

Contract--Statute of Frauds--Subscription of Memorandum (Robinson v. Karr, 273 App. Div. 790 (2d Dep't 1947))

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divorced from the sentiments of its author is to subject those rights to the tyranny of words.

The constitutionality of all types of religious instruction programs wherein public school officials cooperate with religious groups is now left in doubt. The practice in New York State is to release pupils from secular studies for periods of religious instruction but no part of the religious instruction is given in public school buildings. It is believed that this fact may be sufficient to exclude the program from the scope of this decision.

Aside from abstract legal principles such decisions may be considered in the light of some extraneous facts. The *Everson* decision¹⁹ met considerable criticism on the ground that it favored the Catholic Church. The present decision followed a year later. It might be said that here we have a decision which treats all religions alike. That is true in so far as it tends to isolate all religion from public school education. It may be that the adverse effect on any particular group will be in proportion to the use which that sect has made of the released time program. However, it is well known that the Catholic Church has a wide-spread system of parochial schools, for which no amount of released time religious education would be a substitute. The effect of the decision may be far more harmful to those sects which do not have a comparable education system.

F. F. G.

CONTRACT—STATUTE OF FRAUDS—SUBSCRIPTION OF MEMORANDUM.—The parties entered into a contract for the sale of real property. The only written memoranda of the sale consists of a check for \$500.00 signed by the purchaser (defendant), given as a deposit and a receipt setting forth the terms of the sale signed by the vendor (plaintiff). Thereafter, the purchaser stopped payment on the check and the vendor sold the property to a third person.

The vendor sues for damages for the breach of the contract, consisting of the difference between the contract price and the market value, and for brokerage charges. The defense is the Statute of Frauds. *Held*, defendant's motion for summary judgment granted. The court assumed that the memorandum was a sufficient statement of terms to satisfy the requirements of the Statute of Frauds¹ but nevertheless, held the agreement to be void as not having been subscribed by the party sought to be charged.² *Robinson v. Karr*, 273 App. Div. 790, 75 N. Y. S. 2d 460 (2d Dep't 1947).

¹⁹ *Everson v. Board of Education*, 330 U. S. 1, 91 L. ed. 711 (1947).

¹ N. Y. REAL PROP. LAW § 259.

² As required by N. Y. REAL PROP. LAW § 259, as amended by Laws of 1944, c. 198. Prior to this amendment the statute required an executory con-

*Matter of Wechler's Estate*³ is frequently cited for the proposition that the courts will not allow the Statute of Frauds to be used as an instrument of fraud. This general proposition must be tempered with the realization that the statute requires a writing subscribed by the party to be charged and one embodying the complete agreement. Mere acts of parties no matter how conclusive and unequivocal to show an agreement, if not supplemented by the required writing, will not suffice. It is no fraud to seek the protection which the statute affords.

In the abstract the construction of the statute is well settled, but its application to the particular facts of a given case sometimes becomes difficult. The two broad questions involved are those of sufficiency and those of subscription. A memorandum sufficient to take a case out of the operation of the statute must state the whole contract without recourse to parol evidence.⁴ It must identify by name or description the parties to the transaction, a seller and a buyer.⁵ The subject matter of the sale and the terms must be included.⁶

The memorandum exacted by the statute does not have to be in one document. It may be pieced together out of separate writings, connected with one another either expressly or by internal evidence of subject matter and occasion.⁷ It may consist of a series of letters, or telegrams or written drafts.⁸

tract, to lease or sell an interest in real property, to be subscribed by the grantor or lessor. The amended statute requires a subscription by the party to be charged. The purpose of the amendment is to afford equal protection to purchasers. (See 1944 LEG. DOC. NO. 65(D) 1944, REPORT, LAW REVISION COMMISSION, pp. 71-89.) For a brief but excellent article on the development and application of the statute, from 1787 when N. Y., by Laws of 1787, c. 44, § 11, adopted Section 4 of the English Statute of Frauds (29 Car. 2, c. 3, 1677) to the time of the 1944 amendment, see 18 ST. JOHN'S L. REV. 137 (1944).

³ 171 Misc. 738, 13 N. Y. S. 2d 940 (Surr. Ct. 1939).

⁴ *Textile Capitol Building Corp. v. Wendel Foundation*, 253 App. Div. 332, 338, 2 N. Y. S. 2d 45, 50 (1st Dep't 1938), *aff'd*, 279 N. Y. 769, 18 N. E. 2d 860 (1939); *Friedman & Co. v. Newman*, 255 N. Y. 340, 343, 174 N. E. 703, 704 (1931); *De Goode v. Burton*, 141 App. Div. 22, 125 N. Y. Supp. 662 (2d Dep't 1910).

⁵ *Lerand Corporation v. Meltzer*, 267 N. Y. 343, 196 N. E. 283 (1935); *Irvmor Corp. v. Rodewald*, 253 N. Y. 472, 171 N. E. 747 (1930); *Mentz v. Newwitter*, 122 N. Y. 491, 25 N. E. 1044 (1890).

⁶ In *Mentz v. Newwitter*, 122 N. Y. 491, 498, 25 N. E. 1044, 1046 (1890), the court states: "Such essentials must appear, without the aid of parol proof, either from the memo itself or from a reference therein to some other writing or thing; and such essentials, to make a complete agreement, must consist of the subject matter of sale, the terms, and the names or a description of the parties." For the broad definition of the essentials of a memorandum see RESTATEMENT, CONTRACTS § 207 (1932). See Note, 153 A. L. R. 1112 (1944).

⁷ *Marks v. Cowdin*, 226 N. Y. 138, 145, 123 N. E. 139, 141 (1919); *cf. Raubitschek v. Blank*, 80 N. Y. 478, 482 (1880).

⁸ *Ford Motor Co. v. Hotel Woodward Co.*, 271 Fed. 625 (C. C. A. 2d 1921).

Each writing need not contain all the elements of a contract; it is sufficient if when taken together a contract is made out.⁹ Unquestionably, a receipt for money may be relied upon as a note or memorandum of the contract. But if it be relied upon, it is well settled that it must contain the entire agreement of the parties; and if it appears that it is incomplete, in the sense that it does not contain the entire agreement, then the writing is insufficient.¹⁰

Since the decision in the principal case turned on the lack of subscription, this article is more concerned with that factor rather than with the sufficiency of the memorandum, although the two cannot be entirely divorced. In the great majority of jurisdictions, wherein the statutes require a signing by the party to be charged, the person against whom it is sought to enforce the contract by action, whether the vendor or the purchaser, is deemed to be the party to be charged and a signing by him is necessary and sufficient to satisfy the statute.¹¹ But Idaho¹² and Michigan¹³ construe the words, "the party charged," to mean the party, whether one or more, charged with the performance of some duty or obligation under the contract. Thus, they require a signature of both parties in case of bilateral agreements and that of one party in the case of a unilateral undertaking.¹⁴

When memorandum relied upon consists of separate writings, they must, on their face, relate to or connect with each other, either by express reference from one writing to the other or, where each writing is subscribed, by internal evidence of their unity.¹⁵ Parol evidence will be allowed to identify the writing referred to, where

⁹ *Hasenfrazt v. Berger Apartments*, — Misc. —, 61 N. Y. S. 2d 12 (Sup. Ct. 1946).

¹⁰ *Ansorge v. Kane*, 244 N. Y. 395, 398-400, 15 N. E. 683, 684, 685 (1927); *Kleinert Rubber Co. v. Wood*, 220 App. Div. 773, 221 N. Y. Supp. 840 (2d Dep't 1927); *Polucek v. Jahoda*, 203 App. Div. 38, 196 N. Y. Supp. 445 (2d Dep't 1922); *Lichtman v. Mazzeo*, 188 Misc. 519, 68 N. Y. S. 2d 876 (Sup. Ct. 1947).

¹¹ See Note 37 C. J. S. *Frauds*, Statute of, § 206 n. 67 (1943); *RESTATEMENT, CONTRACTS* § 211 (1932). New York follows same view but the statute specifically requires a subscription rather than a signature.

¹² *Rouker v. Richardson*, 49 Idaho 337, 288 Pac. 167 (1930).

¹³ *Willebrandt v. Sisters of Mercy*, 185 Mich. 366, 152 N. W. 85 (1915).

¹⁴ This seems to the writer to be a construction which should be followed since it results in the most equitable adjudications. In the absence of such a construction, it is necessary to rule as in New York (*Bache v. Bankograph Co.*, 120 Misc. 44, 197 N. Y. Supp. 663 (Sup. Ct. 1922)) that mutuality of obligation is not essential to the validity of a contract, in so far as its compliance with the statute is concerned, and the fact that the contract may not be enforceable against one party, because not subscribed by him, is no defense to the other party, by whom it is subscribed.

¹⁵ *Atlas Shoe Co. v. Lewis*, 202 App. Div. 244, 195 N. Y. Supp. 618 (3d Dep't 1922); *Raho v. DeVito*, — Misc. —, 69 N. Y. S. 2d 619 (Sup. Ct. 1947); *Culotta v. Banana Sales Corp.*, 142 Misc. 149, 254 N. Y. Supp. 84 (Sup. Ct. 1931); *Decar v. Streeter*, 136 Misc. 206, 240 N. Y. Supp. 492 (Sup. Ct. 1930).

there is clear reference in one of the writings to the other, and to show circumstances of preparation of memorandum.¹⁶

An express or explicit reference from one document to another incorporates the latter in the former so as to allow the two to be considered together for the purpose of determining whether the requirements of the statute are satisfied.¹⁷ But where the several writings are each subscribed by the party to be charged, an express reference is not necessary to justify their consideration together; the connection of the writings may be implied where their contents show that they relate to the same parties and subject matter and are part of one and the same transaction.¹⁸

It is not essential that all writings be subscribed; unsubscribed writings may be considered provided they are sufficiently connected with the subscribed writings.¹⁹ But it is important to bear in mind that the subscribed writing must refer to the unsubscribed. It is not sufficient that the unsubscribed refer to the subscribed.²⁰ That is the most important single element in the decision of the cases.

Thus in *Raho v. DeVito*,²¹ which was an action brought by a purchaser of realty for specific performance, the memorandum involved was:

Received on account on 22 Ohio Avenue for Deposit \$500

Anita DeVito

\$9,650.00 Full Price

Plaintiff's contention, that a check for \$500 given by him and a letter from defendant's attorney returning said check remedy the defect of omission of name or description of purchaser from memorandum, was not upheld. The two documents are not mentioned or referred to in the original memorandum. It was correctly stated that the fact that the amount of deposit and the amount of the check are \$500 does not constitute a reference in the memorandum to the check. The fact that the check was signed by the plaintiff does not prove that she was the purchaser.

*Berlin v. Himmelstein*²² was an action for specific performance by a lessee. A sufficient memorandum of a two-year lease was writ-

¹⁶ *Atlas Shoe Co. v. Lewis*, *supra* note 15; *Delaware Mills v. Carpenter Bros.*, 200 App. Div. 324, 193 N. Y. Supp. 201 (3d Dep't 1922).

¹⁷ *Atlas Shoe Co. v. Lewis*, *supra* note 15; *Meinig Co. v. United States Fastener Co.*, 200 App. Div. 522, 193 N. Y. Supp. 106 (1st Dep't 1922).

¹⁸ *Dawson v. Margolies*, 126 Misc. 39, 212 N. Y. Supp. 471 (Sup. Ct. 1925), *aff'd*, 218 App. Div. 755, 218 N. Y. Supp. 729 (1st Dep't 1926).

¹⁹ *Atlas Shoe Co. v. Lewis*, *supra* note 15.

²⁰ *May v. McVann*, 272 App. Div. 929, 71 N. Y. S. 2d 151 (2d Dep't 1947); *Berlin v. Himmelstein*, — Misc. —, 71 N. Y. S. 2d 626 (Sup. Ct. 1947); *Raho v. DeVito*, — Misc. —, 69 N. Y. S. 2d 619 (Sup. Ct. 1947); *RESTATEMENT, CONTRACTS* § 208 (1932).

²¹ — Misc. —, 69 N. Y. S. 2d 619 (Sup. Ct. 1947).

²² — Misc. —, 71 N. Y. S. 2d 626 (Sup. Ct. 1947).

ten up by plaintiff lessee but defendant did not sign it, although urged to do so by plaintiff. At the time plaintiff paid defendant \$25 and received a signed receipt from defendant. This receipt was silent as to the term of letting. Defendant gave plaintiff the key to the apartment. Plaintiff's contention, that the receipt, the memorandum on the reverse side thereof, the check and the defendant's affidavit in the action, taken together and considered as a whole, constitute a sufficient memorandum, was not upheld. The memorandum could not be pieced together with defendant's receipt since memorandum was in plaintiff's handwriting and not subscribed to by defendant. The receipt made no reference to the memorandum.

In *May v. McVann*,²³ which was an action by purchaser of realty for specific performance, the contract of sale was held void under the statute where check and letter, read together, were insufficient as a note or memorandum, and endorsing the check was held not to be a subscription of the note or memorandum, even though the check was delivered with the letter.

In the instant case there is no question that the check could not be pieced together with the plaintiff's receipt since there was no reference made by the check to the receipt.²⁴ Had the check referred to the receipt, it would seem that the two writings could nevertheless not be pieced together in the absence of defendant's subscription (a signing at the physical end of the writing). The mere signing of the check as maker would not suffice to satisfy the subscription requirement of statute. Should the reference and the subscription be present, there is no reason why the check and the receipt could not constitute a sufficient memorandum.²⁵

The requirements of the statute are very exacting. Where there is the slightest room for fraud, the contract will not be recognized.

²³ 272 App. Div. 929, 71 N. Y. S. 2d 151 (2d Dep't 1947).

²⁴ In *Hefford v. Lichtman*, 116 Misc. 692, 190 N. Y. Supp. 554 (Sup. Ct. 1921), a check which contained no reference to terms of contract did not constitute a sufficient memo.

²⁵ As to the sufficiency of a check or note as a memo satisfying Statute of Frauds: (a) where it refers to contract and (b) where it does not, see Notes 20 A. L. R. 363-369 (1922) and 153 A. L. R. 1112-1122 (1947). In *Bach Realty Corp. v. George Whiten Realty Corp.*, 228 App. Div. 361, 240 N. Y. Supp. 31 (2d Dep't 1930), a memorandum on the back of a check, given by a purchaser in part payment of the purchase price of land, was sufficient to comply with the statute. The check was made payable to the vendor's agent and subscribed by him. (It must be remembered that the case is not that of a check which made reference to another writing but rather that of a check, the reverse side of which was itself the memorandum duly subscribed.) In *New Neilson Ave. Corp. v. Levine*, 118 N. Y. L. J. 1477 (Mun. Ct. Nov. 26, 1947), there was a complete contract subscribed by the plaintiff seller. On the face of a check given in part payment by defendant's agent was a reference to the contract. The complaint was dismissed because of improper pleadings. The court indicated, however, that the writings when read together may constitute a sufficient memo; that it was a question of fact and that explanatory evidence would be considered and evaluated at the trial.

Though this strict interpretation often results in parties to an otherwise valid agreement not being able to seek the aid of the courts, it is to be desired as the lesser of two evils.

V. P.

CRIMINAL LAW—CHANGE OF VENUE—TRANSFER—RIGHT TO FAIR TRIAL.—The defendant in this action seeks a transfer under the N. Y. Code of Criminal Procedure, § 344, from the County Court to the Supreme Court of Bronx County, and also a change of venue from Bronx County to another county on the grounds that he can not obtain a fair and impartial trial before an unbiased court and unprejudiced jury in that community. The defendant, who was charged with manslaughter in the second degree because his dogs, which killed an eleven year old boy, were allowed by him to run at large despite his knowledge of their dangerous propensities, maintained that widespread newspaper comment and publication of belief of his guilt would prevent him from obtaining an unbiased trial. *Held*, application denied. The defendant must present clear and unequivocal proof that the trial would be held in a community so prejudiced as to cause him to be denied the full benefit of presumption of innocence until proof of guilt beyond reasonable doubt. The mere existence of widespread newspaper comment does not evidence such overwhelming bias. *People v. Sandgren*, — Misc. —, 75 N. Y. S. 2d 753 (Sup. Ct. 1948).

The right to remove the place of trial from one county to another when a fair trial can not be had where the indictment is pending is a right which existed under common law¹ and was subsequently incorporated into the laws of the State of New York.² This right is a substantial one and necessary in order to fairly protect the rights of the defendant. Safeguard against local prejudice is a fundamental principle of criminal jurisprudence.³

The defendant in the instant case applied for both remedies under the applicable section,⁴ that is, transfer from the County Court to the Supreme Court, as well as change of venue to another county. The application for a change of venue of the County Court indictment must be made to the Supreme Court, Special Term,⁵ but it is not necessary to first transfer the indictment to the Supreme Court of the county where it was found.⁶ The right to transfer from the

¹ *People v. McLaughlin*, 150 N. Y. 365, 44 N. E. 1017 (1896).

² N. Y. CODE CRIM. PROC. § 344.

³ *People v. Becker*, 135 Misc. 471, 239 N. Y. Supp. 61 (Sup. Ct. 1930); *People v. Nathan*, 139 Misc. 345, 249 N. Y. Supp. 395 (Sup. Ct. 1931).

⁴ N. Y. CODE CRIM. PROC. § 344.

⁵ N. Y. CODE CRIM. PROC. § 346.

⁶ *People v. Green*, 201 N. Y. 172, 90 N. E. 658 (1911).