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COMMENTS

REAL ESTATE BROKERS' CONTRACTS WITHIN THE STATUTE OF FRAUDS

That the dictates of the law and the principles of common morality are not always blended to perfection is not a startlingly new pronouncement. Undoubtedly the courts use every legitimate means at their disposal in forming their decrees to enforce conduct that we are pleased to regard as called for in the name of simple honesty. But in at least one situation the Statute of Frauds has appeared to many courts to prevent a decree harmonizing law and justice. The type situation is that P, being desirous of purchasing a piece of realty, orally engages A to negotiate the purchase with X, the present owner. The deed is to be taken in P's name, and P is to secure the funds or the credit needed to pay for the land. At the time P orally engages A, neither of them have any interest in the land, or contract with respect to it. A then approaches X, who has

no knowledge of P, and arranges for a conveyance. However, he causes the deed to run to himself, and pays the purchase price with his own funds.¹ Immediately thereafter A sells the land to some third person, making a handsome profit. P, upon learning of the facts, seeks to impose a constructive trust on the profits made by A. On being confronted with this situation in the recent case of *Carikonen v. Alberts*,² the Supreme Court of Washington, relying on two sections of our Statute of Frauds,³ concluded that no constructive trust could be imposed. In so deciding, the court is in line with a great many other jurisdictions.⁴

A substantial number of courts have, however, refused to admit that either a statute similar to our REM. REV. STAT. § 5825 requiring the agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or commission, or a statute requiring that all agreements for the conveyance of an interest in land be in writing is a bar to imposing a constructive trust either on the land or the proceeds from the sale in the hands of the agent.⁵ However, few, if any of them, have come to

¹This case is clearly distinguishable from one where the agent takes title in his own name, but uses the funds of his principal. Either a resulting or constructive trust may be imposed in such a case.

²196 Wash. 575, 83 P. (2d) 899 (1938). In this rather lengthy opinion the court reviewed a large number of cases, both of this and other jurisdictions, and concluded that the weight of authority denied a constructive trust and that all the previous cases around the point in Washington that might seem to compel a contrary holding could be distinguished.

³REM. REV. STAT. § 5825: "In the following cases specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say . . . (5) an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

REM. REV. STAT. § 10550: "Every conveyance of real estate, or any interest therein, and every contract creating or evidencing an encumbrance upon real estate, shall be by deed: . . ."

Mitchell v. Wright, 155 Ala. 458, 46 So. 473 (1908); *Kimmons v. Barnes*, 205 Ky. 502, 266 S. W. 891, 42 A. L. R. 5 (1924); *Willis v. Lam*, 158 Ky. 777, 166 S. W. 251 (1914); *Kennerson v. Nash*, 208 Mass. 393, 94 N. E. 475 (1911); *Dougan v. Bemis*, 95 Minn. 220, 103 N. W. 882 (1905). An extensive list of authorities may be found in 42 A. L. R. 29.

⁴(a) The following cases hold that a statute requiring the agreement authorizing the broker to sell or purchase real estate for commission goes to his right to collect the commission: *Butterfield v. MacKenzie*, 37 Ariz. 227, 292 Pac. 1097 (1930); *Cohen v. P. J. Spitze Co.*, 121 Ohio St. 1, 166 N. E. 804 (1929); *Pierce v. Wheeler*, 44 Wash. 326, 87 Pac. 361 (1906); *Stewart v. Preston*, 77 Wash. 559, 137 Pac. 993 (1914).

Krzyzsko v. Gaudynski, 207 Wis. 608, 242 N. W. 186 (1932) said: "The purpose of the statute was not to relieve real estate brokers from their obligations as agents, but to protect the public against frauds perpetrated by dishonest agents through falsely claiming oral contracts of agency when another agent effected a sale by which the land owner was subjected to claims for commissions by two or more agents, and by falsely claiming agency and claiming a commission for procuring a purchaser when no bona fide purchaser was in fact procured."

(b) The following cases hold that a statute requiring all contracts for the conveyance of an interest in land to be in writing does not prevent the imposition of a constructive trust upon the orally employed agent who

grips with both problems in one opinion, and the Washington court itself put the greater emphasis on the statute relating to the employment of real estate brokers. At page 605 of its decision⁶ the court said:

"The insuperable obstacle to enforcement of respondents' oral promise to negotiate purchase of land for appellant is the provision of the statute (Rem. Rev. Stat. § 5825) of frauds that an *agreement employing an agent or broker* to sell or *purchase* real estate for compensation shall be void unless such agreement be *in writing* and *signed* by the party to be charged herewith."

In the eyes of the court, the agent was in no way bound to the principal by the oral contract. No enforceable fiduciary relation arose. Such a view of the meaning of the statute may be justifiable,⁷ but if it is, the court did not adequately dispose of certain previous Washington cases to which it was referred.

It has sometimes been thought that REM. REV. STAT. § 5825 in no way affected the existence or validity of an oral agreement by A to purchase land for P, but merely prevented A from claiming a commission from P. *Pierce v. Wheeler*⁸ says:

"The contract which the statute declares to be void unless in writing is one for the payment of a commission to his agent, but it does not say that the actual authority to sell or purchase must be in writing."

The court distinguished the *Pierce* case by saying that the question there involved was the authority of the agent to execute a contract of sale. This is true, but the court did find that the agent who was orally employed had authority to make the contract. If he had the authority at all, it follows that he was an agent. Taking this case with the *Carکنون* case, it would seem that the agent who is orally employed has authority to act for his employer but is in no way bound to act (which is sound enough),⁹ or to observe the fiduciary rules applying to agents if he actually undertakes to act (which rule would be of doubtful validity).¹⁰ If this be not the rule of the *Carکنون* case, then the holding must be that no agency at all was created by the oral engagement, and this is squarely contrary to the *Pierce* case.

Other states having a similar statute have held that the effect

purchases the land for himself with his own funds: *Zeckendorf v. Steinfeld*, 12 Ariz. 245, 100 Pac. 784 (1909); *Rathbun v. McLay*, 76 Conn. 308, 56 Atl. 511 (1903); *Rose v. Hayden*, 35 Kan. 106, 10 Pac. 554, 57. Am. Rep. 145 (1886); *Johnson v. Hayward*, 74 Neb. 157, 103 N. W. 1058, 107 N. W. 384, 12 Ann. Cas. 800, 5 L. R. A. (n. s.) 112 (1905); *Harrop v. Cole*, 85 N. J. Eq. 32, 95 Atl. 378 (1914), *aff'd*, 86 N. J. Eq. 250, 98 Atl. 1085 (1916); *Jackson v. Pleasanton*, 95 Va. 654, 29 S. E. 680 (1898). These cases and many others will be found in 42 A. L. R. 29. See also the RESTATEMENT, AGENCY (1933) § 414 (2).

⁶196 Wash. 575, 83 P. (2d) 899 (1938).

⁷RESTATEMENT, AGENCY (1933) § 414 (3).

⁸44 Wash. 326, 87 Pac. 361 (1906).

⁹RESTATEMENT, AGENCY (1933) § 414 (3).

¹⁰A gratuitous agent must be loyal to his principal. *Krzysko v. Gaudynski*, 207 Wis. 608, 242 N. W. 186 (1932); RESTATEMENT, AGENCY (1933) § 387, comment c.

of the statute is to prevent a broker orally employed from receiving compensation.¹¹ If he undertakes to act, he is as responsible to his principal as if this particular statute had not been enacted.¹²

There are three other Washington cases¹³ which were cited to the court as tending to support the appellant's case. In *Merriman v. Thompson*,¹⁴ where a broker orally misrepresented to his principal the price at which the land was sold, it was said that the fact that the employment was oral would only have a bearing on the question of commissions. In *Stewart v. Preston*¹⁵ the agent was orally employed to negotiate a purchase of certain land for his principal. He misrepresented to the principal the price for which the land could be obtained, and then arranged with the seller to sell for less, but named the represented price in the deed. To a denial by the agent of the agency relationship, the court quoted from the *Pierce* and *Merriman* cases. It further quoted from a Connecticut case,¹⁶ saying:

"To adopt the defendant's contention would be to hold the monstrous doctrine that an agent employed to do anything concerning land could with impunity be as dishonest as he pleased and cheat and defraud his principal to his heart's content, if it chanced that his agency was not evidenced in writing."

By adopting this quotation, the court would seem to be saying (1) that despite the fact that the employment was oral, an agency was created, and (2) that since the agency was created, giving the agent authority to act, the agent was bound to observe the usual rules applying to fiduciaries in this position. If this is a proper interpretation of the court's meaning in using the quoted language, it is directly opposed to both of the two possible interpretations of the *Carkonen* case. There is a third Washington case that bears upon the interpretation of REM. REV. STAT. § 5825. In *Ewing & Clark v. Mumford*,¹⁷ the orally employed agent engaged to find a buyer. He found one who was willing to pay more than his principal demanded. Thereupon he contracted with the prospective buyer to convey the land at the buyer's price. Then he went to his principal and secured an option to purchase for himself at the price the principal demanded, not disclosing that he had already secured a purchaser for the land at a better price. The principal thereafter refused to convey, and the erstwhile agent sued for damages. In denying the relief, the court con-

¹¹See note 5 (a), *supra*; *Mock v. Mitchell*, 30 Ohio App. 97, 164 N. E. 365 (1927); *Brace v. Johnson*, 45 Idaho 327, 262 Pac. 148 (1927).

¹²The general rule of agency requiring a gratuitous agent to observe the rules of loyalty should be applicable in this case. *Ware v. Salisbury*, 183 Ill. 505, 56 N. E. 149 (1899); *Jenckes v. Cook*, 9 R. I. 520 (1870); see note 10, *supra*.

¹³*Infra* notes 14, 15 and 17.

¹⁴48 Wash. 500, 93 Pac. 1075 (1908).

¹⁵77 Wash. 559, 137 Pac. 998 (1914).

¹⁶*Rathbun v. McLay*, 76 Conn. 308, 56 Atl. 511 (1903). The Connecticut case did not, however, involve the real estate broker's statute, but only the general statute of frauds applying to interests in land.

¹⁷157 Wash. 617, 289 Pac. 1026 (1930).

cluded that when the agent obtained the verbal authority to find a purchaser, the relation of principal and agent was created, notwithstanding that the engagement was oral. It became the duty of the agent to make full disclosure of the facts as they actually existed, and he could not deal with his employer at arm's length.

These three cases were summarily dismissed by the court by pointing out that in each instance, the agent had perpetrated some fraud in addition to merely breaking his oral agreement to act as agent. This distinction in the facts is apparent enough, but the real purpose of the appellant in citing the cases was to show that in each employment an agency relation was created despite the fact that no writing existed. If the decision in the *Carkonen* case means that no agency is created, these cases should be more fully explained, and if that decision is taken to mean that the power of the agent to act exists without the burden of the fiduciary relation, then the court has taken a position that will prove hard to defend.¹⁸

Admittedly there is authority for the point that when the statute is not observed, no agency relation arises,¹⁹ but the Washington view as delineated by the prior cases seems to have been that even though the engagement was oral, an agency relation did arise, and that the statute applies only to the payment of commissions.²⁰ For this view there is well reasoned support.²¹ Therefore, *Carkonen v. Alberts* would seem to be a departure from the previous rule upon this point.

Many jurisdictions have no statute such as REM. REV. STAT. § 5825. When the situation has arisen in those states, disposal of the case depends upon the court's interpretation of the statute requiring that all contracts for the conveyance of an interest in land be in writing.²² Upon the question of whether or not the oral employment of an agent to negotiate for the purchase or sale of land is a contract within the 4th section of the Statute of Frauds there is a distinct split of authority.²³ Speaking of the variance among the authorities, the Virginia court, in an oft quoted opin-

¹⁸The difficulty with this possible holding is, again, that a gratuitous agent is subject to the fiduciary burdens. See notes 10 and 12, *supra*.

¹⁹*Peters v. Martin*, 69 Ind. App. 436, 122 N. E. 16 (1919); *Smith v. Starke*, 196 Mich. 311, 162 N. W. 998 (1917); *Morris v. O'Neil*, 239 Mich. 663, 215 N. W. 8 (1927); *Skinner v. Red Lodge Brewing Co.*, 79 Mont. 292, 256 Pac. 173 (1927).

²⁰*Cushing v. Heuston*, 53 Wash. 379, 102 Pac. 29, 42 A. L. R. 29 (1909), holding that no agency arose did not discuss the statute, and further, the court finally concluded that even the oral agreement was not proven.

²¹*Butterfield v. MacKenzie*, 37 Ariz. 227, 292 Pac. 1097 (1930); *Brace v. Johnson*, 45 Idaho 327, 262 Pac. 148 (1927); *Cohen v. P. J. Spitz Co.*, 121 Ohio St. 1, 166 N. E. 804 (1929); *Moch v. Mitchell*, 30 Ohio App. 97, 164 N. E. 365 (1927); *Stewart v. Preston*, 77 Wash. 559, 137 Pac. 993 (1914); *Krzysko v. Gaudynski*, 207 Wis. 608, 242 N. W. 186 (1932).

²²REM. REV. STAT. § 10550. Such statutes are universal and are derived from the 4th section of the English Statute of Frauds. (29 Charles II c. 3 (1677)).

²³Cases announcing that the employment is within the statute of frauds are: *Mitchell v. Wright*, 155 Ala. 458, 46 So. 473 (1908); *Kimmons v. Barnes*, 205 Ky. 502, 266 S. W. 891 (1924); *Barrow v. Grant*, 116 La. 952, 41 So. 220

ion, said:²⁴

“This confusion and conflict has arisen, we think, from a failure to apply to every case the test of a very simple question, Was the contract in its essence and effect one of agency, or was it one for the purchase of real estate? If it was the former, it creates a trust relation, is not within the statute of frauds, and can be established by parol; if the latter, the parties are to that extent dealing with each other as principals, and the contract is within the statute and can only be established by such a writing as will meet the requirements thereof.”

Cases taking the view that the agency contract is not within the statute of frauds often rationalize their holdings by saying that the agent will not be permitted to successfully abuse a confidence.²⁵ This in itself should not justify the non-observance of an otherwise positive statute, but some cases which have analyzed the problem closely²⁶ conclude that no interest in land is conveyed or affected by the oral agreement to create an agency. The subject matter of the agreement is the creation of a personal relationship. The ultimate object of the agreement may be to procure a conveyance of an interest in land, but no interest in land is actually affected until the realty itself becomes the subject of a contract.²⁷ The agency employment in and of itself should no more be construed to convey an interest in land than should the formation of a partnership to deal in land. It has been held that a partnership agreement to deal in land in the future may be proved by oral evidence.²⁸ These cases reason that the agreement to form a partnership is a thing entirely apart from an agreement touching upon the conveyance of an interest in land and is therefore not within the American counterpart of the 4th section of the Statute of Frauds. The Washington court has been able to sever the partnership incidents of such an agreement from the incidents relat-

(1906); *Kennerson v. Nash*, 208 Mass. 393, 94 N. E. 475 (1911); *Dougan v. Bemis*, 95 Minn. 220, 103 N. W. 882 (1905); *Wheeler v. Hall*, 54 App. Div. 59, 66 N. Y. Supp. 257 (1900). *Contra*: *Zeckendorf v. Steinfeld*, 12 Ariz. 245, 100 Pac. 784 (1909); *Rathbun v. McLay*, 76 Conn. 308, 56 Atl. 511 (1903); *Rose v. Hayden*, 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 145 (1886). *Johnson v. Hayward*, 74 Neb. 157, 103 N. W. 1058, 107 N. W. 384, 12 Ann. Cas. 800, 5 L. R. A. (n. s.) 112 (1905); *Harrop v. Cole*, 85 N. J. Eq. 32, 95 Atl. 378 (1914), *aff'd*, 86 N. J. Eq. 250, 98 Atl. 1085 (1916). These citations may be found with others in 42 A. L. R. 29.

²⁴*Matney v. Yates*, 121 Va. 506, 93 S. E. 694 (1917). This case is not authority for the view opposing *Carikonen v. Alberts*, 196 Wash. 575, 83 P. (2d) 899 (1938), but the approach indicated by the quotation is a good one in the *Carikonen* situation.

²⁵*Harrop v. Cole*, 85 N. J. Eq. 32, 95 Atl. 378 (1914), *aff'd*, 86 N. J. Eq. 250, 98 Atl. 1085 (1916).

²⁶*Rose v. Hayden*, 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 145 (1886); *Johnson v. Hayward*, 74 Neb. 157, 103 N. W. 1058, 107 N. W. 384, 12 Ann. Cas. 800, 5 L. R. A. (n. s.) 112 (1905).

²⁷The discussion in 3 *BOGERT, TRUSTS AND TRUSTEES* (1st ed. 1935) § 1535, is pertinent at this point.

²⁸*Ingram v. Johnson*, 38 Cal. App. 234, 176 Pac. 54 (1918); *Koyer v. Willmon*, 150 Cal. 785, 90 Pac. 135 (1907); *Smith v. Imhoff*, 89 Wash. 418, 154 Pac. 793 (1916).

ing to the land,²⁹ and is thus in line with the great weight of authority on this point.³⁰

Courts holding that an oral agreement to create an agency to negotiate a purchase of land is within the prohibition of the 4th section of the Statute of Frauds, say that the agreement to create the agency is inseparably bound with the interest in the land to which it relates.³¹ Despite the fact that the Washington court has been able to distinguish the personal agreement from the agreement relating to land in the partnership cases,³² it has, in the *Carکنون* case, definitely refused to do so in this particular agency situation. In support of its holding the court reviewed a number of its previous decisions around the point. In *Cushing v. Heuston*³³ the intervener sought to establish an oral contract by Cushing to act as her agent in the purchase of certain tide land. Cushing ultimately contracted to take them for himself, and to pay for them with his own money. In the action arising on his bill to compel the grantor to convey the land to him, the intervener tried to impose a constructive trust on the land. In effect the action was the same as in the *Carکنون* case. The court said that since no positive fraud was indicated, upon which a trust *ex maleficio* could be imposed, the 4th section of the Statute of Frauds should have prevented a showing of an oral agreement to create an agency. Although the effect of that case is considerably weakened when we read farther on³⁴ that in any event the Supreme Court could not say that the agency was proven even with the aid of the improperly admitted testimony, it is strong authority for the present holding of the court on this point.

Chamberlain v. Abrams,³⁵ involving an oral agreement by the defendant grantor of certain uplands by quit claim to acquire the title that then stood in the name of the State of Washington and to hold it in trust for the plaintiff grantees was cited in the *Carکنون* case as analogous. That case is clearly within the statute requiring that a contract for the conveyance of an interest in land be in writing, but it should be readily distinguishable by a court that is willing to separate the agency from the real property aspects in the question of an orally employed broker. In the *Chamberlain* case, the agreement itself purported to create property interests in the plaintiff while the same can hardly be said of the *Carکنون* case. A like distinction can be made with *Croup v. De Moss*³⁶ where the defendant orally agreed to exercise an option to purchase certain mining rights for the benefit of the plaintiff. Here again the contract itself attempted to create property rights

²⁹Case v. Seger, 4 Wash. 492, 30 Pac. 646 (1892); Smith v. Imhoff, 89 Wash. 418, 154 Pac. 793 (1916).

³⁰Jones v. Patrick, 140 Fed. 403 (1905); Greenleaf v. Feinberg, 210 Ill. App. 271 (1918); Hammel v. Feigh, 143 Minn. 115, 173 N. W. 570 (1919). These and other cases are noted in 18 A. L. R. 484.

³¹See note 23, *supra*.

³²See note 29, *supra*.

³³53 Wash. 379, 102 Pac. 29 (1909).

³⁴Cushing v. Heuston, 53 Wash. 379, 390, 102 Pac. 29, 33 (1909).

³⁵36 Wash. 587, 79 Pac. 204 (1905).

³⁶78 Wash. 128, 138 Pac. 671 (1914).

and parol evidence was properly rejected. *Farrell v. Mentzer*³⁷ which is relied on as an exposition of the law of constructive trusts arose when the plaintiff, being about to bid for the property at a trustee's sale, orally agreed that one Wright was to bid for the property. Wright was then to transfer the property so purchased to the defendant, who was in turn to convey one-half to the plaintiff upon being reimbursed. The defendant received the property as had been planned, but refused to convey to the plaintiff. The supreme court held that parol evidence of the agreement to convey to the plaintiff would violate the Statute of Frauds. Clearly in this case it would, for the contract itself tried to bind an interest in the land. Cases of agreements to purchase at a judicial sale and either hold in trust or convey later are clearly distinguishable because the Statute of Frauds bars proof of either the contract or the express trust.³⁸ *Farrell v. Mentzer* is a sound case and authority of the strongest sort on the law of constructive trusts in Washington, but factually it is not controlling in the *Carikonen* case.

It may be said that the *Carikonen* case has this very decided effect upon so much of the 4th section of the Statute of Frauds as is set forth in REM. REV. STAT. § 10550. The court has declared that the oral employment of an agent to purchase land does affect an interest in the land, and thus the employment is within the statute. In this position the court is well supported by other decisions.³⁹ It is arguable, however, that this holding is inconsistent with the Washington cases which say that an oral agreement to form a partnership to deal in land is not within the statute.⁴⁰

It is apparent, then, that the present stand of the court on this point is sound, and on the construction of the statute requiring the agreement employing the broker to be in writing is also supported by good authority, if not entirely consistent with certain previous pronouncements on the subject. Accepting the premises of the court, there can be no quarrel with the decision.

HARDYN B. SOULE.

STATUTORY LIMITATION OF INNKEEPERS' LIABILITY

Many of the earliest cases of which reports are extant deal with the liability of the innkeeper to his guest, and the earliest known Roman law gave an action against the innkeeper if the baggage of the guest was in any way damaged, lost or stolen.¹ At common law the innkeeper was the insurer of the baggage of his guest. He was under an absolute liability unless he could prove that the loss was caused by an Act of God, the public enemy, by the act of the guest or of the guest's servants.² This absolute

³⁷102 Wash. 629, 174 Pac. 482 (1918).

³⁸More than an agency is involved in such cases. 3 BOGERT, TRUSTS AND TRUSTEES (1st ed. 1935) § 1571.

³⁹See note 23, *supra*.

⁴⁰See note 29, *supra*.

¹WHARTON, INNKEEPERS (1st ed., 1876) 88.

²This rule was first laid down in Y. B. 10 Henry VII, p. 26 (1495), and has been reiterated from time to time by practically all courts down to the present.