

# Liability of Corporations Where Statute Requires Agent's Authority To Be in Writing

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## Recommended Citation

Donovan, Andrew P. (1948) "Liability of Corporations Where Statute Requires Agent's Authority To Be in Writing," *St. John's Law Review*: Vol. 23 : No. 1 , Article 5.  
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol23/iss1/5>

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Co.,<sup>47</sup> upon which the lower court relied. “. . . we believe the settlor evidenced her intention to give a remainder to her next of kin because she (1) made a full and formal disposition of the principal of the trust property, (2) made no reservation of a power to grant or assign an interest in the property during her lifetime, (3) surrendered all control over the trust property except the power to make testamentary disposition thereof and the right to appoint a substitute trustee, and (4) made no provision for the return of any part of the principal to herself during her lifetime.”<sup>48</sup>

The *Richardson* case now gives rise to perplexity as to the course which the courts may follow hereafter. The policy of liberalizing revocations and the realistic approach seem to have been abandoned. Certainly the atmosphere is shrouded in doubt and heavy and dark clouds once more hang over *Doctor v. Hughes*. Clarification is indicated, if not imperative. There is no comfort to be found in the recently enacted Article 79 of the Civil Practice Act which merely defines procedural methods to be followed in trust accountings.<sup>49</sup> The remedy would lie in retroactive statutory enactments and should receive the closest consideration of the New York State Law Revision Commission.

DANIEL M. SHIENTAG.

#### LIABILITY OF CORPORATIONS WHERE STATUTE REQUIRES AGENT'S AUTHORITY TO BE IN WRITING

A majority of jurisdictions in the United States have Statutes of Frauds which require an agent's authority to be in writing under certain circumstances.<sup>1</sup> There is considerable variation as to the situations which require written authority on the part of the agent; some statutes require such authority in all situations wherein the Statute of Frauds applies,<sup>2</sup> while others make no provision that the agent's

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<sup>47</sup> See note 34 *supra*.

<sup>48</sup> 120 N. Y. L. J. 411 (Ct. of App. Sept. 13, 1948).

<sup>49</sup> N. Y. CIV. PRAC. ACT §§ 1307-1319. But see Ninth Annual Report of the Judicial Council, 1943 LEG. DOC. NO. 20, pp. 311-312.

<sup>1</sup> Typical of these statutes are CAL. CIV. CODE § 2309 (1937); DEL. REV. CODE § 3106 (1935); ILL. REV. STAT., c. 59, § 2 (1943); KAN. GEN. STAT. ANN. § 106 (1935); N. J. REV. STAT. §§ 25:1-1, 25:1-2 (1937); PA. STAT. ANN., tit. 33, § 1 (1936); TEX. STAT. REV. CIV., art. 1288 (1936); VT. PUB. LAWS § 1675 (1933).

<sup>2</sup> A typical statute is CAL. CIV. CODE § 2309 (1937): "An authorization is sufficient for any purpose, except that an authority to enter into a contract required to be in writing can only be given by an instrument in writing."

authority be in writing under any circumstances.<sup>3</sup> Still others demand written authority only in specified real property cases.<sup>4</sup> What might be regarded as typical provisions are the New York statutes:

An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, can not be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, *or by his lawful agent thereunto authorized by writing.*<sup>5</sup> (Italics ours.)

A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void, unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, *or by his lawful agent thereunto authorized in writing.*<sup>6</sup> (Italics ours.)

This type of provision, clear on its face, in most instances has occasioned no difficulty in construction. A definite problem has arisen, however, in applying such a provision to corporations; since by their very nature, corporations can act only through the agency of human beings. It therefore follows that a relationship of principal and agent will often exist. While it has been generally recognized that the agency clause in the Statute of Frauds applies to the acts of corporations as well as individuals,<sup>7</sup> difficulty has arisen in determining the precise manner of application where corporate officials are involved.

<sup>3</sup> See CONN. GEN. STAT. §§ 5982, 5983 (1930); MASS. ANN. LAWS, c. 259, §§ 1-6 (1933).

<sup>4</sup> See N. Y. REAL PROP. LAW §§ 242, 259, quoted in text, *infra* p. —.

<sup>5</sup> N. Y. REAL PROP. LAW § 242.

<sup>6</sup> N. Y. REAL PROP. LAW § 259. The provision requiring the agent's authority to be in writing was added by Laws of 1934, c. 750. The old statute read: "A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void, unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the lessor or grantor, or by his lawfully authorized agent."

It is interesting to note that N. Y. REAL PROP. LAW § 259-a does not require the agent's authority to be in writing: "A contract to devise real property or establish a trust of real property, or any interest therein or right with reference thereto, is void unless the contract or some note or memorandum thereof is in writing and subscribed by the party to be charged therewith, or by his lawfully authorized agent."

Prior to the change in Section 259 in 1934, the problem of whether the agent's authority had to be in writing did not arise. See *Brune v. Vom Lehn*, 112 Misc. 342, 183 N. Y. Supp. 360 (Sup. Ct. 1920), *aff'd mem.*, 196 App. Div. 907, 187 N. Y. Supp. 928 (2d Dep't 1921).

<sup>7</sup> See Note, 37 C. J. S. Frauds, Statute of, § 207, n. 79, 80 (1943).

The general rule would appear to be that an act of an executive corporate officer, required to be in writing by a Statute of Frauds, need not be authorized in writing.<sup>8</sup> The application of this general rule might lead to another problem, namely, that of determining just which corporate officials are to be included in the categorical term "executive officers." Because of the magnitude of corporate business, corporations have found it necessary to elect a considerable number of officials in order to distribute the managerial work efficiently. The Home Title Guaranty Company, for example, has one president, five vice-presidents, one treasurer, one secretary, one assistant vice-president, six assistant secretaries, and one assistant treasurer. Assuming that all of these officials had contracted for the sale of land on behalf of the corporation, it would be a difficult problem to determine which of them would fall into the "executive officer" category so as to warrant the application of the general rule. In dealing with such instances, courts have held that for the purposes of the rule the term "executive officer" includes a president,<sup>9</sup> a treasurer,<sup>10</sup> a secretary-treasurer,<sup>11</sup> and a vice-president.<sup>12</sup> It must be remembered that such nominal titles alone are not the sole basis upon which the corporate liability is determined; for closely tied up with this phase of the problem is the question of the express, implied and apparent scope of the particular officer's authority. Just who will be excluded from the category will depend upon the facts in each particular case, with particular emphasis upon the official title and the scope and nature of the officer's authority.

The first important decision tending toward the establishment of the majority rule was a Missouri case, *Donovan v. P. Schoenhofen Brewing Co.*<sup>13</sup> There it appeared that a contract for a lease for more than one year was made on behalf of the corporation by its general agent on the basis of oral authority.<sup>14</sup> The court was of the opinion that, inasmuch as the act done was within the scope of the agent's implied powers, he was not required to have written authority.<sup>15</sup>

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<sup>8</sup> *McCartney v. Clover Valley Land & S. Co.*, 232 Fed. 697 (C. C. A. 8th 1916).

<sup>9</sup> *Black Diamond Coal Mining Co. v. Jones Coal Co.*, 204 Ala. 506, 86 So. 27 (1920); *Arnold v. La Belle Oil Co.*, 47 Cal. App. 290, 190 Pac. 815, 817 (1920); *Potter v. Fon Du Lac Park Dist.*, 337 Ill. 111, 168 N. E. 908 (1929).

<sup>10</sup> *McCartney v. Clover Valley Land & S. Co.*, *supra* note 8.

<sup>11</sup> *Uline Loan Company v. Standard Oil Company*, 45 S. D. 81, 185 N. W. 1012 (1921).

<sup>12</sup> *Emmerglick v. Philip Wolf, Inc.*, 138 F. 2d 661 (C. C. A. 2d 1943).

<sup>13</sup> 92 Mo. App. 341 (1901).

<sup>14</sup> The extent of the agent's authority appears from the statement of the court: "In this case it appears . . . that Dienger's agency was to look after the sale of defendant's beer which involved the renting of places where it might be sold." *Ibid.* at 346.

<sup>15</sup> "But from the very necessity of the thing that law may not have room for application where the agent is the agent of a corporation, and the act of contracting for a lease, or of leasing, is such an act as is within the scope of

Shortly thereafter the Supreme Court of Pennsylvania had occasion to consider a similar problem in *Henry v. Black*.<sup>16</sup> In that case the treasurer of a realty corporation, who was also a stockholder, took an option in his own name and, together with a director, sold real property to the plaintiff, substituting the corporation as the vendor and receiving a commission from the original owner. The court held that the provision in the Pennsylvania statute requiring written authorization was not applicable to this type of corporate officer. "That a corporation which can only conduct its business by and through its officers and employees, must show, . . . a written authority to that officer . . . when that officer acting for the company executes a written contract . . . would be to stretch the inhibition of the statute far beyond anything contemplated by its framer."<sup>17</sup>

What seems to be the earliest recognition of the problem in New York is the lower court dictum in *Riviera Realty Co. v. Henry*,<sup>18</sup> wherein the corporate superintendent executed a lease on behalf of the corporation. While actually holding that the agent's signature did not bind the corporation because it was not in proper form, the court indicated that it was not necessary under the statute<sup>19</sup> for an officer's authority to be in writing.<sup>20</sup> The same conclusion was reached three years later in *McCartney v. Clover Valley Land & S. Co.*,<sup>21</sup> a federal decision which is commonly regarded as the leading case involving this issue. The chief executive officer of a corporation, who was also its treasurer and a director, arranged an exchange of real property for the corporation without any written authority, and the circuit court of appeals, construing the California Civil Code,<sup>22</sup> unequivocally ruled that the requirement of an agent's authority to be in writing had no application to the executive officers of a corporation.<sup>23</sup> To the same effect was an Alabama

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his authority. For a corporation can only act through agents, and when the act of the agent is within the limit of the authority which his agency covers, it is the act of the corporation itself, and the agent may act as though he was the principal." *Ibid.* at 345, 346.

<sup>16</sup> 210 Pa. 245, 59 Atl. 1070 (1904).

<sup>17</sup> *Id.* at 252, 59 Atl. at 1072.

<sup>18</sup> 144 N. Y. Supp. 790 (Sup. Ct. 1913).

<sup>19</sup> The provision in question was N. Y. REAL PROP. LAW § 242. For the text of this statute see text, *supra* p. 102.

<sup>20</sup> 144 N. Y. Supp. 790, 792 (Sup. Ct. 1913).

<sup>21</sup> 232 Fed. 697 (C. C. A. 8th 1916).

<sup>22</sup> CAL. CIV. CODE § 1624 (1937): "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent: . . . 4. An agreement for the leasing for a longer period than one year or for the sale of real property or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged. . . ."

<sup>23</sup> *McCartney v. Clover Valley Land & S. Co.*, *supra* note 8 at 701. "It has never been the practice to require powers of attorney to confer authority upon such agents. We think the statute was intended to apply to agents proper; that is, persons who were not officers of the corporation. The executive officer

case<sup>24</sup> in which the court regarded the president as the "alter ego" of the corporation<sup>25</sup> and a California case holding that the president of a corporation did not need written authority.<sup>26</sup> The same rule has been applied to the president of a municipal park board<sup>27</sup> and to the secretary-treasurer of a loan company,<sup>28</sup> but not to a railroad land

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of a corporation is something more than an agent. He is the representative of the corporation itself. It was early decided that directors, though they are only agents of the corporation, are exempt from the rule which requires the authority of an agent to be in writing in order to vest him with power to execute a deed."

<sup>24</sup> Black Diamond Coal Mining Co. v. Jones Coal Co., 204 Ala. 506, 86 So. 27 (1920).

<sup>25</sup> In this case the president of the defendant corporation signed a contract with the plaintiff which by its terms was not to be performed within one year. The Alabama code required that an agent be authorized in writing to execute such a contract on behalf of his principal. The court said: "He was, in a sense, the agent of his corporation; but in another sense, . . . he was, for the purpose of transacting its business, the corporation's alter ego, and, according to the authorities and the clear reason of the matter, the contract in question was, presumptively at least, signed by the corporation." *Ibid.*

<sup>26</sup> Arnold v. La Belle Oil Co., 47 Cal. App. 290, 190 Pac. 815, 817 (1920), where the president of the defendant corporation authorized the plaintiff broker, in writing, to offer for sale real estate owned by the corporation. CAL. CIV. CODE § 1624 (1937) provides: "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent: . . . 6. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission; . . ." and CAL. CIV. CODE § 2309 (1937) provides: "An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing." The court, construing these provisions, said: "That when section 1624, supra, is construed with and in the light of section 2309 . . . requiring an agent's authority to execute a contract in writing to be itself in writing—it does not, we think, apply to the executive officers of a corporation."

In *Carrier v. Piggly Wiggly of San Francisco*, 11 Cal. App. 2d 180, 53 P. 2d 400, 401 (1936), the court said: "Appellant contends that, since the contract was one, of necessity, in writing, the authority of the corporate agent to enter into the same must have been in writing. The trend of authority is to the contrary. Corporations can act only through the agency of natural persons, and it has been held that the authority of an agent of a corporation need not be in writing, so far as the Statute of Frauds is concerned." *But cf. Matheron v. Ramina Corporation*, 49 Cal. App. 690, 194 Pac. 86 (1920), where the court was of the opinion that the fact that one contracting to purchase land in behalf of a corporation was its president is not alone sufficient to show that he was authorized to enter into such a contract.

<sup>27</sup> *Potter v. Fon Du Lac Park Dist.*, 337 Ill. 111, 168 N. E. 908, 911, 912 (1929). The case involved an action for specific performance of a contract to sell a tract of land to the defendant corporation. The court held: "It is next contended that the president of the park board was not authorized, in writing, to execute the contract, and that therefore the same is within the Statute of Frauds and void; . . . The Statute of Frauds applies to a corporation as it does to an individual. . . . The president is the head and one of the executive officers of the park board, and in signing a contract does not do so as agent but rather as principal. The rule as to agency does not apply to an executive officer of a corporation, who is more than an agent."

<sup>28</sup> *Uline Loan Company v. Standard Oil Company*, 45 S. D. 81, 185 N. W.

agent on the ground that he was outside the category of executive officers.<sup>29</sup>

In considering the question whether the officer, in addition to being an executive officer, must have express, implied or at least apparent authority to execute the contract in question, in order to be exempt from the requirement of a writing, it would appear that some authority is necessary, most courts tending towards agreement with the *McCartney* case view to the effect that "Let it be once established that the making of the contract is within the scope of the officer's authority, then no separate writing is required from the board or the stockholders to meet the requirements of the Statute of Frauds."<sup>30</sup>

The minority current of authority, as exemplified particularly by the New Jersey rule, is that any corporate agent or officer, whether or not acting within his authority, must have a written authorization. Representative of this viewpoint is *Clement v. Young-McShea Amusement Co.*<sup>31</sup> in which a lease was signed by the owner of a large majority of the stock of a corporation, who was also treasurer, manager, and a director. Despite this officer's paramount position,

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1012, 1013 (1921). Here the secretary-treasurer of the corporate plaintiff executed an option contract in the name of the corporation giving the defendant a 30-day option within which to buy certain lots. Defendant exercised the option and a contract in writing was executed on behalf of the plaintiff by its secretary-treasurer. Plaintiff's board of directors adopted a resolution repudiating the transaction basing their refusal on the fact that such act was not within the scope of his authority. The court, in upholding the defendant's counterclaim for specific performance of the contract, said: "The respondent corporation was organized for the purpose of loaning money on real estate and other security, and it was also expressly authorized 'to take, buy, hold, sell, mortgage, use, and lease real estate.' . . . Elliott was the sole officer in charge of the operations of respondent, and . . . was clothed by the directors with the authority of general manager. Therefore his acts, within the scope of the business of the corporation, were the acts of the corporation itself, and not the acts of an agent, within the ordinary meaning of the word 'agent.'"

<sup>29</sup> *Rosenblum v. New York Cent. R. R.*, 162 Pa. Super. 276, 57 A. 2d 690, 691 (1948). Here the defendant appealed from a decree of specific performance of a contract for the sale of land executed by its general land agent. Citing *Henry v. Black*, 210 Pa. 245, 59 Atl. 1070 (1904), the court said: "Giving the fullest extent to the *Henry* case, written authority was not required to be shown as to written contracts in the name of the corporation executed by an *executive* officer of the corporation. . . ."

"We think that any variation of the rule enunciated by our statute, insofar as corporations are concerned, must be confined to executive officers of the entity, and cannot be extended to officers of the business thereof." See also *Frudden v. Peppers Fruit Co.*, 71 Cal. App. 245, 14 P. 2d 874 (1932); *Power v. Immigration Land Co.*, 93 Minn. 247, 101 N. W. 161 (1904).

<sup>30</sup> *McCartney v. Clover Valley Land & S. Co.*, 232 Fed. 697, 701 (C. C. A. 8th 1916). To the same general effect see *Corporation of America v. Harris*, 5 Cal. App. 2d 452, 43 P. 2d 307, 310 (1935), where the court commented, ". . . that the president of a corporation has no authority, by virtue of his office alone, to bind the corporation by contract . . . 'is an elementary principle of corporation law.'" See also *Matheron v. Ramina Corporation*, 49 Cal. App. 690, 194 Pac. 86 (1920).

<sup>31</sup> 70 N. J. Eq. 677, 67 Atl. 82 (1906), reversing 69 N. J. Eq. 347, 60 Atl. 419 (1905).

the court held that the corporation was not bound on the lease because his authority was not in writing.<sup>32</sup> A later New Jersey decision<sup>33</sup> reached a similar conclusion in respect to a vice-president who had executed a lease. This holding is distinguished from that of the *Clement* case, however, because the vice-president's execution of the lease was not in the usual course of business of the corporation, and it could therefore be argued that the vice-president in no event had authority to execute it.

Although the question in New York seems not to have been squarely passed upon, a strong dictum in a recent lower court decision<sup>34</sup> indicates a tendency to follow the majority view. The case involved the signing by the president of a corporation of a contract for the sale of real property without a written authorization so to do. The actual holding was that the corporation was free of obligation on the contract because the president's signature was in such form

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<sup>32</sup> *Id.* at 682, 67 Atl. at 84, "To render that transaction valid, either in law or equity, against Young's principal, his authority must have been in writing, and, where a written authority is required by the very nature of the transaction, it is the duty of persons dealing with the agent to make inquiries as to the nature and extent of the authority. . . ." The statute involved read as follows: "All leases . . . of . . . any . . . tenements . . . made or created . . . by parol and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect, . . ."

<sup>33</sup> *Stammelman v. Interstate Co.*, 111 N. J. Law 122, 166 Atl. 724 (1933), *rev'd on other grounds*, 112 N. J. Law 342, 170 Atl. 595 (1934). *See also Lindhorst v. St. Louis Protestant Orphan Asylum*, 231 Mo. 379, 132 S. W. 666, 670, 671 (1910), which overrules *Donovan v. P. Schoenhofen Brewing Co.*, 92 Mo. App. 341 (1901). The *Lindhorst* case involved a real estate agent, and the court, in holding that the agent needed written authority, castigated the reasoning in the earlier *Donovan* opinion. "With all due regard for the opinion of that learned court, we are not favorably impressed with the reasoning by which the conclusions there stated are reached. The statute in question is general in its provisions, and contains no such exception as that interpolated into it by the Court of Appeals. Nor is there any better reason suggested for saying that the authority of an agent of a corporation to sell its real estate need not be in writing, than there is for saying that the agent of an individual for the same purpose need not be in writing. It is common knowledge that, prior to the enactment of the amendment to said section 3418, innumerable suits have been brought and prosecuted for the specific enforcement of contracts for the sale of real estate made by agents who had no written authority authorizing them to make the sales; . . . In order to put a stop to that character of litigation, and for the purpose of preventing fraud and perjury, the amendment in question was wisely enacted. The evil at which the statute was aimed was feasting upon corporations as well as upon individual landowners; and there has been no suggestion made why the one should not be protected therefrom as well as the other. The *Donovan* case . . . is based upon neither reason nor authority . . . and should not be followed." It should be noted that the person who acted in behalf of the corporation in the *Lindhorst* case was a mere agent and not an officer of the corporation. It is not clear, therefore, whether the Missouri court would reach the same conclusion in respect to an officer of a corporation.

<sup>34</sup> *Hasenfratz v. Berger Apartments*, 61 N. Y. S. 2d 12, (Sup. Ct. 1946).

as to indicate an individual liability, but the court by way of dictum clearly indicated its belief that the president by a proper signature, if acting within the scope of his authority, could bind the corporation without any written authorization. ". . . While an executive officer of a corporation is in a sense an agent, he is more than that; he is the alter ego of the corporation. A signing by him is generally considered to be the act of the corporation itself and not the act of an agent. Hence a signing by him, while acting on behalf of the corporation and within the scope of his authority, satisfies the statute requiring a signing by the party to be charged and not authorizing a signing by an agent. Also, although there is authority to the contrary, he is not an agent within the meaning of statutes requiring the authority of an agent to sign to be in writing. . . ." <sup>35</sup> There are faint indications in opposition to this view in two New York lower court decisions; <sup>36</sup> but in those cases the court never had occasion to consider the distinction between executive officers and ordinary agents, and hence their dicta are of little weight.

Since executive corporate officers may well be considered as quasi-principals rather than agents, the majority position seems sound in not requiring such officers to have written authority where they are acting within the scope of their implied powers. The policy of the statutes, to prevent frauds, would appear to be satisfied by demanding written authority in the case of minor agents while permitting major officials to act just as if they themselves were principals. It would be unduly cumbersome to demand that such major officials obtain written authority from the board of directors or stockholders in every instance in which the agency provisions of the Statutes of Frauds are involved.

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#### DOES ENTRY UNDER VOID PAROL LEASE CREATE TENANCY FROM YEAR TO YEAR IN NEW YORK

In these postwar days of housing shortages and scarcity of business sites, the legal problems presented by parol leases, which are voidable under the Statute of Frauds,<sup>1</sup> are rarely encountered. The

<sup>35</sup> *Id.* at 15. The court here adopts a quotation from 37 C. J. S. Frauds, Statute of, § 207 (1943), as its own.

<sup>36</sup> *Karnal v. Horovitz*, 187 Misc. 851, 65 N. Y. S. 2d 525 (Sup. Ct. 1946); *Klores v. Empire Title & Guarantee Co.*, 64 N. Y. S. 2d 477 (Sup. Ct. 1946).

<sup>1</sup> N. Y. REAL PROP. LAW § 242. "An estate or interest in real property, other than a lease for a term not exceeding one year, . . . can not be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing. . . ."