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Contracts: Brokers: Right to Recover in Quantum Meruit for Services Rendered Under Oral Contract: Vested Rights

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Owens, says this: "We have no hesitation in holding the exemption contained in the ordinance we are considering as a reasonable and legitimate exercise of legislative power, and in pronouncing the ordinance immune from the assault here made upon it." And again the court says: "To assert that the ordinance here under consideration denies the equal protection of the law would not only defeat the purpose of zoning laws in general, but it would amount to a declaration that society is powerless to prevent the growth and development of an evil without completely stamping out the evil."

AL WATSON, '28

Contracts: Brokers: Right to Recover in Quantum Meruit for Services Rendered Under Oral Contract: Vested Rights.

Closely following the case of *Hale* v. *Kreisel*,[1] the Supreme Court of Wisconsin has again denied, in the recent case of *Nickol* v. *Racine Coat & Cloak Co.*,[2] the right of a broker to recover in quantum meruit for services performed and accepted under oral contract to procure a lessee. In the instant case the plaintiff had procured a lessee for defendant, a satisfactory lease was effected, and the lessee took possession. Plaintiff sued the defendant for services rendered in quantum meruit, as his right to recover on the express contract was clearly barred by section 240.10, R.S. The Supreme Court held that the right to recover on quantum meruit was also barred by the statute and hence plaintiff's action failed.

The statute in question, passed in 1917, albeit it has had but a comparatively short life, has had a very interesting history. The statute reads as follows:

Every contract to pay a commission to a real estate broker or agent or to any other person for selling or buying real estate or negotiating lease therefor for a term or terms exceeding three years shall be void unless such contract or some note or memorandum thereof describing such real estate, expressing the price for which the same may be sold or purchased or term of rental, the commission to be paid and the period during which the agent or broker shall procure a buyer or seller or tenant, be in writing and be subscribed by the person agreeing to pay such commission.

Shortly after its passage, the statute came before the court twice but in each instance the suit was on contract, based on meagre written memoranda.[3] Then, in 1921, in the case of *Seifert* v. *Dirk*,[4] the precise question here in point was brought before the court for adjudication. In a very exhaustive opinion, written after deliberate consideration, the court concluded that although the statute avoided the oral contract, the broker's right to recover in quantum meruit was still available. The court conceded that numerous other states with similar statutes who had passed upon the question had denied the broker's right of recovery for services rendered. However, it felt compelled to reach a contrary conclusion, basing its decision upon the rule that has

[1] 215 N.W. 227; [2] 215 N.W. —.

[3] *Gifford* v. *Straub*, 172 Wis. 396; *Brown* v. *Marty*, 172 Wis. 411.

[4] 175 Wis. 220.

been applied in cases arising under other provisions of the statute of frauds where recovery was had in quantum meruit under contracts void because not in writing. Three justices vigorously dissented, they contending that to so hold was abusing the clear intent of the legislature. Following this case, two similar ones[5] were passed upon by the court, and in each, the broker was held entitled to recover, the court regarding the Seifert case as stare decisis on the question.

The application as so stated, however, fell in September, 1927, when in the case of *Hale* v. *Kreisel*, supra, the court reconsidered the precedent it had set. The justices' conclusion, overruling *Seifert* v. *Dirk*, was entered without dissent, albeit two of the majority justices in the prior case participated in the hearing. In justifying this revolutionary change of mind, the court quoted from a Nebraska case[6] which had interpreted a similar statute. That opinion declared, "that to hold that there could be a recovery in quantum meruit would be to open the door to the very abuses the statute was enacted to prevent, and defeat its very purposes." Further, the Wisconsin court said: "It is the duty of the court to give effect to the legislative intent as expressed in the statute. That intent is so clearly expressed that no rule of construction and no precedent or prior judicial decision should be sufficiently potent to lead to a construction of this statute which does not give effect to the plain legislative intent."

It is of interest to note that although counsel for the broker in the Hale case strongly propounded *Seifert* v. *Dirk* as stare decisis, no claim was made that Hale had performed such services in reliance upon the ruling made in that case. Had he so argued to the satisfaction of the court, it is possible that he might have succeeded. This supposition is strengthened by dicta in the Nickol case. Therein, the plaintiff urged that he would be divested of a vested right should recovery be denied him, for he had performed the services under the oral contract in reliance upon the Seifert case. The court recognized such plea but concluded that as plaintiff had not satisfactorily established such contention, he was not deprived of a vested right. That the disregarding of a case as stare decisis should not affect any vested right (should it be possible to so acquire one) the court was careful to declare:

"We deem the Hale case supported by cogent reasons, and it was decided after full consideration of the principles of stare decisis. We think there should be no departure from that decision except in cases where services were performed after the Seifert case, in reliance thereon, and prior to the Hale case."

The law-makers realized that in the buying and selling of real estate many indiscrepancies were being practiced, and to prevent such frauds, the statute was passed.

The ultimate effect of the ruling of this case is still open to conjecture. Will the Wisconsin Supreme Court at its first opportunity overthrow the strong line of decisions which declare that an oral contract for services rendered under a promise to devise and bequeath

[5] *Martin* v. *Bauer*, 188 Wis. 188; Estate of Kayser, 190 Wis. 189.

[6] 76 Neb. 701.

real property as remuneration for such services, does not prevent the right to recover in quantum meruit? Or again, will one who performs services under any other void oral contract, as one not to be performed within a year, still be able to recover? The situations are quite analogous, but yet there will probably be a clear enough distinction to keep alive the old doctrine as to recovery for such services.

C. W.

Criminal Law: Inability of Federal Courts to Suspend Sentence or Grant Probation After Service of Sentence is Begun.

The two cases, *U.S.* v. *Murray* and *Cook* v. *U.S.*, decided simultaneously by the Supreme Court of the United States on January 3, 1928, present a neat instance of judicial interpretation of a statute, quite apart from the interest attached to one of the parties, namely, Doctor Cook, of North Pole fame.

The question presented is this:

Can a federal trial court grant probation to a prisoner after the latter has started to serve his sentence?

The answer requires an interpretation of the Probation Act of Mar. 4, 1925, c. 521, 43 Stat. 1259 (18 USCA Nos. 724-727), which provides a probation system for the federal courts.

In 1916, the Supreme Court of the United States held, in *Ex parte U.S.*, 242 U.S. 27, 61 L.Ed. 129, etc., that a federal trial court had no power of its own to suspend its own sentence and to place the defendant under probation. In that case, the Supreme Court held that the ordinary discretion of the trial court in measuring out sentence did not authorize the full withdrawal of sentence. While the latter result might be desirable and in line with the ideals of modern penology, it could not be reached by the trial court without assistance from Congress, which assistance Congress did not bestow until 1925.

The heart of the Probation Act is as follows:

"That the courts of the United States having original jurisdiction in criminal actions . . . . shall have power, after conviction or after a plea of guilty or nole contendere . . . . to suspend the imposition or execution of sentence and to place the defendant upon probation."

The words "suspend the imposition" plainly authorize the court to refuse to sentence the prisoner at all. Even if the court does see fit to impose sentence, it still can refuse to put the sentence into operation. But the present decision says that once the service of sentence has been entered upon by the prisoner, the trial court cannot recall and release the latter, even if done in the same term of court in which sentence was imposed. "We do not say," says Chief Justice Taft, "that the language is not broad enough to permit a possibly wider construction, but we think it not in accord with the intention of Congress."

This intention of Congress is manifest in two ways.

First. It is plain from the Committee report on the Act in question that Congress wished to provide a means of withholding the stigma of actual imprisonment in cases where there might be a chance to reclaim an useful member of society. This, in fact, is the motive behind all probation legislation. But, if any part of the sentence has