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DOES A PROMISE MADE WITHOUT INTENT TO PERFORM IT CONSTITUTE FRAUD IN PENNSYLVANIA?

Suppose A tells B, "If you will sell me your property, I will use it only for dwelling-house purposes." They make a written contract to sell and later a deed, but no mention is made of the limitation in either instrument. The promise forms no part of the consideration, and the parol evidence rule estops B from asserting it as a term of the contract. The deed is in fee simple without limitation. Is B left without a remedy if A breaks his promise?

Suppose A never intended to keep his promise—is this such fraud as will support an action for damages or rescission at law, or a suit for equitable relief, in Pennsylvania?¹

* * * * *

"The word 'fraud' is a generic term which embraces a great variety of actionable wrongs."² Like the term "malice," it is one of those legal catch-alls which must be redefined in virtually every case.³ The term will be used here as it is used in the common law action of deceit.

The elements of that action are, briefly:

(1) A false representation (2) of material facts (3) made with knowledge of the falsity (4) to one who is ignorant of the falsity (5) with intention that it shall be relied upon; and (6) a change in position by the victim in reliance thereon to his injury.⁴

Since the courts of Pennsylvania have until recently⁵ combined the functions of law and equity, the elements of common law deceit, which is an action for damages, have come to be virtually the same as those in an action for avoidance or rescission at law or at equity. One may safely say that where the facts are such as warrant an action of deceit, they also will warrant an avoidance or rescission.

* * * * *

In the case of *Standard Interlock Elevator Company v. Wilson*,⁶ decided in 1907, the plaintiff sold a safety device for an elevator, to be installed at such date

¹ See 2 Okla. L. Rev. 365; 21 Tulane L. Rev. 639; 27 Tex. L. Rev. 389; 15 J. Bar A. Kan. 305. See also 23 Am. Jur. §§ 35-44 and § 48; 71 A.L.R. 78, 117; 68 A.L.R. 638; 91 A.L.R. 1300. For text materials, see Williston on Sales, rev. ed., 1948, vol. 3, §§ 624 et. seq.; Prosser on Torts, 1941, §§ 85 et seq.; Restatement of Contracts, § 473; Restatement of Torts, § 544.

² *La Course v. Kiesel*, 366 Pa. 385, 77 A.2d 877 (1951). See also *In re Thorne's Estate*, 344 Pa. 503, 25 A.2d 811; *In re Reichert's Estate*, 356 Pa. 269, 51 A.2d 615; *In re McClellan's Estate*, 365 Pa. 401, 75 A.2d 595.

³ Prosser on Torts, 1941, p. 704.

⁴ *Ibid.*, p. 706; Williston on Sales, vol. 3 § 624. See also *Berwick Hotel Co. v. Vaughn*, 300 Pa. 389, 150 A. 613, 71 A.L.R. 1340.

⁵ Fisher, *The Administration of Equity through Common Law Forms in Pennsylvania*, 1 L.Q. Rev. 455 (1885), reprinted in 2 *Select Essays in Anglo-American Legal History* 810 (1908); Cowan, *Legislative Equity in Pennsylvania*, 4 U. of Pitt. L. Rev. 1 (1937).

⁶ 218 Pa. 504, 67 A. 463. See also *Purcell v. Binns*, 298 Pa. 447; *Zettlemoyer et al. v. Block et al.*, 329 Pa. 205, 198 A. 80; *Fidelity-Philadelphia Trust Co., v. Simpson*, 293 Pa. 577, 143 A. 202, modifying 10 D. & C. 403; *McCreary v. Edwards*, 113 Pa. Super. 151, 172 A. 166.

as the buyer might name. The buyer refused to name a date and plaintiff sued for breach of contract. Defendant raised the affirmative defense of fraud, claiming he was induced to buy through plaintiff's representations that he (plaintiff) was about to join a trust for controlling the sale of safety devices. Plaintiff knew his representations to be false when he made them.

The court, in deciding that the defense was valid, said:

"Although it is true that false statements, to be deemed fraudulent in law, must relate to something represented as an existing fact, a statement apparently of intent, purpose or opinion only, may amount to a statement of fact where a person fraudulently misrepresents his intent in doing a particular act to the damage of another."

This was by no means a new idea, although it had not been so clearly or openly expressed before. The court cited the cases of *Williams v. Kerr*,⁷ and *Sutton v. Morgan*,⁸ both of which had been decided around 1900. But the idea had been hinted at as early as 1867, in the leading case of *Grove v. Hodges*.⁹ The language of that case, often cited as the parent fraud case in Pennsylvania,¹⁰ is significant:

"Fraud consists in false representations of things as facts which are not such. . . A promise is not, in itself, a false and deceitful representation. *Performance may have been intended when the promise was made.*" (Emphasis supplied.)

So it has been recognized quite often that a promise made without intent to perform it may be fraud in Pennsylvania. The case of *Williams v. Kerr*, *supra*, was a suit in equity for a decree of reconveyance of land, where the landowner was induced to sell by the buyer's false representation that he would build a machine shop and foundry on the land. This decision followed a line of cases going back to *Hoge v. Hoge*¹¹ in 1832, where a testator was induced to devise land by the fraudulent representation of the devisee that he would hold the land for another's benefit. The court decreed a trust in favor of the third party. In a similar case in 1873, where a grantor was induced to confide in another's verbal assurance that he would buy land for the grantor's benefit at a sheriff's sale, and in reliance upon that, permitted the defendant to become holder of legal title, a subsequent refusal to deed over the land was held to be such fraud as will convert the grantee into a trustee *ex maleficio*.¹²

The case of *Sutton v. Morgan* also was a suit in equity for reconveyance. The buyer was induced to buy through the false representations of the seller that there

⁷ 152 Pa. 560, 25 A. 618 (1891).

⁸ 158 Pa. 204, 27 A. 894, 38 Am.St.Rep. 841 (1893).

⁹ 55 Pa. 504 (1867).

¹⁰ 23 Am. Jur. 35; 7 R.C.L. 239; R.C.L., Perm. Supp. (1947); 51 A.L.R. 108; 68 A.L.R. 642. This case is cited in numerous Pennsylvania decisions; see especially *Berwick Hotel v. Vaughn*, 4, *supra*.

¹¹ 1 Watts 163 (1832).

¹² *Wolford v. Herrington*, 74 Pa. 311, 15 Am.St.Rep. 548 (1873).

was a great demand for lots on the land, that a railroad was about to move its shops nearby, and that a syndicate of prominent men had been formed to secure the land and had offered more than the contract price for the land. This case, it will be noted, could easily have been decided on the grounds of ordinary common law deceit, since the representations were partly of present and past fact.



The *Standard* case in 1907 was the last case in which the decision was based solely on the fact that one party misrepresented his intent to act in the future.¹³ A great number of cases since that time have dealt with the problem, and virtually all of them, with a few distinguishable exceptions,¹⁴ have recognized the rule of the *Standard* case. But from 1907 until the present day, not a single Pennsylvania Supreme or Superior Court decision has followed the *Standard* rule in the absence of evidence which could of itself have brought the case legitimately to the same result on other grounds.

There is ample reason for this. Perhaps a quotation from a recent case, *Fidurski v. Hammill*,¹⁵ will serve to illustrate:

"The mere failure to perform a promise will not sustain an action for deceit. An unperformed promise does not give rise to a presumption that the promisor intended not to perform when the promise was made, and a fraudulent intention will not be inferred merely from nonperformance. . . . A promise to do something which is not subsequently complied with does not constitute fraud. There is not a particle of evidence in this case from which it could be inferred that the defendant had any dishonest intention. . . ."

There is the problem. The gist of the fraud involved in this type of case is not in breach of contract¹⁶ nor in the misrepresentation of some easily demonstrable fact.¹⁷ It is in the promisor's *state of mind*, in a false representation of *existing intent to perform* where such intent is in fact non-existent, and in the deception of the obligee by that representation.

¹³ With the possible exception of a few very recent Pennsylvania decisions to be discussed later.

¹⁴ See especially the case of *Lowry National Bank v. Hazard et al.*, 223 Pa. 520, 72 A. 889, decided just two years after the *Standard* case. Even those cases which did not mention the *Standard* rule did not expressly deny it. It was overlooked or ignored in several cases, however. But it is the opinion of the writer that it would have made no difference in the decisions. Most of the cases involved (and they have been very few) are readily distinguishable on the facts. Those which are not, do not depend on the *Standard* rule.

¹⁵ *Fidurski et ux. v. Hammill*, 328 Pa. 1, 195 A. 3 (1937). See also the cases of *Klerlein v. Wer-ver*, 307 Pa. 16, 23, 160 A. 719; *Martachowski v. Orowitz*, 14 Pa. Super. 175; *Warren Balderston Co. v. Integrity Trust Company*, 314 Pa. 58, 170 A. 282.

¹⁶ "A contract will not generally be invalidated by reason of a total or partial failure to comply with an agreement, as by failure to pay the sum agreed upon by neglect or refusal, for in such case the plaintiff has a remedy based on his contract to recover." *Maguire v. Wheeler*, 300 Pa. 513, 150 A. 882; see also *Krebs v. Stroub*, 116 Pa. 405, 9 A. 469.

¹⁷ That is, a fact other than the state of mind of the promisor at the time the promise was made.

Agreed that the promisor should be held responsible for his misrepresentations—how may it be *proved* that the promisor had no intent to perform at the time the promise was made?

Note that the *Fidurski* case clearly states that lack of intent to perform will not be presumed. This seems reasonable enough. The mere fact of nonperformance, though it may be sufficient to permit recovery in breach of contract, surely is not of itself indicative of a fraudulent intent at the time the promise was made. On this point the cases are agreed.¹⁸

But if such intent is not to be presumed, how may it be shown? The decisions are not very helpful. Perhaps a few quotations may point out the problem:

"Fraud may be predicated on the nonperformance of a promise in certain cases where the promise is the device to accomplish the fraud."¹⁹

"We deem it unnecessary to discuss the question, because if a fraudulent intent is to be established, it must at least be proved by proper evidence. There is no evidence in this case from which it may be inferred that the defendant had any dishonest intent."²⁰

". . . Of course, a promise to do something in the future in itself does not constitute fraud, but fraud may be predicated on the nonperformance of a promise made as a device to accomplish the fraud."²¹

"There must be bad faith; an intent at the time to defraud the seller."²²

"The mere failure to carry out a promise of something to be done in the future is not itself evidence of fraud, and we must find support for the allegation of fraud in other circumstances showing that the promise was but a device fraudulently contrived to take advantage of another."²³

Apparently since 1907 no one has been able to prove successfully that the promise was a "device to accomplish the fraud" *except by introducing one of two additional elements*. They are (1) a confidential relationship between the parties and (2) an express or implied statement of fact *other* than the fact of existing intent, made in conjunction with or implied by the promise.

A case illustrating the first of these is *McCreary v. Edwards*,²⁴ where the court said:

"Fraud may be predicated on the nonperformance of a promise in certain cases where the promise is the device to accomplish the fraud. . . or where a relationship of trust and confidence exist between the parties."

¹⁸ Purcell v. Binns, 298 Pa. 447, 148 A. 516, 517; Zettlemoyer et ux. v. Block et al., 329 Pa. 205, 198 A. 80; McCreary v. Edwards, 113 Pa. Super. 151, 172 A. 166. These are representative cases.

¹⁹ McCreary v. Edwards, n. 18, supra. See also Pusic v. Salak, 261 Pa. 514, 104 A. 751, quoting 12 R.C.L. 251.

²⁰ Purcell v. Binns, supra.

²¹ Commonwealth v. Meyer, 169 Pa. Super. 40 (1951).

²² Rodman et al. v. Thalheimer, 75 Pa. 232; see also Smith v. Smith, 21 Pa. 367, and Penn Lumber Co. v. Hanover, 96 Pa. Super 16.

²³ McCreary v. Edwards, supra.

²⁴ N. 19, supra.

The court cited the case of *Maguire v. Wheeler*²⁵ as standing for that proposition. That case involved a lawyer-client relationship and said simply:

"If the person making the promise intended at the time not to perform it, thus fraudulently making use of the promise as a device to procure the contract or deed, equity will grant relief."

The case of *Murphy v. Greybill*²⁶ illustrates the second type. The decision reads:

"An unfulfilled promise is only fraud if it is connected with a misrepresentation respecting alleged facts, or falsely holds out a prospect of collateral advantages that lead the seller to accept a price far below the real value of the property parted with."

Both the *McCreary* case and the *Murphy* case, though apparently swayed by the *Standard* rule, were in fact decided on other grounds. The former involved so-called "constructive fraud,"²⁷ i.e., fraud which does not depend on good or bad faith and does not require dishonest intent to be actionable. The latter was a case which could have been decided by a literal interpretation of the rule of common-law deceit, as stated by the court in *Berwick Hotel Company v. Vaughn*:²⁸

". . . It must be alleged and proved that there was a false statement of facts made with fraudulent intent which was relied on, and, as a general rule, a statement, to constitute a false and fraudulent representation, must be a representation of fact, and not a mere expression of opinion, belief, or prediction. . . ."

Of course, the rule of the *Standard* case is that a promise may be a statement of fact. But, where a representation of fact *already* exists, why go further?

* * * * *

We have seen that the courts of Pennsylvania have paid lip-service to the *Standard* rule, but have been extremely reluctant to apply it. It may now be queried—will the Pennsylvania courts apply the rule in a proper case? As the Minnesota court recently observed:²⁹

"There is a growing unwillingness on the part of the courts to allow the statements to be made without liability which are calculated to induce, and which do induce, action on the part of the hearer. Where a statement is made with fraudulent intent, there is still more reason for regarding it as a ground for liability, even though couched in the form of a promise or though it relates to a matter as to which certainty is impossible."

²⁵ N. 16, *supra*.

²⁶ 34 Pa. Super. 339 (1907).

²⁷ 17A C.J.S. 5, 6. See also 77 A.2d 877.

²⁸ N. 4, *supra*.

²⁹ *Schmitt v. Ornes Esswein & Co.*, 149 Minn. 370, 183 N.W. 840 (1921). Cf., Restatement of Contracts, § 474; Restatement of Restitution, § 8, comment d.

This attitude seems to be gaining ground in Pennsylvania and in other liberal jurisdictions. The old "dog-eat-dog" viewpoint of the early common law is gradually giving way to a sense of social responsibility on the part of the courts.

A few recent lower court decisions⁸⁰ were made in favor of advocates of the *Standard* rule, and the courts apparently did not rely upon the two additional elements usually found in such cases. Two recent federal decisions⁸¹ recognized the rule as Pennsylvania law, and applied it as such. The appellate courts of Pennsylvania also seem to have recognized the rule, although in an oblique way, in two recent cases, one involving criminal law,⁸² and the other dealing with an Office of Price Stabilization (O.P.S.) regulation.⁸³

It would seem, then, that there is a strong possibility that the Pennsylvania courts *will* recognize as fraud a promise to perform where no intent to do so exists, IF adequate proof of the fraudulent intent *existing as of the time the promise was made* is presented. What kind of proof? That is the sixty-four dollar question, and the courts offer no hint as to the answer.

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Member of the Senior Class

⁸⁰ *Leedom v. Weaver*, 28 Del. 352; *Dunlop v. Freeman*, 7 Fay. L. J. 5; also, 2 *Lycoming* 42. These cases were decided in 1939, 1944, and 1950, respectively.

⁸¹ *Boulevard Airport v. Consolidated Vultee*, 85 F.Supp. 876 (1949), and *Toner v. Sobelman*, 86 F.Supp. 369 (1949).

⁸² *Commonwealth v. Meyer*, 169 Pa. Super. 40 (1951). Here a prisoner represented that he was of a "penitent state of mind," thus obtaining a parole. The court said this was, in effect, a promise, and, citing the *Standard* case, revoked the parole.

⁸³ *Crawford et ux v. Pituch et ux*, — Pa. —, 84 A.2d 204, also a 1951 case, involved a false statement by a landlord that he desired an apartment occupied by plaintiff for his own use and occupancy, whereupon tenant moved and landlord rented to a third person at a higher rental. Held: The tenant may maintain an action for common law deceit. However, the court stated that the decision was based on federal case holdings under the O.P.S., and cited no Pennsylvania cases.