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THE BROKER'S RIGHT TO A COMMISSION WHEN THE SALE IS CONSUMMATED AFTER THE BROKERAGE CONTRACT HAS BEEN TERMINATED

INTRODUCTION

IN ORDER TO PROCEED expeditiously with the subject-matter of this article, it must be assumed that the reader understands the requirements necessary for a broker to be entitled to a commission prior to the termination of his contract. These requirements, *i.e.*, procuring cause, and ready, willing and able buyer, have been discussed in the immediately preceding articles of this volume.

Frequently after a broker has begun negotiations with a prospective purchaser, his contract of employment as agent becomes terminated, and a sale of the property is consummated by the principal after termination. The question then arises as to whether the broker may collect a commission upon the sale. For convenience, the answer to this question will be divided into five general categories—the general rule; the view more favorable to the broker; effect of the manner of termination; waiver or bad faith by the owner; and the use of particular brokerage contracts.

GENERAL RULE

As a general rule, in the absence of waiver, fraud or fault of the owner, a broker is not entitled to a commission unless he has fulfilled his part of the agency contract within the time limitation of the contract or an extension thereof granted by the principal.[1] If no time is specified in the contract, performance must take place within a "reasonable time."[2] It is felt that the owner has a right

* The author wishes to acknowledge the efforts of Assistant Professor Ralph L. Brill, Chicago-Kent College of Law, who aided in the preparation of this article.

1 Groome v. Freyn, 374 Ill. 113, 28 N.E.2d 274 (1940); Morgan v. Meister, 346 Ill. App. 577, 105 N.E.2d 775 (2d Dist. 1952) (abstr.); Hunt v. Judd, 225 Ill. App. 395 (3d Dist. 1922); Carroll v. Leafgreen, 170 Ill. App. 328 (1st Dist. 1912); Hoffman v. Boomer, 40 Ill. App. 231 (1st Dist. 1891); Reedy v. Beauchamp, 307 Ky. 409, 211 S.W.2d 393 (1948); Porter v. Hunter, 60 Utah 222, 207 Pac. 153 (1922); Brackett v. Schafer, 41 Wash. 2d 828, 252 P.2d 294 (1953); 2 Restatement (Second), Agency § 446 (1958). Where the time is limited, "the performance must be within *that* time; and the broker will not be entitled to commissions because efforts begun within that time bear fruit after the expiration." 2 Mechem, Agency § 1997 (2d ed. 1914).

2 Clark v. Muir, 298 Ill. 548, 132 N.E. 193 (1921); Hunt v. Judd, *supra* note 1 *(dictum)*; Stedman v. Richardson, 100 Ky. 79, 37 S.W. 259 (1896).

to stand upon the literal terms of his contract, and if the broker fails to sell or produce a purchaser within the specified time, the owner may treat the contract as at an end.[3] The owner may then sell the property to anyone, including a person with whom the broker had been negotiating before termination, and the recovery of a commission will generally be denied.[4] In such a case, the broker may not be able to recover a commission even though he has performed many of the activities which are commonly deemed to constitute the "procuring cause" of the sale.[5]

In *Sibbald v. Bethlehem Iron Co.*,[6] a leading decision in this area, a New York court announced the general rule in these words:

> [A] broker is never entitled to commissions for unsuccessful efforts. The risk of failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor, and expend his money with ever so much of devotion to the interests of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons his effort, or his authority is fairly and in good faith terminated, he gains no right to commissions. He loses the labor and effort which were staked upon success. And in such event it matters not that after his failure, and the termination of his agency, what he has done proves of use and benefit to the principal. . . . He may have introduced to each other parties who otherwise would never have met; he may have created impressions which under later and more favorable circumstances naturally lead to and materially assist in the consummation of a sale; he may have planted the very seeds from which others reap the harvest; but all that gives him no claim.[7]

The requirement of performance within the specified time has been very strictly enforced in many cases. In an early Kansas case,[8] for example, a broker who was authorized to sell within a

[3] Loxely v. Studebaker, 75 N.J.L. 599, 68 Atl. 98 (Ct. Err. & App. 1907).

[4] Nicholson v. Alderson, 347 Ill. App. 496, 107 N.E.2d 39 (2d Dist. 1952); Barney v. Yazoo Delta Land Co., 179 Ind. 337, 101 N.E. 96 (1912); Reedy v. Beauchamp, *supra* note 1; Stedman v. Richardson, *supra* note 2;

> The world is open to the owner to sell to whomever will buy, upon whatever terms he pleases. No right can thereafter accrue to the broker, express or implied. Loxely v. Studebaker, *supra* note 3, at 606, 68 Atl. at 100.

[5] Where a sale is completed after the termination of employment the right to commissions on such sale has been denied in the majority of cases notwithstanding that the broker was the procuring cause of the sale or had negotiated with the prospect prior to such termination. See generally Annot., 27 A.L.R.2d 1348, 1352 (1953). And see Brackett v. Schafer, *supra* note 1, where the lower court found that the sale was the direct result of interest created by the broker's efforts, and that he was the efficient procuring cause of the sale, but no commission was granted.

[6] 83 N.Y. 378, 38 Am. Rep. 441 (1881).

[7] *Id.* at 383, 38 Am. Rep. at 445.

[8] Fultz v. Wimer, 34 Kan. 576, 9 Pac. 316 (1886). The court stated:

two month period took a prospective purchaser out to the property, introduced him to the owner, and arranged for a sale. The purchaser was unable to raise the down payment until after the broker's agency had expired. The owner then had the broker draw up a contract of sale for him. However, having failed to make the sale within the period provided by the contract, the broker was denied his commission even though the court recognized that he had been the instrumental factor in consummating the sale.[9]

To earn a commission, a broker is usually only required to find a purchaser, not to conclude the sale itself.[10] If a purchaser who is ready, willing, and able to buy is procured within the limited period, the broker will be entitled to his commission even if the sale is not fully consummated and title not conveyed until after the termination of the agency.[11] However, to insure receiving the commission the broker must give notice to the owner that he has procured a purchaser before his authority expires.[12]

> [T]he plaintiff [broker] is bound by the special contract; and, to entitle him to recover, he must show that he complied with his part of the agreement, and sold the land within two months . . . , or that he sold the same within the time to which the contract was extended. Courts can only enforce contracts as the parties themselves made them. 34 Kan. at 580, 9 Pac. at 318 & 319.

9 *Accord,* Stedman v. Richardson, 100 Ky. 79, 37 S.W. 259 (1896). In that case negotiations had taken place between the broker and a prospective buyer, but no sale had been made. One day after the termination of agency, sale was made to the prospect by the owner. Held: no recovery. Also *accord,* Reedy v. Beauchamp, 307 Ky. 409, 211 S.W.2d 393 (1948); Porter v. Hunter, 60 Utah 222, 207 Pac. 153 (1922) (sales made two weeks after agency expired).

In Barney v. Yazoo Delta Land Co., *supra* note 4, the broker had succeeded in interesting a prospect, but he declined to purchase at that time. After termination, the owner sold to that prospect through another broker. It was stated:

> If the broker produces a proposed purchaser, but no sale is consummated until after the broker's commission has expired, when the principal makes the sale in good faith, the broker is not entitled to his commission. 179 Ind. at 345, 101 N.E. at 99.

Further, the court said:

> After such a revocation the principal is under no further legal obligation to said broker, and he may grant options to other persons, or even proceed to sell the same lands to the same person or corporation with whom the broker has been negotiating a sale and failed; and under such conditions, the first broker is not entitled to any compensations for his efforts. 179 Ind. at 348, 101 N.E. at 100.

10 Monroe v. Snow, 131 Ill. 126, 23 N.E. 401 (1890); Fallen v. Ranguth, 253 Ill. App. 328 (1st Dist. 1929); Purgett v. Weinrank, 219 Ill. App. 28 (2d Dist. 1920). Even where the contract calls for him "to sell" a broker is required only to procure a purchaser, final consummation of the sale being left to the owner. 2 Mechem, Agency § 2430 (2d ed. 1914).

11 Chandler v. Gaines-Ferguson Realty Co., 145 Ark. 262, 224 S.W. 484 (1920); De La Cuesta v. Armstrong Holdings Co., 48 Cal. App. 487, 192 Pac. 135 (1920); Sotham v. Kern, 221 Mich. 5, 190 N.W. 744 (1922) (Where the purchaser took an option during the agency period and exercised it later.); Crowley v. Meyers, 69 N.J.L. 245, 55 Atl. 305 (Ct. Err. & App. 1903).

12 Des Rivieres v. Sullivan, 247 Mass. 443, 142 N.E. 111 (1924); Igo v. Brinkman, 151

VIEW MORE FAVORABLE TO THE BROKER

The general rule requiring full performance by the broker before dissolution of his agency may frequently prove harsh. The broker may spend much of his time and money trying to find a purchaser and may succeed in interesting someone. However, if that person is not ready, willing, and able to buy upon the owner's terms during the period of the agency, the broker cannot secure the commission for which he has labored. He may have been the "procuring" or "efficient" cause of the sale and yet, under the general rule, receive no commission.

To relieve brokers of the harshness possible under such a rule, courts in many states, possibly including Illinois, have applied tests more favorable to the broker in particular cases. In a leading decision, *Owens v. Mountain States Telephone & Telegraph*,[13] it was stated:

> [W]here the owner receives and appropriates to his own use the benefit of the efforts of a broker, no sound reason exists why courts should construe the contract strictly in favor of the owner. It is held that whenever there is justification for treating the broker as the procuring cause of the sale, his services are regarded as highly meritorious, and the law leans to that interpretation of the facts

Minn. 188, 186 N.W. 297 (1922). In McCoy v. Conkwright, 206 Okla. 545, 245 P.2d 89 (1952), the plaintiff had an exclusive agency for twelve months. Sales were made by the owner after this period to persons who had been procured during the agency period, but of whom the owner had been given no notice. Recovery was denied. *But see*, O'Connor v. Sample, 57 Wis. 243, 15 N.W. 136 (1883), wherein the broker was allowed a reasonable time after expiration to give notice.

13 50 Wyo. 331, 63 P.2d 1006 (1936). In this case, the court based part of its decision upon the difference between "special" and ordinary brokerage contracts. An ordinary or general contract is one in which the broker is required to "find a purchaser within a certain time, at a price satisfactory to the owner." *Id.* at 350, 63 P.2d at 1012. See, Bossart v. Erie Coal Mining Co., 276 Pa. 63, 119 Atl. 731 (1923), and Walker v. Randall, 85 Pa. Super 443 (1924), which are both cited with approval in the *Owens* case. *Accord*, see Humphrey v. Knobel, *infra* note 16. A special contract is one where compensation is conditional upon specified results within a specified time limit. 2 Restatement (Second), Agency § 446 (1958).

The court, in *Owens*, thoroughly discussed the liberal view, and held that whenever a broker employed under an ordinary brokerage contract is the procuring cause of a sale, he is entitled to a commission if he induces a person to begin negotiations with his principal before the contract expires, and the negotiations materialize within a short period (usually less than six months) after the contract expires. The court also held, however, that if the contract provides for compensation upon the procurement of a purchaser within a definite period of time, then it is a special contract, and the broker is not entitled to his commission unless he has produced a ready, willing, and able buyer *within* that time period. Therefore, this case was remanded to the trial court for a factual determination of whether the contract involved was "special" or ordinary.

> of the case and the acts of the parties which will best secure to the broker payment of his commissions.[14]

This statement clearly reveals the underlying rationale of the "procuring cause" principle utilized in the liberal view permitting the recovery of a commission after the brokerage contract has been terminated.

In *Facchina v. Sullivan*,[15] the agent advertised the property and Mr. and Mrs. Weaver responded. Their offer of $35,000 was rejected by the owner, and his counter-offer of $39,000 was in turn declined. Shortly thereafter, the owner withdrew the property from the market, stating that he would try to sell it himself. About two months later, the Weavers passed by the property, saw that it was still for sale, met with the defendant, and finally bought the property for $36,750. It was held that the broker was the procuring cause of the sale; as such, he was entitled to a commission.

In a recent Nevada case,[16] the broker, under a sixty-day exclusive listing, referred a prospect to the principal during the contract period. The purpose of the referral was to permit the prospect to negotiate the difference between his offer of $30,000 and the principal's asking price of $31,500. These negotiations culminated in a sale for $30,000 fourteen days after the expiration of the brokerage contract. The court held that the broker was entitled to his commission as the procuring cause of the sale.

The more liberal view has apparently been applied in Illinois, but limited to those cases in which the brokerage contract has been terminated by the revocation of the principal.[17] Thus, in *Gleason*

14 Owens v. Mountain States Telephone & Telegraph, *supra* note 13, at 350-51, 63 P.2d at 1012.

15 109 A.2d 581 (D.C. Munic. Ct. App. 1954).

16 Humphrey v. Knobel, 78 Nev. 137, 369 P.2d 872 (1962). In a reversal of the lower court, the court stated:

> The cases seem to agree that where negotiations are still going on, the contract will remain effective for a reasonable time after its expiration . . . . Although the trial court made no definite determination whether the contract in question was a general or special contract, its refusal to adjudge the broker entitled to a commission was in effect to construe the contract as one recognized in law as a special contract. In doing so, it made no factual determination in support of such construction. *Id.* at 147, 369 P.2d at 877.

In other words, the court held that the facts in the case did not support the finding of a special brokerage contract, and therefore, it could and did permit recovery of a commission under the liberal view.

17 Harrison v. Augerson, 115 Ill. App. 226 (2d Dist. 1904); Schuster v. Martin, 45 Ill. App. 481 (2d Dist. 1892); Gleason v. McKay, 37 Ill. App. 464 (1st Dist. 1890). The cases involving termination by revocation will be discussed hereinafter under a separate heading.

v. McKay,[18] an Illinois court permitted a broker to recover his commission after the revocation of the brokerage contract by applying the liberal view. In that case, Thomas Gleason, in behalf of his wife, placed the property in the hands of a broker to sell. The broker commenced negotiations with the person who subsequently purchased the property from Gleason. Then, Gleason withdrew the property from sale, and later sold it to the broker's customer. The court held that the broker was entitled to his commission. The rationale used to permit recovery was that the principal cannot, while in the midst of a negotiation which the efforts of the broker have set in motion, and which results in a sale of the property, revoke the brokerage contract and thereby deprive the broker of his commission.

In all cases involving brokerage contracts which have been terminated by the expiration of the time provisions in the agency agreement, Illinois courts have refused to apply the liberal view.[19] However, there is one case which must be classified as an exception to the foregoing statement. In *Griswold v. Pierce*,[20] the broker had been authorized to sell a farm. He was notified that he would have only one more week in which to make a sale. Three days later, he began negotiations with a prospect and continued until the closing of the deal which was after the expiration of his contract. The agent recovered his commission. This Illinois court clearly applied the liberal view to a case involving a contract terminated by the expiration of time.

The *Griswold* case has never been specifically overruled; but the fact that it has been completely ignored in Illinois plus the fact that a subsequent court in the Third District upheld the general rule in an expiration of time case,[21] indicates that this holding is not the present law in Illinois. Also, the *Griswold* case might be explained by saying that the owner waived the time limit; the court did not use waiver, but the facts strongly suggest it.

18 *Supra* note 17.

19 Groome v. Freyn, 374 Ill. 113, 28 N.E.2d 274 (1940); Morgan v. Meister, 346 Ill. App. 577, 105 N.E.2d 775 (2d Dist. 1952) (abstr.); Hunt v. Judd, 225 Ill. App. 395 (3d Dist. 1922); Carroll v. Leafgreen, 170 Ill. App. 328 (1st Dist. 1912); Hoffman v. Boomer, 40 Ill. App. 231 (1st Dist. 1891). For a discussion of the general rule applicable in these cases, see text accompanying note 1 *supra*.

20 86 Ill. App. 406 (3d Dist. 1899).

21 Hunt v. Judd, 225 Ill. App. 395 (3d Dist. 1922).

To be the procuring or efficient cause of the sale, under the liberal view, the broker must originate a series of events which result in the prime object of the agent's employment without a break in continuity.[22] Of course, unless there is waiver or culpability of the owner, the negotiations must have begun prior to the expiration of the broker's contract.[23] There must be a direct connection between the broker's activities and the sale, and the negotiations must be continuous, although not necessarily uninterrupted. Interruptions may occur providing that they do not destroy the continuity or causal connection between the broker's efforts and the effectual transaction.[24] An owner, who had originally rejected an offer as unfair and who sells to the same offeror at the same price five years later without intervening negotiations should not be required to pay the broker merely because the latter originally found the purchaser.[25] But if the intervening time is comparatively short, the jury can grant the agent his brokerage fee even though the period of agency has expired, if it determines that his actions have proximately caused the sale.[26]

In the *Owens* case,[27] the court held that an intervening period of four or five months between the negotiations and a final acceptance would not be of sufficient length to constitute, as a matter of law, a fatal break in the causal chain in an ordinary brokerage contract. In *Cole v. Crump*,[28] the sale was effected two years after

22 Owens v. Mountain States Telephone & Telegraph, 50 Wyo. 331, 353-56, 63 P.2d 1006, 1013-15 (1936).

23 4 R.C.L. *Brokers* § 47, p. 306 (1914). *But cf.* McCarthy v. McCarthy, 49 R.I. 200, 142 Atl. 142 (1928).

24 Owens v. Mountain States Telephone & Telegraph, *supra* note 22.

25 *Id.* at 355, 63 P.2d at 1014.

26 *Ibid.* There are two legal theories which some courts seem to apply in order to allow recovery by the broker after his contract has terminated.

(1) Where the broker is the procuring cause of the sale, the seller, by completing the sale, is estopped to deny that the buyer was ready, willing, and able during the listing period.

(2) Where the broker is the procuring cause of the sale, there is an *implied* waiver by the owner of the provision in the contract which requires the broker to produce a buyer within the listing period. Both theories are used in Everson v. Phelps, 104 Ore. 288, 206 Pac. 306 (1922).

In most cases, however, including the *Owens* case, the courts do not base their holdings on any particular theory other than the general theory that where a broker is the procuring cause of a sale within a reasonable time after the termination of his agency, he is entitled to recover his commission. It is submitted that this latter theory reflects "fuzzy" thinking by the courts which have applied it without further explanation.

27 Owens v. Mountain States Telephone & Telegraph, *supra* note 22. For a complete statement of the holding in this case, see note 13 *supra*.

28 174 Mo. App. 215, 156 S.W. 769 (1913).

negotiations were begun and four months after the agent's authority had ended. The broker recovered as procuring cause of the sale though he was not participating at the time the transaction was closed. The original effort by the broker had been availed of, continued, and consummated by the owner; he was therefore obligated to compensate the broker.

In summary, the liberal view can and should be adopted by the courts where the broker has been the efficient cause of a sale which has taken place within a reasonable time after his brokerage contract has terminated. The appropriate application of this view will protect the deserving broker and thus prevent grave injustice.

Effect of the Manner of Termination

The manner by which the broker's authority is terminated may have some bearing upon the court's determination of his right to a commission. The broker's agency may be terminated in several ways—by expiration of the time limit provided in the contract itself, or by lapse of a reasonable time when no express limit is provided; through abandonment of efforts by the broker; and as a result of revocation by the owner.

Expiration

Generally, where the broker's commission is promised in consideration for the production of a ready, willing, and able customer within a specified time period, no commission is payable to the broker for producing a prospective customer within the specified time if the latter does not reach an agreement with the principal until after the expiration of the time period. The terms of the agency agreement control, and therefore, the principal's obligation to pay a commission automatically ends when the specified time period expires. If the brokerage contract does not express a time limit, recovery of a commission is denied where a purchaser is not procured until after the lapse of a reasonable time.[29] Specific excep-

[29] Clark v. Muir, 298 Ill. 548, 132 N.E. 193 (1921); Hunt v. Judd, 225 Ill. App. 395 (3d Dist. 1922); Stedman v. Richardson, 100 Ky. 79, 37 S.W. 259 (1896).

What is a reasonable time for a broker to sell the property depends on the circumstances. The more expense required of the broker, subdividing, paving streets, and so forth, the longer the period will be. Some properties are harder to sell than others, for example, a one-purpose building such as a church. A

tions to these general rules will be discussed hereinafter under the topical heading "Waiver and Bad Faith by Owner."

Where the broker's authority ends by the expiration of the time provisions in the agency agreement, the courts have generally been strict in their application of the general rule even though the broker's services prove beneficial to the owner.[30]

Some courts in particular cases, however, have sought to prevent harsh results and have granted the broker a commission through application of the "procuring cause" test of the *Owens* case. Illustrative of such an application is the case of *Wolf v. Casamento*.[31] The broker interested one Piera in buying the defendant's house. One month after the broker's authority lapsed, the owner completed the sale by himself. The court held that the owner, by continuing negotiations uninterruptedly with the prospect procured by the broker, became obligated to compensate him for his services.

In a recent Massachusetts case,[32] the court applied an implied waiver theory in holding a principal liable for commissions. It was held that where there were continuing negotiations between the broker and the ultimate purchaser and the owner failed to give notice of termination, upon the expiration of the time limit of the agency contract the time provision was waived and the power to sell the property remained in the agent.

Abandonment

Where the broker has abandoned his efforts to effectuate a sale, it is unlikely that he will be able to obtain a commission under

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longer period will be allowed in such case than would be true in the case of a quick-selling item, such as a modern single-family dwelling. Kratovil, *Real Estate Law*, 110 (3d ed. 1958).

30 Groome v. Freyn, 374 Ill. 113, 28 N.E.2d 274 (1940); Oliver v. Sattler, 233 Ill. 536, 84 N.E. 652 (1908). See generally, Annot., 27 A.L.R.2d 1348, 1353, 1391 (1953).

31 185 So. 537 (La. App. 1939). See Viguerie v. Mathes, 10 La. App. 246 (1929). In that case, the agent produced one Ritchie who agreed to purchase the property within forty-five days. The sale and conveyance were actually made five months later. The owner contended that the original agreement with Ritchie was abandoned and the later sale in December was a separate and distinct transaction on different terms. Held: the plaintiff was the procuring cause of the sale. The owner could not avail himself of such services which eventually inured to his advantage and, by continuing negotiations beyond the time allowed, relieve himself of his duty to pay for these services.

32 Coan v. Holbrook, 327 Mass. 221, 97 N.E.2d 649 (1951).

any theory.[33] This would appear to be the case even though a sale is subsequently made to a person who was originally solicitated by the broker and who became interested as a result of his efforts.[34] Therefore, the only question to be determined is, whether, on the basis of the facts presented, there was an abandonment of the transaction by the claimant so as to preclude his recovery of compensation for bringing the parties together.[35]

Whether the broker has abandoned his undertaking is ordinarily a question of intention as inferred from the circumstances.[36] For instance, inactivity for a substantial period of time after negotiations may indicate that the broker has abandoned his efforts to sell.[37]

However, a mere temporary cessation of activity would not necessarily be abandonment.[38] In an early Illinois case,[39] the fact that negotiations between the broker and the purchaser ended three months before the deal was closed by another broker was held to be insufficient evidence of abandonment. In a later Illinois case,[40] the court stressed the intention of the prospective purchaser after the cessation of negotiations by the broker. The court stated:

> The mere fact that negotiations may have been discontinued for a short time will not defeat recovery. In order to constitute abandonment the evidence must not only show the breaking off of negotiations but also abandonment of all intention by the purchaser of purchasing the property.[41]

This case seems to require abandonment by the purchaser as well

[33] Rheinberger v. Security Life Ins. Co. of America, 47 F. Supp. 196 (N.D. Ill. 1942); Weisjohn v. Bell, 316 Ill. App. 62, 43 N.E.2d 688 (1st Dist. 1942); West End Dry Goods Store v. Maun, 133 Ill. App. 544 (1st Dist. 1907); Watts v. Howard & Calkins, 51 Ill. App. 243 (1st Dist. 1893). See generally Annot., 27 A.L.R.2d 1348, 1353, 1402 (1953).

[34] Chaffee v. Widman, 48 Colo. 34, 108 Pac. 995 (1910); Rheinberger v. Security Life Ins. Co. of America, *supra* note 33; Savage v. Stewart, 226 Ill. App. 388 (2d Dist. 1922); West End Dry Goods Store v. Maun, *supra* note 33; Watts v. Howard & Calkins, *supra* note 33; Mattingly-Lusky Realty Co. v. Camper, 228 Ky. 407, 15 S.W.2d 24 (1929); Rabkin v. Calhoun, 83 Ohio App. 222, 81 N.E.2d 241 (1948).

[35] Rheinberger v. Security Life Ins. Co. of America, *supra* note 33, at 198.

[36] The courts examine the objective intent of the broker as manifested by his activity or inactivity. In Rheinberger v. Security Life Ins. Co. of America, *supra* note 33, the court gives an excellent review of the Illinois cases in this area. Also, see generally 12 C.J.S. *Brokers* § 65 (1938).

[37] Mammen v. Snodgrass, 13 Ill. App. 2d 538, 142 N.E.2d 791 (3d Dist. 1957); Mattingly-Lusky Realty Co. v. Camper, *supra* note 34.

[38] 2 Mechem, Agency § 2442 (2d ed. 1914).

[39] Rigdon v. More, 226 Ill. 382, 80 N.E. 901 (1907).

[40] Rasar & Johnson v. Spurling, 176 Ill. App. 349 (3d Dist. 1912).

[41] *Id.* at 351.

as by the broker; this theory has been advanced in other cases, but only to the extent that it is necessary to examine the intentions of all the parties to the transaction in order to conclude whether or not there has been abandonment by the broker.[42]

The fact that the broker tried to sell the prospective purchaser other property after an apparent failure to sell the principal's property does not necessarily show an intention to abandon.[43] For example, in *Cowan v. Day*,[44] the plaintiff had been trying to sell property to Mrs. Kane for a long period of time. He sent word to her via a friend that the defendant's property was for sale. Hearing nothing from her relative to that property, he resumed his efforts to interest her in other property. Mrs. Kane meanwhile had purchased the defendant's property. The court held the agent was the procuring cause of the sale. He did not personally introduce Mrs. Kane to the defendant, show her the property, or even communicate with her in person, but she was induced to negotiate with the defendant through the instrumentality of the broker. No abandonment was found. All the broker was required to do was to cause a purchaser for the property to be found and nothing required him to cease endeavoring to sell other property to her.

In summary, the courts will only preclude a broker's recovery of his commission where he outwardly manifests an intention to abandon the brokerage contract. The facts and circumstances of each case must be examined in order to determine whether the broker's action or inaction constituted an intention to abandon.

Revocation

Generally, revocation takes place where the principal revokes the agency contract before the broker performs the services for which he was employed. Usually, revocation is express, but it is also accomplished by operation of law. Thus, the death of the broker automatically revokes the agency.[45] The dissolution of a

42 See Rheinberger v. Security Life Ins. Co. of America, 47 F. Supp. 196 (N.D. Ill. 1942).

43 Cowan v. Day, 156 Ill. App. 105 (3d Dist. 1910); La Verde v. Impagliazzo, 125 Atl. 284 (R.I. 1924). This is also true where the agent continues his attempts to sell to other prospects. Bloom v. Christiansen, 18 Wash. 2d 137, 138 P.2d 655 (1943).

44 *Supra* note 43.

45 W. B. Martin & Son v. Lamkin, 188 Ill. App. 431 (1914). Of course, if the agency is coupled with an interest, this is not true. See note 48 *infra*.

partnership terminates an agency contract appointing the partnership.[46] Where an owner employs several brokers to sell his real estate, the sale of the property by the owner in person or by one of the brokers revokes the agencies of all the brokers immediately, without notice.[47]

The question of whether a broker is entitled to his commission, or at least damages, after revocation by his principal will be the topic of the following discussion.

The ordinary contract of agency for the sale of real estate is a unilateral offer and can be prematurely terminated at any time before it is accepted by the procurement of a purchaser, provided the revocation is in good faith.[48] This is true even if the terms of the agreement provide for an exclusive agency during a definite period or where there is an express declaration that the contract is to be irrevocable.[49] However, notice of the revocation should be given to the broker and a failure to do so may cause the owner to be liable for a commission.[50]

In revocation cases, however, courts have not been so reluctant to permit recovery of a broker's commission as they have been in expiration and abandonment cases. For example, where the agent's authority is terminated by revocation, it may be easier for the courts to find bad faith on the part of the principal.[51] Also, even though there was no finding of bad faith, there have been a number of cases in Illinois which strongly indicate that the Illinois

46 Schlau v. Enzenbacher, 265 Ill. 626, 107 N.E. 107 (1914). One partner remaining in the real estate business is not authorized to bind the owner by executing a sale contract in his own name or in the firm's name.

47 Hunt v. Judd, 225 Ill. App. 395 (3d Dist. 1922). This automatic revocation is an implied term of the employment because the object of the broker's employment is attained when one of the several brokers procures a ready, willing, and able buyer for the seller. 2 Mechem, Agency § 2457 (1914).

48 Nicholson v. Alderson, 347 Ill. App. 496, 107 N.E.2d 39 (2d Dist. 1952); Pretzel v. Anderson, 162 Ill. App. 538 (1st Dist. 1911). Exceptions to this rule are cases where the agency is coupled with an interest or where consideration is given by the agent for the inclusion of a time limit. See *dicta* in cases cited in note 49 *infra*. See generally, 12 C.J.S. *Brokers* § 12 (1938).

49 Walker v. Denison, 86 Ill. 142 (1877); Goetz v. Ochala, 180 Ill. App. 458 (1st Dist. 1913).

50 Bash v. Hill, 62 Ill. 216 (1871) (notice not given); Nicholson v. Alderson, *supra* note 48 (proper notice given). Notice is not necessary where the agency is revoked by the death of the principal. Hunt v. Judd, *supra* note 47.

51 Day v. Porter, discussed *infra* at note 83; see generally, Annot., 27 A.L.R.2d 1348, 1353, 1395 (1953).

courts will apply the more liberal view when there is revocation, providing the proper circumstances exist. Thus, a number of cases have held the principal liable where the broker was engaged in active negotiations with a prospective purchaser at the time of revocation and sale was subsequently made to that purchaser.[52] This is clearly an application of the liberal view advocated by the *Owens* case.

In *Schuster v. Martin*,[53] the broker was engaged to sell or exchange an eighty acre tract, with no time limit set. The principal discharged the broker from further employment approximately two months prior to an exchange of deeds with the broker's prospect. At that time, the prospect was not ready, willing, and able to trade. The court, in allowing recovery of the commission, emphasized the fact that negotiations had been continuous from the time when the broker had introduced the prospect to the principal (before termination of the agency), until the sale was consummated.

In another Illinois case, *Gleason v. McKay*,[54] the court held that "[t]he principal cannot, while in the very midst of a negotiation which the efforts of the agent [have] set in motion, and which results in a *sale* of the property, withdraw the agency from the broker and thereby deprive him of his commission."[55]

Some courts have permitted the recovery of commissions by upholding the general proposition that brokerage contracts are unilateral and can therefore be revoked at anytime prior to acceptance, but also holding that partial performance by the broker constitutes acceptance of the contract.

An interesting conflict has become apparent in the First and Second Appellate Districts in Illinois regarding the power of the principal to revoke an agency given for a definite period of time. The theory of one appellate court is that the unilateral offer be-

52 Schuster v. Martin, 45 Ill. App. 481 (2d Dist. 1892); Gleason v. McKay, 37 Ill. App. 464 (1st Dist. 1890). See also, Dancy v. Baker, 206 Ala. 236, 238, 89 So. 590, 592 (1921) (*dictum*); Maddox v. Harding, 91 Neb. 292, 135 N.W. 1019 (1912).

53 *Supra* note 52.

54 *Supra* note 52.

55 *Id.* at 464 and 465. In both the *Schuster* and *Gleason* cases, it appears that the court could have applied the estoppel or implied waiver theories espoused in Everson v. Phelps, 104 Ore. 288, 206 Pac. 306 (1922), to produce the same results. Indeed, this application would have been much more beneficial from the standpoint of sound jurisprudence. See discussion in note 26 *supra*.

comes irrevocable, under ordinary contract principles, after there has been part performance by the broker. The other theory is that an ordinary brokerage contract is a unilateral offer containing a number of conditions to be met before the broker is entitled to his commission, and therefore, this unilateral offer can be revoked at anytime before it is accepted by meeting all of the conditions set forth in the contract.

The leading appellate case advocating the irrevocability of a listing for a definite period of time after performance has begun is *Schwartz v. Akerlund.*[56] The brokerage contract in this case contained promises by the agent to advertise and show the property without expense to the principal. The broker, Schwartz, showed the property to prospective purchasers on several occasions and advertised the property for sale a number of times in a newspaper. Then, nine days before Schwartz's thirty-day exclusive agency was to expire, the principal contracted to sell the property to Goodkin through another broker, Lapin. This sale was consummated and Lapin was given a commission. The principal contended that the sale of the property automatically revoked his unilateral offer to Schwartz. In holding that Schwartz was entitled to his full commission, the court stated:

> A mere offer is not a contract, but when the offeree pursuant to the offer has done some work and spent some money, which in and of themselves constitute some consideration, may it be said that the offer has been transmuted into a binding promise and become[s] part of the contract between the parties, even though the offeree has only partly performed the consideration provided for in the offer? In a note to section 2452 (p. 2059) Mechem on Agency, 2d ed. vol. 2, the subject is discussed quite at large. In our judgment, speaking generally, such an offer is irrevocably accepted by the first unequivocal act which may be said to constitute something in the nature of substantial consideration; otherwise the law would permit the capricious withdrawal of an offer when the consideration was all but completed and deprive the offeree of a remedy even for what he had done. We are of the opinion, therefore, that there was a binding contract.[57]

The Supreme Court denied certiorari in the *Schwartz* case, thus making the decision permitting recovery by the broker final.[58]

[56] 240 Ill. App. 480 (1st Dist. 1926). This is the most recent brokerage contract case in the 1st District involving a problem comparable to the one under discussion.

[57] *Id.* at 484. Apparently, the 1st Appellate District Court had made a similar holding in Hanlon v. Dunne, 189 Ill. App. 123 (1st Dist. 1914).

[58] Schwartz v. Akerlund, 241 Ill. App. XXXVIII (1st Dist. 1926).

The decision in *Schwartz* is supported by basic contract law. Under modern contract principles, when the offeree of a unilateral contract undertakes part performance to such an extent that it causes him to be bound, then mutuality of obligation is provided. Such part performance is sufficient to bind the offeror and make the contract irrevocable.[59]

The Supreme Court attempted to clarify this area back in 1888 in *Plumb v. Campbell.*[60] It made the following statement:

> On these authorities, it is clear that appellant [the offeror] could be bound, under this writing, in either of three ways: First, by appellee [the offeree] engaging, within a reasonable time, to perform the contract on his part; second, *by beginning such performance in a way which would bind him to complete it*; and, third, by actual performance.[61] (Emphasis added.)

The holding in this case was based upon "actual performance." It is interesting to note that there are three other First District cases, besides *Schwartz,* which support the modern contract principle set forth in *Plumb.*[62]

In addition, many fine authors have found merit with the modern rule utilized in the *Schwartz* case, although their theories are varied.[63] There is good reason to believe that the Supreme Court of Illinois will hold in accord with this view when the next opportunity arises.

Courts which uphold the strict view of revocation do so by advocating that a unilateral brokerage contract can be revoked at

59 1 Corbin, Contracts § 154 (1950); Restatement, Contracts § 45 (1932).

60 Plumb v. Campbell, 101 Ill. 101 (1888).

61 *Id.* at 107.

62 *See* Kling Bros. Engineering Works v. Whiting Corp., 320 Ill. App. 630, 51 N.E.2d 1004 (1st Dist. 1943); Central Guarantee Co. v. Fourth & Central Trust Co., 244 Ill. App. 61 (1st Dist. 1927); Alexander Hamilton Institute v. Jones, 234 Ill. App. 444 (1st Dist. 1924).

63 (1) An implied promise to keep the offer open which is accepted by starting the requested performance: Corbin, *Offer and Acceptance and Some of the Resulting Legal Relations,* 26 Yale L.J. 169 (1917); Kratovil, *Real Estate Law,* 112-15 (3d ed. 1958). (2) Promissory estoppel: Ashley, *Offers Calling for a Consideration Other than a Promise,* 23 Harv. L. Rev. 159 (1910). (3) Commencement of performance is acceptance and binding on the offeror: Book Review, 28 L.Q. Rev. 100 (1912). (4) Offeror becomes bound on a contract from the time performance began on it, but liability thereon is conditional upon complete performance: Ballantine, *Acceptance of Offers for Unilateral Contracts by Partial Performance of Service Requested,* 5 Minn. L. Rev. 94 (1921). See generally Comment, 28 Ill. B.J. 239, 241 and n.20 (1940). See also Restatement, Contracts § 45 (1932).

anytime prior to the fulfillment of all the conditions set forth in the contract—including the sale itself. The leading case favoring strict revocation is *Nicholson v. Alderson*.[64] In that case the broker contracted for a ninety day exclusive agency promising "to sell or exchange the real estate described therein and to advertise and show the property without expense."[65] The principal revoked the agency thirty-three days later, after the broker had begun to perform the acts required of him. Denying the recovery of a commission, the court flatly rejected the broker's contention that this was an executory contract which became irrevocable when he began performance.

In reaching this conclusion the Second District court not only completely neglected a previous Second District case reaching a *contra* result,[66] but it also relied on a clearly distinguishable First District case.[67] The court then proceeded to summarily distinguish all cases *contra* including the *Schwartz* case.[68] However, the *Schwartz* case was distinguished erroneously. The court in *Nicholson* said that there was no revocation in *Schwartz* since the contract called for a written revocation, but the court in *Schwartz* actually held otherwise. As previously stated, the sale of the property by the owner or by another broker revokes the agencies of all brokers immediately.[69] Therefore, although the attempted oral revocation in *Schwartz* might be invalid because a written revocation was required by the contract, the sale through another broker would be a revocation by law; however, in *law*, the contract was held irrevo-

64 347 Ill. App. 496, 107 N.E.2d 39 (2d Dist. 1952).

65 *Id.* at 497, 107 N.E.2d at 40.

66 Goodmanson v. Rosenstein, 144 Ill. 243 (2d Dist. 1908). This case uses very broad language in granting a full commission under the theory of general assumpsit; the facts are strikingly similar.

67 Goetz v. Ochala, 180 Ill. App. 458 (1st Dist. 1913). This case sounded in general assumpsit; recovery was denied because the court found no evidence upon which to base a *quantum meruit* recovery, but indicated via *dicta* that it would have permitted such a recovery since there were beneficial services to the owner. The court held that the exclusive agency was revocable; however, this case should have been distinguished from the *Nicholson* case on the basis that the contract here did not call for specific services by the broker.

In another early 1st District case, the court specifically rejected the view that performance of services by the broker makes an exclusive sixty day agency contract irrevocable. Here again, however, there was no promise by the broker to provide specific services in the contract. Also, the court indicated that a *quantum meruit* recovery could be won upon proof of a sum certain. Pretzel v. Anderson, 162 Ill. App. 538 (1st Dist. 1911).

68 Schwartz v. Akerlund, 240 Ill. App. 48 (1st Dist. 1926). See text accompanying note 55 *supra*.

69 See text accompanying note 47 *supra*.

cable because of the broker's partial performance. Thus, it is submitted that the *Nicholson* case was incorrectly decided.

Some of the older cases have favored the broker by distinguishing between the *power* to revoke and the *right* to revoke. These cases state that while the principal has the power to revoke, he does not have the right to do so without liability for damages incurred by the agent.[70] This extreme view ignores the fact that an ordinary brokerage contract is unilateral and construes it as if it were a bilateral contract.[71]

If, after revocation by the principal, the court is willing to provide the broker with a remedy by applying any of the theories discussed above, then damages will be given to the broker. The damages collectable under present views in the revocation area seem to fall into three major groups:[72] (1) The agreed rate of compensation under the part performance view utilized in the *Schwartz* case; (2) a reasonable sum based on *quantum meruit* where services have been partially performed; and (3) the payment of no more damages than the actual circumstances permit in a particular case, as advocated in *Pretzel v. Anderson*.[73] Where the court finds that the revocation is a result of bad faith on the part of the principal, the amount of damages awarded is usually the agreed rate of compensation.[74]

WAIVER OR BAD FAITH BY OWNER

Although the broker has not produced a purchaser within the time specified by the contract, he may be able to collect his com-

70 Harrison v. Augerson, 115 Ill. App. 226 (2d Dist. 1904). In this case the agreement provided that the property would be left with the broker for sale during a one month period. Shortly thereafter, the broker began negotiations with a prospect. Only a few hours before the broker's prospect became ready, willing, and able to buy, the principal withdrew the property from the market. The court held that the broker was entitled to full commission. *Accord*, Hancock v. Stacy, 103 Tex. 219, 125 S.W. 884 (1910).

71 It is submitted that this view not only plays havoc with basic contract law, but it also produces an unjust result. It should be noted that in this case no sale took place; therefore, even the most liberal view advocated by the *Owens* case would not have permitted recovery. See text accompanying note 22 *supra*. The only worthwhile explanation for this holding is suggested by the facts; the circumstances surrounding the revocation are tantamount to a bad faith repudiation.

72 For an excellent discussion, see 31 Chi.-Kent L. Rev. 180 (1953).

73 *Supra* note 67.

74 Day v. Porter, 60 Ill. App. 381 (1st Dist. 1895), *aff'd*, 161 Ill. 235, 43 N.E. 1023 (1896); see generally Annot., 27 A.L.R.2d 1348, 1357-61 (1953).

mission if the principal by his actions waived the time limitation of the contract, or if he was prevented from carrying out his part of the agreement by the fault, fraud or bad faith by the owner.

Waiver

The time limitation imposed upon brokers in their contracts of employment are ordinarily "of the essence" in the contract,[75] but the owner may by his conduct waive such a limitation and become liable to a broker who finds a purchaser after the time has elapsed.[76] Waiver is commonly found where the principal knowingly permits the agent to continue to expend his time and money negotiating after the expiration date or after revocation. The owner will not be permitted in such circumstances to appropriate the efforts of the agent without compensating him for his services.[77]

In an early Illinois case,[78] for example, the broker concluded a sale several days after the expiration of his authority. The principal had continually urged the plaintiff on during this period, inquired regularly of the progress being made, and on the day of the sale had sent a messenger to represent his interests and to collect any payments that might be made at the time. These facts led to the conclusion that the time limitation was waived by the parties, and the broker recovered a commission.[79]

75 Barney v. Yazoo Delta Land Co., 179 Ind. 337, 345, 101 N.E. 96, 99 (1912).

76 See generally 8 Am. Jur. *Brokers* § 171 (1938).

77 Stiewal v. Lally, 89 Ark. 195, 115 S.W. 1134 (1909); Moore v. Borgfeldt, 96 Cal. App. 306, 273 Pac. 114 (1929); Frost v. Thompson, 18 Ill. App. 410 (1st Dist. 1886); Holbrook-Blackwelder Real Estate & Trust Co. v. Hartman, 128 Mo. App. 228, 106 S.W. 115 (1908); Moran v. Bair, 394 Pa. 471, 156 Atl. 81 (1931).

78 Frost v. Thompson, *supra* note 77. Where a broker, authorized to act for sixty days, started negotiations with a prospective purchaser which continued past the specified date, and the principal knew of the scope of the negotiations but said nothing, he was held to have waived the time limit. Moran v. Bair, *supra* note 77.

79 *Accord*, Stiewal v. Lally, *supra* note 77. The owner was informed of the negotiations by the broker and continued to furnish information when requested, without objection. The court stated:

> [A] party to a contract containing a limitation as to time for performance who induces the other party after the expiration of the time limit to continue in the performance of the contract will not be permitted to withhold the fruits of the contract because it was not performed within the specified time. 89 Ark. at 204, 115 S.W. at 1138.

Contra, Rutherford v. Mancuso, 180 Md. 628, 25 A.2d 374 (1942). The agent's authority was revoked, effective February 13. On that date, the agent brought two couples out to see the property and was permitted to show them around. Sale was made to these persons five months later by the defendants. No waiver was found, and therefore, recovery was denied.

Bad Faith

If the agent is prevented from full performance by the owner's fault, fraud, or bad faith, recovery of a commission will be allowed for a sale made after the dissolution of his authority.[80] The question of bad faith commonly arises where the owner has revoked the broker's authority or made the sale through other means when the broker had accomplished all that he was to have undertaken or when he was plainly approaching success.[81] Bad faith in such cases has been defined as a purpose on the part of the owner to obtain a profit from the broker's exertions without paying for them.[82]

In *Day v. Porter*,[83] the plaintiff secured an offer from Corneau to purchase the defendant's land for $35,000. This was declined, as was an offer of $40,000. Although the owner stated that he wanted $45,000, an offer for that amount was refused and he increased his asking price to $50,000. The owner then learned the name of the offeror, terminated the agency, and sold the land to Corneau for $50,000. It was held that this evidence warranted a finding that the agency was terminated for the purpose of avoiding a commission. The court said:

> The principal cannot, when the broker's efforts have resulted in negotiations for a sale and the expected customer still has the matter under consideration, step in, and, taking up the unbroken thread by which the broker and customer are connected, weave it into a completed fabric and escape liability for the work of his agent he has turned to profit.[84]

80 Dunn v. Snell, 124 Neb. 560, 247 N.W. 428 (1933); Ramezzano v. Avansino, 44 Nev. 72, 189 Pac. 681 (1920); see generally 8 Am. Jur. *Brokers* § 141 (1938). A good example of fault by the owner not involving bad faith or fraud is Hunter v. Gales, 227 Ill. App. 105 (3d Dist. 1922), wherein the principal was unable to effectuate a sale to the agent's ready, willing, and able prospect because he could not pass good title; the principal's wife refused to sign the deed.

81 Sherman v. Briggs Realty Co., 310 Mass. 408, 38 N.E.2d 637 (1941).

82 Kacavas v. Diamond, 303 Mass. 88, 29 N.E.2d 936 (1939). In Pate v. Marsh, 65 Ill. App. 482 (2d Dist. 1895), the owner sent a letter to a prospect with whom the agent was dealing which stated: "A real estate man has been trying to work a good commission out of it, but I told him it was not for sale. There is no use of one paying $50 to make a trade, consequently if you buy, you can trade with me." Held: the owner could not rescind the contract under such circumstances and appropriate the broker's labors. Good faith required that he allow the broker to complete the sale he had started.

83 60 Ill. App. 381 (1st Dist. 1895), *aff'd*, 161 Ill. 235, 43 N.E. 1023 (1896).

84 *Id.* at 389. *Accord*, Dunn v. Snell, *supra* note 80. The court here agreed with the trial court and permitted the broker to recover his commission after an exchange of properties between his prospect and the principal. The principal had signed a contract of exchange, but the prospect refused to sign. Then, after the principal had interviewed the prospect, the principal showed unusual diligence in getting back his exchange contract. When the exchange was made shortly thereafter, through another broker, the

However, the mere fact that the owner, after the revocation of the broker's authority, accepts the offer which he had refused during that period is not, of itself, conclusive evidence of bad faith.[85]

Circumstances which strongly indicate a bad faith revocation by the principal are: (1) where the principal sells to the broker's prospect within a short period of time (generally within one year) after the revocation;[86] and (2) where the difference between the sale price and the price asked by the broker is only a slight amount (usually the amount of the broker's commission).[87]

Effect of Particular Contracts

This section is for the purpose of illustrating the construction which the courts have given to particular contracts where the agent's right to a commission on a sale consummated after the termination of the agency is under consideration.[88] Thus, suggestions for drafting agency contracts will be provided. The references in this section will be made to general source material.[89]

first broker brought this suit and recovered his commission. The court held that: "[T]he broker's contract was not revoked in good faith, but was cancelled so that the defendant could appropriate the broker's services without compensation." *Id.* at 562, 247 N.W. 428, 429.

85 Uphoff v. Ulrich, 2 Ill. App. 399 (1st Dist. 1878); Loxely v. Studebaker, 75 N.J.L. 599, 68 Atl. 98 (Ct. Err. & App. 1907). In Havens v. Irvine, 61 Wyo. 309, 157 P.2d 570 (1945), the broker carried on negotiations with a prospect who was willing to buy if he could get better terms. The owner, who knew of the interest of the prospect, told the plaintiff that he was withdrawing the property from sale. The following day, he sold the ranch to the prospect through the help of a friend. Such circumstances were held not to indicate bad faith. *Contra,* Smith v. Anderson, 2 Idaho 537, 21 Pac. 412 (1889). The principal sold to the broker's prospect about one month after the revocation. The court said:

> . . . [C]onsidering the fact that the defendants stated in their letter of revocation that they did not desire to sell the ranch, yet, in the very teeth of that statement, proceeded to sell, and to the very person to whom the plaintiff had introduced them. . . . These defendants should not be permitted by their own act to deprive the plaintiff of his lawful commissions, and, the case having been submitted to the jury upon the whole evidence, and the jury having found a verdict for the plaintiff, we do not deem it proper, under the circumstances, to interfere with that verdict. *Id.* at 539-40, 21 Pac. 412-13.

86 Howard v. Street, 125 Md. 289, 93 Atl. 923 (1915) (sale made nine months after termination); Studt v. Leiwicke, 100 S.W.2d 30 (Mo. App. 1937) (one week).

87 Shannon v. Garr, 233 Iowa 38, 6 N.W.2d 304 (1942); 2 Restatement (Second), Agency § 454 (1958). *See* Axsom v. Thompson, 239 Mo. App. 732, 197 S.W.2d 326 (St. Louis Ct. App. 1946).

88 In Hunt v. Judd, 225 Ill. App. 395 (3d Dist. 1922), the court states in *dictum* that where the language of the brokerage contract is unambiguous in its terms, it must be strictly interpreted according to those terms.

89 This method will make it possible for practical suggestions to be made without placing the burden of pondering extraneous detail upon the reader. The most enlightening source of practical suggestions regarding brokerage contracts discovered by this author is Robert Kratovil's book, *Real Estate Law* (3d ed. 1958).

Where a brokerage contract provides that the agent will be entitled to his commission if the property is sold to any prospect with whom he "has negotiated," the agent will be able to recover his commission after the termination of his contract upon sale to the prospect.[90] Under such a contract, the agent can recover even though he is not the procuring cause of the sale regardless of who has procured the purchaser.[91] However, some courts have held that the agent must have at least contributed to the consummation of the sale.[92] Most contracts of this type limit the period of time for which this stipulation is effective; where no definite time period is stated in the contract, the sale must be a reasonable time after the termination of the agency.[93]

If an agent wishes to bind the principal for the period specified in the contract, he should provide in the contract that he will do something specific[94] as was done in the *Schwartz* case.[95] This will make the contract irrevocable upon part performance by the agent. In discussing this suggestion, Kratovil states:

> Many listing contracts contain vague, general statements such as "in consideration of the broker's best efforts to sell the property," the owner will pay a commission. These . . . [general statements will not result in irrevocable unilateral] contracts. The broker must promise to do something specific. . . . Let the listing contract provide "broker agrees to publish an advertisement of the property at least once in a newspaper of general circulation in the county." The listing should be signed by the broker, though this may be done after the landowner has signed the listing and left the broker's office. This listing is irrevocable from the date it is signed,

90 Kratovil, *id.* at 108. See generally Annot., 27 A.L.R.2d 1348, 1408-17 (1953). Kratovil points out in his book that:

> Courts are unfriendly to these provisions for automatic extension of the listing period. Even if the listing contract is an exclusive agency or exclusive right to sell, it will be considered an open listing during the extended period if it is at all ambiguous. When a listing stated it was to be "sole and exclusive for three months and thereafter until 60 days written notice had been given," it was exclusive only for the initial period of three months. Thereafter it was only an open listing. Boggess Realty Co. v. Miller, 227 Ky. 813, 14 S.W.2d 140, 27 A.L.R.2d 1420; Wilson v. Franklin, 282 Pa. 189, 127 Atl. 609. Kratovil, *op. cit. supra* note 89, at 111; see generally Annot., 27 A.L.R.2d 1348, 1419-24 (1953).

91 See generally Annot., 27 A.L.R.2d 1348, 1408-12 (1953); 12 Am. Jur. 2d *Brokers* § 220 (1964).

92 See generally Annot., 27 A.L.R.2d 1348, 1412-15 (1953); 12 Am. Jur. 2d *Brokers* § 220 (1964).

93 Messick v. Powell, 314 Ky. 805, 236 S.W.2d 897 (1951); 12 Am. Jur. 2d *Brokers* § 220 (1964).

94 Kratovil, *op. cit. supra* note 89, at 112-13.

95 Schwartz v. Akerlund, 240 Ill. App. 480 (1st Dist. 1926). See text accompanying note 56 *supra*.

assuming, of course, that the broker advertises that property as agreed.[96]

From the principal's point of view, if the contract provides that the payment of a commission is conditional upon the procurement of a purchaser at a fixed price within a definite period of time, or apparently, conditional only upon the procurement of a buyer within a definite period, it is a "special contract."[97] Therefore, under this provision, the broker would not be permitted to recover his commission unless the condition was fulfilled.[98] This special contract provision makes performance within the contract period an absolute requirement. Such an arrangement would seem to be advantageous to the principal.

"Option" contracts given to a broker are treated the same as all option contracts. It is usually stipulated in these option agreements that in the event of a sale to the broker, his customer, or his assignee, the broker will receive a commission. Recovery of a commission is denied unless the sale is consummated within the option period.[99]

Conclusion

Brokerage law is a hybrid of cause and effect, the danger of unjust forfeiture, a requirement of good faith, and the enforcement of specific contract provisions. A delicate balance must be maintained between these elements. The courts have done a laudable job, indeed, in maintaining a proper balance. For instance, Illinois courts apparently have refused to apply the liberal view in all instances except where revocation by the principal exists. This division and application has resulted in justice for both the principal and the agent. In expiration of time cases, the Illinois courts have held for the principal by applying the general rule,[100] and thus basic contract principles have not been violated. On the other hand, where there has been a revocation by the principal and part performance by the broker, the courts have held for the

96 Kratovil, *Real Estate Law* 112 (3d ed. 1958).

97 See discussion in notes 13 and 16 *supra*.

98 *Ibid.*

99 See generally Annot., 27 A.L.R.2d 1348, 1417-19 (1953).

100 See note 19 *supra* and accompanying text.

broker by utilizing the liberal view[101] or by holding the unilateral offer irrevocable under modern contract principles.[102]

It cannot be said, however, that the Illinois courts have provided "flawless" justice in the area discussed herein. Where the agency is for a definite period, and termination has been caused by revocation within that period, the court should not follow the *Nicholson* case.[103] An unjust forfeiture by the broker can be prevented by holding that the contract is binding upon the principal if the agent was required to perform specific acts and has done so. On the other hand, the power *vis-à-vis* the right to revoke theory should be discarded entirely. This theory will cause unjust results if applied consistently because the broker will be permitted to recover his commission even though no sale has been consummated between the principal and the broker's prospect.[104]

It is submitted that the theory used in the liberal view (commonly characterized as the "procuring cause" theory) is much more effective. This theory prevents the injustice toward the principal which is caused by the power *vis-à-vis* the right to revoke theory, and yet it provides justice for a broker by permitting his recovery where he actually procured the sale. However, this "procuring cause" theory must always be applied with extreme caution. Otherwise, valid and binding contract rights might become worthless in cases where the principal has adequately provided for his own protection by the terms of the brokerage contract.

Some authors have complained that the area discussed herein has been so fraught with conflict and confusion that it defies analysis. Such a statement does no more than increase the possibility of conflict and confusion. With careful analysis, every case can be fitted into the complex "jig-saw puzzle" created, out of necessity, by the courts.

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101 See note 52 *supra* and accompanying text.
102 See notes 56-62 *supra* and accompanying text.
103 See note 64 *supra* and accompanying text.
104 See discussion in note 71 *supra*.