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Real Estate Broker's Contract--Broker's Rights to Compensation for a Sale by the Vendor under an Exclusive-Right-To-Sell Agreement

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REAL ESTATE BROKER'S CONTRACT— BROKER'S RIGHTS TO COMPENSATION FOR A SALE BY THE VENDOR UNDER AN EXCLUSIVE-RIGHT-TO-SELL AGREEMENT*

I. Introduction

Ascertaining the precise overt act that entitles a real estate broker to his commission has been and continues to be a prolific area for litigation. The Kentucky Court of Appeals confronted this dilemma in *Shanklin v. Townsend.*[1] The court in *Townsend* decided that a "sale" was the necessary overt act that entitled the broker to his commission. In the court's opinion a "sale" under an exclusive-right-to-sell brokerage contract was executed when a contract of sale was made to sell the listed property although the contract of sale was later rescinded.

The appellee Townsend was one of the owners of certain property that was put up for sale. Townsend and the other owners contracted with the appellant Shanklin's real estate firm to aid them in finding a buyer and effectuating a "sale." The contract was dated March 17, 1964, and was to terminate after one year. The contract provided that the brokers would be entitled to their commission when a sale of the property was made regardless of by whom the sale was effectuated[2] (a provision of this type is the distinguishing feature of an exclusive-right-to-sell brokerage contract). The contract further stipulated that the commission was to be five per centum of the $713,000 asking price or five per centum of whatever the eventual sales price happened to be.

The appellee Townsend without any assistance from the appellant Shanklin found a prospective buyer. Townsend granted the intended buyer an option contract to purchase the property for $626,200. This option was exercised on October 20, 1964, with the execution of a contract of sale. The buyer tendered to Townsend $20,000 that was to be applied towards the purchase price if the contract was honored, but if it was not honored, the $20,000 was to be considered liquidated damages. The contract

* Shanklin v. Townsend, 431 S.W.2d 874 (Ky. 1968).

1. 431 S.W.2d 874 (Ky. 1968).
2. *Id.* at 875.

was rescinded by the buyer, and the owners accepted the $20,000 as a satisfactory settlement for their damages.

Shanklin's real estate firm sued for its commission. Shanklin contended that the broker's only obligation for the brokerage commission to accrue under an exclusive-right-to-sell contract was the "sale" of the listed property. A "sale" of the property, he argued, had occurred with the formation of the executory contract of sale.

The court of appeals overruled the lower court and held for the appellant real estate broker. The court reasoned that because a contract of sale is a "sale" when the broker procures a buyer, there is also a sale when the seller procures a buyer under an exclusive-right-to-sell brokerage agreement.[3] Thus, the requirement entitling the broker to his commission had been fulfilled, *i.e.* a "sale" had taken place.

The primary purpose of this article is to consider the *Shanklin* court's reasons for granting the commission to the broker and the other approaches upon which the court could have based the decision. Secondly, this article discusses the effect on the Kentucky brokerage law by the precedent established in the *Shanklin* case. The exclusive-right-to-sell agreement is the primary brokerage contract considered; however, in order to put the exclusive-right-to-sell contract in its proper perspective it is necessary to consider brokerage contracts in general and to focus on the consequential elements of each type of real estate brokerage contract: the concept of "sale", the damages for breach, and the right to commissions.

II. BROKERAGE CONTRACTS

The parties to a brokerage contract have the freedom to contract as they see fit.[4] Among other things, they may designate at what point the broker is to receive his commission, the consideration to be given to establish a binding agreement, the length of time in which the contract will be binding, and the parties who may sell the property while the contract is in force. The parties to the contract also have the freedom to put conditions in the brokerage agreements that alter their legal positions

3. For the purposes of this article a brokerage agreement and a brokerage contract have the same meaning and are interchangeable.
4. *See generally* 17 C.J.S. *Contracts* § 29 (1963).

as broker and seller.[5] The judiciary in construing the legal duties of the parties generally ascertain the intended meaning of the conditions from within the four corners of the brokerage contract.[6] The courts have generally recognized three distinct classifications of brokerage contracts: the general "listing" agreement, the exclusive-agency contract, and the exclusive-right-to-sell agreement.[7]

A general "listing" contract is the most common brokerage agreement. Anyone, including another agent and the vendor, may sell the real property contracted to be sold without the broker's right to a commission accruing. For the purposes of a general "listing" agreement the broker makes a "sale" when he procures a ready, willing, and able buyer or when he procures a contract of sale with the buyer and seller as parties.[8] Once the broker has fulfilled these requirements for a "sale" under a general "listing" contract he has earned his commission.[9]

The general "listing" contract is uniformly recognized as an unilateral contract. The consideration given by the broker is

5. Island Greek Fuel & Transp. Co. v. Kenova Terminal Co., 150 F. Supp. 479 (S.D.W. Va. 1957); Inman v. Clyde Hold Drilling Co., 369 P.2d 498 (Alas. 1962); Leiter Minerals, Inc. v. California Co., 241 La. 915, 132 So. 2d 845 (1961); Pearl River Valley Water Supply Dist. v. Wood, 252 Miss. 580, 172 So. 2d 196 (1965); Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 582, 236 A.2d 843 (1967); *see* Note, *The Real Estate Broker's Right to a Commission Upon the Procurement of a Purchaser Ready, Willing, and Able to Purchase,* 41 CHI.-KENT L. REV. 67, 83 (1964); 17A C.J.S. *Contracts* § 295 (1963).

6. *See* General Cas. Co. of America v. Azteca Films, Inc., 278 F.2d 161 (9th Cir. 1960); Arkansas Power & Light Co. v. Murray, 231 Ark. 559, 331 S.W.2d 98 (1960); Lalow v. Codomo, 101 So. 2d 390 (Fla. 1958); Duncan v. Turner, 171 Mo. App. 661, 154 S.W. 816 (1913).

7. The general "listing" agreement offers the broker the least protection of his commission, while the exclusive-right-to-sell offers him the greatest amount of protection. The broker, however, is not denied any of the rights he may have under a contract of lesser protection when he enters into a contract offering greater protection. There is a presumption that a real estate agreement to sell is a general "listing" contract unless the agreement shows that this was not the intent of the parties. *See, e.g.,* Yondorf, *The Rights of a Broker Under an Exclusive Listing Contract,* 40 CHI. B. REC. 225 (1958); Comment, *Exclusive Sales Rights Given to Real Estate Brokers,* 6 DE PAUL L. REV. 107 (1956).

8. Shopen v. Bone, 328 F.2d 655 (8th Cir. 1964); Wickersam v. Harris, 313 F.2d 468 (10th Cir. 1963); Deeble v. Stearns, 82 Cal. App. 2d 296, 186 P.2d 173 (1947); T.W. Sandford & Co. v. Waring, 20 Ky. 169, 256 S.W. 9 (1923); Walker v. Russell, 24 Mass. 386, 134 N.E. 388 (1922); Lohman v. Edgewater Holding Co., 227 Minn. 40, 33 N.W.2d 842 (1948).

9. Knight v. Taylor Real Estate & Ins. Co., 38 Ala. App. 295, 83 So. 2d 353 (1955); Wood v. Planzer, 73 Ga. App. 731, 37 S.E.2d 813 (1946); Wilson v. Mason, 158 Ill. 304, 42 N.E. 134 (1895); Brinton v. Motte, 244 S.W.2d 480 (Ky. 1951); Swinebroad v. Foster, 195 Ky. 459, 244 S.W. 881 (1922). *See, e.g.,* 72 DICK. L. REV. 522 (1968); 12 AM. JUR. 2d *Brokers* § 182 (1964).

performance. He must procure a buyer before a binding contract is formed.[10]

An exclusive-agency contract precludes all others who might act as agents for the seller from executing a "sale."[11] It does not, however, preclude the seller from making a "sale" himself.[12] If a "sale" is made by anyone other than the exclusive agent or the property owner, the broker still has a contractual right to his commission or a right to damages for the breach of the contract.[13] Thus, a broker earns his commission either when he procures a party as under a "listing" agreement or when some other agent makes a sale. In either case the law maintains that a "sale" has been made.

Generally, consideration is necessary for any contract to be legally enforceable.[14] Some jurisdictions hold that for an exclusive-agency brokerage agreement to be binding mutual promises between the owner and the broker are the only consideration necessary.[15] Other jurisdictions hold, however, that a promise by the seller must be set-off with partial performance by the broker before the brokerage contract is enforceable.[16] The pre-

10. Once a contract of sale, which has as a party a purchaser, procured by the broker, is formed with the seller, the seller is under an affirmative duty in most jurisdictions to enforce the contract. Thus, a broker may receive his commission whether or not the seller enforces the contract. Of course, the parties may stipulate in the brokerage agreement that the broker's commission is only due upon a consummation of a sale, the commissions are to be paid upon the receipt of the purchase money, or some other requirement limiting the duty of the seller to enforce the contract of sale. At any rate, the procured buyer must be acceptable to the seller before any right to a commission accrues. *See, e.g.,* 72 DICK L. REV. 522 (1968); Comment, *The Right of a Real Estate Broker to a Commission in California,* 8 U.C.L.A.L. REV. 152 (1969); Annot., 74 A.L.R.2d 437 (1960); RESTATEMENT OF AGENCY § 445 (1933). *But cf.* Sweet v. H.R. Howenstein Co., 73 F.2d 660 (D.D.C. 1934).

11. *See, e.g.,* Firszt v. Wdowiak, 104 Conn. 528, 133 A. 586 (1926); Nickolas v. Bursley, 119 So. 2d 722 (Fla. App. 1960); Irish v. Fisher, 74 Ga. App. 631, 40 S.E.2d 588 (1946); Flynn v. La Salle Nat'l Bank, 9 Ill. 2d 129, 137 N.E.2d 71 (1956); Note, *In General: Licenses, Registration and Employment of Brokers,* 41 CHI.-KENT L. REV. 40 (1964).

12. *See, e.g.,* Annot., 28 A.L.R. 886 (1924); Note, *supra* note 11.

13. *See, e.g.,* 12 AM. JUR. 2d *Brokers* § 64 (1964); Annot., 88 A.L.R.2d 936 (1963); RESTATEMENT (SECOND) OF AGENCY § 449, comment *d* at 363 (1957).

14. The exclusive-agency and exclusive-right-to-sell brokerage agreements appear to have two distinct consideration requirements. Besides the exchange of promises mentioned in the text to make an enforceable contract, the seller must pay the broker his commission in exchange for a "sale" being made. That is to say, that for the consideration of a sale being made the owner has a duty to pay the broker his commission. This type of brokerage agreement then is one with a dual exchange of consideration-each separate and distinct.

15. *See, e.g.,* Meyer, *The Broker's Exclusive Listing Contract,* 61 W. VA. L. REV. 274 (1958).

16. *Id.*

vailing view appears to be that the mutual promises of the broker and seller are sufficient consideration to make the contract enforceable; the broker promises to use his "time and facilities" to secure a purchaser in return for the seller's promise to leave the "sale" open for the broker during the stated contract period.[17]

The exclusive-right-to-sell agreement, which was the center of controversy in the *Shanklin* case, entitles a broker to his commission or damages when a "sale" is made by anyone, including the owner, within the contract period.[18] The feature of an exclusive-right-to-sell contract that distinguishes it from the excluclusive-agency contract is the lack of the owner's right to execute a "sale."

It is apparent that the "sale" of the property is the important aspect of any real estate broker's agreement. The concept of "sale" varies to some extent in each of the three general types of brokerage agreements. In order to determine when a broker's commissions accrue, it is important to know exactly when a "sale" occurs.

III. THE CONCEPT OF "SALE"

The *Shanklin* court decided that a "sale" under an exclusive-right-to-sell brokerage agreement was a contract of sale even when the contract was procured by the seller without the assistance of the broker and subsequently not enforced by the seller. Although the court used only a few decisions from other jurisdictions to buttress its conclusion, there is additional case authority arriving at the same result.

The leading American case on the point is *Lewis v. Dahl*,[19] which is relied upon in the *Shanklin* opinion. It is usually said to stand for the proposition that an oral contract of sale for real estate between a seller and buyer is not a "sale" since such an agreement by virtue of the Statute of Frauds is not enforceable. By negatively stating that an oral contract of sale was

17. Comment, *supra* note 7, at 110. *See generally* Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917).

18. Molbert v. Block-Meeks Realty Co., 227 Ark. 246, 297 S.W.2d 929 (1957); Pfarner v. Poston Realty & Ins. Agency, 109 Ga. App. 14, 134 S.E.2d 835 (1964); Power v. Security Sav. & Trust Co., 38 Idaho 289, 222 P. 779 (1923); Byers Bros. Real Estate & Ins. Agency v. Campbell, 329 S.W.2d 393 (Mo. App. 1959); Szemis v. Szachta, 172 Pa. Super. 351, 93 A.2d 892 (1953); *see* 8 DE PAUL L. REV. 100 (1958).

19. 108 Utah 486, 161 P.2d 362 (1945).

not a "sale," the *Lewis* court concluded that a written agreement was a "sale." The *Lewis* case, therefore, while dealing with the problem of an oral agreement and never actually confronting the precise factual situation that brought about the *Shanklin* litigation,[20] was cited by the *Shanklin* court as being supporting authority.

Several other jurisdictions have reached the same result as the Kentucky Court did in *Shanklin*.[21] These cases, however, are distinguishable on their facts. The usual factual situation confronted has been that, after the brokerage agreement has terminated, a "sale" has been consummated by the owner under a contract of sale that had been executed by the owner and buyer during the contract period. Such a "sale" has been said to be an obvious effort on the part of the owner to defraud the broker of his rightful commission.[22] Thus, all of these cases have reached the same conclusion: A "sale" is a contract of sale for the purposes of an exclusive-right-to-sell brokerage agreement. There was no consummated "sale" by the owners in the *Shanklin* case, however, either before or after the termination of the brokerage agreement.[23]

The *Shanklin* court's decision to grant the commission to the broker appears at first glance to be unjust. There was obviously no intent to deprive the broker of his commission, and the property was still retained by the owner. The brokers did not prove that they had expended any time or money in attempting

20. *Id.* In the Lewis case the plaintiff, a real estate broker, sued for his commission contending that a "sale" had been made when the defendant, the owner of the property, negotiated an oral agreement with a buyer to sell the property. The broker and the owner had executed an exclusive-right-to-sell brokerage contract stipulating that the broker's commission would accrue when the broker or anyone else executed a "sale." The oral agreement between the buyer and seller postponed the delivery of a deed until the brokerage contract had terminated. The broker attempted to show that such an oral contract was an attempt to defraud him of his rightful commission.

The court determined that since the oral contract was not binding, the broker retained the legal right to procure a buyer and effectuate a "sale" until the brokerage agreement had terminated. The broker, therefore, was not entitled to his commission.

21. *See, e.g.,* Whitehurst v. Erstling, 184 So. 2d 333 (Fla. App. 166); Alex D. Smith Real Estate, Inc. v. Gables Venetian Waterways, Inc., 98 So. 2d 372 (Fla. 1957); Dobbs v. Conyers, 36 Ga. App. 511, 137 S.E. 298 (1927); *see* Annot., 160 A.L.R. 1040 (1946).

22. Alex D. Smith Real Estate, Inc. v. Gables Venetian Waterways, Inc., 98 So. 2d 372 (Fla. 1957).

23. For the purposes of this article a "sale" and a consummated "sale" are not the same. A consummated "sale" takes place when a deed to the property is actually delivered. A "sale" denotes many transactions as will be shown in the pages that follow, including a contract of sale.

to procure a buyer for the owners. The first impression of the case is that the broker has been unjustly enriched. An analysis of the reasoning of the *Shanklin* court tends to make the decision even more questionable.

The court cites several Kentucky cases which conclude that a "sale" is made by the broker when he procures a ready, willing and able buyer or a contract of sale.[24] All of the cited cases, however, deal with a general "listing" agreement. The court fails to cite any cases that deal with the exclusive-right-to-sell contract, which is the situation in the *Shanklin* case. As pointed out previously, the consequential elements and effects of the two types of contracts are readily distinguishable. The concept of "sale" is one of these consequential elements of a brokerage agreement that distinguishes an exclusive-right-to-sell contract from a general "listing" contract.

The dissent of Justice Osborne in *Shanklin* observes that the definition of a "sale" as used in connection with a general "listing" agreement is an exception to the general concept that a sale of property is a transmutation.[25] But such an exception, Justice Osborne asserts, is needed to provide the broker a "shield" with which he may protect his commission.[26] If the broker's commission was dependent on an actual transmutation of property, the broker could be denied his rightful commission if an unscrupulous seller refused to consumate a "sale" with a broker-procured buyer or refused to enforce a contract of sale that the broker had procured from his buyer. The law protects the broker from these *sub rosa* tactics of a seller by defining a "sale" under a general "listing" agreement as occurring at a point in time before the consummated "sale" occurs. That is, a "sale" takes place when the broker procures a contract of sale or procures a ready, willing, and able buyer; at this point the broker is entitled to his commission.

The exclusive-right-to-sell brokerage agreement includes the protection offered to the broker in a general "listing" agreement. A broker, however, has additional protection under an exclu-

24. Odem Realty Co. v. Dryer, 242 Ky. 58, 45 S.W.2d 838 (1932); Ferguson v. Harris, 200 Ky. 146, 254 S.W. 329 (1923); T.W. Sandford & Co. v. Waring, 201 Ky. 169, 256 S.W. 9 (1923); Swinebroad v. Foster, 196 Ky. 459, 244 S.W. 881 (1922); Casey v. Hart Wallace & Co., 188 Ky. 441, 222 S.W. 111 (1920).

25. Rice v. Ware & Harper, 3 Ga. App. 349, 60 S.E. 301 (1908); O'Reilly v. Keim, 54 N.J. Eq. 423, 34 A. 1073 (1896); 46 AM. JUR. *Sales* § 2 (1943).

26. 431 S.W.2d at 880.

sive-right-to-sell contract since the broker has a right of action against the seller if anyone other than the broker transfers the property. It is evident, therefore, that the concept of "sale" under the two types of brokerage agreements can be readily distinguished.[27]

A contract of sale procured by the broker on the one hand is not analogous to a contract of sale procured by the seller on the other.[28] The purpose, in defining a "sale" as a contract of sale when the broker procures the buyer is to protect the broker. The broker in the case of a broker-procured buyer has rendered performance that can readily be seen as sufficient to entitle him to a commission. But when the seller procures a buyer the performance of the broker cannot be readily seen. The broker's need for legal protection in the latter case is not as apparent as the need for protection in the former. The broker in the latter situation retains the right to show that he cannot perform his obligation because of the breach of the duty of the seller who drew up a contract of sale. Each case would entitle him to some measure of compensation for the wrongful action of the seller. But simply to say that a contract of sale made with a buyer by the seller while an exclusive-right-to-sell brokerage contract is in existence, is a "sale" entitling the broker to his commission, affords unnecessary protection to the broker at the expense of the seller—particularly if the contract of sale is rescinded soon after being entered into by seller and buyer.

The *Shanklin* decision, nevertheless, neglects to distinguish the exclusive-right-to-sell and the general "listing" agreements and states that "the word 'sold' must be given the same meaning in the one event as it would have been given in the other."[29]

The definitions of "sale" are as abundant as the factual situations from which sales originate.[30] Thus, what is a "sale" in one instance is not necessarily a "sale" in another. Blackstone's definition of a "sale" is the generally accepted criterion for establishing a "sale" in most jurisdictions.[31] Blackstone defines "sale"

27. *See supra* note 4.
28. 431 S.W.2d at 880.
29. *Id.* at 876.
30. "The word sale has not a fixed and invariable meaning." Mattingly v. Bohn, 84 Ariz. 369, 371, 329 P.2d 1095, 1096 (1958).
31. *See, e.g.*, Edwards v. Baldwin Piano Co., 79 Fla. 143, 83 So. 915 (1920); John Whiteman & Co. v. Fidei, 176 Pa. Super. 142, 106 A.2d 644 (1954); McElhinney v. Belsky, 165 Pa. Super. 546, 69 A.2d 178 (1949); 46 AM. JUR. *Sales* § 2 (1943).

as a "transmutation of property from one man to another in consideration of some price or recompense in value."[32] Exceptions to this definition are made as justice demands. The concept of a "sale" in a general "listing" agreement has been one of these exceptions.[33]

Blackstone's concept of a "sale" has been the basis for deriving definitions of "sale" to fit particular purposes as well as for ascertaining exceptions. A transfer to a mortgagee has been held to be a "sale"[34] whereas a transfer into a partnership by one of the partners has been held not to be a "sale."[35] A common definition of "sale" is a transfer of title.[36] The Uniform Sales Act provided that "a sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price."[37]

The Uniform Commercial Code states that "a sale" consists of passing title from the seller to the buyer for a price.[38] It also distinguishes a contract of sale from a "sale."[39] Many cases have distinguished a "sale" from a contract of sale for a specific situation,[40] and many courts have likewise found that in certain factual circumstances a contract of sale and a "sale" are one and the same.[41]

The purpose of the above discussion has not been to show that the court erred in defining the contract of sale as a "sale"; but has merely been to show that the court did not necessarily have to come to that particular conclusion with respect to recovery of commissions. At the same time it must be recognized that the

32. 46 AM. JUR. *Sales* § 2 (1943).
33. *See* Rice v. Ware & Harper, 3 Ga. App. 349, 60 S.E. 301 (1908); O'Reilly v. Keim, 54 N.J. Eq. 423, 34 A. 1073 (1896).
34. John Whiteman & Co. v. Fidei, 176 Pa. Super. 142, 106 A.2d 644 (1954).
35. McElhinney v. Belsky, 165 Pa. Super. 546, 69 A.2d 178 (1949).
36. *See, e.g.*, Hatch v. Standard Oil Co., 100 U.S. 124 (1879); South Carolina Cotton Growers' Co-Op. Ass'n v. Weil, 220 Ala. 568, 126 So. 637 (1929). *See generally* 46 AM. JUR. *Sales* § 2 (1943).
37. UNIFORM SALES ACT § 1.
38. UNIFORM COMMERCIAL CODE § 2-106. *See generally* Comment, *Commercial Transactions Warranties-Implied Warranties of Quality Under the Uniform Commercial Code*, 20 S.C.L. REV. 323, 324 (1968).
39. UNIFORM COMMERCIAL CODE § 2-106.
40. *E.g.*, Christensen v. Cram, 156 Cal. 633, 105 P. 950 (1909); Davis v. Roseberry, 95 Kan. 411, 148 P. 629 (1915); Andrews v. Connick, 209 App. Div. 161, 204 N.Y.S. 6 (1924).
41. *E.g.*, Needham v. Jameson, 66 S.D. 131, 279 N.W. 538 (1938); Travelers Ins. Co. v. Gibson, 133 Tex. 534, 130 S.W.2d 1026 (1939); Houston, E. & W. Ry. v. Keller, 90 Tex. 214, 37 S.W. 1062 (1931).

case involved an exclusive-right-to-sell contract which is not completely analogous to a general "listing" contract. A "sale" in one instance does not necessarily have to be a "sale" in the other. Nevertheless, the court, by defining a "sale" as a contract of sale, in the case of an exclusive-right-to-sell contract, closed the door to any alternative solutions for similar litigation in the future regardless of the factual situation. The *Shanklin* case established a precedent setting definition of "sale." The ramifications of the case may be insurmountable and may result in undue hardship on the seller.[42]

IV. THE EFFECT OF SHANKLIN

As Mr. Justice Osborne's dissent demonstrates, the *Shanklin* decision has added a "sword" to the brokerage contract with which the broker may attack the unwary seller.[43] The prior brokerage contract decisions in Kentucky which defined "sale" as a contract of sale dealt with a contract that had been procured by the broker. As has been mentioned previously, the purpose, in holding that a contract of sale between a broker-procured buyer and the seller is a "sale," is to protect the broker from the unscrupulous seller. The concept of a "sale" as applied to a general "listing" brokerage contract was not intended, however, as a means to place the seller at the mercy of a derelict real estate broker.

After *Shanklin*, the agent who operates under an exclusive-right-to-sell agreement is in a position to have his commission accrue regardless of whether a consummation of sale is made — the intent of all brokerage agreements. The broker need not show that he intended to use his facilities and time to procure a buyer as he had promised. He must show only that he has made the promise with an enforceable contract resulting. This case has opened the door for the unscrupulous agent to enter into a contract with a seller and wait out the contractual period with the hope that someone will make a contract of sale. A consummated sale need not be made within this period. Therefore, without proving more than an overt promise and the for-

42. The court attempted to buttress its decision with the case of Hartig v. Schrader, 190 Ky. 511, 227 S.W. 815 (1921). *Hartig* states in dictim that a sale of land in Kentucky was an executory contract of sale. But, needless to say, the *Shanklin* court was not bound by the dictum in this decision.
43. 431 S.W.2d at 880.

mation of a contract of sale for the listed property, the broker becomes entitled to his commission.

The agent's ability to perform the contract, moreover, appears to be unimportant under *Shanklin* in ascertaining his right to a commission. An agent need not show that he had the ability at all times during the existence of the exclusive-right-to-sell agreement to perform his part of the contract before he is entitled to his commission.

Suppose the seller and buyer enter into a contract of sale during the existence of an exclusive-right-to-sell agreement. Before the brokerage agreement terminates, the contract of sale is rescinded leaving the property under contract "unsold." Has the broker's right to a commission accrued although there still remains time in which he could procure a buyer and although there is no longer any obstruction hindering his performance? Under such circumstances, if the *Shanklin* case is followed, the requirement of the brokerage agreement that a "sale" be made for the broker's commission to accrue has been performed by executing a contract of sale.

By defining a "sale" as a contract of sale regardless of the existing factual situation when dealing with an exclusive-right-to-sell brokerage agreement, the *Shanklin* opinion has placed an immovable obstruction in the path of a seller who contemplates entering into an exclusive-right-to-sell agreement and fears that the broker may not attempt to sell the property. If the seller executes a contract of sale, the brokerage commission will accrue regardless of the broker's ability or intent to perform. The court, therefore, excludes the possibility that the formation of a contract of sale is a breach of the owner's promise to leave the sale open exclusively for the broker for the duration of the contract period which would entitle the broker only to damages.

V. DAMAGES OR COMMISSIONS

The Kentucky court excluded the possibility that, instead of a fulfillment of the brokerage contract requirements, the contract of sale executed by the seller is to be viewed as an actual breach of the brokerage agreement. If the court had concluded that there was a breach of the brokerage agreement, the broker would have been entitled to damages. The damages may or may not have been the commission due under the agreement.

Damages have been awarded in many jurisdictions for the actual consummation of a "sale."[44] These courts have based their decisions on the proposition that the seller has breached his promise not to sell the property while the exclusive-right-to-sell brokerage agreement is in force. Thus for the breach of the contract the broker is entitled to damages. The contract has not been fully performed and the commission is not to be granted. In most cases, however, the damages granted for a breach by an actually executed "sale" are usually the commission that would have been paid if the contract had been properly performed.[45]

Most jurisdictions consider a consummated "sale" as rendering the performance of the broker impossible and constituting a breach of the contract.[46] In such cases the broker must be able to prove his damages.[47]

The *Shanklin* opinion cites the Kentucky case of *Carter v. Hall*[48] to substantiate its position that a consummated "sale" by the owner of property who has entered into an exclusive-right-to-sell agreement with a broker allows the broker to collect his commission. The court obviously overlooked the chief significance of this case. It is true that the broker was allowed to recover his commission, but he was not allowed the commission because the required performance of the brokerage contract had been fulfilled. He was allowed the commission as damages that occurred when the "sale" was consummated.

The court, therefore, seems to take a view that differs with the law as previously set forth in its own jurisdiction. It ap-

44. Powers v. Security Sav. & Trust Co., 38 Idaho 289, 222 P. 779 (1963); Murphy v. Sawyer, 152 Ky. 645, 153 S.W. 991 (1913); *see* Lewis v. Dahl, 108 Utah 486, 161 P.2d 362, 367 (1945) (concurring opinion).

45. *See, e.g.*, Mattingly v. Bohn, 84 Ariz. 369, 329 P.2d 1095 (1958); E.A. Strout Western Realty Agency v. Gregoire, 101 Cal. App. 512, 225 P.2d 585 (1951); Harris v. McPherson, 97 Conn. 164, 115 A. 723 (1922); Brown v. Maris, 150 N.E.2d 760 (Ind. 1958). *See generally* Note, *supra* note 11.

46. Park v. Swartz, 110 Tex. 564, 222 S.W. 156 (1920); Robertson v. Wilson, 121 Wash. 358, 209 P. 841 (1922). *See, e.g.*, 17 AM. JUR. 2d *Contracts* § 442 (1964).

47. Crawford v. Cicotte, 186 Mich. 269, 152 N.W. 1065 (1915); Park v. Swartz, 110 Tex. 564, 222 S.W. 156 (1920); Senden v. Loabs, 30 Wis. 2d 618, 151 N.W.2d 865 (1963). Some jurisdictions require that the broker show that he could have actually produced a buyer or have sold the property within the brokerage contract period. *See, e.g.*, Wellinger v. Crawford, 48 Ind. App. 176, 93 N.E. 1051 (1911).

48. 191 Ky. 75, 229 S.W. 132 (1921). The case set a precedent in Kentucky. If the holding of this case had been relied on by the *Shanklin* court, the obvious conclusion that a contract of sale is a breach of the contract would have followed, giving the broker his damages sustained by the breach.

parently did not consider that the commission may not necessarily be the damages that are sustained when a seller executes a contract of sale. At any rate, the court fails to distinguish between an actual fulfillment of the brokerage agreement and a breach of it. The former entitles a broker to a recovery for the commission, and the latter entitles him to damages for a breach.

The Oregon courts have held that a lease executed by the seller while an exclusive-right-to-sell brokerage agreement exists between the seller and broker is a breach of the brokerage agreement making the performance by the broker impossible.[49] The breach entitles the broker to damages which are not necessarily his commission. It is difficult to conceive that the Kentucky court could stretch the concept of "sale" to include a lease. Yet, is the end result of a lease so different from the execution of a contract of sale that the theory for the remedy of one should differ with the remedy of the other? Should the broker be required to show his losses from one and not the other? Performance is certainly not any more impossible when a lease has been executed than when an executory contract of sale has been executed.

The *Shanklin* case opens the door for inequitable results in favor of the broker. It sets a precedent from which there is no escape. It appears that a contract of sale for land in Kentucky from this point on will be a "sale" regardless of the fact that the owner of listed property will be put in a precarious position.

V. CONCLUSION

It is submitted that the court overlooked an obvious feature of exclusive listing contracts. These contracts apparently contemplate a double exchange of consideration between the parties. In order to make the brokerage agreement binding at the moment of formation the broker promises to use his time and facilities in exchange for the owner's promise to leave the property open for "sale" only by the broker.[50] This exchange of promises binds the parties for the contractual period.

It should be obvious at this point that a "sale" of some sort must occur before a broker is entitled to his commission. This is the second exchange of consideration. The broker has the

49. Brady v. East Portland Sheet Metal Works, 222 Ore. 584, 352 P.2d 144 (1960).
50. *See, e.g.*, Comment, *supra* note 7.

duty of attempting to consummate a "sale" of the listed property. If he succeeds, the owner then has a duty to pay the broker his commission for his performance.

The conclusion that can be drawn from this discussion is that when someone other than the exclusive broker executes a contract of sale with a prospective buyer, the brokerage agreement requirement that a "sale" take place has not been fulfilled. Instead, the promise of the property owner to keep the "sale" open for the contract period has been breached. It is the first exchange of promises that has been affected by the formation of the contract of sale. Such a breach has nothing to do with the second exchange of consideration. The breach of the owner's promise to leave the "sale" up to the broker should not effect the owner's duty to pay a commission for a "sale" by the broker. A consummated "sale" by the broker gives rise to the broker's commission while a contract of sale or "sale" by anyone else is merely a breach of the exclusive-right-to-sell agreement which entitles the broker to a cause of action for damages.

The court could have easily left itself an escape hatch for the future by reasoning that the contract of sale was a breach of the brokerage agreement and not a fulfillment of the contractual requirement. If the court had chosen this alternate course of the contract of sale being a breach and not a fulfillment of the contract requirement, a contract of sale would not necessarily give the broker a right to his commission. The broker would have to show that the only just result would be to grant him his commission as damage. The derelict and unscrupulous broker would be hampered in his attempt to take the seller for a ride.

At any rate the court could have given itself a more flexible position for future litigation. The general contract theory of breach,[51] partial breach,[52] and damages[53] as well as agency[54]

51. "A total breach of contract is nonperformance of the duty that is so material and important as to justify the injured party in regarding the whole transaction as at an end." A. CORBIN, CONTRACTS § 946 (1952). Corbin points out that there is a difference between a major and minor breach and makes a distinction as to the rights of an aggrieved party as to each.

52. "A partial breach by one party . . . does not justify the other party's subsequent failure to perform . . . ." *Id.*

53. "[A] party who seeks to recover damages from the other to a contract for a breach must show that he himself is free from fault in respect to performance of a dependent promise or counterpromise . . . or a condition precendent . . . ." 17 AM. JUR. 2d *Contracts* § 441 (1964).

54. RESTATEMENT (SECOND) OF AGENCY § 449, comment *d* at 363 (1957), states a breach of the seller's promise not to employ another agent gives rise to damages which consist of the amount promised less the expenses he would

law could be applied to future cases if the court had chosen to consider the contract of sale as a breach.

Whether the conclusion in *Shanklin* was a just one is another matter. Granting the broker his commission may have been the most equitable conclusion. But it is safe to say that the Kentucky court has saddled itself with a precedent of doubtful validity and with a great potential for injustice.

HUBBARD W. MCDONALD, JR.

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have incurred. In all events the broker has the duty to show that there was a probability that he could accomplish the desired result.