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Statute of Frauds—Sufficiency of Memorandum

Eldon C. Parr

author concluded that the court was bringing the situation within the operation of that part of the statute of frauds (represented in Washington by RCW 64.04.010, [RRS § 10550]) which requires every conveyance of real estate or of an interest therein to be by deed, and that in reaching the result by this avenue the court was supported by precedent in many jurisdictions. If this was the view of the court, the *Carkonen* case appears to be inconsistent with the *Pederson* case which held that RCW 19.36.010 [RRS §5825] was controlling in this type of case. In the *Mele* case the *Pederson* case was cited for this position, and the interpretation given that statute was quite different from that given it in the *Carkonen* opinion. In the latter case the court mentioned certain prior Washington cases, stating that the "fraud perpetrated by the agent in those cases distinguishes them from the present case." If there can be a distinction between the *Carkonen* decision and the two recent cases, the quoted portion from that opinion is the apparent answer. It seems questionable, however, whether this is a valid distinction, when the ultimate question for decision is whether an agency relationship was created by virtue of the oral agreement.

Although the *Carkonen* case may possibly stand alone on its facts, the reasoning of the *Mele* and *Pederson* cases appears inconsistent and seems preferable. The fact that fraud is not present may be a means of reaching the result that no constructive trust could arise, but it does not seem a valid reason for a different interpretation of RCW 19.36.010 [RRS § 5825]. The literal interpretation of that statute in the *Carkonen* case might easily further the perpetration of fraud upon an innocent landowner or prospective purchaser. The court quoted with approval in the *Mele* case a passage from *Rathbun v. McLay,* 76 Conn. 308, 56 A. 511 (1903), which sums up this line of reasoning adequately: "To adopt the defendant's contention would be to hold the monstrous doctrine that an agent employed to do anything concerning land could with impunity be as dishonest as he pleases, and cheat and defraud his principal to his heart's content, if it chanced that his agency was not evidenced in writing." It is to be hoped that in the future the Washington court will adhere to the principles advanced in the *Pederson* and *Mele* cases.

JAMES B. MITCHELL

Statute of Frauds—Sufficiency of Memorandum. Action on a contract whereby *P* agreed to sell and *D* to buy 4200 day-old poults. Such a contract is unenforceable unless a memorandum signed by *D* is sufficient to satisfy the requirements of the statute of frauds. RCW 63.04.050 (1) [RRS § 5836-4(1)]. *P* relied on a printed contract form, filled in by *P* but unsigned by either party, and a postal card signed by *D* on which *D* wrote, "Dear Mr. Grant: I have decided to not raise any turkeys this year so will you please cancel my order? . . ." *P* contended that the word "order" incorporated by reference the terms of the form filled in by *P*. Judgment for *P*. On appeal, *Held:* Reversed. *Grant v. Auvil,* 39 Wn. 2d 722, 238 P. 2d 393 (1951).

The decision turns on the construction of the reference in the postal card to the "order." The Court cited RESTATEMENT, CONTRACTS § 208, *Illus.* 9 where a distinction is drawn between a written memorandum of an agreement and the intangible agreement which is evidenced by the memorandum. According to the RESTATEMENT, a letter referring to the "agreement between us" would constitute a sufficient memorandum if the reference is to the writing, but not if the reference is to the intangible agreement. Whether the reference is to the writing or to the intangible agreement is a question of interpretation. RESTATEMENT, CONTRACTS, *supra.* Here, the Court said there was nothing to indicate that the postal card referred to an extrinsic writing.

When the seller has filled out a printed contract form, unsigned by the buyer, and the buyer later writes to the seller making reference to the "order" and acknowledges

its existence, one line of cases holds that "order" refers to the intangible agreement. *Wagner-White Co. v. Holland Co-op Assn.*, 222 Mich. 58, 192 N.W. 552 (1923). The other line of cases holds that "order" refers to the writing. In *Kahn v. Schoen Silk Corp.*, 147 Md. 516, 128 Atl. 359 (1925), the seller's agent took an order for goods which the buyer did not sign. Later, the buyer wrote requesting partial cancellation of the order. The seller refused to cancel, wherefore the buyer wrote, "We are compelled to cancel our entire order." The court held that the letter incorporated the written "order" by reference. In *Louisville Asphalt Varnish Co. v. Lorick*, 29 S.C. 533, 8 S.E. 8 (1888), the defendant wrote, "Don't ship paint ordered through your salesman. We have concluded not to handle it." This was held to incorporate the unsigned written order. In *Knobel & Bloom v. Cortell-Markson Co.*, 122 Me. 511, 120 Atl. 721 (1923), the word "order" in "Please cancel the order given your representative, . . ." was found as a fact to refer to the written unsigned order. *Morris Furniture Co. v. Braverman*, 230 N.E. 346, 210 Iowa 946 (1930), held the word "order" in "Will you please hold our order of Sept. 17, until further notice?" referred to the writing.

Jones-Scott Co. v. Ellensburg Milling Co., 108 Wash. 73, 183 Pac. 113 (1919), the Washington case most nearly in point, held that a sufficient memorandum arose from the exchange of correspondence concerning a sale of wheat. Plaintiff had written two letters to defendant in which the terms of the sale had been set forth. Defendant's second reply letter concluded, "If you will give me time I will take the wheat bought from you in August." The Court said, "We think there can be no doubt that the letter refers to the contract mentioned . . ." by the plaintiff in its letters. It appears that the reference in the principal case is as direct a reference to the unsigned written contract as is the reference in the *Jones-Scott* case.

In view of the Court's admission that the use of the word "order" is a question of interpretation, it seems that "order" ought to be construed as a reference to the written "order" rather than a reference to the intangible order. The facts of this case do not present the slightest suggestion that fraud is being practiced by *P;* yet, the holding in the case permits the buyer to breach his contract and to use the statute of frauds as a shield to avoid liability to the seller. The courts have consistently said that they will not allow the defense of the statute of frauds when in so doing it becomes an instrument of fraud.

ELDON C. PARR

Taxation — Limited Partnership — Taxable as a Partnership or as a Corporation. *A, B* and *C,* brothers, having for years operated their business as a general partnership and later as a corporation, formed a limited partnership under the Washington Limited Partnership Act of 1869, RCW 25.12.010 *et seq.* [RRS § 9966 *et seq.*], with themselves as general partners and their ten adult children as the limited partners. The articles of co-partnership provided: the management was to be vested in the general partners; upon the death or retirement of a general or limited partner, the remaining general partners were to have the right to continue the business; the interest of a limited partner was to be transferable only with the approval of the general partners; and the general partners were to have the right to admit additional limited partners upon the same footing as the original ones. The Commissioner of Internal Revenue contended that the enterprise constituted an "association" within the meaning of the Internal Revenue Code and was therefore taxable as a corporation. *Held:* Petitioner does not bear such a resemblance to an association or operate effectively as such to justify inclusion of it in that category for tax purposes. *Western Construction Co. v. CIR,* 14 T. C. 453, *Non-acquiesced,* 1950-2 CUM. BULL. 6, *aff'd without opinion,* 191 F. 2d 401 (C.C.A. 9th 1951).