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CONTRACTS-BROKER'S LISTING AGREEMENT-EFFECT OF LEASE OF PROPERTY BY OWNER

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CONTRACTS—BROKER'S LISTING AGREEMENT—EFFECT OF LEASE OF PROPERTY BY OWNER—Plaintiff, a broker, procured from defendant a listing agreement for the sale of defendant's property.[1] Plaintiff produced a purchaser, ready, willing, and able to purchase the property, but defendant refused to convey inasmuch as he had leased the property after giving the listing agreement. The lessee refused to cancel the lease for less than $3,000. Plaintiff brought an action to recover his commission and defendant disclaimed liability as the execu-

[1] The listing agreement reads: "Upon receipt of payment according to this contract, I agree to make a good and sufficient conveyance of said property by warranty deed . . . I do here state . . . that my title to same is good and without incumbrance except $8,500 mortgage." Principal case at 875.

tion of the lease was known to plaintiff and to the prospective purchaser before the offer to purchase was made. *Held*, defendant could not alter the plaintiff's rights by placing a lease on the property and the fact that plaintiff knew of the lease before or about the time he produced a purchaser does not affect his right to recover the commission agreed on in the listing agreement. *Broomfield v. Abass*, (Mich. 1948) 30 N.W. (2d) 874.

A listing agreement, in the absence of a counterpromise by the broker, is usually deemed a mere offer on the part of the vendor contemplating the formation of a unilateral contract which is accepted by performance of the requested act—the production of a purchaser ready, willing, and able to buy.[2] It is hornbook law that an offer may be revoked before acceptance, thus preventing the formation of a contract.[3] Consequently, in the normal case, the owner of property may terminate the broker's employment before he has completed a sale,[4] and the fact that the broker has expended time and money is immaterial.[5] While most courts require that the broker be notified of the termination,[6] there are statements, in some cases, that no notice need be given when the owner sells the property himself on the theory that the offer is in reality one to pay a commission if the broker produces a buyer before the owner has made a sale.[7] Even in cases where the agency is exclusive and the broker has started, in good faith, to perform, the general view is that while the contract is irrevocable [8] a distinction may be drawn between "agency" and "power of sale"; the power of sale being revocable even if the agency is not. In such a case, the agent is entitled to recover the amount he has expended plus the reasonable value of services rendered.[9] It is also generally agreed that revocation of an offer need not be direct; it may be indirect and informal as in the case where the offeree has actual knowledge that the offeror has changed his mind.[10] Evidence that the offeror is acting in a manner inconsistent with the idea that the offer is still in existence may be held

[2] In Ettinger v. Loux, 96 N.J.L. 522, 115 A. 384 (1921), on a listing agreement similar to the one in the principal case, the court said at 524: "An examination of the writing shows that in form it is that of an offer and not that of a contract. There is no consideration which is essential to a contract. It is, in essence, simply a revocable, naked power, an offer to pay for services when rendered if performed within the limited period and before revocation" Judge Learned Hand has stated: "In principle I am very clear that the agent makes no implied undertaking, and that the promise is unilateral." Auerbach v. Internationale Wolfram Lampen Aktien Gesellschaft, (C.C. N.Y. 1910) 177 F. 458 at 462; see also Haggart v. King, 107 Kan. 75, 190 P. 763 (1920).

[3] GRISMORE ON CONTRACTS, § 32 (1947).

[4] Des Rivieres v. Sullivan, 247 Mass. 443, 142 N.E. 111 (1924).

[5] Elliott v. Kazajian, 255 Mass. 459, 152 N.E. 351 (1926).

[6] Granata v. Mothner, (Tex. Civ. App.) 44 S.W. (2d) 817 (1931); Allsman v. Robinson, (Tex. Civ. App.) 25 S.W. (2d) 237 (1930).

[7] Des Rivieres v. Sullivan, 247 Mass. 443, 142 N.E. 111 (1924).

[8] Gunning v. Muller, 118 Wash. 685, 204 P. 779 (1922); Harris v. McPherson, 97 Conn. 164, 115 A. 723 (1922).

[9] Williamson Real Estate Co. v. Sasser, 179 N.C. 497, 103 S.E. 73 (1920); Gossett v. McCracken, 189 N.C. 115, 126 S.E. 117 (1925).

[10] Dickinson v. Dodds, 2 Ch. Div. 463 (1876).

to have revoked the offer.[11] Thus, a contract to sell the land [12] or an actual sale to a party foreign to the vendor-broker relationship,[13] brought to the knowledge of the broker, has been held to be a revocation of the broker's authority. In the principal case, there being no indication of an exclusive agency, the court might well have found that the offer was revoked and that there was no liability on the part of the defendant to pay a commission. If the broker, in the principal case, had actual knowledge of the lease before he found a purchaser, it could be held that he was fairly placed on notice that a sale could not be consummated and that the owner had changed his mind. Even if the agency were exclusive, the court could have found that while the agency itself was still in effect, the power to sell had been revoked. If so, the broker could recover only his expenses and reasonable compensation for services rendered rather than the full commission.

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[11] 6 R.C.L. 604; Parks, "Indirect Revocation and Termination by Death of Offers," 19 MICH. L.REV. 152 (1920).

[12] Bancroft v. Martin, 144 Miss. 384, 109 S. 859 (1926).

[13] Hechmann v. Van Graafeiland, (Mo. App. 291 S.W. 190 (1927); Haggart v. King, 107 Kan. 75, 190 P. 763 (1920); Des Rivieres v. Sullivan, 247 Mass. 443, 142 N.E. 111 (1924).