Real Estate Broker and His Commissions

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THE REAL ESTATE BROKER AND HIS COMMISSIONS.

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SECTION I. NATURE OF HIS UNDERTAKING.—In dealing with the question of the right of a real estate broker to commissions for selling or buying land, and the conditions under which they become payable, it is essential at the outset to get a clear conception of the nature of his undertaking as he is ordinarily employed. A broker employed to sell real estate may be authorized and required by the terms of his undertaking, not only to find a purchaser, but even to conclude an actual transfer, or at least to procure from the purchaser a valid written agreement binding him to purchase upon the terms specified; and where this is his undertaking the broker has not earned his commission until he has performed it or the principal has accepted a less complete performance.¹²

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¹² Thus in Rutenberg v. Main, 47 Cal. 213 (distinguishing Duffy v. Hobson (40 Cal. 243), cited in a later note and distinguished in Armstrong v. Lowe (76 Cal. 616, 18 Pac. 755), also cited in a following note), it was held that the broker was clearly relied upon to complete a binding contract. It was manifest from the evidence, said the court, that it was the intention that the agent "should do more than discharge the functions of a broker."

See, also, Hyams v. Miller, 71 Ga. 608; Parker v. Walker, 86 Tenn. 566, 8 S. W. 391; Gilchrist v. Clarke, 86 Tenn. 583, 8 S. W. 572; Wiggins v. Wilson, 55 Fla. 340, 45 So. 1011. Compare, also, Kerfoot v. Steele, 113 Ill. 610 (a broker to purchase property).

In Pfanz v. Humburg, 82 Ohio St. 1, 91 N. E. 863, the court recognized the general rule that a broker who has secured a purchaser ready, willing and able to buy has earned his commission, but held that under a written contract of employment to "pay for services when the property is sold," the broker earned no commission unless he secured a written contract binding the purchaser to buy.

In Barber v. Miller, 41 Pa. Super. Ct. 442, the court, in reversing a judgment of the county court, said that good defense had been made if defense showed that contract of employment of plaintiff agent was that he should secure a lessee to sign the lease and to make a down payment thereon, that the plaintiff did secure an acceptable offer from people with whom defendant had been negotiating before he employed plaintiff, but that plaintiff failed and could not secure the tenant's signature to the lease, nor any down pay-
SEC. 2. But the authority and duty of the real estate broker, as ordinarily employed, do not go so far. He has usually very few of the characteristics of an ordinary agent, but stands rather in the attitude of one to whom the offer of a unilateral contract has been made. That is to say, the owner offers to pay a commission if the broker will perform a certain act, namely, to find a purchaser for the property upon certain terms. The broker, on the other hand, ordinarily makes no present promise. He does not agree that he \textit{will} find a purchaser. He may, however, accept the owner’s offer, and thus change it into a binding contract, by the performance of the act stipulated.

SEC. 3. \textbf{Usually need not conclude a binding sale—find purchaser ready, willing and able to buy.}—Inasmuch as the broker in the ordinary case is employed without writing, and inasmuch as in several states an agent for the sale of land must be authorized by writing, the broker, as ordinarily employed, in such states would not be properly authorized to make a binding contract of sale.\textsuperscript{2} \textit{A fortiori}, he would not be authorized to execute a deed of conveyance.\textsuperscript{3} Moreover, even if no question of written authority were involved, it is doubtless true that the general employment of an ordinary broker to “sell” land does not contemplate that he is to close the bargain; and, unless something more is expressly stipulated for, the broker will have neither the authority nor the duty to

\footnotesize{\textsuperscript{2} Lawson v. King, 56 Wash. 15, 104 Pac. 1118; Shillinglaw v. Sims, 86 S. Car. 76, 67 S. E. 906. Cases going upon the ground that written authority was essential: Ballou v. Bergwendsen, 9 N. Dak. 285, 83 N. W. 10; Halsell v. Rentrow, 14 Okla. 674, 78 Pac. 118; Purkey v. Harding, 23 S. Dak. 69, 123 N. W. 69.

\textsuperscript{3} White v. Lee, — Miss. —, 52 So. 206.}
complete a binding contract between the purchaser and the seller. His duty is ordinarily performed when he has found a purchaser who is ready, willing and able to purchase upon the terms specified.

4. **Duffy v. Hobson**, 40 Cal. 240, 6 Am. Rep. 617, is one of the leading cases upon the subject. It was agreed that written authority was not necessary, and the case turned upon the proper construction of an authority to a broker to sell. The court said that a sale of land involved so many questions concerning which the seller presumptively would wish to decide for himself—such as the adjustment of the terms, the kind and form of the conveyance, the state of the title, the surrender of possession, the personality of the purchaser, and the like—that "a mere authority 'to sell' can hardly confer power upon the agent to determine all these matters for his principal, so as to bind him by his determination." "To give to the mere words 'to sell' such a broad signification as that would be to invest the agent with power of that ample and discretionary character usually only conferred with caution and by means of a general letter of attorney where the terms are distinctly expressed." Followed in **Armstrong v. Lowe**, 76 Cal. 616, 18 Pac. 758 (distinguishing **Rutenberg v. Main**, 47 Cal. 219, cited in a preceding note); **Bacon v. Davis**, 9 Cal. App. 83, 98 Pac. 71.


In **Lindley v. Keim**, 54 N. J. Eq. 418, 34 Atl. 1073, the court affirmed a declaration of the court below that "the mere employment of an ordinary real estate broker to effect a sale of a parcel of land, even though the price and terms be prescribed, does not amount to giving present authority to such broker to conclude a binding contract for the same. Moreover, such authority is not usually to be inferred from the use by the principal and broker in that connection of the terms 'for sale' or 'to sell' and the like. Those words in that connection usually mean no more than to negotiate a sale by finding a purchaser upon satisfactory terms." See also, **Milne v. Kleb**, 44 N. J. Eq. 378; **Dickinson v. Updike** (N. J.), 49 Atl. 712.

**Contra:** **Haydock v. Stow**, 40 N. Y. 363.

5. (This list does not purport to be complete.)


**Alabama:** **Cook v. Forst**, 116 Ala. 395, 22 So. 540; **Richardson v. Olahe Milling & Elevator Co.**, Ala., 52 So. 659.

**Arkansas:** **Posten v. Hall**, Ark., 132 S. W. 1001.


or, if no particular terms were prescribed, then upon terms accept-

Florida: Carter v. Owens, 58 Fla. 204, 50 So. 641.
Maine: Veacie v. Parker, 72 Me. 443; Smith v. Lawrence, 98 Me. 92, 56 Atl. 455.
Maryland: Jones v. Alder, 34 Md. 440; Livezy v. Miller, 61 Md. 336.
Minnesota: Gooc v. Stevens, 32 Minn. 472, 22 N. W. 549; Cullen v. Bell, 43 Minn. 230, 45 N. W. 428; Fairchild v. Cunningham, 84 Minn. 521, 88 N. W. 15; Hubachek v. Hazard, 83 Minn. 437, 86 N. W. 426.
North Carolina: Mallonee v. Young, 119 N. C. 549, 26 S. E. 141.
North Dakota: Ward v. McQueen, 13 N. Dak. 153, 100 N. W. 253.
Ohio: Roush v. Leffler, 18 Ohio Cir. R. 806, 6 Ohio Cir. Dec. 760.
Tennessee: Cheatham v. Varbrough, 90 Tenn. 77, 15 S. W. 1076; Woodall v. Foster, 91 Tenn. 195, 18 S. W. 241.
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able to the principal.6

Sec. 4. When Is Such a Purchaser "Found"?—When a purchaser is to be deemed to be "found" or "produced" within the meaning of this rule, is a question upon which there is some difference of opinion. (1) If the broker has obtained from a proper person and delivered to his principal a written contract to purchase, or —since he may not be authorized to sign a written contract—a written offer to purchase which the principal can immediately turn into a written contract by accepting it, he would ordinarily be deemed


As has been seen in an earlier section, the principal may expressly keep the matter wholly within his own control, as by stipulating that he will pay commissions only if he approves the sale, or if he then sees fit to sell, or if he accepts the purchaser. See Stewart v. Pickering, 73 Iowa 652, 25 N. W. 690; Walker v. Turrell, 101 Mass. 257, 3 Am. Rep. 352; Condict v. Cowdrey, 139 N. Y. 273, 34 N. E. 791; Hungerford v. Hicks, 39 Conn. 259.

That the terms are satisfactory to the seller may ordinarily be shown either (1) by the fact that the sale was actually consummated, or (2) by the fact that the seller actually accepted the buyer as a satisfactory one, even though for some reason (not the fault of the broker) the seller afterwards permits the sale to fail. (1.) That the sale was actually consummated: Conkling v. Krakauer, 79 Tex. 735; 21 S. W. 127; Hanna v. Collins, 69 Iowa 51, 28 N. W. 431; Cassaday v. Seeley, 69 Iowa 29, 29 N. W. 432; Iseh in v. Griffith, 62 Iowa 688, 18 N. W. 302; Cook v. Fiske, 12 Gray (Mass.), 491; Keys v. Johnson, 68 Pa. 42; Glenthworth v. Luther, 21 Barb. (N. Y.) 145; Coleman v. Meade, 13 Bush (Ky.), 358; Hugill v. Weekley, 64 W. Va. 210, 61 S. E. 360, 15 L. R. A. (N. S.) 1262.

A "sale" is effected within this rule not only when an actual conveyance has been made, but also where, upon the production of a satisfactory buyer, a binding contract between the seller and buyer is entered into, even though the sale afterwards fails, through no fault in the broker's performance: Rice v. Mayo, 107 Mass. 150, 550; Peasie v. Parker, 72 Me. 443; Cook v. Fiske, 78 Mass. 12 Gray), 491; Ward v. Cobb, 148 Mass. 518, 20 N. E. 174; Roche v. Smith, 176 Mass. 595, 58 N. E. 152, 79 Am. St. R. 345; Carnes v. Howard, 180 Mass. 524, 63 N. E. 122; Pearson v. Mason, 120 Mass. 53; Francis v. Baker, 45 Minn. 85, 47 N. W. 452; Coleman v. Meade, 13 Bush (Ky.), 358; Keys v. Johnson, 68 Pa. 42; Love v. Miller, 53 Ind. 294; Fox v. Kyen, 240 Ill. 301, 88 N. E. 974; Hugill v. Weekley, 64 W. Va. 210, 61 S. E. 360, 15 L. R. A. (N. S.) 1262; Wenks v. Hazard, — Iowa —, 127 N. W. 1099.

In Cook v. Fiske, where the undertaking of the broker was to find a hirer for a ship, it was held that he had performed when he had brought the parties together and a valid oral contract had been made, even though no charter party was ever executed and the transaction therefore fell through.

(2.) The principal may also, by words or conduct, accept the buyer produced by the broker as one satisfactory to him, and if he does so the broker has earned his commission, although the later negotiations between the parties never even ripened into a binding contract, to say nothing of an actual con-
to have performed his undertaking. When the broker has brought forward, or designated and put the principal into communication with, a suitable person to whom the principal may sell in the ordinary course of business, he has, by the weight of authority, performed his undertaking, even if, through no fault of the broker's, no sale actually takes place; although there are cases which hold

veyance. Thus Davis v. Morgan, 96 Ga. 518, 23 S. E. 417 (where the principal "accepted the proposed purchaser without objection, recognizing him as answering all the requirements"); Sayre v. Wilson, 86 Ala. 151, 5 So. 157 (where it is said that if the principal accepts a married woman as the proposed purchaser, he waives any objection upon that ground); Krahner v. Hellman, 16 Daly (N. Y.), 132 (where the principal "accepted the purchaser, but afterwards declined to enter into a contract with her"). See, also, Blodgett v. Sioux City, etc., R. Co., 63 Iowa 606, 19 N. W. 799.

On the other hand, it may be entirely possible that a preliminary, tentative or provisional contract may have been entered into between the principal and the proposed purchaser without finally accepting him as satisfactory merely for the purpose of holding the matter until further inquiries can be made. This would not preclude the principal from afterwards rejecting him, so far as the broker is concerned. See Burnham v. Upton, 174 Mass. 408, 54 N. E. 873; Butler v. Baker, 17 R. I. 582, 23 Atl. 1019, 33 Am. St. R. 897; Crombie v. Waldo, 137 N. Y. 129, 32 N. E. 1042; Montgomery v. Knickerbocker, 27 App. Div. 117, 50 N. Y. Supp. 128; Murray v. East End Imp. Co. (Ky.), 60 S. W. 648.

Especially is this true where the acceptance, if any, was made upon the strength of the broker's representations and not upon any independent knowledge on the part of the principal: Butler v. Baker, supra; Crombie v. Waldo, supra.

Again, the contract may be one which gave the buyer the option to withdraw, and if he does so there may be no sale. See post, § 13; Fox v. Land Co., 37 Colo. 253, 86 Pac. 344; Aigler v. Land Co., 51 Kan. 718, 33 Pac. 593; Lawrence v. Rhodes, 188 Ill. 96, 58 N. E. 910; Lawrence v. Pederson, 34 Wash. 1, 74 Pac. 1017, and other cases cited in the section referred to.

In Mortgage Co. v. Davis, 96 Tex. 504, 17 S. W. 17, the broker had produced a man with whom the owners negotiated. After offer and counter offer, the defendants sent him, through the plaintiff's hands, an offer. To this offer he mailed an acceptance, but he changed his mind, by telegram to the postmaster succeeded in recalling his letter, and notified the defendants, the owners, of his entire unwillingness to take the land. The owners knew nothing of the first letter until the broker sued for commission. The court held that inasmuch as the defendants' offer had not been by mail, no mailed acceptance was binding until received; that therefore there was no contract, and that since at no other time and in no other way had the customer been presented ready, able and willing to deal upon defendants' terms, the broker had earned no commission.

7. In Flynn v. Jordal, 124 Iowa 457, 100 N. W. 326, the court said: "In Johnson Bros. v. Wright, 124 Iowa 61, 99 N. W. 103, we held that, to earn his commission for services rendered in finding a purchaser of land, where no sale is actually consummated, the agent must either procure a valid obligation to buy, and tender it to the vendor, or bring the proposed purchaser and the vendor together, so that a contract of sale may be entered into if the latter so elects."

See, also, Young v. Ruhwedel, 119 Mo. App. 231, 96 S. W. 228; Carnes v. Howard, 180 Mass. 569, 63 N. E. 122.

The broker who produces a written offer, which the principal, by signing, may at once turn into a contract, has produced a purchaser. Ryer v. Turkel, 75 N. J. L. 677, 70 Atl. 68; Flynn v. Jordal, supra.

8. In Gunn v. Bank of California, 99 Cal. 349, 33 Pac. 1105, the court
that a written contract between the buyer and the seller is essential

said: "But the question here is: What is 'finding' or 'producing' a pur-
chaser within the meaning of the rule of law declared in this and the other
cases cited? Is it sufficient for a broker to merely find a person financially
able, and who verbally agrees with him to purchase upon the terms of the
vendor, and makes a deposit, but who neither signs a binding agreement to
purchase upon such terms, nor is produced before the vendor as a person
ready and willing to enter into such a contract? It seems to us very clear
that this question must be answered in the negative. The contract of the
broker is to negotiate a sale; that is, to procure a valid contract to purchase,
which can be enforced by the vendor if his title is perfect; or if he does not
procure such contract, to bring the vendor and the proposed purchaser
together, that the vendor may secure such a contract, unless he is willing to
trust to an oral agreement." Followed in Shepherd-Teague Co. v. Hermann,

In Baars v. Hyland, 65 Minn. 150, 67 N. W. 1148, it was said: "The
next question is: When, under such a contract, has the agent earned his
commissions by finding a purchaser? Is it when the agent himself has found
the purchaser, or when the principal has found him, through the agent? Is
it sufficient that the agent has himself found a person ready and willing
to buy, or must he produce that person to his principal? Must he bring the
parties together, so that the principal has also found the purchaser? We
are clearly of the opinion that he must. He must at least put the principal
in communication with the proposed purchaser. The principal must have
an opportunity to make a binding contract with the proposed purchaser
before the agent has earned his commission."

In Platt v. Johr, 9 Ind. App. 58, 36 N. E. 294, it was said: "Whether a
broker is to 'introduce' a purchaser, or to 'find' or 'procure' one, or whether
he is to do all these things combined, his duties remain practically the same.
The words 'find,' 'procure,' 'introduce,' are generally used synonymously in
the making of such contracts, and, whether used conjunctively or disjunc-
tively, the essential thing they require the broker to do is to secure a cus-
tomer who is or will become a purchaser."

In Hayden v. Grillo, 35 Mo. App. 647, the court said: "Now, what does
a real estate broker contract to do? He agrees to effect a valid sale of the
property for a stipulated price, and, in consideration of this, the owner
agrees to pay him a certain per cent of the purchase money as commissions
for his trouble. This contract, on the part of the broker, is complete when
he delivers or tenders to the owner a valid written contract, containing the
terms of sale agreed on, signed by a party able to comply therewith, or to
answer in damages if he should fail to perform. This is all the agent can
do, and when it is done he is entitled to his commissions. But the necessity
of a written contract of sale may be rendered unnecessary if the agent bring
the vendor and vendee together, and the latter is able and willing and offers
to complete the contract, provided the vendor will make the conveyance. In
such a case the agent has done all that he can do, and if the vendor under
such circumstances refused to complete the sale, he, nevertheless, will be
compelled to pay the agent his commissions." See, also, McCray v. Fpofi,
118 Mo. App. 672, 94 S. W. 998.

In Gelatt v. Ridge, 117 Mo. 553, 23 S. W. 882, it was said: "It is well
settled in this state that a real estate broker performs his duty and is enti-
tled to his commission when a purchaser is introduced who is ready, willing
and able to buy on the terms authorized by the principal. The completion
of a valid and binding written contract is not required in case the principal
is in a situation to execute it himself. It may, and doubtless often does,
happen that the purchaser would prefer dealing with the owner. So it is
held that the agent is entitled to his commission if he is the procuring cause
of negotiations which result in the sale, even though the negotiations are
conducted and concluded by the principal in person."

In McDonald v. Smith, 99 Minn. 42, 108 N. W. 291, it is said: "A real
in any event,\(^9\) and there may easily be such forms of undertaking or such special circumstances as to require a written contract or even a completed sale.\(^{10}\)

(3) When the broker has, by whatever method

estate broker in order to earn a commission for finding a purchaser must either obtain a contract from a proposed purchaser able to buy whereby he is legally bound to buy on the authorized terms, or he must produce to his principal a proposed purchaser who is able, willing and ready to buy upon the terms authorized. It is not necessary that the principal and the purchaser actually be brought face to face, but the principal must be notified that such purchaser has been found and afforded a full opportunity to make a binding contract for the sale of the land on the authorized terms. If the broker complies with either of the conditions stated he is entitled, unless he has stipulated to the contrary, to his commission, although no sale is finally consummated.\(^*\)

See, also, Fitzpatrick v. Gilson, 176 Mass. 477, 57 N. E. 1000; Middleton v. Thompson, 163 Pa. 112, 29 Atl. 796; Mattingly v. Pennie, 105 Cal. 514, 30 Pac. 200; Buckingham v. Harris, 10 Colo. 455, 15 Pac. 817; Merriman v. Wheelersham, 141 Cal. 567, 75 Pac. 180; Hildenbrand v. Lillis, 10 Colo. App. 522, 51 Pac. 1008; Wiggins v. Wilson, 55 Fla. 346, 45 So. 1011; Vaughan v. McCarthy, 59 Minn. 199, 60 N. W. 1075; Duclos v. Cunningham, 102 N. Y. 678, 6 N. E. 790; Moody v. Elder, 56 N. Y. 238; Cheatham v. Farbrough, 90 Tenn. 77, 15 S. W. 1076; Barnes v. German, etc., Society, 21 Wash. 448, 58 Pac. 569; Magill v. Stoddard, 70 Wis. 75, 35 N. W. 346.

Statute of Frauds: The fact that the purchaser produced, who is ready, willing and able to buy, might be able to avoid the contract under the statute of frauds, will not defeat the broker's right to commissions, where the buyer has not shown any intention to take advantage of the statute: Sayre v. Wilson, 86 Ala. 151, 5 So. 157; Vaughan v. McCarthy, 59 Minn. 199, 60 N. W. 1075.

Satisfactory Purchaser: Where the terms are not fixed, but the price, the conditions or the purchaser are to be "satisfactory," this means, ordinarily, satisfactory to the principal, and the broker ordinarily takes his chances of being able to satisfy the principal in the matter. See Forrester v. Price, 6 N. Y. Misc. 306, 26 N. Y. Suppl. 799.

The case is stronger where the stipulation is to pay commission "in case of a sale at figures satisfactory to us" (the principals): Weibler v. Cook, 77 N. Y. App. Div. 637, 78 N. Y. Suppl. 1029.

Where real estate agents, for an agreed compensation, undertake to find a purchaser satisfactory to the owner, he alone has the right to determine the consideration for which he will sell and the details governing the payment therefor: Kilham v. Wilson, 112 Fed. 565.

But in Mullally v. Greenwood, 127 Mo. 138, 29 S. W. 1001, where the agreement was to pay commissions for negotiating a "satisfactory lease," the court said: "We do not think that the defendants (principals) had the right to say, arbitrarily and without cause, that the lease contracted for by plaintiff for them was not satisfactory to them. It was their duty to act fairly and honestly and in accordance with the reasonable expectations of the plaintiff, as implied from the contract, its subject-matter, and the facts and circumstances surrounding its execution, its nature, object and purpose."

9. "The true rule is that the broker is entitled to his commissions if the purchaser presented by him and the vendor, his principal, enter into a valid, binding and enforceable contract." Wilson v. Mason, 158 Ill. 304, 42 N. E. 134, 49 Am. St. R. 162.

(But compare Monroe v. Snow, 131 Ill. 126, 23 N. E. 401; Hersher v. Wells, 193 Ill. App. 418, in which last case it is said that in Wilson v. Mason there was no intention to change the well-settled rule upon the subject.)

See, also, Jenkins v. Hollingsworth, 83 Ill. App. 139.

10. See Hale v. Kunlur, 29 C. C. A. 67, 85 Fed. 181; Hyams v. Miller, 71 Ga. 688; Gilchrist v. Clarke, 86 Tenn. 583, 8 S. W. 572; Parker v. Walker,
found, and induced the purchase by, a person to whom the principal has in fact sold, there could seem to be no doubt that the broker has performed his undertaking, under any rule.\textsuperscript{11}

SEC. 5. It was thought at one time, and still seems to be required in some states, that a purchaser had not been "produced" within the meaning of the second rule until he had been brought face to face with the seller; but this seems not to be indispensable if there be other substantial and satisfactory evidence of his existence and his readiness and ability to purchase.\textsuperscript{12}

Nevertheless, it is not enough for the broker merely to assert that there is somewhere somebody who is ready to purchase, but without either producing such purchaser to show for himself, or

\textsuperscript{11} See Desmond v. Stebbins, 140 Mass. 339, 5 N. E. 150.

\textsuperscript{12} See McDonald v. Smith, 99 Minn. 42, 108 N. W. 291, supra. (Compare Gunn v. Bank of California, 99 Cal. 349, 33 Pac. 1105, supra.)
definitely designating him or producing some other substantial evidence of his existence and readiness to purchase.\(^{13}\)

A broker who would recover for producing a purchaser, notwithstanding an attempted repudiation of the offer by the principal, must show that he had in fact substantially performed before such repudiation.\(^{14}\)

**SEC. 6. CONTRACT IN PARTICULAR CASES MAY REQUIRE LESS.**—It is, of course, entirely possible that the agreement between the broker and the principal may not require that the broker shall bring about a "sale" in any sense. Thus the offer of the principal may be that he will compensate the broker if the latter will "assist" him in finding a purchaser;\(^{15}\) or if he shall be "in any manner instrumental" in finding a purchaser;\(^{16}\) or if the broker will "urge" someone to buy,\(^{17}\) etc.; and in all of these cases the broker, having done what he agreed to do, may recover compensation.

**SEC. 7. CONTRACT WITH BROKER NEED NOT BE IN WRITING.**—These agreements with the broker to pay a commission for finding a purchaser for real estate are not within the Statute of Frauds, and hence are valid though not in writing.\(^{18}\) In some states, however, special statutes require writing.

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\(^{13}\) As said in a Missouri case (*Huggins v. Hearne*, 74 Mo. App. 86) where the broker contended that he had found a purchaser in Iowa: "Is plaintiff to be allowed to recover on the mere supposition that he might get the purchaser to come down from Iowa? Suppose he had written him to come; there is not a particle of evidence to suggest that he would have complied."

\(^{14}\) In *Mattingly v. Pennie*, 105 Cal. 514, 39 Pac. 200, the broker had not "found" a purchaser within the requirements of the California rule which demands either a written contract to buy or an actual production of the buyer to the principal. (See *Gunn v. Bank of California*, 99 Cal. 349, quoted from in a preceding note.) The broker attempted to excuse himself on the ground that the defendant had repudiated the contract, and that therefore he had prevented him from performing. The court found that there was, in fact, no repudiation, but said that while the rule might be as contended in the case of bilateral contracts, it was not so where, as here, the contract was unilateral. In such a case "the party to whom the promise is made cannot recover without proof of performance of the condition upon which the promise depends; and in such cases a mere refusal by the promisor to perform, or even an entire repudiation by him of the contract, does not of itself amount to prevention."\(^{19}\)

\(^{15}\) Terry v. Reynolds, 111 Wis. 122, 86 N. W. 557; Wyckoff v. Kerr, — S. Dak. —, 123 N. W. 733; Bast v. Hill, 62 Ill. 215.


\(^{17}\) Tuffree v. Staint, — Iowa, —, 126 N. W. 373.

\(^{18}\) *Waterman Real Estate Exchange v. Stephens*, 71 Mich. 104, 38 N. W. 685; *Young v. Ruhwedel*, 119 Mo. App. 231, 96 S. W. 228; *Friedman v. Reilly*, 120 Ill. 175.

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HeinOnline -- 6 Ill. L. R. 154 1911-1912
SEC. 8. Broker Must Be Procur ing Cause—May Be Such Through Not Present at Sale—Directness of Cause.—It is not necessary that the broker should personally have conducted the negotiations between his principal and the purchaser which have resulted in the sale, or that he should have been present when the bargain was completed, or even that the principal should, at the time, have known that the purchaser was one found by the broker. It is


Nor can there be a recovery on quantum meruit: Beahler v. Clark, supra; Blair v. Austin, supra; Leimbach v. Regner, supra.

A statute making it a misdemeanor for any person in cities of first and second class to offer for sale real property without written authority is unconstitutional, and a broker employed orally may recover commissions. Fisher v. Woods, 187 N. Y. 99, 79 N. E. 836, 12 L. R. A. (N. S.) 707.


In Jungblut v. Lindra, 134 App. Div. 201, 118 N. Y. Suppl. 942, it was held that, while generally it is immaterial that the owner was ignorant that a purchaser was produced by the broker, yet where, on request to disclose the probable purchaser, the broker gave the name of another, and the owner subsequently sold to the broker's customer, in good faith and without knowledge,
but it is also sufficient, that his efforts were the efficient, procuring or producing cause of the sale, that through his agency the purchaser was brought into communication with the

and deducted a broker's commissions from the price, the broker cannot re-

cover.

In Boyd v. Improved Property Holding Co., 135 App. Div. 623, 120 N. Y. Suppl. 850, the owner offered a commission in case plaintiff furnished the name of one to whom the owner made a lease. The plaintiff tried to interest a lessee, who subsequently leased from the owner, but the plaintiff did not disclose the name because requested not to do so. The court said: "He has failed to perform the one thing that was required of him, and that was to mention the proposed tenant's name to the owner."

In Quist v. Goodfellow, 99 Minn. 509, 110 N. W. 65, 8 L. R. A. (N. S.) 153, the court said: "Some of the authorities hold that a real estate broker is entitled to his stipulated commission where his efforts were in fact the procuring cause of a sale, though made by the owner in good faith and in ignorance of his efforts; but such is not the law of this state. Here the purchaser, with whom the broker was negotiating to the knowledge of the owner, procured a third person to make the purchase directly from the owner, the third person stating to the owner that the purchase was in his own behalf, and in consideration of which and the fact that there would be no commissions to pay, the owner reduced the price." This, the court says, has been the law in Minnesota since Cathcart v. Bacon, 47 Minn. 34, 49 N. W. 331.

In Gerding v. Haskin, 141 N. Y. 514, 36 N. E. 601, the broker intro-
duced to the owner a person who offered to buy on the owner's terms on behalf of a newly-created syndicate, giving the names of those who had thus far agreed to enter the syndicate, but before the syndicate was fully formed the owner sold the land to others. Held, that the owner was entitled to know who the purchasers were, and that, as all had not been disclosed at the time of the sale, no commission could be recovered.


See Rice v. Omberg, 25 Ky. Law R. 531, 76 S. W. 15, in which a buyer who knew that property was for sale at a given net price employed the plain-
tiff broker, to secure a purchase at this price, with a stipulation in the con-
tract that the seller pay the current taxes. The sale went through, but only upon terms which gave the current taxes to the buyer to pay. Upon the ground that the agent failed in the very undertaking for which he was employed, the court refused him commissions.

23. Many other forms of expression are found in the cases, apparently without any real difference in meaning. Thus it is said he must be the "procuring cause": Hill v. Jebb, 55 Ark. 574, 18 S. W. 1047; Dolan v. Scan-
lan, 57 Cal. 261; Livesey v. Miller, 61 Md. 336; Fraser v. Wyckoff, 63 N. Y. 445; or the "efficient cause" or "agent": Henderson v. Vincent, 84 Ala. 99, 4 So. 180; Lyon v. Mitchell, 36 N. Y. 235, 93 Am. Dec. 502; or "immediate cause": Gleson v. Nelson, 162 Mass. 245, 38 N. E. 497; or "the efficient or effective cause or means of bringing about the actual sale": Whitcomb v. Bacon, 172 Mass. 479, 49 N. E. 743; Dowling v. Morrill, 165 Mass. 491, 43 N. E. 295; or "controlling cause": Brooks v. Leathers, 112 Mich. 493, 70 N. W. 1099; or "proximate and procuring": Latshaw v. Moore, 53 Kan. 234, 36 Pac. 342; or "proximate cause": Schmidt v. Baumann, 36 Minn. 189,
seller, although the parties then negotiated in person. 24 His efforts may have been slight, but if they brought about the desired result, no more could be asked; and their operations may have been circuitous, but if the purchase was the natural and proximate result of his endeavors, it is sufficient. 25 The law prescribes no particular method of procedure, nor has it any other standard by which to measure exertion, in such a case, than the result attained.

(To be continued)


The broker may be the procuring cause though the person he dealt with was only the agent of the real purchaser. Henry v. Stewart, 185 Ill. 448, 57 N. E. 190.


In Hoadley v. Savings Bank, supra, it is said: "If any act of the broker in pursuance of his authority to find a purchaser is the initiatory step that leads to the sale consummated, the owner must pay the commission."

In Roberts v. Markham, 26 Okla. 88, 109 Pac. 127, the court quotes with approval this statement from Tyler v. Parr, 52 Mo. 249: "If, after the property is placed in the agent's hands, the sale is brought about or procured by his advertisements and exertions, he will be entitled to his commissions; or if the agent introduces the purchaser, or discloses his name, to the seller, and through such introduction or disclosure negotiations are begun, and the sale of the property is effected, the agent is entitled to his commissions, though the sale may be made by the owner." Same effect: Stinde v. Blesch, 42 Mo. App. 578; Bass v. Jacobs, 63 Mo. App. 393; Timberman v. Craddock, 70 Mo. 638; Gelatt v. Ridge, 117 Mo. 553, 23 S. W. 682.

Some illustrations of what has been deemed sufficient in such cases may be of use: Thus in Lincoln v. McClatchie, 36 Conn. 136, the defendant had put into the hands of the plaintiff, a real estate broker, a house on a certain street to sell for $6,500, instructing him not to advertise it, but to sell by private sale. Afterwards the plaintiff advertised in general terms that he had houses on that street to sell. One G, who lived on the street, who had
been looking for a house on the same street for his friend B, saw the advertisement and went to plaintiff's office, where he learned that defendant's house was for sale. Plaintiff, by mistake, had entered the price on his books at $6,000 and so informed G. G informed B that the house was for sale at $6,000 and advised him to buy it. B then examined the house and entered into negotiations with defendant, which resulted in B's purchase of the house, with less than a hundred dollars' worth of personal property included, at $6,500. B never saw plaintiff in the transaction and was never in his office, and G's action was purely voluntary. It was held, however, that the plaintiff's efforts were the procuring cause, and that he was entitled to his commission.

The same result was reached in a very similar case in Nebraska. A employed broker B to sell his farm. B advertised the property in a newspaper. Farmer C saw the advertisement and told his neighbor D that A's farm was for sale. D went to A and bought the farm. Held, that B was entitled to his commissions. Anderson v. Cox, 16 Neb. 10.

So in Green v. Bartlett, 14 C. B. (N. S.) 691, an auctioneer and broker had been employed to sell an estate. Having advertised it and made an unsuccessful effort to sell it by auction, he was asked by a person who had attended the sale who the owner was, and he directed him to the principal. Ultimately this person purchased the estate of the principal, without any further intervention of the broker, but the court held that he was the procuring cause of the sale and entitled to his commission.

In Ratts v. Shepherd, 37 Kan. 20, 14 Pac. 496, the broker advertised the property (a farm) in a newspaper, called it to the attention of the purchaser, offered to take him to see it, gave him a copy of the paper containing the advertisement, and directed him to the house of the owner. The purchaser bought of the owner for less than the sum named by the broker, but it was held that the broker had produced the purchaser.

In Carter v. Webster, 79 Ill. 435, the plaintiff broker, being employed to find a purchaser and acting in pursuance of a local custom among brokers, applied to another broker, and the latter to a third, who sent a buyer to the owner. Held, that plaintiff had earned his commission.

So in Mansell v. Clements, L. R. 9 C. P. 139, 8 Eng. Rep. 449, defendant had placed a house in plaintiffs' hands to sell. A was looking for a house in that neighborhood, and seeing a notice (not posted by nor referring to the plaintiffs) that this house was for sale, made some inquiries about it, but concluded that the house was too large. He afterwards called upon plaintiffs to see what houses they had, and received from them cards of admission and terms for several houses, among which was the one in question. He examined the house and finally purchased it through another agent of the defendant for a less sum than that named, the plaintiff having nothing to do with the whole transaction other than giving A the card and terms. A stated upon the trial that he thought he should not have purchased the house if he had not received from plaintiffs the card and terms. Held, that there was evidence from which the jury might find that plaintiffs brought about the sale.

In Benedict v. Dakin, 243 Ill. 384, 90 N. E. 712, where the property to be sold was owned by a corporation, it was held that finding a purchaser who would buy all the stock of the corporation was a sufficient compliance.

In Willard v. Wright, 203 Mass. 406, 89 N. E. 559, the plaintiff had been employed to sell defendant's business, a combined trucking and ice business. Plaintiff heard from C, who was doing other business with plaintiff, that C knew two men who might buy this kind of business, and C, at plaintiff's request, promised to speak to them. C, at a second request, actually did speak to the wife of one of them; she spoke to her husband, and her husband looked into the matter. He obtained another man who had first been interested in defendant's business through a broker, not the plaintiff, but had abandoned all negotiations and given up being able to buy. The husband started for defendant's office; on the way he was met by plaintiff and by plaintiff he was actually introduced to defendant. As a result of negotia-
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sitions with the defendant directly the two men bought out the business, and the plaintiff in this suit for his commission was held the procuring cause of the sale.

Compare Johnson vs. Seidell, 150 Pa. 396, 24 Atl. 687, where the plaintiff broker worked upon one P and secured him to look at the property. P finally decided not to buy himself, but upon P's advice P's brother J bought directly of the owner. The plaintiff was held not the procuring cause of the sale to J and the court was upheld in directing a verdict for the defendant.

But the law regards only proximate, and not remote, causes; hence, if, after the broker's services have failed to accomplish a sale, and after the proposed purchaser has decided not to buy, other persons induce him to do so, the broker is not entitled to commissions. Earp vs. Cummins, 54 Pa. St. 394, 93 Am. Dec. 278.

In Gleason vs. Nelson, 162 Mass. 245, 38 N. E. 497, it was said: "The general rule of law applicable to a case like this is, that, where there has been no direct communication between the broker and the purchaser, it must be shown affirmatively that the latter was induced to enter into the negotiations which resulted in the purchase through the means employed by the broker for that purpose. If the broker employed other persons to aid him, whether under pay or not, or if he put up maps, signs, notices, or otherwise advertised the property, by means of which a person was induced to open negotiations with the owner which resulted in his buying the property, the sale may be said to have been effected through the broker's instrumentality, but it must be made to appear that what the broker did was the immediate and efficient cause of such negotiations. If the broker merely talked about the property with different persons, and one of them, on his own accord, and not acting in behalf of the broker, mentioned to another that the property was for sale, and such last mentioned person thereupon looked into the matter and finally became the purchaser, the agency of the broker in inducing the sale was not sufficiently direct to entitle him to a commission."

In Witherbee vs. Walker, 42 Colo. 1, 93 Pac. 1118, it was pointed out that where the buyer refused to deal with a broker, that broker cannot be said to be a procuring cause.

In Holliday v. Southern Agency, 100 Md. 294, 59 Atl. 646, a broker had attempted to sell certain land to H, but failed to induce him to pay the price. Several months later A bought the land and immediately resold most of it to H. A testified that when he bought he had no arrangement with H that the latter should buy it. Held, that the broker was not entitled to a commission as for a sale to A or H.

In Waters v. Rafalsky, 134 App. Div. (N. Y.) 870, 119 N. Y. S. 271, a broker had called the attention of T to the property, had given him the price and terms of sale and told him what rent the property yielded. He did nothing more than this, but T went to the owner and negotiated a sale of property with the owner, who had employed the broker to sell the property, but did not know that there had been any relation between the broker and T until after the contract was complete. The court held that there was not evidence to go to a jury from which it could find that plaintiff broker was the procuring cause of the sale.

In Meyer v. Improved Property Holding Co., 137 App. Div. (N. Y.) 691, 122 N. Y. Suppl. 296, the plaintiff broker had been given, at his request, information concerning rentals of stores in defendant's building, that he might perhaps interest one Seleznick in leasing one of them. He secured an offer from Seleznick which defendant would not accept. Later Seleznick of himself made another offer to defendant directly. That offer was not accepted, but as a result of the negotiations Seleznick formed a syndicate and was active in securing leases to syndicate of all of stores in building, and then he himself took one of them under syndicate upon terms practically those of his last offer. The upper court reversed a judgment for the plaintiff broker because the lower court had refused to instruct the jury: "If plaintiff introduced Mr. Seleznick to defendant as a prospective tenant for one store, and Mr. Seleznick afterwards applied to defendant, either on
his own behalf or for himself and others, for a lease for a number of stores, this would not give the plaintiff any claim for commissions," and because this subsequent lease was not in accordance with Seleznick's "original intention, or of the same nature, or in consummation of the original negotiations."

In Stone v. Ferry, 144 Ill. App. 191, two brokers had been employed by the owner of land to effect an exchange. The salesman of the plaintiff real estate firm had dealt with one of three joint owners of other land to be exchanged, had interested him in the property of the defendant, taken him to it and given him information and facts about it, that he might communicate with his two co-owners. The other real estate firm in the meanwhile went to work upon the same man, but it got another one of the joint owners, and took the two men to see defendant's land, and gave them information and sent data to the third joint owner. Then the contract of exchange was made apparently directly between the two sets of owners. The Appellate Court reversed a judgment allowing the plaintiff a commission, and said that there was nothing in the evidence to show that plaintiff was the cause of the interest of more than one of the joint owners with whom trade was made; to cause the trade it was necessary to get all of these joint owners.

In Goff v. Hurst, 135 Ky. 276, 122 S. W. 148, a real estate broker authorized to sell defendant's land approached a man who had already had negotiations with the defendant, spoke to him of the land, told him of the agency, of the terms and price demanded for sale, and asked him to take the matter up with the owner. This man did go on with the owner and made the deal with the owner. The court reversed a judgment allowing the broker a commission, and said that the lower court should have charged peremptorily for defendant, that plaintiff had given the purchaser no information which he did not already possess except the fact of the existence of the agency, and had done nothing to secure the purchaser.

In Auerbach v. Internationale Wolfram Lampen Aktien Gesellschaft, 177 Fed. 458, an agent had been employed to sell foreign interests belonging to defendant and its grantors in American patents. This agent, plaintiff in this case, had suggested a purchaser in America, had conducted considerable negotiation, and had induced the American company to send abroad two representatives to confer with the people in Europe. These negotiations, however, failed, and then plaintiff suggested a scheme of consolidation of defendant's interests with other interests, such that they might force the American company to terms. While plaintiff was so working upon proposed consolidation the defendants themselves, and directly with the American company, opened and soon completed fresh negotiations. The contract with plaintiff had provided that he should have his commission "if they utilized his services or assistance at the sale or in the proceeding leading up to the sale." But the court held for the defendant upon the ground that although the purchaser may have been first interested by the plaintiff's efforts, and although probably the final sale would never have occurred but for plaintiff's efforts in the first negotiations, still, when the final sale did occur, it was the result of independent negotiation in which the plaintiff had no share and was of no assistance.

In Karr v. Brooks, --- Tex. Civ. App. ---, 129 S. W. 160, a broker authorized to sell defendant's land had interested one S in buying it. S in casual conversation told his neighbor N of the land that he was considering, and the result of the conversation between S and N was that N was to look at defendant's land and if he liked it and could get it he would, and S would buy N's place. N looked at the land, liked it, and got defendant's agreement to sell it to him if S did not take it. N refused to deal with plaintiff and said that he would deal directly with owner if at all. He did do so, although up to the time the sale was closed the owner supposed that N was sent by plaintiff. When defendant learned that N and the plaintiff had not dealt with each other he refused to pay any commission. The upper court reversed a judgment for plaintiff on the reasoning that no exertion of plaintiff's caused N to buy, that it was his own volition which made N wish to
buy as soon as he heard by chance and not through plaintiff's efforts that
the land was for sale.

In Bidwell v. Haas, 121 N. Y. Suppl. 211, the Supreme Court, Appellate
Term, reversed a judgment of a municipal court which had allowed the
plaintiff a commission. There was dispute as to plaintiff's employment, but
the upper court assumed that the plaintiff had been employed, but thought
that there was no showing that he was the procuring cause, when the evi-
dence showed that he had suggested to defendant owner that one Newberger
would be likely to buy, and that defendant should see him, and had then
called upon Newberger and told him that defendant was owner, to which
Newberger said that he would talk with the owner, and as result of the
meeting of Newberger and the defendant a sale to Newberger was made.
It was thought that plaintiff had not secured a purchaser, but had merely
advised defendant where he might find one.

In Winthrop Land Co. v. Utley, — Iowa —, 125 N. W. 164, the
defendant had had some talk with Blanchard, who finally bought the land
before he employed plaintiff to sell. The evidence showed that when plain-
tiff was talking to Blanchard about another farm he spoke to Blanchard of
defendant's place and urged him to buy it, but Blanchard said that he had
already known all about that place and refused to look at it. The plaintiff
was not allowed to put in evidence that he had advertised the land, because
there was no further evidence offered to show that Blanchard had seen or
knew anything of the advertisement. The lower court left it to the jury to
determine whether the plaintiff had placed defendant and Blanchard in com-
munication with reference to sale of defendant's farm and the upper court
affirmed the judgment based upon verdict for the defendant.

In Moore v. Brenninger, 134 App. D. C. 86, the defendant had employed
plaintiff to sell his house and plaintiff approached one Sheppard. A neighbor
had already called Sheppard's attention to house and defendant's attention
to Sheppard, and the neighbor had been asked by defendant to urge Shep-
pard to buy. When plaintiff approached Sheppard, Sheppard talked trading
and plaintiff thereupon undertook to get defendant's acquiescence in a trade.
This he failed to do, and returned to Sheppard a deposit which Sheppard had
made, and there is no evidence to show any further activity by plaintiff
toward getting Sheppard. Sheppard, however, did finally buy for cash of
defendant, who did not know who was the man who had proposed trade.
The upper court, in affirming the judgment of the trial court, held,
that the evidence was such as to justify jury in finding that plaintiff had not been the
procuring cause of the sale, and, therefore, for the defendant.

In Chaffee v. Widman, — Colo. —, 108 Pac. 995, the defendants had
made a contract whereby they were to pay plaintiffs a commission "if the
parties of the second part (the plaintiffs) procure a purchaser for the ranch
who shall on or before March 1, 1904, pay or secure to parties of the first
part (defendants) the sum of $16,000." On the same day defendants made a
contract of sale with a purchaser procured by plaintiffs, under which the
final security for purchase price of $16,000 was to be given to defendants on
March 1, 1904. This contract was never completed and the security was
never given, but in the meanwhile another agent had interested another man.
This man carried back a new and better offer from defendants and urged it
upon the man who had failed as first purchaser. As a result of the second
offer another man still was interested, and he joined with the purchaser
who had failed under first contract and they bought the land on March 18
from the defendants. These last negotiations were without participation
by the plaintiff. The plaintiff declared upon his contract and the upper
court affirmed a judgment for defendant upon the double ground that he
had failed to show that he had procured the purchaser to give security by
March 1 and that he had failed to show that he had procured the contract
which was really worked upon and carried through.