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Article 7

Agency: Agent as the Procuring Cause of the Sale

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RECENT DECISIONS

Agency — Agent as the Procuring Cause of the Sale — Plaintiff entered into an oral agreement with the defendant that plaintiff would "use his time, efforts and business contacts in an effort to procure for defendant, orders and manufacturing contracts from C. Company" and that defendant would pay to plaintiff "over and above his regular salary a commission of five per cent of the net sales made by defendant to said compan(ies) on orders or contracts obtained by defendant from said compan(ies)." The evidence showed that plaintiff spent time and effort in working on modifications of defendant's product to suit the needs of C. Company, and that he introduced defendant to representatives of C. Company with whom defendant successfully contracted for the sale of its product. Plaintiff sued for his commission. *Held:* the evidence was sufficient to sustain a finding that plaintiff was the procuring cause of the sale and therefore entitled to his commission. *Chamberlain v. Abeles, 198 P. (2d) 927 (California 1948).*

The agent's right to his commission depends entirely on the agreement between the parties, and the agent must fulfill all of the requirements imposed by the principal to be entitled to this commission.[1] An agent for the sale of property on commission must be the procuring cause of the sale to be entitled to his commission.[2] "Procuring cause" means a cause setting in motion a series of events which without break in their continuity result in achieving the prime objective of the employment of the agent.[3] The agent who is the procuring cause of a sale is to receive his commission though he is personally not present when negotiations are concluded[4] and though he is not the sole cause of the sale.[5] In *Session v. Pacific Improvement Co.*[6] the court stated "He who shakes the tree is the one to gather the fruit." Whether or not the agent is the procuring cause of a particular sale is a question of fact and such finding is ordinarily conclusive.[7]

Controversies over whether or not an agent has earned his commission arise generally in real estate agency contracts and many states now require such contracts to be in writing.[8] Contracts with real estate agents are either exclusive or non exclusive. Under the latter the agent to be able to secure his commission must prove that he was the procuring cause of the sale. It is generally held that the owner may list

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[1] 3 C.J.S. 178.
[2] RESTATEMENT, AGENCY § 448, comment (a).
[3] Roth v. Thomson, 40 Cal. App. 208, 180 Pac. 656 (1919).
[4] Hodges v. Ramsey, 216 S.W. 62 (Mo. App. 1919).
[5] Henning v. Holbrook Blackwelder R. E. Trust Co., 218 Mo. App. 433, 277 S.W. 62 (1925).
[6] 57 Cal. App. 1, 206 Pac. 653 (1922).
[7] James v. Foster, 116 Cal. App. 162, 2 P(2d) 582 (1936).
[8] See annotation in 9 L.R.A.(N.S.) 933.

his property with several agents under non exclusive contracts and compensate the agent who produces or procures the purchaser. This applies to cases where another agent first offered the property to the purchaser, the owner being ignorant of the offer having been made.[9] A fruitless attempt at sale on the part of the owner followed by a sale to the purchaser procured by the agent will also entitle the agent to his commission.[10]

Exclusive real estate agency contracts are either contracts giving an exclusive "agency" to sell or those giving an exclusive "right" to sell real property.[11] Where the agent is given an exclusive "agency" to sell real property for a fixed period of time, he is entitled to his commission regardless of whether the sale within the time stipulated was procured by himself or another agent.[12] The agent under such a contract need only prove a bona fide attempt to procure a purchaser.[13] The placing of a "For Sale" sign[14] or the mere listing of property without further efforts to sell are not bona fide attempts to procure a purchaser.[15]

Generally, the giving of an exclusive "agency" to sell precludes sale through another real estate agent only and does not preclude the owner himself from selling without liability.[16] The courts, however, are in conflict on the effect to be given a sale by the owner of real property where an exclusive right to sell has been given to the agent. Many hold that such a contract will be strictly construed and precludes the owner from himself selling the property as well as precluding sale through another agent.[17] In Wisconsin by legislative enactment contracts for commission on the sale of realty by an agent must also be in writing.[18] The Wisconsin Court in the case of *Bowe v. Gage*[19] in construing a non exclusive contract for the sale of real estate repudiated the rule cited with approval in an earlier case[20] that where the agent is the procuring cause of a sale, the law leans toward such construction as will best secure to the agent his commission. In *Roberts v.*

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[9] Terry v. Bartlett, 153 Wis. 208, 140 N.W. 1133 (1913).
[10] Burdon v. Briquelent, 125 Wis. 341, 104 N.W. 83 (1905).
[11] ". . . A distinction has been made between an exclusive agency and an exclusive right to sell, the owner having a right to sell where the broker is merely given the exclusive agency, but not where he is given the exclusive right to sell. . . ." Annotations in 20 A.L.R. 1270.
[12] Balser v. Ramseur, 209 Ark. 150, 189 S.W.(2d) 785 (1945).
[13] Genske v. Christensen, 189 Wis. 520, 208 N.W. 467 (1926).
[14] Huchting v. Rahn, 179 Wis. 50, 190 N.W. 847 (1922).
[15] Starszek v. Kochanik, 199 Wis. 473, 222 N.W. 21 (1929).
[16] Greene v. American Malting Co., 155 Wis. 216, 140 N.W. 1130 (1913).
[17] Falkenberg v. Giacomazzi, 53 Cal. App. 449, 200 Pac. 372 (1921).
[18] WIS. STAT. 240.10 (1947).
[19] 127 Wis. 245, 106 N.W. 1074 (1906). *Contra*: Duncan v. Borden, 13 Colo. App. 480, 59 Pac. 60 (1899).
[20] Stewart v. Mather, 32 Wis. 344 (1873); *accord,* Duncan v. Borden, *supra* note 19.

Harrington[21] the owner gave the agent the "exclusive sale" of his farm for four months but the contract did not specifically preclude the owner himself from selling. The Wisconsin Court held that under such circumstances the owner himself could sell without liability where he had no knowledge of the prior negotiations carried on by the agent. In that case the agent had given no consideration and the Court refused to construe the contract as one limiting the owner's right to sell. The agent was free to act or not act under the circumstances and the Court reasoned that it would be inconsistent with the idea of ownership to preclude the owner himself from selling without liability unless clear and unequivocal language to that effect was used. In the subsequent case of *Greene v. Minnesota Billiard Co.*[22] the agent was given an exclusive right to sell but the contract contained the stipulation that the agent was to receive his commission "regardless of who negotiates the sale." The owner sold the property and it was shown that the agent had spent time and money in efforts to procure a purchaser, and the Court held that the agent was entitled to his commission.

The Wisconsin Court's interpretation of contracts giving an exclusive right to sell does not place an unreasonable burden on the agent by forcing him to expressly stipulate that a sale by the owner shall not deprive him of his commission. In the absence of either type of exclusive contract the requirement that the agent prove that he was the procuring cause of the sale is the only reasonable method of determining whether the agent is to receive his commission.

PAUL KRUMHOLZ

Evidence — John Doe and Grand Jury Proceedings — Plaintiff, in his capacity as town chairman of the town of Lake, was arrested on the charge of accepting a bribe. After the arrest, a magistrate in another proceeding subpoenaed witnesses and conducted a John Doe hearing into the matter. Plaintiff prayed for a writ of prohibition to restrain the magistrate from further investigational hearings in the John Doe proceeding. *Held:* writ denied. The Court stated that a writ of prohibition is only issued to correct some grave abuse of power or when the magistrate abuses his discretion, and will not issue in the absence of a showing that the magistrate proceeded beyond his powers and jurisdiction. *State ex rel. Kowaleski v. District of Milwaukee County et al., 254 Wis. 363, 36 N.W. (2d) 419 (1949).*

This action involved a John Doe proceeding, rather than a Grand Jury hearing, so that for clarity it becomes necessary to distinguish between the two. A John Doe proceeding is a hearing conducted by a

[21] 168 Wis. 217, 169 N.W. 603 (1918).
[22] 170 Wis. 597, 176 N.W. 239 (1920).