

# Statute of Frauds - Necessity of Written Authority for Agent to Sign Land Contracts

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## Recommended Citation

DePaul College of Law, *Statute of Frauds - Necessity of Written Authority for Agent to Sign Land Contracts*, 2 DePaul L. Rev. 296 (1953)  
Available at: <https://via.library.depaul.edu/law-review/vol2/iss2/15>

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While there is valid ground to question the strict construction of the Joint Rights and Obligations Act by the Illinois Supreme Court in the instant case and the resulting defeat of the decedent's intention, the decision nevertheless indicates once more the basic inadequacy of the statute—namely, it recognizes that a joint tenancy can be created but it furnishes no simple procedure for creating such interest.

#### STATUTE OF FRAUDS—NECESSITY OF WRITTEN AUTHORITY FOR AGENT TO SIGN LAND CONTRACTS

Defendant, in writing, appointed an investment broker to act as his agent for the sale of a ranch. The broker secured a customer and with the defendant vendor's approval signed a written contract selling the property to plaintiff. Upon refusal to convey the land, plaintiff brought an action for specific performance, and as a defense, the vendor replied that the Wyoming Statute of Frauds<sup>1</sup> required that "every agreement or contract for the sale of real estate" be "void unless . . . subscribed by the party to be charged therewith." The Supreme Court of Wyoming, in affirming a dismissal of the action on demurrer, held that where a contract is within the Statute of Frauds, an appointment of an agent to sign for one party must be in writing. *Wallis v. Bosler*, 246 P. 2d 771 (Wyo., 1952).

One discrepancy in the case immediately is evident. The "Real Estate Brokers Agency Contract" whereby the vendor appointed his agent appears to have been "s/ Frank C. Bosler, Owner." Other than reprinting the document and referring to it in quotation marks as a "written appointment," the court nowhere considered its effect. If it were in fact signed by the owner, it must be concluded that the document was overlooked in applying the facts to the holding. But as the court ignored the "appointment" it will not be treated in this note.

The Statute of Frauds<sup>2</sup> originally passed by Parliament in 1677<sup>3</sup> provided in Section 4 that:

. . . 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 upon 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

<sup>1</sup> Wyo. Comp. Stat. (1945) c. 5, § 5-101.

<sup>2</sup> 29 Charles II (1677) c. 3, § 4.

<sup>3</sup> Costigan, *Date and Authorship of Statute of Frauds*, 26 Harv. L. Rev. 329 (1913); Hening, *Original Drafts of the Statute of Frauds and Their Authors*, 61 U. of Pa. L. Rev. 282 (1913).

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*.

Similar laws exist in all 48 states<sup>4</sup> although the wording differs slightly in each.

Wyoming's Statute of Frauds is different from the English version in that the italicized phrase has been omitted. This is the only state where this clause, or one requiring "some other person thereunto lawfully authorized in writing" does not appear, and the decision in the principal case hinges on interpreting the legislative intent.

This exact problem has never previously arisen. In those jurisdictions where the local statute expressly requires that the agent be authorized in writing, a contract executed by an agent-acting under parol authority is unenforceable. But where the statute is in the English form, the rule is without exception that oral appointments are valid.<sup>5</sup> The Wyoming Statute of Frauds<sup>6</sup> makes no mention of an agency.

Where a written appointment is unnecessary, the reason is given<sup>7</sup> that unless the statute expressly requires it, the common law of agency prevails and an agency relationship may be established by parol.<sup>8</sup> A Washington case suggested that a contrary holding would be "reading into the statute something that is by no means either clearly or necessarily implied."<sup>9</sup>

On an historical basis, it is questionable whether the original Statute of Frauds was intended to require authority in writing to satisfy the phrase "or some other person thereunto by him lawfully authorized." The original bill<sup>10</sup> introduced in the House of Lords on February 16, 1673, by Lord Keeper Finch,<sup>11</sup> afterwards the Earl of Nottingham, stated only that ". . . all Leases, Estates, Interests or terms of years, of, in, to or out of any Messuages, Manors, Lands, Tenements, or Hereditaments made or created by Parole *and not put into writing by direction of the parties thereunto*, shall have the force and effect of Leases or Estates at will only. . . ." It was referred to a committee of peers where it was smothered, but was re-introduced April 14, 1675, in essentially the same

<sup>4</sup> Md. Const., Declaration of Rights, Art. 5 (1867); 46 States by Statute; New Mexico by decision, *Childers v. Talbott*, 4 N.M. 168, 16 Pac. 275 (1888).

<sup>5</sup> See cases cited 27 A.L.R. 606 (1921).

<sup>6</sup> Wyo. Comp. Stat. (1945) c. 5, § 5-101.

<sup>7</sup> *Brandon v. Pritchett*, 126 Ga. 286, 55 S.E. 241 (1906).

<sup>8</sup> Mechem, *Outlines on Agency*, c. 2, § 24 (4th ed., 1952).

<sup>9</sup> *Peirce v. Wheeler*, 44 Wash. 326, 87 Pac. 361 (1906).

<sup>10</sup> 29 Charles II (1677) c. 3.

<sup>11</sup> *Ash. v. Abdy*, 3 Swans. 663, 36 Eng. Rep. 1014 (1678).

form and sent to a new committee of whom Earl Aylisbury was chairman. Their report, dated April 20, 1675, recommended "After (writing) Leave out (by direction of) and Reade (and Signed by) and Instead of (thereunto) Reade (or their Agents thereunto lawfully authorized by writing)." A few paragraphs later the committee proposed Section 4 of the Statute of Frauds in its present form. Shortly afterwards, Parliament was prorogued and the bill died but was introduced again in October, 1675, and subsequently became law.

It is certain that in England it was never seriously contended that a requirement of written authorization was implied in the phrase "or some other person thereunto by him lawfully authorized," for as early as 1804 Lord Chancellor Eldon<sup>12</sup> summarily dismissed such an argument as violating settled law. The reason for this is that elimination of the "authorized in writing" clause in Section 4 was not "inadvertence" by Parliament but a deliberate intent to distinguish between executed conveyances and executory contracts to convey.<sup>13</sup>

In support of its holding in our *Bosler* case, the Wyoming court relied upon as precedents several cases wherein statutes other than the Statute of Frauds were construed. Particularly it considered those arising from Lord Tenterden's Act<sup>14</sup> which excluded evidence charging a person with misrepresenting the credit, skill or character of another unless it be a writing in the handwriting of or signed by the "party to be charged." Principal cases were similar to *Swift v. Jewsbury*,<sup>15</sup> where banking houses were held not liable for misrepresenting the credit of a person to another bank since their own clerks who wrote and signed the letters were not the parties being charged.

When an identical case arose in America, the court in *Nevada Bank of San Francisco v. Portland National Bank*<sup>16</sup> refused to follow these precedents on the ground that they were not in harmony with the American tendency to "modify the protection the Statute affords to fraud by enforcing a strict construction of its provisions." *Fordyce v. Seaver*<sup>17</sup> indicates that the reason for the English decisions was that the original Statute of Frauds, passed in 1677, contained ". . . or their agents lawfully authorized" while Lord Tenterden's Act of 1828 did not; this was interpreted as being a statutory amendment to the former requiring the

<sup>12</sup> *Coles v. Trecothick*, 9 Ves. 235, 32 Eng. Rep. 592 (1804).

<sup>13</sup> *Murphey v. Brown*, 12 Ariz. 268, 100 Pac. 801 (1909).

<sup>14</sup> 9 George IV (1827) c. 14, § 6.

<sup>15</sup> L. R. 9 Q. B. 301 (1874); *Hirst v. West Riding Union Banking Co.*, 2 K.B. 560 (1901); *Williams v. Mason*, 28 L.T. 232 (1873), where a partner could not bind the partnership; *Clark v. Alexander*, 8 Scott. N.R. 147, 13 L.J.R. 133 (1844); *Hyde v. Johnson*, 2 Bing. N.C. 776, 132 Eng. Rep. 299 (1836).

<sup>16</sup> 59 Fed. 338 (C.C. Ore., 1893).

<sup>17</sup> 74 Ark. 395, 85 S.W. 1126 (1905).

party himself to sign. As the court points out, most American Statutes of Fraud were passed in one enactment, so the English interpretation as to legislative intent is inapplicable here.

The Wyoming court discussed both the above cases but seems to have misconstrued the former into a holding favorable to the vendor in *Wallis v. Bosler*.<sup>18</sup> While it is true that the decision in *Nevada Bank* was based on the rationale that an act by an agent of a corporation is in fact the act of the corporation, its express disapproval of the English precedents certainly does not bear out the claims of the Wyoming court. The comment in the *Fordyce* Case was ignored since it "followed" a case not really in point.<sup>19</sup>

On the other hand, there are a few cases such as *De Raismes v. De Raismes*<sup>20</sup> which are in accord with the English interpretation of "the party to be charged." But two other American cases<sup>21</sup> cited in our present case are in no sense even similar.

Underlying most American decisions interpreting the Statute of Frauds is what could best be termed a frank hostility.<sup>22</sup> While it is unquestionably true that the Statute has succeeded in its purpose of preventing the commission of many frauds, it has also enabled the perpetration of countless others when raised as a merely technical defense going contra to the merits, where a meritorious claim is based on an oral contract, the terms of which are clear.<sup>23</sup> In his work on Contracts,<sup>24</sup> Professor Corbin extensively discusses the Statute of Frauds in an objective manner and concludes that, while repeal is probably unfeasible, its employment should be prohibited unless the defendant swears on oath

<sup>18</sup> 246 P. 2d 771 (Wyo., 1952), at p. 775.

<sup>19</sup> *Wiener v. Whipple*, 53 Wis. 298, 10 N.W. 433 (1881), where the main issue was an application of the parol evidence rule and the statute contained "or his agent duly authorized."

<sup>20</sup> 70 N.J.L. 15, 56 Atl. 170 (1903).

<sup>21</sup> *King v. Knudson*, 209 Iowa 1214, 229 N.W. 839 (1930); *In Re Sleezer's Estate*, 209 Iowa 56, 227 N.W. 644 (1929).

<sup>22</sup> E.g., *Ireton, Should We Abolish the Statute of Frauds?*, 72 U.S.L. Rev. 195 (1938); *Proposed Repeal of Statute of Frauds*, 69 U.S.L. Rev. 11 (1935); *Willis, Statute of Frauds, A Legal Anachronism*, 3 Ind. L.J. 427 and 528 (1928); *Burdick, Statute for Promoting Fraud*, 16 Col. L. Rev. 273 (1916). It has not escaped criticism in England: *Stephen & Pollock, Section Seventeen of the Statute of Frauds*, 1 L. Q. Rev. 1 (1885); *An editorial note, Pollock*, 29 L. Q. Rev. 247 (1913); *Firth, A Doubt on the Statute of Frauds*, 9 L.Q. Rev. 366 (1893).

<sup>23</sup> *In Nevada Bank of San Francisco v. Portland National Bank*, 59 Fed. 338 (C.C. Ore., 1893), defendant bank misrepresented to plaintiff bank that a lumber company was financially secure in order to induce defendant to grant it a loan. The lumber company was insolvent and the loan was for the purpose of repaying a prior debt to defendant.

<sup>24</sup> 2 Corbin, *Contracts* § 275 (1950).

that he did not make the contract.<sup>25</sup> On our particular issue, he states that, "Successful fraud can indeed be consummated by employing a third party to sign as agent and then to testify that he was authorized; but there is more danger in attempting to induce a third party to commit forgery and perjury than in perpetrating those crimes oneself."<sup>26</sup>

Thus *Wallis v. Bosler*,<sup>27</sup> by a broad interpretation where a narrower one would not only have reached a more just result but would still have maintained the essential guarantees against fraud, is one more case added to the multitude where the Statute of Frauds has been converted into a "sword" rather than the "shield" for which it was designed.<sup>28</sup>

### DESCENT—RIGHT OF ILLEGITIMATES TO INHERIT

The deceased Bertha Spencer's illegitimate half brother and the lawful grandchildren of her illegitimate half sister intervened in an effort to recover from Bertha's estate. Their claim was asserted under the Illinois statute which allows illegitimate children to inherit from their mother and all maternal ancestors. The Illinois Supreme Court held that the term "maternal ancestor" meant only lineal ascendants and therefore denied the intervenors' petition. *Spencer v. Burns*, 413 Ill. 240, 108 N.E. 2d 413 (1952).

At common law an illegitimate was without parents, kindred or family and thus did not inherit from anyone; not even his mother.<sup>1</sup>

This common law disability of illegitimates to inherit continued in Illinois until 1829, when, by section 47 of the act relative to wills and testaments,<sup>2</sup> it was provided that the illegitimate child, or children, of an unmarried woman should be deemed capable of inheriting from the estate of his deceased mother.

Then, in 1853, an act was passed which established the rules of descent of all property of any illegitimate person dying intestate by giving the illegitimate's heirs the same rights as those granted to the heirs of a legitimate person.<sup>3</sup>

<sup>25</sup> Code of Iowa (1924) c. 494, § 11288. "The oral evidence of the maker against whom the unwritten contract is sought to be enforced shall be competent to establish the same."

<sup>26</sup> 2 Corbin, Contracts § 525 (1950).

<sup>27</sup> 246 P. 2d 771 (Wyo., 1952).

<sup>28</sup> Lightman, Statute of Frauds, A Sword Instead of A Shield, 74 L.J. 182, 194-5, 205-6 (1932).

<sup>1</sup> *People v. Moczek*, 407 Ill. 373, 95 N.E. 2d 428 (1950); *Murrell v. Industrial Commission*, 291 Ill. 334, 126 N.E. 189 (1920); *Gorden v. Gorden*, 283 Ill. 182, 119 N.E. 312 (1918); *Wallace v. Rappleye*, 103 Ill. 229 (1882); *In re Crapa's Estate*, 344 Ill. App. 503, 101 N.E. 2d 611 (1951).

<sup>2</sup> Ill. Rev. Laws (1829) p. 207, § 47, repealed.

<sup>3</sup> Ill. Laws (1853) p. 255, § 1, repealed.