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Agency--Broker's Commissions--Contract (Saum v. Capital Realty Development Corp., 268 N.Y. 341 (1935))

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whole of the fare to be legal.⁴ A carrier cannot by special agreement secure immunity from its negligence or that of its servants unless such intent is specifically and expressly stated in the agreement.⁵ The parties may agree that recovery shall be limited to an agreed valuation which forms the basis of the charges fixed by the carrier, but if the limitation is imposed without choice of rates between limited and unlimited liability it is not valid.⁶ From the instant case it would appear that an aeroplane fulfilling the conditions of a common carrier may limit its liability for negligence, but such limitation must be in consideration of a reduced fare or other benefit to the passenger, and notice of such limitation and different rates must be expressly made to the passenger.

S. W. R.

AGENCY—BROKER'S COMMISSIONS—CONTRACT.—By the terms of a brokerage contract, the defendant corporation engaged the plaintiff to procure a lessee of certain premises for a twenty-one year period. It was further stipulated that no commissions would be earned by the plaintiff until the final execution of the lease. The broker produced a prospective tenant of doubtful financial ability, whereupon the defendant corporation refused to execute the lease until the broker agreed to take a portion of his commissions as the lessee paid its rents. Without waiting for his commissions to accrue, the broker brought an action for the full amount of his unpaid commissions on the theory that the second agreement lacked consideration. *Held*, the subsequent contract was valid and subsisting and a complete bar to the broker's action. *Saum v. Capital Realty Development Corp.*, 268 N. Y. 341, 197 N. E. 303 (1935).

It is a hornbook rule that a broker's commissions are earned when he produces a customer ready, willing and able to comply with

⁴ *Pendergast v. Union R. Co.*, 10 App. Div. 207, 41 N. Y. Supp. 927 (1st Dept. 1896); *Murray v. Cunard S.S. Co., Ltd.*, 200 App. Div. 466, 193 N. Y. Supp. 220 (1st Dept. 1922), *rev'd on other grounds*, 235 N. Y. 162, 139 N. E. 226 (1923); *Bissell v. N. Y. C. R. Co.*, 25 N. Y. 422 (1862); *Hodge v. Rutland R. Co.*, 112 App. Div. 142, 97 N. Y. Supp. 1107 (3d Dept. 1906), *aff'd*, 194 N. Y. 570, 88 N. E. 1118 (1909); *Seybolt v. N. Y., L. E. & W. R. Co.*, 95 N. Y. 562 (1884); *Smith v. N. Y. C. R. Co.*, 24 N. Y. 222 (1862); *Mynard v. Syracuse, Binghamton & N. Y. R. Co.*, 71 N. Y. 180 (1877); *Perkins v. N. Y. C. R. Co.*, 24 N. Y. 196 (1862).

⁵ *Holsapple v. Rome, Watertown etc. R. Co.*, 86 N. Y. 275 (1881); *Blair v. Erie R. Co.*, 66 N. Y. 313 (1876); *Perkins v. N. Y. C. R. Co.*, 24 N. Y. 196 (1862); *Kenny v. N. Y. C. R. Co.*, 125 N. Y. 422, 26 N. E. 626 (1891); *Mynard v. Syracuse, Binghamton & N. Y. R. Co.*, 71 N. Y. 180 (1877).

⁶ *Kiltow v. Internat. Mer. Mar. Co.*, 245 N. Y. 361, 157 N. E. 267 (1927); *Burke v. Union Pac. R. Co.*, 226 N. Y. 534, 124 N. E. 119 (1919).

all the terms fixed by the lessor.¹ Once the liability to pay commissions has arisen, a subsequent agreement to postpone payment is without consideration.² It is also fundamental that this rule may be varied by express agreement.³ In the instant case, the plaintiff was content to agree that compensation was earned only upon the execution of the lease. The employer, at any time before the consummation of the contract, may revoke the agency without incurring liability,⁴ provided only that it is not one coupled with an interest⁵ or given for a valuable consideration⁶ and that he acts in good faith.⁷ Here the evidence of the financial irresponsibility of the corporate lessee refutes any claim of bad faith. No obligation having accrued under the unilateral contract of employment⁸ prior to the execution of the lease, the defendant had the right to terminate the agency,⁹ His offer to pay the brokerage commissions on a different basis was something he was not legally bound to do, and was therefore good consideration for the revised contract.¹⁰

J. E. H.

¹ *Wylie v. Marine National Bank*, 61 N. Y. 415 (1875); *Fraser v. Wyckoff*, 63 N. Y. 445 (1875); *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378 (1881); *Gerding v. Haskin*, 141 N. Y. 514, 36 N. E. 601 (1894); *Wittwer v. Hurwitz*, 216 N. Y. 259, 110 N. E. 433 (1915); *Bendell v. Fisher*, 219 App. Div. 498, 220 N. Y. Supp. 457, *aff'd*, 246 N. Y. 614, 159 N. E. 673 (1927); *Meador v. Brown*, 116 App. Div. 734, 102 N. Y. Supp. 32 (2d Dept. 1907); *Mutchnick v. Davis*, 130 App. Div. 417, 114 N. Y. Supp. 997 (1st Dept. 1909); *Backer v. Ratkowsky*, 137 App. Div. 559, 122 N. Y. Supp. 225 (1st Dept. 1910); *Herron v. Cameron*, 144 App. Div. 43, 128 N. Y. Supp. 871 (1st Dept. 1911).

² *Reis Co. v. Zimmerli*, 224 N. Y. 351, 120 N. E. 692 (1918); *Benedict v. Pincus*, 134 App. Div. 555, 119 N. Y. Supp. 266 (1st Dept. 1909); *Farrell v. Massapequa Holding Corp.*, 222 App. Div. 815, 226 N. Y. Supp. 810 (2d Dept. 1928); *Bernstein v. Fulson Realty Co.*, 152 N. Y. Supp. 995 (App. T. 1st Dept. 1915); *Miller v. Rossiter*, 125 Misc. 80, 209 N. Y. Supp. 767 (App. T. 1st Dept. 1925).

³ *Colvin v. Post Mortgage & Land Co.*, 225 N. Y. 516, 122 N. E. 454 (1919); *Bliven v. Lighthouse*, 231 N. Y. 64, 131 N. E. 70 (1921); *Lougheed & Co., Ltd. v. Suzuki*, 216 App. Div. 487, 215 N. Y. Supp. 505 (1st Dept. 1926); see *Fuller v. Bradley Contracting Co.*, 183 App. Div. 6, 20, 170 N. Y. Supp. 318, 328 (2d Dept. 1918), *aff'd without opinion*, 229 N. Y. 605, 129 N. E. 925 (1920).

⁴ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378 (1881); *Donovan v. Weed*, 182 N. Y. 43, 74 N. E. 563 (1905); *O'Hara v. Murray*, 142 App. Div. 113, 128 N. Y. Supp. 1009 (1st Dept. 1911); *Prendergast v. Cord Meyer Co.*, 156 N. Y. Supp. 750, *aff'd*, 175 App. Div. 895, 161 N. Y. Supp. 1142 (1st Dept. 1916).

⁵ *Hunt v. Rousmanier*, 21 U. S. 174 (1823); *Terwilliger v. Ontario & etc. R. Co.*, 149 N. Y. 86, 43 N. E. 432 (1896).

⁶ *O'Hara v. Murray*, 144 App. Div. 113, 128 N. Y. Supp. 1009 (1st Dept. 1911); 2 RESTATEMENT, AGENCY (1933) §450.

⁷ *Sibbald v. Bethlehem Iron Co.*, *Donovan v. Weed*, *O'Hara v. Murray*, *Prendergast v. Cord Meyer Co.*, all *supra* note 4.

⁸ 2 MEECHEM, AGENCY (2d ed. 1914) §§2429, 2452. But see *Martin v. Crimb*, 216 N. Y. 500, 506, 111 N. E. 62, 64 (1916).

⁹ *Sibbald v. Bethlehem Iron Co.*, *Donovan v. Weed*, *O'Hara v. Murray*, *Prendergast v. Cord Meyer Co.*, all *supra* note 4.

¹⁰ 1 WILLISTON, CONTRACTS (1920) §103 f.