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sportsmanship can survive atomic power and bacterial bombs. If the net result of an overtechnicalized notion of civil liberties has encouraged pressure groups to spring up in a field where each individual must stand on his own feet, as the writer believes it has, the equilibrium of man's individuality with his social responsibility has been upset. That is an unhealthy climate in which to enter upon the atomic age.

THE REAL ESTATE BROKER AND HIS COMMISSION

JAMES MUNRO

A problem that seems to arise with fair frequency is that of the real estate broker and his rights to a commission. More precisely, the familiar pattern of litigation, almost infinitely varied as to form and emphasis, is along the following lines: A, a broker, lists B's property for sale at X dollars. A obtains a prospect, but the price is too high. B deals directly with the prospect, reduces the price, and makes the sale. B refuses to pay a commission on the ground A did not procure a purchaser who would pay the asking price. A sues.

The fact situations do not, of course, reduce themselves readily to a formula. Suppose, for example, that a vendor lists his ranch known as the "Razor Bill" place with a broker for a price of $22,000, agreeing to pay a commission of 5% ($1100) to the broker.[1] The terms are cash. Broker procures a prospect who is interested but cannot meet the terms. Broker contacts vendor and latter agrees to one-half cash, balance at 6%. Prospect cannot meet these terms. Thus matters stand as of June 1. On August 27, vendor notified broker he is withdrawing ranch from sale "for the present". On August 28, vendor sells to prospect for $22,000, terms of $2,000, terms of $2,000 cash, with balance payable over several years. The broker had judgment in the trial court. The Wyoming Supreme Court reversed, one judge dissenting, on the grounds that the plaintiff had not succeeded in bringinig the parties together on the terms of the original listing. On the question of possible bad faith, the majority held that the mere fact of a sale one day after the termination of the agency was not sufficient of itself to show bad faith. The burden, if any, was said to be on the plaintiff to show bad faith or fraud.[2]

Generally, although it may be changed as the parties so desire, a real estate "listing" is indefinite in duration. It is presumably a standing offer. The vendor agrees to sell his property, or if he does not sell, to pay the broker's commission, if the latter during the life of

1. Havens v. Irvine, 157 P. (2d) 570 (Wyo. 1945).
2. Havens v. Irvine, 157 P. (2d) 570, 575 (Wyo. 1945).

the listing produces a buyer ready, able and willing to buy on the terms of the listing. But what if the broker produces one who will buy but only at a lesser price? Or what if the prospect refuses to pay the asking price, the listing is terminated, and the vendor then sells to the prospect at a smaller figure? Suppose, between the date of termination and the date of sale, one day elapses, or two days, or two months, or a year? In short, how does the time element affect the matter? What is bad faith? Is it to be imputed by the actions of the parties, or must it be affirmatively proved?

Actually much that is said in the *Razor Bill* decision leads to the conclusion that the absence or presence of "bad faith" is the criterion. The majority judges agree that they must accord every favorable inference to the plaintiff's evidence, since the court below held in his favor.[3] But it is said that the only evidence of bad faith was the fact of the termination of the agency one day and the sale to the agent's prospect the next. It is said that fraud will not be imputed where the facts are consistent with purity of intention. Good faith, the court noted, was not at issue in the pleadings, but even if it had been, the burden would have been on the plaintiff to show bad faith. The so-called Massachusetts rule was invoked: that a broker may recover against a vendor where broker has performed all he has undertaken to do, or the deal was "approaching success" when the agency was ended.[4] Here the broker had not performed all he had undertaken and the deal was not approaching success. In fact it had reached a stalemate.

The court in both majority and dissenting opinion recognized the necessity of harmonizing the decision with an earlier case in which a broker had prevailed.[5] There the property had been listed orally for $25,000. The time was limited to a period of weeks. There was considerable conflict as to terms of the listing, but the broker claimed that, although the price was put at $25,000, he (broker) had said he would submit any offer. Arp made an offer of $15,000, and made a down payment of $500. This offer was turned down, and the vendor gave Riner & Co. an exclusive agency for 60 days. Riner also dickered with Arp and, during the course of the 60 days, Riner inquired of Owens if he would agree to accept half the commission if Riner completed a sale to Arp. Owens refused. After termination of Riner's exclusive agency, the property was sold to Arp for $15,000. Justice Blume's decision lays down three factors for consideration: (a) the nature of the contract, whether special or general. Was the plaintiff required to find a buyer who would pay not less than $25,000, or was he to find someone who would purchase the property for $25,000 or

3. Havens v. Irvine, 157 P. (2d) 570, 571 (Wyo. 1945).
4. Id. 157 P. (2d) at 574.
5. Owens v. Mountain States Tel. & Tel. Co., 50 Wyo. 331, 63 P. (2d) 1006 (1936).

less? (b) Time element. May broker recover where sale is made to broker's prospect after termination of listing? and (c) Continuity of negotiations.

The court concluded that the jury could have found that the contract was a general one, the duty of the plaintiff being to "find" a purchaser who would buy at a price satisfactory to the vendor. The court also felt that the fact that the listing had been terminated would not necessarily bar recovery if it appeared that the original prospect was at all times willing to buy. "... The law leans to that construction of the contract and to the interpretation of the facts of the case and the acts of the parties which will best secure to the broker the payments of his commissions."[6] As to the third factor the court notes, citing Corpus Juris, that the negotiations must have been uninterrupted and that the broker must have been "actively instrumental throughout in causing the parties to consummate the transaction."[7]

With these two cases in mind, what is the practitioner to conclude is the vital factor or factors? The essence of the *Razor Bill* decision is that, under the circumstances there obtaining, bad faith is not to be presumed merely from the fact of termination one day and consummation of sale the next. The burden is there put on the plaintiff to show bad faith. The court assumes a contract special both as to amount and terms. The amount was never questioned by the vendee, but the terms could not be met. In the *Owens* case, the decision seems to turn on the contract requiring plaintiff to "find" a purchaser and the insistence that, in order to recover for a sale made after the period of the agency, the negotiations must have been uninterrupted.[8]

This discussion is confined to those situations where a broker has found a purchaser and sues to recover a commission. The defense is sometimes that of termination of the contract,[9] lapse of time,[10] failure to sell on contract terms,[11] lack of bad faith,[12] ignorance that

6. Id. at 335, 63 P. (2d) at 1012.
7. The cases cited in C. J. do not go that far. At most they insist on "continuity" and not on the agent having been "actively instrumental throughout." Cf. In Re Breon Lumber Co., 181 Fed. 909 (M. D. Pa. 1910).
8. Incidentally, the judgment for the plaintiff in the Owens case was reversed and a new trial granted in order to enable the jury to have the benefit of the defendant's theory that the contract was a special one and that, consequently, no right to commission accrued unless the plaintiff procured a buyer ready, willing and able to buy at the price stipulated, $25,000. In some ways the Owens case seems actually a weaker case for recovery. The disparity between the asking price and the sale price, $10,000, was a 40% reduction, and it could be argued that at this price the broker had performed his duty of finding a prospect but had done nothing to obtain a good price. Regardless of the apparent soundness of such an argument, there is little emphasis on it in the decisions. See Notes 9 C. J. 595, 12 C. J. S. 187.
9. Havens v. Irvine, 157 P. (2d) 570 (Wyo. 1945); Stedman v. Richardson, 100 Ky. 79, 37 S.W. 259 (1896).
10. Slagle v. Russell, 114 Md. 418, 80 Atl. 164 (1911).
11. Hughes v. Dodd, 164 Mo. App. 454, 146 S.W. 446 (1912).
12. Sunflower Bank v. Pitts, 108 Miss. 308, 66 So. 810 (1914).

broker has procured or talked to prospect.[13] The points sometimes raised are that the broker has complied with his contract,[14] that he has substantially performed, [15] or that he was the procuring cause of sale. [16] At the other end of the spectrum are those situations where the broker has clearly failed to comply with the express terms of the listing. As in the *Razor Bill* case, he may have had his agency terminated,[17] or failed to secure the stipulated price.[18] Frequently, there is insistence, as in *Havens v. Irvine,* on a showing of bad faith as prerequisite to recovery.[19] But there are other cases in this group, or perhaps classifiable somewhere between the *Razor Bill* and the strict contract cases which predicate the broker's recovery on the theory that, having appropriated the services of the broker, the vendor cannot proceed and sell the property for perhaps a smaller price or at different terms.[20] Though not so denominated, there is, in such cases, a certain fraud element.

The fraud element exists, as has been shown, in the cases of sudden termination followed by sale within a relatively short time to the broker's prospect. It is also found in so-called special contract cases where the courts, even though the broker is limited to a certain minimum price, will allow recovery where the matter has been taken away from the broker and the deal effected between vendor and broker's prospect.[21] Courts apply different theories, depending on the facts. In the *Heaton* case, it was the appropriation theory. It sometimes is called the interruption theory,[22] or the Massachusetts version of the interruption theory, which states that the broker must be approaching success, when the vendor stepped in.[23] All these theories, regardless of the use or non-use of the terms "fraud" or "bad faith" rest basically on equitable concepts.

If fraud in some form or in some shading of meaning, whether called by that name or not, is a sine qua non of the broker's case, how is that element to be established? The majority in the *Razor Bill* decision rejected an implication of bad faith from the fact of cancellation one day and sale the next. The burden was on plaintiff to show bad faith. In the dissent, Chief Justice Blume devoted a considerable portion of his opinioin to answering the majority on this point. He

13. Quist v. Goodfellow, 99 Minn. 509, 110 N.W. 65 (1906); Terry v. Bartlett, 153 Wis. 208, 140 N.W. 1133 (1913).
14. Gregory v. Bonney, 135 Cal. 589, 67 Pac. 1038 (1902).
15. Biester v. Evans, 59 Ill. App. 181 (1895).
16. Ramezzano v. Avansino, 44 Nev. 72, 189 Pac. 681 (1920); Graves v. Hunnicutt, 8 Ga. App. 99, 68 S.E. 558 (1910).
17. Palmtag v. Danielson, 174 P. (2d) 470 (Cal. App. 1946).
18. Hughes v. Dodd, 164 Mo. App. 454, 146, S.W. 446 (1912); Holcomb v. Stafford, 102 Minn. 233, 113 N.W. 449 (1907).
19. Sanden v. Ausenhus, 185 Ia. 389, 168 N.W. 801 (1918).
20. Heaton v. Edwards, 90 Mich. 500, 51 N.W. 544 (1892).
21. Hill v. Wheeler, 2 Ga. App. 349, 58 S.E. 502 (1907).
22. Dancy v. Baker, 206 Ala. 236, 89 So. 590 (1921).
23. Sherman v. Briggs Realty Co., 310 Mass. 408, 38 N.E. (2d) 637 (1941); Kacavas v. Diamond, 303 Mass. 88, 20 N.E. (2d) 936 (1939).

concedes that fraud must be shown, but insists that only in the rare case could fraud be shown apart from the circumstances themselves. He asks: "What possible inference could be drawn in this case, when defendant sent for Von Forell on August 26, 1941, terminated the agency the next day, and, on the day subsequent, made the sale to the purchaser found by the agent, except the fact that the agency was terminated to evade the payment of a commission?" Certainly that inference, he concludes, could have been drawn by the trial court. He discusses other facts that have bearing on good or bad faith, such as lapse of time and the impasse in the negotiations. In this latter connection he rejects the majority holding, citing one case where, though a lesser figure was agreed upon, the broker was allowed to recover,[24] and another in which the broker prevailed where the property had been sold to broker' prospect nine months after the termination of the agency and the withdrawal of the property from sale.[25] In both instances bad faith was presumed from the circumstances. "If that were not the rule, it is clear that the question of bad faith could never be made to appear in any case in which the owner himself completes a sale on terms different from those given to the agent."[26]

While it was not, perhaps, necessarily involved in the dissenting opinion, the logical result of the argument of Chief Justice Blume is that, by the mere closeness in time, a presumption of bad faith may arise. It could arise from other facts, such as the fact that the vendor knew on August 26 that Von Forell was coming to see him (apparently there was some evidence indicating that he sent for Von Forell). As the dissent points out, there would not be in this type of case any other kind of proof available. The burden would rightly be placed, as in the res ipsa loquitur cases, on the party in possession of the facts.[26] If, for example, in the unlikely event that the vendor had honestly given up any idea of selling to Von Forell and had terminated the agency and had then, by sheer coincidence seen Von Forell the following day and sold the property, he would have had ample opportunity to so prove.

Another point, not stressed[27] in the two Wyoming cases, is that "bad faith" as such is not necessarily present and need not be present to permit recovery. Thus, any owner is naturally desirous of selling at the highest price. He hires a broker and agrees to pay him a commission because he knows no other way of selling. If he discovers, after negotiations have progressed, that it will not be possible to sell at the original price—a very common experience—his natural desire

24. Warren v. Van Der Veide, 193 Mich. 164, 159 N.W. 137 (1916).
25. Howard v. Street, 125 Md. 289, 93 Atl. 923 (1915).
26. Cf. Kenny v. Antonetti, 211 Cal. 336, 295 Pac. 341 (1931). Where statute prohibited any person owning or controlling livestock to permit animals to stray on to public highway, burden was on such owner to show how horse happened to be on highway.
27. 157 P. (2d) 570, 582 (Wyo. 1945).

will be to sell at less and save the broker's commission. This may all be done with the best of intention, but as in the case of constructive trusts, the law will, or should, step in and protect the party who has suffered. The actual bad faith in the sense of a conscious attempt to defraud is not a necessary element is illustrated in a recent New Mexico case where the broker was promised a commission of $2000 in the event he sold the property for $45,000. After listing and the securing of a prospect, the owner dealt directly with the prospect and concluded a sale for a lesser amount.[28] In affirming a judgment for the plaintiff, the Supreme Court remarked:

> "We take it as an admitted fact in this case that the property was listed with appellee as agent for sale at $45,000. The owner, conducting his own negotiations with purchaser, ignoring the agent and having no further communication with him chose to sell at a lesser price than that at which he had listed the property with the agent. Liability to the agent, under the circumstances here present, is not to be lightly brushed aside. . . ."[29]

There is no use of the expression "bad faith" or any similar expression. The case goes on the proposition that the broker was the procuring cause and that his interests, as the court remarks, cannot be "lightly brushed aside."

Some courts that have hewed to the line with respect to the so-called special contracts have overlooked a practical element in many of these cases. This element is the net return to the vendor. For example, suppose A wishes to sell his ranch for $100,000. He lists with B, a broker, for that price. B procures P as a possible purchaser. If A then deals directly with P and sells for $98,000, A stands to gain, if he refuses to pay a commission on the ground that the price specified has not been paid, the sum of $3,000. If A sells for $95,000 without brokerage, he nets the same amount he would have after paying 5% (the customary percentage) to the broker on the original asking price. The upshot is that the magnanimous owner, dickering between $100,000 and $95,000, is playing not with his own, but with the broker's money. It may accordingly be said that any reduction of the purchase price within the limits of the brokerage would make a strong case for recovery, whereas, when the price goes substantially lower, it could be more easily made to appear that there was no market at or near the original asking price. This would not mean that a broker, in the case above mentioned, could not recover if the sale were for $75,000 on the ground that the owner was selling at a sacrifice. It would be fact tending in some measure to rebut the inference of bad faith.

It is of course arguable that the broker can always protect himself by framing his contract so that he will be protected against ap-

28. Wilson v. Sewell, 50 N.M. 121, 171 P. (2d) 647 (1946).
29. Id. 171 P. (2d) at 650.

propriation of his services. This no doubt true, as it is also true that brokers may sometimes accept a listing, show the property to a large number of prospects and then do nothing. It would be unconscionable to tie up the owner of land for any considerable time under such circumstances, but the dangers to be apprehended are not seemingly caused by the unscrupulous broker so much as by the owner who seeks to take advantage of a loose contract to avoid payment for services rendered. Indeed it would seem to be fair to litigate any issue of the broker's failure to keep up with the situation and do what he can to further the deal.[30]

While the broker with whom property has been listed may go to considerable effort and expense to find a buyer and effect a sale, this fact alone would not, of course, prevent the vendor from terminating the agency. It cannot be argued, as in the case of sales agencies,[31] that by his efforts contemplated and required by the contract, the agent has acquired such an interest in the matter that courts will not permit the principal to revoke for no cause, or for insufficient cause. As above noted, the vital factor in the case of the broker is the production of a prospect who buys or is willing to buy.[32] Once a broker has done that, he has "performed" under the contract, and under such circumstances it would seem entirely proper to take cognizance of the time and expense the broker has devoted to securing the prospect. His efforts certainly constitute an element worth noting, especially in view of the fact that the real estate man is constantly gambling his time and money in the hope that enough sales will result from his efforts to keep him in business.

By way of summary and conclusion, it is suggested that the better approach to the stock situation in which broker sues for commissioin after sale has been made to broker's prospect at a lesser figure, is to inquire whether the broker's services have been appropriated by the vendor. As a necessary corollary, it would seem that the mere fact of termination of the agency one day and a sale to broker's prospect the next or within a fairly short time would raise a presumption of "appropriation" or "bad faith." As Chief Justice Blume points out, there would be small chance ordinarily of the plaintiff showing bad faith affirmatively. On the other hand, there may well be instances, such as, for example, where the vendor actually was unaware that his vendee had been contacted by the broker, in which the defendant can show that he acted in good faith and did not appropriate the services of another.[33]

30. In Havens v. Irvine, for example, Hildreth, plaintiff's agent in Torrington (where Von Forell lived) apparently failed to communicate an offer by Von Forell to pay $5000 or $6000 cash and the balance on time. The final terms were much more lenient.
31. Cf. Munro, The necessity for "Mutuality" and the Right of Termination in Sales Agencies, 28. Ill. L. Rev. 800 (1934).
32. May v. Avansion, 185 S.W. 1178 (Mo. App. 1916).
33. See note 13 supra.

In assessing the owner's claim that he is not liable for commission because the broker was to recover only if he sold the property at the price stipulated in the "special" contract, the courts should favor the broker for the following reasons: (1) the vital factor in all cases is the finding of a purchaser—either a purchaser ready, able and willing to pay the asking price, or a purchaser who will and—even more important—who does buy at a price satisfactory to the vendor; (2) the somewhat absurd situation whereby the vendor may, by his own act of accepting a smaller price, deprive the broker of a commiswhich he might have received but for the act of the vendor; and (3) the related factor, above mentioned, of the owner's scaling the price down within the limits of the brokerage he saves by scaling it down. As to the difference, if any, where a genuine sacrifice sale has been made, a better argument could be worked out for the vendor. Even in such cases, however, the vendor is benfiting, and he may be better off for having sold at a sacrifice than not at all.