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THE LAW RELATING TO COMMISSIONS TO REAL ESTATE AGENTS.

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This subject is one of great interest at the present time as may be seen by the number of decisions which have been reported during the past few years. We find in vol. 4 of the Dominion Law Reports, at p. 531, a collection of the authorities grouped under the above appropriate headings. These are given in an annotation to the recent case of *Haffner* v. *Grundy*, which appears in full at 529 of the same volume, and a note of which appeared on page 546 ante. As this annotation exhausts the subject we give it to our readers in full as follows:—

The General Principles Applicable to Commission on Sales.

In order to found a legal claim for commission on a sale, there must not only be a casual, but also a contractual relation between the introduction of a purchaser and the ultimate transaction of sale: *Toulmin* v. *Millar*, 58 L.T. 96.

An agent who brings a person into relation with his principal as an intending purchaser, has done the most effective and possibly the most labourious and expensive part of his work, and if the principal takes advantage of that work and, behind the back of the agent and unknown to him, sells to the purchaser thus brought into touch with him, the agent's act may still well be the effective cause of the sale, though he advised the principal not to accept the terms offered by the purchaser: *per* Lord Atkinson in *Burchell* v. *Gowrie and Blockhouse Collieries*,

[1910] A.C. 614, 80 L.J.P.C. 41, 103 L.T. 325, reversing the judgment of the Supreme Court of Canada (not reported) which affirmed the judgment of the Supreme Court of Nova Scotia, 43 N.S.R. 485, and restoring the judgment of the referee, who held the agent entitled to the full commission stipulated for in the agency agreement under the circumstances shewn.

An agent of an absent principal entered into negotiations with a person who was anxious to buy certain hotel property belonging to the principal, but no sale was completed at the time because the prospective purchaser found the cash payment required too much for him to handle. He then called the attention of two of his acquaintances to the desirability of the property and the three entered into an agreement among themselves that they would buy it. The amount of the cash payment, however, was still too large even to the three, and, the owner having returned, they carried on all further negotiations in regard to a sale with him personally without any further intervention on the part of the agent. The property was finally sold to the two acquaintances of the person with whom the agent negotiated on the same terms as it had been offered through the agent, excepting that the cash payment was smaller. It also appeared that the agent did not know the two purchasers until after the sale was completed. It was held that, though the person whose attention the agent had called to the land withdrew from the transaction and the sale was made to his associates without him, the agent was the efficient cause of the sale of the property, and that he was therefore entitled to recover a commission on such sale: *Stratton* v. *Vachon*, 44 Can. S.C.R. 395, reversing *Vachon* v. *Stratton*, *sub nom.* *Vachon* v. *Straton*, 3 Sask. L.R. 286.

Where the contract is that the agent is merely to find a purchaser willing to purchase and he fulfilled it by finding such person, the agent is entitled to his commission, though the sale fell through, if the cause of the failure was the fault of the principal and not of the agent: *per* Chief Justice Ritchie in *MacKenzie* v. *Champion*, 12 Can. S.C.R. 649.

Where an owner placed his farm in the hands of a real estate agent for sale at a fixed price under an agreement in writing whereby, in consideration of the agent registering the farm in a real estate register issued by him describing properties for sale, the owner agreed to pay him a commission of a certain per cent. on the price obtained "whenever a sale of the property or any part thereof takes place," to be paid when the farm was sold, either at the price fixed or at such other price that the owner might accept, and the agent did nothing apart from including the property in his register towards affecting a sale and the property was sold by the principal about a year after without the interposition of the agent, the agent was entitled to recover commission on the selling price of the farm at the rate stipulated in the agency agreement: *McCallum* v. *Williams*, 44 N.S.R. 508.

Where the agent introduced a purchaser with the result that a contract for the sale of land was executed which contract was replaced by a later one whereby the price of the land was reduced in consideration of an incumbrance thereon being paid by the purchaser who borrowed the money for the purpose and assigned his interest in the contract to the lender, and the owner afterwards sold the mining lands to a person buying for such lender, such sale was not a transaction independent of the contract of the purchaser introduced by the agent but was a continuance thereof and the agent was entitled to a commission on the full amount received for the land as finally sold: *Glendinning* v. *Cavanagh*, 40 Can. S.C.R. 414, affirming *Cavanagh* v. *Glendinning*, 10 O.W.R. 475 (Ont. C.A.).

Where the owner of farm lands authorises an agent to dispose of them and agrees to pay him the usual commission, and the latter succeeds in bringing about an agreement whereby the lands were taken as part payment in an exchange for city property, the owner of the farm lands is liable to the agent for commission on the sale: *Lewis* v. *Bucknam*, (Man.), 1 D.L.R. 277, 20 W.L.R. 4.

A principal is not liable to a real estate agent for commission who found a purchaser for the principal's property on terms that he had no authority to make and which the principal refused to accept, though the proposed purchaser testified at the trial of an action brought by the agent for his commission that he had been and was ready and willing to buy upon the principal's terms where he had not disclosed such fact until then to either the principal or the agent: *Haffner* v. *Grundy*, 4 D.L.R., p. 529, *supra* (Man.).

To entitle an agent to recover a commission he must find a purchaser ready and willing to complete the purchase on the terms fixed by his principal unless the principal agrees to a change. It appears, therefore, no commission is recoverable where the agent was instructed to sell the property on the terms of a specified sum in cash and the balance in one, two, three and four years and that as a result of his negotiations with an intending purchaser he gave him a receipt for a deposit paid in cash in which the same cash payment was provided for but which further stipulated that a certain mortgage would be assumed by the purchaser and that the balance should be made payable in one, two, three and four years in equal payments and that the purchaser should have the privilege to pay off at any time to which last additional term the owner refused to agree: *Egan* v. *Simon*, 19 Man. L.R. 131. Attention may here be called to the fact that in an action which finally reached the Supreme Court of Canada, *Gilmour* v. *Simon*, 37 Can. S.C.R. 422, affirming 15 Man. L.R. 205, and in which the judgment was delivered before *Egan* v. *Simon* was heard by the Manitoba Court of Appeal, it was held that the additional term incorporated into the receipt given by the agent was unauthorized.

An agent is entitled to a commission for the sale of land where it appeared that his principal entered into negotiations looking to a purchase with a proposed purchaser introduced by the agent and while a purchase

was not then made, subsequently and as a result of the negotiations the principal made to the prospective purchaser a lease for three years with a collateral agreement giving the lessee the option of purchasing within a year, which the latter exercised: *Morson* v. *Burnside*, 31 O.R. 38.

Under an agreement whereby an agent was to receive a certain sum of money as commission if he found for his principal a purchaser who would pay not less than a specified amount in cash, the agent, upon finding a purchaser who paid only half such sum down but who was accepted by the owner the latter promising after the sale to pay the agent the sum stipulated as commission in the agreement of agency, was permitted by the trial Judge to recover on the common counts a sum equal to the amount promised him as commission on the grounds (1) that he could not have recovered on the contract itself "because of his non-literal performance of its terms" and (2) that the owner had made the subsequent promise. On appeal by the principal, the Court of Queen's Bench (Ont.) affirmed the trial Judge's decision as to the amount due the agent though they declared that while they did not hold that the agent should recover the exact sum stipulated as commission in the agreement by which he was hired, he was entitled to some remuneration—how much it was unnecessary to say in view of the subsequent promise of the owner and of the fact that no objection was taken to the amount of damages below: *Wycott* v. *Campbell*, 31 U.C.Q.B. 534.

An agent is entitled, if there has been no revocation of his authority and his contract of employment specified no time limit, to his commission for a sale by his principal to a purchaser to whose notice the property was brought by the agent though the sale was made without the owner knowing that the purchaser came to him through his agent: *Rice* v. *Galbraith*, 2 D.L.R. 859, 26 O.L.R. 43, 3 O.W.N. 815, 21 O.W.R. 571.

Unless there is a specific agreement to the contrary, the putting of a house into the hands of an agent for sale does not prevent the owner of the house from selling it himself to a person not introduced by the agent, or from selling it through a different agent. Accordingly, where a house is put into the hands of an agent for sale, and the agent finds a person willing to purchase it, but who cannot purchase it because the house has already been sold by the owner, the agent is not entitled to commission: *Brinson* v. *Davies*, 105 L.T. 134, 27 Times L.R. 442, 55 Sol. Jo. 501.

Under an agreement entitling the agent to a commission when the property was "disposed of," the remedy of the agent upon the wrongful refusal of his principal to sell is not by action for the commission which he can earn only in the terms of the contract. *Per* Patterson, J., in *Adamson* v. *Yeager*, 10 O.A.R. 577, at p. 486. That, in the learned Justice's opinion, the proper remedy for the agent under such circumstances was an action for damages for refusing to sell, or an action on a *quantum meruit*, may be inferred from his adding to the above statement that the damages in an action for refusing to sell or the amount to be recovered

as a *quantum meruit*, would necessarily be governed by the amount of commission stipulated to be paid when the property was disposed of. Mr. Justice Osler in the same case also said that on the wrongful refusal of the owner to sell, the agent was not entitled to sue for or to recover the commission, *qua* commission on the terms of the agreement, though he added that in that case the measure of damages might well have been the full amount of the commission.

Where the authority of an agent employed to sell on commission is revoked by the principal before a sale has been effected, the right of the agent to remuneration for what he has done in endeavouring to effect a sale depends on the terms on which he was employed. Thus, where clerical agents employed by the defendant to sell an advowson upon a commission upon the purchase money when the contract was completed, agreed as the purchase money was likely to be large, to forego a claim of three guineas which they ordinarily made for entering such property on their books, and for the trouble of answering inquiries respecting it, are not entitled to recover anything upon the principal having afterwards sold the advowson himself, and having revoked the plaintiffs' authority to sell, the agents as they had not effected the sale, and there was no evidence of their having done more than was ordinarily covered by the charge of three guineas, which they had agreed to forego: *Simpson* v. *Lamb*, 17 C.B. 603, 25 L.J.C.P. 113, 2 Jur. (N.S.) 91, 4 W.R. 328.

A firm of real estate brokers is not entitled to a commission from a vendor for securing a purchaser for land, who was, without the fact being disclosed to the vendor, a member of such firm and bought the land for its benefit: *Edgar* v. *Caskey*, 4 D.L.R. 460 (Alta.).

The Right to Commission as Affected by the Employment of Two or More Agents.

Where an owner, dissatisfied with his agent's failure to sell, placed his property with other agents but did not withdraw it from the first agent and it was sold by one of the agents at the same price net to the owner as the price he offered to the first agent, such first agent is not entitled to a commission: *Johnson* v. *Appleton*, 11 B.C.R. 128.

Where the owner of land, being hard pressed by the mortgagees thereof, employed an agent to sell the land at a specified price and the agent failed to make a sale at such price to a person he was negotiating with, and such person, through his banker, afterwards got into communication with a real estate agent employed by the mortgagees and, as a result of the work of the mortgagees' agent in the matter, finally purchased the property at a much less price than that at which it was offered through the owner's agent, the mortgagees' agent and not the owner's agent brought about the sale and the owner's agent is not entitled to any commission, although the owner was chargeable with the commission payable to the mortgagees' agent: *Bridgman* v. *Hepburn*, 13 B.C.R. 389, affirmed 42 Can. S.C.R. 228.

Where an owner who had employed an agent to sell his land subsequently and without notice to the agent gave an option to another real estate agent known to him to be such, who had the property conveyed to a person originally found by the first agent and with whom he was negotiating, the second agent having secured the purchaser not by reason of anything the first agent had done, the first agent is entitled to no commission in the absence of shewing any collusion on the part of the owner to deprive him of his commission, the owner believing at the time that the option holder was purchasing it himself: *White* v. *Maynard*, 15 B.C.R. 340.

An agent employed to sell at a specified price entered into negotiations with a prospective purchaser but nothing came of it. Subsequently the same person and the owner were brought together by another agent who had to conduct the further negotiations before the prospective purchaser agreed to buy at all. The property was finally sold to him at a price less than that offered through the first agent. The trial Court gave the agent half the amount agreed upon and on an appeal by the agent the Court of Queen's Bench refused to disturb the verdict so as to give him the full amount stipulated.

As the principal failed to appeal the question of the agent's right to recover anything at all was, of course, not decided: *Glines* v. *Cross*, 12 Man. L.R. 442.

An agent who actually sold the land in *Glines* v. *Cross*, 12 Man. L.R. 442, *supra*, had to sue for his commission and in the action he recovered the full amount claimed. On an appeal by the principal the full Court sustained the trial Judge's refusal of the owner's application for a new trial or to vary the judgment, relying on the fact that another real estate agent had recovered a verdict against him for half the usual amount the full Court declared that the fact of the recovery by another agent of the amount with respect to the same sale was *res inter alios acta* and not in itself material: *Douglas* v. *Cross*, 12 Man. L.R. 534.

A real estate agent who was not an exclusive agent for the sale of the property cannot recover a commission where the land was sold by the efforts of another agent though the first agent had introduced the property to the purchaser at an earlier date than the other agent: *Robins* v. *Rees*, 2 O.W.N. 1115, 19 O.W.R. 277. Mr. Justice Middleton in delivering the opinion of the Court said: "A fisherman who actually lands the fish is entitled to it, even though it was first allured by the bait of another."

A broker who introduced a purchaser is entitled to his commission even though the sale to such purchaser was effected wholly through another agent: *Osler* v. *Moore*, 8 B.C.R. 115.

An estate agent appointed at an annual salary with an additional commission upon the first year's rent for every house which he should let on the estate, is entitled to such commission for letting houses for his principal, though the evidence was that the agreement for the letting was entered into with another agent, where it appeared the tenants were introduced to him by the first agent: *Bray* v. *Chandler*, 18 C.B. 718.

Land agents were severally employed to sell an estate. A person called on one of the agents to inquire after another estate, and was told by him that it was not in the market, but that the estate above first mentioned was to be sold. The enquirer took from this agent particulars of the estate and afterwards meeting the other agent negotiated with him the terms of the purchase which was afterwards completed. The agent first approached brought an action for commission on the sale, payable to the agent who found the purchaser. It was held (1) that the question for the jury was, whether they thought that, in fact, the plaintiff had secured the purchaser and (2) that if they thought he had, and gave their verdict for them, they were not bound to give him the full amount of the commission, though the fact of that commission being usually paid was some evidence to guide them in their decision: *Murray* v. *Currie*, 7 Car. & P. 584.

The Right to Commission as Affected by the Taking of a Secret Profit by the Agent.

Where the agent negotiated with a person who was anxious to buy but wanted time to arrange for funds and the agent gave him time upon his promise to pay the agent a certain sum of money and the sale was finally made to him. It was held in an action by the agent for his commission brought before he had received the money promised him by the purchaser that his consent to accept such sum from the purchaser was such a breach of his duty as agent for the vendor as to disentitle him to recover his commission: *Manitoba and North West Land Corporation* v. *Davidson*, 34 Can. S.C R. 255, reversing *Davidson* v. *Manitoba North West Land Corporation*, 14 Man. L.R. 233. The language of Mr. Justice Nesbitt in delivering the opinion of the Court is such a clear and concise statement of the principles governing cases where the agent by some service to the purchaser against the interest of his principal attempts to obtain a secret profit on the sale as to merit quotation in full. "I think that the non-receipt of the money makes no difference; the bargain was that he should get the money and it is that which would affect the mind of Davidson (the agent); he expected to get the money at the time and the question is: Does such a transaction as this disentitle him to the payment of his commission assuming that he is otherwise entitled to such a commission? I think the test is: Has the plaintiff by making such an undisclosed bargain in relation to his contract of service put himself in such a position that he has a temptation not faithfully to perform his duty to his employer? If he has, then the very consideration for the payment for his services is swept away. I think that the making of such a bargain necessarily put Davidson in a position where it was to his interest that Grant should become the purchaser, in which case he would receive not only the commission but $500 commission as a secret profit. It put him in a position where he was getting pay for the very time which the company were agreeing to pay him for while securing the purchaser, and his duty as agent was to get the highest price possible for his employer;

and it is perfectly evident from his own statement that Grant was a person who was willing to pay at least $500 more for the property and probably a considerable advance on that: *Manitoba and N. W. Land Corpn.* v. *Davidson*, 34 Can. S.C.R. 255."

Where a person knowing that another person was an agent for the sale of certain lands entered into an agreement with him for the purchase thereof on joint account in his own name, upon the understanding that they should each be owners of one-half the lands and share profits equally upon a re-sale and the agent transferred one-half his interest to a third person who gave valuable consideration therefor, with knowledge, however, at the time of his transferor's agency for the sale of the lands, and shortly after the conveyance of the land by the owner to the first party above mentioned they were re-sold to a fourth person at a large profit, the owner was allowed, in an action brought by him against the three after he had discovered the nature of the transaction, to recover the amount of the profits which they had realized upon the re-sale of the land made by the three together with the amount of the commission paid by him on the sale of the lands as shared in by each: *Pommerenke* v. *Bate*, 3 Sask. L.R. 51, *per* Johnstone, J. Attention should be called to the fact that this judgment was varied by the Supreme Court of Saskatchewan (*Pommerenke* v. *Bate*, 3 Sask. L.R. 417), in which it was held that the transferee of the agent was under no obligation to account for profits, he being a *bonâ fide* purchaser for valuable consideration and this latter judgment was affirmed by the Supreme Court of Canada *sub nom. Coy* v. *Pommerenke*, 44 Can. S.C.R. 543. The agent did not appeal and therefore as to him the trial Court's judgment remained in force.

It is well established that the acceptance of an agent of a secret commission from the other side disqualifies him from recovering any remuneration from his principal: *Miner* v. *Moyie*, 19 Man. L.R. 707.

The principal may in an action for that purpose recover back the commission which he has paid to the agent notwithstanding that he has already recovered from the agent the secret commission paid him by the purchaser for effecting the sale: *Andrews* v. *Ramsay*, [1903] 2 K.B. 635, 72 L.J.K.B. 865, 89 L.T. 450, 52 W.R. 126, 19 Times L.R. 620. Lord Chief Justice Alverstone said: "A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission. In my opinion, if an agent directly or indirectly colludes with the other side, and so acts in opposition to the interest of the principal, he is not entitled to any commission."

Attention may here be called to a case distinguishing *Andrews* v. *Ramsay*, [1903] 2 K.B. 635, *supra*, though not strictly in point in this note as it is concerned with the sale of goods, in which an auctioneer was held not to be disentitled to retain his commission under an agreement providing that in addition to a lump sum by way of commission he was to be paid all "out-of-pocket expenses" including the expenses of printing and advertising where it appeared that in his account of such

expenses to his principal he debited the latter with the gross amount of the printer's bill and of the cost of advertising in the newspapers though he had, in fact, without the principal then knowing it, received discounts both from the printers and the newspaper proprietors according to a general custom on the part of printers and newspaper proprietors to allow auctioneers a trade discount off their retail charges which discount they did not allow to the auctioneers' customers if they dealt with them directly, and where the auctioneer in omitting to disclose the fact of his discounts to his principal did so in the honest belief that he was lawfully entitled under the custom to receive the discounts and retain them for his own use: *Hippisley* v. *Knee*, [1905] K.B. 1, 74 L.J.K.B. 68, 92 L.T. 20, 21 Times L.R. 5. Lord Chief Justice Alverstone declared that he was satisfied that there was no fraud on the part of the agent and that what was done by him was done under a mistaken notion as to what he was entitled to do under the contract which was enough to differentiate the case of *Andrews* v. *Ramsay*, [1903] 2 K.B. 635, *supra*, where the Court was dealing with an agent who acted downright dishonestly. He added that he was not prepared to go to such a length as to hold the agent not entitled to receive any commission if he failed to account for a secret discount received even though that failure might be due to an honest mistake. "If the Court is satisfied that there has been no fraud or dishonesty upon the agent's part, I think that the receipt by him of a discount will not disentitle him to his commission unless the discount is in some way connected with the contract which the agent is employed to make or the duty which he is called upon to perform. In my opinion, the neglect by the defendants to account for the discounts in the present case is not sufficiently connected with the real subject-matter of their employment. If the discount had been received from the purchasers the case would have been covered by *Andrews* v. *Ramsay*, [1903] 2 K.B. 635, *supra*; but here it was received in respect of a purely incidental matter; it had nothing to do with the duty of selling. It cannot be suggested that the plaintiff got by one penny a lower price than he would otherwise have got."

In another case dealing with the sale of goods and therefore not strictly in point with this annotation it was held that where the agent in numerous instances did not forward the invoices to purchasers of the goods which were made out in the name of the customer but were sent to the agent, and forwarded invoices made in his own name as agent at an increase over the price set in the principal's invoice and retained for himself the excess in that price while crediting only the written price to the principal, such act was a dishonest one in each transaction and deprived the agent of any right to commission in such transactions but did not deprive him thereof in other sales by him where he honestly acted within the terms of the contract of agency and credited his principal with the full amount received by him from the purchaser: *Nitedals Taendstikfabrik* v. *Bruster*, [1906] 2 Ch. 671, 75 L.J. Ch. 798.

An agent is not entitled to any remuneration in respect of a transaction in which he has been guilty of any misconduct or breach of faith towards his principal and therefore a recovery of commission will be denied a company in business as a real estate broker, where it appears that the owner of the property employed the company to sell the same, the listing thereof being done by a clerk, who introduced to the owner another clerk of the company, as a gentleman recently arrived from England and anxious to buy property; that in the negotiations that followed the owner set a certain price which the intending purchaser having been previously informed by his fellow-clerk that the property could be bought for a less sum, refused to pay, and that the other clerk without disclosing that he and his companion were in the agents' office and that the intending purchaser had seen the listing or had been told the minimum figure at which the owner would sell, took part in the discussion that was going on between the owner and "the gentleman from England," and acting as well for the seller as for the buyer, brought the parties together, with the result that the owner agreed to accept the minimum price, but afterwards repudiated the contract: *Canadian Financiers, Ltd.* v. *Hung Wo* (B.C.), 1 D.L.R. 38.

To the same effect are *McLeod* v. *Higginbotham*, 18 W.L.R. 296 (B.C.); *Myerscough* v. *Merrill*, 12 O.W.R. 399; *Price* v. *Metropolitan House Investment and Agency Co.*, 25 Times L.R. 630 (C.A.).

Where a land agent in the course of his employment after negotiating with an intending purchaser effected a sale by having land of the purchaser taken in part satisfaction of his principal's price after the agent on his demand had been paid by the purchaser a commission for effecting such exchange, of which payment his principal was aware and made no objection to his retaining it and the principal afterwards negotiated with the agent for a settlement of his remuneration, the principal cannot afterward in an action by the agent for his commission set off the sum paid the agent by the purchaser: *Culvercell* v. *Campton*, 31 U.C.C.P. 342.

The owner of land who, before he closed the transaction, was informed by one of the intending purchasers that the agent he had employed to sell the same was to be paid by the purchasers a certain sum of money if the sale was completed, cannot, after he went on and effected the sale, recover the commission he paid the agent: *Webb* v. *McDermott*, 5 O.W.R. 566, affirming 3 O.W.R. 644, which reversed 3 O.W.R. 365.

Cases in which the Right Commission was Upheld.

An agent is entitled to his commission if he shews that in accordance with his contract he has obtained a purchaser ready and willing and able to buy on the terms offered who was accepted by the principal after the latter had succeeded in adding additional terms upon which he insisted, where the sale finally fell through because of the sole fault of the principal: *Bagshewe* v. *Rowland*, 13 B.C.R. 262.

Where a person opened negotiations with an agent for an exchange of

property of his, for property listed with the agent for sale or exchange, and before the deal was closed between the agent and the prospective purchaser the principal telephoned the agent asking if any disposition of his property had been effected and was replied to in the negative and then said that he withdrew the property, but at or about the same time he consummated a deal for the same property with the prospective purchaser upon negotiations made directly with the principal, the relationship of vendor and purchaser was held to have been brought about by the agent and the agent was therefore entitled to the commission: *Lalande* v. *Caravan*, 14 B.C.R. 298.

An agent is entitled to his commission where he introduced a purchaser who obtained from the principal an option which he finally allowed to lapse and a small portion of the property was afterwards sold to another person, the agent being paid a commission thereon and subsequently the option holder entered into negotiations with the owner without the intervention or knowledge of the agent, although the sale which resulted was made at a price less than the price offered through the agent: *Lee* v. *O'Brien*, 15 B.C.R. 326.

An agent employed to sell land at a net price to the owner introduced a purchaser to the owner whom he privately told the price at which he offered it, the price quoted being higher than the net price, and asked to be protected in getting his commission to which the owner assented. Sometime after this interview, when the agent was not present, the purchaser asked the owner his price and the latter gave the same price as the price he had offered it to the agent and it was sold at that price to this purchaser. The agent was held to be entitled to recover as his commission the difference between the net price to the owner stipulated in the agreement of agency and the price at which the agent offered it to the purchaser: *Rowlands* v. *Langley*, 16 B.C.R. 72, 17 W.L.R. 443.

An agent is entitled to a commission where he produced a purchaser between whom and the owner it was agreed that upon the payment of a certain price, part of which was to be paid in cash, everything went with the property just as it was with the exception of certain personal property then designated and the purchaser afterwards got a certified cheque for the amount of the cash payment and was prepared to give the same to the owner until the latter expressed a desire to exclude other personal property from the sale which the purchaser would not accede to unless a reduction was made in the price of the property which the owner refused to accede to and the sale consequently fell through: *Cuthbert* v. *Campbell*, (B.C.), 12 W.L.R. 219.

An agent employed to sell lands at a specified price who found a purchaser willing to buy but at a much less price than the one specified, but who was nevertheless accepted by the owner who agreed to the reduction in the price, is entitled to his commission on the sale: *Wolf* v. *Tait*, 4 Man. L.R. 59.

An agent is entitled to a commission on the full price where having

secured a purchaser ready, able and willing to complete the purchase, as the contract of agency called for, though no agreement of sale binding on the purchaser was entered into because the owner refused to execute an agreement unless it should provide for the forfeiture of the deposits paid at first by the purchaser if there should be default in carrying out the transaction and the purchaser would not consent to such a provision being inserted: *MacKenzie* v. *Champion*, 4 Man. L.R. 158, 12 Can. S.C.R. 649.

Persons whom the owner of land knew to be real estate agents called on the owner and ascertained through him that his house was for sale at a certain price and during the conversation nothing was said about the commission. Shortly afterwards the agents introduced a prospective purchaser who after inspecting the property authorized the agents to offer a sum less than that which was set on the house by the owner. When this offer was communicated to the owner he told the agents that he would not accept any less than the price he had stated and that he wanted that net, that is, clear of commission, and the agents tried to induce the prospective purchaser to buy on these terms but the latter afterwards dealt with the owner directly and bought the property at the exact price quoted to the agents. The agents were held entitled to recover the full amount of the usual commission on the price at which it was sold: *Aikens* v. *Allan*, 14 Man. L.R. 549.

After the agent had procured a purchaser ready and willing to carry out the purchase on terms satisfactory to the principal the proposed purchaser discovered that one of the walls of the building on the property sightly overhung the adjoining lot and called on the owner to make good the title to such building. Being unable or unwilling to make good the defect in the title or to make satisfactory terms with the owner of the adjoining lot, the principal proposed to the purchaser that the agreement of sale should be cancelled and it was so done. The trial judge awarded compensation to the agent equivalent to the amount of the commission agreed on had the sale gone through. On appeal it was held that the agent had earned and was entitled to be paid a compensation for his services in finding a purchaser though he had not procured a purchaser to execute a binding agreement to purchase and that such recovery need not be the amount agreed on as commission but a compensation as on a *quantum meruit* or by way of damages, but that under the circumstances it was competent for the trial judge to award the sum he did: *Brydges* v. *Clement*, 14 Man. L.R. 588.

A person who was not known to the owner of the property to be a real estate agent, and who had no office as such, went to the owner and ascertaining that the property was for sale obtained the terms on which it would be sold. At a subsequent interview this person told the owner he had found a purchaser and in answer to a request by the owner gave the latter the name of the purchaser. The owner stated the terms as before but said he would require a larger cash payment than the agent

had previously understood would be accepted. The agent then said that the purchaser would take the property on such terms and brought him to the owner. The purchaser then proposed that instead of the cash payment he should pay half thereof in cash and the other half in six months, the other payment to be as agreed on to which the owner acceded and the sale was carried out. The trial judge dismissed the action because there was a conflict of testimony as to whether the owner understood that the person who introduced the purchaser was working for a commission on the sale. On appeal the court, declaring itself to be in as good a position to judge of the facts as the trial Judge, held the person who introduced the purchaser to be entitled to the usual commission on the sale: *Wilkes* v. *Maxwell*, 14 Man. L.R. 599. Attention may be called to the following ground on which the Court of Appeal reviewed the evidence and decided that the right to maintain the action was established. "Where there are two persons of equal credibility and one states positively that a particular conversation took place while the other positively denies it, the proper conclusion is to find that the words were spoken and that the person who denies it has forgotten the circumstances."

A son of an owner resident in another country placed a farm in the hands of two different real estate agents for sale. One of the agents found a purchaser and informed the owner's son by letter, and the latter replied accepting the offer but asking the agent to call on the other agent and arrange regarding commission so that the writer of the letter would have to pay no more than one commission. The agent who found the purchaser did not communicate with the other agent but introduced his purchaser to the son's solicitor. The purchaser paid the solicitor a substantial sum to be applied on the purchase and was ready and willing to pay the balance on receipt of a transfer. In the meantime the other agent also made a sale of the farm at the same price as the first agent and this sale was completed by the owner's son who paid such other agent the usual commission. It was held that the first agent was entitled to his commission as he had done all that was necessary to earn it and as the son held a power of attorney from his father to sell and convey the property he was personally liable therefor: *Bell* v. *Rokeby*, 15 Man. L.R. 327. (Dubuc, C.J., and Perdue, J.)

Agents were held to be entitled to one-half the commission they would have earned if they had affected a sale of the property where they introduced to the owner a probable purchaser who afterwards arranged with the owner an exchange of some property of his own for the principal's: *Thordarson* v. *Jones*, 17 Man. L.R. 295.

Under an agreement whereby the principal promised to pay his agent a commission "on the completion of such sale" and "on completion of the deal," the expressions quoted are to be construed to mean on the execution of a binding agreement of sale, and, upon the happening of that event, the agent is entitled to recover his commission even though the purchaser afterwards defaulted: *Haffner* v. *Cordingly*, 18 Man. L.R. 1.

The tenants of certain property not in the business of real estate agents having learned that the owner of the property was anxious to sell the same discussed the price and terms with the latter with the view of effecting a sale and as a result had on one occasion introduced to him a prospective purchaser when the owner agreed that if the sale went through the tenants should have a commission; but no general agency to sell was conferred upon them. A person passing by the property and thinking that it might be suitable for his purpose entered the tenants' place of business on it and inquired of one of them if the property was for sale and was told that it was, and this tenant telephoned the owner and told him he had a prospective purchaser and asked his best terms which the owner told him and agreed to pay the tenant a commission out of the price fixed. The tenant then quoted the price to the inquirer and sent him to the owner. The prospective purchaser met the owner upon the same evening and after some negotiations the sale was completed on the next day for a price somewhat less than that offered through the tenant. The purchaser did not mention the tenant's name to the owner and the owner testified that he did not connect the purchaser with his telephone conversation with the tenant. It was held that he was put upon inquiry when a prospective purchaser appeared a few hours after the conversation with the tenant; that he should have ascertained if such person was the one referred to by the tenant; and that upon the facts shewn he and his fellow-tenant were entitled to a commission on the price for which the property was sold: *Robertson* v. *Carstens*, 18 Man. L.R. 227.

An agent is entitled to a commission if he has found a purchaser ready, willing and able to carry out the purchase at the price set by the principal when employing the agent where the latter on obtaining a purchaser informed the principal and the principal then ignored the agent and sold the land to such purchaser at the price offered through the agent less the commission promised the agent: *Ross* v. *Matheson*, 18 Man. L.R. 350, 13 W.L.R. 490.

Owners of property which they wished to sell prepared a large number of identical statements describing the same in detail and containing the price and terms on which they would sell and distributed the same to many real estate agents in the city where the owners had their office. One of the agents entered into an arrangement with a provincial officer, who was, of course, not in the business of a real estate agent, to assist him in finding a purchaser, and the agent gave the officer several copies of the statement before mentioned. The latter gave one to a person who called at his office for the purpose of getting information as to homesteads after convincing him that it was better to buy an improved farm and gave him a card of introduction to the owners of the property in question without indicating in any way that he was an agent for the sale thereof. The inquirer then went to the owners' office but did not there shew the card of introduction to the owners' manager. The manager asked him if

he came from any real estate agent and he said "no," stating what he believed to be the truth. After this assurance the manager made an agreement of sale with him after having made a reduction in price to meet the purchaser's offer, for an amount slightly more than the regular commission would have been under the belief that no commission would be payable. It was held that the facts above shewn were such as to put the owners upon inquiry, and that their manager had failed to make sufficient inquiry and that it was by the instrumentality of the agent who gave the circular to the provincial officer that the purchaser was procured and consequently the agent was entitled to commission on the sale: *Hughes* v. *Houghton Land Co.*, 18 Man. L.R. 686.

An agreement between an agent of a vendor company and the company's manager for an equal division of the agent's commission upon the latter's sale of the company's real property, does not disqualify the agent from recovering his half of the commission from the company if the sale has been effected by him, as such an agreement could not create either in the agent or in the company's manager an interest in conflict with the interests of the owning company, although the fact that the agreement for division of the commission was not known to the directors of the company: *Miner* v. *Moyie*, 19 Man. L.R. 707, 10 W.L.R. 242.

An agent who has been promised a commission on the sale of land, if made within a limited time at a price and on terms stipulated, although he had not an exclusive agency, is entitled to payment *quantum meruit* for his expenditure of time and money paid for advertising which resulted in his finding within the time limited a purchaser for the property able and willing to carry out the purchase, although the agency was revoked before the proposing purchaser had actually bound himself to buy the property, in a case in which the principal, at the time of creating the agency, knew that the agent would, in reliance upon the terms of his employment, spend time and money in the hope of earning the commission agreed on, was given judgment for half the amount of the commission plaintiff would have earned if the sale had been carried out: *Aldous* v. *Grundy*, 21 Man. R. 559 (C.A.).

A person not usually engaged in the real estate was employed by the owner of land to sell or exchange the same for him, nothing being said as to the rate of compensation for his services and he went to a real estate agent and asked him to take the matter up and to endeavour to make a deal, and he himself took no further part in the negotiations which followed. The real estate agent wrote to the owner and submitted some propositions to him. The latter knowing that the real estate agent had been brought into this transaction by the party he had employed, and regarding one of the propositions admitted favourably, referred the real estate agent to another agent in the same business and finally from the result of the two agents getting together the exchange of lands resulted. The person first employed by the owner was held to be the cause of bringing the parties together and was entitled to remuneration for his services: *Barteaux* v. *McLeod*, 19 W.L.R. 138 (Man.).

An agent employed to find a purchaser for property at a price named who finds a purchaser satisfactory to his principal and procures a binding contract to be entered into, is entitled to his commission although the sale does not go through owing to the default of the buyer, especially where the principal signified in the written offer of the purchasers his acceptance thereof and added thereto an agreement to pay the agent his commission upon the purchase price: *Copeland* v. *Wedlock*, 6 O.W.R. 539.

Where the agent procured a purchaser able and willing to pay the price asked by the principal for his property and submitted a written offer to which the principal made no objection saying that he wanted to look into the matter and used the offer as a lever to move a prospective purchaser with whom he had already entered into negotiations to purchase the property at the same price as offered through the agent, in order to escape paying any commission, the agent is entitled to be awarded as damages for the breach of the implied agreement on the part of the principal to accept a purchaser, an amount equal to the commission which he was promised, the Court being of the opinion that it was immaterial, however the case be put, that is, whether the agent was entitled to a commission or only to a *quantum meruit* or to damages, he was entitled to receive the sum awarded: *Marriott* v. *Brennan*, 14 O.L.R. 508, 10 O.W.R. 159.

A person who knew the property in question went to agents employed by the owner to sell the same by reason of having seen a board on the premises with the agents' name on it offering the property for sale, but nothing was done, the agents not even getting an offer or attempting to get one, apparently because an offer had already been sent the owner which offer fell through. The land was finally sold by the owners to the person who saw the agents' board. The trial Court allowed a five per cent. commission on the price at which the property was sold, apparently upon the ground that that was the usual rate of commission. Upon an appeal to a Divisional Court Mr. Justice Britton, in delivering its judgment, declared that it seemed clear to him that upon the evidence the agents did not find and were not intrumental in finding a purchaser but that they were entitled to be paid something by their principals and the amount of the judgment was cut in two: *Waddington* v. *Humberstone*, 15 O.W.R. 824. It seems strange that if the agents neither found nor were instrumental in finding a purchaser they could recover a commission upon any principle.

A real estate agent is entitled to the commission agreed to be paid him though the sale was actually made through other agents where the purchaser was first introduced by the agent and the continuity of the transaction was not broken. For example, where he took a prospective purchaser to inspect the property and informed the owner that he had done so and the prospective purchaser having become hostile to the agent would not deal with him and other real estate agents having got into communication with such prospective purchaser succeeded in affecting a sale, though not

until they had furnished the owner with an agreement to accept a certain sum as commission for the sale much smaller than the owner agreed to pay the first agent, and to be responsible for any other agent claiming commission for the property: *Sager* v. *Sheffer*, 2 O.W.N. 671, 18 O.W.R. 485.

A real estate agent who has done all that is necessary in the securing of a purchaser on the terms and conditions imposed by the owner, the contract signed by the purchaser being in proper and intelligible terms, is entitled to his commission even though the purchaser refuses to carry out the contract: *Hunt* v. *Moore*, 2 O.W.N. 1017, 19 O.W.R. 73.

A real estate agent hearing that the Government of Canada wanted an armory site approached the owner of certain land and procured from him a document providing that he would at any time within 30 days accept a certain amount net for such land and the next day the agent finding that it was necessary that the owner himself offer an option to the government induced the owner to submit an option to the Government at an advance on the price fixed in the document aforesaid, which option stated no time for acceptance and which provided that all buildings were to be retained and removed by the owner on or before a specified date considerably more than 30 days from the date of the option to the agent and that the owner was to have free use of the land until that date. The Government finally accepted the option and purchased the property, but not until after the expiration of the 30 days and after the owner had notified the agent that he had cancelled the agreement which attempted cancellation took place also after the 30 days had elapsed. In an action by the agent for his commission the agreement was construed to mean that the owner of the land authorized the agent to sell the land at the price stipulated thereon within 30 days from the date thereof and that any sum over and above that price which the agent could get for the property would go to him as commission for making the sale. It was also held that the agent having procured by means of the option to the Government a customer who ultimately and within a reasonable time purchased the property, he secured a purchaser within 30 days as required by his agreement and, therefore, he was entitled to recovery for the difference between what the Government paid for the land and the price fixed in the agreement aforesaid: *Meikle* v. *McRae*, 3 O.W.N. 206, 20 O.W.R. 308.

Where an agent secured a purchaser who could not pay the agreed amount as deposit but who was accepted by the owner who signed an agreement with him to sell and received from him a smaller cash deposit upon an understanding with the agent that the payment of his commission should be postponed until the purchaser could get a loan to pay for the property or resell it, such agent, in the absence of an agreement to the contrary, was entitled to his commission though subsequently the purchaser failed to make any further payment than the cash deposit resulting in the vendor cancelling the contract, basing the agent's right so to recover apparently upon the fact that the principal himself cancelled the agreement of sale thus putting it out of the purchaser's power to raise the means out

of which the commission was to come: *McCallum* v. *Russell*, 2 Sask. L.R. 442.

An agent whose agency was not an exclusive one and who sold the land on terms to which the owners agreed and forwarded a deposit on such sale, stating that the balance of the purchase money would be forwarded in a few days, is entitled to his commission on the sale, though before the balance was forwarded the owners advised him that the land was no longer available and returned the deposit, it not being shewn that the inavailability of the land was due to it being previously sold by the owners or to any other cause: *Hammans* v. *McDonald*, 4 Sask. L.R. 320, 19 W.L.R. 741.

Real estate brokers employed to find purchasers who found persons willing and able to purchase upon terms varied from those proposed by the principal when the agents were employed, which terms were satisfactory to the owner and to which he offered no objection, are entitled to a compensation for their services though no sale was actually completed because of the refusal to do so on the part of the principal on the sole ground that the proposed purchasers were in the same business as himself: *Boyle* v. *Grassick*, 6 Terr. L.R. 232.

An agent who took a prospective purchaser to inspect the land and as a result of this inspection the purchaser went to the owner and entered into personal negotiations with him without any further act on the part of the agent, which negotiations resulted in the sale of the land, the agent is entitled to his commission as agreed even though the purchaser was not personally introduced to the vendor by the agent and though there was included in the sale some other property not listed with the agent: *Ings* v. *Ross*, 7 Terr. L.R. 70.

Certain house agents employed on commission if they found a purchaser, but to be paid one guinea only if the premises were sold "without their intervention," entered the particulars on their books and gave a few cards to view. A person who had observed on passing that the house was to be sold called at the agents' office and obtained a card to view the premises, the selling terms being written by their clerk on the back of the card. The prospective purchaser went to the house, but thinking the price too high he made no further communication with the agent. He subsequently, however, entered into negotiations with a friend of the owner and though the same were at first broken off, he renewed them and ultimately purchased the property at a much less sum than the price offered through the agents. It was held that there was sufficient evidence for a jury to find that the purchase of the premises had been accomplished through the agents' "intervention" and consequently they were entitled to the stipulated commission: *Mansell* v. *Clements*, L.R. 7 C.P. 139.

Where it appeared that the agent introduced a prospective purchaser to the owner who was then in insolvent circumstances, but no agreement could at that time be come to as to terms, and the owner a few days afterwards presented his own petition in bankruptcy, that further negotiations took place between the person so introduced and the trustee in bankruptcy

in respect of the property; and that a week afterwards, the purchase was completed, a sale of property is brought about in consequence of an introduction by the estate agent and is traceable thereto so as to entitle him to a commission: *Re Beale; Ex parte Durran*: 5 Morrell's Bankruptcy Cases 37.

Five years after the owner of an estate had employed real estate brokers to sell it at a minimum price fixed at a specified sum, a certain person applied to the agents for information regarding another estate. In reply he was sent particulars not only of the property inquired about, but of others including the one first above mentioned, of which he thought well but considered the price too high, and negotiations ceased in that regard. Three years after, the same person applied to the same brokers for particulars regarding the same property and obtained them and was urged by the agents to make an offer for it, but he did not do so. Somewhat more than a year thereafter the same person inserted in a newspaper an advertisement for estates of the description he desired, and soon after he received from the owner of the property first mentioned a letter calling attention to it, on which negotiations followed between them, resulting in the sale of the property to such person at a price much less than the minimum price set by the owner when he employed the real estate brokers to sell it. In an action by the agents against the owner for commission, it was held that their exertions, as duly authorized agents of the seller, did to a material degree contribute to the sale of the estate to the purchaser, and, therefore, that they were entitled to a commission on the price at which it was sold: *Walker* v. *Fraser's Trustees*, [1910] Scot. L.R. 222.

An agreement with auctioneers provided that if the property should not be sold at auction but should be sold within, "say," two months afterwards, to a purchaser who has been found by means of the agents' advertisements or posters or introduction, then the agents were to receive half of the commission they would have received if the property had been sold at auction, and that if a sale should take place either before the sale under the hammer or before a specified date, the usual commission was to be paid to the agents, such commission to include all out-of-pocket expenses, and that if the property remained unsold at such date, then no charge of any description whether for out-of-pocket expenses or services, was to be made by the agent. The agent's commission was held to be payable on the property being knocked down to a purchaser at auction, who signed a contract and paid a deposit, though subsequently the contract was rescinded by the vendor in consequence of a requisition being made by the purchaser which the vendor could not comply with: *Skinner* v. *Andrews*, 54 S.J. 336, 26 Times L.R. 340 (C.A.).

In an action for damages by a commission agent for wrongfully preventing him from earning his commission, the damages recoverable where nothing remained to be done by the commission agent to entitle him to his commission if the transaction had gone through, are the full amount of the commission which he would have earned: *Roberts* v. *Barnard*, 1 Cab. & E. 336.

An agent employed to find a purchaser for some land, at a commission on the purchase money if a sale was completed, is entitled upon his principal's refusal to complete the sale with a purchaser found by the agent, to recover on a *quantum meruit* for the work and labour done, as he had performed his part of the contract, and the principal prevented its completion: *Prickett* v. *Badger*, 1 C.B.N.S. 96, 26 L.J.C.P. 33, 3 Jur. (N.S.) 66, 5 W.R. 117.

Where an agent instructed by his principal to find a purchaser for his house, found a purchaser who was accepted by the owner, and subsequent negotiations took place between the owner and the purchaser, but the purchase finally went off, the owner, having accepted the purchaser, is liable to the agent for commission on the purchase price: *Passingham* v. *King*, 14 Times L.R. 392 (C.A.).

When all the terms of an agreement are stated except the terms as to the time when it is to be carried out, and there is no express stipulation as to the time, then it is an implied term that the agreement is to be performed within a reasonable time; and, therefore, an agent is entitled to his commission, where instructed by his principal to find a purchaser for his house for a specified price, he found one on 16th January ready and willing to pay that sum, who required possession by March 15th, and the principal refused the offer on the ground that he could not give up possession so soon as 15th March, the jury finding that from 16th January to 15th March was a reasonable time: *Nosotti* v. *Auerbach*, 79 L.T. 413, 15 Times L.R. 41, affirmed 15 Times L.R. 140 (C.A.).

A jury is entitled to find that the ultimate sale was not due to any introduction of the agents whereby they could recover any commission, where it appears that the estate which the agents were employed to sell was divided into lots, some of which was purchased and upon the completion of that purchase the agents received their commission; that the owner then withdrew his authority to sell from the agents and the same purchaser subsequently bought the remainder from the owner by private contract: *Lumley* v. *Nicholson*, 34 W.R. 716.

Under an agreement that the agent's commission should become payable upon the adjustment of terms between the contracting parties in every instance in which any information had been derived at, or any particulars had been given by, or any communication whatsoever had been made from the agent's office, however and by whomsoever the negotiation might have been conducted and notwithstanding the business might have been subsequently taken off the books, or the negotiation might have been concluded in consequence of communications previously made from other agencies, or on information otherwise derived, or the principals might have made themselves liable to pay commission to other agents; and that no accommodation that might be afforded as to time of payment or advance should retard the payment of commission, the agent through whom a contract of sale was arranged and duly executed, on which a deposit was paid, the residue of the purchase money being payable on a later specified date, is entitled to his

commission, at all events on the later date, although the balance of the purchase price was not, for some unexplained reason, then paid: *Lara* v. *Hill*, 15 C.B. (N.S.) 45.

Under an agreement an auctioneer and estate agent was to receive a commission if an estate should be sold, and, if not sold, he was to be paid a specified sum as a compensation for his trouble and expense. Where the agent after failure to sell on putting the property up at auction, was asked by a person attending the sale for the name of the owner of the property and referred him to his principal; and ultimately that person without any further intervention of the agent, became the purchaser, the sale was effected through the means of the agent and he was entitled to the stipulated commission: *Green* v. *Bartlett*, 14 C.B. (N.S.) 681, 32 L.J.C.P. 261, 8 L.T. 503, 11 W.R. 834.

The plaintiffs, who were auctioneers and land agents, wrote to the defendant, who was also an auctioneer and land agent, that they were acting for a certain person in seeking a house in their neighbourhood, asking if he had any house on his books that would be suitable, and adding that they presumed the defendant would divide commission with the plaintiffs. The defendant replied giving particulars of a house and adding that in the event of business ensuing he would be pleased to share commission with the plaintiffs. Negotiations for that house fell through, but afterwards negotiations were entered into between such prospective purchaser and the defendant on behalf of the owner of another house, and these negotiations resulted in a contract for the sale of such house. The contract was signed by the defendant purporting to act for the owner, but in an action for specific performance the owner pleaded that the defendant had no authority to make the contract and the action was abandoned. The defendant then sued the owner for his commission and that action was settled, the owner paying the amount claimed. It was held that the plaintiffs were entitled to half the commission so recovered by the defendant from the owner: *Bell* v. *Carter*, 16 Times L.R. 240.

In the following additional cases the agents were allowed to recover their commission: *Duck* v. *Daniels*, 7 W.L.R. 770 (B.C.); *Buckworth* v. *Nelson*, 8 W.L.R. 43, 9 W.L.R. 490 (B.C.); *Cunningham* v. *Hall*, 17 W.L.R. 497 (B.C.); *Schuchard* v. *Drinkle*, 1 Sask. L.R. 16; *Gartney* v. *Oleson*, 3 W.L.R. 80 (Sask.); *Monsees* v. *Tait*, 4 W.L.R. 322 (Sask.); *Scott* v. *Benjamin*, 2 W.L.R. 528 (N.W.T.).

Total or Partial Failure of Claim to Compensation.

An agent taking upon himself a position incompatible with his duty to his principal, is not entitled to be paid for his services, and, therefore, where an owner of land, by his single writing, authorized either one of two agents to sell or exchange his land and in the writing stipulated to pay a commission to the one affecting the sale or exchange, no commission is recoverable by one of the agents for affecting an exchange of the land of his principal for land belonging to the other agent, especially where

the evidence shewed that the agents were to divide the commission between them: *Onsun* v. *Hunt*, 2 Alta. L.R. 480.

An agreement was entered into by an owner of land and a real estate agent whereby the owner agreed to pay the agent a specified sum as a commission payable by instalments, the dates of the payment thereof being contemporaneous with the dates agreed upon by the owner and the purchaser for the payment of the instalments of the purchase money, and in which it was also provided that the commission should be paid only in case the owner received the payments from the purchasers due under the contract of sale. The agent received his proportion of all the money received by the owner under the agreement with the purchaser up to the time at which the purchaser defaulted. Upon the default, it was agreed between the purchaser and the owner that the agreement for sale should be cancelled and that the money that the purchaser had paid should be forfeited to the owner. The agent was held to be entitled to no further commission though such purchaser some months after the cancellation of the agreement of sale bought the land, which was the subject of such agreement, together with other lands, upon the refusal of the owner to sell him the other lands unless he also bought the lands covered by the first agreement of sale: *Hammer* v. *Mullock*, 14 W.L.R. 652 (Alta.).

Where an agent is employed by the owner to sell land at a commission, and himself becomes the purchaser he is not entitled to remuneration: *Calgary Realty Co.* v. *Reid*, 19 W.L.R. 649 (Alta.).

An agent for the sale of certain mineral claims procured a person to take an option to purchase the same before a certain day, which document provided that the holder thereof should pay the owners a certain sum in cash and that, if he should on or before a certain date pay to them a further sum, the period of the option would be extended to a later date and that the option might be exercised at any time up to such date by a written notice and by the payment of a further sum on or before that date, whereupon the agreement should cease to be an option and become a contract of purchase and sale, in which event the sums aforesaid if paid were to be credited on the purchase price. After this option was obtained the agent drew up a written agreement to be signed by him and the owners stipulating that the agent's commission should be a certain per cent. on all instalments or payments made to the owner under the option agreement, which the owners refused to sign as offered them because it called for commissions under any agreement which might thereafter be substituted by the holder of the option or his assigns, and only signed the agreement after such clause was struck out of the agreement. The first two payments required by the option were made by the holder thereof and the agent received his stipulated commission on these sums. The holder of the option made no further payment and later informed the owners that he could not carry out the option at all and finally threw it up altogether. Afterwards he entered into new negotiations with the owners which culminated in a new agreement between the latter and an

associate of the original holder of the option named by him at the suggestion of the owners after they declined to enter into a new agreement with him because they were afraid they would get into a dispute with the agent about his commission. This agreement stipulated that the owners were to be paid for the mineral claims by the once holder of the option and his associates the original purchase price stipulated for in the option aforesaid, a portion in cash, a part in shares of a company to be formed, another part by giving credit for the sums paid under the option and the balance in promissory notes. It was held in an action by the agent for the alleged balance of his commission that the new agreement was not such a continuation of the old option as to give him a right to a commission at the rate stipulated in the option on the whole purchase price and that he was not entitled to anything more than the commission that he received on the payments paid under the option as aforesaid: *Beveridge* v. *Awaya Ikeda & Co.*, 16 B.C.R. 474, 17 W.L.R. 674.

A real estate exchange was engaged in the business of obtaining the listing of properties from their owners for sale upon commission and while it did not make the sale itself it published lists which were sent to the real estate brokers subscribing thereto from day to day and any alterations in terms or otherwise or withdrawals or sales were noted on these lists against the respective property. For this information the subscribers paid and the first one of them obtaining a purchaser for property so listed in making a deposit with the exchange was to have a commission and was given a receipt for the deposit with an order of the vendor for the commission. A subscriber to the exchange received a list containing, among others, a certain piece of property, and sometime in the month following the first publication the same property appeared in the list with a statement of a reduction in the price, and four months thereafter the subscriber, because of the time that had elapsed since the property had first appeared in the lists made inquiry of the exchange as to whether the property was "still good," to which he received the answer: "Yes, it has not been withdrawn." On the strength of this, the subscriber proceeded to advertise the property and made the sale on which he took a deposit which he handed over to the exchange and obtained from it a receipt and an order on the owner for the amount of the subscriber's commission. When the subscriber went to the owner to complete the deal with the purchaser and to get his commission, he was informed that the owner had sold the property herself to another purchaser some months before. The subscriber then brought an action against the owner for his commission and alternatively against the listing exchange for a breach of warranty for authority to list the property. The trial Judge found that there was no such listing as claimed by the exchange, but that they had received the listing as a genuine one and had acted *bona fide* in so holding it out to their subscribers and dismissed the action against the owner. He also held, however, that the good faith of the real estate exchange did not relieve it from liability to the subscribers for the misinformation contained therein and that the measure of damages was the commission the subscriber would

have earned if he had been able to complete the sale to the purchaser: *Austin* v. *Real Estate Exchange*, 2 D.L.R. 324, 20 W.L.R. 921 (B.C.).

A prospective purchaser made an offer to the sub-agent of the owner's agent to purchase certain lands on the terms fixed by the owner, which, however, contained a further statement that if not accepted before a certain time on the third day after the date of the offer the offer would be withdrawn. The sub-agent at once wrote to the agent informing him of the offer and its condition and urging haste in communicating it to the owner, but without disclosing the name of the purchaser. The agent received the letter on the next day after the offer was made and made every effort to induce the owner who lived in another place to accept the offer, informing him fully of its terms and conditions, but not, of course, giving the name of the purchaser as he did not then know it. The owner wrote by first mail to his solicitor in the city where the agent lived instructing him to see the agent and make inquiries and communicate the result by telephone in the evening of the day before the offer expired. The solicitor met the agent in the afternoon of such day and ascertained all particulars, including the name of the purchaser and reported to the owner that evening and was instructed by him to accept the offer, but through some mischance the agent was not informed of this in time to allow him to notify the purchaser of the acceptance before the hour on which the offer expired and the offer was withdrawn on that hour. It was held that the agent was not entitled to recover any commission: *Rogers* v. *Braun*, 16 Man. L.R. 580.

Agents were not permitted to recover either a commission on a sale or anything for their services by way of *quantum meruit* where it appeared that they mentioned the property to one who thereafter negotiated with the owner for the purchase of the property and who concealed from him the fact that the agents had sent him and the owner without any knowledge of the agent's intervention or of facts to put him on his inquiry as to whether the agent had sent such person to him, sold the property to such person on terms less advantageous to the owner than those contemplated in the agency agreement: *Locators* v. *Clough*, 17 Man. L.R. 659.

Where a director of a company in conversation with a real estate agent assured him that if he would procure a purchaser for certain property owned by the company that he, the director, felt sure the company would quote the price at a certain figure and in the event of a sale would pay the agent a specified sum as a commission to be substracted from the purchase price, but that any abatement of the price below a certain figure was to be borne by the agent, the company is not liable to the agent for a commission or for the value of his services as on a *quantum meruit* on the sale of the property after such director had become president of the company, though made to a purchaser who had been introduced to the property by the agent for the exact sum from which, by the statement of the director, any abatement was to be borne by the agent, in the absence of evidence that the director had any authority from the company to sell the

property or to employ an agent to find a purchaser: ***Bent*** v. ***Arrowhead***, 18 Man. R. 632. To the same effect is *Haffner* v. *Northern Trusts Co.*, 14 W.L.R. 403 (Man.), where the agent dealt with a clerk of the defendant company.

It is part of the duty of an agent to let his principal know before the latter has agreed to sell, that the purchaser was procured through the agent's instrumentality. That is part of his contract with the vendor, and in order to recover in an action for commission the onus is upon the agent to shew that the vendor knew or, had he made proper inquiries, would have known that the purchaser had been sent by the agent: ***Per*** Mathers, J., ***Hughes*** v. ***Houghton Land Co.***, 18 Man. L.R. 686.

An agent who had been given the exclusive sale of real estate for a limited period on terms of being paid a commission in case of sale is entitled to substantial damages upon a revocation of his authority, if he has, within the time limited, found a purchaser for the property as the result of special efforts and the expenditure of money in advertising and otherwise which the principal knew or had reason to believe the agent would make and incur to find a purchaser: *Aldous* v. *Swanson*, 20 Man. L.R. 101.

Real estate agents undertook to sub-divide certain land for the owner and to sell it which gave the agents a certain "per cent. commission for making sales, drawing of agreement, making all collections and generally looking after the property." It appeared that they made no sales or no collections unless sums paid by applicants (who were not, however, legally bound to any purchase) secured by them could be treated as such, and that the owner had cancelled the contract under a right reserved so to do. It was held, that under the agreement there must be an actual sale to entitle the agents to the commission agreed upon, though they are entitled to be paid, as upon a ***quantum meruit*** for their actual services and their expenses in connection with the property: *McMillan* v. ***Barratt***, 16 W.L.R. 209 (Man.).

Where an agent failed to make any sale or to find any purchaser ready and willing to buy before the time his contract for agency expired, though he had attempted to form a military club to which, when organized, he hoped to sell the property for the purpose of a club house, which idea was abandoned apparently because it was to be a mixed club of military men and civilians and this was distasteful to the officers of the various military corps and the officers of a certain new regiment to be afterwards formed in the city where the property was, some of them having been, apparently, among the people approached by the agent, decided three days before the expiration of the agency to form a military institute which would have some of the characteristics of a club and at the same time to carry on certain educational work, and a committee was appointed to look for suitable property, and this committee inspected several properties that were offered them, including the one in question, which they knew from previous interviews was for sale, and liking it best requested one of their number to

see the owner and get his price, which he did, after the expiration of the agent's agreement, and upon incorporation of the institute a binding agreement was entered into by it to buy such property at a price less than that offered through the agent, the agent, under the circumstances shewn, did not perform his contract and, therefore, could not recover any commission: *Counsell* v. *Devine*, 16 W.L.R. 675 (Man.).

A real estate agent who had been attempting to sell a certain tract of land for the owner, and who afterwards took from the latter an option for its purchase made in his own favour, which contained no stipulation that if the agent produced another purchaser to take his place under the instrument the agent was to have a commission for the sale of the land to the substitute, and there was no other contemporaneous agreement to that effect, cannot claim any commission after the transfer of the property to a new purchaser, especially where it is shewn that the owner, upon being so requested, refused to stipulate in his contract of sale with the substituted purchaser that the agent should have a commission, and the latter then abandoned his claim rather than have the sale fall through: *Nixon* v. *Dowdle* (*No.* 2), 2 D.L.R. 397 (Man.), 20 W.L.R. 749, reversing *Nixon* v. *Dowdle*, 1 D.L.R. 93, 19 W.L.R. 775.

Where an agreement was entered into between the owners of a mining property and another person whereby it was provided that the latter party had the option to purchase the mine for himself for a specified sum and also that he was to be remunerated with a specified sum as agent for the introduction of a purchaser who would purchase at the figure named in the option and that if it be found necessary to reduce the price to get a purchaser he was to have, after the sale was affected, a commission at a certain per cent. and before the expiration of this agreement the second party wrote the owner that he had failed to bring about a sale of the property and that he had induced a person to join him in purchasing it and made a cash offer payable in thirty days, saying, among other things: "I am now a buyer instead of a seller," which offer was not carried into effect, the relation established between the agent and the owner under the first agreement was practically that of principal and agent and was terminated when the agent made his offer of purchase, and he was, therefore, estopped from claiming any remuneration from the owners on any contract of sale subsequently made by them with a company which included the associate of the agent on whose behalf and his own the agent had offered to purchase: *Fleming* v. *Withrow*, 38 N.S.R. 492.

An agreement for the agency for the sale of land in which no time limit was set for its continuance must be construed as only to be for a reasonable and not for an indefinite time and in deciding what was a reasonable time, verbal testimony as to the time spoken of by the parties when the agreement was entered into as being two years might be properly considered. Therefore, under such an agreement the agent is not entitled to the commission stipulated for therein where he did not procure an offer to purchase it until three years after the date of the agreement when, through

one of the advertisements that the land was for sale which he had continued to publish during these three years apparently without the knowledge of the owners he procured an intending purchaser who went to see the land and was informed by its owner whom he then saw that the agent was not at that time authorized to sell it and the purchaser in spite of this information later made an offer through the agent at a sum in cash equal in amount to the amount for a time sale stipulated in the agreement of agency, which offer the owner refused to accept: *Adamson* v. *Yeager*, 10 O.A.R. 477.

It has been declared to be the law that the agent's introduction of a person who does not in fact purchase the land and who himself afterwards procures a purchaser, though it may be a *causa sine qua non*, is not the *causa causans* of the sale and the agent is not entitled to his commission. This proposition was applied in an action to recover a commission where it appeared that the defendant, endeavouring to sell certain lands for the owners thereof, agreed with two of the plaintiffs that he would pay them a commission; that these two plaintiffs associated the third plaintiff with them in the matter, promising him one-half of the commission if he should procure a purchaser; that he introduced a person interested in a syndicate which was endeavouring to purchase lands in that locality to the defendant as a prospective purchaser and that such party himself after the syndicate refused to purchase, later procured a purchaser and was paid by the defendant a commission on the sale. The Court, after distinguishing *Stratton* v. *Vachon*, 44 Can. S.C.R. 395, *supra*, declared that the sale was a new and distinct transaction; that the plaintiff's acts were not the effective cause of the sale which actually took place; and that when the member of the syndicate secured a purchaser not interested in the syndicate, it was a distinct act intervening between the introduction of such member and the sale, was the real *causa causans* of the purchase and was a new transaction attributable to the member's finding a purchaser and not to the original introduction, though without the latter a sale would not have occurred: *Imrie* v. *Wilson*, 3 D.L.R. 826, 3 O.W.N. 1145, 21 O.W.R. 964.

Where a real estate agent procured a written offer from a person to purchase land owned by the vendor, which the latter accepted, and the only agreement shewn as to the payment of the plaintiff's commission was a stipulation in such offer that it was to be paid out of the purchase money, the agent is not entitled, upon the refusal of the purchaser to complete the purchase, to recover a commission from the vendor, unless the latter is at fault in not carrying out the purchase: *Robinson* v. *Reynolds*, 4 D.L.R. 63, 3 O.W.N. 1262, 22 O.W.R. 124.

Where an agent promised by his principal a commission providing he sold the property for a specified sum introduced to the principal a third party capable of buying on his own account, to whom the owner gave an option and the option holder offered the property to certain persons at a price above the price at which it was offered to him and they refused to buy and finally, being unable to find any purchasers, he threw the matter up and told the owners that he was unable to do anything with the option and that

they were free to deal with the property without reference to him, and he informed the agent who introduced him that he had done so, such agent is entitled to no commission on a subsequent sale by the owners for a price less than that offered through the agent after the expiration of the option to the same persons to whom the holder of the option had offered the property and whose name was given to the owners by him after the expiration of the same: *Pardee* v. *Ferguson*, 5 O.W.R. 698, affirmed, 6 O.W.R. 810.

Where a person entered into a contract to purchase certain property with an implied agreement on the part of the owner that he would be paid commission if he secured some one else to buy, and he endeavoured in vain to get up a syndicate to buy the property and he failed to effect a sale through anybody else, and one of his quondam associates afterwards got up a syndicate of which the person first mentioned was not a member and went to the owner, and upon being informed that the property was still in the market brought about a sale to another party with whom, however, the person effecting the sale and third party were equally interested in the transaction and the owner paid the person who first approached him a commission as an ostensible agent by whom the sale was effected, the party who entered into the first contract of sale has no claim against the owner for any commission: *Murray* v. *Craig*, 10 O.W.R. 888, affirmed without written opinion, 11 O.W.R. 265.

Under an agency agreement which was not an exclusive one, the agent cannot recover a commission for a sale by him to a purchaser whom the agent did not even know until after the sale of the property and with whom the principal was not acquainted until he entered into negotiations with him after the agency agreement had been entered into, though the purchaser's attention had been called to the property by a neighbour of the owner who had seen an advertisement issued by the agent that the property was for sale: *Willis* v. *Colville*, 14 O.W.R. 1010.

Where an agent was informed by his principal that a third party had been inquiring about the land with a view to purchase resulting in the agent opening negotiations with such third party but either from negligence or as a tactical proceeding on his part to make the prospective purchaser "sweat" as he put it, he failed to sell and the principal after trying to get the agent to attend to the matter opened negotiations directly with the third person and effected a sale at practically the same price as that originally offered through the agent, the agent did not under such circumstances find the purchaser or assist to affect a sale so as to entitle him to recover any commission: *Thompson* v. *Milling*, 1 Sask. L.R. 156.

Where the owner of land instructed his agent by letter to sell at a certain price net to him and with the letter included a document stating the terms of the sale and fixing the price at a higher rate than his net price to the agent and he subsequently sold the land to a purchaser found by himself at a price less than the net price to the agent and all that the agent did was to shew the property to the son of the purchaser at one time and the purchaser himself at another time upon their coming down

to see the property, and on the last occasion to wire his principal to come and close the contract which was answered by a telegram from an employee of the principal that the principal was not at home but was coming that night and to have the purchaser come to the principal's place of residence to close the deal which the agent did not do, the agent's employment was of a special character, namely, to sell the land at a specified price, which he failed to do, and he was not, under the circumstances shewn, instrumental in bringing the parties together and therefore he was not entitled to recover anything at all either by way of commission or on a *quantum meruit*: *Munro* v. *Beischel*, 1 Sask. L.R. 238.

Where a broker was instructed to procure a purchaser for land who was to deposit with a certain bank a specified portion of the purchase price pending the arrival of a clear title on the contract, and the purchaser deposited the sum required in the bank but left the same to his own credit without appropriating it to the purchase as the terms of the broker's employment required, the broker was not entitled on the refusal by the vendor to complete the sale, to recover a commission for his services in procuring a purchaser: *Reser* v. *Yates*, 41 Can. S.C.R. 577, reversing *Yates* v. *Reser*, 1 Sask. L.R. 247.

An agent is not entitled to a commission on the sale of certain hotel property where it appears that the owner agreed with him to have the only right and privilege to sell the same until a certain date and to pay him a specified commission and at the time the agreement was entered into the owner told the agent of a certain person who would probably purchase and the agent saw such person in regard to buying the property but nothing came of this meeting then, though the property was, after the date set for the expiration of the agreement with the agent, sold by the owner himself to the person so approached by the agent at a price a little less than that at which it was listed with the agent: *Blackstock* v. *Bell* (Sask.), 16 W.L.R. 363, affirming *Blackstock* v. *Bell*, 3 Sask. L.R. 181, 14 W.L.R. 519.

The owner of land failing to come to terms with a prospective purchaser, subsequently listed the land for sale with the defendant company. The plaintiff having learned that the party with whom the owner had negotiated still wished to buy the land, secured an agreement from the defendant company, that in the event of his making the sale of the land he would be paid one-half the commission, and, without disclosing the source thereof, submitted various offers to the owner on the part of the same party, all of which were refused. Afterwards the owner met this party again and without knowing that the offers aforesaid came from him, made the sale of the land on terms similar to those of the last offer made through the plaintiff and refused. In an action brought by the plaintiff for his commission, it was held, that neither he nor the defendant company was an efficient cause of the sale and that therefore he could not recover any commission: *Dicker* v. *Willoughby Sumner Co.*, 4 Sask. L.R. 251, 19 W.L.R. 142.

An agent whose agency was not an exclusive one, is not entitled to any commission on the sale of the land on the terms fixed by the owners where, upon forwarding a cash payment made by the purchaser thereon, the same was returned by the owner with the information that the land had already been sold: ***Hammans*** v. ***McDonald***, 4 Sask. L.R. 320, 19 W.L.R. 741.

Where an agent introduced to his principal a person with whom the principal finally made an agreement by which he was to take in exchange for the land which he desired to sell certain lands of the other person which were represented by the agent as being worth a certain sum per acre and the principal, upon an inspection of the lands to which the contract entitled him, found that their value had been grossly misrepresented by his agent and that they were worth only about one-fourth the price the latter placed upon them, repudiated the contract and revoked the agent's authority, the agent is not entitled to recover any commission though the owner subsequently sold the land for a different consideration to the person introduced by the agent: *Northern Colonization Agency* v. *McIntyre*, 4 Sask. L.R. 340, 17 W.L.R. 270.

A broker obtaining an option in his own name and therefore putting himself in the relation of a purchaser as regards the owner of the land, is not entitled to claim commission, in the absence of a special agreement to that effect, on a sale afterwards made without reference to the option by the owner to a prospective purchaser whom the broker had introduced within the time limit of the option, the option not having been taken up by the broker: ***Sutherland*** v. ***Rhinhart***, 2 D.L.R. 204 (Sask.), 20 W.L.R. 584, affirming ***Sutherland*** v. ***Rhinhart***, 19 W.L.R. 819.

Where the owner refused to give an agent an exclusive right to sell a piece of property for her but on his representations that she would still have the right to sell it herself without becoming liable to him for commission she was induced to sign a written agreement prepared by him giving him for thirty days the exclusive right of selling the property at an agreed commission, the agent could not upon the owner making a sale of the property herself without any assistance from him, recover such agreed commission though he advertised the property in a newspaper: ***Cadwell*** v. ***Stephenson***, 3 D.L.R. 759 (Sask.).

Where a real estate broker having an exclusive right to sell property who did nothing towards making a sale but to advertise it in a newspaper before the owner effected a sale herself without his intervention, such sale revoked the agency and the agent is entitled to recover on a *quantum meruit* only for the services actually performed by him and not the commission if he made the sale: ***Cadwell*** v. ***Stephenson***, 3 D.L.R. 759 (Sask.).

A surveyor was retained by the defendant to negotiate with the commissioners of woods and forests for the sale to them of certain premises of the defendant, for which he was to receive a commission of £2 per cent. "on the sum which might be obtained either by private treaty, arbitration, or trial by jury." Private treaty proving unavailing, a jury was empannelled, by whom the value of the property was assessed at a certain price;

but, in consequence of a defect in the defendant's title, arising out of an annuity charged upon part of the premises, which the commissioners required the defendant to buy off, the money was not paid to him, but was placed in the hands of the accountant-general to await the adjustment of the difference. The surveyor was not previously aware of the existence of this charge. It was held that he was, nevertheless, not entitled to his commission until the money awarded was actually received by the defendant: *Bull* v. *Price*, 5 M. & P. 2, 7 Bing. 237, 9 L.J. (O.S.) C.P. 78.

Under an agreement whereby the owner of an advowson contracted to pay his agent, if the latter brought to pass an exchange thereof for another advowson, a specified sum for commission, one-third down and the remaining two-thirds when the abstract of conveyance was drawn out, the agent cannot recover the two-thirds of the commission remaining after the down payment of the other third, where all that he did towards an exchange was the delivery of his principal's abstract of title to the other party who declined to proceed any further in the matter, upon the ground that the event—the drawing of the abstract of conveyance—had not happened, for which the commission was to be paid: *Alder* v. *Boyle*, 4 C.B. 635, 16 L.J.C.P. 232, 11 Jur. 591.

An agent is not entitled to recover commission under an agreement whereby the owner of certain houses, who was desirous of selling, was to accept a specified sum for the property, and the agent was to be at liberty to receive anything over and above that as a commission, it being understood that the owner was to receive the full sum specified without deduction, where the agent found a purchaser who entered afterwards into a contract to purchase for the sum specified but who afterwards defaulted and the purchase was, therefore, never completed owing to this default: *Beale* v. *Bond*, 84 L.T. 313, 17 Times L.R. 280 (C.A.).

An agent is not entitled to a commission under an agreement whereby the owner of a hotel, if the agent introduced a friend within one week, who would become the purchaser of the hotel, was to pay the agent a certain sum "by way of commission . . . . when and if the purchase is completed by private treaty," where the agent's friend upon being introduced by the agent signed a formal contract to purchase the hotel for a specified price, a part of which was paid at once, the balance to be paid upon completion, and the purchaser, being unable to find the balance of the purchase-money and to carry out the contract, was released by the defendant who retained the sum paid as a deposit: *Chapman* v. *Winson*, 91 L.T. 17, 53 W.R. 19, 20 Times L.R. 663 (C.A.).

If an auctioneer employed to sell an estate is guilty of negligence, whereby the sale becomes nugatory, he is not entitled to recover any compensation for his services from the vendor: *Denew* v. *Daverell*, 3 Camp. 451.

The owner employed agents to find a purchaser or mortgagee of his estate. Thereupon they went down to the estate, valued it, put it in their books, advertised it in their circulars and in newspapers, and took

some journeys, and had communications about it, and ultimately, while negotiating with a person upon the matter, the agents and the owner agreed that a letter should be written by the agents to such person and that if such letter induced him to become a purchaser or mortgagee the agents should be paid a certain sum. Such person ultimately became mortgagee, but denied that he was influenced in any way by the letter. It was held that the plaintiffs could not recover on a *quantum meruit* for work and labour upon a claim for an agreed commission: *Green* v. *Mules*, 30 L.J. C.P. 343.

The mortgagees of an estate agreed to pay to their agent in addition to a commission on the purchase money of the estate further remuneration if the purchase was completed by a certain date, and that the purchase would be considered completed if a definite offer and acceptance were made. Before the specified date a memorandum of agreement between the intending purchaser and the principals was signed, by which the former undertook to send professional persons to verify the particulars of the property; and, provided he received a satisfactory report, he undertook to enter into a formal contract for the purchase of the estate for a named sum. The contract for the purchase was not signed until some time after the specified date. In an action by the agent to recover the additional commission it was held that as the memorandum of agreement contemplated a formal contract, the terms of which would require settlement, that there was no definite offer and acceptance made on or before the specified date, and that therefore the additional commission was not payable: *Henry* v. *Gregory*, 22 Times L.R. 53.

A firm of auctioneers who sold for one of its members certain property which had been mortgaged to him with power of sale, was held not entitled to a commission: *Matthison* v. *Clarke*, 3 Drew. 3, 24 L.J. Ch. 202, 18 Jur. (N.S.) 885, 11 W.R. 1036; but an express contract with the mortgagor may entitle the mortgagee to an allowance of the usual commission for sale in the taking of the mortgage account: *Douglas* v. *Archbutt*, 2 DeG. & J. 148, 27 L.J. Ch. 271.

No such contract or continuous retainer as will entitle the estate agents to commission on a sale of an estate is shewn where it appears that the agents were employed to find a purchaser, or failing a purchaser a tenant for such estate; that they introduced a person and tried to bring about a purchase; that such person did not then purchase but took a lease of the property for seven years and the owner paid the agents a commission on the letting; and that after the tenant had been in possession for fifteen months, he bought the property from the owner: *Millar* v. *Radford*, 19 Times L.R. 575 (C.A.).

The Court refused to sustain a verdict rendered in an action by real estate brokers claiming commission on the purchase-money of a sale of certain property that such sale really and substantially proceeded from the agents' acts, and that they were entitled to a commission therefor, where it appeared that the agents' employment was on the terms that they

were to receive a commission if they found a purchaser, but that if no sale took place there was to be no charge, and they advertised the property for sale and introduced to the owner a certain person as a possible purchaser who inspected the premises and stock but made no offer; that thereafter the owner with the agents' approval decided not to sell, and the agents claimed and were subsequently paid a small sum for their out-of-pocket expenses in the matter; that subsequently the owner consulted a friend as to the sale of the property who knew the person introduced by the agents, and knew he was looking out for a business of the kind, but did not know of his introduction to the owner by the agents, that he suggested this person as a likely purchaser and subsequently communicated with him advising him to purchase, that he inspected the premises and stock, and made an offer, and that after some negotiations between him, the owner and a third party, a price was fixed at which he bought the property: *Brandon* v. *Hanna*, [1907] 2 Ir. R. 212 (C.A.).

Recovery of their commission was denied the agents in the following additional cases: *Macleod* v. *Peterson* (Alta.), 18 W.L.R. 162; *Holmes* v. *Lee Ho*, 16 B.C.R. 66, 17 W.L.R. 428, affirming 15 W.L.R. 226; *Galloway* v. *Stobart*, 14 Man. L.R. 650, affirmed, 35 Can. S.C.R. 301; *Lawrence* v. *Moore* (Man.), 3 W.L.R. 139; *Hunter* v. *Bunnell* (Man.), 3 W.L.R. 229; *Couse* v. *Banfield* (Man.), 7 W.L.R. 19; *Elim* v. *Clough* (Man.), 8 W.L.R. 590, reversing 7 W.L.R. 762; *McCuish* v. *Cook* (Man.), 10 W.L.R. 349, reversing 9 W.L.R. 304; *Coward Investment Co.* v. *Lloyd* (Man.), 11 W.L.R. 338; *Prittie* v. *Richardson*, 8 O.W.R. 981; *Wiley* v. *Blum*, 10 O.W.R. 565; *Hollwey* v. *Covert*, 11 O.W.R. 433; *Markle* v. *Blain*, 11 O.W.R. 505; *Millar* v. *Napper* (Sask.), 4 W.L.R. 335; *Land* v. *Gesche* (Sask.), 2 W.L.R. 456.

THE FORCIBLE RECAPTION OF CHATTELS.

This is an important and interesting subject. The law affecting it is not elsewhere to be found in such an accessible form as given in an article which we copy from the *Law Quarterly Review* from the per of Mr. Branston who appears to have collected all the law on the subject. We omit the authorities given by the author for his various propositions, but they will be found in foot notes in the article as printed in the *Law Quarterly Review*. It is as follow :—

The most salient characteristic which strikes the peruser of cases from the Year Books is the paramount importance, in the case of chattels, of possession as opposed to ownership, and the actual protection afforded to the former. "Note if a man

takes my goods he is seised now of them as of his own goods, adjudged by the whole court." If I bail goods to a man and he give or sell them to a stranger, if the stranger take them without livery, he is a trespasser and I shall have a writ of trespass against him; for by that gift or sale the property is not changed but by the taking." In an action against a man who had stolen a horse and subsequently killed it, it was contended by counsel that this was not trespass: "for by the tortious taking the property was devested out of you" (the plaintiff) "and vested in us" (the defendant) "and therefore we could not kill our own horse contra pacem." A servant who takes his master's cattle without his consent and places them on another's land is the trespasser and not the master himself, "because he gained a special property for the time, and so, for this purpose, they are his animals." "If a man take my horse by force and give it to J. S. . . . I shall not have trespass against J. S., for the first offender has gained property by tort."

As has been pointed out by Sir F. Pollock and the late Prof. Maitland, the principles to which this anomalous state of things can be attributed are four in number:

(*a*) The maintenance of public peace and order, which would be seriously endangered if violence were permitted;

(*b*) The maintenance of the right, enjoyed by every private citizen, to exist in undisturbed tranquillity;

(*c*) The desirability of providing an easy proof of the right to property;

(*d*) The inability of man to conceive a right as entirely separate from any physical evidence of it.

The writer inclines towards the last-named principle, and in justification of his opinion he would point out: first, that all these principles have been evolved as it were ex post facto; secondly, that the fourth is the only one which does not (by its reasoning) imply, but which actually denies the very existence of, an advanced jurisprudence; thirdly, that the period of our legal history when the later circumstance applied coincides well with the time when this anomalous protection was most

prominent; fourthly, that the absence of remedies in the bailor against third persons, again coincident with the last-named period, finds its most logical explanation in this principle; and lastly, that this principle has been of no mean importance at various other stages of our legal history.

All through the course of our legal history runs the note of dubitation with regard to incorporeal rights. "If we ascribe possession to a hirer of land this will not debar us from ascribing a certain sort of possession or seisin to the letter; . . . but it is otherwise with chattels. As between letter and hirer . . . we must make up our minds, and if we concede possession to the one, we must, almost of necessity, deny it to the other." A transfer of a "right" was inconceivable without the transfer of the thing to which it related. Thus the sheriff who was to seize an advowson for the King had to go into the church and make a declaration there to that effect. The transfer of an advowson conferred but an "imaginary seisin," so that, if the transferee transferred to a third person before he had had an opportunity of proving his title to the advowson by presenting, the transfer to the third person was void, and the next presentment would be by the original transferor.

Finally we have the following common law rules:

The lord had no warship of an infant whose ancestor, being a tenant, died out of seisin (temp. Edward III.).

The lord could not bring an action escheat against the disseisor of a tenant who (subsequently to being disseised) died without heirs (temp. Henry VII.).

Until 1833 seisin during coverture was an essential condition precedent of dower.

Until 1833 the rule of inheritance was "seisina facit stipitem."

Until 1838 a right of entry was inalienable inter vivos or by will.

Until 1845 land could be transferred only by the symbolic act of livery of seisin [or some special statutory equivalent.]

Until 1845 feoffments operated by wrong.

Until 1873 a debt or legal chose in action was unassignable, with a few exceptions governed by the law merchant.

To this very day seisin during coverture is an essential condition precedent of courtesy.

Even though these instances be viewed as archaic survivals, it is sufficiently evident that actual possession came close to the proverbial "nine points of the law." [In this connection it should be remarked that the modern instances of importance of possession as opposed to ownership afforded by the Bankruptcy Act, 1883 (reputed owner clause); the Bills of Sale Act Amendment Act, 1882 (voidance of unregistered bills of sale); and at common law (landlord's right to distrain on goods of strangers) are due to the second and third of the principles above referred to.]

In attempting to obtain redress for wrongs suffered the dispossessed owner had two courses open to him; he could either revert to man's primeval instinct and take the law into his own hands, and by pursuing the thief and recapturing the thing stolen in the case of chattels, return matters to the status quo ante; or he could apply to the courts for redress of grievance, when he would have to choose the proper form of action; and, if successful, damages would be awarded him, though specific restitution seldom or never.

For a detailed account of the various judicial remedies available to the dispossessed owner reference should be made to works such as Pollock and Maitland's History of English Law, etc., as in the present article it is intended to deal only with the first-mentioned mode of obtaining reparation for wrongs suffered, viz., by self-redress.

A characteristic feature of the stage of development in which the brutish ideas of the right of the strongest have given way to a higher moral consciousness, is that the executive is powerless to enforce the new principles resulting from the more advanced ideals, the result being a rigorous prohibition of the force incidental to self-redress, on the one hand in the interest of law and order with regard to the community at large, on the other for

the projection of the weaker against the stronger party in the dispute.

Had the alternative remedy for the infringement of the right of property been expeditious, easily available, and effective, recaption would, no doubt, rapidly have disappeared from our legal system, and its interest would be restricted to the anthropologist and the legal antiquary. But the procedure imposed by the courts was not expeditious; it was lengthy and cumbersome. Redress was not easily available; the courts gave their best time and thought to the solution of the all-important land questions. The remedy was not effective; not only did the claimant risk life and limb in a possible wager of battle, but until the nineteenth century was well advanced he had no means of obtaining the specific return of the chattels lost; while even now exceptions have been created against him by the Bills of Exchange Act, 1882, the Factors Act, 1889, and the Sale of Goods Act, 1893. It is therefore not to be wondered at that, in spite of all prohibition, self-redress became an established remedy, forcing its presence on a reluctant legal system.

The writer does not pretend to say when the right of self-redress reached its lowest level, but it will no doubt be conceded on all sides that it was not far removed from it during late Anglo-Saxon and early Norman times, the case of the pursuit and punishment of a hand-having or back-bearing thief or cattle-lifter being really an example of an archaic court procedure (to which self-help was an inevitable concomitant) and not one of self-redress at all. However, as time went on a limited amount of self-redress seems to have been allowed, but was invariably restricted to the first few days immediately following the dispossession, though the inevitable extension of this period proved to be but a matter of time. Thus the writer of the Mirror of Justices: "who is a conservative and an antiquary complains "that force holds in disseisin after the third day of peaceable seisin." This, he says, is an abuse "for as much as he is not worthy of the law's help who condemns judgment and uses force."

Though the first Statute of Forcible Entry, 1381, rendered self-redress illegal where land was concerned, no such measure seems to have been considered necessary in the case of chattels, and it is during the fourteenth, fifteenth, and sixteenth centuries that the right of self-redress received its greatest expansion.

A complete title, says Blackstone, consists of: possession, the right of possession, and the right of property, or in the words of Fleta, "juris et seisinæ conjunctio," and invests the owner with the three incidents of free and exclusive enjoyment, free disposition, and indeterminate duration. It is the first of these three, the right of free and exclusive enjoyment, which affects the present subject, as a disturbance of that right entails as of course the right to abate that disturbance. Though questions of public policy have caused the exercise of this right to be greatly curtailed at different times, whereby unexpected difficulties in its interpretation and application have arisen, yet the principles involved would seem to be sufficiently sharply defined to enable their scope (quite part from the limitations just referred to) to be definitely stated; this involves the four questions: by whom, against whom, with respect to what things, and under what circumstances, may the right of recaption be exercised at the present day?

By whom may the right of recaption be exercised?

By all those who have a right of possession and by all custodians, i.e., by all those who are true owners or into whose possession the goods have come with the consent of the true owner. Thus this right resides in the dispossessed owner, the bailee for a term, the bailee at will, the bailor of goods bailed at will, joint owner and owners in common, both severally and jointly, against strangers as well as against one another, servants from whose custody the goods were taken, etc. To this should be added that a wrongful possessor has a right of recaption against a third person who has acquired possession wrongfully from him.

Against whom may the right of recaption be exercised?

Against all those who possess without the right of possession and who are not custodians, provided always they be privy or consenting to the original trespass or wrong. Thus goods may be recaptured from a trespasser, a thief, a second trespasser, a second thief, a bailee who has determined his bailment by breaking bulk conversion, etc. It should be noted, however, that according to some authorities the proviso of privity and consent to the original trespass or wrong should be omitted.

What things are subject to the right of recaption?

All chattels (but not chattels real). In connection with this it should be remembered that in former times human beings were included in this category, while cases of accession, confusion, and specification form an exception to the above generality. Instead of creating difficulties by formulating general principles, our law leaves the court free to award or apportion the combined, altered or mixed goods as may see most fair, with the assistance of damages. It would therefore seem that in these cases recaption has no place in our law, on the grounds of its being a usurpation of judicial functions.

Under what circumstances may the right of recaption be exercised?

Whenever goods have been taken from the possession of one of the persons entitled to the exercise of the right, without claim of title, and which therefore involves a breach of the peace, either actual (as in a felonious taking), or constructive (as in the case of a wrongful taking).

A claim of title will arise:

In the transferee on a transfer for value, i.e., a sale.

In the mortgagee, pledgee, or creditor on a transfer under a mortgage or as a pledge or security.

In the donee on a transfer as a gift.

In the baille on a transfer under a bailment.

In the vendor, mortgagor, pledgor, debtor, donor, or bailor on a failure to fulfil all the conditions of the sale, mortgage, pledge, agreement, gift, or bailment by the vendee, mortgagee, pledgee, creditor, donee, or bailee.

The meaning of the word "possession" in this connection will be clear from the following interpretations by the courts, etc. Fish are not in the possession of the fisherman who is fishing with a seine net until the net is entirely closed; and a man who, before this was the case, rowed his boat into the net and captured some of the fish, was held not to have committed larceny. Game is not acquired until either caught or killed. In the whale fishery local custom is allowed to settle the matter. In the case of buried treasure, the person on whose land it exists does not obtain possession until it is actually dug up.

The exercise of the right of recaption by force has necessitated (more especially in early times) numerous restrictions to prevent the public peace from being broken. As it is frequently difficult to say where defence of property ends and recaption begins, the writer intends to give briefly the law on the subject of the defence of property.

The use of a certain amount of force in the defence of persons, lands, and goods has ever been justifiable, partly, no doubt, to ensure peaceful possession, partly to avoid breaches of the peace, partly to secure the apprehension of the criminal. At common law a person has the right to protect himself, and this protection has gradually been extended to his wife and child, to his servant, to his master, and to any other person. The more generally received opinion seems to have been that the amount of force used was limited only by the necessity of the case, though Coke maintains that a killing could not be justified se defendendo.

Similarly with regard to the protection of land and goods the common law has recognised the necessity of permitting the use of force, with the following distinction:

"There is a force in law as in every trespass quare clausum fregit as if one enters into my ground; in that case the owner must request him to depart before he can lay hands on him to turn him out; for every impositio manuum is an assault and battery which cannot be justified upon the account of breaking the close in law without a request. The other is an

actual force, as in burglary, as breaking open a door or gate; and in that case it is lawful to oppose force to force; and if one breaks down the gate or comes into my close vi et armis I need not request him to be gone, but may lay hands on him immediately, for it is but returning violence with violence; so if one comes forcibly and takes away my goods, I may oppose him without any more ado, for there is no time to make a request."

As before, the amount of force which one is justified in using is a matter of dispute, but now it would seem that whatever force is necessary is also justified.

Where actual possession has been disturbed by the act of the wrongdoer, the use of force by the owner in recovering possession has been recognised in many cases where persons are concerned. In the case of re-entry upon land, force was recognised provided the re-ejectment took place infra quartum diem. The Statute of Forcible Entry, 1381, and subsequent statutes made entry vi et armis an indictable offence, but the effect of this has been, not to render a re-entry void, but only to make the entering owner liable to an indictment for assault, breach of the peace, or under the Statutes, of Forcible Entry, as the case may be, "for howsoever he may be punishable at the King's suit, for doing what is prohobited by statute as a contemner of the laws and disturber of the peace, yet he shall not be liable to pay any damages for it to the plaintiff, whose injustice gave him the provocation in that manner to right himself."

The right to retake one's goods peaceably seems to be established beyond all doubt, and those who deny the right to use force in this connection may perhaps have been influenced to some extent by the necessity to the well-being of the community, of bringing the wrongdoer to justice; it might be argued that if recaption were allowed in such a way as to apply in all cases of wrongful dispossession, the owner would have no incentive to do his dut, towards his fellow-citizens, either by arresting the wrongdoer or by prosecuting him, but would be induced to compound the felony or misdemeanour by letting the wrong-

doer go, provided he obtained the return of his lost goods. It may be argued in favour of the use of force that if it be allowed in the case of land, where the risk of destruction or permanent loss of the property is very small, then it should be justified all the more in the case of chattels, where a summary remedy is often the only way of saving the goods from being destroyed or lost for good and all.

Where possession has actually been disturbed by the wrongdoer, but recapture takes places immediately, thus forming, as it were, part of the same transaction, the right to use force has generally been recognised; perhaps because it was hard to differentiate between the force necessary to capture the thief and that required to regain the lost property; perhaps because the prompt setlement of the matter was not likely to lead to abuse or the punishment of the wrong person.

In *R.* v. *Mitton,* excise officers, armed with a search warrant, came to the house of the defendant for the purpose of searching it. The defendant asked to see the officers' authority, and on the warrant being handed to him, refused to return it. The officers thereupon used force in their endeavour to possess themselves of the warrant, and in the struggle the defendant, taking up a pewter pot, struck one of the officers over the head with it. In summing up, Lord Tenterden, C.J., said: "It is conceded on all hands that the defendant had no right to keep the warrant; and that being so, the officer had a right to take it from him, and even to coerce his person to obtain possession of it, provided that in so doing they used no more violence than was necessary.

When, however, some time has elapsed between the taking by the thief and the recapture by the owner, i.e., when the taking and recapture have become two entirely separate events, the question naturally arises: is there a time limitation to the right of forcible reception? but the present writer has been unable to find any decisions which exactly meet the case. Sir F. Pollock states that:

"It would seem that a true owner who peaceably retakes his

goods after being out of possession for however long a time may hold them as in his former right against all the world. The effect of a recapture by force after the expiration of the time limited for bringing an action seems open to doubt. It might be held that possession so taken was so wrongful as not to be capable of coalescing with the true title. On the other hand, it might be held that the force was a personal wrong for which an action might be brought, but that this made no difference in the character of the possession once acquired, and did not prevent the combination of it was the right to possess—a right not extinguished, though no longer enforceable by action—from constituting a full revival of property in the true owner. It could not be held lawful, it is conceived, to retake one's goods by force, after the right of action had been barred. For the use of force could be justified only after demand of the goods and refusal to deliver them (*Blades* v. *Higgs*), but where an action would not lie for the recovery of the goods, or recompense in damages, the actual possessor would not be bound to redeliver them on request, in other words, there could not be any lawful demand of possession. The right of recapture may be extinguished by sale of the goods in market overt, or, in the case of negotiable instruments, by transfer to a bonâ fide holder for value. In these cases the property is conclusively changed."

The second view here propounded by Sir F. Pollock (viz. that the wrongful holder can have his action for the force employed against him, but not for the return of the goods taken from him, by the rightful owner) is analogous to what is now recognised as being the law relating to land, and in *Blades* v. *Higgs*, Erle, C.J., held that it applied equally to chattels. In America the courts seem to have extended the prohibition to peaceable reception: "Where the statute would be a bar to a direct proceeding by the original owner, it cannot be defeated by indirection within the jurisdiction where it is law. If he cannot replevy he cannot take with his own hand. . . . A title which will not sustain a declaration will not sustain a plea." On what grounds this decision was arrived at does not appear, and it would seem

to be contrary to the principles of the common law, as recaption has always been regarded as something essentially different in its nature from, and not merely alternative to, the judicial remedies available. Thus: "If the owner retakes his goods from a trespasser, he will still have trespass for the taking." "If . . . the demandant releaseth to the tenant all manner of actions realls yet this shall not take the demandant from his entrie but the demandant may well enter notwithstanding such release." "If a man by wrong take away my goods, if I release to him all actions personalls yet I may by the law take my goods out of his possession."

Where the property has left the hands of the wrongful taker, the right of recaption would still, so it seems, hold good. There is, however, but one modern case in which the point has arisen.

In *Blades* v. *Higgs*, the facts of the case were as follows: A number of rabbits, snared by poachers on the land of the Marquis of Exeter, had been sold and consigned to the plaintiff, a game dealer, who called for them at Stamford station. While he was taking them away, the defendants claimed them as belonging to their master, the Marquis of Exeter; and upon his refusing to give them up they used the necessary force to obtain possession of them. The plaintiff brought an action for assault and battery and for the loss of his goods. He demurred to the defendant's third plea, which stated that they gently laid their hands upon the plaintiff to obtain the return of the goods belonging to their master. The demurrer was dismissed in the common pleas, where Erle, C.J., said:

"If the defendants had actual possession of the chattels and the plaintiff took them against their will, it is not disputed that the defendants might justify using the force sufficient to defend their rights and retake the chattel. And we think there is no substantial distinction between that case and the present. For if the defendants were the owners of the chattels and entitled to the possession of them, and the plaintiff wrongfully detained them from them after request, the defendants in law would have the possession and the plaintiff's wrongful detention

against the request of the defendants would be the same violation of the right of property as a taking of the chattels out of the actual possession of the owner. It has been decided that the owner of land entitled to the possession may enter thereon and use force sufficient to remove a wrongdoer therefrom. In respect of land as well as of chattels, the wrongdoers have argued that they ought to be allowed to keep what they are wrongfully holding, and that the owner cannot use force to defend his property, but must bring his action lest the peace should be endangered if force was justified. But in respect of land that argument has been overruled in *Harvey* v. *Brydges*. Parke, B., says: "where a breach of the peace is committed by a freeholder who, in order to get possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly; even if in so doing a breach of the peace was committed." In our opinion all that is so said of the right of property in land applies in principle to a right of property in a chattel and supports the present justification. If the owner was compellable by law to seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the injury instead of redressing it."

Sir F. Pollock points out that the decision in this case is contrary to the common law of the thirteenth century.

Closely connected with the question of recaption is that of the right to go on to the land of another person to regain possession of one's lost chattels.

Where the land is that of the wrongdoer or of a third party who knew of, and assented to, the act of the wrongdoer, the dispossessed owner may, it seems, enter and even use force in so doing. "If a man takes my goods and carry them into his own

land I may justify my entry into the said land to take my goods again; for they came there by his own act." "If J. S. have driven the beast of J. N. into the close of J. S., or if it has been driven thereinto by a stranger with the consent of J. S. and J. N. go thereinto to take it away, this action does not lie; because J. S. was himself the first wrongdoer."

Where the goods have been placed upon the land of an innocent third party, the owner cannot follow to take them except on fresh pursuit and (or) where they have been taken feloniously. "I cannot justify breaking open a private stable or entering the grounds of a third person to take my horse except he be feloniously stolen."

Where goods have been obtained rightfully, but their detention subsequently becomes wrongful owing to the determination of the right of retaining them, forcible recaption is illegal, as the recaptor would be guilty of taking the initiative in the use of force.

Where one person has a right to go on to the land of another, to fetch anything that belongs to him, he may employ force if his entry is resisted: "If J. S. who is entitled to corn growing upon the land in the possession of J. N. and go thereupon to cut and take it away, an action of trespass does not lie." "If it is my right, the law will protect me in the enjoyment of it and the person who attempts to hinder or obstruct me is the aggressor and the first in the wrong."

Though recaption might well have found a place among the doctrines of the Court of Chancery, in mitigation of the inflexibility of the common law, yet it does not appear that it was frequently met with in equity cases, though there is, of course, the significant saying of Lord Eldon in *Goodhart* v. *Lowe*: "If the plaintiff has a right to the goods, he may lay his hands upon them and recover them if he can; indeed, Mr. Justice Buller used to say by any means short of felony." But it may perhaps be pointed out that Buller, J., was a King's Bench (1778-94) and subsequently a common pleas judge (1794-1800), though he frequently presided for Lord Thurlow in Chancery, and so may

have introduced some common law principles into the latter court.

In conclusion, there remains the necessity of reconciling, if possible, the decisions of the nineteenth century with the common law of the thirteenth. The prohibitions and limitations imposed on the exercise of the right of recaption which are such a characteristic feature of the late Anglo-Saxon and early Norman periods were gradually relaxed in the course of the fourteenth and fifteenth centuries; and during the succeeding three hundred years they would seem to have been still further neglected, though the question appears but rarely to have come up for decision in our higher courts. When recaption finally made its appearance in the course of the nineteenth century, it did so released from all the restrictions of former times, and it is suggested that just as the curtailment of the right was rendered necessary in early times by the inability of the law to regulate extra-judicial remedies, so the release of the right from all these limitations in the nineteenth century was due to the reliance which it was felt could be placed in modern times on the legal machinery of our courts and the power of the executive as represented by the police, to whom the maintenance of the public peace might safely be entrusted.

Book Reviews.

A Treatise on the Law of Partnership. By Rt. Hon. Lord Lindley. Eighth edition. By Hon. Walter B. Lindley, Judge of County Court, T. J. C. Tomlin, Barrister-at-law and A. Andrewes Uthwatt, Barrister-at-law. With an appendix on the law of Scotland by J. Campbell Lorimer, K.C. London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1912.

The author's first treatise was on the law of partnership including its application to companies. This was in 1860. The matter in the first volume with large additional matter was in 1888 divided into two books, the law of partnership and the law of companies. Considerable additions were made in the sixth

edition in 1890 and again in the seventh edition in 1907. The great demand for this monument of learning and industry has required a new edition. The profession will be glad to have this revised, and we may well think complete record of partnership law, now a large volume of 1228 pages. We are glad to see a voluminous index of over 200 pages which adds largely to the value of the work.

Principles of the Criminal Law. By SEYMOUR F. HARRIS, B.C.L.M.A. 12th edition, by CHARLES L. ATTENBOROUGH, Barrister-at-law. London: Stevens & Haynes, Bell Yard. 1912.

As our readers are aware, this well known book is a concise exposition of the nature of crime and the various offences punishable by the English law with chapters on criminal procedure and summary convictions, a table of offences and their punishments, etc. Since the last edition in 1908, various important statutes have been passed in England in connection with criminal law, all of which have been worked into the present edition. It is unnecessary to speak further on this standard text book.

Flotsam and Jetsam.

A LEGAL BULL.—That peculiar inconsequential form of speech known as an "Irish Bull" we are all familiar with, but as a rule we do not seek it in law books. It is therefore a pleasing surprise to find one straying in such a pasture—e.g., we read in Cutler's Edition of Ortalari's History of Roman Law. —Speaking of the great Roman jurist Triboniau:—

"As a jurist he possessed a varied stock of information; he was well versed in the study of the ancient writers upon jurisprudence, and had, beyond doubt, an exceedingly well-stocked library at his disposal, for of the 2,000 volumes collected for the composition of the Digest, the acquisition of which must have involved enormous outlay, and of which many must have been unobtainable, the greater part were furnished from his own collection." How those volumes were collected and acquired and at Triboniau's disposal which were "unobtainable" is not explained, and we fear cannot be explained. Our only conclusion is that a bull got into the translator's brain and had to come out.