Real Estate Contracts—Brokers—Brokerage Contracts.

A contract to buy and sell real estate is invalid unless in writing and subscribed by the party.

Mrs. Laura Frederick, December 11, 1930.
Deputy Real Estate Commissioner,
Helena, Montana.

My dear Mrs. Frederick:

You have requested an opinion regarding the legality of a verbal contract pertaining to the sale of real estate and the point indicated being as to whether a real estate broker has a valid contract for the collection of a fee where he has effected the sale of real estate in the event that the contract is not in writing.

You are advised that by the provisions of code section 7519 a contract is invalid unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or his agent, in case of "6. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission."

The same thing is true of subsection 5, which reads:

> "5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party to be charged."

A case directly in point is that of Skinner vs. Red Lodge Brewing Co., 79 Mont. 292, 256 Pac. 173. In speaking of subdivision 6, the court says:

> " 'The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or his agent: * * * 6. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission.' (Sec. 7519, Rev. Codes 1921). Pursuant to this express statutory requirement, the law is settled by repeated decisions that a brokerage contract for the sale of real estate in this state must be in writing and subscribed by the party to be charged, or his authorized agent, in order to permit a broker to recover compensation or a commission on the sale of real estate by the owner. (King v. Benson, 22 Mont. 256, 56 Pac. 280; Marshall v. Trerise, 33 Mont. 28, 81 Pac. 400; Newman v. Dunleavy, 51 Mont. 149, 149 Pac. 970; Cobb v. Warren, 64 Mont. 10, 208 Pac. 928; Dick v. King, 73 Mont. 456, 236 Pac. 1093).
>
> "The writing upon which the plaintiff predicates his right to recover a brokerage commission is in no sense a binding contract between the defendant company and the plaintiff to sell the property on the terms and conditions stated, but rather the expression, addressed to a person other than the plaintiff of a willingness on the part of certain of the individual stock-

holders of the defendant corporation to sell on the terms stated. It cannot possibly be construed as a contract between the defendant corporation and the plaintiff, assuming that Lehrkind, as its secretary and manager, possessed authority to execute such a contract. The statute requires a note or memorandum, in writing, subscribed by the party to be charged. The letter in evidence is obviously signed by Paul B. Lehrkind as an individual, and does not in any manner purport to be a corporate act or to bind the corporation itself in any way. It amounts merely to an expression of the attitude of the Lehrkind heirs, as individual stockholders in the corporation, and it is addressed, not to the plaintiff, but to one of the stockholders and directors of the corporation. In effect, it is merely a declaration of the attitude of certain individual stockholders, in the event a sale of the property shall be accomplished by 'anyone' on the terms stated. This letter is not the character of a note or memorandum, subscribed by the party to be charged, made by the express language of the statute a prerequisite for the recovery of a broker's commission on the sale of real estate. It is manifest that it was not intended as a corporate act. In our opinion, it cannot be considered as meeting the precedent requirement of the statute in any respect. The case does not involve question of ratification by the acceptance of a less amount of money than was authorized in the first instance, but rather a complete failure of authority on the broker's part because of lack of the required authorization.

"The statute is mandatory and must be strictly followed as respects the original agreement, as well as any subsequent modification thereof. A writing being necessary in the first instance as a basis of recovery, where there is a change made in the terms, it must also be reduced to writing so long as the contract remains executory (Cobb v. Warren, supra), and the burden rested upon the plaintiff to show that, at the time he produced a purchaser ready, able and willing to buy on the defendant's terms, there was an existing contract of employment between himself and the defendant sufficient to meet the requirements of the statute of frauds. (Brophy v. Idaho Produce & Provision Co., 31 Mont. 279, 78 Pac. 493; Newman v. Dunleavy, supra; Dick v. King, supra). This he has failed to do."

As to subdivision 5, an interesting case is that of Eckles vs. Kendrick, 80 Mont. 120, 259 Pac. 601.

It would be impracticable for this office to attempt to write a treatise on subsection 6 and on subsection 5 as the application of the laws and the exceptions to the law cover a wide field and we cannot go further in this opinion than to state that a contract to buy and sell real property is invalid as a general rule unless some note or memorandum of the same be in writing and subscribed by the party.

Very truly yours,

L. A. FOOT,

Attorney General.