

An attorney cannot contract for his client no matter how intimately he be associated with his affairs and no matter how wisely he deem himself to be furthering his client's interests. In *Warwick v. Marlatt*,²⁵ where an attorney of a mortgagor attempted to enter into a settlement of account with the holder of the mortgage, who was heavily in debt to the mortgagor, it was held that he had no authority to bind his client by agreeing to waive the defense of usury in the mortgage debt in consideration of the holder's cancellation of certain judgments owned by him against the mortgagor. The attorney cannot contract for his client²⁶ nor can he change the terms of his client's contracts by a written agreement and bind him thereby, without special authority.²⁷

It is apparent that in many situations the authority of an attorney is hardly any more than that of any other agent. His position as an attorney does not clothe him with authority to conduct his client's affairs as he wishes or deems best. If he is to create obligations binding upon his client or alter any of his legal rights, he must have special authority to do so. The client may retain him to prosecute a suit, from which he will derive authority to control the cause as it concerns the remedy, or he may appoint him agent for a special purpose, but from neither of these authorizations does an attorney receive the power to determine for his client his legal rights.

PRINCIPAL AND AGENT—LIABILITY OF A DEFRAUDER FOR BROKER'S COMMISSION.—The general rule is well settled by authority and good reason that to entitle a real estate broker to his commission, in the absence of a contrary agreement, all that is required of him is to bring to the vendor a purchaser who is ready, willing and able to buy upon the terms and conditions set forth by the vendor, or upon terms satisfactory to the vendor.¹ Should the agreement provide other-

²⁵ 25 N. J. E. 188.

²⁶ *Wechsler v. Clarke*, 7 N. J. Misc. 627, 146 Atl. 786 (Sup. Ct. 1929), holding that an attorney has no implied authority to buy window shades for property owned by his client and bind him for payment therefor; *Callaway v. Equitable Trust Co.*, 67 N. J. L. 44, 50 Atl. 900 (Sup. Ct. 1902) holding that an inference that an attorney has authority to bind his clients to pay commissions to a broker for obtaining a tenant does not arise from the fact that he knew of such claim at the time he superintended the execution of the lease between the principals.

²⁷ *Falkenstein v. Gibson*, 108 N. J. Eq. 251, 154 Atl. 876 (E. & A. 1931).

¹ *Hinds v. Henry*, 36 N.J.L. 328 (Sup. Ct. 1873); *Crowley v. Myers*, 69 N.J.L. 245, 55 Atl. 305 (E. & A. 1903); *Courter v. Lydecker*, 71 N.J.L. 511, 58 Atl. 1093 (Sup. Ct. 1904); *Ryer v. Turkel*, 75 N.J.L. 677, 70 Atl. 68 (E. & A. 1907); *Owen v. Riddle*, 81 N.J.L. 546, 79 Atl. 886 (E. & A. 1910); *Freeman v. VanWagenen*, 90 N.J.L. 358, 101 Atl. 55 (Sup. Ct. 1917); *Kruse v. Ferber*, 91 N.J.L. 470, 103 Atl. 409 (Sup. Ct. 1918); *Clark v. Griffin*, 95 N.J.L. 508, 113 Atl. 234 (E. & A. 1920); *Steinberg v. Mindlin*, 96 N.J.L. 206, 114

wise, then the commission is not earned until the terms of the agreement have been complied with or performed.² In the application of the general rule, the broker to earn his commission must be the efficient procuring cause of the agreement between the vendor and purchaser, and the mere introduction by a broker of a buyer to the seller is not sufficient.³ Nor is the broker entitled to a commission from his principal where he has been a party to the sacrifice of his principal's interest without the latter's knowledge, either by fraud or intentional concealment of facts.⁴ The principal is entitled to complete loyalty throughout the entire transaction,⁵ and if the broker produces a "dummy" purchaser and fails to disclose such knowledge to his principal, and by false representations leads him to believe that he is dealing with a "real" purchaser, the broker on failure of the "dummy" purchaser to consummate the sale cannot recover his commission,⁶ and the vendor, in the event the sale is consummated, is entitled to rescind.⁷ But if the broker made no misrepresentations whatsoever,

Atl. 451 (E. & A. 1921); *Resky v. Meyer*, 98 N.J.L. 168, 119 Atl. 97 (E. & A. 1922); *Feist & Feist, Inc., v. Taub*, 105 N.J.L. 237, 143 Atl. 335 (E. & A. 1928); *Brindley v. Brook*, 10 N.J.Misc. 612, 160 Atl. 398 (Sup. Ct. 1932).

²*Steinberg v. Mindlin*, 96 N.J.L. 206, 114 Atl. 451 (E. & A. 1921); *Klipper, et al., v. Schlossberg*, 96 N.J.L. 397, 115 Atl. 345 (Sup. Ct. 1921); *Resky v. Meyer*, 98 N.J.L. 168, 119 Atl. 97 (E. & A. 1922); *Dubowy v. Blau*, 4 N.J.Misc. 290, 132 Atl. 481 (Sup. Ct. 1926); *Apfelbaum v. Topf*, 104 N.J.L. 343, 140 Atl. 295 (E. & A. 1928); *Apfelbaum v. Bernstein*, 104 N.J.L. 664, 141 Atl. 750 (E. & A. 1928). But see *Schwartz v. Weinstein*, 104 N.J.L. 368, 140 Atl. 418 (E. & A. 1928) in which broker obtained an exclusive agency option with provision that broker must give notice in writing to owner of name of purchaser. After option expired broker, without notice in writing, procured a purchaser who was ready, willing and able to buy or exchange. Owner, after making an oral agreement with purchaser for an exchange refused to perform, and broker sued for commission. The Court, in a divided opinion, upheld the right of broker to recover his commission and stated that the fact that the owner and intended purchaser agreed with relation to the exchange of properties, and that the owner knew who the purchaser was, is controlling, despite the fact that the option had expired, or that the broker was to notify the owner in writing of the name of the purchaser.

³*Vreeland v. Vetterlein*, 33 N.J.L. 247 (Sup. Ct. 1869); *Resky v. Meyer*, cited note 1, *supra*; *Apfelbaum v. Bernstein*, cited note 2, *supra*; *Dubowy v. Blau*, cited note 2, *supra*; *Carpenter v. Overland Tire Co.*, 102 N.J.L. 196, 130 Atl. 665 (E. & A. 1925).

⁴*Steinberger v. Young*, 73 N.J.Eq. 586, 75 Atl. 807 (Ch. 1907); *Rogers v. Genung*, 76 N.J.Eq. 306, 74 Atl. 473 (E. & A. 1909); *Gordan v. Kaplan, et al.*, 99 N.J.Eq. 390, 132 Atl. 110 (E. & A. 1926); *Carpenter v. Overland Tire Co.*, cited note 3, *supra*.

⁵*Carpenter v. Overland Tire Co.*, cited note 3, *supra*; *Gordan v. Kaplan, et al.*, cited note 4, *supra* (the Court said, "one who accepts employment as an agent to sell real estate for another, whether he be called a 'realtor', or a 'broker', or a 'real estate agent' is most strictly bound within the scope of his employment to the duty of absolute loyalty to his principal", and a breach of his contract of loyalty deprives him of his right to receive the agreed upon compensation or commission which the principal was to pay him for services").

⁶*Smith v. Kreps*, 104 N.J.L. 408, 140 Atl. 314 (E. & A. 1928).

⁷*Turner v. Kuehne*, 70 N.J.Eq. 61, 62 Atl. 327 (Ch. 1905); *Brittingham*

but fully and truthfully acquainted his principal with everything he knew, and in fact the owner knew that he was not getting a "real" purchaser, and with such knowledge he chose to take a chance of the sale ultimately being consummated, then the broker would be entitled to recover his commission since the owner with full knowledge of the facts has accepted the purchaser.⁸

It is also settled that where the broker assumes to act for each of the parties, he is bound to disclose to each his double agency,⁹ and in the absence of such disclosure he cannot recover his commission, and rescission of the sale will be allowed either party or both if aggrieved.¹⁰ This rule, however, applies only where the broker is acting as an "agent," and it is necessary to distinguish it from the rule applicable when the broker acts as a "middleman." It is generally understood that the broker acts as a "middleman" when he has no duty to perform but to bring the parties together, and his undertaking is merely that of an introducer, to find a purchaser who is ready, willing and able to buy at a price fixed by the seller, or at a price satisfactory to the seller.¹¹ The "middleman" is given no authority or discretion to exercise in the transaction, being engaged not to negotiate a sale or purchase, but simply to bring the parties together, and permit them to make their own bargain.¹² Acting as a "middleman" the broker is under no duty to either party to disclose his double agency, and he may recover any agreed commission from one or both, though neither may know that compensation is expected from the other.¹³

It is well established that the principal also owes a duty to the broker, where an employer and employee, or a principal and agent relationship exists or can be inferred, and if the principal fails to act in good faith, or if he breaches his duty to the broker, the broker may recover his commission, whether or not the sale is consummated after the parties have agreed on the terms.¹⁴ If the principal attempts

v. Huyler's, et al., 118 N.J.Eq. 352, 179 Atl. 275 (Ch. 1935) (holding that equity will set aside transactions founded upon fraud).

⁸Smith v. Kreps, cited note 6, *supra*; Feist, et al., v. Jerolamon, 81 N.J.L. 437, 75 Atl. 751 (E. & A. 1910) (it is not necessary for broker to establish pecuniary ability of his purchaser, where it would be futile, because of the conduct of the vendor, in order to recover commission).

⁹Young v. Hughes, 32 N.J.Eq. 372 (E. & A. 1880) (the rule is predicated upon public policy and is not intended to be remedial of the actual wrong, but a preventative of the possibility of it).

¹⁰Feist, et al., v. Jerolamon, cited note 8, *supra*.

¹¹Feist, et al., v. Jerolamon, cited note 8, *supra*; see cases cited 4 R.C.L. 330, et seq.

¹²Shepherd v. Heddan, 29 N.J.L. 334 (Sup. Ct. 1862); Sternberger v. Young, cited note 4, *supra*.

¹³See cases cited 4 R.C.L. 330, et seq.

¹⁴Rauchwanger v. Katzin, 82 N.J.L. 340, 82 Atl. 510 (Sup. Ct. 1912) (To invoke Statute of Frauds in order to deprive the broker of his commission would in effect work a fraud on the broker); see cases cited 4 R.C.L. 323, et seq.

by fraudulent practice or by misrepresentation to defraud the broker of his commission, the broker is allowed recovery.¹⁵ Recovery is also allowed where the broker was employed by the owner to find a purchaser at a fixed price, and the broker produced such purchaser, who was ready, willing and able to buy, but the owner declined to sell.¹⁶ Where the purchaser, in good faith, declines to consummate the sale because of an imperfection in the owner's title, the broker cannot recover his commission, unless the owner, when he employed the broker, fraudulently concealed the fact of the existence of the imperfection, or by some other willful act, prevented the title from passing and the sale being consummated.¹⁷

In the event that the broker has an "exclusive agency" contract, he is of course entitled to his commission whether or not his efforts were the immediate procuring cause of the sale even though the purchaser was a stranger to him,¹⁸ but where the agency is not an exclusive one, it is the broker, who, acting in good faith and without fraud on his part, procures and delivers the purchaser, who is entitled to the commission,¹⁹ regardless of the fact that it subsequently develops that the ultimate purchaser had been originally introduced to the owner by another broker.²⁰ In such case if it can be shown that the owner, purchaser, broker, who received the commission, or a third

¹⁵*Demody v. N. J. Realities, Inc.*, 101 N.J.L. 334, 128 Atl. 265 (E. & A. 1925).

¹⁶*Ryer v. Minningham*, 78 N.J.L. 742, 75 Atl. 890 (E. & A. 1909); *Owner v. Riddle*, 81 N.J.L. 546, 79 Atl. 886 (E. & A. 1910); *MacBride v. Rogers*, 83 N.J.L. 407, 85 Atl. 202 (Sup. Ct. 1912); *Steinberg v. Mindlin*, cited note 1, *supra*.

¹⁷*Apfelbaum v. Topf*, cited note 2, *supra*. (D, vendor, agreed to pay commission on "passing of title", or in the event of failure to pass title through his default. P, broker, procured purchaser who entered into agreement of sale. On search of property purchaser found restrictive covenants in old deed and did not consummate sale. P sued D for commission, and Justice Kalisch, speaking for the Court, said, "such a situation does not *per se* determine the right of the broker to be paid a commission where payment thereof is made expressly to depend upon the actual passing of title and consummation of the sale, unless it is made to appear that the vendor, when he entered into the contract with the real estate broker, fraudulently concealed the fact of the existence of the restrictions on the property; or by some other willful act prevented the title from passing and the sale being consummated").

¹⁸*Carpenter v. Overland Tire Co.*, cited note 3, *supra*.

¹⁹*Carpenter v. Overland Tire Co.*, cited note 3, *supra*.

²⁰*Apfelbaum v. Topf*, cited note 2, *supra*. The Court of Errors and Appeals in a *per curiam* opinion affirms the decision of the Circuit Court in which Judge Dungan said: "I have never understood that the commissions of the broker were earned by the mere introduction of a buyer to the owner of real estate, or lessor of real estate, but that the broker must have been in the words of the cases, the efficient procuring cause of the contract between seller and purchaser, lessor and lessee"; *Dubowy v. Blau*, cited note 2, *supra* (the ordinary buyer is under no legal duty to purchase property through a broker as an intermediary. If he could purchase at a lower price, either directly or indirectly, he had a legal right to do so. The loss by the broker of the prospective sale was an ordinary hazard of business dealings).

party, fraudulently and willfully acted in such manner as to cause the original broker to lose his commission, then a right of action can be maintained by the latter and he may recover damages for the loss of commission against those who perpetrated the fraud. In the recent case of *Kamm v. Flink, et al.*,²¹ our Court of Errors and Appeals, in no uncertain terms, upholds such right of action by a broker, and speaking through Mr. Justice Heher says:

“ * * * full, fair, and free competition is necessary to the economic life of a community, but under its guise, no man can, by unlawful means, prevent another from obtaining the fruits of his labor * * *.”

The Court, citing with approval the Connecticut case of *Skene v. Carayanis*,²² states that it is not a requisite to the cause of action that there should have been a special agreement or contract between the owner and the broker, since the action is not predicated on a contract, but is for the damages resulting from the fraudulent conduct of the defendants.²³ It would seem then that regardless of the agreement between the parties,²⁴ a defrauder can be held accountable for

²¹ 113 N.J.L. 582, 175 Atl. 62 (E. & A. 1934) in which P, broker, disclosed name of prospective purchaser to D, vendor, upon vendor's promise to keep name confidential. Subsequently purchaser consummated deal with vendor, through another broker and other broker was paid commission. P brings action against vendor, purchaser and broker for damages for loss of commission. The Court in reversing a motion striking the complaint said: “ * * * the right to pursue a lawful business is a property right that the law protects against unjustifiable interference * * * any act or omission which unjustifiably disturbs or impedes the enjoyment of such right constitutes its wrongful invasion, and is properly treated as tortious * * * if the act is committed with malicious intent of inflicting injury upon his rival's business, his conduct is illegal, and if damages ensue from it, the injured party is entitled to redress. And it does not matter whether the wrongdoer effects his object by persuasion or by false representation * * *.”

²² 130 Conn. 708, 131 Atl. 497 (Sup. Ct. of Errors 1926).

²³ In *Skene v. Carayanis*, cited note 22, *supra*, V listed property for sale under a general real estate listing with P, broker, introduced D to V, and although general terms were discussed no agreement was reached. Subsequently X, another broker, through Y, a “dummy”, purchased the property from V for D. P sued all parties claiming fraud, and recovered against X, Y, and D, V being found innocent of the fraud. In affirming the judgment the Court said: “ * * * the general listing of property with a real estate broker for sale, without special agreement, does not give rise to such mutual obligations as in themselves constitute a contract. 1 MEACHAM, AGENCY, sec. 31.

Such listing approximates an offer which ripens into a contract when the broker meets its terms by producing one who is able, ready and willing to buy on the terms stated or on terms satisfactory to the owner * * * the trial court clearly and emphatically charged to the jury that the broker was not seeking to recover a commission for the sale of the property, but damages resulting from the fraudulent conduct of the defendants * * *.”

²⁴ *Kamm v. Flink, et al.*, cited note 21, *supra* (the protection given by law is not confined to rights springing from enforceable contracts. What is forbidden is unjustifiable interference with one's right to pursue his lawful business or occupation and to reap the earnings of his industry. Liability is not

his tortious acts and that the broker may recover as damages the loss of the commission he would have earned, even though the sale is subsequently rescinded for fraud. In the recent case of *Brittingham v. Huyler's, et al.*,²⁵ Vice-Chancellor Berry, in an action for rescission brought by the vendor, held the defrauding purchaser to account for the commissions of the broker, after a finding that the purchaser acted fraudulently and that the broker acted in good faith.

When an action is brought for commission by a broker and the action is not predicated on any theory of tort liability, but on the contractual obligation, it is necessary, of course, to first interpret the contract and analyze the undertaking of the broker. If the contract contemplates that the commission is payable on the "sale" of the property, the word "sale" is held to connote that the purchaser and seller agreed on the terms,²⁶ and the broker is entitled to his commission irrespective of whether or not the contract negotiated is ever consummated, so long as the failure to carry it through to a successful completion is not due to any fault on the part of the broker.²⁷ But if the words of hiring contemplate a perfecting of title in the vendee, then the commission is payable only in the event that the contract is a valid binding one or upon the conveyance of the property.²⁸ The word

affected by the fact that the contract is void for non-compliance with the Statute of Frauds. Strangers to the agreement will not be permitted to interpose this defense).

²⁵ 118 N.J.Eq. 352, 179 Atl. 275 (Ch. 1935).

²⁶ *Steinberg v. Mindlin*, cited note 1, *supra*, D, owner, promised P, broker, commission if P was instrumental in procuring a purchaser for his property. The agreement contained the clause "this agreement shall hold good only if the property is sold to a purchaser introduced to me through the broker." P introduced purchaser to D and the terms were settled by agreement between the purchaser and D. D then stated that he would not execute the contract of sale unless P would abate commission to a less amount. P declined and the matter fell through for that reason alone. P sued D for commission and recovered. In affirming the decision the Court said that the word "sold" in the broker's commission contract ordinarily means that purchaser and seller agreed on terms.

²⁷ *Klipper v. Schlossberg*, cited note 2, *supra*. D, owner, agreed to pay P, broker, commission for "perfecting the sale". P introduced purchaser who entered into a contract with D. Subsequently because of an encroachment, purchaser refused to take title, and D returned deposit and expenses to purchaser. P sued and recovered his commission from D. The court holding that "perfecting the sale" meant entering into a contract, and not a passing or devolution of title. But see *Gottlieb v. Connolly*, 5 N.J.Misc. 372, 136 Atl. 599 (Sup. Ct. 1927), where broker obtained purchaser for D's property, and the contract of sale called for seven acres, more or less, but survey showed only 4.65 acres and purchaser refused to accept deed. D returned deposit, and broker sued D for balance of commission. D counterclaimed for commission already paid. In denying the broker a recovery and allowing D's counterclaim the court said that where the contract entered into was voidable at option of the purchaser, under a mistake of fact, there was no meeting of the minds sufficient to entitle broker to a commission, and D could recover commission already paid to broker. There was no buyer ready, willing and able.

²⁸ *Volker v. Fish*, 75 N.J.Eq. 497, 72 Atl. 1011 (Ch. 1909) (this case dis-

"sale" contemplates a "meeting of the minds", and once the vendor and purchaser have agreed upon the terms, the broker's right to commission is determined, since his job has been completed, the vendor having accepted the purchaser presented by the broker.²⁹ The broker is not held to be an insurer, and since he did not contract or agree that the representations made by the purchaser were true, the law does not impose such a burden upon him.³⁰ Where, however, the contract of employment contemplates a valid binding agreement or a conveying of title, then as a matter of contract law, the broker is not entitled to any commission if the purchaser defrauded the vendor, or if the contract is invalid.³¹ But if the defrauded vendor has recovered such commission from the fraudulent purchaser in an action for damages, the broker may rightfully maintain an action against the owner for such commission.³²

It is well settled now that when the principal, or the employer of the broker, acts fraudulently, the broker is allowed recovery of his commission on the theory that the agreement between the parties imposes a duty for the breach of which the defrauder is held accountable. But where the broker is acting as a "middleman" recovery on a contractual basis usually depends on whether or not the defrauder would have been liable for the commission if no fraud had been practised. It is submitted, however, that regardless of whether or not recovery is allowed on any contractual basis, the broker should be allowed recovery against a defrauder, whether he be the vendor, purchaser, or a third party, within the principles of the *Kamm*³³ and the *Brittingham*³⁴ cases. It should be immaterial, in an action for damages for loss of commission because of a tortious act what the consequences are. Whether the fraud resulted in another broker receiving the commission, a rescission of a sale already consummated, or the failure of the parties to consummate a sale, there should be recovery, since the right of action accrues when the tort is committed.

tinguished in *Steinberg v. Mindlin*, cited note 1, *supra*, on grounds that parties contemplated a perfecting of title in the vendee, and since the contract of sale was voidable on grounds of infancy of vendee and rescission was decreed, the broker could not recover commission).

²⁹ *Klipper v. Schlossberg*, cited note 2, *supra*; *Steinberg v. Mindlin*, cited note 1, *supra*.

³⁰ *DeWiese v. Brown*, 55 Colo. 430, 135 Pac. 800 (1913); *Lockwood v. Halsey*, 41 Kan. 166, 21 Pac. 98 (1899). *Contra*: *McCarthy v. Reid*, 237 Mass. 371, 129 N.E. 675; *Bird v. Rowell*, 180 Mo. App. 421, 167 S.W. 1172 (there cannot be a "meeting of the minds" since if the fraud or misrepresentation were not committed there would have been no contract and commission would not have been earned).

³¹ *Volker v. Fish*, cited note 28, *supra*.

³² *Haber v. Goldberg*, 92 N.J.L. 367, 105 Atl. 874 (E. & A. 1918).

³³ *Kamm v. Flink, et al.*, cited note 21, *supra*.

³⁴ *Brittingham v. Huyler's, et al.*, cited note 25, *supra*.