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Vendor and Purchaser -- Statute of Frauds -- Sufficiency of Memorandum

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Vendor and Purchaser—Statute of Frauds—Sufficiency of Memorandum.

The existence of some fifty cases before the Supreme Court of North Carolina on the question of the sufficiency of a writing within the meaning of the Statute of Frauds[1] is evidence of the difficulty and the continuing importance of the subject. The frequency with which the problem has recurred on appeal suggests the difficulty of prediction with which the lawyer is confronted. This note was undertaken with the hope that a study of the cases would lead to the discovery of some more or less predictable rules. The hope has not been justified by the study. However, it is felt that a statement of available generalities, with a frank recognition of their limitations, along with the collection of cases on the point, will prove of some value to the practicing attorney.

The cases seem to group themselves around three general problems:

(1) the sufficiency of the written description of the land to be conveyed;

(2) the necessity of the statement of the consideration and the price;

(3) the sufficiency of signing.

(1) The cases uniformly announce the uselessly vague formula that the land to be conveyed must be described with "reasonable certainty."[2]

[1] N. C. CODE ANN. (Michie, 1935) §988. "All contracts to sell or convey any lands, tenements or hereditaments or any interest in or concerning them . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

[2] (a) The following descriptions, with the aid of parol testimony, were held sufficient: Mizell v. Burnett, 49 N. C. 249 (1857) (letter stating: "You can have my timber on the tract of land, known as the Walling tract, on Roanoke River . . . "); Carson v. Ray, 52 N. C. 609 (1860) ("My house and lot in the town of Jefferson"); Phillips v. Hooker, 62 N. C. 193 (1867) (memorandum to effect that agent agreed for "Mrs. Hooker to make a deed for her house and lot north of Kinston to the said J. R. Phillips . . ."); Thornburg v. Masten, 88 N. C. 293 (1883) ("Received of G. T. five hundred dollars on account of the sale of my interest in the 'Lenoir lands,' owned by myself and J. W. T."); Gordon v. Collet, 102 N. C. 532, 9 S. E. 486 (1889) ("Beginning at a stake on Grant's corner running north with the Rocky Ford road to Tate's line . . . and then with said line to the beginning; containing 1¼ acres, more or less"; on the same piece of paper: "Received of Austin Collett $33, in part payment on a lot on Rocky Ford road . . ." "M. C. Avery." On the opposite side of same paper: "I, Austin Collett, promise to pay Mrs. M. C. Avery 53 dollars on a lot adjoining W. Grant's on the Rocky Ford road, by March 1, 1886. Austin Collett"); Falls of Neuse Manufacturing Co. v. Hendricks, 106 N. C. 485, 11 S. E. 568 (1890) (land on which vendee "now lives"); Love v. Harris, 156 N. C. 88, 72 S. E. 150 (1911) (note made by auctioneer on back of notice of sale of lands to the effect, "Sold to C. J. for $1,500.22 January, 1910"); Bateman v. Hopkins, 157 N. C. 470, 73 S. E. 133 (1911) ("Received of W. E. Bateman $5, to confirm the bargain on the purchase of the farm on which I now live . . ."); Lewis v. Murray, 177 N. C. 17, 97 S. E. 750 (1918) ("Received on account of trade on home place one hundred dollars. From D. B. Lewis"); Buckharn Land and Timber Co. v. Yarbrough, 179 N. C. 335, 102 S. E. 630 (1920) (all that tract of land in two certain counties, lying on "both sides of old road between" designated points and bounded by lands of named owners "and others"); Norton v. Smith, 179 N. C. 553, 103 S. E. 14 (1920) (". . . J. A. Smith

This gives rise immediately to the problem of the admissibility of parol evidence. It may be said generally that if a particular piece of land is mentioned in the paper, and if parol evidence will reveal that such description refers to only one piece of land owned by the vendor, the writing is sufficient.[3] For example, under this test, a memorandum purporting to convey the land "on which I now live" has been held good.[4] On the other hand, if the attempted description is such that, as revealed by parol evidence, it may apply to one or more tracts of land owned by the vendor, the attempted conveyance is said to be within the

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has sold to W. H. Norton his entire tract or boundary of land consisting of 146 acres . . ."); Harper v. Battle, 180 N. C. 375, 104 S. E. 658 (1920) (a check stating that it was "payment on Watts Street House"); McCall v. Lee, 182 N. C. 114, 108 S. E. 380 (1921) (agreement by mother with her children that if they would convey her what their father had left them, she would combine the whole of their father's estate with the greater part of her own estate and make an equal division to the children); Gilbert v. Wright, 195 N. C. 165, 141 S. E. 577 (1928) ("Agreement made . . . of sale of her home property on Pennsylvania Avenue and Cypress Street. . . . Dr. Wright agrees to buy the vacant lot from Mrs. O. F. Gilbert, during the month of January, 1925, for the sum of fifteen hundred dollars.").

(b) The following descriptions were held insufficient and parol testimony held inadmissible: Allen v. Chambers, 39 N. C. 125 (1845) ("Received of Mr. Drury Allen two hundred and forty dollars, in part for a certain tract of land lying on Flat River, including Taylor Hicks' spring-house and lot, etc., and adjoining the land of Lewis Daniel, Womach, and others"); Plummer v. Owens, 45 N. C. 254 (1853) ("1841, W. P. to H. C. O., Dr. To 4 loads of Rock one lot at one year's credit, $125"); Murdock v. Anderson, 57 N. C. 77 (1858) ("Received of A. C. Murdock . . . in part payment of one house and lot in the town of Hillsboro"); Capps v. Holt, 58 N. C. 153 (1859) ("Received . . . of Henry Capps $100, in part payment . . . on a bargain made by us for a tract of land on the North side of the Watery Branch, in the County of Johnston, and state of North Carolina, containing 150 acres . . ."); Farmer v. Batts, 83 N. C. 387 (1880) ("Received of W. D. Farmer fourteen hundred dollars, in full payment of one tract of land, containing one hundred acres more or less, it being the interest in two shares adjoining the lands of James Barnes, Eli Robbins, and others"); Breaid v. Munger, 88 N. C. 297 (1883) ("In settlement with A. E. Breaid, Kipp and Munger owed him $316.30 to be applied to his 100 acres of land and the lot where he now lives is paid for in full"); Fortescue v. Crawford, 105 N. C. 29, 10 S. E. 910 (1890) ("Charles Crawford

Land	125.00
Paid	61.58
Balance due	$ 63.42

1 Jan., 1875"); Falls of Neuse Manufacturing Co. v. Hendricks, 106 N. C. 485, 11 S. E. 568 (1890) (bond for title to convey thirty acres of land of the "Deaver Tract," which tract contained more than thirty acres); Lowe v. Harris, 112 N. C. 473, 17 S. E. 539 (1893) ("19 April, 1880—James Harris has paid me $20 on his land, owes me six more on it.").

[3] Thornburg v. Masten, 88 N. C. 293 (1883); Falls of Neuse Manufacturing Co. v. Hendricks, 106 N. C. 485, 11 S. E. 568 (1890); Bateman v. Hopkins, 157 N. C. 470, 73 S. E. 133 (1911); Lewis v. Murray, 177 N. C. 17, 97 S. E. 750 (1918); Norton v. Smith, 179 N. C. 553, 103 S. E. 14 (1920); Harper v. Battle, 180 N. C. 375, 104 S. E. 658 (1920). For the description used in these cases, and for other cases, see (a) under note 2, *supra*.

[4] Falls of Neuse Manufacturing Co. v. Hendricks, 106 N. C. 485, 11 S. E. 568 (1890); Bateman v. Hopkins, 157 N. C. 470, 83 S. E. 133 (1911).

prohibitions of the Statute.[5] From this has evolved the familiar formula that parol evidence is admissible to identify the land already described in the paper, but not to a *describendum* not already indicated therein.[6] The value of such a rule is limited. Close cases make hazy the distinction between a description and an identification.[7] At first glance, it might seem that this difficulty is absolved by virtue of the presence of another statute which reads that "in all actions for the possession of or title to any real estate, parol testimony may be introduced to identify the land sued for. . . ."[8] But, whatever may have been the purpose of this statute, it has been treated as merely reiterating the same rule as to the admissibility of parol testimony as existed theretofore.[9] Thus it has had no effect in the evolution of a workable formula as to what constitutes a sufficient writing under the Statute of Frauds.

(2) A noted writer[10] on the subject has stated that a memorandum to be sufficient must contain all the essential elements of the agreement, including a statement of the consideration and the price. The North Carolina decisions are not in accord with this conclusion. It has been held that the consideration need not appear[11] in the memorandum, but that a statement of the price must.[12] This calls forth the explanation that "consideration" is a much broader term than that of "price."[13]

[5] Murdock v. Anderson, 57 N. C. 77 (1858); Farmer v. Batts, 83 N. C. 387 (1880); Fortescue v. Crawford, 105 N. C. 29, 10 S. E. 910 (1890); Lowe v. Harris, 112 N. C. 473, 17 S. E. 539 (1893). For the description used in these cases, see (b) under note 2, *supra*.

[6] Higdon v. Rice, 119 N. C. 623, 26 S. E. 256 (1896); Norton v. Smith, 179 N. C. 553, 103 S. E. 14 (1920); Gilbert v. Wright, 195 N. C. 165, 141 S. E. 577 (1928).

[7] Carson v. Ray, 52 N. C. 609 (1860) (memorandum called for sale of "My house and lot in the town of Jefferson," and the court held that parol evidence was admissible to identify the land). But in Murdock v. Anderson, 57 N. C. 77 (1858), where the description was "One house and lot in Hillsboro," parol testimony was held inadmissible, since that would be aiding the description and not identifying land already described.

[8] N. C. CODE ANN. (Michie, 1935) §1783.

[9] Lowe v. Harris, 112 N. C. 473, 17 S. E. 539 (1893). The court said that the Act did not change the law in reference to contracts and deeds relating to land, the word "description" being used in this Act to mean one which has a legal susceptibility of being aided by testimony so as to identify the land, not a description which is in law no description whatever.

[10] POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS (3d ed. 1926) §87.

[11] Miller v. Irvine, 18 N. C. 103 (1834) (the court said consideration was not part of the contract, but only the inducement to it); Ashford v. Robinson, 30 N. C. 114 (1847); Nichols v. Bell, 46 N. C. 32 (1853); Green v. Thornton, 49 N. C. 230 (1856); Kent v. Edmonston, 49 N. C. 529 (1857); Thornburg v. Masten, 88 N. C. 293 (1883); Falls of Neuse Manufacturing Co. v. Hendricks, 106 N. C. 485, 11 S. E. 568 (1890); Haun v. Burrell, 119 N. C. 544, 26 S. E. 111 (1896); Peele v. Powell, 156 N. C. 553, 73 S. E. 234 (1911); Bateman v. Hopkins, 157 N. C. 470, 73 S. E. 133 (1911); Lewis v. Murray, 177 N. C. 17, 97 S. E. 750 (1918).

[12] Hall v. Misenheimer, 137 N. C. 183, 49 S. E. 104 (1904).

[13] In Hall v. Misenheimer, 137 N. C. 183, 49 S. E. 104 (1904), the court said: "It is true that the consideration of the contract need not be stated. . . . There is quite a difference between the price to be paid by the vendee and the consideration necessary to support the contract and enforce it against the vendor. The latter

There are two probable explanations for this. First, the court has applied the familiar rule that consideration may always be shown by parol testimony. Secondly, the party "to be charged" is usually the purchaser, and the court has said that the terms of the bargain necessary to bind him must appear in the memorandum. Since, under the first of these explanations, a statement of the consideration is not an essential part of the writing, the contract is enforceable against the vendor in the absence of a written inclusion of the consideration, but is not enforceable against a purchaser unless the writing contains a statement of the price. This seems an untenable inconsistency.

(3) The provision of the statute requiring that the agreement or memorandum thereof shall be signed "by the party to be charged" has been interpreted by the court to require a signing only by the party against whom the contract is sought to be enforced.[14] It follows, therefore, that the plaintiff who has not signed the paper, may enforce a specific performance, although no relief could be obtained against him on his correlative obligation. Hence the criticism that the doctrine of mutuality of obligation is violated.[15] The cases merely exemplify the general rule that the signing of an instrument requires the writing of one's name with the intention thereby to authenticate the instrument.[16] These prerequisites appearing, the precise manner of inscription on the paper is immaterial.[17] It need not be his own name;[18] it may be written by a third person;[19] and it may appear on any part of the instrument.[20]

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may be shown by parol, as at common law, and the writing . . . need not contain any matters but such as charge him, the vendor, that is, such stipulations as are to be performed on his part. He is to convey, and the writing must be sufficient to show that this duty rests on him as one of the parties to the contract when he is sought to be charged. The vendee is to pay a certain price, and the writing must likewise show his obligation—its nature and extent—when the action is against him. It must show the price, for, otherwise, the true contract of the vendee as to one of its essential terms would not be reduced to writing, and we could not see from the writing what it is so as to enforce it against him. If we permitted the vendor to supply this defect by parol proof, it would at once introduce all the mischiefs which the statute was intended to prevent."

[14] Hall v. Misenheimer, 137 N. C. 183, 49 S. E. 104 (1904); Lewis v. Murray, 177 N. C. 17, 97 S. E. 750 (1918).

[15] POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS (3d ed. 1926) §75.

[16] McCall v. Textile Industrial Institute, 189 N. C. 775, 128 S. E. 349 (1925).

[17] Devereux v. McMahon, 108 N. C. 134, 12 S. E. 902 (1891) (name signed by "his mark"); Burris v. Starr, 165 N. C. 657, 81 S. E. 929 (1914) (endorsement on back of note); Harper v. Battle, 180 N. C. 375, 104 S. E. 658 (1920) (endorsement on a check).

[18] Hargrove v. Adcock, 111 N. C. 166, 16 S. E. 16 (1892) (agent signing in his own name).

[19] Devereux v. McMahon, 108 N. C. 134, 12 S. E. 902 (1891) (auctioneer's signature); Proctor v. Finley, 119 N. C. 536, 26 S. E. 128 (1896) (auctioneer's signature on notice of sale of lands); Combes v. Adams, 150 N. C. 64, 63 S. E. 186 (1908) (agent).

[20] Burris v. Starr, 165 N. C. 657, 83 S. E. 929 (1914); Flowe v. Hartwick, 167 N. C. 448, 83 S. E. 841 (1914).

In conclusion it may be said that the vagueness of the Statute itself and the constantly varying fact situations which arise make impossible the development of adequate rules as to what constitutes a sufficient writing. Although the cases are replete with judicial utterances that the Statute must be rigidly enforced, the court at times has been extremely lenient in upholding seemingly incomplete memoranda. This occasional laxity may be explained in two ways. There may be unusual hardship in the particular case. Or, the court may be seeking an indirect means of avoiding the strict North Carolina rule regarding part performance.[21]

STATON P. WILLIAMS.

Workmen's Compensation—Notice to Employer—Filing of Claims—Action Under Federal Employers' Liability Act.

Employee was killed in an accident in December, 1929, while in defendant's employ. Defendant was a self-insurer and reported the accident to the industrial commission at once, offering to pay the claim. Plaintiff, the employee's administrator, without filing a claim, notified the defendant and the commission that he would proceed under the Federal Employers' Liability Act rather than the Workmen's Compensation Act. After various rulings and an appeal under the Federal Act[1] the plaintiff took a voluntary nonsuit. In 1935 the plaintiff petitioned for an award under the Workmen's Compensation Act and requested a hearing before the industrial commission. The North Carolina Supreme Court *held* that the claim was not barred by the one year statute of limitations as it was pending before the industrial commission during the entire period.[2]

Generally, before the injured employee or his personal representative can recover compensation under the Workmen's Compensation Act he must comply with the statute in two respects. First, he must notify the employer of the accident either within a limited time after the injury or as soon thereafter as is practicable.[3] While the notice is usually

[21] North Carolina does not allow part performance of the contract to take the contract without the statute. Hall v. Misenheimer, 137 N. C. 183, 49 S. E. 104 (1904); (1922) 1 N. C. L. REV. 48.

[1] Hanks v. Utilities Co., 204 N. C. 155, 167 S. E. 560 (1933).

[2] Hanks v. Utilities Co., 210 N. C. 312, 186 S. E. 252 (1936).

[3] The statutes vary in different jurisdictions. Only a few are listed below. ALA. CODE ANN. (Michie, 1928) §7568 (notice to employer within 5 days; no compensation if after 90 days); ARIZ. CODE ANN. (Struckmeyer, 1928) §1446 (injury to be reported at once); GA. CODE ANN. (Harrison, 1933) §114-303 (notice immediately; barred after 30 days unless reasonable excuse and employer shown not to be prejudiced by delay); IOWA CODE (1935) §1383 (notice in 15 days; if in 30 days, not barred except as to extent employer was prejudiced; bar absolute after 90 days); KY. STAT. ANN. (Carroll; Baldwin's Rev., 1936) §§4914, 4915 (notice as soon as practicable); N. C. CODE ANN. (Michie, 1935) §8081