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CONTRACTS--STATUTE OF FRAUDS--VALIDITY OF MEMORANDUM MADE PRIOR TO ORAL CONTRACT

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CONTRACTS—STATUTE OF FRAUDS—VALIDITY OF MEMORANDUM MADE PRIOR TO ORAL CONTRACT—Plaintiff and defendant exchanged several letters concerning six contiguous lots which defendant owned. In one letter plaintiff made an offer to purchase the lots which was declined by defendant. Plaintiff then requested defendant to name her price. She replied that they were worth at least \$12,000 but made no offer to sell. Subsequently they orally contracted for sale of the lots for \$11,000. As a down payment plaintiff gave defendant a \$500 check which contained a notation that it was “to be applied on purchase of property on E. Central Ave., Albuquerque, N. M. . . .” Defendant indorsed and cashed the check and later signed and acknowledged a warranty deed granting the six lots to the plaintiff. Prior to delivery of the deed, defendant refused to complete the sale and attempted to refund the \$500. In a suit for specific performance, plaintiff conceded that the check, by itself, was an insufficient memorandum because the subject matter of the contract was not adequately set forth. It was contended, however, that the check plus defendant’s letters specifically describing the property constituted a sufficient memorandum. The lower court felt that the statute¹ had been satisfied but denied equitable relief because of insufficient consideration. On appeal, *held*, affirmed. An oral contract within the Statute of Frauds cannot be proved by writings made prior to consummation of the contract. *Pitek v. McGuire*, (N.M. 1947) 184 P. (2d) 647.

It has been stated as the general rule that a memorandum satisfying the Statute of Frauds may be made at the time of or subsequent to the making of the contract.² Ordinarily, however, the memorandum must be made before the action is brought.³ One writer is of the opinion that the making of a valid memorandum “presupposes the existence of a prior parol contract.”⁴ The *Restatement of Contracts*, on the other hand, states that a valid memorandum may be made before the contract,⁵ but the only cases supporting such a position seem to be those in which there has been a written offer to sell or buy which has been orally accepted.⁶ As pointed out above, plaintiff could not make use of

¹ The English Statute of Frauds, 29 Car. 2, c. 3 (1677), is part of the common law of New Mexico. *Childers v. Talbott*, 4 N.M. 168, 16 P. 275 (1888).

² 2 WILLISTON, CONTRACTS, rev. ed., § 590 (1936); WOOD, STATUTE OF FRAUDS, § 345 (1884); BROWNE, STATUTE OF FRAUDS, 4th ed., § 352a (1880).

³ CONTRACTS RESTATEMENT, § 215 (1932); *Bird v. Munroe*, 66 Me. 337 (1877); *contra*, *Remington v. Linthicum*, 14 Pet. (39 U.S.) 84 (1840). As to the possibilities of making use of pleadings or depositions to satisfy the statute, see 22 A.L.R. 735 (1923).

⁴ WOOD, STATUTE OF FRAUDS, § 345 at p. 656 (1884).

⁵ Sec. 214.

⁶ 2 WILLISTON, CONTRACTS, rev. ed., § 579, note 5 (1936) cites numerous authorities pro and con. The weight of authority probably is to the effect that the statute is satisfied. *Kludt v. Connett*, 350 Mo. 793, 168 S.W. (2d) 1068 (1943) is one of the more recent cases holding the memorandum sufficient under similar circumstances.

this authority inasmuch as defendant never made a written offer to sell. While the court stated that the contract could not be proved by writings made prior to the meeting of the minds of the parties,⁷ it was conceded that a sufficient memorandum might consist partially of writings made prior to the oral contract. Plaintiff, however, was not allowed to use defendant's letters because their existence could not be ascertained from the writing on the check. In this connection the court followed the weight of authority which is to the effect that there must be something in the original writing which will lead the reader to any collateral papers which are intended to complete an otherwise insufficient memorandum.⁸ It is essential that the memorandum describe the subject matter of the contract with reasonable certainty⁹ or other means of identification must be provided.¹⁰ While defendant owned no other property fitting the notation on the check, the description was felt to be insufficient because it was impossible to tell whether defendant was selling all or only part of the lots on East Central Avenue.¹¹

Edward S. Tripp, S.Ed.

⁷ Accord: *Handy v. Barclay*, 98 Conn. 290, 119 A. (2d) 227 (1922); *Jacobson v. Perman*, 238 Mass. 445, 131 N.E. 174 (1921).

⁸ 2 KENT, COMMENTARIES, 12th ed., 511 (1873); WOOD, STATUTE OF FRAUDS, § 364 (1884); 2 WILLISTON, CONTRACTS, rev. ed., § 582 (1936) and cases cited therein.

⁹ 1 CONTRACTS RESTATEMENT, § 207 (b) (1932); 2 WILLISTON, CONTRACTS, rev. ed., § 578 (1936).

¹⁰ *Ibid.*

¹¹ Cf. *Cousbelis v. Alexander*, 315 Mass. 729, 54 N.E. (2d) 47 (1944).