

2217.

LICENSE—REAL ESTATE BROKER—PERSONAL IN CHARACTER—ADMINISTRATOR TO CONTINUE BUSINESS NEEDS NEW LICENSE.

SYLLABUS:

1. *The license of a real estate broker is personal in character and expires at his death.*
2. *Upon the death of a real estate broker, there is no authority for the administrator to continue to operate the brokerage business, either under the license of the deceased broker or by virtue of the exceptions to the definition of a real estate broker contained in Section 6373-25 of the General Code, and, in the event that such administrator does continue such business, it will be necessary for him to secure a license as a real estate broker.*

COLUMBUS, OHIO, June 11, 1928.

HON. EARL D. BLOOM, *Director of Commerce, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, as follows:

“We have on two different occasions and now have a request based on the following facts:

- A. ‘A’, a licensed broker, died.
- B. ‘A’ has a number of licensed salesmen in his employ. ‘B’ is appointed administrator of the estate. Can ‘B’ continue to the end of this year to operate the business of ‘A,’ the deceased broker?

These two questions naturally arise:

1. Can the administrator be licensed as a real estate broker in Ohio?
2. Can the administrator function during the year for which the license has been issued to the deceased broker?”

Difficulty is encountered in answering your inquiries in view of the fact that the Legislature has entirely failed to provide against the contingency of the death of a licensed broker. Accordingly it becomes necessary to have recourse to certain recognized principles of statutory construction in order to reach a solution of the problems you present. Without quoting various sections of the real estate license law which are pertinent, it is sufficient to say that the license of a real estate broker is obviously personal in character. In obtaining the license the broker is required to take an examination and also must prove to the satisfaction of the board that he is honest, truthful and of good reputation. He is further required to give bond conditioned upon the faithful performance of all of the provisions of the act. This being so, the license obviously falls within the ordinary rule which provides that licenses in general are terminated by the death of the holder. This rule is stated in 37 Corpus Juris, p. 246, as follows:

“A license to pursue a given occupation or business is also terminated by the holder’s death, or, in case of a license granted to a partnership, by the dissolution of the firm by death or otherwise, except to the extent that it protects an assignee member of the firm.”

It is likewise a general rule that licenses of a personal nature, such as this one, cannot be transferred except by express authority. As stated in 37 Corpus Juris, p. 245:

"Unless a transfer is permitted by the license statute or ordinance, a license is generally regarded as a special privilege of personal trust and confidence which cannot be assigned or transferred without the consent of the licensing authorities, and express provision to this effect is made by some license statutes and ordinances."

An examination of the real estate license law fails to reveal any authority herein contained for the transfer of a broker's license. It accordingly follows under the rules heretofore discussed that the license of "A," the broker, expired with his death and that there is no provision for the assignment of that license so as to preserve its life thereafter.

Your first inquiry is whether the administrator of the broker may continue to the end of this year to operate the business of the broker who at the time of his death had a number of licensed salesmen in his employ. Your inquiry discloses nothing concerning the details of the business at the time of the broker's death and the answer to your question must accordingly be governed by the application of general principles.

It is a well recognized rule that an administrator cannot ordinarily continue the business of the decedent. His function is to liquidate the assets and, after paying all debts, turn over the net proceeds to those entitled thereto. The rule is stated in Rockel's Complete Ohio Probate Practice, paragraph 518, as follows:

"To carry on the business of a deceased person is not within the scope of the powers of an ordinary administrator. Neither can an executor conduct such a business unless expressly authorized by the will. He might, however, continue the business so far as is reasonably necessary for its proper preservation and profitable disposition of the money and property invested therein.

It is not meant, generally speaking, that the administrator or executor is bound, immediately upon the decedent's death, to convert into cash the assets employed in his trade; on the contrary where the best interests of the estate require it, he may, within reasonable limits, make purchases which will bind the estate. However, an administrator or executor, conducting the business of a deceased person, always does so with great risk to himself.

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Where the executor or administrator carries on business of the deceased in good faith at the request of heirs, distributees or legatees they will not be heard to object to credits in his account, or loss incurred in consequence thereof. But the burden lies on him to show that the losses were incurred with the full understanding of all the parties.

Only by the clear and unmistakable intention of the testator can assets other than those employed in the business be held liable for the debts of a going concern.

As before observed, a wider latitude is allowed an administrator or executor in closing out the business than in continuing one. In order to preserve a business until it could be disposed of, would not be a continuation of the business. In such a matter the executor or administrator must exercise the judgment of an ordinary prudent and careful man, and endeavor to dispose of the business at the very earliest possible time. Sometimes it would be very detrimental to close up a business at once, but as a general rule, it will be more profitable to the estate than to continue it, even for a short time. If it can be disposed of for a slight loss, it will generally be more profitable to the estate than to hold it."

From the foregoing quotation it may be gathered that in certain instances the administrator would be justified in continuing the business, where the best interests of the estate required, so that the business may be sold as a going concern. There exists, however, no statutory authority in Ohio for such a course. An administrator so doing is subject to considerable risk of liability, since he may possibly be held responsible for the losses incurred in the business, while bound to account for any profits made. Accordingly I must answer your first inquiry by stating that an administrator has no statutory or other authority to continue to operate the business of the decedent who, in this case, was a real estate broker.

If, however, in disregard of this lack of authority the administrator nevertheless proceeds to carry on the business, I am of the opinion that in so acting he is not acting in his official capacity as administrator, but is responsible individually.

The conclusion just reached makes the answer to your inquiry as to whether the administrator need be licensed as a real estate broker fairly obvious. That is to say, if the administrator actually does carry on the business, he is then acting individually and not as an administrator. He, therefore, would not come within the exception of Section 6373-25, General Code, where it is provided, after defining "real estate broker" and "real estate salesman", as follows:

"Neither of the terms real estate broker or real estate salesman hereinbefore defined includes a person, firm or corporation, or the regular salaried employes thereof, who performs any of the aforesaid acts,

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(c) As receiver or trustee in bankruptcy, as guardian, executor, administrator, trustee, assignee, commissioner or any person doing the things hereinbefore mentioned, under and by virtue of authority or appointment of any court or courts, or as executor or trustee under any trust agreement, deed of trust or will;

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Since the administrator in continuing the business of the broker in this instance would not be acting under any authority which could lawfully be conferred upon him, his acts would not bring him within the exemption stated in paragraph (c), above quoted. Especially is this true in view of the rule as stated in 37 Corpus Juris, p. 237:

"An exemption from license taxation under a constitutional or statutory provision is in derogation of common right and must receive a strict interpretation and no claim to exemption can be sustained unless it is clearly within the scope of the exempting clause. The existence of an exemption will not be presumed, but must be clearly proved, and if there is any doubt, the uncertainty will be resolved against the exemption."

In this instance, since the administrator in continuing the business steps outside his statutory duties and authority, the exemption cannot be said to apply. Accordingly, if, in continuing the business, the administrator acts as a real estate broker, it will be necessary for him to secure a license.

My previous discussion has, I believe, answered your inquiry as to whether the administrator could function during the year for which the license has been issued to the deceased broker. The license obviously is personal in character and hence, unless there are specific provisions in the statute to the contrary, expires at the death of the licensee. There being no provisions in the statutes to the contrary, the license in this instance expired at the death of the broker and the administrator has no authority to act thereunder.

Additional force to the conclusion herein reached is given by the fact that the bond of the broker, which is given to protect the public in its dealings with the broker, has obviously expired at his death. In any business transaction after death there would accordingly be no bond for the benefit of the public.

It should, perhaps, also be pointed out that the salesman, in order to be lawfully authorized to act as such, must be licensed as the employe of some *licensed broker*. The provisions of law with relation to the salesman's license require that his application shall show the broker by whom he is or is to be employed and the license must be kept on file in the office of the broker. Consequently, where the broker dies, the authority of the salesman to act also ceases.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2218.

FILMS—AUTHORITY OF BOARD OF CENSORS TO EXAMINE AND
CENSOR VITAPHONE AND MOVIE-TONE PICTURE FILMS—MAY
REQUIRE EXHIBITOR TO FURNISH CONTINUITY SHEETS.

SYLLABUS.

Under the provisions of Sections 871-48 and 871-49, General Code, the board of censors are authorized to examine and censor vitaphone and movietone picture films and if necessary order the elimination of objectionable matter that is to be either seen or heard and as an incident to such authority said board may require the exhibitor to furnish continuity sheets showing the words, whether spoken or sung, which are to be reproduced as a part of the picture and explanatory of and otherwise characterizing the same in all cases where it is practicable to furnish such continuity sheets.

COLUMBUS, OHIO, June 11, 1928.

HON. J. L. CLIFTON, *Director of Education, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of a communication from you in which my opinion is requested on certain questions therein stated. Your communication is in part as follows:

“In the censorship of moving pictures the following question has arisen, upon which your opinion is respectfully asked:

Certain films are now being offered which do not have printed statements or titles running with the pictures, but which instead have with them the records for spoken statements or titles. As the film is run these words are made audible, and constitute for the pictures the explanatory matter.

In some cases the firms submitting the films give the matter to be heard by the audience with them under protest, and they now insist that I am not acting within my legal rights in demanding this matter or in ordering the elimination or modification of such spoken words connected with the films as I deem objectionable. Believing that the spoken words are essentially the same in their effects as the corresponding words cast on the screen, when connected with the pictures as the words like print might have been, I have deemed the censoring of such words for sound reproduction with the pictures