

CONCERNS THE SALE OF LANDS

SUPREME COURT PASSES ON COMMISSIONS—FULL TEXT PUBLISHED BY COURTESY OF F. A. TURNER, REPORTER OF SUPREME COURT.

Hall v. Olson, Multnomah County, Joseph C. Hall respondent, v. N. C. Olson, appellant. Appeal from the circuit court for Multnomah county. Hon. John B. Cleland, Judge. Argued and submitted March 21, 1911. I. N. Smith, Pease & Wintler and John F. Logan, for appellant. Thomas O'Day, for respondent. Burnett, J.: Reversed.

The plaintiff alleges that on August 14, 1908, the defendant employed him to effect a sale of 320 acres of timber land in Marion county at the price of \$18,000, warranting that the land had thereon 40,000,000 feet of merchantable timber and agreeing to pay the plaintiff \$1,000 for his services in bringing about the sale, no specific time being fixed for completing the transaction; and that within 10 days thereafter plaintiff did negotiate a sale of the property upon condition that the premises contain that amount of timber, to be determined by scaling it, and requested the defendant to allow the purchasers, naming them, to cruise the land for that purpose. The complaint also states that it was "agreed between this plaintiff and defendant that the purchasers thereof should have the privilege of having said timber examined and scaled so as to determine the amount of timber thereon." However, there is no testimony to support this agreement as a condition



That "Every Little Movement" Chorus in "Madame Sherry."

tion of the contract between plaintiff and defendant. It is further charged that the purchasers obtained by the plaintiff were ready, able and willing to purchase and pay for the land; that when plaintiff requested defendant to allow them to scale the timber he refused to do so and declined to make the sale; that by the term of the contract between the parties the commission of \$1,000 became due and payable from defendant to plaintiff as soon as the sale was consummated; and that when the defendant declined to complete the sale the plaintiff demanded from him payment of said commission, which was refused.

The answer tenders the general issue to every allegation of the complaint except as to defendant's title to the land and states in effect that the contract was made August 14, 1908, and provided that if the sale was concluded at \$18,000 and the money realized thereon by the 17th of that month, but not thereafter, the defendant would pay the plaintiff \$1,000 as commission, but that plaintiff did not procure a purchaser within the time or on the terms stipulated.

The reply traverses the time limit and the alleged failure to produce a purchaser, as mentioned in the answer. From a judgment on a verdict of \$1,000 for plaintiff the defendant appeals. Burnett, J.: The defendant assigns as error the court's refusal to give to the jury certain instructions which he requested. One class of these instructions was based on the idea that the alleged contract between plaintiff and defendant was wanting in mutuality and not supported by any consideration. It is elementary that where one promises to pay money to another on performance by the other of a particular thing, lawful in its nature, mutuality of contract exists because the performance constitutes a consideration for the promise to pay. The other class of defendant's refused instructions proceeds on the theory, in support of which there is some testimony, that the defendant withdrew the land from sale and so notified the plaintiff some days before the latter produced a purchaser.

A real estate broker, where no time limit is prescribed within which he must procure a purchaser, has a reasonable time in which to perform his part of the contract. Stedman v. Richardson, 100 Ky. 79. The question of what would be a reasonable time is one of mixed law and fact to be left to the jury, under proper instructions from the court as to the law. If the defendant would rely on a withdrawal of the land from sale he must plead it, with notice to the plaintiff before the purchaser was produced. Such a defense is in the nature of a confession and avoidance. In this case the defendant pleads the agreement which he claims expired by limitation of time without performance, but does not meet the complaint by an averment that he rescinded the contract on which the plaintiff relies. After the expiration of a reasonable time, where no time is

specified within which the purchaser must be produced, the defendant would have a right to withdraw the land from sale and thus rescind the brokerage contract, but no such case is made in the answer. The latter class of instruction requested by the defendant is good as an abstract theory, but without the pleading to sustain them, they were very properly refused. Conceding, however, that this question was rightly before the court on the pleadings, there is testimony sufficient to take the case to the jury on that point. According to the witness Stewart, the defendant talked to him about the transaction and said: "I think I will turn this down. I ought

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No attraction announced for the Grand opera house in years has attracted the attention now being centered in the engagement of "Madame Sherry" tonight.

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The "Sunkist" is a tree-ripened orange, seedless and fibreless—never pithy—every "Sunkist" is firm, solid and sound.

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Buy a box of "Sunkist" oranges and your fruit dealer will make you a special price. You will find no trouble in keeping them as long as you want to, because "Sunkists" reach you in excellent condition.

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"Sunkist" wrappers should be kept and sent to us to secure, free, a set of genuine Rogers Orange Spoons, Dessert Spoons and Fruit Knives. The patterns are new 1911 styles, designed exclusively for us. They are as attractive and stylish as money can buy. All are Rogers quality, standard A-No. 1 plate and are fully guaranteed by the makers, Wm. Rogers & Sons. No advertising appears on any of our premiums.

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Valuable Dessert Spoon Free
The picture shows our new 1911 design, Dessert Spoon, actual size. It is of the same excellent quality and beautiful design as the orange spoon, but being larger and heavier is more valuable. Sent to you on receipt of 24 "Sunkist" wrappers and 20c additional. For each additional dessert spoon send 24 "Sunkist" wrappers and 20 cents.



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