THE ORAL LEASE V. CONTRACT FOR LEASE PROBLEM UNDER THE NEBRASKA STATUTE OF FRAUDS

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INTRODUCTION

No area of the law is so fraught with peril as that statutory section dealing with the requirement of a writing, an area generally referred to as the Statute of Frauds. Statute of Frauds problems are many and varied, but this article will focus upon a particular one existing in our jurisdiction: the distinction among leases, tenancies to commence in futuro, and contracts for leases and the application of the Nebraska Statute of Frauds provisions to these legal categories.

A common factual situation giving rise to the issues to be explored in this article would be as follows: A college student, interested in obtaining housing, discovers a suitable apartment which the owner agrees to lease for a period of one year commencing with the first of the following month. The terms are agreed upon and a handshake concludes the negotiation. The student leaves, feeling that he has legally acquired a one-year tenancy on the apartment. Later, for one reason or another, the owner or student might want to repudiate this "agreement," and a lawyer is therefore consulted and asked whether, under Nebraska law, the "agreement" between the owner and student is enforceable. The lawyer mumbles something about "parol evidence rule or some such rule, I can't remember which," and informs his client that he will do some quick checking and have an answer shortly.

The quick check includes a perusal of the Nebraska Statute of Frauds sections and annotations thereunder, which include three cases indicating that under section 36-105, an oral lease of one

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1. See Heaney & Oldfather, Business Leases in Nebraska State Bar Association Real Estate Manual (1970) wherein the statement "A lease for more than one (1) year must be in writing" is the single sentence under the heading "Parole Evidence Rule."


year, entered into prior to the beginning of the term, is void. The cumulative supplement indicates that this statute has not been amended recently; Shepherd's Citations does not reveal any further relevant law. A quick reading of the legal encyclopedias indicates the same results.\(^4\) Our Nebraska attorney now informs his client that it is quite clear under Nebraska law that the agreement entered into by the owner and student is void according to the Nebraska case and statutory law. The issue will now probably be laid to rest either because of the trifling amount of money involved or because counsel representing the other side reaches the same conclusion on the substantive law involved.

The purpose of this article is to show that the categorization and resolution of the legal issues presented in the above hypothetical is not nearly so simple as might first appear. The caveat issued is that the Nebraska law on this point has taken a rather confused and uncertain course, despite the best efforts of at least one body to clarify the problems involved.\(^5\)

A particularly difficult facet of the problem centers around the terminology employed in understanding the various factual-legal situations that arise. Fortunately, the recent publication of Tentative Draft Number one of the Restatement of the Law, Second, Property,\(^6\) provides some assistance in categorizing these factual settings. This tentative draft, in its provisions on basic landlord-tenant law, distinguishes among the following:

(a) A tenancy presently existing because of a present right to possession (present demise);

(b) A tenancy commencing upon an event to occur in the future (tenancy to commence in futuro); and

(c) An agreement to make a lease (a contract).\(^7\)

According to the tentative draft, "the landlord-tenant relationship will not commence until the tenant has a present right to possession . . . ." Thus, in the hypothetical outlined above, the Restatement definition would clearly preclude one from denomiating the owner and student's agreement, as of the date of making, a present demise; or, to use the terminology of the Restatement, there is no landlord-tenant relationship existing because a "present right of possession" has not been transferred. Accordingly, we are left with the tenancy in futuro and contract categories within which to place the factual situation. Placement in category (b)

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5. See text at note 35 infra.
7. Id. §§1.2;1.8;2.5.
8. Id. §1.2, comment a.
or (c) may not be required in a number of situations, but in the context of the Statute of Frauds question, the process becomes outcome-determinative. Let us now turn to the Statute of Frauds problem evolving in the three categories of conduct just outlined.

EXAMINATION OF NEBRASKA STATUTES AND CASE LAW

THE PRESENT-DAY STATUTE OF FRAUDS PROVISIONS AND ITS PREDECESSORS

Since the problem raised in this article is governed by statute, we start by examining those sections of the Nebraska Revised Statutes that have been cited as relevant. Those sections are 36-103 and 36-105, which provide as follows:

36-103. Interest in Land; How Created.
No estate or interest in land, other than leases for a term of one year from the making thereof... shall hereafter be created... unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating... the same.

36-105. Contract for Lease or Sale of Land; When Void.
Every contract for the leasing for a longer period than one year, or for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made.

The forerunner of these statutory provisions was the original English Statute of Frauds,* enacted in 1677. Sections 1, 2 and 4 of the original Statute of Frauds provided:

Section 1. All leases... made or created by livery and seisin only or by parole, and not put in writing and signed by the party so making or creating the same, or their agents thenceunto lawfully authorized by writing, shall have the force and effect of leases and estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect: any consideration for making any such parole leases or estates, or any other law or usage, to the contrary notwithstanding.

Section 2. Except nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term, shall amount to two-thirds parts at the least of the full improved value of the thing demised.

9. 29 Car. 2, c.3 (1677).
Section 4. No action shall be brought whereby to charge any executor or administrator . . . 4, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; 5, or upon any agreement that is not to be performed within the space of one year from the making thereof; 6, unless the 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 and by him lawfully authorized.

The effect and interrelationship of these sections of the original Statute of Frauds has been well stated by Sudgen:10

The first and second sections appear to enact, that all interests actually created without writing shall be void, unless in the case of a lease not exceeding three years (at nearly rack rent). An actual lease for any given number of years, whether with or without rent, or any interest uncertain in point of duration, must, it should seem, equally fall within the provision of the first section, and cannot be sustained unless it come within the saving in the second section. This, however, of itself would not have prevented all the evils which the act intended to avoid, for although actual estates could not be created, yet still parole agreements might have been entered into respecting the future creation of them. To remedy this mischief, the provision in the fourth section was inserted, which relates not to contracts or sales of land, etc., but to any agreement made upon any contract or sale of land, etc. and as agreements were more to be dreaded than contracts actually executed, no exception was inserted after the fourth section, similar to that which follows the first section, and consequently an agreement by parole, to create even such an interest as is excepted in the second section would be nearly void.11

What is clearly a critical distinction, then, is the determination whether an agreement between the parties constitutes a lease or a contract for a lease. This distinction was recognized in an 1856 case, Tillman v. Fuller:12 wherein the Michigan statutes, which are practically identical to the Nebraska sections 36-103 and 36-105, were analyzed in a case thoroughly representative of the type hypothesized in the introduction.

10. As quoted in 1 H. TIFFANY, LAW OF LANDLORD AND TENANT §25 (1912).
11. Id. at 224.
12. 13 Mich. 113 (1865).
Justice Christiancy therein observed that:
(The sections corresponding to the Nebraska statutes) clearly adopt the well-known common law distinction between a lease and a contract for a lease. If the contract constitutes a lease of itself, it can be effected only by the (section corresponding to 36-103); if only a contract for a lease or future letting, it will be governed by the (section corresponding to 36-105). If a lease, then the question intended to be raised by the first assignment of error is fairly presented — whether it is void, because the term, though but for a year, yet being made to commence in future, extends beyond a year from the time of demise.

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The general features of difference between a lease; or present demise, and a contract for a future letting are well understood, though the line of distinction is often difficult to trace, in its application to particular cases; and there is much conflict in the authorities. The question has generally arisen, as one purely of law, upon construction of the language of a written instrument, the distinction being often made to turn upon a very slight difference of phraseology, though it is always a question of the intention of the parties. But in the present case, the agreement being merely verbal and informal, and to be gathered from conversations, and the evidence being, in some respects, conflicting, the question was one of fact — what the contract was, or, at most, one of mixed law and fact.

And so the inquiry, a particularly difficult one to make in weighing oral testimony, comes to this: did the parties intend to create a tenancy to commence in futuro, or did they intend to enter into an agreement for lease? Once that decision is made, however, other problems arise, relating principally to the words “from the making thereof.” And in this regard, the Nebraska experience has been particularly interesting.

**Early Changes in Nebraska Law**

**The Original Nebraska Statutes**

From the territorial days of Nebraska until 1903, the statutes corresponding to the present sections 36-103 and 36-105 read as follows:

No estate or interest in land, other than leases for a term of not exceeding one year . . . shall hereafter be created . . .

13. *Id.* at 118-19.
united by act or operation of law, or by deed or conveyance
in writing, subscribed by the party creating . . . the same. 14

Every contract for the leasing for a longer period than one
year or for the sale of any land, or any interest in land, shall
be void unless the contract, or some note or memorandum
thereof, be in writing, and signed by the party by whom the
lease or sale is to be made. 15

In accord with changes made in other states, the parol lease
for one year was recognized as an exception and the words "from
the making thereof" were omitted. Under the one-year exception
of section 36-103, the one-year period unquestionably is computed
by measuring the term from the first day of the lease term, rather
than from the date upon which the lease is made. 16 The contract
for lease section, likewise not containing a "from the making there-
of" clause, also excepted the lease for one year, and thus under
the original hypothetical posed, the tenancy to commence in futuro/
agreement to make a lease distinction would not be critical. Thus
the result would be either a finding of a valid lease to commence
in futuro or a valid oral contract to execute a one-year lease.
As noted, several states, including Minnesota, 17 Michigan 18 and New
York, 19 have statutes practically identical to these early Nebraska
wordings. No cases can be found interpreting these first Nebraska
statutes but decisions from the other jurisdictions mentioned clearly
indicate the results suggested herein.

The 1903 Revision

In 1903, the Nebraska Legislature amended both of the statutes
dealing with the oral lease and the contract to make a lease by in-
serting the words "from the making thereof" after the one-year
leasehold exceptions of both statutes. 20

The effect of these changes will now be considered with respect
to each of the statutes in question. As to the in futuro section, the
1903 amendment placed the Nebraska statute in pattern with section
two of the original Statute of Frauds, and so the one-year
exception is to be computed from the time of the making of the
lease, and not from the first day of the lease term. By way of
example, this means that a lease for nine months, entered into
more than three months prior to the first day of the lease term,
is invalid. This change by the Nebraska Legislature is puzzling

14. NEB. LAWS c.33, §3 (1856).
15. Id. §5.
17. MINN. STAT. ANN. §§513.04-05 (1947).
20. NEB. LAWS c.44 (1903).
in view of the fact that the normal pattern of state legislatures was to borrow the English statute with the "from the making thereof" terminology, and later omit it.\textsuperscript{21} In any event, the change was made and since that time the statute has not been again amended; thus, the current oral lease section, section 36-103, and its effect seem apparent.

The effect of adding the words "from the making thereof" to the contract for lease action is not so easily stated. The counterpart to this action in the original Statute of Frauds prohibited enforcement of any "contract or sale of land, tenements, or hereditaments, or in any interest concerning them." This all-inclusive statute prohibited the making of any contract for an interest in land, including leasehold estates, without making any exception for short-term leases.\textsuperscript{22} The Nebraska contract for lease section, prior to the 1903 amendment, contained an exception in these words: "Every contract for the leasing for a longer period than one year" must be in writing. Under this language only the actual lease term is looked at and if the lease term is greater than one year, a contract to give a lease of such type must be in writing. What is the effect of adding "from the making thereof" to this exception? Apparently the result is similar to that experienced in construing the oral lease section: the period between the date of the contract for lease and the ending date of the lease term must not exceed one year.

The rationale and the advisability of making such changes might well be questioned at this point. Proponents would argue, however, that the vice intended to be cured by the statute is the unreliability of parol evidence, particularly after the passage of a significant amount of time. By measuring the date from the making of the agreement and ending one year therefrom, it could be reasoned that the statutes comport with the express goal of the statute. By omission of the words "from the making thereof" a one-year lease can be granted by parol to take effect five years from today's date. This parol transfer might be questioned for a period of six years, yet the absence of a writing is not fatal. Again a strong policy argument can be made that the Statute of Frauds, to the extent it has values, should be operative to reduce the possibility of litigation over long-forgotten parol lease transactions. At a later stage of this article we will return to the question of policy, but in the meantime we turn to the two Nebraska cases decided after the 1903 revision.

\textsuperscript{21} See \textit{American Law of Property} \#3.18 (A.J. Casner ed. 1952).
JUDICIAL INTERPRETATION

The first case in Nebraska confronting the lease to commence in futuro/contract to lease problem was Thostesen v. Doxsee, decided in 1906. Plaintiff-lessee Thostesen had entered into a written one-year lease with defendants C. H. and C. W. Doxsee to commence March 1, 1904. In December of 1904, the “parties got together” and according to the agreed statement of facts:

[D]uring the month of December preceding the expiration of the written lease, there was a conversation between the three parties in which it was understood that C. H. Doxsee did not desire to occupy the premises beyond the term of the written lease, but that defendant Charles W. Doxsee desired to lease the premises on the terms contained in the written lease for the year beginning March 1, 1905, and ending March 1, 1906; and that plaintiff agreed that he would make such an oral lease with the defendant Charles W. Doxsee: this verbal contract was entered into three months before the beginning of the lease; that a little while before the time of the expiration of the written lease plaintiff rescinded his oral contract for the lease of the premises to Charles W. Doxsee, and then served the statutory notice to quit the premises within three days after the expiration of the written lease....

The plaintiff then brought a forcible entry detainer action against the Doxsees, who relied on the December oral agreement but to no avail. The court quoted the contract for lease section of the statute and concluded:

To our minds the agreement between plaintiff and Charles W. Doxsee was nothing more than an oral contract for the leasing of lands for a period of more than one year from the making thereof, which is denounced as void by the provisions of the statute above quoted as it now stands as amended in 1903.

At this point it should be noted that the distinction between a lease to commence in futuro and a contract to make a lease, in the Doxsee situation, would have made no difference. Assuming that the court had characterized the December agreement as a lease to commence in futuro, commencing March 1, 1905, the result would have been the same since the parol lease exception would not have applied due to the 1903 amendment.

23. 77 Neb. 536, 110 N.W. 319 (1906).
24. Id. at 537-38, 110 N.W. at 320.
25. Id. at 538, 110 N.W. at 320.
As observed earlier, characterization of the December agreement as a tenancy to commence in futuro or as a contract for lease is not an easy task, although certain language in the factual stipulation is helpful. It will be observed that the court in Doxsee did call the written lease a "contract" for the leasing of the premises. As Tiffany points out, this terminology is unfortunate:

It is somewhat surprising that the decisions of respectable courts quite frequently fail to discriminate between a lease and a contract for the making of a lease. The distinction involves, it is evident, the fundamental distinction between creation of rights in personam and the creation of rights in rem. The failure to discriminate in this regard is presumably due, to a considerable extent, to the unfortunate use of the term "contract of lease" as descriptive of the whole transaction by which an estate is vested in the lessee and the parties at the same time enter into certain contractual stipulations in connection therewith, this resulting in a tendency to confuse such "contract of lease" and a contract "for a lease."26

In its discussion, the court in Doxsee appeared to be thinking in terms of an executory contract: "Plaintiff agreed he would make such an oral lease";27 "plaintiff rescinded his oral contract for the lease of the premises."28 Again, while it does not make a difference in this case, it is hard to read the opinion without feeling that Charles W. Doxsee thought he had acquired a right to remain on the premises for another year and that nothing further remained to be done. To this writer, it is doubtful that the parties contemplated a further "letting" of the property after the December meeting.

The 1908 case of Kofoid v. Lincoln Implement & Transfer Co.29 also involved a forcible entry and detainer action brought by a party who had purchased property in January, 1906, subject to a written one-year lease owned by the defendant, terminating on March 1, 1906. The tenants' defense in the action was that at the time of the plaintiff's purchase "the parties . . . entered into a verbal contract whereby plaintiff leased said premises to the defendant for one year."30 This contention was denied by the plaintiff, but the court assumed "that plaintiff did by parol agree to lease said premises to the defendant for one year."31 The court

27. 77 Neb. at 537, 110 N.W. at 320.
28. Id.
29. 80 Neb. 634, 114 N.W. 937 (1908).
30. Id. at 635, 114 N.W. at 938.
31. Id.
then inquired into the time "for the beginning of this term," and deduced that this term "was to begin upon the expiration of the written lease," remarking: "The tenancy under the verbal lease beginning at a subsequent time, the contract is void under (§36-105)... See Thostesen v. Doxsee..." The date upon which the new tenancy was to begin was a critical finding for the defendant. As in Doxsee, a characterization of the transaction as a tenancy to commence in futuro or as a contract for lease is relevant if the new term commences in the future. Only by showing a present demise of a one-year term on the date of the making of the "agreement" could the defendant come within the one-year parol lease exception. Evidently this fact did not escape the defendant's counsel, but the evidentiary burden on this issue was too much to hurdle as witnessed by this statement of the court:

The defendant's evidence does not fix the time for the beginning of this term. The witnesses, testifying to that fact, say no more than that it was to be for one year. In view of the fact that the written lease was then in force, and there being no evidence that the parties agreed to discontinue it and to substitute a verbal contract therefor, we are bound to conclude that the period of time provided for by the verbal agreement was to begin upon the expiration of the written lease. Another fact clearly indicating that the parties did not intend that the verbal lease should begin at the time it was made is that the same was made prior to the plaintiff's purchase of the property.33

Whether the court properly characterized this transaction as a contract for lease case is hard to determine, but the facts are so sketchy that it would be difficult to question this holding. Yet it does appear that the court, as in Doxsee, has conceptual difficulties in visualizing a tenancy to commence in futuro. If the difficulties expressed by the Michigan court in Tillman were bothersome to the Nebraska court, there is no written indication of such difficulties.

The 1903 amendments and the purposes they were intended to serve are clearly illustrated by the Doxsee and Kofoid decisions. In retrospect, it can be seriously suggested that in these cases, the Statute of Frauds, as many critics have stated, operated to perpetrate frauds rather than to prevent them. That the parties in

32. Id. at 635-36, 114 N.W. at 938.
33. Id. at 635, 114 N.W. at 938.
34. Judicial critics of the Statute of Frauds are legion. Perhaps the most scholarly criticism of the Statute is contained in the English Law Reform Committee Report of 1953. Of the sections whose repeal was recommended, one interesting comment
these cases were given the right to disregard agreements fairly made and arrived at is highly questionable. With no judicial exceptions to the statute available, the only recourse is to turn to the legislature which is the route that we shall now take.

The 1943 Statute Revision

The 1943 Statute Revision Committee, without comment, made no change in the language of section 36-103, and thus the present statute is the same as it has been since 1903. The Statute Revision Commission did, however, alter the contract for lease section, section 36-105, by omitting the words “from the making thereof.” The “Reviser’s Note” in the Statute Revision Committee Report provides the following reason for the omission:

The words “from the making thereof” have been omitted. By its terms, the section is meant to govern, not leases, but contracts for a lease. The subject of “lease for the term of one year from the making thereof” is governed by section 36-103. Accordingly, oral leases and oral contracts for a one-year leasehold estate are not within the policy of the Statute of Frauds. These have been generally considered valid in Nebraska. But according to 36-105 as it now stands, it is not necessarily so, because the period is not measured by the length of the term but by the time intervening between the date of the contract (not the lease) and the end of the term. In other words, the period mentioned as the section now stands, is not one year from the date of the lease, but one year from the making of the contract for the lease. Thus an oral agreement for a lease which is to create a term of eleven months to begin sixty days after the making of the contract, would be void because, although the lease when executed would purport to create a term for only eleven months, the term would expire more than a year after the making of the contract. If this is really what is intended, then the phrase “from the making thereof” should be retained; otherwise it should be eliminated. With this phrase eliminated, oral contracts for a one-year leasehold estate would be valid, even though the term did not commence on the first day after the contract was made. Thus this section would be brought into better harmony with
section 36-103, which makes an express exception in favor of oral leases for one year. That section uses the identical phrase "from the making thereof," but with a difference, because there the word "thereof" refers to the lease, whereas here it refers to the contract for the lease."

Insofar as this quotation recognizes the distinction between tenancies to commence in futuro and contracts for leases, and correctly articulates the result obtained by omitting the words "from the making thereof," the policy evidenced by the statement provides a welcome change. But the problem with the statement as written arises in conjunction with the discussion of section 36-103. It is simply not true that the words "from the making thereof" are used "with a different meaning" in section 36-103. The word "thereof" in that section clearly refers to the date of the making of the lease, and not the first day of the lease term. Thus in the standard example, if owner demises to student on March 15 for a one-year period commencing April 1, the lease was made on March 15, not April 1. The one-year period thus begins at the earlier date and the practical result is that for an oral one-year leasehold to be valid, the date of the making of the lease and the first day of the term must coincide. This is the standard construction dating back to the original Statute of Frauds of 1677 and, as we have seen, prompted practically every American legislature to omit the words "from the making thereof" from their one-year lease exception, as indeed did the territorial legislature of Nebraska. To be totally consistent with its action in respect to section 36-105, the Statute Revision Committee should have deleted the words "from the making thereof" from section 36-103. They did not, however, and our statutes have so stood since 1943. Before compounding our analysis by introducing another section of the Statute of Frauds to this discussion, let us briefly consider the post-1943 cases relevant to this inquiry.

**Misleading Dicta**

The 1947 case of *Schmidt v. Henderson*, facets of which were described by Judge Yeager as "exceedingly strange," "unusual" and "extraordinary," was a complex case basically involving an accounting of rents to the plaintiff landlord by the defendant tenant. One aspect of the case involved the question of the plaintiff's application for a writ of assistance which the lower court had granted.

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37. *Id.*
On this issue the defendant alleged "that he was entitled to retain possession under an oral lease for one year... which by reason of part performance by him was valid and binding." Ultimately the court concluded that the writ of assistance was improperly issued in the consolidated cases before it and reversed on that ground. Yet the court did, by way of dicta, comment on the part performance defense by citing section 36-105 and stating:

Within the meaning of § 36-105 an oral lease, though for only one year, if entered into prior to the beginning of the term, is void under the statute. Thostesen v. Doxsee, 77 Neb. 536, 110 N.W. 319; Kofoid v. Lincoln Implement & Transfer Co., 80 Neb. 634, 114 N.W. 937.41

This dictum is correct if the court were referring to section 36-103. It is the oral contract for a lease, which, if entered into prior to the beginning of the term, is void under section 36-105 as it existed from 1903 to 1943 and as it was interpreted in the Doxsee and Kofoid cases. As pointed out in the prior section, the 1943 revision and subsequent legislative approval intended to and did change the principle enunciated in two earlier cases.

The 1951 case of Prigge v. Olson was much simpler factually than the Schmidt case. In that case the plaintiff lessor and defendant lessee had entered into a signed written lease of certain premises for the year March 1, 1947, to March 1, 1948. The parties in July, 1947, June, 1948 and June, 1949 purported to "extend" the term of the lease for one year by changing the dates on the written instrument, i.e.; crossing out the last two figures of the year dates and writing in new figures. The plaintiff in July of 1949 entered into a contract to sell the subject property, mistakenly believing that the written lease contained a provision which would make the lease void if the property were sold. The plaintiff later discovered, however, that the part of the lease which provided for voiding in the event of sale was not completed. Plaintiff then served a notice of termination on the defendant in July of 1949 and demanded possession as of March 1, 1950. Upon defendant's refusal to vacate, plaintiff filed a forcible entry and detainer action, and the lower court held in favor of the defendant on the basis of the June 1949 meeting at which the parties extended the term of the lease. On appeal, Judge Boslaugh stated the issue as follows:

The very narrow and restrictive problem in this case is whether or not the original lease including the modification thereof

39. Id. at 347, 27 N.W.2d at 399.
40. Id. at 354, 27 N.W.2d at 402.
41. 154 Neb. 131, 47 N.W.2d 344 (1951).
made on June 20, 1949, after it was signed and delivered, constitutes a written contract of the lease within the demands of the statute. §36-105, R.R.S. 1943.

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If what the parties said and did on June 20, 1949, as recited above, was not sufficient to satisfy the Statute of Frauds, the appellee wrongfully prevailed in trial court. An oral lease for only one year is void within the meaning of the statute, if entered into prior to the beginning of the term. §36-105, R.R.S. 1943; Schmidt v. Henderson, 148 Neb. 343, 27 N.W.2d 396.42

The court finally decided that the Statute of Frauds requirement was met in that the parties adopted their signatures by "making the changes in the presence of each other and with their consent."43 In other words, the court concluded that the writing requirement of section 36-105 was satisfied. But was a writing even required if the June, 1949 agreement was truly a contract for a lease? Under section 36-105 a contract for the leasing of a one-year term need not be in writing. And so the writing requirement, stated to be the "very narrow and restrictive problem" of the case, could very well be considered irrelevant. On the other hand, in one part of the opinion the court stated that "it is certain that there was a verbal lease of the land by the owner to the tenant for the year ending March 1, 1951."44 Now this verbal lease would fall under the terms of section 36-103 and the one-year exception would not be applicable because of the retention of the words "from the making thereof." It might be possible, using the court's theory of adoption of signatures, to use the changed document as the requisite writing. The problem with this theory is that it leads to a plethora of problems in categorizing the amended document, i.e. after the June, 1949 amendment did the document serve only as a lease for the coming year, and if so, what happened to the lease for the year ending March 1, 1950? One could spend a considerable amount of time construing the legal effect of the changes to the original lease but for our purposes this is unnecessary. We should simply note that the Schmidt error in citing section 36-105 for the proposition that "an oral lease for only one year is void ... if entered into prior to the beginning of the term" is perpetuated in Prigge, although again the pronouncement is dictum.

**CONCLUSION**

By now the reader probably thinks that recommending to the Nebraska Legislature that they omit the words "from the making
thereof" from section 36-103 will dispel much of the confusion in this area. Alas, this is not so. Another problem is lurking under the Nebraska Statute of Frauds provisions. This time the troublesome section would be section 36-202, the Nebraska counterpart of section 4 of the original Statute of Frauds, which voids "an agreement . . . not to be performed within one year from the making thereof." Consider again our standard hypothetical whereby owner orally agrees on March 15 to demise a one-year term to student commencing April 1. The astute lawyer might point out the "agreement" of March 15 cannot, by its terms, be performed within one year from the "making" date, March 15, and thus the agreement of March 15 is void under section 36-202. No Nebraska case has squarely faced this problem, but fortunately practically every other jurisdiction has, and the weight of authority holds that the infra annum section does not govern. The reasons are spelled out in many cases in which the issue has been litigated and the reasoning on both sides has commendable points.

In the light of the 1943 Statute Revision Commission Report, can it be seriously urged in the case involving a tenancy of one year to commence in futuro, entered into prior to the term, that the legislature thought that the one-year tenancy to commence in futuro would be invalid despite the change to section 36-105? In any event the conflict between section 36-103 and section 36-202 still looms, and the threshold problem of distinguishing the tenancy to commence in the future and the contract to make a lease is still extant. Perhaps now, though, in view of what has been written, thoughtful people might consider where we have gone in the area of the one-year parol lease and where we should be going. At a minimum, the author suggests that: (1) the legislature omit the words "from the making thereof" from section 36-103: and (2) that lawyers and judges recognize the distinction between a tenancy to commence in futuro and a contract to make a lease.

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