

1957

Keith L. Knight v. Ross H. Chamberlain : Brief of Respondent

Utah Supreme Court

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Crockett

IN THE SUPREME COURT
of the
STATE OF UTAH

KEITH L. KNIGHT, d.b.a.
Knight Realty Company,
Plaintiff and Appellant,

vs.

ROSS H. CHAMBERLAIN,
Defendant and Respondent.

No. 8623

FILED
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Clerk, Supreme Court, Utah

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Keith L. Knight, dba Knight Realty Company, commenced an action against Ross H. Chamberlain alleging that Chamberlain had “employed Knight’s services to assemble options” in favor of Chamberlain on large tracts of land in Salt Lake County. Knight alleged that the reasonable value of services rendered was the sum of \$3,450.00. At the conclusion of plaintiff’s evidence, a motion to dismiss was made and the court, in granting defendant’s motion to dismiss, found that plaintiff’s evidence showed that

plaintiff was employed by defendant to obtain options granting to defendant the right, for a fixed period, to purchase real property in Salt Lake County and, there being no written instrument evidencing the agreement, such employment contract alleged by appellant was void by virtue of the provision of section 25-5-4 (5) Utah Code Annotated 1953.

STATEMENT OF FACTS

Essentially, the testimony of Mr. Knight, as well as the exhibits attached, indicate that Mr. Knight was asked by Mr. Chamberlain to obtain options for the purchase of real property in Salt Lake County [Tr. 92 and 93]. Mr. Knight answered in the affirmative when asked the question whether or not the bulk of his time was spent in obtaining options on real property [Tr. 93]. Exhibit 10 indicates that of a total of twenty-two full days spent in Chamberlain's service, over seventeen days was spent in contacting land owners for the purpose of obtaining options. The appellant testified that Chamberlain stated he would pay Knight for his services. However, the terms and conditions were never discussed and Knight indicated that he never mentioned to Chamberlain how much he would charge per day or per hour for the service that he had rendered [Tr. 93].

STATEMENT OF POINTS

POINT 1

THE NATURE OF THE SERVICE AND FOR WHOM IT IS RENDERED DETERMINE WHETHER OR NOT A CONTRACT EMPLOYING A REAL ESTATE BROKER COMES WITHIN THE STATUTE OF FRAUDS.

POINT II

EMPLOYMENT TO OBTAIN OPTIONS TO PURCHASE LAND COMES WITHIN THE STATUTE OF FRAUDS.

ARGUMENT

POINT 1

THE NATURE OF THE SERVICE AND FOR WHOM IT IS RENDERED DETERMINE WHETHER OR NOT A CONTRACT EMPLOYING A REAL ESTATE BROKER COMES WITHIN THE STATUTE OF FRAUDS.

The appellant contends that the employment of services to be paid for in the event there is not a sale need not be in writing and maintains that the agreement in question was not an agreement for compensation for the purchase or sale of real estate, but an agreement that no compensation need be paid in the event a purchase or sale is consummated. Appellant concedes that an action in quantum meruit is not available to a broker who is employed to purchase or sell real estate where he fails to put the agreement in writing, but he maintains that where the employment is to render services *connected with land* and not for the purchase or

sale of land, a recovery for the reasonable value of the service can be had even though there is no memorandum in writing. [Appellant's brief, page 13]. He cites several cases to support this proposition. Respondent maintains that the nature of the broker's service and for whom it is rendered determines whether or not a contract employing a broker comes within the statute of frauds.

Certainly every agreement connected with land does not come within the prohibition of the statute of frauds. A review of the cases will indicate the type of agreement the statute contemplates.

The case of *Hall v. Rankin*, 22 Ariz. 13, 193 P. 756 illustrates an agreement not contemplated by the statute of frauds. In that case it was alleged the defendant entered into the following agreement with plaintiff:

“ ‘I have been trying to sell the Henrietta mine to the Big Ledge people, but the mine must stand the inspection of Mr. Shockley, their engineer. I have had a “racket” with him and I cannot get them to go out and look over the property. You know these people, and I want you to get their engineer on the ground, and if I get \$150,000 for it I will pay you \$25,000 for your services, and if I sell it for less I will pay you very liberally, and in any event I will pay you for your trouble and expense.’ ”

Appellant's brief contains a portion of the court's opinion, but does not include the following

language which is most important to clearly understand the reasoning upon which the decision was based:

“In this case the plaintiff, as agent, undertook to perform for the defendant, who was not the owner of the mine, certain services, and the defendant undertook to make compensation therefor. The plaintiff was employed to get the engineer of the Big Ledge Company—on the mine for the purpose of inspection; he was not employed to sell the mine—that was the business of the defendant. The only characteristic in the contract, indicating that the employment of the plaintiff was to sell real estate, is the stipulation that his compensation for his services should be \$25,000 if the defendant sold the mine for \$150,000, and if the mine was sold for a less amount that the plaintiff should be paid liberally. We think that this provision should be construed as fixing merely the ‘measure’ of the plaintiff’s compensation and not that it is to be considered as one of the terms of a contract for the sale of the mine.”

A similar case is the Oregon case of *Clark v. Opp*, 156 Ore. 197, 66 P. 2nd 1179. In that case the plaintiff was employed to go upon certain mining property and tunnel, timber and develop the property and to expose and sample the ore bodies so that the mine could be exhibited to a prospective lessee. In the Clark case it is evident that the plaintiff was employed not to sell the property but as indicated, to develop the property so that it could be

sold. The Clark case and the Hall case illustrate an agreement which contemplates a service not embracing the purchase or sale of real property.

It is important in examining the broker's agreement to determine whether or not the broker is dealing with another real estate broker or agent, or is dealing or contracting with a prospective purchaser or seller of real property. The California case of *Howard v. D. W. Hobson Company*, 176 P. 2nd 715 is illustrative of a fact situation involving two real estate brokers engaged in a joint venture. In that case, the plaintiff informed representatives of the defendant company that he could obtain an option to purchase property belonging to a Mrs. Moore for the sum of \$25,000.00. Representatives of the defendant company agreed with the plaintiff that if he could secure the option, defendant would endeavor to sell the land and would divide any sums in excess of the option price of \$25,000.00, received pursuant to said sale. The defendant raised the question of the statute of frauds alleging that the employment agreement was oral. The court stated:

“That we may go further and hold that even if it were necessary to concede that the agreement in question in effect involved the employment of the plaintiff to purchase the Moore property for the defendant, still, since said agreement was between real estate brokers and not between a broker and the owner

of land, it was not necessary to make it valid that it should have conformed to the formalities prescribed by subdivision 6 of Section 1624 of the Civil Code.”

On rehearing the Supreme Court of California said:

“PER CURIAM. The application for a hearing in this court after decision in the District Court of Appeal of the Third Appellate District is denied.

In denying the application, we deem it proper to say that we are not prepared to hold that subdivision 6 of section 1624 of the Civil Code is not applicable in the case of a simple contract between a real estate agent or broker and a proposed purchaser to obtain an option for the purchase of real estate by the purchaser. The opinion clearly shows that this was in substance a joint venture on the part of plaintiff and defendant for the sale of real property of a third party and the distribution of the profits between them. The District Court of Appeal was clearly right in concluding that subdivision 6 of section 1624 of the Civil Code does not extend to agreements between brokers to co-operate in making sales for the sake of the commission or profits and that this was substantially such a case.”

In *Arbuckel v. Clifford F. Reid, Inc.*, 118 Cal. App. 272, 4, P. 2nd 978, the defendant corporation was a company engaged in the business of subdividing and improving tracts of real estate in the county of Los Angeles and employed two hundred salesmen for selling the properties subdivided. The defendant

employed the plaintiff as director of sales and manager of real estate salesmen and agreed to pay plaintiff for his service a certain sum based on commissions received from sales concluded by the salesmen of the corporation. The Court, in regard to the employment contract, stated:

“This contract, as we view it, is not the kind of contract or agreement to which reference is made by said section 1624. It contains no authorization to respondent to either purchase or sell the property of appellant, but, on the contrary, simply makes him the business manager of appellant for the purpose of aiding and assisting its salesman in disposing of its lands. As was said in the case of *Pettibone v. Lake View Town Co.*, 134 Cal. 227, 66 P. 218, 219, in holding that said section 1624 had no application, ‘The contract here involved is for the personal services of the plaintiff,’ and so in the case at bar the compensation or commission agreed to be paid was in lieu of salary or wages for the personal services to be performed by respondent.”

The Utah case of *Andersen v. Johnson*, 108 Utah 417, 160 P. 2nd 725 involved an action between a real estate broker and his agent. In that case, the defendant employed the plaintiff to obtain listings on property in Box Elder County and defendant agreed that in the event any of the land caused to be listed by plaintiff with defendant was sold the defendant would pay plaintiff one-third of the commission realized. The court held that the contract

was one of employment and did not involve any right or interest in land. The court stated that:

“The contention of respondent that plaintiff cannot recover because his agreement was oral is untenable. The contract was one of employment and not involving any right or interest in land. See *Johnson v. Allen*, Utah 1945, 158 P. 2d 134. The proposition that a contract for fee or commission may be recovered by agent from broker though not in writing is upheld in *Arbuckle v. Clifford F. Reid, Inc.*, 1931. 118 Cal. App. 272, 4 P. 2d 978;”

Having considered certain employment agreements and relationships not contemplated by the statute of frauds, consideration is now given to agreements and relationships various courts hold to be within the statute. In appellant's brief at page 20 the following statement appears:

“Thus it appears that specific employment to purchase or sell or to bind the principal is a necessary part of the employment of a broker in order to comply with the statute of frauds. Conversely, if the employment does not authorize the purchase or sale and does not authorize the agent to bind the principal there is no employment for the purchase or sale of real estate and the statute of frauds is not applicable at all.”

We cannot agree with appellant's position. The statute of frauds pertaining to brokers does not contemplate a situation where a broker is authorized to execute a conveyance of real property for a

seller or enter into a written contract binding his principal to purchase real property. Rather, the statute contemplates the employment of a broker to render services in connection with the procurement by a broker of a bound seller or purchaser of real property. The Supreme Court of California, in the case of *Shanklin v. Hall*, 100 Cal. 26, 34 Pac. 636, commenting on a statute similar to our own stated:

“ . . . Among the contracts declared invalid, if not in writing, etc., by section 1624 of the Civil Code is: “6. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission.” The contract set out in the complaint is embraced in the findings of the court which we have quoted, and it appears to possess all the elements essential to bring it within the purview of the statute. It is not necessary in the sense of the statute that he should have been authorized to execute a conveyance of defendant’s real property. Bouv. Law Dict. “The duty assumed by a broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made.” . . . ”

The Supreme Court of the State of Utah in *Baugh v. Darley*, 112 Utah 1, 184 P. 2d 335, said in reference to our statute:

“ . . . It is different with the statute on broker’s agreements. It provides that any agreement for the performance of services as a real estate broker shall be void unless in writing. The statute is as applicable to contracts implied in law as any other. In effect

it forbids any recovery for services in selling land which are are not provided for by written agreement. See also Page on the Law of Contracts, Sec. 1413."

The purpose of our statute of frauds relating to broker agreements is to require a written contract of employment between a broker and a purchaser or seller of real property. Where a principal wishes to sell real property it is not necessary that the land the principal desires the broker to sell be described with particularity. This issue was raised and decided in *Johnson v. Allen*, 108 Utah 148, 158 P. 2nd 134. In that case the defendant alleged that the listing agreement did not contain an adequate description of real property. In answering this contention, the court said:

"Sec. 33—5—4 (5), U.C.A. 1943, expressly provides that "Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation" shall be void unless some "note or memorandum thereof, is in writing subscribed by the party to be charged." The construction of this section as to the sufficiency of a description of the real estate is apparently a matter of first impression in this state. The section is almost identical to Sec. 1624(6) of the California Civil Code. In an early case the Supreme Court of California in construing this provision noted that its chief element was the employment. *Toomy v. Dunphy*, 86 Cal. 639, 25 P. 130. The provision has subsequently been before the California courts many times. Many of the cases are cited in *Pray v.*

Anthony, 96 Cal. App. 772, 274 P. 1024, 1026, wherein the court noted that; "As uniformly held by numerous decisions in this state upon the subject, the essential part of a contract to employ a real estate broker, so far as the statute of frauds is concerned, is the matter of the employment and consequently need not describe the land specifically if the terms of the employment can be made definite without it. The description of the land and its identity are only incidental to the main purpose of the contract, and, since contracts of that nature do not purport to involve the title or right of possession of land, much greater liberality is allowed in construing and curing defective descriptions therein than in cases of executory contracts to convey land or in deeds of grant, for, as stated, so far as the statute of frauds is concerned, the terms of the employment are the essential parts. The well-established rule is, therefore, that broker's contracts are not to be declared void merely because of a defect, uncertainty or ambiguity in the description of the property to be sold, when such defect can be cured by allagations and proof of extrinsic facts or circumstances." This doctrine was approved by the Supreme Court in *Needham v. Abbot Kinney Co.*, 217 Cal. 72, 17 P. 2d 109."

In many situations a purchaser employing a broker does not know exactly what property he wishes to purchase and consequently a property description could not be included in an employment contract, nor does the statute require a land description.

The statute of frauds relating to brokers agree-

ments deals with an employment contract as stated in *Johnson v. Allen*; supra.

“The contention that the contract was void because of the fact that the wife, who under Idaho community property law was a part owner of the land, did not sign the contract is based on a statute relating solely to transfers or contracts to transfer an interest in the land itself. This was a contract of employment and did not purport to convey an interest in land. The defendant, by this contract, employed the plaintiff to find a purchaser for certain lands. When plaintiff did the work he was entitled to the commission agreed upon whether the land was sold or not, whether defendant owned the land or not. No case has been cited and we have found none holding that such a listing contract is void unless signed by the wife. The Utah Statute of Frauds does not require that such a contract be signed by the “owner” of the lands listed, but only that it be signed “by the party to be charged.” Defendant employed plaintiff to do certain work by a valid written contract. Plaintiff did the work and is entitled to the agreed compensation.”

The Utah case of *Case v. Ralph*, 56 Utah 243, 188 P. 2nd 640, sets forth the type of service contemplated by the statute and the terms and conditions required to be in writing:

“The courts generally hold that under such a statute a real estate broker or agent cannot recover commission for services rendered in either selling or procuring a purchaser for real property unless it appears: (1) That there is an express contract or

agreement of authority in which the terms and conditions of his employment, if any, and the amount of his commission, etc., are stated; (2) that such contract be in writing; (3) that in the absence of such an express contract no recovery can be had for the reasonable value of the services rendered as upon a quantum meruit, nor for the money and time expended for the use and benefit of the owner of the property.' ”

We wish to emphasize that a real estate broker in order to recover compensation for services rendered in procuring a seller of real property, must produce a written agreement setting forth the terms and conditions of his employment and the amount of his compensation, not the terms and conditions of his authority to bind his principal.

Having considered that the function of a broker is primarily to bring about a purchase or sale of real property by bringing a purchaser and seller to an agreement regarding an exchange or sale of real property and having discussed cases indicating that such an employment contract must be in writing, let us next consider the meaning of the statutory term “purchase or sale”. Several California cases have construed this term. In *Duckworth v. Schumacher*, 135 Cal. App. 661, 27 P. 2nd 919, according to the complaint, the plaintiff was to assist and aid the defendant in laying out for subdivision and subdividing for sale certain lands of the defendant and to act as defendant's general sales manager in

charge of the advertising of said subdivision and devising ways and means of promoting the sale of said tract and superintending the sale thereof at a stated salary per week. The defendant-appellant contended that by the very terms of the contract it fell squarely within the provisions of the California statute of frauds which provided that an agreement employing an agent or broker to purchase or sell real estate for compensation is invalid unless in writing. The Court stated:

“... Stating the proposition otherwise, the plaintiff was to aid and assist the defendant in the preliminary work of laying out a subdivision and subdividing a certain tract of land owned by the defendant; to plan and carry out an advertising promotional scheme looking to the sale of the land; to act as sales manager; superintend the sale of said tract. the contract in its entirety looked to the sale of said tract through the agency of said plaintiff and by the means conceived and devised by the plaintiff, all to the end that defendant might sell his said tract through the medium of and by the activities of the plaintiff. Such employment, therefore, had for its sole object and purpose the sale of the real property, and such an employment is within the inhibition of section 1624 of the Civil Code. To hold otherwise would give rise to a practice of ingenious forms, without substances in fact, and thus avoid the very salutary rule of law as declared in section 1624 of the Civil Code, and open the door to fraud, long closed by said statute, and would in effect abrogate such

statute of frauds (Civ. Code, Sec. 1624 If one assists either in the purchase or sale of real estate on a contract for compensation either by commission or salary, he falls within the inhibitions provided in said section to the same extent and in the same manner as though he had been the sole and exclusive medium through which the purchase or sale was made. We think that the terms "employed to sell or purchase" should and does include to aid and assist in the purchase or sale, and it seems to us that to state otherwise would be equivalent to saying that the whole does not include all of its parts. *Shanklin v. Hall*, supra; *Dolan v. O'Toole*, supra. Measured by this standard, all the testimony in the record shows that plaintiff was to aid and assist defendant in the sale of real estate, and such was the purpose of his employment. The evidence, therefore, was insufficient to support the findings of the court and the judgment, there being no evidence that the contract was in writing, that the contract was of such a nature as to require it to be in writing or some note or memorandum thereof in writing and signed by the party to be charged.

The judgment is reversed."

Appellant in his brief has referred to the case of *Owen v. National Container Corp of California*, 115 Cal. App. 2nd 21, 251 P. 2nd 765. In that case the plaintiff alleged that defendants employed plaintiff to locate a suitable industrial site in Los Angeles; that the plaintiff was to develop surveys for defendant on labor conditions, transportation matters, fi-

nancial arrangements and further, plaintiff was to negotiate and assist defendants in the preparation of engineering drawings on various proposed factory layouts and further to negotiate on behalf of defendants with the Federal Manufacturing District, Inc., of Los Angeles, respecting the proposed plant to be constructed by defendants in that District. The lower court dismissed the complaint and on appeal the appellate court held that an employment of a broker to negotiate and assist a third party in effecting a purchase of real property for compensation would be invalid unless in writing. The court went on to say:

“An employment of plaintiff merely to give defendants information as to available factory sites would not have to be in writing. *Wilson v. Morton*, 85 Cal. 598, 24 P. 784. An employment of plaintiff “to locate a suitable industrial site,” without any duty on his part to bring the parties together or to negotiate or assist in a purchase would not be an employment to purchase real property . . .”

“... Plaintiff has pleaded a most unusual agreement under which he was to locate a site but not negotiate for or otherwise assist in its purchase . . .”

“We may say, however, in conclusion, that if the court should find that the services alleged were merely incidental to plaintiff’s efforts to bring about a sale of real property to defendant, and that there was no express agreement of defendant to pay for the same,

plaintiff cannot prevail in this action, either upon contract or in quantum meruit."

And finally we refer to the case of *Pacific-Southwest Dev. Corp. v. Western Pac. R. Co.*, 301 P. 2d 825. In that case the plaintiff contended that an agreement authorizing or employing a broker to obtain an option to purchase real property did not come within the statute of frauds. The court held that in California an option to purchase real property had been held to come within the statute of frauds and must be in writing, and further stated:

"In determining the nature of the services which will bring an employment contract within the statute, the phrase "to sell or purchase" includes "to aid or assist in the purchase or sale" of real estate. *Hooper v. Mayfield*, 114 Cal. App. 2d 802, 806, 251 P. 2d 330; *Duckworth v. Schumacher*, 135 Cal. App. 661, 666, 27 P. 2d 919. Such broad construction of the term conforms with one of the primary purposes of the statute, the protection of real estate owners from the assertion of false claims by brokers and agents. *Toomy v. Dunphy*, 86 Cal. 639, 642, 25 P. 130; also *Gorham v. Heiman*, 90 Cal. 346, 27 P. 289; *Hooper v. Mayfield*, supra, 114 Cal. App. 2d 330. Likewise, the procurement of an option agreement for the purchase of real property is a contract that aids or assists in the purchase or sale of real property, and properly comes within the provisions of the statute. Accordingly, a contract employing a broker to obtain an option for the purchase of real

property, like a contract employing a broker to purchase or sell real property, *Steiner v. Rowley*, 35 Cal. 2d 713, 717, 221 P. 2d 9; *Marks v. Walter G. McCarty Corp.*, supra, comes within the statute and must be in writing. To hold otherwise would open the door to the assertion of unfounded claims by brokers and others on the pretense of oral employment in real estate transactions relative to options, and so frustrate the purpose of the statute.

In the instant case the appellant was dealing with a prospective purchaser of real property. His evidence indicates that the majority of his time was spent in contacting the owners of real property to obtain from them an option to purchase property. We think that all of his efforts were calculated to effectuate and to bring about a sale of real property and consequently because there is no agreement of employment in writing he is not entitled to recover for the service rendered.

POINT II

EMPLOYMENT TO OBTAIN OPTIONS TO PURCHASE LAND COMES WITHIN THE STATUTE OF FRAUDS.

The authorities are divided on this problem. The appellant has cited cases which hold that the employment of a broker to obtain options to purchase land does not come within the statute of frauds. The courts that so hold reason that an option is not a sale nor an agreement to sell; that it is

simply a contract by which the owner of property agrees with another than he shall have the right to buy his property at a fixed price within a time certain. They reason that an owner does not sell his land, that he does not then agree to sell it; but that all he sells is the right or privilege to buy at the election or option of the other party. The second party gets in praesenti, not land, or an agreement that he shall have land, but he does get something of value, i.e., the right to call for and receive land, if he elects.

Corbin, in his work on contracts, maintains that options to buy lands are contracts and that options to purchase create an interest in the land. In volume 2 of Corbin on Contracts at pages 438, 439, and 441, the following statements appear:

“If a broker is employed to procure an option on land, the contract would seem to be within the statute unless the statute clearly distinguishes between conditional and unconditional contracts. In obtaining an option, the employer desires and gets a contract right to a conveyance of land, even though it is subject to a condition that he is not bound to perform. . . .

“It is clear from all this that a binding option is a conditional contract for the future conveyance of land. It is usually a unilateral contract, by virtue of a seal or some executed consideration; but it may be bilateral, as in the case of a lease with option to buy, in which the consideration is a return promise

by the lessee to pay rent. Probably it is the unilateral character of most options that is the chief reason for confusion, for many have been very slow to grasp the nature of a unilateral contract; but an additional reason is found in the fact that the holder's right is subject to a condition precedent, and many have erroneously asserted that until the condition is performed there is no contract. . . .

“If a reasonable interpretation of the statute shows that it was intended to apply to all cases in which the broker is employed to negotiate a contract for the purchase and sale of land, including unilateral and conditional contracts, then it should have been held applicable in the Oregon case. The question whether an option contract in itself creates an interest in the land is considered in another section. . . .”

It would seem that a reasonable interpretation of our statute would show that it was intended to apply to all cases where a broker is employed to negotiate a contract for the purchase and sale of land, including unilateral and conditional contracts. Certainly, the activities of the broker in both situations are the same. To hold that a broker employed to obtain options does not come within the provisions of the statute of frauds would open the door to the assertion of unfounded claims by brokers and others in real estate transactions and frustrate the purpose of the statute.

SUMMARY AND CONCLUSION

The appellant's argument may be summarized as follows:

1. Because the appellant was not authorized to purchase any land for the respondent and was given no authority to bind the respondent in any particular, there was no employment for the purchase or sale of real estate and where the employment is to render services connected with land only, and not for the purchase or sale of land, recovery for the reasonable value of services can be had even though there is no memorandum in writing.

2. Employment to obtain options to buy land is not within the statute of frauds.

Care should be exercised to determine the nature of the employment contract. For example, if a broker employs an agent to obtain listings on property so as to enable the broker to sell property this clearly is not within the statute. If two brokers undertake a joint venture for their mutual advantage, this has been held not to come within the statute. However, where a broker is dealing with a third party, the authorities state that service rendered by a broker which aids or assists his principal to purchase or sell real estate comes within the terms of the statute.

We think that the services performed by the

appellant in this case were calculated to bring about a sale of real property to the plaintiff. We reject appellant's contention that because he was not authorized to bind the defendant there was no employment for the purchase or sale of real property. A broker's task is to bring the minds of the buyer and seller of property to an agreement concerning the terms, conditions and sale of real property and not to act as agent with a power of attorney to enter into agreement binding his principal. Our courts have held that under such a statute as ours, a real estate broker or agent cannot recover compensation for services rendered unless there is an express contract or agreement of employment in which the terms and conditions of employment, if any, and the amount of compensation are stated and that such a contract must be in writing. Appellant testified that he would look to the seller of property for his compensation in the event a sale was consummated, but in the event a sale was not concluded, it was his understanding that respondent would pay him for his services. If, as appellant contends this particular situation takes the agreement out of the statute of frauds, then it is entirely possible, wherever real estate brokers have unsuccessfully rendered services to prospective purchasers of property, for those brokers to commence actions based

on oral agreements to recover in quantum meruit for services rendered. We maintain that this is the exact situation the statute of frauds seeks to avoid.

Respectfully submitted,

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