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**THE INDIAN RELIC COLLECTOR'S
RIGHTS AND REMEDIES UNDER THE LAW**

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THE INDIAN RELIC COLLECTOR'S RIGHTS AND REMEDIES UNDER THE LAW

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A STARTING POINT

This article is presented from the point of view of a lawyer/prosecutor, very interested in Indian relics. Its goal is to give some understanding of the law as it affects us as Indian relic collectors, as well as to provoke thoughts on how we might better protect ourselves and our hobby through the legal process. If it succeeds, it is with the benefit of research by Bob Arentson of the Mississippi Prosecutors College and Marshall Bennett of the State Attorney General's Office and the encouragement and guidance of my friend, Jack Roberts.

Some collectors think that the law affords little or no protection to the deceived purchaser of simulated Indian relics. This is not the case. The law does not allow a seller to intentionally deceive his buyer by false representations, and when this happens, the buyer has various remedies available; he may seek to recover the damages he suffered by a civil action against the seller, to put an end to his deceptive practices with the help of a consumer protection agency or to bring him to account through the criminal system.

I am not suggesting that every time an item bought as a genuine Indian relic turns out to be a reproduction, the buyer should sue the seller or otherwise proceed against him. On the contrary, an honest dealer in Indian relics will not have consciously tricked his buyer, and when the buyer contacts such a dealer about a questionable item, the dealer will gladly return his money. However, in the event a fair adjustment is not made by the seller, the buyer should be aware of the vehicles of protection available to him and make use of these.

The buyer of Indian relics who has been duped will have to decide which of the available legal remedies he will seek. If his loss is worth the expense of hiring a lawyer and going to court, he can bring a civil action against the seller to collect his money damages. If the cost of a lawsuit is too high to make his suing the seller for the value of the item worthwhile, but there exists sufficient impact on consumers to warrant such action, the buyer can call upon a consumer protection agency to bring a suit to obtain an injunction to make the seller stop his illegal acts at public expense. If the fraud is clearly willful and persistent, so that it affects the public, the buyer can notify the government's attorney about this offense, so the prosecutor can bring the seller into criminal court and put him in jail. In some cases, both civil and criminal actions will lie.

This article is by no means a complete discussion of the legal remedies that exist to aid the buyer of fraudulent artifacts. Whether the seller is legally responsible for deception depends on the facts of each case, and while Mississippi laws are mainly relied on here, the applicable rules of law vary somewhat from state to state. Therefore, the buyer who consults his attorney to determine if he has the basis for a legal action or asks an official of the appropriate state or Federal consumer protection or law enforcement agency to investigate a complaint and if justified, seek an injunction or prosecute the offending seller, should discuss the particulars of his problem with the attorney or official and consider the statutes of that particular jurisdiction. I hope this information on fraudulent artifacts and the law will help him in that situation.

FRAUD OR MISREPRESENTATION IN SALES - GETTING YOUR MONEY BACK

The general principles of the law of fraud are applicable in sales or exchanges of property. In such a transaction, a material representation of fact, made by the seller to the buyer, which the buyer believes and on which he relies to his injury, will justify the setting aside of the sale and entitle the buyer to relief. Fraud must be clearly established, and the burden of proof is on the buyer who brings the action.

In an action for fraud, it is essential that the buyer establish the following: the seller's representation that the item sold is a genuine Indian relic was made as a statement of fact, the statement was untrue and known to be untrue by the seller, the statement was made with the intent to deceive and for the purpose of inducing the buyer to buy the item, and the buyer did in fact rely on the representation and was induced by it to buy the item, thereby sustaining damages. The buyer must show that, whether directly or indirectly, the representation was made to him, it was of such a nature that it was reasonably calculated to deceive him, and he would not have purchased the item if the seller had told him it was a reproduction.

In short, the buyer of Indian relics should be aware of the problem with phony ones and exercise caution; if a sales offer sounds too good to be true, it may well be. When buying an item, the buyer should be careful to obtain the seller's representation of fact, as distinguished from his opinion, in definite, rather than vague, terms, as to the genuineness of the item; he should also make any reasonable inquiries to ascertain that the source of the item is prehistoric or Stone Age man. The testimony of a disinterested witness who observed the transaction could be useful to the buyer in proving that the seller represented that the item is genuine. Although often impractical, if not impossible, to obtain, a written statement from the seller indicating that the item sold is a genuine, prehistoric Indian relic would be the best evidence to prove this issue.

Also, the buyer of an item that turns out not to be the genuine Indian relic he thought he was getting but a fake instead may be able to return it and bring an action for breach of contract against the seller to recover the price he paid for it. The Uniform Commercial Code, adopted by Mississippi and other states, contains provisions on good faith, sales, warranties and remedies of the buyer, and an action against the seller could be brought under it in a proper case.

GOVERNMENT PROTECTION OF BUYERS — PUTTING A STOP TO ILLEGAL CONDUCT

Of course, civil actions are expensive, but even when the amount recoverable is too small to make a lawsuit economically feasible, an important principle is involved, and the buyer should assert his rights. Most states have adopted deceptive trade practice and consumer protection acts which make it unlawful to use or otherwise engage in unfair or deceptive acts or practices in the conduct of trade or commerce. Section 75-24-5 of the Mississippi Code of 1972 Annotated sets out what conduct is forbidden in this state. The Attorney General may bring an action in the name of the state pursuant to Section 75-24-9 in order to enjoin deceptive acts and practices against one representing that goods are of a particular source or quality when they are not; and Section 75-24-19 authorizes a civil penalty of not more than \$5,000.00 payable to the state upon violation of the terms of an injunction issued under the consumer protection act and an additional penalty not exceeding \$500.00 if the Attorney General files a petition and the Court finds a willful violation of the statute on prohibited business acts has occurred.

The right of an injured person to maintain an action to collect damages under a consumer protection act is provided by legislation in some states. Section 75-24-15 of the Mississippi Code authorizes an individual

suffering a loss by a deceptive act or practice in the sale of goods "primarily for personal, family or household purposes" to bring an action against the seller to recover his money and a reasonable attorney's fee. I believe that it would be easier to present proof in an action brought under this or a similar statute than in a common law action for fraud, as the buyer would not be required to establish certain of the elements of proof required in a fraud action. Also, under the Mississippi statute on discovery in consumer protection actions, proceedings can be brought by the Attorney General to require the seller to file a statement or report or obey a subpoena or investigative command. Although prohibited by our statute, the laws in some other states provide the right to maintain a class action, an action brought on behalf of other persons similarly situated, under the consumer protection acts.

Many states have established consumer protection agencies to help the victims of deceptive acts or practices. In Mississippi, the Office of Consumer Protection of the State Attorney General's Office has been created and charged with administration of our consumer protection laws. Persons with whom buyers in some other states may wish to register complaints about unfair actions by sellers are: Susan P. Dewitt, Assistant Attorney General and Chief, Consumer Protection Division, 500 South 2nd Street, Springfield, Illinois 62706; David A. Miller, Assistant Attorney General and Director, Consumer Protection Division, 219 State House, Indianapolis, Indiana 46204; William C. Newcomb, Jr., Chief Counsel, General Protection Division, Supreme Court Building, Jefferson City, Missouri 65101; and Robert S. Tongren, Chief, Consumer Fraud and Criminal Division, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215.

The Federal Trade Commission, Washington, D.C. 20580, is also concerned with unfair business practices. Federal laws prohibit the use of the mails to defraud; help may be as near as your post office.

CRIMES INVOLVING INDIAN RELICS - PUNISHING THE OFFENDER

In clear cases when a fraud has been perpetrated, a serious offense has been committed, some individual victimized and our hobby hurt, and the wrongdoer should be arrested, prosecuted and punished by the state for his crime. I am proud to report that Mississippi's laws on fraudulent relics are progressive.

Section 39-7-27 of the Mississippi Code, Reproduction or Forgery Prohibited, states: "No person shall intentionally reproduce, replicate, retouch, rework, or forge any archaeological or other object which derives value from its antiquity, with intent to represent the same to be original or genuine and with the intent to deceive or offer any such object for sale or exchange." Section 39-7-35 provides that any person violating the preceding statute, as well as other provisions of the chapter on antiquities, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than \$50.00 and not more than \$500.00 or by confinement in jail for not more than thirty days or by both such fine and imprisonment; and Section 39-7-37 provides that the Attorney General shall have the power to bring an action in any court of competent jurisdiction to enjoin violations of the antiquities laws.

Section 224.2, Simulating Objects of Antiquity, Rarity, Etc., of the Model Penal Code of the American Law Institute, which contains uniform acts which can be adopted by the states, states: "A person commits a misdemeanor if, with purpose to defraud anyone or with knowledge that he is facilitating a fraud to be perpetrated by anyone, he makes, alters or utters any object so that it appears to have value because of antiquity, rarity, source, or authorship which it does not possess."

Mississippi is not the only state with a section addressed to criminal simulation. Section 2913.32 of the Ohio Revised Code on criminal simulation is similar to the Model Penal Code section; in addition, it makes it illegal for a person to "possess with

purpose to utter any object he knows to have been simulated" as therein provided. Section 570.090 of the Annotated Missouri Statutes on forgery states: "A person commits the crime of forgery if, with the purpose to defraud, he . . . makes or alters anything other than a writing, so that it purports to have a genuineness, antiquity, rarity, ownership or authorship which it does not possess; or uses as genuine, or possesses for the purpose of using as genuine, or transfers with knowledge or belief that it will be used as genuine, any writing or other thing which the actor knows has been made or altered in the manner described in this section."

It appears that in a criminal prosecution for reproducing an archaeological object, it would be necessary for the state of Mississippi to establish by competent evidence, beyond a reasonable doubt, that the supposed relic is fraudulent, the defendant manufactured or altered it and he had the intent to represent it to be genuine and to mislead another with it or to make a sale or trade of it.

I believe that the positive evidence of experts in the field, that is, archaeologists, museum officials, reputable dealers and advanced collectors, such as members of the Authentication Committee of our Society, would be required to show that the item in question is a fake. Testimony in connection with the methods used to decide the authenticity of the questioned item would be important.

Although Mississippi has enacted a statute expressly providing that the reproduction of an archaeological object with the intent to represent it as genuine is punishable, I note that our statute only applies when the fraudulent relic is made by the defendant and does not provide protection against a

seller who is not also the maker. However, I believe that this void is filled by the statute on false pretenses, Section 97-19-39, which makes it a crime for one to obtain money or property by means of an erroneous statement of fact, that the item sold is a genuine relic, made with the intent to cheat or defraud.

Again, the statutes of the various states on false pretenses or deception are similar. For example, Section 17-1 of the Illinois Criminal Code states: "A person commits a deceptive practice when, with intent to defraud . . . he knowingly makes or directs another to make a false or deceptive statement addressed to the public for the purpose of promoting the sale of property or services." Section 35-43-5-3 of the Indiana Criminal Statutes states: "A person who . . . with intent to defraud, misrepresents . . . the identity or quality of property . . . commits deception."

IN CLOSING

Finally, the Genuine Indian Relic Society, Inc., through its publication, Authentication and other programs, helps to make it difficult for the manufacturers and sellers of imitations to operate. We should recognize the importance of our organization, its purposes and the opportunity for working together which it gives. We should support our Society in its efforts against these unscrupulous persons and develop additional programs to help with the problems they cause. Also, the victim of a fraud should be willing to make a complaint, and the knowledgeable, experienced collector should be willing to appear as his witness. We should let our views be known and ask our elected representatives to make even better and stronger laws to protect collectors and this hobby we so much enjoy.