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COMMENTS

CONTRACTS—STATUTE OF FRAUDS—CHECK GIVEN AS PART PAYMENT UNDER ORAL CONTRACT TO PURCHASE LAND

Sturgis v. Meadors, 266 S.W.2d 81 (Ark. 1954)

Defendant vendee entered into an oral contract to purchase plaintiffs' farm and delivered a check for \$1,000 as payment for earnest money, but a few days thereafter stopped payment on the check. The vendors, alleging that they were ready, willing and able to convey the land to the vendee in accordance with the contract, sued to recover the amount of the check. Proof at the trial disclosed that plaintiffs were unable at that time to convey a marketable title to defendant as provided in the oral agreement. The Arkansas Supreme Court, affirming the trial court's decision for the plaintiffs, held that the failure to comply with the statute of frauds in making the contract to convey land did not prevent the vendors from recovering the amount of the check and that defendant, by stopping payment on the check, rendered useless any further efforts by the plaintiffs to perfect their title.¹

The general rule is that a vendor can recover the amount of a negotiable instrument given him as part payment for the purchase of land even though the vendee pleads that the promise to sell fails to comply with the applicable statute of frauds, provided that the vendor is ready, willing and able to perform as he promised.² In states having statutes providing that no action shall be brought upon a parol contract for the sale of land,³ the courts have sustained the vendor's recovery on the ground that the action is based upon the negotiable instrument rather than upon the parol agreement.⁴ The more appropriate defense to such an action on a negotiable instrument is failure or lack of consideration rather than non-compliance with the statute of frauds.⁵ But a promise to convey land, even though it is not enforceable, is sufficient consideration⁶ for a negotiable instrument and, so long as the vendor is ready and willing to perform in

1. *Sturgis v. Meadors*, 266 S.W.2d 81 (Ark. 1954).

2. 2 CORBIN, CONTRACTS § 236 (1950). See Note, 132 A.L.R. 1486 (1941).

3. See, e.g., IND. ANN. STAT. § 33-101 (Burns 1949); KY. REV. STAT. § 371.010 (1953); TEX. REV. CIV. STAT. ANN. art. 3995 (1945).

4. *Schierman v. Beckett*, 88 Ind. 52 (1882); *Edelin v. Clarkson's Executors*, 42 Ky. (3 B. Mon.) 31 (1842); *Crutchfield v. Donathon*, 49 Tex. 691 (1878). *But cf.* *Reese v. Bailey*, 199 Ky. 504, 251 S.W. 633 (1923).

5. Negotiable instruments are deemed prima facie to have been issued for a valuable consideration. See NEGOTIABLE INSTRUMENTS LAW § 24. Absence or failure of consideration is a defense against any person not a holder in due course. See NEGOTIABLE INSTRUMENTS LAW § 28.

6. RESTATEMENT, CONTRACTS § 84, comment e (1932).

accordance with the parol agreement, the consideration for the negotiable instrument has not failed.⁷

In states where the statute of frauds provides that parol contracts to sell land are void,⁸ the vendor is allowed to recover on the theory that the statute's requirement that a promise to convey land be in writing is for the protection of the vendor only.⁹ Failure to comply with this requirement does not make the parol agreement void even though the statute so provides, but merely voidable at the election of the vendor.¹⁰ If the vendor chooses to perform his parol promise to convey land, there is sufficient consideration for the negotiable instrument to enable him to collect its proceeds from the defaulting buyer.¹¹

Another rationale appearing in the cases¹² that have granted recovery to the vendor has been based on an allusion to cases involving a converse situation wherein the vendee, who has given cash as earnest money to the vendor, attempts to recover the earnest money after deciding not to perform the parol agreement to purchase land. Recovery in such a situation is denied to the vendee by the majority of courts¹³ if the vendor is able and willing to perform his promise to convey. Statutes of fraud preventing maintenance of an action on a parol contract to convey land,¹⁴ or providing that such contracts are void¹⁵ or invalid,¹⁶ are again interpreted as being for the protection of the vendor only. The vendee, accordingly, cannot take advantage of the statute by seeking to set aside the parol agreement and recover his partial payment if the vendor has decided not to avail himself of the statute's protection and is ready, willing and able to perform the oral agreement.¹⁷ Inasmuch as these courts will deny the vendee recovery of

7. 2 CORBIN, CONTRACTS § 286 (1950).

8. See, e.g., COLO. REV. STAT. § 59-1-8 (1953); MINN. STAT. ANN. § 513.05 (West 1947). See also 2 CORBIN, CONTRACTS § 284, n.72 (1950).

9. Garbarino v. Union Savings & Loan Ass'n, 107 Colo. 140, 109 P.2d 638 (1941); Phelan v. Carey, 222 Minn. 1, 23 N.W.2d 10 (1946).

10. See note 9 *supra*.

11. 30 MINN. L. REV. 647 (1946).

12. Fletcher v. Lake, 121 Me. 474, 118 Atl. 321 (1922); McGowen v. West, 7 Mo. 569 (1842); Fleischman v. Plock, 19 Misc. 649, 44 N.Y. Supp. 413 (Sup. Ct. 1897); see cases cited in note 9 *supra*.

13. See Note, 169 A.L.R. 187 (1947).

14. See, e.g., ARK. STAT. ANN. § 38-101 (1947); ILL. ANN. STAT. c. 59, § 2 (1951); IND. ANN. STAT. § 33-101 (Burns 1949); ME. REV. STAT. c. 119, § 1 (1954); MO. REV. STAT. § 432.010 (1949); VT. REV. STAT. § 1716 (1947).

15. See note 8 *supra*. N.Y. REAL PROP. LAW § 259; ORE. COMP. LAWS ANN. § 2-909 (1940).

16. See, e.g., MONT. REV. CODES ANN. § 74-203 (1947); OKLA. STAT. ANN. tit. 15, § 136 (1937). See also 2 CORBIN, CONTRACTS § 284 n.73 (1950).

17. Venable v. Brown, 31 Ark. 564 (1876); Colorado Lumber, Land & Improvement Co. v. Dustin, 38 Colo. 398, 87 Pac. 1142 (1906); Mitchell v. McNab, 1 Ill. App. 297 (1878); Day v. Wilson, 83 Ind. 463 (1882); Gammon v. Butler, 48 Me. 344 (1861); Sennett v. Shehan, 27 Minn. 323, 7 N.W. 266 (1880); Chamberlain v. Ft. Smith Lumber Co., 179 S.W. 740 (Mo. App. 1915); Perkins v. Allnut, 47 Mont. 13, 130 Pac. 1 (1913); Keystone Hardware Corp. v. Tague, 246 N.Y. 79, 158 N.E. 27 (1927); Schechinger v. Gault, 35 Okla. 416, 130 Pac. 305 (1913); Barton v. Simmons, 129 Ore. 457, 278 Pac. 83 (1929); Shaw v. Shaw, 6 Vt. 66 (1834).

his cash down payment if the vendor is willing to perform, by analogy, the vendor should be able to recover on an earnest money check if he is willing to perform. This rationale is the one relied on by the Arkansas Supreme Court in the principal case.¹⁸

Although the plaintiffs in the principal case were willing to perform their promise to convey the land to the vendee, they were unable and certainly not ready to perform at the time of trial as proof disclosed they could not at that time convey a marketable title to the defendant as required by the parol agreement.¹⁹ Inability or unwillingness of a promisor to perform a promise unenforceable against him for lack of compliance with the statute of frauds is such a failure of consideration as will defeat his action against the promisee upon a negotiable instrument given pursuant to the oral agreement.²⁰ But the proof also disclosed that defendant stopped payment on the earnest money check a few days after drawing it and did not tender the remainder of the purchase price or demand performance by the vendor, thus manifesting his intent to repudiate the oral agreement to purchase plaintiffs' land. Defendant's repudiation of the parol agreement made his duty to pay the negotiable instrument independent of the plaintiffs' duty to convey a marketable title, at least in the absence of evidence that plaintiffs could not or would not make marketable title, and rendered useless further efforts by the plaintiffs to perfect their title.²¹

The court in the principal case clearly is correct in adopting the prevailing rule that a vendor can collect the proceeds of a negotiable instrument given as partial payment for land according to the terms of a parol agreement which is unenforceable against the vendor for failure to comply with the statute of frauds, provided that the vendor is ready, willing and able to perform as he promised. The extension of this rule to cover the instant situation wherein the vendors were unable and not ready to perform at the date of trial is also warranted in that the vendee's repudiation of the parol agreement by stopping payment on the check excused the vendors from further performance.

18. *Sturgis v. Meadors*, 266 S.W.2d 81 (Ark. 1954).

19. Brief for Appellants, pp. 17, 19, 50-53, *Sturgis v. Meadors*, 266 S.W.2d 81 (Ark. 1954).

20. *Hamburg Bank v. Ahrens*, 118 Ark. 548, 177 S.W. 14 (1915); 2 CORBIN, CONTRACTS § 286 (1950).

21. *Lambright v. Heck*, 86 Ohio App. 456, 93 N.E.2d 45 (1949); RESTATEMENT, CONTRACTS § 306 (1932).