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Article 8

Agency - Effect of Parol Authority to Complete Deed Incomplete on Delivery

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Agency—Effect of Parol Authority to Complete Deed Incomplete on Delivery — Michael Burns, an attorney, was asked to come to the decedent's home to prepare a deed. He prepared the deed and had it executed by the decedent before two witnesses. Because the description to the property was not available, the decedent instructed Burns to procure the proper description and insert it in the instrument, have it recorded and deliver it to the grantee. Two days later and just four days before the grantor's death the description was inserted. *Held:* Parol authority may be given to complete a conveyance by later inserting a material portion omitted at the time of execution and acknowledgment, and when the insertion is made, no further execution is required. *Prosser v. Nickolay,* 249 Wis. 77, 23 N.W. 2nd 403 (1946).

The Wisconsin Statutes require that instruments to operate as deeds be under seal.[1] The rule stated by the Restatement of Agency is that an instrument under seal to be executed through an agency arrangement must be executed by an agent who has obtained written authorization under seal.[2] This is a codification of the strict common law rule that the principal's authorization to the agent be made by an instrument of equal dignity.

To admit an exception, Wisconsin thrusts a wedge into the general rule. The alteration of a sealed instrument is upheld if parol or implied authority is granted to the agent. In *State ex rel Dorwin v. White*[3] a bond was executed by the school treasurer and sureties for an undeterminable amount The instrument was left with the clerk who agreed to insert in the blank space the amount when it was ascertained. The intent that the clerk write in the sum of the bond was clear and undisputed. The court held that a mere omission to insert words intended and authorized to be inserted cannot be held to defeat the bond. To hold otherwise would allow technicality to defeat an intention that would be given effect save for a legal remnant which states[4] in increasing numbers are discarding. A reason exists for the presumption of consideration that is raised by a seal in contracts. In the instant case it is only the seal that stands in the way of effecting the grantor's intentions because the lack of acknowledgment and attestation does not impede the transfer of interest as between the parties.[5] The agent could not hurdle the barrier of a seal

[1] Section 235.01, Wisconsin Statutes; Kohler v. Black River Falls Iron Co., 2 Black (U.S.) 715 (1862); Dreutzer v. Lawrence, 58 Wis. 594, 17 N.W. 423 (1883): An instrument lacking a seal is not properly executed as a deed sufficient to convey legal title.

[2] Section 28(1), Restatement of Agency.

[3] State *ex rel* Dorwin v. White, 161 Wis. 170, 152 N.W. 825 (1915).

[4] Williston on Contracts, Rev. ed., Vol. I, Section 218. Satute changing common law of sealed instruments.

[5] Slaughter v. Bernards, 88 Wis. 111, 59 N.W. 576 (1894); Harrass v. Edwards, 94 Wis. 459, 69 N.W. 69 (1896): A deed takes effect to pass title upon its execution and delivery and not when it is attested and acknowledged.

on account of the ancient rule. The propriety and justness of an adverse conclusion was early recognized in Wisconsin. As in the instant case concerning the insertion of the description to sustain the manifest intention of the parties, parol authority was recognized as sufficient to complete the instrument.[6]

Reasonably enough, this doctrine is extended to cover cases where the principal's intentions are disregarded by the agent. In *Nelson v. McDonald*[7] where the agent exceeded his authority in filling certain blanks, the principal was bound by his parol authorization. The agent inserted in a mortgage the description of the homestead which belonged to his wife rather than one of property owned by him alone, which he represented to his wife he was mortgaging. The principal put the agent into a position to perpetrate the fraud and she was liable for the acts performed within the scope of his apparent authority. Viewed in a certain light, the decision gives effect to the intention of the parties. The principal intended that a mortgage be executed and that intent was transferred to the mortgage completed by the agent.

It seems that the seal is disregarded in the decision of the instant case. The seal is ignored to allow insertion in an already executed instrument a material alteration. The conclusion is that it is an exception to the common law rule of "equal dignity". It is an exception that is in keeping with the trend which in many jurisdictions has been to abrogate or modify the seal's effect through statutory provision allowing expression of intent to prevail over archaic technicality. Augmenting this judicial chipping at the seal, the legislature[8] in 1943 further confined the seal's effective scope by providing for recordation of instruments without a seal or attestation on the condition that they be acknowledged in the manner and form set forth in the chapter.[9] By the use of the form of acknowledgment provided, it appears that the necessity of the seal may be abolished. This places Wisconsin among the number of states[10] who have abolished the distinction between sealed and unsealed instruments. But this would seem to be merely an alternate method in the execution of instruments to those already in use, which have not been abolished by the legislature.

EDWARD PATCH

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[6] Van Etta v. Evenson, 28 Wis. 33 at 37, 9 Am. Rep. 486 (1871): "They are grounds of the purest and most unalloyed technicality, originating in a state of things and condition of the law which have long since passed away . . . The great weight of authority undoubtedly is, that effect will be given to the plain intention of the parties, notwithstanding the instrument may be under seal, and notwithstanding the technical rules of the early common law with respect to the execution and delivery of such instruments."

[7] Nelson v. McDonald, 80 Wis. 605, 50 N.W. 893 (1891).

[8] Section 329.14, Wisconsin Statutes (1945).

[9] Section 329, Wisconsin Statutes (1945).

[10] Fn. 4, supra.