

**Principal and Agent--Commissions Earned by Salesman After Leaving Employ of Broker--Right of Broker to Share in Such Commissions (Byrne & Bowman v. Barrett, 268 N.Y. 199 (1935))**

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PRINCIPAL AND AGENT—COMMISSIONS EARNED BY SALESMAN AFTER LEAVING EMPLOY OF BROKER—RIGHT OF BROKER TO SHARE IN SUCH COMMISSIONS.—Under a contract terminable at will, defendant was employed as a salesman on commission for plaintiff, a firm of real estate brokers. Defendant had found a prospective purchaser of a long-term lease for a bank, one of plaintiff's clients, but while this transaction was pending, he resigned from his employment with the plaintiffs, without disclosing to them the status of the pending deal. Subsequently he obtained a broker's license<sup>1</sup> and continued the negotiations. Thereafter the bank agreed to accept the terms proposed by the prospective purchaser of its lease, but subsequently it defaulted on the deal and the salesman recovered a judgment against it for the commissions involved.<sup>2</sup> In an action by the plaintiffs, to impose a trust upon the proceeds of that judgment,<sup>3</sup> the Special Term held for the plaintiff on a finding of fraud on the part of the defendant, but since the original employment of the real estate brokers was non-exclusive, and since the transaction had not been completed during the agency, the Appellate Division dismissed the complaint when it found that the defendant had not acted fraudulently and had resigned in good faith.<sup>4</sup> On appeal, *held*, reversed. Plaintiff has the right to share in such commissions as the defendant earned<sup>5</sup> even though the defendant may not have been conscious of a purpose to defraud his employers. *Byrne & Bowman v. Barrett*, 268 N. Y. 199, 197 N. E. 217 (1935).

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<sup>1</sup> See N. Y. REAL. PROP. LAW (1922, am'd'd 1926) art. 12 A, §§440, 440(a), 442(d), 442(e), requiring a real estate broker to be duly licensed. See also *Bendell v. Domincis*, 251 N. Y. 305, 167 N. E. 452 (1929).

<sup>2</sup> When a broker secures a customer who is ready, willing and able to accept the terms announced to the agent by his principal, he is entitled to his commissions whether the sale is consummated or not, and an arbitrary refusal of his principal to accept his services does not deprive him of his right to compensation. *Mooney v. Elder*, 56 N. Y. 238 (1874); *Jacquin v. Boutard*, 157 N. Y. 686, 51 N. E. 1091 (1898); *John Reis Co. v. Zimmerli*, 224 N. Y. 340, 120 N. E. 692 (1918); *O'Hara v. Bronx Consumers' Ice Co.*, 254 N. Y. 210, 172 N. E. 472 (1930).

<sup>3</sup> *Beatty v. Guggenheim Exploration Co.*, 225 N. Y. 380, 122 N. E. 378 (1919). When property has been acquired under such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. *Robert Reis & Co. v. Volck*, 151 App. Div. 613, 136 N. Y. Supp. 367 (1st Dept. 1912): "The only indispensable elements of a good cause of action to enforce such a trust are the fiduciary relation and the use by one of the parties to it of the knowledge or the interest he acquired through it to prevent the other from accomplishing the purpose of the relation."

<sup>4</sup> *Byrne v. Barrett*, 242 App. Div. 583, 276 N. Y. Supp. 1 (1st Dept. 1934).

<sup>5</sup> Here plaintiffs only recovered their share of the commissions, defendant receiving the balance; but note that in the opinion of *Robert Reis & Co. v. Volck*, 151 App. Div. 613, 136 N. Y. Supp. 367 (1st Dept. 1912), *Scott, J.*, quotes from the opinion of *Sanborn, C. J.*, in *Trice v. Comstock*, 121 Fed. 620

An agent is bound to exercise the utmost good faith and loyalty toward his principals.<sup>6</sup> This places upon him the active duty of full disclosure to his employers, not simply the duty of refraining from deceiving them.<sup>7</sup> Especially is this true where the agent is managing a venture, and if he fails to make full disclosure, he may be held liable even when there is no finding of actual fraud or bad faith.<sup>8</sup> Further, an agent or employee may not use confidential knowledge acquired in his employment, in competition with his principal.<sup>9</sup> "Confidential knowledge is something known only to one or a few and kept from others."<sup>10</sup> One who enters into an employment impliedly contracts not to carry confidential knowledge obtained from his employer, into competition against him,<sup>11</sup> and an agent may be

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(C. C. A. 8th, 1903), 61 L. R. A. 176: " \* \* \* the law peremptorily forbids everyone who in a fiduciary relation has acquired information concerning, or interest in the business or property of his correlate from using that knowledge or interest to prevent the latter from accomplishing the purpose of the relation. If one ignores or violates this prohibition, the law charges the interest or the property which he acquires in this way with a trust for the benefit of the other party to the relation, at the option of the latter, while it denies to the former all commission or compensation for his services."

<sup>6</sup> *Selwyn v. Waller*, 212 N. Y. 507, 106 N. E. 321 (1914); *Visigraph Typewriter Mfg. Co. v. Spiro Mfg. Co.*, 122 Misc. 852, 204 N. Y. Supp. 813 (1923); *Elco Shoe Mfrs. v. Sisk*, 260 N. Y. 100, 183 N. E. 191 (1932). *TIFFANY, AGENCY* (2d ed. 1924) 367: "The duty of the agent to exercise good faith results from the fiduciary character of the relation. Of necessity, the principal must repose confidence in the agent, and must rely upon his good faith and loyalty to the interest which is committed to him."

<sup>7</sup> *Munson v. Syracuse, etc., R. R. Co.*, 103 N. Y. 58, 8 N. E. 355 (1896); *Wendt v. Fischer*, 243 N. Y. 439, 154 N. E. 303 (1926); *Meinhard v. Salmon*, 249 N. Y. 458, 164 N. E. 545 (1928), where *Cardozo, C. J.*, says: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties." *TIFFANY, AGENCY* (2d ed. 1924) §146: "It is the duty of the agent to exercise good faith and loyalty toward the principal in the transaction of the business intrusted to him. This requires—(c) That he shall give notice to the principal of all the facts relative to the business of the agency coming to his knowledge which may affect the principal's interests." But see *Knauss v. Gottfried Kreuger Brewing Co.*, 142 N. Y. 70, 36 N. E. 867 (1894), where the court held that the agent was not under a duty of full disclosure where the evidence clearly showed that the agent had no discretionary powers.

<sup>8</sup> *Meinhard v. Salmon*, 249 N. Y. 458, 164 N. E. 545 (1928).

<sup>9</sup> See *Little v. Gallus*, 4 App. Div. 569, 38 N. Y. Supp. 487 (4th Dept. 1896), and *Kammagraph Co. v. Stampagraph Co.*, 197 App. Div. 66, 188 N. Y. Supp. 678 (1st Dept. 1921), *aff'd*, 235 N. Y. 1, 138 N. E. 485 (1923), for further explanation of what constitutes confidential knowledge.

<sup>10</sup> *Kammagraph Co. v. Stampagraph Co.*, 197 App. Div. 66, 188 N. Y. Supp. 678 (1st Dept. 1921), *aff'd*, 235 N. Y. 1, 138 N. E. 485 (1923).

<sup>11</sup> *Little v. Gallus*, 4 App. Div. 569, 38 N. Y. Supp. 487 (4th Dept. 1896). Note dissenting opinion by *Green and Ward, JJ.*, denying the implied contract and quoting *Bristol v. Equitable Life Ass. Society*, 132 N. Y. 264, 30 N. E. 506 (1892): "Without denying that there may be property in an idea or trade secret or system, it is obvious that its originator must himself protect it from escape or disclosure. If it cannot be sold or negotiated, or used without a disclosure, it would seem proper that some contract should guard or regulate the disclosure, otherwise it must follow the law or ideas and become the acquisition of whoever receives it."

restrained to prevent such breach of contract and confidence.<sup>12</sup> Even though the agency or employment has terminated, the agent may not use, adversely to his former principals, such special information acquired in the course of his employment,<sup>13</sup> and this is true although the contract of employment included no covenant not to compete after leaving the employment.

L. H. R.

TAXATION—INCOME AND ESTATE TAX—RECOUPMENT—STATUTE OF LIMITATIONS.—Archibald H. Bull, a member of a partnership engaged in the business of ship brokerage, died on February 13, 1920. The partnership agreement provided that in the event a partner died the survivors were to continue the business for one year subsequent to the death, and the estate should participate in the gains or losses of the business to the same extent as the deceased partner would if he had lived. There was included in the estate tax return only the profit accrued prior to the partner's death. In August, 1921, the petitioner, executor of the estate, acquiesced and paid an additional estate tax assessment representing the value of Bull's interest in the partnership as measured by the sum received as profits after his death. In July, 1925, the Commissioner adjudged these very and same profits as being income to the estate and taxable as such. The petitioner, on appeal to the Board of Tax Appeals from the proposed deficiency of income tax, asserted that the item could not be both corpus and income of the estate. On dismissal of his appeal on April 9, 1928,<sup>1</sup> it was found to be too late to file a claim for refund of overpayment of estate tax. The petitioner then paid the income tax and in 1930 brought suit in the Court of Claims praying that the United States credit against income tax the overpayment of estate tax and refund the balance. On appeal from the decision of the Court of Claims<sup>2</sup> holding the suit not timely instituted, *held*, reversed. A claim for recovery of money which is the property of the claimant may be used by way of recoupment and is not barred by limitations so long as the main action itself is timely. *Bull v. United States*, 294 U. S. —, 55 Sup. Ct. 695 (1935).

The case presents two novel and important questions, one addressed to the merits of the case and the other to the bar of the statute of limitations. The same sum of money, as evidenced by the decedent's share of profits accrued to the date of his death, may well be both income to the decedent and an asset of the estate. However, where partners contribute no capital and own no tangible property, there is no reason to characterize the right of a living partner to his

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<sup>12</sup> *McCall Co. v. Wright*, 198 N. Y. 143, 91 N. E. 516 (1910).

<sup>13</sup> *People's Coat Supply Co. v. Light*, 171 App. Div. 671, 157 N. Y. Supp. 15 (2d Dept. 1916), *aff'd*, 224 N. Y. 727, 121 N. E. 886 (1918).

<sup>1</sup> *Bull v. Commissioner*, 7 B. T. A. 993 (1927).

<sup>2</sup> *Bull v. United States*, 6 F. Supp. 141 (1934).