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Fraud

FRAUD.—The appellee's amended complaint alleged that appellant and three others, officers of the Marion County Sand and Gravel Company, conspired to perpetrate a fraud upon the appellee by inducing him to purchase from two of the defendants, fifty shares of worthless stock of said gravel company. It further alleged that in consideration of appellee's promise to pay a note of the company to the appellant then overdue, to cancel an obligation owed by the company to appellee, and to make another loan to the company,

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[13] Those basic privileges and immunities secured against federal infringement by the first eight amendments have never been held to be protected from state action by the privileges and immunities clause. See Walker v. Sauvinet (1875), 92 U. S. 90; Presser v. Illinois (1886), 116 U. S. 252, 6 S. Ct. 580; O'Neill v. Vermont (1892), 144 U. S. 323, 12 S. Ct. 693, Maxwell v. Dow (1900), 176 U. S. 581, 20 S. Ct. 448, Twining v. New Jersey (1908), 211 U. S. 78, 29 S. Ct. 14, Hurtado v. California (1884), 110 U. S. 516, 4 S. Ct. 111, West v. Louisiana (1904), 194 U. S. 258, 24 S. Ct. 650.

[14] (1935) 295 U. S. 495, 55 S. Ct. 837.

[15] (1935) 295 U. S. 330, 55 S. Ct. 758.

[16] For a full discussion of the view see Hugh E. Willis (1936), "Constitutional Law of the United States," at p. 927.

The principal case has probably occasioned less comment in the newspapers and periodicals because it doesn't concern a three letter governmental agency. However, its constitutional, social and economic importance should merit quite as much consideration.

totaling in all, $4,222.50, the defendants, Case and O'Hair, promised to assign to appellee, fifty shares of the capital stock of the gravel company and deliver to appellee as trustee, an additional fifty shares which would become the appellee's property in case of failure to repay the debt. The president of the appellant told the appellee that the plant of the gravel company was worth $60,000 to $70,000 and that the stock was worth $400 to $500 per share. It is alleged that the stock was, in fact, worthless and that the appellee in ignorance of the falsity of the representations relied upon them. Undisputed evidence shows that the appellee was a man of 54 who had had extensive experience in the road contracting business, that he had personal knowledge of the financial condition of the gravel company, and was on good terms with his brother, Bascom O'Hair, president of the gravel company, and therefore was in a position to investigate the financial status of the company. Appellee was awarded a verdict of $7,500 damages and the appeal followed an overruling of the motion for new trial. Held, the court erred in overruling the motion for new trial. Where strangers are dealing at arm's length, statements of value are regarded as mere expressions of opinion, and that a person dealing thus, who deliberately ignores facts which are well known to him and chooses to believe statements to the contrary is held not injured in law so as to be entitled to recover for misrepresentations in statements which he chose to believe.[1]

The Restatement of Contracts defines misrepresentation as any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts.[2] Fraud is defined as a misrepresentation known to be such.[3]

Fraud becomes of importance in at least three general situations:

(1) It makes a contract voidable and the party upon whom the fraud has been practiced may rescind or disaffirm such contract.

(2) It is a defense to a contract action when the contract was induced by fraud.

(3) It furnishes the basis for a tort action in deceit.

The modern position, as set forth by the Restatement of Contracts, Chapter 15, holds that material misrepresentation makes a contract voidable the same as fraud. Chapter 15 of the Indiana Annotations to the Restatement of Contracts, points out that the law of fraud has been approaching misrepresentation through the rules as to scienter, and the law of misrepresentation has been growing through the development of the law of voidability where there are confidential relations and confidential contracts. The Restatement has completed this process of development. Of course this refers to fraud in the inducement; fraud in the execution makes a contract void. The position of the Restatement is supported in Indiana by the case of Frenzel v. Miller,[4] where it was held that a material misrepresentation make the contract voidable regardless of whether the representor knew the falsity of his statements or not. This position has been followed and upheld by many subsequent cases[5]

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[1] Security Trust Co. v. O'Hair (1935), — Ind. App. —, 197 N. E. 694.

[2] American Law Institute, Restatement of Contracts, Sec. 470.

[3] American Law Institute, Restatement of Contracts, Sec. 471.

[4] (1871), 37 Ind. 1.

[5] Krewson v. Cloud (1873), 45 Ind. 273, Bethell v. Bethell (1883), 92 Ind. 318, Slaughter v. Favorite, Guardian (1886), 107 Ind. 291, 4 N. E. 880; Wheatcraft v. Myers (1914), 57 Ind. App. 371, 107 N. E. 81, Kirkpatrick v.

To predicate an action for damages, the fraudulent representations "must be in regard to a material fact, operating as an inducement to the purchase or making of the contract, and upon which the purchaser or person making the contract had a clear right to rely; and the party complaining must have been actually deceived thereby; and, generally, such representation must not be a mere matter of opinion, or in respect of facts equally open to the observation of both parties, and concerning which the party complaining, had he exercised ordinary prudence, could have attained correct knowledge."[6]

Representations as to quality and value of the subject matter have quite generally been held not to be actionable upon the theory that they are mere expressions of opinion and that no one has the right to rely on another's opinion—especially where the parties are dealing adversely. So, the rule of *caveat emptor* has been applied to this situation in which parties stand on equal footing, with an equal opportunity to investigate. In recent years this ancient dogma has been subjected to an increasing array of limitations. Thus, today, representations as to value may be made under such circumstances as to be actionable if false and productive of injury; they are then usually held to be statements of fact rather than of opinion.[7] When a fiduciary relationship exists between the parties,[8] or one party has or professes to have expert knowledge or knowledge superior to that of the other party,[9] or where the pertinent facts are peculiarly within the knowledge of one party,[10] or where physical or mental incapacities render one party inferior in ability to bargain,[11] or where one party does not have the opportunity to investigate,[12] then representations of value are held to be statements of fact and, if false, may become the basis of a tort action.

While in some cases the manifestation is clearly but an expression of opinion and in others is clearly a statement of fact, there remains a great number of borderline situations. Into this latter class generally fall the cases involving representations of value. It has been repeatedly held in Indiana that this is a question for the jury to determine.[13] It appears, then, that there can be no hard and fast line drawn between statements of opinion and those of fact, nor can a definition be formulated which will accurately determine whether a representation of value will be an expression of fact or an expression of opinion. If such a definition were possible, perhaps it would not be

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Reeves (1889), 121 Ind. 280, 22 N. E. 139; New v. Jackson (1912), 50 Ind. App. 120, 95 N. E. 328, Furnas v. Friday (1885), 102 Ind. 129, 1 N. E. 296, Roller v. Blair (1884), 96 Ind. 203.

[6] Frenzel v. Miller (1871), 37 Ind. 1.

[7] Ferrell v. Hunt (1919), 189 Ind. 45, 124 N. E. 745.

[8] Manley v. Felty (1896), 146 Ind. 194, 45 N. E. 74, and cases cited therein at p. 199.

[9] Merchant's National Bank of Massilon, Ohio v. Nees (1915), 62 Ind. App. 290, 110 N. E. 73, Culley v. Jones (1904), 164 Ind. 168, 73 N. E. 94, Judy v. Jester (1912), 53 Ind. App. 74, 100 N. E. 15, Armstrong v. White (1893), 9 Ind. App. 588, 37 N. E. 28.

[10] Bloomer, Administratrix v. Gray (1894), 10 Ind. App. 326, 37 N. E. 819.

[11] Bloomer, Administratrix v. Gray (1894), 10 Ind. App. 326, 37 N. E. 819; Culley v. Jones (1904), 164 Ind. 168, 73 N. E. 94.

[12] Armstrong v. White (1893), 9 Ind. App. 588, 37 N. E. 28; Bolds v. Woods (1893), 9 Ind. App. 657, 36 N. E. 933.

[13] Culley v. Jones (1904), 164 Ind. 168, 73 N. E. 94, Stauffer v. Hulwick (1911), 176 Ind. 410, 96 N. E. 154, New v. Jackson (1911) 50 Ind. App. 120, 95 N. E. 328; Kluge v. Ries (1917), 66 Ind. App. 610, 117 N. E. 262.

desirable since the present nebulous condition permits the courts to attain a just result by applying the phraseology they see fit.

The court in the principal case said, "Appellants and appellee were strangers to each other. No fiduciary relation existed between them, and they were dealing at arm's length, and in such cases, the general rule is that statements of value are regarded as mere expressions of opinion." This statement of law seems to over-emphasize the necessity of a fiduciary relationship—in fact one might conclude that a false statement of value would always be considered an expression of opinion and, therefore, not actionable unless there existed a fiduciary relationship between the parties. That this is not the law in Indiana is evident from a consideration of the cases cited in the paragraph immediately preceding. There it was shown that misrepresentations of value are actionable in many situations where no fiduciary relationship existed and the parties were dealing at arm's length. The establishment of a fiduciary relationship appears to be of little importance except in the cases of undue influence, unless it be used to show reliance on the misrepresentation in fraud cases.

While it is certain that one has no right to rely on the representations of another when he knows them to be false, the law does not require one to investigate a representation to ascertain its truth or falsity when he has no reason to be suspicious. The New York case of *Mead v. Bunn*[14] held that a false representation by one of the parties to a contract did not put the other on inquiry as to its truth. There, the court held, "Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual engagement; and he is under no obligation to investigate and verify statements, to the truth of which, the other party to the contract, with full means of knowledge has deliberately pledged his faith." This position has been adopted and followed by a considerable number of Indiana cases.[15]

In the principal case the court pointed out that, "Both (appellants and appellee) had the same opportunities for investigation, and there is nothing disclosed by the record that either party was prevented from making an investigation. As disclosed above, the appellee was put on notice " Here the court seems to disregard a considerable number of cases decided by both of our highest courts following the rule of *Mead v. Bunn*,[16] that there is no duty to investigate imposed upon the vendee in such cases by misrepresentations of the other party. If the court bases its decision upon either the point that the appellant's misrepresentation was an expresion of opinion because there was no fiduciary relation, or upon the point that the appellee failed to investigate, then it is submitted that the case is contra to considerable Indiana authority.

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[14] (1865) 32 N. Y 275.

[15] Kramer v. Williamson (1893), 135 Ind. 655, 35 N. E. 388, Ledbetter v. Davis (1889), 121 Ind. 119, 22 N. E. 744; Jones v. Hathway (1881), 77 Ind. 14, Bloomer, Administratrix v. Gray (1894), 10 Ind. App. 326, 37 N. E. 819; Boltz v. O'Conner (1909), 45 Ind. App. 178, 90 N. E. 496 Anderson v. Evansville Brewing Association (1911), 49 Ind. App. 403, 97 N. E. 465, Armstrong v. White (1893), 9 Ind. App. 588, 37 N. E. 28.

[16] (1865), 32 N. Y. 275.

The court further stated that, "When parties are dealing at arm's length and one party, in spite of facts well known to him, deliberately ignores such facts and choses to believe statements to the contrary, he closes his eyes to the truth and deliberately takes a chance. It cannot be said that he was injured in law." From this statement it seems reasonable to conclude that the court based its decision on the assumption that the facts were so obvious to the appellee as to require no investigation. If this be assumed, the appellee, of course, had no right to rely on the appellant's misrepresentations. It seems a little difficult to arrive at this conclusion on the evidence stated, but, if the conclusion is in fact warranted, then the decision is entirely sound. If this was the ground for the decision, then the statements of the court concerning value and opinion and the duty to investigate are mere dicta. It is submitted that the latter is the only rationale upon which the decision may be supported.

H. S. C.