Indiana Law Journal

Volume 10 | Issue 4 Article 11

1-1935

Torts-Deceit-Oral Promise to Buy Land

Torts—Deceit—Oral Promise to Buy Land.—In an action of tort for fraud, the plaintiff had alleged that defendants took part in an auction sale of property and it was knocked down to them on their bid of $12,225.00 which succeeded an alleged bona fide bid of $12,200.00. Upon demand of a required 10% deposit, defendants represented that they did not have the money with them nor had the money in the bank upon which a check could be drawn. Plaintiff then informed them that a $500.00 deposit would be acceptable and defendants represented that payment would be made at their place of business in the afternoon. Plaintiff went there several times and each time they made some excuse about not paying and finally told her that they would pay only $10,750.00 for the property. Plaintiff refused and subsequent efforts to sell being unsuccessful, a second auction was held at which the property was sold for $10,350.00. The plaintiff charged that all of the bids made by the defendants were fraudulently made with no intention of complying therewith for the purpose of blocking the sale of the property, as it was known to them that the plaintiff must sell immediately to prevent foreclosure, and they might thus be able to obtain the property for less, and she therefore claims damages for the difference between the amount of the next highest bid at the first auction and the price at which the property did sell and subsequent expenses. Held, demurrer to the sufficiency of the complaint should have been upheld.[1]

It is quite true that the Indiana Supreme Court "has repeatedly said that actionable fraud cannot be predicated upon a promise to do a thing in the future although there may be no intention of fulfilling the promise."[2] But it is questionable if this rule has evolved from or should be applied to actions of tort for deceit. Of the cases cited by the majority opinion in support of this principle, not one was of that class. What does the complainant seek in a tort action? Not to be put into the position that he would have occupied if the promise had been performed, which is the contractual remedy for an unperformed promise, but to be placed in the position he would have been in if the injury had not occurred,[3] i. e., if the promise had not been made. It is the latter which the appellee sought here. As set out by Judge Treanor in his dissenting opinion, "The appellee is not seeking compensation for a loss legally caused by appellants failure to carry out their oral contract; she is complaining of the loss occasioned by her failure to sell to the second highest bidder and the facts alleged show that this failure was caused by the fraudulent conduct of the appellants."[4]

Yet in upholding the demurrer of the appellants that the appellee had shown no cause of action, the court cited cases wherein the plaintiff sought his remedy either in contract or in equitable proceedings to quiet title or regain property conveyed. An analysis of those cases shows no necessary domination of the principal case.

In Hayes v. Burkam[5] the plaintiff sought damages for defendants nonperformance of a promise to sign a surety bond. Bethell v. Bethell[6] was an action of covenant, and although the court set out that where a party merely promises to do a thing in the future, there can be no fraud, yet a recovery of the purchase money paid for land was ordered where the defendant did

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[1] Sachs v. Blewett (1933), 185 N. E. 856 (Ind.).

[2] Sachs v. Blewett (1933), 185 N. E. 856 (Ind.); Callaghan's Ind. Digest, Vol. 7, sec. 9, 15 N. E. D. 143, 144.

[3] McCormick, Damages in Actions for Fraud and Deceit (1933), 28 Ill. L. Rev. 1051; In re Scheupler, Chadwick, and Burnham (1933), 63 F. (2d) 241; Willis, Law of Damages (1910), sec. 14, 52.

[4] Sachs v. Blewett (1934), 188 N. E. 674 (Ind.).

[5] (1895) 51 Ind. 130.

[6] (1883) 92 Ind. 318.

not include certain required covenants in the deed as he had promised he would. Again in Balue v. Taylor[7] the plaintiff, although alleging numerous fraudulent acts, sought to recover damages due to defendant's breach of a promise to pay cash and convey certain property in settlement of a previously alleged fraudulent transaction by the defendant, and here also, relief was granted in accordance with the complaint. Burt v. Bowles[8] was an action to set aside a conveyance made for an unwritten promise by the defendant to convey other property and the bill was granted, while Robinson v. Reinhart[9] was an action to quiet title where the plaintiffs had conveyed their land under misrepresentations made to them. The conveyance was set aside and title quieted, the court, quoting from Bethell v. Bethell, adding, "* * * there is more than a mere failure to make good a promise; there is deceit, misrepresentation, abuse of confidence * * *."[10]

In each of these cases, the rule set out above was used by the court, but since the pleadings and results are so varied, it is submitted that the court in the principal case should have immediately proceeded to a solution of the problem solely upon the principles of tort law. Possibly the court rightfully feared to diminish the efficacy of the Statute of Frauds by permitting any action to be based upon this promise to buy land which was not in writing, but this action was in tort, seeking recovery for damages which followed "a false representation, fraudulently made, which entitled the plaintiff to rely thereon."[11] The following dictum in the case, however, evidences the court's failure to make this distinction. "If the appellant's contract to buy had been in writing, they would be responsible in damages for its breach, regardless of their good or bad intention at the time it was made. But the action would arise out of the contract and not in tort. Since the contract was not in writing, the breach of it cannot be made the basis of an action, and the fact that at the time it was made, they did not intend to carry it out makes their liability for the breach no greater than if they had intended to comply with it."[12]

Undoubtedly the court sought to prevent every disgruntled contractor from seeking a remedy in tort for deceit, and the above statements were quite true in that the appellants liability for their breach of contract is unaffected. But what of their liability in tort for fraudulent bidding and misrepresentation of intent? "It is very generally held that fraud may be predicated of a promise accompanied by a present intent not to perform."[13] "To profess an intent to do or not to do when the party intends the contrary is as clear a case of misrepresentation and of fraud as could be made."[14] This follows from the even more generally accepted basis that a misrepresentation of a present state of mind is to be treated as any other misrepresentation of fact.[15]

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[7] (1894) 136 Ind. 368, 36 N. E. 2, 69.
[8] (1879) 69 Ind. 1.
[9] (1894) 137 Ind. 674, 36 N. E. 519.
[10] (1894) 137 Ind. 674, 682.
[11] Harper, Law of Torts (1933), sec. 217.
[12] Sachs v. Blewett (1933), 1 Ind. Adv. Rep. 584, 592.
[13] 12 R. C. L. 261, 51 A. L. R. 63; (1932) 18 St. Louis L. Rev. 166.
[14] Herndon v. Durham & S. R. Co. (1913), 161 N. C. 650, 656, 77 S. E. 683, 685; (1929) 38 Yale L. J. 544; Harper, Law of Torts (1933), sec. 220.
[15] Edgington v. Fitzmaurice (1882), 29 Ch. Div. 459; Bayse v. Bayse (1899), 152 Ind. 172, 52 N. E. 797; Adams v. Schiffer (1887), 11 Colo. 15, 17 Pac. 21; Pocatello Security Trust Co. v. Henry (1922), 35 Idaho 321, 27 A. L. R. 337, 206 Pac. 175; Miller-Cahoon Co. v. Wade (1923), 38 Idaho 484, 221 Pac. 1102; Daniel v. Daniel (1921), 190 Ky. 210, 226 S. W. 1070; Laing v. McKee (1865), 13 Mich. 124, 87 Am. Dec. 738; Kritzer v. Moffatt (1925), 136 Wash. 416, 44 A. L. R. 681, 240 Pac. 355.

Unfortunately, the Indiana decisions are found listed among the small group holding to the minority of these viewpoints,[16] partially due of course to the use in our decisions of the rule discussed in the early part of this note, but in an annotation to the principal case,[17] the American Law Reports cite three recent cases which still follow such reasoning as compared with forty-three recent cases which are placed within the rules set out here as to promises made without present intent to perform. It is submitted that this jurisdiction need not have considered itself so bound by previous decisions as to prevent its reaching a more just and desirable result. H. A. A.

Workmen's Compensation—Who Is an "Employee" Under the Act.—This was an appeal from an award made by the majority of the full Industrial Board of Indiana. From an award denying compensation to appellant for the death of her husband, the appellant appealed to the Appellate Court of Indiana. The case was submitted on an agreed statement of facts, which showed that at the time of his death, decedent had the title of vice-president of appellee, Dusenberg, Incorporated, then under the control of the Auburn Automobile Company. The services the decedent rendered appellee consisted solely of carrying on appellee's engineering and experimental work, of which he was in charge, and of drawing plans of automobiles and motors, as well as often supervising and aiding in their construction. For these services decedent was paid a yearly compensation of $15,000. Decedent also owned a small portion of the stock of appellee, but was at all times under the direction and control of superior officers, so that even his hiring and discharge of the engineers working under him was subject to approval. While driving a car, belonging to appellee and under appellee's orders, decedent met with the accident which resulted in his death. The only question in dispute was whether decedent was an employee of the appellee within the meanings of the statute. Held, decedent was not an "employee" within the meaning of the Workmen's Compensation Act.[1]

The question of who is an "employee" under the Workmen's Compensation Act is a perplexing problem. In the instant case, there were two judges dissenting; one so strongly that a separate dissenting opinion has appeared.[2] To analyse the problem of the principal case successfully it is first necessary to examine the general provisions of the statute as well as the general rules of law applicable to such provisions, both in Indiana and neighboring states before dealing with the specific cases referred to in the majority opinion.

The Workmen's Compensation Act providing for compensation to be paid employees by employers for personal injury or death by accident arising out of or in the course of employment, also[3] provides that unless the context otherwise requires, "The term 'employee' as used in this act shall be construed to include every person, including a minor, in the service of another, under any contract of hire or apprenticeship, written or implied, except one whose employment is both casual and not in the usual course of the trade, business, occupation or profession of the employer."[4]

The Act, thus includes employees in all industrial pursuits, except those expressly exempted,[5] namely, casual laborers, farm or agricultural employees

16 12 R. C. L. 262, 51 A. L. R. 78.
17 91 A. L. R. 1297.
1 Duesenberg v. Duesenberg, Inc. (1933), 187 N. E. 750 (Ind. App.).
2 Duesenberg v. Duesenberg, Inc. (1934), 190 N. E. 894 (Ind. App.).
3 Baldwin's Ind. Stat. (1934), Sec. 16378.
4 Baldwin's Ind. Stat. (1934), Sec. 16449 (b).
5 In re Boyer (1917), 65 Ind. App. 408, 117 N. E. 507.