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# Contracts — 1961 Tennessee Survey (II)

Paul J. Hartman\*

## I. ILLEGAL BARGAINS—REAL ESTATE BROKER'S COMMISSIONS—EFFECT OF FAILURE TO PROCURE STATUTORY BOND

## II. RENEWAL OF CONTRACT—PERFORMANCE AFTER EXPIRATION OF CONTRACT WITH FIXED DURATION

Litigation in the field of contracts has been quite light during the period covered by this survey.

### I. ILLEGAL BARGAINS—REAL ESTATE BROKER'S COMMISSIONS—EFFECT OF FAILURE TO PROCURE STATUTORY BOND

The Tennessee Supreme Court case of *Acuff v. Barnes*<sup>1</sup> involved the question whether the failure of a real estate broker to give bond in conformity with a statutory requirement barred a recovery of his commission for services in trying to sell real estate belonging to the owner.<sup>2</sup> When the complainant-broker sued the defendant-owner for his commission, one of the defenses interposed against the claim was that the contract was illegal and void because the broker had not given the bond required of real estate agents by a Tennessee statute.<sup>3</sup>

The broker had paid the privilege tax for a license as a real estate broker as required by statute, and he had filed with the county clerk a bond; but it did not comply with the statute, in that the bond did not provide that it was for the use and benefit of all persons who may be injured or aggrieved by the wrongful act of default of such agent.<sup>4</sup> The statute also makes it a misdemeanor for any person to engage in the business of real estate agent without giving the bond required by the statute.<sup>5</sup>

In reversing both the trial court and the court of appeals, the Tennessee Supreme Court denied recovery of the commission by the broker, even though the broker had acted in good faith upon the advice of the county court clerk who informed him that the bond in question would be sufficient until the proper form of the bond could be made. The court was of the opinion that the bond actually given by the broker was not in conformity

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1. 348 S.W.2d 296 (Tenn. 1961).

2. The broker did not effect a sale but allegedly he had fully performed on his part by finding an acceptable purchaser. See *id.* at 297.

3. TENN. CODE ANN. § 67-5102 (1956).

4. TENN. CODE ANN. § 67-5102 (1956).

5. TENN. CODE ANN. § 67-5112 (1956).

with the statute; that compliance in exact conformity with the statute is mandatory; that the clerk had no power or discretion to waive compliance with the statute; and that the broker, having done the business without having made a proper bond, cannot recover on a contract made by him.

Not only does the *Acuff* decision appear to be in line with the rationale of the overwhelming weight of authority, but it makes the maximum contribution to achievement of the objective of the statute requiring the bond for the protection of persons who may be injured or aggrieved by the wrongful act or default of real estate brokers. Where a statute requires a broker to obtain a license before sales of the kind in question can be negotiated by him, it seems clear that if such a sale is made by one acting as a broker without the required license, he is not able to recover compensation for his services.<sup>6</sup> Recovery is denied even though the requisite license has been procured after the deal has been initiated and before the commission has become due.<sup>7</sup>

Statutes may impose a tax upon the transaction of certain business merely for the purpose of raising revenue, and not with any view of regulating the business itself. Even though such statutes impose a penalty for failure to comply with their provisions, contracts made without paying the requisite tax or obtaining the requisite license generally are not thereby made unenforceable.<sup>8</sup> Of course, the legislature may provide that the failure to comply with a revenue statute will invalidate a bargain.<sup>9</sup> But where, as in the *Acuff* case, the purpose of the statute is the protection of the public, a bargain made in violation thereof generally will be held unenforceable, even though it may incidentally raise revenue.<sup>10</sup>

In such situations, not only will recovery usually be denied on contract, but quasi contractual recovery likewise is generally denied.<sup>11</sup> If it appears that the bargain forming the basis of the action is opposed to public policy or transgresses statutory prohibitions, the courts ordinarily give the plaintiff no assistance, because courts do not wish to aid a man who founds his

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6. *Benham v. Heyde*, 122 Colo. 233, 221 P.2d 1078 (1950); 6 WILLISTON, CONTRACTS § 1765 (rev. ed. 1938).

7. *Burns v. Gartzman*, 139 Pa. Super. 453, 11 A.2d 708 (Super. Ct. 1940); 6 WILLISTON, CONTRACTS § 1765 (rev. ed. 1938). See *Houston v. Williams*, 53 Cal. App. 267, 200 Pac. 55 (Dist. Ct. App. 1921); *Calhoun v. Banner*, 254 N.Y. 325, 172 N.E. 523 (1930), where the court permitted recovery where the real estate broker procured the license after his employment but before he procured the purchaser.

8. *Howard v. Leppy*, 197 Ky. 324, 246 S.W. 828 (1923); *Coates v. Locust Point Co.*, 102 Md. 291, 62 Atl. 625 (1905); 6 WILLISTON, CONTRACTS § 1768 (rev. ed. 1938).

9. 6 WILLISTON, CONTRACTS § 1769 (rev. ed. 1938).

10. 6 WILLISTON, CONTRACTS § 1768 (rev. ed. 1938). *But cf.* *John E. Rosaco Creameries, Inc. v. Cohen*, 276 N.Y. 274, 11 N.E.2d 908 (1937), where a statute required a license to sell milk, and it was a misdemeanor to sell without a license; nevertheless a violation of the statute was not a defense.

11. 6 WILLISTON, CONTRACTS § 1786A (rev. ed. 1938); RESTATEMENT, CONTRACTS § 598 (1932).

cause of action upon his own illegal act. The court's refusal to give aid is not for the sake of the defendant, but because the court will not aid such a plaintiff. Under this rationale, relief likely would have been denied in the *Acuff* case even if the broker had sued in quasi contract.

## II. RENEWAL OF CONTRACT—PERFORMANCE AFTER EXPIRATION OF CONTRACT WITH FIXED DURATION

The question in the Tennessee Court of Appeals case of *Associated Press v. WGNS, Inc.*<sup>12</sup> was whether a five-year contract with a cancellation clause on two years' notice was terminable at will after performance beyond the five years' expiration date. Plaintiff, Associated Press, entered into a written contract with defendant, WGNS, Inc. which owns and operates a radio station at Murfreesboro, Tennessee. The contract obligated plaintiff to furnish and defendant to accept teletype news service for the defendant radio station at specified weekly charges. The original draft of the contract provided that it would continue in force for five years from January 1, 1953, but the contract contained a clause that it could be terminated upon two years' notice in writing by registered mail. However, at defendant's request, in order to get a cheaper rate for its news, an additional clause was inserted in the contract by which it was agreed that defendant would not terminate the contract for five years, which assured that the contract would continue until the termination date of January 1, 1958.

The parties performed under the contract from January 1, 1953, until January 17, 1959. On January 14, 1959, defendant wrote plaintiff a letter purporting to terminate the contract as of January 17, 1959, on the theory that the contract had already expired on January 1, 1958. Defendant refused further to perform under the contract. Treating this repudiation as a breach of contract, plaintiff sued defendant for damages.

In the litigation that followed, defendant, by way of defense, claimed the right to terminate the contract without further notice at any time after the specified termination date of January 1, 1958, and that it had so terminated. Plaintiff, on the other hand, insisted that the defendant lost its right to terminate the contract on January 1, 1958, by continuing to give full performance of the contractual obligation for more than one year after the expiration date. Hence, plaintiff contended that defendant could terminate only by giving the requisite two years written notice of termination.

In reversing the trial court, the Tennessee Court of Appeals held that defendant had breached the contract and awarded plaintiff damages for the breach. The court was of the opinion that the contract was not terminable at will by defendant after January 1, 1958, as defendant claimed. The court further held that since defendant continued to accept services under

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12. 348 S.W.2d 507 (Tenn. App. M.S. 1961).

the contract after the expiration date, the original contract was renewed; that the contract could not be cancelled except on two years' notice; and that defendant's attempt to terminate at will constituted a breach of contract for which defendant was liable in damages.

In holding that the continued performance by defendant of contractual obligations after the expiration date of the contract constituted a renewal of the original contract, the court is in accord with the relevant law as stated by Professor Corbin in his monumental work on contracts. He summarizes the law on this point in this manner:

Parties who have made an express contract to be in effect for one year (or any other stated time) frequently proceed with performance after expiration of the year without making any new express agreement, of extension or otherwise. From such continued action a court may infer that the parties have agreed in fact to renew the one-year contract for another similar period. Illustrations can be found in leaseholds, employment transactions, and contracts for a continuing supply of some commodity.<sup>13</sup>

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13. 1 CORBIN, CONTRACTS § 18, at 36 (1950).