Washington University Law Review

Volume 18 | Issue 2

January 1933

Fraud—Promise with Present Intention Not to Perform

Even with its limitations, the decision is to be welcomed as settling a point of law which has been moot. As a practical matter the existence of this power in the trustee is advisable, since it makes it more likely that the insurance will be placed with strong companies which pay losses promptly. The commissions which the trustee receives from the insurance companies do not increase the premiums which the borrower would have to pay if he took out the insurance himself, while they may serve as an inducement for trustees to act for lower fees, thus lessening the present heavy burden of fees which the prospective borrower must pay. G. W. S., '33.

FRAUD—PROMISE WITH PRESENT INTENTION NOT TO PERFORM.—Plaintiff was an experienced banker, capable of managing a banking business. The defendants, a group of stockholders in a bank, pooled 250 shares of the capital stock, and appointed Cooke to sell it at a fixed price of $135 per share. The market value of the stock was $95, which fact was known to plaintiff. He was induced to purchase the stock, and pay this premium on it by a promise on the part of the defendants that inasmuch as they held the majority of the stock in the bank they would make him managing officer of the bank at a salary of about $300 per month. The defendants, at the time of making the promise did not intend to perform. The court sustained a demurrer to plaintiff's petition. This was affirmed by the Supreme Court *holding:* Fraud cannot be predicated upon a mere promise though accompanied by present intention not to perform. *Reed v. Cooke* (Mo. 1932) 55 S. W. (2d) 275.

It is a well known and accepted rule in the law of fraud and deceit that an actionable representation must relate to past or existing facts and cannot consist of mere broken promises, unfulfilled predictions, or erroneous conjectures as to future events. 26 C. J. 1087. However, to this rule there are several well recognized exceptions. State of mind can be just as much of an existing fact as the state of digestion. *Edgington v. Fitzmaurice.* (Eng.) 29 Ch. D. 459; *Deyo v. Hudson* (1919) 225 N. Y. 602, 122 N. E. 635; *Swift v. Rounds* (1897) 19 R. I. 527, 35 Atl. 45. This rule has been extended to allow recovery on the basis of fraud and deceit where a promise has been made with a present intent of future breach. *Wright v. Barnard* (D. C. D. Del., 1917) 248 F. 756; *Birmingham Warehouse Co. v. Elyton Land Co.* (1891) 93 Ala. 549, 9 So. 235; *Olson v. Smith* (1912) 116 Minn. 430, 134 N. W. 117. As pointed out by the dissenting judge in the principal case, twenty-one American states, England, and the Federal courts, have adopted this view. Massachusetts, Pennsylvania, New York, Ohio, and Wisconsin originally held, to the contrary. But in each of these states more modern decisions have abandoned the former position so that now it is probable that recovery could likewise be had there upon such a state of facts. *Bowe v. Gage* (1906) 127 Wis. 245, 106 N. W. 1074.

Other authorities hold that a misrepresentation of intention is purely promissory and is therefore not remediable fraud. *Farris v. Strong* (1897)

24 Colo. 107, 48 Pac. 963; *Miller v. Sutliff* (1911) 241 Ill. 521, 94 N. E. 651; *Hunt v. Lewis* (1914) 87 Vt. 528, 90 Atl. 578. The reason for this view is stated in *Miller v. Sutliff, supra,* "If an intention not to perform constituted fraud, every transaction might be avoided where the facts justified an inference that a party did not intend to pay the consideration, or keep his agreement." This seems to be nothing more than an assurance that the doctrine of caveat emptor will be maintained in all its ancient viciousness.

In Missouri there are cases holding that a promise made with present intent to break it is sufficient fraud to warrant a recission of the contract. *Laswell v. National Handle Co.* (1910) 147 Mo. App. 497, 126 S. W. 969; *Culbertson v. Young* (1901) 86 Mo. App. 277. However the rule seems to be settled that "a promise made without intention to fulfill is not a misrepresentation of an existing fact", within the rule that a misrepresentation of fact is ground for recission. *Younger v. Hoge* (1908) 211 Mo. 444, 111 S. W. 20; *Estes v. Desnoyers Shoe Co.* (1900) 155 Mo. 577, 56 S. W. 316. As was pointed out by the dissenting judge, the cases in which this minority rule has been applied do not upon their facts call for its application. Furthermore, in the instant case, the matter was before the court on a demurrer so that the issue of legal sufficiency was clear cut. Had the court seen fit to do so, it could have established the majority rule in this state, without necessarily overruling previously decided cases, and the opportunity to decide this specific question of law alone was afforded. It is somewhat to be regretted that Judge Gantt was unable to prevail upon his associates to adopt the views which he expounds in the dissenting opinion, and thereby drawing this jurisdiction away from old common law rules which favored chicanery. It seems hard to perceive, from a practical point of view at least, how the court can refuse to recognize the fraudulent nature of a promise made with present intent not to perform. A. P., '33.

INTERNAL REVENUE—REFUNDS—AMENDMENT AFTER TIME FOR FILING NEW CLAIM HAS EXPIRED.—Two recent decisions by the Supreme Court of the United States, both written by Mr. Justice Cardozo, have served to clarify the law of this important subject, although they have left it in a position which seems highly illogical. The recent revenue acts have contained provisions that in order to secure a refund a claim, in the form prescribed by the regulations of the Treasury Department, must be made within a certain period after the tax has been paid. The period for filing these claims with the commissioner of internal revenue has varied. Under the Revenue Acts of 1926 and 1928 it was four years, but the Revenue Act of 1932 reduced the period to two years. 44 Stat. 66 (1926), 45 Stat. 871 (1928), 11 U. S. C. 1065b; Revenue Act of 1932 sec. 322.

In the first case the claim had been filed within the proper time, but was too general to meet the tests of the regulation. Nevertheless, the federal agents investigated the claim and were apparently about to allow it, when the commissioner discovered it was not in the proper form. He notified the