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TORTS - ACTION IN DECEIT FOR PROMISE MADE WITH NO INTENT TO PERFORM - EFFECT OF UNENFORCEABILITY OF CONTRACT UNDER STATUTE OF FRAUDS

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TORTS — ACTION IN DECEIT FOR PROMISE MADE WITH NO INTENT TO PERFORM — EFFECT OF UNENFORCEABILITY OF CONTRACT UNDER STATUTE OF FRAUDS — Undertaking to state a cause of action sounding in tort, plaintiff alleged that defendant never intended to perform an oral contract for certain manufacturing and selling rights, but that, on the contrary, defendant's fraudulent purpose was to reap the benefits of plaintiff's investigation as to the value of the said manufacturing and selling rights without cost to defendant. Plaintiff, in reliance upon the oral contract, incurred expenses in connection with his investigation as to the value of the said selling rights and in preparation to take advantage of his contract. The contract itself was unenforceable because it was within the statute of frauds. *Held*, plaintiff cannot recover in tort; to enforce liability would be to evade the statute of frauds. *Cassidy v. Kraft-Phenix Cheese Corporation*, 285 Mich. 426, 280 N. W. 814 (1938).

A promise made with no intent to perform it is fraudulent and may give rise to rescission and restitution or to an affirmative remedy.[1] While the Michigan court has, in some cases, granted relief from detrimental reliance induced by a deceitful promise,[2] the court felt that in the instant case it could not sanction recovery in tort for deceit where the action was founded on a promise which was unenforceable because it was within the statute of frauds.[3] The court reasoned that the only proximate result of the defendant's deceit was that plaintiff was unable to sue for damages for breach of contract; and so to permit recovery would be indirectly to enforce the contract, and thereby evade the statute of frauds.[4] Obviously the fact that plaintiff incurred preliminary and investigatory

[1] 5 WILLISTON, CONTRACTS, rev. ed., § 1496 (1937); 14 Am. & Eng. Ency. Law, 2d ed., 51 (1899); and see, for a collection of cases and discussion of the problem, 51 A. L. R. 46 at 53 (1927); 68 A. L. R. 635 at 637 (1930); 91 A. L. R. 1295 at 1297 (1934).

[2] Laing v. McKee, 13 Mich. 124 (1865); Shipman v. Seymour, 40 Mich. 274 (1879); Ross v. Miner, 67 Mich. 410, 35 N. W. 60 (1887); Weidman v. Phillips, 159 Mich. 380, 124 N. W. 40 (1909); Van Dellen v. Van Dellen, 259 Mich. 275, 243 N. W. 5 (1932).

[3] Cassidy v. Kraft-Phenix Cheese Corp., 285 Mich. 426 at 435, 280 N. W. 814 (1938). There is a note in 104 A. L. R. 1420 (1936) which deals with the problem.

[4] Principal case, 285 Mich. at 439.

expenses because of defendant's deceit is ignored when it is argued that the only proximate result of defendant's deceit is the inability of plaintiff to sue for breach of contract.[5] The court also thought that to permit recovery would violate the policy of the statute of frauds. A difference of opinion is entertained on this point; [6] but it certainly cannot be denied that the Michigan court itself has not permitted the policy of the statute of frauds to preclude relief in some cases.[7] The court's arguments that the plaintiff could not be deceived because he knew, or was presumed to know, that he did not have an enforceable contract, and that it is not actionable deceit not to intend to do what one does not have to do are not convincing; for the latter assumes the question and the former ignores common honesty and morality and everyday business practice, and is founded on a presumption of nice technicality that should easily be equalized by the presumption that every man is innocent. The argument that a confusion of remedies would result if recovery were allowed is not particularly weighty. Clear thinking would dispel any confusion. Nonetheless there appears to be some authority in accord with the decision of the Michigan court.[8] The ultimate end to be subserved is security of business transactions.[9] Whether this can best be accomplished by requiring written evidence as a condition to bringing an action in a situation like that involved in the instant case presents a problem that could, with some justification, be answered either affirmatively or negatively.[10]

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[5] It may be that the pleadings and arguments left something to be desired anent this point. See 285 Mich. at 434.

[6] Keeton, "Fraud—Statements of Intention," 15 TEX. L. REV. 185 at 201 (1937).

[7] Judge Cooley said in Laing v. McKee, 13 Mich. 124 at 126 (1865): "It is a matter of no moment whether the fraud was perpetrated by means of a promise upon which he relied, and which defendant did not intend to keep, or by untrue statements as to existing facts. And it is not necessary for us to decide, in this view of the case, whether the agreement to assign the certificate was or was not void under the Statute of Frauds." The case was one in equity to obtain relief from allowing the period of redemption from a tax sale to expire in reliance upon the promise of the holder of the tax-sale certificate to assign the certificate. In the case of Ochsenkehl v. Jeffers, 32 Mich. 482 (1875), it was held that the statute of frauds did not prevent the showing of an oral contract where the action was for deceit. However, there had been fraud in the integration of the oral contract and undoubtedly relief could have been obtained in equity. In the case of Gillett v. Knowles, 108 Mich. 602, 66 N. W. 497 (1896), the plaintiff was allowed to recover in assumpsit on an oral contract which was within the statute of frauds, where plaintiff's performance was obtained fraudulently and without proper performance on the part of the defendant. In McNaughton v. Smith, 136 Mich. 368, 99 N. W. 382 (1904), the statute of frauds was held not to preclude proof of an oral promise made with no intent to perform it. However, that case was based on a rescission theory and there were false representations in addition to the implied representation of intent to perform the promise.

[8] Dawe v. Morris, 149 Mass. 188, 21 N. E. 313 (1889). An effort is made to distinguish this case in Burgdorfer v. Thielemann, 153 Ore. 354, 55 P. (2d) 1122 (1936).

[9] Keeton, "Fraud—Statements of Intention," 15 TEX. L. REV. 185 at 203 (1937).

[10] Ibid., at pp. 202 and 203.