1931

Evidence, Application of Parol Evidence Rule to Written Memorandum of an Oral Contract Within the Statute of Frauds

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NOTES

EVIDENCE—APPLICATION OF PAROL EVIDENCE RULE TO WRITTEN MEMORANDUM OF AN ORAL CONTRACT WITHIN THE STATUTE OF FRAUDS.—[New York] A case[1] recently decided by the New York Court of Appeals presents several perplexing problems.

The plaintiff and the defendant negotiated a contract by telephone for the sale of certain bank stock to the defendant. The plaintiff then signed and sent to the defendant a written "confirmation" of the sale which was accepted by the latter. In this document the purchase price was stated as $1,060.00 a share. The plaintiff claimed that in the oral contract a price of $1,160.00 had been agreed on, and that the price of $1,060.00 was entered in the confirmation by mistake. The defendant claimed that $1,060.00 was the price agreed on.

The defendant brought an action for damages for the failure to deliver the stock at the lower price. The plaintiff brought a cross-action for reformation of the confirmation and damages for failure to accept and pay the higher price. The actions were consolidated and tried together, resulting in a judgment in favor of the defendant. The Appellate Division reversed this judgment and entered a decree in favor of the plaintiff for reformation and damages. The Court of Appeals reversed this decree and dismissed both actions on the following theories:

First, that "parol evidence" was admissible to prove that the written confirmation or memorandum did not conform to the oral contract.

Second, that the Statute of Frauds required a memorandum conforming to the contract actually made, and that the finding of mistake demonstrated that there was no note or memorandum in writing of the true oral contract.

Third, that a court of equity could not, by the process of reformation, supply a memorandum which the parties had not made.

In other words, the defendant could not enforce the contract he alleged because no such contract was made.

The plaintiff could not enforce the real contract because there was no corresponding written memorandum.

The plaintiff could not have relief in equity because the oral contract was unenforceable in the absence of a written memorandum conforming to it.

This note is not concerned with the question of relief in equity since that involves a field with which the writer is not particularly familiar, though it is rather hard to see why a court of equity is precluded from decreeing the reformation of a memorandum if it could decree reformation of a contract required to be in writing.

It is perfectly obvious that without reformation of the memo-

1. *Donald Friedman & Co.* v. *Newman* (N. Y. 1931) 174 N. E. 703.

randum the vendor could not enforce an oral contract for a sale at $1,160.00 a share because there was no written memorandum of such a contract. The doubtful question is whether the vendee's action at law should be defeated by proof of the variance between the oral contract and the written memorandum on which he relied. The opinion disposes of the matter by this statement:

"The memorandum is not subject to the parol evidence rule, for it does not integrate, but merely evidences, the oral agreement. It may be shown by parol to be inaccurate or incomplete."

The statement that the memorandum may be shown to be inaccurate or incomplete seems to be supported by the cases, though the actual decisions on the point are rather scant.[2] If the confirmation was a mere evidence document, a mere written admission like a receipt, it could of course be contradicted.[3] The so-called "parol evidence" rule is not a rule discriminating between writings as evidence and other varieties of evidence, but operates to shut out the facts, which the evidence tends to prove, as the basis of a claim or defense.

In the case of written contracts, or oral contracts "integrated" by a written instrument, the parties have theoretically expressed their intention to be bound exclusively by the writing, and, so far as the courts give effect to such expressed intent, they shut out prior oral agreements because they are no longer effective.

Now it may be granted that the written confirmation was not a contract or the integration of a contract, and hence is not governed by the technical contract rule. From this it does not follow that it is open to contradiction to the same extent as a receipt or a mere memorandum.

Where the Statute of Frauds is involved, a written memorandum, conforming to certain standards of completeness, etc., has the legal effect of making the contract enforceable. That is, a sufficient memorandum either furnishes the necessary condition precedent to the maintenance of an action, or operates to destroy an excuse for non-performance of the oral contract.

If insufficient on its face, the deficiency can not be supplied by proof of the oral contract for the simple reason that under the accepted construction of the statute, nothing short of a writing embodying the omitted price, quantity, description, etc., will have the desired legal effect. If the memorandum is sufficient on its face to make enforceable the contract alleged, and which it tends to prove, then whether such memorandum may be invalidated by a variance between it and the oral contract depends on the effect given to the statutory requirement of a written memorandum.

If the statute is construed as requiring actual conformity in fact between the memorandum and the oral contract, then, of course,

2. *Boardman* v. *Spooner* (1866) 13 Allen (Mass.) 353; *Fisher* v. *Andrews* (1901) 94 Md. 46; *Williams* v. *Pittsfield Lime Co.* (1926) 258 Mass. 65.

3. *Ensign* v. *Webster* (1799) 1 Johnson's Cases (N. Y.) 145.

lack of conformity would be provable because by this assumption it would destroy the legal effect of the memorandum. Whether sound policy requires such a construction of the statute is a matter which deserves more consideration than has apparently been given to it.

It might be thought that the purpose of the statute was to prevent fraud and perjury by eliminating contentions which could be supported by perjured testimony. If a memorandum, sufficient on its face, is subject to attack for alleged mistake or omission, there is as much opportunity for fraud and manufactured testimony as there would be where no statute had been passed, because the same contest would arise in the attempt to prove and disprove the terms of the oral contract.

There is no greater hardship in shutting out mistake as a ground of defense to a written memorandum deliberately made for the purpose of making the sale binding than there is shutting out mistake in integration as a defense to a written integration of an oral contract.

Different consideration might affect a casual memorandum or written admission not made for the purpose of complying with the statute.

If there is undue hardship in making the memorandum conclusive in actions triable by jury, a court of equity could order the cancellation of the memorandum on satisfactory proof of such a mistake as to make it unconscionable to hold the party to the writing.

If this view should be accepted mistake would doubtless be treated as an "equitable defense" in the code states, though in New York that would not be helpful since the New York Practice Act has been construed to make equitable defenses triable by jury.[4]

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PRACTICE—EFFECT OF LEGISLATIVE ENACTMENTS OF RULES OF PRACTICE AS AN INVASION OF THE JUDICIAL DEPARTMENT—[United States] *Herron* v. *Southern Pac. Co.*[1] recalls the case in Illinois[2] which involved the construction and validity of that provision of the Illinois Practice Act (Section 66) making it a cause of continuance, if it shall appear to the court that the attorney, solicitor, or counsel of the party applying for the continuance is a member of the General Assembly of the State, in actual attendance of its sessions at the time, and that the attendance of the attorney, solicitor, or counsel in court is necessary to a fair and proper trial of the suit. In that case the court found the affidavit relied upon for a continuance insufficient to show that attendance in court by the particular attorney who was the member of the General Assembly was necessary. In sustaining the action of the trial court in its refusal to permit a continuance in that case, the court held that to give to the statute the effect of requiring a continuance on

4. *Susquehanna S. S. Co.* v. *Anderson* (1925) 239 N. Y. 285.

1. (1931) 75 L. Ed. Adv. Sheets 586, 51 Sup. Ct. 383.
2. *Johnson* v. *Theodoron* (1927) 324 Ill. 543, 547.