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THE FLORIDA REAL ESTATE BROKER AND HIS COMMISSIONS

It has become apparent in the past several years that the real estate business has assumed a predominant position in Florida's economic pattern.¹ One of its unavoidable by-products has been the ever increasing amount of litigation concerning brokerage fees. In spite of the numerous appellate cases in Florida on this topic, there still remains a large field of uncertainty. Strong public reaction² to the recent case of *Pembroke v. Caudill*,³ illustrates the truth of this proposition. The answers to the problems ensuing from the subject matter can not be determined by reference to our statutory law. There is, and has been, no legislation in Florida concerning brokerage commissions other than from the licensing aspect.⁴

This comment is an attempt to reexamine and organize past local decisions, so as to present a broad introductory survey of the present status of brokerage law. There has been no attempt made to cover the innumerable facets of the topic, but the comment is limited to the more general and interesting situations.

I

BROKERAGE CONTRACT

A broker's right to remuneration for his services must be predicated on contractual relations existing between himself and his principal.⁵ If he is unable to prove an express promise to pay for his services, he is permitted to show facts from which the law will imply a promise.⁶ The necessary result is that the terms of the contract are left to conjecture and require judicial construction and fact finding. This situation has been adequately handled in other jurisdictions by statutory control.⁷ A common example is that of Texas: "No action shall be brought in any court in this state for the recovery of any commission for the sale or purchase of real estate unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith or by some person by him thereto lawfully authorized."⁸ In effect, all brokerage contracts are thus within the Statute of Frauds, even though title to realty is not actually

1. WOLFF, MIAMI-ECONOMIC PATTERN OF A RESORT AREA (1945).

2. Undated open letter issued by the Florida Real Estate Commission, Orlando, Florida, to all real estate brokers.

3. 37 So.2d 538 (Fla. 1948); Stephenson, *Quarterly Synopsis*, 3 MIAMI L. Q. 290 (1949).

4. FLA. STAT. c. 475 (1941).

5. *Varn v. Pelot*, 55 Fla. 357, 45 So. 1015 (1908); Note, 15 WASH. L. REV. 124 (1940) (there must be a fiduciary relationship between the parties before any liability is incurred).

6. *Varn v. Pelot*, *supra*.

7. N. J. REV. STAT., tit. 25, c. 1, § 9 (1937); NEB. COMP. STAT., c. 36, Art. 107 (1929); WIS. STAT., c. 240, § 10 (1949); CAL. CIV. CODE, § 1624, p. 5 (1941).

8. TEX. STAT., c. 6573a, § 22 (Vernon, 1939).

involved. Although the statute is mandatory⁹ and recovery is not allowed under quantum meruit,¹⁰ judicial interpretation has successfully avoided some of the harshness of the statute. A broker whose efforts have resulted in a sale on terms satisfactory to the vendor is not to be deprived of his commission where, as a result of bargaining between vendor and vendee, vendor agrees to accept a price less or on terms different than those stated in the written contract of employment.¹¹ It could be argued that the practical application of such a statute in Florida might be unwise; however, weighed against the considerations of less litigation, less opportunity for fraud, the contention of inconvenience does not seem to be a valid one.

In keeping with general contract law the broker must not be a volunteer, and he is not entitled to compensation even though a purchaser is found through information furnished by him.¹²

The nature of the broker's rights arising from the contract of employment are dependent upon the terms of the contract itself. These employment contracts have been generally broken down into the classification of "open or general listings," "exclusive agency" and "exclusive right to sell." A general listing is an offer that does not ripen into a contract until it is accepted by fulfillment of its terms, i.e., a unilateral contract.¹³ An exclusive agency or right to sell is generally construed as a presently binding contract of employment, i.e., a bilateral contract.¹⁴ The vendor-principal's liability under an exclusive agency is different from that under an exclusive right to sell.¹⁵ If the broker has an exclusive right to sell, the owner is liable for damages even though he himself sells the property,¹⁶ but the vendor incurs no such liability under a contract of exclusive agency.¹⁷ In Florida an "exclusive sale" has been strictly construed to mean an exclusive agency.¹⁸ In both situations, i.e., whether an exclusive agency or exclusive right to sell, where someone other than the vendor sells the property, the broker is entitled to damages.¹⁹

9. Coughran v. Smith, 167 S. W.2d 815 (Tex. Ct. Civ. App. 1942).

10. Walker v. Keeling, 160 S. W.2d 310 (Tex. Ct. Civ. App. 1945).

11. Volkmann v. Wortham, 189 S. W.2d 776 (Tex. Ct. Civ. App. 1945).

12. Howell v. Blackburn, 100 Fla. 114, 129 So. 341 (1930); City Builder's Finance Co. v. Stahl, 90 Fla. 357, 106 So. 77 (1925).

13. Haggart v. King, 107 Kan. 75, 190 Pac. 763 (1920); Saunders v. Hackley & Hume Co., 275 Mo. 41, 208 S. W. 67 (1918); cf. Stoy v. Berg, 96 Fla. 858, 119 So. 139 (1928) (qualified contract has the same legal effect as an open listing).

14. South Florida Farms Co. v. Stevenson, 84 Fla. 235, 93 So. 247 (1922).

15. See Note, 64 A.L.R. 395 (1929).

16. Harris v. McPherson, 97 Conn. 164, 115 Atl. 723 (1922); Falkenburg v. Giacomazzi, 53 Cal. App. 449, 200 Pac. 372 (1921); Dain v. Loeffler, 256 Pa. 319, 100 Atl. 888 (1917).

17. See note 14 *supra*.

18. *Ibid.*

19. Niemann v. Severson, 246 Wis. 636, 18 N. W.2d 338 (1945); Fleming v. Dolfin, 214 Cal. 269, 4 P.2d 776 (1931).

II

BROKER'S UNDERTAKING

The broker's right to a commission is conditioned upon the fulfillment of his duties as set forth in the brokerage contract. The exclusive agreement usually is phrased so as to call for the procurement of a purchaser or the effecting of a sale. The oft-cited case of *Wiggins v. Wilson*²⁰ asserts that under a contract to procure a purchaser, the broker need only find the purchaser and introduce him to the vendor; in the case of a contract to effect a sale, the broker must completely negotiate the sale on the terms authorized by his principal, leaving nothing for the principal to do but execute the papers necessary to transfer title.²¹

The minimum requirements to effect a sale are that the broker must either procure a binding contract of purchase within the terms authorized;²² secure purchase money and transfer title when so empowered;²³ or, the principal must relieve the broker of the burden of securing execution of a written contract.²⁴ Mere procurement of one who takes an option is not sufficient performance,²⁵ nor is the payment less than the amount stipulated in the contract since such payment is presumed to be the mere holding of an option contract and not a sale.²⁶ A verbal agreement accompanied by payment of earnest money is inadequate. Hence, the basic requirement for effecting a sale is that there be a contract enforceable by the principal.²⁷

When the contract of employment calls for the procurement of a purchaser, the broker must either present to the principal a customer who is ready, willing and able to buy on the terms prescribed by the contract, or he may go further and take from the purchaser a binding contract of purchase.²⁸ This leads to the further inquiry as to when a purchaser is ready, willing and able. Notwithstanding the comprehensive articles of many writers²⁹ concerning the terms "ready, willing and able," there seems to be no universal test. In

20. 55 Fla. 346, 45 So. 1011 (1908).

21. *Weida v. Bacon*, 102 Fla. 628, 138 So. 32 (1931); *Livingston v. Malever*, 103 Fla. 200, 137 So. 113 (1931); *Malever v. Livingston*, 95 Fla. 272, 116 So. 15 (1928); *Squires v. Kilgore*, 92 Fla. 1001, 111 So. 113 (1926); *E. A. Strout Farm Agency v. Hollingsworth*, 92 Fla. 673, 110 So. 267 (1926); *Blue v. Staten*, 84 Fla. 233, 93 So. 686 (1922); *Elliot v. Gamble*, 77 Fla. 798, 82 So. 253 (1919); *Varn v. Pelot*, *supra*.

22. *Wiggins v. Wilson*, *supra*; *Varn v. Pelot*, *supra*; *Weida v. Bacon*, *supra*; *Lohmeyer v. Williams*, 37 So.2d 419 (Fla. 1948).

23. *Sullivan v. Brown*, 67 Fla. 133, 64 So. 455 (1914); *Elliot v. Gamble*, *supra*; *Dwiggins v. Roth*, 37 So.2d 702 (Fla. 1948) (listing of property does not confer authority to sell).

24. *Livingston v. Malever*, *supra*.

25. *Acheson v. Smiths Inc.*, 110 Fla. 240, 148 So. 576 (1933).

26. *Williams v. Ray*, 107 Fla. 327, 144 So. 679 (1932).

27. *Malever v. Livingston*, *supra*.

28. *Strano v. Carr & Carr*, 97 Fla. 150, 119 So. 864 (1929); *Carter v. Owens*, 58 Fla. 204, 50 So. 641 (1909); *Wiggins v. Wilson*, *supra*.

29. *Mechem, The Real Estate Broker and His Commissions*, 6 ILL. L. REV. 149 (1911); Note. 16 MINN. L. REV. 584 (1932).

Perper v. Edell,³⁰ the court arrived at this definition: "A broker producing a purchaser financially able is not required to show that the purchaser is then standing outside of the office door with all the cash in hand required to pay for the property. If the purchaser is financially able to pay for the property within the time stipulated it is sufficient. [Financially] 'able' means that the proposed purchaser is able to command the necessary money to close the deal on reasonable notice or within the time stipulated by the parties."³¹

The connotation "willing" imputes agreement with the offer of the principal and not a counter-offer.³² The broker has not earned his commission by securing a person who is only willing to take an option.³³ A satisfactory purchaser is procured even though he may buy the property with an associate of whom the broker has had no knowledge.³⁴ The burden of proof as to whether a purchaser ready, willing and able has been secured, is upon the broker.³⁵

If there is a time limit set for performance by the broker, some jurisdictions hold that procuring a purchaser ready, willing and able requires performance strictly within the time allocated,³⁶ and other states³⁷ apply the procuring cause doctrine and allow recovery on the theory of estoppel or quantum meruit.

III

PROCURING CAUSE DOCTRINE

It often happens that, although the broker may secure a prospective buyer, the sale is finally concluded on terms other than those in the contract of employment and without the broker's further aid. Does this prevent recovery by the broker? In Florida the answer to this problem lies in a consideration of whether or not the broker was the *procuring cause* of the sale. To be the procuring cause the broker must show that he called the potential vendee's attention to the property and that it was through his efforts that the sale was consummated. When the purchaser is not introduced by the broker, he must prove that it was through his continued efforts that a satisfactory arrangement was concluded. The active negotiations consist not only of a mere introduction of the parties, but also a series of propositions and invitations which result in a sale.³⁸

30. 35 So.2d 387 (Fla. 1948); Stephenson, *Quarterly Synopsis*, 3 MIAMI L. Q. 279, 291 (1949).

31. *Id.* at 391.

32. *Waters Realty Co. v. Miami Tripure Water Co.*, 100 Fla. 221, 129 So. 723 (1930).

33. *Acheson v. Smiths Inc.*, *supra*.

34. *George A. Fuller Co. v. Ford*, 63 F.2d 889 (C.C.A. 5th 1933).

35. *St. Petersburg Land & Loan Co. v. Shallcross*, 84 Fla. 575, 94 So. 502 (1922); *Perper v. Edell*, *supra* (Dun & Bradstreet report admissible evidence to show financial ability); *Stewart v. McMurray*, 82 Ala. 269, 3 So. 47 (1887).

36. Note, 7 IND. L. J. 389 (1932).

37. *Jaeger v. Glover*, 89 Minn. 490, 95 N. W. 311 (1903); *Southwick v. Swavienski*, 114 App. Div. 681, 99 N. Y. Supp. 1079 (1906).

38. *Wood v. Smith*, 162 Mich. 334, 127 N. W. 277 (1910); Note, 27 ILL. L. REV. 436 (1932).

This doctrine was adopted in Florida in *Cumberland Saving & Trust Co. v. McGriff*.³⁹ A broker was employed to procure a purchaser of real estate at a definite price, on a percentage commission basis. The broker introduced to the owner a prospective purchaser, who took an option and later allowed it to lapse. The broker continued to discuss the matter with the potential vendee. Later, after negotiations with the owner, in which the broker took no part, the purchaser bought the property. Applying the procuring cause test, the court reasoned that the broker, having introduced and continued to interest the person who eventually did buy, was entitled to his commission.⁴⁰ And in *Pensacola Finance Co. v. Simpson*,⁴¹ the first time the vendor dealt with the prospective purchaser, the vendor was not aware that the purchaser was sent by a broker and, accordingly, did not include the broker's commission in the sale price. Prior to the actual sale, the vendor was advised that the proposed purchaser had been obtained and sent to him through the efforts of the broker who claimed a commission for services. The vendor then withdrew the offer which had been made directly to the purchaser and, by a new transaction, sold the property to the vendee at the same price. The court allowed the broker to recover, stating that he was the procuring cause of the sale.

In order to allow recovery in this type situation, the broker must plead that he was the procuring cause for the consummation of the sale.⁴² The *Wiggins* case further delineates Florida's use of the procuring cause doctrine. The broker was denied recovery, the court holding that since the purchaser was not ready, willing and able when procured, when at a later date the vendor sold the property to the same purchaser, the broker could have no claims, since he was not the procuring cause of the sale.

The procuring cause test is also applied to those instances where the final contract or transaction negotiated is different from that specifically stipulated in the broker's contract of employment. In *Taylor v. Dorsey*,⁴³ the court allowed the brokerage commission although the sale was consummated at a price less than the amount designated by the vendor at the time of the listing, the broker's continued activity being considered the procuring cause of the sale. However, if the brokerage contract expressly calls for the negotiation of a sale at a fixed price, and no other, the consummation of the sale on any other terms precludes the broker from recovering.⁴⁴ This doctrine has been followed in almost all cases, since the procuring cause test is based on

39. 61 Fla. 159, 54 So. 265 (1911).

40. *Lowe v. Crawford*, 97 Fla. 672, 122 So. 11 (1929); Note, 21 *TULANE L. REV.* 137 (1946).

41. 82 Fla. 368, 90 So. 381 (1921).

42. *Foley-Carter Ins. Co., Inc. v. Commonwealth Life Ins. Co.*, 128 F.2d 718 (C. C. A. 5th 1942).

43. 155 Fla. 305, 19 So.2d 876 (1944).

44. *Rickmers v. Tuckerman*, 80 Fla. 839, 87 So. 53 (1920); *Varn v. Pelot*, *supra*.

the theory that some such modification was in the original contemplation of the parties.

Thus, it may be seen that it is not necessary for the broker to have personally conducted the negotiations which took place between the vendor and vendee, or that he was present, or even that the principal should have known at the time that the purchaser was one found by the broker. All that is necessary is that the broker's efforts were the efficient, procuring or producing cause of the sale being consummated. Although the broker's efforts might have been slight, if they brought about the desired results, no more is necessary, and though his operations might have been indirect, if the purchase was the natural and proximate result of his endeavor, it is sufficient.

IV

FAILURE OF SALE BECAUSE OF VENDOR-PRINCIPAL

When the brokerage contract calls for the effecting of a sale and the broker procures a purchaser, but, for one reason or another, the seller defaults, the question arises as to whether or not the broker is entitled to his commissions. To determine if recovery will be allowed, the courts do not apply the procuring cause test, but only consider if the broker has, or has not, completed all that his contract of employment calls for. In *Hutchins & Co. v. Sherman*,⁴⁵ a broker under an effect sale contract, secured a purchaser who was ready, willing and able to purchase the vendor's property on the required terms. The purchaser cancelled his offer because of the withdrawal by the vendor of part of the property. As to the broker's recovery of commissions, the court has held that where a broker has performed and the consummation of the transaction was prevented because of some fault of the principal, the broker is entitled to his commission.⁴⁶

The extension of the principle of the *Hutchins* case⁴⁷ is exemplified in the decisions allowing the broker to recover when his commission is to come from the first cash payment, but the transaction is not consummated because of the vendor's action.⁴⁸ If one prevents the happening or performance of a condition precedent upon which the liability by the terms of the contract is based, he cannot avail himself of his own wrong and relieve himself of his responsibility to the broker.⁴⁹

45. 82 Fla. 167, 89 So. 430 (1921).

46. *Perper v. Edell*, *supra*; *Davis v. Battle*, 132 Fla. 240, 182 So. 243 (1938) (owner arbitrarily withdrew); *Livingston v. Malever*, *supra*; *Hart v. Pierce*, 98 Fla. 1087, 125 So. 243 (1929) (owner paid purchaser to withdraw from transaction).

47. See note 45 *supra*.

48. See Note, 20 A.L.R. 289 (1922).

49. *Waddell v. J. P. Holbrook Co.*, 108 Fla. 332, 147 So. 213 (1933) (broker may recover commission which was to come from the first cash payment, but only earnest money had been paid, when vendor withdrew); *Walker v. Chancery*, 96 Fla. 82, 117 So. 705 (1928) (commission to come from first cash payment, but vendor withdrew after

If the transaction is not consummated because of a defect in the vendor's title,⁵⁰ or for other faults of the vendor,⁵¹ recovery for the broker will be granted provided he had no knowledge of the defect.

V

THE FIDUCIARY RELATIONSHIP

One condition that must be fulfilled in all cases before the broker is entitled to compensation, regardless of the fact that he has completed all that his contract of employment requires, is that he in no way has breached his fiduciary duty toward his principal.⁵² This principle was announced in the *Wiggins* case where the broker claimed that he had procured the purchaser to whom the vendor had sold the property. The vendor disclaimed any liability and maintained that the broker had been guilty of a breach of his fiduciary duty. In holding for the vendor the court said, "If they knew or thought that this alleged customer of theirs had the ability and was ready and willing to purchase the property at the price and on the terms that they were authorized to sell, it was their duty to promptly notify their principal of such fact. Then, after receiving such notice, if the principal sold to such customer at a less price and on different terms than those given to the brokers, they would be entitled to their commissions. But if the brokers knew of the customer's ability, readiness, and willingness to take the property at the price and on the terms named in their contract of employment, and withheld such knowledge from their principal, it amounted to bad faith with their principal, which forfeits their rights to any commissions out of a sale effected by the principal in ignorance of such facts."⁵³ In *Carter v. Owners*,⁵⁴ a broker had a net listing on the vendor's property. A purchaser was found who was willing to buy at the vendor's price, but the broker withheld the information from the vendor and tried to induce the vendor to lower his selling price so as to increase his commission. Upon refusal of the vendor to lower his price, the broker persuaded the purchaser to buy the property at the first offered price. In denying the broker's commission the court held that a real estate broker is bound to disclose to his principal any material facts known to him, and, if the broker takes part in the negotiation, he is bound to exert all his skill for the benefit of his principal. Any concealment

being offered a higher price. *Held*, broker may recover); Note, 18 MINN. L. REV. 587 (1934).

50. *Knowles v. Henderson*, 156 Fla. 31, 22 So.2d 384 (1945) (vendor only owned one-half interest in land); Notes, 43 COL. L. REV. 108 (1943), 30 COL. L. REV. 255 (1930); *R. J. & B.-F. Camp Lumber Co. v. Tedder*, 78 Fla. 183, 82 So. 865 (1919) (portion of vendor's title not marketable).

51. *Sullivan v. Brown*, *supra* (deficiency in amount of land which vendor offered for sale).

52. MECEM, AGENCY § 643 (1923).

53. *Wiggins v. Wilson*, 55 Fla. 346, 356, 45 So. 1011, 1014 (1908).

54. 58 Fla. 204, 50 So. 641 (1909).

from the principal of material facts, or any collusion by him with the purchaser, will preclude the right of the agent to compensation for his services.⁵⁵ The same will hold true if the broker is representing both purchaser and vendor, unless such dual agency has the consent of both parties.⁵⁶ Many times, however, the broker is acting as a middleman, and may collect compensation from both the vendor and vendee.⁵⁷

CONCLUSION

The writer has endeavored to depict the pattern followed by the courts, particularly in Florida, where the question of real estate brokerage commissions is presented. The principles announced in the leading case of *Wiggins v. Wilson* illustrate the type of approach used by the courts in dealing with such a question, namely (1) a careful examination of the brokerage contract to determine the type of employment and scope of the undertaking; (2) a determination of whether or not the broker was the procuring cause of the sale, if the sale was not consummated on the terms authorized; (3) a determination of whether any breach of a fiduciary relationship has occurred.

It has been stated previously, with regard to oral contracts of employment, that considerable litigation could be avoided by legislative enactment. Pending such legislation, it is submitted that the following suggestions will serve to eliminate pitfalls that might well lead to litigation. First, as many of the details of the brokerage contract as practically feasible should be reduced to writing. Next, if the contract is one granting to the broker exclusive rights, use of the term "exclusive sale" should be avoided, for it may be interpreted to mean either an "exclusive agency" or an "exclusive right to sell"—with different consequences regarding the principal's liability. Next, a clear distinction should be made as to whether the broker, before becoming entitled to his commission, must only procure a purchaser or actually effect a sale. Finally, the amount of the commission should be stated in certain terms.

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55. *Skinner Mfg. Co. v. Douville*, 57 Fla. 180, 49 So. 125 (1909); *Van Woy v. Willis*, 153 Fla. 189, 14 So.2d 185 (1943); Note, 34 CALIF. L. REV. 772 (1946).

56. *Burnham City Lumber Co. v. Rannie*, 59 Fla. 179, 59 So. 617 (1910); *Red Cypress Lumber Co. v. Perry*, 118 Ga. 876, 54 S. E. 674 (1903); *Zichlin v. Dill*, 157 Fla. 96, 25 So.2d 4 (1946); MECHAM, AGENCY § 644 (1923); See Note, 80 A.L.R. 1075 (1932).

57. *Grossman v. Herman*, 266 N. Y. 249, 194 N. E. 694, 695 (1935).