

DRAFTING OF REAL ESTATE INSTRUMENTS: THE PROBLEM FROM THE STANDPOINT OF THE BAR

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Since real estate transactions are seldom negotiated solely and directly by the parties to them, and are usually effected through agents or brokers, it is necessary, if what transpires is to be understood and fully appreciated, that the exact nature of the relationship and activities of such an intermediary be described and defined.

Of the province and functions of a real estate agent or broker the courts have said:

“A real estate agent is a person, who, generally speaking, is engaged in the business of procuring purchases or sales of lands for third persons upon a commission contingent upon success. He owes no affirmative duty to his client, is not liable to him for negligence or failure, and may recede from his employment at will without notice. On the other hand, courts almost unanimously unite in holding that, in case of an ordinary employment to sell, when he has procured a party able and willing to buy upon the terms demanded by his principal, and has notified him of the purchaser's readiness to buy, the agent's work is ended, and he is entitled to his commission. It is not his duty to procure a contract or to make one, and he is not in default if he fails to do either.”¹

“Strictly speaking, he is but a middleman whose office it is to bring the principals together, with the understanding that they are to negotiate with each other, and trade upon such terms as may be mutually satisfactory.”²

“A sale of real estate involves the adjustment of many matters besides the fixing of the price. The delivery of the possession has to be settled, generally the title has to be examined, and the conveyance, with its covenants, is to be agreed upon and executed by the owner. . . . For these obvious reasons, and others which might be suggested, it is a wise provision of the law which withholds from such an agent any implied authority to sign a contract of sale in behalf of his principal.”³

The initial step in any real estate transaction in which an agent or broker participates is his contract of employment. This arrangement runs the gamut of one

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¹ Carstens v. McReavy, 1 Wash. St. 359, 25 Pac. 471 (1890).

² Allison v. Fuller-Smith & Co., 20 Ala. App. 216, 220, 101 So. 626, 628 (1924).

³ McCullough v. Hitchcock, 71 Conn. 401, 42 Atl. 81 (1899).

entirely implied, or one entirely oral, to an enlarged, written contract containing extreme provisions of questionable fairness.

There follows the negotiation of the deal.

No real estate transaction can be said to be unimportant. Whether it involves an inexpensive lot upon which the purchaser expects to build a home or a business property of greater worth, the undertaking, at least relatively speaking, is likely to be one of the most important in the lifetime of the buyer. Hence, as the deal develops, and as an accompaniment thereof, important and essential inquiries are, or should be, made. Their number, extent and character depend upon the circumstances of each case.

Because they are so important, it is clearly in the public interest that every inquiry necessary to safeguard a party's interests, especially those of the buyer, be made; that each be made by one qualified, competent, and authorized, or licensed, by law to make it; and that none be intrusted to one whose interests conflict with, or are adverse to, those of the person he serves. It is of paramount public importance that the buyer be not lulled into a sense of false security, into thinking or believing that essential investigations need not be made, or that they are being competently made by one entirely disinterested when such is not the case.

For example, if the property requires identification, location and general inspection, a surveyor or engineer licensed as required by law will be employed therefor. The architect to whom the buyer of improved property usually turns for added information and security is, also, qualified conformable to statutory requirements. For an audit of the receipts and disbursements of income-producing property, resort is usually had to the public accountant whose qualifications and competency have been certified following rigid inquiry and careful scrutiny. The examination of the title is facilitated by an abstract of title supplied by an abstractor whose responsibilities are well established and widely known and, usually, well insured; or the title may be insured by a licensed and publicly supervised insurer. Appraisals and value may be checked by a licensed real estate agent. Even the adequacy of the plumbing must be passed upon by one possessing a license granted under provisions of law or ordinance. The financing may be effected through a bank, a building and loan, or other financial institution similarly qualified, supervised and authorized to engage in such undertakings in the manner prescribed by statute.

Obviously, the one employed for any of the purposes mentioned should be trained, skilled and authorized to do the particular thing required. In many cases practical common sense and prudence suggest the desirability of employing more than one of those mentioned. In the more important transactions, all are employed as a matter of course. And, equally obviously, the architect should not be employed nor should he undertake to perform the work of the licensed real estate agent nor of the certified public accountant; or vice versa.

In respect of each of these inquiries, the real estate agent or broker finds his position difficult. He finds himself "on the spot"; his good faith, honesty and in-

tegrity challenged. For any of the investigations referred to may bring to light facts or conditions which will change an eager buyer into an unwilling one—and the deal may be spoiled. Hence, the self-interest of the agent whose compensation depends upon a ready, willing and able buyer, or seller, presents great temptations to avoid or evade the very important and necessary steps outlined above. As has been said, one in such a position must be prevented from either inducing the vitally affected party not to make appropriate inquiries or from allowing them to be made by one who is not competent or authorized to do so and who, besides, is directly interested and, perhaps, irretrievably affected by what is disclosed thereby.

When the negotiations have reached the point where the parties are ready, willing and able to deal, that fact, and the agent's performance of his undertaking, is often evidenced by a "binder," or earnest money, contract. If, when this point is reached, all prerequisites, of investigation, inquiry and the like, have been attended to, there is little need for the contract except to give the parties and their attorneys time to attend to the inquiries of a legal nature and to prepare the final closing contract or conveyance. However, in practice, these agreements run from very fairly and impartially expressed arrangements which give the purchaser every reasonable opportunity to investigate and inquire into every remaining thing necessary for his protection to an extreme which completely distorts the purpose of the contract; which lets the buyer beware; requires him to buy the property blindly and to take title "as is" without inquiry and without effort to protect himself. When an instrument of the last mentioned type is resorted to, it is usually for the brazen purpose of advantaging the seller and the intermediary, ruthlessly, at the expense of a careless or too-trusting purchaser.

When the transaction has reached this point, possibly even before the earnest money agreement has been executed—when the terms of the sale have been agreed to and nothing remains except to reduce them to writing—the function and the undertaking of the real estate agent is completed and ends. If he proceeds beyond that point he does so gratuitously and unnecessarily, possibly even officiously. If he does so he almost inevitably trespasses upon the domain of another's business or profession; and, at least conceivably, may be dealing with what he is neither qualified, competent, nor authorized in the public interest to handle.

By now it will be apparent that most real estate deals require the drafting and execution of one or more legal instruments: the contract of employment of the agent or broker, the "binder," or earnest money, contract, and the final, closing contract or conveyance. It is also evident that after all else has been arranged there remains to be made a number of vital inquiries of a strictly legal nature, among which are the state and condition of the title to the property the subject of the deal; the ability or disability, the capacity and competency, of a party to act as grantor or grantee of the entire estate to be conveyed; the existence, or non-existence, and the nature and maturity of liens or incumbrances and how they are to be dealt with; the general

form of, and the essential provisions to be included in, the closing agreement or conveyance; and the formal prerequisites of the execution and recordation thereof.

With purveyors of abstracts of title everywhere crying their wares, with title insurance companies insistently advertising the protection afforded and the high value given the insured by their policies, with statutes providing for Torrens titles to be considered, with numerous cases involving real estate always before our courts, it seems unnecessary to declare that real estate transactions do not follow a rigid pattern of identity or even similarity; that each differs substantially from another; that they are not susceptible of ready classification or standardization. Nevertheless there is a strange and unaccountable insistence on the part of those concerned with the sale of real estate, whether as principal or agent, to use so-called simple or standard forms of legal instruments, containing ready-made-to-order printed provisions to express the terms of their widely varying agreements.

Obviously, the provisions of the closing contract or conveyance must be adapted and responsive to very dissimilar facts, circumstances and conditions in respect of the state and condition of the title, the capacity and competency of the parties and the considerable range taken by the terms of their agreements. No mould, strait-jacket, nor standard form of expression, written or printed, simple or complex is appropriate. If they are suitable, it is the odd chance—the accident—perhaps, even, the miraculous.

Very naturally, the public, generally inexperienced in such matters, believes, especially when the idea is specifically suggested, that such "simple," or "standard" forms have general acceptance and universal use, that they have been "officially" adopted by some "authority" or that they have legislative sanction or approval; or that they have been "worked out" in some disinterested, neutral or impartial manner so as to reflect the utmost fairness to both parties.

Conveyancing is not so simple a matter as merely going to a book store and asking for a warranty deed or to a form book and copying one. It is not a purely mechanical or clerical process of transcription. But even if it were, one of inquiring mind is surprised at the number of radically different forms of the same instrument he is likely to find in the same store or in the same book of forms. There are short forms and long forms; forms with much and little fine print; forms whose provisions, or whose absence of provisions vary so greatly that their use in any particular case cannot possibly be optional or always appropriate.

Of this particular matter the American Bar Association's Committee on Unauthorized Practice of the Law said in its annual report to the Association for 1937:⁴

"No instrument is so fraught with potential danger and inquiry as is the so-called 'simple' or 'standard' property conveyance. In practically no cases are such instruments drawn by neutral or disinterested authorities. Too often, the initial document, the earnest money contract, is prepared solely in the interests of the realtor and the seller and in total disregard of the interests of the buyer. Too, as regards leases, they are filled often with fine print provisions in the landlord's interest and in utter disregard of the protection of the tenant."

⁴ AM. BAR ASS'N, ADVANCE PROGRAM (1937) 165.

Because the unwary and inexperienced are so easily deceived and deluded by the badge of respectability apparently possessed by such instruments, an attempt to use them should be regarded, rather, as the red flag warning of danger ahead.

When a real estate deal, initiated perhaps by employment of an agent or broker, has been negotiated either with or without the intervention of an agent to the point where an earnest money contract is in order or the principal contract is being prepared and the terms of any of these contracts are to be reduced to writing, who may, or who should, draft and prepare the instrument?

If the parties are natural persons they may themselves, whether qualified or competent or not, attend to every detail, every incident, and every requisite of the transaction, and of the instruments necessary to consummate it. They are not obliged to allow or to employ anyone else to intervene, or intrude, or participate therein.

The capacity and competency of a party to the transaction to attend to whatever is necessary for his protection, unassisted, obviously does not depend upon its magnitude, whether measured absolutely or relatively. As a practical matter, he who is most experienced in dealing with real estate and is by his frequent participation in such deals most familiar with the steps essential to safeguard his interests, usually relies less upon himself and more upon those qualified and competent to do the particular thing needed.

From the standpoint of the public welfare serious problems begin to develop when a party feels the need of assistance of one more qualified, skilled and competent than himself.

Again the matter has been summarized by the same Committee of the American Bar Association in the same report:⁵

“The American Bar Association’s Committee on Unauthorized Practice of the Law has sought continuously to ascertain to what extent the general public is benefited or harmed by laymen who draft legal documents. The investigation has been particularly zealous into instances where the compensation of the draftsman, usually a commission, for inducing the parties to deal with each other, depends on their executing the agreement he has drawn.

“The bar recognizes unconditionally that any person may act as his own lawyer and draft his own agreements, and never has evinced a desire to force a person to go to a lawyer for any purpose.

“If one feels incompetent, however, to draw his own agreements and must rely upon another party, it has been the unequivocal and unconditional position of the bar that one who has an interest adverse to that of one or both parties to the deal should not, and in the public interest must not, be allowed to draft the agreement. Such instruments might irretrievably affect the rights and interest of the parties, and their drafting must not be trusted to persons whose compensation depends entirely upon seeing that they are signed.

⁵ *Ibid.*

“The foregoing applies especially to realtors who negotiate deals between buyers and sellers of real estate and who will not be paid if the deal falls through. . . .

“To enter safely into such a transaction calls for careful and thorough inquiry into many matters. If the inquiry is made, as it should be, before the parties are bound by any unsuitable and illadvised instrument, one of them may decide not to go forward with the deal. Obviously a party who may lose his compensation if inquiry discloses defects to defeat the deal ought not be permitted, in the public interest, either to make the inquiry or to induce the vitally affected parties not to have it made.

“Similarly, the one interested solely in ‘putting over the deal and collecting his commission’ and whose interest may be entirely wiped out if provisions are inserted in the agreement which will protect the interests of one or both of the parties, might be tempted to insert provisions in an instrument of his own drawing that would further his interest, to the irreparable damage of the interests of the parties. Mere common sense dictates that he should not be allowed to suggest that he can draw the vital instrument as well or better than an attorney and ‘at no cost to the parties.’ The ‘cost’ may not be discerned at the time, but eventually it may be more than a party can bear. . . .

“The legal profession recognizes that no persons having a conflicting interest should profit by drafting instruments or making investigations for others. One of the basic canons of ethics in the legal profession prevents an attorney from representing another in cases corresponding to the situation that arises when a real estate dealer negotiates a deal between two parties and acts for both.”

To conclude: the real estate agent is an intermediary whose undertaking is definitely limited and restricted to finding purchasers, or sellers, of real estate and to negotiating with them to the point where one is ready, willing and able to buy and the other to sell. He is not required, for the accomplishment of his objectives, nor is he expected or permitted, to perform the functions of the surveyor, engineer, abstractor, insuror, accountant, or of any other profession or licensed employment. Nor is it in the public interest nor compatible with the public welfare that he induce another not to take appropriate and essential precautions or to make requisite investigations or that he, himself, undertake them when he is without the necessary qualifications, competency and license and his personal interests conflict and are incompatible with those of the person he serves.