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REFORMATION OF MEMORANDUM UNDER THE STATUTE OF FRAUDS.

A written agreement cannot be modified by parol evidence as to prior negotiations. The writing is conclusively presumed to contain the final result of these negotiations.¹ An exception to this rule exists in equity in cases of mistake, accident, or fraud. There, parol evidence is competent to show that the writing does not represent the true agreement of the parties.^{1a}

Accordingly, equity exercises its power to reform the writ to make it conform to the true agreement of the parties.² The effect which the Statute of Frauds has upon this power of equity is the subject of investigation in the present note. We shall confine ourselves to determining how far the Statute of Frauds interferes with this power to reform an instrument, which, by the statute is required to contain all the essential terms of the oral agreement.³

The courts frequently reform instruments clearly required by the Statute of Frauds to be in writing but without referring to the statute.⁴ Equity has always been clothed with the salutary power of preventing fraud and mistake, or affording positive relief against its consequences; and this power it has not hesitated to exercise by compelling the specific execution of a verbal contract to which the provisions of the Statute of Frauds apply; where the refusal to execute it would amount to practicing a fraud.⁵

It must be noted, however, that in so doing, it disclaims the power of ingrafting exceptions upon the statute but proceed upon the ground that to prevent hardship is their supreme duty as courts of conscience.⁶ Thus the great weight of authority holds that the Statute of Frauds does not prevent the reformation of executed instruments like deeds and mortgages.⁷

In this connection the case of *Gillespie v. Moon*,⁸ which became the leading case in support of the theory that the Statute of Frauds does not prevent reformation, should be noticed. That was a bill in

¹ See note to *Butler v. Barnes*, 12 L. R. A. 273, for cases cited as to equity jurisdiction to correct errors in contracts and conveyances due to mutual mistake or fraud.

^{1a} *Murdock v. Gould*, 193 N. Y. 369, 86 N. E. 12, *rev's'g* 120 App. Div. 888, 105 N. Y. Supp. 1132 (1st Dept., 1907).

² *Supra* note 1.

³ *Infra* note 13.

⁴ *Infra* note 5.

⁵ *Beardsley v. Duntley*, 69 N. Y. 580 (1877); *Gillespie v. Moon*, 2 Johns. 585 (N. Y., 1817).

⁶ *Gillespie v. Moon*, *supra* note 5.

⁷ *Beardsley v. Duntley*, *supra* note 5, where mistake in the description of land in deed was corrected to conform to agreement; *Gillespie v. Moon*, *supra* note 5, where deed is reformed which included more land than the parties agreed upon. The same rule applies to correcting mistakes in mortgages. See *Prior v. Williams*, 3 Abb. App. Dec. 624 (N. Y., 1866).

⁸ *Supra* note 5.

equity to correct the mistake in the description of land conveyed in the deed. The Statute of Frauds was urged on behalf of the grantee as preventing relief. The Court did not refer to the statute, but, after determining that there had been a mistake, stated that "the relief can be had against any deed or contract founded in mistake of fraud." In that case the Court permitted the plaintiff to show, by parol, that a deed which in terms conveyed a tract of 250 acres was not intended to include a fifty-acre farm which constituted part of the tract, and a decree was entered compelling the grantee to reconvey a fifty-acre tract. The effect of the decree was to enforce the written instrument according to its true intent, rather than in its written form, though the Statute of Frauds requires deeds of conveyance and instruments for the sale of land to be in writing.

The effect of the Statute of Frauds as a possible limitation upon the exercise of the equitable power of the Court was not considered by the Court in its opinion, but the decision had been generally accepted as authority for the rule that the Statute of Frauds constitutes no bar to the exercise of the equitable powers of the Court under similar circumstances.⁹

In all these cases the question was whether the Court might exercise its equitable power to correct mistakes in written instruments constituting *jural acts* which at law could not be varied by parol, and then to give effect to the instruments as corrected in spite of the provisions of the Statute of Frauds.

The question now presents itself whether a memorandum, mere *evidence* of a contract,¹⁰ can be reformed in its necessary details to comply with the Statute of Frauds.

This point recently came before the Court of Appeals in New York.¹¹ The Court held, that a memorandum of an oral contract cannot be reformed to correct the mistake where the Statute of Frauds is involved, for, unless the paper writing evidences the contract, it is unenforceable, and the Court has no power to substitute a writing which never existed. The facts of the case as set out in the opinion are as follows:

The plaintiff was a dealer in bank stocks. It agreed to sell to the defendant 10 shares of stock. It then prepared a memorandum of the sale. The memorandum was signed by both parties and read as follows:

⁹ De Peyster v. Hasbrauch, 11 N. Y. 582 (1854); Rider v. Powell, 28 N. Y. 310 (1865); Wall v. Arrington, 13 Ga. 88 (1853); Morrison v. Collier, 79 Ind. 417 (1881); Hammer v. Medsker, 60 Ind. 413 (1878); Blackburn v. Randolph, 33 Ark. 119 (1878); Wykle v. Bartholemew, 255 Ill. 358, 101 N. W. 597 (1913); Rousseau v. Lambert, 10 Ky. 23, 7 S. W. 923 (1888); Olsen v. Erickson, 42 Minn. 440, 44 N. W. 317 (1890); Hitchkins v. Pettingill, 58 N. H. 386 (1878); McDonald v. Yungbluth, 46 Fed. 836 (1891); Craig v. Kittridge, 23 N. H. 231 (1851). See also cases *supra* note 5; for other citations see 23 Cent. Dig., title "Frauds, Statute of," sec. 267.

¹⁰ Durham v. Taylor, 29 Ga. 166 (1906).

¹¹ Friedman & Co., Inc. v. Lee Newman, 255 N. Y. 340, 174 N. E. 703 (1931).

"We beg to confirm our sale to you today of 10 shares Chase National Bank at 1,060—10,600. Accepted. L. Newman (signed). Delivery Bank of U. S.; Pitkin Ave.

Yours truly,

(signed) Donald Friedman & Co.

By B. Willung."

The plaintiff refused to deliver the stock in accordance with the terms stated in the confirmation. It claims that the parties agreed to a sale at \$1,160 per share and that in the memorandum the price of \$1,060 per share was inserted by mistake.

The seller thereupon brought this action for a reformation of the memorandum purporting to confirm the sale and for damages for breach of the contract as reformed.

The Court held:

"No Court of Equity could change the contract made by the parties or reduce to writing what rested in parol. The parol contract is 'void' under the provisions of the Statute of Frauds unless a note or memorandum thereof be in writing. The parties intended to make a note or memorandum of the contract they had made. By mistake the writing is a memorandum of the contract which in fact was never made. No note or memorandum of the contract which the plaintiff seeks to enforce was never made. Therefore that contract is 'void' and no Court of Equity, by reforming the memorandum, can give it an effect forbidden by the statute. * * * It (equity) has no power to reconstitute an evidentiary writing."^{11a}

An examination of the Statute of Frauds and the decisions relating thereto would not be amiss. Section 85 of the Personal Property Law¹² provides:

"A contract to sell or a sale of any goods or choses in action of a value of \$50 or upwards shall not be enforceable by action * * * unless some note or memorandum in writing of the contract or sale be signed * * * etc."

The memorandum to be sufficient under this section must contain all the essential terms of the parol contract.¹³ Thus where the name of the vendor was missing from a memorandum, the contract was declared void.¹⁴ It is not sufficient that the note or memorandum

^{11a} *Ibid.* at 347.

¹² Laws of 1911, ch. 571, sec. 85.

¹³ *Ward v. Hasbrouch*, 169 N. Y. 407, 62 N. E. 434 (1902); *Mentz v. Newmitter*, 122 N. Y. 491, 25 N. E. 1044 (1890).

¹⁴ *Supra* note 13.

may express the terms of a contract. It is essential that it shall completely evidence the contract which the parties entered into.¹⁵

"If instead of proving the existence of the contract, it establishes in fact that there was no contract, or evidences a contract in terms and conditions different from that which the parties entered into, it (the memorandum) fails to comply with the statute."¹⁶

Oral evidence is not admissible to complete the terms of the contract. Such terms must be embodied in the memorandum itself.¹⁷

It is thus well established that courts of law in this state will not enforce oral agreements where the memorandum is incomplete. The rule is similar in other jurisdictions.¹⁸

We have seen that equity will reform instruments of a *jural nature* where mutual mistake or fraud is involved.¹⁹ This theory is approved by text writers of prominence where the question concerns reformation of contracts and other instruments of a *jural nature*.²⁰

The question to be determined, however, is whether equity with its broad powers will reform a memorandum, a mere evidentiary writing,²¹ incomplete on its face, which does not accurately evidence the contract under the Statute of Frauds. A memorandum is defined²² as "an informal note or instrument embodying something that the parties desire to fix in memory by the aid of written evidence." We have seen that courts of law will not lend their aid where the memorandum is incomplete.²³ Can we therefore say that equity will come to the rescue with its broad powers? To allow

¹⁵ *Stone v. Browning*, 68 N. Y. 598 (1877). See also *Wright v. Weeks*, 25 N. Y. 153 (1862). It was held in that case that a memorandum was incomplete where it referred to terms as specified, meaning thereby as specified by an oral agreement.

¹⁶ *Pell v. Brunswick-Balke-Collender Co.*, 216 N. Y. 310, 110 N. E. 619 (1915). To same effect see *Bauman v. Meadle-Luneppe Co.*, 171 App. Div. 204, 155 N. Y. Supp. 1093 (1st Dept., 1915).

¹⁷ *Evans v. Pelta*, 146 App. Div. 749, 131 N. Y. Supp. 411 (1st Dept., 1912); *Julliard v. Trokie*, 139 App. Div. 530, 124 N. Y. Supp. 121, *aff'd* in 203 N. Y. 609, 96 N. E. 1117 (1910); *Leach v. Weil*, 129 App. Div. 688, 114 N. Y. Supp. 234 (2nd Dept., 1909). See *Atkinson v. Truesdell*, 127 N. Y. 230, 27 N. E. 844 (1891) where marks and characters of a technical nature may be explained by parol. *Routedge v. Worthington Co.*, 119 N. Y. 592, 23 N. E. 1111 (1890).

¹⁸ *Winner v. Williams*, 62 Mich. 363, 28 N. W. 904 (1886); *Carman v. Smick*, 15 N. J. L. 252 (1835); *Mayer v. Child*, 47 Cal. 142 (1873); *North v. Forest*, 15 Conn. 400 (1842); *Ins. Co. v. Cole*, 4 Fla. 359 (1851).

¹⁹ See notes 1, 5, 6, 7, 9, *supra*.

²⁰ *Pomeroy, Equity Jurisprudence* (3rd ed.), sec. 866; *Story, Equity Jurisprudence* (13th ed.), sec. 161 and cases cited. See also *Kenedy v. Kennedy*, 2 Ala. 571 (1841).

²¹ A memorandum is not the contract but merely evidence of the contract. See *Durham v. Taylor*, *supra* note 10.

²² *Black's Law Dictionary*, p. 771.

²³ See *supra* notes 13-18, inclusive.

equity to intervene would be in effect to annul the statute. The purpose of the Statute of Frauds is to prevent mischief contemplated thereby and equity does not ignore the provisions of a positive rule of law.²⁴

Quoting from the opinion in *Burns v. McCormick*,²⁵ the following language is enlightening on this point:

"It, the Statute of Frauds, is intended to prevent a recurrence of mischief which the statute would suppress. Equity in assuming what is in substance a dispensing power does not treat the statute as irrelevant, nor ignore the warning altogether."

And further,

"A power of dispensation, departing from the letter in supposed adherence to the spirit, involves an assumption of jurisdiction easily abused and justified only within the limits imposed by history and precedent. *The policy is not exercised unless the policy of the law is saved.*"²⁶

The policy of the law is sufficiently clear. It says that,

"a contract * * * *shall not be enforceable* by action unless some note or memorandum be in writing * * * etc."²⁷

We have already seen that the law demands a full memorandum of the oral contract.²⁸ Can the policy of the law be more definite? New York courts interpret the statute strictly and refuse to lend their aid.²⁹ The policy of the law therefore will not be saved if equity interferes in such a case. Equity therefore should stand aloof.³⁰

"If a court of equity can supply one requirement of an instrument that is required by the statute to be in writing and completed, it may supply another, and the logical conclusion would be that it might, in the end, supply all the requirements and thereby contravene a positive statute."³¹

²⁴ *Sinclair v. Purdy*, 213 App. Div. 439, 210 N. Y. Supp. 208, 1st Dept. (1926), *aff'd* 242 N. Y. 559, 152 N. E. 426 (1925).

²⁵ 233 N. Y. 230, 135 N. E. 273 (1922).

²⁶ *Ibid.* at 234, 135 N. E. at 274.

²⁷ *Supra* Note 12.

²⁸ *Supra* notes 13-18, inclusive. See also *Brauer v. Oceanic Steam. Nav. Co.*, 178 N. Y. 339, 349, 70 N. E. 863 (1904); *Raubitachek v. Blank*, 80 N. Y. 478 (1880); *Davis v. Shields*, 26 Wend. (N. Y. 341 (1841); *Newberry v. Wall*, 65 N. Y. 484 (1875).

²⁹ *Supra* note 28.

³⁰ *Supra* note 25.

³¹ *Allen v. Kitchen*, 16 Ida. 133, 100 at 1052 (1909).

Although equity may grant relief from a contract where there is mutual mistake, yet a contract which the parties intended, but failed to make, cannot be established by a court of equity.³²

It is important to recall the difference between a contract and a *memorandum* of a contract. A contract is the agreement of the parties, while a memorandum is only *evidence* of a contract; ^{32a} of an oral agreement which the law deems unenforceable unless there is a sufficient memorandum.^{32b} When equity reforms a contract or a deed, it reforms an instrument of a legal nature, the contract of the parties itself. To reform a memorandum, equity would reform an instrument which would *evidence* an oral agreement that was never made in the eyes of the law.

This rule prevents the reformation of a building contract which was signed by sureties under the words, "in presence of sureties"—a signing which was held not a sufficient note or memorandum in writing to satisfy the Statute of Frauds, and charge the signers as sureties on the contract.³³

The principle was applied and the Statute of Frauds held to prevent reformation of a defectively written collateral promise or guarantee, although the minds of the parties met on all the essentials of a verbal promise to make a valid guarantee, but, through mutual mistake, without any element of fraud, failed to embody it in the writing.³⁴

"Many judicial warnings may be found in the books against any further development of the idea that the Statute of Frauds 'may be uplifted,' so to speak, and the consequences of non-compliance with it thereby be avoided."³⁵

It was pointed out where it was thought the power of equity had already been extended to the danger line, if not beyond, and it was suggested, that to further extend it would, in effect, avoid it altogether.³⁶

"If equity could reform a so-called contract of guarantee, which is not a contract at all, because, though in writing, does not contain the statutory essentials, the Statute of Frauds would have no effect."³⁷

³² *Regan v. Bruff*, 108 S. W. 185 (Tex. Civ. App., 1908); *Davimes v. Green*, 83 N. J. Eq. 596, 92 Atl. 96 (1914).

^{32a} *Supra* notes 10 and 27.

^{32b} *Supra* note 12.

³³ *Mead v. White*, 53 Wash. 638, 23 L. R. A. (N. S.) 1197, 132 Am. St. Rep. 1092, 102 Pac. 755 (1909).

³⁴ *Rowell v. Smith*, 123 Wisc. 510, 102 N. W. 1 (1905).

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

The Appellate Division in the case of *Rosen v. Philipsberne Co.*³⁸ refused to reform an evidentiary writing. The complaint set forth a verbal agreement between the plaintiff and the defendant, whereby defendant employed plaintiff, and plaintiff agreed to serve defendant for a period of three years at stated compensation, and it was agreed that a contract embodying the terms should be prepared by the defendant and executed by the plaintiff and defendant. A memorandum was drawn up which through mutual mistake omitted certain terms of the oral agreement.

Judge Scott said:

“The oral agreement contravened the Statute of Frauds and was wholly void. The written paper never became a contract because it was never signed by both parties. * * * There is, therefore, nothing to reform and the action in effect amounts to one to compel the defendant to make a valid contract in furtherance of a void oral one.”³⁹

The principal case, *Friedman & Co., Inc. v. Newman*⁴⁰ finds precedent in the State of Indiana.⁴¹ It was there held that a memorandum of a sale of goods which is insufficient to satisfy the Statute of Frauds cannot be reformed. It was claimed as in the principal case that the omission from the memorandum of the fact which made it insufficient was the result of mutual mistake. The Court states:

“It is immaterial how the omission occurred, as it is very clear that, under the law, parol evidence cannot be received to supply the omitted fact in the memorandum.”⁴²

The omission was of the word ‘sold’ before the name of the purchaser in the memorandum. Reformation of the memorandum was therefore denied.

It has been held that a resolution of a city council instructing the mayor to purchase property, which did not amount to a contract, could not be reformed so as to give it the force and effect of a contract, as that would be creating by parol a contract which the law requires to be in writing.⁴³

The Court said:

“Reformation of the resolution is not possible. As written it was not a contract, and it was desired by the reformation to give it the quality and force of a contract.”

³⁸ 135 App. Div. 499, 120 N. Y. Supp. 486 (1st Dept., 1903).

³⁹ *Ibid.*

⁴⁰ *Supra* note 11.

⁴¹ *Lee v. Hills*, 66 Ind. 474 (1879).

⁴² *Ibid.*

⁴³ *Carskaddon v. Southbend*, 141 Ind. 596, 39 N. E. 667 (1895).

In order to render an oral contract falling within the scope of the Statute of Frauds enforceable by action, the memorandum thereof must state the contract with such certainty that its essential terms can be known from the memorandum itself without recourse to parol proof to supply them. Accordingly, if an oral contract falling within the scope of the Statute of Frauds has terms not stated in the memorandum, or stated by mutual mistake incorrectly therein, or if the memorandum contains a reference to such terms, or imports their existence by fair inference, without clearly stating them, the case falls within the Statute of Frauds. Under these circumstances, a court of law will not allow parol testimony to prove the agreement because there is no agreement in the contemplation of the law, nor will equity with its broad dispensing powers substitute under the guise of reformation a writing which never existed.⁴⁴

GEORGE LANDESMAN.

CONSTRUCTION OF INCONSISTENT PROVISIONS IN A BOND
AND MORTGAGE.

The Bench at a Special Term in Westchester County recently expressed itself, "I know the case. The Bar is talking about it and when the Bar talks of a case it is important."¹ Last April the New York Bar was talking of *Adler v. Berkowitz and Gast*.²

On June 28, 1927, Philip Gast *et ux* Rose conveyed the mortgaged premises to the defendant Berkowitz. By the terms of the mortgage an installment of principal and interest was due on July 25, 1928. In addition the mortgage provided that all of the principal was to become due and payable if that installment was not paid within *twenty days*. The bond which Philip Gast *et ux* had signed expressed itself differently—by its terms all of the principal became immediately due and payable if the installment was not paid within *thirty days*, and such acceleration was *at the option of the mortgagee*. Berkowitz paid the installment of July 25, 1928, twenty-six days after its due date, and Adler, the mortgagee, accepted it. For a subsequent default the mortgagee sued to foreclose and joined Rose Gast as a party liable upon her bond for any deficiency. The defendant Gast contended and the Appellate Division held (1) that the terms of the mortgage were controlling, (2) that by its terms, as soon as the twentieth day had passed *ipso facto et eo instanti* all of the principal of the mortgage became due, and (3) that by accepting the installment after the twentieth day the mort-

⁴⁴ *Mead v. White*, *supra* note 38.

¹ Mr. Justice Morschauer.

² 254 N. Y. 433, 173 N. E. 574, *mod'f'g* 229 App. Div. 245, 240 N. Y. Supp. 597 (2nd Dept. 1930).