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Contracts of Sale of Merchandise--Fraud on the Vendor

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CONTRACTS OF SALE OF MERCHANDISE.

FRAUD ON THE VENDOR.

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CHARACTER OF STATEMENTS MADE.

REPRESENTATIONS TO COMMERCIAL AGENCIES.

In a former article (May number Journal) fraud in contemplation of law, or legal fraud was considered. It was contended that a false representation, though honestly made and believed to be true, afforded sufficient ground to the vendor for rescinding a contract of sale. We now propose to briefly consider character of statements made, with some reference also to representations made to commercial agencies. It may be regarded as within the common knowledge of the profession, that the false representation must be the assertion of a fact, and usually of an existing fact, although the fact may depend upon some practical test assumed to have been made. This question oftener arises, in cases of alleged fraud on the purchaser, and though we are treating of fraud on the vendor, we may refer to such cases as illustrating the subject. The fullest inquiry is permissible. Thus, where on a sale of milk cans, the defendant attempted to recoup damages by reason of the false representation of plaintiff, that the plaintiff had title to certain territory, in which to use the cans, evidence was admitted, that the plaintiff's agent represented that as soon as the defendant's creamery was completed, another creamery company then operating in the territory, would have to leave it. So also in the same case it is held that the agent's representation, which he knew to be false, that 600 cans would operate the creamery, was a good ground for damages, if damages resulted. Davis v. Davis, 97 Mich. 419.

It is obvious that the assertion, in reference to the 600 cans is considered as based upon the assumed knowledge of the agent ob-
tained by a practical trial, and therefore a representation of fact, and not a mere expression of opinion; for without a trial it could hardly be determined what number of cans would operate the creamery. There is a test that is always helpful, if not decisive, in determining how far a statement should be regarded as an assertion of fact of an actionable character, if false. Every person may be said to repose at his peril in the opinion of others, when he has an equal opportunity to form and exercise his own judgment. When the vendor has no superior knowledge, and the parties stand upon equal terms and the facts lie open to both parties, with equal opportunities and observation and examination, and the vendor honestly expresses his opinion, though it turn out to be incorrect, the buyer is not relieved from the application of the principle of caveat emptor. Thus on a sale of stock of goods the vendor's statement does not generally stand on the same footing as facts, even as to amount, quality, or value, when the purchaser sees or knows the property, or has opportunities to know it. Collins v. Jackson, 54 Mich. 186. Johnson v. Seymour, 70 Mich. 156. See also Farrar v. Churchill, 135 U. S. 609. Farnsworth v. Duffner, 142 U. S. 43. Southern Development Company v. Silver, 125 U. S. 247.

It may be observed that, unless under exceptional circumstances, statements of value, though incorrect, are not such assertions of fact as to constitute fraud. Yet it cannot be laid down as a rule of law that value is never a material fact. When it is known that the purchaser relies upon the superior knowledge of the seller, as to quality or value, the seller is bound to act honorably and deal fairly with the purchaser; when confidence is reposed in him he is bound not to abuse it; thus when a jeweler, knowing the purchaser's ignorance, designately defrauds him by false statements of the value of articles in his trade, which none but an expert could reasonably be expected to understand; so also representation of value made by the vendor of mining stock to one who knows nothing about the value of mining property, and relies on such representation; so also in the case of a purchaser of a mortgage on distant lands who relies on and is misled by representations made to him by the seller, as to the mortgagor's responsibility, and value of the security, even though honestly made and even though the seller had suggested to the purchaser that he look at the lands for himself, and had offered to pay the traveling expenses of the purchaser, if the lands did not suit, as their judgment might not agree. It is said that such a suggestion implies the assertion, that the seller has exercised an

The representation must also be material. This is not made to depend upon any notion of materiality the vendor may have in his mind. Though the representation appears to the vendor to be material, it is not to be decided by him. If the materiality is disputed it is a question like many others, for the jury, and they must determine under the evidence and instructions of the court, whether the fact represented is or was really material, and it would be error to instruct the jury to find whether they were deemed by the party to be material. *Davis v. Davis supra.*

The representation itself need not be the sole inducement for entering into the contract. Various matters may exert an influence; but if the false representation operates as one cause of the sale, it is fraudulent, although the sale may have been mainly prompted by reliance placed on other matters. *Kirkendall v. Hartsock, 58 Mo. App. 234.*

It is hardly necessary to suggest that the vendor must rely in whole or in part, upon the false representation made, and some damage by reason thereof must accrue to him. And still further, it is essential that the means used should be successful in deceiving however false and dishonest the artifices, they do not constitute fraud, if the other party sees through them.

Thus far we have assumed that the representation is made to the vendor, but the existence of large commercial agencies cannot be ignored. They exist and are organized to collect information, as to the standing and pecuniary responsibility of merchants and dealers throughout the country. Their subscribers when applied to by customers to purchase goods on credit, invariably resort to the agency or to published lists, before yielding a favorable answer to the application. They are thus especially helpful to the jobber, to enable him to know when and to whom to give credit. They are supposed to have facilities at their command, to enable them to become familiar with the financial standing of the business class, and business men desiring credit make statements and representations, which are intended and calculated to secure it. It is usually true that upon the faith of such statements credit is not then asked of any particular person, but it is yet intended and understood, that such statements shall afford a basis of credit. These statements are now regarded in the law as in effect made to the person or persons

There is however much to determine in connection with this question. The courts usually go no further than is necessary, to decide the particular case. Ordinarily the party suffering is a regular subscriber to the agency, but we conceive that it would make no difference, if the agency imparted him the information on special request, on any terms, or conferred it as a gift. But how if surreptitiously obtained through a clerk or employee, who was known to be violating his duty in imparting it? Do the methods or means of obtaining the information affect the question? Does the retail merchant who submits a statement of his business affairs for the purpose of giving him a standing and credit among his business men, run the hazard and risk of its use by any one who obtains it, and of whom he secures credit, relying upon it, or can it be insisted that he intended it only for the subscriber to the agency, of which he himself was one?

Again it has been forcibly remarked, that these agencies do not rely on what the merchant has stated as much as they do on the general information, respecting his financial status, which they are able to gather in the community. There is oftentimes a combination of the statement with what the reporters of the agency have been able to learn otherwise, so that when it reaches the foreign subscriber, it is a far different thing from an accurate transcript of what the home merchant has said. *Burchinell v. Hirsh* 39 P. 352 (Court of Appeals of Colorado.) There is a necessity therefore as the president judge well suggests, that the evidence should be confined to the actual representations made by the buyer, and it is these representations that must have been communicated to the vendor, and as made, must have furnished in whole or in part, an inducement to the vendor to part with his goods on credit.

Where a statement was made by a person to obtain a rating in the agency, though not for the purpose and with the intent that the same should be used to establish or obtain a credit for himself, the court held that he could not shield himself, from the effects of a business statement, behind a secret intention at the time of making the statement, that he would not profit by it. *Moyer v. Lederer* 50 Ill. App. 94.

An important question is: What are the obligations of the party making the statement, in case of change of condition as respect his financial affairs? The question has received some consideration in
Mooney v. Davis 75 Mich. 188. The majority of the court seem to hold, that if there had been any material change in his financial standing after the statements were made, he should have notified the agency to whom the information was given, that persons with whom he commercially deals may not be misled as to the credit they may safely extend. Some significance however is apparently given to evidence, claimed to show an approval of the statements recently before the sale in question. There is also a dissenting opinion, in which it is contended that a merchant who is visited by the agents, or attaches of a mercantile agency, and at their request gives to them a statement of the condition of his business, is not bound thereafter to notify such agencies of the financial or other changes in his business; nor is he obliged to inform them if afterwards he is on the verge of bankruptcy or unable to pay his debts. That if a merchant should seek out an agency, for the express purpose of building up a credit therein, the case might be different. But a merchant doing a business without regard to these agencies as he has a right to do, who is sought out by such agencies or their employees, and a statement demanded of him, and who in good faith frankly and honestly tells them his business condition, although under no legal obligation to do so, is not thereby bound forever afterward to keep such agencies informed of his financial standing, any more than he would be, had he made a statement to some person not connected with such agencies.

Mooney v. Davis, Supra is evidently somewhat modified by a later decision of the Michigan court, by which it would seem that a merchant is not bound to report his changed conditions to the agency, unless he knows or should know, that credit is extended upon the strength of his original rating, or unless he has or knows that he will become insolvent. Courtland Manufacturing Co. v. Platt 83 Mich. 419.

This particular matter is also referred to in Burchinell v. Hirsh Supra. In that case the jury was instructed by the trial judge, that if after the buyers had made his statement to the commercial agency, he found his financial condition altered, so that in some substantial respect his statement would not be true, he was bound to publish the fact of his insolvency; to which the learned justice, delivering the opinion of the Court of Appeals, remarks "There is no such responsibility," but it appears that the suggestion is rather intended to be confined to the facts of the particular case then before the court.