South Carolina Law Review

Volume 11 | Issue 2 Article 5

Winter 1959

Oral Modification and Rescission of Contracts Required by the Statute of Frauds to Be in Writing

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ORAL MODIFICATION AND RESCISSION OF CONTRACTS REQUIRED BY THE STATUTE OF FRAUDS TO BE IN WRITING

Where a particular contract or transaction is required to be in writing by the Statute of Frauds, the question frequently arises whether modification or rescission must also be by a writing; or, to state it differently, whether oral modification or rescission of such a contract or transaction is effective. The purpose of this note is to discuss the question primarily from the point of view of the South Carolina cases. The original English Statute of Frauds, enacted in 1677,[1] was made of force in South Carolina in 1712,[2] and it is principally with the sections originally and still commonly known as the fourth[3] and seventeenth[4] sections that this note is concerned.

ORAL MODIFICATION OF CONTRACTS WITHIN THE STATUTE

From even a cursory reading of cases involving oral modification of contracts within the Statute of Frauds, one can readily see the

1. 29 CAR. 2, c 3 (1677).
2. 2 STAT. 525 (1712).
3. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 11-101. This section reads as follows:

> *Agreements to be in writing.*
> No action shall be brought whereby:
> (1) To charge any executor or administrator upon any special promise to answer damages out of his own estate;
> (2) To charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person;
> (3) To charge any person upon any agreement made upon consideration of marriage;
> (4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; or
> (5) To charge any person upon any agreement that is not to be performed within the space of one year from the making thereof;
> Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

The present section differs only slightly in verbiage from the original version of the fourth section.

4. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 11-103. This section reads as follows, with only minor changes in verbiage from the original seventeenth section:

> *Contracts for sale of goods for fifty dollars or more*
> No contract for the sale of any goods, wares and merchandise for the price of fifty dollars or upwards shall be allowed to be good unless (a) the buyer shall accept part of the goods so sold and actually receive the same or give something in earnest to bind the bargain or in part payment or (b) some note or memorandum in writing of the bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized.

necessity for distinguishing that Statute from the parol evidence rule. The parol evidence rule renders inadmissible all prior or contemporaneous oral statements which are inconsistent with or tend to vary the terms of the written contract. This rule does not prevent the introduction of testimony showing a *subsequent* oral variance inconsistent with or rescinding the prior written contract.[5] Where an original contract comes within the provisions of the Statute of Frauds and is thus required to be in writing, the Statute of Frauds renders unenforceable a *subsequent* oral contract, which while changing or varying the terms of the original written contract, yet remains within the Statute of Frauds.[6] Or, to state the rule more simply, a contract required by the Statute of Frauds to be in writing cannot be validly changed or modified by a subsequent oral contract so as to make the original written contract as modified an enforceable contract, unless the modification removes the original contract from within the terms of the Statute.[7]

In determining whether the written contract as modified by the oral contract is within the Statute of Frauds, the contract as modified ". . . is regarded as creating a new single contract consisting of so many of the terms of the prior contract as the parties have agreed not to change, and in addition the new terms on which they have agreed."[8] If the result is a contract the terms of which are required by the Statute to be in writing, the oral modification is unenforceable.[9] If the resulting contract as orally modified is not within the Statute or if the oral contract is complete within itself and not within the Statute of Frauds, it is generally enforceable.[10]

South Carolina in numerous decisions has considered and followed the general rule of non-enforceability of oral modifications of con-

5. Koth v. Board of Education, 141 S. C. 448, 140 S. E. 99 (1927). This case is also authority for a view contrary to common law that a contract under seal can be modified or varied by a contract not under seal, or even by an oral one where it does not contravene the Statute of Frauds. *See* Lindsay v. Garvin, 31 S. C. 259, 9 S. E. 862 (1889) (land).

6. *See* Schaap v. Wolf, 173 Wis. 351, 181 N. W. 214, 17 A. L. R. 7 (1921) (land).

7. *See* Pence v. Life, 104 Va. 518, 52 S. E. 257 (1905) (land); Whitfield v. Rowland Lumber Co., 152 N. C. 211, 67 S. E. 512 (1910) (land); Planters Cotton Oil Co. v. Bell, 54 Ga. App. 433, 188 S. E. 41 (1936) (chattels); Rudder v. Trice, 236 Ala. 234, 182 So. 22 (1938) (not within a year); Van Iderstine Co. v. Barnet Leather Co., 242 N. Y. 425, 152 N. E. 250 (1926) (chattels); Florence Printing Co. v. Parnell, 178 S. C. 119, 182 S. E. 313 (1934) (not within a year); ANNOTS., 17 A. L. R. 10 (1922), 80 A. L. R. 539 (1932), 118 A. L. R. 1511 (1939).

8. RESTATEMENT, CONTRACTS § 223 (1932).

9. *See* ANNOT., 17 A. L. R. 10, 31 (1922).

10. Lieberman v. Templar Motor Co., 236 N. Y. 139, 140 N. E. 222, 29 A. L. R. 1089 (1923) (not within a year).

tracts which are required to be in writing.[11] There are, however, certain cases which at first glance do not appear to be in harmony with the general rule.

Perhaps the earliest case in this State dealing with the problem is *Doar v. Gibbes*.[12] In that case there was a written contract for the sale of land. The vendee sued for specific performance alleging that there had been an oral modification extending the time for performance. The Court denied specific performance and held that an oral agreement to extend the time for the performance of a written contract for the sale of land was within the Statute of Frauds and unenforceable. Much later, there was a holding in *Williams v. Bruce*[13] to the effect that parol evidence could be admitted to show an oral modification establishing a time for performance of a contract for the sale of land. The written contract contained no time for performance. The fifteen-day limitation allegedly established by an oral modification had expired at the time of this suit for specific performance. The vendee's bill was denied. Since the Court did not mention the Statute of Frauds, it is arguable that the holding admitting evidence of the oral modification was based on the parol evidence rule and admitted for the purpose of establishing a reasonable time for performance since no time was provided for in the written contract. Another basis for the decision is the fact that the fifteen day extension had been executed and could not now be undone.[14] A third and very slim possibility is that the decision was based upon the very controversial theory that the Statute of Frauds applies to the formation of contracts and not to their performance,[15] though there

11. *See* Lindsay v. Garvin, 31 S. C. 259, 9 S. E. 862 (1889) (land); Birlant v. Cleckley, 48 S. C. 298, 26 S. E. 600 (1896) (not within a year); O'Neal v. Bennett, 33 S. C. 243, 11 S. E. 727 (1890) (land); Midland Roofing Co. v. Pickens, 96 S. C. 286, 80 S. E. 484 (1913) (chattels); McLaurin v. Eddins, 114 S. C. 193, 103 S. E. 531 (1920) (land); Florence Printing Co. v. Parnell, 178 S. C. 119, 182 S. E. 313 (1934) (chattels), cited in 118 A. L. R. 1511 (1939) as being in support of the general rule; Doar v. Gibbes, Bailey Eq. 371 (S. C. 1831) (land); Standard Ins. Co. v. Simpson, 64 F. 2d 583 (4th Cir. 1927) (suretyship); Southern States Ins. Co. v. Foster, 229 F. 2d 77 (4th Cir. 1956) (not within a year).

12. Bailey Eq. 371 (S. C. 1831).

13. 110 S. C. 421, 96 S. E. 905 (1918).

14. *See* Alston v. Connell, 140 N. C. 485, 53 S. E. 292 (1906) (land); Thomson v. Poor, 147 N. Y. 402, 42 N. E. 13 (1895) (not within a year); Imperator Realty Co. v. Tull, 228 N. Y. 447, 127 N. E. 263 (1920) (land); Florence Printing Co. v. Parnell, 178 S. C. 119, 182 S. E. 313 (1934) (not within a year).

15. Professor Williston criticizes this theory saying that it is based on a principle ". . . which cannot be supported and the current of authority runs strongly against it." 2 WILLISTON, CONTRACTS § 599 p. 1717 (Rev. Ed. 1936). But see Van Iderstine Co. v. Barnet Leather Co., 242 N. Y. 425, 152 N. E. 250 (1926) (chattels); 31 MICH. L. REV. 134 (1932); ANNOT., 17 A. L. R. 10 (1922).

is no indication that this theory was even considered and *Doar v. Gibbes*[16] is clearly opposed to such a view.

In *American Oil Co. v. Cox*[17] there was a written lease which by its terms could be terminated by either party upon presentation of a twenty-four hour written notice. The plaintiff gave such notice and, upon defendant's refusal to vacate, brought an action to dispossess him. The defendant alleged that the written lease had been orally modified. The nature of this alleged modification was not reported. The trial judge excluded testimony with reference to this modification, and on appeal the Supreme Court said:

> Unquestionably, it is true that a written contract may be changed by a subsequent parol agreement, supported by a valuable consideration, and evidence is admissible in proof of such parol agreement.

The report of the case did not show that the lease was originally for a period greater than a year or that the modification was such as to require the application of the Statute of Frauds, which was not mentioned. It is submitted that such sweeping language could refer only to the parol evidence rule and could not be applicable to the Statute of Frauds. At any rate, the circuit court was affirmed on the ground that the exception was not properly raised.

The Supreme Court recently re-affirmed the general rule in *Farr v. Williams*.[18] This case concerned a written lease for two years duration. In an action for one-half of a condemnation award, the lessor alleged that there had been an oral agreement to extend the terms of the lease for an additional two year period. The Court held that an oral agreement would have been invalid in the absence of such partial performance as would remove the bar of the Statute of Frauds.[19]

The sharpest apparent departure from the general rule is the case of *Searles v. Auld*.[20] A written contract provided for the delivery of certain corporate stock in addition to money as consideration for the sale of the land. The parties orally agreed that the vendor would accept the vendee's personal note in lieu of the corporate stock. The vendee made two cash payments and delivered the note. Later, the vendee tendered the stock in accordance with the terms of the written

16. See note 11 *supra*.
17. 182 S. C. 419, 424, 189 S. E. 600 (1937).
18. 232 S. C. 208, 101 S. E. 2d 483 (1958).
19. That case was decided under a different section of the Statute of Frauds, CODE OF LAWS OF SOUTH CAROLINA, 1952 § 57-306, but the law is nonetheless applicable.
20. 118 S. C. 430, 111 S. E. 785 (1921). The Court did not mention the Statute of Frauds by name.

contract and demanded return of the note. The vendor refused and the vendee sued for breach of contract. The vendor set up the oral modification as a defense. The Court, citing 39 Cyc. 1351 (1912), held that such a modification could be made by oral contract. This case can be reconciled by the fact that the oral modification had been acted upon and as such was binding.[21]

As should be expected, the courts, having realized that gross injustice would result from a strict application of the general rule against the enforcement of oral modifications to contracts within the Statute of Frauds, have applied such equitable remedies as estoppel and waiver where a party's reliance on an oral modification has resulted in an irretrievable change of position or loss of a legal right.[22] The case of *Florence Printing Co. v. Parnell*[23] sums up the general attitude quite adequately. The circuit court decree as adopted by the Supreme Court declared:

> Equity will not allow the statute of frauds to be used as an instrument of fraud, and where a party to a contract within the statute induces the other to waive some provision thereof upon which he is entitled to insist and to change his position to his disadvantage with respect thereto, the party so acting will be estopped to claim the benefit of the statute.

ORAL RESCISSION OF CONTRACTS WITHIN THE STATUTE OF FRAUDS

The general rule as to oral rescission of contracts within the Statute of Frauds is that an executory written contract within the Statute can be effectively rescinded by a subsequent oral contract.[24]

21. See cases cited in note 14 *supra*.

22. *See* McDonald v. Whaley, 244 S. W. 596 (Tex. Com. App. 1922) (land); Planters Cotton Oil Co. v. Bell, 54 Ga. App. 433, 188 S. E. 41 (1936) (chattels); McMillan v. King, 193 S. C. 14, 7 S. E. 2d 521 (1940) (land); Walker v. Railroad Co., 26 S. C. 80, 1 S. E. 366 (1887) (not within a year) (dictum); Gee v. Hicks, Rich. Eq. Cas. 17 (S. C. 1831) (not within a year); Southern States Ins. Co. v. Foster, 229 F. 2d 77 (4th Cir. 1956) (not within a year) (dictum).

23. 178 S. C. 119, 126, 182 S. E. 313 (1934) (not within a year). There was a written agreement between the principal stockholders of that printing company whereby they agreed to equalize their stock holdings. The parties agreed orally to extend the period for such stock equalization for two or three additional years. The plaintiff relied on this extension and hence did not insist on the time specified by the written contract. *See also*, Alston v. Connell, 140 N. C. 485, 53 S. E. 292 (1906) (land); Thomson v. Poor, 147 N. Y. 402, 42 N. E. 13 (1895) (not within a year); Imperator Realty Co. v. Tull, 228 N. Y. 447, 127 N. E. 263 (1920) (land).

24. *See* Hooke v. Great Western Lumber Co., 54 Cal. App. 576, 202 Pac. 492 (1921) (chattels); Haberman v. Sawall, 72 Cal. App. 576, 237 Pac. 776 (1925) (land); McKinney v. Flanery, 205 Ky. 766, 266 S. W. 629 (1924) (land); Wangsness v. Stephenson, 44 S. D. 536, 184 N. W. 362 (1921) (land);

If the contract is one involving the sale of land or chattels which exceed fifty dollars in price and has been executed, an attempted rescission which has the effect of revesting the title in the vendor is equivalent to a new contract of sale, and as such is within the Statute of Frauds.[25]

Where the original contract is executory and deals with the sale of land or personalty in excess of fifty dollars in price, the oral rescission presents some problems.[26] Both Professor Corbin[27] and Professor Williston,[28] as well as the *Restatement of Contracts*,[29] agree that where the original contract was operative not only as a promise, but as a conveyance of the title in the chattel or of an interest in the land, and the rescinding contract must operate not only to discharge the obligations but also to reconvey title to the chattel or the interest in the land, the rescinding oral contract is within the Statute of Frauds and hence unenforceable.[30] The basis for this view and that of a similar strong minority is well illustrated by a passage from *Friar v. Baldridge*.[31] This case concerned a written contract for the sale of land which was allegedly rescinded by oral agreement. The Court declared:

> A contract for the conveyance of land is a contract respecting an interest in lands. It creates an equitable estate in the vendee in the very lands, and makes the vendor a trustee for him. A contract for the sale of an equitable estate in lands is clearly a sale of an interest in the land within the statute of frauds. . . . [T]he court can perceive no distinction between the sale of land to which a man has only an equitable title and a sale of land to which he has a legal title. They are equally within the statute.

The majority of the jurisdictions apparently base their holdings

Hicks v. Oak's Adm'r., 233 Ky. 27, 24 S. W. 2d 917 (1930) (land); 2 WILLISTON, CONTRACTS § 592 p. 1703 (Rev. Ed. 1936); 2 CORBIN, CONTRACTS § 302 p. 91 (1950); RESTATEMENT, CONTRACTS § 222 (1936); ANNOT., 38 A. L. R. 294 (1925).

25. *See* Fripp v. Fripp, Rice Eq. 84 (S. C. 1839) (land); Shinall Bros. v. Skelton, 28 Ga. App. 527, 112 S. E. 163 (1922) (chattels); McDonald v. Whaley, 244 S. W. 596 (Tex. Com. App. 1922) (land); Anderson v. Anderson, 128 Wash. 504, 223 Pac. 323, 38 A. L. R. 292 (1924) (land); 2 WILLISTON, CONTRACTS § 592 p. 1704 (Rev. Ed. 1936); 2 CORBIN, CONTRACTS § 302 p. 92 (1950).

26. See 11 N. Y. U. INTRA MURAL L. REV. 43 (1955).

27. See note 25 *supra*.

28. *Ibid.*

29. RESTATEMENT, CONTRACTS § 222, Ills. 2 and 3 (1932).

30. *See* Sonborn v. Murphy, 86 Tex. 437, 25 S. W. 610 (1894) (land); Anderson v. Anderson, 128 Wash. 504, 223 Pac. 323, 38 A. L. R. 292 (1924) (land); Hardinger v. Till, 1 Wash. 2d 335, 96 P. 2d 262 (1939) (land); Maxon v. Gates, 112 Wis. 196, 88 N. W. 54 (1901) (land).

31. 91 Ark. 133, 120 S. W. 989, 992 (1909).

on a theory similar to that expressed by the court in *Niernberg v. Feld*:[32]

> It seems to be the better-reasoned rule that an executory contract involving title to, or an interest in, lands may be rescinded by an agreement resting in parol. The Statute of Frauds concerns the making of contracts only, and does not apply to the manner of their revocation.

Both logic and reason would appear to lie with the minority view as so aptly expressed in *Friar v. Baldridge*,[33] especially since the Statute of Frauds refers to "any interest" in land. The majority seems to ignore legal theory and relies on expediency.

The law in South Carolina seems, however, to be well settled in its approval of the general rule allowing oral rescissions of executory contracts in general, and also in its approval of the majority view as to oral rescissions of contracts pertaining to the sale of land and chattels.

A very early case, *Fripp v. Fripp*,[34] established the rule in so far as land is concerned. The plaintiff and defendant made mutual assignments in writing of certain realty devised to them. The result of this transaction was that each took possession of a tract of land, though the Court held that they did not acquire a legal interest thereby. Later, there was an alleged oral offer to rescind this agreement. Defendant contends that he accepted this offer two years after receiving it. The Court held that the offer was not accepted within a reasonable time, and then stated:

> Though property once legally vested cannot be re-transferred without a conveyance, yet an agreement may be rescinded by parol or by an act significant of the intention, as by cancelling a bond or giving it up to be cancelled.

The rule is unequivocally stated in *Moseley v. Witt*[35] under the authority of *Fripp v. Fripp*.[36] The plaintiff sought specific performance of a written contract for the sale of land. The defense was an oral rescission of that contract and the substitution of a rent contract. The Court declared: "A written contract of sale may be res-

32. 131 Colo. 508, 283 P. 2d 640 (1955). *See* McIntosh v. Goodwin, 292 S. W. 2d 242 (Tenn. App. 1954) (land); San Rogue Properties v. Pierce, 18 Cal. App. 2d 397, 63 P. 2d 1198 (1937) (land); 2 CORBIN, CONTRACTS § 302 p. 93 (1950); Annot., 38 A. L. R. 292, 294 (1925) citing Moseley v. Witt, 79 S. C. 141, 60 S. E. 520 (1907) (land) and Lewis v. Cooley, 81 S. C. 461, 62 S. E. 868 (1908) (land).
33. 91 Ark. 133, 120 S. W. 989 (1909).
34. Rice Eq. 84, 108 (S. C. 1839).
35. 79 S. C. 141, 60 S. E. 520 (1907).
36. Rice Eq. 84 (S. C. 1839).

cinded and a rent contract substituted by parol."[37] It will be noted, however, that the Court made no mention of the fact that equitable title might have passed on execution of the contract.

The rule as to oral rescissions of contracts for the sale of personal property at a price in excess of fifty dollars is perspicuously set out in *Midland Roofing Co. v. Pickens*.[38] The plaintiff sued for goods sold and delivered. The defense was an oral rescission of the contract and the substitution of an agreement to receive them upon consignment. The chattels were destroyed by fire while in the defendant's possession. Under the authority of *Moseley v. Witt*,[39] it was held that a written contract for the sale of chattels of a value in excess of fifty dollars could be rescinded orally. In that case, however, the contract was rescinded before the goods had been delivered or title to them had passed to the vendee.

CONCLUSION

The general rule that oral modifications of contracts required to be in writing by the Statute of Frauds are unenforceable is well established and supported by reason and the authorities. On the whole, South Carolina is in agreement with the general rule. With the possible exception of *Searles v. Auld*,[40] any divergence from that general rule can be easily distinguished or reconciled. That case may be out of line, but can possibly be harmonized under the facts.

South Carolina is in complete agreement with the general rule that contracts within the Statute of Frauds may be rescinded orally. South Carolina also accepts the majority view in allowing oral rescissions of executory contracts for the sale of land and chattels where the price exceeds fifty dollars, at least in the later case if title has not passed, and possibly if it has.

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37. *Accord*: Lewis v. Cooley, 81 S. C. 461, 62 S. E. 868 (1908) (land); *cf.*, Ray v. Counts, 82 S. C. 555, 64 S. E. 1135 (1909) (land) (semble).
38. 96 S. C. 286, 80 S. E. 484 (1913).
39. 79 S. C. 141, 60 S. E. 520 (1907).
40. 118 S. C. 430, 111 S. E. 785 (1921).