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Civil Procedure And Evidence—Charge Limiting Use of Evidence

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of frauds may not be raised as a bar to granting relief by way of constructive trust against unjust enrichment accomplished by abusing a confidential relationship.[23]

Charge Limiting Use of Evidence

The Court of Appeals, in an action to recover brokerage commissions, held, receipt in evidence of broker's unsuccessful efforts to sell property was not only immaterial but in this case prejudicial error which was not cured by the trial court's belated charge to limit the use of such evidence to corroboration.[24]

The rule of substantive law that a broker can not recover for his unsuccessful efforts is basic.[25] The rule of adjective law upon which this case was decided must by its very nature depend in its application upon the facts of the individual case. There is, however, ample precedent for its use. An early case[26] in referring to this rule, said the effect of prejudicial evidence is not obviated by the judge's direction to disregard it. This principle was again enunciated when the court on the basis of the above decision held that the reception of this type of evidence was error which was not cured by the charge.[27] Again, in 1943, the Appellate Division said, "In our opinion it may not be said that the hearsay statements . . . were harmless because the court instructed the jury to disregard them."[28] The rule as applied in these cases depends in the main on whether the court in its discretion feels there is a need for it.

Lis Pendens

Where plaintiff had filed a summons, complaint and notice of pendency of action in county court, but had not served any defendant within sixty days after filing,[29] plaintiff was not entitled after cancellation of the notice to file another.[30]

The filing of lis pendens is a privilege[31] granted by statute.[32] Although other

23. *Wood v. Rabe*, 96 N. Y. 414 (1884); *Goldsmith v. Goldsmith*, 145 N. Y. 313, 39 N. E. 1067 (1895).
24. *Fred W. Hoch Assoc. v. Western News U.*, 308 N. Y. 461, 126 N. E. 2d 749 (1955).
25. *Sibbald v. Bethlehem Iron Co*, 83 N. Y. 378 (1881).
26. *Erbin v. Lorillard*, 19 N. Y. 299 (1859).
27. *Arthur v. Griswald*, 55 N. Y. 400 (1874).
28. *Greenberg v. Prudential Ins. Co. of America*, 266 App. Div. 685, 40 N. Y. S. 2d 494 (2d Dep't, 1943).
29. Civil Practice Act §120.
30. *Israelson v. Bradley*, 308 N. Y. 511, 127 N. E. 2d 313 (1955).
31. *Cohen v. Biber*, 123 App. Div. 528, 108 N. Y. Supp. 249 (2d Dep't 1908).
32. Note 1, *supra*.