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Statute of Frauds—NEW REQUIREMENTS FOR ENFORCEABLE PURCHASE AGREEMENTS—*Schwinn v. Griffith*, 303 N.W.2d 258 (Minn. 1981).

Prior to the passage of the English Act for the Prevention of Frauds and Perjuries in 1677, transfers of interests in land were not required to be in writing to be enforceable.¹ Interests in land were transferred by elaborate livery of seisen ceremonies in which a clod of earth was passed from grantor to grantee to symbolize the conveyance.² One account states that villagers would gather as witnesses to memorialize the event. A young man from the nearest village would be forced to view the passing of seisen and be promptly beaten after the ceremony. The beating was supposed to fix the occasion indelibly in the young man's memory.³ Just as the beating etched the memory of the young villager, this tale of punishment vicariously strikes the vision of the ceremony deep into the memory of the law student. The village boys' reluctance to join in the festivities and the increased frequency of land transfers prompted the elders to enact the statute of frauds which would memorialize land transfers by means of a written record rather than a writhing one.

Under the English statute of frauds, both actual conveyances of land and agreements to convey land had to be in writing.⁴ Most American jurisdictions adopted the English statute or a variation thereof.⁵ Even

1. See J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 123 (2d ed. 1975); S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 488 (W. Jaeger 3d ed. 1960); 1 *AMERICAN LAW OF PROPERTY* §§ 1.15, .36 (A.J. Casner ed. 1952).

2. R. MEGARRY & H. WADE, *THE LAW OF REAL PROPERTY* 50 (3d ed. 1966); 1 G. THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* § 34 (1980).

3. See S. WILLISTON, *supra* note 1, § 488.

4. See generally *id.* § 488.

5. See ALA. CODE § 8-9-2 (1975); ALASKA STAT. § 09.25.010 (Supp. 1981); ARIZ. REV. STAT. ANN. § 44-101 (1967); ARK. STAT. ANN. §§ 38-101, -104, -105 (1962); CAL. CIV. CODE § 1624 (West 1973); COLO. REV. STAT. § 38-10-108 (1973); CONN. GEN. STAT. ANN. § 52-550 (West 1958); DEL. CODE ANN. tit. 6, § 2714 (1974); D.C. CODE ENCYCL. § 28-3502 (West 1967); FLA. STAT. ANN. § 725.01 (West Supp. 1981); GA. CODE ANN. § 20-401 (Supp. 1982); HAWAII REV. STAT. § 656-1 (1976 & Supp. 1981); IDAHO CODE § 9-505 (1979); ILL. ANN. STAT. ch. 59, § 2 (Smith-Hurd Supp. 1982); IND. CODE ANN. § 32-2-1-1 (West 1979); IOWA CODE ANN. § 622.32 (West 1946); KAN. STAT. ANN. § 33-105 (1973); KY. REV. STAT. § 371.010 (Supp. 1982); LA. CIV. CODE ANN. art. 2278 (West 1952); ME. REV. STAT. ANN. tit. 33, § 51 (1964); MD. REAL PROP. CODE ANN. §§ 5-103, -104 (1981); MASS. GEN. LAWS ANN. ch. 259, § 1 (West 1959); MICH. COMP. LAWS § 566.106 (1967); MINN. STAT. §§ 513.04, .05 (1982); MISS. CODE ANN. § 15-3-1 (1972); MO. ANN. STAT. § 432.060 (Vernon 1949); MONT. CODES ANN. § 30-11-111 (1981); NEB. REV. STAT. § 36-105 (1978); NEV. REV. STAT. § 111-105 (1979); N.H. REV. STAT. ANN. § 506:1 (1968); N.J. STAT. ANN. § 25:1-2 (1940); N.Y. GEN. OBLIG. LAW §§ 5-703, -705 (McKinney 1978); N.C. GEN. STAT. § 22-2 (1965); N.D. CENT. CODE § 9-06-04 (1975); OHIO REV. CODE ANN. §§ 1335.04, .05 (Page 1979); OKLA. STAT. ANN. tit. 15, § 136 & tit. 16, § 4 (West 1972 & Supp. 1981); OR. REV. STAT. § 41.580 (1979); 33 PA. CONST. STAT. ANN. § 1 (Purdon 1967); R.I. GEN. LAWS §§ 9-1-4, 34-11-1 (1969 & Supp. 1981); S.C. CODE ANN. § 32-3-10 (Law. Co-op. 1976); TENN. CODE ANN. § 29-2-101 (1980);

prior to statehood Minnesota had two statutes of frauds, one pertaining to conveyances⁶ and one pertaining to purchase agreements.⁷ The current Minnesota statute of frauds applicable to purchase agreements⁸ requires that the writing express the consideration supporting the transaction⁹ and that it bear the subscription of the vendor.¹⁰ A vendor's

TEX. STAT. ANN. art. 26.01 (Vernon 1968 & Supp. 1981); UTAH CODE ANN. §§ 25-5-1, -3, -4 (1953); VT. STAT. ANN. tit. 12, § 181 (Supp. 1982); VA. CODE §§ 11-1, -2 (1978); WASH. REV. CODE ANN. § 64.04.010 (1966); W. VA. CODE § 36-1-3 (1966); WIS. STAT. ANN. § 706.02 (West 1981); WYO. STAT. ANN. § 16-1-101 (1977).

Though most states have enacted the statute or a variation, some have merely incorporated it through the adoption of pre-existing common law. New Mexico adopted the English statute of frauds through the common law rather than legislative enactment. *See Coseboom v. Marshall's Trust*, 64 N.M. 170, 326 P.2d 368 (1958). Maryland enacted one sweeping piece of legislation in 1776 under which all laws protecting citizens of the Commonwealth were continued to protect citizens of the state. *See Lewis v. Tapman*, 90 Md. 294, 45 A. 459 (1900).

6. Minn. Rev. Stat. (Terr.) ch. 62, §§ 6, 7 (1851) (current version at MINN. STAT. § 513.04 (1982)).

7. *Id.* §§ 8-9 (current version at MINN. STAT. § 513.05 (1982)).

8. MINN. STAT. § 513.05 (1982) reads:

Every contract for the leasing for a longer period than one year or for the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing and subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing; and no such contract, when made by an agent, shall be entitled to record unless the authority of the agent also be recorded.

The current statute referring to conveyances reads:

No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the parties creating, granting, assigning, surrendering, or declaring the same, or by their lawful agent thereunto authorized by writing. This section shall not affect in any manner the power of a testator in the disposition of his real estate by will; nor prevent any trust from arising or being extinguished by implication or operation of law.

MINN. STAT. § 513.04 (1982).

9. The consideration as stated in the memorandum need not be faultless, but merely representative. The terms and subject matter must be set out only with "reasonable certainty." *Swallow v. Strong*, 83 Minn. 87, 93, 85 N.W. 942, 944 (1901). The Minnesota Supreme Court stated in *Radke v. Brenon*, 271 Minn. 35, 38, 134 N.W.2d 887, 890 (1965), that a purchase agreement which "states expressly or by necessary implication the parties to the contract, the lands involved, and the general terms and conditions upon which the sale will be made" adequately fulfills the statute. The consideration actually paid may differ from that listed in the memorandum if it is not substantially different. *Id.* at 39, 134 N.W.2d at 890.

10. A signature or signing fulfills the subscription requirement. The signature may be written or printed and may be placed anywhere on the memorandum, provided it is made with the apparent intent of authenticating the memorandum. *See* 2 A. CORBIN, CONTRACTS §§ 520-526 (1952); 4 S. WILLISTON, *supra* note 1, § 585; RESTATEMENT (SECOND) OF CONTRACTS § 210 (1979); 34 MINN. L. REV. 277, 278 (1950); 16 MINN. L. REV. 325, 326 (1932). *But see* *Ferguson v. Trovaten*, 94 Minn. 209, 214, 102 N.W. 373, 376 (1905) (printed signature does not constitute subscription or signing within statute of frauds).

agent may fulfill the subscription requirement by signing the agreement.¹¹ Judicial interpretations of the statute of frauds have imposed additional requirements.¹² Because these judicially imposed requirements supplement but do not supplant the statute, they have been tacitly accepted by the legislature.¹³ The public policy which originally supported the creation of the statute of frauds—protection against fraudulent agreements to transfer land—also supports the judicial gloss.¹⁴

In *Schwinn v. Griffith*,¹⁵ the latest Minnesota case interpreting the statute of frauds, the Minnesota Supreme Court held that the purchase agreement must be delivered to the vendee and the vendee must accept the agreement before the agreement becomes enforceable;¹⁶ literal compliance with the statute of frauds is no longer sufficient to create an enforceable purchase agreement.¹⁷

The defendant in *Schwinn* was the successful bidder on a parcel of land

11. MINN. STAT. §§ 513.04, .05 (1982). For text of statutes, see *supra* note 8.

12. The Minnesota Supreme Court has interpreted the statute of frauds to include an adequacy of terms requirement that is not literally required by the statute. See *Greer v. Kooiker*, 312 Minn. 499, 506, 253 N.W.2d 133, 139 (1977); *Radke v. Brenon*, 271 Minn. 35, 38, 134 N.W.2d 887, 890 (1965); *Doyle v. Wohlrabe*, 243 Minn. 107, 110, 66 N.W.2d 757, 761 (1954); *Swallow v. Strong*, 83 Minn. 87, 93, 85 N.W. 942, 944 (1901).

13. This follows from the general rule that the court shall look at the object to be attained when interpreting a statute. See *Mankato Citizens Tel. Co. v. Commissioner of Taxation*, 275 Minn. 107, 145 N.W.2d 313 (1966); *Farmers & Mechanics Sav. Bank of Minneapolis v. Department of Commerce*, 258 Minn. 99, 102 N.W.2d 827 (1960); *County of Hennepin v. County of Houston*, 229 Minn. 418, 39 N.W.2d 858 (1949); *State v. Industrial Tool & Die Works, Inc.*, 220 Minn. 591, 21 N.W.2d 31 (1946).

In addition, the court has held that statutes shall not change the common law and are presumed to be consistent with it. See *Phelps v. Benson*, 252 Minn. 457, 461, 90 N.W.2d 533, 536 (1958); *Application of Shetsky*, 239 Minn. 463, 469, 60 N.W.2d 40, 45 (1953).

Finally, MINN. STAT. § 645.17(4) (1982) provides that “[w]hen a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language.”

14. A classic expression of the policy supporting the statute of frauds was offered in the 1954 case of *Doyle v. Wohlrabe*, 243 Minn. 107, 66 N.W.2d 757 (1954), in which the court stated:

When we recall the historical fact that the statute of frauds was originally enacted simply to prevent the frauds to which transfers of land by parol and livery of seisin lent themselves, we will readily recognize that its basic purpose is only to provide reasonable safeguards to insure honest dealing and that it was not enacted to make a fetish of literal statutory compliance or a fetish of requiring a perfect written contract. That adherence to the strict letter of the statute or perfection in the drafting of written conveyance are not ends in themselves is illustrated by the equitable doctrine that the statute may not be used as an instrument of fraud and that part performance may, in some instances, place the transaction wholly outside the statute.

Id. at 110, 66 N.W.2d at 761; see *Malevich v. Hakola*, 278 N.W.2d 541, 544 (Minn. 1979); *Greer v. Kooiker*, 312 Minn. 499, 505, 253 N.W.2d 133, 138-39 (1977).

15. 303 N.W.2d 258 (1981).

16. *Id.* at 262.

17. *Id.*

which had been offered for sale at an auction.¹⁸ The defendant left the auction grounds before the auction was finished but left a signed blank earnest-money check with his daughter who had accompanied him. The plaintiff, who was the conservator of the estate to which the land belonged, and the auctioneer prepared and signed a purchase agreement after the auction but refused the defendant's check pending his signature on the agreement.¹⁹ The defendant subsequently refused to sign the agreement or pay the earnest money. The plaintiff sued for specific performance of the purchase agreement. The trial court interpreted the statute of frauds to require that the writing be signed by the party to be charged. Since the defendant had not signed the agreement, the trial court dismissed the complaint.²⁰

Although the *Schwinn* court did not set forth rules delineating adequate delivery and acceptance of a purchase agreement, it held that the acceptance and signing of the agreement by an auctioneer was sufficient to bind a purchaser.²¹ The supposition is that the vendor and vendee reached an agreement when the parcel of land was offered at the auction and the vendee, the highest bidder, offered to purchase the land. A memorandum prepared later by the vendor and auctioneer merely formalized the bargain and insured that the agreement would fulfill the requirements of the statute of frauds. The memorandum evidenced the agreement already made; it did not represent an agreement between the vendor and the auctioneer to defraud the vendee.²² The vendee's participation occurred at the time of the bidding and not at the time of the signing of the written agreement.²³ The vendee could have abandoned the transaction at any time before the written memorandum was signed by the auctioneer, because prior to that time the contract was avoidable.²⁴ A repudiation by the vendee after the memorandum was signed constituted a breach of contract.²⁵

The twist in *Schwinn* was that the writing, which both parties agreed

18. *Id.* at 260.

19. *Id.*

20. *Id.*

21. *Id.* at 263.

22. *See id.* at 262.

23. *See id.*

24. *Id.* The Minnesota Supreme Court has interpreted "void" in MINN. STAT. § 513.05 (1982) to mean voidable. In a 1951 case involving a personal services contract in violation of the statute of frauds, the court stated that "it is not morally wrong to make or keep an oral agreement that falls within the statute of frauds, nor is there any statute which forbids entering such a contract." *Borchardt v. Kulick*, 234 Minn. 308, 316, 48 N.W.2d 318, 324 (1951). The agreement, however, can be avoided and cannot be enforced. It is not that no contract ever comes into being, the traditional meaning of "void." *See also Greer v. Kooiker*, 312 Minn. 499, 505, 253 N.W.2d 133, 138 (1977); *Royal Realty Co. v. Levin*, 244 Minn. 288, 294, 69 N.W.2d 667, 672 (1955). Of course if the contract fully complies with the statute of frauds, once it is signed it is binding.

25. 303 N.W.2d at 262.

fulfilled the statute's requirements, was a memorandum of sale that merely memorialized a parol agreement to purchase the property offered for bid at the auction.²⁶ At an auction, the auctioneer acts as the agent of the vendor while auctioning the merchandise or property.²⁷ When the auctioneer signs the purchase agreements after the auctioning is complete, he then acts as the agent of the purchaser.²⁸ If the *Schwinn* case had not involved an auction the agreement would not have been enforced because the vendee had not accepted delivery of the written purchase agreement.²⁹ When the auctioneer signed the purchase agreement, however, he was acting as the agent of the purchaser and thereby bound him to the agreement.

Prior to *Schwinn* the Minnesota court consistently held that in non-auction settings, purchase agreements or memoranda of sale which met the requirements of the statute of frauds would be enforceable against either the vendor or the vendee.³⁰ The lone exception to the literal requirement of the statute of frauds arose in 1891, when the Minnesota

26. *Id.* In a case to recover damage on an uncompleted auction sale of land, the New Jersey Supreme Court held that a memorandum of purchase prepared by an unsuccessful bidder prior to the auction and subsequently altered to identify the successful bidder was not sufficient to comply with statute of frauds. *Borough of Lodi v. Fravi Realty Co.*, 4 N.J. 28, 33, 71 A.2d 333, 335 (1950).

27. *Romani v. Harris*, 255 Md. 389, 395, 258 A.2d 187, 190 (1969); *Wilcher v. McGuire*, 537 S.W.2d 844, 847 (Mo. App. Ct. 1976); *Dinuba Farmers' Union Packing Co. v. J.M. Anderson Grocer Co.*, 193 Mo. App. 236, 238, 182 S.W. 1036, 1038 (1916); *Borough of Lodi v. Fravi Realty Co.*, 4 N.J. 28, 32, 71 A.2d 333, 335 (1950); *Polka v. May*, 383 Pa. 80, 83, 118 A.2d 154, 156 (1955); 4 S. WILLISTON, *supra* note 1, § 588; RESTATEMENT OF CONTRACTS § 212 (1932).

28. 303 N.W.2d at 262. *But see* *Couture v. Lowery*, 122 Vt. 239, 168 A.2d 295 (1961). In *Couture*, an auction case, the vendors plead the Vermont statute of frauds as an affirmative defense to an action for the specific performance of a land contract. The vendors and the vendee had a parol agreement for the sale and purchase of a parcel of land. The memorandum of purchase was not signed by the vendors but was signed by the auctioneer. The vendors and the auctioneer had no written agency agreement, therefore the auctioneer was not properly authorized to act in the vendors' behalf. The *Couture* court interpreted the Vermont statute requiring subscription "by the party by whom the sale is to be made, or by his lawful agent thereunto authorized in writing," to require that there be a written agency agreement between the vendor and the auctioneer. *Id.* at 244, 168 A.2d at 298. The *Schwinn* court reached the same conclusion, requiring the auctioneer's agency agreement with the vendor to be of record. 303 N.W.2d at 262 n.7 (citing MINN. STAT. § 513.05 (1982)). However, the auctioneer's agency agreement with the vendee is not required to be in writing. *Id.*

In North Dakota an auctioneer's memo satisfies the statute of frauds as to both vendor and vendee. N.D. CENT. CODE §§ 3-05-02, 9-06-06 (1975).

29. 303 N.W.2d at 262.

30. *See* *Radke v. Brenon*, 271 Minn. 35, 134 N.W.2d 887 (1965) (vendee enforcing contract against vendor); *Miracle Constr. Co. v. Miller*, 251 Minn. 320, 87 N.W.2d 665 (1958) (same); *Colstad v. Levine*, 243 Minn. 279, 67 N.W.2d 648 (1954) (same); *Doyle v. Wohlrahe*, 243 Minn. 107, 66 N.W.2d 757 (1954) (same); *Krohn v. Dustin*, 142 Minn. 304, 172 N.W. 213 (1919) (same); *Gregory Co. v. Shapiro*, 125 Minn. 81, 145 N.W. 791 (1914) (vendor enforcing contract against vendee); *Wilson v. Hoy*, 120 Minn. 451, 139 N.W. 817

Supreme Court in *Yeager v. Kelsey*³¹ held that purchase agreements must be signed by both the vendor and the vendee.³² Neither the language of the 1891 statute³³ or the present statute³⁴ contains such a requirement. *Yeager* was considered an aberration and was overruled in *Western Lands Association v. Banks*³⁵ which, until *Schwinn*, was the leading case on the statute of frauds requirements for enforceable purchase agreements. While *Schwinn* does not embrace *Yeager's* terms, it implicitly assumes its rationale. More recent opinions in Minnesota and elsewhere have pondered the problem addressed in *Yeager*: If compliance with the statute of frauds affords a vendor the privilege of enforcing an agreement against a silent vendee, the protection provided a vendee under the statute is negligible.³⁶ Courts in some jurisdictions have faced this problem squarely by demanding compliance not only with the literal requirements of the statute of frauds, but also with other requirements: That the vendor must deliver the purchase agreement to the vendee and the vendee must accept delivery.³⁷ These additional requirements evidence the vendee's willingness to be bound by the agreement and assure the mutuality of the contract.³⁸

By establishing delivery and acceptance as additional requirements of the statute of frauds, the *Schwinn* decision assures mutuality and a greater degree of fairness in the execution of purchase agreements in Minnesota. Even a young villager would welcome this painless and equitable addition to the statute.

(1913) (same); *Murray v. Nickerson*, 90 Minn. 197, 95 N.W. 898 (1903) (vendee enforcing contract against vendor).

31. 46 Minn. 402, 49 N.W. 199 (1891).

32. *See id.* at 403, 49 N.W. at 199.

33. 1887 Minn. Gen. Laws ch. 41.

34. *See supra* note 8.

35. 80 Minn. 317, 322, 83 N.W. 192, 194 (1900).

36. *See Pierce v. Clarke*, 71 Minn. 114, 121, 73 N.W. 522, 523 (1898) (no action shall be brought upon contracts unless they are in writing and signed by party to be charged); *see also Greer v. Kooiker*, 312 Minn. 499, 505-06, 253 N.W.2d 133, 139 (1977) (memorandum of sale and purchase of real estate setting out bases for terms of sale to be later formalized in formal contract which was signed by vendees and vendors satisfied statute of frauds). *But see Malevich v. Hakola*, 278 N.W.2d 541, 544 (Minn. 1979) (vendor must sign contract for sale of land where vendees able to supply a description of real estate in his acceptance otherwise opportunity for fraud created especially when vendor intends to sell only part of tract); *cf. Peterson v. New England Furniture & Carpet Co.*, 210 Minn. 449, 453, 299 N.W. 208, 210 (1941) (agreement for purchase of stock by corporation from stockholders not enforceable where letter signed by officers of corporation specifying that purchase would be made at future date was not signed by stockholders so as to evidence their agreement to sell).

37. *See Equitable Life Assurance Soc'y v. Meuth*, 145 Ky. 160, 140 S.W. 157 (1911); *Dinuba Farmers' Union Packing Co. v. J.M. Anderson Grocer Co.*, 193 Mo. App. 236, 182 S.W. 1036 (1916); *Cohen v. Wolgel*, 107 Misc. 505, 176 N.Y.S. 764 (N.Y. Sup. Ct. 1919), *aff'd*, 191 A.D. 883, 180 N.Y.S. 933 (1920).

Wisconsin statutorily requires delivery. WIS. STAT. ANN. § 706.02(q) (West 1981).

38. *See 2 A. CORBIN, supra* note 10, § 510; 4 S. WILLISTON, *supra* note 1, § 579A.