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Contracts--Statute of Frauds--Right of Realty Broker to Collect Commission on Quantum Meruit

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Recent Cases

CONTRACTS—STATUTE OF FRAUDS—RIGHT OF REALTY BROKER TO COLLECT COMMISSION ON QUANTUM MERUIT—The defendants orally listed with a realty broker certain real property for sale. The broker produced a purchaser who submitted a written offer to buy defendants' property and defendants accepted the offer in writing. On the day set for closing the transaction the defendants refused to convey the property to the purchaser and subsequently refused to pay the broker a commission. The only written evidence of the contract for a commission was the name of the broker written at the top of the offer and acceptance form. The broker sought to recover on the contract and in the alternative on quantum meruit. The Circuit Court of Fayette County sustained the defendants' general demurrer to the broker's amended petition and dismissed the petition when the broker declined to plead further. The broker appealed. *Held:* reversed. The contract for the commission of a realty broker is specifically within the statute of frauds (KRS 371.010(8)) and thereby required to be in writing. The writing of the broker's name at the top of the offer and acceptance form was only evidence of a prior parol agreement and not sufficient to satisfy the statute of frauds. Nevertheless the broker may recover his commission on quantum meruit for services rendered. *Clinkenbeard* v. *Poole*, 266 S.W. 2d 796 (Ky. 1954).

The Court reasoned in this case that, although an action on an oral contract within the statute of frauds may not be maintained, the law will not ordinarily permit a party to keep the benefit which has been conferred upon him by another party under an unenforceable contract. The statute of frauds was not intended to be used in such a manner as to allow one party to enrich himself at the expense of another. In many previous cases in Kentucky this rule has been applied in allowing a party to recover the value of his services when a contract under which these services were rendered was held unenforceable under the statute of frauds.[1]

Prior to 1950 the case law in Kentucky was clear in holding that brokerage agreements, which defined the rights of owner and broker as between themselves, were *not* within the statute of frauds where no

[1] Head v. Schwartz' Ex'r, 304 Ky. 798, 202 S.W. 2d 623 (1947); Carpenter v. Carpenter, 299 Ky. 738, 187 S.W. 2d 282 (1945); Hinton v. Hinton's Ex'r, 239 Ky. 664, 40 S.W. 2d 296 (1931); Randolph v. Castle, 190 Ky. 776, 228 S.W. 418 (1921); Duke's Adm'r v. Crump, 185 Ky. 323, 215 S.W. 41 (1919); Boone v. Coe, 153 Ky. 233, 154 S.W. 900, 51 L.R.A. (N.S.) 907 (1913).

interest in land passed between the parties. Such brokerage agreements were considered as being in the nature of employment contracts and enforceable though oral.[2]

In 1950 the Kentucky legislature enacted an amendment to the statute of frauds which specifically placed such brokerage agreements within the statute.[3] The principal case is the only case to date interpreting the new amendment.[4] Although the Court recognized the amendment as applicable to the contract in question, it may be argued that the Court has nullified the effect of the amendment by allowing recovery on quantum meruit.

Looking at the problem in other jurisdictions, it may be said that there is some general support for allowing one to collect the value of the benefit he has conferred on another, through a theory of quantum meruit, when the contract under which he has performed is made unenforceable under the statute of frauds. It has been stated that,

> One who has performed labor and services under a contract which cannot be enforced because within the statute of frauds, and which has been repudiated by the other party thereto, may recover for such services on a quantum meruit.[5]

Further, there is some indication that where the statute of frauds of a particular state does not specifically include agreements to compensate a realty broker, but such a contract is otherwise found to be within the statute, some form of implied contract or quantum meruit

[2] Henson v. Arnold, 310 Ky. 742, 221 S.W. 2d 662 (1949); Stuart-McKnight & Co. v. Monroe, 222 Ky. 602, 1 S.W. 2d 1054 (1928); Nisbet v. Dozier, 204 Ky. 204, 263 S.W. 736 (1924); Oliver v. Morgan, 198 Ky. 442, 248 S.W. 1020 (1923); Carter v. Hall, 191 Ky. 75, 229 S.W. 132 (1921); Womack v. Douglas, 157 Ky. 716, 163 S.W. 1130 (1914); Shadwick v. Smith, 147 Ky. 159, 143 S.W. 1027 (1912); Whitworth v. Pool, 29 Ky. L. Rep. 1104, 96 S.W. 880 (1906); Annot., 151 A.L.R. 641, 651 (1944).

[3] Ky. Rev. Stat. sec. 371.010 states:

> "Statute of frauds: contracts to be written. No action shall be brought to charge any person:
>
> (8) Upon any promise, agreement, or contract for any commission or compensation for the sale or lease of any real estate or for assisting another in the sale or lease of any real estate: unless the promise, contract, agreement, representation, assurance or ratification, some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent. The consideration need not be expressed in the writing, but it may be proved when necessary or disapproved by parol or other evidence." (1950, c. 174; effective June 15, 1950).

[4] But see Treacy v. James, 274 S.W. 2d 46 (Ky. 1954). This case involved essentially the same facts as those in the Clinkenbeard case, and the Court of Appeals refused to consider the theory of quantum meruit as a basis for recovery since such relief was not prayed for in the court below.

[5] 37 C.J.S. Statute of Frauds, see 259 (1943); see cases from twenty jurisdictions, Id. at 780, n. 87.

will be allowed to give the broker recovery. But there are actually too few cases on the subject to reflect a definite rule.[6]

However, in states in which the statute of frauds specifically includes such agreements, there has been overwhelming uniformity in holding that agreements to compensate a broker must be in writing to be enforceable and that in event the statute is not satisfied there can be no recovery in quantum meruit, implied contract, or the like, for the broker's services.[7] The theory advanced in favor of such a view is that to hold otherwise would be to nullify the effect of the statute completely.[8]

Kentucky, by virtue of the principal case, represents the only jurisdiction with a clear-cut minority decision.[9] In this view Kentucky has some support from two other jurisdictions, although the support is indirect in one instance and dictum in another.[10]

In order to properly evaluate this Kentucky decision, it appears advisable to consider briefly the merits of placing contracts for the broker's commission between a broker and a vendor within the statute of frauds.

The object of requiring such an agreement to be in writing is apparently to protect unsuspecting landowners from scheming realty brokers. But why assume that realty brokers, as a group, are more scheming and dishonest than any other business group? A retailer seels his goods and then submits his bill, a doctor or a lawyer performs professional services and then presents his bill, and these contracts, though oral, are given legal significance. In such cases the ordinary burden of proof on the plaintiff and the other processes of justice are deemed adequate to protect a defendant from spurious claims. Why should landowners be singled out for a more special protection?[11]

Another practical consideration in regard to requiring contracts

[6] Annot., 41 A.L.R. 20, 901, 919 (1954).
[7] Id. at 908.
[8] Id. at 910.
[9] Ibid.
[10] An Oregon case apparently assumed that recovery might be had in quantum meruit, although the contract did not satisfy a statute providing that agreements for a broker's commission must be in writing, since the claim for quantum meruit was considered on the merits, although the claim was found to be unjustified. Taylor v. Peterson, 76 Ore. 77, 147 Pac. 520 (1915).
As dictum, a New Jersey court stated that it did not follow
> "that an admittedly retained real estate agent is not entitled to compensation for negotiating a sale of real estate for a receiver if his authority is not in writing or he has failed to comply in other respects with the provisions of the statute. If his services are necessary or beneficial to the estate, reasonable allowance will be made."

Merchants & Mfrs. Nat. Bank v. Newark Rubber Co., 131 Atl. 389, 390 (1925).
[11] See Lasser, "Real Estate Broker's Commission—Oral Agreements and Statute of Frauds", 10 Rutgers L. Rev. 410, 411-12 (1955).

for realty brokers' commissions to be written is the hardship visited on a broker in obtaining such agreements from a vendor. A landowner may well feel that it is a slur on his integrity for a broker to insist on a written agreement and therefore he may take his business to another broker who is willing to chance the honesty of the landowner in order to obtain business. The vendor then has the protection of the statute of frauds if he chooses not to pay the broker his commission.[12]

The Court of Appeals in the principal case has recognized section 8 of the Kentucky statute of frauds as applicable to the contract in question but nevertheless allowed recovery on quantum meruit. While the decision of the Court may have circumvented the statute of frauds, it is difficult to find this result alarming. Not only does quantum meruit have support as a basis for recovery where a contract, either for broker's commission or for labor and services, has been held unenforceable because within the statute of frauds, but there also seems to be no valid policy reasons in favor of denying recovery.

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EVIDENCE—DOES THE PRIVILEGE AGAINST SELF-INCRIMINATION EXTEND TO INCRIMINATION UNDER THE LAWS OF ANOTHER JURISDICTION?—The witness, Rhine, was summoned before the Jefferson County, Kentucky, grand jury and questioned concerning his relations with the Communist Party and Carl Braden. Braden had been convicted for violating the Kentucky sedition laws, but that conviction had been reversed earlier by the Court of Appeals of Kentucky on the ground that Congress had pre-empted the field of sedition.[1] Rhine refused to answer certain questions[2] propounded by the Commonwealth's Attorney on the ground that his answers might tend to incriminate him. The trial court ruled that Rhine was privileged to refuse to answer the questions, and the Commonwealth appealed to the Court of Appeals for the purpose of a certification of law under Section 337 of the Kentucky

[12] Id. at 412.

[1] Braden v. Commonwealth, 291 S.W. 2d 843 (Ky. 1956).

[2] The following questions were asked Rhine:

> "56 Q. Mr. Rhine, regardless of whether or not you are a Communist —I am not interested in that—but do you know whether or not Carl Braden is a Communist?
>
> "57 Q. Did you ever attend a Communist Party meeting in Carl Braden's house—without asking or wanting to know what effect such attendance might have had on you, if any effect, but in view of that, did you ever attend any meeting in Carl Braden's house relative to Communism or where a cell meeting was being held?"

Commonwealth v. Rhine, 303 S.W. 2d 301, 302 (Ky. 1957).