

Exclusive Sales Rights Given to Real Estate Brokers

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Although the owner is sovereign over his land, he has the duty to consider the safety of all those who, having the right or privilege to enter his premises, may be expected to enter it. The "commonly accepted formula in America" that divides those to whom this obligation is owed into "licensees" and "invitees" depends upon whether their right to enter is by virtue of permission or of invitation.⁶¹ If such is the case, it seems illogical to hold, as most courts have, that a fireman *cannot* be an *invitee* because there has been no *invitation*, but that he *can* be a *licensee* even though there has been no *permission*.⁶²

If we accept *benefit to the landowner* as the determining factor of the invitee, it is equally difficult to see on what basis it can be held that a fireman is a mere licensee.⁶³ It is absurd to say that a fireman who comes to extinguish a blaze in the defendant's building confers no benefit on the defendant.⁶⁴

Perhaps the real reason why firemen seem to be set apart as a class to whom no duty is owed to inspect and prepare the premises is that they enter at unforeseeable moments, upon unusual parts of the premises, and under circumstances of emergency, where care in preparation cannot reasonably be looked for. As Professor Bohlen has stated:

It would be an obviously unreasonable burden to impose on landowners to require them to keep the whole of their premises in such condition as to make every part of it safe for those whose unusual and exceptional right of entry may never accrue. . . . [T]he balance of social benefits can[not] require such a serious restriction on the owner's use of his land, or justify the imposition of such a burden on his exchequer, to prevent so vague a risk of so improbable an injury.⁶⁵

⁶¹ Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right*, 69 U. Pa. L. Rev. 142, 237, 340 (1921).

⁶² *Are Firemen & Policemen Licensees or Invitees?*, 35 Mich. L. Rev. 1157 (1937).

⁶³ *Ibid.*, at 1160.

⁶⁴ Prosser, *Torts* § 78 at 461 (2d ed., 1955); Prosser, *Business Visitors & Invitees*, 26 Minn. L. Rev. 573, 608-611 (1942).

⁶⁵ Bohlen, *op. cit.* supra note 61, at 350-51.

EXCLUSIVE SALES RIGHTS GIVEN TO REAL ESTATE BROKERS

When a real estate broker is employed to sell property, one of two types of agreement is entered into; the first being a general listing whereby the broker is given the bare right to sell the owner's property with the broker receiving a commission for producing a purchaser. The second is a so-called "exclusive" agreement of one kind or another whereby the broker is given the exclusive agency to sell, or exclusive right to sell, for a stipulated period of time— the broker's commission being due when or if a purchaser is found.

Upon occasion, an owner who has entered into such an "exclusive" agreement gets the opportunity to sell the property during the exclusive period to a buyer not in any way procured by the broker. If the owner does sell to this person, though the broker has not yet found a purchaser willing to buy according to the terms of the listing, a suit for a commission often results. Where only an exclusive agency to sell has been given, and it appears that the owner sold his own property without the aid of another broker, the broker's suit will fail in most jurisdictions.¹ Where, however, a second broker appears to have sold the property during the exclusive agency, some courts have allowed recovery.² The concern of the courts for the broker's welfare in that situation and where an exclusive right to sell has been given, has resulted in decisions which blur the distinction between unilateral and bilateral contracts, leaving the law in a rather confused state. It is this situation primarily which will be examined here.

THE AGREEMENT—A UNILATERAL CONTRACT

In return for the broker's act of procuring a purchaser, the owner has promised a commission. The broker's promise to find a purchaser is not sought, nor is it given in the usual exclusive listing. It seems clear, therefore, that the owner has made an offer for a unilateral contract,³ and such an offer may be revoked, whether it is said to be irrevocable or not, at any time before performance of the act requested.⁴

In *Bartlett v. Keith*, decided by the Supreme Judicial Court of Massachusetts, a broker had an exclusive right to sell certain property.⁵ The owner, during the period, sold the property to a buyer of her own finding. In disallowing recovery the court stated:

Here the condition was at least the procuring of a customer who was able, willing, and ready to buy on the owner's terms. The plaintiff's contention that

¹ *Manzo v. Park*, 220 Ark. 216, 247 S.W. 2d 12 (1952); *E. A. Strout Western Realty Agency v. Gregoire*, 101 Cal. App. 2d 512, 225 P. 2d 585 (1951); *Lambert v. Haskins*, 128 Colo. 433, 263 P. 2d 433 (1953); *Bradbury v. Morrison*, 93 Ga. App. 704, 92 S.E. 2d 607 (1956); *Wozniak v. Siegle*, 226 Ill. App. 619 (1922); *Des Rivieres v. Sullivan*, 247 Mass. 443, 142 N.E. 111 (1924); *Keller Corp. v. Cable*, 207 Minn. 336, 291 N.W. 515 (1940); *Levy v. Isaacs*, 285 App. Div. 1170, 140 N.Y.S. 2d 519 (1955), appeal denied 143 N.Y.S. 2d 642 (1955); *Ferree v. De Ely*, 265 S.W. 2d 860 (Tex. Civ. App., 1954); *Baker v. Skipworth*, 244 S.W. 2d 299 (Tex. Civ. App., 1951); *Roberts v. Harrington*, 168 Wis. 217, 169 N.W. 603 (1918). Contra: *Werner v. Hindle*, 129 Pa. Super. 137, 194 Atl. 754 (1937).

² *Dixon v. Dodd*, 80 A. 2d 282 (D.C. Munic. App., 1951); *McManus v. Newcomb*, 61 A. 2d 36 (D.C. Munic. App., 1948); *Schwartz v. Akerlund*, 240 Ill. App. 480 (1926).

³ "A unilateral contract is one in which no promisor receives a promise as consideration for his promise." Rest., Contracts § 12 (1932).

⁴ 1 Williston, Contracts § 60 (Rev. ed., 1936).

⁵ 325 Mass. 265, 90 N.E. 2d 308 (1950).

by listing the property she fully performed the service required is fallacious. The writing says nothing of the kind, and the usual rule is to the contrary. The defendant's objective, like that of any seller, did not stop with the placing of her property on the plaintiff's list. Nor is the plaintiff's case aided by asserting that the defendant bound herself for ninety days when she did not bind herself at all. The acceptance of an offer to a unilateral contract must be by all the acts contemplated by the offer. There was no fraudulent revocation, and once the question of consideration is analyzed, this case falls within the usual principles of brokerage cases.⁶

This statement represents proper legal reasoning in requiring consideration be given to make a promise to keep an offer open binding.⁷

An Illinois court presented with a similar factual situation refused to grant a commission to the broker and said: "[T]he agreement in this proceeding is not one coupled with an interest and it was revocable at the will of the principals."⁸

An Ohio court, where the broker sued for a commission when the owner sold his own property during the "exclusive sales right" period, stated:

[P]laintiff did not purchase the exclusive right to sell the defendant's property. There was no consideration flowing to defendants. The plaintiff was not bound to do anything. He could abstain from any activities in the interest of selling the property without incurring the slightest legal liability to the defendants. The offer to contract was unilateral in its effect.⁹

Where even nominal consideration has been given in fact by the broker for the owner's promise to keep the offer for a unilateral contract open for a given period, the offer must be kept open.¹⁰ In a state where a seal is conclusive evidence of consideration, such an offer under seal would also have to be kept open.¹¹ These methods for rendering the owner's offer irrevocable do not often appear in the reported cases as the basis for decision.

A few courts have applied proper theory.¹² Numerically, courts apply-

⁶ Ibid., at 309, 310 (omitting court's citations).

⁷ Rest., Contracts § 19 (1932).

⁸ Nicholson v. Alderson, 347 Ill. App. 496, 507, 107 N.E. 2d 39, 44 (1952).

⁹ Davis v. Hora, 63 N.E. 2d 843, 844 (Ohio App., 1944).

¹⁰ 1 Williston, Contracts § 115, 115B (Rev. ed., 1936).

¹¹ Whyte v. Rogers, 303 Ill. App. 115, 24 N.E. 2d 745 (1940). For a discussion of more recent developments concerning seals, see *An Analysis of Recent Illinois Legislation Concerning Seals*, 1 DeP. L.R. 250 (1952).

¹² Cole v. Pursley, 86 Ga. App. 452, 71 S.E. 2d 575 (1952) where factor of payment of nominal consideration was ignored; Irish v. Fisher, 74 Ga. App. 631, 40 S.E. 2d 588 (1946); Ocean Lake & River Fish Co. v. Dotson, 70 Ga. App. 268, 28 S.E. 2d 319 (1943); Barrington v. Dunwody, 35 Ga. App. 517, 134 S.E. 130 (1926); Ferguson v. Bovee, 239 Iowa 775, 32 N.W. 2d 924 (1948) but weakened by allowing damages to extent of "out of pocket" loss to broker.

ing proper theory are in the minority. The unsound methods by which the other courts reach their conclusions follow.

POWER TO REVOKE VERSUS RIGHT TO REVOKE

Several courts have spoken in terms of power to revoke versus right to revoke, admitting the power of the owner to revoke the agreement, but claiming that he had no right to do so, in that the employment contract was broken.¹³ Professor Mechem is quoted as follows:

[T]he principal always has the power to revoke: but not . . . the right to do so in those cases wherein he has agreed not to exercise his power during a certain period . . . the authority may be withdrawn at any moment, but the *contract* of employment cannot be terminated in violation of its terms, without making the principal liable in damages.¹⁴

This statement then *presupposes* a contract, a binding agreement. Later statements by Professor Mechem concerning the necessity of contract in the broker-owner relationship make this even more clear:

[T]he principal may agree—for a *sufficient consideration*—that, during a stated period, he will not sell except through the broker, or that the broker shall have his commission whoever makes the sale. . . .¹⁵

Therefore, it is submitted that the courts that apply the power versus right to revoke rules have begged the question of whether a contract exists at all or not. Unless the owner for a consideration has contracted away his right to revoke, he may do so at any time.¹⁶ A contract, then, has still to be found.

PROMISE TO PROCURE AND PROMISE TO TRY TO PROCURE

It is true that the possible harshness of the rule allowing revocation of offers for unilateral contracts at any time is the basis for a rule of law which would construe such offers and assents as bilateral, and therefore, as contracts, if at all feasible.¹⁷ Few brokers would agree that they have promised to find a purchaser in return for the owner's promise to pay a commission, not wishing to risk a suit for damages for not finding a buyer.¹⁸ Most brokers, however, would agree that they have promised to *try* to find a purchaser. Some courts have considered such promise to be

¹³ E.g., *Geyler v. Dailey*, 70 Ariz. 135, 217 P. 2d 583 (1950) where the broker found a purchaser on the day after revocation; *Ferguson v. Bovee*, 239 Iowa 775, 32 N.W. 2d 924 (1948); *Isern v. Gordon*, 127 Kan. 296, 273 Pac. 435 (1929) where nominal consideration was given, but not relied on.

¹⁴ 1 Mechem on Agency § 568 (2d ed., 1914) (*italics added*).

¹⁵ 2 Mechem on Agency § 2445 (2d ed., 1914) (*italics added*).

¹⁶ 1 Mechem on Agency § 563, 565, 566 (2d ed., 1914).

¹⁷ Rest., Contracts § 31 (1932).

¹⁸ 2 Mechem on Agency § 2429 (2d ed., 1914). No case has been found where the broker promised specifically to find a purchaser.

part of the consideration requiring that the broker keep the offer open or be guilty of breach of contract.¹⁹ The courts do not rely, however, on the promise to try exclusively. In *Jones v. Hollander* it is stated that: "the consideration is the agreement of the broker to try to obtain a purchaser and his actual efforts in that regard. . . ."²⁰

The promise to try is subject to the objection that it is too vague, and therefore, void.²¹ However, in *Wood v. Lucy, Lady Duff-Gordon*, a promise to use reasonable efforts was implied and upheld, as being proper.²² A federal court in New York was faced with a situation wherein the defendant had given plaintiff the exclusive right to sell its wholly owned subsidiary.²³ Defendant then sold the business himself prior to revoking plaintiff's authority, and plaintiff sued for a commission. In finding the agreement to be bilateral, the court cited the *Lucy* case and stated that: ". . . Braxton's promise to work intensively, since a speedy sale was desired, and to handle the matter with the utmost discretion may be fairly implied."²⁴

But, is it to be supposed that the owner's promise to keep the offer open was "bargained for and given in exchange" for the broker's promise to use "efforts" to sell? If the broker were to list the property at all, his efforts would be a foregone conclusion if he hoped to earn a commission. No real element of bargaining appears—the owner simply holds out a prize for the broker to take or not, as he is able or chooses. There has been no case reported where the owner has recovered damages for the broker's *inactivity*. The broker's degree of activity is of relatively little importance to the owner. The only thing that matters to the owner is the production of a buyer who is ready, willing and able to meet the owner's terms of sale. If the broker could do this without getting out of his chair or lifting a telephone, the owner would be satisfied.

However, if the broker did refuse to attempt to sell the property except on the condition that he be given an exclusive right to sell, and the owner, because he wanted this *particular* broker to sell the property, gave the broker this right, the owner might properly be said to have bargained for the broker's efforts, and hence be bound by his agreement to keep the offer open.²⁵ This probably is not the usual case. Most businessmen do not so easily turn away a possible client.

¹⁹ *Piper v. Wells*, 175 Md. 326, 2 A. 2d 28 (1938); *Melzner v. Toman*, 57 N.D. 639, 223 N.W. 691 (1929); *Jones v. Hollander*, 3 N.J.M. 973, 130 Atl. 451 (1925).

²⁰ 3 N.J.M. 973, 130 Atl. 451, 452 (1925).

²¹ Rest., Contracts § 32 (1932).

²² 222 N.Y. 88, 118 N.E. 214 (1917).

²³ *Hammond v. C.I.T. Financial Corp.*, 203 F. 2d, 705 (C.A. 2d, 1953).

²⁴ *Ibid.*, at 708.

²⁵ 2 Mechem on Agency § 2453 (2d ed., 1914). This rationale has not been found in any reported case.

THE PART PERFORMANCE THEORY

The most popular method, however, of protecting the broker's commission under an "exclusive" agreement involves section 45 of the *Restatement of Contracts*.²⁶ Here it is admitted that the agreement was unilateral to begin with, but by "part performance" the broker is said to accept the owner's offer for a unilateral contract, rendering the agreement bilateral and hence irrevocable.²⁷

Baumgartner v. Meek, a California decision which followed this theory, quoted section 45 and disposed of the contention that there was no consideration to support the contract by stating that it was to be found in the services to be performed by the broker.²⁸ An Ohio statute referring to unilateral contracts was as follows:

The contract does not come into existence until one party to it has done *all that is necessary* on his part; it is performance by one party which makes obligatory the promise of the other.²⁹

The court's interpretation follows:

Conceding that at the time the contract was signed and accepted it was a mere *nudum pactum*, when the plaintiff exerted her efforts to find a purchaser for the property, consideration was supplied.³⁰

Apparently the statute was taken as meaning "part performance," not "performance" as it stated. Advertising, phone calls, and showing the property to prospective purchasers, then, are said to constitute part performance. Theoretically at least, this is not part performance of the act of producing a purchaser, because purchasers do not come in parts—one is either found, whole and entire, or he is not. Efforts to find one are mere preparations to the performance of the act of producing the purchaser.

What is tendered must be part of the actual performance requested in order to preclude revocation under this Section [45]. Beginning preparations though they may be *essential* to carrying out the contract or to accepting the offer is not enough.³¹

²⁶ Rest., Contracts § 45 (1932). If "part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract." For an excellent criticism of this doctrine see Anderson, *Mutual Assent in Unilateral Contracts*, 1 DeP. L.R. 167 (1952).

²⁷ E.g., *Baumgartner v. Meek*, 126 Cal. App. 2d 505, 272 P. 2d 552 (1954); *Harry H. Rosin Co. v. Eksterowicz*, 45 Del. 314, 73 A. 2d 648 (1950); *Hutchinson v. Dobson-Bainbridge Realty Co.*, 31 Tenn. App. 490, 217 S.W. 2d 6 (1946).

²⁸ 126 Cal. App. 2d 505, 272 P. 2d 552 (1954).

²⁹ 9 Ohio Juris. 239, § 5.

³⁰ *Bell v. Dimmerling*, 149 Ohio St. 165, 78 N.E. 2d 49 (1948).

³¹ Rest., Contracts § 45, Comment a (1932) (*italics added*).

Most conclusive is the fact that the owner did not promise to reward efforts, but *only* performance, though the efforts might have been in some way foreseeable.

PROMISSORY ESTOPPEL

The theory of promissory estoppel, which does away with the necessity of consideration, is stated as follows:

A promise which the promisor should reasonably expect to induce action of a definite and substantial character upon the part of the promisee and which does induce such action, is binding, if injustice can be avoided only by enforcement of the promise.³²

In *Richter v. First Nat. Bank of Cincinnati* it was said that "whether consideration existed upon the making of the promise would be important if an action for breach of one or the other had been instituted before the parties had acted upon the promise. . . ."³³ The broker had an exclusive right to sell several lots, had sold all but the last, which the owner sold, without notice to the broker, on his own. In allowing recovery of the commission, the court mentioned promissory estoppel and went on to state:

To now limit his commission to such sales only as he initiated and carried to fulfillment would operate as an injustice to him.³⁴

Justice to the owner was not discussed.

A Missouri court, in a situation where an owner had granted an exclusive right to sell and then had sold the property during that period, to a buyer of his own finding, stated:

While the Agreement did not expressly bind plaintiffs [broker] to do anything at all and plaintiffs had no interest in the subject matter of the agency, plaintiffs, it may be inferred, listed the property and . . . *acted* [court's italics] in the endeavor to procure a purchaser, spending considerable time and money . . . upon the performance of these stipulated acts in *reliance* upon the defendants' *promise* the Agreement became a bilateral one and binding upon the defendants.³⁵

This court then does not specifically adopt the doctrine, but the rationale is present, and in some degree controlling.

This analysis, like others, is subject to the criticism that the owner promised only to reward success, not efforts, and that the nature of a uni-

³² Rest., Contracts § 90 (1932).

³³ 82 Ohio App. 421, 80 N.E. 2d 243, 245, 246 (1947).

³⁴ *Ibid.*, at 246.

³⁵ *Chamberlain v. Grisham*, 360 Mo. App. 655, 230 S.W. 2d 721, 723 (1950) (italics added).

lateral contract is such that certain things must be done preparatory to acceptance. All this is within the contemplation of the parties at the time of the offer and efforts to accept are entered into with the realization that they might fail, in the ordinary course of business. The section 90, *Restatement of Contracts* (quoted above), version of the doctrine has had only slight usage as the actual basis for decision among the courts of last resort of the commercial states.³⁶

SPECIFIC JURISDICTIONS

In *Hutchinson v. Dobson-Bainbridge Realty Co.*,³⁷ a Tennessee appellate court adopted the "part performance" rationale in a decision which was mentioned by many other courts.³⁸ A few year later, in *Hood v. Gillespie*, the court allowed a seller, under an exclusive agency agreement, to withdraw his property from sale without liability.³⁹ Apparently the fact that the owner had not agreed not to take the land off the market was controlling. The broker's "part performance" availed him nothing. Then, in *Jenkins v. Vaughan*, the Tennessee Supreme Court refused a commission to a broker where the owner had sold the property himself during the exclusive period.⁴⁰ The basis for this decision was that the broker's efforts had been insufficient to warrant a commission. The court acknowledged the rule of the *Hutchinson* case, but stated:

The reason for the rule is avoidance of hardship to a broker, who has spent time and money in an effort to sell and may have created a market or stimulated a demand for the property.⁴¹

Tennessee, then, would weigh the efforts of the broker, determining whether they constitute "part performance" or not. This is not a very certain rule at best, and seems more equitable than legal.

New York, according to decision and dictum in the lower courts, is committed to the rule that when an exclusive right to sell has been given, the owner may not revoke without becoming liable for a commission.⁴² Two very early cases are relied on as having established this rule. The first was *Moses v. Bierling* which stated the rule as follows:

³⁶ Restatement in the Courts § 90 (1945) (supplemented by later editions in 1949 and 1954).

³⁷ 31 Tenn. App. 490, 217 S.W. 2d 552 (1954).

³⁸ E.g., *Harry H. Rosin Co. v. Eksterowicz*, 45 Del. 314, 73 A. 2d 648 (1950); *McManus v. Newcomb*, 61 A. 2d 36 (D.C. Munic. App., 1948).

³⁹ 190 Tenn. 548, 230 S.W. 2d 997 (1950).

⁴⁰ 197 Tenn. 578, 276 S.W. 2d 732 (1955).

⁴¹ *Ibid.*, at 733.

⁴² *Gaillard Realty Co., Inc. v. Rogers Wire Works, Inc.*, 215 App. Div. 326, 213 N.Y. Supp. 616 (1926); *Levy v. Isaacs*, 285 App. Div. 1170, 140 N.Y.S. 2d 519 (1955), appeal denied 143 N.Y.S. 2d 642 (1955) (dictum); *Werner v. Eurich*, 263 App. Div. 744, 31 N.Y.S. 2d 233 (1941) (dictum).

... [W]hen one of the contracting parties prevents or waives the literal performance of a condition precedent, which the other is ready and offers to fulfill, he cannot avail himself of such non-performance to relieve him from his own obligation.

A broker, employed to make a sale, under an agreement for the exclusion of all other agencies, is entitled to his commissions when he produces a party ready to make the purchase at a satisfactory price. . . .⁴³

In that case the owner had sold four thousand muskets through another agent, and had, therefore, refused to sell to the buyer found by the plaintiff. The other case, *Levy v. Rothe*, involved a situation where consideration had been paid for a sole agency, the owner sold his own property, and the broker recovered a commission.⁴⁴

In the *Moses* case it appears that the broker probably found a buyer prior to the revocation of his authority, in which case, he was obviously entitled to his commission. Were the buyer found after revocation, the result perhaps would have differed. The offer, in the *Levy* case, was given for consideration and therefore binding. These two cases then are not entitled to their position as establishing a rule allowing the broker to recover when the owner sells the property himself under the usual "exclusive right to sell" agreement.

Ohio courts have arrived at decisions applying proper theory,⁴⁵ promissory estoppel,⁴⁶ and the part performance theory.⁴⁷ Pennsylvania courts have allowed the broker a commission where the owner sold the property himself during the exclusive agency, or right to sell period.⁴⁸ Various other courts have allowed the broker to recover a commission with no discussion of the lack of consideration being given for the owner's promise to keep the offer open.⁴⁹

Some jurisdictions have allowed revocation, but have allowed the broker to recover on a *quantum meruit* basis.⁵⁰ This view is criticized in

⁴³ 31 N.Y. 462, 464 (1865).

⁴⁴ 17 Misc. 402, 39 N.Y. Supp. 1057 (1896).

⁴⁵ *Davis v. Hora*, 63 N.E. 2d 843 (Ohio App., 1944).

⁴⁶ *Richter v. First Nat. Bank of Cincinnati*, 82 Ohio App. 421, 80 N.E. 2d 243 (1947).

⁴⁷ *Bell v. Dimmerling*, 149 Ohio St. 165, 78 N.E. 2d 49 (1948).

⁴⁸ *Byrne v. Bushkoff*, 177 Pa. Super. 101, 110 A. 2d 813 (1955) "exclusive right to sell"; *John Whiteman & Co. v. Fidei*, 176 Pa. Super. 142, 106 A. 2d 644 (1954); *Werner v. Hindle*, 129 Pa. Super. 137, 194 Atl. 754 (1937) exclusive agency.

⁴⁹ *Piatt & Heath Co. v. Wilmer*, 87 Mont. 382, 288 Pac. 1021 (1930); *Melzner v. Toman*, 57 N.D. 639, 223 N.W. 691 (1929); *Torrey & Dean, Inc. v. Coyle*, 138 Ore. 509, 7 P. 2d 260 (1932); *Holmes v. Halik*, 238 S.W. 2d 260 (Tex. Civ. App., 1951) which quoted *Bell v. Dimmerling*, 149 Ohio St. 165, 78 N.E. 2d 49 (1948) at length.

⁵⁰ *Geyler v. Dailey*, 70 Ariz. 135, 217 P. 2d 583 (1950) where the commission was allowed because broker found a buyer the day after the revocation; *Ferguson v. Bovee*, 239 Iowa 775, 32 N.W. 2d 924 (1948). See *Nicholson v. Alderson*, 347 Ill. App. 496, 107 N.E. 2d 39 (1952).

John T. Burns & Sons, Inc. v. Brasco where it was stated that whatever the owner promised, he did not promise to pay the broker the fair value of his services, nor did he get anything of value for those services.⁵¹ Either the owner was liable for a commission or he was not liable at all. Allowing recovery on a *quantum meruit* basis is prompted by sympathy for the broker, and not legal theory.

In 1952, an Illinois court, in *Nicholson v. Alderson*, followed proper legal theory and refused to grant a broker a commission, where the owner sold his property after written notice of revocation during the exclusive period, no consideration being given for the exclusive by the broker.⁵² Earlier decisions were less astute. In *Schwartz v. Akerland* (1926) a broker was allowed to recover a commission where the owner had sold the property through another broker during the exclusive agency period.⁵³ The broker's advertisement was held to be consideration for the promise to keep the offer open. *Wozniak v. Siegle*, four years earlier, did not allow a commission in a similar situation.⁵⁴ In 1911, in *Pretzel v. Anderson*, a broker was refused a commission under an exclusive agency agreement where he found a purchaser within the period, but after revocation by the owner.⁵⁵ The court stated:

The contract is not under seal, and was not paid for when given. It is unilateral, it is maintained, and without consideration—a *nudum pactum*, liable to be revoked at will . . . [as to contentions that advertising, etc. constituted consideration, it was said] we do not think, however, this a consideration which makes the agency irrevocable either generally or for any time specified therein.⁵⁶

CONCLUSION

About forty years ago, a New Jersey court, in allowing a broker to recover in a situation similar to that discussed here, claimed that the governing rule was a "doctrine of public policy intended to effectuate justice between the parties."⁵⁷ This statement explains all the twisting and turning done to allow the broker a commission, but does not explain the necessity for overthrowing the common-law rule requiring consideration for a promise in order to make it binding. That rule, too, has for its basis the intention to "effectuate justice between the parties." Consider the mortgagor, in 1954, pressed to meet payments, who decided to sell his property, giving a broker an exclusive right to sell for no consideration.⁵⁸ Two

⁵¹ 327 Mass. 261, 98 N.E. 2d 262 (1951).

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

⁵³ 240 Ill. App. 480 (1926).

⁵⁴ 226 Ill. App. 619 (1922).

⁵⁵ 162 Ill. App. 538 (1911).

⁵⁶ *Ibid.*, at 541.

⁵⁷ *Stevenson Co. v. Oppenheimer*, 91 N.J.L. 479, 104 Atl. 88 (1918).

⁵⁸ *John Whiteman & Co. v. Fidei*, 176 Pa. Super. 142, 106 A. 2d 644 (1954).

months later when the broker had not yet sold the property, this mortgagor, under threat of foreclosure, reconveyed to the mortgagee. This was held to constitute a sale within contemplation of the parties, and the mortgagor-seller had to pay a commission though he had received no consideration for his irrevocable offer. Suffice to say, the equities are not always with the broker. A resurgence of the doctrine of consideration to render a promise binding might better "effectuate justice between the parties."

The basic fallacy in this area is the supposition that the owner bargained for the broker's efforts, or that these efforts constitute an acceptance of the owner's offer. It is submitted that this is contrary to the agreement, and to the owner's promise, which would reward only success, regardless of verbiage about "services." "The acceptance of a unilateral contract must be by all the acts contemplated by the offer."⁵⁹

⁵⁹ *Bartlett v. Keith*, 325 Mass. 265, 90 N.E. 2d 308, 310 (1950).

MATTER OF TOTTEN—AN ANOMALY IN THE LAW OF TRUSTS

The term Totten Trust¹ is a familiar one.² A comprehension of the meaning of the term exists in the minds of the majority of lawyers to varying degrees. Yet, the very danger of the Totten Trust lies in this vague familiarity which leads to various misconceptions.

Many lawyers feel that the Totten Trust is the law throughout the land, and that it is certainly the law in their particular jurisdiction, though the question may never have been litigated. There are those who accept it as a valid trust without question, completely overlooking its transgression of many of the settled concepts of trust law. Oftentimes, bank accounts for more than a single person are indiscriminately labeled as Totten Trusts.³

The purpose of this discussion is to dispel the misunderstandings and doubts concerning the Totten Trust. The analysis of this anomaly⁴ in the

¹ *Matter of Totten*, 179 N.Y. 112, 71 N.E. 748 (1904).

² The Totten Trust is often referred to as a "tentative trust" also.

³ See footnote 30 for a treatment of the problem.

⁴ In 1905 the case *Matter of Totten* was thought to be judicial legislation. For example, one author said:

"This decision has been widely commented upon by legal journals and, so far as the writer is aware, has been unanimously disapproved. It is inconsistent with earlier authorities in the State of New York. It introduces a serious anomaly into the law of trusts; indeed, a trust that is revocable at the will of the creator can hardly be said to be a trust at all. It impugns the policy of the statute of wills, by permitting a disposition of property to take effect only after death, without following the testamentary requirements. On the other hand, as a piece of constructive legislation the decision could hardly be too highly praised. It effectuates a custom which has grown up among the hum-