THE LAW

RELATING TO

REAL ESTATE AGENTS' RIGHTS TO COMMISSION

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PREFACE

For the last few years real estate agents have been prominently before the public throughout this country. The time has come, unfortunately, where their relations with their clients will not proceed as smoothly as they did in days of greater prosperity, and law-suits where real estate agents are concerned are commencing to multiply.

Having had the advantage of practising before the Courts of Quebec and Saskatchewan, and having been interested in a number of cases in both Provinces wherein real estate agents were parties, it struck me that I could, perhaps with profit, to parties dealing with real estate, put in book form the notes I had taken in the course of my work as a lawyer.

The introduction to this book shows the method and the order following.

My sincere thanks are due to Mr. Peers Davidson, K.C., who had the kindness to go over the manuscript of this book, and on whose favorable report the publication thereof was undertaken; to my partner, Mr. Edouard Fabre Surveyer, K.C., Lecturer in Civil Procedure at McGill University, whose valuable advice from time to time was of considerable assistance to me, and to Mr. E. J. Waterston, Advocate, of Montreal, who undertook the ungrateful task of proof-reading, and assisted me with the index.

I may say that my quest for precedents has been

singularly facilitated by the perusal of the Dominion Law Reports, which conatin, as every member of the Bar knows, a very judicious selection of cases in all the Provinces, and also copious notes of the greatest utility to the practitioner.

C. G. OGDEN.

ADDENDA.

In the case of Allard v. Meunier, decided by Hon. Mr. Justice Chauvin in the Superior Court, at Montreal, on the 6th day of November, 1913, the document upon which the agent, Allard, relied was an agreement signed by the owner, Meunier, and worded as follows:—"A commission of 2½% will be payable to you upon the sale price which I may accept for my property hereinabove described, which is put in your hands for sale for the term of two months from this date."

The owner sold the property before the expiration of the time mentioned in the agreement, and the agent claimed the two and a half per cent. commission upon the ground that the agreement constituted an "exclusive listing."

It was held that the agreement was not an "exclusive listing," but that the agent who had rendered certain services by taking an intending purchaser to view the property before the revocation of his mandate, was entitled to recover a *quantum meruit*, which the Court fixed in this case at the sum of ten dollars.

The case has been inscribed in Review and the outcome will be awaited with interest, for the agreement is so worded that it is difficult to say whether the owner intended to bind himself to pay a commission only if the agent actually effected a sale within the time specified, or whether the words, "which (i.e., the property) I place in your hands for sale for a term of two months from this date (laquelle je vous confie en vente pour le terme de deux mois de cette date)," can be interpreted as granting an exclusive right of sale for a period of two months.

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INTRODUCTION.

CHAPTER I.

GENERAL EMPLOYMENT.

Introduction.

Sec. 1. Owner may sell property himself or through other Agent unless agreement to contrary.
2. Interpretation of Contract.
3. Knowledge of owner not necessary if purchaser sent by duly authorized agent.
4. Agreement to pay commission when property "disposed of"—Damages equal to commission when sale by owner in violation of agreement.
5. Sale effected by principal at lower price.

INTRODUCTION.

An agent is a person duly authorized to act on behalf of another, or one whose unauthorized act has been subsequently duly ratified, either expressly or tacitly. A real estate agent may be employed by his principal, subject to the payment of a commission, either specified as to amount, or implied by custom, to buy or sell real property, to obtain loans on mortgage, or to acquire or dispose of mortgages.

He may also be employed to lease his principal's property to third parties, or to procure a lease of property required by his principal; or to sell on behalf of, or acquire for, his principal, a lease already in existence.

An agent's right to remuneration or commission depends on the nature and conditions of his employment. This employment may be provided for by an express contract, or may be implied from the acts of the parties and the circumstances of the case.

The agent must be in a position to shew that he has acted in accordance with the powers conferred on him, and has substantially fulfilled the terms and conditions attached to his mandate. These conditions may be expressly embodied in a contract or legally implied by the agent's undertaking to transact or negotiate for the principal.

The nature of an agent's employment may be general or special. His contract, whether express or implied, may be to find a purchaser at a fixed price,

or at the best price obtainable. He may be employed for an indefinite time subject to the principal's right of revocation, either with or without payment, according to circumstances. On the other hand, by a special contract the agent may acquire the exclusive right to sell at a certain price, within a certain specified time, in which case the principal cannot sell during such time without paying commission to the agent, irrespective of any question as to whether the agent has or has not rendered any services.

The contract between the principal and agent may also contain special conditions in derogation from the ordinary rules of law, which would otherwise apply to a general employment to buy or sell on commision, and these conditions, when not contrary to public policy or good morals, must be given effect to.

The contract may provide for a commission to be paid to the agent on any amount realized over and above a fixed price, consisting of either the whole or part of the surplus. The agreement may also provide that the agent's duty is simply to find a purchaser at a price named. As Judge Robson remarked, in the Manitoba case of Wolfson v. Oldfield *et al.*, "It is quite possible that there may be cases where the agency is merely to procure a purchaser at a fixed price, and where considerations as to the personality of the purchaser or the adequacy of the price do not apply."

While, as a general rule, the agent is entitled to commission as soon as he brings about an agreement between the buyer and seller, which can be legally enforced by the latter, his right to commission may, by the terms of the contract, be made to depend on

the payment of the whole or part of the purchase price, the giving of security, or such other conditions precedent as may be agreed upon.

These various kinds of commission agreements, and dealings between property owners and persons who are by profession or calling real estate agents, from which in many cases an undertaking to pay commission may be legally inferred, in the absence of any express contract, have given rise to litigation which is increasing from time to time in proportion to the number of transactions.

The vast majority of cases of this nature, in this country especially, have to do with real estate agents' claims for commission on sales of real property, but the rules laid down in some of the leading English cases dealing with the employment of agents to secure loans have, of course, equal application where the object of the contract with the agent is a sale.

CHAPTER I.

GENERAL EMPLOYMENT.

Introduction.

An agent may be generally employed without any time being specified, and the naming of a price which the owner is willing to take may be only fixed as a basis for future negotiations.

Where the question arises as to whether the employment is general or special, regard must be had to the terms of the contract if in writing, and complete in itself, or to all the correspondence and dealings between the parties, taken as a whole, where no such complete written contract exists.

When an agent is generally employed, and has substantially fulfilled his part of the bargain, the principal cannot, by his intervention, prevent the agent from earning his commission.

General employment, which is sometimes referred to as continuous employment, has been defined by Lord Watson, in the case of Toulmin v. Miller, decided by the House of Lords (reported 3 Times Law Reports, page 836), as follows:—

"When a proprietor, with a view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to the purchaser introduced by the agent, the

latter will be entitled to his commission, although the price should be less than the sum named at the time the employment was given."

"The mention of the specific sum prevents the agent from selling at a lower price without the consent of his employer; but it is given merely as a basis of future negotiations, leaving the actual price to be settled in the course of these negotiations."

Lord Watson further remarks:—

"It is impossible to affirm in general terms that A. is entitled to a commission, if he can prove that he introduced to B. the person who afterwards purchased B.'s estate, and that his introduction became the cause of the sale."

"In order to found a legal claim for commission there must not only be a *causal*, there must be a *contractual* relation between the introduction and the ultimate transaction of sale."

"If A. had no employment to sell, express or implied, he could have no claim to remuneration. If he was generally employed to sell, and thereafter gave an introduction which resulted in the sale, he must be held to have earned his commission, although he did not make the contract of sale or adjust its terms, because in that case he had implemented his contract by giving the introduction, and his employer could not defeat his right to commission by determining his employment before the sale was effected."

The rule laid down by Lord Watson is commented on as follows in Evans' Law Relating to Remuneration of Commission Agents, page 142:—

"The distinction drawn by Lord Watson between

a causal relation and a contractual relation is a fundamental one. This distinction may be put in plain language by saying that a person who is the cause of a transaction, *e.g.*, a sale, loan, or letting and hiring of property, being brought about between two or more persons, will not be entitled to claim commission unless he was acting under some contract with both or one of them; for then, and then only, will there exist both relations, viz.—the contractual and the causal. Suppose, for instance, that A., having heard that B. wishes to sell his house, tells C., who calls on A., and enters into a contract with him for the purchase, on what ground could A. claim commission from B.? Consequently, the 'contractual relation' being absent, A. would derive no claim from merely proving that he was the cause of C.'s inquiry about the property and subsequent purchase."

In the case of Burchall v. Gowrie and Blockhouse Collieries (43 N.S. reports 485, 1910 A.C., page 614 *et seq.*), in which the Privy Council reversed the judgment of the Supreme Court of Nova Scotia, dismissing the agent's action for commission, the facts were substantially as follows:—

An agent entrusted with the sale of a mining property upon terms involving the payment of a considerable portion of the purchase money in cash, for which he was to receive a commission of 10%, after efforts extending over two years and involving considerable expenditure, failed to carry out the object aimed at and his principals were subsequently approached by the parties with whom their agent had been negotiating and were induced to agree to the

sale of the property for a different consideration than that originally contemplated, consisting wholly of bonds and preferred and common stock in the Company by which the property was acquired, although advised against entering into this agreement by the agent, who apparently had reason to believe that he could have secured better terms.

In the judgment of the Privy Council, delivered by Lord Atkinson, which maintained the agent's claim for commission according to the referee's finding, the question of law is reviewed (at page 624) as follows:—

"There is no dispute about the law applicable to the first question.

"It was admitted that, in the words of Earl, C.J., in Green v. Bartlett, that if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission, although the actual sale has not been effected by him, in the words of the later authorities, the plaintiff must show that some act of his was the *causa causans* of the sale (Tribe v. Taylor, 1876, 1 C.P.D. 505), or was the efficient cause of the sale."

Lord Atkinson further stated, at page 626:—

"The referee found that 'the power of sale was a continuing one,' by that presumably he meant that the agent's employment was 'a general employment,' in the sense in which Lord Watson, in his judgment in Toulmin v. Miller, uses these words. This means, however, that Birchall's contract was that should the mine be eventually sold to the purchaser introduced by him, he (Birchall) would be entitled to commission at the stipulated rate, although the price paid

should be less than, or different from, the price named to him as the limit."

"The secret sale deprived him of the benefit of that contract. He lost his chance of earning that commission."

Sec. 1.—Owner may sell property himself or through other agent unless agreement to contrary.

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 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; 4 D.L.R. page 533.)

Sec. 2.—Interpretation of contract.

In the case of George v. Howard, decided by the Supreme Court of Alberta, in June, 1912 (4 D.L.R. page 257) the contract by which the agent was employed, read as follows:—

"Blairmore, May 20, '10.
(*This was a mistake for '11.*)

"T. B. George, Esq.,
"Blairmore.

"Dear Sir:—

"I will sell my hotel complete, except personal effects and stock, for the sum of forty thousand dollars ($40,000), covering lots 1 and 2, block 4, and

lot 19, block 4, in Blairmore. I will pay you five per cent. commission on purchase price.

"HENRY HOWARD."

A sale was subsequently effected to a purchaser procured by the plaintiff for $34,000. The defendant contended that this must be interpreted as an agreement to pay commission only in the event of the plaintiff finding a purchaser willing to pay at least the full price named.

The Hon. Mr. Justice Beck, in rendering judgment in the plaintiff's favour, said, at page 258:—

"As a matter of interpretation, in the light of the surrounding circumstances, the contract was, in my opinion, one to pay a commission—not on $40,000, but upon the 'purchase price,' whatever that might ultimately be fixed at, accompanied by a statement that the basis of negotiation was to be a price of $40,000. The contract was quite clearly merely to find a purchaser. The plaintiff was given no authority to conclude a contract. It was never intended or expected that $40,000 cash down could be obtained. It was contemplated that even if that price could be obtained, terms of payment would be arranged by the defendant, and involved in the contemplated negotiations was the reduction of the price in consideration of terms of payment more nearly equivalent to cash down."

Sec. 3.—Knowledge of owner not necessary if purchaser sent by duly authorized agent.

It was held in the case of Rice v. Galbraith (21 O.W.R. 571) that 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.

Sec. 4. — Agreement to pay commission when property "disposed of" — damages equal to commission when sale by owner in violation of agreement.

Under an agreement entitling the agent to a commission when the property was "disposed of," the remedy of an 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 page 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, 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.

Sec. 5.—General employment—Sale effected by principal at lower price.

In the case of Strong v. London Machine Tool Co., decided by the Supreme Court of Ontario in April, 1913, 10 D.L.R. page 510, dismissing an appeal from the judgment of Middleton, J., (4 O.W.N. 593), it was held that where an agent is employed to bring together his employers (as vendors) and a prospective purchaser, and where subsequently (after negotiations and a tentative agreement of sale) his employers, believing a bargain within reach, enter into an agreement with the agent, fixing his commission on the basis of the presumed selling price and making the payment of same contingent on the deal going through, the agent is still entitled to remuneration if the bargain at the presumed price is not carried out, but a sale is effected by the principal at a lower price; under such circumstances the agent is entitled to recover as upon a *quantum meruit*.

CHAPTER II.

COMMISSION ONLY ON TRANSACTIONS DIRECT RESULT OF AGENCY.

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Introduction.

An agent who has no exclusive right of sale (or "exclusive listing") and whose remuneration depends on his success in bringing about a transaction, must (whether the nature of his employment be general or special) in order to establish his right to commission, prove that the transaction in respect of which his claim is made, was the *direct*, although not necessarily the *immediate* result of his services.

It is not, however, necessary for him to complete the transaction himself, and he is, provided that he was the *causa causans* of the transaction, or that the transaction substantially proceeded from his acts, entitled to remuneration, even though the transaction be completed by a third party, after he has ceased to act as agent.

In actual practice it is often difficult to ascertain whether a given transaction is a direct, or merely an indirect, remote, or casual result of the agent's efforts.

While the general rules above stated have been laid down in a number of leading English cases, and have been adopted by the Courts in all the Provinces of Canada, the application of these rules to actual transactions has given rise to considerable conflict of judicial opinion, especially in certain recent Canadian cases which will be dealt with in this chapter.

An interesting case dealing with general employment, and maintaining an agent's right to commission owing to the fact that the transaction substantially proceeded from his acts, although it was actually completed without his intervention or knowledge, is that of Stratton v. Vachon, decided by the Supreme Court of Canada in April, 1911, (reported 44 S.C.R. page 395) upon an appeal from the judgment of the Supreme Court of Saskatchewan (sitting in appeal), denying the plaintiff's right to compensation.

The agent Stratton was a solicitor who transacted the business of the principal. When the principal was leaving on a long journey, he spoke to the agent with reference to the sale of certain lands, and asked the agent to communicate any offers he might receive. The agent subsequently learned of a likely purchaser (one Moore), and asked for the principal's price. This was received, but the terms proved unsatisfactory, and the sale was not made. This prospective purchaser mentioned the property to two other parties (whose identity was then unknown to the agent), who were to purchase with him. Moore, however, retired from the transaction, and these parties, on the principal's return, waited on him and completed a purchase of the property in question on different terms. The principal was not aware that these parties were in any way connected with the original negotiations or of the agent's relation to the sale. The agent, on learning of the sale, claimed commission. The agent's action was dismissed by the trial judge, and this judgment was affirmed by the Supreme Court of Saskatchewan, sitting in appeal, on the grounds that:—(1) the agent, not

having secured a purchaser upon the original terms, could not recover upon the contract of agency; (2) an allowance by way of *quantum meruit* is based upon the acceptance by the principal of the agent's efforts, and an implied agreement to compensate him in respect thereof, which implies knowledge on the part of the principal of the agent's previous connection with the transaction, and, therefore, where the principal had no knowledge of or reason to suspect the agent's previous connection with the transaction, no allowance could be made.

This judgment was reversed by the Supreme Court of Canada, and it was there held that, as the steps taken by the agent had brought the owner into relation with the persons who finally became purchasers, he was entitled to recover the customary commission upon the price at which the property in question had been sold, following the principles laid down by the Privy Council in Burchall v. Gowrie and Blockhouse Collieries (1910; A.C. 614).

It will be seen by a perusal of the reports of the different judgments in this case that the same facts were taken as proven by all the judges who had to pass upon them.

The trial Judge found that the property would not have been sold if the agent, Stratton, had not spoken to Moore, but took the view that as Moore was not Stratton's agent and the owner had no knowledge of any connection between the purchasers and Stratton, no commission should be allowed. The fact, or rather the assumption, that had the owner known that the purchasers had been induced to buy as an ultimate result of Stratton's efforts, he would

have increased the price to provide for the payment of commission, evidently influenced the mind of the trial Judge to a marked extent.

The reasoning of the Chief Justice of the Supreme Court of Canada, in rendering judgment maintaining the agent's claim for commission, is cogent and convincing.

He remarks (at page 399 of report):—"I quite agree with the trial Judge that on all the facts the conclusion is that the sale would not have been made had Stratton not spoken to Moore in the first instance, but I go further, and hold that the relation of buyer and seller between Flanagan and Millar and Robinson was brought about by Stratton, and that he was the *causa causans* of the sale."

"The property was brought by Stratton to the attention of Moore, who was instrumental in inducing Millar and Robinson to consider it with a view to a purchase on joint account. The subsequent disappearance of Moore as a purchaser before the transaction was finally completed did not operate to destroy the right acquired by Stratton, through his original introduction of the property to one of the three associates, two of whom completed alone the purchase begun with and through the man to whom it was introduced originally and who had undertaken then to buy it or find a purchaser for it."

The Chief Justice also remarks that "the disappearance of Moore as a purchaser, *after the purchase had been decided upon*, could not affect any right then acquired by Stratton if some of the parties who had been introduced to the property through

his medium completed the transaction *as originally contemplated.*"

In the Ontario case of Imrie v. Wilson, (3 D.L.R. 826, 3 O.W.N. 1145, 21 O.W.R. 965) which was distinguished on the facts from the case of Stratton v. Vachon, the defendant, who was agent for the owner, agreed with two of the plaintiffs that he would pay them a commission. These two plaintiffs associated the third plaintiff with them, promising him one-half of the commission if he should procure a purchaser. This third plaintiff introduced to the defendant a person interested in a syndicate which was endeavouring to purchase lands in that locality, as a prospective purchaser, and this party, after the syndicate refused to purchase, later procured a purchaser and was paid a commission on the sale by the defendant.

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 *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.

It was pointed out in this case that though the agent's introduction of a person who does not purchase himself, but who afterwards finds a purchaser,

may be a *causa sine qua non* of a transaction, it is not sufficient to entitle the agent to commission unless it is also the *causa causans*.

Clute, J., in reviewing the evidence (at page 830), remarks:—

"If Kligenswith had at any time been associated with the purchaser, and then retired, or retained an interest, directly or indirectly, in the purchase, that would have been a continuing of the original negotiations brought about by his introduction to Wilson. It would have been the immediate cause of the sale. Or, if there had been any evidence of collusion, shewing that the name of the purchaser was merely changed in order to avoid liability for commission, the result might have been different; but, after a careful consideration of the evidence, I cannot find anything to support such a view. Kligenswith sought for and obtained a purchaser, who had not formerly been interested in his syndicate, and with whom he now retained no interest. That, I think, was a distinct act intervening between the introduction of Kligenswith and the sale, the real *causa causans* of the purchase, a new transaction attributable to Kligenswith's finding a purchaser and not to the original introduction, although that was the *causa sine qua non* which resulted in the sale."

These cases follow the principles laid down in Tribe v. Taylor, (1876, 1 C.P.D. page 505), see page 31 *infra*.

It would appear, however, that while in cases of general employment the agent is entitled to his commission when he is the *causa causans* of the sale, and when without his services a sale would not have

taken place, the agent's chances of success must, in actual practice, depend on the judicial appreciation of the particular facts of each case. It has also been demonstrated by the conflicting judgments in the case of Stratton v. Vachon, that there is room for great divergence of opinion, when principles of law, which in the abstract are fairly well agreed upon, have to be applied to a special set of facts arising out of a transaction in which a number of parties are involved.

(See Anthrobus v. Wickens, page 28 *infra*.)

Sec. 1.—Sale to party who saw agent's sign board on premises—Agent held entitled to half commission.

In the case of Waddington v. Humberstone, 15 O.W.R. 824, 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 agent's 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 agent's 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 instrumental in finding a purchaser, but that they were entitled to be paid some-

thing by their principals and the amount of the judgment was cut in two.

This decision, while it may have done substantial justice between the parties from an equitable point of view, seems somewhat unusual, for if the agents neither found nor were instrumental in finding a purchaser, it is difficult to find any legal reason why they should recover a commission.

(See 4 D.L.R. page 144.)

Sec. 2.—Knowledge of owner not necessary if agent efficient cause of sale.

In the case of Rice v. Galbraith (Divisional Court, Ont., reported 21 O.W.R. 571), Clute, J., at page 573, remarked:—"The plaintiffs having brought the parties together and a sale having been effected by their intervention, it is not sufficient, in my opinion, to disentitle them to a commission to say that the vendor had proceeded with his negotiations with the purchaser *without the knowledge that the agents had been instrumental in bringing the parties together.*"

The learned Judge refers to, and disapproves of, the doctrine laid down by Phippen, J., in the Manitoba case of Locators v. Clough (17 Man. L.R. 659), in which it was held upon somewhat similar facts, that the owner was not liable for commission on the ground that he effected a sale "on terms less favourable than those expressed in the commission contract, in ignorance of the plaintiff's action, and under circumstances *which did not place him upon enquiry.*"

Further, at page 573, Clute, J., in referring to a

New York case, says:—"The decision of the Commissioners of Appeal, New York, is to the same effect, Lloyd v. Matthews, 51 N.Y. 125."

"There the objection was taken that the seller is entitled to know that the party with whom he is dealing is a customer of the broker, if such be the fact. In dealing with this objection, Lott, Ch. J., said:—'The sixth proposition is not correct. It is to be understood in the connection in which it is presented, as declaring that, although a party is brought, through the agency and instrumentality of the broker, into a negotiation and dealing with the owner, which actually results in a sale, yet the broker is not entitled to compensation, unless it is made known to the owner that the purchaser is his customer. That is not true. It is sufficient that the purchaser is in fact such customer.' "

In the case of Paton v. Price, decided by the Ont. County Court (21 O.W.R. page 753), following Rice v. Galbraith, an owner who had already paid commission to the only agent he knew in the transaction was compelled to pay the same amount again to an agent who had actually been the efficient cause of the sale.

Denton, J., in the course of his judgment remarked:— "I think it is beyond question that it was the action of Stewart (the plaintiff's agent) in introducing this property to Warren, followed immediately, as it was, by his being shewn through the stores by the plaintiff Linton, that kindled the desire in the defendant Warren's mind to buy the property. This was what induced him to buy. It was the foundation

upon which all subsequent negotiations proceeded, and it is clear that what the defendant Partridge did was to snatch the transaction out of the plaintiff's hands for the purpose of earning the commission for himself."

In the case of Spenard v. Rutledge, decided by the Manitoba Court of Appeal, 17th March, 1913, reported 10 D.L.R. page 682, it was held:—

(1) A real estate agent employed to procure a customer, and whose acts in bringing the buyer and seller together were the effective cause of the sale, is entitled to the commission, although the sale was finally completed through another agent whom the prospective customer had brought in under a scheme to deprive the real agent of his commission, the real agent acting promptly in claiming the commission from the seller before it was paid over to the other agent.

(Stratton v. Vachon, 44 Can. S.C.R. 395, and Burchell v. Gowrie and Blockhouse Collieries, (1910) A.C. 614, applied; Spenard v. Rutledge (No. 1), 5 D.L.R. 649, reversed. See also Annotation on real estate agent's commissions, 4 D.L.R. 531.)

(2) The right of a real estate agent to commission for procuring a customer for his principal is not dependent upon the knowledge of the principal that the agent was the means of bringing the parties together, if as a matter of fact the agent was the efficient cause of the sale, and asserted his rights to the commissions promptly.

(Per Perdue and Cameron, JJ.A.)

(Stratton v. Vachon, 44 Can. S.C.R. 395, applied; Spenard v. Rutledge (No. 1), 5 D.L.R. 649, reversed.)

(3) In an agreement between an owner of land and an agent employed to procure a customer, the words "to bring a purchaser," or "to produce," or "to introduce," or "to find a purchaser," have no real difference in meaning so far as liability of the seller to pay the commission is concerned, if the steps taken by the agent were the efficient cause of bringing the owner into relation with the person who finally became the purchaser.

(Spenard v. Rutledge (No. 1), 5 D.L.R. 649, reversed.)

In the case of St. Germain v. L'Oiselle, 6 D.L.R. page 149, decided by the Supreme Court of Alberta 4th October, 1912, it was held:—

(1) Although it is the law that an agent may not be disentitled to the commission on a sale of lands, merely because the actual sale takes place without his knowledge, if his acts really brought about the relation of buyer and seller, yet, in a case in which the agent fails to shew that some act of his was the *causa causans* or an efficient cause of the sale, he cannot recover. (Burchell v. Gowrie, (1910) A.C. 614, specially referred to.)

(2) That where an agent claims commission under a contract for negotiating the sale of lands, the determining principle is that he must have brought the vendor and purchaser together, not necessarily a personal introduction, but one through which the purchaser knew that the land of the vendor was for sale, and the absence of that element is fatal to the claim.

Sec. 3.—English cases.

One of the leading English decisions illustrating the principles of law involved in cases where the transaction is not completed by the agent, and the question arises as to whether it resulted directly, remotely, or casually, from his intervention, is that of Barnett v. Isaacson (1888, 4 T.L.R. 645, C.A.; 4 T.L.R. 595, Q.B.)

The facts may be summed up as follows:— A agreed to pay B. a commission of £5,000 in the event of B. introducing a purchaser of A's business. B. failed to find a purchaser, but introduced C., an accountant, as a person who might be able to introduce a purchaser. C. eventually himself bought the property at the proposed price after deducting the commission which he was to have been paid in the event of his finding a purchaser. It was held that there was no evidence for the jury that B. had introduced a purchaser of the business, he having introduced C., not as a purchaser, but as an agent to find a purchaser, and that B. could not reclaim for a *quantum meruit* being excluded by the express contract.

In this case it is clear, from all the circumstances connected with the somewhat complicated transactions between the parties, that the purchase of the business was a *remote result* of the plaintiff's efforts, and *was not contemplated by the parties* at the time the commission agreement was entered into. The plaintiff had claimed £5,000 under a memo. of May, 1880, worded as follows:— "In the event of your introducing to me a purchaser of the business, I undertake to pay you a commission of £5,000."

The business was estimated to produce, it was said, £30,000 a year, and the estimated value was between £40,000 and £30,000. The plaintiff endeavoured to obtain a purchaser but did not succeed in effecting a sale. He then induced a Mr. Chatteris, of the firm of Chatteris, Nichols & Company, Accountants, to find a purchaser, and in December, 1880, Mr. Isaacson gave them a note undertaking to pay commission of £5,000 if they found a purchaser. He found an intending purchaser, but Mr. Isaacson could not carry out one of the terms stipulated, and so the contract failed. Chatteris then sued Mr. Isaacson for the commission, contending that the contract failed through his default, and this action was settled on the terms of Mr. Chatteris receiving £650 and being employed to audit the accounts of the business, which he did for four years; and then becoming acquainted with the value of the business, he negotiated with Mr. Isaacson for the purchase of it for himself.

This decision was, however, as will be seen from the remarks of their Lordships in appeal, based on the fact that the first introduction of Mr. Chatteris (the subsequent purchaser) to the defendant was not *with a view to Mr. Chatteris becoming a purchaser*, but with a view to his obtaining a purchaser. (See 4 T.L.R. page 595.) The different members of the Court seemed to think that the plaintiff had merely introduced to the owner another agent, to do what the plaintiff could not do himself.

An alternative claim was also made by the plaintiff for a *quantum meruit*. This was left to the jury in the court of first instance, and they allowed the plaintiff £2,000.

The verdict was reversed by the Court of Appeal and the Master of the Rolls, in dealing with the rules applicable to claims of this nature, expressed himself as follows:—(at page 646) "It was, however, said that the plaintiff introduced Chatteris to the defendant, and the defendant accepted that introduction and must pay for his services."

"To entitle a plaintiff to sue upon a *quantum meruit*, the rule was that if the plaintiff relied upon the acceptance by the defendant of something he had done, he must have done it under circumstances which led the defendant to know that if he, the defendant, accepted what had been done, it was on the terms that he must pay for it. Neither party ever thought that it was to be paid for. If payment was to have been made for it, it would be due immediately after the introduction, but the plaintiff never claimed it for six years, and it never was claimed until it was suggested by Counsel during the argument of the case. There was, therefore, no evidence at all to give to the jury. There must be no new trial; a judgment must be entered for the defendant with costs."

In the case of Anthrobus v. Wickens (1865, 4 F. & F. 291) it was held that where an agent claims commission for procuring a loan, it is not sufficient to shew that the loan indirectly resulted from his intervention. He must shew that it was obtained by means of the agency, from the parties to whom he applied, or to whom a party acting on his behalf has applied. If third persons casually heard from the party to whom the agent had in the first place applied, that a loan was wanted, and lent the money directly to the principal, the agent cannot claim commission thereon.

Chief Justice Cockburn there directed the jury that "it was not enough to prove that the loan indirectly and as a remote and casual consequence resulted from the intervention of the party who sued; but it must be proved that the loan was obtained by means of his agency or by means of some sub-agent of his, from the parties to whom he applied, and if all that appears is that the party to whom he introduced the subject, declining the proposal, mentioned it to a third party, who *not at his suggestion*, but of his own motion, knowing nothing of the plaintiff, negotiated the loan on his own account with the party sued, the commission is not due."

In this case defendants were introduced by plaintiff to a Bank which declined the proposition. The money was afterwards obtained by defendants from parties who had heard of defendants' requirements through the Bank. The jury found that the money was not procured through the instrumentality of the plaintiff in accordance with the agreement.

A Scottish decision which seems to go very far indeed is that of Walker v. Fraser's Trustees (1910) Scot. L.R. 222, the facts of which were as follows:—

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.

(4 D.L.R. page 547 notes.)

Sec. 4.—Mere introduction not sufficient to entitle agent to commission.

In the case of Wilkinson v. Martin (8 C. & P. 1, 1837), Chief Justice Tindall said:—"A dry introduction of one man to another is not enough, but if the introduction is the foundation on which the negotiation proceeds, without which it would not have proceeded, then the parties cannot by their agreement deprive the brokers of commission."

The learned Judge, in charging the jury, said (at page 4):—"The only question for you to decide is whether the sale really proceeded in effect from the act of the plaintiffs, whether it really substantially

proceeded from their act, though they did not complete the sale. If it did, they will be entitled to your verdict." The learned Judge further said:—"Undoubtedly a dry introduction will not be enough, but if the introduction is the foundation on which the negotiations proceeded and without which it would not have proceeded, then the parties cannot by their agreement deprive the broker of his remuneration."

Sec. 5.—Not sufficient to shew that transaction would not have been entered into but for introduction—Introduction must be direct cause of sale.

In the case of Tribe v. Taylor (1876, 1 C.P.D. 505):—A. entered into an agreement with B. in the following terms:—"In case of your introducing a purchaser (of a certain business) of whom I approve, or capital which I should accept, I could pay you five per cent. commission, provided no one else is entitled to commission in respect of the same introduction." B. introduced C. who advanced 10,000 pounds by way of loan, and B. was duly paid his commission in respect of that advance. Some months afterwards, A. and C. entered into an agreement for a partnership, C. advancing a further 4,000 pounds by way of capital. It was held there that B. was not entitled to commission on the 4,000 pounds, that amount having been advanced in consequence of the negotiations between A. and C. for a partnership, with which B. had nothing to do, and the rule was laid down that *it is not sufficient for the agent to shew that the transaction would not have been entered into but for his introduction.* He must shew that the introduction is the *direct cause* of the transaction.

See also the following cases:—Boyd v. Tovil Paper Company, 1884, 4 T.L.R. 332, C.A.; Prickett v. Badger, 1 C.B.N.S. 296; Simpson v. Lamb, 17 C.B. 616.

Sec. 6.—Services may be of slightest possible kind.

In Mansell v. Clements, L.R. 9 C.P. 139, the plaintiffs, real estate agents, were requested by the agent of the defendant to place certain properties on their books for sale on terms as to commission previously made known by the plaintiffs to the defendant. One Upton, wishing to obtain a house, and seeing a board up announcing "Woodfield" for sale, went to view the premises, but, on knocking and being informed there was a wedding in progress, went away. He went to the plaintiff's office and enquired what houses were to be had in the neighbourhood. He was given cards to view five, one of which was to view "Woodfield." Upon the back of this card were the terms: "Lease and rent. Premium 2,200 pounds, rent 120 pounds, term unexpired, thirty-seven years," etc. A few days after, Upton was shewn over the premises by the agent of the defendant, who had given the direction to enter the place on the books for sale. On leaving, Upton offered to the agent 1,700 pounds premium, which offer the agent promised to submit to the defendant. After some correspondence between Upton and this agent, negotiations were broken off, but after a time renewed and Upton's offer accepted and the premises conveyed, the plaintiffs never having in any manner been consulted.

Upton, in the box, swore he would not, he thought,

have purchased the premises but for the card got from the plaintiffs exhibiting the price, which was within his means and less than what he expected on his first visit. The plaintiffs were held by Keating, Denman and Honyman, J.J., entitled to commission. Keating, J., said:—"In ninety-nine cases out of a hundred the services performed by the agent upon these occasions is of the slightest possible kind; it consists for the most part in merely bringing the vendor and purchaser together, so as to result in a sale. It is often done by a line written or a word spoken."

Sec. 7.—Sale by auction—Subsequent purchase by party present at sale.

The contract creating the agency in Green v. Bartlett (8 L.T. 503; 14 C.B.N.S. 681) was contained in a writing dated 11th July, which provided that the agent (a real estate agent and auctioneer) should loan to the defendant Bartlett three hundred pounds, in consideration of which loan the borrower should charge certain described property, as well as some other personal property, with the repayment of the loan, and, in further consideration of the loan, the agent was instructed to proceed forthwith to sell by public auction or otherwise the whole of the Island of Herm, and if the same should be sold, then Green, the agent, should be paid a commission of $2\frac{1}{2}$ per cent. on the amount of the sale; if the property should not be sold, then twenty-five pounds for his trouble and expenses.

The plaintiff advertised the property in the usual way, and it was put up for sale by auction as advertised, but the sale proved abortive. A party at the sale, who did not bid, obtained from the agent the

name of the owner, entered into communication with him, and ultimately, in September, bought the property from the owner. On the 25th of August, the defendant had written the plaintiff withdrawing the property from sale. *Held* (Erle, C.J., and Williams, J.), plaintiff entitled to commission.

In Miller v. Radford, 19 T.L.R. page 575, a case where the plaintiffs had procured a tenant for the defendants, who afterwards purchased direct from the defendants, after fifteen months' tenancy, the Master of the Rolls said:—"It was not sufficient to shew that the introduction was an efficient cause in bringing about the sale. . . . It was open to the defendant to say the plaintiffs were not his agents, or if agents to say that they had not effected the sale. If the defendants proved either the one or the other, the plaintiffs must fail."

Sec. 8.—Name of purchaser need not be communicated to principal—Agent entitled to commission if he finds a purchaser according to agreement.

In Wilkinson v. Alston (1879), 48 L.J.Q.B., page 733, 41 L.T. 394, the owner of a ship employed the plaintiff to find a purchaser. The plaintiff introduced a person who had been recommended by one White. It was agreed between the plaintiff and the defendant that should this sale go through, the plaintiff and White should share in the commission. No sale resulted. A month later White mentioned the same vessel to one Wise, who had to call in reference to a ship of another owner. The plaintiff, hearing of this, informed the defendant of the call of Wise, and suggested to the defendant his seeing Wise. The defendant did nothing, and Wise, at the time,

had no intention of buying the ship. Another month elapsed, and White wrote Wise again, but Wise took no notice. Later Wise wrote direct to the defendant, and, after the lapse of some time and of four months from the first introduction to Wise, he became the purchaser as agent for one Learoyd. The plaintiff Wilkinson was held entitled to a commission. Bramwell, L.J., said:—"The defendant practically said to the plaintiff, 'If you or White can find me a purchaser, and if the purchase is completed, I will pay you a commission,' and the expression 'if you can find a purchaser,' may be expanded as meaning 'if you can introduce a purchaser to myself or can introduce a purchaser to the premises or call the premises to the notice of a purchaser.'" Brett, J.J., said:—"*The law applicable to each case is so different, that I will not give any opinion except on the special facts before me.* I will, therefore, not give any opinion as to what would have been the rights of the parties if at the time the instruction was given to Wise he had not been the agent of Learoyd. I will not say that even in that case the plaintiff might not have been entitled." Cotton, L.J., said:—"That the name of the purchaser should be communicated cannot be material if the plaintiff really introduces a purchaser, and through that introduction the purchase takes place."

Sec. 9.—Listing land for sale or exchange—Purchaser using knowledge gained from agents to open negotiations with vendor.

Defendant listed with plaintiffs for sale or exchange ten acres of land. One Callaghan opened negotiations for an exchange. While the deal was

being transacted defendant telephoned plaintiffs asking if any disposition of his property had been effected, and was replied to in the negative. He then said that he withdrew the property, and at or about the same time consummated a deal for the property mentioned by Callaghan to the plaintiffs, Callaghan having opened up negotiations with him direct:—Held, that the relationship of vendor and purchaser had been brought about by the plaintiffs, and that Callaghan had endeavoured, by approaching defendant, to deprive them of their commission.

(Lalande v. Caravan, 14 B.C.R. 298.)

Sec. 10.—Assisting to procure purchaser—Quantum meruit.

Held, that when the principal lists lands with an agent and communicates to such agent the information that a third party has been enquiring with a view to purchasing the land and as a result of such information the agent opens negotiations with such third party, but fails to make a sale, and the principal thereafter owing to the neglect or inability of the agent to effect a sale, opens negotiations directly with the third party, and effects a sale at substantially the price originally listed, the agent cannot be said to have introduced the purchaser or so assisted to effect a sale as to entitle him to recover his commission.

(Thompson v. Milling, 1 Sask. R. 150.)

Sec. 11.— Owner under certain circumstances put upon enquiry where prospective purchaser fails to disclose agent's intervention.

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.

Sec. 12.—Implied contract—Owner dealing with party known by him to be land agent.

In Aikens v. Allan (14 Man. L.R. 5, 549), 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.

Sec. 13.—Continuing contract.

In the case of Cavanagh v. Glendinning, decided by the Supreme Court of Canada (40 S.C.R. 414); M., owner of mining lands, agreed to give G. a commission for effecting a sale thereof. G. introduced a purchaser to M. and a contract for sale of the lands to said purchaser was executed.

This was replaced by a later contract, by which the sale price was reduced in consideration of an incumbrance on the property being paid off by the purchaser who borrowed the money for the purpose

and assigned his interest in the contract to the lender, also signing a release in favour of M. of any claim against him on the contract.

M. afterwards sold the mining lands to a person buying for the lenders of the money to pay off the encumbrance. It was held that he was entitled to the commission on the full amount received for the land as finally sold. Held also that the sale of the land was not a transaction independent of the contract with the purchaser introduced by G., but was a continuance thereof.

See also report of same case in the Court below (Vol. 10, O.W.R., page 477); remarks of Moss, C.J.:—"I do not think it was satisfactorily shewn that the right to be paid this commission was conditional upon the receipt by the defendants of the purchase money, or that the plaintiffs were only to be paid as and when the moneys were received on account of the purchase price." (See Hamar v. Bullock, 14 W.L.R. 652, *infra* page 188).

Sec. 14.—Where purchaser introduced by agent allows option to lapse and subsequently purchases property, agent entitled to commission.

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.

Sec. 15.—Purchaser introduced in course of previous business.

In the case of White v. Baxter (1 Cab. & El. 199, 1883) the plaintiffs who were doing business as ship-brokers, brought action for the recovery of commission on a sale made to customers who had been introduced by the plaintiffs, not in connection with the actual sale in respect of which they made their claim, but in the course of previous transactions. The questions put to the jury were:—(1) Whether the business which was done in January was in the contemplation of the parties when they were introduced? (2) Whether the business resulted proximately from the introduction?

Sec. 16.—Miscellaneous cases.

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.

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 a 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.

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 adver-

tisement issued by the agent that the property was for sale: Willis v. Colville, 14 O.W.R. 1019.

In order to entitle a real estate agent to commission, he must have been an "efficient cause" of the sale; it is not enough that there was an introduction and that such introduction was a *causa sine qua non.* (Strayer v. Hitchcock, 7 D.L.R. page 589.)

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 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.

An agent 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.

Sec. 17.—Sale resulting indirectly from plaintiff's services—Agent entitled to commission under special agreement.

While as a general rule an agent is only entitled to commission in respect of a transaction which is the

direct result of his efforts, he may nevertheless, if the terms of his contract with the owner so provide, be entitled to commission where a sale results only indirectly from his intervention.

An interesting case in this connection is that of Bayley v. Chadwick (36 L.T. Rep. 740), which was finally decided in the agent's favour by the House of Lords, overruling a judgment of the Court of Appeal. The plaintiff sued for commission on the sale of a ship. The contract on which the action was based read as follows:—

"In case the ship is not sold by auction she is forthwith to revert to the custody of the owners for private sale; but in case a subsequent sale be effected to any person or firm introduced by you, or led to make such offer in consequence of your mention or publication for auction purposes, you to be entitled to the same 1 per cent. commission on such sale." The agent advertised the ship for sale by auction, but no sale was effected. It was subsequently bought from the defendant, the owner, by a person who was not present at the sale and who had not seen the advertisement, but who made an offer to the owner through having heard of the advertisement. Lord Coleridge told the jury that the agent would be entitled to recover although the purchase was only an indirect consequence of the advertisement. The jury found for the plaintiff. The Divisional Court held that there was evidence for the jury, and refused to grant a new trial. "The question is," said Mr. Justice Denman, "whether the Lord Chief Justice was wrong in ruling that there was evidence to go to the jury on the question

whether the purchaser of the ship was led to make the offer that he did make in consequence of the publication of the advertisement by the plaintiff. The words 'in consequence of' are very large words, and, I think, are amply sufficient to include indirect, as well as direct, consequences." Lord Coleridge, C.J., who, with Mr. Justice Denman, formed the Divisional Court, said:—"Two points are raised by the argument. First, as to the construction of the contract in this case; secondly, as to whether there was evidence to go to the jury that the sale was even the indirect consequence of the advertisement. On the first point, I held at the trial that 'any person led to make such offer in consequence of publication,' was not limited to a person making an offer in consequence of his personally or by his agent seeing the publication, but included the case of an offer in consequence of the person offering or his agent hearing of the publication. Upon consideration, I am unable to see that I was wrong. Looked at fairly, 'in consequence of' must include indirect as well as direct consequence. That may make the contract an indirect one, but that does not affect the question. By the very collocation of the words in the contract, it seems to be reasonably clear that the parties did intend very indirect consequences indeed. The other question is, whether there was any evidence to go to the jury that this advertisement for auction purposes did indirectly lead to the offer that resulted in a purchase. I am of opinion that there was, an opinion in which both learned judges agreed." The Court of Appeal, consisting of Lords Justices Bramwell, Brett, and Cotton, reversed the

decision of the Divisional Court, holding that there was no evidence that the purchase was in consequence of the plaintiff's advertisement. "Certainly the parties in this case," said Lord Justice Bramwell, "have done their best to create litigation by expressing the contract between them in such a foolish document as that which is now before us. The question is, was there any evidence that the subsequent sale of the Bessemer was effected to a person who was led to make an offer in consequence of the plaintiff's mention or publication of the ship for auction purposes? I am of opinion that there was no such evidence. Sugden was the purchaser of the ship, and Sugden purchased through Wilson (his agent). There was evidence to shew that Sugden may have been led to make an offer for the ship in consequence of his dealings with Pearson; but what led Pearson to have correspondence with the plaintiff and communicate what he knew to Sugden? This communication took place in consequence of Pearson's casually meeting Sugden in the market and saying that there had been no offer, and Sugden saying that if he had been at the auction there would have been a bid. But Pearson might just as well have made the same remarks to Sugden if there had been no advertisement. All that the advertisement did was to cause Pearson to know that the plaintiffs were the persons who had the sale, but it did not cause Pearson and Sugden to walk together and hold a conversation, nor did it cause Sugden to make the offer. The plaintiff's advertisement was no part of the train of causation." The House of Lords finally decided the case in favour of the plaintiffs, and expressed the opinion that there

was no question of law involved, and that upon the facts set out there was ample evidence to go to the jury in support of the plaintiff's claim.

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 effect a sale so as to entitle him to recover any commission: Thompson v. Milling, 1 Sask. L.R. 150.

CHAPTER III.

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CHAPTER III.

WHEN COMMISSION EARNED.

GENERAL RULES.

Sec. 1.—Agent who has fulfilled his part of contract not deprived of right to commission where transaction is broken off without his fault.

In order to entitle an agent to receive his commission or remuneration, he must have substantially carried out what he bargained to do.

He is not, however, deprived of his right to commission where he has done all that he agreed to do, by the fact that the transaction is not beneficial to the principal, or that it has subsequently fallen through, whether by some act or default of the principal or otherwise, unless there is a provision to the contrary, expressed or implied, to that effect, or unless the agent was himself the cause of his services being abortive. (Halsbury, vol. 1, page 1, 94.)

In the case of Fuller v. Eames, 8 T.L.R. 278, an agent was employed to negotiate a loan on commission. The principals were brought together but the prospective lenders eventually refused to carry out their agreement to advance the amount they had previously been willing to advance, on the ground that a certain statement as to tenants, and rental of part of the building on which the loan was to be secured, was inaccurate.

It was there held that the agent was entitled to commission. Mr. Justice A. L. Smith, in rendering judgment, stated the facts and said that if he had been construing this agreement without the authority of the cases cited, he might have held that this commission was only to be recovered if the money was actually paid, but the cases had long since been settled in such a contract as this—that if the person proposing to negotiate a loan brings the principals together and if nothing remains for him to do, he is entitled to his commission.

This case, however, is not very fully reported, and the result no doubt turned on the fact that the inaccurate statement which was the cause of the negotiations being broken off was *due to the negligence of the principals* and that the agent had relied upon this statement and rendered services accordingly.

In the case of The Sovereign Life Insurance Co. (Salter's Claim), 7 T.L.R. page 602-603, the facts reported were substantially as follows:—A Company employed a mortgage broker to obtain for them a loan, agreeing to pay a certain commission per cent. The broker introduced mortgagees, but a petition to wind up the Company having been presented, the intending mortgagees refused to complete, held that the broker could neither rank as creditors for the commission in the winding up of the Company nor receive damages on a *quantum meruit*. Chitty, J., at page said:—"It is clear that the applicants never procured from the intending mortgagees a contract or any binding obligation to make the loan. If A. employs B. to procure a buyer for his horse at a price, and B. gets C. to go and look at the horse,

and C., for reasons good or bad, or for no reason at all, although he negotiates, declines to buy, the commission is not earned. So though he expresses his willingness, *but in such a manner as not to bind himself*, and afterwards declines to proceed, the commission is not earned," also "If A. employs B. to procure a loan of £1,000 on his bond and B. finds C. who says he is willing to make the advance if A. will pay C.'s solicitor a fee for negotiating the loan, to which A. does not agree, the commission is not earned."

The letter on which this action was based read in part as follows:—"If directly or indirectly through your negotiations or introduction the loan is procured, we agree to pay you a commission of ¾ per cent. on the amount."

In a Quebec case of Lightfall v. Caffrey (6 L.N. page 202), it was held that where a broker or agent has negotiated a sale of property between his principal and a purchaser whom he has procured, and an agreement for carrying out the transaction is entered into between the parties, he is entitled to his commission, notwithstanding that the agreement may fall through by reason of bad faith on the part of one or other of the parties to the contract.

It was also held by Judge Archibald in the case of Brown v. McDonald (R.J.Q. 6 S.C. 491) that an agent is entitled to his commission when the sale is not completed owing to defective titles.

In the case of Lepage and Bouchard, decided by the Court of Review at Montreal in December, 1912 (R.J.Q. 43 S.C. 181), reversing a judgment of the Superior Court, it was held (two judges to one) that,

in the Cities of Quebec and Montreal, the sale of a licensed restaurant is only perfected by the transfer of the license, duly consented to by the License Commissioners, and that if their consent is withheld, the sale is null for lack of consideration or want of object (*"defaut d'objet"*), and that consequently, the agent who negotiates such a transaction is not entitled to his commission.

The question, however, is still a debatable one and has not, as yet, come up before the Court of Appeals. In the first Court Greenshields, J., maintained the agents' action on the ground that they had done all they agreed to do, the bargain having been completed, and an instalment of the purchase price actually paid, although the transaction was subsequently cancelled by agreement between the vendor and purchaser, and the instalment returned.

This view of the case was taken in the Court of Review by Chief Justice Sir Charles Peers Davidson, who dissented from the majority. The learned Chief Justice (at page 187) remarks as follows:—"In the present case the sale represented an absolutely legal transaction. Moreau had the right to sell the equities in the license. If the sale had had for its object an immoral condition, then it would have been different, as, for example, if the sale had been of a marketplace for harlots. But all that Johnson and Grace had to do was to find a person who would comply with the conditions required by the defendants, and this was accomplished."

"They had neither to see to the transfer of the license, nor to the making of the payments on the fulfilment of any of the other conditions of the sale."

"French and English authorities are in harmony. They are unanimous in asserting that under such circumstances, the commission has been earned at the moment the transaction is completed."

It is worthy of observation that, of the four Superior Court Judges who passed on the case, two were in favour of maintaining the agents' claim, and cited the highest authorities in support of their opinion; but the two Judges who took the contrary view happened to be in the right place—for the defendant.

In the case of Brotman v. Meyer, 41 Que. S.C. 433, 1 D.L.R. 371, it was held that where a real estate agent procured a written offer of purchase made in good faith by a person able and willing to carry out the same, of which written offer the owner signed an acceptance, and the offer contained a stipulation that the owner should pay a certain percentage "provided he accepted the offer," the agent's mandate is fulfilled and the commission earned, although the owner declined to carry out the sale; so far as the agent's right of action for his commission, the signing of the agreement under private signature was an acceptance of the offer, although his principal refused to complete the sale. (Lighthall v. Caffrey, 6 L.N. 202; Thomas v. Merklet, 32 L.C. Jur. 207; Gohier v. Villeneuve, R.J.Q. 6 S.C. 219; Brown v. McDonald, R.J.Q. 6 S.C. 491; and Massicotte v. Lavoie, R.J.Q. 40 S.C. 258 specially referred to.)

In the case of Gordon v. Holland, 2 D.L.R. 327, 20 W.L.R. 887, where the plaintiff and the three

defendants purchased land in partnership and the conveyance was made to one of the defendants who afterwards gave an option of purchase to another defendant and the latter succeeded in securing a purchaser at a price and on terms to which all expressed assent, though the plaintiff refused his formal consent unless the defendant who secured the purchaser would make an affidavit, which he refused to do, that he was not receiving a secret profit, it was held that the defendants were not guilty of fraud or of a breach of duty to the plaintiff in completing the sale without his consent, if there was in fact no secret profit, particularly in view of the provisions of the Partnership Act, R.S.B.C. Ch. 175, sec. 25, making the assent of the majority of a number of partners sufficient.

In the case of Wrenshall v. McCammon, decided by the Supreme Court of Saskatchewan, sitting in appeal in July, 1912, reported 5 D.L.R. 608, 21 W.L.R. 842, where land was listed with an agent to sell at a price net to the owner, the agent to receive for his services anything he could obtain over that amount, and the agent found a purchaser ready, willing and able to purchase for a price at a slight advance over the net price and on the terms given by the owner to the agent, and the owner refused to sign an agreement for sale for the reason that the price was not enough, it was held that the agent was entitled to recover on a *quantum meruit* the difference between the net price to the owner and the price the purchaser was willing to pay. (Bagshawe v. Rowland, 13 B.C.R. 262, specially referred to.)

Sec. 2.—Duty of agent to procure binding agreement—Questions of fact not properly before the jury.

In the case of MacKenzie v. Champion, which came up before the Supreme Court of Canada on an appeal from the Court of King's Bench for Manitoba (Rep. 12 S.C.R. 650), MacKenzie *et al.*, the appellants, real estate brokers at Winnipeg, received verbal instructions from the respondents to sell certain lands of theirs at a certain price and terms of payment. MacKenzie *et al.* sold the land at the price named, receiving from the purchasers the sum of $5,000 as a deposit on account of the purchase money, and giving therefor a receipt. Prior to the expiration of the delay within which the balance of the purchase money was to be paid, the purchasers refused to complete their purchase for want of title in the respondents to a certain portion of the land, and contended that from the absence of writing signed by them they could not be compelled to do so. The appellants then brought an action for commission upon the entire purchase money. The respondents set up the defence that the appellants promised to sell the said lands and to complete such sale by preparing the necessary agreement in writing to make a binding contract with the purchasers.

The case came on for trial before a jury who followed the charge of the Chief Justice, and found a verdict in favour of the appellants for the full amount of their claim, thereby giving them 2½ per cent. upon the entire purchase money of both parcels of land. The jury were not asked by the judge to pronounce upon the nature of the terms upon which appellants were employed, upon the question

whether the sale went off through the neglect of the appellants to take a writing binding the purchasers, or whether it went off by reason of the vendors not being able to complete the title, or because they were unwilling to do so. In review before the full Court, a judgment was rendered directing that the verdict should be reduced to $125, being commission at the rate of 2½ per cent. on the $5,000 actually paid, or in the alternative, that there should be a new trial.

It was held by the Supreme Court, affirming the judgment of the Court below, Strong, J., dissenting, that there was a mis-trial, inasmuch as the trial Judge omitted to put the questions above indicated to the Jury, and that therefore the order for a new trial should be affirmed, appellants to have the alternative of reducing his verdict to the $125.

Chief Justice Ritchie, in the course of his judgment, remarks as follows:—

"I think the Jury should have been asked to find what the contract was between the plaintiff and the defendant; that is, what defendants were employed to do, and then what they did do; whether plaintiff was to make a valid and binding sale of the property? If so, did plaintiff fulfil the contract and make such a sale? If he did, he would be entitled to his commission, otherwise not."

"If a sale was made, was the sale not completed by reason of want of title in or default of defendants? If such was the case, the plaintiff would be entitled to his commission. Or, in other words, was plaintiff merely to find a purchaser willing to purchase? If so, did he fulfil his contract, and was the purchaser

ready and willing to complete his purchase, and did the sale fall through because of want of title or otherwise, and so the non-completion of the sale was the fault of the principal, and not that of the agent? If so, plaintiff would be entitled to his commission, because he substantially performed what he undertook to do. And whether the plaintiff should have bound the purchaser by a writing or not, did the sale go off by reason of the purchaser not being so bound or by reason of the defendant's refusal or inability to complete it?"

"All these matters should have been submitted to the Jury with proper directions. The question, therefore, in this case, turned rather on questions of fact than of law, and I am of opinion that the Court below, in granting a new trial, did right, and that the judgment should be affirmed."

The Hon. Mr. Justice Henry, however, held that it was the duty of the appellants to take from the purchasers a binding agreement under the statute, and, having neglected to do so, they were not entitled to any compensation.

Sec. 3.—Loan agreement cancelled owing to refusal of principal to furnish abstract of title—Agent entitled to commission.

In Fisher v. Drewett (39 L.T. Rep. 253) the plaintiff, a mortgage broker, was employed to find a loan for the defendant. The terms of his employment were contained in a letter which read as follows:—"In the event of your procuring me the sum of £2,000, or such other sum as I shall accept, I agree to pay you a commission of 2½ per cent. on any money received."

The plaintiff applied to a Building Society, which agreed to advance the sum of £1,625 on the property the defendant was prepared to mortgage as security for the loan. The defendant refused to furnish the Society with abstracts of title, with the very natural result that the Building Society broke off negotiations.

The plaintiff thereupon claimed his commission. Judgment was entered for the plaintiff and the defendant appealed, relying principally on the last part of the letter, "I agree to pay a commission . . . on any money received."

The judgment was confirmed in the Court of Appeal. Lord Thesiger disposed of the defendant's contention as follows:—"The contract is divided into two parts: first, the commission which the agent is asked to perform; and secondly, the promise of the principal. The consideration is in these terms: In the event of your procuring me the sum of £2,000, or such other as I shall accept. That is all the agent binds himself to do, and as soon as the Temperance Building Society agreed to advance the loan and the defendant accepted the offer, the whole consideration was in fact performed. I think that the subsequent part of the agreement, viz.—the promise, 'I agree to pay you a commission of 2½ per cent. on any money received,' means no more than this: If you will perform the consideration I will pay you commission, but as the sum you procure may be more or less than £2,000, I will only pay you *pro rata*. Now *there was a point in the negotiations at which the Temperance Society would have advanced the money*, and the position is the same as in Green v. Lucas. It

was the defendant's fault that the loan was not completed, and he would have been liable to an action for not carrying out his agreement."

Sec. 4.—Loan agreement cancelled owing to inaccurate statements furnished by borrower—Agent entitled to commission.

In the case of Green v. Lucas (31 L.T. Rep. 731, 33 *ibid.* 584), the defendant had agreed to pay the plaintiffs a commission of 2 per cent. "for procuring him on loan the sum of £20,000 upon the security of a certain leasehold property at Southwark." The defendant had previously furnished the plaintiff with two statements giving the value of the property at "about £37,000," and the duration of the lease as for a term of ninety-nine years. It was stated in one of these valuations that the lease "contained no arbitrary or restrictive clauses, but only the usual covenants." When the plaintiffs, relying upon these valuations, applied for a loan to a Provident Institution, the Directors agreed to advance the sum applied for "subject to the title and all other questions proving to be satisfactory."

It turned out, however, that the lease was not for ninety-nine years absolutely, but contained a clause providing for re-entry under certain conditions. The Directors of the Institution, believing that this newly disclosed clause would considerably diminish the value of the property, refused to lend the money. The plaintiffs entered suit for commission. Lord Coleridge directed a verdict for the plaintiffs, which was subsequently confirmed by the Court of Appeal.

Lord Chancellor Cairns said:—"It is a case

where one of two parties, without default on either side, must suffer, and it therefore resolves itself into the letters of the contract, and lies within a narrow compass. It appears to me that the plaintiffs have done everything which agents in this kind of work are bound to do, and it would be forcing their liability if they were to be held answerable for what happened after. If the contract afterwards were to go off from the caprice of the lender or from the infirmity in the title, it would be immaterial to the plaintiff, and that appears to be the understanding of the persons themselves. . . . Either it was a sufficient reason to justify the company in refusing to go on with the loan, or it was not. If they were not justified, the defendant ought to have proceeded against them; and if they were justified, then the failure of the loan was owing to the defendant's own default, or the failure of the security he had proposed." "In the present case," said Mr. Justice Blackburn, "'procure' means procure a person who is ready and willing to lend the money on the leaseholds." To the same effect was the observation of Mr. Baron Bramwell that the word "procure" meant in this contract to procure the lender and not the money, and that the contract was completed, as far as the plaintiffs were concerned, when they had procured a person who was ready and willing to advance the money.

Sec. 5.—Where principal refuses to complete transaction owing to objection to unreasonable clause in agreement, agent entitled to damages equal to amount of commission.

In the case of Roberts v. Barnard (1 Cab. & El. 336) the defendant employed the plaintiff to sell

certain ground rents, the agreement reading as follows:—"We hereby agree to allow you as commission one-half year's purchase upon such amount as Messrs. Rooke & Sons, or any other party to whom you may introduce us, may purchase; and we hereby authorize such purchaser's solicitor to retain the same out of the purchase money on your account."

The plaintiff found a purchaser willing to complete the transaction upon terms acceptable to the defendant. The purchaser's solicitor, however, rightly objected to an unreasonable clause in the agreement of sale, and the defendant thereupon broke off negotiations.

Mr. Justice Mathew in charging the Jury, pointed out that the plaintiff was not entitled to commission, as the sale had not been completed, but that he was entitled to damages "as a compensation for the commission which he would have earned but for the wrongful conduct of the defendants; and that the measure of damages in this case, where there was nothing more to be done by the plaintiffs to earn the commission if the purchase had been completed, was the full amount of commission which he would have earned."

Sec. 6.—Where contract cancelled by voluntary act of principal, agent entitled to commission.

In the case of Horford v. Wilson (1 Taunt. 12) the defendant entered into an agreement with the plaintiff, by which the plaintiff was to receive a commission of £5 if he would procure the defendant a tenant for certain premises, and obtain £350 for the lease.

The plaintiff succeeded in inducing one Stevens to make an agreement with the defendant, by which Stevens was to lease the premises for £350. Stevens actually paid £50 as a deposit, but being unable to complete the agreement, forfeited the £50 upon the defendant consenting to release him.

The case was tried before Lord Mansfield and a Jury. A verdict was returned in favour of the plaintiff and a rule for a new trial discharged. The facts were summed up as follows by his Lordship:—"The plaintiff procured a person who offered to take the house upon the stipulated terms; the defendant made no objection, he accepted Stevens, entered into an agreement with him, and received £50 as a deposit; a compromise afterwards takes place; the defendant does not renounce the agreement, but retains the £50, and dispenses with further performance of it. This, upon every principle of fair construction, must be considered as a fulfilment of the contract on the part of the plaintiff."

Mr. Justice Rooke remarked:—"The plaintiff procured a tenant whom the defendant accepted, with whom he entered into an agreement for these premises, and under that agreement received £50 as a deposit. It is true that he did not afterwards insist on the full performance of this engagement, but he retained the money which had been paid, and thereby affirmed the contract."

Mr. Justice Chambers expressed the opinion that the defendant might have, in the first place, rejected Stevens, but having once accepted him, the plaintiff must be held to have completed his part of the contract.

Sec. 7.—Agent entitled to commission where sale falls through owing to fault of owner.

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.

Sec. 8.—Solvency of intending purchaser.

In the Quebec case of the Gross Real Estate Agency v. Racicot (1910) 20 Que. K.B. 394, it was held that a real estate agent is entitled to his commission, or any other form of compensation agreed upon, when he brings his principal the seller, and prospective purchaser into agreement, but the latter must be possessed of the means to carry out his obligations. Hence a young man of twenty-four years of age, whose whole means are his wages of $1,000.00 a year, is not an acceptable buyer of real estate for a price of $20,000.00 payable $6,000.00 cash and the balance yearly in instalments of $1,000.00, in addition to shouldering mortgages to the amount of $8,000.00.

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.

Sec. 9.—What constitutes purchaser ready, willing and able to complete contract.

In the case of Herbert v. Vivian, decided by the Manitoba Court of King's Bench, Metcalfe, J., in December, 1912, 8 D.L.R. page 340, it was held:—

(1) Where a broker was authorized to find a pur-

chaser by the lessee of a hotel for the unexpired lease and the chattels contained in the building, and he found one who was willing to buy at the terms laid down by the principal, and a deposit was made on the purchase price and a receipt therefor issued by the principal, setting forth the terms of the sale, but the sale was not consummated because the lessor of the premises refused to consent to an assignment of the lease unless the lessee carried out the terms of a previous arrangement with him, whereby the lessor was to get a certain percentage of the purchase price in the event of a sale of the unexpired term, which arrangement was not disclosed to the broker or the prospective buyer, the broker had found a purchaser ready, willing and able, and is entitled to the commission.

(2) Where the purchaser of an unexpired lease of a hotel and the chattels contained therein pays part of the purchase price, for which a receipt is issued by the seller, setting forth the terms of the contract, and the seller told the buyer that the lessor of the premises would have to be satisfied with the new tenant, but did not disclose to him or to the agent that there was an arrangement between him and his lessor by which the lessor was to get a certain percentage of the purchase price in the event of the sale of the unexpired term and it subsequently developed that the lessee refused to carry out this arrangement but tried to get the purchaser to pay all or part of this sum to the lessor, the purchaser is justified in rescinding the contract.

In the case of Smith v. Barff, decided by the Ontario Divisional Court in November, 1912, 8

D.L.R. page 996, it was held that where a real estate agent was employed to "sell" certain property and he found a purchaser and obtained an agreement of sale to be entered into between such purchaser and his principal, a subsequent written agreement between the agent and his principal whereby it was stiplated that the latter should pay the agent a stated percentage as commission "for selling my property," is to be construed as contemplating merely an agreement of sale with a person of substance against whom it might be enforced; and the commission will be payable although the sale was not completed by reason of the purchaser's default in carrying it out and the dishonour of his cheque given for the deposit.

(Robinson v. Reynolds, 4 D.L.R. 63, 3 O.W.N. 1262, distinguished; Mackenzie v. Champion, 12 Can. S.C.R. 649, referred to; see also Annotation on commission agreements generally, 4 D.L.R. 531.)

CHAPTER IV.

DUTIES OF AGENT.

Introduction.

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Sec. 13. Agent forfeits right to commission by agreeing to accept money from purchaser in consideration of allowing time for payment of price.

14. Result of secret agreement to divide commission with agent of vendor.

15. Promoters of company—Duty towards company.

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17. Promise to pay share of commission—Sale of land to syndicate—Agent member of syndicate.

18. Misrepresentation by agent.

19. Option contract providing for payment of commission.

20. Commission received by agent with acquiescence of principal.

21. Secret commission recoverable by principal.

CHAPTER IV.

DUTIES OF AGENT.

Introduction.

An agent entrusted with the sale of property, or employed to transact or negotiate any other business, may be said to occupy a position of trust towards his principal, following the general rule that whenever there is a relation that puts one party in the power of another, there exists a fiduciary relation. The policy of the law is to prevent any person placing himself in a position where his interests conflict with his duty.

As a result of this fiduciary relationship, it follows that the agent cannot sell his own property to his principal, nor buy his principal's property without the knowledge of the principal. And in this and all other transactions with the principal, he must disclose every material fact which is or ought to be known by him, if it would be likely to operate upon the principal's judgment. If this is not done, the fairness of the transaction is immaterial, and it is voidable at the principal's option.

In such cases the contract is not an absolute nullity, but voidable at the option of the principal, who may subsequently ratify the transaction, and so render it legal and binding.

This rule does not, however, prevent an auctioneer from making a bid on behalf of a third person; nor does it prevent a *bona fide* purchaser from after-

ward, in good faith, selling it to the agent, nor incapacitate the agent from purchasing the property after the agency has ceased. (Cyc. Vol. 39, pages 1439-40.)

The Quebec Law on this subject is formally declared in Art. 1484 of the Civil Code, which provides that "Agents cannot become buyers of the property which they are charged with the sale of."

The principles of law governing the duty of an agent have been laid down in a number of leading English and Canadian cases. In Vagnell v. Carlton (1877, L.R. 6 Ch.D. at page 385), Bacon, V.C., says:—

"The law I take to be clear, that under such circumstances the agent, whatever may be the nature of his employment, or under whatever circumstances, is bound, if he has any interest in the matter, not only to declare that fact, but to specify the nature of his interests; and that *all persons who act with him*, and who share in that interest, are jointly and severally bound to make good, when their interest is discovered, to the principal, the whole benefit which has been obtained without the sanction of the principals."

Sec. 1.—Third parties joint purchasers with agents—Sale to a stranger at a profit.

As has been stated in Vagnell v. Carlton, above cited, not only is an agent liable towards the principal for the profits when he buys the property of his principal (either in his own name or through a *prête nom*) and re-sells at a higher price, but third parties associated with him for the purpose, knowing

that he is an agent, are equally liable towards the principal.

An interesting Canadian case in this connection is that of Pommerenke v. Bate, decided by the Supreme Court of Saskatchewan (sitting in appeal) on the 5th November, 1910. The facts were as follows:—

The plaintiff employed defendant B. to secure a purchaser for land. B. approached defendant C., who agreed to purchase on plaintiff's terms and plaintiff accepted C. as purchaser. Thereupon B. advised defendant M. of the arrangement and expressed a wish that he could have secured the land himself, whereupon M. offered to finance the transaction for B. if he could secure a half interest, M. agreeing to take a quarter interest in the entire undertaking. B. then informed C. that he would not complete the sale unless he secured a half interest, and C. having no enforceable contract for the purchase of the land agreed, it being understood that the purchase should be made in C.'s name. A memorandum of the sale was then made between B., as plaintiff's agent, and C., and a second agreement as to the relationship of B. and C., both agreements being made at the same time. After this, B. signed an agreement assigning one-half of his interest to M. It did not appear, however, that M. was aware that the arrangement between C. and B. was concluded, while the relationship of principal and agent was still subsisting between plaintiff and B., but rather that he believed that B. re-purchased from C. The land was subsequently re-sold at a large advance, and Pommerenke, becoming aware of the arrangement between defen-

dant, brought action to recc er the amount of the profit realized.

It was held: "That it is the duty of the agent to use his best endeavour to promote the interests of the principal, and no agent will be permitted to enter into any transaction in which he has a personal interest in conflict with such duty, except with the consent of the principal, after full disclosure, and the agent so violating his trust must surrender any benefit he has obtained."

2. "That any person who enters into a partnership with the agent and acquires an interest in the benefits derived from the breach of his trust, knowing the circumstances, must also account for his share of the profits, so the defendant Coy, who had entered into such a partnership with the agent, was liable."

3. "The defendant Murison would have been similarly liable had he been aware when acquiring his interest that the relation of principal and agent still subsisted between B. and the plaintiff when he acquired his interest in the land, but, as the evidence disclosed that he believed that the sale to Coy had been concluded and that B. re-purchased, he was not liable."

"Per Newlands, J. (dissenting), that if the plaintiff had come into Court before the re-sale of the property, he would have been entitled to have the whole transaction set aside, but, the property having been sold, different remedies are open to the principal, who can sue the agent for any benefit he had received, and the agent and his associates for any damages he has sustained, but cannot make such

associates account for their interest in the transaction."

2. "That there being no fraud on the part of C. and M. and no damages to the principal being shewn, the plaintiff could not recover against them."

The judgment of the Saskatchewan Court of Appeal was confirmed by the Supreme Court of Canada in May, 1911, (see 44 S.C.R. page 543), the Chief Justice and Anglin, J., dissenting.

The reasons given by the majority of the Court are practically a reiteration of those contained in the judgment appealed from and above cited.

The Hon. Mr. Justice Anglin, who dissented, expressed the opinion that there was no partnership between Coy and Bate, and that Coy, who only agreed to allow Bate a half interest and to accept half Bate's commission, because he feared that Bate would sell the property to somebody else, "had no idea of doing anything which would injure the plaintiff," but strangely enough, his Lordship says further on (at page 572), "*His fault lay in permitting Bate to become a co-purchaser with him, knowing that Bate was concealing from his principal the fact that he was acquiring an interest in the property.*" The Chief Justice agrees with this opinion, but makes no comment.

Upon carefully considering the various judgments in this case and the authorities cited, it seems clear that the doctrine laid down by the majority of the Court would not be disturbed by the Privy Council.

It would appear from the undisputed facts that Coy was placed in a somewhat difficult position, and could hardly be taxed with fraud in the popular

acceptation of the term, but he did undoubtedly by his actions, and especially by accepting one-half Bate's commission, put himself in the same position as Bate *quo ad* the principal.

Sec. 2.—An agent acting for vendor and purchaser who fails to disclose his interest to the vendor forfeits right to commission and sale may be cancelled.

In a recent case, Demers v. Lacroix, May, 1913, Lafontaine, J., held agent's claim valid against the purchaser who had employed him but deducted amount received from vendor.

A Manitoba case of considerable interest in Canada, both on account of the questions of law and fact involved and the prominence of the defendants in Western Canada, is that of Wolfson v. Oldfield, Kirby and Gardner (decided by the Court of King's Bench for Manitoba, rep. 18 D.L.R. page 449), in which a sale of the plaintiff's property was set aside on the ground that the agents had acted for the purchaser (in this case a Company of which the defendant, Gardner, was Manager), as well as for the sellers without disclosing their interest to the plaintiff who relied upon them to secure the best price obtainable.

The plaintiff, Wolfson, who resided in England, in August, 1910, gave the defendants (who were then acting as his agents) a list of properties owned by him with prices indicated thereon, including the property in question, the selling price of which was fixed at $28,000.

Matters stood at this between these parties until January 20, 1911, when Oldfield & Company opened

a cable correspondence with plaintiff in England, they using the name of "Oldgard" and wired the plaintiff as follows:—

Winnipeg, Jan. 20th, 1911

"Wolfson,"
Weightman Peddler Company,
18 Water Street, Liverpool.

Offered $27,500. Carlton Street. Best offer we could get, $7,500 cash, assumed mortgage, balance three annuals, interest six, reply.

"Oldgard."

The property was, after the interchange of several cables, sold at the price finally agreed to by plaintiff ($28,375.00), to the "Real Estate Investment Company" through the intermediary of one Meredith, a *prête nom* of the Company, to whom it was transferred in the first place and who in turn transferred it to the Company.

The trial Judge took the view that even though the "listing" at $28,000.00 *might*, although he does not say that it *would*, have given the defendants the right to sell at that price to any purchaser, the relationship between the plaintiff and defendant was changed by the telegram of 20th January, and that by this cable the defendants told plaintiff plainly that they had been trying to find a purchaser for his property and the best price they could get was $27,500.00.

As the trial Judge remarked: — "This intimated that Oldfield & Co. had found themselves unable to fulfil the special employment, and that they therefore tendered their services to procure the best price

available. They abandoned the special employment, if it could be said to be still existing, and desired to assume that of getting the best price."

The learned Judge distinguished the case on the facts from the English case of Morgan v. Elford (4 C.D. 352) in which the bargain between the owner and the broker was that the latter should have whatever the land brought above a certain price, and it was held that there was no fiduciary relationship.

This case subsequently came before the Manitoba Court of Appeals, after the terms of the judgment ordering a re-transfer of the property to the plaintiff had been complied with, the defendants, Oldfield *et al.*, endeavouring to have the finding of fraud reversed, although they otherwise acquiesced in the judgment. The Appellate Court refused to interfere with the original judgment.

In the case of Arnold v. Drew, decided by the British Columbia Court of Appeal in April, 1913, reported 11 D.L.R. page 72, it was held that:—

1. A real estate agent is not entitled to commission on an alleged sale of his principal's lands to a salesman in the agent's own office, holding moreover, a close relationship with the agent, where the alleged purchaser's position was not disclosed to the principal and the latter on learning thereof repudiated the agreement.

2. It is a ground for refusing specific performance to the alleged purchaser that the latter is an employee of the vendor's real estate agent who made the contract, although such employee's compensation may

have been upon a commission basis only and not on salary, if the business relationship of the purchaser to the agent was not disclosed to the vendor who lived in a distant city and was not aware of same.

(McGuire v. Graham, 16 O.L.R. 431, applied.)

Sec. 3.—Agent purchasing from principal must make full disclosure—Burden of proof on agent.

In the case of Edgar v. Caskey, decided by the Alberta Supreme Court, sitting in Appeal in October, 1912, reported 7 D.L.R. page 45, (McPherson v. Watt, 3 A.C. 254, 263, followed; Edgar v. Caskey, 4 D.L.R. 460, reversed), it was held that a real estate agent purchasing from his principal the lands which the latter has listed with him for sale, is bound to disclose to the latter that he is the purchaser; and, although the sale may be fair and reasonable in other respects, yet if the vendor has not been made aware that the real purchaser is his agent, such a sale cannot be supported unless the principal chooses to ratify it after knowledge of such fact.

It was further held in the same case that the onus is upon the agent, who seeks to enforce against his principal an alleged purchase on his own account of the principal's property which he had been employed to sell, to establish to the satisfaction of the Court that he disclosed to his principal the fact that the offer was on his own behalf.

Sec. 4.—Agent cannot purchase property of principal.

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 Company v. Reid, 19 W.L.R. 649 (Alta.)

Sec. 5.—Agent must fully disclose interest—Not sufficient to indicate that he has an interest.

In Dunne v. English, L.R. 18 Sq. 524, at 535, Jessel, M.R., says:—"Now what is the meaning of 'Knowledge which he himself possessed'—'Full disclosure of all that he knows?' Is it sufficient to say that he has an interest? Is it sufficient to put the principal on enquiry? Clearly not. Upon that point I have before me the case of Imperial Mercantile Credit Association v. Coleman, L.R. 6, H.L. 189, 194. There is a passage in the argument of the counsel for the appellants which, I think, very fairly and properly states the law: 'It is not enough to say that the directors were sufficiently informed to be put upon enquiry. They ought, in such a case, to be driven to enquiry,' for which two cases are cited, Fawcett v. Whitehouse, 1 R. and U. 132, and Hichens v. Congreve, L. R. & U. 150 N. I take it that is a correct statement of the law."

Sec. 6.—Change of circumstances affecting price must be disclosed to owner.

In the case of Laycock v. Lee & Fraser, 1 D.L.R. page 91, it was held that where real estate agents, while acting in a fiduciary relation to the property owner, become aware of a change of circumstances affecting the property, but not known to the owner, which would make wholly inadequate the price at which the owner had previously authorized them to sell, they are bound as agents to disclose the fact to

their principal, and to advise him to seek independent advice before taking from him an option of purchase in their own names at the price he had named.

(See also 1 Halsbury's Laws of England, page 189.)

Sec 7.—Agent must get best price.

In Beable v. Dickerson, 1 T.L.R. page 654, a case where the holder of certain bank shares agreed to pay an agent a commission upon their sale by auction or otherwise. The bank, not liking their shares to be advertised, wrote to the agent offering to find a purchaser for them. The agent accordingly, without the knowledge of the principal, allowed the bank to sell the shares. It was held upon these facts by Lord Coleridge, C.J., that the agent, having allowed the bank, which was not as much interested in getting the highest bid as in preventing the shares being hawked about for sale, to sell without the knowledge of the principal, and not himself having sold the shares, was not entitled to a commission. The point was said not to bear argument. Mr. Justice Grove, in concurring, said that the defendant had voluntarily divested himself of all authority to sell the shares and handed it over to third parties, who had no interest in getting the best possible price for them. Under the circumstances the agent had lost his right to a commission.

Sec. 8.—Where secret profit made by agent through transaction involving sham purchaser, commission forfeited.

H., a broker, undertook to obtain two lots for F., as an investment of funds supplied by F. for that

purpose, at prices quoted and on the understanding that any commission or brokerage chargeable was to be got out of the vendors. H. purchased one of the lots at a price lower than that quoted, receiving, however, the full amount quoted from F., and, by representing a sham purchase of the other lot, got an advance from F. in order to secure it. Held, affirming the judgment appealed from, that H. was the agent of F. and could not make any secret profits out of the transactions, nor was he entitled to any allowance by way of commission or brokerage in respect of either of the lots so purchased.

Hutchinson v. Fleming, 40 Can. S.C.R. 134.

Sec. 9.—Concealment of material fact by auctioneer—Deprivation of commission.

An action of deceit will lie against an auctioneer who, being employed to effect the sale of a piece of property, concealed from his principal a material fact by reason of which concealment the latter sold the property for a smaller sum than he could have obtained if he had been in possession of all the facts, such failure of duty on the part of the auctioneer towards his principal deprives him of any right to the compensation agreed to be paid to him upon the sale being effected: Ring v. Potts, 36 N.B. 42.

Sec. 10.—Collusion of agent with opposite party.

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. Hong Wo (B.C.), 1 D.L.R. 38.

Sec. 11.—Agent may be awarded part of commission only.

In the case of Thordarson v. Jones, 17 Man. L.R. 295, agents claiming commission were held to be entitled to one-half the commission they would have earned if they had effected 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.

Sec. 12.—Two agents employed by same party agreeing to divide commission.

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 effecting the sale or exchange, no commission is recoverable by one of the agents for effecting 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.

Sec. 13.—Agent forfeits right to commission by agreeing to accept money from purchaser in consideration of allowing time for payment of price.

In the case of the Manitoba and North-West Land Corporation and Davidson, 1903 (reported 34 Can. S.C.R., page 255), one Davidson represented to the manager of a land corporation that he could obtain a purchaser for a block of its land, and was given the right to do so up to a fixed date. He negotiated with a purchaser who was anxious to buy but wanted time to arrange for funds. Davidson gave him time for which the purchaser agreed to pay him $500.00. The sale was carried out and Davidson sued for his commission, *not having then received the $500.00.*

It was held, reversing the judgment of the Manitoba Court of King's Bench (1) (14 M.L.R. page

232) that the consent of Davidson to accept the $500.00 was a breach of his duty as agent for the Corporation, which disentitled him from recovering the commission.

This case followed the judgment of Lord Alverstone in the case of Andrews v. Ramsay & Company (19 T.L.R. 620), in which his Lordship says:—"This case turns on the broad principle that where a person was not entitled to say, 'I have been acting as your agent and doing the work you employed me to do,' he cannot recover the commission promised to him. I consider that a principal is entitled to receive his commission."

Attention may here be called to a case distinguishing Andrews v. Ramsay, (1903) 2 K.B. 635, though not strictly in point on the facts, 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, 2 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 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., *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."

Sec. 14.—Result of secret agreement to divide commission with agent of vendor.

(1) An agreement between the agent of the vendor Company and the manager of the Company for an equal division of the commission to be received by the agent on a sale of the Company's real property, though kept from the knowledge of the Company, is no bar to the right of such agent to recover the commission in case the sale is effected, as it places neither the agent nor the manager in a situation where their interests would be in conflict with their duty to their employers in getting the best possible price for the property. Rowland v. Chapman (1901) 1 Times L.R. 669, and Scott v. Lloyd (1894), 35 Pac. Rep. 733, followed. (2) Unless, however, the Company knew of and acquiesced in such an agreement, they could recover the half commission from their manager if he received it, and therefore the agent could have judgment for only half the commission.

Miner v. Moyie, 19 Man. R. 707.

Sec. 15.—Promoters of company—Duty towards company.

When it is once established that promoters are in a fiduciary position, they cannot become vendors to the Company unless they make a full disclosure, so if A. purchases a horse in the name of B., for 100 guineas, and invites someone else to join in the purchase from B. without disclosure of the fact that A. is really the vendor, the sale cannot stand. (See

per Lord Justice James, New Sombrero Phosphate Company v. Erlanger, 46 L.J. Ch. 425, also L.R. 5 Ch. Div. 873), further, on page 118 (L.R. 5 Ch. Div.) Lord Justice James remarks that:—

"A man may buy at any price and sell at any price that he can fairly get for it—it is quite open to a man to buy any property at any price he likes, with the view and in the hope of selling that property to any company that he can get to buy it, if that is the mode in which he intends to dispose of it . . but that has nothing whatever, as it appears to me, to do with the question in this case, which is, whether a man who has so bought at a low price is entitled to a higher price fairly and properly in accordance with the view that the Court of Equity takes of such transactions. . . . (page 120). I can for myself conceive it to make a very great difference indeed in the minds of persons minded to speculate in such matters, whether they were buying a property which Baron Erlanger and his associates were *selling*, or whether they were buying the property which Baron Erlanger and his friends were buying with them."

"Therefore, it is not a technical rule at all which requires that a vendor who in any respect is in a fiduciary position, should tell the exact truth and should say he is the vendor or *state the interest that he has.*"

Sec. 16.—Director purchasing without mandate—Resale to company.

Where a director purchases property without a mandate from the Company, and under such cir-

cumstances as did not make him a trustee for the Company, and thereafter sold the same to the Company at a profit; it was held that whether or not the Company was entitled to a rescission of the contract of re-sale, it was not entitled to affirm it and to, at the same time, treat Director as trustee of the profit made.

Earle v. Burland, L.R. 1902, App. Cas. page 83.

Sec. 17.—Promise to pay share of commission—Sale of land to syndicate—Agent member of syndicate.

In an action by a land agent against another land agent for a share of a commission earned by the defendant upon the sale of land to a syndicate of purchasers, of whom the plaintiff was one:—Held, that the defendant's promise to pay the plaintiff a share of the commission was well proved, on the evidence adduced at the trial, and the plaintiff was entitled to recover notwithstanding his interest in the purchase, and notwithstanding that in his pleading he alleged that one C., who was merely a trustee for the syndicate, was the purchaser, it being immaterial who the purchaser was.

Frank v. Goodman, 14 W.L.R. 406 (Man.).

Sec. 18.—Misrepresentation by agent.

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.

Sec. 19.—Option contract providing for payment of commission.

In the case of Kelly v. Enderton, decided by the Manitoba Court of Appeal in May, 1912, it was held that:—(1) The fact that the payment of a commission, if a sale was made, was provided for in an agreement giving a person an option to purchase property, does not constitute him the vendor's agent. (2) A sale of land will not be set aside on the ground that a third person for whose benefit it was purchased in the name of a stranger, obtained an option giving a firm of real estate brokers the right to purchase it which option he intended to use for his own benefit and concealed from the vendor knowledge of facts tending to enhance the value of the property, where the real estate brokers were not interested in such purchase other than to receive the commission which the vendor had agreed to give them if the property was sold and all negotiations pertaining to the sale to the stranger were conducted by the person for whose benefit it was purchased on his own behalf and not as agent for the brokers.

(3) A sale of land will not be set aside on an allegation that a third person, by falsely representing that he was acting as an agent or employee of a firm of real estate brokers and, mentioning the name of a probable purchaser, obtained from the vendor an option giving the firm the right to purchase his property, though it was his intention to deceive the vendor and to purchase the property in another name for his own benefit. (4) An executed conveyance of land will not, in the absence of evidence of positive fraud, be set aside on the ground that it was taken in the name of a person other than the real purchaser, where it does not appear that the vendor would have refused to sell had he been aware that the vendee named in the conveyance was not the real purchaser. (Bell v. Macklin, 15 Can. S.C.R. 576; and Brownlie v. Campbell, 5 A.C. 925, specially referred to.) (5) Where it was not alleged that one who negotiated for the sale of land which was purchased for his benefit in the name of a stranger, was the vendor's agent, and he and the vendor acted at arm's length, false representations to the vendor that he knew of nothing that would enhance the value of the property, are not sufficient to justify setting aside the sale. (6) The fact that, without the knowledge of the vendor, commissions he had agreed to pay to a real estate agent upon the sale of property the latter had an option to purchase, were paid by such agent to a person who, in the negotiations for the purchase, ostensibly acted as agent for the person to whom the property was conveyed, but really purchased it for his own benefit, will not make him the vendor's agent, or create a fiduciary relation between them.

Sec. 20.—Commission received by agent with acquiescence of principal.

In the case of Culverwell v. Campton, 31 U.C.C.P. 342, it was held that 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, it was held that the principal could not afterward in an action by the agent for his commission set off the sum paid the agent by the purchaser.

In Webb v. McDermott, (5 O.W.R. 566, affirming 3 O.W.R. 644, which reversed 3 O.W.R. 365) it was held that 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 purchaser 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.

In the case of Laycock v. Lee and Fraser, 1 D.L.R. page 91, it was held that to establish an estoppel by ratification of a voidable transaction entered into between parties in a fiduciary relationship, it must be shewn, by clear and cogent evidence, that the party against whom the estoppel is set up elected to proceed with the transaction as valid, notwithstanding the breach by the other party of the fidu-

ciary obligation to disclose certain facts, and that such election was made after having brought to his mind the proper materials upon which to exercise his power of election.

(See also United Shoe Co. of Canada v. Brunet, [1909] A.C. 330, 18 Que. K.B. 511, 2 Can. Ten Year Digest, 3344.)

It was further held in the same case that where an option of purchase has been obtained by real estate agents to themselves from the owner under circumstances which render the same voidable for non-disclosure by the agents of facts brought to their knowledge while they were acting in a fiduciary capacity for the owner, a conveyance made to the agents in conformity with such option may be set aside, together with the option agreement which is impeached; and the conveyance will not operate by way of estoppel or confirmation unless it clearly appears that the owner had, in the meantime, obtained from some source the information and advice which his agents had improperly withheld and, notwithstanding the same, had elected to affirm the transaction.

(For other cases see 2 Can. Ten Year Digest, 2995 *et seq.*)

Sec. 21.—Secret commission recoverable by principal.

In the case of Stapleton v. American Asbestos Co., 6 D.L.R. page 340, decided by the Privy Council, July 29, 1912, it was held:—

(1) Where an agent employed to make a purchase of property for his principal has taken a secret commission from the vendor, the principal is not only

entitled to recover from the agent the amount of such commission, but is released from his obligation to pay a commission to the agent.

(2) Where an agent employed to make a purchase of property for his principal has taken a secret commission from the vendor, the principal is entitled to recover any commission which has been paid by him to the agent before the discovery of the fraud.

In the case of Miller v. Hand, Ontario High Court, 8 D.L.R. page 465, it was held that an agent selling land cannot make a profit for himself at the expense of his principal; and so if the agent fraudulently purchases the land himself, and afterwards makes a profit on the re-sale he is accountable to his principal for the amount of his profit less the commission on such profit.

CHAPTER V.

MISCONDUCT OR NEGLIGENCE OF AGENT.

Introduction.

Sec. 1. Where agent's work is useless through want of skill.

2. Where the work is not altogether useless. *Quantum meruit.*

3. Agent employed to let house liable for negligence.

4. Liability of Real Estate Exchange where wrong information given to subscriber.

5. Liability of house agent for misrepresentations by employee.

CHAPTER V.

MISCONDUCT OR NEGLIGENCE OF AGENT.

Introduction.

An agent is liable for loss or damage for his negligence, wrongful act, or want of skill, and he may, in such cases, be held to have forfeited either the whole, or part of his commission, according to the extent of the loss suffered by the principal.

Where fraud is proven, however, the agent is not entitled to any commission.

Sec. 1.—Where agent's work is useless through want of skill.

The principles of law applicable to claims for commission where the agent's work is useless, were laid down fully by Lord Ellenborough in Denew v. Deverell (3 Camp. 451; 1813). The plaintiff, an auctioneer employed by the defendant to sell for him a leasehold house, made out the conditions of sale, omitting the usual proviso that the vendor was not to be called upon to shew the title of the lessor. Owing to this omission the defendant had been put to great expense, the Court of Chancery, upon a bill being filed by the vendee, holding that the vendor was bound, in the absence of the proviso, to shew the title of the lessor. This he could not do, and the vendee recovered back his deposit. In the present action the auctioneer claimed

2½ per cent. commission upon the sum for which the lease was sold. Evidence was given that it had been the constant usage of auctioneers, when employed to sell leasehold property, to insert such a proviso in the conditions of sale. Lord Ellenborough directed the Jury that, if the plaintiff's services are found to have been wholly abortive, he is entitled to recover no compensation. "By the omission," said his Lordship, "the defendant has the house thrown back upon his hands, with expensive litigation. It is not necessary that the particulars were shewn to him, and that he made no objection to them. I pay an auctioneer, as I do any other professional man, for the exercise of skill on my behalf which I do not myself possess; and I have a right to the exercise of such skill as is ordinarily possessed by men of that profession or business. If, from his ignorance or carelessness, he leads me into mischief, he cannot ask for a recompense, although, from a misplaced confidence, I follow his advice without remonstrance or suspicion." The Jury found for the defendant. . . . Also an auctioneer employed to sell an estate cannot claim commission if the sale becomes nugatory by reason of his default. (Denew v. Arden, 9 Bing. 287.)

Sec. 2.—Where the work is not altogether useless—Quantum meruit.

If the agent's work is not entirely useless, he will be entitled to claim on *quantum meruit* in the absence of any special contract or custom to the contrary. In Hammond v. Halliday (1 C. & P. 352), heard at the Guildhall, 1824, where a broker's claim

for commission was disallowed, Chief Justice Best said:—"It is the broker's duty to draw up the bargain intelligibly, and if he does not, he is entitled to nothing. I agree with the law laid down in the case cited (Haines v. Brisk, 5 Taunt. 521). There the contract was clear and intelligible, and the broker was allowed a compensation, he having done all that he was bound to do. But has this broker done all that he was bound to do? . . . If the defendant has received advantage from the cause of the broker, then the verdict should be for the plaintiff with proportionate compensation, but if the business has been performed in so slovenly a manner that no advantage has been derived from it, then the verdict must be for the defendant."

Sec. 3.—Agent employed to let house liable for negligence.

A house agent employed to let a house is liable for the consequences of negligently procuring an insolvent person as tenant. (Heys v. Tindall, 1 B. & S. 296, 30 L.J.Q.B. page 362.)

His employer also may refuse an improper person: but if he accepts the person offered, with knowledge of his qualifications, he cannot refuse to pay the agent's commission. (Horford v. Wilson, 1 Taunt. 12; Leake on Contracts, page 359.)

It would seem, however, that in Canada, the agent would hardly be held liable for negligence unless the person procured as lessee were shewn to be notoriously insolvent, or of such a character that the agent knew, or should have known, that he would prove an undesirable tenant.

If the agent used ordinary care and skill; and made reasonable inquiries and received satisfactory reports as to the tenant's character and financial status, he could not be held liable even if it were proven that these reports were false and that the tenant was not financially able to meet his obligations at the time he leased the premises.

Sec. 4.—Liability of real estate exchange where wrong information given to subscriber.

In the case of Austin v. Real Estate Exchange, 2 D.L.R. 324, 20 W.L.R. 921 (B.C.), the facts were substantially as follows:—

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 some time 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.

Sec. 5.—Liability of house agent for misrepresentations by employee.

In Whiteman v. Weston ("Times" newspaper, March 15, 1900), the defendant, a house agent, was held liable for breach of duty as an agent in finding

a tenant and in negotiating the terms of tenancy, where, being aware of certain restrictive covenants in the said lease, his clerk represented to the tenant these were "a mere matter of form, and not binding." Upon the plaintiff bringing an action against the tenant to enforce these restrictions, the latter was successful in the litigation, on the ground that he only signed the lease on the representation of the agent's clerk. The defendant was held liable to repay to the plaintiff the whole of the costs incurred by him in the action against the tenant.

CHAPTER VI.

AGENT EXCEEDING AUTHORITY.

Introduction.

Sec. 1. Agent who accepts promise of sale on behalf of party whose name is not disclosed held personally liable.

2. Ratification by principal of unauthorized act must be clearly proven.

3. Agent receiving payment without authority.

CHAPTER VI.

AGENT EXCEEDING AUTHORITY.

Introduction.

An agent must comply with the terms of his employment. If he exceeds his authority he is not entitled to claim commission, unless of course the principal subsequently ratifies the agent's acts.

In a Manitoba case of Haffner v. Grundy (4 D.L.R. 529), it was held that 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.

In the case of Gilmour v. Simon, in which the Supreme Court of Canada confirmed the judgment of the Court of King's Bench for Manitoba (37 S.C.R. page 422, 15 Man. L.R. 205), the agent had by verbal agreement the exclusive right to sell the defendant's lands until the following Monday, December 7th. On December 5th he made a sale to Gilmour, and signed as agent of the vendor a receipt embodying the terms of sale. On the vendor refusing to carry out the sale the purchaser brought an action to compel specific performance of the agreement. The

agent was not given special or express instructions to sell the land and enter into a binding contract. The Court held that what took place in that case was merely "the ordinary case of an owner putting his property in the hands of an agent to negotiate a sale for him. The agent in such case is only authorized to find a purchaser who would accept the vendor's terms, and bring him to the owner. He has no authority to sign a binding agreement in the owner's name."

In the case of Boland v. Philp, decided by the Ontario High Court of Justice, in June, 1912, (5 D.L.R. page 81) it was held that an owner of land cannot be compelled to specifically perform a contract for the sale of such land, made by a person acting without instructions from or the authority of the owner.

Sec. 1.—Agent who accepts promise of sale on behalf of party whose name is not disclosed held personally liable.

In the case of Dagenais v. The Modern Realty and Investment Co., decided by the Superior Court at Montreal in January, 1912, (5 D.L.R. page 315) it was held that where a promise of sale of immovable property is accepted in these words:—"This promise is accepted for our client," and the name of the client is not disclosed at the time, there is a valid sale, and the person accepting the promise becomes personally responsible as the purchaser unless he discloses his client's name and the latter accepts the property.

The Hon. Mr. Justice Demers, in rendering judg-

ment, said:—"The defendant has accepted the promise of sale from the plaintiff. The defendant's written document states that 'this promise is accepted for our client.'"

"This is a case of the *réserve d'elire command* (reserve of electing a purchaser)."

"There is a contract before the purchaser appears. Until the real purchaser appears the party who has stipulated is the acquirer (Beaudry-Lacantinerie, Sale, vol. 1, Nos. 172 and 176). The person who stipulates is bound up till the time he discloses his principal, if he has one, and if he has none, up till the time someone has accepted (Beaudry-Lacantinerie, vol. 1, No. 180.")

"The defendant gave the name of Dunn. It had no mandate from Dunn. Dunn always refused to engage himself and therefore it remains under the obligation, because since there is a sale there must be a buyer."

Sec. 2.—Ratification by principal of unauthorized act must be clearly proven.

In the case of Margolis v. Birnie, decided by the Supreme Court of Alberta in June, 1912, it was held as follows:—

1. An agent is not clothed with authority to make a binding agreement for the sale of land, by letters from his principal, in effect stating his price and terms of payment, and that he would refer all inquiries concerning the land to the agent, and directing that the necessary papers, upon a purchaser being found, be sent him for execution, and that he would come at any time if wanted, where subsequently and before any sale was made by the agent,

the principal wrote the agent not to do anything until his arrival.

2. An agent's unauthorized agreement for the sale of land can be ratified by his principal only by his unequivocal and definite assent to the transaction.

3. Assent by a principal to an unauthorized agreement for the sale of land made by his agent, is not shewn where the former continually repudiated the agent's act, although he at one time said he would sign the agreement, but immediately afterward refused to do so, and refused to accept the money paid by the purchaser on the agreement to the agent.

4. Ratification of an agent's unauthorized agreement for the sale of land does not arise from the fact that the sum paid the agent by the purchaser was, without the principal's knowledge, included in the amount of a cheque given the principal by the agent for money actually due from him, which sum the former returned to the purchaser's agent as soon as he learned of its inclusion in the cheque.

(Hunter v. Parker, 7 M. & W., 322; Brewer v. Sparrow, 7 B. & C. 310; "The Bonita," 30 L.J. Adm. 145, referred to.)

Sec. 3.—Agent receiving payment without authority.

In the case of Bergeron v. Cook, 5 D.L.R. 233, 30 W.N. 968, it was held that where a vendor and the agent who sold land for him agreed that the agent's commission should be paid him in instalments, as the payments of the vendee fell due, the latter is not entitled to credit for payments made to the agent, to apply on his commission, when made without authority from the vendor.

CHAPTER VII.

INTERPRETATION OF CONTRACT.

Introduction.

Sec. 1. Where express contract no agreement inconsistent with its terms will be implied.

2. Agreement to share profits on re-sale of property purchased.

3. Duration of agency when no time fixed by contract — Reasonable time — Verbal evidence.

CHAPTER VII.

INTERPRETATION OF CONTRACT.

Introduction.

The rules governing the interpretation of contracts are laid down by the Civil Code of the Province of Quebec, Articles 1013–1021 inclusive, and as these rules have from time to time been recognized by the Courts of the other Provinces of the Dominion, and are in accordance with the principles of the common law, it would be well to quote them at length.

The Articles in question are as follows:—

1013. When the meaning of the parties in a contract is doubtful, their common intention must be determined by interpretation rather than by an adherence to the literal meaning of the words of the contract.

1014. When a clause is susceptible of two meanings, it must be understood in that in which it may have some effect rather than in that in which it can produce none.

1015. Expressions susceptible of two meanings must be taken in the sense which agrees best with the matter of the contract.

1016. Whatever is doubtful must be determined according to the usage of the country where the contract is made.

1017. The customary clauses must be supplied in contracts, although they be not expressed.

1018. All the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire act.

1019. In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation.

1020. However general the terms may be in which a contract is expressed, they extend only to the things concerning which it appears that the parties intended to contract.

1021. When the parties in order to avoid a doubt whether a particular case comes within the scope of a contract, have made special provision for such case, the general terms of the contract are not on this account restricted to the single case specified.

Sec. 1.—Where express contract no agreement inconsistent with its terms will be implied.

In the case of Blackstock v. Bell *et al.*, 4 S.L.R. 458, the plaintiffs, being real estate agents, were employed by the defendants to sell a certain property at a stated price and within a limited time, for which they were to receive a commission of $1,000. It was apparent, however, that the payment of commission was conditional upon the vendors securing their price, as the whole price was raised to provide an increased commission for the agent. It was also apparent that the time was limited, as when the first date mentioned for sale expired a new agreement was entered into extending the time. The agents mentioned the property to a probable purchaser, but failed to complete the transaction within the time limited. Later the party to whom the agents

mentioned the property purchased direct from the principal on terms different from those upon which it was originally listed. There was no evidence of any fraud or attempt to deprive the agents of their commission. The agents demanded payment of the commission, and this being refused, brought action upon the contract. At the trial the plaintiffs applied for leave to amend by pleading *quantum meruit*, which was refused. The action being dismissed, plaintiffs appealed.

It was held that in order to establish a right to recover upon a *quantum meruit* there must not only be a casual, there must also be a contractual relation between the principal and agent, between the introduction and the ultimate conclusion of the sale; and here, the nature of the contract being of a most special character, the contractual relation was determined upon the date fixed, and no relation thereafter existed upon which such a claim could be based. Boyle v. Grassick (1905), 2 W.L.R. 284, explained. (2) That where there is a contract in express terms between parties, no agreement which is inconsistent with these terms can be implied from the conduct of the parties, and the parties here having entered into a contract providing in express terms as to time of sale and remuneration, no contract inconsistent therewith should be implied.

Sec. 2.—Agreement to share profits on re-sale of property purchased.

An agreement between a purchaser and agent to divide the profits on the re-sale of property pur-

chased does not necessarily create a partnership between the parties of the agreement.

In the case of Donough v. Moore (2 D.L.R. 525, 20 W.L.R. 334, 22 Man. L.R. 79), it was held that where a purchaser of land enters into a contract with a real estate agent, whereby the purchaser is to furnish the purchase money less the commission payable to the real estate agent, and the profits on a re-sale of the property are to be divided equally between them, this does not create a partnership between the parties, and the real estate agent acquires no title or interest in the land in question.

Sec. 3.—Duration of agency when no time fixed by contract—Reasonable time—Verbal evidence.

In the case of Adamson v. Yeager, 10 O.A.R. 477, it was held that 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.

CHAPTER VIII.

IMPLIED CONTRACT.

Introduction.

Sec. 1. Owner dealing with party known to him as Land Agent.
2. Agent's services volunteered—Purchaser not accepted.
3. Evidence of Custom.
4. A Mining Prospector not entitled to commission in absence of agreement.

CHAPTER VIII.

IMPLIED CONTRACT.

Introduction.

A contract by which an agent is employed to buy or sell on behalf of his principal may, as has been stated in the introductory chapter, be implied from the acts of the parties or the circumstances of the case. In this connection it must be remarked that the rules of proof in the Provinces of Alberta and Quebec differ from those recognized in the other Provinces of the Dominion. In the former Province, according to a special statute, an agent has no recourse in the absence of a commencement of proof in writing, while in Quebec the jurisprudence is almost unanimous to the effect that a commencement of proof in writing is required by the code. (See preceding chapter on "Proof of Contract.")

Sec. 1.—Owner dealing with party known to him as land agent.

In the case of Morson v. Burnside (31 O.R. page 438), the defendant, knowing that the plaintiff was a land agent, arranged with him to procure a purchaser for his house and lot at a named price. Through the plaintiff's intervention a proposed purchaser was procured, and a purchase discussed between the owner and the proposed purchaser introduced by the agent.

Subsequently, and as a result of this discussion

and a further discussion between the intending purchaser and the owner alone, a lease was entered into of the premises for three years with a collateral agreement giving the purchaser the option of purchasing within a year, which he exercised.

It was there held that the plaintiff was entitled to his commission from the defendant.

In this case the agent, who was to the knowledge of the owner, a real estate agent, telephoned to the owner and asked him if he was still willing to sell his house and lot for $6,500.00, also telling him that he thought he could find a purchaser for him at that price, to which the defendant replied that his price was still $6,500.00.

In the notes in the evidence, the following question and answer by the defendant appear:—"Q. And he said in addition to that, 'I think I can make a sale for you.' A. I do not know whether he might have said that, but I said I would not take anything less than $6,500,00."

Meredith, C.J., remarks at page 440:—"Upon the facts I think that, especially in the absence of an explicit denial by the defendant, and there is none, the only inference to be drawn from what took place is that the defendant authorized the plaintiff to act as his agent in procuring a purchaser for the property at $6,500.00."

It is to be observed, however, that the owner, in this particular case, dealt with the person introduced by the agent, and did not make it clear to the agent that he wanted $6,500.00 *net to him, exclusive of commission.* Had he done so, or had the purchaser alone gone direct to the owner without mentioning the name

of the agent, it is extremely doubtful whether the Court would have upheld the plaintiff's claim, although the English decisions cited in chap. II., especially that of Bartlett v. Green, go very far.

It may, however, be generally stated that where it is shewn that an owner is willing to benefit by an agent's services, and does benefit by them, the Courts will endeavour to uphold the agent's right to remuneration. In fact it may be said that in such cases the agent will get the "benefit of the doubt," although, for obvious reasons, there has never been a judicial dictum, or even an *obiter dictum*, to this effect.

Sec. 2.—Agent's services volunteered—Purchaser not accepted.

In the case of Calloway v. Stobart, decided by the Supreme Court of Canada, (35 Can. S.C.R., 301).—A land broker volunteered to make a sale of real estate owned by a trading corporation and obtained, from the General Manager, a statement of the price, and other particulars with that object in view. He brought a person to the Manager who was able and willing to purchase at the price mentioned and who, after some discussion, made a deposit on account of the price and proposed a slight variation as to the terms. They failed to close, and the Manager sold to another person on the following day. The broker claimed his commission as agent for the sale of the property, having found a qualified purchaser at the price quoted.

It was there held, affirming the judgment appealed from (14 Man. Rep. 650) (Taschereau, C.J.,

and Girouard, J., dubitants) that the broker could not recover a commission as he had failed to secure a purchaser on the terms specified. Under the circumstances, as the owner did not accept the purchaser produced and close the deal with him, there could be no inference of the request necessary in law as the basis of an obligation to pay the plaintiff a commission. It was also held, per Taschereau, C.J., and Girouard, J.:—That the General Manager of a commercial corporation could not make a binding agreement for the sale of its real estate without special authorization for that purpose.

The judgment of the Supreme Court is, however, a most unsatisfactory one. The Chief Justice held that the manager of the Corporation had no authority to bind the Corporation by an agreement to pay Calloway a commission, but clearly intimated that but for this lack of authority the agent, Calloway, would have been entitled to recover the amount of commission agreed upon, and Girouard, J., agreed with him.

Davies, J., took the view that even though the defendant knew when the plaintiff applied to him for terms that he did go with the object and hope of finding a satisfactory purchaser, that "these facts did not of themselves constitute the plaintiff the agent of the defendants to sell the property, nor from them can there be implied a contract to pay him for his services as a land agent," but the learned Judge goes on to say:—"I agree that if the owners *had under the circumstances accepted the purchaser produced to them by the plaintiff and thus profited by the plaintiff's volunteered services, the case might be*

different, and the plaintiff might recover, but this is not the case here. The owners declined to enter into a contract with the purchaser produced by the plaintiff. They did not, therefore, profit by any work or services performed by the plaintiff."

Nesbitt, J., after citing the facts, remarks:—"I would infer from this an implied contract of agency entitling the plaintiff to be paid on production of a purchaser on the terms demanded by the defendant."

Finally, his Lordship intimates that the purchaser was not willing to comply with the exact terms of the memo. relied upon by the plaintiff; and that it is not, therefore, necessary to discuss the question of the manager's authority.

Sec. 3.—Evidence of custom.

In the case of Williams v. Tuckett ("Times" newspaper, March 9, 1900), tried before Lawrence, J., and a special jury, evidence was given for the plaintiff that a custom existed to pay commission, where the property had been withdrawn from the hands of the auctioneer and sold through another channel, after the auctioneer had advertised it, while the evidence for the defendant was to a contrary effect. His Lordship, in summing up the case to the jury, said that with regard to the alleged custom, it must be notorious to the whole world, and not to auctioneers only, and it must be reasonable. Three auctioneers stated that there was such a custom; on the other hand it was unknown to another auctioneer of equal standing, but the latter said that if what the auctioneer had done had the effect of bringing about the relation of vendor and purchaser,

then he was entitled to commission. That seemed to be consistent with common law and common sense, which sometimes went together. Had the plaintiff made out that the custom existed, and, if not, what was he entitled to? The jury found that no such custom existed, and judgment was entered for the defendant.

Sec. 4.—A mining prospector not entitled to commission in absence of agreement.

In the case of Lea v. Jacobs, decided by the Court of Review at Montreal, in December, 1912, (8 D.L.R. page 447), it was held that where a mining prospector, at the request of a prospective purchaser of mining property, examines a mine and reports favourably thereon, he is not entitled, if the purchaser buys such mine, to remuneration on the basis of a commission on the purchase price *in the absence of an agreement to that effect*, the custom existing in the Cobalt district which allows mining commissions to "grub-stakers" who discover and stake out for another a claim on land of the Government open for discoveries does not extend to such a case.

CHAPTER IX.

PROOF OF CONTRACT.

Introduction.

Sec. 1. Contract between Incorporated Company and Agent.

2. Positive and negative evidence—Powers of Appellate Court.

3. Evidence—When party may contradict his own witness by other evidence.

4. Powers of Appellate Court.

CHAPTER IX.

PROOF OF CONTRACT.

Introduction.

The contract by which an agent is employed to sell real estate on commission may be either expressed or implied, written or verbal. If the contract is in writing, it cannot be varied by verbal evidence, but verbal evidence may be introduced to explain its meaning in case of ambiguity.

In the Province of Quebec it has been held in a number of cases that a contract by which an agent is engaged to sell immoveable property on commission is not a commercial, but a civil contract, and cannot therefore be proven by verbal evidence in the absence of a commencement of proof in writing or an equivalent admission by the defendant. (See Trudel v. Rochon. Paguelo, J., R.J.Q. 8 S.C. page 387; Baillie v. Nolton, R.J.Q. 12 S.C. page 534; Laflamme v. Dandurand, R.J.Q. 26 S.C. 499, confirmed in review; Mainwaring v. Crane, 22 Que. S.C. 67.)

In the recent case of Dudemaine v. Pelletier, inscribed in Review, decided on the 10th February, 1913, R.J.Q. 44 S.C. 239, Judge Charbonneau has, however, contrary to previous precedents, decided that verbal proof is admissible in order to establish the fact that the agent was employed, and the value of his services. The learned Judge regards such an action as being one for services rendered, based on a *quasi* contract, and points out that the agent is as much

entitled to make verbal proof as to his employment and remuneration for selling a property, as the workman who might have made repairs to the same property. It is not clear, however, that an agent would, in such a case, even proceeding upon Judge Charbonneau's interpretation of the law, be entitled to prove, by oral evidence, an agreement to pay a commission in excess of the customary rate. He could, in accordance with this holding, so prove his employment and the value of his services, but it is doubtful if he could, by oral evidence alone, make proof, of a verbal agreement, to pay any amount or rate, however out of proportion to the legal or customary remuneration, in cases where no commencement of proof in writing exists, and the owner denied having entered into any agreement with the agent.

While the weight of authority in Quebec is overwhelmingly in favour of the theory that such an agreement constitutes a civil contract, and against the practice of permitting claims of this nature to be established by verbal evidence alone, Mignault nevertheless expresses the opinion that an immovable may be an object of commerce, and that a contract for the purchase of land to erect buildings on it and re-sell at a profit, should be regarded as a commercial transaction. (See Mignault, vol. 8, page 81, also vol. 6, page 63, note (b).)

In view of modern conditions, which vastly differ from those in existence at the time the code was introduced, the opinion of the learned commentator would seem almost uncontrovertible, but for previous (and ancient) authority, and the jurisprudence based upon it.

In the case of Langlois v. Berthiaume, decided by the Court of Review at Montreal on the 14th May, 1913, the plaintiff's claim was for the recovery of $400.00 as representing five per cent, commission on the sale to one Duquette of defendant's grocery store and outfit. The plaintiff based his action on the following grounds:—

(a) Defendant invoked his services to effect the sale.

(b) On October 31, 1908, and this before telling defendant of the offer obtained, he informed him that a commission of five per cent was to be charged.

(c) Defendant acquiesced by asking the terms of the offer, by acceptance thereof, by urging plaintiff to secure its completion, and by subsequent recognition of the mandate of plaintiff.

The defendant's plea is thus summarized by Chief Justice Davidson who rendered the judgment of the Court:—

"The plea denies the asserted agency, declares that plaintiff was acting as the agent and for the profit of the purchasers; denies notice of five per cent. commission being payable, and asserts that the plaintiff was so fully representing the purchasers that he induced the defendant to accept 70 cents on the dollar. The plea further sets forth that one Allard, agent for Duquette and Falcon, had an interview with defendant, and was told that if the transaction went through he would receive a gift of $100. This amount, it is alleged, was tendered before action, and is deposited with the plea. It is prayed that the tender be declared good, and that plaintiff's declaration be, as to surplus, dismissed with costs."

The judgment of the trial Judge found that defendant had never placed the property in plaintiff's hands for sale; that the acceptance of the written offer did not constitute a mandate in favour of plaintiff; that there was no usage which created under the circumstances liability to pay a commission, and that the plea was established.

The Hon. Chief Justice, in commenting both on the legal and practical aspect of the case, remarked as follows:—

"The Court held that attempted verbal evidence to the contrary was not admissible. We concur in that belief. An owner of property, whether movable or immovable, who makes known, or in answer to inquiries states that he is ready to sell, does not thereby create an agency in favour of any person who chooses to open and complete negotiations for a purchase. Liability to pay commission does not involuntarily result. There must be a contract of hiring, for in these matters 'the person who, of his own motion, concerns himself with the matter, and especially if he seeks to break down the stated price, may well carry on negotioations in the full belief that what he is to receive is without deduction for commission."

"Effort is made to establish that, in largest measure, the custom is not to exact a written contract for payment of commission. Witnesses for the defence swear to the contrary. It is obvious from the general tenor of the evidence that in many cases a writing is not pressed for because of fear that the vendor would refuse to commit himself."

"Suits of this character are plentiful. The largest

proportion of them disclose that the party sought to be charged never imagined that the agent was acting otherwise than on behalf of and in the interests of the buyer."

The judgment in this case is one that all real estate agents, amateur and professional, should "read, mark, learn and inwardly digest."

In the Province of Alberta, verbal proof, in the absence of some note or memorandum in writing signed by the owner or party from whom commission is claimed, is expressly prohibited by Statute. Chapter 27 of the Statutes of the Province of Alberta, 1906, reads as follows:—"1. No action shall be brought whereby to charge any person either by commission or otherwise, for services rendered in connection with the sale of any land, tenements or hereditaments, or any interest therein unless the contract upon which recovery is sought in such action or some note or memorandum thereof is in writing signed by the party sought to be charged or by his agent thereunto lawfully authorized in writing."

At Common Law verbal proof is admissible and will be admitted by the Courts in all the Provinces of the Dominion with the exception of Quebec and Alberta.

As stated above, the judgments in Quebec are conflicting, although the weight of authority is against the admissibility of verbal evidence, in the absence of a commencement of proof in writing, while in Alberta special legislation was introduced to restrict the agents' rights at Common Law.

In actual practice, when the agent's claim is not supported by any written proof, it is extremely diffi-

cult for him to establish his case, when the owner either expressly denies having employed him, or avers that he actually refused his services.

In the Ontario case of Morson v. Burnside, cited at page 111, in which the agent, who relied on verbal evidence, was successful, the owner did not deny the employment in the clearest and most convincing manner, although he did not admit it. In the Quebec case of Dudemaine v. Pelletier, 44 S.C. 239, above referred to, the plaintiff admitted having employed the defendant, but on conditions other than those alleged.

In either of these cases had the defendant been untruthful, and at the same time skilful, the agent's chances of success would have been considerably diminished.

In the case of Bindon v. Gorman, 10 D.L.R. page 431, decided by the Supreme Court of Ontario, in February, 1913, it was held that:—

(1) A verbal agreement to divide profits of transactions in land is valid, at all events where no specific lands are referred to, since such agreement does not deal with an interest in land.

(Gray v. Smith [1889], 43 Ch.D. 208; Re De Nicols, De Nicols v. Curlier, [1900] 2 Ch. 410, R.S.O. 1897, ch. 338, referred to; see also Galbraith v. McDougall, 6 D.L.R. 232.)

(2) An agreement to "divide profits" of transactions in land does not necessarily mean an equal division. (Dictum per Lennox, J.)

Lennox, J., in rendering judgment, said:—"I am asked to pronounce upon the rights, if any, of both the plaintiff and the defendant Murray against the

defendant Gorman; and, if there is judgment against Gorman, to apportion the money between Bindon and Murray. I do not think that R.S.O. 1897, ch. 338, and the various cases referred to, have any bearing upon this case. It is not a question of an interest in land; it is simply as to certain services and a division of profits; and a verbal agreement to divide profits of transactions in land is valid, at all events where no specific lands are referred to.

Sec. 1.—Contract between Incorporated Company and agent.

In cases where a contract for the sale of property on commission is entered into between an incorporated company and an agent, it should be under seal, and specially authorized by resolution of the Board of Directors, unless it is one that the manager is generally authorized to make under the terms of his contract of employment with the company, or one that falls within the ordinary scope of his duties as manager. (See Calloway v. Stobart, cited at page 113).

The manager of a real estate company doing a commission business would no doubt be held to be acting on behalf of the company for the purposes of employing a sub-agent to sell property which had been listed with the company for sale, but, under ordinary circumstances, the manager of an incorporated company must be specially authorized to enter into such an agreement, for it is obviously not within the ordinary scope of a manager's duties to alienate, or contract for the alienation of, the immovable property of his principal. For example, the general

manager of a bank could not, in the absence of proper authorization, validly make an agreement with an agent to sell a building occupied by the bank, on commission.

Sec. 2.—Positive and negative evidence—Powers of Appellate Court.

The defendant had a property for sale which he had placed in the hands of several estate agents. The plaintiff, who was not known to defendant to be a real estate agent, and who had no office as such, went to defendant, ascertained that the property was for sale, and asked the terms, which the defendant gave him. Plaintiff tried to find a purchaser; and, at a subsequent interview, he told defendant that he had found one. In answer to defendant, plaintiff gave the name of the purchaser. Defendant stated the terms as before, but said he would require a larger cash payment than plaintiff had previously understood would be accepted. Plaintiff then said that the purchaser would take the property on these terms, and brought the purchaser to the defendant. The purchaser then proposed that, instead of $10,000 cash, he should pay $5,000 cash and $5,000 in six months—the other payments to be as agreed on—to which the defendant acceded and the sale was carried out. There was some conflict of testimony as to whether defendant understood that plaintiff was working for a commission on the sale, but the trial Judge, in dismissing the action, said that he did so with hesitation, and that all the witnesses had impressed him with the honesty of their belief in their statements:—Held, that the Court on appeal was in

as good a position to judge of the evidence and its effect as the trial Judge, and that the plaintiff was entitled to the usual commission on the sale. Wolf v. Tair (1887), 4 M.R. 59, followed. Where there are two persons of equal credibility, and one states positively that a particular conversation took place, whilst the other positively denies it, the proper conclusion is to find that the words were spoken, and that the person who denies it had forgotten the circumstances. Lane v. Jackson (1855), 20 Beav. 535; King v. Stewart (1905), 32 S.C.R. 483.

Wilkes v. Maxwell, 14 Man. R. 599.

Sec. 3.—When party may contradict his own witness by other evidence.

In the case of Spenard v. Rutledge, decided by the Manitoba Court of Appeal, 17th March, 1913, reported 10 D.L.R. page 682, it was held that where an adverse witness, whether a party to the action or not, is called to prove a case, but his evidence disproves it, the party calling him may yet establish his case by other witnesses, called not to discredit him, but to contradict him on facts material to the issue.

(Stanley Piano Co. v. Thomson, 32 O.R. 341; Roberts v. Reynolds, 23 U.C.Q.B. 560; Ewer v. Ambrose, 3 B. & C. 751; Greenough v. Eccles, 5 C.B.N.S. 786, referred to; Spenard v. Rutledge (No. 1), 5 D.L.R. 649, reversed.)

It was further held, in the same case, that a party at a trial is not concluded by a statement of one of his witnesses brought out on cross-examination, where it appears that the witness, who was opposed in interest to the party calling him, was

called merely to establish certain material facts necessary to enable the party calling him to make out a case. (Per Perdue, J.A.)

(Spenard v. Rutledge (No. 1), 5 D.L.R. 649, reversed.)

Sec. 4.—Powers of Appellate Court.

Where it is evident from an appeal, in a case tried without a jury, that the trial Judge based one of his conclusions entirely upon the inferences which he drew from certain facts to which he referred in his opinion or written reasons for judgment, and the Appellate Court is of opinion that he erred in such conclusions, it may draw from the same facts the inferences which it considers to be the proper ones, and dispose of the case upon its own finding of the effect of the transaction in question. (Edgar v. Caskey, 7 D.L.R., page 45.)

CHAPTER X.

EXCLUSIVE RIGHT OF SALE ("EXCLUSIVE LISTING") DURING TIME SPECIFIED IN CONTRACT.

Introduction.

Sec. 1. Sale after expiration of agreement—No commission payable unless contract revived.

2. Sale after expiration of time specified—Proof of continuing contract.

3. Quebec cases.

4. Purchaser found within time stipulated, but sale only effected subsequently.

5. Contract procured by false representations of agent.

6. Revocation of agency to sell land.

7. Property registered in real estate register—Agreement to pay commission whenever sale takes place.

8. Agent's contract substantially fulfilled although transaction only completed after expiration of time.

9. Sale made after expiration of time specified to party previously mentioned by principal.

10. Exclusive agency for time limited—Property purchased after expiration of time by party found as agent.

11. United States cases.

CHAPTER X.

EXCLUSIVE RIGHT OF SALE ("EXCLUSIVE LISTING") DURING TIME SPECIFIED IN CONTRACT.

Introduction.

An agent may, by the terms of his contract, acquire the exclusive right of sale for a certain specified time.

A contract of this nature (usually referred to as an "exclusive listing") must be in writing. In the case of Mainwaring v. Crane, 22 Que. S.C. 67, it was held by Judge Davidson that in order to vest a real estate agent with the exclusive right of sale of an immovable, and entitle him to a commission, there must be a contract in writing, or, at least, an equivalent admission on the part of the owner, of the existence of a contract. The mere statement of a price which the owner is willing to take, and of a commission which he is willing to pay, does not constitute such a contract.

In the case of Dudemaine v. Pelletier, referred to at page 118 *supra*, it was held that an agent could make verbal proof of his services and the value of such services, but in that case there was no question of a contract granting an exclusive right of sale.

There is therefore no conflict of judicial opinion on this point in the Province of Quebec.

When such a contract granting an exclusive listing exists, the owner cannot sell the property himself, without being obliged to pay the agent the commission

or remuneration agreed upon, but when the time provided by the contract expires, the agent's rights expire with it.

It is not, however, necessary that the sale be fully completed within the time specified, and an agent who succeeds in procuring a binding agreement executed by the purchaser, before the expiration of the time mentioned, will be held to have fulfilled his part of the bargain, and to have earned his commission.

Sec. 1.—Sale after expiration of agreement—No commission payable unless contract revived.

Plaintiff obtained from defendants an option on a mining property, to expire May 31st, 1902, under an agreement by which he undertook to find a purchaser for the property for the sum of $27,000, for a commission of $5,000, but with a provision that in case it might be found necessary to make a reduction in the price of the property, the commission payable to plaintiff should be 20 per cent. on the purchase price. Some time before the expiration of this option, on the 12th March, 1902, plaintiff wrote defendants informing them that he had failed to bring about a sale of the property, but that he had induced a person whose name was mentioned, to join with him in purchasing it, and making a cash offer of $15,000, for the property as it stood, payable in thirty days, and saying, among other things:—"This is only a game of chance as far as I am concerned, for I am now a buyer instead of a seller . . . this is a cash offer . . . and it is all I can afford

or will offer, whether accepted or rejected." The offer was not carried into effect, and defendants having subsequently made an arrangement to sell the property to other parties, plaintiff claimed commission:—Held, that the relationship established between plaintiff and defendants under the first arrangement, which was practically that of principal and agent, was terminated when plaintiff made his offer of the 12th of March, and that plaintiff, having then elected to associate himself with the parties who were proposing to purchase the property, was stopped from claiming remuneration from defendants in connection with the sale made subsequently. Also, that the relationship between plaintiff and defendants having been severed on the 12th March, the burden was on plaintiff to shew, by express evidence, that it was subsequently revived.

Fleming v. Withrow, 38 N.S.R. 492.

Sec. 2.—Sale after expiration of time specified—Proof of continuing contract.

A principal who commits the sale of an immovable to a real estate agent, on commission, for a period of six months, and, after the expiration of that time, renews the mandate, under modified conditions, for a further period of six months, and afterwards, himself sells the property, owes no commission to the agent. The facts (a) that the latter had put up an advertisement board on the property with his address thereon which was not removed after the period of the renewed mandate up to the time of the sale, (b) that the purchaser, whose attention was attracted by this advertisement, first applied to the

agent before dealing with the owner, and (c) that the latter had written a letter giving the agent liberty to sell at a figure clear to himself (the owner), higher than that afterwards obtained, do not imply a continuance of the agency, nor an undertaking to pay a commission, nor do they afford a commencement of proof in writing of such an undertaking.

Donovan v. Hyde, 18 Que. K.B. 310.

Sec. 3.—Quebec cases.

It has been held in a number of Quebec cases that an agreement by which an owner employs a real estate agent to sell certain property within a specified time, for a stated commission, obliges the owner to pay the commission agreed upon, if within the stipulated time, he sells the property himself.

See Q.B. 1889, Carle & Parent, 17 R.L. 122; M.L.R. 5 C.B.R. 451; R.J.Q. 1 S.C. 256; 13 L.N. 122 —Q.B. 1880, Dillon & Borthwith, 3 L.N., 22; 15 R.L. 526—C.R. 1894, Gohier v. Villeneuve, R.J.Q. 6 S.C. 219.

Sec. 4.—Purchaser found within time stipulated, but sale only effected subsequently.

In the case of Massicotte v. Lavoie, decided by the Superior Court of the Province of Quebec (rep. 40 Que. S.C. 258), it was decided that where in an agreement between the owner and an agent, for the sale of a business, for a commission to be paid out of the first money received after completion of the bargain, a covenant that *"the right (exclusive)" is given for eight days*, does not mean that the sale must be

effected but that *a purchaser must be found within that delay.*

So if the agent within two or three days, finds the purchaser who afterwards buys, and acquaints him with the willingness of the owner to sell, he is entitled to his commission, though the principal parties only meet and perfect the transaction, after the expiration of the delay.

Sec. 5.—Contract procured by false representations of agent.

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.)

Sec. 6.—Revocation of agency to sell land.

The plaintiffs, being entitled to a commission for finding a purchaser for the defendant's farm, placed in their hands for sale, consented to forego the commission on the defendant giving them the special sole right to sell the land for a fixed higher price within a time named:—Held, that defendant could not revoke the agency thus conferred, and was liable in damages for having, before the expiration of the time

limited, notified the plaintiffs that he would not sell. A special agreement of agency, founded on a distinct and valuable consideration, cannot be revoked at the will of the principal.

Richardson v. McClary, 16 Man. R. 74.
(Dubuc, C.J., and Mathers, J.)

Sec. 7.—Property registered in real estate register—Agreement to pay commission whenever sale takes place.

In a Nova Scotia case of McCallum v. Williams, (44 N.S.R. 508) 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, 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 effecting 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.

Sec. 8.—Agent's contract substantially fulfilled although transaction only completed after expiration of time.

In the case of Meikle v. McRae, (3 O.W.N. 206, 20 O.W.R. 308) the facts were substantially as fol-

lows:—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 thirty 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.

Sec. 9.—Sale made after expiration of time specified to party previously mentioned by principal.

In the case of Blackstock v. Bell (Sask.), 16 W.L.R. 363, affirming Blackstock v. Bell, 3 Sask. L.R. 181, 14 W.L.R. 519, the defendants listed land with plaintiffs, real estate agents, for sale on specified terms, and within a limited time. At the time of such listing the defendants mentioned the name of a possible buyer. Plaintiffs saw this party, but were unable to make a sale within the time limited. Subsequently this party purchased from the defendants without plaintiffs' intervention, but on more favourable terms and for a less price than mentioned in the memorandum given the plaintiffs. At the time of the original listing, the price was increased to cover the plaintiffs' commission, and defendants refused to allow the commission asked unless an increased price were obtained.

The plaintiffs sued for the agreed commission, or alternatively on a *quantum meruit*:—

It was held that (following Yates v. Reser (1909), 41 S.C.R. 577) as the plaintiffs did not procure a purchaser ready and willing to purchase on the terms stated, they could not recover.

2. That (distinguishing Boyle v. Grassick [1905], 2 W.L.R. 284, the plaintiffs were not entitled to recover on a *quantum meruit*, because the party who

ultimately purchased was not found by the agents, but was mentioned to the agent by the principal.

Sec. 10.—Exclusive agency for time limited—Property purchased after expiration of time by party found by agent.

A recent case on this point is that of Sibbit v. Carson, decided at Ottawa in June, 1912, by Middleton, J., without a jury (reported 22 O.W.R. page 640), in which the facts were as follows:—Plaintiff had sought and obtained an exclusive agency for the sale of the property for a certain limited time. Within this time he endeavoured to interest several prospective purchasers, amongst them one Grant, but was unsuccessful in concluding a sale, and so notified the defendants. A short time thereafter Grant, whose attention had been directed to the property by plaintiff, together with another, purchased the property from defendant, approaching them directly.

Plaintiff claimed the sale had been brought about by his efforts and that he was entitled to a commission.

The action was dismissed with costs by Middleton, J., who distinguished the case on the facts from Burchell v. Gowrie, C.R. (1910) A.C. 250; Stratton v. Vachon, 44 S.C.R. 395; and Rice v. Galbraith, 260, L.R. 43, and remarked as follows:—"Rice v. Galbraith, 260 L.R. 43, indicates that my brother Latchford had present to his mind what seems to me the vital point in the case, when he says, in deciding in the plaintiff's favour there:—'No limit as to time was imposed when authority was given.'"

This decision was confirmed by the Ontario

Divisional Court in October, 1912. Riddell, J., in rendering judgment, remarked as follows:—"I agree in the result; and, speaking for myself, I have no manner of doubt that the owner of property can simply 'sit tight,' knowing that some purchaser is negotiating with his agent, and, seeing the two quarrel, say: 'I have agreed with this agent that if he bring me a purchaser by a fixed time he is to have his commission, and I am not going to interfere; buy or not, just as you please;' and then, when the purchaser fails to complete his contract by the fixed time, deal with that purchaser. It would be preposterous if the liberty a man has to deal with his own property should be limited in the manner which has been suggested. Of course good faith must, in all cases, be preserved."

Sec. 11.—Exclusive agency--U.S. cases.

If the time is limited within which the agent is to find a purchaser, he may receive his commission, though the owner of the real estate sold the same within the time agreed upon before the broker found a purchaser; U.S. cases:—(Lane v. Albright, 59 Ind. 275; Short v. Millard, 69 Ill. 292).

If the contract is in writing, it cannot be varied by parol evidence, but may be explained in certain cases. (See chapter on Proof.)

CHAPTER XI.

EMPLOYMENT OF AGENT FOR A FIXED TIME.

An agent who has no exclusive right of sale, may, nevertheless, be employed subject to the condition that he shall only be paid a commission provided that he succeed in finding a purchaser within a certain time specified by the terms of his contract.

In the case of Counsell v. Devine, 16 W.L.R. 675 (Man.), it was held that 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.

In the case of Aldous v. Grundy, 21 Man. R. 559 (C.A.), it was held that an agent who had 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 upon, was given judgment for half the amount of the commission plaintiff would have earned if the sale had been carried out.

CHAPTER XII.

OPTION CONTRACT.

Introduction.

Sec. 1. Contract—Construction of—Whether agency contract or option.

2. Option contract containing alternative agreement to pay commission.

3. Sale after expiration of time fixed.

4. Duration of option given for certain number of days.

5. Failure to pay purchase price.

6. Option—Continuing contract.

CHAPTER XII.

OPTION CONTRACT

Sec. 1. — Contract — Construction of — Whether agency contract or option.

In many cases the agreement between the principal and agent combines the terms of an ordinary agreement providing for commission and those usually inserted in an option agreement, and the question arises as to whether the contract as a whole must be taken as an agency agreement, in which case the agent could not oblige the principal to sell to him personally on the terms mentioned, or whether it is to be treated as an option in favour of the agent.

A very instructive case, by reason of the nature of the facts passed upon being of almost every day occurrence in the business world, and one therefore well worth considering in detail is that of Livingstone v. Ross, decided by the Privy Council in July, 1901, (1901 A.C. page 327).

In this case the plaintiff Livingstone claimed an option on Ross's property, relying on a letter which read in part as follows:—

Mr. John Livingstone,
105 Temple Building,
Montreal.

"Dear Sirs, Quebec, 23rd August, 1897.

We hereby agree to sell and convey all our rights and titles to lands, timber limits, farms, water powers, slides, joint interest in slides with Maclaren, new saw-mill, store and stores goods, crops, shanty supplies and keep-over, goods, booms, piers, houses, work-

shops, all equipments and appurtenances, horses, cattle, and all utensils and effects of every kind other than saw logs and sawn lumber, the whole situate in the County of Ottawa."

"The whole of the said properties, movable and immovable belonging to the concern, whether described or not, except as aforesaid, for the sum of $130,000. Terms—Cash or equal thereto, with interest thereon or any part thereof at four per cent. per annum; $30,000 to be paid at even time with the execution of the deeds of conveyance and not later than the 15th January next, and not less than $30,000 each year thereafter in semi-annual payments of $15,000 until the whole amount with interest is paid."

"We to have reasonable and sufficient time to saw and move said logs and timber with use of plant and means of handling free of charge, but at our own expense, unless otherwise arranged by sale of such to you."

"You to have reasonable and sufficient time, not exceeding three months from the 1st Sept. next, for correspondence and communication with foreign and near correspondents; and for inquiry, explanation, exploration, and for arrangements for development, the said offer not prejudiced by the continuance of the business as a going business by us, pending the arrangements by you for completing sale.

"Two and a half per cent. commission payable to you on the said sum after completing sale.

"Yours truly,

(signed) Ross Bros.,
In Liq."

"All outlays in connection with logging for next year's business to be borne by purchasers."

It was held that this letter was not an option in favour of Livingstone, but merely constituted an agency agreement.

Sir Ford North in rendering judgment, remarked as follows:—

"It is necessary now to consider carefully the letter of August 23, and ascertain what are the rights of the parties thereunder. The opening words of that letter are, 'We hereby agree to sell and convey' without saying to whom. If the sale was intended to be to Livingstone alone, as he contends, is it credible that when he prepared this letter for Ross to sign he would have omitted to insert here the words, 'to you' which are found in the passage giving him the right to a commission."

"Then there is the provision as to three months' delay from September 1 (which has already been read). What was that for? Obviously to give Livingstone the opportunity of finding at home or abroad responsible persons to examine and explore, and, if satisfied, to purchase the property, and thus earning his commission. Such delay for the purposes mentioned would have been quite unnecessary if Livingstone were to be the purchaser, for he had known the property for years. Then, at the end of that paragraph, is the provision that Ross may carry on the business pending the arrangements by you for completing the sale. What were these arrangements? The finding of substantial persons willing to buy and to comply with the conditions of the letter. If Livingstone had been sole purchaser, the arrangements

he would have had to make would be to complete the purchase, not the sale."

"Again, the passage at the end of the letter, as to the outlay in connection with logging for next year's business being borne by the purchasers, it is entirely inconsistent with Livingstone's contention that he was to be the sole purchaser."

In dealing with that portion of the letter reading: "We (*i.e.*, Ross) to have reasonable and sufficient time to saw and move said logs, but at our expense unless otherwise arranged by sale of such to you," his Lordship says in conclusion:—

"There is one overriding answer to all criticisms upon this passage. In their Lordships' opinion the words, 'the sale of such to you' does not mean to Livingstone personally. Looking at the agreement as a whole, it clearly is not a vendor and purchaser agreement, but an agency agreement; and it would be wholly altering the position of the parties to read it as Livingstone desires us to do."

"The phrase 'to you' means to the persons whom Livingstone might find to buy the property; and it has the same meaning as if the phrase has been 'to your parties, your friends, your syndicate, your purchasers, or the like.' One must not expect to find legal accuracy of drafting in a letter which is the joint production of an accountant and timber merchant; but the meaning is obvious."

In the case of Reddy v. Rutherford, decided by the Superior Court at Montreal (43 S.C., page 289),* the agreement on which the action was based was summarized by the Hon. Mr. Justice Charbonneau as follows:—"The party of the first part

* Confirmed in the Court of Appeal, January 10th, 1914, not yet reported.

(Drummond) agrees to sell to the party of the second part (Reddy), the farm in question, at any time before the first of November, 1909, for the sum of $80,000, $15,000 cash, the balance to be secured by mortgage and to bear interest at 5%. Then comes a special agreement about the buildings, about the partial discharge of subdivision lots, payment of taxes, etc. The only interesting clause is the following:—"And should the said party of the second part (Reddy), dispose of, or sell, the said property during the term of the present option, for a larger sum than eighty thousand dollars, the price to be paid to the said party of the first part (Drummond), such larger sum so obtained by him, the said party of the second part (Reddy), shall be the price that shall appear in the deed of sale from the said party of the first part (Drummond), to the purchaser thereof, and such additional sum, in excess of the price mentioned in the present option, shall be paid to the said party of the second part (Reddy), by the party of the first part (Drummond), out of the first moneys received by him on account of the said purchase price, over and above the said first payment to him of fifteen thousand dollars."

It was held that an agreement (commonly called an option), by which the owner of real estate promises to sell it to a party, at a stated price, within a stated delay, enlarged by a subsequent covenant, and followed by another promise, within such enlarged delay, to sell to a third party at an advanced price, the difference to be shared between the owner and the first promisee, but which is not carried out, does not create the relation of principal and agent

between the owner and the first promisee that entitles the latter to reward or commission, on a subsequent sale made by the former.

In the case of Nixon v. Dowdle, 2 D.L.R. 397, 20 W.L.R. 749, 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.

Sec. 2.—Option contract containing alternative agreement to pay commission.

In the case of Booker v. O'Brien, decided by the Supreme Court of Saskatchewan (9 D.L.R. 801), the agreement entered into between the plaintiff and the defendant was as follows:—

"Moose Jaw, Sask., Jan. 10, 1912.

"For and in consideration of the sum of one dollar cash in hand paid, the receipt of which is hereby acknowledged,

"I, T. R. O'Brien, owner of lots eleven (11) and twelve (12) in block seventy-two (72), being in the

Town of Swift Current, Province of Saskatchewan, do by these presents sell, grant and convey unto John T. Booker, of Swift Current, Sask., an option to buy lots above-mentioned at a price of sixteen thousand dollars on following terms, viz.:—Six thousand dollars cash on execution of contract, five thousand to be paid six months from date of contract, five thousand to be paid twelve months from date of contract, with 8 per cent. interest."

"I also agree to pay John T. Booker one thousand dollars, to be taken out of second payment, as commission provided sale of lots herein mentioned is made not later than Jan. 25, 1912, on which date this option expires at 18 o'clock."

"T. R. O'BRIEN.
"J. T. BOOKER."

"On the 25th January, 1912, the plaintiff, by his agent, sold the property to T. H. McVicar for the sum of $16,000, payable $6,000 cash, balance six and twelve months. He received in cash $300, and it was agreed that the balance of the first payment would be paid 'when papers are executed.' A telegram was sent by the plaintiff to the defendant on the 25th, informing him of the sale, to which the defendant replied, 'Wire received at one, option expired, property not for sale at present.' As a matter of fact, the option had not then expired, and did not until 6 p.m. on that day. The defendant refused to carry out the sale, and the plaintiff brought this action for specific performance, or in the alternative, $1,000 for commission on the sale of the same."

It was held that the plaintiff, inasmuch as he did not buy the lots himself, was not entitled to specific

performance, but that he was entitled to recover the sum of $1,000 commission agreed to be paid by the defendant, on the ground that he actually sold the lots, before the expiration of the option, to a person able and willing to purchase the same on the terms agreed to by the defendant.

In the case of Deschamps v. Goold, decided by the Court of King's Bench at Montreal in April, 1897, rep. 6 K.B. 367 (Quebec), where the owner of real estate offered to sell the same for a price named, to the plaintiff or to anyone whom he might designate, and in the event of the plaintiff effecting a sale he was to receive a commission or rebate of $500.00—the offer to hold good until a day fixed—it was held, reversing the judgment of the Court of Review, that the plaintiff was not entitled to claim the commission unless the vendor was put *en demeure* before the day fixed, to complete his part of the obligation by the tender of a deed with the purchase price; or unless there is proof that the plaintiff, before the expiry of the term, had obtained a purchaser able and willing to fulfil his obligation, and that the inexecution of the sale was due to the unwillingness or inability of the vendor to complete it.

Deschamps v. Goold, 6 K.B. page 367.

Sec. 3.—Sale after expiration of time fixed.

In the case of Baker v. Birchenough, decided by the Hon. Mr. Justice Archibald in the Superior Court at Montreal in May, 1913, dismissing the agent's claim, the defendant had given the plaintiff a seven day option on a property, agreeing that if the latter put through a sale within the specified time, defendant would give him $5,000. Plaintiff im-

mediately gave a five day option to a third party; the third party entered into negotiations with a fourth in an attempt to sell the holdings; at the expiration of the option no sale had been effected, whereupon the fourth party negotiated direct with the defendant —the giver of the option in the first place—and bought the property at a reduction equal to one half of the commission which the plaintiff would have received had he been able to pull off the deal.

It appeared from the evidence submitted that on the 22nd of February, 1912, the defendant gave plaintiff an option to purchase a piece of property, No. 9 St. John Street, for $60,000, $25,000 payable cash, balance bearing interest at five per cent., such option being good for seven days. Defendant gave plaintiff an undertaking to the effect that if he should sell the property within the specified time of the option, he would pay him $5,000. On reception of the option, plaintiff made an offer of the property to Wilson Smith, the latter's option, however, to expire in five days. Plaintiff engaged himself to divide a commission of two and one half per cent. on the sale of the property with R. Wilson Smith. On the 29th February, plaintiff had not procured the sale of the property and visited defendant and asked him for an extension of the option, informing him that he had given an option to R. Wilson Smith. Thereupon defendant wrote a letter direct to R. Wilson Smith, stating that if he would deposit $1,000 and would sign an undertaking to buy the property in question on that same day he would give all necessary time for the passing of the deeds. Defendant gave the letter to plaintiff, and the latter delivered it in person to R. Wilson Smith.

In the meantime, however, R. Wilson Smith had entered into negotiations with Prudential Trust Company with a view of selling the property under the option which he had received from the plaintiff. These negotiations, however, were not concluded, and on the 29th February, R. Wilson Smith notified the Prudential Trust Company that all negotiations were off, as he was no longer in a position to deliver the property.

A couple of days later, the Prudential Trust Company through its attorney, C. A. Barnard, K.C., entered into direct relations with Birchenough, the defendant, and as a result the property was transferred direct from the defendant to the Prudential Trust Company for $57,500.

The Hon. Mr. Justice Archibald held that at the expiration of the time of plaintiff's option, there having been no sale effected, the right of plaintiff to any payment of commission was absolutely terminated. There was, moreover, no proof that the plaintiff had any knowledge of the Prudential Trust Company, or ever in any way negotiated with them or influenced them in any manner towards buying the property. When the actual sale was put through between the defendant and the Prudential Trust Company direct, plaintiff had no rights either legal or equitable to any commission. Hence the dismissal of the action with costs.

Sec. 4.—Duration of option given for certain number of days.

In the case of Beer v. Lea (Ontario High Court), 7 D.L.R. page 436, it was held that an option for a

certain number of days is an option for that number of consecutive periods of twenty-four hours, running from the hour at which the option is given, and expires at the corresponding hour of the last day, and not at midnight of that day. (Cornfoot v. Royal Exchange, [1904] 1 K.B. 40, applied.)

In this case Middleton, J., in rendering judgment, remarked:—"The question as to the duration of the option is both important and interesting. In Cornfoot v. Royal Exchange Assurance Corporation, (1903) 2 K.B. 363, and (1904) 1 K.B. 40, the Court of Appeal determined that thirty days in an insurance policy, whereby a ship was insured for thirty days in port after arrival, meant thirty consecutive periods of twenty-four hours, the first of which began to run upon the arrival of the ship in port."

"I can see no reason why the same meaning should not be attributed to the expression in all contracts. Any attempt to give any other meaning would create difficulty. It is true that in most cases the law takes no notice of the fraction of a day; but this rule has been modified, and the true principle now seems to be that as between private litigants the exact time can be ascertained, when necessary to determine the rights of the parties litigant. See Clarke v. Bradlaugh, 7 Q.B.D. 151, and 8 Q.B.D. 63; Barrett v. Merchants Bank, 26 Gr. 409; Broderick v. Broatch, 12 P.R. 561."

Sec. 5.—Failure to pay purchase price.

An option to purchase for a certain sum, which provided for payment of part of such sum in cash can be effectually effected only by making the cash

payment, and, until such payment, no contractual relationship arises. (Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555, followed; see also Miller v. Allen, 7 D.L.R. 438, post.)

Sec. 6.—Option—Continuing contract.

In the British Columbia case of Beveridge v. Awaya Ikeda & Company (16 B.C.R. 474, 17 W.L.R. 674), 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 p ovided 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.

CHAPTER XIII.

PRINCIPAL'S LIABILITY FOR COMMISSION WHERE SEVERAL AGENTS EMPLOYED.

Introduction.

Sec. 1. Introduction of intending purchaser by agent —Subsequent sale to same person by other agents.

2. Purchaser found by first agent and sale completed by second agent.

3. Miscellaneous cases.

CHAPTER XIII.

PRINCIPAL'S LIABILITY FOR COMMISSION WHERE SEVERAL AGENTS EMPLOYED.

Introduction.

Where several agents are employed by the same principal to sell the same property, the general rule that, in the absence of a special agreement, he who is the "*causa causans*" or the efficient cause of the transaction is alone entitled to the commission, must be applied.

In actual practice, however, these cases almost invariably turn on special facts, and while the jurisprudence seems to be conflicting, there is practically no divergence of judicial opinion in respect of the rules to be applied.

In the Irish case of MacLean v. Fitzsimon, 3 Cr. & Dix CC. 381, 1845, the facts may be stated as follows:—A. desiring to let his house, entered it in the books of two house agents, viz.—B. and C. D. inspected the books of B., who furnished him with a list including the house of A., and thereupon entered into a negotiation with A. which ended in the letting of the house to D. During the negotiations A. stated that C. was his house agent, and the agreement for the letting was prepared by C. The Court held that B. was entitled to recover his commission from A.

In the case of Travis v. Coates, decided by the Ontario Divisional Court in August, 1912, it was

held that a real estate agent is not entitled to any commission, upon the ground that while his services were a *causa sine qua non*, they were not a *causa causans*, where it appeared that he communicated with a prospective purchaser and went to the owner and asked her if she would sell her house and she authorized him to obtain a purchaser upon the usual terms as to commission, and finally an agreement of sale was entered into between the owner and the prospective purchaser who signed nothing and could not, therefore, be compelled to carry out the contract, and he afterwards repudiated the contract, and the owner went to the agent she had first employed and he, after having been approached by the wife of the purchaser aforesaid, finally brought about a sale of the property to him.

(Imrie v. Wilson, 3 D.L.R. 826, 3 O.W.N. 1145, affirmed, 3 D.L.R. 833, 3 O.W.N. 1378; Barnett v. Isaacson [1888], 4 Times L.R. 645; Taplin v. Barrett [1889], 6 Times L.R. 30, specially referred to; Wilkinson v. Alston [1879], 48 L.J.Q.B. 733, 41 L.T.R. 394, distinguished. See also annotation to Haffner v. Grundy, 4 D.L.R. 531-560.)

In Gillow v. Lord Aberdare (1892), 9 Times L.R. 12, the agent was to let a house or sell the ground lease. He did procure a lessee in one T. for the same, but T. refused to deal with him for the ground lease, and dealt with another agent. It was held by Hawkins, J. (8 Times L.R. 676), that he could not recover, and this was sustained by the Court of Appeal. Lord Esher, M.R., said (9 Times L.R. 12):—"The sale . . . had not been brought about by the introduction of the plaintiffs, with whom . . . T.

. . . had refused to have any dealings, but had been the result of independent action on his part in going to another firm of house agents. . . ."

In the case of Taplin v. Barrett (1889), 6 Times L.R. 30, the defendant employed the plaintiffs, a firm of house agents, to sell a house on commission. The plaintiffs introduced S. as a possible buyer, but he made certain stipulations and did not complete the purchase. Then the defendant put the property in the hands of a firm of auctioneers, who put it up for sale by auction, and S. bought it at the auction sale. The County Court Judge held that the plaintiffs could not recover, and the Divisional Court sustained that view, saying, per Wills, J., "that it was doubtful whether but for the auction S. would have bought at all," and holding that the only right of action the plaintiffs had was for revocation of authority. Mathew, J., points out that the contention of the plaintiffs would render the defendant liable for two commissions, one to the plaintiffs and the other to the auctioneers.

In the cases of Walker & Webb v. MacDonald and Graham v. MacDonald, which were tried together before the Ontario High Court of Justice, Falconbridge, C.J., in September, 1912, reported 6 D.L.R. page 501, in which special actions were taken by two different parties, claiming commission from the defendants, it was held:—

(1) Where two actions are brought by two separate land agents, each claiming as against the vendor, commission on the same sale of the same property, the right to commission is his who was the *causa causans* or the efficient cause of the sale to the exclusion of the other agent so claiming.

(Burton v. Hughes, 1 Times L.R. 207, specially referred to.)

(2) Where a purchaser of real estate, in assuming to make a deal entirely without the intervention of the vendor's agent, misrepresents to the vendor that the vendor's agent has assigned no commission on the sale, and thereby misleads the vendor and induces him to lower his price by the amount of the commission which would otherwise be payable, in an action subsequently brought by vendor's agent against the vendor (adding the purchaser as a third party) establishing the claim for commission, the purchaser may be held bound to make good to the defendants the amount of such commission.

In the case of Sager v. Sheffer, (2 O.W.N. 671, 18 O.W.R. 485), it was held that 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, 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 effecting 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.

In the case of Scott v. Moachan, 4 D.L.R. page

372, 21 W.L.R. page 864, it was held that the plaintiff, a real estate agent, in whose hands the defendant had placed property for sale, but not exclusively, could not recover commissions from the latter on a *quantum meruit* where a purchaser was found by another broker purporting to act independently of and without the plaintiff's assistance, although the attention of the other broker, to whom a commission had been paid by the defendant for effecting the sale, had been called to the property by the plaintiff, but without notice from the latter to the owner that such other broker had been referred to the property by him, was paid a commission by the defendant on the sale being made.

Sec. 1.—Introduction of intending purchaser by agent—subsequent sale to same person by other agents.

It was held in the English case of Burton v. Hughes (17 T.L.R. 207) that where a house agent, with the consent of the vendor, introduces a purchaser, he is entitled to his commission, even if the sale be wholly effected through other agents, and would have been brought about without his intervention.

The purchaser testified at the trial that he should have purchased the lease if his attention had never been called to it by the plaintiff at all, and that, as a matter of fact, the intervention of the latter had not influenced him in any way in purchasing it, and it was also proven that the house was purchased at a much lower price than that quoted to the plaintiff.

Mr. Justice Mathew, in giving judgment, said:—"That it was proved that the plaintiff has told the

defendant in April, 1883, that he knew of somebody likely to buy his house. The defendant has expressed his willingness to sell, if he could first find himself a house in the country. The plaintiff had, in finding the purchaser, done all that he had undertaken to do for the defendant, who ought to have understood that what he had been doing had amounted to an agreement with the plaintiff to pay him a commission on the sale of the house if it were sold to anybody through his (plaintiff's) intervention."

In the case of White v. Lucas (3 T.L.R. page 516), in which a sale was made by a second agent, and plaintiff's claim for commission was dismissed, although he had in the first place apparently rendered certain services, and handed one of his cards to the person who finally purchased, no general employment or retainer of services was proven to the satisfaction of the Jury.

In fact it was shewn that the owner *had refused to allow the plaintiff to enter the property in question on his books*, and merely named a certain price which he would be willing to accept.

The judgment in this case is not, therefore, in conflict with that of Burton v. Hughes, above cited.

In the case of Herbert *et al.* v. Bell ("The Locators" v. Bell), 8 D.L.R. 763, 22 W.L.R. 884, in an action by the plaintiff as real estate agent for commission for alleged sale of lands setting up a written authority to them from the owner with a provision worded as follows:—"In case you find such a purchaser, or in case you bring the property directly or indirectly to the attention of anyone who becomes a purchaser upon any terms whatsoever, you are to

be paid by me a commission of five per cent." it was held that such a provision means that the agents must bring the property, directly or indirectly, to the attention of some person who shall thereby become a purchaser; and where the agents actually brought the property to the attention of a third party who, however, did not thereupon agree to buy, but on the contrary gave up all idea of buying, yet subsequently took the matter up afresh with another agent and purchased, the plaintiffs, as a matter of law, had nothing to do with effecting such sale and are not entitled to any commission. (See also annotation, 4 D.L.R. 531.)

Sec. 2.—Purchaser found by first agent and sale completed by second agent.

A typical case in this connection is that of Murray v. Currie (7 C. & P. 584), which was decided in 1836. The plaintiff and B. and other land agents were severally employed to sell an estate for the defendant. A Mr. Prothero called upon A., the plaintiff, to enquire after another estate, and was told by him that it was not in the market, but that the defendant C.'s estate was to be sold. He then took from the plaintiff particulars of the estate, and, afterwards meeting B., the other agent, negotiated with him the terms of the purchase, which was afterwards completed. The plaintiff brought an action for commission on the sale, viz., 2 per cent. on the purchase money payable by usage to the agent who found the purchaser. Several land agents were called to prove a usage that where several agents were employed the person who found a purchaser

should have a commission of 2 per cent., whether he did anything more towards the completion of the purchase or not; but they knew of no instance where one agent had found the purchaser and another had completed the purchase, but only instances where the completion had been by the vendor himself.

Lord Denman directed the jury that the real question was whether, in point of fact, the plaintiff found the purchaser, *i.e.*, the person who ultimately became the purchaser, and that, if they found this in favour of the plaintiff, they should say what compensation he was entitled to, as they were not bound to give the amount of commission, though the amount usually paid was some evidence to regulate their decision. The jury awarded a smaller sum than the commission claimed.

(Evans on Commission Agents, page 112.)

Sec. 3.—Miscellaneous cases.

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 of 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. Hees, 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.

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.)

CHAPTER XIV.

OWNER'S LIABILITY FOR COMMISSION TO SUB-AGENT.

An owner may be obliged to pay commission, under certain circumstances, to a sub-agent employed by his agent. The general rule as to delegation of authority is clearly stated by Lord Thesiger in the English appeal case of de Bussche v. Alt. 8 Ch.D. at page 310, as follows:—

"As a general rule, no doubt, the maxim *delegatus non potest delegare* applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim when analyzed merely imports that when an agent cannot without authority from his principal, devolve upon another, obligations to the principal which he has himself undertaken to personally fulfil; and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed 'a sub-agent' or 'substitute' (the latter of which designations, although it does not exactly denote the legal relationship of the parties, we adopt for want of a better, and for

the sake of brevity), and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute; and that when such authority exists, and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself."

While it is clear that an agent employed to sell real estate, who employs a sub-agent to effect a sale, is entitled on the completion of the sale to claim his commission, although the sale be effected by the sub-agent, interesting questions may arise as to the liability of a principal towards a third party employed by his agent.

As a good example of such may be cited the case of Westaway and Greaves v. Close (7 D.L.R. page 849), decided by the District Court of Saskatchewan in June 1912,, in which the facts were stated by the presiding Judge as follows:—

"The defendant, Henry Close, authorized his

brother, C. W. Close, to sell for him the said land, and agreed to pay him for such service the sum of $100. C. W. Close went to the plaintiffs and listed the land, and at the same time stated to the plaintiffs that the land belonged to his brother, and that they would be paid for their services the sum of $1 per acre commission. The plaintiffs never saw the defendant himself, and all negotiations were made with C. W. Close, and he signed the listing book for the sale of the property. The plaintiffs introduced to C. W. Close, one Gordon, who afterwards purchased the land from the defendant. Gordon was introduced to the defendant by C. W. Close, but he (C. W. Close) did not inform the defendant that he had listed the property with the plaintiffs, or that any arrangement with respect to $1 an acre commission was at any time made. The defendant, in his evidence, admitted that he had inquired from his brother, C. W. Close, how he happened to meet Gordon, and was informed that the introduction came from the plaintiffs, and the defendant said that he at once notified his brother that he was not going to be responsible for any commission other than the $100, which he afterwards paid over to C. W. Close."

The Hon. Mr. Justice MacLean, in the course of his judgment dismissing the plaintiff's action, tersely expressed the doctrine to be applied in cases of this nature in the following words:—

"A person may make an arrangement with any person to sell his property, but that should not convey the right to the third person to bind his principal to give terms other than those originally agreed to, unless it can be clearly shewn that he acquiesced and

ratified what the said party did after full knowledge of all the facts."

In the case of Edgar v. Caskey, decided by the Supreme Court of Alberta in October, 1903, (7 D.L.R. page 45) the Hon. Mr. Justice Walsh remarked at pages 53-54:—"While the general rule appears to be that there is no privity of contract between a principal and a sub-agent and that a right or a duty arising out of a contract between an agent and a sub-agent can only be enforced by or against the parties to it, it is equally true that the agent may under certain circumstances make another the agent of his principal." . . . "The business of selling real estate is one in which the right of an agent to employ another to dispose of the same might reasonably be presumed. It is common knowledge that this is a very usual method employed by real estate agents in this country."

In view of the jurisprudence it may be taken as a general rule that an owner who lists property for sale with an agent may be held liable for the amount of commission agreed upon towards the agent he employs, whether the sale be effected by the agent so employed or by a sub-agent engaged by the latter, but the principal cannot be held liable for any greater amount or higher rate of commission promised by his agent to the sub-agent unless he ratifies the acts of his agent either expressly or tacitly.

CHAPTER XV.

JOINT AND SEVERAL CHARACTER OF MANDATE.

Article 1712 of the Civil Code of the Province of Quebec provides that when several mandatories (or agents) are employed for the same business, they are jointly and severally responsible for their acts of administration in the absence of a stipulation of the contract. Article 1726 applies the same rule to mandators. It provides that, if the mandate has been given by several persons, their obligation towards the mandatary is joint and several.

Article 2002 of the Code Napoleon contains a similar disposition except that it exacts that the mandate, in order to have this effect, must be given by several persons for the same purpose. According to Mignault, this condition should be read into the interpretation of the article of the Quebec Code, for if mandators, or principals, whose interests are not the same, employ a mandatary or agent, to perform for them distinct and separate acts, there would really exist as many mandates as there are mandators.

The decisions of the Quebec Courts on these articles of the Code are, however, conflicting. In the case of Doutre v. Dempsey, (9 L.C.J. 176; 1 L.C.L.J. 65; 14 R.J.R.Q. 300) Judge Monk decided in 1865 that no joint and several liability existed with regard to a number of parties who had signed a proceeding, employing an advocate, for the payment of the fees due to the latter.

Judge Routhier, however, decided in the case of Frenette v. Bedard (12 L.N. 362; 13 L.N. 362; 13 L.N. 266), that clients defended by an advocate, in the same case, by one and the same defence, should be held jointly and severally liable for the payment of the advocate's fees.

This opinion is approved of by Mignault (vol. 8, page 55), and the Court of Appeal in the case of Auger v. Cornellier (R.J.Q. 2 Q.B. 293; 16 L.N. 184), decided that persons who authorize the use of their names as provisional directors of a company, in the course of formation, and who sign the petitions required to obtain its incorporation by Act of Parliament, are jointly and severally liable for the payment of the fees of the solicitor whose services are engaged by the promoter of the company.

The joint and several character of the liability of several mandators towards an agent employed for the same business has also been laid down in the cases of Malo v. The Land and Loan Company, (R.J.Q. 5 S.C. 483) and Tasse v. The St. Lawrence and Adirondack Railway Company (R.J.Q. 6 S.C. 301, Court of Review).

In the first case it was held that an arbitrator appointed by the parties was the mandatary of each one of them and that the parties were jointly and severally liable to him for his fees and disbursements, and in the second case it was held that a clerk employed in connection with expropriation proceedings was entitled to exercise a joint and several recourse against the Railway Company and the party expropriated for his fees.

CHAPTER XV.

SPECIAL CONDITIONS LIMITING AGENT'S RIGHT TO COMMISSION.

Introduction.

Sec. 1. Commission payable only on payment of purchase price—Cancellation by vendor—Effect on plaintiff's right to commission.

2. Contract to effect sale at fixed price—Sale at lower price.

3. Condition that money be deposited in bank pending proof of title—Not complied with by deposit in name of purchaser.

4. Commission payable on completion of sale.

5. Condition requiring security not complied with.

6. Effect of condition providing for net price to owner exclusive of commission.

7. Owner to receive net amount specified in agreement.

8. Commission only on instalments actually paid.

9. Condition that agent should forfeit balance of commission due if balance of purchase price not paid on certain date—Agent held entitled to commission where balance of purchase price subsequently paid.

10. Additional commission promised if contract completed within time fixed.

11. Offer to purchase within limited time withdrawn on expiration of time before acceptance of owner communicated to purchaser.
12. Terms of contract not complied with although price acceptable to purchaser.
13. Variation of terms of agreement—*Quantum meruit* allowed.
14. Commission payable "on sum obtained by private treaty or Trial by Jury."
15. Contract to sell subdivision—*Quantum meruit* where contract cancelled before actual sale made.

CHAPTER XV.

SPECIAL CONDITIONS LIMITING AGENT'S RIGHT TO COMMISSION.

Introduction.

As has been stated in the introductory chapter, an agent's right to commission, apart from, and in addition to, the rules which would apply in the case of general employment, may be restricted, and provided for, by special conditions contained in the agreement between the parties, and these conditions, when not contrary to law or public order, must be substantially complied with, before the agent can claim commission or remuneration for his services.

Sec. 1.—Commission payable only on payment of purchase price—Cancellation by vendor—Effect on plaintiff's right to commission.

In the case of McCallum v. Russell, decided by the Saskatchewan Court of Appeal (rep. 2 Sask. page 447) the defendant listed certain land with plaintiff for sale on certain terms, and a commission of $200 was agreed upon. Plaintiff sold the land to a purchaser who could not pay the agreed amount as deposit, but the defendant accepted the purchaser and signed an agreement to sell. At the time it was arranged that the payment of the plaintiff's commission should be postponed until the purchasers could get a loan to pay for the property or sell it. Subsequently no payment being made under the

contract other than the deposit of $50, the vendor cancelled the contract.

It was held on these facts that the plaintiff, having secured a purchaser, who was willing to purchase for the price agreed and who was accepted by the defendant, was, in the absence of any agreement to the contrary, entitled to his commission.

That, even if the time of payment of the commission had been postponed, yet, as the defendant had by his action in cancelling the contract made it impossible for the purchaser to complete his contract, so that the plaintiff would be entitled to recover, notwithstanding the arrangement for postponement.

The terms of the agreement, in so far as they were material to this action, upon which the property was listed, are as follows:—The "rate of commission to be $200, paid out of the deposit, viz. city, town or village property; five per cent. of purchase price. Farm lands, per acre, $1." Therefore, the commission agreed to be paid was $200.

The terms of sale were: "Price $4,200 cash payment, including the above deposit, $500, or $50 per month" (*sic*). Between the figures "$500" and the words and figures "or $50 per month" the words "balance as follows" appear in print.

The remarks of Wetmore, C.J., dealing with the legal effect of the cancellation of the agreement of sale by vendor upon the agent's right to commission, are as follows:—"I am of opinion that, the defendant having signed under such circumstances, and the Judge having found that he so signed and there being evidence to warrant that finding, that the case is brought within Lindley v. Lacey (1864), 17

C.B.N.S. 578, and if the *status quo*, as a result of the defendant signing that agreement under such circumstances had continued, I am inclined to think that the plaintiff would not be entitled to recover the amount of the balance of his commission until Smith had got a loan or sold the property. But the difficulty I find is that the defendant afterwards cancelled the agreement of sale. Now, it seems to me, under such circumstances, that being his own act, he cannot say to McCallum, 'It is true you earned your money, but you agreed with me not to press for payment until one of certain events happened, and I have rendered it impossible for either of these events to happen by cancelling the agreement of sale which you brought about, and therefore I am not bound to pay you anything for your services.' I am of opinion, therefore, that the defendant, having so cancelled the agreement of sale and put it out of Smith's power to raise the means contemplated for paying the plaintiff, that the defendant is bound to pay the commission."

Judge Lamont dissented chiefly on the ground that the purchaser had abandoned the property, and that the plaintiff had failed to shew that the condition upon which he was to receive his commission would have been fulfilled but for the defendant's act.

The judgment of the majority of the Court is, however, in accordance with the general principles laid down by the jurisprudence. The vendor had an agreement which was legally enforceable against Smith and he made no attempt to enforce it. Had he done so and had he been then unable to collect from Smith, he would not have been obliged to pay commission.

It seems, therefore, hardly reasonable to hold that the agent must prove that *the purchaser would have carried out the contract but for the cancellation* in order to be entitled to commission, and in any case the mere abandonment of the property by the purchaser is not in itself proof that the contract could not have been enforced against him.

Sec. 2.—Contract to effect sale at fixed price—Sale at lower price.

An interesting Canadian case on this subject is that of Munro v. Beischel, decided by the Saskatchewan Court of Appeal in July, 1908. The defendant in the Court below (Munro) employed the plaintiff (respondent) to find a purchaser for certain lands at a certain price ($28.00 per acre) clear of all commission. The land was subsequently sold to a purchaser found by the principal, but at a price less than that at which it was listed. The agent performed some services in connection with the sale, but was unable to sell at the price authorized.

It was held (Lamont, J., dissenting), that as the agent was not instrumental in bringing the vendor and purchaser together and as his employment was of a special character, namely, to sell the land at a specified price, which he was unable to do, he was not entitled to a commission or to recover for his services upon a *quantum meruit.*

Per Lamont, J., that as the agent had performed certain services in connection with the sale, which services were recognized by the principal, he was entitled to recover on a *quantum meruit* the sum of $75.00 for trial expenses.

The contract in this case was embodied in a letter which read as follows:—"I enclose you herewith description of my home farm which I am offering for sale. I will take $28.00 per acre net to me. This gives you $2.00 per acre to work on, which would make you a commission of $1,280.00. Should have prospective buyer for same bring him over, and I will make a few extra inducements to close deal."

The Chief Justice Wetmore comments on the terms of this letter and the facts generally (at page 243–244) as follows:—"I am of opinion that the plaintiff is not entitled to recover anything in this action; first, because he was not instrumental in bringing the parties together or in bringing about the sale, as I have before stated; secondly, his employment was by virtue of a special contract, and was of a character which prevented his recovering anything at all, either by way of commission or compensation, or on a *quantum meruit*, unless he obtained a purchaser on the terms specified in that letter. It is clear he did not do that. He did not secure a purchaser for an amount exceeding $28.00 an acre, and by that letter he was only to be paid for his services what he could sell the land for over and above that price; at any rate unless some new contract was made, either expressly or by implication, which would entitle him to sell at a lower figure, and that was not the case here.

"Here the defendant writes the plaintiff that he will take $28.00 an acre for his land, that that would give the plaintiff $2.00 per acre to work on, and on which he could make a commission of $1,280.00. I am of opinion that he practically states in a letter

of that sort: 'I will not give any commission unless I can get my property sold to nett me $28.00 an acre.' I am quite aware that that is at variance with what was laid down in Aikens v. Allen, 14 Man. L.R. 549. I am free to confess, however, with all due deference to the opinion of the learned Judges who decided that case, that I concur in the view expressed by Perdue, J., I may just add that I do not feel it necessary to discuss this question any further, because I am of opinion that so far as this case is concerned the matter is disposed of by the first ground upon which I put my judgment. In my opinion the judgment of the learned trial Judge should be reversed, and judgment entered for the defendant with costs."

This case is distinguished from that of Toulmin v. Miller, on the ground that the facts shewed clearly that the principal was not willing to accept any sum less than that named. Whereas in Toulmin v. Miller the price quoted was merely mentioned as a basis of negotiations.

In support of this distinction the Chief Justice quotes the remarks of Lord Watson in the same case, which were as follows:—"On the other hand, suppose a proprietor goes to an agent for the purpose of letting and instructs him to let. The agent then says, 'I think I can find you a purchaser; will you not sell?' To which he replies, 'I will sell for $10,000, not a sixpence less; if you can get that sum, sell; if not, let the property.' I am not prepared to hold that an arrangement expressed in these or in equivalent terms would confer a general employment to sell upon the agent. In my opinion it would merely

give him a limited mandate to sell for the price specified, instead of letting." (See Beale v. Bond, 1901, 84 L.T. 313; Barnett v. Isaacson, 1888, 4 Times L.R. 645; Lott v. Outhwaite, 1893, 10 Times L.R. 76; Green v. Mules, 1861, 30 L.J.C.P. 343; Toulmin v. Miller, 1887, 58 L.T. 96; Martin v. Tucker, 1860, 1 L.T.R. 655; Sumpter v. Hedges, 1898, 1 Q.B. 673; Alder v. Boyle, 1847, 4 C.B. 635.)

Sec. 3.—Condition that money be deposited in bank pending proof of title—Not complied with by deposit in name of purchaser.

In the case of Yates v. Reser (1 Sask. 247), the provision of one of the documents authorizing the plaintiff to procure a purchaser for the land was that $4,000 was to be "deposited with the Union Bank at Swift Current on or before August 22nd, 1906, pending arrival of clear title." That sum was paid into that Bank on the 22nd August, but it was deposited in the name and to the account of Murray and Hein, the proposed purchasers. The purchasers subsequently instructed the Bank to hold the money on deposit in Reser's name in accordance with the contract, but Reser refused to complete the sale on the ground that the deposit had not been made within the time specified.

It was held (1) (*per curiam*), that when land is placed with an agent exclusively for sale upon specified terms, the agent is not bound to do more than find a purchaser and is not required to complete the sale, but is entitled to recover his commission when he finds a purchaser who is able and willing to purchase the land on the terms specified if the

sale is not completed by reason of the refusal of the vendor to carry it out.

The Court being equally divided, the judgment of the trial Judge holding that the condition as to the deposit had been substantially complied with, and awarding the agent his commission, was confirmed.

(2) Per Johnstone and Lamont, J.J., that the evidence indicated that the proposed purchasers were ready and willing to complete the sale and to comply with the terms of the vendor, who was not justified in refusing to complete the sale and the agent was therefore entitled to recover his commission.

(3) But per Wetmore, C.J., and Prendergast, J., that, the terms of sale requiring the deposit of a certain sum of money in a certain Bank "pending arrival of a clear title," the deposit of the sum named to the credit of the *purchaser* in the Bank was not a sufficient compliance with the terms of the principal, who was justified in refusing to complete.

Judge Lamont in rendering judgment in the agent's favour expressed himself as follows:—"The learned trial Judge found as a fact that the plaintiff did procure a purchaser both able and willing to complete the sale, and that the sale fell through because the defendant would not complete. And a perusal of the evidence satisfies me that the finding was justified. With great deference to those who hold the contrary view, I must say that the fact that the money was deposited in the names of the purchasers does not appeal to my mind as one of vital importance when considered in the light of the other facts, that the purchasers had instructed the plaintiff to change the contract to comply with Reser's demands, that they

believed when depositing the money that they were fully complying with his demands and that immediately on being notified that he expected the Bank to have instructions to pay it over to him on production of a clear title, the necessary instructions were wired to the Bank. The plaintiff in my opinion has substantially performed all that he undertook to do. He procured a purchaser able and willing, even anxious to complete, and should be remunerated for his services in the amount awarded by the learned trial Judge."

This judgment was, however, reversed by the Supreme Court of Canada (S.C.R., vol. 41, page 577), Idington, J., dissenting, on the ground that the condition as to the deposit had not been properly complied with before the expiration of the stipulated time, and the agent was himself to blame for the omission.

Sec. 4.—Commission payable on completion of sale.

A dispute having arisen as to the plaintiff's right to a commission on the sale of certain property belonging to the defendant, the former claiming $5,000, the latter denying liability for anything, the parties compromised at $2,000, and the defendant gave the plaintiffs a letter which was in part as follows:—"In connection with the sale of (*description*) from Mrs. Cordingly and myself to John A. Lock *et al.*, I hereby agree that, on the *completion of the said sale*, I will pay your firm a commission of $2,000. . . . This amount to be paid on *completion of the deal.*" The purchaser had previously made a deposit of $2,000, but had not signed a formal agreement to

purchase. A few days afterwards the formal agreement was executed by all parties and a further payment of $8,000 was made. The purchaser made default in payment of further instalments of the purchase money, and the defendant took back the land, retaining all money paid, and released the purchaser from further liability. The defendant resisted the action for the $2,000 commission on the ground that the sale had not been completed within the meaning of his letter. He had, however, on several occasions after the agreement had been executed, asked time for payment of the $2,000:—Held, that, interpreting the letter in the sense in which the parties intended the words to be understood at the time, as gathered from the document itself and the surrounding circumstances and the defendant's promises to pay, what the parties meant by the words "completion of sale" and "completion of the deal" was the execution of a binding agreement of sale, and the plaintiffs were entitled to recover.

Haffner v. Cordingly, 18 Man. R. 1.

Sec. 5.—Condition requiring security not complied with.

In an action by land agents to recover a commission as remuneration for their services in procuring a purchaser for land placed by the defendant in their hands for sale:—Held, upon the evidence, that the plaintiffs had not procured a purchaser upon the defendant's terms, which included the giving of security by the purchaser if only $1,000 was paid in cash.

Miller v. Napper, 14 W.L.R. 335 (Sask.)

Sec. 6.—Effect of condition providing for net price to owner exclusive of commission.

In the case of Chappell *et al.* v. Peters, decided by the Supreme Court of Saskatchewan in January, 1913, (rep. vol. 9, D.L.R., page 584) the question of special employment as distinguished from general employment, is discussed at length by Judge Lamont.

The "listing" upon which the plaintiffs relied and which described the property and stated the price, also contained the following clause:—

"I hereby agree to place the above described land with the International Realty Company (plaintiffs) for sale for the next two months, and thereafter to give ten clear days' notice in writing of withdrawal or increase or decrease in price. Their commission to be above quoted price."

It was further expressly agreed that the defendant should be at liberty to sell the land either by himself or other agents, and the commission to the plaintiffs was to be one dollar per acre.

The agent introduced a purchaser who was not willing to pay more than $25.00 an acre, the owner's net price, although the latter did apparently honestly endeavour to secure $26.00 an acre in order to protect the agent to the extent of one dollar an acre.

A sale was effected at the net price and the agent sued for commission. His action was dismissed on the ground that the special conditions of the employment had not been complied with.

It was held:—(1) If an agent employed to sell real estate has a special employment, as distinguished from a general employment, he is entitled to commission only when he brings himself within the terms of the

special employment. (Munro v. Beischel, 1 S.L.R. 238, followed.)

(2) Where property is listed with a real estate agent for sale, with a stipulation that the sale was to net the owner a certain price per acre, and the agent's commission was to be a certain price per acre above the net price, the employment is a special one, and the sale must be made above the stipulated net price in order to entitle the agent to a commission. (Wrenshall v. McCammon, 5 D.L.R. 608, considered; Rowlands v. Langley, 17 W.L.R. 443; Stratton v. Vachon, 44 Can. S.C.R. 395, distinguished.)

(3) Where land is listed with a real estate agent for sale under a contract of special employment whereby he is to negotiate a sale to net the owner the latter's minimum price over and above the commission, it is the owner's duty to ask from prospective purchasers with whom he may negotiate, a sufficient price to cover both the net price and the commission; but, where the purchaser will not pay more than the net price and there is no collusion between the owner and the purchaser to deprive the agent of his commission, the owner will not be liable for any commission on a sale *bona fide* closed at the net price, although the purchaser was introduced by the agent. (Dictum per Lamont, J.) (See Wrenshall v. McCammon, 5 D.L.R. 608.)

Sec. 7.—Owner to receive net amount specified in agreement.

In the case of Beale v. Bond (16 T.L.R. 311, 1900; 17 T.L.R. 280, [A.C.]), the plaintiff, a house and estate agent, was employed by virtue of a "commis-

sion note" worded as follows:—"April 26, 1899, 48 and 50, Howland Street, Tottenham Court Road. I agree to accept a sum of £1,150, for the above property, and you are to be at liberty to receive anything over and above that as a commission, it being understood that I am to receive the full sum of £1,150 without deduction, except, of course, apportionments of outgoings. Completion to be within a month and deposit of 10 per cent. to be paid over. Signed, C. W. Beale. To Messrs. Henry Bond & Son." The time on which the purchase was to be completed was subsequently extended over July 19 by mutual consent. The defendant, having procured this commission note, made a contract dated July 9, on behalf of the plaintiff, with one R., for the purchase of the houses for £1,250, of which £25 was paid as deposit. The contract contained provisions fixing dates for delivery of the abstract of title, requisitions and answers thereto, date of completion, and other matters, and continued: "If the purchaser shall fail to comply with any of the conditions herein contained the vendor may, without tendering any assignment, either enforce specific performance of this contract or, by notice in writing to be given to the purchaser, declare the said deposit money to be forfeited, and thereupon the said deposit money shall be forfeited to the vendor as liquidated damages and the contract shall be at an end."

There was evidence that the plaintiff accepted R. as a purchaser and communications passed between them upon that footing. R., however, did not complete the purchase, and the deposit of £25 became forfeited, and, it being in the hands of the defendant,

the plaintiff claimed it from him. At the trial the defendant counterclaimed for his £100 commission, on the ground that it became due when R. was accepted as a purchaser, and the Divisional Court, consisting of Day and Lawrence, JJ., decided that he was so entitled on the authority of Passingham v. King (14 T.L.R. 39 and 392; 1897, 1898.)

This decision was, however, reversed by the Court of Appeal (17 T.L.R. page 280), on the ground that the effect of the contract was that the owner was not to pay anything as actual commission, but that if the agent obtained £1,150 clear for the owner, then anything over and above that the agent might put in his pocket. The Master of the Rolls pointed out that the decisions relied on by the Judges of the Divisional Court had to do with ordinary contracts for commission and "did not in any way touch the special contract in this case."

Sec. 8.—Commission only on instalments actually paid.

In the case of Hamer v. Bullock, (14 W.L.R. 652, Alberta), 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 the money received by the owner under the agree-

ment 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.

It was held that the agent was not entitled to any 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.

Sec. 9.—Condition that agent should forfeit balance of commission due if balance of purchase price not paid on certain date—Agent held entitled to commission where balance of purchase price subsequently paid.

In the case of DeSalis v. Jones, decided by the British Columbia Court of Appeal (Rep. 11 D.L.R. 228), the agent after receiving half the commission due to him agreed in writing that he waived all right to the balance of his commission unless the balance of the purchase price should be paid on a certain date.

The letter embodying this agreement, which was drawn up by the defendant's solicitor, read as follows:—"If the said instalment is not paid on the said 12th day of June, 1912, I hereby waive all claim for said balance of $1,000.00."

The instalment in question was paid subsequently, with interest.

It was held, per MacDonald, C.J., that the plaintiff was entitled to relief on equitable grounds against the forfeiture of his commission, inasmuch as the defendant was not damnified in any way by the delay. Irving, J., expressed the opinion that there could be no waiver of the plaintiff's contractual rights without consideration and that no consideration was proven.

In the Province of Quebec, where the Civil Law prevails, the Court is unable to grant relief on equitable grounds, but error, or want of consideration, or both, might be invoked in a case of this nature, and the Court would be free to interpret the contract according to the real intention of the parties.

Sec. 10.—Additional commission promised if contract completed within time fixed.

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.

Sec. 11.—Offer to purchase within limited time withdrawn on expiration of time before acceptance of owner communicated to purchaser.

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; 4 D.L.R. 551 (notes).

Sec. 12.—Terms of contract not complied with although price acceptable to purchaser.

In the case of Cairns v. Buffet, decided by the Manitoba Court of Appeals in November, 1912, (8 D.L.R. page 53), it was held:—

(1) Where the plaintiffs and the defendants are real estate agents, and the defendants to the knowledge of the plaintiffs hold a restricted special contract from the option-holders of certain lands under which the defendants are to receive not a variable percentage commission but the lesser lump sum of $1,000 for negotiating at a stipulated price and terms a sale of the lands, and where the defendants agree to pay the plaintiffs $500 as one-half of the lump sum for negotiating the sale at the price and terms so fixed, and where, under that agreement, the plaintiffs introduce to the option-holders a proposed purchaser, who, however, fails to agree definitely with the option-holders upon the terms or to make the purchase, but instead purchases a few days later directly from the owners at the same price on terms disclosed in the evidence, the plaintiffs cannot, under such a restricted special contract recover any compensation.

(2) Where real estate agents agree for a lump sum under a restricted special contract of agency to negotiate at a stipulated price and terms the sale of certain lands, and under the agreement procure a purchaser ready and willing to buy at the price but not on the terms so fixed, this is not such a fulfilment of the contract as will entitle the agents to any compensation whatever.

(3) Although vendors of lands may sometimes be held liable to real estate agents where the vendors themselves proceed to sell to parties introduced by those agents on terms other than those on which the agents were instructed to procure purchasers, upon the ground that a vendor may not, after making such a sale and taking the benefit of the agent's services, refuse to pay therefor; such a principle cannot apply in an action by a real estate agent as against his employer, another real estate agent, who derives no benefit whatever and is no party to the change in the terms of sale.

Sec. 13.—Variation of terms of agreement—Quantum meruit allowed.

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.

Sec. 14.—Commission payable "on sum obtained by private treaty or trial by jury."

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. 5, 7 Bing. 237, 9 L.J. (O.S.) C.P. 78.

Sec. 15.—Contract to sell sub-division—Quantum meruit where contract cancelled before actual sale made.

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 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.)

CHAPTER XVI.

LEGAL INCAPACITY OF PARTY EMPLOYING AGENT.

Introduction.

Sec. 1. Contract between Agent and Manager of Incorporated Company—Agent not entitled to commission where Director not authorized by Company.

CHAPTER XVI.

LEGAL INCAPACITY OF PARTY EMPLOYING AGENT.

Introduction.

As an agent's right to remuneration depends on a contract, express or implied, it follows that the party who employs him must be legally capable of contracting; otherwise the contract itself may be set aside and the agent's right to commission cease to exist. Thus, according to Quebec law, an agent who is employed by a married woman, common as to property, to sell either her own property, or the property of the community, will have no recourse against either the community or the wife personally for commission should the husband repudiate the transaction.

Again, in the case of a married woman separate as to property employing an agent to sell her own property, the husband's consent is necessary to validate the transaction, and as the contract is one that the wife cannot legally enter into, for reasons of public order, the transaction, if not authorized in writing by the husband, is an absolute nullity, and no claim for commission can be based upon it.

This authorization must be given either by the husband joining in the agreement with the agent, or separately, in which latter case it must be in writing, and given either at the time of the execution of the agreement with the agent, or previously.

It is not sufficient that the husband subsequently ratify the wife's agreement with the agent. According to Quebec law such a contract being an absolute

nullity, and not therefore susceptible of ratification, the wife could at any time afterwards, repudiate it if she saw fit.

An agent employed by a minor, or an interdicted person, would not, unless the transaction were to be approved and completed by the tutor, guardian or curator (acting under authority of the Court), have a right to claim commission, for the laws by virtue of which these transactions may be annulled, have for their object the protection of the minor or interdict.

In like manner if an agent contracts with a principal either insane or temporarily incapable of understanding the nature of the contract, whether by reason of intoxication, or feebleness of mind due to illness, the contract may be set aside by the Courts, in which case the agent is not entitled to recover any remuneration for his services.

In all these cases the contract or undertaking to pay commission may be set aside, whether the agent acted in good faith or not. Laws of this nature are enacted to protect those who are either actually, or presumed by law, for reasons of public policy, to be incapable of acting for themselves, and if mere lack of knowledge on the part of those who deal with them could be pleaded to give validity to their acts, the object of the law would in many cases be defeated.

Sec. 1.—Contract between agent and manager of incorporated company.

Apart from the general legal capacity of the principal to contract, it may happen that the person

employing the agent is himself, to the knowledge of the agent so employed, merely the representative of another, and in this case, if the party employing the agent exceeds his own authority, the agent may be left without recourse against the actual principal.

As an example of this, where the manager of an incorporated company, without authorization, and outside his general duties as manager, employs a real estate agent to sell the Company's property on commission, the agent will have no recourse against the Company, should the purchaser found by him be not accepted. This was held by two of the Judges in the Supreme Court of Canada in the case of Calloway v. Stobart (*supra*, page 113).

Agent not entitled to commission where director not authorized by company.

In the case of Bent v. Arrowhead, 18 Man. R. 632, 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 subtracted from the purchase price, but that any abatement of the price below a certain figure was to be borne by the agent. It was held that the company was 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. 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.

CHAPTER XVII.

TERMINATION OF AGENCY.

Sec. 1. Revocation by principal.

2. Revocation of agent's authority.

3. By death, lunacy, or bankruptcy.

4. Revocation of agency by death of principal—The death of the principal, in the absence of a special testamentary disposition, operates as a revocation of the agent's authority.

CHAPTER XVII.

TERMINATION OF AGENCY.

Sec. 1.—Revocation by principal.

While the general rule of law is that a principal may at any time revoke the authority conferred upon his agent, this rule is subject to the exception that where an agent has an "Authority coupled with an interest" (*e.g.*, an option contract or an "exclusive listing") or has incurred liability, the principal is not entitled to terminate the agency, and if he does so may be held liable in damages.

In cases of general employment, although the principal may be entitled to revoke the agent's authority, he cannot escape liability for commission, if, at the time of the revocation, the agent has accomplished what he had undertaken to do.

In the case of Wilkinson & Alston, 41 L.T. Rep. 394, Lord Justice Bramville remarked:—"Then it is said that at the time this introduction was effected the plaintiff's authority to find a purchaser for the ship had ceased, having been revoked by the letter written by the defendant. . . . I do not consider this revocation of authority, or anything at all like it. It simply means 'it is of no use doing anything in the matter at present.' And, moreover, even had this letter been as contended, a revocation of the authority, it would have been too late, for the authrity had been acted upon, and the introduction had already taken place, before the date of that letter."

In the case of Hudon v. Cool, 42 Que. S.C. 228 (Superior Court), the agreement by which a property owner nominates a person as his sole agent, for three years, to sell his immovables on payment of a commission and expenses, is a mandate and not a hiring of services, and is, therefore, revocable at any time subject to liability for *damages in case of revocation, without cause or reason.*

See Arts. 1720–1726 in C.C. Quebec.

Sec. 2.—Revocation of agent's authority.

Where the agent has not, however, accomplished anything and has not incurred any special expense, while acting in accordance with his contract, the principal is free to revoke the mandate without paying the agent anything by way of remuneration.

In the British Columbia case of Holmes v. Lee Ho, Rep. 15 W.L.R. 226 (B.C.), the facts were as follows:—On the 8th January the defendants "listed" land for sale with the plaintiff, a land agent, at $6,000, but four days later told the plaintiff that, as property had gone up, they should want $6,000 net. On that day the plaintiff had brought the property to the notice of C., but C. had not seen it, and had not decided to purchase. The plaintiff then changed his advertisement of the sale of the property so as to make the price read $6,500 instead of $6,000, and tried to get C. to pay $6,500, but he refused, and eventually bought for $6,000 direct from the defendants.

It was held that the defendants had properly revoked the plaintiff's authority to sell at $6,000, and the plaintiff was not entitled to commission on the sale.

Sec. 3.—By death, lunacy, or bankruptcy.

An agent's authority is determined by the death, lunacy or unsoundness of mind of either the principal or agent. Where the principal is a corporation or an incorporated company, its dissolution has the effect of a revocation.

In certain cases, however, the agent's authority is not revoked by death, lunacy or bankruptcy. The general rules governing such cases are stated by Bowstead (fifth edition, at page 456), as follows:—"Where the authority of an agent is given by deed, or for valuable consideration, for the purpose of effectuating any security, or of protecting or securing any interest of the agent, it is irrevocable during the subsistence of such security or interest, but the authority of an agent is not irrevocable merely because he has an interest in the exercise of it, or has a special property in, or lien for advances upon, the special matter thereto, the authority not being given expressly for the purpose of securing such interest or advances."

"Where an agent is employed to enter into any contract, or do any other lawful act involving personal liability, and is expressly or impliedly authorized to discharge such liability on behalf of the principal, the authority becomes irrevocable as soon as the liability is incurred by the agent."

"Where an agent is authorized to pay money on behalf of his principal, to a third person, the authority becomes irrevocable as soon as the agent enters into a contract, or otherwise becomes bound to pay or hold such money to order for the use of such third person."

Sec. 4.—Revocation of agency by death of principal—The death of the principal, in the absence of a special testamentary disposition, operates as a revocation of the agent's authority.

Evans, on Commission Agents, at page 259, says:—

"A distinction must be drawn between a revocation of the agent's authority by the act of the principal and a revocation by the death of the principal. In the former case, if the revocation is unlawful, the agent will be entitled at least to recover the expenses to which he has been put in acting upon the authority; in the latter case he has no such right."

Campanari v. Woodburn (24 L.J. 13 C.P.), decided in 1854, was a claim against the administratrix of the principal for £100 commission on the sale of a picture. The plaintiff alleged an agreement between him and the intestate to the effect that if the plaintiff sold the picture he should be paid the sum mentioned. Endeavours to sell the picture were made by the plaintiff, but they did not result in a sale until after the death of the intestate. The Court ordered judgment to be entered for the defendant, on the ground that the death of the principal was a revocation of the authority. "It is plain," said Chief Justice Jervis, "that the *intestate might in his lifetime have revoked the authority without rendering himself liable to be called upon to pay the £100*, though possibly the plaintiff might have had a remedy for a breach of the contract if the intestate had wrongfully revoked his authority after he had been put to expense in endeavouring to dispose of the picture. In that way, perhaps, the plaintiff might

have recovered damages by reason of a revocation. His death, however, was a revocation by *the act of God*, and the administratrix is not, in my judgment, responsible for anything." Mr. Justice Crowder pointed out the distinction between a revocation of a bare authority by death and a revocation by act of party. In the former case the agent could not recover his expenses from the representative of the deceased; whereas he would in the latter case be entitled to recover the reasonable expenses he might have incurred in endeavouring to execute the authority.

The same rule would also hold good in the case of an engagement, or even an "exclusive listing," for a fixed period. Evans (Commission Agents) at page 128, says:—

"In engagements *for fixed periods* a distinction may be made between cases where the business in which the agent is employed is put an end to by the voluntary act of the principal, and cases where the business comes to an end without such act."

FORMS.

OPTION OF PURCHASE OF LAND.

AGREEMENT made the —— day of —— 19—, between —— of ——, hereinafter called the vendor, of the first part, and —— of ——, hereinafter called the purchaser, of the second part.

WITNESSETH that in consideration of the sum of —— dollars now paid by the purchaser to the vendor (the receipt whereof is hereby acknowledged) the vendor hereby gives to the purchaser an option irrevocable within the time for acceptance herein limited, (or, the sole and exclusive option) to purchase free from encumbrances, all that certain parcel of land situate, etc.

The purchase price of the said property shall be the sum of —— dollars, which shall be paid in cash on the acceptance of this option (or, the sum of —— dollars in cash, —— dollars on the —— day of ——, and —— dollars on the —— day of ——, or as the case may be.)

(Provided that neither the signing of this contract for purchase, nor the payment of any instalment herein provided shall bind the purchaser to pay the other instalment, but he shall always be at liberty to cancel and rescind the contract completed by such signature or payments by forfeiting the payments already made in respect thereof, and upon such cancellation he shall not be in any way liable or responsible for any further payments, nor for any damages for failure to carry out the said contract.)

Provided that if the purchaser fail or neglect to comply with the stipulations or provisos herein contained, or any of them, the vendor may, at his option, rescind this agreement on —— days' notice to be given by a letter delivered to the purchaser or mailed postage prepaid and registered addressed to the purchaser at ——, and upon the expiry of the time limited by the said notice, the vendor may forthwith re-possess himself of the said property (and of all work done thereon, without making any compensation therefor to the purchaser.)

(If a substantial sum be paid for the option or to bind the bargain add, if desired, the following: The sum of —— dollars paid by the purchaser to the vendor as part consideration for the giving of this option shall, upon the completion of this agreement, be allowed as part payment of the purchase money.)

The option hereby given shall be open for acceptance up to but not after the —— day of —— 19—, and may be accepted by a letter delivered to the vendor, or mailed postage prepaid and registered to the vendor at ——.

The vendor shall not be bound to produce any abstract of title, or deeds, copies of deeds or any other evidences of title except such as are in his possession.

The purchaser shall search the title at his own expense and shall have —— days from the date of acceptance to examine it and shall be deemed to have accepted the title except as to any written objections made within that time. If any objection be made within that time, the vendor shall have a

reasonable time to remove it, but if he be unable or unwilling to do so, he may, notwithstanding any intermediate correspondence, cancel the contract and return the deposit, and shall not be liable to the purchaser for any expenses incurred by him.

All adjustments shall be made to the date of the transfer of possession. Time shall be of the essence of this agreement.

This agreement shall enure to the benefit of and be binding also on the heirs, executors, administrators and assigns of the parties hereto respectively.

IN WITNESS, etc.

SIGNED, SEALED, etc.

O'Brien's Conveyancer.
Fourth Edition. Page 42.

OPTION OF PURCHASE OF LAND.

(Short form).

AGREEMENT made this —— day of —— 19—, between —— of ——, ——, hereinafter called the vendor, of the one part, and —— of ——, ——, hereinafter called the purchaser, of the other part.

WHEREAS the vendor alleges that he is the owner of (describe land) containing (about) —— acres.

NOW THIS AGREEMENT WITNESSETH that the vendor, in consideration of the sum of (five) dollars (*a*)

(*a*) In a unilateral agreement, such as an option usually is, it is advisable that some real and substantial consideration should pass, for a seal will not supply the place of a real consideration if it is proved that none actually passed. In a suit for specific performance equity will enquire into the consideration of a contract, no matter what its form may be. (Crandall v. Willig (1897), 166 Ill. 233. See also article on options, 36 Canada Law Journal (1900), p. 521.)

(the receipt whereof is hereby acknowledged) hereby offers and agrees to sell to the purchaser, his heirs or assigns, free from encumbrances, the said lands (or such part thereof as may be required by the grantee), for the sum of —— dollars, (or, at the rate of —— dollars per acre) at any time before the —— day of —— 19—. This offer to be irrevocable until the said last mentioned date. This offer, if accepted before the said date, shall thereupon constitute a binding contract of purchase and sale; all adjustments to be made to date of transfer; the purchaser to examine the title at his own expense, the vendor not to be bound to produce or shew any evidences of title except such as are in his possession. The purchaser to make objections and requisitions within —— days after acceptance, and title to be deemed accepted except as to any objection or requisition made within that time, and if any objection to title be made which the vendor is unwilling to remove he may rescind this agreement.

This offer may be accepted by a letter delivered to the vendor, or mailed postage prepaid and registered, addressed to the vendor at ——.

Time shall be of the essence of this contract.

IN WITNESS, etc.

SIGNED, SEALED, etc.

O'Brien's Conveyancer.
Fourth Edition. Page 44.

OPTION ON BUSINESS.

(Short form).

THE UNDERSIGNED hereby agree, in consideration of one dollar and other good and valuable considerations, to sell to C.D. or his assigns, as a going concern, the business carried on by the undersigned, including the property, machinery, materials and supplies used in connection with the business, and also the good will, trade rights, trade marks, brands, patents, inventions, formulæ, recipes, trade names and patterns owned or controlled by the undersigned, excepting only money in bank and bills and accounts receivable, which are to be and remain the property of the undersigned. All the said property to be at the time of such sale free and clear of all liens, charges, encumbrances, taxes and assessments. The consideration for the said sale to be —— dollars in addition to inventory value of stock on hand at the time of transfer.

This option shall expire on the —— day of —— 19—, unless the said C.D., or his assigns, shall before that time give notice in writing of his acceptance thereof, in which case the transaction is to be completed and the property delivered within —— months thereafter, or earlier at the option of ——.

It is understood and agreed that, in accepting this option, C.D. assumes no responsibility or liability to purchase the said property unless C.D., or his assigns, shall elect so to do by written notice, and that, in case of assignment, this instrument and all of its parts and provisions shall enure to the

benefit of and be obligatory upon such transferee, and C.D. shall be free from liability therein and thereunder to the same purport and effect as though such transferee had originally been made the purchaser herein.

WITNESS our hands and seals this —— day of ——, 19—.

WITNESS.

O'Brien's Conveyancer.
Fourth Edition. Page 84.

OPTION AGREEMENT ON MANUFACTURING BUSINESS.

THIS AGREEMENT, made the —— day of ——, 19—, between The —— Company, incorporated under (name of Act under which charter granted), the first party hereto, and —— of ——, the second party hereto.

WITNESSETH as follows:—

FIRST. For and in consideration of (ten) dollars (and other good and valuable considerations) paid by the second party to the first party, the receipt whereof is hereby acknowledged, the first party agrees, upon the request of the second party, provided such request be made to the first party on or before the —— day of ——, 19—, to sell, convey, transfer, and deliver to the second party the following:—

All the real estate, buildings, improvements, appurtenances, easements, plants, machinery, fixed and

movable, now belonging to the first party and located at —— in the county of —— and province of ——; also all the railroad tracks, furnaces, brickwork, foundations, boilers, pumps, water-heaters, engines, housings, chilled rolls, shears, cranes, annealing boxes and stands, castings, buggies, trucks, steam, gas and water pipes, water and acid tanks, storage tanks, spare parts of machinery, electric plant, cars, shafting, belting, pulleys, hangers, gears, tools, forges, horses, wagons, implements, and utensils of every nature whatsoever, located on or within the above described premises, or any property of the character described above belonging to the first party, which may be temporarily located elsewhere than on the above described premises, or for the purpose of making repairs, or for any other reason; intending hereby to include all property, machinery, material, and supplies now being used for, or in connection with the manufacture and shipment of ——, excepting the goods, materials and supplies hereinafter mentioned; also, all of the good will, trade rights, trade marks, brands, patents, inventions, formulas, recipes, and trade names now owned or controlled by the first party. All of the foregoing property to be free and clear from all liens, charges, encumbrances, taxes and assessments whatsoever.

The first party shall and will within (ten) days after notice to that effect furnish and deliver to the second party for examination by its counsel full and complete abstracts of title to the said real estate.

Second. The second party shall have and is hereby given the exclusive right and option to purchase of the first party all of the foregoing property on or

before the —— day of ——, 19—, for the consideration of —— dollars, (cash) to be paid by the second party to the first party (at the time of the consummation of such purchase.

THIRD. If, during the period of this contract, any part of the property hereinbefore described shall be destroyed or damaged by fire or other casualty, then and in that event, unless the property so destroyed or damaged shall be fully restored on or before the —— day of ——, 19—, to the condition in which it was immediately preceding such destruction or damage, then to the extent of the loss resulting from such injury the purchase price hereinbefore specified shall be abated. The extent of such loss, in case the parties hereto cannot agree thereon, shall be ascertained and determined by arbitrators in the manner hereinafter provided.

FOURTH. At the time of the consummation of the sale and purchase of the property hereinbefore described the first party hereby agrees to sell and deliver, and the second party hereby agrees to purchase of the first party, in addition to the foregoing, the following:

(*a*) All of the (manufactured product described in detail) then owned by the first party, the price to be paid therefor to be the then market value thereof.

(*b*) All of the following described goods, materials and supplies located upon or within the above decribed premises, or in transit to the same, at their cost price to the first party, to wit: (Crude materials described in detail).

(c) All unexpired fire, liability and other insurance policies then in force, at the *pro rata* thereof.

The price to be paid for the property specified in this paragraph shall be paid in cash contemporaneously with the payment of the sum specified in paragraph "Second" hereof.

FIFTH. In case of the consummation of the purchase of the property covered by this contract, then contemporaneously therewith the second party shall assume all *bona fide* contracts made by the first party for the purchase or sale of materials, raw or manufactured.

SIXTH. In case of the purchase of the property covered by this contract, then contemporaneously therewith the first party shall cause to be properly executed by itself and by all of its officers a contract or contracts with the second party, by which the first party and such officers shall bind themselves for a period of (fifteen) years after the consummation of such purchase not to engage or be or become interested, directly or indirectly, as individuals, partners, stockholders, directors, officers, clerks, agents or employees in the business (other than that of transferee hereunder of the second party) of buying, manufacturing or selling ——, or any kindred products or any of the by-products of a —— factory, within a radius of —— miles of the city of ——.

SEVENTH. The first party hereby agrees in case of the consummation of the purchase of the property embraced in this contract that it will forthwith, upon demand of the second party, execute or cause to be executed by the first party and all its officers such

further instrument or instruments as may be required by the second party for the purpose of carrying out the purposes and provisions of this agreement.

EIGHTH. In case any difference of opinion shall arise between the parties hereto in the interpretation and carrying out of this instrument, or any of its provisions, then and in that event such difference shall be determined by three arbitrators; each of the parties hereto to appoint one arbitrator, and the other two so chosen to select a third arbitrator. The award of a majority of such arbitrators shall be binding and conclusive upon the parties hereto; the appointment of such arbitrators by the respective parties hereto shall be made by each of the said parties within ten days after receiving notice from the other of the said parties to make such appointment. The failure of either of the parties hereto to appoint such arbitrator shall authorize the other of the said parties to make an appointment for the one so in default. The two arbitrators chosen shall select a third arbitrator within five days after the appointment of the first two arbitrators. If the first two arbitrators fail or are unable within the time hereinbefore specified to select a third arbitrator, then any judge of any court of record in the province of —— upon application made by either of the parties hereto for the purpose, is hereby authorized and empowered to appoint such third arbitrator. The award to be made by the arbitrators hereunder shall be made within fourteen days of the appointment of the third arbitrator.

This agreement and everything herein contained shall enure to the benefit of and be binding upon

the parties hereto and their respective heirs, executors, administrators, successors and assigns.

IN WITNESS, etc.

SIGNED, SEALED, etc.

O'Brien's Conveyancer.
Fourth Edition. Page 320.

OPTION.

ON MINING LAND.

AGREEMENT made the —— day of —— 19—, between —— of ——, hereinafter called the vendor, of the first part, and —— of ——, hereinafter called the purchaser, of the second part.

WITNESSETH that in consideration of the covenants of the purchaser herein contained and of the sum of —— dollars(*f*) now paid by the purchaser to the vendor (the receipt whereof is hereby acknowledged) the vendor hereby gives to the purchaser or his nominee an option (or, the sole and exclusive option) to purchase (free from encumbrances) the mining property situate, etc., having an area of about —— acres (together with the exclusive right and privilege

Note (*f*).—See second paragraph.

In a unilateral agreement, such as an option usually is, it is advisable that some real and substantial consideration should pass, for a seal will not supply the place of a real consideration if it is proved that none actually passed. In a suit for specific performance equity will enquire into the consideration of a contract, no matter what its form may be. (Crandall v. Willig (1897), 166 Ill. 233. See also article on options, 36 Canada Law Journal (1900), p. 521.)

Notwithstanding legal decisions to the effect that an option under seal made for a specified time is binding and cannot be revoked, it is deemed safer either to accept it before revocation or else pay a consideration. This receipt clause may be embodied in the option if desired.

of utilizing any water or water-power of any river or stream flowing through the property), upon the terms hereinafter set forth.

The purchase money for the property shall be the sum of —— dollars (together with the interest in the property, or, the proportion of stock in a certain company to be formed as, hereinafter set forth), and the said sum of —— dollars shall be paid in cash on the acceptance of this option (or, the sum of —— dollars in cash and —— dollars on the —— day of ——, or as the case may be).

The interest above referred to shall be an interest of —— per cent. in the property, provided, however, that if the purchaser or his nominee shall form a joint stock company for the purpose of operating the property, then the vendor shall accept in lieu of such —— per cent. interest in the property (one fifth) of the stock or shares in any company which may be formed for the purpose of taking over and operating the property, and such stock or shares shall be fully paid up and non-assessable.

It is, however, agreed as a condition of this option that the purchaser or his nominee shall cause at least —— dollars of actual development work to be done on the property before the —— day of ——, 19—, and such development work shall be as follows:— ——, and he shall commence the said development work before the —— day of —— next, and in the event of the purchaser or his nominee failing so to do, then this agreement and all rights thereunder shall cease and be null and void and any moneys paid hereunder shall be retained by the vendor as liquidated damages and not as a penalty.

If the purchaser or his nominee decide to exercise this option he shall, in pursuance of the preceding paragraph and to insure the carrying out thereof and as part of the consideration for these presents and in addition to the said sum of —— dollars, pay to the vendor the sum of —— dollars by depositing the said sum at the —— bank at —— on or before the —— day of —— next, or within (thirty) days after the acceptance of this option, to the joint credit of the vendor and the said bank, and in the event of the purchaser or his nominee failing to perform —— dollars' worth of development work on the property in the time above specified, the said sum of —— dollars so deposited shall become the absolute property of the vendor, but in the event of the purchaser or his nominee fully complying with the conditions above mentioned the said sum of —— dollars so deposited shall be returned to him.

Provided that if the purchaser or his nominee fulfil all the agreements and particulars of this option as herein set forth on or before the —— day of —— 19—, such performance shall entitle the purchaser or his nominee to an extension of time hereunder, not exceeding —— days, for the purpose of completing the organization of any company which is being formed for the purpose of operating the property.

Provided that after payment of the said sum of —— dollars on this option, the purchaser or his nominee may, during the period for which this option is given, enter upon the property and examine it for the purpose of satisfying himself as to the value of the property and its minerals, and may remove from

the property such reasonable quantity of rock, etc., as may be reasonable and proper for the purpose of satisfying himself as aforesaid, and the purchaser or his nominee shall be at liberty to mine and ship ore to an amount not exceeding —— tons, but in the event of his non-compliance with the terms and conditions of this agreement and not making the payments herein provided for, the purchaser or his nominee shall pay to the vendor the net value of the ore so shipped, after deducting therefrom actual treating and shipping expenses.

Provided that the vendor shall have access to the property and the workings thereof during the currency of this agreement.

Provided that having made any of the payments due hereunder the purchaser may, by notice to the vendor to be given by a letter delivered to the vendor or mailed postage prepaid and registered addressed to the vendor at —— post office, rescind this agreement, and such payment or payments shall thereupon be retained by the vendor as liquidated damages for breach of this agreement.

(Provided that neither the signing of this agreement nor the payment of any instalment herein provided for shall bind the purchaser to pay the other instalments, but he shall always be at liberty to cancel and rescind the contract completed by signature or payments by forfeiting the payments already made in respect thereof, and upon such cancellation he shall not be in any way liable or responsible for any further payments, nor for any damages for failure to carry out the said contract.)

Provided that if the purchaser or his nominee

fail or neglect to comply with the stipulations or provisions herein contained, or any of them, the vendor may, at his option, rescind this agreement, on —— days' notice to be given by a letter delivered to the purchaser or mailed postage prepaid and registered addressed to the purchaser at —— post office, and upon the expiry of the time limited by the said notice the vendor may forthwith repossess himself of the property and of all the work done (and plant placed) thereon, without making any compensation therefor to the purchaser or his nominee, or the vendor may forthwith sell the property either by public auction or private sale, and any difference in price which may happen on such re-sale shall be forthwith paid by the purchaser and shall be recoverable as liquidated damages.

(If a substantial sum be paid for the option or to bind the bargain add, if desired, the following:— The sum of —— dollars paid by the purchaser to the vendor as part consideration for the giving of this option shall, upon the completion of this agreement, be allowed as part payment of the purchase money.)

The option hereby given shall be open for acceptance up to but not after the —— day of ——, 19—, and may be accepted by a letter delivered to the vendor or mailed postage prepaid and registered, addressed to the vendor at —— post office.

All adjustments to be made to the date of the transfer of possession, and the purchaser or his nominee shall have (fourteen) days after acceptance of this offer to satisfy himself as to the title.

(*Here insert such stipulations as to title as may be required.*)

This agreement shall enure to the benefit of and be binding on the parties hereto, their heirs, executors, administrators and assigns, respectively.

IN WITNESS, etc.

SIGNED, SEALED, etc.

O'Brien's Conveyancer.
Fourth Edition. Page 522.

EXCLUSIVE LISTING.

MONTREAL, ——, 19—.

GENTLEMEN:

—— place —— propert—— in your hands to sell, giving you an option on same for six months at $——, if the propert—— at the expiration of time mentioned —— not sold, this contract remains in force until cancelled by written notice. It is distinctly understood, that if a sale takes place either through your agency or otherwise during term of contract, or in the event of the contract being cancelled, or the propert—— being sold to a party with whom you had dealings, your commission will be —— %, which is to be paid by —— on the execution of the Deed of Sale.

DESCRIPTION OF PROPERTY FOR SALE.

Cadastre——	Sub-division——
Ward——	Street and Number——
Size of lot——	Total area——
Size of buildings——	Material——
Roof——	Heating——

Plumbing——	Occupation——
Can be seen——	"For Sale" notice——
Owner's value of land——	Owner's value of buildings
Municipal valuation——	Tenants——
Annual rent——	Term of leases——
Insurance——	Insurance due——
Mortgages——	Mortgages held by——
Occupied as——	State of repair——
Outbuildings——	Interior arrangement——
Storeys——	Basement——
Ground floor——	1st floor——
2nd floor——	3rd floor——
Mantels and grates——	Electric light——
Gas——	Price——
Terms——	Remarks——
.....	.....
.....	.....
	.....

Telephone—— Address——

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