



1914

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## Recommended Citation

LEE J. PERRIN, *WHAT PERFORMANCE ENTITLES A REAL ESTATE BROKER TO COMMISSION THE NEW YORK LAW*, 23 *Yale L.J.* (1914).

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## WHAT PERFORMANCE ENTITLES A REAL ESTATE BROKER TO COMMISSION— THE NEW YORK LAW

“There are many reported cases of suits by real estate brokers for their commissions, and the opinions of learned judges are not always in harmony with each other.” In less judiciously moderate language than these words, quoted from the opinion of Earl, C. J., in *Wylie v. Marine National Bank*, 61 N. Y., 415, it might be said with equal truth that, with the single exception of the so-called “accident cases” there is probably no one kind of litigation more frequently appearing in the New York reports than the action for the real estate broker’s commission. That this should be so is due not so much, it is believed, to the intricacy of the governing legal principles, as to a growing tendency on the part of the courts to fall back upon certain technical expressions and rules of thumb which have become current in the law of real estate brokerage, without sufficient analysis and understanding of their precise application.

In order to establish his right to the agreed or customary commissions for services in connection with the sale, exchange, or lease of real estate, a real estate broker must prove (*a*) that he was employed as such by the person from whom he seeks to recover his commissions; (*b*) that he has acted pursuant to such employment; (*c*) that a certain benefit has accrued to his employer; (*d*) that such action on his part was the procuring cause of such benefit; and (*e*) that any special conditions precedent contained in his contract of employment have been duly performed or complied with.

Upon the assumption that the broker has succeeded in proving that he was employed as such, in the ordinary way and without any special or unusual condition precedent to his right to commissions, by the person from whom he seeks to recover his commissions, and that he has acted pursuant to such employment, it is proposed to consider, first, the nature of the benefit which must be proved to have accrued to the employer, and second, the proof required to establish the broker’s action as the procuring cause of the accrual to the employer of such benefit. Under each of these two topics the cases involving the broker’s right to commis-

sions will be classified according to their facts under the following three general heads:

(A.) Where the transfer of interest<sup>1</sup> which the broker was employed to facilitate has in fact been completed.

(B.) Where a final and binding contract for the transfer of interest which the broker was employed to facilitate has in fact been executed, but the transfer of interest itself has not been completed.

(C.) Where the terms prescribed or agreed to by the employer for the transfer of interest which the broker was employed to facilitate, have been consented to, but the contract itself has not been executed.

#### I. THE BENEFIT TO THE EMPLOYER.

(A.) Where the transfer of interest which the broker was employed to facilitate has in fact been completed.

Obviously the requirement that there must be shown to have accrued to the employer a certain benefit is satisfied by proof that the very transaction to facilitate which the broker was employed has in fact been completed.

(B.) Where a final and binding contract for the transfer of interest which the broker was employed to facilitate has in fact been executed, but the transfer of interest itself has not been completed.

The real estate broker's right to commissions is not (at least in the absence of special provision to that effect in his contract of employment) dependent upon the completion of the transfer of interest which he was employed to facilitate. His office being at most that of a mediator for the purpose of bringing the employer and the customer into agreement as to the terms and conditions on the basis of which the transfer is to be completed, allegation and proof of a written contract between the employer and the customer for the transfer of interest may be as fully sufficient to entitle the broker to recover commissions as allegation and proof of the completed transfer of interest itself.<sup>2</sup>

<sup>1</sup> The expression "transfer of interest" is used to denote a conveyance or a lease, as the case may be.

<sup>2</sup> *Hodgkins v. Mead*, 8 N. Y. Supp., 854; aff'd 130 N. Y., 676; *Cody v. Dempsey*, 86 A. D., 335; *Bruce v. Hurlburt*, 47 A. D., 163; *Brown v. Helmutz*, 2 Misc., 566. See also cases cited *post* in notes 12-15 inclusive. As to the effect of informality of the instrument, see *Benedict v. Pincus*, 191 N. Y., 377 (sub-lease); *Simonson v. Kissick*, 4 Daly, 143; *Heinrich v. Korn*, 4 Daly, 74.

In order to be sufficient for this purpose, however, the contract must be binding upon both parties and not a mere option,<sup>3</sup> or a mere preliminary statement setting out the terms suggested by one of the parties;<sup>4</sup> it must not depend for its validity upon the consent or approval of a third party,<sup>5</sup> or upon the fulfilment of a condition not dependent upon action by the employer;<sup>6</sup> and it must be final and complete; that is, it must show a meeting of minds upon the material terms,<sup>7</sup> must be more than a mere agreement as to price,<sup>8</sup> and must leave no material detail to be arranged by future negotiation.<sup>9</sup>

<sup>3</sup> *Folinsbee v. Sawyer*, 15 Misc., 293; 157 N. Y., 196; *Crombie v. Waldo*, 137 N. Y., 129 (lease); *Benedict v. Pincus*, 109 A. D., 20, 113 A. D., 903, reversed in 191 N. Y., 377, on ground that contract was binding (sub-lease); *Kampf v. Dreyer*, 119 A. D., 134; *Milstein v. Doring*, 102 A. D., 349; *Walsh v. Gay*, 49 A. D., 50; *Simonson v. Kissick*, 4 Daly, 143 (instrument held to be a contract); *Hess v. Investors & Traders Realty Co.*, 67 Misc., 390 (covenant by seller giving purchaser right to reject title and get back purchase price if parcels not contiguous, held not sufficient to make contract a mere option.); *Hough v. Baldwin*, 50 Misc., 546, 53 Misc., 284; *Seidman v. Rauner*, 51 Misc., 10; *Ward v. Zborowski*, 31 Misc., 66 (lease); *Fusco v. Bullova*, 17 Misc., 573 (lease); *Levy v. Kottman*, 11 Misc., 372; *Bennett v. Egan*, 3 Misc., 421; *Schlansky v. Hillman*, 111 N. Y. Supp., 696.

<sup>4</sup> *Guthman v. Meuer*, 31 Misc., 810 (letter from employer to broker); *Montgomery v. Knickerbocker*, 27 A. D., 117 (provisional offer in writing by customer); see *Inge v. McCreery*, 60 A. D., 557 (letter from employer to customer).

<sup>5</sup> *Crombie v. Waldo*, 137 N. Y., 129 (lease); *Ward v. Kennedy*, 51 Misc., 422; *Halprin v. Schachne*, 21 Misc., 519. At least unless the basis on which such consent or approval is to be given or withheld is definitely stated. *Sullivan v. Frazier*, 40 A. D., 288 (conditioned on approval of title by customer's lawyer).

<sup>6</sup> *Condict v. Cowdrey*, 139 N. Y., 273.

<sup>7</sup> A slight variation between the customer's acceptance procured by the broker and the offer given by the employer, which is due to the mistake of the broker in writing out the form of acceptance, will not, if explained as such to the employer and if the customer offers to rectify the mistake, entitle the employer to claim that no contract was made. *Riker v. Post*, 110 N. Y. Supp., 79. But if the terms of the customer's acceptance intentionally differ from those of the employer's offer, the employer may claim that no contract was made, unless he has treated the acceptance as a counter-offer, and as such has himself accepted it. *Roberts v. New & Beaver St. Corp.*, 138 A. D., 47 (lease); *Bayles v. Robinson*, 102 N. Y. Supp., 755 (lease).

<sup>8</sup> *Peace v. Ross*, 123 A. D., 611; *Haase v. Schneider*, 112 A. D., 336; but see *Heinrich v. Korn*, 4 Daly, 74.

<sup>9</sup> *Herron v. Cameron*, 144 A. D., 43 (plans of building and estimated costs—lease); *Haase v. Schneider*, 112 A. D., 336 (time of closing title);

Having established such a contract (and the employer being unable to prove that it is for any reason legally void,<sup>10</sup> or was varied by parol with the knowledge of the plaintiff, or was never delivered,<sup>11</sup> it is no defense to the employer, in the absence of fraud or bad faith on the part of the broker, that the customer subsequently failed or was unable to perform the contract,<sup>12</sup> or refused to perform the contract on account of misrepresentations made by the employer;<sup>13</sup> or that the employer himself refused or failed to perform the contract,<sup>14</sup> or was unable to perform the

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*Kahn v. Verschleiser*, 57 Misc, 381 (details of mortgage); *Hess v. Bloch*, 56 Misc., 480 (kind of deed to be given); *Davis v. Gottschalk*, 141 N. Y. Supp., 517 (exchange). Nor can such omission be supplied by the broker by proof of custom. *Hess v. Bloch*, *supra*.

<sup>10</sup> See *McCormick v. Hazard*, 77 Misc., 190.

<sup>11</sup> See *King v. Knowles*, 122 A. D., 414.

<sup>12</sup> *Gilder v. Davis*, 137 N. Y., 504; *Alt v. Doscher*, 102 A. D., 344, *aff'd* 186 N. Y., 566; *Kalley v. Baker*, 132 N. Y., 1 (exchange); *Slocum v. Ostrander*, 141 A. D., 380 (exchange); *Tieck v. McKenna*, 115 A. D., 701; *Charles v. Cook*, 88 A. D., 81; *Brady v. Foster*, 72 A. D., 416; *Norton v. Genesee Nat'l Savings Ass'n*, 57 A. D., 520 (exchange); *Travis v. Graham*, 23 A. D., 214; *Heinrich v. Korn*, 4 Daly, 74; *Brink v. Goodelle*, 138 N. Y. Supp., 1035; *Crombie v. Waldo*, 17 N. Y. Supp., 373, reversed in 137 N. Y., 129, on ground that contract not binding (lease); *Donohue v. Flanagan*, 9 N. Y. Supp., 273. Unless the broker knew, but did not disclose, that the customer was unable to perform. *Wiley v. Kraslow Construction Co.*, 141 A. D., 706 (exchange); see *Baumann v. Nevins*, 52 A. D., 290 (exchange); or unless the broker assumed to sign the contract on behalf of his employer. See *Kalley v. Baker*, 132 N. Y., 1, 7; *Inge v. McCreery*, 60 A. D., 557. But if the broker's employment was to effect an exchange of his employer's property for certain specified other property, then the broker must prove, in addition to the execution of the contract for the exchange, the fact that the customer had good title to the property to be conveyed by him. *Barnes v. Roberts*, 5 Bosw., 84; *Kalley v. Baker*, 132 N. Y., 1.

<sup>13</sup> *Glentworth v. Luther*, 21 Barb., 145; *Sokolski v. Bleistift*, 129 N. Y., Supp., 26 (misrepresentation of dimensions); *Condict v. Cowdrey*, 5 N. Y. Supp., 187, 123 N. Y., 463, 139 N. Y., 273.

<sup>14</sup> *Benedict v. Pincus*, 134 A. D., 555 (lease); *Norton v. Genesee Nat'l Savings Ass'n*, 57 A. D., 520 (exchange); *Brown v. Grassman*, 53 A. D., 640; *Swee v. Neumann*, 67 Misc., 605; *Mason v. Hinds*, 19 N. Y. Supp., 996 (exchange).

contract on account of defects in title,<sup>15</sup> at least unless such defects were known to the broker.<sup>16</sup>

(C.) Where the terms prescribed or agreed to by the employer for the transfer of interest which the broker was employed to facilitate, have been consented to, but the contract itself has not been executed.

The real estate broker's right to commissions is not, however, necessarily dependent even upon the execution of a final and binding contract for the transfer of interest which he was employed to facilitate. Allegation and proof that the customer was ready, willing and authorized<sup>17</sup> to enter into, and able to perform, such a contract upon the employer's terms, but that the contract, through the fault of the employer, was not executed, may be as fully sufficient to entitle the broker to recover commissions as allegation and proof of the execution of such a contract.<sup>18</sup> Testimony by the broker or by the customer to the simple effect that the latter was so ready, willing and able to appears to be sufficient to make out a *prima facie* case.<sup>19</sup> But unless the employer has accepted the customer, or has dealt with him in such a manner as to amount to an acceptance of him as being able to perform,<sup>20</sup> the broker must, when it is put in issue by, or contradicted

<sup>15</sup> *Knapp v. Wallace*, 41 N. Y., 477 (broker employed by purchaser); *King v. Knowles*, 122 A. D., 414; *Baumann v. Nevins*, 52 A. D., 290 (exchange); *Allen v. James*, 7 Daly, 13; *Scott v. Neuberger*, 58 Misc., 22; *Finck v. Bauer*, 40 Misc., 218; *Landsberger v. Murray*, 6 Misc., 605; *Strout v. Kenny*, 107 N. Y. Supp., 92; *Cox v. Hawke*, 93 N. Y. Supp., 1117.

<sup>16</sup> See *Corbin v. Mechanics & Traders Bank*, 121 A. D., 744 (no contract); *Folsom v. Lewis*, 14 Misc., 605 (no contract); *Landsberger v. Murray*, 6 Misc., 605 (defects not known to broker); *Strout v. Kenny*, 107 N. Y. Supp., 92 (defects not known to broker); *Cox v. Hawke*, 93 N. Y. Supp., 1117 (defects not known to broker).

<sup>17</sup> *Kirwan v. Barney*, 27 Misc., 181, 29 Misc., 614; see *Callister v. Wichern*, 147 A. D., 14.

<sup>18</sup> *Mooney v. Elder*, 56 N. Y., 238; *White v. Douglas, etc., Brown Co.*, 153 A. D., 776; *Moore v. Macguire*, 98 N. Y. Supp., 752; see also cases cited *post* in notes 20, 23, 26, 27, 28, 29 and 30.

<sup>19</sup> See *Mutchnick v. Goldstein*, 130 A. D., 417 (exchange); *Woolley v. Lowenstein*, 83 Hun, 155 (exchange); *Moskowitz v. Hornberger*, 15 Misc., 645, 20 Misc., 558 (exchange).

<sup>20</sup> *Brand v. Nagle*, 122 A. D., 490; *Krahmer v. Heilman*, 16 Daly, 132; *Simpson v. Smith*, 36 Misc., 815; *Miller v. Barish*, 35 Misc., 372; *Callister v. Wichern*, 147 A. D., 14 (contract); *Brady v. Foster*, 72 A. D., 416 (contract); *Thain v. Philbrick*, 36 Misc., 829 (contract); *Brink v. Goodelle*, 138 N. Y. Supp., 1035 (contract).

by evidence on behalf of the employer,<sup>21</sup> prove that the customer was, at the time of the employer's refusal,<sup>22</sup> in fact ready and willing to execute the contract, and in fact legally, as well as financially, able to perform the same.<sup>23</sup>

The terms and conditions which the customer must be ready and willing to have embodied in the contract, and which he must be able to perform, are such terms and conditions as have been given by the employer to the broker, prior to the production of the customer by the broker, or such as have been subsequently agreed upon in a preliminary way between the employer and the customer.<sup>24</sup> They should be fully worked out, excepting as one party may have delegated to the other party full authority to determine by his own individual decision such terms and conditions as may have been left indefinite.<sup>25</sup>

When the broker has so established such readiness, willingness and ability on the part of the customer, it is no defense to the employer, in the absence of fraud or bad faith on the part of the broker, that the customer refused to execute the contract on account of misrepresentations made by the employer,<sup>26</sup> or that the

<sup>21</sup> *Barnes v. Roberts*, 18 Super. Ct., 73, 84; *Marshall v. Goodman*, 135 N. Y. Supp., 11; *Mullenhoff v. Genster*, 15 N. Y. Supp., 673; see also cases cited in preceding note.

<sup>22</sup> Evidence of customer's insolvency subsequent to date for closing the contract, irrelevant. *Brady v. Foster*, 72 A. D., 416.

<sup>23</sup> *Alt v. Doscher*, 102 A. D., 344, aff'd 186 N. Y., 566; *Gerding v. Hasbin*, 141 N. Y., 514 (financially); *Herron v. Cameron*, 144 A. D., 43 (financially—lease); *Mutchnick v. Goldstein*, 130 A. D., 417 (must prove customer had good title—exchange); *Schnitzler v. Price*, 122 A. D., 409; *Corbin v. Mechanics' & Traders' Bank*, 121 A. D., 744; *Lovett v. Clench*, 115 A. D., 635 (legally); *Woolley v. Lowenstein*, 83 Hun, 155 (legally—exchange); *Folsom v. Hesse*, 24 Misc., 713 (legally—lease); *Moskowitz v. Hornberger*, 15 Misc., 645, 20 Misc., 558 (legally—exchange); *Marshall v. Goodman*, 135 N. Y. Supp., 11; *Davis v. Jacobson*, 110 N. Y. Supp., 1075 (lease); *Behrman v. Marcus*, 102 N. Y. Supp., 467; but see *Jaffe v. Nagel*, 141 N. Y. Supp., 905 (in which part of the purchase price was to be paid by the assignment of a mortgage on other property, which mortgage the purchaser did not then own).

<sup>24</sup> *Redfield v. Tegg*, 38 N. Y., 212; *Gilder v. Davis*, 137 N. Y., 504; *Milne v. Ingersoll-Sergeant Drill Co.*, 120 A. D., 465; *Putter v. Berger*, 95 A. D., 62; *Gorman v. Scholle*, 13 Daly, 516; *Forrester v. Price*, 6 Misc., 308; *Brink v. Goodelle*, 138 N. Y. Supp., 1035.

<sup>25</sup> *Beebe v. Ranger*, 35 Super. Ct., 452.

<sup>26</sup> *King v. Knowles*, 122 A. D., 414; *Putter v. Berger*, 95 A. D., 62; *Lord v. Vrane*, 78 Misc., 389; *Goodman v. Hess*, 56 Misc., 482; *Seidman v.*

employer himself refused to execute the contract<sup>27</sup> or was unable to perform the contract by reason of the existence of unrevealed defects in title,<sup>28</sup> or that the contract failed of execution by reason of the employer's insistence upon adding to or varying the material terms previously given,<sup>29</sup> or even by reason of the employer's insistence upon varying the previous arrangement for the payment of the broker's commissions.<sup>30</sup> It is of course, however,

*Rauner*, 51 Misc., 10; *Frank v. Connor*, 107 N. Y. Supp., 132. For instances of immaterial misrepresentations, see *Shapiro v. Nadler*, 51 Misc., 13 (concealment of mortgage); *Keough v. Meyer*, 111 N. Y. Supp., 1 (misstatement of front footage); *Diamond & Co. v. Harlley*, 38 A. D., 87, 47 A. D., 1 (same); *Hausman v. Herdtfelder*, 81 A. D., 46 (same); *Sotsky v. Ginsberg*, 129 A. D., 441 (same); *Rohner v. Lenisch*, 29 Misc., 315 (misstatement of rent—sale of lease); *Curtiss v. Mott*, 90 Hun, 439 (misstatement of rent); see also *Folsom v. Lewis*, 14 Misc., 605.

<sup>27</sup> *Benedict v. Pincus*, 134 A. D., 555 (lease); *Suydam v. Healy*, 93 A. D., 396 (exchange); *Van Siclen v. Herbst*, 30 A. D., 255; *Krahmer v. Heilman*, 16 Daly, 132; *Dennis v. Charlick*, 6 Hun, 21; *Cook v. Kromeke*, 4 Daly, 268; *Barnard v. Monnot*, 3 Keyes, 203; *Bucksdorf v. Bender*, 80 Misc., 498 (exchange); *Greenwald v. Rosen*, 61 Misc., 260; *Getzelsohn v. Donnelly*, 50 Misc., 164; *Michaelis v. Roffman*, 37 Misc., 830 (broker employed by purchaser); *Walsh v. Stich*, 36 Misc., 835 (lease); *Simpson v. Smith*, 36 Misc., 815; *Goldberg v. Gelles*, 33 Misc., 797; *Halprin v. Schachne*, 27 Misc., 195; *Auten v. Jacobus*, 20 Misc., 669 (broker employed by purchaser); *Friend v. Jetter*, 18 Misc., 368, 19 Misc., 101; *Moses v. Helmke*, 18 Misc., 357; *Riker v. Post*, 110 N. Y. Supp., 79; *Smith v. Smith*, 31 Super. Ct., 552.

<sup>28</sup> *Cusack v. Ackerman*, 93 A. D., 579; *McQuillan v. Carpenter*, 72 A. D., 595; *Doty v. Miller*, 43 Barb, 529; *Dreyer v. Rauch*, 42 How. Pr., 22; *Ranger v. Lee*, 66 Misc., 144 (seller under no obligation to inform broker of covenants as to nuisances, unless asked by broker); *Scott v. Neuberger*, 58 Misc., 22; *Cox v. Hawke*, 93 N. Y. Supp., 1117.

<sup>29</sup> *Davidson v. Stocky*, 202 N. Y., 423; *Tannenbaum v. Boehm*, 111 N. Y. Supp., 185, 202 N. Y., 293 (lease); *Phillips v. Kraft*, 136 A. D., 859; *Sotsky v. Ginsberg*, 129 A. D., 441; *Milne v. Ingersoll-Sergeant Drill Co.*, 120 A. D., 465; *Lovett v. Clench*, 115 A. D., 635; *Lucas v. Smith*, 113 A. D., 31; *Martin v. Werman*, 107 A. D., 482; *Suydam v. Healy*, 93 A. D., 396 (exchange); *Gorman v. Scholle*, 13 Daly, 516; *Levy v. Sonneborn*, 78 Misc., 50 (employer's insistence upon adding words "more or less" to description of footage of property, will not justify customer in declining to proceed); *Mettzer v. Straus*, 61 Misc., 250; *Seidman v. Rauner*, 51 Misc., 10; *Levy v. Ruff*, 4 Misc., 180; *Fran kv. Connor*, 107 N. Y. Supp., 132; *McGill v. Gargoula*, 103 N. Y. Supp., 113; *Marks v. Elliot*, 90 N. Y. Supp., 331; *Hattenbach v. Gundersheimer*, 13 N. Y. Supp., 814; *Beebe v. Ranger*, 35 Super. Ct., 452.

<sup>30</sup> *Marks v. Elliot*, 90 N. Y. Supp., 331; *Friend v. Jetter*, 18 Misc., 368, 19 Misc., 101.



fatal to the broker's case if, in the absence of fraud or bad faith on the part of the employer, such contract failed of execution by reason of the refusal of the customer, or by reason of the customer's insistence upon adding to or varying the material terms previously given by the employer,<sup>31</sup> or by reason of the customer's insistence upon varying the previous arrangement for the payment of the broker's commission.<sup>32</sup>

## II. PROCURING CAUSE.

As a practical matter, the cases relating to the question of "procuring cause" are almost entirely those in which the transfer of interest has been completed, or those in which a contract for such transfer of interest has been executed. The reason for this presumably is that where the only benefit to the employer was the customer's consent to the employer's terms, not more than one broker, from the very nature of the circumstances, is likely to have sufficient knowledge of such benefit on which to base a plausible action for commissions, and not even that one broker, unless he was so instrumental in conferring the benefit, as to leave little room for contention that any one else was the procuring cause; whereas if the transfer of interest has been completed, or if a contract therefor has been executed, the matter is apt to have become sufficiently of public record to afford opportunity for any broker who has been at any time employed with reference to the property in question to bring a more or less plausible action for commissions.<sup>33</sup>

The expression "procuring cause", and its less frequently used equivalents, "producing cause" and "efficient cause", are often

<sup>31</sup> *Chenkin v. Lipman*, 138 A. D., 267; *Weiss v. Rubinson*, 112 A. D., 276; *Sheinhouse v. Klueppel*, 80 A. D., 445; *Weibler v. Cook*, 77 A. D., 637; *Inge v. McCreery*, 60 A. D., 557; *Walsh v. Gay*, 49 A. D., 50; *Bruce v. Hurlbut*, 47 A. D., 163; *Pulich v. Casey*, 43 A. D., 122; *Platt v. Kohler*, 65 Hun, 557; *Ranger v. Lee*, 66 Misc., 144; *Shapiro v. Nadler*, 51 Misc., 13; *Kronenberger v. Bierling*, 37 Misc., 817; *Byrne v. Korn*, 25 Misc., 509; *Feiner v. Kobre*, 13 Misc., 499; *Rosenthal v. Emerson Realty Co.*, 126 N. Y. Supp., 85; *Nadler v. Menschel*, 110 N. Y. Supp., 384; *Barnes v. Barker*, 40 Super. Ct., 102; but see *Heinrich v. Korn*, 4 Daly, 74.

<sup>32</sup> *Smith v. Nicoll*, 91 Hun, 173, aff'd 158 N. Y., 696.

<sup>33</sup> "It is established that Mallowney had absolutely nothing to do with the negotiations, terms, prices, or anything else out of which grew the contract between Todd and Sternfield. The first thing he knew about it was when he saw the completed transaction in the newspaper." *May Company v. Holland Holding Co.*, 156 A. D., 162.

used by the courts as though expressing some special technical rule applicable to the law of real estate brokers. When, however, the court declares that the broker, in order to recover his commissions, must prove that he was the procuring cause, all that appears to be meant is that the broker must prove that the efforts which he has rendered pursuant to his employment were, as against the efforts of some rival claimant, the proximate cause of the benefit which has admittedly accrued to the employer.

The broker is not entitled to go to the jury upon proof of the mere facts that he called the customer's attention to the property, and that subsequently there accrued to the employer the benefit upon which the broker's claim for commissions is based.<sup>34</sup> On the other hand, it seems to be impliedly recognized that a *prima facie* case in favor of the broker is made out by proof that prior to the final negotiations he introduced the customer to the employer, or made the customer known to the employer as his customer,<sup>35</sup> and that he was present at the final negotiations between the employer and the customer.<sup>36</sup> Such *prima facie* proof, although material,<sup>37</sup> is not, in the absence of express provision to the contrary in the contract of employment,<sup>38</sup> indispensable to the broker's case; without it, however, the broker must cause it to appear affirmatively that his efforts were in fact the proximate

<sup>34</sup> *Handy v. Van Cortland Realty Co.*, 156 A. D., 110. Even where such an inference would receive additional support from the fact that the employer, prior to the transfer of interest, in bad faith attempted to terminate the broker's employment for the apparent purpose of depriving him of his commissions. See *Blumberg v. Sterling Bronze Co.*, 56 Misc., 477.

<sup>35</sup> *Wylie v. Marine Nat'l Bank*, 61 N. Y., 415; *Sussdorff v. Schmidt*, 55 N. Y., 319; *Lloyd v. Matthews*, 51 N. Y., 124; *Kalstein v. Jackson*, 132 A. D., 1; *Vert v. Schlachter*, 120 A. D., 559; *Southwick v. Swavienski*, 114 A. D., 681; *Kiernan v. Bloom*, 91 A. D., 429; *Metcalf v. Gordon*, 86 A. D., 368; *Michaelis v. Roffman*, 37 Misc., 830 (broker employed by purchaser); *Feldman v. O'Brien*, 23 Misc., 341; *Bickart v. Hoffman*, 19 N. Y. Supp., 472. See also cases cited *post* in note 36.

<sup>36</sup> *Travis v. Bowron*, 138 A. D., 554; *Walton v. Chesebrough*, 39 A. D., 665; *Hobbs v. Edgar*, 23 Misc., 618; *Baker v. Thomas*, 12 Misc., 432; *Schubert v. Kaplan*, 109 N. Y. Supp., 729; *O'Shea v. Brill*, 108 N. Y. Supp., 1020.

<sup>37</sup> *McClave v. Paine*, 49 N. Y., 561; *Martin v. Fegan*, 95 A. D., 154; *Putter v. Berger*, 95 A. D., 62; *Metcalf v. Gordon*, 86 A. D., 368; *Diamond v. Wheeler*, 80 A. D., 58; *Brown v. Snyder*, 57 A. D., 413; *Pulich v. Casey*, 43 A. D., 122, 126; *Fredel v. Baldwin*, 138 N. Y. Supp., 147 (lease); *Willard v. Ferguson*, 110 N. Y. Supp., 909; *Foley v. Punchard*, 103 N. Y. Supp., 206; *Condict v. Cowdrey*, 19 N. Y. Supp., 699.

<sup>38</sup> *Getzler v. Boehm*, 16 Misc., 390.

cause of such benefit to the employer<sup>39</sup> and were intended as such.<sup>40</sup>

Assuming that the broker succeeds in proving some degree of causal relation between the efforts which he has made pursuant to his employment and the benefit which has admittedly accrued to the employer, the question whether or not he was the procuring cause, narrows itself to one whether or not the causal relation so proved is remote by reason of action either (a) by the employer himself, or (b) by some broker other than the plaintiff, or (c) by some customer other than the plaintiff's customer.

(A.) Where the transfer of interest which the broker was employed to facilitate has in fact been completed.

B.) Where a final and binding contract for the transfer of interest which the broker was employed to facilitate has in fact been executed, but the transfer of interest itself has not been completed.

(a) REMOTENESS BY REASON OF ACTION BY EMPLOYER.

Whether or not the causal relation between the efforts of the broker and the benefit to the employer is remote as against the causal relation between the efforts of the employer himself and such benefit, is a mixed question of law and fact. The employment of the broker by the employer creates a legal relationship out of which arise certain correlative rights and duties, one of which is the right in the broker as against the employer, and the corresponding duty upon the employer toward the broker, and the interference under certain circumstances, with the broker's customer. As a consequence, if the efforts of the employer have involved a violation of such right and duty of non-interference, it will not avail the employer to establish as a matter of fact the

<sup>39</sup> *Wylie v. Marine Nat'l Bank*, 61 N. Y., 415; *Sussdorf v. Schmidt*, 55 N. Y., 319; *Halterman v. Leining*, 45 Misc., 397; *Chilton v. Butler*, 1 E. D. Smith, 150.

<sup>40</sup> Although any discussion of the nature of the efforts which the broker must make, is without the scope of this article, it may be noted that it is not sufficient that the broker merely tell an acquaintance who, in turn, tells the customer of the property. *Colwell v. Thompkins*, 6 A. D., 93, aff'd 158 N. Y., 690; see *Kalkstein v. Jackson*, 132 A. D., 1. Nor that the customer learn of the property by accidentally overhearing the broker speak of it to another. *McCarty v. Tracy*, 13 Misc., 243. Nor that the customer learn of the property accidentally in the course of negotiations with the broker regarding other property owned by the same person. *Randrup v. Schroeder*, 21 Misc., 52; *Meyer v. Improved Property Holding Co.*, 137 A. D., 691 (lease).

remoteness of the causal relation between the efforts of the broker and the benefit which has accrued to the employer.

Thus, remoteness is not necessarily established by proof of the mere fact that the employer and the customer, before the termination of negotiations and to the exclusion of the broker, took matters into their own hands,<sup>41</sup> even though the benefit to the employer accrued upon less advantageous terms than those stated by the broker to the customer.<sup>42</sup> Remoteness is established, however, by proof that the customer from the outset refused to avail himself of the broker's services or assistance;<sup>43</sup> or that such independent action on the part of the employer was taken in good faith,<sup>44</sup> or followed a termination of the broker's employment in

<sup>41</sup> *Lloyd v. Matthews*, 51 N. Y., 124; *Malken v. Sterry*, 146 A. D., 332; *Lyon v. West Side Transfer Co.*, 132 A. D., 777; *Vanderveer v. Suydam*, 83 Hun, 116, aff'd 151 N. Y., 673; *Southwick v. Swavienski*, 114 A. D., 681; *Kiernan v. Bloom*, 91 A. D., 429; *Palmer v. Durand*, 62 A. D., 467; *Carroll v. Pettit*, 67 Hun, 418; *Walton v. Chesebrough*, 39 A. D., 665; *Doran v. Bussard*, 18 A. D., 36; *Wychoff v. Bliss*, 12 Daly, 324; *Morgan v. Mason*, 4 E. D. Smith, 636; *Lynch v. McKenna*, 58 How. Pr., 42 (broker employed by purchaser); *Hanford v. Shapter*, 4 Daily, 243; *Hobbs v. Edgar*, 23 Misc., 618; *Atwater v. Wilson*, 13 Misc., 117; *O'Toole v. Tucker*, 17 Misc., 554; *Schubert v. Kaplan*, 109 N. Y. Supp., 729; *O'Shea v. Brill*, 108 N. Y. Supp., 1020; *McKnight v. Thayer*, 27 N. Y. Supp., 440 (exclusive agency—termination); *Dailey v. Young*, 13 N. Y. Supp., 435; *Tyler v. Seiler*, 76 Misc., 185 (condemnation by city at price in excess of sale price stated).

<sup>42</sup> *Palmer v. Durand*, 62 A. D., 467; *Doran v. Bussard*, 18 A. D., 36; *Hobbs v. Edgar*, 23 Misc., 618; *Hamm v. Weber*, 19 Misc., 485, 489; *O'Toole v. Tucker*, 17 Misc., 554; *Pollatschek v. Goodwin*, 17 Misc., 587; (substitution of other property—exchange; cf. *Meyer v. Improved Property Holding Co.*, 137 A. D., 691 (lease) ); *Jones v. Henry*, 15 Misc., 151 (employer varied terms to meet customer's inability to comply with terms as preliminarily agreed upon); *Atwater v. Wilson*, 13 Misc., 117; *Gold v. Serrell*, 6 Misc., 124; *O'Shea v. Brill*, 108 N. Y. Supp., 1020; *Levy v. Coogan*, 9 N. Y. Supp., 534.

<sup>43</sup> *Oppenheimer v. Barnett*, 131 A. D., 614; *Sampson v. Ottinger*, 93 A. D., 226.

<sup>44</sup> If the customer informs the employer that he has received particulars from some source other than the employer himself, the employer is charged with notice that a broker may have been active in the matter, and it is his duty to make inquiry from whom. *Lloyd v. Matthews*, 51 N. Y., 124. But if, upon being approached directly by a customer, the employer asks the broker for the name of the broker's customer and the broker gives a misleading answer, as a result of which the employer innocently deals directly with the broker's customer and makes a reduction in the purchase price in the belief that there is no broker involved, the broker cannot recover his commissions. *Jungblut v. Gundra*, 134 A. D., 291.

good faith and without intent to deprive him of earned commissions;<sup>45</sup> or that (in the absence of an express right during the period of his employment to commissions on the transfer of interest by whomsoever made<sup>46</sup>), the broker had failed in or abandoned the attempt to confer a benefit upon the employer.<sup>47</sup>

Questions of the termination of employment, failure, or abandonment are, of course, mainly question of fact. The question of abandonment, however, must be considered in the light of the broker's employment, which may be one of the following three general types:

(1) Where the employer specifies in advance to the broker the essential terms upon which it is desired to bring about the transfer of interest.

(2) Where the employer, without in any way obligating himself, requests the broker to obtain and report for his consideration offers of the terms upon which customers making the same desire to bring about the transfer of interest.

(3) Where the employer, without in any way obligating himself, requests the broker simply to put him into communication with parties willing to negotiate with regard to the transfer of interest.

<sup>45</sup> *Mooney v. Elder*, 56 N. Y., 238 (bad faith); *Vanderveer v. Suydam*, 83 Hun, 116, aff'd 151 N. Y., 673; *O'Hara v. Murray*, 144 A. D., 113; *Travis v. Bowron*, 138 A. D., 554; *Cords v. Ruth*, 115 A. D., 568; *Diamond v. Wheeler*, 80 A. D., 58 (termination a question of fact); *Geery v. Pollock*, 16 A. D., 321 (bad faith—broker employed by purchaser); *Woolley v. Loew*, 80 Hun, 294 (bad faith); *Dailey v. Young*, 13 N. Y. Supp., 435; *McKnight v. Thayer*, 27 N. Y. Supp., 440 (exclusive agency).

<sup>46</sup> See *O'Hara v. Murray*, 144 A. D., 113; *Parkhurst v. Tryon*, 134 A. D., 843; *Emberson v. Dean*, 46 How. Pr., 236; *Van Patten v. Taber*, 71 Misc., 610; *Davis v. Van Tassel*, 107 N. Y. Supp., 910.

<sup>47</sup> *Lloyd v. Matthews*, 51 N. Y., 124; *McClave v. Paine*, 49 N. Y., 561 (purchaser had been customer of broker in regard to a different parcel); *Moloney v. Brennan*, 138 A. D., 510; *Meyer v. Improved Property Holding Co.*, 137 A. D., 691 (lease); *Boyd v. Improved Property Holding Co.*, 135 A. D., 623 (lease); *Waters & Son v. Rafalsky*, 134 A. D., 870; *Cohn Co. v. Lee*, 132 A. D., 697; *Miller v. Vining*, 112 A. D., 304; *Bouscher v. Larkins*, 84 Hun, 288; *Brown v. Snyder*, 57 A. D., 413; *Meyer v. Straus*, 42 A. D., 613; *White v. Twitchings*, 26 Hun, 503; *Goodwin v. Brennecke*, 21 A. D. 138; *Batterthwaite v. Vreeland*, 3 Hun, 152; *Michaelis v. Gahren*, 9 A. D., 495; *Briggs v. Rowe*, 4 Keyes, 424; *Harris v. Burnett*, 2 Daly, 189 (broker employed by purchaser); *Schano v. Storch*, 56 Misc., 484; *Markus v. Kenneally*, 19 Misc., 517; *Willard v. Ferguson*, 110 N. Y. Supp., 909; *Nadler v. Menschel*, 110 N. Y. Supp., 384.

Obviously it is easier to prove abandonment by the broker in the first two of the above three types of employment, where the broker's duty is to participate as a mediator in finding a common basis of agreement, than in the third, where he has done all that is expected of him when he has brought the employer and the customer into touch, although his right to commissions remains contingent upon the accrual of the benefit to the employer.<sup>48</sup> It is to be noted, however, that the mere fact that negotiations ceased for a time is not in itself proof of abandonment;<sup>49</sup> and if the broker has not abandoned the transaction he cannot be judged, as against the employer, to have failed before the *bona fide* termination or the expiration of the period of his employment, or, in the absence of either, for a reasonable time.<sup>50</sup>

(b) REMOTENESS BY REASON OF ACTION BY OTHER BROKER.

There is, of course, no such relationship between rival brokers as exists between the employer and the broker, and consequently there arise in the former case no such rights to, and duties of, non-interference as in the latter. In the absence of express provision in the contract of employment of the plaintiff broker, entitling him to a commission by whomsoever the transfer of interest is brought about,<sup>51</sup> or giving him the exclusive agency,<sup>52</sup> it becomes therefore (with the exception hereafter referred to), simply a question of fact whether or not the causal relation between the efforts of the plaintiff broker and the benefit to the employer is remote as against the causal relation between the efforts of the rival broker and such benefit.<sup>53</sup> The exception is,

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<sup>48</sup> "In the first case the broker's duty is fulfilled and his commissions are earned when he produces a customer, ready, willing and able to comply with all the terms fixed by the former. \* \* \* In the second case, the broker's commissions are not earned until the customer produced by him reaches an agreement with the owner upon the price and terms upon which a sale can be made." *Arnold v. Schmeidler*, 144 A. D., 420; *Brundige v. McCormick*, 69 Hun, 65; *Wyckoff v. Bliss*, 12 Daly, 324, 328.

<sup>49</sup> *Goodwin v. Brennecke*, 21 A. D., 138; *Michaelis v. Gahren*, 9 A. D., 495.

<sup>50</sup> *Moore v. Boehm*, 45 Misc., 622; *Donovan v. Weed*, 182 N. Y., 43; *Parvin v. Abels-Gold Realty Co.*, 110 N. Y. Supp., 582.

<sup>51</sup> See *Davis v. Van Tassel*, 107 N. Y. Supp., 910.

<sup>52</sup> See *Johnson v. Lord*, 35 A. D., 325; *Powell v. Anderson*, 15 Daly, 219.

<sup>53</sup> *Smith v. McGovern*, 65 N. Y., 574; *Sussdorf v. Schmidt*, 55 N. Y., 319; *Shapiro v. Shapiro*, 117 A. D., 817; *Metcalf v. Gordon*, 86 A. D., 368;

that if it appears that the facts as proved favor the rival broker because of action by the employer, through the medium of the rival broker, of such a nature as to amount to an indirect violation of the employer's duty of non-interference with the plaintiff broker's customer, the plaintiff broker's claim will not be defeated.<sup>54</sup>

It is part of the broker's risk that other brokers may avail themselves to some extent of his labors.<sup>55</sup> Thus, remoteness is established as against the plaintiff broker by proof that while his efforts to interest a customer were still unsuccessful, or after the customer's refusal to accept his offices,<sup>56</sup> some other broker, profiting by the ground-work already laid by the plaintiff broker, but without fraud or bad faith, succeeded in inducing the same customer to complete the transaction or to enter into a final and binding contract therefor, upon terms no more advantageous or even less advantageous<sup>57</sup> to the employer than those unsuccessfully proposed by the plaintiff broker.<sup>58</sup>

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*Bellesheim v. Palm*, 54 A. D., 77 (remoteness not overcome by proof of subsequent express promise to pay commissions); *Goldstein v. Waters*, 15 Daly, 397 (undisclosed customer); *Gillen v. Wise*, 14 Daly, 480; *Feldman v. O'Brien*, 23 Misc., 341; *Maracella v. O'Dell*, 3 Daly, 123; *Klinck v. Burrows*, 6 N. Y. State Rep., 715.

<sup>54</sup> See cases cited *post* in notes 61 and 62.

<sup>55</sup> *Donovan v. Weed*, 182 N. Y., 43; *Jenkins v. Mahoney*, 142 A. D., 653; *Cole v. Kosch*, 116 A. D., 715; *Hamilton v. Gillender*, 26 A. D., 156; *De Zavala v. Rogaliner*, 45 Misc., 430. A broker may, of course, employ a second broker as his agent, in which case, if the agent broker causes the benefit to the employer, the principal broker becomes entitled to his agreed share of the commission. *Kohn v. Jacobs*, 4 Misc., 265. But payment to the agent broker discharges the employer. *Goldenberg v. Spargo*, 134 A. D., 626.

<sup>56</sup> *Haase v. Ullman*, 148 A. D., 40; *Hendricks v. Daniels*, 19 N. Y. Supp., 414.

<sup>57</sup> *Baker v. Thomas*, 12 Misc., 432; *Hendricks v. Daniels*, 19 N. Y. Supp., 414.

<sup>58</sup> See cases cited *ante* in note 55; also: *Wylie v. Marine Nat'l Bank*, 61 N. Y., 415; *Donovan v. Weed*, 182 N. Y., 43; *Alden v. Earle*, 4 N. Y. Supp., 548, *aff'd* 121 N. Y., 688 (lease); *May Co. v. Holland Holding Co.*, 156 A. D., 162; *Sutphen v. United States Trust Co.*, 142 A. D., 8223 (lease); *Rae Company v. Kane*, 121 A. D., 494; *Cole v. Kosch*, 116 A. D., 715; *Sampson v. Ottinger*, 93 A. D., 226; *Douglas v. Halsted*, 81 Hun, 65; *Freedman v. Havemeyer*, 37 A. D., 518; *Johnson v. Lord*, 35 A. D., 325; *Dreyer v. Rauch*, 42 How. Pr., 22; *Ware v. Dos Passos*, 4 A. D., 32; *Goldstein v. Walters*, 15 Daly, 397; *Freeman v. Polstein*, 49 Misc., 644 (broker employed by purchaser); *De Zavala v. Rogaliner*, 45 Misc., 430,

*Remoteness is not established*, however, when it appears that the employer, in the absence of a previous abandonment by the plaintiff broker, or *bona fide* termination by the employer of the plaintiff broker, or *bona fide* termination by the employer of the procured from a customer by the plaintiff broker, and then later accepted the same or perhaps a less advantageous proposition from the same customer when submitted by some other broker;<sup>59</sup> unless the employer was induced by the misleading statements of the plaintiff broker to believe that the proposition submitted by the rival broker came from some customer other than the customer of the plaintiff broker.<sup>60</sup>

(c) REMOTENESS BY REASON OF ACTION BY CUSTOMER.

Remoteness is not necessarily established by proof that the transfer of interest or the execution of the contract was first made between the employer and some customer other than the broker's customer before the ultimate transfer or assignment of such interest or contract to the broker's customer. It is true, of course, that in the absence of an unrevoked or unterminated<sup>61</sup> contract of employment whereby the broker is given the exclusive agency with a definite time in which to produce a customer,<sup>62</sup> the

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84 N. Y. Supp., 969; *Farber v. Cohn*, 74 Misc., 396; *Tyng v. Constable*, 35 Misc., 283 (lease); *Haines v. Barney*, 33 Misc., 748; *Shipman v. Wilkeson*, 112112 N. Y. Supp., 895; *Hendricks v. Daniels*, 19 N. Y. Supp., 414; *Powell v. Lamb*, 1 N. Y. Supp., 431, N. Y. Supp., 930; *Feldman v. O'Brien*, 23 Misc., 341; *McNulty v. Rowe*, 28 Misc., 523; *Baker v. Thomas*, 12 Misc., 432; *Shipman v. French*, 1 N. Y. Supp., 67.

<sup>59</sup> *L'Ecluse v. Field*, 154 A. D., 685 (question for the jury); *Van Sicklen v. Herbst*, 30 A. D., 255; *Holley v. Townsend*, 2 Hilt., 34; *McCloskey v. Thompson*, 26 Misc., 735 (broker employed by purchaser); *Buehler v. Weiffenbach*, 21 Misc., 30; *Hendricks v. Daniels*, 19 N. Y. Supp., 414.

<sup>60</sup> If the employer informs the plaintiff broker that some other person has approached him regarding the property, but the plaintiff broker does not disclose the name of his customer, or gives a misleading answer, and the employer thereafter in good faith sells through such other person (who proves to be another broker) to the plaintiff broker's customer, the plaintiff broker cannot recover commissions. *Courtney v. Rhodes*, 148 A. D., 799.

<sup>61</sup> Having employed a broker for no definite period, to negotiate an exchange, and the broker having incurred expenses for advertising the property pursuant to the contract, the employer cannot revoke the contract, except after a reasonable time, without being liable in damages to the broker. *Bathrick v. Coffin*, 134 A. D., 103.

<sup>62</sup> *Bathrick v. Coffin*, 13 A. D., 101, 103; *Levy v. Rothe*, 17 Misc., 402; *Schultz v. Griffin*, 5 Misc., 499.



employer is free at any time<sup>63</sup> to deal directly with a customer found by himself or brought to him by another broker, and if a benefit<sup>64</sup> accrues to him through such negotiation, his liability to the broker for commissions ceases as to any services rendered thereafter;<sup>65</sup> but such direct negotiations must have been made in good faith, and if it appears that the customer was simply an intermediary or dummy for the purpose of cloaking a deal with the broker's customer in order to defeat the broker's claim for commissions, remoteness is not established.<sup>66</sup> In the absence of proof to the contrary, bad faith in such a transaction with an intermediate customer will not be presumed;<sup>67</sup> proof of bad faith, however, need not be actual proof, but only circumstantial evidence from which bad faith may be inferred as a question of fact.<sup>68</sup>

(d) WHERE THE TERMS PRESCRIBED OR AGREED TO BY THE EMPLOYER FOR THE TRANSFER OF INTEREST WHICH THE BROKER WAS EMPLOYED TO FACILITATE HAVE BEEN CONSENTED, TO, BUT THE CONTRACT ITSELF HAS NOT BEEN EXECUTED.

In this class of cases the employer can establish remoteness by proof that the consenting customer was not in fact "produced" to him by the plaintiff broker even though the plaintiff broker was admittedly the first to secure the customer's consent to the em-

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<sup>63</sup> But not after a complete preliminary agreement with the broker's customer. *Moses v. Helmke*, 18 Misc., 357.

<sup>64</sup> The benefit must be at least an agreement and not merely an unaccepted offer. *Lovett v. Clench*, 115 A. D., 635.

<sup>65</sup> *Shusterman v. Kraus*, 148 A. D., 727; *Hodge v. Apelles*, 122 A. D., 437; *Cole v. Kosch*, 116 A. D., 715; *Ettinghoff v. Horowitz*, 115 A. D., 571; *Ranger v. Lee*, 66 Misc., 144; *Shapiro v. Nadler*, 51 Misc., 13; *Pescia v. Haines*, 50 Misc., 550 (lease); *Harris v. Rogers*, 15 N. Y. State Rep., 396; *Goldsmith v. Cook*, 14 N. Y. Supp., 878.

<sup>66</sup> *Travis v. Bowron*, 138 A. D., 554; *Martin v. Fegan*, 95 A. D., 154; *Winans v. Jacques*, 10 Daly, 487; *Konner v. Anderson*, 32 Misc., 511; *Randrup v. Schroeder*, 22 Misc., 365; *McKnight v. Thayer*, 21 N. Y. Supp., 440.

<sup>67</sup> *Bennet v. Kidder*, 5 Daly, 512 (broker employed by purchaser); *Hamm v. Weber*, 19 Misc., 485.

<sup>68</sup> *Travis v. Bowron*, 138 A. D., 554.

ployer's terms.<sup>69</sup> The "production" of the consenting customer implies more than the mere notification of the employer to come to meet the customer:<sup>70</sup> the broker must bring or send the customer in person to the employer,<sup>71</sup> or at least make authorized tender on behalf of the customer, the latter being within call,<sup>72</sup> unless, of course, the employer, after receiving notice from the broker that the broker has found a customer willing to accept the employer's terms, declines in advance to proceed further.<sup>73</sup>

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<sup>69</sup> *McCloskey v. Thompson*, 26 Misc., 735 (broker employed by purchaser). The transfer of interest had in fact been completed, but the case presents a situation where the second broker "produced" the customer to the employer after the first broker had induced the customer to consent to the employer's terms, but before the customer was "produced" by the first broker. Both "productions", however, occurred before the actual preliminary closing of the transaction.

<sup>70</sup> *Lotz v. Herriman*, 120 A. D., 477.

<sup>71</sup> *Rae Co. v. Kane*, 121 A. D., 494; *Shapiro v. Shapiro*, 117 A. D., 817 (producing another broker who in turn produces a customer is not sufficient); *Halterman v. Leining*, 45 Misc., 397; see generally cases cited in notes 68 to 72.

<sup>72</sup> *Marks v. Elliot*, 90 N. Y. Supp., 331.

<sup>73</sup> *Getzelsohn v. Donnelly*, 50 Misc., 164; *Moore v. Boehm*, 45 Misc., 622.