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The Application of the Wyoming Real Estate Laws to an Auctioneer

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courts could not allow a forfeiture of the deed because to do so would be to allow the grantor to use the courts to sustain an illegal act.

A comparison of the more recent decisions indicates that the trend of opinion is toward the view that mere inaction by the grantor will waive a condition subsequent when the grantee has changed his position in reliance on the grantor's silence. This is as it should be. The grantor has a duty to speak when he has knowledge that the grantee has breached the condition.¹⁶

No definite rule as to passage of time and type of change in conditions should be laid down as to whether silence alone by the grantor will waive a condition because it becomes too inflexible. The only rule that should be followed is that the condition will be waived if it is inequitable to enforce a forfeiture. It is a rare case in which a failure to exercise the right of forfeiture would not be accompanied by a change in condition or action on the part of the grantee.

The cases herein discussed clearly indicate judicial recognition of equities created in the grantee because of changed factual conditions or expenditures by the grantee which were deemed sufficient to cause the court to deny enforcement of the grantor's reserved condition although he remained silent. Only when such equities in the grantee are absent can reference be had to a theory dictating that silence by the grantor will not waive a condition subsequent.

RICHARD J. MACY

THE APPLICATION OF THE WYOMING REAL ESTATE LAWS TO AN AUCTIONEER

The question of whether an auctioneer selling realty at auction should be required to have a real estate license has been a proverbial football among individuals engaged in the two respective businesses. In general, the auctioneers take the position that they are not required by law to hold a real estate license, while the licensed realtors contend that the auctioneer should be licensed, on the theory that the auctioneers are dealing with realty in the same capacity as does any real estate broker. Auctioneers enjoy a competitive advantage because the auctioneer's fee¹ is much less than the real estate broker's fee.² Most real estate associations have set up standards to guide and regulate their fees, but there are no such standards applying to auctioneers, hence each individual auctioneer is free to charge whatever he desires. The problem is that of an unlicensed and unregulated business existing alongside a well regulated business.

16. *Migliaccio v. Davis*, 120 Utah 1, 232 P.2d 195 (1951); *Johnson v. Neil*, 123 Colo. 337, 229 P.2d 939 (1951).

1. Auctioneers' usual fee is 2% of the gross sale on general sales and some sell real estate for 1%.
2. Real estate brokers usually charge 5% up to a certain sum, and then 3% thereafter. Of course, this may differ with localities.

In general, an auctioneer is defined by Webster as a "person who sells at auction," and an auction as a "public sale of property to the highest bidder by one licensed and authorized for that purpose." This definition is cited with approval in *Russell v. Miner*.³ Therein, Judge Cardozo stated that the services which an auctioneer as such performs, are "selling property at public sale to the highest bidder." All else is technically beyond his mere calling as "auctioneer";⁴ and it is only for services as "auctioneer" that the compensation is given. It should be noted that this is the only case in point on this matter which research disclosed. The auctioneer is an agent for both parties, and, of course, both parties⁵ necessarily and obviously⁶ have knowledge of this.

The selling of property at auction is a lawful business and in the absence of statutory limitation anyone may act as an auctioneer,⁷ since his authority to conduct a particular sale is dependent solely on the nature and extent of the agency existing between himself and the prospective seller for whom he purports to act. However, public supervision is appropriate, to the end that purchasers will not be imposed on nor the owners of property sold at auction, defrauded. The state, in the exercise of its police power, may limit or qualify the right⁸ to act as an auctioneer by imposing reasonable regulations thereon.⁹ Pursuant to this power, the majority of states have enacted statutes requiring persons who carry on the business of an auctioneer to have a license. However, Wyoming is in the minority group of states which have no such licensing statutes.

Generally, a broker is one who, for a commission or fee, brings parties together¹⁰ and assists in negotiating contracts between them.¹¹ With respect to real estate he may be a person who was authorized to secure a purchaser, or a seller, and to obtain and negotiate offers for certain property, subject to the owner's approval.¹² A licensed real estate broker deals with the public in a confidential relationship.¹³ Completed transactions by an unlicensed broker are not void so far as the buyer and seller are concerned. The acts of the unlicensed broker are unlawful only to the

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3. *Russell v. Miner*, N.Y., 5 Lans. 537, 65 Barb. 534, 25 Hun. 114 (1872).
 4. 4 Words and Phrases, page 808 (Perm. Ed.).
 5. 4 Words and Phrases, pages 808, 809 (Per. Ed.). *Simon v. Motivos*, 1 Bl.Wm. 599, 3 Burr 1921, Bull. N.P. 280 (1766); *Hinde v. Whitehouse*, 7 East 558, 3 Smith 528, 8 R.R. 676 (1806).
 6. He is agent of the seller in making the sale, and as soon as the property is sold he also becomes the agent of the purchaser, to the extent of binding both parties by his memorandum of sale. *Randall v. Lautenberger*, 16 R.I. 158, 13 Atl. 100 (1888).
 7. 7 C.J.S. Auctioneers, § 4, page 1245. *State v. Balesh*, 180 Ark. 204, 21 S.W.2d 163 (1929).
 8. *Minnesota v. Martin*, 124 Minn. 498, 145 N.W. 383, 51 L.R.A.(N.S.) 40, Ann.Cas. 1915 B, 812 (1914).
 9. *Biddles v. Enright*, 239 N.Y. 353, 146 N.E. 625, 39 A.L.R. 766 (1925). The selling of property by auction is a business affected with a public interest and is subject to legislative restriction.
 10. *Rhode v. Bartholomew*, 94 Cal.App.2d 272, 210 P.2d 768 (1949).
 11. 5 Words and Phrases, page 826 et seq. (Perm. Ed.).
 12. *Massie v. Dudley*, 173 Va. 42, 3 S.E.2d 176 (1939).
 13. 12 C.J.S. Brokers, § 67, page 156, 169 A.L.R. 783 Note B.

extent that he is not entitled to receive his commission,¹⁴ and he also may subject himself to a criminal liability. The Wyoming statute¹⁵ imposes a penalty of a fine of not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00), or imprisonment for a term not to exceed six (6) months, or both such fine and imprisonment for any violation of the Wyoming Real Estate Act.¹⁶ If a person takes any part in real estate negotiations, no matter how slight, he is a "broker" required by statute to have a real estate broker's license.¹⁷

As already mentioned, an auctioneer is clearly and unmistakably an agent for both parties. Normally a broker is not an agent for both. He may be, however, if both parties know and consent. It is the same knowledge and consent that enables the auctioneer to be an agent for both parties. The two occupations also differ in that a broker both buys and sells, while an auctioneer only sells.¹⁸ Other lines of demarcation between the two businesses are at best shadowy.

In order clearly to understand what acts an auctioneer of real estate performs, let us consider a hypothetical situation of an auction of a Wyoming residence:¹⁹

First the owner contacts the auctioneer, or possibly the auctioneer may contact the owner if he has reason to believe the owner wishes to sell. After an agreement is reached as to the terms of the agency, including the date and time of the sale and the auctioneer's fee (usually 2% of the gross selling price), the owner either by himself or in conjunction with the auctioneer will get the legal description of the property from the records of the county assessor, along with the amount of current real estate taxes, and detailed information concerning any mortgages, liens or other encumbrances on the property. The auctioneer then works up, with the owner's help, a complete, detailed physical description of the property with emphasis upon its desirable qualities.

A rough draft of a sale bill, notice or advertisement to be published in the newspaper is then formulated, usually by the auctioneer, although this is sometimes done by the newspaper staff for him. In addition to newspaper publication, both owner and auctioneer may distribute the sale bill to the public generally, or see that it is done. If the auctioneer knows of anyone who may be interested in the property, he will contact him to be sure the interested party knows of the impending auction. He

14. *Supra* note 12. *Owens v. Capri*, 65 Wyo. 325, 202 P.2d 174, 176 (1949); *Dunham v. Heyde*, 122 Colo. 233, 221 P.2d 1078 (1950).

15. Wyo. Comp. Stat. § 37-2112 (1945).

16. Wyo. Comp. Stat. §§ 37-2101-2112 (1945).

17. *Abrams v. Guston*, 110 Cal.App.2d 556, 243 P.2d 109, 110 (1952); *Oliver v. Eureka Springs Sales Co.*, 222 Ark. 94, 257 S.W.2d 367 (1953). In the latter case an auction Sales Company, which had been innocently entrusted with custody of stolen heifers by their purported owners, was not a "broker," but in selling them at auction, was acting as the purported owner's agent or a "broker."

18. *Wilkes v. Ellis*, 2 H.Bl. 555, 557, Eng. Reports V 126 P699 (1795).

19. This is an actual case, reported by an auctioneer who has been selling real estate, as well as conducting other types of auctions, for the past fifteen years.

may even take a prospect to the house and show him through it, making representations as to its desirability, and trying to influence his judgment—the same as any real estate broker would do.

On the day of the sale the auctioneer must make an opening statement, giving all pertinent information about the property and the details of the sale, such as terms and date of possession—again acting in the same capacity as a real estate broker. All during the sale the auctioneer is performing the functions that any broker would conscientiously do toward any property he is endeavoring to sell. If the bidding lags or comes to a standstill, the auctioneer will usually cease the actual “crying” and make additional statements in hopes of enticing further bids. Before a sale ends, a recess is held of five to ten minutes, depending upon the trend of the bidding. During this time, the auctioneer and his helpers (ringmen) will talk privately with all those who have made any indication of interest in buying and try to discover their intentions. In addition, they consult with the owner for confirmation or rejection of an apparent selling price. After the recess, the auction resumes and is finally terminated.

Thus it is obvious that during all this time the auctioneer is negotiating or attempting to negotiate a sale or purchase of the house, and upon the completion of the auction, he will expect his commission or compensation as agreed upon, the same as a broker. Some auctioneers may completely close the deal, but those doing so are usually exceptions to the rule. Normally, the purchaser and seller will have a lawyer take care of the final papers.

It is quite apparent that an auctioneer goes beyond the mere “crying” while carrying out a real estate sale. This is beyond the strict limits of his calling as an auctioneer and categorizes him as a real estate broker. There is little difference between the overall actions of an auctioneer in a real estate auction and those of a real estate broker in a normal real estate sale, with the possible exception that a real estate broker may consummate the sale entirely in his office and not look to an attorney for assistance in closing the transaction and signing the final papers.

The Wyoming Compiled Statutes²⁰ define the persons who are subject to the real estate laws in part as follows: “A real estate broker within the meaning of this act is any person, firm, partnership, co-partnership, association or corporation, who for a compensation or valuable consideration sells or offers for sale, buys or offers to buy, or negotiates the purchase or sale or exchange of real estate . . . as a whole or partial vocation.” This language is typical of the real estate statutes of most states.

Looking further in the same section, we find this language: “One act for a compensation or valuable consideration of buying and selling real estate of or for another, or offering for another to buy or sell, or exchange real estate, shall constitute the person, firm, . . . performing, offering or

20 Wyo. Comp. Stat. § 37-2102 (1945).

attempting to perform any of the acts enumerated herein, a real estate broker or a real estate salesman within the meaning of this act."²¹ The Wyoming Supreme Court in 1949²² held that one whose regular vocation was that of a cattle buyer, but who acted in a single real estate transaction submitting offers of vendor to purchaser, was a "broker" within the licensing statute and not entitled to the agreed compensation, because he was not licensed.

The last paragraph of Section 37-2102²³ specifically enumerates those persons to whom the statute does not apply, and an auctioneer is not mentioned in the exceptions. A fortiori, by two well established doctrines of statutory construction, an auctioneer must be included in the act.

The first doctrine is the canon of construction known as "Expressio Unius Est Exclusio Alterius,"²⁴ which means, the expression of one thing is the exclusion of others. It results that when a provision of a statute mentions certain persons to whom the statute does not apply, an intention to include all other persons within its operation may be inferred. So where auctioneers are not mentioned as being in the class to which the statute does not apply, it must be presumed that the statute does apply to them.

The other doctrine referred to is the "Plain Meaning Rule" of construction, which holds that when the meaning of the words are plain, there is no room for other interpretation. Applying this to the statute defining a real estate broker,²⁵ an auctioneer who sells real estate performs all of the acts described in the statute, viz., he sells or offers for sale, or negotiates²⁶ the sale of real estate for a compensation or valuable consideration as a whole or partial vocation. A fortiori, an auctioneer, in a real estate auction, should be classed as a real estate broker. However, the auctioneer's contention is that he need not be licensed because it is not expressly stipulated that he must comply with the licensing statute.²⁷

Wyoming also has a statute²⁸ making it unlawful for anyone to act as a real estate broker or assume to act as such, as a whole or partial vocation, without a license issued by the real estate board. An auctioneer is not precluded from acquiring a license but the examination is so difficult that few auctioneers care to undertake it. This examination covers, among other things, real estate principles and practices, including the

21. Wyoming is in the minority, as most states require more than one act to constitute being a broker. Among the other states having statutes of the same effect as Wyoming's are: Alabama, Arkansas, California, Georgia, Nebraska, New Jersey, Ohio, Utah, Virginia and Wisconsin.

22. *Owens v. Capri*, 65 Wyo. 325, 202 P.2d 174, 176 (1949).

23. *Supra* note 20.

24. *Blacks Law Dictionary*, page 692.

25. *Note 20 supra*.

26. *Grammer v. Skagit Valley Lumber Co.*, 162 Wash. 677, 299 Pac. 376 (1931). This case held that a broker "negotiates" just as much when he brings parties together in such a frame of mind that they can by themselves evolve a plan of procedure, as when he himself carries on the discussions and personally induces an agreement.

27. *Supra* note 20.

28. Wyo. Comp. Stat. § 37-2101 (1945).

elements of land economics, real estate law, including estates in lands, acquisition of title, deeds, leases, mortgages, land contracts, agency contracts, liens, zoning and taxation. The auctioneer contends that this knowledge is not needed to sell real estate at auction. He has no objection to paying the fee for the license and the amount of the fee the auctioneer charges for his services is not affected by his qualifying as a real estate broker. If he acquires a real estate license he must furnish a bond on an annual basis, the premium of which is usually less than ten dollars (\$10.00). This bond requirement is for the protection of the buyer and the seller in case the real estate broker should violate any of his duties toward them, thus enabling them to recover any damages which they might suffer at the hands of the broker.

A survey of states other than Wyoming reveals that in a number of them statutory provisions governing auctioneers exist. Nebraska,²⁹ Utah,³⁰ and Ohio³¹ (whose civil code Wyoming has adopted) have statutes that expressly include persons selling at auctions in defining the term "real estate broker." In fact, the Ohio statute³² goes much further by stipulating that any auctioneer who offers for sale real estate at an auction is required by statute to secure a license as a real estate broker, despite the fact that he is already licensed as a general auctioneer under the provisions of law applicable thereto. The applicable Montana Statute³³ does not require that an auctioneer must be licensed to sell real estate, but it does provide that he must be bonded to sell either real or personal property. The Colorado real estate statute,³⁴ which is worded almost identically with the Wyoming statute,³⁵ does not specifically mention auctioneers as persons who are required to be licensed to sell real estate, but it is known³⁶ that such is required. Colorado also has a statute³⁷ requiring an auctioneer to be licensed to sell or negotiate a sale of farm produce at auction. The auctioneer, in the last mentioned statute, is included in the definition of a broker. The Idaho real estate statute,³⁸ like that of Wyoming, does not expressly include sales at auction; but another statute³⁹ requires an auctioneer to be licensed to conduct auction sales.

Under statutes expressly making unlawful even a single isolated act of an unlicensed real estate broker in negotiating a sale, the decisions appear to be practically unanimous in holding that no compensation can be recovered under such circumstances by an unlicensed person.⁴⁰

29. Neb. Rev. Stat. §§ 81-867 and 81-868 (1943).

30. Utah Code Ann. § 61-2-2 (1953).

31. Ohio Rev. Code § 4735.01 (1956).

32. *Supra* note 31.

33. Rev. Code of Mont. § 66-203 (1947).

34. Colo. Stat. Ann., chapter 15, § 29 (1935).

35. *Supra* note 20.

36. Letter from Jim Stichka, investigator for the Colorado Real Estate Broker and Salesman License and Commission Board, dated February 28, 1957.

37. Colo. Stat. Ann., chapter 15, § 1 (b) (1935).

38. Idaho Code § 54-2001 et seq. (1947).

39. Idaho Code § 63-2311 (1947).

40. *Supra* note 14.

It should be noted that statutes regulating the real estate business and requiring individuals to procure licenses before engaging in it have been enacted in practically all the states.⁴¹ These statutes all have the same general purpose⁴² and are designated not merely as revenue measures, but also to regulate the business, to protect the public from the fraud, misrepresentation and imposition of dishonest and incompetent persons. The nominal amount of the license fee makes it evident that the regulatory rather than the revenue producing features of the law are of primary importance. The relation of trust and confidence, which lie in the very nature of the business, requires that honesty and a fair amount of intelligence be exercised by those engaged in its pursuit. As an enforcement device, the statutes declare void and unenforceable any act of business, under penalty, unless the license is first obtained.

In view of these considerations, it seems evident that a person who, for a compensation or valuable consideration, sells real estate for another at public auction to the highest bidder, is a real estate broker within the meaning of Wyoming Real Estate Laws⁴³ and hence should be required to obtain a license as a real estate broker from the Wyoming Real Estate Board.⁴⁴

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41. Some of the states having real estate statutes are: Alabama, Arkansas, California, Colorado, Georgia, Illinois, Minnesota, Montana, Nebraska, New Jersey, Ohio, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Virginia, and Wisconsin. In fact, almost every state in the Union has some statute regulating real estate transactions.
 42. *Mapes v. Foster*, 38 Wyo. 244, 266 Pac. 109 (1928). This case held that an act licensing real estate brokers must be construed in the light of the obvious purpose of protecting the public.
 43. *Supra* note 20.
 44. An Attorney General's opinion dated December 28, 1956, requested by the Wyoming Real Estate Commission and written by Bruce P. Badley, Assistant Attorney General, held that an auctioneer is included within Wyo. Comp. Stat. § 37-2102 (1945) and is therefore required to obtain a real estate license before he can legally sell real estate at auction.