The Law of Deceit, 1790-1860: Continuity Amidst Change

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by Paula J. Dalley*

Introduction

American legal historians have written a great deal about the marked changes occurring in the common law, in both substantive law and procedure, during the period between the American Revolution and the Civil War. The evolving private law concepts of negligence and the "will" theory of contract formation, among others, have been characterized as being part of, if not a cause of, the transformation of the American economy from a pre-market subsistence culture to industrialized and entrepreneurial capitalism.1 This period has also been described as witnessing the separation of contract and tort.2 Oddly, the law of fraud has largely been omitted from the story, although fraud cases have occasionally been considered in connection with the explicit rejection, first in England and then in the United States, of the civil law "sound price" doctrine and the pronouncement of the common law maxim "caveat emptor."3 Since civil fraud usually occurs in sales transactions and would be more likely to occur in transactions between strangers, the law of fraud should have affected, or been affected by, the rise of a market economy, if, in fact, developments in the law and developments in society and the economy are related in such a direct way. The question remains, therefore, what

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2. See Nelson, supra note 1, at 78-88.

3. The question whether, and for how long, the "sound price" rule (according to which a sound price implied a warranty of quality) existed in English law has been vigorously debated. See A.W.B. Simpson, The Horwitz Thesis and the History of Contracts, 46 U. Chi. L. Rev. 533, 580-85 (1979). Some early commentators, including Blackstone, described misrepresentation as giving rise to an implied warranty. 3 W. Blackstone, Commentaries *165. In addition, gross inadequacy of consideration might be evidence of, or at least accompany, fraud, so that a defense to a contract action based on fraud might resemble a defense based on inadequacy of consideration. Consequently, discussion of deceit cases sometimes occurs in discussion of implied warranties, resulting in some confusion of concepts.
was happening in the law of fraud during this period?

Deceit or misrepresentation has long been considered an intentional
tort: a personal (if economic) wrong done with intent to injure. An inten-
tional breach of contract, without a misstatement of present fact, eventu-
ally developed into a contractual claim.\(^4\) It was with this conceptual anom-
aly in mind that I set out to examine the law of fraud in the United States
from the commencement of digested printed reports (which occurred
around the turn of the nineteenth century in most of the original states) to
approximately 1860. In connection with this project, I read over 250
cases, virtually all the reported deceit cases in the period. I expected to
find, if not the creation of our modern idea of tortious misrepresentation,
at least some change in the law reflecting the growth of a capitalist econo-
my. The picture that emerged from my research, however, did not include
either significant doctrinal change or pro-capitalist development. On the
contrary, with few exceptions, I found that in cases involving traditional
agrarian economic life courts consistently applied inherited common law
doctrines and, in cases involving market transactions or speculative
investments, courts attempted to distill from the common law doctrines
broad principles that could be applied to new economic conditions with-
out fundamentally changing the law. As I shall try to show, the picture
that emerged from the cases was one of continuity and surprising consis-
tency, reflecting the establishment of a rough equilibrium between com-
peting principles (and policy goals) of honesty and fair dealing, on the one
hand, and prudence and diligence on the other.

I shall commence with a description of the law as it was understood
to exist throughout the period and a discussion of certain noteworthy
anomalies. I shall then describe certain patterns that might have been
expected to exist in the data but did not, as well as those patterns that did
emerge. The law remained relatively constant throughout the period, with
development occurring both in the sort of facts that came before the
courts and in the application of the law to those facts. I shall therefore
focus more than is usual on the facts of the cases. Finally, I shall describe
one area of the law of fraud that did in fact witness legal development: the
action for misrepresentation of the creditworthiness of another was cre-
at the beginning of the period, in 1789, and was developing into com-
mon law securities law by the 1850s.

Throughout the following discussion, I shall try to show that the
courts’ primary considerations were usually precedent, justice between the
parties and the enunciation of results that reached the appropriate balance
between honesty on the part of sellers and prudence on the part of buyers.\(^5\)

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4. By the nineteenth century, assumpsit’s origins as a trespass action had been completely
forgotten in America, although not in England, where the action was referred to as “case for
assumpsit.”

5. In most cases, the party accused of misrepresentation is the seller. Although buyers and
creditors were sometimes also accused, in general discussion I shall refer to the “buyer”
(usually also the plaintiff) to mean the allegedly innocent party accusing the defendant seller
of deceit.
The Action for Deceit

Overview

By the end of the eighteenth century, the law of fraud (or, as it was more commonly called, deceit) in sales transactions was established in a form that would be familiar to lawyers today. Although the "elements" of the tort were settled, several issues repeatedly arose in the application of the basic principles to common fact patterns. Early nineteenth-century judges understood that the law should serve two distinct and often conflicting interests. On the one hand, the law should encourage honesty and fair dealing in business transactions; on the other hand, the law should encourage people to be prudent and diligent in protecting their interests. Those policies defined the parameters of the law of deceit and limited the willingness of judges to impose strict liability on either buyers or sellers. In this sense, the action resembles other tort actions based on fault. Although there does not seem to be any factor which accurately predicts which policy a particular court will find determinative in a particular case other than the merits of the case, I nonetheless think it would be wrong to argue that policy considerations were simply trotted out on appropriate occasions to provide support for a court's decision. I would argue that the legitimacy of both arguments kept the law in this area flexible in difficult cases and forced the law of fraud into the rather narrow confines outlined below — confines which existed before the nineteenth century and which continue to exist today.

Elements and Damages

Elements. The elements of an action in the case for deceit at the beginning of the nineteenth century were much the same as the elements of the tort of fraud or misrepresentation today: the plaintiff must plead and prove a misrepresentation (or, in some cases, a suppression) of a

6. Cases in which courts advocate honesty and fair dealing include Baker v. Ezzard, Ga. Dec. 112, 115, Pt. 2 (Ga. Super. Ct. 1843); Robertson v. Clarkson, 48 Ky. 506, 507 (1849); Whitney v. Affaire, 4 Denio 554 (N.Y. Sup. Ct. 1847). Cases in which courts advocate prudence include Pollard v. Lyman, 1 Day 156 (Conn. 1803); Sherwood v. Salmon, 2 Day 128 (Conn. 1805); Starr v. Bennett, 5 Hill 303, 306 (N.Y. Sup. Ct. 1843); Clark v. Baird, 7 Barb. 64, 66-67 (N.Y. App. Div. 1849). In Van Epps v. Harrison, 5 Hill 63, 67-68 (N.Y. Sup. Ct. 1843), Justice Bronson acknowledged the policy in favor of prudent business decisions, but felt it was not dispositive where there was clear evidence of fraud. See also Medbury v. Watson, 47 Mass. 246, 259 (1843) (The deceit action serves to protect "the weak and ignorant against the designs and artifices of the crafty."

7. In the following discussion, I have omitted two important issues—the liability of principals for the misrepresentations of their agents and the extent to which fraud could be used as a defense to a note or a bond—because the nineteenth-century developments in those areas seem more appropriately considered as part of the development of the law of agency and the law of negotiable instruments, respectively. Courts of law and equity had concurrent jurisdiction over fraud; there were few substantive differences in the treatment of fraud at law and in equity, since courts of law freely borrowed equitable principles, and vice versa.

8. See infra notes [101-120] and accompanying text.
material fact that was made knowingly and with intent to defraud and that was relied upon by the plaintiff to his damage. The gist of the action is the fraudulent intent or scienter of the defendant; it is this element that distinguishes deceit from an innocent misstatement or a breach of warranty. Fraudulent intent must be proved, and would not be presumed; however, courts were occasionally willing to allow fraudulent intent to be inferred from certain acts. As a general rule, a misstatement of fact without fraudulent intent was not actionable, even in those cases where the defendant made a strong positive statement without any knowledge of the truth of the statement whatever.

The misrepresentation must be of a material fact, not of an opinion. Statements as to value, which were deemed to be opinions, were


One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.


11. See, e.g., Coleman v. Wolcott, 1 Conn. 285, 294 (1814) ("When the effect of an act understandingly done is necessarily injurious to the rights of another, the quo animo is not a matter of fact, it is settled, and becomes an inference of law;") Williams v. Wood, 14 Wend. 126 (N.Y. Sup. Ct. 1835) (by showing the falsity of a recommendation of the credit of another, "the inference of a fraudulent intent almost necessarily arose;") Clark v. Baird, 9 N.Y. 183, 197 (1833) (allowing fraud to be proved by circumstantial evidence and an inference of fraud to arise from knowledge of contradictory facts).

Unrelated acts of the defendant might also be evidence of fraudulent intent. Cragin v. Tarr, 32 Me. 55 (1859); Castle v. Bullard, 64 U.S. (23 How.) 172, 186 (1859) ("Similar fraudulent acts are admissible in cases of this description, if committed at or about the same time, and when the same motive may reasonably be supposed to exist, with a view to establish the intent of the defendant in respect of the matters charged against him in the declaration.") But see Clarke v. White, 37 U.S. (12 Pet.) 178, 193 (1838) (plaintiff's statements to other creditors do not excuse defendant's payment unless those statements were connected to defendant's alleged damage).

12. See, e.g. Young v. Covell, 8 Johns. 23 (N.Y. Sup. Ct. 1811); Russell v. Clark's Ex's, 11 U.S. (7 Cranch.) 69, 95 (1812); Schneider v. Heath, 170 E.R. 1462, 3 Camp. 506 (Nisi Prius 1813) (Mansfield, C.J. stating that there may be cases where an innocent misstatement was actionable, but refusing to so allow in the case at bar). But see Snyder v. Findley, 1 N.J.L. 57 (1791) (defendant's knowledge of the actual facts was immaterial); Lord v. Colley, 6 N.H. 99 (1833); Smith v. Richards, 38 U.S. (13 Pet.) 26, 36-7 (1839); Stone v. Denny, 45 Mass. 151, 155 (1842); Bokée & Co. v. Walker, 14 Pa. 139, 142 (1850) ("[If] he asserted a fact of which he knew nothing . . . he is guilty of a falsehood . . .").

13. This distinction has been attributed to an attempt by the courts to limit "judicial intervention into the bargaining system." HORWITZ, supra note 1, at 263. Courts did occasionally use the opinion rule to defeat an action that looks, to the modern reader, meritorious. See Page v. Bent, 43 Mass. 371, 374 (1841); Crown v. Brown, 30 Vt. 707, 710 (1858). Ironically, Pasley v. Freeman, the case cited by Professor Horwitz for the origin of the rule, created a new branch of the law of deceit which allowed significant judicial intervention in credit transactions and, later, the stock market. See infra notes 155-193.
not actionable; although misrepresentations of facts pertaining to value clearly were actionable.\textsuperscript{14} Statements as to the price offered by a third party were also not actionable, nor was the concealment of such an offer, in the absence of a special relationship.\textsuperscript{15} In short, the misrepresentation must be in something, in regard to which the one party places a known trust and confidence in the other. It must not be a mere matter of opinion, equally open to both parties for examination and inquiry; and where neither party is presumed to trust to the other, but to rely on his own judgment.\textsuperscript{16}

We can see from the elements of the action of deceit that it was limited to a narrow range of cases in which the plaintiff was able to prove, among other things, a serious moral wrong. Less stringent “gatekeeping” rules would have offered more protection to buyers who did not receive the expected benefit of their bargains. Whether or not one believes such protection should be an aim of the law, or that the late eighteenth and early nineteenth century judges had a contrary aim in mind, it must be remembered that there existed another remedy, assumpsit for breach of warranty, for those cases in which the defendant had acted without fraudulent intent.\textsuperscript{17} In a deceit action, the defendant’s plea was “not guilty,” and a judgment for the plaintiff might carry a stigma even if the fraudulent act was not indictable. Consistent with its nature as a moral wrong, deceit might also subject the defendant to liability for punitive damages.\textsuperscript{18} Certain kinds of “puffery” are common among otherwise virtuous citizens, and it may have seemed impracticable to impose liability on everyone who engaged in the practice. Also, once such a practice was common, there would naturally be some doubt that such statements would be relied upon by a reasonable person. Proving statements of opinion to have been false when made might also have raised practical difficulties. To the extent that unsophisticated economic actors were being harmed in ways that did not amount to deceit (as defined), a remedy that did not carry with it any moral stigma would have been more acceptable and appropriate. It is perhaps for this reason that there is considerable argument in courts

\textsuperscript{14} E.g. Marshall v. Lewis, 14 Ky. 140, 145 (1823) (“value is mere matter of opinion, and the representations should be grossly and palpably false, to authorize from thence the inference of fraud;”) Sanford v. Handy, 23 Wend. 260, 268-69 (N.Y. Sup. Ct. 1840) (opinion of value not actionable, but false representation as to location of land “might have been material” and might have been made in circumstances so as to mislead. Misrepresentation of the cost of the land was also a “material fact” and more than mere opinion.). See also Cornelius v. Molloy, 7 Pa. 293, 297 (1847); Medbury v. Watson, 47 Mass. 246, 259 (1843).

\textsuperscript{15} Moore v. Turbeville, 5 Ky. 602 (1812) (in dictum); Matthews v. Bliss, 39 Mass. 48 (1839).

\textsuperscript{16} Smith v. Richards, 38 U.S. 26 37 (1839).

\textsuperscript{17} In the words of the Massachusetts Supreme Judicial Court,

“With the application of the prevailing liberal views of the courts, in construing the affirmation of the vendor to be a warranty in all cases where the language will bear that construction, it would seem, that, without further extension of the liability of the vendor, all cases, where liability should be reasonably attach to the party making such representations, are sufficiently provided for.

Stone v. Denny, 45 Mass. 151, 156 (1842).

\textsuperscript{18} See infra note 22.
across America and in England throughout the first half of the nineteenth century about the existence of implied warranties, while there is very little argument, even in the early years of the century, that "nude assertions of value" or genuinely innocent misrepresentations should be actionable as deceit.

It may be the case that rules which made the action of deceit more readily available to plaintiffs would have presented greater relief than the deceit rules that courts actually adopted from a regime in which inadequacy of consideration was not a ground for avoiding a contract, and this may be grounds for a criticism of the existing law of deceit. In fact, some courts in the first half of the nineteenth century did raise such criticisms. But as I will try to show, protection of buyers was only one goal of the law of deceit. The competing interest in encouraging prudent behavior in business transactions necessarily limited the extent to which buyer-plaintiffs were permitted to recover for their losses. The evolution of the rather narrow law of deceit reflects a process of continuous compromise between an interest in honesty and an interest in prudence in a legal world that did not contain a "sound price" rule.

**Damages.** Once a plaintiff had successfully alleged and proved the elements of his action, the amount of damages was generally left to the discretion and calculation of the jury. The general rule was that the plaintiff was at least entitled to an amount equal to his actual injury. The plaintiff was also entitled to consequential damages to the extent such damages were a "necessary and natural consequence" of the defendant's fraud, as, for example, when the buyer's own animals were destroyed by a

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19. A discussion of the use of implied warranties is beyond the scope of this article. For some discussion and citations on implied warranties, see *Oneida Mfg. Soc. v. Lawrence*, 4 Cow. 440 (N.Y. Sup. Ct. 1825); *Howard v. Hoey*, 23 Wend. 350 (N.Y. Sup. Ct. 1840); *Osgood v. Lewis*, 2 H. & G. 495 (Md. 1829); 3 WILLIAM BLACKSTONE, COMMENTARIES *165-166.


21. Actual injury was usually represented by the difference between the actual value of the object of the transaction and the presumed value based on the misrepresentation. *Sherwood v. Sutton*, 21 F. Cas. 1300, 1302 (C.C.D.N.H. 1827) (No. 12,781); *Stiles v. White*, 52 Mass. 356, 358 (1846). *See also Fagan v. Newson*, 12 N.C. 20 (1826) (not allowing damages for loss of benefit when plaintiff rescinded contract). In *Allen v. Addington*, 7 Wend. 9 (N.Y. Sup. Ct. 1831), both the trial judge and the Supreme Court permitted the jury to award exemplary damages. The lower decisions were reversed and remanded by the Court of Errors (11 Wend. 374 (1833)), without reference to the damage award. In *Singleton's Adm'r v. Kennedy, Smith & Co.*, 48 Ky. 222, 226-7 (1848), the court, applying Louisiana law, refused to allow "vindictive damages" because under the Civil Code a deceit action was treated as a contract action. The price paid might be evidence of the presumed value, but it was not part of the calculation of damages. *Fisk v. Hicks*, 31 N.H. 535, 538 (1855). But see *Crews v. Dabney*, 11 Ky. 278 (1822), in which the defendant informed the plaintiff that the maker of a note (which the defendant was proposing to deliver to the plaintiff in exchange for two watches) was away on a visit when the maker had actually fled the jurisdiction. The court stated that the measure of damages was the consideration the plaintiff gave for the note (the value of the two watches), and not the face amount of the note.
disease introduced by a purchased horse. The appropriate time to measure damages was the date of the transaction, so that the defendant bore any loss resulting from a decline in prices. This rule undoubtedly provided some incentive for disappointed purchasers to raise claims of fraud when intervening events revealed the foolhardiness of their bargains, and the frequent cases involving speculative land transactions may reflect this incentive. On the other hand, the number of such cases may reflect the fact that shady characters would flourish in an environment in which many relatively unsophisticated people eagerly participated in speculative transactions, both in land and patents.


23. *Van Epps v. Harrison*, 5 Hill 63, 68 (N.Y. Sup. Ct. 1843). But see *Campbell v. Hillman*, 54 Ky. 508, 518-21 (1854), an action involving the sale of a life estate in certain slaves when the seller represented his title as absolute, in which subsequent events (such as the death of one slave and the improvement in the health of the seller) were to be considered in calculating damages.

24. *Vezzie v. Williams*, 28 F. Cas 1124 (C.C.D. Me. 1845) (No. 16,907), rev'd 49 U.S. (8 How.) 134 (1849), is one of the few cases in which the plaintiff's motives were discussed. The plaintiff purchased a mill at auction in 1836 for $40,000; the defendants had set a minimum price of $14,500. In 1841, the plaintiff commenced suit in equity, alleging that the auctioneer had made false bids. The property was then worth $10,000. There was no allegation that the defendants had been aware of the auctioneer's acts. Circuit Justice Story dismissed the plaintiff's bill on a number of grounds, including "the lapse of time and change of circumstances since the original sale," which, in Story's judgment, "constituteth[d] a sufficient and conclusive bar" to the action. 28 F. Cas at 1130. The district judge dissented. On appeal, the Supreme Court reversed the decision of the circuit court, 49 U.S. (8 How.) at 134, based on (among other things) the "probability" that a property would not be sold for $25,000 more than the owner asked for it "unless under some imposition or great mistake" and the importance of the integrity of the auction process. 49 U.S. at 151, 154. The determinative fact seemed, however, to be that the defendant received the economic benefit of the auctioneer's fraud. 49 U.S. at 157. Chief Justice Taney and Justices M'Lean and Grier dissented without opinion. Cf. *Birdseye v. Flint*, 3 Barb. 500 (N.Y. App. Div. 1848) (innocent wife not held jointly liable for husband's fraudulent representations in the sale of the wife's land, even though the wife received the benefit of the fraud).

In *Sanborn v. Stetson*, 21 F. Cas 314 (C.C.D. Mass. 1843), Justice Story again found the passage of time dispositive in a case in which the sale of land, with standing timber, occurred in 1835 and the action was commenced in 1841. In *Sanborn*, however, there was no allegation that the plaintiff had only recently been made aware of the fraud, and the statute of limitations (which applied in *Sanborn* because the case was brought in law, rather than equity) would have expired two days after the suit was brought. The facts in *Sanborn* were also somewhat less compelling than the facts in *Vezzie*; in *Sanborn*, the defendant told the plaintiff to determine the amount of timber for himself. The plaintiff told the defendant his findings and the defendant said, in effect, "As far as I know, that's right, but I haven't explored the land." 21 F. Cas at 317.

25. With respect to deceit in the sale of patent rights, see, e.g., *Bull v. Pratt*, 1 Conn. 342 (1815); *Corwin v. Davison*, 9 Cow. 22 (N.Y. Sup. Ct. 1828); *Peck v. Bacon*, 18 Conn. 377 (1847); *Swazey v. Herr*, 11 Pa. 278 (1849).
Deceit Distinguished from Breach of Warranty: Tort or Contract Substantive Differences. The elements of the tort of deceit, and the rules governing damages, reflect one of the most important and procedurally troubling features of deceit: it was not the same as a breach of warranty. In the middle ages, an action on the case for deceit lay only for what modern lawyers call breach of warranty.26 The courts eventually recognized fraudulent intent as an alternative ground for the action. The search for the origin of the requirement of scienter in the absence of warranty usually focuses on Chandelier v. Lopus,27 although at least one earlier case had allowed an action based on intent.28 In Chandelier v. Lopus, the Exchequer Chamber reportedly reversed the judgment for the plaintiff in the Kings Bench on the ground that

the bare affirmation that it was a bezoar stone, without warranting it to be so, is no cause of action. And although he knew it to be no bezoar stone, it is not material, for everyone in selling his wares will affirm that his wares are good, or the horse which he sells is sound, yet if he does not warrant them to be so it is no cause of action.29

According to later manuscript reports of the case,30 however, argument and discussion in the King’s Bench continued through several terms, with the Chief Justice stating that an intention to deceive would give rise to an action in the absence of a warranty and Justice Tanfield arguing that a warranty must be expressed for an action to lie.31 The issue in the case—"whether or not he shall be charged upon his own knowledge and affirmation of the sale, without a warranty"—was referred to all the justices of


27. 79 E.R. 3-4, Cro. Jac. 4 (Ex. Ch. 1604), reprinted in BAKER & MILSOM, supra note 26, at 518. The case concerned the sale of a purported "bezoar stone: " A hard gastric or intestinal mass, found chiefly in ruminants and once considered an antidote to poison." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1976).


30. Lopus v. Chandler (K.B. 1606), in BAKER & MILSOM, supra note 26, at 518. These reports may relate to another case on the same facts, or to the same case.

31. Id. at 521.
England in 1606. While I am not aware of any further report of the case, a lawyer in a later case stated that the plaintiff prevailed—an action would lie based on scienter alone.

Whatever its origin, by the end of the eighteenth century, the rule was relatively well settled that, where there is an express warranty or a warranty implied by law, the seller will be held liable if the item sold does not conform regardless of his knowledge of the falsity of the warranty. Where there is not such a warranty, the seller will be held liable for a false statement only if he knew of its falsity and intended to deceive the buyer thereby. In modern terms, an action for breach of warranty is a contractual action where the liability for misstatement is "strict" or absolute and the recovery is "on the contract," whereas an action for deceit without warranty is a tort action "outside" the contract between the parties. During the first half of the nineteenth century, that distinction came under some pressure.

The characterization of an action as deceit or breach of warranty determined other important procedural and substantive issues besides whether the plaintiff would be required to prove intent or warranty. For example, courts would sometimes allow an action for deceit, which was *ex delicto*, to be brought against an infant, although the infant could not be

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32. *Id.* at 522-23. *Cf.* *Roswell v. Vaughan*, 79 E.R. 171, Cro. Jac. 196 (Exch. 1607) (holding that a purchase without covenant or warranty is "at the peril of him who buys.")


34. Professor Milson has argued that in the late middle ages deceit actions with fictitious allegations of fraudulent intent came to be used solely for breach of warranty rather than intentional fraud, a development which left the common law without a remedy for fraud until 1789. MILSOM, HISTORICAL FOUNDATIONS, *supra* note 26, at 322-22, 363. Even the earliest cases I found seem to reflect an understanding of the actions for intentional fraud, including a requirement of (nonfictitious) intentional misstatement, that persists throughout the period, a fact which may, however, reflect liberal borrowing from equity. Milsom attributes the rebirth of an independent action for fraud to *Pasley v. Freeman*, 100 E.R. 450, 3 Term. Rep. 51 (K.B. 1789), a case which seems to have influenced American courts surprisingly quickly. *See, e.g., Armstrong v. Hall*, 1 N.J.L. 207-208, (1793). For further discussion of *Pasley, see infra* notes 155-178 and accompanying text. The question whether an action for deceit would lie in the seventeenth and eighteenth centuries for a misstatement with scienter but without warranty has not, to my mind, been settled. *Compare Lysney v. Selby*, 92 E.R. 240, 242, 2 Ld. Raym. 1118, 1120-21 (K.B. 1705) (Powell, J., stating that an action would lie) with *Waddill v. Chamberlayne*, 1 Jeff. Rep. 10, [2 Va, Col. Dec. B45] (Va. Gen’l Ct. 1735) (no such action allowed).

35. The authority usually stated for the rule about the distinction between warranty and deceit is *Stuart v. Wilkins*, 99 E.R. 15, 1 Doug. 18 (K.B. 1778), although the actual question decided was whether one could use assumpsit for a deceit action. Earlier cases had applied the rule. *See cases noted at Williamson v. Allison*, 102 E.R. 439, 440, note (a)1, 2 East 446, 448 (K.B. 1802), and accompanying text.

36. The blurring of distinctions between deceit and breach of warranty may have occasionally been the result of honest confusion. In *Waters v. Mattingly*, 4 Ky. 244, 246 (1808), Judge Edwards clearly understood the difference between the requirement of warranty and the requirement of *sciens*, but unfortunately he thought the distinction arose from the distinction between a *suppressio veri* and a *suggestion falsi*, discussed *infra* notes 101-120.
held liable for a breach of the underlying contract. A plaintiff in a deceit action sometimes recovered punitive damages. In a contract action (such as breach of warranty), the plaintiff had to plead all the terms of the contract and consideration, and the proof must conform to the plea exactly. In a deceit action, however, the contract and consideration were immaterial and need not be pleaded or proved. Where the plaintiff did set out the terms of the contract in his declaration, a variation in the proof usually was not fatal; in addition, proof of oral statements was allowed in deceit actions even when the contract had been reduced to writing. On the other hand, a plaintiff in a deceit action was required to plead that the statement was made fraudulently and with knowledge of its falsity. In the early years of the nineteenth century, courts were often unwilling to infer the required averment from language such as "and so I was fraudulently deceived."

A plaintiff in a deceit action was not required to plead or prove that there was privity between him and the defendant. Thus, an uninterested third party who voluntarily misrepresented a fact without receiving any benefit therefrom could be liable in a deceit action. A plaintiff in a deceit action, unlike a plaintiff seeking the return of purchase money in a contract action, was not required to return the item that was the subject of the transaction. The cause of action arose with the commission of the fraudulent act, and no further act of the plaintiff was necessary to perfect the action.

37. See Word v. Vance, 1 Nott & McC. 197, 199-200 (S.C. 1818). But see Prescott v. Norris & Norris, 32 N.H. 101, 103-4 (1855) (holding that, since the claim arose out of a sale contract, an infant could not be held liable.)

38. See supra note 21 and accompanying text.


40. Faris v. Lewis, 41 Ky. 375 (1842) (the contract as proved must conform to the pleadings only to the extent necessary to ensure the identity of the contract and make the suit a bar to future actions); Pettijohn v. Williams, 47 N.C. 33 (1854); Cunningham v. Kimball, 7 Mass. 65 (1810). But see Maine v. Bailey, 15 Conn. 298, 301 (1842), in which the plaintiff pleaded the purchase of a cow for $29, but proved that the purchase was of three cows for $58. The judgment for the plaintiff was reversed. In Williamson v. Allison, 102 E.R. 439, 2 East 446 (K.B. 1802), it was decided that averments, without proof, of fraudulent intent in a breach of warranty action would not destroy the breach of warranty claim.


43. See, e.g., Irwin v. Sherrill, 1 N.C. (1799) (plaintiff inquired of defendant as to health of horse purchased from third party); Windover & Hopkins v. Robbins, 2 Tyl. 1 (Vt. 1802) (defendant gave a bankrupt funds to allow him to maintain his credit with plaintiffs); cases discussed infra, notes 155-178 and accompanying text.

44. Bacon v. Brown, 7 Ky. 91 (1815); Allaire v. Whitney, 1 Hill 484, 486 (N.Y. Sup. Ct. 1841), aff'd on reh'g 4 Denio 554 (N.Y. Sup. Ct. 1847), aff'd on other grounds 1 N.Y. 305 (1848).
Procedural Issues. In light of the differences between the actions, a given plaintiff might prefer one set of rules to the other, and courts invariably allowed a plaintiff the choice of action. Defendants’ counsel frequently argued that the deceit action would lie only in the absence of any other remedy, but I did not find any case in which a defendant in a warranty action argued that the plaintiff should have brought a deceit action. The best course, from the plaintiff’s point of view, would be to raise both claims and hope that, at trial, he would be able to prove either warranty or intent. The plaintiff could accomplish this maneuver by bringing one writ and offering evidence of both kinds, or by joining the two actions. An example of the fanner strategy may be seen in Bartholomew v. Bushnell. The plaintiff brought an action on the case for deceit (the normal action for a fraudulent misrepresentation (other than a false warranty) and averred that the defendant falsely “warranted” some horses to be sound. The defendant denied that there was an express warranty. The court held that, regardless of the form of action, this was a warranty action and the plaintiff could not prove his claim by proving scienter.

Although courts allowed breach of warranty claims to be brought in case for deceit and fraud claims to be raised in assumpsit, they frowned upon joinder of deceit and assumpsit actions in the same suit. While one court allowed joinder of case and assumpsit claims “when their nature is the same, so that the same plea may be pleaded and the same judgment


47. In McFarland v. Newman, 9 Watts 55, 57 (Pa. 1839), Chief Justice Gibson, after denying the existence of a warranty action, noted that the plaintiff would have been better off bring a deceit action.

48. 20 Conn. 271 (1850).

49. See 3 WILLIAM BLACKSTONE, COMMENTARIES *166; SIR JOHN COMYN, 1 DIGEST OF THE LAWS OF ENGLAND *223 (4th ed. 1800). In the early years of the period, it was not entirely clear which writ was appropriate for a deceit action. In Fenemore v. United States, 3 U.S. (3 Dall.) 357, 358 (1797), for example, the action was brought “in case, with counts for assumpsit.” The declaration stated that the defendant “undertook and faithfully promised” that the misrepresented account was good, but the defendant “did not regard his said last mentioned promises.” The defendant pleaded non assumpsit. This form of pleading was at issue in Stuart v. Wilkins, 99 E.R. 15, 17, 1 Doug. 18 (K.B. 1778), in which Lord Mansfield expressed surprise at the form but was convinced by Justices Ashhurst and Buller that it had been standard form for some twenty years.

50. 20 Conn. at 274-5. See also Everton Ex’rs v. Miles, 6 Johns. 138, 141-142 (N.Y. Sup. Ct. 1810) (refusing to allow evidence of fraud in assumpsit action alleging false promise but not fraud and deceit); Massie v. Crawford, 19 Ky. 218, 220 (1826) (stating that, although assumpsit was now the usual form for a breach of warranty claim, the ancient form was in case, and a plaintiff still had a right to choose).

51. This flexibility would seem to confirm Professor Nelson’s argument that lawyers and judges in the early nineteenth century increasingly focused on substance, rather than technicalities, in pleading. See NELSON, supra note 1, at 77ff.
given,” 52 more frequently such joinder was grounds for a nonsuit. 53 The 
view of the New Hampshire Supreme Court of Judicature is typical: “To 
allow [a declaration] such a double character would be contrary to the 
whole theory of the common law and would make it a perfect anomaly in 
legal proceedings.” 54 A plaintiff might have flexibility in choosing his 
claim and formulating a writ, but in refusing to allow joinder of claims, 
courts forced plaintiffs to select one and only one basis of liability and 
thereby preserved the distinction between deceit and breach of warranty. 55

Defining a “Warranty.” The conceptual wall between deceit and 
breach of warranty could have been breached from the warranty side. As a 
general rule, a statement not containing actual warranty language would 
give rise to an express warranty only if it was intended as such by the par-
ties. 56 If the requirement of intent to warrant were relaxed, the distinction 
between misrepresentation and warranty would collapse. 57 Despite much 
judicial discussion, however, the distinction between representations and 
warties was generally retained. Although a written description in an 
invoice or a bill of sale might be considered a warranty, a simple oral 
statement not intended as a warranty would not give rise to liability with-
out scienter. 58

New York, “tort” and contract claims could be joined when they arose from the same trans-

53. Crocker v. Wilard, noted at 28 N.H. 135 (1851) (granting leave to plaintiff to 
amend); Brown v. Shields, 33 Va. (6 Leigh) 440 (1835). In Fenemore v. United States, 3 
U.S. (3 Dall.) 357, 361 (1797), the defendant argued that the joinder of an assumpsit count 
with a case action was improper, but the lower court had allowed the addition of the assumps-

54. Mahrin v. Harding, 28 N.H. 128, 133 (1853). The court disagreed with the rule in 
Williamson v. Allison, 102 E.R. 439, 2 East 445 (1802), saying it was bad law, without support 
at common law, inconsistent with common law doctrines, and not authority in New 

55. Occasionally, an assumpsit action would be brought to recover goods or purchase 
money when the original agreement for payment or delivery had been based on fraud. See, 
e.g., Wilson v. Forre, 6 Johns. 110 (N.Y. Sup. Ct. 1810); Pierce v. Drake, 15 Johns. 475 
(N.Y. Sup. Ct. 1818). In such cases, the action was quasi-contractual and the deceit was 
material only in that it voided the original agreement between the parties.

56. Tyre v. Cause, 4 Del. 425 (1846).

57. See, e.g., Oneida Mfg. Soc. v. Lawrence, 4 Cow. 440, 442 (N.Y. Sup. Ct. 1825), in 
which the court stated that no particular phraseology was required to create a warranty, but 
that the statement must be “positive and unequivocal,” must be relied upon, and must be 
“understood by the parties as an absolute assertion, and not the expression of an opinion.” 
Such a definition does not establish much of a distinction between deceit and warranty.

58. See Osgood v. Lewis, 2 H. & G. 495 (Md. 1829) (finding a bill of parcels created a 

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In *McFarland v. Newman*, the Pennsylvania Supreme Court affirmed that a representation did not amount to a warranty. A warranty, Chief Justice Gibson argued, was an agreement to make good any deviation from the warranted fact, and as such could not be entered into without the consent of the warrantor. The Chief Justice distinguished deceit actions as cases in which the seller's motive is relevant. Parties dealing at arms' length are required to use no falsehood, "and to require more of them would put a stop to commerce itself in driving every one [sic] out of it by the terror of endless litigation."

One might suppose that the failure of the procedural and substantive attacks on the distinction between deceit and breach of warranty would have established the difference between actions in tort and actions in contract once lawyers began to think in those terms. The courts, in fact, seem to have understood the distinction before it was memorialized in the nomenclature—they consistently treated deceit as what we would recognize as a tort and breach of warranty as what we would call a contractual claim. On the other hand, nineteenth-century commentators discussed deceit as a defense to a contract or as a fact (analogous to illegality or mistake) that voided the contract. It may not be surprising that commentators, seeking to impose scientific rationality on the amorphous mass of the common law, should have included deceit with other legal rules regarding contracts in general and sales in particular. William W. Story, in his treatise on sales, included deceit in three different places: with warranties, with defenses (such as mistake and duress) tending to negate mutual assent of the parties, and with illegalities. Another explanation is that the commentators were hoping to subsume deceit in the nascent law of contracts in order to subject it to the "will" theory. Whatever the ulterior-

(C.C.S.D.N.Y. 1848) (No. 7,168) (finding no liability on the part of defendants who drew up invoice describing goods as cochineal which were actually just indian corn, where the defendants were themselves the victims of fraud and had drawn up the invoice without inspection, in accordance with mercantile custom); *Borrekins v. Bevan*, 3 Rawle 23 (Pa. 1831) (finding, over a vigorous dissent, a description in an invoice amounted to a warranty since the seller is presumed to know what he is selling, while the buyer may rely on the "integrity and knowledge" of the seller). The dissent in *Borrekins* provides a good summary of the arguments against an expansive definition of warranty. *See also Stone v. Denny*, 45 Mass. 151, 155-56 (1842) (noting that the trend was for courts to construe statements liberally as warranties).


60. Watts, at 57-58.

61. 9 Watts, at 57. He noted that the plaintiff in *McFarland* would not have had to face these issues had he brought a deceit action, and it appeared that the facts would have allowed him to recover in deceit.

62. 9 Watts, at 57.


64. WILLIAM W. STORY, A TREATISE ON THE LAW OF SALES IN PERSONAL PROPERTY, WITH ILLUSTRATIONS FROM THE FOREIGN LAW §§ 158ff, 352ff, 510ff (1847).
or motives of the commentators, however, the law of deceit remained
rooted in intent, or, to put it another way, the moral character of the action
lived on.65

Use of Deceit Actions for Breach of Covenant. It bears noting that it
was not only breach of warranty which sometimes became entangled with
deceit. In a number of cases, the plaintiff brought an action on the case for
deceit in respect of a claim that the modern lawyer would recognize as
involving a breach of covenant. A strange series of cases involving slaves
purchased with an agreement that the buyer would not remove the slave
from the neighborhood illustrates this use of the deceit action.66 While the
Maryland Court of Appeals allowed such actions, in Fenwick v. Grimes,67
Circuit Justice Cranch noted that the act complained of was not misrepresent-
ation, but breach of promise; the deceit alleged was the sort of deceit
any debtor practices when he refuses to pay on his debt. The defendant’s
motion in arrest of judgment was granted, without leave to amend. The
plaintiff later added a third count by consent, alleging that the defendant
knew the plaintiff would sell the slave for less than her worth to a buyer
within the District of Columbia, so the defendant falsely represented that
he would not sell the slave, thereby imposing on the plaintiff.68 This time
Justice Cranch overruled the defendant’s motion in arrest of judgment,
stating that the deceit existed in the fact that “at the time [the defendant]
made [the statements], he fraudulently intended and designed to remove
the said slave. . . .”69

In other cases in which the alleged misrepresentations consisted of

65. By the 1850s, courts and lawyers were beginning to use the modern nomenclature,
describing deceit as a “tort” and distinguishing “contract” actions as a type. See White v.
Sawyer, 82 Mass. 586 (1860); Sibley v. Hubert, 81 Mass 509, 512 (1860); Robinson v. Flint,
(Q.B. 1853); Marsh v. Billings, 61 Mass 322, 330 (1851). See also Cornelius v. Molloy, 7
Pa. 293, 298 (1847) (describing breach of warranty cases as “ex contractu”).

66. In Adams v. Anderson, 4 H. & J. 558 (Md. 1815), the court rejected the defendant’s
argument that this was an attempt to make him liable for the default of the actual purchaser
(whom the defendant had introduced to the plaintiff) and found that this was a palpable cheat
and fraud on the part of the defendant. In Price v. Read, 2 H. & G. 291 (Md. 1828), the
plaintiff included in his declaration a count asserting that the defendant had falsely affirmed
that he lived in Montgomery County and intended to use the slave there. There was no evidence
as to the defendant’s actual residence, the deceit apparently consisted of his failure to
use the slave in the county as agreed. Citing Adams, the court affirmed the judgment for the
plaintiff.

67. 8 F. Cas. 1142 (C.C.D.C. 1838) (No. 4,733), appeal on reh’g 8 F. Cas. 1144
(C.C.D.C. 1839) (No. 4,734).

68. 8 F. Cas. 1144 (C.C.D.C. 1839) (No. 4,734).

69. Id. at 1145. Cases involving the sale of slaves frequently contained outcomes that
would strike the modern lawyer as bizarre. Such cases became more common after the
importation of slaves was prohibited in 1808 and as the opening of the Southwest increased
the demand for slaves (frequently purchased from the upper South, where large slavehold-
ings were becoming unprofitable). See BRUCHEY, supra note 1, at 230, 247-48;
SELLERS, supra note 1, at 129. Further work is needed on the application, or misapplication,
of the law of deceit and of contract law to sales of slaves.
statements of future intentions, the courts did not allow actions for deceit to lie, either on the ground that the defendant's performance of his agreement was not consideration for the sale (so that the plaintiff had not sustained any injury), or on the ground that there was no evidence that the statement of intention was false when made. The slave cases therefore seem to be an anomaly, which may be a reflection of the subject matter of the cases.

**Competing Policies**

If deceit and breach of warranty had collapsed into one remedy, emerging contractual concepts of intention and "will" would have provided a theoretical basis and limit on liability. But deceit remained a tort, and the courts needed another guiding principle to provide a framework for the legal rules governing the action. Two principles, both based on prevailing conceptions of morality, were ready to hand. Honesty and fair dealing in business transactions and prudent attention to one's own affairs were (and are) social goals with which it is difficult to argue. Those goals came squarely into conflict in the law of deceit, and that conflict can be seen in the efforts of the courts to enunciate rules for deceit actions, to identify the important facts in those actions, and, in general, to define the "wrong" with which they were concerned.

**The Seller's Liability for Misrepresentations about Patent Defects and Matters of Public Record, and the Buyer's Duty to Inspect**

The cases involving obvious defects show the courts' concern for both honesty and prudence. As a rule, a defendant could not be held liable for a misrepresentation if it was patently false, since a plaintiff was presumed not to have relied on the misrepresentation in entering into the transaction. In the simplest of cases, this rule presented no difficulties, as when a defendant sold as sound a horse which was missing the "frogs" on the bottom of its feet. This rule traces its lineage as far back as 1623. Considerations of honesty outweighed considerations of prudence, however, when the defect was somehow concealed or disguised, or when the

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70. Miller v. Howell, 2 Ill. 499, 500 (1838) (agreement to improve town by building storehouse, bridge, etc.); Gallagher & Mason v. Brunel, 6 Cow. 346 (N.Y. Sup. Ct. 1826) (agreement to endorse note does not amount to deceit, which requires that "the fact asserted is not true at the time.") See also Vernon v. Keys, 104 E.R. 246, 249, 12 East 632 (K.B. 1810) (discussing defendant's statement that his partners would not pay more than £4500 for plaintiff's business).

71. Thompson v. Morris, 50 N.C. 151 (1857). For a statement of the general rule, see Fagan v. Newson, 12 N.C. 20, 22 (1826) ("[T]he misrepresentation must be of a kind the falsehood of which was not readily open to the detection of the other party.")

72. Baily v. Merrel, 79 E.R. 331, Cr. Jac. 386 (K.B. 1626) (in which a judgment against the defendant for representing a load of dye to weigh 800 pounds, when it actually weighted 2200 pounds, was stayed following the defendant's argument that the plaintiff was negligent in not checking the weight, "a thing which lies in his own conusane.")
misrepresentation was calculated to prevent further inquiry on the part of the plaintiff. A fast-talking defendant who explained a horse’s diseased eye as the result of the slash of a switch could not argue that anyone could have seen the defect prior to the sale, even if the defect might have been thought to put the buyer on his guard.

So long as the defendant restrained his explanations, the plaintiff had an obligation (consistent with the law’s expectation that men will be prudent in the conduct of their affairs) to make inquiries about certain matters pertaining to the transaction. Defects that could be discovered upon reasonable inspection were treated as obvious defects. A plaintiff could, for example, ascertain the extent of water privileges by making inquiries of the seller’s neighbors. The obligation to inquire was said to arise from the law’s presumption that ordinary persons (as opposed to infants and imbeciles) have discretion. One might think that, in particular, matters of public record would be deemed to be within the knowledge of plaintiffs and therefore not susceptible to misrepresentation; courts were, however, often unwilling to charge plaintiffs with the burden of going over to the record office to have a look, at least when the defendant appeared to have been considerably dishonest.

Similarly, in the commercial context, plaintiffs were held to the duty

73. Hanks v. M’Kee, 12 Ky. 227, 228 (1822); Thompson v. Morris, 50 N.C. 151, 152 (1857); Campbell v. Hillman, 54 Ky. 508, 516 (1854).


75. See U.S. v. Watkins, 28 F. Cas. 419, 426 (C.C.D.C. 1829) (No. 16,649) (distinguishing the common law crime of fraud by false tokens (which can, presumably, be detected) from the tort of deceit on the basis that the public, unlike an individual, is not subject to a rule of watchfulness.) Compare Hanks v. M’Kee, 12 Ky. 227, 229 (1822), in which the defendant was held liable for misrepresentations in the sale of a slave with “phthisic,” in part because the slave was located at some distance from the buyer and there was no opportunity for inspection.


77. Fisher v. Brown, 1 Tyl. 387, 404-405 (Vt. 1802) (also distinguishing the case of criminal fraud by false tokens). The court apparently agreed with the defendant’s counsel that buyers frequently put “glosses” on their creditworthiness when endeavoring to persuade sellers to extend credit.

78. See Bacon v. Sandford, 1 Root 164 (Conn. 1790).

79. See Monell v. Colden, 13 Johns. 395 (N.Y. 1816) (royal grant of rights to adjacent areas of the Hudson River shoreline negated plaintiff’s right to apply to the state for such rights); Watson v. Atwood, 25 Conn. 313 (1856) (jury finding for plaintiff on question of plaintiff’s negligence in not conducting a title search); Young v. Hopkins, 22 Ky. 18 (1827) (acknowledging that prudent men examine land records, but nevertheless granting an injunction against the seller’s obtaining a judgment on the purchase money notes). See also Campbell v. Hillman, 54 Ky. 508 (1854), a case involving the sale of slaves, in which the defendant stated that he held the slaves absolutely under his testator’s will. The court distinguished a situation in which the seller advised the buyer to examine the will to determine the seller’s ownership. When the defendant was a public servant, however, the plaintiff might actually be held to his burden, as in Starr v. Bennett, 5 Hill 303, 305 (N.Y. Sup. Ct. 1843), in which the court stated, in dictum, that even if the defendant sheriff had lied about the words of the return of a writ fieri facias, no action would lie because the return was public and could be inspected.
to inspect when the seller was not guilty of true chicanery. In the leading case of Salem India Rubber Co. v. Adams, which concerned a purchase of shoes, the court held that since the plaintiff had been able to inspect the shoes, he had not been “imposed upon” and could not recover. On the other hand, in Stout v. Harper, which involved the purchase, without inspection, of a load of cotton mixed with sand, the court refused to relieve the defendant of liability, noting that while it would be imprudent not to check the cotton for quality, it would have been an insult to an honest merchant to inspect the cotton for sand. A similar concern seems to have been involved in Singleton’s Administrator v. Kennedy, Smith & Co., in which cotton bagging had been rolled with high quality pieces on the outside of the rolls and poor quality pieces within. The plaintiff argued that unrolling the packages was difficult and was not customary. The court believed that the defendant’s offer to allow the plaintiff to inspect the rolls was not made in the expectation that the plaintiff would actually do so. It would appear, then, that the plaintiff’s duty to inspect, at least in a commercial context, usually required him to guard himself only against ordinary deviations from specifications, and not against sharp and disreputable practices.

Failure to Inspect Land. The evolution of the law concerning land purchased unseen similarly reflects the policy issues involved. There was an old English rule that sellers of land could not be held liable for misrepresentations as to either title or quality. The rule with respect to title derived from the requirement of livery of seisin in land conveyances, by which the ownership of land was deemed to be made known to the whole world. The rule with respect to quality was justified in the nineteenth century by the fact that land is immovable and at a known location, and therefore the buyer is always capable of inspecting it for himself. There may also have been some idea that land is a major investment and would be unlikely to be purchased unseen. In the early years of the nineteenth century, however, land was frequently purchased unseen and frequently purchased from unscrupulous characters, and there was considerable pressure

80. 40 Mass. 256 (1839).
81. 51 N.C. 347 (1859).
82. 51 N.C. at 350.
83. 48 Ky. 222 (1848).
84. 48 Ky. at 225.
86. Baker v. Ezzard, Ga. Dec. 112, 114, Pt. 2 (Ga. Super. Ct. 1843); Sherwood v. Salmon, 2 Day 128, 136 (Conn. 1805). Compare Sandford v. Handy, 23 Wend. 260, 269 (N.Y. Sup. Ct. 1840), in which the Chief Justice noted that the defendant might not have been able to ascertain the location of the land and so was entitled to rely on the representations of the plaintiff.
on courts to relax the old rule.

A series of early cases from Connecticut illustrates the courts’ ambivalent attitudes. Each case involved the purchase of unseen land in Virginia. In the 1803 case of Pollard v. Lyman,87 the Supreme Court of Errors reversed the decision for the plaintiff on a number of grounds, including an insufficiency of evidence and the failure of the lower court to find that the defendant had had scienter and that the plaintiff had been induced by the representations. The court further stated that the plaintiff had assumed the risk related to the value of land which he had “improvidently” purchased unseen, and concluded with an exhortation that purchasers use the due diligence and circumspection that in the ordinary circumstances of business usually accompany similar transactions.88

The following year the same court decided the case of Bostwick v. Lewis.89 The defendant’s counsel argued that an exaggeration of value was not actionable, and further stated that

There have been decisions in the Superior Court in favor of a recovery for fraud in the sale of lands. A state of things has existed, which led the court to adopt principles which, in less tumultuous times, would never have been recognized.90

The court affirmed the judgment for the plaintiff without opinion. In 1805, yet another case arose in Sherwood v. Salmon.91 The defendant’s counsel made the familiar argument that his client had simply engaged in a little puffery. The plaintiff’s counsel argued that caveat emptor should not apply when the purchaser could not inspect the article in question. He further argued, rather perspicaciously, that the English rule was not relevant to the American situation: in England, all the land was settled and the material fact was the rents owed on it.92 The lack of English precedent was therefore only a reflection of the fact that this particular cheat could not be perpetrated on an English purchaser. The court was unconvinced and applied the doctrine of caveat emptor, noting that morality and commerce are two different things. The purchaser must use such diligence as prudent men ordinarily use; the purchaser of land may always inspect it, and if he does not do so, he should obtain covenants (that is, a warranty)

87. 1 Day 156 (Conn. 1803).
88. 1 Day at 167-68. Pollard was an action to enjoin collection of a bond. Cases in which fraud was used as a defense in an action to collect on a note or bond presented issues about the impairment of circulation of such instruments. In Pollard, however, the bond had not been assigned and such issues were not discussed by the court.
89. 1 Day 250 (Conn. 1804). The determinative fact in Bostwick seems to have been the defendant’s use of a decoy to whet the plaintiff’s appetite for the land. The reporter in Bostwick described the apparently unreported case of Norton v. Hathaway (Conn. 1800), which involved facts closely similar to those in Bostwick. 1 Day at 255-256.
90. 1 Day at 255. He also argued that the plaintiff should be forced to sue on the covenant of seisin in his deed, but the plaintiff sought the deceit action because it entitled him to damages beyond the purchase price and interest thereon. 1 Day at 253.
91. 2 Day 128 (Conn. 1805).
as to its quality.\textsuperscript{93}

In the 1840s, the courts were once again faced with a number of land cases, this time resulting from a buying spree in the mid-1830s. By now, the purchase of land unseen was apparently a more comprehensible phenomenon, perhaps leading courts to consider the failure to inspect as not unreasonable. In \textit{Van Epps v. Harrison},\textsuperscript{94} the court noted that it might seem strange, in the relative calm of 1843, that the defendant (pleading fraud as a defense to an action on his bond) would not have examined the land. But in 1835 and 1836, there had been such a frenzy to purchase land that men did not dare leave Wall Street even for a day in fear that if they did so they might miss yet another advantageous deal.\textsuperscript{95} The judgment below for the plaintiff was reversed and a new trial was granted.\textsuperscript{96}

In \textit{Baker v. Ezzard},\textsuperscript{97} also decided in 1843, Judge Cone noted that much land in Georgia was purchased unseen and professed himself unable to see why the moral and legal obligations with respect to honesty should be different in the case of sales of land. With respect to the argument that the buyer can visit the land and see its quality for himself, Judge Cone wrote “[T]his is a poor and weak reason, for sanctioning fraud and legalizing dishonesty.”\textsuperscript{98} It would be better for society to hold men responsible for their misrepresentations. The plaintiff’s argument in \textit{Sherwood v. Salmon}\textsuperscript{99} finally prevailed: Judge Cone refused to be swayed by the lack of English precedent, noting that in England, quality is judged by the rents a land will bring and a seller can be held liable for misrepresentations as to rents or location.\textsuperscript{100}

We can see, then, the conflict between policy issues in the attitudes of courts considering whether to hold plaintiffs to a duty of inspection: if the defendant’s act was sufficiently dishonest, or the plaintiff’s failure to inspect sufficiently reasonable, the courts would not allow a failure to

\textsuperscript{93} 2 Day at 136. The court did not mention \textit{Bostwick}, although the plaintiff, apparently in response to some argument, argued that the existence of a decoy (as in \textit{Bostwick}) should not be relevant to the fundamental question whether an action for deceit lies for misrepresentations in the sale of land. 2 Day at 134.

\textsuperscript{94} 5 Hill 63 (N.Y. Sup. Ct. 1843).

\textsuperscript{95} 5 Hill at 67.

\textsuperscript{96} Justice Bronson also expressed some apprehension about making a seller liable for representations about the condition or quality of land, but felt that the case of \textit{Sandford v. Handy}, 23 Wend. 260 (N.Y. Sup. Ct. 1840) (noting that the buyer might not have been able to determine the location of the land) had decided the question in New York. 5 Hill at 68. Justice Bronson did not think that the plaintiff’s misrepresentations as to the price he had paid were actionable. He distinguished cases in which actions were permitted for misrepresentations as to rents because in those cases, the tenant may refuse to reveal the amount to the prospective purchaser or even be in collusion with the landlord-seller. A majority of the court did think the misrepresentation as to price paid was actionable, and the new trial was granted on those grounds.


\textsuperscript{98} Ga. Dec., Pt. 2, at 114.

\textsuperscript{99} Described \textit{supra}, text accompanying notes 91-93.

\textsuperscript{100} Ga. Dec., Pt. 2, at 115.
inspect to bar the plaintiff’s recovery.

**Seller’s Liability for Silence about Latent Defects, and Buyer’s Liability for Silence about Hidden Value**

Courts in the first half of the nineteenth century frequently discussed the extent to which the failure to disclose a material fact was actionable. An equitable maxim held that the *supressio veri* was equivalent to the *suggestio falsi*, but courts in the early nineteenth century were generally unwilling to hold defendants liable for a simple failure to state a fact within their knowledge, when such failure was unaccompanied by otherwise misleading statements or acts. Courts frequently discussed the actionability of the *supressio veri* in dicta, even in cases in which the alleged deceit consisted of affirmative statements, but cases requiring the application of the doctrine rarely occurred. While it may seem that allowing an action for deceit consisting of mere silence is effectively equivalent to granting a buyer an implied warranty of quality, the nineteenth-century courts did not consider the question in that context. That unspoken consideration may explain, however, the fact that the courts were willing to assert the doctrine in dicta but not to apply it in actual cases.

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102. With the exception of the Kentucky Court of Appeals in *Hughes v. Robertson*, 17 Ky. 215 (1824), discussed *infra* notes 105-106 and accompanying text, courts did not distinguish between application of the rule in law and in equity. The rule was applied more scrupulously in those cases in which the defendant was found to have some duty to the plaintiff. See, e.g., *Watson v. Delafeld*, 2 Johns. 526 (N.Y. 1807) (duty of insurer to inform insurer of loss). *Cf. Taylor v. Bradshaw*, 22 Ky. 145 (1827) (litigant in ejectment action does not have duty to disclose that claim to land was not adverse); *Matthews v. Bliss*, 39 Mass. 48 (1839) (tenant in common does not have duty to disclose offer for purchase of interest in ship to co-tenant).

103. In *Jeffrey v. Bigelow*, 13 Wend. 518, 523 (N.Y. Sup. Ct. 1835), there was no allegation of a statement by the defendant’s agent that the sheep were healthy. The court focused on the defendant’s liability for the actions of his agent, but did mention that the defendant (or his agent) had a duty to tell the plaintiff of the disease. In the leading New York case of *Ward v. Center*, 3 Johns. 271 (N.Y. Sup. Ct. 1808), the defendant, in inducing the plaintiff to sell goods to Brown, a third party, on credit, failed to tell the plaintiff that he (the defendant) held a bond of Brown, on which he later obtained an execution. Justice Van Ness stated “Fraud is imputable, in some cases, as well where a man suppresses the truth, as where he represents what is false.” 3 Johns. at 282. Although he disagreed with the findings of fraud, he was unwilling to set aside the jury’s verdict.

104. In those cases in which a failure to disclose was held to be actionable, the results sometimes seem rather surprising. *Mann v. Parker*, 6 N.C. 262 (1813), for example, involved the sale of an ill slave to a “speculator.” The North Carolina Supreme Court, finding evidence that the defendant knew of the child’s condition, overturned a jury verdict for the defendant, despite evidence that the plaintiff had been aware of the condition and that the defendant had not made any representation to the plaintiff. Compare *Hamrick v. Hogg*, 12 N.C. 350 (1827), a later North Carolina case in which the defendant sold a sick slave to the plaintiff. There was no evidence of any representation by the defendant of the condition of the slave. There was evidence that the slave had been hired out prior to the sale and, upon her return to the defendant, the lessee demanded a reduction in price for sickness. The court
In one case in which the rule was actually applied, both the reasoning and the result seem quite radical. In a case involving the sale of a blind horse,\textsuperscript{105} the plaintiff had examined the horse but had not discovered the defect; the defendant said nothing. The defendant's counsel argued that, while suppression of the truth might give rise to an action in equity for recission, there was no damage remedy at law. The court noted the lack of precedent for such an action at law, but felt that the rules about misrepresentation were sufficiently analogous to equitable principles to give rise to an action for suppression. The court concluded by observing,

In all such cases, it will better comport with morality and sound policy, to subject the seller to an action at law, and thereby impose upon him the legal, as well as moral duty of telling the whole truth, especially where the defect, as in this case, is a latent one, which might take some time and nicety of observation to discover.\textsuperscript{106}

An 1839 case from Maine contains an even more surprising statement:

Fraud may be committed by the suppressor veri as well as by the allegator falsi, if the means of information are not equally accessible to both, but exclusively within the knowledge of one of the parties, and known to be material to a correct understanding of the subject; and especially when one of the parties relies upon the other to communicate to him the true state of facts to enable him to judge the expediency of the bargain.\textsuperscript{107}

This statement, which would appear to make each party the guardian of the other's interest, occurs in a case in which there was an actual misrepresentation by the defendant.\textsuperscript{108}

\textsuperscript{105} Hughes v. Robertson, 17 Ky. 215 (1824).

\textsuperscript{106} 17 Ky. at 217.

\textsuperscript{107} Prentiss v. Russ, 16 Me. 30, 32-33 (1839). This statement strongly resembles the arguments made by Gulian Verplanck in his treatise on the subject. See GULIAN VERPLANCK, AN ESSAY ON THE DOCTRINE OF CONTRACTS: BEING AN INQUIRY HOW CONTRACTS ARE AFFECTED IN LAW AND MORALS, BY CONCEALMENT, ERROR OR INADEQUATE PRICE (1826) (hereinafter cited as "VERPLANCK").

\textsuperscript{108} See also Rawdon v. Batchford, 1 Sand. Ch. 344, 246 (N.Y. Ch. 1844) in which plaintiff was induced, by misrepresentations, to release certain securities of Redfield held by

**Hall v. Marston, 17 Mass. 575 (1822), and Otis v. Raymond, 3 Conn. 413 (1820), both concerned debtors who had fled the jurisdiction leaving assets in the hands of the defendant to be delivered to the plaintiff. In Hall, the Supreme Judicial Court of Massachusetts affirmed a judgment for the defendant on the ground that the defendant's silence had injured the plaintiff by preventing him from taking other action which he might have taken had he known the facts. 17 Mass. at 580. In Otis, the Connecticut Supreme Court of Errors stated, "if the suppression of the truth, with a fraudulent intent, was not actionable deceit, neither was the misrepresentation, made with the same design," 3 Conn. at 418. (The defendant in Otis had told the plaintiff he did not have any property for the plaintiff). Since the plaintiff had no right to receive the property given to the defendant (which would, presumably, have been subject to execution by all the creditors), he had not been deprived of anything other than the knowledge that the defendant held the property. Chief Justice Hosmer stated, "I do not find the footsteps of an action for the fraudulent suppression of information, which the party was not obliged by law to supply..." 3 Conn. at 419.**

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There was a theoretical distinction between concealment by a seller and concealment by a buyer.\textsuperscript{117} The leading case in the latter area is \textit{Laidlaw v. Organ},\textsuperscript{109} in which the Supreme Court expounded a rule carefully discouraging both undue trust and unfair "imposition." The plaintiff sold tobacco to the defendants on February 18, 1815. That night, the defendant learned from some private source of the Treaty of Ghent, which ended the War of 1812 and immediately enhanced the price of tobacco. The following morning, when the defendant came to collect the tobacco, the plaintiff's clerk inquired whether the defendant had heard any news that would increase the price of the tobacco. The defendant was silent. Counsel for the parties argued whether the undisputed moral obligation of the defendant was also a legal obligation. The defendant's counsel argued that "The maxim of caveat emptor could never have crept into the law, if the province of ethics had been co-extensive with it," and accused the plaintiff of contending for "a romantic equality" of knowledge which can never exist.\textsuperscript{110} The Court, by Justice Marshall, held that a buyer had no obligation to disclose extrinsic circumstances "where the means of intelligence are equally accessible to both parties. But at the same time, each party must take care not to impose upon the other."\textsuperscript{111} The case was remanded for a new trial, since the district court had not allowed the jury to determine whether the defendant had practiced any imposition on the plaintiff.\textsuperscript{112} The supposed amorality of the \textit{Laidlaw} rule inspired Verplanck's diatribe on the law of contracts in general, and suppression and deceit in particular, in which he argued for a common sense-based rule about the expectations of reasonable men.\textsuperscript{113}

\textit{Laidlaw} has often been quoted as standing for the proposition that mere silence, at least by a buyer, is not actionable.\textsuperscript{114} The opinion carefully limits the rule, however, to those cases in which the information is

\textsuperscript{109} 15 U.S. (2 Wheat.) 178 (1817). Professor Horwitz, apparently (and justifiably equating a doctrine of actionable suppression with a sound price rule, discusses \textit{Laidlaw} as a leading case in the development of the doctrine of caveat emptor. HORWITZ, supra note 1, at 182.

\textsuperscript{110} 15 U.S. at 193-4.

\textsuperscript{111} 15 U.S. at 195.

\textsuperscript{112} See also Foley \textit{v. Cowgill}, 5 Blackf. 18 (Ind. 1838) (finding for defendant on analogous facts because extent of supply and demand was often a matter of opinion on which people differ).

\textsuperscript{113} VERPLANCK, supra note 107.

\textsuperscript{114} See Gage \textit{v. Parker}, 25 Barb. 141 (N.Y. App. Div. 1857) (stating that to hold the defendant liable for fraud because he knew the buyer's price was low would reverse the rule of caveat emptor and make the purchaser the guardian of the seller's interest). \textit{Laidlaw} continues to generate commentary today. See, e.g., KIM LANE SCHEPPELE, \textit{LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW} passim (1988); Kim Lane Scheppelle, "\textit{It's Just Not Right}": The Ethics of Insider Trading, 56 LAW & CONTEMP. PROBS. 123, 132-133 (1993).
available to both parties and to those cases in which the buyer is careful not to impose otherwise on the seller. In many cases, the defendant's craftiness was sufficient to overcome this latter standard. For example, in *Bench v. Sheldon*, the plaintiff lost a flock of sheep. The defendant found the sheep, went to the plaintiff, and without saying he had found them, offered to buy the sheep for $10 as a risk to them both. The defendant's counsel cited *Laidlaw*, among other authorities, and argued that "The policy of the law is . . . to reward enterprise and punish indolence and folly." The court stated,

In the case of the sale of property, the law presumes that the purchaser reposes confidence in the vendor, as to all such defects as are not within the reach of ordinary observation, and therefore imposes the duty upon the vendor to disclose fully and fairly his knowledge of all such defects.

But in ordinary cases, the vendor reposes no such confidence in the purchaser. The former does not look to the latter for information in regard to the qualities or condition of the thing sold, and is not deceived or misled by any information the latter may have in regard to it. And hence it has been held, that a purchaser may use any information he may have in regard to property, for his own advantage, without disclosing it, providing he does nothing to mislead or deceive.

Although the buyer-defendant did not have a duty to disclose his knowledge, he was under an obligation not to deceive or mislead the plaintiff. The defendant, after learning that the plaintiff had not found his sheep, told the plaintiff that he did not believe he would ever find them. The court held that this was equivalent to a statement that the defendant had not found them and did not know of anyone who had, and that this attempt to mislead the plaintiff amounted to fraud.

In sum, the rule that one may be liable for a suppression of fact presented some theoretical difficulties for courts in the first half of the nineteenth century. The general maxim with respect to suppression by sellers was rarely applied correctly, although it was frequently invoked

115. Plaintiff's counsel claimed that the news of the treaty was "monopolized" by the messengers, 15 U.S. at 194, while the defendant's counsel claimed the plaintiff might have learned the news himself had he gotten out of bed earlier. 15 U.S. at 193.


117. The paradigm case of the latter involves the purchase of land containing a valuable mine. One can infer the ancient view of the morality of that case from Matthew 13:44: "Again, the kingdom of heaven is like unto treasure hid in a field; the which when a man hath found, he hideth, and for joy thereof goeth and selleth all that he hath, and buyeth that field." The Pennsylvania Supreme Court similarly found nothing wrong with this practice in *Harris v. Tyson*, 24 Pa. 347, 359-60 (1855).

118. 14 Barb. at 70-71.

119. 14 Barb. at 73.

120. 14 Barb. at 74. The distinction between concealment by the seller and concealment by the buyer is illustrated by *Nickley v. Thomas*, 22 Barb. 652 (N.Y. App. Div. 1856), in which the defendant sold the plaintiff a "balky" horse. The defendant's statements were technically true, although misleading. The plaintiff asked whether the horse was good, and the defendant replied "As I just told you." The court quoted *Bench v. Sheldon* for the proposition that the seller must disclose all defects known to him and must tell the whole truth. 22 Barb. at 654-55.
unnecessarily. The rule for suppression by buyers, rather clearly stated by Justice Marshall in *Laidlaw* and applied in *Bench v. Sheldon*, was not applicable to cases of suppression by sellers; nevertheless, there seems to have been a general unwillingness by courts to hold parties liable for suppressions of fact in the absence of some misleading statement or act. This attitude reflects a compromise between the competing policy goals requiring honesty on the one hand and prudence on the other, and an unwillingness to find liable for deceit someone who had not committed any affirmatively dishonest act. A party who maintains a scrupulous silence has not practiced any active dishonesty and encourages those dealing with him to exercise their own judgment and conduct their own investigations.

**Effect of the Rules**

Throughout the first half of the nineteenth century, then, courts continued to limit recovery for deceit to cases in which the defendant had actively committed an act of dishonesty. While there was some pressure to allow a recovery to those who might incur honest losses, the development in the law in that direction was confined to contract, rather than tort remedies, through the finding of warranties in invoices and bills of sale, for example. The law of deceit was untouched by the debate over the merits of the civil law “sound price” doctrine and the broader question of the role of the courts in assessing the adequacy of purchase price. The early common law of deceit was available only to enforce express warranties; it therefore imposed liability on a seller (but not a buyer) when either the buyer or both parties were mistaken as to the value of the item, so long as the seller expressly agreed to take that risk. The relation of the purchase price to the actual value would be relevant only to the damages the buyer was to receive. Eventually, the seller’s knowledge of the actual value and his misleading of the buyer came to be alternative grounds for relief in an action for deceit. The rule now imposed liability both on a seller (whether knowledgeable or not) who undertook the risk of mistake and on a knowledgeable seller who was responsible for the buyer’s mistake. The source of the mistake was now relevant, but the adequacy of the purchase price was still irrelevant, except to the extent it was evidence of the buyer’s mistake. It is, therefore, a misunderstanding of the nature of the deceit action to characterize it as an abrogation of the sound price rule. Existing deceit rules may have helped to lessen the sting of a regime in which the adequacy of the purchase price was not considered, and such rules would have no place in a pure sound price regime. But, the decision not to have a sound price regime would be intellectually separate from the decision to adopt deceit rules.\(^{121}\) This is not to say, however, that the law of deceit was unaffected by policy considerations (including the functioning of the market). As I have tried to show, policy considerations did exist, but they were concerns for the behavior of the parties and not for the outcome of

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121. If, as is sometimes argued, medieval common law had recognized the sound price rule, it is not clear why a requirement of express warranty or scienter would have developed.
the bargaining process.

Patterns in the Cases

While the underlying policy concerns of the courts illuminate to some degree the nature of the tort of deceit and the considerations affecting courts' decisions in the cases, I also examined the patterns occurring in the facts and the holdings of the cases to see if those patterns might shed further light on the courts' behavior and reveal other concerns relating to the economic or social environment of the time. Surprisingly, however, the law of deceit seems to have been to some degree immune to environmental factors. By organizing the cases according to region, date, and fact pattern, I was able to locate certain patterns in the decisions.122 Somewhat more than half the cases had outcomes that could be described loosely as "pro-buyer,"123 but the pro-buyer decisions did not appear any more frequently at the end of the period than at the beginning. This lack of change in outcomes over time corresponds to the continuity I found in the courts' statements of the law. Surprisingly, there was not a steady increase in the number of reported deceit cases per decade after 1810 although there were more appellate cases in the 1850s than there had been in any prior decade.124

Factual Patterns

In General. To the extent the frequency of pro-buyer or pro-seller decisions followed a pattern, it was a fact-based pattern. I categorized the cases according to the object of the dispute: land, horses, slaves, corporate stocks, transactions between merchants, ships, and debt instruments.125 More than fifty cases did not involve any of those subjects. Surprisingly, more of the cases that could be so classified involved merchants' transactions than any other facts; the second largest number involved land. Even more surprising, the proportion of the cases involving merchants' transactions remained more or less constant in each decade after 1800, except the 1820s (which had fewer commercial cases but a disproportionate number

122. I did not perform statistical analysis on the data, and, in order to discourage the inference that the following discussion is based on statistical methods, I have deliberately refrained from giving percentages, averages, deviations, or any other quantitative measurements.

123. This includes holdings overturning decisions for the seller and remanding the case for further proceedings.

124. The number of deceit cases dating from the middle of the nineteenth century included in the Decennial Digest was larger than the number of cases from the early years of the century; this seems to be due to more complete digesting, however, and not to an increase in litigation. Also, many of the later cases included in the Digest as fraud actually involved breach of warranty or fraudulent conveyance issues, and so are not relevant to my research.

125. Because there was a discrete line of cases in both England and America involving ships falsely described as "copper-fastened" and sold "with all faults," I separated those cases from the merchant cases.
of slave cases). The proportion of cases involving horses varied widely between decades, with a marked lull appearing in the 1820s and 1830s.

The cases involving merchants’ transactions, land, horses, and corporate securities more often resulted in pro-buyer decisions, while the cases involving ships, slaves, and debt instruments more often resulted in pro-seller decisions. Except in the case of debt instruments, none of the differences were significant. The debt cases were almost unanimously decided in favor of the seller (usually the payee), a fact which probably reflects concern for the negotiability of debt instruments.

*Entrepreneurial Parties.* Over one-fifth of the cases involved parties (either one or both) who could be characterized as speculators or entrepreneurs.\(^{126}\) Courts dealing with cases involving entrepreneurs were noticeably more pro-buyer, but this tendency may reflect the fact that all the out-and-out swindles involving patents or manufacturing facilities involved “entrepreneurial” parties. In cases not involving swindles, both parties were usually entrepreneurs, so that, as in the commercial cases, a pro-buyer holding did not favor an entrepreneur over, say, a farmer. The cases involving speculators were neither more pro-buyer nor more pro-seller than the other cases. In characterizing parties as “speculators,” I included any party entering into a transaction for what appeared to be investment, rather than consumption. I also excluded the commercial cases. The “speculator” cases do not, therefore, reflect the pro-buyer tendency that might have appeared had I limited the term “speculator” to its derogatory sense.

*Swindling.* One of the features one might expect to find in the fraud cases was a large number of cases involving swindlers, especially toward the middle of the century. A growing proportion of the population involved themselves in risk-taking in the market, in transactions on credit and in investment, particularly in land, although also in machinery and later in corporate stocks.\(^{127}\) The growing number of transactions involving complete strangers and unfamiliar commodities (as well as the emergence of a boom-and-bust economic cycle) produced opportunities both for outright fraud and for “honest” economic loss. By the end of the period, fraud and confidence schemes were topics of national awareness and debate.\(^{128}\) Despite the “general climate of fraud and deception”\(^{129}\) existing by the 1850s, however, fewer than one-fifth of the cases involved traditional swindles (phony land sales, securities fraud, quackery, and sales of other worthless goods, for example), perhaps because confidence men

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126. This does not include the commercial cases, in which the parties would necessarily be somewhat entrepreneurial.

127. Professor Horwitz notes the increasing contract between commercial and noncommercial interests in his discussion of the legal recognition of mercantile custom. HORWITZ, *supra* note 1, at 191-92.


129. QUIRK, *supra* note 129, at 32.
could not be located or were "judgment proof." More than half the traditional swindle cases involved the sale of land; ten cases involved the sale of corporate stocks and another five involved the sale of patents or rights to inventions. The remaining cases involved, among other things, forgeries, the inducement of a drunken man to sign a bond, the purchase of a contract to operate a canal, and the purchase, for exhibition, of a portrait of George Washington and figurines representing the signers of the Declaration of Independence. There were a relatively large number of cases involving horses which I did not include in the "swindle" category. While most of these cases seem to have involved deliberate fraud by the seller, the defendants often did not appear to be the shady "horse traders" of myth, but seem to have been known in the neighborhoods in which they did business. Not surprisingly, the holdings in the swindle cases were more often, but not exclusively, pro-buyer. The reports rarely contain facts that enable the reader to determine conclusively whether the seller was a habitual swindler, rather than an overzealous businessman, and so my characterization of some of these cases may be inaccurate. Nevertheless, in the cases decided in favor of the seller, the buyer frequently failed to recover because the court applied a rule of law that was indifferent to the facts of the case. Thus, the drunken maker of a bond was held to his obligation, and purchasers of land were denied recovery because the law did not recognize misrepresentations about the title or quality of land.

Geographical Patterns

The holdings of the cases considered by region revealed a few anomalies. Cases in New England resulted in marginally more pro-seller decisions, and cases in the West and the Middle Atlantic states resulted in noticeably more pro-buyer decisions. Most striking, however, was the frequency with which cases in the South resulted in pro-seller decisions, and the Southern cases more often contained holdings or statements of law that appear anomalous, if not wrong. The Southern pro-seller tendency appears in conjunction with a larger proportion of slave cases and smaller proportion of commercial and, especially, land cases, but even the commercial, horse, and land cases in the South were more often decided in favor of the seller than similar cases elsewhere. It is difficult to attribute the results in the Southern cases to an anti-developmental atti-

130. I am concerned in this paper only with civil actions for deceit. There was, of course, a crime of fraud, as well as of covin (conspiracy to commit fraud). At common law, criminal fraud was limited to fraud on the public at large, such as by false weights and measures, false tokens, or corruption of provisions, but the crime was extended by statute.

131. Again, the truly criminal horse traders probably would not have been available for litigation.


133. See supra notes 85-86 and accompanying text.

134. There were only three land cases occurring in the South.
tude, since it is not possible to characterize developmental interests as appearing more often as either buyers or sellers.135 The only generalization about the parties that is at all supported by the evidence is that the buyers are usually more credulous and the sellers more shrewd. Except in the swindle cases, commercial interests generally dealt with commercial interests, and purchasers of speculative land usually purchased from speculators.

One pattern that illustrates the dangers inherent in drawing conclusions about judicial design in the patterns of holdings is the pro-buyer attitude of courts in the West. Of the cases involving sales of slaves, all but one occurred in either the South or the West. As a group, the slave cases were slightly more often decided for the seller; in the West, however, all but one of the slave cases were decided for the buyer. In view of the demand for slaves in the new slave states,136 it would not be surprising if the courts in the West took steps to regulate the market. On the other hand, a pro-buyer climate might have been thought to discourage trade (an argument Eastern courts sometimes used when refusing to expand the grounds for a deceit action).137 It is also possible that unscrupulous or easily tempted sellers took advantage of the great demand for slaves in ways more frequently amounting to fraud. No explanation for the courts' attitudes appear in the reports of the cases.

Factual Considerations Raised by the Courts

In addition to numerical patterns appearing in the data, certain general patterns emerge from the opinions. Certain factual situations were noted by the courts with some regularity and seem to be, to a limited extent, predictors of the outcome a court noting the fact will reach. These facts relate more to the economic environment than to enunciated legal rules and consequently reflect a pattern in the decisions rather than a development in the law.

Availability of Information. As a general rule, when a court described the situation as one in which information was available only to the defendant, the defendant was held liable.138 The difficulty arose in

135. The apparent Southern pro-seller attitude may actually represent a pro-defendant attitude, reflecting judicial unwillingness to encourage litigation. A pro-defendant attitude may also reflect a belief in non-intervention in market (or other) transactions, but the Southern courts sometimes found for the defendant-seller in the face of substantial evidence of fraud, which would seem to indicate a particularly radical laissez-faire policy. On the other hand, Southern courts were also capable of unusual pro-buyer decisions. See supra note 104.

136. See supra note 69.

137. I assume that judges in the new slave states did not have a hidden abolitionist agenda which led them to undermine the slave trade, although it is certainly possible that some of them may have done so.

138. See Cornelius v. Mollay, 7 Pa. 293 (1847); Shaeffer v. Sleade, 7 Blackf. 178, 183 (Ind. 1844); Bacon v. Bronson, 7 Johns. Ch. 194 (N.Y. Ch. 1923); Irwin v. Sherrill, 1 N.C. 99 (1799); Bacon v. Sandford, 1 Root 164 (Conn. 1790). Another fact pattern which, not surprisingly, tended to convince courts to decide in favor of plaintiffs was the illiteracy of the
cases in which the information was available to neither party, as in the
case of a sale from one middleman to another. Such cases were often
accompanied by bills of sale, invoices, or advertisements containing a
misrepresentation of the facts, and courts might, or might not, choose to
hold a seller liable (for breach of warranty) based on the faulty descrip-
tion.\textsuperscript{139}

The dangers of the situation are illustrated by the oft-cited case of
\textit{Seixas v. Woods}.\textsuperscript{140} The defendant sold the plaintiff a load of wood
described in the advertisement, the invoice, and the bill of parcels as
brazilletto, a very valuable wood. The wood was actually practically
worthless, a fact of which neither party was aware. The facts of this case
would seem to militate in favor of a holding for the plaintiff: the
description might be seen as a warranty of type, if not of quality, and the defend-
ant, who had purchased the wood from the original owner (in fact there
was some evidence that the defendant was his agent), was in a better posi-
tion to protect against this sort of fraud.\textsuperscript{141} The plaintiff, unaware of the
original owner, may have relied upon the defendant’s commercial reputa-
tion. But the court, in applying the rule of the English case of \textit{Parkinson v. Lee},\textsuperscript{142}
that liability required an express warranty or misrepresentation
with knowledge, held that the description did not amount to a warranty.\textsuperscript{143}
Justice Kent, who wrote the opinion of the court in \textit{Seixas} and went on to
author the well-known \textit{COMMENTARIES}, later somewhat recanted his posi-
tion in his description of \textit{Seixas}:

\begin{quote}
There is no doubt of the general rule of law as laid down in \textit{Seixas v. Woods}; and
the only doubt is whether it was well applied in that case, where there was a
description in writing of the article by the vendor which proved not to be correct,
and from which a warranty might have been inferred.\textsuperscript{144}
\end{quote}

The importance of \textit{Seixas} for nineteenth-century law is alleged to be
its adoption of the rule of \textit{Parkinson v. Lee} and its refusal to apply a
(finding for defendant based in part on the fact that note stated clearly that the assignor did
not stand as security for the note). \textit{See also Cole v. Taylor}, 22 N.J.L. 59 (1849) (holding that
the fact that plaintiff was illiterate was evidence of fraud). Lack of sophistication might be
invoked by a court to excuse a defendant as well as a plaintiff. \textit{See Lord v. Colley}, 6 N.H. 99
(1833) (finding that, although the defendants had used the word “certify,” they were “prob-
ably common men” who did not know what “certify” meant; the certificate was probably
intended only as a recommendation).

\textsuperscript{139} \textit{See supra} note 58.
\textsuperscript{140} 2 Cai. R. 48 (N.Y. Sup. Ct. 1804).
\textsuperscript{141} In the analogous English case of \textit{Horn v. Nichols}, 91 E.R. 256, 1 Salk. 289 (Nisi
Prius, c. 1709), Chief Justice Holt held the defendant liable for the fraud of his “factor
beyond the sea,” because it was better that “he who employs and puts trust and confidence in
the deceiver should be a loser, than a stranger.”
\textsuperscript{142} 102 E.R. 389, 2 East 314 (K.B. 1802). \textit{Parkinson} similarly involved a case of two
middlemen defrauded by the original grower.
\textsuperscript{143} 2 Cai. R. at 56.
\textsuperscript{144} 2 JAMES KENT, \textit{COMMENTARIES} *479, quoted in \textit{Osgood v. Lewis}, 2 H. & G.
495, 526 (Md. 1829).
sound price rule. The holding as to the effect of a description in an invoice or advertisement was not universally followed.

The situation in which neither party had access to the relevant information presented a troublesome fact pattern for early nineteenth-century courts, since it did not in fact involve deceit in the common sense of the term. The policy in favor of requiring honesty in sales transactions is not violated by failing to hold the defendant liable, and the policy in favor of encouraging prudence does not provide a clear choice between the plaintiff and the defendant. The decision of the courts in both England and the United States to find in favor of the defendant in such situations may reflect other considerations, such as the likelihood of increased litigation, that would not be deemed relevant in a case in which the policy considerations and equities were less evenly divided.

**Mercantile Custom and Economic Conditions.** Courts sometimes considered mercantile (or non-mercantile) practices in deciding where to assign liability. Courts also considered economic conditions in assessing the parties' behavior. We have already seen the courts allowing recovery to plaintiffs who had purchased unseen land in the land rush of the mid-1830s, and the Connecticut Supreme Court of Errors refusing to allow such recovery in similar circumstances. In *Veazie v. Williams* and *Sanborn v. Stetson*, Justice Story considered the decline of prices following the panic of 1837 to be an ulterior motive of the plaintiff in bringing a deceit action, and he voted to deny relief in both cases. Justice Woodbury, in *Veazie*, considered the importance of public faith in the auction system in deciding that damages resulting from fraud by an auctioneer could be recovered from an innocent seller. In *Denny v. Gilman*, the Supreme Judicial Court of Maine dismissed a bill in equity alleging that the defendants had falsely declared themselves insolvent to induce their creditors to settle for fifty cents on the dollar. In the late 1830s, the court reasoned, everyone was panicking; the defendants'  

145. See HORWITZ, supra note 1, at 180.  
146. See supra note 58.  
147. As was common in the English cases, one of the Justices in *Parkinson* analogized the facts of that case to the sale of a horse. Not surprisingly, what seemed like a reasonable rule (placing liability on the seller) when applied to two merchants became unthinkable when applied to the sale of the horse, and Justice LeBlanc quickly changed his mind when faced with the prospect of thousands of horse-buyers flooding the courts.  
148. See Singleton's *Adm'r v. Kennedy*, Smith & Co., 48 Ky. 222, 225 (1848) (finding that an offer to allow inspection was not a defense to fraud in case where inspection was not customary); Jacques *v. Collins*, 13 F. Cas. 282 (C.C.S.D.N.Y. 1848) (finding defendant was not under any obligation to inspect shipment before drawing invoice, where such inspection was not customary); Casco Mfg. Co. *v. Dixon*, 57 Mass. 407 (1849) (custom of trade that inferior cotton be returned promptly so seller could make claim against supplier was reasonable; plaintiff's delay in returning cotton was fatal to action).  
149. *Supra* notes 87-100 and accompanying text.  
151. 49 U.S. at 154.  
152. 26 Me. 149 (1846).
actions did not appear to have been fraudulent.  

While the courts occasionally took extrinsic factors into consideration in deciding cases, such factors were largely limited to the equities between the parties and did not have the precedential force necessary to effect a change in the law as a whole. The application of the law varied little with date, subject matter, identity of the parties, or geography. In one area, however, the economic demands of widening markets led to significant doctrinal development and the permanent alteration of the law of fraud.

_Pasley v. Freeman and its Progeny_

Perhaps the most far-reaching change in economic conditions, at least in terms of its effect on the law, was the extension of credit transactions beyond familial circles in the eighteenth century. As markets widened and merchants found themselves doing business with strangers, the creditworthiness of prospective purchasers on credit became a fact that was both essential and difficult to determine.

In 1789, that problem brought the case of _Pasley v. Freeman_ before the King's Bench. Similar fact patterns were subsequently raised many times in courts in both England and the United States, and the facts may be summarized as follows: A purchaser (not a party to the action) proposes to purchase goods on credit. The shopkeeper or other prospective seller (the plaintiff), who is unfamiliar with the purchaser, applies to a third party for information about the creditworthiness of the purchaser. The third party (the defendant) states in more or less positive terms that the purchaser may be trusted, the plaintiff sells to the purchaser on credit, the purchaser turns out to be insolvent, and the plaintiff loses the value of the goods sold. In some cases, the prospective purchaser or the defendant voluntarily presents an unsolicited recommendation to the plaintiff.

The justices of the King's Bench, in deciding whether to allow this novel action, discussed at length the nature of a deceit action and what, in general, constituted the actionable wrong. They were faced with two basic questions: must there be privity between the plaintiff and the defendant and must the defendant have an interest in the transaction (that is, must the defendant benefit in some way from his misrepresentation)? Each justice delivered an opinion, and the majority, answering both those questions in the negative, agreed to allow the action.

Justice Grose was the only dissenting justice, and he raised issues familiar in all deceit actions. According to Justice Grose, the defendant's statement had simply been opinion or a "nude assertion" of a fact not

153. 26 Me. at 161-62.

154. See SELLERS, supra note 1, at 22. Sellers also describes the establishment of the first credit-rating agency in the 1840s. Id. at 267-68.

155. 100 E.R. 450, 3 Term. Rep. 51 (K.B. 1789). _Pasley_ is also credited with re-establishing an action for intentional fraud in the common law. See supra note 34.
“peculiarly in the knowledge of the defendant.”

The plaintiffs might have inquired of others, who knew as much as the defendant; it was their fault that they did not. . . . It was owing to their own gross negligence that they gave credence to the assertion of the defendant, without taking pains to satisfy themselves that the assertion was founded in fact.\textsuperscript{156}

The other justices were not convinced. Each justice quoted Justice Croke on the basic nature of the deceit action: “Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies.”\textsuperscript{157} Deceit was not a mere lie, but a lie which caused damage and which was \textit{intended} to cause damage.\textsuperscript{158} The defendant’s benefit, or lack thereof, was irrelevant to the plaintiff’s injury. In fact, said Justices Buller and Ashhurst, someone who knowingly damages another without benefit to himself is more malicious than someone motivated by self interest.\textsuperscript{159} The gist of the action was knowingly and intentionally damaging another by false assertions; privity and benefit were not required.\textsuperscript{160}

\textit{The Statute of Frauds and Other Criticisms}

\textit{Pasley} was frequently criticized by later courts applying its holding. It was, however, usually followed.\textsuperscript{161} Courts in later cases were often presented with further issues not raised in \textit{Pasley}.\textsuperscript{162} The requirement of fraudulent intent, which had been discussed but not emphasized in \textit{Pasley},

\begin{itemize}
\item \textsuperscript{156} 100 E.R. at 453. Justice Grose also noted that if the action were allowed, the plaintiff would be entitled to pursue both the purchaser and the defendant, whereas if the defendant had actually guaranteed the purchaser’s debt, the plaintiff’s recovery would be limited to the defendant. 100 E.R. at 452.
\item \textsuperscript{157} Bayly v. Merret, 81 E.R. 81, 3 Bulst. 95 (K.B. 1616), also reported at 79 E.R. 331, Cro. Jac. 386; quoted by Justice Buller, 100 E.R. at 453, Justice Ashhurst, 100 E.R. at 455-56, and Lord Chief Justice Kenyon, 100 E.R. at 457.
\item \textsuperscript{158} 100 E.R. at 453, 456, 457-58.
\item \textsuperscript{159} 100 E.R. at 455, 456. In Medbury v. Watson, 47 Mass. 246, 260-61 (1843), the court held that the defendant’s statements concerning the value of a tannery which he did not own were actionable because the defendant did not have an interest in the sale, since his status as a “disinterested” third party put the plaintiffs off their guard.
\item \textsuperscript{160} 100 E.R. at 455, 456, 457-58. Lord Chief Justice Kenyon compared the deceit action to a slander action, in which the false statement, combined with damage, produced liability. 100 E.R. at 457.
\item \textsuperscript{161} \textit{Pasley} was not usually expressly adopted by American courts, although it was always mentioned, and usually commented upon in strong terms either favorably or unfavorably, in American cases of this description. For cases in which the court did not attack \textit{Pasley} itself, but appeared hostile to the plaintiff’s claim, see Crown v. Brown, 30 Vt. 707 (1858) and Cutter v. Adams, 15 Vt. 237 (1843).
\item \textsuperscript{162} There was some attempt made to hold persons liable under \textit{Pasley} for lending money to an insolvent in order to enable him to continue to conduct his business (a practice roughly equivalent to that known today as debtor-in-possession financing). The courts rejected the argument that such an action amounted to a representation of the insolvent’s credit. Conrad v. Nicoll, 29 U.S. (4 Pet.) 291 (1830). Cf. Windover & Hopkins v. Robbins, 2 Tyl. 1 (Vt. 1802) (finding that the loan was actually part of a scheme to defraud the plaintiff).
was quickly grafted onto the elements of the action. The thorniest issue for later courts concerned the effect of *Pasley* on the statute of frauds, an issue which none of the Justices in *Pasley* had considered. The Statute of Frauds requires a writing to enforce an undertaking to answer for the debt of another. The issue was first raised in *Eyre v. Dunsford*, but Lord Chief Justice Kenyon summarily dismissed the objection as answered by *Pasley*. Later justices following *Pasley* continued to express discomfort with the implications for the Statute of Frauds. In *Evans v. Bicknell*, Lord Chancellor Eldon strongly criticized *Pasley*:

It is almost improper at this day to say anything, having a tendency to shake [Pasley]: but I know Mr. Justice Grose very lately held the same opinion as he did at the time of the judgment. The doctrine laid down in that case is in practice and experience most dangerous. I state that upon my own experience; and if the action is to be maintained in opposition to the positive denial of the Defendant against the stout assertion of a single witness, where the least deviation in the account of the conversation varies the whole, it will become necessary, in order to protect men from the consequences, that the Statute of Frauds should be applied to that case.

Why, the Lord Chancellor asked, should one be liable for the statement "You may trust him: he is a very honest man and worthy of trust," but not "You may trust him; and if he does not pay you, I will"? When he was chief justice of the Common Pleas, Lord Eldon confessed, he always encouraged counsel in these cases to have a special verdict taken (presumably so that the court could disavow *Pasley*); counsel never heeded his suggestion; so, he instead used to caution the jury so strongly about the dangers of the action that they rarely returned a verdict for the plaintiff.

163. *See, e.g.*, *Young v. Covell*, 8 Johns. 23 (N.Y. Sup. Ct. 1811) ("The advice was rash and indiscreet; but there is no ground from which to infer that it was deceitful"); *Russell v. Clark's Ex'r*, 11 U.S. (7 Cranch) 69 (1812) (holding that a merchant was assumed only to have the knowledge obtained from observing another's business, credit, and punctuality, and not held responsible for knowing the full extent of another's accounts); *Tappan v. Darling*, 23 F. Cas. 688 (C.C.D. Mass. 1822) (No. 13,746); *Fooks v. Wapel*, 1 Har. 131 (Del. 1833); *Boyd's Ex'rs v. Browne*, 6 Pa. 310, 316 (1847) (need intent that buyer should receive credit, not intent to injure the plaintiff); Lord v. Goddess, 54 U.S. (13 How.) 198 (1851). *Cf.* *Heycraft v. Creasy*, 102 E.R. 303, 308; 2 East 92 (K.B. 1801) (Kenyon, L.C.J., attempting to apply *Pasley* to cases in which the representation was honestly made by a defendant who had also been the dupe of the purchaser).

164. The English statute of frauds, 29 Car. II. c. 3, was usually considered received by the early American courts prior to the adoption of similar statutes of the state legislatures. For convenience, I shall refer to such statutes as the "Statute of Frauds."

165. 102 E.R. 123, 1 East 318 (K.B. 1801).

166. 102 E.R. at 127.


168. 31 E.R. 998, 6 Ves. 174 (Ch. 1801).

169. 31 E.R. at 1003 (citation omitted).

170. 31 E.R. at 1004.
Having vented his spleen, the Lord Chancellor noted that *Pasley* did not apply in a court of equity, and he dismissed the plaintiff’s bill.171 Lord Eldon’s view did not ultimately prevail, however. Other courts reasoned that the requirement of fraudulent intent made the Statute of Frauds inapplicable to such cases.172

**Defendant’s Liability for Suppression**

Another issue which quickly arose following *Pasley* concerned the liability of the defendant for an incomplete description of the prospective purchaser’s situation (in other words, for an omission). In *Eyre v. Dunsford*,173 the defendant told the plaintiff about a credit on a foreign house in favor of the purchaser, but neglected to mention that the credit bore the condition that the purchaser previously deposit goods worth three times the amount of the credit. The defendant, said Lord Kenyon, need not have spoken to the plaintiff, but when he did so he was obligated to “give a fair representation of what he knows.” The representation about the credit without mention of the condition was, in effect, false, and the defendant could be held liable.174 In *Ward v. Center*,175 the defendant neglected to tell the plaintiff that he held a bond of the purchaser. Justice Van Ness noted that *Pasley* had not been adopted in New York, and he expressed his view that such actions should not be encouraged.176 If the defendant had told the plaintiff about the bond, there would have been no question of fraud; as it was, however, the court was unwilling to overturn the verdict of the jury for the plaintiff.177

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171. *Id.* *Russell v. Clark’s Ex’rs*, 11 U.S. (7 Cranch) 69 (1812), Justice Marshall ruled that while *Pasley* did not create an action in equity, a plaintiff in a court of equity for other reasons would be permitted to recover for such a misrepresentation.


173. 102 E.R. 123, 1 East 318 (K.B. 1801).

174. 102 E.R. at 127.

175. 3 Johns. 271 (N.Y. Sup. Ct. 1808).

176. 3 Johns. at 281.

177. 3 Johns. at 282. *See also Zabriskie v. Smith*, 13 N.Y. 322, 331 (1855) (“The defendant volunteered to inform the plaintiff as to Smith’s business condition, with a view to procure credit for him, and it was disingenuous to withhold this material circumstance [Smith’s debt to the defendant]”); *Allen v. Addington*, 7 Wend. 9, 25 (N.Y. Sup. Ct. 1831) (noting jury instruction that the defendant’s failure to mention his judgments against the purchaser was evidence of fraudulent intent); *Rheem v. Naugatuck Wheel Co.*, 33 Pa. 358 (1859). *Cf. Bokoo & Co. v. Walker*, 14 Pa. 139 (1850) (omission of facts is evidence of insincerity, but not conclusive proof of fraud).
Extension to Securities Fraud

Pasley eventually became a popular citation for counsel and courts in all sorts of deceit actions, since it contained lengthy discussions of the nature of the action in general.178 It was an especially useful precedent in any case in which a defendant argued as a defense that he had not received any benefit from the alleged fraud.179 Perhaps its greatest contribution to modern law, however, resulted from a special set of facts not present in Pasley itself. It often happened that the representation upon which the plaintiff relied was not made directly to the plaintiff, but to another merchant. To extend Pasley to such facts would be to hold a defendant liable to a plaintiff of whom he might conceivably never have heard. The courts were, however, willing to so hold.180 The first mention of representations to others in a Pasley-type action appears in an 1808 English case at nisi prius, where the plaintiff offered evidence of such representations to prove a fraudulent connection between the defendant and the purchaser.181 The defendant had also made statements to the plaintiff, and the testimony was allowed.182

The leading case on these facts is Allen v. Addington,183 in which the court stated

Nor is it necessary that the intention should exist, to defraud the plaintiff in particular. If a person intending to defraud somebody gives a general recommendation of credit to an insolvent person, any one who sustains damage by reason of such recommendation, is entitled to an action for such damage, grounded upon

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179. See, e.g., Weatherford v. Fishback, 4 Ill. 170, 173 (1841) (uninterested defendant showed plaintiff certain land and misrepresented the land as that offered by third party for sale).

180. A defendant’s liability for representations made to those other than the plaintiff could also be an issue in the case of person falsely declaring himself to be insolvent and thereby inducing his creditors to compromise their claims. Courts were sometimes unwilling to allow these claims even when the representation of insolvency was made directly to the plaintiff. See Denny v. Gilman, 26 Me. 149 (1846). See also Edwards v. Owen, 15 Ohio 500 (1846) (refusing recovery if the plaintiff simply relied on statements to others that became known among the defendant’s creditors generally (that is, if there had been no representation made to the plaintiff)). In White v. Clarke, 29 F. Cas. 997, 1000-1001 (C.C.D.C. 1837) (No. 17,540), aff’d 37 U.S. (12 Pet.) 178 (1838), Chief Justice Cranch, the circuit justice, stated that the creditor must prove that he was induced to compromise his debt either by the news of the compounding of the debtor’s debts or by other false representations made with intent to injure, whether or not such representations were made to the creditor.


182. An analogous situation had arisen two years earlier, in an assumpsit action based on the defendant’s letter to the purchaser that the defendant would stand as security for the purchaser’s debts. Lawrason & Mason, 7 U.S. (3 Cranch) 492 (1806). Justice Marshall, writing for the Supreme Court, declared that the letter amounted to an “actual assumpsit [undertaking] to all the world,” such that anyone who trusted in the letter would have a right of action against the defendant. 7 U.S. at 496.

183. 7 Wend. 9 (N.Y. Sup. Ct. 1831), rev’d on other grounds 11 Wend. 374 (N.Y. 1833).
the fraud. This is upon the same principle as the case of the squib, which having passed through several hands before the plaintiff lost his eye, yet he sustained an action against the person who first put it in motion.184

The case was appealed to the Court of Errors and reversed on other grounds.185 The Chancellor in that case stated that an action for fraud lay whenever one intended to deceive a class of persons and someone in the class was deceived.186

The extension of liability to defendants who made representations to persons other than the plaintiffs was a prerequisite for courts to hold corporate officers and directors liable to stockholders who had purchased their shares in the open market based on statements made about the corporation to the marketplace generally or to existing stockholders. This area of the law was taken over by statutory law governing corporations and eventually by state and federal securities laws, but in the period prior to the Civil War, stockholders’ actions were based on common law fraud principles, chiefly those found in Pasley and its progeny. The clearest example of this may be found in Bartholomew v. Bentley,187 in which the defendants purported to establish a bank and defrauded the entire community. The court cited Allen v. Addington for the proposition that the plaintiff need not prove an intent to defraud him in particular, but only a “general design to defraud all such as could be defrauded.”188

In Cazeaux v. Mali,189 the defendants “issued” false stock in an existing corporation. When the fraud was discovered, the valid stock was seriously devalued based on the market’s misconception that the corporation would be liable for the false stock. The plaintiff had purchased valid stock from another stockholder before the fraud became known. The court rejected the argument that the collapse of the market for the stock resulted from the ignorance of the public rather than the acts of the defendants, stating that a wrongdoer must make amends for the consequences of his wrongful acts.190 The court described the facts as analogous to a misrepresentation as to the credit of another (in this case, the corporation).

It is not essential that the representation should be addressed directly to the plaintiff; if it were made with the intent of its influencing every one to whom it might

184. 7 Wend. at 22.
185. 11 Wend. 374 (N.Y. 1833).
186. 11 Wend. at 384. Cf. Iasigi v. Brown, 12 F. Cas. 1147, 1150, 1152 (C.C.D. Mass. 1853) (No. 6,994) (finding that no representation had been made when the plaintiffs relied on a confidential letter from the defendants to a third party, who did not have authority to show the letter to the plaintiffs), rev’d 58 U.S. (7 How.) 183, 195 (1854) (finding, over a dissent joined by three Justices, that the defendants must have known that the addressee of the letter intended to show it to others).
187. 15 Ohio 659 (1846).
188. 15 Ohio at 667.
190. 25 Barb. at 583. The court surprisingly did not mention the squib case.
be communicated, or who might read or hear of it, the latter class of persons would be in the same position as those to whom it was directly communicated; but they must have come to a knowledge of it before their purchase. 191

The court stated that “it is enough if [the representation] was in a newspaper, intended to be read by dealers in stock, and to influence them to purchase, and that it was so read by the plaintiff and did so influence him.” 192

A full discussion of common law securities fraud is beyond the scope of this article. I mention these cases only to illustrate the importance of Pasley v. Freeman in providing a basis of relief for plaintiffs defrauded in the emerging stock market. 193 Pasley and its progeny enabled a plaintiff to bring into court a defendant who not only had not received any benefit from his conduct, but who had also never had any contact with the plaintiff at all. The basic principles derived in Pasley from traditional common law rules were, half a century later, used in a world beginning to resemble our own.

Conclusion

Courts in the first half of the nineteenth century developed, but did not fundamentally change, the law of fraud. Despite the changes in the law and the enunciation of new doctrines purportedly occurring in other areas, litigants in deceit actions in the 1850s faced the same general rules as their counterparts a half-century earlier. By mid-century, any inclination to combine the action of deceit with the warranty action had been rejected, the technicalities of the writ system had ceased to defeat plaintiffs’ claims, and, thanks to Pasley v. Freeman and its progeny, the law of deceit had been made available for use in emerging factual situations. But it was not any more likely that a buyer would win his case in 1860 than in 1810, nor was it any more likely that his case would involve a commercial transaction, rather than the sale of a horse (although it was more likely that it would involve corporate stocks). What, then, was happening? Courts were applying inherited common law principles, evaluating the relative merits of the parties’ behavior (the prudence of the buyer, the honesty of the seller), considering extrinsic factors, such as the availabi-

191. Id.

192. Id. at 584-585. Justice Peabody wrote a vigorous dissenting opinion illustrating his lack of understanding of the issues involved, both in the stock marked and the law of fraud. In Morse v. Switz, 19 How. Prac. 275 (1859), the false statements had been made in a report (later published) to the superintendent of banking. The lower court held that the plaintiff, who was not a shareholder when the report was made, was not within the class intended to benefit from the statute requiring the filing of reports. The decision was overturned at general term. The reporter, in a note to the decision, described the liability of corporate officers and directors in such cases as “settled in all the courts of England and of this country.” Reporter’s Note to Morse v. Switz, 19 How. Prac. at 288.

ty of information and economic conditions, and in general seeking to do justice in the individual case without distorting the legal rules. Even in the rapidly developing area of representations of creditworthiness, the pattern is the same: continuity of principle and attention to fact.