

Brokers--When License Necessary to Recover Commissions (Calhoun v. Banner, 254 N.Y. 325 (1930))

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The existence of a joint deposit is the evidentiary fact which has been raised by virtue of the statute⁵ to the status of a presumption. During the joint lives of the parties it may be rebutted, but after the death of either of them the same statute that created the presumption gives it conclusive force. All this is solely by reason of the statute. At common law it has been held that the mere fact that the joint form of deposit was employed, is insufficient, of itself, to establish a gift.⁶ In *McDonald v. Sargent*,⁷ decided under the statute, it was intimated that a joint deposit in other than the statutory form might give rise to a presumption that the account was so made for convenience only. Clearly no presumption of joint tenancy arises in the absence of the statutory form, and clearly the statute was never intended to raise a conclusive presumption of joint tenancy in a case where there is no joint deposit, in the statutory form or otherwise, at the time when the presumption becomes irrebuttable.

It is submitted that the dissenting opinion applies the statute in a manner consonant with reason and authority and that, therefore, there being no conclusive presumption in favor of the plaintiff by reason of the inapplicability of the statute, the evidence offered to prove that the joint account was opened for the convenience of the deceased only, should have been received.

J. V. M.

BROKERS—WHEN LICENSE NECESSARY TO RECOVER COMMISSIONS.—Plaintiff held himself out as a real estate broker in the city of New York. Defendant employed him in the usual manner to bring about a sale of his property. Plaintiff ultimately procured a purchaser who accepted the defendant's offer, and thus brought about a sale of the property. At the time of the broker's employment he did not have a real estate broker's license as required by statute,¹ but procured it before he brought the customer to the defendant and before he did any work toward affecting a sale of the property. During all the time that the negotiations took place and when the sale was consummated, he was duly licensed. Plaintiff brought an action to recover his commission. The defense interposed was that the plaintiff had not complied with the statute, and hence, could not collect his commission, a license being a prerequisite to such an action.² *Held*, plaintiff was a licensed real estate broker according to the statute and was entitled to his commission. All work done in his capacity as a broker for which he was entitled to compensation, was done while he was licensed. *Calhoun v. Banner*, 254 N. Y. 325, 172 N. E. 523 (1930).

⁵ Laws of 1914, ch. 369.

⁶ *Kelly v. Beers*, 194 N. Y. 49, 86 N. E. 890 (1909).

⁷ 121 Misc. Rep. 437, 201 N. Y. Supp. 429 (1923).

¹ N. Y. Real Property Law, sec. 440-A.

² *Ibid.*, sec. 442-D.

The apparent reason for the enactment of the statute was to protect buyers and sellers of real property in their dealings with brokers and to make a standard for the brokers of the state, it being realized that they stand in a position of trust and confidence with their clients.³ At the same time it was made a misdemeanor for a person to carry on the business of a broker without such a license.⁴ It is then, primary and definite in this state that a real estate broker cannot recover a commission for his services without having possessed a license on the date when his cause of action arose, and alleging and proving this fact in the action.⁵ This is also true as to other statutes requiring licenses for the conducting of certain businesses or professions, as for attorneys.⁶ The question then to be determined, is, when does a broker's cause of action for commission arise? It is the general understanding when a person employs a real estate broker or agent to sell real estate for him, that the broker earns his compensation when he brings to his principal one who is ready, able, and willing to contract with the latter on his terms, or, when an offer on different terms is made by the buyer and accepted by the seller.⁷ It has been held that even where it was the agreement between principal and agent that the latter should wait for his commission until title passed, and that even never came about, that he was entitled to his commission when the contract of sale was signed and could recover, the agreement being *nudum pactum* and unenforceable.⁸ If new terms are added by the seller after a ready purchaser is procured and the sale is not consummated, the agent has been allowed to recover.⁹ Performance of the contract between the vendor and vendee is not essential.¹⁰ In all the above instances there was no question as to the broker being licensed or as to the legality of his services. But when this question arises the courts are careful to determine that there was no illegality before they permit a recovery.¹¹ Work done toward the performance of his services while unlicensed is illegal, and thus the

³ Roman v. Lobe, 213 App. Div. 162, 208 N. Y. Supp. 617 (2nd Dept., 1925); *supra* Note 1, sec. 441-E.

⁴ *Supra* Note 1, sec. 442-F.

⁵ Rubin v. Brotter, 123 Misc. 928, 206 N. Y. Supp. 669 (1st Dept., 1924); Bendell v. DeDominicis, 251 N. Y. 305, 167 N. E. 452 (1929); Robinson, New York Real Property Law (1930), 265; 2 Gerard, New York Real Property (6th ed.), 1179; Tiffany, Agency (2nd ed.), 77.

⁶ Hall v. Bishop, 3 Daly 109 (N. Y., 1869); also in the case of a public adjuster there can be no recovery for service rendered while unlicensed; Stake v. Roth, 91 Misc. 45, 154 N. Y. Supp. 213 (1915).

⁷ Davidson v. Stocky, 202 N. Y. 423, 95 N. E. 753 (1911); 2 Williston, Contracts (1920), 1030; 2 Gerard, *supra* Note 5, 1080.

⁸ Ries v. Zimmerli, 224 N. Y. 351, 120 N. E. 692 (1918).

⁹ Davidson v. Stocky, *supra* Note 7.

¹⁰ Gilder v. Davis, 137 N. Y. 504, 33 N. E. 599 (1893).

¹¹ Tiffany, *supra* Note 5 at 162.

whole service is rendered illegal and no recovery is permitted.¹² The broker who performs such a service is deemed to be doing it *gratis*.¹³ Even in an agreement where the broker is not to be paid until title passes, if he did not have a license at the time of performing the services, he cannot recover.¹⁴ The instant case then, follows the long line of decisions, in agreeing that the broker must be possessed of his license during entire time of the performance of his services. But it goes a step farther, too, and states that these services do not begin with the employment but from the time the broker works to procure a customer for his principal. This decision introduces the latest refinement in the theory and is in all justice to both broker and client.

E. H. S.

CONDITIONAL SALES—PERSONAL PROPERTY—FIXTURE STATUTE INAPPLICABLE TO GAS RANGES.—Plaintiff sought an injunction restraining defendant from removing eighty-three gas ranges installed by the usual means in an apartment house of which plaintiff was owner, under a contract of conditional sale between the builder of the apartment house, who was plaintiff's vendor, and the defendant. The stoves had been installed by defendant pursuant to the contract of sale whereby the plaintiff's vendor covenanted to complete the then partially constructed building and finish it "in a fashion similar to buildings of the same type in said location." Some time after the conveyance to plaintiff, the builder defaulted in his payments on the gas ranges and went into bankruptcy. Defendant then, for the first time, filed his conditional bill of sale of the stoves, reserving title in himself and took steps to regain possession of them. *Held*, the reservation of title in the conditional vendor was invalid against plaintiff, a purchaser in good faith, for value without notice of the conditional seller's rights. *Alf Holding Corp. v. American Stove Co.*, 253 N. Y. 450, 171 N. E. 703 (1930).

Gas ranges have already been denominated personal property¹ and the nature of property having a determinate legal character can-

¹² *Roman v. Lobe*, *supra* Note 3 (broker's license expired before he performed his services; he renewed it before bringing his action; *held*, he could not recover part of services being illegally rendered); *Bendell v. DeDominicis*, *supra* Note 5 (where broker was licensed when employed and when contract of sale was signed, but not when he produced customer; he could not recover); *Goldin v. Shankroff*, 125 Misc. 822, 211 N. Y. Supp. 569 (2nd Dept., 1925) (where services were performed while broker was unlicensed, commission was not to be paid until title passed; he had license when title passed but could not recover. Court holding he must have license when services are performed).

¹³ *Stake v. Roth*, 91 Misc. 45, 154 N. Y. Supp. 213 (1st Dept., 1915), *supra* Note 6.

¹⁴ *Goldin v. Shankroff*, *supra* Note 12.

¹ *Central Union Gas Company v. Browning*, 210 N. Y. 10, 103 N. E. 822 (1913); *Madfes v. Beverly Development Corporation*, 251 N. Y. 12, 166 N. E. 787 (1929).