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Samuel B. Chase, Jr., Great Falls; Walter C. Pope, Missoula, and C. A. Blenkner, Columbus. This committee submits the following report:

A questionnaire was mailed to all lawyers engaged in active practice within the state, inquiring as to practice opportunities and positions in law offices available to returning lawyer-veterans. Approximately 200 replies were received, many of which mentioned openings in communities or particular offices. A news story to the effect that the information thus secured would be made available by the committee chairman to any lawyer-veterans who desired it was carried by the Associated Press and was published by a number of newspapers throughout the state. Since then many requests for information have been received and the committee has assisted a number of veterans in finding localities where there is a need for additional lawyers. The committee will act as a clearing house for practicing lawyers and returning veterans and it requests that it be advised of practice opportunities as they arise. Attorneys returning from the armed forces who have not previously practiced law or who desire to reenter practice in different localities are urged to contact the committee chairman at 514 Electric Building, Billings.

The committee plans to cooperate with the Practicing Law Institute and the American Bar Association Section of Legal Education in making available to Montana veterans refresher courses in General and Trial Practice, Federal Taxation, and Significant Developments in The Law During the War Years. It is anticipated that extension courses in these subjects will soon be made available to veterans free of cost.

To aid former servicemen in getting clients, the committee respectfully requests district judges to name veterans in cases which involve court-appointed lawyers. The committee also urges lawyers to refer to veterans any work they are unable to handle personally.

MAY A REAL ESTATE BROKER IN MONTANA COLLECT A COMMISSION ORALLY PROMISED HIM?

At common law and under the usual Statute of Frauds, it seems quite clear that while a contract for the actual sale or purchase of land, where the agent or broker had authority to receive or pass title, was required to be in writing, the rule had no application to a mere contract of employment by which one person was to act as agent or broker for another in ne-

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gotiating a sale or purchase so as to defeat the rights of such an agent or broker under parol authority to recover the agreed compensation.¹

In many jurisdictions, however, statutes have been enacted requiring contracts for employment of real estate brokers to be reduced to writing which preclude recovery for services rendered by the latter pursuant to an oral agreement, even on a quantum meruit basis.²

The reasons behind these statutes may be divided into two broad classes; first, the traditional type of statute intending to prevent fraud and confusion relating to title in land, and second, the specialized type intending to prevent fraud or confusion in contracts and commissions in relation to the securing of parties interested in land, but not directly affecting the title. The theory of this latter type of statutes³ seems to be a prevention of fraud and perjury in a field which has proved excessively litigious.⁴

¹AM. JUR., *Brokers* §160.

²AM. JUR., *Brokers* §161.

³Wis. Stat. 1925, §240.10.

"Every contract to pay a commission to a real estate agent or broker or to any other person for selling or buying real estate or negotiating lease therefor for a term or terms exceeding a period of three years shall be void unless such contract describing such real estate, expressing the price for which the same may be sold or purchased, or terms of rental, the commission to be paid and the period during which the agent or broker shall procure a buyer or seller or tenant, be in writing and be subscribed by the person agreeing to pay such commission."

See *Hale v. Kreisel et al* (1927) 194 Wis. 271, 215 N. W. 227, 228:

"The statute was doubtless enacted for reasons similar to those which led to the enactment of the statute of frauds. It was to prevent frauds and perjuries. Its enforcement will sometimes protect brokers who have rendered valuable services too little appreciated. More often it will protect owners from unfounded claims. It will tend to prevent a flood of litigation arising out of misunderstandings between well meaning persons. . . . To carry out the legislative intent we should hold contracts void which do not substantially comply with the statute. In other words, that the statute means what it says. . . . To hold that there can be a recovery upon quantum meruit is to 'open the door to the very abuses the statute was enacted to prevent, and defeat its manifest purpose.'"

⁴Attempts have also been made to declare such acts unconstitutional as an interference with due process under the 14th Amendment of the Federal Constitution or under special state constitutional provisions which prevent taking a man's services without compensation. But the Indiana court held that such a statute was constitutional. However, the court did admit that the statute was in derogation to the common law and was to be strictly construed. See *Selvage v. Talbott* (1911) 175 Ind. 648, 652, 95 N. E. 114, 116:

". . . before the enactment of this statute numerous suits were instituted. . . by agents or brokers who claimed commissions in the sale

Some states have eliminated much of the confusion by including in their codes specific provisions, as to "procuring" prospects instead of the usual "sell or buy" terminology. Thus the Indiana and the Idaho codes⁴ state, ". . . . as a commission or reward for the *finding or procuring* . . . of a purchaser of real estate." (italics ours).

What then is the intentment of the Montana legislature in the enactment of R. C. M. 1935, Section 7519? This is the section dealing with the Statute of Frauds and it is sub-paragraph 6 with which we are chiefly concerned. It reads:

"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." (italics ours).

As seen, by the traditional view, ". . . The Statute of Frauds ordinarily embraces all interests in realty, whether corporal or incorporeal; but it does not extend to agreements which, although in some manner relating to realty, do not contemplate the transfer of title, ownership, or possession."⁵ Nor has Montana any additional code section requiring a contract to procure to be in writing, or in any other way elaborating on this subject.

Does this sub-section then, apply only to the case where the agent or broker has authority actually to pass title to, or directly effect an interest in, the land or also where he merely is given authority to procure an interested party and negotiate a transaction, in which case the owner himself must act-

of land on the grounds that they had been instrumental in procuring purchasers. . . . and often . . . there was absolutely no basis for the claim; on the other hand, brokers and agents complained that owners when sales were once effected by the agents often after an expenditure of great effort were given to the repudiation of their honest obligations . . . Extreme difficulty (was) imposed upon the courts and juries in ascertaining the truth. . . . The statute was to put an end to such disputes and to prevent fraud and perjury, and we believe the enactment is well within the police power of the state."

The statute in question is Burn's Ann. Ind. St. 1908, §7463; Burn's Ann. St. 1933, §33-104, reads:

"No contract for the payment of any sum of money or thing of value, as and for a commission or reward for the *finding or procuring* by one (1) person of a purchaser of the real estate of another, shall be valid unless the same shall be in writing. . . ." (italics ours).

⁴Idaho Code 1932 §16-508 is identical to the Indiana Section in note 4 *supra*.

⁵37 C.J.S. *Frauds, Statute of* §69.

ually close the deal and convey title, i.e., SELL? There can be little doubt that under general agency law, this latter proposition would be viewed as nothing more than an authority for a strictly personal service completely separate and independent of any interest in the land.

One of the first problems raised in a study of this question is the meaning of the key words "*purchase and sell.*" As ordinarily used in connection with realty transactions they are often held not to include the power to convey title. The varied meanings that are attached to these words under different conditions are well illustrated by the view taken by the American Law Institute, Restatement of Agency, Section 53, which reads as follows:

"Authorization 'to buy' or 'to sell' may be interpreted as meaning that the agent shall:

- a. find a seller or purchaser to whom the principal may buy or sell;
- b. make a contract for purchase or sale; or
- c. accept or make a conveyance for the principal."

So too, an eminent author on Agency⁷ says:

"The expression, an authority to "sell" land is used in a variety of senses:—

1. Merely placing the property in the hands of a real estate broker for sale, or listing it with a real estate agent, in the ordinary way, is usually held not to amount to an authority to sell (i.e., to sell and convey . . .) or even to make a binding contract to sell. The only authority ordinarily deduced in such cases is simply to find a purchaser to whom the principal may sell.
2. The context or the circumstances may show that the agent was authorized to sell, in the sense of making a binding contract to sell, even though his authority would not justify a conveyance.
3. The agent may be authorized to sell *and convey*. Such an authority, where statutes have not changed the rule, usually requires, an instrument, e.g., a power of attorney, under seal."

Thus, when the owner uses the word "sell" in talking with a broker, he is normally presumed not to mean to affect the title or any interest in the land, nor to use it in the same sense generally intended in the Statute of Frauds. A definition of the term in keeping with this statutory sense would seem to

⁷MECHEM, LAW OF AGENCY (3rd Ed. 1923) §257, p. 153.

be that given in Black's Law Dictionary (3rd Ed., 1933) which says "sell" is to,

"Dispose of by sale," and in turn defines "sale" as a, "Contract whereby property is transferred from one person to another for a consideration of value, implying passing of general and absolute title, as distinguished from a special interest falling short of complete ownership."

The same source says of "purchase":

"The word 'purchase' is used in law in contradistinction to 'descent,' and means any other mode of acquiring real property than by the common course of inheritance."

In interpreting this type of statute it is quite clear that the meaning intended was of the latter type. The statute no doubt sought to regulate the power to actually convey or pass title, and not a power merely to negotiate in the sense mentioned by Mechem above. If our legislature had intended to give more power or control than the rather traditional type of statute, it no doubt would have included words to that effect, as other states had previously done in incorporating the "procuring" terminology. Since it omitted this very obviously appropriate language, it must be assumed that it did so purposely.

As we have seen the courts admit that these statutes are in derogation of the common law and therefore must be construed strictly. Yet California and Washington, both having a section identical to R.C.M. 1935, Section 7519⁹ seem to give

⁹R.C.M. 1935, §7519, sub 6; Cal. Civil Code (1937) (enacted 1872) §1624, sub 5; Wash. Rem. Rev. Stat. (1932) §5825, sub 5. The opening words of this section are slightly different, reading,

"In the following cases specified in this section, any agreement, contract or promise shall be void, unless such agreement, contract or promise."

The words "purchase and sell" in the sub-section are in reverse order to those in the California and Montana Sections.

Also nearly identical are Ore. Comp. Law (1939) §2-909, sub 8 and Arizona A.R.A. 1939, §58-101, sub 7, reading,

"Upon an agreement authorizing or employing an agent or broker to purchase or sell real property, or mines, for compensation or a commission."

The legislative history of subdivision 6, R.C.M. 1935, §7519, may be thought to support in some measure the contention that the legislature intended that it should extend to *all* brokerage contracts relating in any way to land, rather than only to those intending to grant a power to deal directly with the title. It seems to have been enacted independently of and subsequent to the bulk of the Section by the California legislature (though it was adopted by Montana in 1895 as an integral part of the Section). Early California cases apparently as-

a very loose and broad meaning to these technical words, and reach a result similar to that under the Idaho or Indiana statute which specifically includes the term, "procuring a purchaser." Let us view some of these decisions.

The length to which the courts have gone in preventing recovery under this statute is well illustrated by a recent California case⁹ where the court held a demurrer to seven separate pleas by way of estoppel against the statute was properly sustained and a recovery of commission barred. The court said,

"These are the oral promise to pay the commission, payment for similar services under previous oral contracts, a mutual relation of trust and confidence because of these prior transactions, plaintiffs' belief induced by this prior conduct that the statute would not be invoked, reliance, injury, and defendants' knowledge of all these circumstances. . . . It would seem manifest that if this contract was unenforceable because of the statute of frauds no part of it could be enforced indirectly by a suit for the reasonable value of time or money laid out under the contract."

The fact that the court fails to differentiate between the "purchase and sell" statute such as ours, and the "procuring a purchaser" statute such as Indiana or Idaho, appears in the case of *Kieth et al vs. Smith et al* in Washington.¹⁰ Here the defendant sent the plaintiff this letter.

"Enclosed find contract, which Mr. Smith wishes signed by Mr. Fletcher and confirmed by Rice and wife. Advise us when the abstract is ready, and we will come over at once."

All the references were understood by the parties. The plaintiff negotiated the purchase of land that was later ratified by the defendant and the defendant actually purchased it himself, making payments through the plaintiff. Plaintiff's services were found to be worth \$1250 but the trial court sustained the defendant's demurrer. The Supreme Court approved, saying:

"We think the reasoning of the Indiana court may well be applied to the allegations of the complaint in this

sume that it so extends to all such contracts without giving any reason therefor. So the source of such conclusion is not apparent in the cases. It is submitted that, in view of the meaning generally given to the words "sell" and "purchase," in general Statutes of Frauds, to so extend it is a doubtful form of judicial legislating.

⁹White v. Hirschman et al (1942) 54 C. A. (2d) 573, 129 P. (2d) 430, 431.
¹⁰(1907) 46 Wash. 131, 89 P. 473, 475.

action, and that the note or memorandum therein set forth is utterly insufficient to constitute a compliance with our statute.”

The Washington court was referring to the case of *Zimmerman vs. Zehender*²¹ which was decided under the very different Indiana “procuring” statute already noted but the Washington court apparently didn’t consider the fact that its legislature had never seen fit to pass such an act and the court now practically adopted it by judicial action.

The better reasoning would seem to be with the broker, where he isn’t himself passing title, unless the statute unequivocally denies recovery for services in procuring or negotiating with prospects. Nor is there any more danger of perjury or fraud in this field than there is in the sale of chattels, securities or any other property. Indeed, any fraud present seems to be that of the owner in accepting his agent’s services and then hiding behind the statute to deny his agreed compensation.

While the Montana court has dealt with various shades of the problem, it appears that the precise question of a broker contracting merely to produce a prospect ready, willing and able to buy or sell at given terms for a commission orally agreed upon with the principal, has not arisen. RCM 1935, Section 7519 (or its predecessor, Civil Code 1895, Section 2185) has been frequently considered and, it would seem, with considerable confusion. The Montana Court had cause as early as 1899²² to interpret this section, when it said,

“No matter what services were rendered to defendant . . . and accepted by defendant, no recovery can be had for them, under the proof of this record, because there was no memorandum of any contract for such services in writing. (Civil Code, Sec. 2185).”

In a 1906 case²³ where there was a written authority to sell within a year, the defendant tried to terminate the agency by a note, unless sold within 30 days at a smaller price. The plaintiff admitted this writing but alleged the understanding was that the 30 days applied only to the reduced price and that thereafter the original agreement should continue in force. The court held for the plaintiff and stated that whether the

²¹(1905) 164 Ind. 465, 73 N. E. 920.

²²King v. Benson 22 Mont. 256, 258, 56 P. 280, 281. See also Marshall v. Trerise 33 Mont. 28, 81 P. 400.

²³Blankenship et al v. Decker et al 34 Mont. 292, 298, 85 P. 1035, 1037.

contract was in writing or not was a matter of proof, not allegation for pleading. It went on in dictum to say:

“ and upon a complete performance of an express contract for services at a stipulated compensation, there seems to be no sound reason why a recovery may not be had upon the *quantum meruit*.”

The court seems to suggest, although probably as dictum, that performance may take the agreement out of the statute. To the same effect is the case of *Cobb v. Warren*.¹⁴ Here the plaintiff agreed in an ordinary brokerage contract in writing to take all over \$35 per acre as a commission for finding a purchaser for defendant's land. Later they agreed *orally* to sell at \$30 net, and the defendant did sell at \$32 and the plaintiff claims the \$2 per acre as commission. The judgment for the plaintiff was reversed and remanded for a new trial for insufficient evidence because the plaintiff had failed to sustain the burden of proof that he was the procuring cause of the sale. The court said:

“A writing being necessary in the first instance as a basis of recovery, where there is a subsequent change of terms agreed upon it must also be reduced to writing, so long as unexecuted. But in this case plaintiff bases his right of recovery upon an executed agreement modifying the original written contract. He had right of recovery on this theory in the event he was able to establish the modification either “by a contract in writing, or by an executed oral agreement, and not otherwise.” (R. C. M. 1921, Section 7569).”

Again the court apparently indicates the case might be taken out of the statute and seems to lay down the test as to whether or not the broker could recover his commission, at least from the dictum, to be whether the oral contract (or modification) was executed or executory.

The cases in Montana seem to be divided into two rather distinct lines. First, the ones just considered, indicating by dictum at least, that recovery might be had either under *quantum meruit* or if the oral agreement is executed. Second, in the later cases, from about 1925 on, the court takes quite an opposite view and allows recovery on no grounds whatsoever if the agreement is not fully reduced to writing. So in *Skinner v. Red Lodge Brewing Co.*¹⁵ there was an action for a commission on

¹⁴(1922) 64 Mont. 10, 18, 208 P. 928, 930.

¹⁵(1927) 79 Mont. 292, 296, 256 P. 173, 175.

quantum meruit theory. One stockholder of the Brewing Co. had written another a letter which was shown to the plaintiff, stating an opinion of several of the stockholders as to the price at which the defendant corporation might sell its property, the commissions, etc. While the court determined against the plaintiff on the grounds that the letter in question was neither addressed to him nor sent by the defendant corporation, it went on to say that R.C.M. 1935, Section 7519, was mandatory and that,

“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.”¹⁶

However, the court appears quite willing to allow recoveries for commissions in oral agreements to secure a lease or option, since it feels that no interest in the land is affected. This view is shown in the *Kramer* case.¹⁷ Here the plaintiff orally agreed to secure an assignment of an option contract held by a third person to buy land at \$20 per acre, and he was to get a commission of one dollar per acre. The court held:

“The holder of the option, then, acquires nothing but a personal privilege to purchase, which does not ripen into an interest in the land until he chooses to exercise the privilege conferred by the option and complies with the terms upon which he obtained it. . . . Awbery (the third person) having acquired no interest in the land, but a mere personal privilege which he could lawfully assign to the defendant, the agreement between the plaintiff and the defendant did not amount to an employment of the former as a broker or agent to buy land or an interest in land which by the statute is required to be in writing, but to an engagement by him to perform a service which could be lawfully made by oral contract.”

Again in the same year in a companion case¹⁸ to the *Cobb* case supra, involving the same transaction, the court said:

“The statute of frauds has no application in this case, as the agreement alleged was one to be performed within one year, and it is not an agreement authorizing or employing an agent or broker to purchase or sell real estate within

¹⁶See also *Dick v. King* (1925) 73 Mont. 456, 236 P. 1093.

¹⁷*Kramer v. Schmidt* (1922) 62 Mont. 568, 572, 206 P. 620, 621.

¹⁸*Awbery v. Schmidt* (1922) 65 Mont. 265, 274, 211 P. 346, 348.

the meaning of Section 7519 R.C.M. 1921, but rather an oral contract to divide commission on the sale of the lands covered by the written option contract from Bain to Awbery. The plaintiff did not contract to sell real estate to the defendant, but rather assigned his right to make purchase of real estate under an option contract, and, as the contract between the plaintiff and the defendant was to be performed within a year, no writing was necessary."

The court went on to quote from an early Montana case¹⁹ approvingly:

"Under this definition the holder of the option is not vested with any interest in the land, but, as said by Mr. Justice DeWitt, he gets '*in praesenti*, not lands, or an agreement that he shall have lands, but he does get something of value, that is, the right to call for and receive lands as he elects'."

Here as in the *Cobb* case, however, the decision turned on the insufficiency of the evidence that the plaintiff was a procuring cause. Thus, it seems clear that the court would allow recovery of a commission where the agent finds an optionee, even though that optionee may immediately exercise his option and "buy," i.e., receive title, because the option itself is not an interest in lands. But on the other horn of this dilemma, it is difficult to see how any interest in land can be affected by such a purely personal service as ferreting out prospects, and negotiating with them, but neither having the power, nor attempting to exercise such a power, as affecting the title to the land in any way. Therefore, to maintain any consistency, both propositions must either be within, or both without, the statute. To allow recovery of a commission in one case, but deny it in the other, is indeed a paradox.

This anomaly is probably most clearly shown in the case of *O'Niel v. Wall* in 1936,²⁰ and we may profit by considering it at greater length. Here the plaintiff orally agreed to induce one of four interested parties to enter into a *lease or option OR a lease and option* with the defendant regarding certain mining properties, on these terms; \$25,000 down, \$15,000 in six months, \$35,000 six months later, and \$50,000 at the end of the 18 month period. The plaintiff was successful in securing one of these parties, Schmidt, who entered into a contract whereby defendant agreed to *sell* and Schmidt agreed to *buy* the mining property in question with the payments conforming in amount and date

¹⁹*Ide v. Leiser* (1891) 10 Mont. 5, 24 Am. St. Rep. 17, 24 P. 695.

²⁰103 Mont. 388 62 P. (2d) 672.

as testified by plaintiff. The defendant pleaded sub-division 6 of R.C.M. 1935, Section 7519, as a bar but the lower court gave judgment of \$5,000 for the plaintiff which the Supreme Court affirmed, holding that it was definitely decided in the Kramer case that,

“It will be noted that the statute relates to the purchase or sale of real estate. It was definitely decided by this court in the case of *Kramer v. Schmidt* . . . that a contract to secure an option need not be in writing. Since the holder of an option acquires nothing but a personal privilege to purchase, which does not ripen into an interest in land until he chooses to exercise the privilege conferred by the option and complies with the terms on which he purchased it, an agreement employing a broker to procure or negotiate an option does not amount to an employment of a broker or agent to buy or sell an interest in land.”²¹

The court went on to say :

“Thus it appears that a lease is not real estate, and accordingly a broker’s contract to procure or sell a lease is not within the statute and need not be in writing. The contract which was entered into by the defendant was an agreement to sell and purchase real estate, but such an agreement does not amount to a sale of real estate. It is an executory agreement which would become a sale of real estate when fully performed, that is, when all of the payments have been made. . . . The contract sued on was not required to be in writing by the statute pleaded.”²²

Even more astounding than the anomaly mentioned above, is the court’s proposition that a lease, which plaintiff had authority to give, is not an interest in land for this purpose although sub-division 5 of R.C.M. 1935, Section 7519 specifically requires that “an agreement for leasing for a longer period than one year” be in writing.²³

So the court seems to have adopted two different views of

²¹Ibid at 391.

²²Ibid at 392.

²³Roscow v. Bora (1943) 114 Mont. 246, 254, 135 P. (2d) 364, 366.

This case may be thought to reject the O’Neil rule that a leasehold is not an interest in land under the Statute of Frauds. At least it presents an interesting converse to the O’Neil case and seems to bear out the inconsistency mentioned above. Here plaintiff had a written agreement to get 10% commission for procuring a purchaser for mining lands for not less than \$100,000. Instead plaintiff secured a lease and option which was later terminated for a straight lease. The court affirmed the judgment for the defendant, stating,

“ . . . the words, ‘procure a purchaser’ can mean but one thing—procuring a person who will *buy* the property. Likewise, the written contract being clear, we cannot say that the plaintiff’s services,

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R.C.M. 1935, Section 7519. If this section refers only to authority in an agent to deal directly with the title, then clearly any authority not including a power to affect the title directly is not covered by the mandate that it be in writing. Under this interpretation the court would correctly exclude authorities to give a mere option. On the other hand, if the object of this section is so sweeping as to interdict all brokerage authorities not in writing, simply to prevent disputes, it doesn't matter whether the authority extends to a dealing directly within the statute or not.

Thus it appears there is considerable confusion in the present state of the law on this question. The court seems to strain unnecessarily in arriving at the result that a lease or option does not amount to an interest in land so as to allow recovery, when it could have frankly based the same result on the obvious fact that the mere finding of a prospect does not affect any interest in the land what-so-ever. Even though the doctrine of this case in saying that a lease-hold is not an interest in land under the Statute of Frauds is unacceptable, the case seems really to support the conclusion that the agent should be allowed to recover his commission where the agreement is simply to find a prospect and no interest whatever in the land is involved in the agent's authority. Further, so much dictum present in some Montana decisions seems to favor the broker's recovery where the oral agreement is to find a prospect; that the court would seem justified in carefully construing the terms "purchase and sell" of this Section so as to allow recovery where the oral agreement is merely to find a prospect ready, willing and able to buy, where he conveys *no interest* in the land, and doesn't even consummate a lease or option. Nor is any property right involved to preclude a clear adoption of such a view.

It is submitted that the court should carefully consider the wording of our Section, if the proper case arises, and not read into it the words of the Indiana or Idaho section which our legislature has never seen fit to include. Since this statute is admittedly in derogation to the common law, no more should be read into it than was clearly intended by the legislature as shown by its words. Under these circumstances, it is hoped that the section will not be so stretched as to preclude the recovery of the broker's commission.

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when the terms of the contract were not met, entitle her to a commission."

Therefore, the court denies plaintiff recovery of commission on the very point which in the O'Neil case it allowed recovery, because there it found that a "lease" is not an "interest" in land and agreements relating to it need not be in writing.