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Statute of Frauds-Parol Modification-Leases Under the Statute

STATUTE OF FRAUDS—PAROL MODIFICATION—LEASES UNDER THE STATUTE.—Appellee herein declared upon a written contract by the terms of which the appellee was to install, repair, and maintain an electric sign, and the appellant was to keep and use the sign for a period of thirty-six months and to pay the sum of twenty-one dollars and seventy cents per month, monthly in advance during the life of the agreement. The agreement further provided for an additional period of thirty-six months, at a price designated in the contract, unless at least thirty days before the expiration of the original term of the contract either party gave written notice to have the agreement terminated. The complaint alleged a breach of the contract after four monthly payments and asked judgment for a sum equal to an amount agreed upon by the parties in the contract to represent their actual loss in event of a breach. The lower court excluded evidence of parol modification of the contract, also a letter of compromise which had never been accepted. Held, the evidence was properly excluded.[1]

The principal case raises an interesting question involving the Statute of Frauds. The provision of the statute applicable to the case is: "No action shall be brought in any of the following cases, * * * Upon any agreement that is not to be performed within one year from the making thereof. Unless the promise, contract, or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, excepting however leases not exceeding the term of three yars."[2]

This provision of the statute has been generally construd to man that if a contract cannot be performed within one year, it is within the statute and therefore must be in writing.[3] It is clear that in the principal case the contract was incapable of being performed within one year. As to the admissibility of evidence to show a parol modification of the written agreement, the authorities agree that where the statute of frauds requires a contract to be in writing, it cannot be modified, changed, or varied in its terms or provisions by a parol contract or agreement.[4] The parol evidence introduced for the

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20 City of Lafayette v. Timberlake (1882), 88 Ind. 330; Town of Laurel v. Blue (1890), 1 Ind. App. 128, 27 N. E. 301, Vaughtman v. Town of Waterloo (1895), 14 Ind. App. 649, 43 N. E. 467, Mayne v. Curtis (1920), 73 Ind. App. 640, 126 N. E. 699. See also Eugene McQuillin, Law of Municipal Corporations (2d Ed. 1928), Sec. 2837, Vol. 6, p. 873.

1 Maglaris v. Claude Neon Federal Co. (1935), — Ind. —, 198 N. E. 462.

2 Burns' Ann. Ind. Stat. (1933), Sec. 33-101.

3 Groves v. Cook (1882), 88 Ind. 169, 45 Am. Rep. 462; Shumate v. Farlow (1890), 125 Ind. 359, 25 N. E. 432; Meyer v. E. G. Spink Co. (1921), 76 Ind. App. 318, 124 N. E. 757, 127 N. E. 455, Page, Contracts, vol. 2, 2247-8, Sec. 1300; Restatement of Contracts, Sec. 198.

4 Bradley v. Hunter (1901), 156 Ind. 499, 60 N. E. 139; Carpenter v. Calloway (1881), 73 Ind. 418, Christian v. Highlands (1903), 32 Ind. App.

purpose of showing a modification of the contract was, therefore, properly excluded.

A rather interesting question is raised by a dictum of the court that, "Even if the contract were to be considered a lease, it would be required to be in writing as it creates a term of more than three years."

The first question that arises is as to whether there is actually a term in excess of three years. The agreement of the parties states that the period is for three years, but provision is made for an additional period unless notice of termination is given by either party. The general rule seems to be that where there is an option in the lease to renew, the lease is within the statute of frauds if the sum of the original term and the renewal period is more than the period provided in the statute.[5] The authorities seem to limit this rule to the situation where there is an option to renew in the lessee. The writer submits that there is a logical explanation for this rule because it might be said that there is in the lessee a right to a term equal to the sum of the original term and the renewal period. The circumstances are slightly different in the principal case where there is an automatic renewal unless either party exercises a power to disaffirm. The fact that where there is an option to renew, the two periods are added to determine the duration of the lease, might seem to show that a fortiari they should be added where the renewal is automatic. On the other hand it is true that in the principal case there was no right in the lessee for a term equal to the sum of the two periods because either party had a power of disaffirmance. The reasoning which upholds adding the original term and the renewal period, to determine the term of a lease where there is an option in the lessee to have a renewal, does not justify using the same formula where neither party may be said to have a right to the renewal, as either party has a power to disaffirm. There is a line of authority in the English cases to the effect that if the renewal depends on whether or not it is agreeable to both parties, then the period of the lease is no longer than the original term exclusive of any term of renewal.[6] This rule has been followed in Indiana.[7] The court, however, does not consider the distinction, but merely states that this was a lease of more than three years.

As it has heretofore been seen, the clause of the statute referring to contracts not to be performed within one year has been construed to mean contracts which cannot be performed within one year.[8] Furthermore, it has been held

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104. 69 N. E. 266, Napier Iron Works v. Caldwell and Drake Iron Works (1915), 60 Ind. App. 317, 110 N. E. 714, Nadgeman v. Cawley (1928), 89 Ind. App. 196, 162 N. E. 68.

[5] Schmitz v. Lauferty (1868), 29 Ind. 400; Williams v. Mershon (1894), 57 N. J. L. 242, 30 Atl. 619; Rosen v. Rosen (1895), 13 Misc. 561, 73 N. Y. S. 946, Tiffany, Landlord and Tenant, vol. 2, page 1518.

[6] Legg v. Strudwick, 2 Salk. 414, 91 Eng. Rep. 360; Roberts, On Frauds, 242, note 93, The Case of Hand v. Hall (1877), 2 Exch. Div. 318, recognizes the necessity of a right in one of the parties to a renewal before the term of the lease may be considered the sum of the original term and the renewal period. It says, "A lease not exceeding three years, in our opinion, must be a lease not giving a right (independent of the lessor) exceeding three years."

[7] Swan v. Clark, Guardian (1881), 80 Ind. 57, Schmitz v. Lauferty (1868), 29 Ind. 400.

[8] Groves v. Cook (1882), 88 Ind. 169, 45 Am. Rep. 462; Shumate v. Farlow (1890), 125 Ind. 359, 25 N. E. 432; Meyer v. E. G. Spink Co. (1921), 76 Ind. App. 318, 124 N. E. 757, 127 N. E. 455; Page, On Contracts, Sec. 19-8.

that the clause is not applicable to contracts that may or may not be performed within one year.[9] Again, referring to the court's dictum regarding leases and admitting that the lease would be one for more than three years, it would seem by analogy that if the lease might be performed within the statutory period, it would be outside the statute. The drawing of such an analogy would be important in the principal case, for here the lease (if it were one) might have been performed within the statutory period were either party to give notice to terminate. It is true that in drawing such an analogy a result would be reached which would be consistent with what is sometimes said to be the trend of modern cases to nullify the operation of the statute of frauds.[10] The New York case of *Ward v. Hasbrouck* holds that a lease for more than the statutory period is outside the statute if there is a possibility that the lease might be terminated within the statutory period.[11] That case, however, has been criticized on the ground that the principles applicable to contracts not to be performed within one year should not apply to leases, since the latter are in the nature of conveyances rather than executory contracts.[12] The courts of Indiana do not apply the analogy and consistently hold that these leases which are of a term greater than that provided by the statute, but which might be terminated before the statutory period has elapsed are within the statute of frauds.[13] O. E. B.

BAILMENTS—LIABILITY OF BAILOR FOR PERSONAL INJURIES TO BAILEE RESULTING FROM VICIOUS PROPENSITIES OF THE BAILED ANIMAL.—In April, 1931, the defendant company rented a team of mules and a mare to plaintiff's decedent and his nephew. The animals were used in defendant's business and were stabled and cared for in decedent's barn. Decedent's nephew worked the mare and paid defendant for her use while decedent worked the mules. On August 11, 1931, the defendant suggested that the mare be worked with one of the mules and the parties agreed upon the exchange. Thereafter, but before the mare had been used in the team, she kicked the decedent causing injuries which resulted in his death. It is agreed that the relation between the decedent and defendant is that of bailee and bailor. The complaint "is predicated upon the alleged negligent conduct of the defendant in knowingly

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[9] Wiggins v. Keizer (1855), 6 Ind. 452; Wilson v. Ray (1859), 13 Ind. 1, Hill v. Jamieson (1861), 16 Ind. 125, 79 Am. Dec. 414, Indiana & I C. R. Co. v. Scearce (1864), 23 Ind. 223, Bell v. Hewitt (1865), 24 Ind. 280; Frost v. Tarr (1876), 53 Ind. 290; Parker v. Siple (1881), 76 Ind. 345, Hinkle v. Fisher (1885), 104 Ind. 84, 3 N. E. 524, Piper v. Fosher (1889), 121 Ind. 407, 23 N. E. 269; Durham v. Hiatt (1890), 127 Ind. 514, 26 N. E. 401, Decatur v. McKean (1906), 167 Ind. 249, 78 N. E. 982; Freas v. Custer (1928), 201 Ind. 159, 166 N. E. 434, Pennsylvania Co. v. Dolan (1892), 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. 289; American Quarries Co. v. Lay (1905), 37 Ind. App. 386, 75 N. E. 608, Timmonds v. Taylor (1911), 48 Ind. App. 531, 96 N. E. 331.

[10] Willis, Statute of Frauds—A Legal Anachronism (1928), 3 Ind. Law Journal 427, at page 539.

[11] Ward v. Hasbrouck (1902), 169 N. Y. 407, 62 N. E. 434.

[12] Tiffany, Landlord and Tenant, vol. 2, page 1518.

[13] Schmitz v. Laoferty (1868), 29 Ind. 400. Had the lease in the principal case been for three years to start some time in the future, the lease would have been within the statute regardless of the question raised by the fact that it could have been performed in three years.