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Agents' Need of Written Authority

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The sections of the Statute of Frauds enacted in Pennsylvania on March 21, 1772,[1] are as follows:

"1. All leases, *estates,* interests of freehold or term of years, or any uncertain interest of, in or out of any messuages, manors, lands, tenements or hereditaments, made and *created* by livery and seisen only, or *by parol, and not put in writing* and signed by the parties so making or creating the same, or *their agents thereunto authorized by writing,* shall have the force and effect of leases or estates at will only; * * * except, nevertheless, all leases not exceeding the term of three years from the making thereof.

"2. And moreover, *no* leases, *estates* or interests, either of freehold or terms of years, or any uncertain interests of, in or out of any messuages, manors, lands, tenements or hereditaments, shall at any time *be assigned, granted or surrendered,* unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, *or their agents, thereto lawfully authorized by writing,* or by act and operation of law."

Section 5 of the Act of April 22, 1856,[2] provided: "That no action shall be brought whereby to charge any person upon any contract hereafter to be made for the sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought shall be in writing and be signed by the party to be charged therewith, or some other person thereunto by him *lawfully authorized by writing.*"

The Act of May 13th, 1857,[3] provides: "That the fifth section of the Act of 22d April, 1856, entitled 'An Act for the greater certainty of title and more secure enjoyment of real estate,' be and the same is hereby repealed, and all actions and proceedings at law and equity may be held and

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[1] 1 Sm. 389, 2 Stewart's Purdon 1753.

[2] P. L. 532, 2 Purd. 1757.

[3] P. L. 500.

maintained in like manner as if said fifth section had never been passed."

In *Bowser v. Cessna,*[4] Justice Sharswood says: "The 4th section of the English Statute of Frauds and Perjuries, 29 Car. 2, c. 3 was purposely omitted from our Act of March 21st, 1772 (1 Smith 389); and although it was enacted by the 5th section of the Act of April 22d, 1856 (Pamph. L. 533), that section was repealed the year following by the Act of May 13th, 1857 (Pamph. L. 500). Recoveries in actions of this nature have been sustained in our courts from the earliest periods: *Bell v. Andrews, 4 Dall. 152; Ewing v. Tees, 1 Binn. 450.*" The action was assumpsit by a vendor against a purchaser of real estate on a parol contract.

In *Ewing v. Thompson,*[5] Justice Read says: "It is much to be regretted, that the 5th section of the act for the greater certainty of title, and more secure enjoyment of real estate, passed the 22d of April, 1856, was repealed by the Act of 13th of May, 1857. A state with three millions and a half inhabitants, with railroads connecting her most distant points, and a common school system pervading the whole Commonwealth, is certainly prepared to require that all contracts for the sale of land shall be in writing. In allowing actions for damages, on verbal contracts, for the sale of lands, we differ not only with the law of England, but I believe with the law of every other state in the Union. A policy thus universal must be right, and we thought so for one year. By our law such an action may be sustained, etc."

The 4th section of the Act of April 22, 1856, *(supra)* provides: "All declarations or *creations of trusts* or confidences *of any lands,* tenements or hereditaments and all grants and assignments thereof *shall be manifested by writing,* signed by the party holding the title thereof, or by his last will in writing, or else be void, etc."

The statutes quoted are the only Pennsylvania statutes relating to the form of contracts for the leasing or sale

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[4]62 Pa. 148, (1869).

[5]66 Pa. 382, (1870).

of real estate. Since the act of 1772 purports to relate only to the formal requisites of leases and transfers of interests in land and the statute purporting to deal with agreements to convey has been repealed, it might be supposed that such agreements could rest in parol and that the agents of the parties could be verbally authorized. Since the contrary is the law, it is proposed to trace the development of the law on the subject.

In *Nicholson's Lessee v. Mifflin*,[6] it was assumed without discussion that the authority of a vendor's agent must be in writing. In the report of this case in 2 Yeates 38, it is said: "The power of an agent authorized *to sell* lands must be in writing, and proved by indifferent witnesses, under the act 'for the prevention of frauds and perjuries', passed 21st March, 1772. (Prov. Laws, 462) * * * It is true, this act of assembly should be construed liberally, and *the law not requiring the written authority of the agent to be signed by the party,* it is to be sufficient if the authority is reduced to writing by his orders, but of this due proof must be had."

In *Snively v. Luce*,[7] four tenants in common appointed by parol four others to *partition* their lands. This was done on the ground and the agents confirmed their division by a writing sealed, acknowledged and recorded. But separate possession was not taken in pursuance of the partition. "Per Curiam.— An unexecuted parol partition is void: and it is still parol when made by the intervention of agents, pursuant to a parol authority, though their act be evinced by a writing under seal. That can give it no additional authority; and the whole being irrelevant and void, ought not to have gone to the jury."

In *McDowell v. Simpson*,[8] one of several heirs signed a *lease* for seven years as attorney for all the heirs but with no written authority. It was held that no parol ratification could make it more than a lease at will, as "by the very

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[6] 2 Dallas 246, (1796).
[7] 1 Watts 69, (1832).
[8] 3 Watts 129, (1834).

words of the act against fraud" the agent must be "lawfully authorized by writing." This case further held that the tenancy would become one from year to year, if the tenant remained in possession for more than a year.[9]

In *Vanhorne v. Frick*,[10] Chief Justice Tilghman held that a purchaser could not maintain ejectment to enforce a sale made by an agent who had only a parol authority from the owner but that the contract was as binding as a parol sale by the principal.

In *Ewing v. Tees*,[11] the same judge had said: It is evident that this provision extends only to the estate intended to be passed. No *estate* in lands shall be conveyed by one person to another, unless the agent is authorized by writing. But it is one thing to convey an estate, and another and very different thing to make an agreement that you will convey it. It might be good policy to establish certain solemnities, without which the title of land could not be transferred; because the peace and happiness of society are promoted by the clearness and facility with which the titles of real estate may be ascertained, and by preventing those frauds and perjuries which would inevitably take place, if after a great length of time it was permitted to establish a title by parol evidence only. Whereas, an action for damages for not performing a contract, is of much less moment. The jury may give such damages as, under the circumstances of each case, appear reasonable, and these damages will often be very small; and there is less danger of perjury, because those actions are limited, so that they must be commenced in six years. I should think the case sufficiently clear, if it was taken upon the act of assembly, without any other consideration; but it is still clearer, when we turn to the English statute of frauds and perjuries, 29 C. 2 c. 3. It is plain that our legislature had that statute

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[9]Dumm v. Rothermel, 112 Pa. 272, (1886); Walter v. Transue, 17 Pa. Super. Ct. 94, (1901), and Inst. etc. v. Lingenfelser, 296 Pa. 493, (1929) accord.

[10]6 S. & R. 90, (1820).

[11]1 Binney 450, (1808) and see McGunnagle v. Thornton, 10 S. & R. 251, (1823).

before them, when they framed the act in question; because that part of our law which I have recited, is copied very nearly verbatim from the English law. But there is a total omission of the fourth section of the English statute, which enacts, that no action shall be brought to recover *damages* upon any 'contract or sale of lands, tenements, or hereditaments, or any interest in or concerning the same, unless the agreement on which it is 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.' It is impossible that this omission should have been accidental. *It must have been intended to leave the common law unaltered, as to the redress which it affords for breach of a parol contract by recovery of damages.* Agreeable to this construction is the sentiment expressed by this court, in the case of *Bell v. Andrews, 4 Dall. 152.*"

In *Twitchell v. The City of Philadelphia,*[12] which was an action for the purchase price of land sold by the plaintiff to the defendant, Justice Read said:

"But there is another insuperable difficulty in this case, that George W. Brown was not an agent of the city 'thereunto lawfully authorized by writing', which is an essential requisite, by our Act of Assembly, in such a case for the *purchase* of lands, in order to enable a *vendor* to enforce a specific performance of it. *Vanhorne v. Frick, 6 S. & R. 90; McDowell v. Simpson, 3 Watts 129; Parrish v. Koons, 1 Parsons 89.* All the cases cited by the plaintiff in error to establish the contrary doctrine, occurred under the 4th and 17th sections of the English Statute of Frauds, which sections were *never re-enacted* in this state." Now *Vanhorne v. Frick* only decided that the landowner's agent must have written authority to sell. The form of authority required to enable a purchaser to contract through an agent was not involved in the case. *McDowell v. Simpson* only involved the power of an agent to bind the landowners on a long lease without a written authorization. *Parrish v. Koons*

[12]33 Pa. 212, (1859).

was a vendor's suit *for the purchase price* and Judge King held that while the agent of either party, authorized only by parol, could sign a written contract and so bind his principal sufficiently to enable the other to recover damages, neither could enforce the specific execution of such a contract. Recovery was denied in the *Twitchell* case because the purchaser's agent had only a verbal authorization.

Twitchell v. Philadelphia contains no reasoning in support of the conclusion that written authority is as essential when the agent represents the purchaser as when he represents the vendor. *Parrish v. Koons* makes an attempt to justify this conclusion. First, it is said, the statute uses the words "parties or their agents" but the court overlooks the fact that the "parties" mentioned in the statute are only those who create, assign or surrender an estate in land and a purchaser does none of these things. Second, it is said that equity should treat both parties alike and hence that the vendee should be required to sign either in person or by an agent authorized in writing. It has long been settled that a written contract signed by the vendor, but not by the vendee, is specifically enforceable by both[13] and it is an obvious anomaly to require that the vendee's agent must have written authority when he happens to sign the contract for his principal. His written promise should not be less effective than a verbal one and if the principal can make a verbal promise directly, why may he not do so through an agent verbally authorized?

In *Tuttleman v. Beetem,*[14] a case of a lease containing an option which, if exercised, would create an interest in the land exceeding three years from the original date of the lease, the lease was signed by the lessees but not by the lessors. Judge Henderson quotes the statute and then observes: "The lessees did not create the estate. They had no capacity so to do. The lessors alone could demise the premises and vest the title for the term in the lessees. This is the clear requirement of the statute as is shown

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[13]Brodhead v. Reinbold, 200 Pa. 618, (1901).

[14]48 Pa. Super. Ct. 345, (1911).

in *Tripp v. Bishop, 56 Pa. 424.*"

In *King v. Myers,*[15] an executor with authority to sell but none to lease executed a long term lease and the devises received the rents from him. He signed as executor and not as agent of the devisees. The doctrine of *McDowell v. Simpson,*[16] that ratification of a lease beyond the statutory term must be in writing, was reiterated, and the lease was held effective only to create an estate at will.

The cases are also numerous in which a purchaser has been denied specific performance on the ground that the vendor's agent lacked the requisite authority in writing.[17]

It also has been decided repeatedly that a vendee can no more acquire an estate in land under a parol ratification by a vendor of a sale made by his agent than he can when the vendor's agent has acted under a parol authorization.[18]

The fourth section of the English statute requires the writing to be signed by the "party to be charged therewith" but no such language is used in the Pennsylvania statutes relating to real estate transactions. Nevertheless the phrase has crept into our appellate court opinions. Discussing a lease from month to month, which of course would have been good though there had been no writing, Judge Orlady, in *Schultz v. Bulbock,*[19] sustained a judgment in ejectment on a lease signed only by the lessee on the ground that "the requirements of the statute are answered by a memorandum in writing signed by the party to be charged therewith". He notes that the purpose of the statute was the protection of landowners and that a sale contract signed by a vendor only and accepted by the vendee satisfies the statute but he utterly misconceived why that is true.

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[15]60 Pa. Super. Ct. 345, (1915).

[16]See note 8 ante. Dunn v. Rothermel, 112 Pa. 272, (1886); Jennings v. McComb, 112 Pa. 518, (1886); Harper Bros. & Co. v. Jackson, 240 Pa. 312, (1913); Mott v. Kaldes, 288 Pa. 264, (1927); Willis-Winchester Co. v. Clay, 293 Pa. 513, (1928) accord.

[17]Heinicke v. Krouse, 14 W. N. C. 106, (1883); Knerr's App., 16 W. N. C. 74, (1885); Tighe v. Doran, 7 Kulp 124, (1893); Croskey v. Stockley, 85 Pa. Super. Ct. 498, (1925).

[18]Llewellyn v. Sunnyside Coal Co., 242 Pa. 517, (1914).

[19]6 Pa. Super. Ct. 573, (1898).

Some such misconception may explain the statement in *Humphrey v. Brown*,[20] that an agent cannot bind a purchaser of real estate unless he has written authority or there has been a subsequent ratification in writing. The cases cited to support this proposition are both cases holding merely that the owner's agent must have written authority to make a long lease. The statement was unnecessary and may be treated as a dictum which will hardly be followed. Recent cases recognize that the mere approval of a deed exhibited to a purchaser is enough to entitle him to compel conveyance of the land described in it.[21] It would hardly be held that if such approval were that of his counsel, it would not have this effect, unless his counsel had a written power of attorney. As already observed, why should one who need sign nothing to be bound be required to authorize another in a signed writing, if his agent is to bind him?

The purchaser of a leasehold estate having more than three years to run may be made to pay the agreed price after acceptance of the surrender by the act of his agent. No suggestion is made that the agent must have written authority to accept.[22]

Section 4 of the Sales Act of 1915 and the Act of April 27, 1925,[23] may be satisfied by a "note or memorandum in writing of the contract or sale signed by the party to be charged or his agent in that behalf." Since the statute is silent as to the form of the agent's authorization, no change from the common law can be presumed.[24] Hence the agent's authority to sign the writing required by this section may be shown by parol.[25]

The conclusion is that it is only in those cases in which an agent attempts to act for a landowner that he may re-

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[20]291 Pa. 53, (1927).

[21]Shrut v. Huselton, 272 Pa. 113, 117, (1922); Shapiro v. Kazmierski et al., 283 Pa. 242, (1925).

[22]Davis et al. v. Inv. Land Co., 296 Pa. 449, (1929); Jenkins v. Root, 269 Pa. 229, (1920).

[23]P. L. 310.

[24]Jessup & Moore P. Co. v. Bryant P. Co., 283 Pa. 434, 442, (1925).

[25]McGowan v. Lustig-Burgerhoff, 93 Pa. Super. Ct. 227, (1928).

quire written authority and that he needs it then only to pass an estate in the land. Though he may impose an obligation upon a vendor principal, when he has only a parol authority, the purchaser cannot have specific performance and the measure of damages is not the same as if he had had a written authorization, for the contract is to be deemed a parol contract.[26] The agents of vendees and lessees of land do not require authority in writing.

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[26]Seidlek v. Bradley, 293 Pa. 379, (1928) and see comment on this case in 33 Dick. Law Rev. 87.

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