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RECENT DECISIONS

CONTRACTS: STATUTE OF FRAUDS INVOKED BY THIRD PARTY:

O'BANION v. PARADISO

(CAL. 1964)

In general, an oral contract falling within the provisions of the Statute of Frauds is unenforceable, and the defense of the statute may be invoked only by a party to the contract. The California cases have generally supported this rule. In *Demeter v. Annenson*¹ the court stated as elementary the rule that the Statute of Frauds can be invoked only by the parties to the oral contract and is not available to third persons.

California courts, however, have extended the availability of the defense provided by the Statute of Frauds in their interpretation of the statute. In so doing, California has followed many other states in broadening the application of the statute in this respect. For example, in *Wolfsen v. Hathaway*² defendants claimed rights under an oral lease as a defense to an action for trespass; plaintiffs held a subsequent written lease from the lessors. In holding the alleged oral agreement invalid, the court, in effect, allowed plaintiffs, who were not parties to the oral agreement, to assert noncompliance with the Statute of Frauds. However, the court did not specifically rule on this point. The case was decided on findings that defendants' alleged rights in the property were based upon an invalid oral agreement and that they had wrongfully interfered with plaintiffs' present possessory rights in the property.

The California Statute of Frauds, Civil Code Section 1624, is not explicit on whether the defense of the statute may be invoked by third persons (as is typical of most such statutes), and only a study of the cases and secondary material will reveal the generally accepted exceptions to the general rule that third persons cannot take advantage of the statute.³ Williston states:

A contract within the statute is valid except that it cannot be enforced against either party *or his successor in interest* unless the

¹ 80 Cal. App. 2d 48, 180 P.2d 998 (1947).

² 32 C.2d 632, 198 P.2d 1 (1948).

³ The secondary sources on California law do not recognize that any exceptions exist. 11 MCK. DIG., *Statute of Frauds* § 58; 23 CAL. JUR. 2d, *Statute of Frauds* § 125; 23 WEST CAL. DIG., *Statute of Frauds* § 143.

statute has been satisfied as to him. A third party should not be able to assert the invalidity of such transactions, *unless he is an assignee or successor to a party to the contract.*⁴

The Restatement of Contracts states a similar rule.⁵

A recent California case establishes an exception. In *O'Banion v. Paradiso*⁶ defendant Orduno agreed to sell certain realty to O'Banion without obtaining the written consent of his wife who was co-owner. Subsequently, Orduno entered into a written agreement with Paradiso for the sale of the same property. O'Banion brought suit to compel specific performance of the first agreement, charging that Paradiso had knowledge of the Orduno-O'Banion agreement prior to purchasing the property. Paradiso pleaded the defense of the Statute of Frauds, i.e., that the Orduno-O'Banion agreement was unenforceable. The main issue was whether a third party (Paradiso) could invoke the defense of the statute.

The lower court, in ruling against the defendants, cited three California cases in support of the general rule that third persons cannot take advantage of the statute.⁷ In *Demeter v. Annenson*⁸ a competing taxi company claimed the statute invalidated a contract between the Southern Pacific Company and the Yellow Cab Company granting Yellow Cab the exclusive right to solicit patronage at a Southern Pacific station. The court held that the statute could be invoked only by the parties to the unwritten contract and was not available to third persons who were not parties to it. In *Wood Estate v. Chanslor*⁹ there was an action to quiet title to certain mining property, both plaintiff and defendant claiming title from a mining company. Plaintiff claimed title under a trust deed executed by the mining company; defendant, a judgment creditor of the mining company, claimed title as purchaser at its execution sale. Defendant claimed that the authority of the agent who issued the trust deed was not in writing and therefore the contract of sale with the plaintiff was unenforceable under Civil Code Section 1624(5). The court held that third parties cannot avail themselves of the statute if the two principals acquiesce, and a judgment creditor cannot have a trust instrument set aside by asserting the statute.¹⁰

⁴ 3 WILLISTON, CONTRACTS § 530 (3d ed. 1960). (Emphasis added.)

⁵ RESTATEMENT, CONTRACTS § 218 (1932).

⁶ 225 A.C.A. 812, 37 Cal. Rptr. 562 (1964), *rev'd*, 61 A.C. 617, 393 P.2d 682, 39 Cal. Rptr. 370 (1964).

⁷ 225 A.C.A. 812, 37 Cal. Rptr. 562 (1964).

⁸ 80 Cal. App. 2d 48, 180 P.2d 998 (1947).

⁹ 209 Cal. 241, 286 Pac. 1001 (1930).

¹⁰ Compare *Burns v. Peters*, 5 Cal. 2d 619, 55 P.2d 1182 (1936); *Bumb v. Bennett*, 51 Cal. 2d 294, 333 P.2d 23 (1958).

In *Mitchell v. Locurto*¹¹ plaintiff brought an action to recover a real estate broker's commission. Defendant's contention was that the broker failed to obtain a purchaser ready, willing, and able to purchase the property, since the buyer's agent did not have written authority to purchase. The court held that the invalidity of the agreement for purchase on this ground may not be raised if the principal does not object.

In reversing the ruling of the lower court in *O'Banion v. Paradiso*, the appellate court held that third persons who are in privity with a party to a contract can assert the Statute of Frauds the same as the contractor himself could have. The court distinguished the California case of *Ellis v. Mihelis*¹² and relied upon several secondary authorities.¹³ In the *Ellis* case plaintiff brought suit to compel specific performance of a contract for the sale of realty. Defendant contended that plaintiff's agent did not have written authority to sign. The court found that the plaintiff had instructed his agent to sign and that such signature was a purely mechanical act which did not involve the exercise of discretion. The court held that where the signing by an agent is an act of this character, the authorization by the principal is not required to be in writing, and the signature is to be treated as that of the principal whether or not he was present at the execution of the agreement.

The appellate court distinguished the cases cited by the lower court by noting that in those cases the third party seeking to invoke the statute was not in privity with a party to the contract. In the *O'Banion* case there was such privity. When *Paradiso* received *Orduno's* deed, he succeeded to *Orduno's* right to assert the statute as a defense.

In reaching the same answer on this point of law the courts have differed in their reasoning. Some have held that a grantee claiming under a vendor who had orally agreed to sell the land to another *succeeds to all the rights* of his grantor.¹⁴ Others have held that the vendor makes his election to avoid the oral contract by selling the property to the second purchaser, and the second purchaser *may rely upon such election to avoid*.¹⁵ This was the reasoning

¹¹ 79 Cal. App. 2d 507, 179 P.2d 848 (1947).

¹² 60 Cal. 2d 206, 384 P.2d 7, 32 Cal. Rptr. 415 (1963).

¹³ 3 WILLISTON, CONTRACTS § 530 (3d ed. 1960); 2 CORBIN, CONTRACTS § 292 (1950); 49 AM. JUR. Statute of Frauds § 592 (1943); 37 C.J.S. Frauds, Statute of § 220d (1943).

¹⁴ *Clarke v. Philomath College*, 99 Or. 366, 195 P. 822 (1921); *Lieber v. Mercantile National Bank*, 331 S.W.2d 463 (Tex. Civ. App. 1960); *Zellner v. Wassman*, 184 Cal. 80, 193 P. 84 (1920).

¹⁵ 49 AM. JUR. Statute of Frauds § 592 (1943).

in *Brought v. Howard*,¹⁶ the court ruling that where one who has orally contracted to convey realty conveys it to a stranger, the latter may, in a suit to render him subject to the terms of the contract, take advantage of the vendor's act of rescission and set up the Statute of Frauds as a defense. (Quaere, whether it would be better to plead simply that there is no contract after an effective rescission rather than attempting to rely upon the defense of the Statute of Frauds.)

In commenting upon *Hyman-Michaels Co. v. Senior & Palmer, Inc.*¹⁷ upholding the right of an assignee of one of the contracting parties to assert the defense of the Statute of Frauds, the author of a law review article¹⁸ makes the following additional observations: (1) If a purchaser from one who was immune from suit because of the Statute of Frauds could not also plead the statute, the title in effect would be unmarketable; (2) while a contract within the statute is not void, but merely voidable, a subsequent sale by the original contract vendor is a denial and avoidance by him of the validity of the oral contract.

In the *O'Banion* case the California court reasoned that Paradiso, upon receiving Orduno's deed, succeeded to her right to assert the Statute of Frauds as a defense. Thus, one exception to the rule that third parties cannot set up the Statute of Frauds as a defense can be stated as follows: Successors in title to one who has made a contract unenforceable as against himself by reason of the Statute of Frauds are in privity so as to enable them to invoke the statute as a defense.

Louis J. Fischl

¹⁶ 30 Ariz. 522, 249 Pac. 76 (1926).

¹⁷ 265 N.Y. 266, 192 N.E. 407 (1934).

¹⁸ 20 CORNELL L.Q. 226 (1934-35).