* 3rd ed. (London: Butterworths, 1990)
Fifoot	Fifoot *History and Sources of the Common Law* (London: Stevens and Sons Ltd, 1949)
Holdsworth	Holdsowrth *A History of English Law* (London: Methuen & Co Ltd)
Kiralfy	Kiralfy *The Action on the Case* (London: Sweet and Maxwell Ltd, 1951)
Kiralfy Source Book	Kiralfy *A Source Book of English Law* (London: Sweet & Maxwell Ltd, 1957)
Milsom	Milsom *Historical Foundations of the Common Law* (London: Butterworths, 1969).
Plucknett	Plucknett *A Concise History of the Common Law* 5th ed. (London: Butterworth & Co Ltd, 1956)
Pollock & Maitland	Pollock & Maitland *The History of English Law* 2nd ed. reissued with a new introduction and select bibliography by Milsom (Cambridge: Cambridge University Press, 1968)
Salmond	Salmond *Essays in Jurisprudence* (London: Stevens & Haynes, 1891)
Simpson	Simpson *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* 1996 paperback edition (Oxford: Clarendon Press, 1975)

INTRODUCTION

This thesis started as a research project into the law relating to rescission of contract for fraud, and quickly grew into a more comprehensive study of the history of deceit on the case and related developments in contract law, which by and large is a history of the effect of fraud on contract. The reason is that waiver of the tort of deceit, and an election to sue in money had and received or trover, is the origin of the common law rule allowing for the rescission of a contract for fraud. The motivation for this development rested on the available proofs of deceit in the action of deceit on the case. Part of my thesis is that deceit was proved in the action of deceit on the case by showing a breach of warranty. A breach of warranty proved deceit in a very effective, robust and determinative manner by showing that the warrantor either knowingly gave a false warranty or otherwise held himself out as knowing the truth of the matter warranted, when he did not. Other forms of proving deceit may have been possible in that actions of deceit were tried by jury, and early jurors made their own inquiries before coming into court to return a verdict. However, in terms of the form of the writ, it can be argued that a breach of warranty was the only legitmate means of proving deceit in an action of deceit on the case.

Towards the end of the seventeenth century a remedy for fraud in money had and received began to develop. Unrestricted by the history of the tort of deceit on the case, the available proofs in the remedy of money had and received were not restricted to showing a breach of warranty. Nonetheless, litigants, who wanted the flexibility of pleading a case on the basis of a breach of warranty, and alternative proofs of deceit, faced the obstacle presented by a rule preventing actions in assumpsit (of which money had and received was a sub-category) and deceit from being combined in one action. To get around this procedural inconvenience, litigants experimented with trying a breach of warranty in special assumpsit (ie. contract), which in turn enabled them to add a money count in money had and received for fraud. This enabled litigants to try both forms of proof in one action; ie. a breach of warranty in special assumpsit, and a fraudulent misrepresentation in money had and received. The net result was our modern learning;

ie. warranties are contractual (not evidential), and misrepresentations occur before a contract comes into being and induce the same.

In telling this history, I have broken the dissertation into two parts. The main purpose of the first part is to explain why the common law was at first unable to recognise the invalidating effect of fraud on contract. The explanation turns on the importance of the seal as an evidential device at common law and the decisive and determinative legal tests formulated in the common law's first formative phase. As the judges concentrated on creating determinative rules that showed when a contractual obligation came into being, the test used (ie. whether or not there was a sealed instrument in writing; viz, a specialty), became so determinative, that other issues, such as whether or not the contract should be enforced as a matter of justice, because, for example, it was induced by fraud, were ignored. The result was that litigants were forced to seek relief in the Court of Chancery; giving rise to a principle head of equitable intervention (ie. fraud).

The second part of the dissertation is a history of the action of deceit on the case and related developments in contract law, which essentially is a history of how the common law acquired remedies for fraud. It starts with an account of trepass, and its most malleable sub-form, trespass on the case, which was the form of pleading that eventually gave rise to the action of deceit on the case, and a remedy for the breach of a parole warranty. This is followed by a discussion of the relevance of the *scienter* writs (ie. the common law action for damages for knowingly keeping an animal that had a propensity to attack) in the history of the action of deceit on the case. The next chapter provides an explanation of common law procedure that shows why certain issues, such as whether or not the plaintiff had to prove that the vendor knowingly gave a false warranty did not surface for judicial resolution until the late seventeenth century. This is followed by an analysis of the basis of liability in the action of deceit on the case. Many modern histories of the common law tend to treat the action of deceit on the case as contractual in nature (although this is often more implicit than explicit),[1] mainly due to an observation made by Arnold that the issue in actions of deceit was almost always joined on the existence of the warranty and never on the allegation of *scienter* (ie. knowledge of the

[1] See, for example, Milsom infra at note 555.

defect).[2] As noted above, counter to this prevailing theory (if indeed it is sufficient to warrant the status of a theory), I have argued that the basis of liability in deceit was actual fraud; proved by showing a false warranty, which in a robust and decisive manner, allowed the early common law to 'look' inside the head of a man, as the false warranty proved that the vendor of personal property had either knowingly:

- given a false warranty, or
- held himself out as knowing the truth of the matter warranted, when he did not.

In the eighteenth century, the old order was broken apart and the modern conception of fraud at common law came into being. The tort of deceit was expanded beyond a mere action between contracting parties, breach of warranty became actionable in contract rather than tort; and via a new remedy for fraud in money had and received (and related actions in trover), deceit could be proved at common law by means other than showing a breach of warranty, and more importantly, the common law rule allowing rescission of contract for fraud came into being.

One of the more interesting observations that I have made is that in a developing legal system there is no obvious basis to distinguish between deceit and breach of contract. Once contract was reified, the difference became obvious. Deceit is dishonesty and breach of contract is the failure to perform an assumed obligation. Before this time, breach and fraud were often treated as different forms of dishonesty, and sometimes in a manner that makes it difficult to determine which was at play. Early common law litigants used this ambiguity to great effect in influencing the development of a remedy for the breach of a parole warranty in trespass on the case, and later in assumpsit to develop a remedy for the breach of parole contracts generally. Even though we may assume that those who considered the law knew what contract was at its very core, the most expansive remedy for breach of contract (ie. assumpsit), continued in form to be a complaint about deceitfully tricking others into performing a contract or incurring a loss of bargain.

---

[2] Arnold (ed) *Select Cases of Trespass from the King's Courts 1307 – 1399* Vol. 103 (London: Selden Society, 1987) at lxxxiv and Arnold "Fourteenth Century Promises" [1976] Cambridge Law Journal 321 at 332.

Another interesting observation was finding a link between the old tort of deceit and the modern tort of deceit as first espoused in *Pasley v Freeman* in 1789. In the old tort of deceit, the implied warranty that the warrantor knew the truth of the matter warranted was sufficient to enable the courts to develop a determinative test for deceit based on whether or not the warranty was correct. If it was not correct, the warrantor had either knowingly given a false warranty, or otherwise had falsely held himself out as knowing the truth of the matter warranted, when he did not. In the modern tort of deceit, a representor who intends another to act on his representation is held to impliedly state his belief in the matter represented. It follows that the absence of such a belief is proof of deceit, and the existence of such a belief, regardless of whether or not the same was negligently obtained, is sufficient to show the representor was honest.

A third observation that I made, was that neither equity nor the common law had a concept of a sound or adequate price. In equity, the issue was raised in cases involving the sale of an expectancy, reversion or remainder interest. A common element in these cases was the sale of an expectancy, reversion or remainder interest at less than market value, which may beg the conclusion that equity intervened on the basis of the price being inadequate. At common law there was a suggestion in the eighteenth century that a warranty of quality would be implied, if the buyer paid a price that one would normally pay for a sound product. The reality is that equity only intervened if there was fraud or usury, and the common law did not imply a warranty on the basis of the payment of a ‘sound price’.

The dissertation ends with a summary that traces the history of the action of deceit on the case and related developments in contract law. Before getting to the same, it will be useful for the reader to note my position that mapping this history is an important endeavour in and of itself. I also note that in telling this history, I have tried to resist the temptation of imposing a strict sense of logic on a sometimes irrational and seemingly random history. It follows that my endeavour has been to do my best to tell the story as it was, as opposed to how it might have been if one individual had utltimate control over how the same played out.