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Authorization of Agents to Deal with Real Estate as Affected by the Statute of Frauds

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AUTHORIZATION OF AGENTS TO DEAL WITH REAL ESTATE AS AFFECTED BY THE STATUTE OF FRAUDS

The courts have long recognized the possibility that the Statute of Frauds could, under certain circumstances, operate as an instrument of fraud.[1] From the time of the inception of the Statute in 1677, it was acknowledged that the employment of an agent by one or the other of the parties created a situation in which the opportunities for fraud were manifold. One who happened to be intent upon the perpetration of fraud might empower an agent to represent him in one of the transactions falling within the Statute, cloak such agent with every indication of full power to act in the principal's stead, short of a lawful power, and subsequently, after the opposite party had been induced to rely upon the supposedly good faith transaction, or when developments proved the transaction non-beneficial to the principal, step out of the contract with substantial immunity by pleading the Statute.[2] Thus, there emerged a conflict between the public policy which the Statute was designed to protect and the good conscience of equity.[3] Here we shall attempt to analyze the impact of this conflict upon the law controlling the authorization of agents to deal with the real estate of their principals.

The rather obvious possibilities of engineering a fraud by such a device is the probable explanation for the fact that the original Statute[4] in England established a double-standard with respect to the appointment of agents to act in transactions involving estates or interests in realty. In order to empower an agent to execute in his principal's name an instrument creating, granting, surrendering or assigning an interest in realty, a lawful authorization *in writing* was required,[5] whereas only a lawful authorization (presumably including authorizations parol in whole or in part) was necessary in order to

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[1] 3 POMEROY, EQUITY JURISPRUDENCE, §921 (5th Ed. 1941).
[2] *Ibid.*
[3] Davis v. Dunnett, 239 N.Y. 338, 146 N.E. 620 (1925).
[4] 29 Charles II (1677) c. 3.
[5] ". . . all Leases, Estates, Interests of Freehold or terms of years, or any uncertain interest of, in to or out of any Messuages, Manors, Lands, Tenements, or Hereditaments made or created by Livery and Seisen only or by Parole, and not put into writing and signed by the parties so making or creating the Same or their Agents, thereunto lawfully authorized by writing, shall have the force and effect of Leases or Estates at will only . . .
"And moreover no Leases, Estates, Interests, either of Freehold, or terms of years, or any uncertain interest of, in, to, or out of any Messuages, Manors, Lords, Tenements or Hereditaments shall at any time hereafter be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party or parties so assigning granting or surrendering the Same, or their agents thereunto lawfully authorized by writing, or by Act and operation of Law." *Ibid.*

empower an agent to contract for such conveyances.[6] This was borne out by early interpretations of the statute.

> "The statute of frauds does not require that the authority of the agent contracting even for the sale of lands should be in writing."[7]

The provision, of course, corresponds to that found in Section 240.08 of the Wisconsin Statutes and its subsequent interpretation, which affirmed, as recently as 1952,[8] the doctrine laid down in *Dodge v. Hopkins*:

> "The authority of the agent contracting to convey need not be in writing, though that of an agent conveying must."[9]

It is of incidental interest to note that the provisions of the original Statute respecting *contracts* to convey were not included within the same sections as dealt with present conveyances of realty, but were, instead, combined with the provisions of the Statute dealing with a number of contract-rights which did not necessarily, or even commonly, relate to interests in realty.[10]

The double standard so created has carried over into the Statutes of a number of American jurisdictions,[11] which, as pointed out above, include Wisconsin.[12] Other jurisdictions of this country[13] have refused

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[6] ". . . no action shall be brought to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, or to charge any person on any agreement made upon consideration of marriage, or upon any contract for sale of lands, tenements or hereditaments or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, 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 some other person thereunto by him lawfully authorized." *Ibid.*

[7] 2 KENT'S COMMENTARIES 614 (1889); Coles v. Trecothick, 32 Eng. Rep. 592 (1804).

[8] Zuhak v. Rose, 264 Wis. 286, 58 N.W. 2d 693 (1952).

[9] Dodge v. Hopkins, 14 Wis. 686 (1861).

[10] *Supra*, note 6.

[11] ARKANSAS, DIGEST OF STATUTES (1937) §6059; GEORGIA, CODE ANNOTATED, §20-401 (3222); INDIANA, BURNS' STATUTES ANNOTATED (1933) §33-101 (8045); IOWA, CODE OF 1939, §11285; KENTUCKY, REVISED STATUTES 1942, §371.010 (470); MAINE, REVISED STATUTES (1930) Ch. 123, §1; MASSACHUSETTS, ANNOTATED LAWS, Ch. 259, §1; NEW JERSEY, STATUTES ANNOTATED, §25: 1-5; NORTH CAROLINA, CODE OF 1939, §988; OHIO, PAGE'S GENERAL CODE ANNOTATED, §8621; SOUTH CAROLINA, CODE OF 1942, §7044; TENNESSEE, WILLIAMS CODE ANNOTATED (1934) §7831; TEXAS, VERNON'S ANNOTATED STATUTES, Art. 6573a, §22; WASHINGTON, REMINGTON'S REVISED STATUTES ANNOTATED, §5825.

[12] WIS. STATS. (1953) §§240.06, 240. 08.

[13] ALABAMA, CODE OF 1940, Title 20, §3; ALASKA, COMPILED LAWS OF 1933, §4315; ARIZONA, CODE OF 1939, §58-101; CALIFORNIA, DEERING'S CIVIL CODE (1937) §1624; DELAWARE, REVISED CODE OF 1935, §3106; HAWAII, REV. LAWS OF 1935, §3900; IDAHO, CODE ANNOTATED (1932) §16-505; ILLINOIS, SMITH-HURD, ANN. STAT., Ch. 59, §2; KANSAS, GEN. STAT. (1935), §33-106; MICHIGAN, STATUTES ANNOTATED, Ch. 261, §26.908; MINNESOTA, STATUTES OF 1941, §513.05; MISSISSIPPI, CODE OF 1930, ANNOTATED, §3343; MISSOURI, REVISED STATUTES (1939)

to continue the double standard in effect. The writer's purpose here is to examine the various considerations supporting and opposing the double standard, both in theory and in legal operation.

Under the original English Statute, as under various Statutes in this country, the broad availability of the doctrine of equitable estoppel tended to reduce, though probably not to eliminate, the opportunities for fraud arising out of the agency situation. The specific provisions tending to accomplish this result was that allowing *contracts* dealing with realty to be executed by orally authorized agents. Thus, since the door was open for wider pleas of equitable estoppel against a principal invoking the Statute of Frauds, some of the harshness that would result from a strict enforcement of the Statute could be softened. This was true because equity, faced with a conveyance that was void because executed by an agent with only parol authority, could, provided the necessary equities prevailed, treat the instrument as a contract to convey and enforce it against a principal attempting to abuse the Statute.[14]

It is apparent, however, that this situation was extremely contradictory since the plain and obvious requirements of the Statute could be circumvented by the manipulation of another part of the Statute in equity.

The New York revision of 1830[15] brought into being in that state a Statute which declared contracts not conforming to its provisions void,[16] as distinguished from voidable, but which retained the original Statute's double standard with respect to authorization of agents. The applicability of defenses of equitable estoppel to pleas of the Statute of Frauds was by no means terminated by this revision, but the situations in which such plea was available were no doubt reduced in scope. As a consequence, the Statute produced under the New York revision tended to preserve the self-contradictory nature of the double standard that existed under the English Statute.

Wisconsin borrowed its Statute practically verbatim from New York[17] and borrowed with it the apparently contradictory features of the statute. As our law now appears to stand, an agent whose authorization rests merely in parol may validly contract on behalf of his

§3354; NEBRASKA, COMPILED STATUTES (1929), §36-408; NEW HAMPSHIRE, REVISED LAWS OF 1942, Ch. 383, §1; NORTH DAKOTA, COMPILED LAWS OF 1913, §5963; OKLAHOMA, STATUTES ANNOTATED, Tit. 15. §136; OREGON, COMPILED LAWS ANNOTATED (1940) §2-909; SOUTH DAKOTA, CODE OF 1939, §10.0605; UTAH, ANNOTATED CODE OF 1943, §33-5-5; VERMONT, PUBLIC LAWS (1933), Chap. 73, §1675.

[14] Griffen v. Baust, 28 App. Div. 553, 50 N.Y.S. 905 (1898). Dreutzer v. Lawrence, 58 Wis. 592, 17 N.W. 423 (1883).

[15] N.Y. REAL PROPERTY LAW, §259 (1930).

[16] "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 lawfully authorized agent." *Ibid.*

[17] WIS. STATS. (1953) §§240.06, 240.08.

principal so as to bind the principal in equity.[18] If specific performance is brought against the principal, he can be compelled to convey legal title, assuming that other equitable considerations do not prevent such decree.[19] On the other hand, if the orally authorized agent should presume to execute a present conveyance, the conveyance itself is void,[20] and the opposite party is left the meager possibility of inducing equity to treat the void writing as an equitable contract to convey.[21]

There is a second respect in which the use of a double standard tends to bring the two sections of the Statute into conflict with each other. No clear or positively definite line of demarcation can be drawn between "present" conveyances and "contracts" to convey *in futuro.* That a deed, of itself, represents a present conveyance is clear,[22] and the same may be said, with slightly greater reservation, of a mortgage.[23] It is not unheard of, nevertheless, that a court of equity, faced with a deed void under the Statute of Frauds, elects to treat the instrument as an equitable contract to convey, thereby escaping the statutory prohibition.[24]

On the other hand it is not nearly so definite that the land contract,[25] or the option,[26] may not constitute a present conveyance of an equitable interest, and thereby partake, at least equitably, of the nature of a present transfer.

The Wisconsin Supreme Court seems to have given cognizance to this principle in the case of an option. Although it was strenuously urged by the optionee throughout the trial, appeal and motion for rehearing that authorization to execute the option was governed by Section 240.08 because it was a mere contract to convey, the argument was ignored in favor of the application of Section 240.06, which deals with present conveyances.[27] A land contract, the conditions of which have been partially or fully performed by the purchaser, vests sufficient equitable title in the purchaser, even for purposes of creating dower in

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[18] Dodge v. Hopkins, 14 Wis. 686 (1861); Smith v. Armstrong, 24 Wis. 446 (1869); Brown v. Griswold, 109 Wis. 275, 85 N.W. 363 (1901); Heins v. Thompson & Flieth Lumber Co., 165 Wis. 563, 163 N.W. 173 (1917); Zuhak v. Rose, 264 Wis. 286, 58 N.W. 2d 693 (1952).

[19] *Ibid.*

[20] Wyman v. Utech, 256 Wis. 234, 40 N.W. 2d 378 (1949); on rehearing 42 N.W. 2d 603 (1950).

[21] Griffen v. Baust, note 14, *supra.*

[22] 26 C.J.S., *Deeds* §1, p. 173.

[23] Davis v. Dunnett, *supra,* note 3.

[24] "A sealed instrument purporting to convey an interest in land for consideration, but ineffective as a conveyance because executed by an agent not authorized under seal, constitutes a memorandum of a contract to convey which, if sufficiently definite and the agent is otherwise properly authorized, satisfies the requirements of the Statute of Frauds." RESTATEMENT, AGENCY, §29, *Comment* a. on Subsection (1) (1933).

[25] 2 DEPAUL L. REV. 296.

[26] Wyman v. Utech, *supra,* note 20.

[27] *Ibid.*

the purchaser's widow.[28] The same is not, apparently, true of a similar contract upon which purchaser stands in default,[29] but, even in such cases, purchaser may have sufficient equity upon which to base a claim of homestead.[30]

In the case of licenses, it would appear that ordinarily oral authorization would be sufficient in any case; because where nothing beyond a mere license is contemplated, no interest in land is proposed to be created, and thus, the Statute of Frauds has no application.[31]

Even more anomalous though, is the lease, which falls within the Statute governing "present" conveyances in many jurisdictions, including Wisconsin, if its term exceeds one year. That such an instrument partakes simultaneously of the nature of a present conveyance of an estate for years and of the nature of a contractual undertaking to render such term on payment of rents has often been decided.[32] A contract to make a contract is ordinarily unenforceable.[33] Nevertheless a contract to lease for a term exceeding one year (necessarily including the contractual aspects of the promised lease) is valid under the Statute if it is reduced to writing and is signed by the prospective lessor or his "lawfully authorized" agent.[34] An attempted lease which fails to satisfy the requirements of Section 240.06 is there declared void. Notwithstanding, equity may treat the transaction as a contract to lease,[35] thereby permitting oral authorization of the same agent, and validating the very transaction which the Statute declared void. Though it has been decided by at least one court that if the shortcoming of the instrument is that the lessor's agent was not authorized by a written power, equity will not treat the lease as a contract to make a lease,[36] little basis is seen for such a decision; and there is substantial authority for asserting that courts not bound by a poorly reasoned precedent (as the Ohio court was) treat such leases as contracts for a lease.[37]

Assuming, however, that we can properly classify these various instruments into present conveyances and mere contracts dealing with real estate, so that the effect of their execution by agents can be distinguished on the basis of the manner in which the agents were authorized, it remains to be determined how and to what extent the problem alluded to in the foregoing can be ameliorated through legislation.

To avoid self-contradiction of the Statute, only two legislative

[28] 66 A.L.R., *Dower*, §11, Note II, p.65 and Note III b., p.69.
[29] 66 A.L.R., *Dower*, §11, Note III a., p.67.
[30] Chopin v. Runte, 75 Wis. 361, 44 N.W. 258 (1890); 89 A.L.R. 511.
[31] Sweeney v. Bird, 293 Mich. 624, 292 N.W. 506 (1940).
[32] 24 WORDS AND PHRASES, PERM. ED., 472 *et seq.* (1940).
[33] Wallace v. Mertz, 86 Ind. App. 185, 156 N.E. 562 (1927).
[34] WIS. STATS. (1953) §240.08.
[35] J. J. Newberry Co. v. Marshall, 125 F.2d 973 (1942); Cress v. Switzer, ——Ariz.——, 150 P.2d 86 (1944).
[36] Hodesh v. Hallerman, 45 Ohio App. 278, 186 N.E. 921 (1933).
[37] Cases cited at 37 C.J.S., *Frauds, Statute of*, §213, p. 710, footnote 54.

policies appear to be open: (1) to relax the Statute of Frauds itself, presumably to the point of allowing exceptions to its provisions such as are contained in Wisconsin, Section 121.04, where, under the Sales Act, transactions are freed from avoidability by acceptance of part of the goods of payment of something "in earnest" or as part payment as well as by "some note or memorandum in writing."[38] It is safe to say that it would be preposterous to require a writing for real estate transactions entered into by the contracting parties *in pro. per.*, while dispensing with the necessity of written authorization for their agents conducting identical transactions. So only one other possibility remains: (2) to require the agent's authority to be evidenced by a writing whereever the transaction itself is required to be written.

New York, by a revision of its Statute adopted in 1934,[39] adopted the second course. It would appear that in so doing, that state has elected not only to eliminate the double-standard of agency appointment, with its contradictory results, but also to reaffirm and strengthen the public policy out of which grew the original Statute of Frauds.

It is readily apparent, however, that under the single-standard Statute, the equitable pleas of the party who dealt with an agent lacking written authorization are far less available than under any variation of the double-standard Statute. Here it will avail equity nothing to construe a conveyance as a contract to convey because the same dignity is required for authorization of agents in either case.

We must consider, though, that after nearly three centuries of acquaintance with the Statute's requirements that real estate transactions be written, the *bona fides* of one who pleads his ignorance of that requirement is difficult to understand. His position in equity is considerably weakened by his culpable ignorance, to the point where he may, perhaps with some justice, be treated as a willing victim of fraud.

Nonetheless, it may be confidently assumed that, wherever a plea of the Statute would cripple strong and substantial equities in favor of the opposite party, equity will intervene to prevent such misuse of the Statute, because it has become practically a maxim of equity that "the Statute of Frauds may not be used as an instrument of fraud."[40]

When circumstances prevail where an agent is sufficiently clothed with authority and where a party dealing with him is sufficiently free from fraud and from negligence in discovering the defective authorization, equity will intervene and hold that a purported principal is estopped, in one way or another, to deny the fact of authorization, in spite of the Statute of Frauds.[41]

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[38] WIS. STATS. (1953) §121.04.
[39] N.Y. REAL PROPERTY LAW, §259 (1934).
[40] POMEROY, *op. cit. supra*, note 1.
[41] Cress v. Switzer, *supra*, note 35 citing 19 AM. JUR. 743.

For instance, P orally directs A to convey Blackacre. Realizing the necessity of sealed authorization, P telephones to T, the prospective purchaser, that A has been authorized under seal. A does not have apparent authority to execute a deed, but P is estopped to deny A's authority if T purchases the land relying upon P's statement.[42]

One class of cases lending support to this proposition are those in which a true owner of land, who stands by and allows an apparent owner of his land to convey it, is estopped to assert his title against the innocent grantee.[43] Thus, we can reason that if an owner of land can clothe another with apparent title and be estopped to deny the conveyance, another owner should be estopped to deny the fact of authorization where an agent with apparent (but sufficient) authority executes a conveyance on his behalf. It is difficult to see why there would be any less an obligation to check the title of an owner of land than there would be to check the authority of an agent.

That there exists little if any legally significant difference in apparent title to and apparent authority over land is clearly illustrated in the language of a New Jersey case.

> "Where an owner of lands holds out another, or permits that other to hold himself out, as having power of disposition thereover, innocent third persons who are thus led into dealing with the person having such a apparent power of disposition will be protected in equity, but the rule operates only to protect those who exercise ordinary caution, and it is essential that the conduct of party against whom an estoppel is claimed did clearly amount to the clothing of another with title to, or authority over, the land."[44]

It also appears that where a conveyance would otherwise fail because of the insufficient authorization of the agent executing it, such conveyance can be made effectual by a ratification by the purported principal,[45] though perhaps not where the statute makes such conveyances void, where ratification is not possible.[46] Notwithstanding, if a purported principal is willing to ratify, it is obvious that he is not attempting to use the Statute as an instrument of fraud, and thus, the principle of ratification drops from further consideration here.

Reasoning negatively, it has been held that the mere taking of possession will not take an act of an unauthorized agent in conveying (leasing) realty out of the Statute of Frauds.[47] The opinion in this

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[42] RESTATEMENT, AGENCY, §28 and §31 (1933).
[43] 10 R.C.L. 780.
[44] Bright v. Forest Hill Park Development Co., 133 N.J. Eq. 170, 31 A.2d 190 (1943).
[45] 37 C.J.S., *Frauds, Statute of*, §214, p. 711.
[46] Jefferson v. Kern, 219 Mich. 294, 189 N.W. 195 (1922).
[47] Woodworth et al v. Franklin ——Okla——, 204 P. 452 (1921).

case indicates, however, that something *more* than mere possession *will* suspend the operation of the statute.

We can conclude, then, that the force of equity is not completely proscribed by even the strictest form of the single-standard Statute.

Does this mean that a Statute such as New York presently has, comparatively strict and unyielding in its requirement, would soon, like the hearsay rule of evidence, come to be known far more by its exceptions than by its rule; or might it be reasoned with equal force that while the double standard of agency remained in force, there was considerable room for argument that the statute implied a legislative policy of leniency, but that now the courts must rule that the door has deliberately been closed to equitable interposition except in the clearest cases of fraud? With New York's present single and strengthened standard, there can be little room to question the legislative determination that no interest in land shall pass without writing and signature, and that only the strongest equities will suffice to take the case out of the Statute.[48]

Although the original Statute provided for two standards and although valid arguments support that position, it would appear that the policy behind the Statute can best be protected only by the strict enforcement of the single-standard Statute, requiring written authorization for agents in all cases affecting an interest in real estate; provided, of course, that the principles of equity will be available to prevent abuse of the Statutes.

It is the writer's belief that New York's action, now twenty years past, was a wise one, and one which might well be emulated by Wisconsin and by other jurisdictions which still tend to regard the Statute of Frauds in an attitude of suspicion and distrust. Such an action would seem to do much to clear the air respecting our dominant policy regarding real estate transactions, and to lend to such policy the strong teeth which it has not had for many centuries.

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[48] Rork v. Orcutt, 53 N.Y.S. 354 (1945).