Sales - The Authority to Sign for Another in Conveying Immovable Property

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such inquiry, the defendant should be precluded from claiming
good faith under the error of law. The result would thus be
that she was in "moral," but not "legal," good faith and thereby
prevented from acquiring the property by the ten-year acquisi-
tive prescription.

In view of the established jurisprudence the case seems un-
sound, and it should not be indicative of a change of rule, since
the issue of good faith apparently was not litigated or brought
to the attention of the court. It is submitted that a person at-
ttempting to purchase immovable property from a woman should
have a duty to determine the marital status of the woman and
her ability to alienate such property. Failing to make an ap-
propriate investigation into the matter, the purchaser would be
precluded from invoking his good faith under a plea of ten-year
acquisitive prescription.

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SALES—THE AUTHORITY TO SIGN FOR ANOTHER IN CONVEYING
IMMOVABLE PROPERTY

The Louisiana Civil Code requires transfers of immovable
property to be in writing, and prohibits the introduction of parol/
evidence to vary the terms of a written conveyance or to prove
an oral sale of real estate. The sole exception to this rule is that
an oral conveyance of immovables may be proved by confession
under oath in answer to interrogatories, but only if there has
been actual delivery.

Under the French Civil Code parol evidence is admissible
to prove a sale if there is written evidence, emanating from the
person against whom the claim is made, which makes probable
the facts alleged. French doctrine declares the following writ-
ings to be among those sufficient to form a basis for "beginning
of proof": books of commerce; domestic papers; letters, whether
addressed to the person who is beginning the proof or to a third
person; and written declarations. The Louisiana Civil Code of 1808 contained a similar provision, but it was not included in the later codes, and an early case held that the doctrine of “beginning of proof” was no longer the law of Louisiana.

The manifest purpose of the requirement of a writing is to diminish the chance of fraud. The writing serves as evidence of the transfer of the immovable and it is elementary that in order for an authentic act to be valid and admissible in evidence, it must be signed by parties to the transfer. Regarding acts under private signature a different rule applies. It is not necessary that the purchaser sign a deed in order to show an acceptance of the purchase. The going into possession by the purchaser of land shows an acceptance of the deed and removes the need for his signature. Although an act of sale may not qualify as an authentic act through some defect in form, it is still valid between the parties as a private writing, if signed by the parties.

Since an authentic act is valid and admissible in evidence only if signed by the parties, the question arises what will constitute a party’s signature. The courts have consistently held that a person’s mark, when established by legal evidence, is a sufficient substitute for his signature for every purpose except an olographic will. The typical mark substituted for a person’s

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5. Patterson v. Bloss, 4 La. 374 (1832).
6. Baker v. Baker, 125 La. 969, 52 So. 115 (1910); Dick v. Maxwell, 6 Mart. (N.S.) 396 (La. 1828) (unsigned partnership project; an incomplete instrument not signed by the parties is inadmissible in evidence); Lombard v. Guillette and Wife, 11 Mart. (O.S.) 453 (La. 1822) (party named in a notarial act but who did not sign was not bound).
8. LA. CIVIL CODE art. 2235 (1870); Hood v. Segrest, 12 Rob. 210 (La. 1845).
In Zacharie the United States Supreme Court quoted the following language, which is taken from the earlier Louisiana case of Tagiasco v. Molinari’s Heirs, 9 La. 512, 519 (1836): “The force and effect to be given to instruments which have for signatures only the ordinary marks of the parties to them, depend more upon rules of evidence than the dicta of law, relating to the validity of contracts required to be made in writing: the genuineness of instruments under private signature, depends on proof. And in all cases, when they are established by legal evidence, instruments signed by the ordinary mark of a person incapable of writing his own name, ought to be held as written evidence.”

The Agurs case presented the interesting situation where one Willie Johnson, who was unable to write his name, appeared before a notary and two witnesses to execute an act of sale. The notary inadvertently wrote the name Willie Jones,
written signature is an “X” which is placed between the person’s given name and surname. Literate persons have been allowed to use their mark instead of their signature when physically disabled in some way.¹⁰

The question arises whether a person can confer authority on another to sign for him as his agent, and, if so, in what instances. Can a person confer authority on an agent to sign a written instrument transferring immovable property, if the authority to sign is not given by a written agreement? It is well settled that an enforceable agency or power of attorney to sell immovables must be in writing.¹¹ However, creating an agency to sell immovables differs from giving an agent the authority to sign an authentic act or written instrument transferring an immovable. The primary difference between an agency to sell and an agency to sign an instrument in the conveyance of real estate is that in the former the agent handles the negotiations with the vendee, whereas in the latter the agent merely affixes his principal’s signature to the written transaction. Article 2234 of the Civil Code states in part that “the authentic act, as relates to contracts, is that which has been executed before a notary public or other officer authorized to execute such functions, in presence of two witnesses, aged at least fourteen years, or of three witnesses, if a party be blind. If a party does not know how to sign, the notary must cause him to affix his mark to the instrument.” (Emphasis added.) Literally interpreted, article 2234 apparently does not apply to an individual physically unable to sign his name or make a mark. Thus it seems that an afflicted individual would not be precluded from creating a valid verbal agency to sign by article 2234. However, due to the lack of jurisprudence and Johnson inserted his “X” between his given name and the incorrect surname.

¹⁰. See Waggoner v. Grant Parish Police Jury, 203 La. 1071, 14 So. 2d 855 (1943), where some of the persons whose marks appeared on the petition were sick or so afflicted that they could not sign at the time the petition was presented to them.

in this area, it is unclear whether a vendor, either afflicted or illiterate, can create a valid agency to sign an instrument transferring immovable property. The Supreme Court first encountered the problem of the legal effect of a person's signature made by another in a transaction involving immovables in the well-known case *Meyer v. King.*

The question arose whether King's son could validly bind his father by signing his father's name, with his father's consent, to a counter-letter. Objection was made on the ground that the authority to sign such a document can be proved only by a written act. The court held that the authority to sign another's name to a single act, if done by order of, and in the presence of the principal, need not be in writing. It should be noted that the *Meyer* case dealt mainly with the signing of a counter-letter and an authentic act was not at issue.

The remainder of the cases permitting a verbal agency to sign for another deal with movable property. *In re Deshotels Estate* was concerned with the validity of the administrator's acknowledgment of a succession debt. In sustaining the acknowledgment the court held that although the administrator was illiterate and did not actually place his mark on the document, "the facts and circumstances surrounding the entire matter, however, satisfy us that he either touched the pen, when the mark was made, or that it was made in his presence, with his knowledge, consent, and approval, either of which we think sufficient. The touching of the pen is a mere symbolic act, serving no other purpose than to show consent to the making of the mark. It is sufficient, when it appears that the mark was made in the presence of the party whose signature it purports to be, with his knowledge and consent." (Emphasis added.)

*Coats v. Guaranty Bank & Trust Co.* followed the *Deshotels* reasoning in holding that an agency to transfer negotiable instruments need not be in writing. The court declared that "where a person's name is signed for him at his direction and in his

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13. Id. at 570. The court also stated in dictum that "the counter-letter was not the mandate, but the act signed for, in presence and under the instructions of the parent. That authority was delegated for only one object, was not to be exercised out of the interested parties' presence, lasted the space of time required to write a name, and expired when the last letter of the principal's name fell from the agent's pen. In such a case, the act itself is the act of the principal, not of the agent." Ibid.
15. Id. at 1097, 97 So. at 204.
16. 174 La. 503, 141 So. 41 (1932).
presence by another, the signature becomes his own, and is sufficient to give the same validity to an instrument as though written by the person himself.”17

Another significant decision on signatures made by an agent for another was rendered by the Supreme Court in Waggoner v. Grant Parish Police Jury18 in which a petition calling for a local-option election was under attack. The court, relying heavily on the Meyer case, had little hesitancy in holding that “the signatures written on the petition by the hand of another in the presence and at the direction of the voters in this case have the same validity as though written by the voters themselves.”19 In further justification of its position the court stated that “a signature may also be made for a person by the hand of another, acting in his presence, and at his direction, request, or acquiescence, unless a statute provides otherwise, and has the same validity as though written by the person himself.”20 The position taken by the court in the Coats and Waggoner cases has continued to be followed in recent decisions.21

The recent case of Elmore v. Butler22 presented the res nova question whether the alleged vendor could create a valid oral agency to sign an instrument transferring immovable property. Plaintiffs attacked the sale on the grounds that the notary signed the authentic act for the alleged vendor without such authority being given to the notary by a written agreement. Additionally, plaintiffs contended that requiring the alleged vendor to sign by affixing his usual mark, if he knew not how to sign his name, would have been the only alternative to an actual signature by the vendor in the absence of a written agreement conferring authority upon the notary as agent to sign for him. The Second Circuit, relying on the prior jurisprudence which deals mainly, if not exclusively, with movables, held that “the signature of Elmore affixed to a deed by a notary, where the

17. Id. at 509, 141 So. at 43.
18. 203 La. 1071, 14 So. 2d 855 (1943).
19. Id. at 1081, 14 So. 2d at 858.
20. Ibid.
22. 169 So. 2d 717 (La. App. 2d Cir. 1964). In Elmore the authentic act of sale was executed some thirty-seven years before the case was brought to trial, and the vendor’s signature was admittedly forged by the notary public before whom the act was passed. The only living member of the group shown to have accompanied the vendor to the office of the notary and who testified that she saw the deed executed was a party defendant to the suit.
former was present authorizing, aiding and consenting, became the signature of the vendor and the deed thus effectively conveyed the property in question. 23

It appears that plaintiff's contention that the vendor must actually sign the authentic act or place his mark on the document is supported by article 2234 of the Louisiana Civil Code, which says that "if a party does not know how to sign, the notary must cause him to affix his mark to the instrument." (Emphasis added.) A valid argument could be made that the sanctity of the requirement of a writing in transferring immovable property should not be violated by allowing a person to confer authority on an agent to sign a deed or document transferring immovable property unless such authority is given in writing. After all, this would conform with the requirement of article 2275 which says that every transfer of immovable property must be in writing. One can easily see the problems which might arise if the holding of the Elmore case were to be extended to the point where an agent could sign for his principal outside of the principal's presence. The possibility of fraud in such a case is self-evident. Anyone could claim he was the agent of the owner of real estate and thus transfer the owner's property to a third party without the owner's consent. Fortunately, such an extension of the agency to sign has not been permitted by the courts. In all the cases where an agency to sign has been granted, the principal was present when the agent did the signing.

It is submitted that the Elmore decision is basically sound if limited to instances in which the disabled principal is present when the agent signs for him. Practical considerations favor the view that if the disabled principal is present, his signature or mark may be validly affixed by another at his direction. A contrary rule would deprive a person unable to sign his name or affix his mark of the capacity to act when a writing is required. Hence, the affixing of his mark should and does suffice. Since there is hardly any way to determine whether a mark was made by one person or another, it should make no difference that the mark is affixed by another for the disabled principal. The formality of having the party touch the pen is meaningless and the rule which dispenses with this insignificant gesture commends itself to reason. Yet it should not be extended to the

23. Id. at 721.
NOTES

case where the person to be bound is not physically present when the act is performed for him. The necessities of the situation do not demand a further relaxation of the requirement of a written signature.

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SUCCESIONS — PRESCRIPTION OF ACTION FOR COLLATION

In a recently decided case the Louisiana Supreme Court purported to put to rest the undecided issue of the prescriptive period applicable to a demand for collation. Whether the court’s pronouncement that the demand prescribed in ten years from the donor’s death can be considered conclusive authority is clouded by the context in which the issue was joined. This uncertainty, together with the prior confusion surrounding the proper classification of collation for prescription, especially warrants a close examination of the decision in light of prior jurisprudence and pertinent statutory provisions.

No Louisiana statute specifically governs prescription of the action for collation, but, arguably, any one of the provisions for five, ten, or thirty years could be applied. Civil Code article 3542 provides that actions to reduce excessive donations prescribe in five years. Under article 3544 “all personal actions,” not previously provided for specifically, prescribe in ten years. As long as heirs hold a succession in common, the action by any one of them to partition the succession remains imprescriptible under article 1304. If, however, one heir has separately and continuously possessed all or a portion of the succession adversely for thirty years, the other heirs are barred from demanding a partition of the property so possessed. Authorities

2. In Naudon v. Mauvezin, 194 La. 739, 194 So. 766 (1940) an action for collation was held prescribed in five years under Civil Code article 3542, but this holding was apparently overruled sub silentio in Himel v. Connely, 195 La. 769, 197 So. 424 (1940). See notes 4-8 infra and accompanying text.
3. LA. CIV. CODE art. 1305 (1870): “When one of the heirs has enjoyed the whole or part of the succession separately, or all the coheirs have possessed separately each a portion of the hereditary effects, he or they who have thus separately possessed, can successfully oppose the suit for a partition of the effects of the succession, if their possession has continued thirty years without interruption.”
Id. art. 1306: “If there be but one of the heirs who has separately enjoyed a portion of the effects of the succession during thirty years, and all the other heirs have possessed the residue of the effects of the succession in common, the