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THE STATUTE OF FRAUDS*

By

JOSEPH P. MCKEEHAN

It is not the purpose of the writer to discuss with any degree of thoroughness any portion of the Statute of Frauds, but it is intended merely to call attention to some peculiarities of the law in Pennsylvania, as compared with the law of other states, and to note the statutes in force in Pennsylvania requiring a writing to establish certain contracts and as a condition of certain other rights.

The English Statute (29 Car. II., c. 3) enacted in 1677, was divided into twenty-four sections.¹ The first section provided that all parol transfers of interests in land and not put in writing and signed by the party making the attempted transfer or his agent authorized by writing should make the transferee a tenant at will only, and this regardless of the consideration given and notwithstanding the former custom of making transfers of estates in land by livery and seizin. The second section excepted all leases which by their terms expired not later than three years from the date of their making (with a further qualification as to the rent reserved). The third section added to grants of interests in land the assignment or surrender of such interests and forbade such transfer "unless by deed or note in writing signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law." The familiar fourth section forbids actions against an executor or administrator on his express promise to be personally responsible for a debt of the estate, actions upon promises to pay the debt of another, actions upon ante-nuptial agreements, actions upon agreements to sell land or interests therein and actions upon any agreement not to be performed within a year from the making. Sections 5, 6, 12 and 19 to 24 inclusive relate to wills. Section 7 to 11, inclusive, relate to declarations of or creations of trusts. Section 13 to 15, inclusive, relate to the signing and dating of judgments. Section 16 relates to executions. Section 18 relates to certain recognizances. Section 25 relates to the estates of intestate married women.

The seventeenth section was the familiar one requiring that in order to be "good" a contract for the sale of goods "for the price of ten pounds or upwards", must be evidenced by "some note or memorandum in writing of the said bargain," "signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

*Re-printed from 25 Dick. L. Rev. 63 (1920).

¹ 29 A. & E. Encyc. of Law P. 801.

In *Ewing vs. Tees*, 1 Binney 450, Chief Justice Tilghman, after quoting the Pennsylvania Statutes of March 21, 1772: 1 Sm. L. 389, sec. 1, 2 Purdon 1754, says: "It is plain that our legislature had that (i. e. the English Statute) 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, etc." He accordingly held that there was no reason why an action for damages could not be maintained in Pennsylvania for breach of a contract for the sale of land.

It is a curious fact that the fourth clause of the fourth section of the English statute relating to contracts for the sale of lands has been adopted in all the United States except Pennsylvania.² The fact remains that the Courts of Pennsylvania have always refused to enforce specifically a parol contract for the sale of land, at the suit of either party thereto. Various reasons have been given and a failure to appreciate the true reason has occasionally led judges of even our appellate courts to make incorrect and misleading statements.

"The Vendee's Remedies for Vendor's Non-conveyance," first when the contract is written, and second when it is oral, have been reviewed in an able article in 11 Dickinson Law Review, p. 171. So also the "Vendor's Remedies for Vendee's Breach of Contract," both under written and oral contracts, have been covered in an article in 11 Dickinson Law Review, p. 195. We will merely refer the reader to these articles and to a summary in concise form in 13 Dickinson Law Review at page 221.

The Act of Apr. 22d, 1856, P. L. 533, 2 Purdon 1757, the fourth section of which forbade the creation of express trusts by parol, in its fifth section required contracts for the sale of land to be in writing. The latter section was repealed, however, by the Act of May 13th, 1857, P. L. 500. This provision of the English statute has never been law in Pennsylvania except for this brief period. The English statute requires that the agreement, 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 obvious that to specifically enforce an oral promise to transfer an interest in land would be to give greater effect to a promise than may be given to livery and seizin. This is why the courts require the vendor's promise to be in writing and signed by him or his agent authorized in writing. To get title to the land the vendee must not have less than is required by the Act of 1772. We are, therefore, surprised to find a judge of our Superior Court say: "The requirements of the statute are answered by a memorandum in writing signed by the party to be charged therewith."³ The fact is that a vendor cannot recover the price from the vendee, who has signed the contract, if the vendor himself has not signed, for want

² 29 Am. & Eng. Encyc. of Law P. 1886.

³ *Schultz v Burlock*, 6 Super. 374.

of mutuality. So again a Justice of the Supreme Court has resorted to the fourth section of the Act of 1856 relating to express trusts to find the reason for requiring contracts for the sale of land to be in writing in Pennsylvania. See *S. Dep. & T. Co. vs. Coal & Coke Co.*, 234 Pa. at 108.

It has always been held in Pennsylvania that the agent of a vendor must have written authority but the agent of a guarantor need not. Compare *Vanhorne vs. Fricke*, 6 S. & R. 90, and *Martin vs. Duffy*, 4 Phila. 75. The only reason for such a difference is that the Act of 1772 expressly requires the agent of the grantor or lessor to have written authority. The Act of 1856 says nothing about the form of the authority of an agent. It is especially curious to find such an old rule of law as that forbidding specific enforcement of an oral sale attributed to as recent a statute as the Act of 1856 and it is a coincidence that that very statute should have had a section in it relating to contracts for sale of land, which was stricken out the following year. The remarkable way in which the justice omits the words showing the true subject of the fourth section, in order to make it serve his purpose, is also noteworthy.

Another case in which a Supreme Court Justice exhibited his confusion of ideas is found in *Twitchell vs. Philadelphia*, 33 Pa. 212. At p. 220, Justice Read says: "It is an essential requisite by our Act of Assembly in a contract for the *purchase* of lands, in order to enable a vendor to enforce specific performance of it, that the agent of the *purchaser* be authorized by writing." As a matter of fact, since purchasers do not sign conveyances, they need not sign contracts of purchase and an oral authority to an agent to sign is perfectly good. Contracts signed by the vendor only are specifically enforceable by both parties, while those signed by the vendee only are not specifically enforceable by either.

Only two provisions of the fourth section of the English statute are part of the law of Pennsylvania. These were enacted on April 26, 1855, P. L. 308, 2 Purdon 1759. They are the two first provisions relating to promises by executors or administrators and promises to answer for the debt or default of another. For a full discussion of this statute and the construction placed upon it, see the article in 24 Dickinson Law Review 223.

This statute was followed the next year by the statute of April 22, 1856, P. L. 532, 2 Purdon 1757, the fourth section of which declares that both declarations or creations of trusts of land 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 to be void," excepting however resulting and constructive trusts. A parol declaration of trust as to personal estate is not within the statute.

On June 12th, 1878, (P. L. 205), 4 Purdon 4044, a statute was passed which provided that a grantee of real estate should not be personally liable for the payment of an encumbrance which bound the land when granted, "unless he

shall, by an agreement in writing, have expressly assumed a liability therefore, or there shall be express words in the deed of conveyance stating that the grant is made on condition of the grantee assuming such personal liability." It further provided that "the use of the words, 'under and subject to the payment of such ground rent, mortgage or other encumbrance,' shall not alone be so construed as to make such grantee personally liable." The second section of the act requires the holder of the encumbrance to be a party to the agreement assuming personal liability, if he is to enforce it, and terminated the personal liability upon a second grant of the encumbered property in the absence of a further agreement continuing such liability. The attempts of the Supreme Court to construe this act have been so conflicting that it has been declared to be "absolutely unintelligible." See 18 Dickinson Law Review, at page 172. Prior to this act a verbal promise of a grantee of encumbered real estate made to his grantor to pay the mortgage debt, though the grantor himself was not personally bound, was held enforceable by the creditor though he was not a party to such contract. *Merriman vs. Moore*, 90 Pa. 78. It was not contended that such a promise came within the Act of 1855 relating to promises to pay the debt of another.

On June 8, 1881, (P. L. 84) an act was passed which precluded proof of a parol agreement that a deed for real estate was intended to take effect as a mortgage. A defeasance must have been made at the time the deed was made, be in writing, signed, sealed, acknowledged and delivered by the grantee in the deed to the grantor and be recorded within sixty days from the date of execution. Prior to this act deeds could be converted into mortgages by parol testimony. *Pearson vs. Sharp*, 115 Pa. 254. This act was used to perpetrate the grossest frauds upon unschooled borrowers of money. For a scathing condemnation of the act, see 11 Dick. L. Rev. 93. It was amended by the Act of April 22, 1909, P. L. 137, 5 Purdon 5908, requiring only that the agreement of defeasance be signed and delivered to the grantor in the deed. As against the holder of the deed, it may now be made subsequently to the deed. It may not have been sealed nor acknowledged nor recorded. But as against a later grantee or mortgagee for value, it must have been recorded before the subsequent deed or mortgage. In its present form it may be hoped that the statute will prevent more frauds than it occasions. See 15 Dick. L. Rev. at page 83.

On May 10th, 1881, P. L. 17, 3 Purdon 3306, the first statute was passed requiring acceptances of drafts to be in writing, "signed by the acceptor or his lawful agent." Like the act relating to promises to pay the debt of another it excepted transactions involving less than twenty dollars. The 132d section of the Negotiable Instruments Act of 1901, P. L. 194, 3 Purdon 3305, merely provides that the acceptance of a bill must be in writing and signed by the drawee.

Sections 30 and 31 of the Negotiable Instruments Act provide that bills and notes payable to order may be negotiated only by the indorsement of the

holder written on the instrument itself or upon a paper attached thereto. Like provisions may be found in the Uniform Commercial Acts with reference to the transfer of title to a certificate of stock, (Sec. 1 of Act of May 5, 1911, P. L. page 126) to an order bill of lading, (Sec. 34 of Act of June 9th, 1911, P. L. page 838), and to an order warehouse receipt, (Sec. 43 of Act of March 11, 1909, P. L. page 18). Section 16 of the Uniform Bills of Lading Act requires that authority to alter a bill of lading must be written or the alteration is void. Section 9, h, of the Uniform Warehouse Receipts Act requires that one must have written authority from the one to whom the goods are deliverable by the terms of a non-negotiable receipt or the warehouseman is not justified in making delivery.

Section 47, 3d sub-section, of the Uniform Sales Act, as amended in Pennsylvania, Act of May 19, 1915 P. L. 543, 6 Purdon 7480 provides that when a buyer of goods directs or agrees that they be shipped C. O. D., the buyer is not entitled to examine the goods before payment of the price, in the absence of agreement *and proper written authority to the carrier* permitting such examination.

The words printed in italics type are not part of the form Sales Act as drafted by the commissioners on Uniform State Laws.

Section 122 of the Negotiable Instruments Act requires that if the holder of such an instrument would renounce his rights against any party to the instrument, it must be in writing, unless the instrument be delivered up to the person primarily liable thereon.

Certain notices are required to be in writing. For example, a surety in a written promise to pay money at a future time shall not be discharged from liability by reason of notice to the creditor to collect from the principal, unless such notice be in writing and signed by the principal. Act of May 14, 1874, P. L. page 157, 3 Purdon 3661. So too when a lease is for less than one year, or by the month, or for an indeterminate time, if the landlord desires to regain possession, he shall serve a notice in writing. Act of March 31st, 1905, P. L. 87, 6 Purdon 6513.

It will be remembered that the Act of 1856, requiring express trusts of land to be in writing excepted resulting trusts. But by the Act of June 4th, 1901, P. L. page 425, 2 Purdon 1758, it is provided that if a resulting trust arise in land by reason of the payment of the purchase money by one person and the taking of the legal title in the name of another, and the person advancing the purchase money has capacity to contract, the trust shall be void as to bona fide judgment or other creditors or mortgagees of the holder of the legal title or purchasers from him without notice, unless a declaration of trust *in writing* has been executed and acknowledged by the holder of the legal title and recorded in the county

where the land is or unless the one advancing the purchase money has begun an action of ejectment in said county.

The 17th section of the English statute relating to sales of goods was no part of the law of Pennsylvania until the Uniform Sales Act was passed on May 19th, 1915, P. L. page 543, 6 Purdon 7473. The fourth section of the Sales Act provides that, "A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf." The most conspicuous change from the English Statute is, of course, the raising of the amount to which the statute applies from ten pounds to five hundred dollars. But a comparison of the language will disclose five changes in phraseology, all working for greater clearness and amply justified in his discussion of this section of the act by the learned draftsman. See Williston on Sales, pages 59 to 154.

It is not pretended that the foregoing is a complete list of the Pennsylvania statutes because of which the omission of a writing may prove fatal to a party's rights but it has been thought that, as so few of the statutes mentioned are collected in the digests under the title, "Statute of Frauds," it would serve a useful purpose if they were collected and attention called to the fact that they are all statutes enacted with the same purpose in view, namely to render it more difficult to enforce a pretended right by means of false testimony.