St. John's Law Review

Volume 18
Issue 2 *Volume 18, April 1944, Number 2*

Article 15

July 2013

Contracts For Lease or Sale of Realty Under our Statute of Frauds

Joseph M. Cunningham

CURRENT LEGISLATION

CONTRACTS FOR LEASE OR SALE OF REALTY UNDER OUR STATUTE OF FRAUDS.—At the last session (1943-44) of the New York State Legislature, Section 259 of the Real Property Law was amended. Before this change the statute read:

> *When contract to lease or sell void.* A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void, unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing subscribed by the lessor or grantor, or by his lawful agent thereunto authorized by writing.

The words "grantor or lessor" were removed and in their place were entered the words "party to be charged" This change is to become effective September 1, 1944.

The New York Statute of Frauds in reference to executory land contracts originated in the Laws of 1787 [1] which contained language similar in effect to the original English statute,[2] *i.e.*, "by the party to be charged." The revisors of the state laws recommended a change in 1827 by inserting the words "void unless subscribed by the person by whom the lease or sale is to be made and by the person to whom the lease or sale is to be made, or payment of a part of the purchase money by the latter".[3] However, when the section was enacted in 1828 the revisors' recommendations were not followed and the subscription by the lessor or grantor was made sufficient.[4] In the words of Pound, J.,[5] "Research has brought no answer to the question why this change was made."

Since the recent amendment changes only the evidentiary requirements in actions against a vendee or lessee, that is the only phase of this profusely litigated statute which we shall consider.[6] In *Champlin v. Parish*,[7] involving the sale of an interest in land by an auctioneer, Chancellor Walworth held the vendor could not enforce the contract for he had not subscribed although it had been subscribed by the vendee-defendant. This gave protection of the Statute of Frauds to a party who had subscribed the contract—a holding entirely out of line with the purpose and wording of the original statute.[8] The court felt that since the vendor could not maintain

---

[1] N. Y. Laws 1787, c. 44, § 11.
[2] 29 CAR. II, c. 3, § 4.
[3] Note that the revisors would have the contract subscribed by both vendor or lessor and the vendee or lessee to be enforceable under the statute.
[4] REV. STAT., c. 7, tit. 1, § 8.
[5] 300 West End Avenue v. Warner, 250 N. Y. 221, 165 N. E. 271 (1929).
[6] Farago v. Burke, 262 N. Y. 229, 186 N. E. 683 (1933).
[7] 11 Paige 405, 410 (N. Y. 1845).
[8] See note 2 *supra*.

a suit under the wording of the statute (because he had not subscribed), it would be unjust to permit him to subscribe it before coming to court and make it enforceable under the peculiar wording of the statute, unless this subscription was assented to by the vendee.[9]

However, a long line of subsequent cases in New York hold that while a vendor may not be bound unless he has subscribed, yet the vendor may enforce an oral contract against the vendee as long as he can produce a contract or memorandum of it sufficient to satisfy the statute which has been subscribed by him, regardless of whether or not the vendee has assented to it.[10] Since the vendee or lessee was bound under an oral contract so long as the vendor or lessor subscribed the contract or memorandum, the next logical step was *Pelletreau v. Brennan*[11] that the vendee or lessee could not raise the defense of the Statute of Frauds in contracts for the sale or leasing of an interest in land, for the statute was enacted solely for the benefit of the vendor or lessor. *300 West End Avenue v. Warner*[12] overruled the holding of *Pelletreau v. Brennan.*[13] The *Warner* case was an action against a lessee on a contract to lease; the defendant interposed the Statute of Frauds as a defense. The plaintiff-lessor moved to strike out this defense as insufficient in law. The decision by Pound, J., held the defense sufficient in law, that a lessor could not meet the requirement of Section 259 by subscribing a contract or a memorandum of an oral contract made with the lessee, but the lessor must allege and prove that the lessee assented to the contract or memorandum thereof subscribed by the lessor in order to meet the evidentiary requirement of the statute. This was based on early history of the statute which adumbrated[14] it before its present amendment. But it is possible under the *Warner* case that a purchaser may not be held to a contract which he has subscribed,[15] for such is no evidence for a subscription by the vendor, yet the door was left open for the vendor or lessor to prove orally that the vendee or

[9] The case of Warral v. Munn, 5 N. Y. 229, 55 Am. Dec. 330 (1851), although cited for this proposition was an action against a vendor on a contract subscribed by him and no holding was made where the vendor has not subscribed but the vendee has.

[10] Brune v. VonLehn, 112 Misc. 342, 183 N. Y. Supp. 360, *aff'd*, 193 App. Div. 90, 187 N. Y. Supp. 298 (1921); Corn v. Bergman, 138 App. Div. 260, 123 N. Y. Supp. 160 (1910); Quinto v. Alexander, 123 App. Div. 1, 107 N. Y. Supp. 422 (1907); Torres v. Thompson, 29 Misc. 526, 60 N. Y. Supp. 790 (1899).

[11] Pelletreau v. Brennan, 133 App. Div. 806, 99 N. Y. Supp. 955 (1906).

[12] See note 5 *supra.*

[13] See note 11 *supra.*

[14] 300 West End Avenue v. Warner, 250 N. Y. 221, 227, cited *supra* note 5.

[15] This resulted from a realization that protection to the vendor or lessor was not enough but that some protection must be afforded the vendee or lessee under the Statute of Frauds. The only reasonable way to afford the protection was to have the lessee or vendee assent to the writing, subscribed by the lessor, itself. Otherwise the statute (as worded before the present amendment) could have no applicability to a vendee.

lessee had in some manner assented to the writing subscribed by the former.

The present requires no assent to the subscription of the vendor but rather that a contract or memo subscribed by the party defendant is sufficient evidence to satisfy the statute. Therefore, the anomaly of the *Warner* case in that a contract or memorandum subscribed by the vendee alone is not sufficient to prove an enforceable contract will no longer exist. In reaching this conclusion, we are assuming the same effect will be given the statute as amended as is now given to similarly worded personal property statutes.[16]

A discussion of the amendment would not be complete without an inquiry into the possibility of the rules of substantive law affecting the judicial construction of the statute. It has been held that Section 259 is merely a rule of evidence,[17] and that *Farago v. Burke* [18] is illustrative, and that oral testimony can prove subscription.[19] The case was decided by a combination of substantive law and the rule of evidence under Section 259 as interpreted by the *Warner* case. It was held the writing though in words a contract was merely an offer and that the vendee understood it as such; also that there was no meeting of the minds on the terms of the contract. But the case does not discuss the question of revocation at all. It is elementary contract law that an offer remains open and liable to be accepted for a reasonable time unless a revocation is communicated to the offeree. Whether or not it was a condition similar to the case of *Petterson v. Pathberg* [20] and the vendor-offeror beat the vendee-offeree in revoking before acceptance is not discussed, and by the reasoning of the court, it did not have to be. Under the statute as amended, since no actual assent to a writing is necessary as far as the evidentiary requirements of Section 259 are concerned, the vendor-defendant in the *Farago* case might have been held. But the case would then have been decided—as it undoubtedly would have been but for the unreasonable assent to the writing doctrine of the *Warner* [21]

---

[16] N. Y. PERS. PROP. LAW §§ 31, 85; Alhambra Amusement Co., Inc. v. Associated 1st Nat. Pictures, Inc., 207 App. Div. 550, 202 N. Y. Supp. 605 (1924), *aff'd*, 242 N. Y. 528 (1925); Talcott v. Greenstein, 210 App. Div. 633, 206 N. Y. Supp. 471 (1924). It is interesting to note that in some jurisdictions where the statute is worded "party to be charged" the vendor or lessor is considered that party rather than the defendant in the action. National Bank v. Louisville Trust Co., 67 F. (2d) 97 (C. C. A. 6th, 1933). The majority of the jurisdictions, however, hold the party to be charged as the defendant in the action. Steel v. Duntly, 115 Cal. App. 451, 1 P. (2d) 999 (1931); Stein v. McKinnity, 313 Ill. 84, 144 N. E. 795 (1924). Since the purpose of the amendment is to give further protection to the vendee or lessee, and since a holding similar to the minority view will leave the meaning of the statute as it is held under its present verbiage, it is most probable that the majority view will be adopted by the New York courts.

[17] Crane v. Powell, 139 N. Y. 379, 34 N. E. 911 (1893).

[18] See note 6 *supra*.

[19] *In re* Bernado Estate, 176 Misc. 132, 26 N. Y. S. (2d) 767 (1941).

[20] 248 N. Y. 86, 161 N. E. 428 (1928).

[21] See note 5 *supra*.

case—on the rules of substantive law. The instrument subscribed by the vendor was undoubtedly an offer, but like any written offer, if it had been accepted before a revocation reached the offeree, a contract would have been consummated which met both the requirements of the evidentiary rule (if it is such) of Section 259 and the rules of the substantive law of contracts. Thought must be given to the intent of the subscriber of the contract or memorandum thereof. If both parties considered it but an offer and a revocation is communicated to the offeree, whether vendor or purchaser, the offeror cannot be held for no contract was entered into even though one party may be able to meet the requirements of Section 259 by primary or secondary evidence.[22] Consequently, the essential elements of a contract in substantive law must always be kept in mind and such essential elements must be shown to exist in a manner which satisfies the so-called evidentiary requirements of the statute.

The present amendment of Section 259 is but the following of a recent tendency of the legislature to protect parties to a contract.[23] Section 259a [24] also is particularly interesting for before its enactment contracts to devise or to establish a trust in realty were considered as covered by Section 259.[25] Before this amendment to Section 259, therefore, more protection was given to a devisee or trust beneficiary than to a contract vendee or lessee. The devisee or trust beneficiary contemplated by Section 259 has usually given either antecedent value or no value in return for a promise to devise or establish a trust, yet the legislature thought such person to be in need of protection, while the vendee or lessee for value could be held to his alleged bargain by oral proof of a verbal assent to a contract or memorandum thereof subscribed by the vendor or lessor.

Although Section 259a in verbiage refers to executory contracts, at the time these contracts are sought to be enforced, usually against the personal representative of the testator or against the settlor of a trust, they are unilateral with performance due only from the settlor. It is seldom, if ever, that the devisee or beneficiary will be the party charged under such contracts. But the vendee or lessee has been charged under realty contracts as often and perhaps more often than the vendor or lessor. It was illogical that the one instance where a party is seldom charged affords the protection of the Statute of Frauds, while in another instance where a party is often charged under a contract, no protection of the statute is afforded.

---

[22] In other words it may be possible for either vendor or purchaser to show that a contract or memorandum thereof sufficient to satisfy the statute has been subscribed by the party to be charged, yet if it were meant to be but an offer legally revoked before the offeree accepted, it would be but a revoked offer in substance and no proof of a contract.

[23] N. Y. REAL PROP. LAW § 282.

[24] *Id.* § 259a.

[25] Canute v. Minor, 232 App. Div. 325, 249 N. Y. Supp. 680 (1931), *aff'd*, 258 N. Y. 558, 180 N. E. 331 (1932); Burns v. McCormick, 233 N. Y. 230, 135 N. E. 273 (1922).

This amendment shows removal of feudal theories. The protection of the landowner was one of the greatest interests in the feudal law. But in the modern use of the word "landlord" is found no meaning such as "lord of the land." That it has taken more than a century to overcome the error of the 1828 legislature is unfortunate. However, this is not the only example of the slow metamorphosis of the law from the engulfing cocoon of feudalism. The criticism of continuation of the seal as evidence of consideration seems appropriate, but the failure to remedy Section 259 exemplifies the slow growth of the law. It is only due to modern business methods and the painstaking care of today's lawyers that more confusion has not arisen. Indeed New York's Statute of Frauds in reference to land contracts was more feudal than the English Statute of Frauds enacted in 1677.

This amendment, then, has brought a most important phase of the law back to a logical basis. But feudalism dies hard, if at all, and we must await judicial construction of the statute as amended before it can be said how far this recent step has gone. The basic policy of a constitutional democracy should have the liberty, equality, and rights of man, as its prime consideration with the feudal rights of property owners secondary to those great inalienable rights.

JOSEPH M. CUNNINGHAM.

NOTICE REQUIRED TO TERMINATE MONTHLY OR MONTH TO MONTH TENANCIES OUTSIDE THE CITY OF NEW YORK.—Section 232b of the Real Property Law,[1] enacted in 1942 and amended by the Legislature of the State of New York at this session, represents another step in the direction of statutory standardization of the notice required to terminate monthly or month to month tenancies. In its original form this section sounded the death knell for the alleged distinction between monthly and month to month tenancies outside the City of New York; the proposed modification merely defined the character of the notice required[2] and reaffirmed the common law. Unlike tenancies for a fixed period which end on the date provided for in the agreement, notice is a condition of the contract when the leasing is for an indefinite term.[3] This was formerly subject to

[1] N. Y. REAL PROP. LAW § 232b: NOTIFICATION TO TERMINATE MONTHLY TENANCY OR MONTH TO MONTH TENANCY OUTSIDE THE CITY OF NEW YORK. A monthly tenancy or tenancy from month to month of any lands or buildings located outside of the city of New York may be terminated by the landlord or the tenant [upon his notifying] *by written notice from the one to* the other of at least one month before the expiration of the term *of* his election to terminate; provided, however, that no notification shall be necessary to terminate a tenancy for a definite term. *Such notice must be served upon the tenant or the landlord, as the case may be, either personally or by registered mail.* The matter in *italics* is new; the matter in [brackets] is old law to be omitted.

[2] *See Report of Law Rev. Comm.* (1938) 405-421.

[3] Pugsley v. Aikin, 11 N. Y. 494 (1854).