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## THE CASE OF THE BROKER'S COMMISSION \*

MAURICE FINKELSTEIN †

A RECENT case in which the Court of Appeals was unable to muster a majority for either side<sup>1</sup> brings to the foreground again the difficult problems involved in determining at what precise point a broker has earned his commission. Here the path of the law shows divergent trends between law in books and law in action. With a simple facility, both law teachers and text writers have frequently stated the general rules.<sup>2</sup> But the application of these rules to practical situations as they arise seems to raise some undreamed of difficulties.

If a broker is employed to secure a purchaser for real or personal property under an agreement which does not make his fee contingent on consummation of the sale, and he procures such a purchaser who is, as the courts say, ready, willing and able to purchase the property on the terms specified in the brokerage agreement, the stipulated commission has been earned.<sup>3</sup> If no amount of commission is stipulated, then the custom of the particular trade governs,<sup>4</sup> or at worst,

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\* This is the second of a projected series of case studies designed to analyze case histories from the viewpoint of factual structure. The effort is to study in detail the progress of the litigation through the courts. The first of these studies was published in this Review *sub nomine* *The Case of the Beverly Hotel—A Study of the Judicial Process*, 27 ST. JOHN'S L. REV. 261 (1953).

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<sup>1</sup> *Wiesenberger v. Mayers*, 281 App. Div. 171, 117 N.Y.S.2d 557 (1st Dep't 1952), affirming by a divided court a decision by Justice Henry Clay Greenberg, granting defendants' motion for summary judgment, and denying plaintiff's cross motion for summary judgment. The plaintiff appealed, and the case was argued before the Court of Appeals on May 19, 1953. Inasmuch as the Court split 3-3, the plaintiff moved to withdraw the appeal and the motion was granted. 306 N.Y. 732, 117 N.E.2d 910 (1954).

<sup>2</sup> See, *e.g.*, simple statement of the rule in 4 WILLISTON, CONTRACTS § 1030A (Rev. ed. 1936).

<sup>3</sup> RESTATEMENT, AGENCY § 445, comments *c* and *d* (1933).

<sup>4</sup> *Freas B. Snyder & Co. v. Media-69th St. Mortgage Pool*, 32 Del. Co. 36 (Pa. C.P. 1943); see *Ingalls v. Streeter*, 67 N.Y.S.2d 351, 354 (Syracuse Munic. Ct. 1946).

the broker will be entitled to recover in *quantum meruit*.<sup>5</sup> Such situations furnish a minimum of difficulty. The factual question is limited to a determination of whether in truth the proposed purchaser ever offered to purchase the property at the price stipulated in the brokerage agreement, and at a time when he was ready and able to do so; and the legal question is confined *largely* to the relevance of the Statute of Frauds; for, in some states, real estate brokerage agreements are void unless in writing and signed by the vendor,<sup>6</sup> or the person to be charged.<sup>7</sup>

In these simple cases it does not matter that the contract of sale was never entered into,<sup>8</sup> or that its enforcement was barred by the Statute of Frauds,<sup>9</sup> or that either of the parties refused to consummate the deal.<sup>10</sup> The broker has earned his commission when, and as soon as, he has complied with the brokerage contract by producing a purchaser ready, able and willing to buy on the terms stipulated in the brokerage contract.

<sup>5</sup> See note 4 *supra*; see also *Bierman v. Barbieri*, 124 Misc. 157, 158, 207 N.Y. Supp. 174, 175 (App. T. 1st Dep't 1924).

<sup>6</sup> IDAHO CODE ANN. § 9-508 (1947); IND. STAT. ANN. § 33-104 (Burns, 1933); NEB. REV. STAT. § 36-107 (1952); N.J. STAT. ANN. tit. 25, § 25:1-9 (1940).

<sup>7</sup> ARIZ. CODE ANN. § 58-101(7) (1939); CAL. CIV. CODE § 1624(5) (Deering, 1949); MICH. COMP. LAWS § 566.132(5) (1948); MONT. REV. CODES § 13-606(6) (1947); N.Y. PERS. PROP. LAW § 31(10); ORE. REV. STAT. c. 41, § 41.580(7) (1953); TEX. STAT. art. 3995a (Vernon, 1948) (mineral lands only); UTAH CODE ANN. tit. 25, § 25-5-4(5) (1953); WASH. REV. CODE tit. 19, § 19.36.010(5) (1951); WIS. STAT. § 240.10 (1951) (party agreeing to pay such compensation). See also CANAL ZONE CODE tit. 3, § 886(5) (1934); HAWAII REV. LAWS tit. 22, § 8721(6) (1945); ALBERTA REV. STAT. Div. 18, c. 319, § 2 (1942); ONTARIO REV. STAT. c. 332, § 39(a) (1950). A similar statute in Ohio [OHIO GEN. CODE ANN. § 8621 (1921)] was repealed in 1931 by 114 Laws of Ohio 110. For exceptions to the New York statute, see note 11 *infra*.

<sup>8</sup> "It is a well-settled rule that when a broker finds a purchaser ready, willing, and able to meet the owner's terms, the broker may recover his commission even though the employer refuses to transact business with the person in question. 4 R.C.L. 308." See Note, 51 A.L.R. 1390 (1927). See also Note, 36 HARV. L. REV. 875 (1923).

<sup>9</sup> "That the requirement of the Statute of Frauds, that the agreement must be evidenced in writing, might be pleaded in defense, has no bearing upon the question of whether the plaintiffs had earned their commissions." *Tanenbaum v. Boehm*, 202 N.Y. 293, 299, 95 N.E. 708, 710 (1911). See also *Rosenblatt v. Bergen*, 237 N.Y. 88, 142 N.E. 361 (1923).

<sup>10</sup> *Charles v. Cook*, 88 App. Div. 81, 84 N.Y. Supp. 867 (2d Dep't 1903); *Brown v. Helmuth*, 2 Misc. 566, 21 N.Y. Supp. 615 (Super. Ct. 1892); *Bach v. Emerich*, 3 Jones & S. 548 (N.Y. Super. Ct. 1873); *Heinrich v. Korn*,

At least in New York, with some exceptions, brokerage agreements are required by the statute to be in writing.<sup>11</sup> The advisability of such a requirement from the point of view of natural justice is obvious. Often the terms of sale are complex. The rate of commission frequently departs from the customary. Oral testimony and human recollection are but feeble props in such circumstances. Nor is the application of the statute an insurmountable obstacle where good conscience requires other results. There still remain the twin judicial inroads on the Statute of Frauds: the doctrine of part performance, and the rule with respect to fiduciary relations.<sup>12</sup>

Such cases are law office chores and do not press for nice legal discernment. Of an altogether different vintage are cases where the broker's claim to have earned a commission is based on the theory that a buyer and seller have come together on a deal, different from that specified in the brokerage agreement, or absent specified terms in the brokerage agreement. Here, if for some reason the deal fails of consummation, difficult questions of law and fact are presented in seeking an answer to the question: has the broker earned his commission?

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4 Daly 74 (N.Y.C.P. 1871); *Roche v. Smith*, 176 Mass. 595, 58 N.E. 152 (1900); *Scully v. Williamson*, 26 Okla. 19, 108 Pac. 395 (1910).

<sup>11</sup> N.Y. PERS. PROP. LAW § 31(10), as added by Laws of N.Y. 1949, c. 203 (effective Sept. 1, 1949). The statute specifically excludes contracts to pay brokerage commissions to an attorney or duly licensed real estate broker. For all practical purposes, the exception removes from the purview of the Statute of Frauds all real estate brokerage agreements, since under Sections 440-a, 442-d, 442-e, and 442-f of the Real Property Law, a real estate broker other than an attorney or officer of the court must be licensed, licensing being a prerequisite to an action for commissions, and violation thereof constituting a misdemeanor. The section will be applicable to non-licensed real estate brokers only in the situation where a contract is made within the state to render services without the state. See 1949 LEG. DOC. NO. 65(G), REPORT, N.Y. LAW REVISION COMMISSION 617 (1949).

<sup>12</sup> But see opinion of Rabin, J., in *Goldberg v. Shlingbaum*, 112 N.Y.S.2d 8 (Sup. Ct. 1951), holding that part performance under N.Y. PERS. PROP. LAW § 31(10) means "... complete performance including payment." 112 N.Y.S.2d at 9. The learned justice relied on *Tyler v. Windels*, 186 App. Div. 698, 174 N.Y. Supp. 762 (1st Dep't), *aff'd mem.*, 227 N.Y. 589, 125 N.E. 926 (1919), and *Smith v. Graham*, 277 App. Div. 1116, 101 N.Y.S.2d 732 (1st Dep't 1950) (both cases dealing with subdivision 1 of Section 31, but seemingly applicable to subdivision 10 of that section). See also New York annotations to RESTATEMENT, CONTRACTS § 198 (1932), although the text of Section 198 would imply a contrary rule elsewhere than in New York.

As indicated above, the legal principles involved can be easily stated. If all or substantially all the terms of the agreement between the buyer and the seller have been determined and assented to by them, and merely formalities remain for the consummation of the transaction—formalities such as the fixing of a date for closing, or the reduction of the agreement to writing,<sup>13</sup> or other comparatively immaterial details—the broker has earned his commission. The enigma is in the word “formalities.” Whether a particular provision of the agreement is so vital to the entire transaction that the failure to resolve it renders the agreement between the buyer and seller incomplete, is the precise problem. But there is still another problem, and that arises even where the essential elements of the agreement exist. They must not only exist, but co-exist, at the same moment of time. If *A* says to *B*, “I am willing to sell you my black horse for \$100,” and *B* says to *A*, “I will let you know what I decide about it tomorrow,” or, “I will surely buy it if my uncle will lend me the money,” or, “It is a deal if my wife does not object,” and *A* says, “Very well,” meaning, “I agree,” is there a meeting of the minds which entitles the broker to commission if by tomorrow *B* produces the \$100, or his wife’s assent, and is ready, willing and able to proceed only to discover that by then *A* has already changed his mind?

Prophylactic law would certainly avoid this and similar problems, but brokerage contracts are infrequently drawn by lawyers, and laymen’s language is geared to the imaginative. The hunt is, therefore, one for the “intent of the parties.” Thus, even where the brokerage agreement provides that the commission is not earned unless “title is closed,” or “contract is performed,” or “deal is consummated,” or “if the deal fails

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<sup>13</sup> Perhaps as good a statement of the rule as can be found was made by Hunt, J., in *Barnard v. Monnot*, 3 Keyes 203, 204, 33 How. Prac. 440, 441 (N.Y. 1866): “The duty of the broker consisted in bringing the minds of the vendor and the vendee to an agreement. He could do no more. He had no power to execute a contract, to pay the money for the one side, to convey the land on the part of the other, or to compel the performance by either of their duties. The plaintiff produced a purchaser, willing and ready to accept the terms of the defendant, and able to perform the obligation on his part. He had then earned his commissions, and it would be a singular conclusion of the law that the refusal of his employer to complete the bargain, should destroy his right to them.”

for any reason to go through," the seller may still have to pay the commission though the transaction is not closed. This might occur where the seller repudiates or is unable to perform; certainly where the seller's retirement from the transaction is culpable or arbitrary. Language more specific is required to enable the seller arbitrarily to avoid both the sale agreement and the commission.<sup>14</sup>

It is a nice problem to determine whether a seller, having once acquiesced, may withdraw from a transaction and still be immune to the claim for commission, shielded by the umbrella of laymen's phrases that "no commission is payable unless deal is closed."<sup>15</sup>

The suggestion here made is that the unity of time, as one says in property law, is all important. If the vendor's agreement to accept the proffered terms is coincident in time with the buyer's readiness, willingness and ability to buy, the broker has earned his pay. It will not in that case matter if the seller declines to bind himself with legal chains to the purchaser and, in fact, repudiates the transaction pursuant to his legal right to do so.

In the recent case above adverted to in which the Court of Appeals, with only six judges sitting, was unable to reach a decision, prickly problems, not easily resolved, were raised. As the case came up on cross motions for summary judgment under the New York Rules of Civil Practice,<sup>16</sup> the factual

<sup>14</sup> Language, *e.g.*, such as used in Grenell Realty Agency, Inc. v. Gruner, 63 N.Y.S.2d 443 (App. T. 1st Dep't 1946), where the vendor was exculpated from any obligation to the broker if title failed to pass for any reason "... including the fault of the vendor." *Id.* at 444.

<sup>15</sup> The New York cases have gone furthest in protecting the broker in such cases. Thus, in Magrill v. Langan, 43 N.Y.S.2d 210 (App. T. 2d Dep't 1943), the broker had agreed that his commission should not be paid until delivery of a deed, yet the broker prevailed though the transaction never was consummated, because seller's title was defective. The principal case is Colvin v. Post Mortgage & Land Co., 225 N.Y. 510, 122 N.E. 454 (1919); see also Smith v. Peyrot, 201 N.Y. 210, 94 N.E. 662 (1911); Knapp v. Wallace, 41 N.Y. 477 (1869); Cusack v. Aikman, 93 App. Div. 579, 87 N.Y. Supp. 940 (2d Dep't 1904); *accord*, Peters v. Dreger, 146 Neb. 670, 21 N.W.2d 436 (1946). *Contra*: Guy L. Deano, Inc. v. Michel, 191 La. 233, 185 So. 9 (Sup. Ct.), *reversing* 190 La. 7, 181 So. 551 (Ct. App. 1938).

<sup>16</sup> See note 1 *supra*. Summary judgment is permitted on application of either party by Rule 113 of the New York Rules of Civil Practice. The courts are authorized to grant such relief, before trial, where only questions of law remain for decision, all questions of fact having been resolved.

situation was not seriously in doubt. Of course, there were conflicts in interpretation of the facts between the opposing affidavits. But this was a situation in which written documents spoke for themselves and it was not necessary to resort to interpretation of the facts by counsel for the respective parties.

The story began in the summer of 1950, when two men, brothers, who, with their respective wives, were the owners of all the capital stock of a corporation, sought to sell the securities for approximately two and one-half million dollars. To this end they engaged the services of a broker, the plaintiff, and their arrangement was in writing as contained in a letter addressed by the plaintiff to the two brothers and reading as follows:<sup>17</sup>

May 25, 1950.

Messrs. L. and C. M——s,  
516 West 34th Street  
New York City, N. Y.

Dear Lawrence and Chauncey:

This will serve as the memorandum which you requested of what we previously agreed upon orally regarding the sale of all of the outstanding stock of L. and C. Mayers Co., Inc., which I understand is owned by your wives and yourselves.

As I explained, it takes time to negotiate a sale because first, considerable preparatory work is required before a proper presentation can be made to a prospective buyer, and, second, it takes time for a buyer to decide whether or not to buy. Accordingly, you now give me the exclusive right until August 31, 1950, to sell the above stock. The price is \$2,500,000 for all the shares, payable in cash, or upon such other terms as may be acceptable to you. For my efforts in producing a purchaser by that date, you will pay me \$100,000 upon completion of the transaction. Of course, if I do not obtain a purchaser by that date, you will owe me nothing, regardless of my efforts and expense—and it follows also that should I obtain a purchaser by that date, but the transaction should perchance close thereafter, my commission nonetheless will have been earned.

Because the deal is capable of being worked out in different ways, our understanding is that I am to receive my commission no matter

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<sup>17</sup> See Record on Appeal (App. Div.), Fols. 105, 246-249.

what kind of assets you actually sell or in what form the transaction is cast.

I believe this covers our understanding completely, and, if you agree, kindly sign the enclosed copy of this letter and return it to me.

Very sincerely yours,

(Signed) ARTHUR WIESENBERGER

AW/ms

Agreed:

LM (signed) Lawrence M———s

CM (signed) Chauncey M———s

Acting under the authority of this letter, the plaintiff interested a purchaser in acquiring the property referred to at a reduced price from that stipulated in the brokerage contract. Then followed the not unusual long and protracted discussions participated in by the buyer and the seller and the broker and the attorneys for the respective parties. Information was exchanged, proposals and counter proposals were made and considered, and, finally, all the terms of the proposed agreement were arrived at and incorporated in a written instrument. Throughout these negotiations, it was known to all the parties that the purchaser did not propose to enter into the transaction unless he could borrow a substantial sum from local lending institutions. But it was not doubted that he would be successful in making such a loan. Nevertheless, the purchaser was unwilling to bind himself legally until definitive word with respect to the loan could be obtained from the lending institutions. But since the purchase and sale agreement had been whipped into shape, a novel scheme was adopted to eliminate debate and discussion when the loan should be consummated. To this end both the sellers and the purchaser executed the purchase and sale agreement, but the agreement was not delivered. It was, instead, placed in escrow with the attorney for the purchaser under an escrow agreement which provided as follows:<sup>18</sup>

1. That the purchaser and the seller had deposited with the escrow holder the purchase and sale agreement executed in three counterparts.

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<sup>18</sup> *Id.*, Fols. 37-50.

2. That the purchaser was engaged in negotiating a loan and that when the escrow holder was advised by the purchaser that the negotiations were successful, he was to so inform the seller; thereupon the seller was to deliver the stock to the escrow holder and the purchaser was to deliver checks, constituting part payment, to the escrow agent.

3. Upon receipt of such checks and stock, the escrow agent was to insert in the sale agreement a closing date to be no later than one week after the receipt by the escrow agent of the stock and the checks. And he was also to deliver one of the counterparts of the agreement to the purchaser, and two counterparts to the seller, together with the checks, and the agreement was then to be considered "in full force and effect for all purposes."

4. If the purchaser should fail to deliver the said checks to the escrow agent within two days after notification of the successful conclusion of the loan arrangements, or if the sellers should fail within two days after such notification to deliver the stock, then the escrow agreement was to be deemed terminated and the escrow agent was to cut off the signatures of the parties from the sale agreement and return one counterpart without said signatures to the purchaser, and two counterparts without said signatures to the sellers, and the sales agreement was to be deemed null and void.

5. The escrow agreement was to endure for only two weeks, at the end of which time if either the purchaser had not notified the escrowee of the successful completion of his loan arrangements and delivered the checks, or the sellers had failed to deliver the stock, the sales agreement was at an end and the transaction was off.

Before the two weeks had expired, the sellers suffered a change of heart and notified the escrow agent that they were unwilling to proceed with the transaction regardless of the outcome of the purchaser's loan arrangements. Thereafter, the purchaser completed his loan arrangements and so notified the escrow agent within the two-week period and tendered checks, but as the sellers refused to perform, the escrow agent declared the agreement at an end, destroyed the

signatures on the sales agreement and delivered one unsigned counterpart to the purchaser, and two unsigned counterparts to the sellers.

At this point the broker demanded and sued for his commission. The broker claimed that on this record he was entitled to his commission when the parties had come together on the terms of the sale. He claimed also that the loan arrangements had been arrived at prior to the execution of the sale agreement and awaited only formalities for their consummation. He asserted that the provisions of the escrow agreement, which apparently permitted each of the parties to withdraw regardless of the outcome of the loan arrangements, were entered into subsequently and without his knowledge. He did not contend that if the assent of the purchaser had been expressly withheld as it appeared to be from the escrow agreement, pending negotiations for the loan, that his commission would have been earned. He claimed, however, that the assent of the purchaser was unconditional and that the two-week delay provided for in the escrow agreement was merely occasioned by the necessity of formalizing the terms of the loan. He did not claim that the parties had ever been bound to each other, the purchasers to purchase, and the sellers to sell. Such a claim would have been inconsistent, to say the least, with the Statute of Frauds or with the terms of the escrow agreement, but he did claim that all the terms of the sale had been agreed upon and that the seller arbitrarily withdrew from the transaction because of a change of heart shielded by the escrow agreement of which he, the broker, had no knowledge, and to which he was not a party.

On this state of facts, Special Term granted summary judgment to the defendants, and the Appellate Division affirmed by a divided court. In the Court of Appeals, with only six judges sitting, briefs were filed and arguments were heard, but no decision was reached; instead the court directed re-argument before a court which included a seventh judge, called in for the purpose. At this point, the parties determined to call off the litigation and the sellers agreed to pay

one-half of the sum demanded by the broker, which the broker accepted.

Both parties agreed on this complicated state of facts that there was no point in requiring a trial. The sellers maintained that the broker had not earned his commission even if he was ignorant of the terms of the escrow agreement because there was no period of time at which the purchaser was ready, willing and able to purchase, since the agreement to purchase was not merely conditioned upon his ability to obtain a loan, but he was unwilling to bind himself in advance, even should the loan negotiations be successful. The purchaser wanted to wait out the two weeks, conclude his loan negotiations, and then say finally whether the purchase and sale agreement should become binding. The sellers likewise maintained that while they had agreed upon all the terms tentatively, they did not absolutely agree to accept them, but postponed such an agreement for two weeks during which they suffered a change of heart.

It will be obvious from the foregoing that the simple statement of the rule is most difficult to apply to this state of facts. The sale agreement was all but consummated and the conceded two weeks' waiting period was reserved by the parties to make a final determination. From the point of view of the defendants in the case, it was as if they had said, "If within the next two weeks we finally determine to sell, these are the terms upon which we will sell"; and as if the purchaser had said, "If within the next two weeks we finally determine to buy, these are the terms upon which we will buy."

Put thus, it is tolerably clear that there was no final meeting of the minds since neither party had said, "We are agreed on these terms and we need time merely for formalities." Here, as elsewhere in the law, there is an underlying moral problem. The broker had been to much trouble to arrange the terms of sale, to induce the purchaser to make an offer, to persuade the sellers to accept the offer. Much effort had been expended in working out the terms of the purchase and sale agreement. All of the terms had been finally worked out. But the sale requires something more

than mere agreement upon its terms. It requires a willingness to act upon what the parties ultimately consider fair terms. The right to refuse to sell even at a fair price is one of the attributes of ownership. And the right to purchase is a similar prerogative. On the record facts, it appears that at one moment the sellers were willing to sell upon the agreed terms, but were unwilling to so state, and the purchaser was willing to purchase on those terms, but the purchaser was inhibited from expressing his agreement by the inconclusive nature of the loan arrangements. When the loan arrangements were concluded and the purchaser was willing to bind himself, the sellers had already changed their minds and had so notified the escrowee. There was thus lacking what we call the unity of time, which apparently is an essential ingredient to enable a broker to claim that his commission has been earned.<sup>19</sup>

Viewed closely, there would appear to have been an issue of fact in the case even though both parties denied it.

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<sup>19</sup> Chief Judge Lehman of the New York Court of Appeals, while yet a justice of the Supreme Court of New York (a *nisi prius* court), sitting in an Appellate Term, had occasion to deal specifically with a strikingly similar problem in *Bender v. Wasser*, 198 N.Y. Supp. 528 (App. T. 1st Dep't 1923). There, defendant orally agreed to sell a garage to a purchaser found by plaintiff for \$13,500. When the parties met to execute the contract of sale at the lawyer's office, it appeared that the purchaser could not enter into the agreement until he obtained a release from a covenant he had made not to operate a garage in the neighborhood. He asked for a postponement for the purpose of securing the release. When he procured the release, the vendor refused to sell. Judge Lehman, in deciding against the broker, said: "[Plaintiffs] . . . were not entitled to any commission until they procured a purchaser ready, able, and willing to make an agreement to buy the business on terms acceptable to the defendants. While it may be that the proposed customer procured by the plaintiff did come to an apparent understanding with the defendants at their first meeting, and that the plaintiffs, as brokers, would have been entitled to their commission, if the customer had been ready, able, and willing to enter into a written contract in accordance with that understanding, yet clearly, since the customer was not able or willing to make any binding agreement with the defendants *at that time*, the plaintiffs had not fulfilled the terms of their employment. The postponement claimed to have been granted by the defendants until a consent was obtained by the customer was not a mere postponement of the time set for putting in writing an oral agreement, for the customer was not obligated to obtain a consent, and there was therefore no complete oral agreement in existence. Until the customer did agree, orally or in writing, to buy the business, the defendants had a right to change their minds as to the terms on which they would sell, and, until the plaintiffs had brought the minds of both parties together upon the terms of an agreement of purchase and sale, they were not entitled to any compensation." *Id.* at 529-530 (emphasis added).

The plaintiff asserted that he did not know that in the escrow agreement the parties had withheld final consent to the transaction on the terms agreed upon. He thought that the delay of two weeks was occasioned by formal requirements and if this were indeed the fact, the broker should have prevailed. The sellers, on the other hand, pointed to the reality that the parties had never agreed to sell on the terms set forth in the undelivered sales agreement and pointed to the escrow agreement as conclusive proof of this fact. Even if the escrow agreement had, indeed, been entered into without the knowledge of the broker, that is, even if he had not been aware of the fact that no agreement to buy and sell had actually been reached, he, of course, would not be entitled to his brokerage commission since the spirit of the brokerage agreement, if not the very letter, was that there was to be no brokerage fee unless the transaction was closed. Until that moment, the seller, of course, was free to withdraw from the sale on any terms which were less than those stipulated in the brokerage agreement, as were the terms in question. The Appellate Division casts some light upon this problem. The majority said,<sup>20</sup> "Recovery is sought upon the basis that defendants said 'yes' to the offer that was presented at less than the original terms, but then said 'no' before a sale had been made or incorporated into an executory contract. Assuming, without deciding, that such facts alone would be sufficient in law to support a recovery, additional facts uphold the dismissal of the complaint by Special Term." It is thus suggested that where a broker procures an offer which is accepted by a seller but rejected before it becomes binding in law, the broker has earned his commission, or at least it is to be assumed *arguendo* that he may have earned his commission.

We had thought that this rule was well settled. All that a broker need prove is that there has been a meeting of the minds between buyer and seller. If the seller said "yes" to an offer, at a moment when the offeror was ready, able and willing to buy, even though a technical contract of sale

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<sup>20</sup> *Wiesenberger v. Mayers*, 281 App. Div. 171, 174, 117 N.Y.S.2d 557, 559 (1st Dep't 1952).

(offer, acceptance, consideration) was never entered into, the broker is entitled to his commission.<sup>21</sup>

But this rule was not applied by the majority to this case because there was not in fact an unequivocal "yes" by the sellers at a moment of time when the purchaser was ready, able and willing to purchase. The essential failure of the broker was predicated upon his inability to prove that the purchaser had at any time before the seller withdrew evinced a willingness to be bound to buy. For a purchaser to say that he is willing to buy and then to recede from the arrangement and to contract for leave to withdraw, said the majority of the Appellate Division, is not enough for the broker's purposes.<sup>22</sup>

It is not enough that the buyer says that he wants to buy, if he later says that he does not know whether he wishes to buy or not, and contracts for leave to withdraw, and no sale is ever executed. That is a different type of condition from the happening of some external event, beyond the parties' control.

The minority of the Appellate Division construed the documents as giving the purchaser an option to purchase upon agreed terms. When the sellers receded from the transaction before the expiration of the time within which the purchaser could exercise his option already granted him, the broker had earned his commission.<sup>23</sup>

Lawyers who spend much of their time in participating in contract negotiations are not unfamiliar with the disappointments inherent in the failure of transactions to come to a conclusion after all of the thorny problems have apparently been ironed out. Frequently much labor is wasted and deferred hopes are painfully frustrated when at the last moment an impediment to the transaction destroys it. Where earnings depend on the conclusion of transactions, it would seem, of course, to be natural justice to deny compensation to any-

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<sup>21</sup> See note 13 *supra*. See also *Stern v. Gepo Realty Corp.*, 289 N.Y. 274, 45 N.E.2d 440 (1942), and *Mengel v. Lawrence*, 276 App. Div. 180, 93 N.Y.S.2d 443 (1st Dep't 1949), both cited by the majority in *Wiesenberger v. Mayers*, *supra* note 20 at 176, 117 N.Y.S.2d at 561.

<sup>22</sup> *Wiesenberger v. Mayers*, *supra* note 20 at 177, 117 N.Y.S.2d at 562.  
<sup>23</sup> *Id.* at 182, 117 N.Y.S.2d at 567.

one who has labored on the contingency of successful fruition. The significant element of this case is the fact that the transaction never came into being. The purchasers' hopes were frustrated and the broker did not get his commission. But so uncertain is the path of the law that no one can say with finality at what point in such a transaction the broker's commission, under the law, has been earned. Natural justice, which requires that commitments be kept, also requires that where there are no commitments, there should be no compulsion to perform. It is not unnatural that the Court of Appeals was divided in such a case, but it does leave the state of the law extremely uncertain, an uncertainty to be sure which would hardly have been resolved had there been a four-to-three decision on either side.