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Charles J. Turck
University of Kentucky

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AN ALTERED MEMORANDUM UNDER THE STATUTE OF FRAUDS

The effectiveness of an alteration in a written instrument, authorized by the parties, depends on the kind of written instrument that is altered. It may be an instrument under seal, a contract or a memorandum of a contract that falls within the Statute of Frauds or some other agreement, which the parties have put in writing for the sake of convenience or definiteness but which they were not required by law to write. In two of these cases, the law as to alterations in the instrument is fairly clear. In the third class, those within the Statute of Frauds, there is a division of opinion among law writers and among the courts.

In the case of sealed instruments, the validity of the alteration must be tested first by the time at which it is made. If it is made before the deed is delivered, the deed will speak as of the time of delivery and in the form that it possesses at that time. The party who authorized the alteration, whether by parol or not, would be estopped to set up the fact that the altered portions were not in the deed when he affixed his seal.¹

If the alteration is made after the deed is delivered, the rule applies that any authorization to affect a sealed instrument must be conferred by an instrument of equal dignity, and hence the alteration will be ineffective, unless the authority has also been created by an instrument under seal.² A new delivery of

¹ *Johnson v. Northern Minnesota Land & Investment Co.*, 188 Iowa 340, 150 N. W. 596 (1915).

Wicker v. Jones, 159 N. C. 102, 74 S. E. 801, 40 L. R. A. (N. S.) 69 (1912).

² *Waldron v. Waller*, 65 W. Va. 605, 64 S. E. 964, 32 L. R. A. (N. S.) 284 (1909); *Hoelle v. Sherwood*, 148 U. S. 21, 37 L. Ed. 351 (1893); *Humphreys v. Guillow*, 13 N. H. 385, 38 Am. Dec. 499 (1843). There is some authority for the proposition that even in the case of a sealed instrument, an alteration made therein after execution by consent of both parties will be effective. *Campbell v. Roe*, 9 N. C. 33, 11 Am. Dec. 738 (1882). *Cribben v. Deal*, 21 Ore. 211, 27 Pac. 1046 (1891). In *Hunt v. Nance*, 122 Ky. 274, 92 S. W. 6 (1906), an interlineation made by consent in a deed after acknowledgment and delivery but before recordation was held binding between the parties. See also *Respass v. Vone*, 102 N. C. 5, 8 S. E. 770 (1889).

the deed after the alteration is made will bring into play the operation of estoppel again, and the deed will speak as of the time of its last delivery and in the form it then has.³ It is assumed here and throughout this article that the alteration is actually authorized and the parties are not in ignorance of the change.

In the absence of a new delivery, subsequent alterations of a sealed instrument authorized by the parties will be effective only if the authorization to make the change is created by a sealed instrument. How far such an alteration will vitiate the original sealed agreement and how far equity will reform the deed in accordance with the actual agreement of the parties are questions dependent for answer on the extent to which a particular court has departed from the old rule that an alteration not legally authorized avoids the document.

In the case of contracts which are not sealed and not within the Statute of Frauds, any authorized alteration in writing is effective. The contract is binding in its altered, not in its original, form. Parol evidence may be received to show the circumstances of the alteration and the authorization to make it. An oral authorization to make the change is sufficient, and there need be no new signing of the writing nor any initials attached to the alteration.⁴

We turn now to the difficult, middle class of cases, those that fall within the Statute of Frauds. Let us assume that a memorandum to satisfy the statute has been duly made in writing and signed by the parties. Subsequently, an alteration is desired by both parties. The most prudent course would be the execution

³*Moelle v. Sherwood*, 148 U. S. 21, 37 L. Ed. 351 (1893); *Huffman v. Hatcher*, 178 Ky. 8, 198 S. W. 236 (1917); *Abbott v. Abbott*, 139 Ill. 488, 59 N. E. 958 (1901); *Baker v. Baker*, 239 Ill. 82, 37 N. E. 868 (1909). In *Eadie v. Chambers*, 172 Fed. 73, 24 L. R. A. (N. S.) 879 (1909), the Circuit Court of Appeals held that a deed is not invalidated by its alteration by consent of the parties, if it is redelivered, but on appeal, sub. nom. *Waskey v. Chambers*, 224 U. S. 564, 56 L. Ed. 885, the Supreme Court held that the deed was not valid, because "it never had but one witness, two being necessary to authorize the recording of a deed, and the only acknowledgment was before the alteration." The court did not refer to the redelivery of the deed.

⁴*Phillips v. Grips*, 108 Iowa 605, 79 N. W. 373 (1899); *Barrett v. Effenberg*, 29 Okla. 679, 119 Pac. 135 (1911); *Canon v. Grigsby*, 116 Ill. 151, 6 N. E. 362 (1886); *Taddiken v. Cantrell*, 69 N. W. 597, 25 Am. Rep. 253 (1877).

of a new memorandum, with a new signing by the parties. But the alteration may be a minor one, or there may be no counsellor of prudence to advise the safe course. How far will the courts recognize an alteration in the memorandum that does not have attached to it a new signature by the parties?

Professor Williston, in his great work on Contracts, vol. 3, sec. 1895, holds that as regards contracts within the Statute of Frauds, "the signature of the obligor attached to the original writing does not authenticate the changes." The implication is that the alteration must be signed in some fashion by the party to be charged.

The argument in support of this position is that "similar reasoning is applicable to alterations in an unsealed writing, made by the obligee under authority from the obligor, if the law requires a contract of the kind which has been altered to be in writing signed by the promisor," as in the case of alterations in a sealed instrument. But it would seem that there may be cogent reasons why the same principle should not apply to the two kinds of instruments. Oral authority to execute a memorandum within the Statute of Frauds is sufficient,⁵ while oral authority to execute a deed is not effective.⁶ Oral authority to sign or initial an alteration in the memorandum within the Statute of Frauds would likewise be valid, but such authority to initial a change in a deed would be futile. May it not be argued that the alteration which has been orally authorized by both parties may be effective in a memorandum under the statute without a new signing, although in a deed it would not be effective? Should not the altered memorandum under the Statute of Frauds be assimilated to other altered writings rather than with the instrument of superior legal dignity, the agreement under seal?

On the other hand, the fact remains that the altered portion of the memorandum has never been signed by the party to be charged. The original signature is there; can it by any

⁵ *Talbott v. Bowen*, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747 (1819); *Curtis v. Blair*, 26 Miss. 309, 59 Am. Dec. 257 (1853); *Despatch Line of Pockets v. Bellamy Mfg. Co.*, 112 N. H. 205, 37 Am. Dec. 203 (1841); *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330 (1851); *Black-nail v. Parish*, 59 N. C. 70, 78 Am. Dec. 239 (1860).

⁶ *Jackson v. Murray*, 5 T. B. Mon. (Ky.) 184, 17 Am. Dec. 53 (1827); *Graham v. Holt*, 25 N. C. 300, 40 Am. Dec. 408 (1843) *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330 (1851).

theory of adoption or estoppel be regarded as authenticating the alteration? Again we turn to the cases of deeds. A change in a deed which has been orally authorized will be recognized, provided there has been a subsequent delivery of the deed in its altered form.⁷ No new signing is required. Such redelivery alone operates as a ratification of the prior changes. It may well be argued that the redelivery is required because of the peculiar rule in the law of sealed instruments that an undelivered deed is wholly ineffective. The altered portions, but for the redelivery, would never have been "delivered" at all. But in the case of the memorandum under the Statute of Frauds, no delivery is required in the first place. The altered deed is good without a resigning, provided that there is a redelivery since delivery is required in the case of deeds. Why should not the altered memorandum to be good without a resigning, and without a redelivery since no delivery is ever required of such a memorandum?

It may be answered again that the redelivery of the deed operates as a ratification of the alteration, and not merely as a satisfaction of the special rule in the case of sealed instruments requiring delivery. But this at once suggests that where no special form of ratification is required, any words or conduct may constitute the ratifying act. No special form of authorization is required under the Statute of Frauds, and hence any kind of ratifying words or conduct would do.

If, therefore, the oral authorization of the change in the memorandum is deemed insufficient, the altered memorandum may still be saved and made effective by virtue of some conduct on the part of the promisor indicating his approval of the change.

In this connection, it should be noted that Professor Williston in discussing ratification at sec. 1896 of his work on Contracts excepts cases where the doctrine of the sealed instrument or the Statute of Frauds applies. It is difficult to assent to this exception so far as the Statute of Frauds is concerned. The doctrine of redelivery takes care of the cases of altered sealed instruments, but the cases of an altered memorandum under the

⁷See cases cited in note 3.

Statute of Frauds are apparently left without judicial help, Professor Williston rejecting the idea of a parol authorization or a parol ratification or adoption of a change in the memorandum.

Turning to the cases cited by Professor Williston in sec. 1895, we find first *Upton v. Archer*,⁸ a case of an altered deed, in which the court said that the alteration, "could not be performed by an agent, in the absence of the plaintiff, unless his authority was in writing. . . . The cases come within the sixth section of the Statute of Frauds." But the California Statute of Frauds expressly provides that the signature must be by the party or "his lawful agent thereunto authorized by writing," and the court applied this requirement to the matter of the alteration as well as to the fact of signature. If the Statute of Frauds requires that the original authorization must be in writing, it is clear that the authorization to make a change must be in writing.

But if the original memorandum may be drawn and signed pursuant to oral authority, why not the alteration? And if the memorandum is not physically resigned after the change but is accepted by both parties as binding, is there not a valid ratification or adoption of the original signature as authenticating the revised memorandum?

The next case cited by Professor Williston is *Ingram v. Little*,⁹ which, however, he notes has been twice overruled, by *Brown v. Colquitt*,¹⁰ and *Smith v. Farmers Mutual Insurance Association*.¹¹ The Ingram case, like the Upton case, concerned an altered deed, and applied the rule that such a deed could not have any legal operation where the alteration was made by one "unauthorized by an instrument under seal." Even on this question where the reasons for requiring a sealed authority are clearer than in the case of a memorandum within the Statute of Frauds, the ruling in the Ingram case is disapproved in *Brown v. Colquitt, supra*, the court saying: "A deed may be signed, sealed and delivered by a person under instructions by parol, if

⁸ 41 Cal. 85, 10 Am. Rep. 266 (1871).

⁹ 14 Ga. 173, 58 Am. Dec. 549 (1853).

¹⁰ 73 Ga. 59, 54 Am. Rep. 867 (1884).

¹¹ 111 Ga. 737, 36 S. E. 957 (1900).

the grantor be present at the time, and it will be good to pass title, because the law considers, under such circumstances, the act of the agent to be the act of the principal; if it is done at his instance and under his direction, it is his act. Why an act done by an agent under the direction and by the instruction of a person who is not present, when he is not present, is not the act of such person so directing the act to be done, it is not easy to perceive; it is as much his act in the one case as in the other."

Without discussing this disputed point further than to repeat that a redelivery of an altered deed removes the difficulty created by a change made without authority given under seal, we may say that the question whether or not alterations in a memorandum within the Statute of Frauds can be effective without a new signature is easier of solution. In the Smith case, *supra*, the court states the issue as follows: "Blanks in a written instrument may be filled in by parol authority. . . . Does the rule just referred to apply in a case where the contract evidenced by the writing is valid only when it is in writing?" The case involved an alteration in an insurance contract made by an agent after the insurance company had signed the policy. The policy was required by law to be in writing, and the court's conclusion was that "it was erroneous to hold that the policy was invalid because Brown did not have written authority to fill the blanks and deliver the same."

Professor Williston's citation of authorities concludes as follows: "But see *Bluck*¹² v. *Gompertz*; *Winslow v. Jones*."¹³ Turning to these cases we find that the courts which decided them are flatly opposed to the idea that there must be a physical signing again of the altered instrument. In *Bluck v. Gompertz*, *supra*, a written guarantee was altered after both parties had signed it to correct a clerical error, signed again by the plaintiff but not by the defendant. The defendant had written in the alteration, however, and hence there was no doubt as to its being authorized and approved by him as well as by the plaintiff. In answer to the argument that the altered memorandum had not been signed by the defendant, the court said: "It may be inferred, from the fact of the second memorandum being writ-

¹² 7 Ex. 862 (1853).

¹³ 88 Ala. 496, 7 So. 262 (1890).

ten on the same paper by the defendant, that it was meant to be authenticated by the old signature, so as to constitute a memorandum of the defendant's agreement in writing signed by the defendant. If so, the Statute of Frauds has been complied with, and, although we have not come to this conclusion without some difficulty and doubt still remaining on the mind of my brother Parke, we think this is the true view of the case."

In *Winslow v. Jones, supra*, a mortgage of personal property was required by statute to be in writing and subscribed by the mortgagor. The parties had duly executed a mortgage, but later by mutual agreement but without any new signing a part of the property listed in the original mortgage was stricken out and other property substituted by interlineation. The court refused to recognize the failure to sign the altered document as fatal, holding that "a resubscription would be a mere formal and useless ceremony."

The Court of Appeals of Kentucky in the case of *Pontrich v. Neimann*¹⁴ has recently had to decide this exceedingly difficult issue. A written lease for two years was duly signed and executed by both parties. About the time when the new lease was to expire, the tenant asked for a renewal and the landlord offered to renew for ten years, which the tenant accepted. On the face of the old contract, just above the signature of the parties, these words were written, "Extended ten years from September 21, 1925." There was no new signing by the parties, but they called in two neighbors who signed the writing opposite the original signatures of the parties. It was thus clear beyond doubt that the alteration extending the lease ten years was the act of both parties, and the only question was whether their conduct satisfied the Statute of Frauds. In holding that it did, the Court of Appeals, speaking through Sampson, J., says: "It is a general rule that a party may adopt any mark, character, or name as his signature to the instrument, and, if he does, he is bound as effectively as if he had written his full name thereto. The signature to a writing is placed there for the purpose of authenticating it, and for the purpose and with the intent of the signer becoming and being bound thereby. Such a signature, one purposely made by the party on a previous occasion, may be adopted

¹⁴ 208 Ky. 715, 271 S. W. 1049 (1925).

for a new writing then made, with the same effect as if made anew. This is a sufficient compliance with the requirements of the Statute of Frauds."

It is submitted that the position taken by the court is entirely logical and sound. It gives effect to the contract of the parties made under circumstances which prove beyond doubt that the change was authorized by both parties. A new signing would have been "a useless formality." The original signature, coupled with the circumstances attending the alteration, constitutes an effective signing of the change within the Statute of Frauds.

Three objections may be suggested. First, it may be said that similar reasoning would permit subsequent alterations to be made in wills without a new attestation. But this objection overlooks the basic distinction between the Statute of Frauds and the requirement of attestation in the case of wills.

An oral contract within the Statute of Frauds is nevertheless a contract; it is unenforceable because of a defect in the proof necessary to hold the party to be charged. But a will, not executed according to the statutory requirements, is no will at all. Compliance with the statutory provisions as to wills is vital. Hence in the case of wills it is held that alterations in a will made after its execution are not effective without a new attestation;¹⁵ otherwise, the subject matter of the alteration would be probated and control the descent and distribution of the decedent's property in spite of the fact that it does not conform to the statutory requirements for such instruments. But the contract has legal existence quite apart from its form, whether oral or written, and the alteration has a legal existence, whether signed or not. It may not be enforceable because the proof required as to signing is defective. It would be entirely consistent to permit oral testimony to supply this defect in the case of an altered memorandum under the Statute of Frauds and to reject such evidence when in effect it would control the distribution of a decedent's property in direct conflict with the original provisions of a solemnly executed will.

¹⁵ *Hesterberg v. Clark*, 166 Ill. 241, 46 N. E. 734 (1897); *Pacholder v. Rosenheim*, 129 Md. 455, 99 Atl. 672 (1916); *In Re Knapp*, 75 Vt. 146, 53 Atl. 1003 (1905).

In this connection, it is important to note that when the will is holographic, being wholly written and signed by the testator, it has been held that alterations which he has written into the will become part of the will without a resigning by him. In *LaRue v. Lee*¹⁶ the court held that the alterations without a resigning would be effective "so long as the signature of the testator remains in such manner as to make it manifest that it is intended as a signature. . . . To say that the whole must be rewritten and again signed by testator is simply to say that which is neither reasonable nor practicable." The same principle would dispense with a new signing of the memorandum within the Statute of Frauds which has been altered.

A second objection is that in the case of the altered contract we have a new contract not executed according to the form of the statute. In the *Pontrich v. Neimann* case, we have a new lease, never actually signed by the parties. The memorandum as altered is a ten year bargain, while the original agreement signed by the parties called for only a two years' lease. Undoubtedly, an oral renewal of the lease for ten years would be worthless.¹⁷

In *Cincinnati N. C. & T. P. Ry. Co. v. Depot Lunch Room*,¹⁸ a renewal of a five year lease by verbal assurances and the acceptance of rent was held to be invalid under the Statute of Frauds. Referring to this case, Judge Sampson in *Pontrich v. Neimann, supra*, properly distinguished the two cases in these words:

¹⁶ 63 W. Va. 388, 60 S. E. 388, 14 L. R. A. (N. S.) 968 (1908).

¹⁷ *Simons v. New Britain Trust Co.*, 80 Conn. 263, 67 Atl. 883 (1907); *Salem Lodge No. 70, K. P. v. Smith*, 94 W. Va. 718, 120 S. E. 895 (1924). The extremely interesting question whether an agreement in the original lease to renew is to be treated like an agreement to extend and if so whether an oral notice of extension will suffice is beyond the scope of this article. It is generally held that where the written lease expressly provides for its extension for an additional term at the option of the lessee, he need not give notice in writing; oral notice will do. *Sheppard v. Rosenkraus*, 109 Wis. 58, 85 N. W. 199 (1901); *Remm v. Landon*, 43 Ind App. 91, 86 N. E. 973 (1909). In Kentucky, the distinction between an agreement to renew and an agreement to extend is recognized, but recent cases have indicated a willingness on the part of the court to sustain an oral extension, if the agreement can be construed as an extension. See *Kozy Theater Co. v. Love*, 191 Ky. 595, 231 S. W. 249 (1921), and *Klein v. Auto Parcel Delivery Co.*, 192 Ky. 583, 234 S. W. 213 (1921).

¹⁸ 190 Ky. 121, 226 S. W. 387 (1920).

“The facts are very different. No question of adoption of old signature was presented by the Depot Lunch Room case. In fact there was no renewal of the lease contract. . . . He (the lessee) claimed no writing, signed or otherwise, giving him a right to remain in the premises after the end of the 5-year term.”

A somewhat similar problem arose in the case of *Commonwealth v. Hinson*.¹⁹ A surety executed a six months' bond for a policeman whose appointment ran for six months. At the expiration of the term, the surety orally promised for a valuable consideration that the bond should cover another six months. The court held that the bond of the surety could not be enforced by one injured during the second six months, on the ground that the promise of the surety for that period was not in writing. However, in that case, it did not appear that the extension of time had been written into the original bond; and if that extension of time had been written into the original bond, it is hardly probable that the defendant surety would have been permitted to escape liability merely because he had not signed the bond again.

The objection that the effect of unsigned alterations, if given legal validity, will be to create contracts, that lie within the Statute of Frauds and that do not satisfy its terms overlooks the theory on which such agreements are to be upheld. There is a signing. The conduct of the parties in accepting the altered memorandum is an adoption of the original signature. A re-tracing of the old signatures would be effective. A recognition of them by placing the alteration over them and accepting it as binding is equally effective.

A third objection is that there will be no limit to the extent to which interlineations, erasures and alterations on written documents will be carried, if mere parol proof will satisfy the statute. The objection is a serious one. On the other hand the tendency of modern law in the direction of less formal, transactional requirements is a recognition that parol proof in general is likely to be as credible as formal writings, and that as much injustice under the forms of law is due to an over-emphasis on formal requirements inadvertently omitted as is due to per-jure dtestimony. There seems to be no conclusive answer to a

¹⁹ 143 Ky. 428, 136 S. W. 912 (1911).

rigid insistence on formal written requirements; in every case the surrender of the form opens the door to false testimony as to the transaction. But on the whole, in spite of the difficulties and uncertainty of proof, it is not to be doubted that an inquiry into the real intent of the parties is productive of larger good than the outworn insistence on a mere form. In the case of a memorandum duly signed by the parties to be charged and thereafter altered by consent and not resigned, the rights of the parties can be better tested by parol proof proving an adoption of the old signature than by the single inquiry whether a new signing took place. The Court of Appeals of Kentucky, in accepting this view in *Pontrich v. Neimann*, has made a signal contribution to the position that the Statute of Frauds must always be interpreted to prevent rather than to perpetrate a fraud.

CHARLES J. TURCK.

University of Kentucky,
College of Law.