

**Opinion No. 39.****Real Estate Brokers—Licenses.**

HELD: 1. A person who negotiates leases of another's real estate comes within the statutory definition of a real estate broker and must have a license.

2. A person employed by another to collect rents from tenants occupying the other's property does not come within the definition of a real estate broker.

February 6, 1935.

Mr. A. H. Stafford  
Commissioner, Department of Agriculture,  
Labor and Industry  
The Capitol

Your letter to us of January 29, is as follows:

"In connection with the Real Estate Division of this department we have in the past frequently met with opposition and refusal of dealers to take out a license and give bond under provision of law, who state that their only activity is the renting, leasing and collecting of rents and that our Real Estate law as drawn in Section 4058 and defining a real estate broker or agent does not cover the above mentioned acts. A number of cases have been called to our attention where losses have been incurred through the failure of agents to remit money that has been collected as rent.

"I am, therefore, asking you for an opinion as to whether the intent and meaning of our law as covering real estate dealers, brokers and agents should include agents who are authorized to lease and collect rent for owners of such real estate for whom they act as agents."

Section 4058, R. C. M. 1921, as amended by Chapter 7, Laws of Montana, 1933, defines a real estate broker as follows: "A real estate broker, within the meaning of this act, is a person who for a compensation, or promise thereof, sells or offers for sale, buys, or offers to buy, negotiates, or offers to negotiate, either directly or indirectly, whether as the employee of another or otherwise, the purchase, sale, exchange, of real estate, or any interest therein, for others, as a whole or partial vocation. The word 'person' as used in this act, shall be construed to mean and include a corporation. The provisions of this act shall not apply to any person who purchases property for his own use or account, nor to any person who, being the owner of property, sells, exchanges, or otherwise disposes of the same for his own account, nor to any person who, not representing himself to be, and not following the vocation of real estate broker, as a whole or in part, acts in that capacity for another

in connection with a single transaction, nor to any person holding a duly executed power of attorney written in a separate instrument designated as such, from the owner granting power to consummate the sale, exchange, or leasing of real estate, nor to the services rendered by an attorney at law for or on behalf of his client, nor to any receiver, trustee in bankruptcy, guardian, administrator, or executor, nor to any person acting under the order of the court, nor to any person selling under a deed of trust."

Since the statute specifically sets forth who are real estate brokers, under the maxim *expressio unius personae est exclusio alterius*, only such persons who can be said to come within it by fair intendment can be affected thereby. Since this is a penal act it must be strictly construed. *Salisbury v. Alskog* (Wash.), 256 Pac. 1030.

Webster's New International Dictionary (1932) defines the verb "negotiate" as: "To direct, manage, or conduct (something); to carry on negotiations concerning; to procure, or arrange for, by negotiation \* \* \* to hold intercourse or treat with a view to coming to terms upon some matter as a purchase or sale, a treaty, etc.; to conduct communications or conferences as a basis of agreement; as to negotiate for the purchase of a house." See also 45 C. J. 1374.

A lease conveys "an interest in real estate" as provided in the statutory definition (Section 6936, R. C. M. 1921) and in this State a leasehold interest is classified as real property. (Sections 16, 1996, 6668 and 10713, R. C. M. 1921; *Standard Oil Company of California v. Idaho Community Oil Company*, et al., 98 Mont. 131, 37 Pac. (2d) 660.)

With these general observations in mind it is our opinion that a person who negotiates leases of another's real estate comes within the statutory definition of a real estate broker.

It is our further opinion, however, that a person employed by another to collect rents from tenants occupying the other's property does not come within the provisions of the act. In the case of *Schomig v. Keiser* (1922), 209 Pac. 550, the Supreme Court of

California held: “\* \* \* Any employment by any person of another to collect payment of an agreement which has already been negotiated, and is in all respects perfected and the terms agreed upon, does not make the party a real estate broker or real estate salesman, and any misconduct in performing such acts would not warrant the real estate commissioner in revoking the license of such person.

“The portion of the act which authorizes the real estate commissioner to forfeit the license of a broker or salesman and take it away from him is highly penal in its nature, and should not be construed to include anything which is not embraced within its terms. \* \* \* .”