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Article 14

Sales: A practical manner of handling "time payments"

B. C.

At the time of the passage of this act, under the provisions of Chapter 65, of the Statutes, the school board of the city of Milwaukee was authorized to submit to the common council of the city an estimate of the moneys required for the ensuing fiscal year. It was the duty of the common council to include such amount in the tax budget. Subsection (7) of Section 65.08 gave the common council power to levy annually a tax based on the taxable property of the city, an amount for: "A school repair fund for keeping in repair school buildings, fixtures, grounds, and fences; the purchase of furniture; the making of betterments to school property; and the purchase of necessary additions to school sites, not exceeding eight tenths of a mill."

Subsequent to the passage of the Home Rule Amendment, the legislature amended this act, raising the eight-tenth mill rate allowed in the former act to a rate of one mill. The Milwaukee School Board using this latter rate as their basis of computation, submitted to the Milwaukee Common Council their estimate to be included in the tax budget. This the council refused to do, claiming that among its recently acquired powers was that of control over the city schools and that having elected to come under the provisions of Section 66.001, it was not bound by the later legislative act raising the rate of tax allowed, from eight tenths of a mill to one mill. The school board thereupon secured an alternative writ of mandamus from the Supreme Court seeking to compel the common council to include in its tax budget for 1926 the sum demanded for school repairs, and so forth. The city moved to quash this writ and it was upon this motion that the recent decision was given.

The court upheld the school board saying that the legislature had never placed the schools of a city under the management of the common council. In all city charters, whether general or special, the schools have been placed under the control and management of a body known as the Board of Education. In view of this holding, questions immediately arise as to the control the common councils of municipalities have over many other independent boards such as city service commissions, park boards and fire and police commission boards, since many of these were created by state statute. The boards also are authorized to submit estimates of their requirements to the common council to be included in the tax budget. It is only a matter of conjecture then, what the Supreme Court's ruling will be when cases of this nature come before it. The case just decided has the distinction that it involves the matter of education which is fundamentally a state function, subject to the control of the legislature, and never given over to the control of the municipality.

R. F. R.

Sales: A practical manner of handling "time payments."—The practice of buying various commodities on the "time payment plan," though not a new idea, has seen its greatest development during the past decade. The system may be considered as the natural outgrowth of two influences working toward the same end,—the manufacturer seeking to create a greater market for his products, and the great so-called middle class of people straining themselves for the greater enjoyment, convenience and comfort which had been limited heretofore to

those of means and who were able to pay or secure large extended credit. This system is particularly appealing to this middle class, the great mass whose regular family income is usually the salary of one wage-earner, for, by budgeting the income and expenditures, and making use of some plan of time-payment, they are enabled to purchase and acquire many things in a gradual way for which payment in a lump sum would be impossible.

Accompanying the numerous beneficial phases, however, are several problems in the attending actual business transaction which present considerable difficulty. This is particularly true from the standpoint of the vending company. What is the simplest and most efficacious manner of handling this class of business? How is the contract to be framed so as to afford the vendor the greatest possible protection against defaults in payment or against conflicting claims of third parties? How far can the rigidity of the bargain be forced without creating such great sales resistance as would make the prospective purchaser reticent about entering the deal? All these queries have been asked by the host of jobbers and distributors seeking to use some form of the deferred payment scheme. They have been answered quite satisfactorily by the adoption and use of a form of conditional sales contract. The following clauses are extracts from such a contract, it being an agreement for the conditional sale of an oil-burning device which, in conjunction with a furnace or boiler, is used in the heating of homes.

Said customer agrees that he will not remove said apparatus from the above mentioned premises, or will he assign, sell, mortgage, or otherwise dispose of the same without the written consent of the company, and that he will not place or permit to be placed any lien upon the above mentioned premises.

It is expressly understood that the title to the said property shall be held by the company until the amount of the full purchase price has been paid.

In the event that the customer shall make default of the above named sums or shall make default in any conditions of this agreement, the whole amount remaining unpaid shall at the option of the company at once become due and payable, and the company may enter the premises of the customer and take possession of the said property and remove and sell the same. The failure to exercise such option at the time of any default shall not operate as a waiver of the right to exercise such option at the time of any subsequent default.

If and when such property, or any part thereof, shall be attached to the freehold so as to entitle the company to a lien, it shall not be deemed that the company has waived its right to such lien on such property. In the event of such attachment to the freehold, and such default in payment on the part of the customer as to entitle the company to retake possession and sell, it is agreed that the sale shall be held after the date of retaking of possession in the above mentioned offices of the company.

The contract, as worded and framed, does not present so intricate and formidable a legal instrument as to frighten the prospective purchaser and yet it preserves and creates certain rights in the vendor which are invaluable from a practical viewpoint.

In the first place, it implies that the goods shall remain, as between the vendor and vendee,[1] personalty, though it admits of a possibility of the device being in some cases attached to the freehold. This interpretation and the express provision to allow removal and sale, permits

[1] Such limitation can be effective only between the vendor and vendee and cannot abridge the rights of a mortgagee of the freehold.

Fuller-Warren Co. v. Harter, 110 Wis. 80, 85 N.W. 698.

the vendor to proceed under section 122.16, Wis. Stats. in the event of a default. Thus the vendor has an effective remedy and is protected almost completely against loss; likewise, the necessity of elaborate legal proceedings to secure relief is avoided.

Whether or not the device actually does in any particular case become a part of the realty depends primarilly upon the intent of the contracting parties,[2] and also upon the question of whether or not the apparatus is actually and physically incorporated into the realty,[3] whether or not it can be removed from the premises without great damage and the premises left in their former condition.[4] Should the subject matter of the contract be so installed and used as to render it a part of the realty, the vendor has the addditional right of lien[5] which may be exercised any time during the six months succeeding delivery. As usual payment schemes run over a period of twelve months, this is sufficient time for the company to estimate the possibility of complete satisfaction of the contract price. Should there be any doubt as to what course to take, the vendor could file a lien and hold it in abeyance upon a default within the six months period.[6]

The provision for holding the sale in the offices of the company, while it complies with the statutory provision for a public sale (due notice being given),[7] avoids the great amount of trouble and delay which ordinarily attends the resale of goods at public auction, and provides a direct and expeditious manner of settlement. The company can bid in, on its own behalf, and usually get the goods at a very nominal price.

Protection against mortgagees of the realty is not available to the company under the contract, but careful investigation will usually apprise them of any such lien. Neither can the company be protected if the goods, having become real property, were purchased by a lessee, who, in default of his payments, subsequently vacates the premises. Such danger can only be avoided by the company's refusal to extend the privilege of time payment to lessors, or to demand, before accepting such contract, the written consent of the owner to place a lien on the realty involved. Careful compliance with the statutory provisions for the recording of the instrument will protect the company against claims of bona fide purchasers from the vendee, and, all in all, the contract provides most every protection required, besides giving the vending company speedy relief at a minimum of expense, trouble, and delay. It is also of importance, from the business standpoint, that while mere notes from purchasers to vending companies will not be accepted by the various acceptance companies as security for loans, these contracts are fully recognized as thoroughly good security.

The numerous jobbers and distributors holding multitudinous contracts of this general nature have found them to be most satisfactory in protecting them to the extent in which they are financially involved, under

[2] *Rinzel v. Stumpf*, 116 Wis. 287, 93 N.W. 36.
[3] *Rinzel v. Stumpf, supra.*
[4] Sec. 122.07, Wis. Stats.
[5] Sec. 289.06, Wis. Stats.
[6] Sec. 289.06, Wis. Stats.
[7] Sec. 122.19, Wis. Stats.

practically any and all circumstances, and all this with very little of the usually accompanying legal red tape and expense.

B. C.

Sales: False representations by seller: As to matters of law: Statement that alcoholic beverage could be legally sold.—

And Noe, a husbandman, drinking of the wine, was made drunk, and was uncovered in his tent.

And Noe, awaking from the wine, when he learned what his younger son had done to him,

He said: Cursed be Chanaan!

Genesis, Chap. 9, Verses 20-25

Neither a new nor a novel application of the law respecting fraud was made in the recent case of *Ad. Dernehl and Sons Company v. Detert,* 186 Wis. 113, 202 N. W. 207. But it is worthy of comment as an illustration of the law's love for fictions and legal precedent. In this, an action for the value of goods purchased to be sold as a beverage and which contained an unlawful percentage of alcohol, a counterclaim for damages caused by defendant's arrest on the basis of representation by the plaintiff that it had special permission from the prohibition officers of the United States and Wisconsin to sell the goods to the defendant; that it had a copy of the law which permitted the sale of the same and that it knew the law permitted such sale to the defendant, was *held* demurrable, these being representations as to the law and not of fact, defendant being charged with knowledge of the law, and that though the matter of special permission was in the nature of fact, the defendant was charged with knowledge that such permission could not lawfully be given.

This case illustrates the general rule that in the absence of confidential relations a misrepresentation as to a matter of law is not a fraud, being considered as a mere statement of opinion.[1] *Gormely v. Gymnastic Association,* 55 Wis. 35, 13 N. W. 242, also a liquor case, governed the instant case on a similar state of facts. The fact that the Gormely case was a typical "cow case" made it difficult to consider and apply the exception to the general rule, i.e.,—where one has superior means of information, professes a knowledge of the law and thereby obtains an unconscionable advantage over another who has not been in a situation to become informed, the injured party is entitled to relief as well as if the representation had been made concerning a matter of fact.[2]

A wider application of this modification of the general rule would seem to be desirable in the present complex state of society where mutual trust and confidence are the very life of business and where it

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[1] *Upton v. Tribilcock,* 91 U.S. 45; *Georgia Home Ins. Co. v. Worten,* 113 Ala. 409, 22 So. 288; *Platt v. Scott,* (Ind.) 6 Black, 389, 39 Am. Dec. 436; *Parker v. Thomas,* 19 Ind. 213, 81 Am. Dec. 385; *Thompson v. Phœnix Ins. Co.,* 75 Me. 55, 46 Am. Rep. 357. See also, 68 Am. Dec. 376; 18 A.S.R. 559; 11 L.R.A. 197; 35 L.R.A. 420; 37 L.R.A. 605; Ann. Cas 1913B, 1143 *et seq.*

[2] *White v. Harrigan,* 77 Okl. 123, 186 Pac. 224; *Jordan v. Stevens,* 51 Me. 78, 81 Am. Dec. 556 at p. 559. See also notes, 9 A.L.R. 1051 and 12 R.C.L. 296.