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Broker. Real Estate Broker's Right to Commission Under Special Contract. The case of *Campbell* v. *Sickels*[1] presented an action by a real estate broker for a commission. Owner alleged that there were material variations between the written terms of sale under which broker acted and the terms of the offer of prospective purchaser procured by the broker. Following the established rule requiring strict adherence to the terms of special contracts in order to qualify for a commission thereunder,[2] the appellate court affirmed the trial court's action in sustaining defendant's demurrer to the motion and amended motion for judgment.

The case is unusual on the facts by reason of broker's strenuous efforts to inform his principal of the provisions of the offer (he finally had a copy posted on the door of defendant's home by the sheriff) and, equally, by defendant's absolute refusal to acknowledge the offer in any way. The court indicated that, although under the circumstances, defendant was chargeable, this was immaterial inasmuch as the owner was under no duty to modify her terms in order to meet those of the offer.

Hensley v. *Moretz*[3] resulted in a reversal of the trial court's judgment for the plaintiff-broker on the grounds that failure of the lower court to instruct the jury to consider the defendant-owner's version of the disputed oral brokerage agreement constituted reversible error. The owner claimed that the agreement comprised a special contract with one of the requirements being that he, the owner, receive a certain sum before any commission became payable. Inasmuch as the prospective purchaser, having signed a valid contract to purchase, defaulted leaving only a relatively insignificant forfeit binder in the owner's possession, it would follow, according to the owner's view, that no commission was due.

On the other hand, the broker's contention was that this initial agreement had subsequently been waived and that the

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[1] 197 Va. 298, 89 S.E.2d 14 (1955).

[2] See Edwards v. Craig, 188 Va. 564, 50 S.E.2d 281 (1948) and cases cited therein.

[3] 197 Va. 440, 90 S.E.2d 183 (1955).

final agreement was that he was to receive a fixed commission upon procuring, as he had, a valid, binding contract to purchase, at the agreed price and upon the prescribed terms.

Recognition by the court that, had the jury accepted the owner's claim as to the existence of a special contract, a contrary judgment in the trial court might well have resulted, was entirely consistent with the prevailing rule of strict adherence to terms in these cases.[4]

Master and Servant. Whose Servant? The determination in *White* v. *Kaufman,* heard in Federal District Court, E. D. Virginia, Alexandria Division, resolved itself to the issue of "whose servant" was a janitor whose negligent acts caused the boiler explosion and resultant injuries forming the basis for the action. The key tests applied by the court in determining liability for the janitor's acts were those of "whose business" was being performed and the critical "right to control test." [5] The evidence strongly indicated that the janitor was acting in the course of his normal duties as an employee of the defendant-apartment building owner and no evidence of control on the part of defendant-contractor was shown. Liability was accordingly imputed to the apartment owner. The fact that the request of a sub-contractor's employee that the janitor shut down the boiler may have set in motion his negligent acts was insufficient, under the circumstances, to raise a serious question as to whether a "borrowed servant" relationship might have existed.

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[4] See Note 2, *supra.*

[5] Coker v. Gunter, 191 Va. 747, 63 S.E.2d 15 (1951); Ideal Steam Laundry v. Williams, 153 Va. 176, 149 S.E. 479 (1929).