Statute of Frauds as a Defense to Insufficient Real Estate Contracts

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NOTES

STATUTE OF FRAUDS AS A DEFENSE TO INSUFFICIENT REAL ESTATE CONTRACTS

By

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In the case of Haskell v. Heathcote, 363 Pa. 184, 69 A.2d 71 (1949), the Supreme Court of Pennsylvania, (concerning the Statute of Frauds), said,

"The object of the statute is to prevent the assertion of verbal understandings in the creation of interests or estates in land and to obviate the opportunity for fraud and perjury. It is not a mere rule of evidence but a declaration of public policy. In the absence of equities sufficient of themselves to take the case out of the statute, it operates as a limitation upon judicial authority to afford a remedy unless renounced or waived by the party entitled to claim its protection.

"In numerous equity cases arising both before and since promulgation of Pa. R. C. P. 1030, the practice of raising the Statute of Frauds by preliminary objections has been permitted without question. There is nothing in Equity Rule 92 or in the Rules of Civil Procedure to authorize or warrant a departure from this well established practice. (See also Glen Aiden Coal Co. v. State Tax Equal. Bd., 376 Pa. 63 at 66 (1951).

Lawyers are sometimes consulted concerning the adequacy of one or more memos purporting to create an interest in land. This writing is concerned with the use of preliminary objections to test the sufficiency thereof within the purview of the Statute of Frauds. A review of pertinent legal precedents becomes interesting in view of the language of the Supreme Court in the case of Sawert v. Lunt and the reference therein to the prior but also recent case of Suchan v. Swope.

By filing preliminary objections the defendant admits temporarily the truth of plaintiff's allegations but concurrently claims that there is a complete defense thereto which does not require the production of evidence to sustain it.

Thus in raising the Statute of Frauds or Statute of Limitations (Laches) in his preliminary objections, defendant admits plaintiffs' allegations but in effect says—"so what;" "the Statute will prevent or render useless the proof of these

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1 And its predecessor the "demurrer"—Heller v. Cochran, 280 Pa. 579 (1924).
2 360 Pa. 521; 63 A.2d 34 (1948).
3 537 Pa. 16; 53 A.2d 116 (1947).
4 Equity Rule 48.
allegations at a hearing; "as a matter of law plaintiff has no case;" "his allegations though true are not admissible or are not material." (But see contrary-discussion in Sawert v. Lunt, supra).

A memo may be lacking in one or more contract essentials and thus insufficient to establish an interest in real estate. The memo may lack designation of party-plaintiff; consideration; time for performance; or the subject matter of the contract, the real estate itself. Maybe the memo is otherwise sufficient but lacks the name of any village, town, township, or other municipal designation.

A fair reading of most of the cases under the statute would indicate that no part of the contract or essential necessary to establish a part of the contract can rest on parol nor on other extrinsic evidence, much less can it rest on presumption. But the courts, especially in recent years, have not so held.

Where one or more essentials of a contract are missing the court may refuse relief saying it cannot make a contract for the parties. This usually occurs when the consideration or the subject matter of the contract is omitted or not clearly stated. But where the time for performance is omitted or uncertain the courts apply the "reasonable time" rule.

I. Description of Real Estate

Cases are most frequent which involve an inadequate description of real estate. Pomeroy, in his "Specific Performance of Contracts" 3rd Edition, (1926), page 233, § 90, states the rule: "A contract to convey a certain quantity of land without any means by which the boundaries can be ascertained is unenforceable."

Pennsylvania courts have held that,

"The memo must designate the land by name, adjoiner, monuments, natural boundaries, or by a reference to a deed, will, warranty number, source of title or possession."  

A similar Pennsylvania rule is that,

"The description and other essential terms must be clear and capable or ascertainment from the instrument itself."  

A Missouri court in Krilling v. Cramer, 133 S.W. 655 (1911) gave the test as follows:

"Could a surveyor with the memo in hand, and with the aid of no other means than provided therein, go to the place stated therein, and accurately locate the land?"

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6 Barnes v. Rea (No. 2), 219 Pa. 287 at 296 (1908); Shaw v. Cornman, 271 Pa. 260 at 263 (1921); Traub v. Hartung, 42 Schuy. L.R. 152 (1946); Rice v. Snyder, 51 Lanc. L.R. 327 (1949); Also see: Felty v. Calhoun, 139 378 (1890); Brown v. Hughes, 244 Pa. 397; Lynn v. Hayden, 119 Mass. 482; Island Coal Co. v. Streilemier, 139 Ind. 83, 87 N.E. 340.

Pennsylvania courts have also referred to the surveyor test.  

There are many examples where the memo or receipt described the real estate to be sold only by street number, *i.e.*, a system of notation regulated by municipal laws; presumably a surveyor, or any acquainted citizen, could locate such street and number where the plot designated by such number is clearly marked; and the adjoining boundaries would be obvious. Street number cases as sufficient descriptions are many in our state. Such cases are:

"136 S. Third Street" Flanigan v. Phila. (1866) 51 Pa. 491
"268 S. Second Street" Fitzpatrick v. Engel (1896) 175 Pa. 393, 298
"1903 Wynnewood Road" McDermott v. Reiter (1924) 279 Pa. 545
"300 S. 9th Street" Persky v. Wolicki (1927) 288 Pa. 98
"305 S. Negley Ave." Sawert v. Lunt (1948) 360 Pa. 521

Other cases in Pennsylvania have very liberally used the occupancy or source of title test. Memos were held sufficient in the following cases:

"the Rose pine tract of land bought of Rose by Thomas Smith and Peter Fleck"
"land which you (vendee) now occupy"
"all the properties of E. J. Unger, deceased, together with Heise and Bertenet additions"
"land you now occupy"

"a certain tract owned by the female signed hereof, situated on East Avenue, Lake Township, Luzerne Col, fronting 50 feet on East Ave. depth 63 feet"
"farm occupied by vendor, only farm vendor owns, bought of S on 4/1/36, adjoins vendee’s land, and known as ‘Harencane’ Farm.”

Also where the memo refers to a tract of land by name, which is well known, a surveyor could presumably locate the same using the memo alone. Such cases where the name was held sufficient are:

"Hotel Duquesne property" Henry v. Black 210 Pa. 245 (1904)
"the Byers Place" Ranney v. Byers 219 Pa. 352 (1908)

In the Byers case the court said "real estate is frequently given some name by

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9 But where as in the Suchan case the vendor voluntarily testifies and verbally amplifies the weak description in the writing, is not the contract then verbal and not enforceable as a written contract? (see Sumner v. Thompson infra.)
which it is known, is described in written instruments, and is recognized by everyone."\(^{10}\)

On the other hand there are many cases in Pennsylvania where the memos did not fulfill any of the aforementioned tests and specific performance was denied. Such cases are:

"The houses on Smithfield Street"  
"ground fronting about 190 feet on P. R.R. in 21st ward, Pittsburgh"  
"all those certain lots in 19th ward, Pittsburgh, bounded and described as: 3 lots, Leeter Plan, Nos. 16, 17, and 18, fronting 180 feet on Beatty St., depth 200 ft."

"house and lot on Acorn Street."

"30,000 acres on head waters of Elk River which K purchased from you last Monday"

"property at No. 3 and Spruce, South Bethlehem, Pa.,"

"Lot on Main Street in Duryea Boro., Luzerne Co., and Improved Silk Mill formerly Dutton Silk Co."

"317 West Market"

(mere street number, no municipality designated)

"an acre of land at road corner beginning at corner of road and extending 200 feet in front along Gettysburg-Harrisburg highway, back far enough to make one acre along the Sydnesburg Road"

"fifty foot lot on Detwiler Avenue"

"All that certain tract in Lower Oxford Township, Chester Co., Pa., being the western part of sellers farm, containing 30 to 35 acres of land, bounded on the west by the Gill Estate, on the South by T.R., on the east by Thompson, on the North by Sumner, description to be made in accordance with survey to be made by A. C. Reg. Surveyor."

\(^{10}\) The "Fleming Farm on French Creek" was cited in Sawert v. Lunt as being a sufficient description but is not a proper precedent therefor. Statute of Frauds as a defense to vendor was not in issue; vendee not a party to the memo, memo passed title as among present owner's predecessors. See discussion seq.

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The case of *Suchan v. Swope* should not be cited as germaine to the issues in the cases noted in this writing. Although the Statute is not a mere rule of evidence but is a limitation (based on public policy) upon judicial authority to afford a remedy, the Statute must be pleaded. It must be raised in the pleadings or testimony by the party to be charged, that is by the vendor. Otherwise its protection is waived by the vendor.\(^\text{11}\)

A reading of the paper books (record) in the *Suchan* case will show that the Statute was not raised in the lower court, not in the pleadings, testimony, nor opinion, and was not raised in the exceptions nor in the assignments of errors to the appellate court, and therefore was not before the appellate court.\(^\text{12}\) Certainly the *Suchan* case should not be cited for holding that a receipt for hand money defining the subject matter of the sale as "my farm" is sufficient to satisfy the Statute of Frauds. Yet the Court in *Sawert v. Lami* did exactly this, in the discussion, several times. Is there any basis for such a conclusion?

*Ross v. Baker*, 72 Pa. 186 (1872) which was referred to in the *Sawert* case as a precedent for the decision therein is also not germaine to the issues. In *Ross v. Baker*, one Martin sold the farm in question to Stout, but one Canfield put up the money. Canfield agreed in writing to sell the farm to Ross, this written agreement called for the "Fleming Farm on French Creek." Baker got a judgment against Canfield and purchased the land at a sheriff’s sale under this judgment, but was told by the sheriff at the time of the sale that Canfield did not own the land. Baker then brought ejectment against Ross. To prove the essentials of the transfer to Ross, Canfield testified as to what was meant by the words "Fleming Farm on French Creek." Canfield who had signed this memo was the "party to be charged therein." He alone could raise the Statute as a defense to the weakness of the memo. He chose not to do so, he amplified it by his testimony. (Just as the vendor did in the *Suchan* case). Baker was thus a stranger to this particular memo; a stranger to the memo cannot raise the Statute as a defense thereto. (See infra.). Therefore *Ross v. Baker* is not a judicial precedent for cases where this type of defense is raised by a vendor. In the *Sawert* case the court observed that "The Fleming Farm is identified by - - - vendors."

*Peart v. Brice*, 152 Pa. 277 (1893) also quoted in the *Sawert* case, is not applicable hereto. In *Peart v. Brice* it was mutually agreed by case stated that parol could be used to prove that a certain farm was the exact farm as described in a deed specifically referred to, and that certain sketches and drafts could also be used for purposes of identification of the land in question. Therefore this case is not a judicial precedent for cases where the vendor raises the Statute of Frauds as a defense to vendee's suit for performance.

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II. Identity of Vendee

The vendee is a necessary party to the contract and the writing must identify the vendee either by name or by some description serving to identify him with certainty.

_Grafton v. Cummings, 99 U. S. 100 (1897)_ holds that, "The other party to the contract must be designated in the same paper signed by the defendant,—so that the plaintiff can be identified without parol proof." Naturally if the memo names no vendee, or the receipt no payor, the writing could be passed around like a street car transfer. In _Ottenberg v. Bailey Cigar Company, 1 Pa. D. and C. 768_, the court said that unless the names of both parties appear the contract may be foisted upon anyone by perjury which is the very thing the Statute was enacted to prevent. This seems to be the rule in most jurisdictions.

Again in _Brown v. Hughes, 244 Pa. 397, 90 Atl. 651 (1914)_ , the writing referred to a grant or conveyance to "you," and since parol would be required to determine whether you was meant to be singular or plural the court could not decree specific performance. In _Conners Estate, 85 Pa. Super. 19 (1925)_ the receipt read—"Received of I.N.D. - - -," and it was argued that the memo did not indicate if I. N. D. was acting for himself or as agent for another, but the court held that the reasonable inference was that I. N. D. was acting for himself—"as recipient (of the receipts) he is identified as the vendee."

III. Lack of Municipality Designation:

In _Sawert v. Lunt_ the court said that the lack of municipality on the receipt is not fatal. Certain cases have admitted a presumption thereof from fact of name of a municipality being on the writing thought outside the body thereof. Furthermore the court in the _Sawert case inferred_ that judicial notice could be taken that "F" creek mentioned in a memo was within 20 miles of "T" Borough and all or both in "C" County. On the other hand it is to be noted that in 1924 the Supreme Court in the case of _Heller v. Cochran, supra_, would or did not infer or presume that "317 West Market" meant 317 West Market "Street," although the municipality was mentioned in this receipt. The court in the _Sawert_ decision distinguished the _Heller_ case, but comparison shows that the receipts in the two cases are practically indentical.

A county court recently discussed the necessity of the inclusion of the designation of some municipality in the receipt in _Callaban v. Potelunas, 40 Luzerne L. R. 78 (1948)_ . In view of the cases cited in this writing it is believed that this county court discussion should be correct, however for the time being we must abide by the _Sawert_ opinion. In _Weber v. Adler, 143 N.E. (Ill.) 95_, it was held that: "Where the contract is not dated at any place no inference can be drawn as to the location of the property as to city, county or state." This seems in accordance with the

"within the instrument itself" rule hereinbefore stated as the law of Pennsylvania. It may be interesting to note by comparison that in Grakelow v. Kidder, 95 Pa. Super. 250 (1929) it was held that description of premises not including street, city, county or state was held insufficient to support a writ of habere facias possessionem.

Implication as to the municipality would seem no more allowable under the statute than inference as to other contract essentials.

IV. Time For Performance

In the year 1852 in the case of Soles v. Hickman, 20 Pa. 180, the Supreme Court of Pennsylvania held that "When the law requires a contract to be in writing, it means the complete contract must be proved by the writing. - - - It is verbal if it requires verbal testimony to sustain it by proving any essential part of it."

In the case of Heller v. Cochran, supra, the memorandum; in addition to being vague as to whether 317 West Market meant 317 West Market "Street" or 317 West Market "something else;" was found indefinite as to the terms or time of payment or time for delivery of the deed. While this case might be cited for the rule that where the terms of sale are not contained in the memorandum, it is insufficient, there were other factors in this case, namely the above description of the real estate, which could have been the main reason for the court's refusing to grant relief.

In the case of Llewellyn v. Sunnyside Coal Company, 242 Pa. 517 (1914) the court held that where the receipt defines the property, but not the price or other terms of sale, specific performance will be denied. Again in this case the memorandum did not define the consideration so for that reason alone the decision may have been against the plaintiff.

In any event recent Supreme Court cases have resolved any doubt in this matter and have uniformly held "Where no time is fixed for delivery of a deed it is presumed that a reasonable time was intended."15

V. Several Memorandums as Constituting One Contract

Where several writings are relied upon to constitute the required memorandum, taking as a whole, either by physical attachment or expressed internal reference, they must incorporate all the terms of the contract, to the exclusion of any parol testimony. In Wright v. Nulton, 219 Pa. 253 (1908) the court said "the memorandum by itself or by reference to another writing must show the whole contract * * * without any aid from parol testimony * * * the several papers by their own statements must require the union one with another." In Peoples Trust Company v. Consumers' Coal and Ice Company, 283 Pa. 76 (1925) the real estate was described by abutting lands and a draft attached to the memorandum, while similar memorandums, expressly referred to a "Carpenter's" survey which gave a full and accurate description of the real estate. Parol testimony was used to identify the "Car-

penter's" survey which was expressly referred to in the memos. Th present law of Pennsylvania apparently is as expressed in the Restatement of Contracts, §§ 207 and 208, as follows:

"The memorandum may consist of several writings,
(a) if each writing is signed by the party to be charged and the writings indicate that they relate to the same transaction, or
(b) though one writing only is signed if
(i) the signed writing is physically annexed to the other writing by the party to be charged, or
(ii) the signed writing refers to the unsigned writing, or
(iii) it appears from examination of all the writings that the signed writing was signed with reference to the unsigned writings."

Where the several memorandums sufficiently refer to each other and comply with the Restatement still if there are discrepancies among the various writings which would require parol testimony to explain and to thus properly correlate the various memos, as to one or more of the essentials of the contract, specific performance will be denied.

In the case of Sorber v. Masters, 264 Pa. 682, the two memos relied upon as constituting one contract recited separate and different considerations. The court held that the memos taken together must accord in every material particular with the bargained averred; and parol testimony cannot be used to pardon or explain discrepancies.

VI. Evidence: Parol; Extrinsic; Presumption.

Not only is parol evidence inadmissible to supply any essential to constitute a contract, it is also inadmissible to correlate separate writings not physically or internally connected. This is consistent with the "within the instrument itself" rule.

The parol evidence rule allows the explanation of certain ambiguities by parol. But not so where the Statute of Frauds is raised as a defense. "THE RULE ADMITTING PAROL EVIDENCE TO SUPPLY OMITTED PARTS DOES NOT APPLY IF THE LAW REQUIRES THE PARTICULAR CONTRACT TO BE IN WRITING."

To create an interest in land the memo or memos must establish all essentials of the contract within the instrument itself.

The question arises as to whether the plaintiff can show that the land sought is the only real estate the defendant owns according to courthouse records and hence the memo with the insufficient description must of necessity refer to this

particular tract. It this were allowed the plaintiff would then be proving his case not only by indirection but also by extrinsic evidence. Pennsylvania cases have held that such negative proof is not permissible.\(^{18}\)

In regard to the court pursuing, inferring or taking judicial notice of certain facts necessary to establish definite contract terms, we note in the *Sawert* case the court approved an inference that a certain creek was near a certain borough and that both were located in a certain county. In contrast to this we note in the *Heller* case that the court did not infer that 317 West Market meant 317 West Market “Street,” although in this receipt the city or municipality was definitely stated in the heading.

We submit that if the plaintiff cannot use parol or other extrinsic evidence to prove or help prove his contract the court should not be permitted to do it for him by the use of inference, presumption or judicial notice.

A further question has been raised as to whether the plaintiff, who cannot use his own verbal testimony, may call the defendant (vendor) upon cross examination and use the defendant’s testimony to add missing parts or specificity to the contract. In the recent case of *Rice v. Snyder*, 51 Lancaster Law Review 327, 331; the court specifically answered this question in the negative.\(^{19}\)

**VII. The Statute Is a Defense Only for the Vendor.**

It must be remembered at all times that the vendor, the party to be charged; the one who signed the memo, is the only party who can raise the Statute of Frauds as a defense. It cannot be raised by a stranger to the memo. This conclusion seems certain from the terminology of the Statute. A number of cases have maintained this view.\(^{20}\)

If this be correct then it is readily seen that the *Suchan* case, and *Ross v. Baker*, cited in the *Sawert* case are not precedents for cases wherein the vendor raises this defense as against his vendee. Stated otherwise, the Statute of Frauds is a defense personal to the vendor.

**VIII. Practice**

In the *Sawert* case the court reasoned that by filing preliminary objections defendant admitted as true all allegations of the bill, and since the bill alleged that the meager description in the memo actually was intended to represent a certain property as adequately and fully described in a duly recorded deed, then the description in the deed was in effect in the memo.

If in thus failing to distinguish between truth and admissibility the court really meant what was actually said such represents a legal theory that is an innovation.

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\(^{19}\) See also: Brown, Pennsylvania Evidence (1949), page 148; Coxe v. England, 65 Pa. 212.

\(^{20}\) Houser v. Lamont, 55 Pa. 311 (1867); Diffenderfer v. Kremp, 8 Berks Co. 154, 25 Dist. 1011; also reported in 34 Lancaster 44 (1916); 49 A.M. Jur., page 896; 9 A.L.R. 2d 177.
Hereafter every plaintiff will allege that "X" land in the receipt actually was meant by both parties to represent a tract as adequately described in a duly recorded deed. The defendant wishing to defend on inadequacy of description will have to swear in an answer that there was no such understanding or agreement. Or defendant will in all such cases forego legal defense and provide plaintiff with a deed. Preliminary objections, under the Sawert theory, will avail the truthful defendant not at all.

Possibly this Sawert reasoning in this regard represents a still further step in the Supreme Court's liberal view in specific performance cases. Or if this issue were squarely put to the court in a future case would they hold otherwise? At the most it appears to be mere dicta. If the ultimate result of the Sawert case is alone the judicial precedent therefrom then we merely add it to the list of street number cases found sufficient and it is not out of line.

In Traub v. Hartung, 42 Schuylkill L. R. 152, 154 (1946) the court said, "True—the bill gives a full and sufficient description of the premises. But in ascertaining whether the Statute of Frauds has been satisfied the court must look in the first instance only at the written agreement: if that being inadequate, the omission cannot be supplied by the averments of the bill." As was aptly said in Agnew v. Southern Land Co., 204 Pa. 193, 194,—"the bill only expresses what the plaintiff desires the contract to mean."

To the statement in the Sawert case that "my farm" (referring to the Suchan case) is a sufficient description of real estate, we ask what lesser description could a farmer place upon a receipt or sales agreement?