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William J. Doran Jr.

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CONTRACTS—REDUCTION OF ORAL AGREEMENTS TO WRITING—EXISTENCE OF A BINDING CONTRACT

Plaintiff brought suit to recover on an alleged oral contract made with the defendant for the removal of dirt from certain drainage canals. Defendant contended that a final, binding contract never came into existence since it was the intention of the parties that any agreement would be reduced to writing and signed. The lower court rendered judgment for the defendant. On appeal, *held*, affirmed. Plaintiff had not proved that a price was agreed on. Moreover, since the parties intended from the beginning to reduce their negotiations to writing, and this had not been done, there was no binding contract between them. *Breaux Brothers Construction Co. v. Associated Contractors, Inc.*, 77 So.2d 17 (La. 1954).

The law is well settled in Louisiana that where the parties to an agreement intend not to be bound until their agreement is reduced to writing and signed, neither party is bound until the writing is executed.[1] The writing is the final operative fact necessary to the enforceability of the contract. However, this situation must be distinguished from that in which the parties intend to bind themselves orally but have the further intention of reducing their agreement to a writing which will serve as evidence of the oral contract.[2] In such case, the writing is intended to serve as a written memorandum of the completed oral contract, which therefore remains unaffected by a subsequent failure to reduce it to writing. This is because it is not the intention of the parties that the enforcement of the contract shall depend upon the execution of the written memorandum. The intention of the parties is controlling.[3] Numerous factors

1. Evans v. Dudley Lumber Co., 164 La. 472, 114 So. 101 (1927); Timken v. Wisner Estates, 153 La. 262, 95 So. 711 (1923); Barrelli v. Wehrli, 121 La. 540, 46 So. 620 (1908); Laroussini v. Werlein, 52 La. Ann. 424, 27 So. 89 (1899); Avendano v. Arthur & Co., 30 La. Ann. 316 (1878); Fredericks v. Fasnacht, 30 La. Ann. 117 (1878); Rawlinson v. Moor, 68 So.2d 271 (La. App. 1953): Vegetable Exchange of Louisiana, Inc. v. Coco, 20 So.2d 762 (La. App. 1945); McIntire v. Industrial Securities Corp., 158 So. 849 (La. App. 1935); Stewart, Carnal & Co. v. Eugene Reboul & Son, 1 La. App. 518 (1925); Crescent City Stock Yards & Slaughter House Co. v. Bosch & Martin, 12 Orl. App. 366 (La. App. 1915).

2. Gilmore v. O'Brien, 125 La. 904, 51 So. 1031 (1910); Carlin v. Harding, 10 La. 223 (1836); Reimann Const. Co. v. Heinz, 137 So. 355 (La. App. 1931); *cf.* Auto-Lec Stores v. Ouachita Valley Camp No. 10 W.O.W., 185 La. 876, 171 So. 62 (1936); Johnson v. Williams, 178 La. 891, 152 So. 556 (1934); Knights of Pythias v. Fishel, 168 La. 1095, 123 So. 724 (1929).

3. See Art. 1945, LA. CIVIL CODE of 1870; Wier v. Texas Co., 79 F. Supp. 299 (W.D. La. 1948), *aff'd*, 180 F.2d 465 (5th Cir. 1950); Snelling v. Adair, 196

will be considered by courts in determining intention. The nature of the contract,[4] business customs and usages,[5] the number of details and particulars in the agreement,[6] and the amount involved in the contract[7] may serve as guides. An important case in which the intention of the parties was considered of importance is *Laroussini v Werlein.*[8] In that case it was found that the parties did not intend to be bound until their contract was reduced to writing. The court observed that the plaintiff, a conservative business man with long experience as a lessor of real estate, had never entered into a lease contract except one in written form. It also found that the contract of lease embraced so many concessions, rights, and obligations that it would not be reasonable to suppose the parties could have intended to leave its terms to the "doubts and uncertainties of a mere verbal agreement."[9] Again in *Avendano v. Arthur & Co.* the court found that the business transacted was of such importance that one would naturally assume that two merchants "would not have been willing to leave it to the uncertainties of a mere verbal agreement."[10] In *Barrelli v. Wehrli,* the court noted that "there are so many reasons why building contracts of any importance should be in writing that it may be readily presumed that such was the intention of the parties in any given case."[11] On the other hand, in *Reimann Const. Co. v. Heinz,* the court upheld an oral contract for plumbing work.[12] Examples such as these are, of course, merely illustrative. The courts will consider any other facts that may throw light on the intentions of the parties.[13]

The facts in the instant case seem to justify the court's finding that a writing was necessary to create a binding contract. Plaintiff's own testimony indicated that the parties contemplated from the beginning that their agreement would be reduced to writing, and that plaintiff would furnish a performance bond.

La. 624, 199 So. 782 (1940); Chicago Mill & Lumber Co. v. Lewis, 68 So.2d 913 (La. App. 1953); J. R. Watkins Co. v. Stanford, 52 So.2d 325 (La. App. 1951).

4. Laroussini v. Werlein, 52 La. Ann. 424, 27 So. 89 (1899).

5. See Hemler v. Union Producing Co., 40 F. Supp. 824 (W.D. La. 1941), *modified,* 134 F.2d 436 (5th Cir. 1943); Barber Asphalt Paving Co. v. Howcott, 109 La. 692, 33 So. 734 (1903).

6. Laroussini v. Werlein, 52 La. Ann. 424, 27 So. 89 (1899).

7. Wolf v. Mitchell, Craig & Co., 24 La. Ann. 433 (1872).

8. 52 La. Ann. 424, 27 So. 89 (1899).

9. *Id.* at 429, 27 So. at 91.

10. 30 La. Ann. 316, 321 (1878).

11. 121 La. 540, 542, 46 So. 620 (1908).

12. 137 So. 355 (La. App. 1931).

13. Annot., 122 A.L.R. 1217, 1246 (1939).

Testimony of two of the defendant's witnesses showed a general custom to put contracts for the removal of dirt in writing. The court also considered it doubtful that a bonding company would have given a performance bond on a mere oral agreement.[14] All these factors tend to show that the parties intended to be bound only upon the execution of a written agreement. The questionable facet of the decision, however, is the court's indication that there may be a binding oral agreement even though the parties agree to reduce it to writing, provided that the agreement to reduce to writing is made *subsequent* to the oral agreement. This same view, the court noted, had been taken in decisions prior to the instant case.[15] Actually the difficulty in cases of this kind is caused by the fact that the intention to execute a writing is voiced at the time the oral agreement is made. If a binding oral contract is entered into, the fact that the parties may later agree to reduce it to writing, and do not, should be immaterial.[16] Aside from the questionable position just discussed, however, the Louisiana jurisprudence seems to be in accord with that of other American jurisdictions[17] and consistent with the sound principle that contracts should be given the effect intended by the parties.

William J. Doran, Jr.

CRIMINAL LAW—ARTICLE 27 OF THE CRIMINAL CODE—ATTEMPTED PERJURY

Defendant was indicted and tried for committing perjury by testifying falsely as a witness before the Grand Jury of Acadia Parish. Although the evidence indicated that a conviction for perjury would probably have been more appropriate, the jury returned a verdict of guilty of attempted perjury. The defendant appealed, contending that there can be no crime of attempted perjury in that it is impossible to commit attempted perjury without completing the intended crime. *Held*, affirmed. There is a crime of attempted perjury and the conviction was responsive

14. Transcript of Record, Docket No. 41,474, p. 153, Breaux Brothers Construction Co. v. Associated Contractors, Inc., 77 So.2d 17 (La. 1954).

15. Gilmore v. O'Brien, 125 La. 904, 51 So. 1031 (1910); Fredericks v. Fasnacht, 30 La. Ann. 117 (1878); Avendano v. Arthur & Co., 30 La. Ann. 316 (1878).

16. There would, of course, be at least a remote possibility of finding in the subsequent agreement an implied mutual rescission of the prior oral contract.

17. Annot., 165 A.L.R. 756 (1946). See RESTATEMENT, CONTRACTS § 26 (1932).