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Get It in Writing?

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"The statute of frauds does not require a written contract." Question: Who wrote that: (a) a confused and deranged law student; (b) a confused and deranged attorney; or (c) the California Supreme Court?

At this point in a quiz like this, the answer is often written upside-down or at the bottom of the page, so as to prevent the tempted reader's eye from unwittingly wondering to the next line or paragraph and discovering the answer. Since upside-down type and page placement options are not available here, this author has simply used this and the previous useless sentence to separate the question from the answer - sorry. The answer is (c) the California Supreme Court.

The court made that statement as it began its legal analysis of *Sterling v. Taylor*, 40 Cal.4th 757 (2007). Although this statement is surprising, it is supported by California's statute of frauds. Such support is sorely lacking for the court's other holding in *Sterling*.

That other holding is that, although the statute of frauds requires all of the essential elements of a contract covered by the statute to be in writing, "when ambiguous terms in a memorandum are disputed, extrinsic evidence is admissible to resolve the uncertainty." With those words, the court overruled long-standing cases such as *Franklin v. Hansen*, 59 Cal.2d 570 (1963), which says, "The sufficiency of a writing to satisfy the statute of frauds cannot be established by evidence which is extrinsic to the writing itself" and *Zellner v. Wassman*, 184 Cal. 80 (1920), which says, "The preeminent qualification of a memorandum under the statute of frauds is that it must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties."

In *Sterling*, plaintiff Donald Sterling and defendant Lawrence Taylor (both experienced real estate investors) met to discuss the plaintiff selling the defendant certain buildings. At the conclusion of that meeting, the plaintiff handwrote a document entitled "Contract for Sale of Real Property." In abbreviated form, the document mentioned the subject properties and their respective sales prices. (One such price was incorrectly written down.) The document was signed by the plaintiff only.

Two days later, the defendant sent the plaintiff a letter stating, "[t]his letter will confirm our contract of sale of the above buildings," the street addresses of which were indeed listed above. The defendant signed the letter directly under the words "Agreed, Accepted & Approved." A dispute later arose as to price, which had been mistakenly scribed on the handwritten "Contractor for Sale of Real Property." The Superior Court granted summary judgment for the defendant on the ground that "the price term was too uncertain to be enforced and the writings did not comply with the statute of frauds." For purposes of the Supreme Court's review, it is important and it is enough that although all essential terms were in writing, and the meaning of at least an essential term could not be determined without resort to extrinsic evidence.

Back to the proposition that "[t]he statute of frauds does not require a written contract." First, it should be noted that the court said that its "discussion does not apply to any other 'statute of frauds' imposing a stricter writing requirement." But, the court's discussion does apply to California's version of the general statute of frauds that is taught in law school contracts classes, the one that applies to real estate purchases, etc. California's version of that statute is found at Civil Code Section 1624. It begins, "The following contracts are invalid, unless they, *or some note or memorandum thereof*, are in writing." [Emphasis added.] When a court decides the meaning of a statute, "a construction making some words surplusage is to be avoided." *Moyer v. Workmen's Compensation Appeals Board*, 10 Cal.3d 222 (1973). The words, "or some note or memorandum

[of the contract]" would be surplusage if they weren't assigned meaning. The meaning that the *Sterling* court assigned to them was their plain one, which is appropriate. See *Berry v. State of California*, 2 Cal.App.4th 688 (1992) for the "plain meaning rule."

Sterling continually uses the word "memorandum" in it analysis that ultimately leads to the disapproval of "the statements in California cases barring consideration of extrinsic evidence to determine the sufficiency of a memorandum under the statute of frauds." The court does not say whether the same liberality applies to a "contract" as it does to a "memorandum." However, there is no apparent reason for it not to do so; the continual use of the word "memorandum" may result from the court thinking that the writings in *Sterling* were memoranda, as opposed to two parts of one "contract."

Surely *Sterling* requires that all essential terms of the contract be in writing, it's just that extrinsic evidence can be used to explain those terms. "Because the memorandum itself must include the essential contractual terms, it is clear that extrinsic evidence cannot *supply* those required terms. [Citation.] It can, however, be used to explain essential terms that were understood by the parties but would otherwise be unintelligible to others." [Emphasis in original.]

Underlying the court's ruling that the statute of frauds allows extrinsic evidence to be used to explain the essential terms is the court's adoption of the Restatement Second of Contracts, Section 131 explanation that, "[t]he primary purpose of the Statute is evidentiary." Relying heavily on this view, *Sterling* concludes, "Thus, when ambiguous terms in a memorandum are disputed, extrinsic evidence is admissible to resolve the uncertainty." But, is . . . [*California's*] statute of frauds' "primary purpose ... evidentiary"? A statute of frauds that declares that "no action shall be brought" on a violative contract is procedural in nature, whereas a statute of frauds that declares a violative purported contract "void" is substantive, according to "Conflict of Laws" by Eugene F. Scholes and Peter Hay. Procedural issues are treated similar to evidentiary issues. See *Elsner v. Uveges*, 34 Cal.4th 915 (2004). Void is a synonym for invalid.

The original English 1677 statute, or at least a portion of the current version of that act uses the "no action shall be brought" language. Other jurisdictions use the same "no action shall be brought" evidentiary language, for instance Florida and Pennsylvania. Thus these statutes of fraud display their evidentiary nature.

On the other hand, New York uses the substantive nomenclature "void" and California uses the synonymous substantive word "invalid." The proscribing language in Civil Code Section 1624 is, "[t]he following contracts are *invalid*." [Emphasis added.] Thus, California's statute of frauds should be considered substantive in nature. *Sterling* comes to that exact opposite conclusion while paying close enough attention to the words of Civil Code Section 1624 to declare the shocking statement, "The statute of frauds does not require a written contract," yet not close enough attention to those words to give even a sideways analytical glance at the word "invalid," a word that should make the statute substantive law. The Supreme Court was led astray by its reliance on the portion of the Restatement Second that it cited in *Sterling*. Once led astray, the Supreme Court never found its way back to acknowledge that California's Legislature wrote that agreements that run afoul California's statute of frauds are "invalid," that is they are substantively not contracts.

The *Berry* court found that "The Legislature is presumed to have meant what it said [in writing statutes]." At Civil Code Section 1624, the Legislature said, and thus meant that California's statute of frauds substantively "invalid[ates]" non-compliant contracts. They don't exist.

Had the *Sterling* court acknowledged the word "invalid," it is doubtful that the rule would now be that the statute of frauds allows extrinsic evidence to explain ambiguous terms. The court would have had to essentially say that extrinsic evidence can explain the terms of a contract that does not exist.

But, *Sterling* is the law. It says, "A memorandum serves only an evidentiary function under the statute. If the writing includes the essential terms of the parties' agreement, there is no bar to the admission of relevant extrinsic evidence to explain or clarify those terms." And it says, "The statute of frauds does not require a written contract."

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