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Contracts—Realty Sales—Agency Agreement as Constituting an Offer and Providing Memorandum under Statute of Frauds

RECENT DECISIONS

CONTRACTS—REALTY SALES—AGENCY AGREEMENT AS CONSTITUTING AN OFFER AND PROVIDING MEMORADUM UNDER STATUTE OF FRAUDS—Defendants Mattuschek gave to Carnell, a real estate agent, the following authorization: "I hereby appoint E. F. Carnell . . . my agent with the exclusive right to sell the following property: . . ." Also included were a description of the property, a statement of the price and conditions of payment, an authorization to the agent to accept a deposit on the price, and a guaranty that the defendants would furnish an abstract and warranty deed. The agent located a purchaser, plaintiff Ward, who agreed to buy the land. No written instrument was executed by the agent to the plaintiff, though the agent *may* have made an oral offer. Plaintiff buyer gave the agent a check as a "binder" and executed an instrument stating: "I hereby agree to buy the Mattuschek place in accordance with the terms of the agreement between E. F. Carnell and the Mattuscheks dated May 14, 1953." Agent Carnell advised the defendants he had "closed the deal," but after negotiations between the parties they refused to convey the land. Plaintiff sued for and was denied specific performance of the "contract" in the district court. On appeal to the Supreme Court of Montana, *held,* reversed. The written agency agreement given to the realtor by the defendant owners, together with the plaintiff's check and written "acceptance," constituted a sufficient memorandum of the contract to satisfy the statute of frauds; further, the mutuality of remedy necessary for specific performance existed. *Ward v. Mattuschek,* 330 P.2d 971 (Mont. 1958) (Justice Adair dissenting).

The court summarily decided that there was a contract, apparently either ignoring the fact that no offeree was named by the defendants, or construing the "exclusive agency agreement" which authorized the agent to sell as an offer to the world. If this latter construction of the agreement be correct, the agreement and plaintiff's unqualified acceptance would constitute a contract in writing clearly evidencing its own terms.[1] There should then have been no difficulty with the statute of frauds.

The court's decision that a contract was consummated was expressed in these words:[2]

> The respondents Mattuscheks unqualifiedly and exclusively agreed in writing *to permit Carnell* for a period of thirty days *to sell* their ranch. . . . The terms of the sale were succinctly but adequately stated. . . . The acceptance of Ward was in writing. . . . It was unqualified. *It is difficult to conceive of a more clear-cut offer and acceptance in writing* than is evidenced in the exhibits set forth. *This is not a situation of a broker making a contract for the seller* at all—it is simply a situation of a buyer executing, in writing, an unqualified acceptance of a *seller's offer to sell.* (Emphasis added.)

The court does not state the basis for its apparent conclusion that the

[1] *Cf.* Hutton v. Watling, 1 All Eng. 803 (C.A. 1948), 1948 Ch. Div. 398.
[2] 330 P.2d at 975.

agency agreement was more than it appeared to be, and constituted an offer to the plaintiff.

To construe the agency agreement as an offer to the world at large as the court appears to have done is to strain the terms of the instrument. Certainly most instruments of this character are not intended by the vendor to constitute an offer to anyone and everyone. The case of *Lusky v. Keiser*[3] was decided on facts similar to those in the principal case. The court there said:

> The most specious argument in behalf of the appellants contention is that the agency contract was an offer thru the agent to the purchasing public, and binding upon acceptance by any one able to comply. This is refuted when consideration is given to the nature of the contract, which is not addressed to the world at large, or to any prospective acceptor whomsoever, as is the case in open offers of rewards, or prizes, or of letters of credit addressed generally.

In *Haydock v. Stow*,[4] where the New York Court of Appeals construed an almost identical instrument, the court stated:

> Nor do I see any ground upon which it [the agency agreement] can be called an offer of sale, except so far as the appointment of the attorney to sell may include such an offer. . . . I consider the instrument to be a plain, direct, unqualified power of attorney to sell the land mentioned in it; nothing more, nothing less. . . . There is neither an agreement for sale nor an offer to any particular person, or to the world at large. It is simply a vesting in [the agent] of a power before existing in the defendant only.

It is basic to the law of contracts that only an offeree has a power of acceptance[5] and the offeror has the sole power to determine who his offerees shall be. Unless an offer is expressly made to the world, or such intent is inferable from the circumstances, as in prize and reward cases,[6] an offer is usually considered incomplete if it specifies no offeree. Corbin has stated concisely the problem which the court here apparently did not consider:[7]

> So long as it is reasonably apparent that some further act of the offeror is necessary, the offeree has no power to create contractual relations by an act of his own, and there is as yet no offer. An expression of willingness to make a contract is not operative as an offer unless it is made in such a manner as justifies another person in thinking that it is *directed to him for his acceptance.* (Emphasis supplied.)

It would seem that Corbin's rationale is equally applicable when some further act of the offeror's agent is necessary.

[3] 128 Tenn. 705, 164 S.W. 777, 779, 1915C L.R.A. 400, 405 (1914).
[4] 40 N.Y. 363, 367, 368 (1869).
[5] 1 CORBIN, CONTRACTS § 56 (1950).
[6] *Id.* at §§ 11, 56.
[7] 1 CORBIN, CONTRACTS § 11, at 22, 23 (1950). *Accord*, RESTATEMENT, CONTRACTS § 25 (1932).

In all likelihood here the principal did not intend the exclusive agency agreement to be an offer to anyone; rather, he more probably intended to confer on the agent *a power to make an offer.*

Apparently the only other case which approaches being on all fours with the instant decision, including the problem of specific performance, is *Gumbin v. Alexander.*[8] In that case the landowner addressed to a real estate broker a letter stating that he agreed to sell certain property, and that "You [the agent] are to have first right to conclude the purchase. . . ." A third party attempted to conclude a contract with the landowner by giving the realtor a written "acceptance" and an "earnest money" payment to seal the deal. When the landowner refused to convey, the "acceptor" sought specific performance. The Court of Appeals for the Seventh Circuit considered the vital question to be whether the landowner's communication to the broker constituted an offer to sell. The court concluded that it did not because, among other things, the instrument was *addressed to the real estate broker.* The court went on to observe that even if the instrument had been an offer as to the broker, it could not be accepted by the third party because, "generally speaking, an offer by A to B cannot be accepted by D."[9]

The court in the *Gumbin* case confirmed the preliminary character of the agency letter as follows:[10]

> If the proposal is intended merely to open negotiations and to solicit tenders, it is not an offer, the acceptance of which will impose upon the offerer the obligations of a binding contract. [citing authorities.] We conclude, therefore, that the so-called offer was but the real estate broker's employment contract.

Professor Corbin, in his treatise on contracts, relies heavily on the *Gumblin* case for the following proposition, which goes to the very heart of the instant decision:[11]

> [The authorization] may empower the agent to make an offer; but it is not itself an offer, even to one who may happen to read the statement. . . . The agent, in making an offer, may use his letter of written instructions as part of the offering process. . . . [But if he does] he must be shown to have adopted the written instructions as a mode of making the offer; and the writing itself is not sufficient for that purpose.

There is not the slightest indication in the principal case that the agent fulfilled the above-quoted requirement by expressly adopting his agency instructions as a mode of offer. If he had done so, his adoption of the principal's instructions would have been tantamount to his making a written offer himself, and this would have satisfied the statute. The agent here apparently did communicate the terms of his agency authorization to the plaintiff, or let the plaintiff read it; but as Corbin points out, this by itself is not sufficient.

[8]22 F.2d 889 (7th Cir. 1927).
[9]*Id.* at 891. *Accord,* 1 CORBIN, CONTRACTS § 56 (1950).
[10]22 F.2d at 891.
[11]1 CORBIN, CONTRACTS § 27 (1950).

If the authorization to agent Carnell, considered with reference to the plaintiff "acceptor," is but a preliminary negotiation, it is analogous to a mere advertisement. In a recent California decision the court was considering whether a form letter sent out by a landowner, advertising his land for sale, was a sufficient offer to support a would-be-buyer's suit for specific performance. The court, citing section 25 of the *Restatement of Contracts,* found that the advertising letter was only preliminary negotiation, constituting a request for an offer. No offer having been made, an attempted acceptance was ineffective and specific performance could not be had.[13]

For the foregoing reasons it is submitted that the Montana court was very possibly in error in deciding so summarily that the defendant's authorization to the realtor was "clearly" an offer to the plaintiff.

It should be noted that the principal case does not interpret the effect of a standard realty listing agreement in which there is no express appointment of the realtor as the seller's agent. The court expressly refused to decide whether a real estate broker has the power to enter into a contract for the sale of the seller's land,[14] electing instead to rest its decision entirely on the statute of frauds.

Although there is a split of authority on the point, the great majority of jurisdictions hold that an ordinary real estate broker, who has not been appointed the seller's agent or expressly authorized to act in the seller's name, does not have the power to bind the seller to a contract of sale.[14] This is true even though the realtor is given an exclusive right to sell, the power to accept deposits on the price, or authority to "close the deal."[15] On the other hand, some authorities have held that if the realtor is expressly made the seller's agent, as was the situation in the instant case, he is ordinarily considered as having power to make a binding contract of sale.[16] The *Restatement of Agency 2d* takes the position that the authorization to an agent "to sell" land is ordinarily interpreted only as an employment to find a customer, not as an authorization to make a contract of sale, if the agent's regular business is that of a realtor who only solicits offers.[17] However, the power to contract with regard to the land may be granted if the language is sufficiently explicit. Illustration 1 to section 53 of the Restatement states an authorization which parallels that in the instant case, and concludes, "A [the agent] has authority to contract for conveyance, but not to convey."

The majority rule as to the effect of a standard realty listing agreement was succinctly stated by the Supreme Court of Arizona in a recent case in these words:[18]

[13]Lonergan v. Scolnick, 129 Cal. App. 179, 276 P.2d 8, 9, 10 (Ct. App. 1954).

[14]330 P.2d at 974.

[14]Annot., 17 L.R.A. (n.s.) 210 (1909); Annot., 48 A.L.R. 634 (1927), supplemented by Annot., 43 A.L.R.2d 1014 (1955).

[15]43 A.L.R.2d at 1022, 1028 (1955); 48 A.L.R. at 640, 644 (1927).

[16]Kramer v. Mobley, 309 Ky. 143, 216 S.W.2d 930 (1949); Nuzum v. Spriggs, 357 Pa. 531, 55 A.2d 402 (1949).

[17]RESTATEMENT (SECOND), AGENCY § 53 (1958), especially at comment *b*.

[18]Solana Land Co. v. National Realty Co., 77 Ariz. 18, 266 P.2d 739, 745, 43 A.L.R.2d 1002, 1013 (1954).

> [A standard] sales listing is nothing more than the employment of an agent to produce a purchaser, ready, willing, and able to buy the property upon the owner's terms. Authorizing a broker to enter into a contract of sale of realty for and on behalf of the owner and in his place and stead is quite a different matter from employing the broker to find a purchaser. Where the broker's duty and obligation to the owner is only to find a purchaser, we should presume the powers conferred to be coextensive with that duty, and delegation of greater powers than those necessary and proper for the performance of the employment would be unusual, and in the absence of explicit declaration thereof such powers do not exist.

A second possible theory upon which the court in the instant case could have proceeded—that of assuming an oral contract between the agent and the plaintiff—would properly raise a real statute of frauds issue. However, in light of the court's own statement that "this is not a situation of a broker making a contract for the seller," it seems unlikely that this approach really underlies the decision. In any event, the court clearly did rest the case on the statute of frauds, and that in itself raises a serious question.

The Montana statutes of frauds require that for an agreement for the sale of real property to be valid, it must be evidenced by a memorandum "in writing and subscribed by the party to be charged, or his agent."[19]

The memorandum required by the statute of frauds is merely evidence of the contract—"apart from its effect as a memorandum, it need have no legal operation."[20]

The *Restatement of Contracts* states that the memorandum may be executed prior to the time of formation of the contract, if it properly states the terms.[21] Corbin deals with antecedent writings in these words:[22]

> Letters and other writings prepared prior to the making of a contract may become part of a sufficient memorandum if they are so referred to in a signed writing that was executed in the bargaining process as to authenticate the terms then offered. If these antecedent writings are not so incorporated by reference or by other internal evidence, they do not properly authenticate the terms agreed upon.

The agent in the instant case did not sign any supplemental agreement with the plaintiff buyer, so the controlling question is whether the agency authorization given by defendants to the agent was sufficient to satisfy the statute as a writing "subscribed by the party to be charged."

In the case of *Fletcher v. Underwood*[23] the Supreme Court of Illinois took the position that the statute of frauds could be satisfied only by a

[19] REVISED CODES OF MONTANA, 1947, §§ 13-606(5), 74-203, and 93-1401-7(5).
[20] 2 WILLISTON, CONTRACTS § 567, at 1618 (rev. ed. 1936). *Accord*, RESTATEMENT, CONTRACTS § 207, comment *a* (1932).
[21] § 214 (1932).
[22] 2 CORBIN, CONTRACTS § 503, at 714 (1950).
[23] 240 Ill. 554, 88 N.E. 1030, 1031 (1909).

written offer or agreement to sell, executed by the agent to the buyer. The court said:

> It is true the instrument states that [the vendor] will upon demand, within the time limited, make a good and sufficient transfer of the interest to whom the contract pertains; but to whom? Manifestly to the person to whom [the agent] should make a sale. The fact that [the agent] had made a sale, the statute of frauds being interposed, could be evidenced, as against [the vendor], only by a writing signed by Parriot, acting as agent for [the vendor] Carney.

Another court has also taken the position that in a situation like the principal case the preliminary agency agreement will not satisfy the statute. In the recent case of *Mitchell v. A&B Coal Co.*, the Supreme Court of Errors of Connecticut stated:[24]

> The agreement sought to be enforced concerned the sale of land and the only document signed by the party to be charged was the exclusive agency contract made with the brokers. This does not identify the purchaser, one of the essential elements of the memorandum. [Citing authority.] It does not, therefore, even show that any agreement had been made at the time the memorandum had been signed. . . . The memorandum was insufficient.

There is, however, one decision supporting the Montana court's apparent holding that the agency authorization satisfied the memorandum requirements of the statute. The Supreme Court of Kansas held in *Willey v. Goulding* that a letter from the owner of realty to his agent, offering to lease the land on stated terms, fulfilled the requirements of the statute of frauds. The court said, "The fact that it was addressed and delivered to the agent of the writer, and not to the other party to the contract, does not render it inadequate for the purpose."[25]

The court in the instant case cites the Montana decision of *Johnson v. Elliot*[26] for the proposition that a party who had not signed the contract "supplied the necessary mutuality of obligation by institution" of legal action. However that case seems to equally support the proposition that in a situation like the instant one, the agent would have to have executed, to the buyer, a written offer or agreement to sell to satisfy the statute. It was held in the *Johnson* case that the names of the contracting parties—a necessary element of the contract—was supplied by reading a power of attorney executed by the defendant vendor together with a subsequent agreement entered into between the agent and the purchaser.[27]

It is submitted that both of the two theories upon which the court could have proceeded in the instant case are questionable. The agent's authorization was seemingly given on a form contract furnished by the agent. It seems objectionable to construe this sort of an agreement as an

[24] 133 Conn. 573, 53 A.2d 202, 203 (1947).
[25] 99 Kan. 323, 161 Pac. 611, 613 (1916).
[26] 123 Mont. 597, 218 P.2d 703 (1950).
[27] *Id.* at 605, 218 P.2d at 707.

offer to the entire world. Further, this collateral agreement which was entered into prior to any possible oral contract between the agent and the buyer, and which certainly was not intended to be a memorandum of contract, should not be construed as part of a memorandum subscribed by the party sought to be charged.

CRIMINAL LAW—LARCENCY BY BAILEE—CRIMINAL INTENT—Defendant was the president and general manager of S Corporation which operated a sawmill. The complaining witnesses were partners in a similar business. A carload of lumber made up of lumber owned by both parties was shipped and sold by S Corporation. The proceeds of the sale were received by the defendant but no amount was paid to the partnership. One of the complaining witnesses testified that there was no agreement whereby the defendant could keep the proceeds of the sale and that the defendant said he would turn over to the partnership its rightful share upon receipt of the money. The defendant was convicted of larceny of property held by him as bailee. On appeal to the Supreme Court of Montana, *held,* reversed. The state failed to prove the requisite criminal intent since there was no showing of a concealment and the amount was treated on the books of both firms as an open account. *State v. Smith,* 334 P.2d 1099 (Mont. 1959).

In most bailments a bailee's initial possession of the property is legal. Therefore, unless the felonious intent to appropriate exists at the time the bailee takes possession, there can be no larceny because of the absence of the necessary trespass. This was the rule at common law and, except where expressly modified by statute, it is the rule today.[1] Because of this apparent defect in the law of larceny, the strictly statutory crime of embezzlement was created by many legislatures.[2] Embezzlement differs from larceny in that the property comes into the possession of the taker lawfully and is later fraudulently or unlawfully appropriated to another's use.[3] In some jurisdictions the conversion of property by a bailee is made larceny by statute, but statutes establishing the crime of larceny by bailee are more analogous to those of statutory embezzlement than to common law larceny.[4]

Revised Codes of Montana, 1947, section 94-2701, in defining the statutory offense of larceny by bailee, provides in part:

> Every person who, with the *intent* to permanently deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person either . . . or, (2) Having in his possession, custody, or control, as *bailee* . . . any money, property, evidence

[1] 32 AM. JUR. Larceny § 57 (1941).

[2] State v. Mathews, 143 Tenn. 463, 226 S.W. 203, 13 A.L.R. 314 (1920).

[3] Moore v. United States, 160 U.S. 268 (1895); Eggleston v. State, 129 Ala. 80, 30 So. 582 (1901). For an excellent annotation concerning the distinction between larceny and embezzlement see 146 A.L.R. 532 (1942).

[4] State v. Keelen, 103 Ore. 172, 203 Pac. 306 (1922).