

Statute of Frauds: Extrinsic Evidence in Relation to Description

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the statute by a motion to make more definite and certain. This goes upon the theory that causes of action are joinable, and can be properly pleaded in one complaint. On the other hand, where they are nonjoinable, they have no proper place in the complaint at all, and cannot be united, either in separate counts or in a jumble in one count. It is therefore considered that the statute requiring a motion to make more definite and certain was intended for an intermingling of non-joinable causes of action in one count, leaving an intermingling of non-joinable causes of action in one count subject to the statutory provision which authorizes a demurrer where two or more causes of action are improperly united. This distinction is manifested to a degree in the decisions of this court, and seems to be the uniform rule in other jurisdictions.

A defect in joining causes of action in one count may be reached by a motion to make more certain by separately stating and numbering where causes are joinable, but where there are nonjoinable causes of action which cannot be united in the complaint, either in separate or in single counts; such a complaint is demurrable and it is not necessary to make a motion to separately state and number before demurring.

The court follows the case of *Fischer vs. Hintz*, 145 Minn. 161, 176 N. W. 177, which holds that defendants may demur for misjoinder, though the pleading in form sets forth but one cause of action, if in reality it embraces two or more *that cannot be joined in any form*.¹

An examination of the authorities upon the subject in this state discloses that in *Buerger vs. Buerger*, 178 Wis. 352, 190 N. W. 126, and *July vs. Adams*, 178 Wis. 375, 190 N. W. 89, and *McIntyre vs. Carroll*, 193 Wis. 382, 214 N. W. 366, language is used based, however, upon the respective issues in these cases, which does not distinguish between joinable and nonjoinable causes of action.

After due and careful consideration, the court is of the opinion that a distinction between joinable and nonjoinable causes of action should be definitely recognized. By so doing the court will be in harmony with the overwhelming weight of authority in other jurisdictions.

GERALD F. HARDY

Statute of Frauds; Extrinsic Evidence in Relation to Description

In *Pierson vs. Dorff*,—Wis.—, 223 N. W. 579, the validity of an agreement for the sale of real estate was questioned on the ground that the description of the property did not comply with the Statute of

¹ *Pomeroy's Code Remedies*, sec. 344; *Bass v. Upton*, 1 Minn. 408 (Gil. 292); *Anderson v. Scandia Bank*, 53 Minn. 191, 54 N.W. 1062; *Goldberg v. Utley*, 60 N.Y. 427; *Leidersdorf v. Second Ward Bank*, 50 Wis. 406, 7 N.W. 306; *Mulholland v. Rapp*, 50 Mo. 42.

Frauds (St. 1927, Sec. 240.06). The description of the property which was to be conveyed was as follows: "The building which is now under construction, consisting of four (4) stores, situated on Oakland Avenue in Shorewood, County of Milwaukee, State of Wisconsin." There was oral evidence that the plaintiffs took possession of the property, placed "For Rent" signs in the windows, and advertised the stores for rent in a newspaper. There was testimony to the effect that plaintiffs were furnished with an abstract of title to the real estate, and that they delivered it to their attorney for examination.

The court was of the opinion that the contract was valid and not subject to these objections: First, that it is impossible to ascertain the property from the face of the description; and second, that even if oral testimony was admissible, still after the introduction of such oral testimony the description remained as indefinite as ever.

Some courts take the position that the description must in itself be expressed with such certainty that the exact location of the property can be ascertained from the face of the agreement.¹ It has been held that the memorandum must contain a description sufficient to readily identify the property without resort to extrinsic evidence.²

The majority view is that oral evidence may be introduced to identify the land and that the description need only furnish the means of location.³

In the case of *Pierson vs. Dorff*, supra, the court virtually added the subsequent acts of the parties to the language used in the contract of sale. Taken by itself the agreement was insufficient in its description. Viewed, however, in the light of extrinsic circumstances the description was sufficiently definite to satisfy the operation of the statute of frauds.

It is undeniable that the Wisconsin Supreme Court has adopted a liberal attitude in giving expression to the legislative intent embodied in Section 240.06. In *Gifford vs. Straub*, 172 Wis. 396, the words "my place" and in *Brown vs. Marty*, 172 Wis. 411, the words, "property owned by first party" were held sufficient to allow parol evidence to identify the land in question.

¹ *Chambers v. Murphy*, 192 Ky. 839, 234 S.W. 960; *Rosen v. Phelps*, (Tex. Civ. App.), 160 S.W. 104.

² *Hines v. Copeland*, 23 Cal. App. 36, 136 Pac. 728; *Shannon v. Wisdom*, 171 Ala. 409, 55 So. 102; *Kentucky Counties Oil Co. v. Cupler*, 204 Ky. 799, 265 S.W. 334.

³ *Desmarais v. Taft*, 210 Mass. 560, 97 N.E. 96; *Gilbert v. Tremblay*, 79 N.H. 431, 111 Atl. 314; *Lente v. Clarke*, 22 Fla. 515, 1 So. 149; *Hodges v. Knowing*, 58 Conn. 12, 18 Atl. 979; *Daniels v. Rogers*, 108 App. Div. 338, 96 N.Y. Suppl. 642; *Boon v. Pierpont*, 28 N.J. Eq. 7; *Ranney v. Byers*, 219 Pa. 332, 68 Atl. 971, *Baxter v. Calhoun*, 222 Fed. 111; *Baker v. Hall*, 158 Mass. 361, 33 N.E. 612.

See:

- (1) *Messer v. Oestreich*, 52 Wis. 689.
- (2) *Whitney v. Robinson*, 53 Wis. 314.
- (3) *Parkinson v. McQuaid*, 54 Wis. 484.
- (4) *McMillan v. Wehle*, 55 Wis. 685, 13 N.W. 694.
- (5) *Meade v. Gilfoyle*, 64 Wis. 18.
- (6) *Docter v. Hellberg*, 65 Wis. 415, 27 N.W. 176.
- (7) *Reinhardt v. Oconto Co.*, 69 Wis. 352, 34 N.W. 135.
- (8) *Keller v. Keller*, 80 Wis. 318, 50 N.W. 173.
- (9) *Ritchie v. Catlin*, 86 Wis. 109, 56 N.W. 473.
- (10) *Singleton v. Hill*, 91 Wis. 51.
- (11) *Hanley v. Kraftczyk*, 119 Wis. 352, 96 N.W. 820.
- (12) *Inglis v. Fohey*, 136 Wis. 28, 116 N.W. 857.
- (13) *Wis. Central R. Co. v. Schug*, 155 Wis. 563.
- (14) *Douglas v. Vorpahl*, 167 Wis. 244.
- (15) *Hemmis v. Consolidated Water Power & Paper Co.* 173 Wis. 518, 181 N.W. 743.
- (16) *Graham v. Lamp*, 174 Wis. 373, 183 N.W. 150.
- (17) *Heller v. Baird*, 191 Wis. 288.

The rule permitting the introduction of evidence to establish the certainty of a description has also been quite liberally applied in other jurisdictions. Oral evidence was allowed to make definite the following indefinite descriptions:

"Twenty-four acres of land at T—————"⁴; "eighty acres of land 1¾ miles N. of Merwin, Bates County, Mo."⁵; "the house known and numbered as No. ————— Thirty-Second Street"⁶; "my fifteen-acre farm, located one mile north of W. M. County, Oregon"⁷; "my forty near the garrison lands in H. County"⁸; "Fleming farm on French Creek"⁹; and "H's place at S."¹⁰

To satisfy the requirements of the statute of frauds it is not necessary that the property be described with such definiteness and certainty that the court must be able to tell from an inspection of the memorandum itself the exact location of the premises without the aid of extrinsic evidence. There might be some question as to whether or not oral proof as to the acts, conduct, or declarations of the parties concerned, or other extrinsic circumstances does not violate the rule that parol

⁴ *Plant v. Bourne*, 98 Mass. 545.

⁵ *Tracy v. Berridge*, 180 Mo. App. 220, 167 S.W. 1176.

⁶ *Bulkley v. Devine*, 127 Ill. 406, 20 N.E. 16.

⁷ *Bogard v. Barhan*, 52 Or. 121, 96 Pac. 673.

⁸ *Lente v. Clarke*, 22 Fla. 515; 1 So. 149.

⁹ *Ross v. Baker*, 72 Pa. 186, 186.

¹⁰ *Hodges v. Kowing*, 58 Conn. 12, 18 Atl. 979.

evidence cannot be given to add to a written contract. It is to be remembered, however, that seldom can one tell from a mere examination of the face of the instrument the exact location of the property, without resort to extrinsic evidence. A liberal attitude in admitting parol proof certainly helps to place the court in the position of the parties at the time of the making of the agreement and thereby enables it to intelligently interpret the contract.

BERNARD SOREF

Taxation; Constitutional Law

A decision of far reaching importance was recently handed down by the Wisconsin Supreme Court.¹ It is a decision not only of interest to the bar, but also to every person who is in anyway interested in the distribution of merchandise. It effects every wholesaler and every retailer in the state of Wisconsin. It is welcomed by every manufacturer outside of the state who looks to Wisconsin as a field of distribution for his product. And more directly it has lulled into security an industry in which millions of dollars are invested, namely public warehousing.

The case was in the form of declaratory relief asking for judicial construction of subdivision 7 of Section 70.13:

Merchandise placed in storage in the original package in a commercial storage warehouse shall while so in storage be considered in transit and not subject to taxation.

Before the passage of this section in 1927, the situation was indeed far from satisfactory. Not only were goods, shipped from outside the state, taxable but such tax had to be paid by the warehouseman if the goods were in his possession on the taxing date, May 1. The warehouseman was expected to collect the taxes paid from the consignees. But here he was given the choice of either paying the tax himself or relinquishing the business to warehouses outside the state where there was no property tax. This was an obvious hardship to the warehouseman. It also prevented the free dissemination of goods into the state, thus depriving the Wisconsin merchant of the benefits to be derived.²

With a view toward remedying this situation the legislature passed the above quoted section. That this section does not apply to goods which are at all times within the state, though warehoused, is pointed out by the court in the light of other sections passed by the same legislature. Sec. 70.205 expressly provides for the taxation of intrastate property stored in warehouses. Subsection of section 70.13 provides

¹ *Nash Sales v. City of Milwaukee*, 224 N.W. 126.

² *State ex rel Bloch Bros. v. Tiesberg*, 220 N.W. 217.