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NOTES

REAL ESTATE BROKERS CONTRACTS IN SOUTH CAROLINA

There has been a great deal of litigation concerning real estate brokers and their rights to commissions. Most of the disputes have arisen out of the fact that the terms of the brokerage agreement were too vague or because the agreement was never reduced to a writing and the parties were forced to depend on parol evidence in order to prove the contract. Even in cases where there were written agreements, often there were no clear provisions concerning the important specifications of property to be sold or commission to be paid.¹ This note focuses upon the problem of determining when a broker has sufficiently performed the requested services to entitle him to his commission. Matters collateral to the central consideration, such as proof, pleading and evidence, will be noted only to clarify or supplement specific areas, and no attempt has been made to treat these areas extensively.

I. EMPLOYMENT AND AUTHORITY

A. Nature of Relation and Contract of Employment

A real estate broker is one engaged by another on a commission basis to negotiate contracts concerning property which is not in the broker's custody.² Every broker is an agent, but he differs from other agents in that he is an intermediary or middleman and is in a sense the agent of both vendor and vendee.³ It might be noted here that in most states the business or occupation of a broker is state regulated and subject to license and taxation.⁴

There is a relationship of special agency existing between a real estate broker and one who employs him to purchase, sell or

1. See 1 CORBIN, CONTRACTS § 50 (1963).

2. A real estate broker is a special agent employed to find a prospective purchaser and to bring him to the owner of the land offered for sale, who completes the sale with the purchaser or, if the contract so provides, to consummate the sale without the owner's participation. *Charles v. West*, 155 S.C. 488, 492, 152 S.E. 644, 645 (1930); *Williamson v. Taylor*, 129 S.C. 400, 124 S.E. 645 (1924), 12 C.J.S. *Brokers* § 1 (1938).

3. See 12 C.J.S. *Brokers* § 3 (1938).

4. S. C. CODE ANN. § 56-1545 (1962) requires brokers to be licensed and provides that it shall be unlawful for any person to act as a real estate broker without first obtaining a license, and any person violating the provisions of the statute shall be guilty of a misdemeanor. See Annot., 39 A.L.R.2d 606 (1955).

otherwise deal with real estate.⁵ A contract of employment is necessary to create and maintain this relationship. This contract is governed by ordinary contract law and usually may be either express or implied. Normally all that is necessary to create a brokerage contract is that the acts of the broker must be carried out with the written, oral or implied consent of the principal.

By leaving a description of property at a broker's office with a request that the broker sell the property at a stipulated price and on stipulated terms, a principal employs the broker. On the other hand the mere fact that a broker asks and obtains from the owner of land the price he is asking for the property does not of itself establish the principal-agency relationship.⁶

In some instances the employment of a broker may be by a bilateral contract in which the consideration for the promise of one party is a promise on the part of the other.⁷ However, the ordinary listing agreement is, at least when made, a unilateral contract which does not obligate the broker to do anything. Such a contract lacks mutuality and is unenforceable.⁸ It has been held, however, that a broker's expenditure of time or money to find a purchaser or his consummation of the undertaking is sufficient consideration for the promise to pay a commission and makes the agreement bilateral and binding.⁹ Whatever the form of the contract may be, in order to establish its validity three things must be shown: a meeting of the minds of the parties through offer and acceptance; a sufficient consideration for the employment, and the existence of definite and certain terms.¹⁰

B. Necessity of Writing

Some controversy has arisen as to whether contracts hiring brokers to sell or purchase land come within the statute of frauds provision concerning contracts for the sale of land or an interest therein. It is generally held that such an agreement need not

5. *Charles v. West*, 155 S.C. 488, 152 S.E. 644 (1930); *Edwards v. Coleman*, 139 S.C. 369, 138 S.E. 42 (1927); *Williamson v. Taylor*, 129 S.C. 400, 124 S.E. 645 (1924).

6. See Annot., 49 A.L.R. 933 (1927); Annot., 43 A.L.R. 842 (1926); See 12 C.J.S. *Brokers* § 12 (1938).

7. See RESTATEMENT (SECOND), AGENCY § 445, comment f (1958).

8. See RESTATEMENT (SECOND), AGENCY § 445, comment c (1958).

9. See 12 AM. JUR. 2d *Brokers* § 32 (1964); see 1 CORBIN, CONTRACTS § 50 (1963).

10. See 12 AM. JUR. 2d *Brokers* § 31 (1964); 12 C.J.S. *Brokers* § 12 (1938).

be in writing unless a written contract is required by statute.¹¹ The South Carolina case, *Carter v. McCall*,¹² involved an oral contract under which a broker had agreed to negotiate the purchase of a tract of land and then to sell it off in lots. As consideration for his services, he was to receive a commission on the lot sales and a portion of value of the lots remaining unsold. This contract was held not to be within the provisions of the statute of frauds relating to sale of lands or interest in them. In many jurisdictions, however, there are statutes requiring that a contract of employment between a principal and a real estate broker be in writing.¹³

C. Duration and Termination of Agency

The duration of a broker's employment depends on the intention of the parties. Employment may continue for either the definite period of time stated in the contract or for a reasonable time if the contract does not specify a definite time limit.¹⁴ An agency unlimited as to duration may be terminated at will by either party if reasonable notice is given and the termination is in good faith. Generally the principal has the power to revoke the agency at any time and for any reason. However, the principal does not have the power to revoke the broker's agency where it is coupled with an interest in the subject matter,¹⁵ or where the authority is given for a specified time for a valuable consideration,¹⁶ or is necessary to effect a security.¹⁷

11. *Carter v. McCall*, 193 S.C. 456, 8 S.E.2d 844 (1940); *Jumper v. Dorchester Lumber Co.*, 119 S.C. 171, 111 S.E. 881 (1922). See Annot., 151 A.L.R. 648 (1944); RESTATEMENT (SECOND), AGENCY § 54 (1958).

12. 193 S.C. 456, 8 S.E.2d 844 (1940).

13. See, e.g., CAL. CIVIL CODE § 1624 (1954); IND. STAT. ANN. § 33-104 (1949); N. J. REV. STAT. tit. 25, ch. 1, § 9 (1937); ORE. REV. STAT. § 41-580 (1959); TEX. REV. CIV. STAT. ANN. art. 6573(a), § 28 (1960); WIS. SESS. LAWS, ch. 383 (1965); Annot., 9 A.L.R.2d 747 (1950); RESTATEMENT (SECOND), AGENCY § 468 (1958). See 13 S.C.L.Q. 539 (1961), as to the insufficiency of written agreement (required by statute) authorizing broker to sell real estate where no statement of commission to be paid is included.

14. See RESTATEMENT (SECOND), AGENCY § 106 (1958). See 7 S.C.L.Q. 654 (1955) on duration of real estate broker's contract when no time is specified. Annot., 28 A.L.R. 893 (1924); Annot., 24 A.L.R. 1537 (1923).

15. *Carter v. McCall*, 193 S.C. 456, 8 S.E.2d 844 (1940). In *George H. Rucker & Co. v. Glenna*, 130 Va. 511, 107 S.E. 725 (1921), the court said, "Coupled with an interest means a writing creating, conveying to, or vesting in the agent an interest in the estate or property which is the subject of the agency . . ." See Annot., 28 A.L.R.2d 1243 (1953).

16. *McCallum v. Grier*, 86 S.C. 162, 68 S.E. 466 (1910).

17. *Thompson v. Waller*, 70 N.Y.S.2d 395, 188 Misc. 316 (1947).

A simple agency to sell property is generally revocable at any time before the broker carries out a substantial act in performance of the agency, or makes a sale, or finds a purchaser that is ready, willing and able to purchase on the terms given by the principal. This power to revoke is not affected by the facts that the contract provided for a fixed time of employment, that a reasonable time has not elapsed, that his power to sell was made exclusive, or that it was not subject to cancellation without the written consent of both parties.¹⁸

The power to revoke must be distinguished from the right to revoke without incurring liability for breach of contract.¹⁹ Although the law will not compel a continuance of the agency, there may be a liability for wrongful termination, at least where a definite period was agreed upon. In such a case the principal is liable for any damages that are the proximate result of his termination unless such revocation was for good cause.²⁰

Ordinarily, in the absence of a contract for a definite period, a broker has no cause of action for the principal's revocation. However, where a time is fixed by the contract, a broker can recover damages for a wrongful revocation of his agency that occurred before the expiration of the time limit. Exemplary of this is where a revocation made during such period after he has expended time and money in performance of the contract, or has performed services,²¹ or begun negotiations, or where revocation comes before the broker has had a reasonable opportunity to make a sale or find a purchaser.²² He must show, however, that he could have made a sale or produced a suitable purchaser within such time or within the time specified in the contract.

Revocation may be made in any manner which shows the principal's intention to withdraw the authority from the broker, and it may be made verbally even though the contract of agency was in writing.²³

18. See 12 C.J.S. *Brokers* § 16 (1938).

19. *Piper v. Wells*, 175 Md. 326, 2 A.2d 28 (1938); See RESTATEMENT (SECOND), AGENCY § 118 (1958).

20. See 12 AM. JUR. 2d *Brokers* §§ 55-56 (1964); 1 CORBIN, CONTRACTS § 50 (1963); See RESTATEMENT (SECOND), AGENCY § 450 (1958).

21. In *Carter v. McCall*, 193 S.C. 456, 8 S.E.2d 844 (1940), a broker who had fully performed obligation at time of revocation was entitled to recover compensation for services rendered after the agreement was made and before its repudiation.

22. *Kolb v. Nash*, 245 S.C. 25, 138 S.E.2d 417 (1964). Here the owner sold the land before broker's time expired under the contract.

23. See 3 AM. JUR. 2d *Agency* § 39 (1962); 12 C.J.S. *Brokers* § 16 (1938).

Recovery is limited to compensation for the damage which actually resulted from the breach, and the amount sought may not exceed the contract price for the services performed.²⁴

D. Authority Conferred on Broker

Since a broker is a special agent, he cannot represent and bind his principal beyond the limitations of the authority conferred on him, and the ordinary authority of a broker is merely to find a purchaser.²⁵

A broker's authority to sell the property exists only where the intention of the principal to give such authority is manifest. Without such specific authority he cannot accept a deposit, collect purchase money, or deliver or accept a deed or possessions.²⁶ Most courts sustain the view that the use of the words "for sale", "to sell" and the like, in the broker's contract, does not give the broker any authority to make a binding contract of sale on the principal's behalf.²⁷ It can be seen that a broker's authority is strictly construed except that he has the implied powers to do any act necessary to effect a purchase or sale of the property.²⁸

II. DUTIES AND LIABILITIES OF A BROKER

A broker in carrying out his duties must exercise the same degree of care and diligence that a prudent man would exercise in a similar business. If he so acts he is not liable, in the absence of fraud, for losses resulting to the principal.²⁹ He must act within his authority and in compliance with the principal's in-

24. See 12 C.J.S. *Brokers* § 17 (1938).

25. *Gallant v. Todd*, 235 S.C. 428, 111 S.E.2d 779 (1960); *Bolen v. Smith*, 223 S.C. 39, 74 S.E.2d 42 (1953); *Yawkey v. Lowndes*, 150 S.C. 493, 148 S.E. 554 (1929); *Edwards v. Coleman*, 139 S.C. 369, 138 S.E. 42 (1927); *Schillinglaw v. Sims*, 86 S.C. 76, 67 S.E. 906 (1910); *Chandler v. Franklin*, 65 S.C. 544, 44 S.E. 70 (1902); *Annot.*, 43 A.L.R.2d 1014 (1955) on broker's power to bind principal; *Annot.*, 30 A.L.R.2d 805 (1953) on payment to broker authorized to sell real estate as payment to principal. See 13 S.C.L.Q. 42 (1960) as to the authority of real estate brokers.

26. *Schillinglaw v. Sims*, 86 S.C. 76, 67 S.E. 906 (1910).

27. In *Gallant v. Todd*, 235 S.C. 428, 111 S.E.2d 779 (1960), the words "I hereby authorize to sell for me" were construed as not giving the broker the right to sell the property but only to furnish a purchaser (*Emphasis supplied*). In *Schillinglaw v. Sims*, 86 S.C. 76, 67 S.E. 906 (1910), a contract authorizing a broker to "effect a sale" was held not to give the broker authority to complete the sale (*Emphasis supplied*). In *Bolen v. Smith*, 223 S.C. 39, 74 S.E.2d 42 (1953), the court held that where parol authority of real estate agent to execute a contract of sale in behalf of his principal is relied upon, proof thereof must be clear and convincing.

28. See 12 AM. JUR. 2d *Brokers* § 66 (1964).

29. See *Annot.*, 94 A.L.R.2d 468 (1964); *Annot.*, 62 A.L.R. 1357 (1929).

structions. He must exercise reasonable skill and diligence in transacting the business entrusted to him and is liable for any loss for not doing so.³⁰

A broker acting as an agent occupies a fiduciary relationship and must act with complete good faith and loyalty where the interest of his principal is concerned.³¹ It is the broker's duty to inform the principal of all the material facts concerning the transaction or affecting his principal's interest.³² It is his further duty to inform the principal if he knows of more advantageous terms that could be obtained.

It is generally held that a purchasing broker cannot, without fully disclosing his ownership or interest, sell to the principal property which the broker owns or in which he has an individual interest. Similarly, a broker, without the principal's full knowledge and consent, cannot become the purchaser of the property or any interest therein³³ or sell to his employees, partners, or near relatives.³⁴

The form of action by a principal against his broker depends on the nature of the breach of duty by the broker. An action in the nature of assumpsit for money had and received may be brought by the principal where the broker has money belonging to the principal.³⁵ Where the broker's act is a tort as well as a breach of contract, the principal may elect between a suit *ex contractu* or a suit *ex delicto*. The measure of damages is ordinarily regulated by the rules governing damages in other civil cases, and regardless of whether the suit is in tort or contract,

30. *Williams v. McRae*, 168 F. Supp. 650 (W.D.S.C. 1958) concerning a peach broker; *Lowrance v. Swaffield*, 123 S.C. 331, 116 S.E. 278 (1923).

31. See Annot's., 94 A.L.R.2d 468 (1964), 62 A.L.R. 1357 (1929).

32. See RESTATEMENT (SECOND), AGENCY § 381 (1958).

33. In *Hallman v. Lipscomb*, 114 S.C. 171, 103 S.E. 513 (1920), it was held that a broker abandons his position as agent to sell on commission by taking a contract for sale of the land directly to himself since the positions of agent to sell and of purchaser are conflicting. In *McCallum v. Grier*, 86 S.C. 162, 68 S.E. 466 (1910), it was held that where the broker's company purchased land the broker was to sell, the contract was void at option of vendor. See Annot., 62 A.L.R. 63 (1929).

34. See Annot., 26 A.L.R.2d 1307 (1952), on the duty to disclose that prospective purchaser is a relative.

35. See *Witsell v. Riggs*, 14 Rich. Eq. 186 (S.C. 1867), where there was an action against a real estate broker to recover damages where the broker had held purchase money until it became valueless. The court held that the measure of damages was the value of the currency at the time it was received by the broker with interest thereon.

the amount of damages is ordinarily compensation for the actual loss or damage to the principal.³⁶

III. COMPENSATION

A. Necessity of Contract

Ordinarily, a broker's compensation takes the form of a commission on the price or value of the thing sold. His right to such commission depends on the terms of his employment contract and on his performing the requested service.³⁷ As a general rule, a contract of employment, either express or implied, is necessary in order to entitle a broker to compensation for his performance.³⁸ A promise by an alleged principal to pay a broker for services already rendered without the principal's request is without present consideration, and the broker can have no recovery thereon. In order to recover upon a subsequent promise, there must have been a pre-existing legal liability or obligation of some sort, as where the services were rendered upon the request of the promisor, although at the time the matter of compensation was not expressly considered.³⁹

Before an implied contract can arise, the owner must say or do something showing that he intended the broker to be his agent. This action by the owner must be more than merely selling to the party who was brought voluntarily to him by the broker.⁴⁰ Similarly, the owner's mere consent to the rendition of the broker's unsolicited services is not sufficient to justify the inference that he intended to enter into contractual relations with the broker and to pay him for his services.⁴¹ If, however, the owner of real estate so conducts himself in his dealings with a broker that the broker, although a volunteer, has reason honestly to believe that he has been employed to sell the property, the owner is estopped to deny the employment and the liability to pay therefor.⁴²

36. See 12 C.J.S. *Brokers* § 57 (1938); Annot., 67 A.L.R.2d 952 (1959) as to the principal's right to recover punitive damages for a broker's breach of duty.

37. See RESTATEMENT (SECOND), AGENCY § 445 (1958).

38. See 12 AM. JUR. 2d *Brokers* §§ 157-158 (1964); 12 C.J.S. *Brokers* § 60 (1938).

39. *Friedman v. Suttle*, 10 Ariz. 57, 85 Pac. 726 (1906).

40. See 12 AM. JUR. 2d *Brokers* § 159 (1964); RESTATEMENT (SECOND), AGENCY § 462 (1958).

41. *Dickinson v. Hanley*, 193 Mich. 585, 160 N.W. 389 (1916); Annot., 49 A.L.R. 933 (1927).

42. See 12 AM. JUR. 2d *Brokers* § 160 (1964); 12 C.J.S. *Brokers* § 61 (1938); Annot., 49 A.L.R. 933 (1927).

A contract to pay a reasonable commission may also be implied from the owner's acceptance of a broker's voluntary services rendered with an expectation of payment, provided the owner knew or had reason to believe that such services were rendered with an expectation of payment.⁴³

A contractual right to commissions arises when an owner lists his property with a broker or places it in his hands for sale and a sale is made as a result of the broker's efforts. However, a general listing of property for sale, without a special agreement or payment of consideration, does not give rise to an enforceable contract of employment. Such is merely an offer to pay a commission and ripens into a contract only when the broker accepts it by fulfilling its terms before the owner withdraws the offer.⁴⁴

B. Compensation as Affected by Revocation

The principal may not defeat the broker's right to compensation by revoking his authority when such authority is given for a valuable consideration⁴⁵ or is coupled with an interest.⁴⁶ By the same token where the contract grants to the broker a certain time within which he may effect a sale, the principal cannot revoke the agency before the expiration of the specified time and defeat the broker's right to compensation.⁴⁷

Where a contract fixes no specific term of duration a broker is not entitled to a commission on a sale made by the owner after termination of the agency. It makes no difference that the vendee was a person originally produced by the broker if the broker was given a reasonable time and fair opportunity to consummate the sale but failed to do so. The owner is liable, however, where he fraudulently revokes the agency in the midst of negotiations and makes the sale himself, at least where there is a strong likelihood that the broker would have made the sale.⁴⁸

43. In *Hester v. Roberts*, 114 S.C. 410, 103 S.E. 773 (1920), evidence was held insufficient to show that there was any contract between the parties or that the defendant owner knowingly accepted the broker's services.

44. See 12 AM. JUR. 2d *Brokers* § 159 (1964); 12 C.J.S. *Brokers* § 361 (1938); 1 CORBIN, *CONTRACTS* § 50 (1963); Annot., 49 A.L.R. 933 (1927).

45. *McCallum v. Grier*, 86 S.C. 162, 68 S.E. 466 (1910).

46. See cases cited note 15 *supra*.

47. *Piper v. Wells*, 175 Md. 326, 2 A.2d 28 (1938). 1 CORBIN, *CONTRACTS* § 50 (1963). See *RESTATEMENT (SECOND), AGENCY* § 450 (1958).

48. See 12 C.J.S. *Brokers* § 66 (1938).

C. Compensation as Affected by an Unlicensed Broker

Questions have arisen as to the enforceability of a claim against a broker who was acting without a license. A license is a prerequisite to acting as a real estate broker,⁴⁹ and if the broker fails to obtain such a license, whether he can recover compensation for his services depends primarily upon whether the purpose of the legislature was the enactment of a revenue measure or a police regulation.⁵⁰ The South Carolina statute requiring brokers to be licensed has never been construed.⁵¹ However, in the majority of cases involving a statute or ordinance expressly declaring it to be unlawful for an unlicensed person to act as a broker, as the South Carolina statute does, the courts, apparently construing the act as a police regulation, have held that the contract of an unlicensed broker for services was necessarily void and incapable of enforcement.⁵² It is not necessary for a broker to be licensed when the contract was made, but he must have had the license when the services were rendered.⁵³

D. Rate or Amount

When the broker has performed his part of the contract of employment he is entitled to the rate or amount of compensation fixed by the contract, or if no amount or rate is fixed, to reasonable compensation.⁵⁴ If no amount is fixed and litigation occurs, determination of what is a reasonable amount becomes a jury question.⁵⁵ Normally the full sale price of the property or in-

49. S. C. CODE ANN. § 56-1545 (1962) requires brokers to be licensed and provides that it shall be unlawful for any person to act as a real estate broker without first obtaining a license and any person violating the provisions of the statute shall be guilty of a misdemeanor.

50. See AM. JUR. 2d *Brokers* § 178 (1964); 12 C.J.S. *Brokers* § 67 (1938); Annot., 169 A.L.R. 767 (1947).

51. However, in *Fairly v. Wappoo Mills*, the court held that a contract was not void even though the broker did not have a license as required by an ordinance of the city of Charleston. The court, however, stressed the fact that the ordinance did not expressly or by manifest intent declare the business unlawful without license. By way of dictum the court said that "... if the law requiring a license actually and in terms declares that the business in question is unlawful unless the requirement of a license is complied with, then the carrying on of the business without such license is prohibited, and a contract made under it cannot be enforced in a court of justice." 44 S.C. 227, 251-52, 22 S.E. 108, 118 (1895).

52. See Annot., 169 A.L.R. 767 (1947).

53. See 12 AM. JUR. 2d *Brokers* § 179 (1964); 12 C.J.S. *Brokers* § 67 (1938).

54. *Brachman v. Wheelock, Inc.*, 343 Mich. 230, 72 N.W.2d 246 (1955) where compensation was fixed. *Eadie v. Arc Wood Development, Inc.*, 189 N.Y.S.2d 340, 19 Misc. 2d 98 (1959) where amount was not specified.

55. See 12 AM. JUR. 2d *Brokers* § 161 (1964).

terest actually sold is the basis for computing commissions for the sale.⁵⁶ However, if there is a contractual provision for some other basis, such as the list price, the price of the property actually delivered, or the cash payment made by the purchaser, such provision is necessarily controlling.⁵⁷

E. Sufficiency of Services

The broker's right to a commission depends on performance of his part of the contract of employment and fulfillment of all the conditions precedent in the contract. When he does not fulfill all such conditions he is not entitled to a commission regardless of the time, effort, and money he has expended. If the terms are stipulated in the contract, the broker must procure a purchaser who will accept such terms. If price or terms are not fixed, it is necessary to secure an offer which is acceptable to the principal.⁵⁸

The broker must conclude the negotiations he is authorized to make to such a point that the minds of the principal and customer meet with respect to all material or essential terms and an agreement is entered into between them. Unless the contract of employment provides otherwise, the broker's commission does not depend on the final consummation of the transaction or the performance of the agreement between the principal and the customer.⁵⁹

F. Producing Customer who is Able, Ready and Willing

In the absence of special contractual provisions to the contrary, a broker has no right to a commission unless he produces a customer who is able, ready and willing to buy or sell the property concerned, on the terms the principal has prescribed, or terms that are satisfactory to the principal.⁶⁰ He has earned his commission whether or not a sale is consummated unless he waives his right to a commission or causes the sale not to be consummated. The only factors necessary to entitle the broker to a commission are that an able, ready and willing customer has been

56. *Zelkowitz v. Tobin*, 108 Cal. App. 2d 69, 238 P.2d 19 (1951).

57. See 12 C.J.S. *Brokers* § 79 (1938).

58. See 12 C.J.S. *Brokers* § 83 (1938).

59. *Charles S. Glassman Associates, Inc. v. Hallen Realty Corp.*, 235 N.Y.S.2d 215, 37 Misc. 2d 877 (1962), *aff'd*, 247 N.Y.S.2d 380, 20 App. Div. 2d 759 (1964).

60. See 12 C.J.S. *Brokers* § 85 (1938); RESTATEMENT (SECOND), AGENCY § 445 (1958); Annot., 169 A.L.R. 605 (1947).

produced within the proper time, that he has offered to buy on the principal's terms, and the principal has been given notice of the purchaser.⁶¹

After the broker has performed, his right to a commission cannot be defeated by the principal's subsequent addition of new or additional terms. It is immaterial whether the customer is an individual or company or that undisclosed persons join with the disclosed parties so long as those disclosed were able, ready and willing to consummate the deal.⁶² The terms "ready" and "willing" ordinarily give no trouble, but in determining whether a prospective purchaser is "able" to meet the principal's terms many factors must be considered.⁶³ The word "able" ordinarily refers to the prospective purchaser's financial ability. The financial ability required of a customer is not necessarily his solvency or ability to respond in damages but is his ability to meet the terms of the principal.⁶⁴ Aside from immediate cash payments when the terms so require, the ability of a purchaser is not to be judged exclusively by money in his possession or in his bank account. Consideration should also be given to his assets, credit, financial rating and anything else indicating his ability or lack of ability to command the funds needed at the time they are required.⁶⁵

G. Purchaser Willing to Buy on Different Terms

When a broker, instead of procuring a person who is ready, able and willing to buy on the terms given to the broker by the principal, procures a person who makes a counteroffer, the principal may either accept the proposed counteroffer or refuse it without giving the broker his reasons for refusal. If he accepts the counteroffer he must pay the broker his commission, but if he refuses he is not obligated to pay the broker.⁶⁶ There have

61. See 12 C.J.S. *Brokers* § 85 (1938).

62. *Ibid.*

63. Of course, if the principal accepts the purchaser and enters into an agreement with him, the broker is entitled to his commission with no question as to ability, willingness or readiness. The problem arises when a purchaser is produced who says he is able, ready and willing to meet the principal's terms, but the principal refuses to consummate the sale. If it can in fact be shown that the prospective purchaser was able, ready, and willing to meet the principal's terms, the broker can recover his commission whether or not the principal in fact sells to the prospective purchaser.

64. See 12 C.J.S. *Brokers* § 85 (1938).

65. *Ibid.*

66. See 12 AM. JUR. 2d *Brokers* § 185 (1964); 12 C.J.S. *Brokers* § 86 (1938); RESTATEMENT (SECOND), AGENCY § 447 (1958).

been, however, a few cases where a contrary result has been reached. For example where the variation in terms would have been beneficial to the principal or where the deviation was so trivial as to make it obvious that the principal was merely seeking to avoid his contract with the broker, the principal has been held to be obligated to pay the broker a commission.⁶⁷

When a listing agreement fails to fix the terms for the sale or specifies only part of the terms with the understanding that the principal and customer will fill in the details, the principal has been held free to cease negotiations without being liable to the broker. In such a situation the broker is entitled to his commission only when the principal and customer reach an agreement.⁶⁸ Unless otherwise agreed, he is not entitled to his commission for negotiating a conditional or option contract unless such an agreement or option is subsequently carried out.⁶⁹

H. Procuring Cause

Under the ordinary brokerage contract, the broker must be the efficient or procuring cause of the sale or other transaction he is employed to negotiate before he is entitled to his commission; *i.e.*, his efforts or services must be the direct cause of the sale.⁷⁰ Whether or not the broker is the procuring cause is a question of fact for the jury if litigation occurs.⁷¹ "Procuring cause," "efficient cause" and "proximate cause" are often used interchangeably. They all refer to a setting in motion of a series

67. See 12 AM. JUR. 2d *Brokers* § 185 (1964); 1 CORBIN, CONTRACTS § 50 (1963); Annot., 18 A.L.R.2d 376 (1951).

68. See 12 AM. JUR. 2d *Brokers* § 187 (1964); RESTATEMENT (SECOND), AGENCY § 445 (1958).

69. See 12 AM. JUR. 2d *Brokers* § 188 (1964); 12 C.J.S. *Brokers* § 86 (1938); 23 A.L.R. 856 (1923).

70. In *Kolb v. Nash*, 245 S.C. 25, 138 S.E.2d 417 (1964), a broker was allowed to recover his commission when the landowner sold the property to a purchaser whose interest in the property was engendered by the broker's efforts. In *Hobbs v. Hudgens*, 223 S.C. 88, 74 S.E.2d 425 (1953), the broker was denied his commission where the broker did introduce the customer to the principal. It was noted, however, that the purchaser's attention was not called to the subject matter by the broker through means intended to cause a sale, and the purchaser had already learned of property and made up his mind to negotiate. See *Cleveland and Williams v. Butler*, 94 S. C. 406, 78 S.E. 81 (1913). In *Goldsmith v. Cox*, 80 S.C. 341, 61 S.E. 555 (1908), a broker was given an exclusive right to sell property. He was allowed to recover his commission when the owner sold to one with whom the broker had been negotiating. See RESTATEMENT (SECOND), AGENCY § 448 (1958); Annot., 9 A.L.R. 1194 (1920).

71. *Kolb v. Nash*, 245 S.C. 25, 138 S.E.2d 417 (1964); *Crook v. Hallett*, 166 S.C. 230, 164 S.E. 641 (1932); *Goldsmith v. Cox*, 80 S.C. 341, 61 S.E. 555 (1908).

of events, which, without a break in their continuity, result in procuring a ready, willing and able purchaser.⁷² The negotiations have not been interrupted so long as the broker can establish the continuity of his agency in bringing the transaction to a conclusion.⁷³ However, if the negotiations are halted and the broker ceases his efforts, or there is a substantial break in negotiations and the principal thereafter concludes the transaction without the broker's aid, the broker may be denied any commission.⁷⁴

It is often said that before the broker can be the procuring cause of a sale, he must first call the purchaser's attention to the property and start negotiations which culminate in a sale. The mere fact, however, that the broker informed the customer of the matter, showed him the property involved, or introduced the customer to the principal, does not necessarily make him the procuring cause.⁷⁵ The broker may be deemed the procuring cause if such information or introduction is the foundation upon which negotiations are begun and the transaction consummated.⁷⁶ Similarly, if the broker may be deemed the procuring cause in other respects, it is immaterial that the broker did not personally introduce the principal to the customer, or never saw the customer, or was not the first to bring the property to the customer's attention.⁷⁷ He may also be the procuring cause even though he is not present during or takes no part in the negotiations between the parties or the closing of the bargain.⁷⁸

To be entitled to his commission, a broker must perform his part of the contract of employment within the time set out in the contract or, where no time is specified, within a reasonable

72. In *Pinson v. Smith Atl. Realty Co.*, 118 S.C. 262, 110 S.E. 392 (1922), the court said that in order to procure contracts, one must be the efficient cause of securing the contract. In *Goldsmith v. Cox*, 80 S.C. 341, 61 S.E. 555 (1908), the court held that the broker will be regarded as the procuring cause if his intervention is the foundation upon which the negotiations resulting in the sale are begun.

73. See 12 AM. JUR. 2d *Brokers* § 190 (1964); 12 C.J.S. *Brokers* § 91 (1938).

74. *Ibid.*

75. In *Hobbs v. Hudgens*, 223 S.C. 88, 74 S.E.2d 425 (1953), the broker was not the procuring cause where he introduced the customer to the principal because the customer knew of the opportunity and had already made up his mind to negotiate. See RESTATEMENT (SECOND), AGENCY § 448 (1958).

76. See 12 AM. JUR. 2d *Brokers* § 190 (1964); 12 C.J.S. *Brokers* § 91 (1938).

77. *Ibid.*

78. *Smith v. Peeples*, 177 S.C. 479, 181 S.E. 653 (1935); *Charles v. West*, 155 S.C. 488, 152 S.E. 644 (1930); *Hutson v. Stone*, 119 S.C. 259, 112 S.E. 39 (1922).

time.⁷⁹ Where he produces a buyer within the time allowed, his right to a commission is not affected by the fact that the sale is not consummated until after the termination of the agency.⁸⁰

Where the broker was the procuring cause for the presence of a customer but the owner sold to such customer in ignorance of this fact, the broker is entitled to his commission unless the contract of employment requires notice.⁸¹ If, however, the owner reduces the price without knowledge that the broker has procured a customer and is prejudiced by the broker's failure to give him notice, some courts have refused to allow the broker to recover even though he was the procuring cause. Other courts have allowed recovery in this situation.⁸²

I. Exclusive Agency or Exclusive Right of Sale

A distinction is often raised between an exclusive agency to sell and an exclusive right of sale. It is generally held that where an exclusive agency is given, the owner may still sell the property unless the broker has procured a purchaser prior to such sale.⁸³ The only effect of such a provision is to prevent the owner from placing the property in the hands of other agents.⁸⁴ If the owner does not give an exclusive agency he may place his property in the hands of as many brokers as he desires. In the event of a sale in a situation such as this, only one commission is to be paid, and that is to be paid in full to the broker who first succeeds as the procuring cause of the transaction.⁸⁵

On the other hand, where a broker is given an exclusive right to sell property he is generally held entitled to his commission when a sale is made by the owner, and it is immaterial that the

79. See Annot., 26 A.L.R. 784 (1923).

80. See Annot., 27 A.L.R.2d 1348 (1953).

81. In *DuRant v. Lubs*, 142 S.C. 33, 140 S.E. 249 (1927), the jury was instructed that a broker had forfeited his right to claim a commission by his failure to give the principal notice that he had interested the purchaser in the property. This instruction was held to be reversible error.

82. See Annot., 46 A.L.R.2d 848 (1956).

83. See Annot., 64 A.L.R. 395 (1929).

84. See Annot., 88 A.L.R.2d 936 (1963). In *Mordecai v. Jacobi*, 12 Rich. Law 547 (S.C. 1860) (concerning selling of slaves) a broker was employed under a contract not giving him the exclusive right to act. The court held that the broker was not entitled to a commission where the owner sells in good faith to a purchaser before the broker has performed and notified the owner of such performance.

85. In *Hutson v. Stone*, 119 S.C. 259, 112 S.E. 39 (1922), the court held that where a broker undertook to sell real estate in competition with others, an implied condition of his employment was that a prior sale by any one of the other brokers would revoke his authority and terminate his agency.

broker was not the procuring cause thereof.⁸⁶ In this situation, however, the employment contract must have been supported by consideration and cannot be merely a unilateral offer.⁸⁷ Regarding the consideration aspect, it has been held that a broker's expenditure of time or money in an effort to find a purchaser or his completion of his undertaking is a sufficient consideration to transform the agreement from unilateral to bilateral and make it binding.⁸⁸

J. Failure of Principal or Customer to Complete Transaction

Generally when a broker finds a customer ready, able and willing to enter into a transaction on the terms set forth by the principal, the broker, in the absence of a contrary provision, cannot be deprived of his commission if the principal causes the transaction to fail.⁸⁹ This is not true where the principal has valid grounds for his refusal such as where a customer insists on a material change in terms or where the contract if executed would be fraudulent or usurious. The criteria are that his refusal must not be arbitrary, capricious, unreasonable, wrongful or fraudulent.⁹⁰

The fact that the principal's inability to complete the transaction is involuntary, as where the property is condemned or foreclosed upon, is not sufficient to defeat the broker's right to his commission.⁹¹ Further, a broker is entitled to his commission even if the principal's failure to complete the transaction was due to a defect in his title of which the broker had no notice.⁹² This rule rests upon the theory that the broker is entitled to assume that the principal's title is marketable, and therefore he has no duty to inquire as to the existence of a defect.⁹³ The presumption that the principal's title is marketable may, of course, be waived by

86. See RESTATEMENT (SECOND), AGENCY § 449 (1958); Annot., 88 A.L.R. 2d 936 (1963).

87. See 12 AM. JUR. 2d *Brokers* § 226 (1964).

88. See 12 AM. JUR. 2d *Brokers* § 32 (1964); 1 CORBIN, CONTRACTS § 50 (1963).

89. See 12 AM. JUR. 2d *Brokers* § 199 (1964); 12 C.J.S. *Brokers* § 95 (1938); Annot., 169 A.L.R. 605 (1947). See Annot., 69 A.L.R. 2d 1244 (1960) on the broker's return of deposit money to customer as a waiver of his right to commissions.

90. See 12 C.J.S. *Brokers* § 95 (1938).

91. *Ibid.*

92. See 12 AM. JUR. 2d *Brokers* § 201 (1964); 12 C.J.S. *Brokers* § 95 (1938); Annot., 169 A.L.R. 605 (1947).

93. See Annot., 156 A.L.R. 1398 (1945).

the acts of the parties or resist implication where the facts dictate otherwise.⁹⁴ A principal may protect himself from having to pay a commission where a defective title prevents consummation of the sale. He may do this by making the broker's right dependent upon the purchaser's acceptance of title, the principal's ability to perform, or the consummation of the transaction.⁹⁵ The cases in this area are in conflict apparently because of the varying terminology of the contracts of employment.

Where the sale fails because of a deficiency in the quantity of land represented by the principal, a broker may recover his commission.⁹⁶ He may be denied his commission, however, where the lot was to be sold "as such" and not by the "front foot," even though there was a deficiency in the represented size.⁹⁷

As to the customer's refusal to consummate the transaction, it is the general rule, in the absence of a contrary provision, that a broker has a right to his commission when a valid contract is drawn up between the principal and customer. This right is not defeated even though the customer defaults, refuses to consummate the contract, is financially unable to carry it out, or the owner subsequently releases the purchaser from the contract.⁹⁸ However, where commissions are dependent on some condition such as completion, consummation, or closing of the sale and this condition never occurs, the broker may be denied his commission.⁹⁹

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94. *Leonard v. Vaughan & Co.*, 117 Va. 514, 85 S.E. 471 (1915).

95. *Wagner v. Derektor*, 306 N.Y. 386, 118 N.E.2d 570 (1954); Annot., 169 A.L.R. 605 (1947).

96. See 12 C.J.S. *Brokers* § 95 (1938).

97. *Baer v. Otts*, 130 S.C. 348, 126 S.E. 44 (1925).

98. See Annot., 74 A.L.R.2d 437 (1960).

99. In *Hamrick v. Cooper River Lumber Co.*, 223 S.C. 119, 74 S.E.2d 575 (1953), a broker was denied his commission where the contract said the broker was to be paid "on date of settlement" and the purchaser refused to carry out the contract. See *Murray v. Texas Co.*, 172 S.C. 399, 174 S.E. 231 (1934); *Charles v. West*, 155 S.C. 488, 152 S.E. 644 (1930).