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He should be the best citizen because he is trained in citizenship. He has spent years in the study of the country's laws and institutions. He knows the reason for these laws, he knows what will make for right and betterment as well as what will tear down and destroy. He is trained to recognize the good from the evil and to see the reason for the difference.

The lawyer should be the best citizen because his education has fitted him for citizenship. He should be the best citizen because he is qualified to render the greatest services to the state. He should be the best citizen because it is the lawyer who mounts the bench to judge of differences between the people, because the safety of the people depends on the integrity of its judges.

Today the people lack confidence in the bench. This is primarily because they lack confidence in the bar.

Every lawyer, and all lawyers regarded collectively, should bend their energies to this end, that the people should look up to, respect, trust, lean upon their profession. They should strive to bring about the day when the mere fact that a judge sprang from the legal profession will be a guaranty of his sterling integrity and ability.

They should strive for the day when the people should point to its lawyers as its model citizens.

When that day comes political and social problems will be very near solution. But will it ever come? Will a race of lawyers appear who are unanimous in preferring probity to pelf?

IMPLIED POWERS OF AGENT FOR SALE OF LAND

By FLOYD R. MECHEM

WHAT HERE INCLUDED—It will be borne in mind that the question here to be considered is not in what form or in what manner authority to sell land may be conferred, e. g., whether it must be by writing or may be by word or act, but whether an authority properly created and unquestionably existing for some purpose will include this one; whether authority unquestionably relating in some form to land confers authority to sell it, and whether an authority clearly authorizing a sale of land confers authority to do some other act relating to it.

So far as form is concerned, it will be recalled that parol authorization ordinarily suffices for a mere broker; usually but not universally written authority is requisite for a binding contract to sell; while authority under seal is usually requisite for the execution of instruments necessarily under seal, as usually in the case of deeds of conveyance of land.

Sec. 2. — AUTHORITY TO SELL RATHER THAN MERELY TO FIND A PURCHASER—MERE BROKER NO AUTHORITY TO MAKE A BINDING CONTRACT.—It is to be noted also that the case here contemplated is that in which the agent is really authorized to *sell* and not merely employed to find a purchaser to whom the principal may sell. The distinction is one of consequence because one employed as a mere real estate broker to "sell" land, even though employed by writing, is usually held to have no power to make a binding contract, but is confined to the finding of a person ready, willing and able to buy from the principal on the terms proposed by him. The cases taking this view proceed upon the theory that the character of the undertaking of the real estate broker is well known, and presumptively his employment, though by writing, is in his capacity as a negotiator merely and not as an agent to close a contract in writing.

Sec. 3. — BUT AUTHORITY TO MAKE A BINDING CONTRACT MAY BE FOUND TO EXIST.—But even if it be conceded that the mere employment of a real estate broker does not confer upon him the power to make a binding contract, it is still true that the language employed or the circumstances of the case

may be such as to show that such a power was intended. Of course a mere request to "list" property, a mere request to endeavor to find a purchaser, mere inquiries as to the possibility of a sale, the mere stating of terms upon which the owner would be willing to sell, and the like, will not of themselves constitute an authority to sell. It is, however, entirely clear that the correspondence or negotiations between the parties may be such as to create the authority to make a binding contract to sell. It is not necessary that any particular phraseology be used, or that the authorization be in any formal terms. The question is, does the language used sufficiently indicate that the party is authorized to close a binding contract of sale? This may be merely a question of the construction of the words used, or it may be an inference of fact as to intention to be decided like other similar questions. Naturally enough as in other similar cases different courts may draw different inferences from substantially similar facts, and many instances are to be found of apparently irreconcilable conclusions although the courts purported to apply the same principles. It is not to be denied, however, that there are some cases in which the courts have proceeded upon wholly irreconcilable theories and of course have reached conflicting results. Thus in a few cases express authority to sell even though all the terms were specified, has been held to be a mere authority to "sell" as a broker, that is, to find a purchaser but not to close a binding contract with him.

In all cases of this sort in which written authority is requisite to justify a contract of sale, the person dealing with the agent, is, in contemplation of law, charged with knowledge of that fact and deals with the agent's credentials before him. These agents, moreover, are usually special agents and their authority is to be deemed to be strictly limited to that which is either expressly given or necessarily implied.

Sec. 4. MERE PRELIMINARY CORRESPONDENCE OR NEGOTIATION NOT ENOUGH TO CONFER AUTHORITY.—It is obvious also that before the questions here suggested can be determined, the authority intended to

be conferred must be completely agreed upon and vested. If, therefore, the dealings between the principal and the agent have not passed beyond the stage of preliminary correspondence, if the terms upon which the authority is to be executed or the property sold are not yet fully determined, if further communications are to be had with the principal or further assent given before the authority is to be exercised, and the like, there can ordinarily be no present authority to sell in such wise as to bind the principal.

Sec. 5. **CONDITIONAL AUTHORITY.**—The authority may of course, be a qualified or conditional one. As long as the conditions or limitations are lawful, there is no reason why the principal may not limit or qualify the authority to any extent which suits his pleasure. Such limitations or conditions, unless waived, will be operative against the agent and also against third persons who have, or are charged with, notice of them. The authority may thus be limited as to time, price, subject matter, terms, and the like, and many illustrations of such limitations will be found in the following sections. It may also require the principal's approval before a particular execution shall be deemed authorized.

Sec. 6. **AUTHORITY TO SELL LAND NOT ORDINARILY TO BE INFERRED FROM MERE GENERAL AUTHORITY TO ACT.**—Authority to sell real estate must ordinarily be conferred in clear and direct language; for, although there are cases in which it may arise by implication, it is not lightly to be inferred from express power to do other acts or brought within the operation of mere general terms. A power of attorney, therefore, "to act in all my business, in all concerns, as if I were present, and to stand good in law, in all my land and other business," gives no power to sell land; nor does a power "to ask, demand, recover or receive the maker's lawful share of a decedent's estate, giving and granting to his said attorney his sole and full power and authority to take, pursue and follow such legal course for the recovery, receiving and obtaining the same as he himself might or could do were he personally present; and upon the receipt thereof, acquittances and other sufficient discharges for him and in his name to sign, seal and deliver;" nor does a power "to make contracts, to settle outstanding debts and generally to do all things that concern my interest in any way real or personal, whatsoever, giving my said attorney full power to use my name to release others or bind myself, as he may deem proper and expedient;" nor does a power "to attend to the business of the principal generally," or "to act for him with reference to all his business;" nor does authority to locate and survey land; nor does a power to sell "claims" and "effects."

Sec. 7. —. But where A wrote to C "I wish you to manage (my property) as you would with your own. If a good opportunity offers to sell everything I have, I would be glad to sell. It may be parties will come into San Antonio, who will be glad to purchase my gas stock and real estate," it was held that C was thereby authorized to contract for the sale of the real estate, but not to convey it. So authority to "use" land to enable the donee of the power to extricate himself from his financial embarrassments, was held to authorize a sale or a mortgage of the land. A power "to do any lawful act for and in my name as if I were present" was held to authorize a sale and conveyance of land.

Sec. 8. **WHAT MAY BE SOLD.**—In order that the agent may lawfully sell any particular parcel of real estate it is essential that that parcel be included within the language of the power either expressly

or by clear implication. It is sometimes said that the land must be described in the power with the same certainty which would be required in the conveyance itself; and, though this may perhaps be too strict a rule, it certainly is requisite that the instruments conferring the authority shall show with reasonable certainty not only what lands are to be the subject matter of the power but also what interests or estates therein are to be sold. A number of illustrations, more or less consistent, of the actual holdings of the courts are appended.

A power of attorney authorizing the agent "to bargain, sell, grant, release and convey, and upon such sales, convenient and proper deeds with such covenants as to my said attorney shall seem expedient, in due form of law, as deed or deeds, to make, seal, deliver and acknowledge," although it is silent as to what the agent is to sell and convey, clearly contemplates a sale of lands and is sufficiently broad to authorize the agent to sell and convey whatever estate the principal then had.

So a power of attorney in due form, authorizing the agent "to sell, bargain and convey three certain lots of land in the village of Pentwater belonging to me," but containing no other or further description, is sufficient where the principal had three such lots and only three in that village; but an authority "to convey a piece of land in Colebrook belonging to the Bank," there being more than one such piece is too indefinite.

An authority to sell all the lands which the principal may own, or all which he may own and lying within a certain territory, is good without a more specific description. And an authority to sell any or the whole of the principal's "property" and to execute all necessary instruments authorizes the sale of his real estate. Where the lands are sufficiently described, the fact that the principal apparently intended to add a more specific description but failed to do so, will not defeat the power.

Sec. 9. —. A power of attorney authorizing an agent to sell "the one-half" of a lot of land, without specifying which half, or whether in common or in severalty, empowers him to sell one-half in severalty and to exercise his own discretion as to which half.

Where an agent is authorized to sell all the land of his principal which the latter had not previously conveyed, he may convey what the principal had previously sold but not conveyed; and under a general authority to sell any of his principal's real estate he may sell that which the principal subsequently acquires, especially where the power expressly refers to lands which the principal "does or may" own. But where the power clearly contemplated the inauguration of a business and authorized the agent to "buy and sell" lands, it was held that the power to sell was to be limited to lands bought under it. And, clearly, where the power is limited to land which the principal owns or is interested in at the time of the execution of the power, a conveyance of subsequently acquired land is not authorized.

Sec. 10. **WHEN AUTHORITY TO BE EXERCISED.**—When a definite time is fixed by the clear language of the power, any sale after that time will be inoperative unless the principal waives the limitation or ratifies the sale. An authority to sell lands at a given sum, if they can be sold "immediately," will not authorize a sale at that price a month afterwards, without any further authority; nor can an agent empowered to sell real estate at a given price, without further instructions, sell it a considerable time later at the same price when the land has greatly

increased in value. An authority to an agent to sell real estate within "a short time" will authorize a sale made within two weeks, even though in the meantime the property has enhanced in value.

Sec. 11. WHAT EXECUTION AUTHORIZED.—An agent authorized to make the purchase price payable "in three years," has no implied authority to make it payable "on or before three years."

So authority to sell real estate in "lots as surveyed by" a person named, does not empower the agent to sell the whole tract for a gross sum or at so much per acre. And an authority to sell lands for \$5,000, one-half cash, does not authorize an agreement to sell for \$5,000, \$2,000 cash, \$2,300 in three weeks and the balance on time; nor does an authority to sell on time with interest on deferred payments authorize a sale for cash; neither does an authority to make a sale of lands for a certain amount authorize a sale in which part of the purchase price is to be paid in cash and part on deferred payments, the vendor to furnish an abstract of title and pay taxes and interest thereafter accruing; so an authority to sell at auction does not authorize a private sale; nor an authority to sell to one person authorize a sale to an entirely different person. Further an authority to sell for one price does not authorize a sale for a less amount; or an authority to sell, the vendee to pay the mortgages does not authorize a sale, the vendee to "assume" the mortgages unless they are not yet due.

Sec. 12. ———. But where an agent is authorized to sell partly for cash and partly on time, a sale with more than one-third cash and the balance in three and five years with 6 per cent interest, and secured by a mortgage is within the terms of the authority; or where the authority is to sell, the payments to be made in three equal installments, a clause providing that if the installments are not paid at the time specified the contract shall be forfeited at the option of the seller is within the authority; or when the agent is authorized to convey land including a town site, he may sell a lot and make the conveyance by metes and bounds; also where he is authorized to make "one-half payment on or before one year" a contract to sell for "one-half payable on or before one year" a contract to sell for "one-half payable in one year" is within the terms of the authorization; and where the authority is to sell for \$15,000, about one-half cash, a sale for \$15,000 cash is within the terms of the authority.

Under a power to convey when the sale has been made by certain other persons, a conveyance can only effectively be made when those persons have made the sale.

Sec. 13. AUTHORITY TO MAKE REPRESENTATIONS AS TO VALUE, QUANTITY, LOCATION, BOUNDARIES OR TITLE.—An agent authorized merely to sell land has thereby, ordinarily, no implied power to bind his principal by representations concerning the value of the land; the same thing is ordinarily true concerning representations as to the quantity, or quality of the land, though such representations, while not furnishing ground for action against the principal, might be sufficient to justify a rescission of the contract. Representations as to location may be within the scope of such an agent's authority as being either necessary or usual, and the same thing may be true respecting boundaries. In a case of the latter sort it was said: "In the sale or exchange of a tract of land, it is usual and necessary that the seller point out to the prospective buyer the boundaries of the tract—that he exhibit the thing he offers for sale to the view and inspection of the prospective buyer."

Representations respecting title, other than the usual covenants of warranty, heretofore referred to, or waivers of the principal's claim of title are not usually within the power of an agent merely authorized to sell.

Sec. 14. AUTHORITY TO MAKE CONTRACT OF SALE JUSTIFIES CONTRACT IN USUAL FORM.—An authority to make a binding contract for the sale of land will, where there is nothing to indicate a contrary intention, carry with it by implication the authority to make the contract in the usual form and to include within it all usual and reasonable terms and provisions to accomplish the desired end. Thus the common provisions in well drawn contracts of this nature respecting remedies, time and place of performance, the effect of failure to perform, and the like, would doubtless be deemed authorized under this rule.

Sec. 15. AUTHORITY TO SELL AND DISPOSE OF LAND IMPLIES RIGHT TO CONVEY.—Unless there be something in the instrument or in the circumstances surrounding its execution by which its scope is limited, as to the mere finding of a purchaser or the negotiation of a contract of sale, a general power to sell real estate if executed with the necessary formalities, carries with it the power to execute all the instruments necessary to complete the sale and carry it into effect. Said Chief Justice Shaw, "where the term 'sale' is used in its ordinary sense, and the general tenor and effect of the instrument is to confer on the attorney a power to dispose of real estate, the authority to execute the proper instruments required by law to carry such sale into effect is necessarily incident."

It is, of course, true in many cases, that an oral or written authority may be sufficient to justify a written contract to sell, although it would not be sufficient in form, as for example because of the lack of a seal, to authorize the execution of a deed.

Sec. 16. TO INSERT USUAL COVENANTS OF WARRANTY.—Although the decisions are not entirely harmonious, the better rule seems to be that a general power to sell and convey land carries with it authority to insert in the conveyance the ordinary covenants of general warranty where such sales are usually made with such covenants, but not to make any unusual or special warranty as of the quantity or quality of the land sold. *A fortiori* may the agent warrant where he is expressly authorized to sell on such terms as he shall deem most eligible.

The fact that the agent inserts an unauthorized warranty will not ordinarily prevent the deed from having effect as a conveyance.

Sec. 17. AUTHORITY TO SELL DOES NOT JUSTIFY A MORTGAGE.—A power to sell, however, conveys no implied authority to mortgage. Said Judge Cooley, "The principal determines for himself what authority he will confer upon his agent, and there can be no implication from his authorizing a sale of his lands that he intends that his agent may, at discretion, charge him with the responsibilities and duties of a mortgagor."

Sec. 18. AUTHORITY TO RECEIVE PAYMENT.—The receipt of so much of the purchase money as is to be paid down, is within the general scope of an authority to sell and convey, or to make a binding contract to sell upon terms including a payment at the time of the execution of the contract, but is held not to be within the power of an agent authorized merely by parol to contract for the sale. Mere authority to receive the immediate payment will not, however, warrant the receipt of subsequent payments. But an agent authorized to contract for the sale with the price to be paid in installments, and upon payment

of the installments to execute the conveyance, has implied power to receive the installments.

When authorized to receive payment he must, like other agents similarly empowered, accept cash only or its equivalent, and he has no implied power to receive in payment notes, checks, or other similar tokens, and *a fortiori* not notes given by himself for which the principal is not responsible. Authority to receive such payments as are to be made as incidents of the sale does not justify the receipt of payments before any sale is entered into, and, obviously, does not justify the receipt of payments upon a contract which the agent had no authority to make.

Sec. 19. CONVEYANCE MUST BE FOR CONSIDERATION MOVING TO PRINCIPAL.—An agent authorized to sell and convey land will, unless the contrary appears, be deemed authorized to convey it only upon a sale; that is, upon a transfer for a consideration, and for a consideration which moves to the principal. The land presumptively represents value and if the agent conveys it, he must be expected to obtain something like a substantial equivalent.

Sec. 20. AUTHORITY TO GIVE CREDIT.—The power to sell land does not of itself imply an authority to sell on credit. The presumption is that the sale is to be for cash. But where the agent is authorized to sell "on such terms as to him shall seem meet" he may grant a reasonable credit. An authority to sell on credit, but not fixing the time to be given, implies a power to grant a reasonable time.

Sec. 21. AUTHORITY TO SELL DOES NOT AUTHORIZE EXCHANGE OR BARTER.—Neither will a power to sell and convey land, imply an authority to barter or exchange it for other property, or to take the pay in merchandise. It is presumed, in the absence of anything showing a contrary intent, that the land is to be sold only, and sold for cash.

Sec. 22. OR GIFT.—*A fortiori* has the agent no authority to give the land away or to convey it without any consideration moving to the principal.

Sec. 23. AUTHORITY TO SELL DOES NOT AUTHORIZE OPTION TO BUY.—An agent with authority to sell, has thereby, no implied authority to give an option to buy. Such option, will, during its term, prevent a sale to any other person, and a sale to the one holding the option will not be insured.

Sec. 24. DOES NOT AUTHORIZE WASTE OR SALE OF TIMBER SEPARATE FROM LAND.—An agent or attorney who has power only to bargain and sell land subject to confirmation, has no authority to license anyone to enter thereon and commit waste or cut timber, nor has he power to sell the timber distinct from the land.

Sec. 25. DOES NOT AUTHORIZE CHANGING BOUNDARIES OF LAND.—Nor has an agent authorized to sell or rent real estate any implied power to agree with an adjoining land owner upon a change of the boundaries of the principal's land.

Sec. 26. DOES NOT AUTHORIZE PARTITION.—Authority to sell and convey land does not authorize a partition of the land in which the principal has an interest as tenant in common.

Sec. 27. DOES NOT AUTHORIZE DEDICATION TO PUBLIC USE.—Mere authority to sell and convey land does not imply power to dedicate any part of it to the public use, but a power "to sell, convey, plat and subdivide in such manner as to make the property marketable and to acknowledge and record such plat" implies a power to dedicate such portion as may be necessary to the public use. So a power to lay out land in order to dispose of it, implies authority to dedicate the necessary highways, and authority to purchase a town site and lay it out,

implies power to dedicate proper and appropriate streets.

Sec. 28. AUTHORITY TO SELL DOES NOT AUTHORIZE CONVEYANCE TO PAY PRINCIPAL'S DEBTS, OR ASSIGNMENT FOR CREDITORS.—The power to sell land does not authorize a conveyance in settlement of a pre-existing claim against the principal, nor an assignment for the benefit of creditors. But where the authority was to sell the land and pay the proceeds to the principal's creditor, it was held that a conveyance directly to the creditor was within the terms of the power.

Sec. 29. NOR CONVEYANCE IN PAYMENT OF AGENT'S DEBTS.—An agent authorized to sell and convey real estate can do so only for and in behalf of his principal. He may not convey it in trust for the payment of his own debts; nor can he make the conveyance directly, for the payment of his own debt, or the joint debt of himself and one of his principals.

Sec. 30. NOR CONVEYANCE IN TRUST FOR SUPPORT OF PRINCIPAL'S CHILD.—A wife was authorized to sell or mortgage land as agent of her husband. It was held that a conveyance in trust for the support of their infant daughter was not within the authority given by the power. Neither can she convey it in satisfaction of advances made to her by their son.

Sec. 31. NO IMPLIED POWER TO REVOKE OR ALTER CONTRACT.—An agent authorized to make a contract for the sale of land exhausts his power with the completion of that contract; and has thereafter no implied power to revoke or rescind it, or to release the purchaser from its obligations. So an agent who has made a contract to sell and received a part payment thereon, has no implied power to return the money because he is erroneously led to believe that the principal's title was imperfect.

Such an agent will, moreover, have ordinarily no power to change or alter the completed contract or to substitute another in its place, though his authority over the subject matter may be sufficiently comprehensive to justify it.

Sec. 32. NO IMPLIED POWER TO DISCHARGE MORTGAGE.—An agent authorized merely to sell land has therefrom no implied power to release or discharge mortgages belonging to his principal; but an agent having general authority to deal in land, may bind his principal by the assumption of a mortgage as part of the purchase price.

Sec. 33. NO IMPLIED POWER TO INVEST PROCEEDS.—A power of attorney authorizing the agent to take possession of and sell all the property of his principal, and collect his debts, does not authorize the agent to re-invest the funds of his principal or to engage therewith in any schemes of speculation, however tempting.—(*Michigan Law Rev.*)

Is your Article in
for our
New Contest?