

12-1-1952

Contracts—Preliminary Negotiations

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Recommended Citation

Maynard Schaus, *Contracts—Preliminary Negotiations*, 2 Buff. L. Rev. 81 (1952).

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ing of the words used in view of the circumstances of their use⁴⁷ (*interpretation*). The former determines the quantity and quality of the estates flowing from the testator's words. Definite rules of property law are applied, and the testator's intent becomes immaterial. The *lex loci rei sitae* controls in this area. The interpretative process, on the other hand, is primarily concerned with establishing the intent of the testator from the words used in the instrument. The meaning of such words can best be judged in the light of the law and usage controlling at the time and place of the will's execution.⁴⁸ Thus it would seem that the law of the testator's domicile should control in this area.⁴⁹

In a situation such as existed in the *Good* case, the natural presumptions would appear to be: *first*, that if the testator had any law in mind at the time of the will's execution, it was the law of his domicile; and, *second*, that he intended that all of his property was to pass in a uniform manner. However, the Court in the instant case applied the law of the *situs* in interpreting the will. If the results flowing from the above propositions are deemed desirable, the present decision is unfortunate in that it did violence both to the testator's intent and to a uniform passage of his property.

IV. CONTRACTS

Appellate review frequently brings forth a change or modification of the existing body of law. The work of the Court of Appeals in the area of contract law is without exception. Last term witnessed the first direct holding in New York that parties may effectively prohibit the assignment of contract rights. The one-year section of the Statute of Frauds also received considerable attention with somewhat less fortunate results. Still other cases tended to clarify or restate existing law.

Preliminary Negotiations

Frequently, parties plan to enter into a formal written agreement and have orally decided upon all the terms to be incorporated therein. The question is whether they have bound themselves prior to the execution of the formal document. In *Schwartz v.*

47. *Id.* § 251.2.

48. *Staigg v. Atkinson*, 144 Mass. 564, 12 N. E. 354 (1887).

49. RESTATEMENT, CONFLICT OF LAWS § 251 (3):

The meaning of words used in a devise of land which, by the law of the state where the land is . . . is, in the absence of controlling circumstances to the contrary, determined in accordance with usage at the domicile of the testator at the time the will was made.

*Greenberg*¹ the parties and their attorneys met for the purpose of entering into a written contract for the sale of certain shares of stock. The plaintiff's attorney produced typewritten duplicates of the agreement, and plaintiff signed one copy and defendant signed the other. The defendant tendered a check for the purchase price, but it was refused, plaintiff demanded a certified check. Thereupon the parties agreed to postpone completion of the transaction until the next day, and each retained his signed copy. The following day, the defendant refused to go on. The Official Referee who tried the action dismissed the complaint on a finding that there was no delivery. This finding was affirmed by the Court of Appeals, which ruled that the evidence showed that the parties did not intend to be bound until a written agreement had been signed and delivered.

The fact that parties to an oral contract intend that it shall be reduced to a formal document will not prevent the creation of a present obligation, notwithstanding the fact that the formal document was never executed, if the oral contract is itself finally assented to.² That the parties contemplated a formal writing does not *per se* leave the oral transaction incomplete, in the absence of a *positive agreement* that it should not be binding until reduced to writing.³ The circumstance however, that the parties contemplated the preparation of a written contract constitutes "strong evidence,"⁴ and perhaps a presumption,⁵ that any preliminary agreement is not a contract.

Whether the oral understanding is binding in itself and the writing is desired as a memorandum, or the oral agreement is merely preliminary to entering into the written contract, is a question of intent.⁶ The test is whether one of the parties has

1. 304 N. Y. 250, 107 N. E. 2d 65 (1952).

2. *Pratt v. Hudson R. R. Co.*, 21 N. Y. 305, 309 (1860); *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209, 214, 39 N. E. 75, 76 (1894). The following cases hold that the oral agreement was binding although it was agreed to reduce the contract to writing: *Sherry v. Proal*, 206 N. Y. 726, 100 N. E. 421 (1912); *Saltzman v. Barson*, 239 N. Y. 332, 146 N. E. 618 (1925). The following cases hold that no binding contract existed until acceptance of the formal writing: *Ansorge v. Kane*, 244 N. Y. 395, 399, 155 N. E. 683, 685 (1927); *Kingsbridge Improvement Co. v. Am. Exchange-Pac. Nat. Bank*, 249 N. Y. 97, 162 N. E. 597 (1929).

3. *Diken v. Herter*, 73 App. Div. 453, 77 N. Y. Supp. 300 (1903), *aff'd mem.*, 175 N. Y. 480, 67 N. E. 1081 (1903).

4. *Sullivan v. Happy Hour Amusement Co.*, 177 App. Div. 232, 163 N. Y. Supp. 715 (3rd Dep't 1917); *Savage v. Weigel*, 128 Misc. 618, 219 N. Y. Supp. 99 (Sup. Ct. 1926).

5. *Bryant v. Ondrak*, 87 Hun. 477, 34 N. Y. Supp. 384 (Sup. Ct. 1895).

6. *Sanders v. Pottlitzer Bros. Fruit Co.*, *supra* n. 2.

THE COURT OF APPEALS, 1951 TERM

manifested the intention not to be bound until the writing shall have been executed,⁷ in which case the agreement must be assented to as written before it becomes binding.⁸ Signing and delivery commonly are sufficient proof of assent.⁹ Actual physical delivery of the instrument is not always necessary, since assent may be shown in various ways.¹⁰ But where the intention is that the writing shall take effect only upon delivery, no contract exists until the document is delivered.¹¹

The instant case clearly shows that where the intention of the parties is not to be bound until delivery of the formal document, the actual signing and retention of that document, coupled with an objection to the manner of payment of the purchase price, is not an acceptance or delivery of the writing, even though no objection was made to the document as written.

Offer and Acceptance

It is not uncommon that parties choose to completely ignore an offer. The difficulty is that silence may be tantamount to acceptance. In *Schultz & Co. v. Camden Fire I. Ass'n.*,¹² the plaintiff alleged that defendant insurer by its agent had orally agreed over the telephone to transfer a certain policy covering plaintiff's 1922 Mack truck to his 1933 Mack truck. Subsequent to this alleged agreement to transfer and insure, the 1933 Mack truck was stolen. Plaintiff now seeks recovery under the theft clause of the policy. The plaintiff's agent testified that she had mailed a post card with the motor number of the 1933 Mack to the agent of the defendant, after telephoning a person who said she was the secretary of the defendant's agent. The telephone conversation was excluded as it was not shown that it was with a person qualified to bind the defendant. The Court of Appeals held that when an application for insurance is made, the silence of the insurer without other circumstances does not operate as an acceptance. As a matter of law, the plaintiff failed to prove acceptance.

7. *Commercial Telegraph Co. v. Smith*, 47 Hun. 494 (N. Y. 1888); 1 WILLISTON, CONTRACTS §28A (rev. ed. 1936).

8. 1 CORBIN, CONTRACTS §30 (1951).

9. 1 CORBIN, *op. cit. supra* n. 8.

10. *Sarasohn v. Kamaiky*, 193 N. Y. 203, 86 N. E. 20 (1908). Simply reading over the terms may not be enough; even signing the written contract and retaining possession of it may not express a sufficient assent. *W. T. Rawleigh Co. v. Royal*, 30 Ga. App. 706, 199 S. E. 339 (1923).

11. *Dietz v. Farish*, 79 N. Y. 520, 523 (1880).

12. 304 N. Y. 143, 106 N. E. 2d 273 (1952).