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Broker--Liability of Third Party to Agent--Commissions (Grossman et al. v. Herman et al., 266 N.Y. 249 (1935))

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on community market value; and (3) that the debtor may obtain clear title to the property by payment of the appraised value, including the amount of the incumbrances, subject to the demand of the secured creditor that the property be sold at public sale.[18]

J. E. H.

BROKER—LIABILITY OF THIRD PARTY TO AGENT—COMMISSIONS.—Plaintiffs, real estate brokers, were employed by the owner of certain premises to effect the sale of the premises. Plaintiffs approached the defendants to induce them to purchase the property. Several proposals were made by the plaintiffs and rejected by the defendants. In the course of one of the conferences, one of the plaintiffs suggested: "I have got an idea where I can show you how you can buy the property without any cash at a price of $145,000. Would you be interested?" The owner consented to the terms offered by the plaintiffs and orally accepted by the defendants, but the latter changed their minds and the plaintiffs sue, alleging an employment of them by defendants, a breach by defendants of that contract of employment and demand as damages a sum measured by the amount of the commissions which defendants were alleged to have prevented plaintiffs from receiving from the owner. The Court of Appeals affirmed the decision for the defendants on the ground that the evidence failed to prove a contract of employment of plaintiffs by defendants. *Grossman et al.* v. *Herman et al.*, 266 N. Y. 249, 194 N. E. 694 (1935).

The mere fact that brokers have been employed by an owner to procure a sale or lease of real estate need not in itself necessarily prevent such brokers, under proper circumstances, from accepting employment also from a purchaser or a lessee.[1] But in order to recover commissions from the latter, the broker has the burden of proving a contract of employment between them.[2] Such a contract has been inferred although the broker was already under contract with the owner.[3] In the instant case the facts did not constitute an employment between the brokers and the prospective purchasers. The latter's acceptance of the proposition made by the brokers who were then acting for the owner would not justify the inference of an

[18] *In re* Slaughter, U. S. Dist. Ct., N. D. Texas, Oct. 12, 1935, reported in Commerce Clearing House, Bankruptcy Law Service, p. 3621 (holding the new section constitutional). *Contra: In re* Young, N. Y. Times, Oct. 22, 1935, at 1, reporting a decision of the U. S. Dist. Ct., Ill. *In re* Sherman Bkpt., N. Y. Times, Nov. 11, 1935, at 6, reporting a decision of U. S. Dist. Ct., Va.

[1] Knauss v. Gottfried Krueger Brewing Co., 142 N. Y. 70, 36 N. E. 867 (1894).

[2] Parker v. Simon, 231 N. Y. 503, 132 N. E. 404 (1921).

[3] Pease & Elliman, Inc. v. Gladwin Realty Co., 216 App. Div. 421, 215 N. Y. Supp. 346 (1st Dept. 1926).

employment of the brokers by the defendants. The brokers throughout were acting merely as intermediaries for the owner to offer proposals and transmit acceptances. There was no evidence that defendants had agreed, expressly or impliedly, to pay commissions or that the parties ever contracted with reference to commissions, or even contracted at all. Whether a contract of employment of the broker by prospective purchasers arises, in addition to that of the broker by the owner, depends in the last analysis on the facts of each case.[4]

H. S.

CARRIERS—CONTRACTUAL LIMITATION OF TIME IN WHICH TO FILE CLAIM FOR LOSS WHERE CARRIER MISDELIVERS GOODS.—Plaintiff delivered to defendant in New York merchandise for transportation and delivery to a consignee in another state. Defendant admittedly misdelivered the goods. Plaintiff filed a claim with defendant fifteen months after the loss occurred. The uniform express receipt, under which the merchandise was shipped, stipulated that such claims must be filed within six months and fifteen days after the date of shipment.[1] *Held,* as the conceded misdelivery, unexplained, constituted negligence on the part of the carrier, the stipulation is void, for the requirement of the filing of a claim with the carrier, as a condition precedent to an action for a loss occurring in transit through the carrier's negligence, violates the Interstate Commerce Act.[2] *Lefcort et al.* v. *Railway Express Agency, Inc.,* 154 Misc. 630, 278 N. Y. Supp. 238 (Mun. Ct. 1935).

Even prior to the enactment of the original Interstate Commerce Act,[3] stipulations that written notice of a claim for loss of, or damage to, goods shipped shall be given within a designated time were held

[4] Thus, in McKnight v. McGuire, 117 Misc. 306, 191 N. Y. Supp. 323 (1st Dept. 1921) the following statement made by the prospective lessee was held to bind him to a contract, breach of which resulted in a recovery by the broker; "If you can get that house for two years for $250 a month I will take it." In James v. Home of the Sons and Daughters of Israel, 153 N. Y. Supp. 169 (App. T. 1st Dept. 1915) where the prospect told the broker to get the property at a certain price, after the owner had agreed to the price, and the prospect refused to proceed, the broker was awarded damages for breach of contract.

[1] Clause 7 of the uniform express receipt provided in part: "* * * as conditions precedent to recovery claims must be made in writing to the originating or delivering carriers * * * in case of failure to make delivery * * * within six months and fifteen days after date of shipment * * *."

[2] As amended (44 STAT. 1448 [1927], 49 U. S. C. A. §20 [11] [1928]) it provides in part: "* * * if the loss * * * was due to * * * negligence while the property was in transit * * * then no * * * filing of claim shall be required as a condition precedent to recovery * * *."

[3] 24 STAT. 386 (1887), 49 U. S. C. A. §20 (11) (1928).