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William S. Cudlipp Jr.
University of Richmond

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The Broker's Claim to a Commission When His Customer Buys Direct or Through Another Broker

WILLIAM S. CUDLIFF, JR.

Very few lawyers in general practice in Virginia have not been consulted at one time or another about the right of a real estate broker to collect a commission on a sale of property consummated directly by the owner or through another broker with a customer found by the first broker. The majority of the disputes of this nature never reach the courts and undoubtedly the great majority of those that do are finally settled at the trial court level. Nevertheless the Virginia reports contain a number of decisions involving such cases, and opposite results have sometimes been reached under substantially similar circumstances. The purpose of this brief note is to examine some of these decisions and to state certain conclusions that may be of some assistance to practitioners who are called upon to give advice upon and possibly litigate such matters.

Sales Closed by the Owner

Where the transaction involves a sale effected at the price, upon the terms, and within the period of the listing the broker's right to the commission is beyond question if it can be established as a matter of fact that he was the procuring cause of the sale. Conflict in the cases exist only where the contract has been closed by the owner at a lesser price or upon terms more favorable to the purchaser than those contained in the listing.

In *Long v. Flory & Garber*, 112 Va. 721 (1911), the defendant, Long, listed his property with the plaintiffs, Flory & Garber, real estate brokers, for sale at a price of \$16,800 of which \$800 was to be paid to them as a commission in the event of a sale. At the plaintiffs' request the price was reduced to \$16,000, of which \$500 was to be paid to the brokers. One Cline became interested in the property through the

plaintiffs' efforts but refused to pay \$16,000 for it. Long sold it for \$15,500 to another person who shortly thereafter transferred it to Cline for \$15,500 under circumstances that strongly indicated that it was a "straw man" transaction although Long was unaware of this when he made the contract. In reversing the judgment in favor of the brokers, the court stated that Long would have been within his rights if he had sold directly to Cline unless in so doing he thwarted a sale to him by the brokers at the price of \$16,000. The court said at page 723 that the governing principle in this class of cases is stated in a West Virginia decision as follows:

Under a special contract between an owner of real estate and an agent for the sale thereof, on commission, at a price agreed upon, the agent cannot recover his commission without proving that he has actually made a sale at the price stipulated, unless it appear that his principal has wrongfully prevented the making of a sale at such price, which would have been made, but for his interference, or has waived the strict performance of the contract.

. . . It may have been a hard contract, and the plaintiff may have entered into it under a misapprehension of the law; but that cannot relieve him from the terms of his contract. In order to recover, he is bound to show compliance with it. This he has utterly failed to do, so far as the evidence shows; for he does not pretend to show that he procured a purchaser for the property, or made a sale of it, at a price which under his contract would have entitled him to commission.

The effect of this decision seems clear; if property is listed with a broker at a fixed price the broker may recover only if he produces a purchaser ready, willing, and able to buy at that price. However, less than a year later the same justices reached an opposite result in *Paschall & Gresham v. Gilliss*, 113 Va. 643 (1912). There the broker, Gilliss, was allowed a commission under the following facts: The defendants agreed to let Gilliss attempt to sell a tract of timber and to pay him a commission of five per cent in the event of a sale at \$200,000.

Gilliss brought the property to the attention of one Johnson and the defendants undertook to assist in the negotiations. In the absence of Gillis, Johnson contracted directly with the defendants to purchase the property for \$180,000. The defendants refused to pay Gilliss a commission on the sale contending that they had reduced the price because Johnson had told them that Gilliss had stated that the quantity of timber was less than had been estimated when the \$200,000 price was set and because he had abandoned his efforts to sell. Gilliss denied making any such statement to Johnson and also denied abandoning the negotiations. The trial court had refused the following instruction offered by the defendants:

The court instructs the jury that the contract entered into between the parties in this suit was a contract for the payment of a commission in the event of a sale at the fixed price of \$200,000; and if they believe from the evidence that said timber was sold for less than \$200,000, then they must find for the defendants. 75 S.E. 220, 221 (1911).

It seems obvious that the instruction was drawn in reliance upon the *Long* case, nevertheless the refusal to grant it was upheld. The court said that *Long*

. . . was very different . . . In the former case the contract between the owner and the agent fixed the minimum price at which the property was to be sold and the agent failed to find a purchaser or to effect a sale at the stipulated price. Moreover there was no evidence tending to prove that the principal had wrongfully prevented the agent from making a sale at such price, or had waived the strict performance of the contract.

The listing here provided for a commission of five per cent on a sale at \$200,000 while in *Long*, the listing first provided for a commission of \$800 on a sale at \$16,800 and was later modified to a commission of \$500 on a sale at \$15,500. In each case the sale was closed by the owner at a lesser figure and there was no evidence in either that a sale could have been

made at the fixed price if the broker had handled the transaction alone. This statement is substantiated by the following quotation from a Pennsylvania decision set forth in *Paschall & Gresham* which clearly indicates that the result would have been the same even if the evidence had affirmatively shown that Johnson wouldn't have purchased at \$200,000:

If 'vendors were permitted . . . to employ brokers to look up purchasers, and call the attention of buyers to property which they desired to sell, limiting them as to terms of sale, and then, when such purchasers were negotiating, take the matter in their own hands, avail themselves of the labor, services, and expenses of the broker in bringing the property into market, and accomplish a sale by an abatement in the price, and yet refuse to pay the broker anything, the business of a broker would not be worth pursuing; gross injustice would be done; every unfair and illiberal vendor would limit his property at a price slightly above the market, and make use of the broker to bring it into notice, and then make his own terms with the buyers, who were in reality procured by the efforts of the agent'. 113 Va. 643, 655 (1912).

In *Arwood v. Hill's Adm'r., et al.*, 135 Va. 235 (1923), the property was listed with the broker for sale at \$15,000 but he was instructed to submit for approval any lesser offer. He obtained an offer of \$12,000 from one Gray but the defendant refused to accept it. Before leaving on a trip the broker urged Gray to offer \$15,000 and while he was away Gray did offer \$14,000 directly to the owner, who accepted. In allowing the commission the court cited *Paschall & Gresham*. The decision is not inconsistent with *Long* for, while a definite price was mentioned in the listing, the broker was requested to submit a lesser price if obtained, thus tending to negate the strict "special contract" concept upon which *Long* was predicated.

The following year, in *Leicht-Benson, etc. Corp. v. Stone & Co., Inc.* 138 Va. 511 (1924), the facts were as follows: The property was listed with the broker for sale at \$14,000. He showed the property to two ladies who said they could not buy unless, as part of the consideration, they could exchange

a house and lot owned by them. The broker told them he would see about it and communicated the suggestion to the defendant corporation's secretary who said he didn't believe the deal could be made but agreed to look at the house and let the broker know. The broker heard nothing more, but a few days later the defendant entered into a contract of exchange with the ladies at a price of \$13,000. The court reversed the judgment in favor of the broker stating that so far as the proposition to exchange the properties was concerned the broker was a mere volunteer whose services were not accepted. However, without referring to *Paschall & Gresham*, or to *Arwood*, the court said at page 514: "It is impossible to reconcile either the expressions of the courts or the various cases involving the commissions of real estate brokers. . . ."

The court also said that the *Long* case was applicable and that it supported the following view:

One distinction which seems sometimes to be overlooked is as to the specific character of the employment. If the broker is employed generally to find a purchaser and introduces him to the owner, and they negotiate a sale, the broker is entitled to his commission; but a different rule applies, or should apply, where the terms of the sale or exchange are specifically fixed in advance, and the broker's authority is limited to finding a purchaser who will buy the property upon the prescribed terms. In the latter instance, in the absence of deceit or fraud on the part of the owner, the broker is entitled to no commission, unless he finds such a purchaser, and such a special contract should not restrain the owner from seeking, in good faith, to find a purchaser for his property on different terms. 138 Va. 511, 514 (1924).

It will be observed that neither here nor in *Long* did the listing stipulate that the commission would be paid only if a sale was made at the price in the listing.

In *Patton, Temple & Williamson, Inc. v. Garnett*, 147 Va. 1009 (1926), the Special Court of Appeals followed *Leicht-Benson, etc. Corp.* and *Long*. No reference was made to *Paschal & Gresham* or to *Arwood*. Here the lowest price at which

the broker was authorized to sell the property was \$11,000 and he offered it without success to one Mitchell for \$11,500. The owner in good faith revoked the broker's authority to sell and two days later sold directly to Mitchell at \$10,000. There was no evidence that Mitchell would have paid \$11,000 or that the revocation was to prevent a sale at that figure. The court said that under such circumstances a listing for an indefinite time is revocable at the owner's pleasure and denied the broker's claim. The finding that there was a revocation made in good faith might be deemed to distinguish it from *Paschall & Gresham* had the court not said, "The contract is one of hazard, to the extent that the agent performs his services without compensation, if he does not find the purchaser. But the production of a purchaser at the agreed price is in the nature of a condition precedent, and is the very essence of the undertaking by the agent." 147 Va. 1009, 1016 (1926).

At this point, although *Paschall & Gresham* had not been expressly overruled, it would be reasonable to conclude that if a definite price has been fixed in the listing and if it contains no direction to submit any lower figure, a sale to the broker's customer could be made by the owner at a price less than the listing without any liability for commissions unless the broker could show that the owner's action precluded him from selling at the stipulated price.

However, the next case, *Blankenship, et al. v. Childress*, 183 Va. 13 (1944), casts serious doubt upon the correctness of this conclusion for while it discussed and distinguished *Patton, Temple & Williamson, Leicht-Benson, etc. Corp.* and *Long* it reiterated the view expressed in *Paschall & Gresham* and other cases therein cited that the owners are "not permitted to reap the benefit of the plaintiff's labor and then deny him his just reward". The listing in the case was at a price of \$60,000 and the sale to the plaintiff's customer was made by the owners at that figure. The defendants denied that the commission was due because the sale was made on a deferred purchase money basis and not for cash. The listing was silent as to how the price was to be paid and the court noted that gen-

erally in such cases the broker is required to produce a cash customer. The court allowed the commission emphasizing however that it was the defendants who offered to accept this method of payment and it had not been requested by the customer. On the foregoing facts it could be said that the holding does not affect the previous decisions in any way, but the following statement unquestionably favors the principle asserted in *Paschall & Gresham*:

If the agency contract were intended by its provisions to require the broker to procure a purchaser who would pay \$60,000 in cash for the property, and the plaintiff produced a purchaser who would pay only \$20,000 in cash and \$40,000 on terms, and the owners, by independent negotiations with the customer of the plaintiff, accepted the \$20,000 cash and the \$40,000 on terms while the agency contract was still in force, they cannot escape liability for the commission of the plaintiff. This is true even where the owner has closed a sale with a customer of the broker for a lesser amount than that authorized for the broker to obtain. . . . 183 Va. 13, 21 (1949).

In 1945 the court had before it *Wilson et al v. Schmidt & Wilson, Inc.*, 184 Va. 642 (1945). The facts were these: a bank, the guardian of an incompetent owner of the property in question, listed it for sale at \$16,000 with a number of brokers, including the plaintiff, Schmidt & Wilson, Inc. The listing stipulated that any offer would be subject to the approval of the court in which a suit to sell the property was pending. Through the efforts of the plaintiff, two persons, the defendants Mr. and Mrs. Wilson, became interested in the property and although they said the price of \$16,000 was "prohibitive", plaintiff's representative was to show them the interior of the house as soon as it could be arranged with an officer of the bank. Mrs. Wilson then by-passed the broker and commenced negotiations with the bank which was later made aware of the plaintiff's efforts. She offered \$13,000 which was refused, and then offered \$13,500 which was finally accepted by the court. When the matter of a commission to

the plaintiff was brought to the attention of the court the Wilsons agreed to be responsible for it if any was found to be due.

The court affirmed the trial judge's findings that the broker was the procuring cause and the allowance of a commission. It said that the case came under the general rule supported in Virginia by *Paschall & Gresham*, by *Blankenship*, and by other Virginia cases. This general rule was quoted from 8 Am. Jur., Brokers, § 190, pp. 1101, 1102:

The rule is well established, that if property is placed in the hands of a real-estate broker for sale at a certain price or upon certain terms, and a sale is brought about through the broker as a procuring cause, he is entitled to commissions on the sale even though the final negotiations are conducted through the owner, who in order to make a sale accepts a price less than that stipulated to the broker or terms more liberal than those the latter was authorized to accept. 184 Va. 642, 651 (1945).

Reference was also made to an exception to the general rule and quoted from 8 Am. Jur., Brokers, §190, p. 1102, as follows:

. . . if the broker's contract of employment *expressly* makes the payment of commissions dependent on the obtaining of a certain price for the property he cannot recover, even though the owner sells at a less price to a person to whom the broker first shows the property, unless the broker is prevented from making the sale by the fault, fraud, or bad faith of the principal. (Emphasis supplied) *Id.* at 652.

The court said that this exception is supported by *Long* and *Leicht-Benson, etc. Corp.* but that the case at bar did not come within the exception so exemplified. It said that the listing of \$16,000 was intended as an "asking price" or guide to the broker and was not a special contract whereby the broker's right to commissions was predicated upon a sale at the stipulated price. The court pointed to the following circumstances to support this view: The property was worth only from

\$13,000 to \$14,000; under the terms of the listing, any offer was subject to the approval of the court; and prior to the acceptance of the Wilsons' offer the highest offer the bank had received was \$13,500 and this was made subject to a real estate commission.

It may be argued with considerable force and merit that none of these considerations satisfactorily distinguish the cases that are said to support the exception to the general rule; that there is nothing to indicate that the guardian knew the property was "worth only from \$13,000 to \$14,000" when the listing was made; that the fact that any offer submitted was subject to the court's approval was simply a sensible precaution against possible liability of the bank to the broker if an offer of \$16,000 was presented but rejected by the court which alone had power to accept it; and that the fact that the highest offer was less than the listing price is in keeping with normal experience and was not indictative of a conscious overpricing of the property.

If the court intended to follow the general rule as quoted by it from 8 Am. Jur. Brokers, § 190, and fully recognize the exception thereto as also quoted in the opinion there really was no need for it to find that the \$16,000 figure was only an "asking price", for there was no evidence whatever that the listing contract *expressly* made the submission of a customer at that figure a condition of the right to a commission.

The opinion also quoted from the Restatement, Agency, § 447, comment *b* (1933) as follows:

Common agreements with brokers. In the ordinary case where the principal promises a broker a commission for finding a purchaser and the asking terms are stated to the broker, the usual interpretation is that the asking terms are intended merely to guide the broker in starting negotiations, and the broker is to have his commission if he produces a customer ready and willing to purchase on the asking terms or on such modified terms as the principal may subsequently accept before the agency is revoked. 184 Va. 642, 654 (1945).

Section 447 of the Agency Restatement, which was not quoted by the court, states the rule in this manner:

An agent whose compensation is conditional upon his procuring a transaction on specified terms is not entitled to such compensation if, as a result of his efforts, a transaction is effected on different or modified terms, although the principal may thereby benefit.

Comment *a.*, to § 447 of the Agency Restatement, which was not quoted in the opinion, reads:

Strictness of the rule. The rule stated in this Section gives effect to the bargain the parties have made, but the harshness of the result frequently gives a reason for interpreting the principal's promise as not containing such an exacting condition. The principal may, however, *by clear language* so condition his promise to pay commissions that the commission is payable only if the broker obtains the original specified price or other terms, even though the principal closes the transaction at a lesser price, and on different terms, with the broker's customer. A condition thus *clearly stated* is effective unless there is evidence that subsequent to the original offer by the principal he agrees to pay a commission upon an altered basis if the broker should produce a customer willing to pay a lesser price. (Emphasis supplied).

Despite the views expressed in these quotations from the *Restatement of Agency* it appears that by its consideration of other facts and circumstances the court indicated that it was unwilling simply to examine the terms of the listing contract to ascertain if the owner had therein "by clear language" conditioned his promise to pay commissions.

In *Edwards v. Cragg*, 188 Va. 564 (1948), although most of the cases above were commented upon, no additional light is supplied because of the unusual facts involved. No commission was allowed but the broker, who had made a special agreement to provide financing so that the purchasers could pay all cash as the listing expressly required, defaulted in this undertaking and the owner was obliged to make a new

contract with the purchasers, giving terms. The court stressed the fact that the owner, at the request of the broker, had permitted the purchasers to take possession prior to the settlement and that this possibly constrained the owner to agree to terms instead of insisting upon cash.

Ford v. Gibson, 191 Va. 96 (1950) is another case where commissions were claimed on a sale closed by the owner. The purchaser had been shown the property by the broker more than a year prior to the sale but the owner was unaware of this fact. The court in affirming the denial of commissions stated that the jury was justified in finding that the broker was not the procuring cause of the sale and that the defendant in good faith had revoked the right to sell prior to the sale.

In *R. A. Poff & Company, Inc. v. Ottaway, et al.*, 191 Va. 779 (1951), a commission was denied the broker who had presented an offer to purchase by one Allen. The offer called for settlement in cash and was accepted by the defendants on the broker's representation that Allen could perform it. Allen was unable to do so and the contract was rescinded but the broker was given an opportunity to negotiate a new contract on terms that Allen could meet. When the broker declined its authority was revoked and a contract was effected with Allen by the owners. It was held not only that the revocation by the defendants was in good faith but also that they were the final procuring cause of the sale.

Summary

Despite the fact that the court has not found it necessary to overrule *Long, Leicht-Benson, etc. Corp.*, or *Patton, Temple & Williamson, Inc.*, the latest decisions show that, where the owner consummates the sale with a purchaser procured by the broker, the mere fact that the sales price is less or the terms of settlement more liberal than provided in the listing is not enough to deprive the broker of a commission. It must appear either from the listing agreement or from the listing and other facts and circumstances that the parties intended to make the production of a customer, ready, willing, and able to meet all of the provisions of the listing a condition precedent to the

recovery of commissions. And the statement in the listing of a definite price for the property is not alone sufficient to disclose such an intent.

Sales Closed Through Another Broker

The Virginia cases applicable to these situations are not in conflict as the following examination of them will disclose.

In the case of *Cannon v. Bates*, 115 Va. 711 (1914), two brokers, the plaintiff, Bates and another, Elam, were both negotiating with the same customer for the sale of the same property. Bates was the first to show the property to him but Elam obtained the offer that was accepted. Each broker knew of the other's efforts. A judgment in favor of Bates was reversed because of erroneous instructions and the case was remanded for further proceedings. The court said that where two or more brokers are employed, if each knows of the employment of the other and neither is preferred over the other by the principal, he may sell to the purchaser who is first produced and the broker producing the purchaser is entitled to the commission. The court quoted the following from a New Jersey case:

It would be at variance with all practical rules to require the party selling to pronounce, under the penalty of paying double commissions, upon the metaphysical question, which agent under the circumstances was the efficient cause of the sale. In the absence of all collusion on the part of the vendor, the agent through whose instrumentality the sale is carried to completion is entitled to the commission. 115 Va. 711, 719 (1914).

The court also quoted with approval a statement that in the absence of "special circumstances" which would make it proper to so charge him the principal ought not to be held liable for commissions to more than one broker and should not be required, at his peril to determine whether some broker other than the one who produced the customer was the procuring cause of this sale. Both of these quotations involved cases where the rival brokers knew of the competition. The

court indicated that a different rule would apply if the competing brokers were not each aware of the activity of the other. *Id.* at 720.

In *Smith-Gordon Co., Inc. v. Snellings*, 130 Va. 528 (1921), the plaintiff who first showed the property to the ultimate purchaser but who had been unable to get him to make an acceptable offer for it sought a commission on the sale made by another broker to whom the defendant had paid a commission. Plaintiff claimed that it had an exclusive agency and that it was the effective cause of the sale. The trial court had resolved both questions of fact against the plaintiff. The appellate court, at page 531, affirmed denial of the commission and said that the case was controlled by the rule in the *Cannon* case "to the effect that where more than one broker is authorized by the owner to make a sale, the broker who is the procuring cause thereof is alone entitled to the commissions". It would be more accurate to say that the broker who was not the procuring cause of the sale is not entitled to the commission.

The court allowed the broker to recover a commission in *Oney v. Jamison et al.*, 175 Va. 420 (1940) although the owner had paid a reduced commission to another broker who had procured the offer of \$13,500 that was accepted. The plaintiff had previously obtained and submitted an offer of \$13,000 from the ultimate purchaser but it had been refused *even though it met all of the terms of the listing*. The broker who presented the offer that was accepted had never shown the property to the purchaser and was a friend of the defendant's family and accepted a very small commission for his services. It is obvious that the court felt that the defendant had not acted in good faith in the transaction.

The decision in the *Oney* case can also be justified upon the ground asserted and sustained in *Washington et al. v. Garrett et al.*, 189 Va. 57 (1949), namely that a broker who produces a customer ready, willing, and able to purchase in accordance with the terms of the listing, need not obtain a written contract unless the listing so stipulates. In this case

the lower court sustained a demurrer to plaintiffs' motion for judgment which alleged that the plaintiffs had performed all of the services that produced the sale except that they had not obtained a signed offer. The written offer was secured by another broker who presented it to the owner. The owner knew all of these facts but was content to accept the second broker's assurance that he would work out with the plaintiffs the matter of commissions. The appellate court reversed. This reversal is clearly not in conflict with the views expressed in the *Cannon* case since the facts alleged constitute "special circumstances" that made the general rule therein stated inapplicable.

Atkinson v. S. L. Nusbaum & Co., Inc. et al., 191 Va. 82 (1950) is the most recent case dealing with the point here under discussion. There two brokers were endeavoring to sell the property to the same customers, Mr. and Mrs. Davis, under circumstances which the court found should have caused the plaintiff to learn of the competition. The plaintiff first showed the property to the Davises and obtained their interest but he was unable to bring them to the point of making an offer. He did not even report his negotiations to his principal. Another broker by questionable tactics induced the Davises to deal through him and procured an offer which was accepted. The owner was unaware of this improper conduct and acted in utter good faith and with strict neutrality between the rival brokers. The court held that the plaintiff had failed to show that his services were the "efficient, predominating and procuring cause of the sale" and affirmed the judgment for the owner. The court also discussed at length the *Cannon* and *Washington* cases and said that they were controlling.

Summary

In each case where the broker has been permitted to recover despite the fact that the written contract with his purchaser was actually presented by another broker it has been found that the former was the procuring cause of the sale and that the owner had knowledge of that fact. On the other

hand a broker who was not the procuring cause of the sale never has been allowed to recover.

The court has not had before it a case where the owner, unaware that the plaintiff broker was the procuring cause of the sale, in good faith has paid or has obligated himself to pay a commission to another broker who actually produced the purchaser. Dicta in *Cannon* and in *Atkinson* indicate that under these circumstances the owner should not be held liable for double commissions if the rival brokers were each aware of the other's employment. However, dicta in the same cases indicate that under the same circumstances the owner may be held liable to the plaintiff broker where such broker was ignorant of the other broker's employment. As a practical matter the latter situation will seldom, if ever, arise since a broker employed on a non-exclusive listing is usually aware that the owner has or will list the property with other brokers.

The distinction indicated by the dicta apparently is predicated upon the feeling that where the plaintiff broker knows of the competition he must pursue his negotiations with his customer to the point of actually obtaining and submitting the offer to the owner before his competitor can do so. But if he is unaware of the competition he need only produce his purchaser before the listing expires or before it is revoked in good faith by the owner.