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MISREPRESENTATION—DEFINITENESS—ENQUIRY.

"OUR law adopts the rule of the civil law, '*Simplex commendatio non obligat*;' if the seller merely made use of these expressions, which are usual to sellers who praise at random the goods which they are desirous to sell, the buyer could not procure the sale to be dissolved. A purchaser ought not to rely upon them, for it is settled that when they are false and uttered with a view to deceive, they furnish no ground for action." *Sugden on Vendors and Purchasers, p. 3.*

If a purchaser do not rely upon the statements made to him, he cannot complain of their falsity.

There is no doubt about the correctness of these rules; the difficulty, and difference of opinion, arise in their application. For example: Upon the sale of property under lease is a statement that the lease is held by "a most desirable tenant," *simplex commendatio*, or is it a statement of a definite fact, which, if untrue, will form a ground for the rescission of a contract, based upon the assumption of its truth? The words are not equivalent to "*the* most desirable tenant," but rather to "*a very* desirable tenant," which is a degree stronger than "a desirable tenant." Neither of these, however, necessarily describes such a tenant as, in every respect, a landlord's heart could covet. A tenant may be short of

perfection and yet answer the description, just as a house may be a very desirable house and yet in some respects be objectionable. What qualities, then, must a tenant possess before a vendor can risk attaching "very desirable" to his description. Sobriety is a good quality—a carouser might spoil the paper and plaster; freedom from family is another excellent feature; if the premises are used as an hotel, one who would attract guests would no doubt be attractive to landlords, for the value of the property would increase with its popularity; if, in addition to this winning characteristic, he practised close economy, with a view to regular payment of rent, he would seem to be "a very desirable tenant," and only second to one who out of his wealth would carry on the hotel for his own diversion, with liberal prodigality and pay the rent in advance—a species rarely encountered. Is, then, the term, "a very desirable tenant" a definite expression of a definite idea, or must we not, if we use the term, at once express our understanding of its import in order to avoid confusion?

The point arose in *Smith* v. *Land and House Property Corporation, 49 L. T. N. S. 532*, where the facts were as follows:

The plaintiffs advertised for sale by auction an hotel, stated in particulars to be held by a "most desirable tenant." The defendants sent their secretary down to inspect the property and report thereon. The secretary reported very unfavourably, stating that the tenant could scarcely pay the rent (400*l.*), rates, and taxes. The defendants, however, relying on the statements in the particulars, authorized the secretary to attend the sale and bid up to 5000*l.* The property was bought in at the sale, and the secretary purchased it by private contract for 4700*l.* It appeared subsequently that the quarter's rent prior to the sale had not been paid; the previous quarter had been paid by instalments, and six weeks after the sale the tenant filed his petition. It appeared, however, that the hotel business was as good during the last year as previously, and that the month of the tenant's failure was the best he had had. The plaintiffs

brought action for specific performance, relying (in answer to the defence and counter-claim for rescission on the ground of misrepresentation) on the fact that the defendants had made their own inquiries. Held, that the statement that the property was held by a "most desirable tenant" could not be treated as "*simplex commendatio*," and that the defendants, having relied thereon, were entitled to rescission of the contract, on the authority of *Redgrave* v. *Hurd*, *L. R. 20 Ch. Div. 1.*

The report made by the secretary was as follows:—

"I visited Walton-on-the- Naze with a view of inspecting the Marine Family Hotel. The hotel has been built over forty years, and up to a recent period enjoyed a high reputation as a respectable and thriving family hotel. Mr. Fleck, the landlord, from the amount of business he is now doing, can scarcely pay the amount of rent with rates and taxes. It seems to be a mystery in the town itself how Mr. Fleck, with his eyes wide open, could have been induced to to take the hotel at present rental. The only thing that I can see that can be done with the hotel to make it pay as an investment would be to make the small theatre into a kind of music-hall, and to convert the billiard-room into a sort of casino. The town itself seems to be in the very last stage of decay from beginning to end; the whole pier wrecked on the 18th Jan., 1881, has never been repaired. The landslip, which occurred on above occasion, has never been made good."

The action came on for trial, when the following evidence was given by the Lord Mayor, who was the chairman of the defendants' board on the 1st Aug., when Mr. McLewin was ordered to attend the sale and bid for the property:

"We had at the time no information as to Fleck's position except the particulars of sale. The secretary was instructed to bid 5000*l*. On the 1st Aug. there was a discussion; the particulars were before us; the "desirable tenant" was the most important part of the whole of the particulars, especially after the secretary's report. That, as far as I can see, was

the unanimous opinion of the board. I should not have bought the property if there had been any hint of any difficulty about the rent: We did not, until six weeks after, discover the condition of the tenant."

On the part of the plaintiffs reliance was placed upon a a conversation which took place between the defendants' secretary, Mr. McLewin, and Mr. Sydney Humbert, a member of the firm of Humbert and Sons, the plaintiffs' auctioneers, who was present when the contract was entered into. The evidence of Mr. Sydney Humbert was, that previously to the signing of the contract he was discussing the price with Mr. McLewin, when he (Mr. Humbert) said that 400*l.* a year ought to be worth 4700*l.*, to which Mr. McLewin replied, "It is not 400*l.* I have calculated it at 300*l.* a year." Mr. Humbert then said, "How is that? because you take it with a good tenant." To which the secretary replied, "I know all about it. I have been staying two or three days at the hotel; no one was staying there at all; two years is the outside I give Mr. Fleck to last."

The expression, "a very desirable tenant," which appears to have been thoughtlessly used by the auctioneer, is thus dealt with by the learned judge:

DENMAN, J.—"A very desirable tenant" seems to me to be a statement of a fact coupled with the fact that he is stated to be a very desirable tenant under a lease which has so many years to run, and which is at so many pounds per annum Putting it together it seems to me to amount to a statement that he is a tenant, and a desirable tenant, or at least desirable in the sense of being a person who is not insolvent, but who is able to pay his way, even although he may be behind in his rent, and not likely to break down so suddenly as this man did, being 3000*l.* to the bad, and unable to obtain credit within six weeks of the time when the contract took place."

Specific performance of the agreement was refused.

If this be law, there seems to be little scope left for auctioneers. They will have to abjure these fervid descriptions by which they are supposed to induce people to purchase, and confine themselves to "going, going, gone." Rigid morality will be vindicated, but must not "a little unpremeditated insincerity be permitted under the stress of social (or business) intercourse"?

Let us examine a few of the cases.

"Great latitude appears to be allowed to sellers in setting forth the advantages and attractions of the property they offer for sale, and when the representations are not in regard to title, but in relation to matters which are objects of sense, and as to which an intending purchaser would, if prudent, examine for himself, the courts are unwilling to relieve the purchaser from his bargain, and have refused relief in cases where the representations made were much further from the actual sober reality than in this case. It is perhaps rarely the case that purchasers are misled by the florid descriptions that are usually to be found in such advertisements; and it is generally the purchasers' own fault if they are misled." Per *Spragge*, V. C., in *Crooks* v. *Davis*, *6 Gr. p. 322.*

On the sale of an advowson, the printed particulars stated that "a voidance of this preferment is likely to occur soon." At the sale the auctioneer stated "that the living would be void on the death of a person aged eighty-two." The incumbent's age was thirty-two, but it appeared in evidence that he expected to be presented to another living on the death of its incumbent, who was aged eighty-two. Sir William Grant thought that the representation made by the printed particulars so vague and indefinite that the court could not take notice of it judicially, and that its only effect ought to have been to put the defendant upon making inquiries respecting the circumstances under which the alleged avoidance was likely to take place previous to his becoming the purchaser. *Trower* v. *Newcome*, *3 Mer. 704.*

This was approved of in *Scott* v. *Hanson*, 1 Sim. 13. In that case a piece of land, imperfectly watered, was described

in the particulars as uncommonly rich water meadow. On decreeing specific performance, Sir J. Leach said:—"I agree with Sir W. Grant, M. R., that a representation which is vague and indefinite is to be treated, by a purchaser, only as a ground for inquiry."

On the negotiation for a lease the lessee asked the lessor what the taxes would be on the property, and the lessor answered that they were about $70 or $75, but that he could not tell exactly, as he had never separated them from his personal assessment. The fact was that for some years the taxes had been nearly double the amount named. The lessee, however, accepted the owner's statement and executed the lease without making reference to the chamberlain's office, where the exact amount could have been ascertained. V. C. Blake said:—"What the defendant did, was to make a speculative statement, on which I do not think the plaintiff was justified in acting. It was such a statement as comes under the language of Sir James Wigram: 'I agree that an indefinite representation by a vendor ought to put a purchaser upon enquiry.' * * * Even if I arrived at the conclusion that the representations were essentially material to the subject in question, I cannot say the plaintiff used proper diligence in the course of the transaction."

Mr. Justice Taylor, in *Huggard* v. *Towner* (unreported), refused to rescind a sale based upon a representation that the property sold was "suitable for a town site," whereas in fact one half of it was annually submerged by the spring floods. He thought, and experience proves, that many places are suitable for town sites although all the year round of marshy character, and that the representation therefore, lacked the quality of definiteness. This learned judge, too, is not one disposed to allow too much scope for the *caveat emptor* plea. In *Hutchinson* v. *Calder*, *1 M. L. R. 18*, he quoted, with approval, the words of V. C. Page Wood:—"The view taken by this court as to the morality of conduct among all parties is one of the highest morality. The standard by which parties are tried here, is a standard, I am thankful to say, far higher than the standard of the world."

We are disposed to think that the words, "a very desirable tenant," occuring in an advertisement would not be taken by any one, at all familiar with the ways of the world, as anything more than the usual puffing commendation, as something calculated, not to mislead, but merely to attract the attention of the public to the sale, as similar to such statements as "splendid investment," "magnificent opportunity," "choicest locality," "better than the best," "extremely desirable property," "just the thing for a gentleman's residence," and many similarly "florid descriptions that are usually to be found in such advertisements."

We are also disposed to think that the decision should, if appealed, be reversed, on the ground that the Company did not rely upon the representation. It was stated that the Board having before it the report of the secretary determined, notwithstanding its statements, to rely upon the advertisement and to purchase the property upon the faith of it. The fact of sending the secretary to the property is amply sufficient to show that the Board placed no dependence whatever upon the advertisement; and after they had the report, they cannot possibly pretend that they paid no attention to it, but believed an advertisement which it contradicted. It is hard to understand how the directors could have the courage to swear that they were such simpletons, and had they, in case of loss, made the explanation to their shareholders instead of to a judge, they would probably have had an opportunity of listening to some valuable dissertations on the methods usually pursued by business men.

With great deference, therefore, we think, (1), that the statement was not of that definite character which is necessary to the rescission of a contract; (2), that, even if definite, the unsupported testimony of the defendants that they relied upon the representation would not be sufficient to induce the court to believe that business men acted as fools; and, (3), that having made enquiries, and having before them the report of their secretary, it is proved affirmatively that they did not rely upon the statement.

ARGUING vs. WRANGLING.

Unskilfulness in boxing, cricket, and other sports shows itself in blind and futile eruptions of nervous energy. The adept is always self-possessed, watchful and effective. In debate the same contrast may be observed. The novice cannot keep still; he must be continually lunging out at his opponent or the judge. If his adversary lays down a proposition of law, it must be instantly denounced; if he contends that the evidence bears a certain complexion, he must be immediately contradicted; if the judge asks a question, it is assumed that only one person is capable of answering it; and after a ruling is given, or a judgment pronounced, it requires several minutes to bring the wrangler to a knowledge of the fact that he is beaten. Let a debate between such men as Edward Blake and Dalton McCarthy be compared with the every day babel and wrangle of our chambers, and our remarks will be amply justified. The object of argument is to convince the judge, not your opponent. It should be borne in mind that the judge does not require constant aid in order that he may retain his common sense, and that for an appeal to his reason argument is more effective than noise.

Interruption is sometimes not only justifiable but imperative. If, in reply, an advocate intentionally, or otherwise, misquote evidence, he should, with an apology for the interruption, be at the moment put right; and, indeed, an interruption at any stage may be justified upon this ground. We have always thought, however, that when the rules of debate permit a reply, it is the very worst policy to point out errors during your opponent's address. Let him proceed, let him build up his argument upon a misconception of the evidence or the law, let him assume premise after premise and cover himself with glory. Your task is being made easy. When your turn comes you have no ingenious argument to meet, you are hampered with no fine distinctions; you point out that there is no foundation for the grand superstructure, and your case is won. Interrupt your

opponent, point out to him that his half-hour has been wasted, and, before he sits down, he will supply in some way the deficiency, or adopt some other argument which it may be impossible to meet.

Let, then, interruption be tempered with discretion, and, above all, with politeness. Barristers, whose manners are in other places unimpeachable, seem to forget that the rules of civility and gentlemanly demeanor are for public as well as private life, and that it is, if possible, a more gross breach of culture to shout down one who is addressing a judge than to break in upon a friend's conversation. Respect must be shown for the judge as well as the one who is addressing him. The one is listening, the other speaking, and your interpolation interrupts both listener and speaker.

This brings us to another point. If the judge sees that interruption is either improper, or ill-regulated, or coarse, the rebuke should come quietly from him. If it be left to the speaker, it will be administered under a sense of annoyance and irritation, and it will not tend to harmony or tranquillity. Let the judges insist upon the observance of the prescribed order of addresses. Let there be the opening, the answer, and the reply, and let us be saved from the wrangle which, in Manitoba, so frequently commences at the opening, and culminating towards the end of the reply merges in it, and continues to rage until the disputants weary of their repetition. The training which our young men are at present undergoing will soon unfit them for argument, and render their opposition offensive.

THE JUDICATURE ACT.

A CORRESPONDENT finds fault with our advocacy of the introduction of the Judicature Act, and asserts that an extremely small minority of the profession are in favor of it. We can hardly believe that the profession in Manitoba are so unprogressive as our correspondent believes. To test the matter, we have determined to ask each member of the bar (not each firm) to send us a post-card answering the following questions:—

1. Do you approve of the unification of the rules of decision?

2. Do you approve of the unification of practice and pleading?

3. Do you approve of the introduction of those portions of the Judicature Act relating to joinder of causes of action, joinder of parties, third parties and costs?

The post-cards may read "yes, yes, yes," or "no, no, no," or as the writer may desire—it will not be necessary to copy the questions.

1. By the unification of the rules of decision is meant the assimilation of the principles followed by the two systems of law and equity. Is it advisable to have two sets of antagonistic principles of law administered by the same court? Is it advisable that the law should be in such condition that if an action is brought at law the plaintiff will succeed, and if in equity he will be defeated? Is it proper that the court should be driven to the device of inserting the words "in equity" in common law papers before justice can be done? (See *Fisher & Brown*, reported in the present number of the MANITOBA LAW REPORTS.) Is it not better to have one set of principles than two, with the uncertainty as to which set the judge will, by exercise of his power of amendment, apply to your case?

2. As to pleading and practice, is there such a divergence between common law and equity cases that they imperatively require different systems by which they may be brought to trial? England and Ontario prove that there is not, but that wherever a man has a cause of action, even a legal mind may be trained to state the grievance in common language, and that there is no greater difficulty in stating plainly the defence. Is it then advisable to maintain the two systems? Have we not enough to learn without doubling any part of our work?

3. We refer our readers to the February number of this journal for a short statement of the matters referred to in the third question.

May we ask members of the bar to send their replies as early as possible.

THE LATE SIR JOHN BYLES.

THE celebrated author of "Byles on Bills," formerly a judge of the Court of Common Pleas, died on the 3rd of February. The *Law Journal* (London) says:—

"The career of Sir John Byles was that of a most successful advocate at the bar, and a very learned lawyer as barrister and judge in one branch of legal study. 'Byles on Bills' for accuracy and clearness is among the best law books in the English language. Lawyers and judges have for years turned to it for information with absolute confidence. It is not too much to say that without it the codification of the law of bills of exchange would have been impossible. Sir John Byles took an interest in this book up to a very few weeks before his death. A question whether its copyright had not been infringed was referred to him to decide whether any and what proceedings should be taken. We believe the matter was amicably arranged, but the incident is curious as showing that one of his last acts was in

vindication of the book which in the future will be his chief title to fame. Sir John was thirty years of age before he was called to the bar, and up to that he had been in business. His business experiences, perhaps, suggested to him the production of a book on one of the most important branches of commercial law. The success of the book still further determined the bent of his legal studies and practice. He became a good commercial lawyer, but he never gained any great reputation in other branches of the law. His mind wanted that breadth and clearsightedness which are essential to the intellectual equipment of a great lawyer, who is to lay down propositions of universal application. He will never take the place filled by James, Willes or Jessel, but will always be known as Byles on Bills, a result to which the 'artful aid' of alliteration conduces. Many are the stories told of Sir John Byles when at the bar and on the bench. His horse figures in several of them. When he was at the bar he had a horse, or rather a pony, which used to arrive at King's Bench Walk every afternoon at three o'clock. Whatever his engagements, Mr. Byles would manage by hook or by crook to take a ride, generally to the Regent's Park and back, on this animal, the sorry appearance of which was the amusement of the Temple. This horse, it is said, was sometimes called 'Bills," to give opportunity for the combination 'there goes Byles on Bills;' but if tradition is to be believed, this was not the name by which its master knew it. He, or he and his clerk between them, called the horse "Business;" and when a too curious client asked where the Serjeant was, the clerk answered with a clear conscience that he was 'out on Business.' When on the bench, Mr. Justice Byles' taste in horseflesh does not seem to have improved. It is related of him that in an argument upon section 17 of the Statute of Frauds he put to the counsel arguing a case, by way of illustration. 'Suppose Mr. So and So' he said, 'that I were to agree to sell you my horse, do you mean to say that I could not recover the price unless, and so on. The illustration was so pointed that there was no way out of it but to say, 'My lord, the section applies only to things of the value of 10*l.*' a retort

which all who had ever seen the horse thoroughly appreciated. Instances of his astuteness in advocacy were numerous. His mode of winning cases was not by carrying juries with him by a storm of eloquence, or cross-examining witnesses out of court, but by discovering the weak point in his adversary's case and tripping him up, or by the nice conduct of such resources as his own case possessed. On one occasion he was retained for the defendant with Mr., afterward Mr. Justice, Willes, whom he led at the bar, but who was afterward his senior in the Court of Common Pleas, in a case of some complication tried before Chief Justice Jervis. At the end of the day (Saturday), Mr. Byles submitted that there was no case, and the judge rose to give his decision next week. In the interval Willes asked Byles why he did not take a particular point which both had agreed in consultation to be fatal to the plaintiff's case. 'I left that to the Chief Justice, 'said Byles; 'I led up to it, and walked round it, so that he cannot miss it, but if I had taken it he would have decided against us at once.' And so it proved, for on Monday morning the Chief Justice gave an elaborate judgment overruling all the points taken, but nonsuiting the plaintiff on a ground which he said he was astonished to find had not been taken by either of the very learned counsel for the defendant, but which in his opinion was conclusive. In another case Byles was for the plaintiff, and Edwin James for the defendant, in an action on a bond tried before Chief Justice Tindal. Byles was a long time in opening his case and examining his witnesses, until the Chief Justice became restless. Still more restless was Edwin James, who wanted to go elsewhere. Byles, seeing his impatience, whispered to him, 'give me judgment for the principal, and I will let you off the interest.' Accordingly a verdict was taken for the plainttff for the amount of the bond without interest. Afterward Edwin James asked Byles why he had foregone the interest? 'You need only have put in the bond,' said he, 'and you would have had both.' 'That was just the difficulty,' said Byles, 'the bond was not in court.' In those days adjournments were not so easily granted as now, and in any ease the costs of the day would have exceeded the

interest. A reputation for successes like these made Byles a formidable adversary.

On one occasion at Norwich he had for an opponent a counsel whose strong point was advocacy rather than law. Byles, who was for the defendant, went into the court before the Judge sat, and in presence of his opponent he called to his clerk, 'What time does the midday train leave for London?' 'Half-past twelve, sir.' 'Then mind you have everything ready; and meet me in good time at my lodgings.' 'But, Serjeant,' said the plaintiff's counsel, 'this is a long case; it will last at least all day.' 'A long case!' said Byles; 'it will not last long; you are going to be non-suited.' The advocate, who stood much in awe of his opponent's legal skill and knowledge, spoke to his client. The result was that the case was settled for a moderate sum, and Mr. Byles caught his train.

Mr. Justice Byles was a strong Tory, and had a horror of Judicature Acts, the fusion of law and equity, and other modern innovations which were floating in the air in 1873. He declared that he would not remain an hour longer on the bench than his fifteen years.

On the first day of Hilary Term, 1858, he took his seat on the bench of the Court of Common Pleas, and on the first day of Hilary, 1873, his resignation arrived. The moment was inconvenient for the appointment of a new judge, but the judge could not resign before, and he would not wait a moment. Of his career on the bench it is enough to say that he was acute, courteous, and upright, as he was kindly in private life. His name is not connected with many great decisions, but he took part in the case of *Chorlton* v. *Lings*, in which it was decided that women did not obtain Parliamentary votes by the representation of the people act, 1867, in virtue of the new franchise conferred on 'every man.' His judgment is an example of his rather quaint and old-fashioned judicial style. 'No doubt,' he says, 'the word man in a scientific treatise on zoology or fossil organic remains would include men, women and children as constituting the highest order of vertebrate animals. It is also

used in an abstract and general sense in philosophical or religious disquisitions. But in almost every other connection the word is used in contradistinction to women. * * * Women for centuries have always been considered legally incapable of voting for members of Parliament, as much so as of being themselves elected to serve as members. In addition to all which, we have the unanimous decision of the Scotch judges. And I trust their unanimous decision and our unanimous decision will forever exorcise and lay this ghost of a doubt, which ought never to have made its appearance.' The following anecdote is also floating around:—A learned counsel on one occasion was pleading a cause before Sir John Byles, and made a quotation from a work, 'which,' said he, 'I hold in my hand, and is commonly called 'Byles on Bills.' Sir John Byles: 'Does the learned author give any authority for that statement?' Counsel, referring to the work: 'No, my lord, Icannot find that he does.' Sir John Byles: 'Ah! then do not trust him; I know him well.'

ADVERTISING.

ETIQUETTE has established the limits within which a lawyer may attract public attention. Largely for lack of a law journal to keep guard in this matter, there have been several instances lately in which it has been only too apparent that the prescribed limits have been exceeded, and that under cover of a newspaper report of some trial, or intended action, the world is notified that Mr. ————'s indispensable services have again been had in requisition. We beg to inform all concerned that we will, in such cases, transfer the advertisements to our columns, and make no charge for the publicity. Some of the envelopes in use, too, savour of the mercantile. The English *Law Journal* for 1st March, 1884, says: "Professional opinion of late has become degradingly callous to what were once the unpardonable sins

of "touting," and "hugging." Let not the far west be too far in advance of the old-fashioned customs.

After this warning, we will not scruple to give the advertiser's name.

Since writing the above, the following advertisement has appeared in the local column of an evening newspaper. It is too transparent to do the writer of it any service.

"BRANDON ASSIZES.

"Mr. ————, barrister, left for Brandon this morning, "being retained to defend one ————, who is to be tried "there before the Chief Justice, for ————————. "He is also engaged as counsel in an important suit against the "C. P. R., also entered for trial there. Mr. ———— 's "successful defence in the late ———— case seems to be "bearing fruit."

REVIEWS.

HOLMESTED'S RULES AND ORDERS. (*a*)

THIS is a capital book, and will be of much use to Manitoba practitioners. The first volume, just to hand, contains all the Ontario Chancery Orders unaffected by the Judicature Act, with copious annotations. The book presents very much the same appearance as Mr. Justice Taylor's work. The arrangement of the notes is an improvement upon anything that we have seen. By grouping the cases under appropriate headings, and by a plentiful use of black letter and italics, the eye is at once carried to the object of the search. The notes upon the orders relating to parties, proceedings in Master's office, &c., are extremely valuable.

(*a*) The General Rules and Orders of the Courts of Law and Equity of the Province of Ontario, passed prior to the Judicature Act and now remaining in force, with notes, by George Smith Holmested, Registrar of the Chancery Division. Vol. I. The Chancery Orders. Toronto: Rowsell & Hutchinson.