Statute Of Frauds: Status Of Agent's Contract Made Without Written Authority

By DOMINADOR C. SAYON

PARAGRAPH (e) of Section 21, Rule 123 of the Rules of Court, otherwise known as the Statute of Frauds, provides: "The following agreements cannot be proved except by writing, or by some note or memorandum thereof, subscribed by the party sought to be charged, or by his agent, or by secondary evidence of its contents:

* * *

(e) An agreement for the leasing for a longer period than one year, or for the sale of real property or of an interest therein; and if such agreement is claimed to have been made by an agent of the party sought to be charged, the only competent evidence of the agency is the authority of the agent in writing subscribed by such party, or secondary evidence of its contents.

While this provision had been copied from section 335 of the Code of Civil Procedure, the Supreme Court made a significant change in the phraseology of the law. The old Code of Civil Procedure categorically provides that an agreement for the leasing for a longer period than one year or sale of real property or of any interest, *if made by an agent of the party sought to be charged, is invalid unless the authority of the agent be in writing and subscribed by the party sought to be charged* (Sec. 335, par. 5, Act 190), but the new Rules of Court merely declares that in a contract of this nature, the only competent evidence of the agency would be the authority of the agent in writing subscribed by the party to be charged. The new Rules of Court declare such an agreement or contract *invalid*. Apparently, therefore, it would seem that under the new law a contract of sale or lease for more than a year of real property made by an agent, whose authority does not appear to be in writing, is no longer invalid, but merely unenforceable like the other cases enumerated in said section 21 of Rule 123.

It is the object of this study to clear up the doubts which may arise out of the apparent change or modification in the law. The question to be resolved is: What is the status, under the present law, of an agreement for the leasing for a longer period than one year or the sale of real property, made through an agent who has no written authorization from his principal? Has section 335 of the Code of Civil Procedure been amended by section 21 of Rule 123 of the new Rules of Court?

It is submitted that the said agreement is not simply unenforceable but invalid, the provision of section 21, paragraph (e), Rule 123 notwithstanding. To arrive at this conclusion, we postulate the following propositions:

(1) That paragraph 5 of section 335, Act 190, in making the contract in question *invalid* unless the authority of the agent be in writing, affects the existence of the contract itself; hence

(2) Said provision partakes of the nature of substantive, rather than procedural law; and, therefore

(3) The Supreme Court has no power to repeal or alter such provision, expressly or by implication.

Under our law, form is generally not essential to the validity of contracts. "Contracts shall be binding, whatever may be the form in which they may have been executed, provided that the essential conditions for their validity are therein present." (Art. 1278, Civil Code; See also Art. 51, Code of Commerce.) To this general rule, however, there are several recognized exceptions, wherein form is made by express provision of law essential to the validity of certain contracts. One of these well-established exceptions is an agreement for the leasing for a longer period than a year or of sale of real property or of an interest therein, made by an agent. (See Bocobo, Outlines of the Law of Obligations, 6th Ed. p. 51, citing par. 5, sec. 335, Act. 190). Unless the authority of the agent be in writing, subscribed by the party sought to be charged, the contract is invalid. By the term 'invalid,' it is not intended that the contract be absolutely null and void. The term is often used not in the sense of an absolute nullity (*Jones vs. Cumming Bank, 131 Ga. 614; 63 L. Ed. 36*), or meaning void in *toto* (*Johnson vs. People, 202 Ill. 306; 36 N. E. 108*); this is especially true of contracts not immoral or against public policy. (*Doney vs. Laughlin, 50 Ind. 38; 94 N. E. 108*). In fact our Supreme Court in the case of *Gutierrez Hermanos vs. Orense, 28 Phil. 571,* treated a contract of sale of a parcel of land made by an agent who was not authorized in writing by the alleged principal, as merely voidable, and therefore capable of ratification.

In accordance with the weight of authority, an agreement for the leasing for more than a year or the sale of real property or of an interest therein, made by an agent not authorized in writing, should be considered as not merely unenforceable, but invalid or voidable.

The next question to be considered is whether the Supreme Court has the authority, under its rule-making power (Art. VIII, Sec. 13, Phil. Const.), to declare the particular agreement or contract under discussion as valid, although unenforceable if not in writing. Apparently, this is what the court attempted to do in making the change heretofore noted in the phraseology of the law (Rule 123, Sec. 21, par. [e]). Perhaps, in effecting the change, the court might have been prompted by a desire to make the rules conform as much as possible to the spirit of Art. 1278 of the Civil Code and Art. 51 of the Code of Commerce, both of which declare form as not essential to the validity of contracts. Indeed, the marked tendency of the modern legislation on contracts has been to repudiate the extreme formalism of the Roman Law, and to do away with the cumbersome formalities which surrounded the execution of contracts under the old laws.

Essentially, however, the question is not one of wisdom or expediency, but of power. Has the Supreme Court, by virtue of its constitutional authority to promulgate rules of procedure, the power to make the change we have noted?

It is submitted that the Supreme Court has no such power. The particular provision of the Code of Civil Procedure, which declares a contract of sale or lease for more than a year of real property as invalid, if made by an agent whose

authority does not appear in writing, partakes more of the nature of substantive, rather than procedural law. "Substantive law prescribes the rights and duties of all who are subject to the law. Adjective (procedural) law relates to the remedies available for the enforcement of such rights and the redress of their invasion. So far as it defines and creates rights and duties, the law is substantive. So far as it provides a method of aiding and protecting, it is adjective." *(Holland, Jurisprudence, 12th Ed. p. 89.)*

The provision which requires the agent's authority to be in writing goes to the very essence of the contract, to its existence. Without such written authority, the contract executed by the agent is, in contemplation of law, void. Unless ratified by the principal, the contract cannot be enforced, because it is non-existent. Such provision therefore determines the very existence of the right upon which an action may be founded, and not merely the mode of enforcing such right.

It is true that the distinction between procedural and substantive is not well understood. They have been used in varied senses in different types of problems. But the difficulty of making a distinction can best be eluded by resolving doubts in favor of treating the questionable matter as substantive. Such an act of self-constraint would avoid encroachment upon legislative power. *(See Edson. S. Sunderland, 21 A. B. A. Jor. No. 7, July 1935)*

The rule-making power of the court extends only to matters of procedure and not to substantive law. It follows, therefore, that the change made by the Supreme Court in the phraseology of paragraph 5 of section 335, Code of Civil Procedure, when said provision was later incorporated in section 21 of Rule 123 of the Rules of Court, cannot be interpreted to mean a repeal or modification of the earlier law. If it is desired to make agreements for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein made by an agent, without any written authority from the alleged principal, no longer *invalid* but merely *unforceable*, the power lies with the Legislature, not with the Courts. Unless and until the Legislature so amend the law, the status of such contracts shall remain as it is: not simply unenforceable, but invalid.