

AUCTIONEERS: Auctioning of real estate
REAL ESTATE BROKERS: License

An auctioneer who advertises and auctions real estate is not a real estate broker and would not have to be licensed as such.

No. 3420

August 14, 1959.

Mr. Lawrence Gubow, Commissioner
Corporation and Securities Commission
300 East Michigan Avenue
Lansing 4, Michigan

By Assistant Attorney General Moule.

You have asked me whether an auctioneer advertising and auctioning real estate has to be licensed as a real estate broker.

Sec. 2 of Act No. 306, P.A. 1919, as amended,¹ provides in part:

"A real estate broker within the meaning of this act is any person, firm, partnership association, copartnership or corporation, who with intent to collect or receive a fee, compensation or valuable consideration, sells or offers to sale, buys or offers to buy, appraises or offers to appraise, lists or offers or attempts to list, or negotiates the purchase or sale or exchange or mortgage of real estate, * * * as a whole or partial vocation, * * *. The provisions of this act shall not apply to any person, firm, partnership association, copartnership or corporation, who as owner or lessor or as attorney-in-fact acting under a duly executed "and recorded power of attorney from such owner or lessor, or who has been appointed by court, shall perform any or the acts aforesaid with reference to property owned by them, unless performed as a principal vocation not through brokers, duly licensed hereunder, nor shall this act be construed to include in any way the services rendered by an attorney at law in the performance of his duties as such attorney at law, nor shall it be held to include a receiver, trustee in bankruptcy, administrator or executor, or any person selling or appraising real estate under order of any court, nor to a trustee selling under a deed of trust: Provided, That this exemption of trustee shall not apply to repeated and/or successive sales of real estate by such trustee, unless such sales are made through "brokers duly licensed hereunder." (Emphasis supplied)

Sec. 3 of the act provides:²

"One acting for a compensation or valuable consideration of (in) buying or selling real estate of or for another, or offering for another to buy or sell or exchange or mortgage or appraise real estate, or to negotiate for the construction of buildings thereon, or leasing or renting or offering to rent real estate, or selling or offering for sale, or buying or offering to buy, or leasing or offering to lease, or negotiating the purchase or sale or exchange of a business, business opportunity, or the good will of an existing business for others, or one who, as owner or otherwise, engages in the sale of real estate as a principal vocation, except as herein specifically excepted, shall constitute the person, firm, partnership, association, copartnership or corporation performing, offering or attempting to perform any of the acts enumerated herein, a real estate broker or a real estate salesman within the meaning of this act. The commission of a single act prohibited hereunder shall constitute a violation." (Emphasis supplied)

Our Supreme Court in *Morris v. O'Neill*, 239 Mich. 663, 667, said:

"It is conceded that the defendant had not obtained a license to engage in the real estate business. Was he required to do so? Was he a real estate broker within the meaning of the act? The statute furnishes its own definition of a real estate broker. In commenting on the use of similar language in defining a 'business chance broker' in *Miller v. Stevens*, 224 Mich. 626, Mr. Justice Steere said: "Following the definition to its conclusion, we find its scope restricted to those who for compensation perform the acts of agency enumerated "as a whole or partial vocation." From the apparent pains taken to define the term, it is to be assumed the final word "vocation" was used advisedly.

¹ C.L. 1948, Sec. 451.202; M.S.A. 1957 Cum. Supp. Sec.19.792

² C.L. 1948 Sec. 451.203; M.S.A. 1957 Cum. Supp., Sec. 19.793

Had "avocation" been adopted, there would be greater force in defendant's contention that a single act constitutes an offense. Though, often inaccurately used as synonymous,' " "An avocation is what calls one away from other work; a vocation, or calling, that to which one is called by some special fitness or sense of duty." Fernald's English Synonyms, Antonyms, and Prepositions.

" 'Vocation is literally a calling. It conveys the idea of systematic employment in an occupation appropriate to the person employed. It implies specific aptitude in the person, the result of training." Smith's Synonyms Discriminated.'

"With this understanding as to the language used, we interpret the statute to mean that, to constitute one a real estate broker. It is not sufficient that he make one sale or two sales. It must appear that he is engaged in the business to such an extent that it can be said to be his vocation or his partial vocation. The defendant's vocation or business was the manufacturing of Murphy wall beds. He and another man had bought the Murphy Wall Bed Company from the plaintiff. It is not claimed that his vocation was the selling of real estate; but that it was part of his vocation because he made the sale in suit and one previously.

It is contended that because of these two transactions he was a real estate broker within the meaning of the statute." The circumstances surrounding the sale involved in this suit do not indicate that in selling the property the defendant was engaged in the real estate business as a partial vocation."

You advise me that "the auctioneers claim they do not close the sale or have anything to do with the matter except, as they call it, "cry the sale.' In other words, they claim that all they do is stand up before a group of people and ask for bids; that the property is then sold to the highest bidder and that the deal is closed by either the seller's attorney or the clerk of the sale who handles all financial details."

Auctioneers, except those selling livestock, do not have to be licensed in this state but do have to execute a bond in the amount of \$2,500 to the county treasurer.³

The sections of R.S. 1846 Chap. 21 following Sec. 26 prescribe what auctioneers must do; so they appear to be well regulated in this state although not licensed.

The Fourth Class Cities Act⁴ empowers Fourth Class Cities to license auctioneers.

There is also provision in Sec. 8 of Chap. 80, R.S. '46.⁵

"That whenever any lands or interest in lands shall be sold at public auction and the auctioneer or the clerk of the auction at the time of the sale enters in a sale book a memorandum specifying the description and price of the land sold and the name of the purchaser, such memorandum, together with the auction bills, catalog or written or printed notice of sale containing the name of the person on whose account the sale is made and the terms of sale, shall be deemed a memorandum of the contract of sale within the meaning of this section."

See Clark v. Holman, 504 Mich. 62.

See also Incorporation of Villages Act, Ch. VII, Sec. 1⁶

The vocation of auctioneer is apparently distinct from that of real estate broker and the legislature has so recognized in the statutes above cited.

Therefore, under the rule in Morris v. O'Neill, supra, an auctioneer advertising and auctioning real estate would not be a real estate broker within the meaning of Act 306, P.A. 1919, as amended, and would not have to have a real estate broker's license.

PAUL L. ADAMS,
Attorney General.

³ R.S. '46, Chap. 21, Sec 26, C.L. 1948 Sec. 446.26, M.S.A. Sec. 19.551.

⁴ Chap/ XI, Sec. 1, Act 215, P.A. 1895, as amended; C.L. 1948 Sec. 91.1; M.S.a. 1949 Rev. Vol. Sec. 5.1740

⁵ C.L. 1948, Sec. 566.108; M.S.a. 1953 Rev. Vol. Sec. 26.908

⁶ Act 3, P.A. 1895, as amended, C.L. 1948 Sec. 67.1; M.S.A. 5.1285