CIVIL REMEDIES AVAILABLE TO BUYERS UNDER THE IOWA SECURITIES LAW

Persons who have invested in securities which have turned out to be less valuable than they were represented to be frequently are able to choose among a number of private remedies. These remedies may be classified into three categories (1) remedies at common law or in equity, (2) remedies, express and implied under the federal securities statutes, (3) remedies, express and implied under the state Blue Sky laws. The federal statutes with respect to securities specifically save all other remedies and approximately half of the state Blue Sky laws specifically save the non-statutory remedies.[1] Thus a plaintiff can use any combination of non-statutory remedies although he will not be permitted to obtain more than the maximum amount recoverable under any of the applicable remedies, or his actual damages, whichever is greater.[2] The choice of remedies must depend on the circumstances of each case. Though the purpose of this paper is to discuss the availability and desirability of the civil remedies provided by the Iowa Securities Law[3] the salient characteristics of the other remedies will be set out for purposes of comparison.

A. Common-Law and Equitable Remedies

1. *Breach of Warranty.* The cause of action for breach of warranty is very limited in the securities field. It is not clear whether securities are "goods" within the language of the Uniform Sales Act.[3½] This means that the only warranties implied from the mere sale, whether under the uniform statute or otherwise, are a general warranty of title and a warranty that the stock or bond is a general security of the kind its purports to be on its face; there is no implied warranty of quality or value.

2. *Rescission.* The elements of rescission are *misrepresentation* of a *material fact* on which the buyer *relied.* The buyer need not show that he has been damaged nor that the seller knew that he was violating the Act. The theory of rescission may also be used defensively in resisting a seller's action for breach of contract or action for the price.

This remedy has some undesirable features, however. Not the least of these is the problem of distinguishing between a statement of fact on the one hand, and an expression of opinion, forecast, statement of law or of value on the other. Another is the prerequisite of privity between the parties, and still another is the problem of being able to restore the seller to his *status quo*. Elements of the latter requirement are tender, laches, waiver and ratification. The difficulties of *status quo* may be illustrated by the laches problem. A buyer discovers the misrepresentation while the security is "booming". If he waits and subsequently the market drops he may run into the successful imposition of the laches defense to his claim for rescission.

3. *Deceit.* The same elements as rescission must be proved so far as misrepresentation of a material fact and reliance are concerned. In addition,

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[1] See 3 Loss, Securities Regulation, 1623 (2d ed. 1961). For a general discussion of civil liabilities in securities transactions see 3 Loss, Securities Regulation, Ch. 11 (2d ed. 1961).

[2] See Iowa R. Civ. P. 22 for the Iowa rule on joinder of actions.

[3] Iowa Code Ch. 502 (1962).

[3½] Iowa Code § 554.13 (1962).

the buyer must prove that he suffered damages as a consequence of his reliance on the misrepresentation. The greatest difficulty in establishing a cause of action in deceit is the necessity of proving *scienter*. The latter term has been defined to mean everything from knowing falsity with an implication of *mens rea* through various gradations of recklessness down to such non-action as is virtually equivalent to negligence[4] or even liability without fault.[5] In an action for *deceit* there is no absolute requirement of privity as there is in rescission, however. Thus it is possible to hold third parties in a deceit action if the plaintiff is one to whom, or to influence whom, the third party made the representation. In the case of an individual defendant there is always the problem of proving that he actually participated in the making of the representation by his corporation. Iowa, along with the majority of the states, applies the "loss-of-bargain" measure of damages in deceit.[6]

B. Civil Remedies under the Federal Securities Acts

The remedies under the Securities Act of 1933[7] and the Securities and Exchange Act of 1934[8] divide themselves conveniently into two areas: those expressly declared by the Acts and those impliedly found by the courts.

1. *Express Remedies.* Three express remedies are made available to buyers and sellers under the Securities Act and two under the Exchange Act.

Of the three express liability provisions in the 1933 Act, section 11 imposes liability for misrepresentations in registration statements and sections 12(1) and 12(2) impose liability for certain types of sales. Briefly stated, section 11 allows purchasers of a registered security to bring an action against certain designated persons upon a showing that the registration statement contained an untrue statement of a material fact or one necessary to make the statement not misleading. Section 12(1) allows purchasers of securities which should have been registered to bring an action based either upon the failure to register or upon failure to furnish to investors a prospectus containing facts set forth in the registration statement. Section 12(2) provides for civil liability for any material untrue statement or omission made by use of the means of interstate commerce or the mails. Under sections 12(1) and 12(2) the buyer is limited by a privity requirement to recovery only from his immediate seller or from any person who controls the seller. The immediate seller then has an action against his predecessor in the chain of distribution as a third party defendant. The real nemesis to buyers' actions under sections 11 and 12 of the 1933 Act has been the one year statute of limitations set forth in section 13.

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[4] American Universal Insurance Company v. Scherfe Insurance Agency, 135 F. Supp. 407 (S.D. Iowa, 1954) (*scienter* may be proved by showing that a party's special situation or means of knowledge were such as to make it his duty to know as to the truth or falsity of the representation).

[5] See 3 Loss, Securities Regulation, 1432 (2d ed. 1961).

[6] Smith v. Middle States Utilities of Del., 224 Iowa 151, 275 N.W. 158 (1937). Some states and the American Law Institute have followed the so-called tort measure or "out-of-pocket" rule, under which the buyer is limited to the difference between the purchase price and the value at the time of delivery. This was also the pre-*Erie* federal rule. See 3 Loss, Securities Regulation, 1629 (2d ed. 1961). It is intended to make the buyer "whole" while the benefit-of-the-bargain rule is intended to put the buyer in the position he would have been if all things had been as they were represented by the seller.

[7] Securities Act of 1933, 48 Stat. 74 (1933), 15 U.S.C. §§ 77a-77bbbb (1958).

[8] Securities Exchange Act of 1934, 48 Stat. 881 (1934), 15 U.S.C. §§ 78a-78hh (1958).

Section 9 of the 1934 Act in essence provides for an action for damages against any person who engages in manipulative and deceptive practices with respect to securities registered on a national exchange. The plaintiff must prove not only that the price of the security was affected by the violating act, but also the extent to which it was affected. Thus the remedy has been nearly useless and becomes more useless as manipulators become more cunning and manipulations become more complicated.

Section 18 of the 1934 Act provides for civil liability for misleading statements of material facts in papers filed under the Exchange Act or any rule thereunder. The action necessitates that the purchaser prove that the price of the security was affected by the misstatement, a generally impossible task, and his damages are limited to those caused by reliance on the misstatement. These requirements, plus the provision of a defense if the defendant proves "that he acted in good faith and had no knowledge that such statement was false or misleading," have thwarted prospective plaintiffs and rendered the remedy ineffective.

2. *Implied Remedies.* The most general civil remedy impliedly granted, and the one most frequently used in the decided cases, is that arising out of section 10(b) of the Securities Exchange Act of 1934 and the Commission's Rule 10b-5 thereunder. By their terms both the section and the rule apply to frauds in connection with the sale or purchase of securities. The rule is specifically aimed at the half-true representation and speaks not in terms of *scienter* or intent to defraud, but rather in terms of falsehood and omission to state a material fact. Neither the section nor the rule provide expressly for civil suits by persons injured as a result of a violation. Nevertheless, in 1946 a United States District Court, in *Kardon v. National Gypsum Co.*,[9] used the implied tort theory to find a remedy for plaintiffs who were induced by fraudulent misrepresentations and suppressions of the truth to sell their stock to the defendants for far less than its true value. The *Kardon* rationale has since been followed by the United States Courts of Appeals in the Second,[10] Third,[11] Fifth,[12] and Ninth[13] Circuits. It has never been rejected and appears to be well established in the law. The plaintiff under 10(b) is not hampered by the short statute of limitations,[14] or by the affirmative defense of a reasonable investigation of lack of knowledge on the defendant's part, nor by the burden of proving that he did not know of the untruth or omission as he must under section 12(2) of the 1933 Act.

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[9] 69 F. Supp. 512 (E.D. Pa. 1946).

[10] Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951).

[11] Slavin v. Germantown Fire Ins. Co., 174 F.2d 799 (3d Cir. 1949).

[12] Hooper v. Mountain States Sec. Corp., 282 F.2d 195 (5th Cir. 1960).

[13] Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961).

[14] Section 10(b) provides no statute of limitations and the courts have looked to the local fraud statute, which is generally 2 years or longer. See Fratt v. Robinson, 203 F.2d 627 (9th Cir. 1953). Where the action is based on a right for which the sole remedy is equity, the equitable doctrine of laches applies. See Slavin v. Germantown Fire Ins. Co., *supra*, note 11. Where the right may be enforced by means both legal and equitable, the enforcement of the claim is limited by both the applicable statute of limitations and by laches. In either situation the applicable statute and laches do not begin to run until evidence of fraud is discovered or could have been discovered with reasonable diligence. See Tobacco & Allied Stocks v. Transamerica Corp., 143 F. Supp. 323 (D. Del. 1956).

Private rights of action have also been implied from violations of section 17(a)[15] of the 1933 Act, the general anti-fraud provision. It forbids such acts by sellers only and thus overlaps with section 10(b) if a civil remedy is implied.

Section 6(b),[16] 7(c),[17] 14(a),[18] 11(d)(2),[19] and 15(c)(1)[20] of the Exchange Act have also been construed to give rise to private rights of action.[21]

C. Iowa Securities Law

The present Securities Law follows the general pattern of legislation of the Uniform Blue Sky Law.[22] The Iowa Law adopts the three-pronged approach of the Uniform Act in that it requires registration of securities, and registration of brokers and dealers, and contains anti-fraud provisions[23] which on their face seem penal but when read in conjunction with the civil remedies section[24] also afford private remedies.

Securities issues are registered by qualification on application of the issuer of securities or of a registered dealer. To obtain registration the applicant must make an appropriate showing of facts to enable the department to satisfy itself that "the sale of the security would not be fraudulent, or would not work or tend to work a fraud upon the purchaser, and that the enterprise or business of the issuer is not based upon unsound business principles."[25] The commissioner of insurance may require the applicant to

[15] Thiele v. Shields, 131 F. Supp. 416 (S.D. N.Y. 1955); Osborne v. Mallory, 86 F. Supp. 869 (S.D. N.Y. 1949).

[16] Baird v. Franklin, 141 F.2d 238 (2d Cir. 1944).

[17] Remar v. Clayton Sec. Corp., 81 F. Supp. 1014 (D. Mass. 1949).

[18] Dann v. Studebaker-Packard Corp., 288 F.2d 201 (6th Cir. 1961).

[19] Hawkins v. Merrill, Lynch, Pierce, Fenner & Beane, 85 F. Supp. 104 (W.D. Ark. 1949).

[20] Osborne v. Mallory, 86 F. Supp. 869 (S.D. N.Y. 1949).

[21] Under both the Securities Act and the Securities and Exchange Act, the plaintiff has a choice of bringing suit either in the district where the defendant is found or where he is an inhabitant or transacts business. Under the Securities Act the plaintiff has the additional option of bringing suit in the district where the offer or sale took place, if the defendant participated in the offer or sale. Under the Exchange Act the plaintiff may institute his action in the district where the act or transaction constituting the violation took place. Under both Acts, purely intrastate issues are exempt from regulation.

[22] Administration of the Act is vested in the insurance commissioner of the state of Iowa by section 502.2 of the IOWA CODE. As amended that section specifically gives the commissioner power to promulgate rules and regulations under the Act. H.F. 178 (61 G.A.). Virtually all regulatory securities acts contain a provision of this nature. In Iowa, this power has heretofore been implied by case law only. See Fund of North America v. Miller, 226 Iowa 1101, 285 N.W. 629 (1939).

All states but two, Nevada and Delaware, have some kind of state securities law. Twenty-five states have voidability provisions. Sixteen states have enacted one or more sections of the Uniform Blue Sky Law. For tabloid presentation of state provisions see 3 LOSS, SECURITIES REGULATION, 1662 (2d ed. 1961).

[23] IOWA CODE § 502.26 (1962).

[24] IOWA CODE § 502.23 (1962).

[25] IOWA CODE § 502.7 (1962). Note the paternalistic approach of the state law as compared with the Federal Securities Act of 1933. Under state law the insurance commissioner makes the decision whether the particular issue "qualifies" for sale in Iowa. Under the federal act the S.E.C. insists only that a full disclosure is made and the ultimate decision rests with the buyer. As a practical matter, the difference is more apparent than real. The S.E.C. by means of revocation of registration and the use of stop orders exerts sufficient influence over prospective issuers so that it is not likely that an issue of which the commission disapproves will be effectively marketed.

submit to him information respecting the names and addresses of the officers, directors and trustees of the corporation, the location of the issuer's principal business office, the purpose of incorporation (if incorporated), the general character of the business, a statement of capitalization, copies of all circulars, advertising matter of such securities, prospectuses, a statement of income during last fiscal year, a statement showing the price at which such security is proposed to be sold, the maximum amount of commission paid in connection with the offering, a detailed statement showing items for which securities were issued, the amount of capital stock which is to be set aside and disposed of as promotion stock if the issuer is a corporation, and a certified copy of the articles of incorporation.[26]

The Act requires that all dealers and salesmen of securities including exempted securities except in exempt transactions to be registered in the office of the commissioner. Registration may be gained by application in writing to the commissioner. The applicant must disclose *inter alia* the names and addresses of his business affiliates, the general plan and character of his business, general information respecting his previous history and record. If the commissioner finds him of good repute in business he shall register the applicant upon his paying the registration fee and filing of a bond required by the statute. He may in his discretion refuse or revoke any registration granted after reasonable notice and hearing and for cause.[27]

The anti-fraud provisions of the Act are concurrent with and probably more extensive than those of the federal acts. Section 502.26 providing that any person making false representations and false entries in reports to the commissioner is guilty of a *felony,* is unique in that the provisions prohibiting the making of a false statement to the commissioner relative to the financial condition of a company make no mention of the necessity of guilty knowledge or criminal intent. Earlier versions of the statute included these requirements.[27½] The Iowa Supreme Court has interpreted the present statute as rendering unnecessary in a criminal prosecution under Section 502.26 proof of defendant's knowledge of the falsity of his statements.[28]

[26] A somewhat abbreviated method of securities registration may be utilized by certain issuers who have for at least five years been in continuous operation and have during that time not defaulted in payment of principal or interest or dividends on any security and who have had average net earnings. This method is called notification. Whether registration is by notification or by qualification, the insurance commissioner has complete discretion to deny or revoke the registration any time he feels that the Act has not been complied with. IOWA CODE § 502.7 (1962). An amendment by the 61st General Assembly gives the commissioner authority to require the filing of more detailed financial information in certain instances where this is necessary to properly review a registration application, and to require certified or audited financial statements when this appears advisable. H.F. 177 (61 G.A. 1965).

[27] The broker and dealer registration provisions are found in IOWA CODE § 502.11 (1962). H.F. 174 (61 G.A., 1965) amends that section to give the commissioner additional power to establish minimum financial requirements to be met and maintained by registered dealers and dealer applicants. This is in line with current requirements in many states and proposed rules under the Federal Securities Exchange Act of 1934.

[27½] IOWA CODE § 1920-t9 (Supp. 1913).

[28] State v. Dobry, 217 Iowa 858, 250 N.W. 702 (1933), appeal dismissed 293 U.S. 519 (1934). A seller may also be convicted of a felony for willfully evading the provisions of the Act and for knowingly making misrepresentations to prospective buyers as provided by sections 502.27 and 502.28, respectively.

The heart of the Iowa Securities Law, so far as civil remedies are concerned, is section 502.23. The theory of this section is that a buyer of securities may at his election void the sale if the sale was made in violation of any provision of the Act. This, of course, resembles common-law rescission. Some of the pitfalls of common-law rescission have been eliminated in the statute, however. For instance the statute does not require a showing that the defendant made a material misrepresentation of fact upon which the plaintiff relied. The statute states that "every sale or contract for sale made in violation of the provisions of this chapter shall be voidable at the election of the purchaser . . . ." Thus, rescission is available to the buyer not only when there has been a misrepresentation or fraud practiced on him, but also when the securities were not registered (and not exempt) and (in a non-exempt transaction) when the broker or dealer who sold them was not registered. As in common-law rescission, the buyer need not show any causal connection between the violation and his loss, nor need he be able to show a loss. The statute does, however, require that the seller when he participated in the sale *knew* that such was in violation of the Act. The inclusion of the knowledge requirement was, perhaps unwise. If the purpose of the statute is to protect the buyer[29] and it does this by broadening the common law remedies already available to him this could have been much more effectively done by subjecting the seller to strict liability for any violation. Only two states, Iowa and Oregon, retain the knowledge requirement. All others impose strict liability on violators of these statutes.[30] Under Iowa law the burden is on the plaintiff to show that the persons sought to be held liable participated in making the sale did so knowing that the law was being violated.[31]

The theory of Section 502.23, like that of common law rescission, is to restore the parties to their original position or *status quo*. The measure of damages is the full amount paid by the purchaser, together with taxable court costs and reasonable attorney's fees plus interest. The *status quo* requirement brings to the fore many of the same problems which are encountered in a common-law rescission action. One of the most troublesome of these is that of "tender" back to the seller of the securities purchased by the plaintiff. Section 502.23 specifically provides that one seeking to void a sale or contract for sale must make a "tender to the seller in person or in open court of the securities sold or of the contract made . . . ." The cases seem to be in agreement that tender of the identical certificates as originally purchased is sufficient even where the securities have become worthless,[32]

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[29] Wagner v. Kelso, 195 Iowa 959, 193 N.W. 1 (1923); Covert v. Cross, 331 S.W.2d 576 (Mo. 1960); Schvaneveldt v. Noy-Burn Milling & Processing Co., 10 Utah 2d 1, 347 P.2d 553 (1959); Reilly v. Clyne, 27 Ariz. 432, 234 Pac. 35 (1925).

[30] 3 Loss, SECURITIES REGULATION, 1637 (2d ed. 1961).

[31] Baumchen v. Donahoe, 215 Iowa 512, 242 N.W. 533 (1932).

[32] Commissioner of Banks v. Chase Securities Corp., 298 Mass. 285, 10 N.E.2d 472 (1937) (where securities had become worthless); Hammer v. Sanders, 8 Ill. App. 2d 414, 134 N.E.2d 109 (1956) (where securities were undivided working interests in producing oil and gas wells evidenced only by invoices); Covert v. Cross, 331 S.W.2d 576 (Mo. 1956) (where securities were tendered for the first time in open court, held sufficient tender); Christie v. Brewer, 274 S.W.2d 265 (Tex. Ct. Civ. App. 1964) (where securities were tendered along with a demand of an exhorbitant amount, tender held sufficient because sellers were not prejudiced thereby); *cf.* Riggs v. Riggs, 322 S.W.2d 571 (Tex. Ct. Civ. App. 1959).

or where the plaintiff's demand is for an exhorbitant amount. But what of the case where the plaintiff has sold his shares before discovering that he might void the sale or where he has exchanged them for new shares in a corporate reorganization? The landmark in this area is an Eighth Circuit case out of Iowa, *Huglin v. H. M. Byllesby & Co.*[33] In that case Huglin had sold his shares before learning that they were sold to him in violation of the law. In court he tendered the same number of shares as he had originally purchased. It was discovered that Huglin had acquired the shares after the proceedings had begun. The court said in effect that it was a reasonable requirement that the buyer must make a tender of securities which are equivalent to those purchased and held that Huglin had met that requirement. The consensus of the cases seems to be that the same identical shares need not be tendered if in fact they are equivalent to those sold to the plaintiff by the seller. If in fact the securities sold are worthless at the time of the trial the securities tendered may differ from those actually purchased if they generally represent the same or similar rights as those originally purchased.[34] There is some authority that if the securities are worthless at the time of the initiation of the action no tender at all need be made.[35]

Certain equitable defenses which ordinarily appear in an action for common-law rescission have been brought over into the field of statutory rescission under the Securities Act. These are the doctrines of "estoppel" and "pari-delicto". In this area estoppel may be defined as some degree of participation or acquiescence in the affairs of the issuer by the buyer *after* the illegal transaction has taken place.[36] A classic case on the subject is an Illinois case, *Bunge v. Kirchhoff.*[37] In that case the buyer discovered that he could rescind shortly after he had made the purchase. Instead he chose

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[33] 72 F.2d 341 (8th Cir. 1934).

[34] *Ibid.;* Commissioner of Banks v. Chase Securities Corp., 298 Mass. 285, 10 N.E.2d 472 (1937) *appeal dismissed,* 302 U.S. 660 (1938); Porkop v. Krenek, 374 S.W.2d 265 (Tex. Ct. Civ. App. 1964) (tender of one share in successor corporation for every three shares originally purchased held sufficient).

[35] McAtee v. Garred, 185 Okla. 314, 91 P.2d 1095 (1939); Moe v. Coe, 134 Ore. 436, 263 Pac. 925 (1928). But where the plaintiff has exercised certain ownership rights over the securities so that he cannot restore the seller to status quo the courts are likely to find insufficient tender. Weisbrod v. Lowitz, 282 Ill. App. 252 (1935) (stock was in fact pledged as collateral for a loan at the time of the alleged tender); Vogler v. Gustin, 257 Mich. 475, 241 N.W. 147 (1932) (pledgee mixed up plaintiff's shares with shares having no right to participate in increased capitalization of the company); Wisconsin Mut. Plate Glass Ins. Co. v. Guaranteed Bond Co., 218 Wis. 197, 260 N.W. 484 (1935) (tender of certificate of deposit evidencing its deposit of bonds with a bondholder's protective committee); Glatt v. Newland, 148 Kan. 483, 83 P.2d 663 (1938) (where plaintiff tendered some oil lease assignments on different properties than those originally purchased); Glen v. Dodson, 347 Ill. 473, 180 N.E. 393 (1935) (where part of the shares had been sold to third parties).

[36] Courts use the term "estoppel" loosely in this area. By definition, equitable estoppel or estoppel in pais involves some change of position on the part of the party asserting the estoppel which was caused by his reliance on words or conduct of the plaintiff. In most of these cases it is difficult to see any detrimental reliance. Perhaps the term "quasi-estoppel" would be more descriptive of the defense as used in the Blue Sky area. Quasi-estoppels include such matters as the doctrines of election, the principle which precludes a party from asserting to another's disadvantage a right inconsistent with a position previously taken by him, waiver, ratification and laches.

[37] 251 Ill. App. 119 (1928). But *cf.* Grabendike v. Adix, 335 Mich. 128, 55 N.W.2d 761 (1952).

to speculate on the economic fortunes of the corporation. He elected to rescind when it appeared that the corporation would fail, but within the period allowed by the statute of limitations. He was allowed to recover on the theory that the statute of limitations set the outer limit of the time when the buyer must elect to rescind, not the equitable rule of estoppel. This result is consistent with the policy of the statute, *viz.*, the protection of the buyer by giving him a remedy that is broader than those already available to him at common law.[38] Nevertheless, the doctrine of estoppel seems to have become firmly rooted in the Blue Sky field and the buyer of securities must be advised that he may ruin his chances of recovery under the statute by any type of participation in the affairs of the issuer. The greater the degree of control exercised over the corporation by the buyer, the more likely it is that the courts will find that the buyer is estopped from rescinding under the statute.[39]

The defense of in pari delicto may be defined as some degree of participation by the buyer in perpetrating the violation *before* the sale took place. It means that the plaintiff is guilty of the same culpable conduct for which he seeks to hold the defendants liable. The courts uniformly hold that one who was mutually culpable (in pari delicto) with the defendants shall be denied the benefit of the election to void the sale or contract.[40] It is clear that where the plaintiff was an incorporator and contributor to the original corporation whose stock was illegally sold he is in pari delicto[41] though lesser degrees of participation and control may be grounds for the successful assertion of the defense.[42] The buyer's mere knowledge of the violation of the Act at the time of his purchase will not generally saddle

[38] Cases rejecting the estoppel defense are: Veenstra v. Associated Broadcasting Corporation, 321 Mich. 679, 33 N.W.2d 115 (1948) (plaintiffs had signed contracts to receive stock in successor corporation in exchange for stock in old corporation which had been sold in violation of Securities Act; the court rejected the estoppel doctrine on these facts); Covert v. Cross, 331 S.W.2d 576 (Mo. 1960) (the court, being urged to apply the theory of estoppel against the plaintiffs, said in effect that the theory would tend to nullify and defeat the very purpose of the statute which is clearly penal in nature, that the Act was passed to protect investors against their own weaknesses and to prevent the happening of such losses as were indicated by the record); Gales v. Weldon, 282 S.W.2d 522 (Mo. 1955) (plaintiff suggested to defendant several people who might be prospective buyers).

[39] Cases recognizing the estoppel defense are: Royal Air Properties, Inc. v. Smith, 312 F.2d 210 (9th Cir. 1962) (case under the Securities Exchange Act of 1934; court said that the common-law defenses of estoppel and waiver are available unless specifically denied by Congress where no statute of limitations is supplied); Moore v. Manufacturers Sales Co., 335 Mich. 606, 56 N.W.2d 397 (1953); Schfler v. B & B Oil Co., 311 Mich. 118, 18 N.W.2d 392 (1945); Tucker v. McDell's, Inc. 359 S.W.2d 597 (Tenn. App. 1961).

[40] However the plaintiff's illegal conduct is no defense when merely collateral to the cause of action sued on; as one offender against the law cannot set up as a defense to an action the fact that plaintiff was also an offender, unless the parties were in the same illegal transaction. Nor will the plaintiff be barred from his action against the defendant by the fact that he has done a wrong to a third person. 1 AM. JUR. 2d, *Actions* § 51 (1962).

[41] Hargiss v. Royal Air Properties, 206 Cal. App. 2d 406, 23 Cal. Rptr. 678 (1962).

[42] Miller v. California Roofing Co., 55 Cal. App. 2d 136, 130 P.2d 740 (1942), where the purchaser had actively participated in making fraudulent representations to the commissioner. In none of the following cases was the defense sustained: Schvaneveldt v. Noy-Burn Milling & Processing Corp., 10 Utah 2d 1, 347 P.2d 553 (1959) (plaintiff sold some of the stock for the corporation); Gormly v. Dickinson, 178 Cal. App. 2d 92, 2 Cal. Rptr. 650 (1960) (paid for stock before registered);

him with the status of one in pari delicto.[43] The buyer has no affirmative duty to investigate in order to determine whether the sale to him was legal, as long as no facts come to his attention which reasonably put him on inquiry.[44] Like the doctrine of estoppel, in pari delicto seems to be well established in this area of the law and perhaps justly so. Were it not for this doctrine it would appear that whoever cried "wolf" first would be the one to recover in a venture where both or all parties were guilty of the same culpable conduct under the Securities Law.

A few words need to be said about the statute of limitations. The Iowa Securities Law provides that "no action shall be brought for the recovery of the purchase price after two years from the date of such sale or contract for sale."[45] This statute applies in derogation of the general statute.[46] Caveat: When the action is brought in another state, the foreign jurisdiction may consider it a matter of public policy to apply their own statute. The seller cannot by his affirmative act curtail or shorten the period of the statute, *i.e.*, it is the buyer's election under the statute to rescind or not to rescind.[47] Another important aspect of the statute of limitations incorporated in section 502.23 is that it is uniformly held not to bar the buyer's assertion of the defense of illegality even though it has run against his right to bring an action for statutory rescission.[48]

CONCLUSION

Judging from the small number of cases decided under the Iowa Securities Act few attorneys realize that the remedies available to the buyer of securities are far broader under the Act than those available to the buyer under the common-law actions of deceit or rescission. Indeed the remedies under the Act are more extensive than those available under the Federal Securities Acts, since the Iowa statute applies to situations not covered by federal law. Perhaps, however, another explanation for the few number of

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Bellerue v. Business Files Institute, Inc., 213 Cal. App. 2d 729, 29 Cal. Rptr. 201, 393 P.2d 401 (1964) (plaintiff loaned the defendant corporation money on condition he be allowed to buy certain amount of stock); Steingart v. 21 Associates, Inc., 220 N.Y.S.2d 267 (Sup. Ct. 1961) (plaintiff sold land to issuer and attempted to use in pari delicto doctrine in defense of issuer's action for specific performance of land sale).

[43] Randall v. California Land Buyer's Syndicate, 217 Cal. 594, 20 P.2d 331 (1933).

[44] Commissioner of Banks v. Chase Securities Corp., *supra*, note 34; Chas. A. Krause Milling Co. v. Chris Schroeder & Son Co., 219 Wis. 639, 263 N.W. 193 (1935).

[45] IOWA CODE § 502.23 (1962).

[46] Bigelow v. Otis, 267 Mich. 409, 255 N.W. 270 (1934).

[47] Schlossberg v. Chicago Dr. Pepper Bottling Co., 350 Ill. App. 166, 112 N.E.2d 173 (1953). On its face it would appear that the Iowa statute would allow curtailment of the statutory period. However on closer examination the result of *Schlossberg* would be consistent with the Iowa statute which provides "that no purchaser *otherwise entitled* shall claim or have the benefit of this section [purchaser's election to void the sale] who shall have refused or failed within thirty days from the date thereof to accept an offer in writing of the seller to take back the security in question and to refund the full amount paid by the purchaser, together with interest . . . ." [Emphasis supplied.] The key lies in the words "otherwise entitled." A purchaser is not entitled to rescind until he has elected to void the sale or contract and has made sufficient tender. Thus it appears that the seller cannot by his affirmative act curtail the statue of limiations until the buyer has made his move.

[48] Moe v. Coe, 134 Ore. 436, 263 Pac. 925 (1928); Cooper v. Southern Discount Co., 61 Ga. App. 581, 6 S.E.2d 799 (1940); Key Broadcasting System, Inc. v. Griffith, 119 N.Y.S.2d 174 (Sup. Ct. 1953); *but cf.* Freiner v. Lane, 302 Ill. App. 248, 23 N.E.2d 750 (1939).

cases decided is the strong criminal sanctions provided for violation of the statute.

Although the Act has materially broadened the buyer's remedies it has added the undesireable requirement that the buyer must prove that the seller knew that he violated the Act before statutory rescission is permitted. This is contrary to the common law action for rescission, and the Blue Sky statutes of most other states. Moreover, proof of knowledge is no longer required in a criminal prosecution for a false registration statement under the Act.

Since the policy of the Act is to protect unsuspecting investors from unfounded claims made by sellers, it is inconsistent to require the buyer to prove that the seller knew that his claims were false. This is particularly true since a felony conviction may be had for violation of some of the anti-fraud provisions of the Act without such proof of knowledge.

It is submitted that the Act could better achieve its basic policy if the proof of knowledge requirement was eliminated and the buyer permitted to recover for any violation of the Act.

ARVID L. WENDLAND (June, 1965)