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NOTES AND COMMENTS

Torts—Actionable Fraud—Promissory Representations

In a recent North Carolina case,[1] the defendant was sued on a conditional sales contract for the price of machinery bought by him. Defendant admitted the execution of the contract but pleaded fraud in the inducement of the contract, in that the plaintiff's agent had represented that the machinery would be better for the work of the defendant, and would save defendant time and labor. Defendant claimed that the machinery was far from what the agent had represented it to be. The court held these statements to be ". . . promissory representations, looking to the future as to what the vendee can do with the property, how much he can make on it, and, in this case, how much he can save by the use of it, [and] are on a par with false affirmations and opinions as to the value of property, and do not generally constitute legal fraud."[2] There was a dissent by three justices in this case on the ground ". . . though the declarations may be clothed in the form of opinions or estimates, when there is doubt as to whether they were intended and received as mere expressions of opinion or as statements of facts to be regarded as material, the question must be submitted to the jury."[3]

The general rule, which is supported by numerous decisions in almost all jurisdictions, is that fraud must relate to a present or pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events.[4] While this general rule seems absolutely clear in itself, the courts in dealing with cases in which an actual

[1] The American Laundry Machinery Co. v. Skinner, 225 N. C. 285, 34 S. E. (2d) 190 (1945).

[2] *Id.* at 290, 34 S. E. (2d) at 194.

[3] *Id.* at 292, 34 S. E. (2d) at 195; *See* also Unitype Co. v. Ashcraft, 155 N. C. 63 at 66, 71 S. E. 61 at 62.

[4] McCormick v. Jackson, 209 N. C. 359, 182 S. E. 369 (1936) (applying rule); Colt Co. v. Norwood, 202 N. C. 819, 161 S. E. 706 (1932) (applying rule); Hotel Corp. v. Overman, 201 N. C. 337, 160 S. E. 289 (1931) (recognizing rule); Hinsdale v. Phillips, 199 N. C. 563, 155 S. E. 238 (1930) (recognizing rule); Shoffner v. Thompson, 197 N. C. 664, 150 S. E. 195 (1929) (applying rule); Potter v. Miller, 191 N. C. 814, 133 S. E. 193 (1926); Erskine v. Chevrolet Motors Co., 185 N. C. 479, 117 S. E. 706, 32 A. L. R. 196 (1923) (recognizing rule); Planters Bank & Trust Co. v. Yelverton, 185 N. C. 314, 117 S. E. 299 (1923) (recognizing rule); Pritchard v. Darley, 168 N. C. 330, 84 S. E. 392 (1915); Whitehurst v. Life Ins. Co., 149 N. C. 273, 62 S. E. 1067 (1908) (recognizing rule); Williamson v. Holt, 147 N. C. 515, 61 S. E. 384, 17 L. R. A. (N.S.) 240 (1908); Braddy v. Elliott, 146 N. C. 578, 60 S. E. 507, 16 L. R. A. (N.S.) 1121, 125 Am. St. Rep. 523 (1908); National Cash Register Co. v. Townsend, 137 N. C. 652, 50 S. E. 306, 70 L. R. A. 349 (1905); Troxler v. New Era Bldg. Co., 137 N. C. 51, 49 S. E. 58 (1904) (recognizing rule); Hill v. Gettys, 135 N. C. 373, 47 S. E. 449 (1904) (recognizing rule).

fraudulent intent existed have made various exceptions and limitations. The weight of authority holds that fraud may be predicated on promises made with an intention not to perform the same, or on promises made without an intention of performance.[5] In these cases, the promisor by implication asserts that there is a bona fide intention to perform, and if this intention does not exist, there is a misrepresentation of a fact upon which fraud can be predicated.[6] It must be remembered that the courts have held that the state of mind of a person at the time he makes a promise is a fact, necessarily within the exclusive knowledge of the promisor; therefore a misrepresentation of a state of mind is a misrepresentation of a then existent fact. And so, fraud may be predicated on a false representation as to what one thinks about the occurrence of future events. In the principal case, the issue centered around the "representations" of the plaintiff's agent as to the potentialities of machinery. The pleadings do not bring into issue the state of mind of the agent, and there is nothing in the opinion to indicate that this was in question. If, at the time the agent made his statements to the defendant, he did so knowing that the machinery would not do the work, you would then have the question arise whether he, the agent, was misrepresenting his state of mind—therefore, a possible ground for fraud in the inducement of the contract. In *Planters' Bank & Trust Co.* v. *Yelverton*[7] the court said that as a general rule fraud cannot be predicated upon promissory representations, because a promise to perform an act in the future is not in the legal sense a representation, but that it may be predicated upon the nonperformance of a promise when the promise is a device to accomplish the fraud.[8]

Even though the representations relate to the future, and the per-

[5] Mitchell v. Mitchell, 206 N. C. 546, 174 S. E. 447 (1934); Hinsdale v. Phillips, 199 N. C. 563, 155 S. E. 238 (1930); Clark v. Laurel Park Estates, 196 N. C. 624, 146 S. E. 584 (1929); Erskine v. Chevrolet Motors Co., 185 N. C. 479, 117 S. E. 706, 32 A. L. R. 196 (1923); Planters' Bank & Trust Co. v. Yelverton, 185 N. C. 314, 117 S. E. 229 (1923); White v. Fisheries Products Co., 185 N. C. 68, 116 S. E. 169 (1923); Williams v. Hedgepeth, 184 N. C. 114, 113 S. E. 602 (1922); Herndon v. Durham & S. R. Co., 161 N. C. 650, 77 S. E. 683 (1913); Braddy v. Elliott, 146 N. C. 578, 60 S. E. 507, 16 L. R. A. (N.S.) 1121, 125 Am. St. Rep. 523 (1908); Troxler v. New Era Bldg. Co., 137 N. C. 51, 49 S. E. 58 (1904); Hill v. Gettys, 135 N. C. 373, 47 S. E. 449 (1904); Blake v. Blackley, 109 N. C. 257, 13 S. E. 786, 26 Am. St. Rep. 566 (1891).

[6] A promise is usually without the domain of the law unless it creates a contract, but if made when there is no intention of performance, and for the purpose of inducing action by another, it is fraudulent, and may be made the ground for relief. *See* Erskine v. Chevrolet Motors Co., 185 N. C. 479, 117 S. E. 706, 32 A. L. R. 196 (1923); Herndon v. Durham & S. R. Co., 161 N. C. 650, 77 S. E. 683 (1913).

[7] 185 N. C. 314, 117 S. E. 299 (1923).

[8] This was a case of fraud inducing execution of a note for stock subscriptions, consisting in representations that the maker of the note would never be called on for any money, but that the note would be held until after a certain date, when certain stock of the company would be offered for sale to discharge the note.

son making them does not intentionally deceive the other party, it seems that, if they are positively stated as facts by one who is in a position to know, and whose duty it is to know, the truth, and are relied on to his injury by one in ignorance of their falsity, they may be found to be misrepresentations of fact on which fraud may be predicated. In *Whitehurst* v. *Life Insurance Co.*,[9] there was evidence from which it seems a jury might have inferred intentional fraud on the part of the representor, but the decision does not seem to be based on this ground. The representor was an insurance agent who, to induce one to take out a policy of insurance, read over to the prospect, who was blind, a provision of the policy stating that, if the insured was living at the end of ten years, the policy might be surrendered and the insured receive the cash surrender value with interest; the agent explained to the prospect that this meant that the company would, at the end of the ten-year period, return the whole amount paid by him, with interest. The court said it is not always required, for the establishment of actionable fraud, that a false representation should be knowingly made; that under certain conditions, if a party to a bargain avers the existence of a material fact recklessly, or affirms its existence positively, when he is consciously ignorant whether it is true or false, he may be held responsible, and that this doctrine is expressly applicable where the parties are not on equal terms with reference to the representations; that the stipulations in the policy were to some extent ambiguous and indefinite, and that it was a question for the jury as to whether the assurances given by the agent were intended as statements of fact, accepted and reasonably relied upon by the plaintiff as a material inducement to the contract; that the verdict established actionable fraud imputable to the insurance company, entitling plaintiff to recover the premiums paid and interest.

If the party making the representations as to the future does not believe the same, and the person to whom they are made does believe them, and relies on them to his injury, it seems that they may be of such a nature that they should be regarded merely as an expression of opinion on which fraud cannot be predicated, unless there are special circumstances, as superior knowledge on the part of the person making the representations or confidential relations. The *Whitehurst* Case was an example of persons on an unequal footing plus a quasi-confidential relationship.

The doctrine that fraud may not ordinarily be predicated on an unfulfilled promise or statement as to a future event finds application or recognition[10] especially where the statements related were made to

[9] 149 N. C. 273, 62 S. E. 1067 (1908).
[10] Hinsdale v. Phillips, 199 N. C. 563, 155 S. E. 238 (1930) (representations

induce the purchase of land.[11] It is held in *Braddy* v. *Elliot*[12] that, while a mere failure by one party to an exchange of land to comply with his agreement to construct buildings on the land granted by him is not sufficient to justify a rescission of the entire contract by a court of equity, yet, if the promises are made without intent on the part of the promisor to fulfill them, there is such fraud as will entitle the other party to a rescission. So, it was held in *Clark* v. *Laurel Park Estates*[13] that fraud warranting rescission of a contract for the purchase of a lot in a subdivision might be predicated on representations of the sales agents, made without intention of performance, as to improvements which would be made on or near the tract.

It seems evident that statements made by promoters to induce persons to subscribe to stock must be accepted merely as expressions of opinion on which fraud cannot be predicated in the event they are not realized.[14] Without discussion of the question, the court in the *Planters' Bank* Case held that for the purpose of showing fraudulent intent, evidence was admissible, in an action on notes given for the purchase price of corporate stock, where, as an inducement to purchase the stock, the sales agent represented to the purchaser that he would never have to pay for the stock except from dividends therefrom, and that the dividends would fully care for and pay off the purchase price. Where there was a promise to hold notes given for subscription to corporate stock until the maker of the notes sold a certain farm, and to return the notes on failure to sell the farm, the North Carolina court has held that if there is no intention of performance, fraud may be predicated thereon.[15]

In *National Cash Register Co.* v. *Townsend*,[16] the court said that fraud may not ordinarily be predicated on a representation by the seller

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as to pavements, sewer, and water system to be installed in tract of land, made in good faith and with an attempt to perform); Potter v. Miller, 191 N. C. 814, 133 S. E. 193 (1926) (promise by grantor to secure outstanding life estate for the grantee); Williamson v. Holt, 147 N. C. 515, 61 S. E. 384, 17 L. R. A. (N.S.) 240 (1908) (representation by vendor of ice plant that with some repairs it would turn out about a certain amount of ice per day, the same being a mere expression of opinion as to a future event, made to a vendee having knowledge of the condition of the plant and full opportunity of investigation).

[11] Troxler v. New Era Bldg. Co., 137 N. C. 51, 49 S. E. 58 (1904) (representation, inducing sale of lot, that the vendee would erect thereon a building, thereby enhancing the value of the vendor's other property).

[12] 146 N. C. 578, 60 S. E. 507, 16 L. R. A. (N.S.) 1121, 125 Am. St. Rep. 523 (1908).

[13] 196 N. C. 624, 146 S. E. 584 (1929).

[14] Hotel Corp. v. Overman, 201 N. C. 337, 160 S. E. 289 (1931) (oral representations to induce a subscription to stock in a hotel corporation, all promissory in their nature); Pritchard v. Darley, 168 N. C. 330, 84 S. E. 392 (1915) (representation as to the future value of, or profits to be derived from stock).

[15] White v. Fisheries Products Co., 185 N. C. 68, 116 S. E. 169 (1923).

[16] 137 N. C. 652, 50 S. E. 306, 70 L. R. A. 349 (1905).

of a cash register that its use would save the expense of a bookkeeper and half of a clerk's time. The court regarded such statements as merely "dealer's talk," on which the purchaser could not safely rely. It is said, however, that there was no evidence that the sales agent knew that these statements were false when he made them. The court in the principal case rely heavily on the *Townsend* Case as expressing the general rule as to promissory representations; i.e., promissory representations do not constitute legal fraud. The majority opinion "without going into a dialectic discussion of what may be a fact and what may not be a fact . . ." holds as a matter of law that actionable fraud was not present.[17] This seems to be the point on which the dissent disagreed.[18]

The habit of vendors to exaggerate the value and suitability of their articles is well known. A purchaser is certainly not justified in placing *substantial* reliance on the seller's opinion as to the article in question. Puffing of value as well as quality is an accepted part of bargaining transactions. But it seems obvious that the recipient is entitled to assume that a representation of facts which are material in determining his decision to engage or not to engage in a particular transaction is honestly made, unless its falsity is obvious to his senses. A purchaser is justified in assuming that even his vendor's opinion has some basis of fact and therefore in believing that the vendor knows of nothing which makes his opinion fantastic. In the Restatement of Torts the following illustration is made:[19]

"A, in order to induce B to buy a heating device, states that it will give a stated amount of heat while consuming only a stated amount of fuel. B is justified in accepting A's statement as an assurance that the heating device is capable of giving the services which A promises."

It would seem in the principal case that the vendee might have justifiably relied on the vendor's statements;[20] and the question as to whether these statements were opinion honestly made or mere puffing would seem to be for the jury.

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[17] The American Laundry Machinery Co. v. Skinner, 225 N. C. 285, 290, 34 S. E. (2d) 190, 193 (1945).

[18] *See* Wolf Co. v. Smith Mercantile Co., 189 N. C. 322, 127 S. E. 208 (1925); Case Threshing Machine Co. v. McKay, 161 N. C. 584, 77 S. E. 848 (1913); White Sewing Machine Co. v. Bullock, 161 N. C. 1, 76 S. E. 634 (1912); Case Threshing Machine Co. v. Freezer, 152 N. C. 516, 67 S. E. 1004 (1910).

[19] §525, Illustration 2.

[20] See Note (1928) 7 N. C. L. REV. 90 on reliance on representation.