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IN GENERAL: LICENSES, REGULATION AND EMPLOYMENT OF BROKERS

THE REQUIREMENT OF A LICENSE

CHAPTER 114½ of the Illinois Revised Statutes, the act regulating real estate brokers and salesmen, requires that anyone acting as a real estate broker must register with the Illinois Department of Registration and Education and obtain a certificate of registration therefrom.¹ Moreover, in some areas, the broker incurs the additional responsibility of procuring a license from the municipality in which he carries on his brokerage activities.²

The statute defines a real estate broker as:

... any person, association, co-partnership or corporation, who for a . . . valuable consideration sells or offers to sell, buys or offers to buy, or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, rents or offers to rent, any real estate or negotiates leases thereof, or of the improvements thereon for another or others.³

Exempted from the act are those who perform the above mentioned services with regard to their own property, or who act as attorneys-in-fact under power of attorney from an owner authorizing final consummation by the performance of any contract of sale, lease or exchange of real estate. Also excepted are those acting as attorneys-at-law, receivers, trustees in bankruptcy, administrators or executors, those selling real estate under order of court, trustees under trust agreements or deeds in trust, or regularly salaried employees thereof.⁴

By virtue of the act, the real estate broker is precluded from bringing any action for the purpose of recovering compensation for his services, unless, prior to the time he offered to perform such services or procured a promise for compensation, he was duly registered under the act.⁵

¹ Ill. Rev. Stat. ch. 114½, § 1 (1963), states: "It is unlawful for any person to act as a real estate broker or real estate salesman, or to advertise or to assume to act as such real estate broker or real estate salesman, without a certificate of registration issued by the Department of Registration and Education. . . ."

² For a discussion of the relationship between the Illinois statute governing real estate brokers and municipal ordinances in the same area, see Kneier, *Licensing By Local Government*, 1957 U. Ill. L.F. 8.

³ Ill. Rev. Stat. ch. 114½, § 2 (1963).

⁴ *Ibid.*

⁵ Ill. Rev. Stat. ch. 114½, § 2(b) (1963).

Although there seems to be no set rule for determining exactly how many transactions a person must conduct in order to be classified as a real estate broker, it appears well settled that a single isolated sale is not sufficient.⁶ In *O'Neill v. Sinclair*,⁷ the Illinois Supreme Court held that a single sale did not make a hardware dealer a real estate broker within the meaning of a municipal ordinance which defined a real estate broker as one “. . . engaged in selling or negotiating sales of real estate belonging to others.”

One who intends to pursue the occupation of a real estate broker should be extremely careful that he performs no acts as a real estate broker until he has in his possession a certificate of registration from the State of Illinois. In *Cooper v. Schoeberlein*,⁸ a real estate broker, before rendering any services as such, applied for a certificate of registration; however, his application was not approved until after the entire transaction for which he claimed compensation had been concluded. In holding that the mere application for a certificate is not tantamount to registration, the court said:

In order for a real estate broker to recover commissions, he must have a formal certificate required by the state, at the time he performs the services for which he seeks compensation, unless for some cause connected with the administration of said Department of Registration and Education⁹

Of course, as the court indicated, if, through the fault of the State, the broker fails to receive his certificate at such time as he is required to be registered, he may still enforce his contract for a commission so long as his application has been approved by that time.¹⁰

⁶ *O'Neill v. Sinclair*, 153 Ill. 525, 39 N.E. 124 (1894); *First Nat'l Bank of Millstadt v. Freant*, 7 Ill. App. 2d 204, 129 N.E.2d 276 (4th Dist. 1955); *Packer v. Sheppard*, 127 Ill. App. 598 (1st Dist. 1906).

⁷ 153 Ill. 525, 39 N.E. 124 (1894).

⁸ 247 Ill. App. 147 (2d Dist. 1928).

⁹ *Id.* at 155.

¹⁰ *Lucas v. Adomatis*, 236 Ill. App. 254 (1st Dist. 1925), presents a case in which the broker's application for registration had been approved prior to the time he rendered any services, but, because of a lack of forms in the Department of Registration and Education, his certificate of registration was not received until after he had performed his services. The court held that the broker was entitled to his compensation, since all of his services had been performed after his registration had been approved, and, therefore, the broker had substantially complied with the law. (At the time of this decision and the decision in *Cooper v. Schoeberlein*, *supra* note 8, Ill. Rev. Stat. ch. 114½, § 2(b) [see note 15] had not yet become law, so it was necessary only that the broker be licensed during the time he rendered services.)

Although the statute¹¹ clearly requires that the broker be registered at the time he offers to perform his services or obtains the promise of compensation for such services, it gives no indication as to his rights in the event that his registration expires¹² subsequent to that time, but prior to the time he is to be paid. *Reed v. Young*¹³ and *Voellinger v. Kohl*,¹⁴ while decided before the act under consideration became law,¹⁵ indicate the probable outcome of such a situation under the present statute. In both cases, the broker was duly licensed at the inception of his contract of employment and throughout the period during which he rendered his services. In each case, the broker's license terminated before the sale, which his services had brought about, was consummated. In neither case did the broker engage in any activity pertinent to the sale after his license had expired. The courts held that it was sufficient that brokers were licensed during the time when they rendered their services; the fact that their registrations had expired prior to the actual closings, in which the brokers took no part, in no way affected their rights to compensation. Thus, it may be reasoned that today a broker must be registered both at the time set forth in the statute and throughout the time he is rendering his services.

Another situation not covered by the statute arises where a broker, duly registered by the State of Illinois, carries out a contract of employment made in a city or state in which he is not licensed, or transacts the sale of land situated in such a city or state. In *Frankel v. Allied Mills*,¹⁶ a broker, registered in Illinois, entered into a contract in New York to sell land in Illinois. At the time of the contract, New York had a statute which specifically prohibited anyone from operating as a real estate broker in that state, without first obtaining a license from one of its agencies. Moreover, the New York law denied the right to bring an action for compensation to anyone acting in violation of that statute. The Illinois Supreme

¹¹ Ill. Rev. Stat. ch. 114½, § 2(b) (1963).

¹² Ill. Rev. Stat. ch. 114½, § 6.01 (1963), requires that a real estate broker's registration must be renewed annually.

¹³ 146 Ill. App. 210 (1st Dist. 1909).

¹⁴ 261 Ill. App. 271 (4th Dist. 1931).

¹⁵ Ill. Rev. Stat. ch. 114½, § 2(b) (1963), which requires that a real estate broker be registered prior to the time he offers to perform his services or procures a promise for compensation, was added in 1947.

¹⁶ 369 Ill. 578, 17 N.E.2d 570 (1938).

Court, in refusing to allow the broker to recover on his contract, stated that when a statute declares an act to be unlawful, and imposes a penalty for its violation, a contract for the performance of that act is void. The court, relying upon conflict of laws principles, held that, since the contract was invalid where entered into, it could not be enforced in Illinois.

A situation slightly different from that in *Frankel* arose in *First Nat'l Bank of Millstadt v. Freant*,¹⁷ and resulted in a recovery for the broker. There, a broker, licensed under the statutes of Illinois and the Municipal Code of East St. Louis, brought about the sale of land situated in Bellville. The city of Bellville had an ordinance which required that a license fee be paid by any person carrying on business as a real estate broker in that city, and imposing a fine for its violation. It was the defendant's contention that the broker, having failed to pay the required fee, was not entitled to receive compensation for selling land within the city. The court, however, pointed out that such ordinances are aimed at licensing the broker's occupation, but that the location of the land sold by the broker is of no significance. The broker's single sale was insufficient to classify him as one doing business as a broker in Bellville, and the fact that the land was situated there had no effect upon his right to compensation. The court went on to say that, because there was nothing in the ordinance making it unlawful to operate as a real estate broker without a license from the city, a contract made in violation thereof would, nevertheless, be valid. Laws such as the one under consideration, which require no more than that a fee be paid, and imposing only a fine for their violation, are aimed at obtaining revenue rather than regulating an occupation. And the trend, said the court, is to limit the penalties for their violation to those provided by the laws themselves.

Together, *Frankel* and *Millstadt* seem to stand for the propositions that the Illinois courts will not enforce a real estate broker's contract of employment if it is invalid at the place where entered into; however, the courts of Illinois will enforce a real estate broker's employment contract, although the fulfillment of that contract may subject the broker to a fine, so long as there are no

¹⁷ 7 Ill. App. 2d 204, 129 N.E.2d 276 (4th Dist. 1955).

laws specifically invalidating the contract, as in *Frankel*, or so long as the law violated is not aimed directly at regulating the activities of real estate brokers. In no case will the location of the land to be dealt with by the broker be the determining factor in deciding whether or not he is conducting his brokerage business in a particular area.¹⁸

Although a broker is duly licensed under the statutes which govern his occupation, it sometimes happens that, while conducting his brokerage business, he violates other statutes. Such a situation arose in *Mickelson v. Kolb*.¹⁹ There, a broker, licensed under state and municipal statutes, carried on business in violation of an act making it unlawful to do business under an assumed name without first registering with the county clerk. The court held that the broker's contract for a commission in return for services rendered while violating the act was unenforceable, because a contract to do an illegal act is void. However, in a later case, *Grody v. Scalone*,²⁰ the Illinois Supreme Court held that the law requiring registry of fictitious names did not render invalid a contract to install a heating unit, although the law had not been complied with. The court, using the reasoning relied upon in the *Millstadt*²¹ case, pointed out that since the legislature provided within the act a penalty for its violation, the law makers intended such a penalty to be exclusive. The court went on to criticize the decision in *Mickelson* and held that while the violators of such statutes may be subjected to the penalties provided therein, contracts for acts which violate the statutes will not be affected.

It should be noted that in both *Grody* and *Millstadt* the courts looked upon the laws in question as revenue measures rather than attempts to regulate. Thus, violations of such acts had no relation

¹⁸ In *First Nat'l Bank of Millstadt v. Freant*, *id.* at 208, 129 N.E.2d at 278, the court pointed out that, while a single isolated sale of land in Bellville did not constitute doing business as a real estate broker there, a series of such transactions might well have brought the person conducting such transactions within the city's ordinance which licensed real estate brokers. For other cases similar to *Millstadt* on this point, see *O'Dea v. Thom*, 250 Ill. App. 577, 163 N.E. 390 (3d Dist. 1928), where a single act was held not to bring an Illinois broker within a foreign statute; *Egeland v. Scheffler*, 189 Ill. App. 426 (1st Dist. 1914), and *Cervenka v. Hunter*, 185 Ill. App. 547 (1st Dist. 1914), where the single acts of out of state brokers were held not to bring them within a Chicago ordinance.

¹⁹ 337 Ill. App. 493, 86 N.E.2d 152 (1st Dist. 1949).

²⁰ 408 Ill. 61, 96 N.E.2d 97 (1951).

²¹ *First Nat'l Bank of Millstadt v. Freant*, 7 Ill. App. 2d 204, 129 N.E.2d 276 (4th Dist. 1955).

to the contracts which were made. The same was true in the *Mickelson* case, since the rights and liabilities under the contract of employment of a real estate broker were wholly unrelated to the broker's registration under an assumed name statute.

It is interesting to note that while the statute denies the right to enforce contracts for compensation to brokers who are not duly registered,²² there seem to be no cases deciding what remedy, if any, is available to one who has paid compensation to such a broker.

In *Anderson v. Elliott*,²³ part of the relief sought was the return of a commission paid to an unlicensed real estate broker. The court, while agreeing with the plaintiff that an unlicensed agent has no right to recover compensation for procuring a purchaser for real estate, refused the plaintiff's request because he had failed to discuss the question as to whether or not such compensation, once paid, can be recovered. The court dismissed the complaint without pursuing the issue further.

CONTRACTS OF EMPLOYMENT

Although the statute of frauds in Illinois requires that any contract for the sale of land must be in writing,²⁴ it makes no such requirement with regard to real estate brokers' contracts of employment. However, any claim of compensation by a real estate broker must be based upon a contract, express or implied, with the person from whom the compensation is sought, or on ratification of the broker's acts by such person.²⁵

Even if the services rendered by a broker are beneficial to the property owner, unless the broker has a contract of employment with the owner, he is not entitled to any compensation. Thus, in *Forney v. LaSusa*,²⁶ a broker called upon a property owner, introduced himself as a broker and asked if the owner would be willing to sell. The owner replied that he would, if a certain price could be netted. The owner then supplied the broker with information about the property and allowed the broker to show it to prospec-

²² Ill. Rev. Stat. ch. 114½, § 2(b) (1963).

²³ 1 Ill. App. 2d 448, 117 N.E.2d 876 (1st Dist. 1954).

²⁴ Ill. Rev. Stat. ch. 50, § 2 (1963).

²⁵ 5 I.L.P., *Brokers* § 72 (1953).

²⁶ 8 Ill. App. 2d 555, 132 N.E.2d 55 (1st Dist. 1956).

tive buyers. The court held that, although the broker had procured a purchaser, he was not entitled to any commission from the owner. The court pointed out that at no time did the owner express a willingness to pay the broker a commission, nor did the broker ever lead the owner to believe that he expected to be paid by him.²⁷ In *Churchill v. Richards*,²⁸ the defendant wrote to the plaintiff, a real estate broker, and asked if he knew of anyone who would be willing to trade land for a stock of merchandise. The broker replied that he did, and introduced the defendant to a third party. The defendant and the third party failed to consummate a sale; however, the third party, also a real estate broker, found a buyer for the defendant's goods. The plaintiff then sued, claiming that he was entitled to a commission from the defendant. The court held that a broker seeking a commission must show that he was employed by the person from whom the commission is sought. But in this case, the defendant's letter to the plaintiff was merely an inquiry as to whether the plaintiff represented someone who might be interested in a trade with the defendant. Thus, the plaintiff had no contract with the defendant to procure a trade for the defendant's goods. In *Turek v. Opava*,²⁹ the plaintiff, a broker employed by a third party who was in the market for real estate, approached the defendant and began negotiating on behalf of his employer for the defendant's land. Subsequently, a sale was consummated between the third party and the defendant, and the plaintiff brought an action against the defendant for a commission. The court, in holding for the defendant, stated that where one acting for another desiring to purchase land approaches the owner and negotiates for a purchase, no contract will be implied on the part of the owner to pay the broker for his services. The broker must have been employed by the one from whom the compensation is sought.³⁰

Ordinarily, the broker's contract of employment arises out of express words. However, no particular words or form are necessary in order to create a contract of employment between a broker and his principal, so long as the broker acts with the consent of his

²⁷ *Bunn v. Smith*, 190 Ill. App. 530 (3d Dist. 1914), held to the same effect on an almost identical set of facts.

²⁸ 163 Ill. App. 500 (3d Dist. 1911).

²⁹ 192 Ill. App. 270 (1st Dist. 1915).

³⁰ For a holding to the same effect, see *Day v. Hale*, 50 Ill. App. 115 (1st Dist. 1892).

principal.³¹ Such consent was manifested through words in *Kelley v. Martin*.³² There the principal hesitated to consummate the sale because the broker demanded a commission of 5%, but later told the broker to "go ahead," the court held that the principal had assented to a contract of employment for a 5% commission. In *Greenwald v. Marcus*,³³ the seller requested that the broker find a buyer at a certain price. The court held that the seller's request and the broker's acceptance had created a contract of employment. And in *Purgett v. Weinrank*,³⁴ the broker asked the vendor, ". . . what will you take for your farm . . . and let me sell it for you?" The vendor answered that he would take \$200 an acre. Later the broker informed the vendor that he had placed an advertisement for the sale of his farm in a local newspaper. The vendor replied, "All right." It was held that the words of the vendor were sufficient to show his consent to the broker's agency.

In some cases, acts accompanying a seller's words have been instrumental in evidencing his consent to a broker's employment. For example, in *Korman v. Wanen Catalpa Apartments, Inc.*,³⁵ the broker had a conversation with the defendant regarding the sale of the latter's apartment building, and agreed to accept a flat commission in the event that he should procure a buyer. Although there seemed to be some conflict as to exactly what was said at that time, there was substantial evidence that the defendant subsequently arranged with the janitor of the building so that the broker could show it to prospective purchasers. Further evidence showed that on two occasions the defendant set up meetings with his lawyer and prospective purchasers sent by the broker. The court, in granting a recovery to the broker, stated that no particular words are required for a contract employing a real estate broker to procure a purchaser for realty, and ordinarily all that is necessary is that the broker act with the consent of the owner of the property. In this case, the actions of the owner toward the broker and those

³¹ *Korman v. Wanen Catalpa Apartments, Inc.*, 20 Ill. App. 2d 598, 156 N.E.2d 621 (1st Dist. 1959); *Read v. Tate*, 20 Ill. App. 2d 147, 155 N.E.2d 337 (3d Dist. 1959); *Doss v. Kirk*, 8 Ill. App. 2d 536, 132 N.E.2d 49 (4th Dist. 1956); *Purgett v. Weinrank*, 219 Ill. App. 28 (2d Dist. 1920).

³² 169 Ill. App. 92 (4th Dist. 1912).

³³ 3 Ill. App. 2d 495, 123 N.E.2d 49 (1st Dist. 1954).

³⁴ 219 Ill. App. 28 (2d Dist. 1920).

³⁵ 20 Ill. App. 2d 598, 156 N.E.2d 621 (1st Dist. 1959).

whom he procured as prospects was sufficient to show that the broker acted with the consent of the owner. In *Doss v. Kirk*,³⁶ the broker was showing property to the defendants when one of them asked the broker whether he had anyone interested in their house. The defendant told the broker that if he had anybody who would give \$16,000, to let them look at it. Subsequently, the broker showed the defendant's house with the consent of the defendants. When the house was finally sold at \$12,500 to a buyer procured by the broker, one of the defenses raised against the broker's claim for a commission was that he had no contract of employment. The court answered this contention by referring to the words of the defendant and by pointing out that the broker was allowed to show the house to prospective purchasers with the consent of the defendants. The court felt that the words and actions of the defendants left no doubt that they had placed their property for sale with the broker.³⁷

Of course, the words and acts of the parties do not always warrant a finding that a contract of employment has been created. For example, in *Whiston v. David Mayer Bldg. Corp.*,³⁸ a broker was approached by a third party who desired to find property for rent. The broker then called the defendant, who had such property, and told him of the prospective lessee. The broker also stated that he wished to represent the defendant in the transaction. The defendant, while he did not expressly accept the broker's offer of representation, did allow the broker to bring the prospect to his office for exploratory negotiations. The parties failed to reach any agreement at that meeting. The broker, however, continued to pursue a deal between the parties, but the evidence indicated that both parties ignored his efforts. There was evidence which specifically showed that the broker placed several calls to the defendant, but that the defendant never returned his calls. When the parties did ultimately consummate a lease, the broker sued the defendant for a commission. The court held that the broker could not recover, because he had failed to show that there was any contract of employment between the defendant and himself. While the broker

³⁶ 8 Ill. App. 2d 536, 132 N.E.2d 49 (4th Dist. 1956).

³⁷ For similar cases, see: *O'Dea v. Throm*, 250 Ill. App. 577 (3d Dist. 1928); *Knight v. Knight*, 142 Ill. App. 62 (1st Dist. 1908).

³⁸ 337 Ill. App. 67, 84 N.E.2d 858 (1st Dist. 1949).

had offered to represent the defendant, his offer was never expressly accepted. Although the defendant allowed the broker to take part in one discussion regarding the lease, that was not evidence that the defendant accepted the broker's offer. There was no evidence that the broker represented the defendant in that discussion. Thus, not even an implied contract could be created from the facts in this case.

In *Lazerus v. McCann-Erickson, Inc.*,³⁹ the plaintiff, a broker, was hired by a tenant of the defendant to find a sublessee. Another of the defendant's lessees agreed to sub-lease the premises in question on the condition that he could be assured that he would be able to continue to rent the sub-leased premises until the expiration of the lease under which he held other parts of the premises. This condition was required because the lease of the sub-lessor was due to terminate nineteen months before that which the prospective sub-lessee held on other parts of the premises. The broker got the defendant landlord to grant the sub-lessee an option to rent the sub-leased premises at the expiration of the sub-lessor's lease, and the sub-lease was consummated. After collecting a commission for finding a lessee for the sub-lessor, the broker brought an action for compensation from the defendant landlord on the theory that he had procured a tenant for the defendant who would rent the sub-leased premises for nineteen months after the termination of the sub-lease. The broker contended that, because he had done work for the defendant on prior occasions, he was recognized as the defendant's broker and, therefore, a contract of employment between the defendant and himself was to be implied. The court, however, did not accept any of the broker's contentions. It first pointed out that the mere fact that the broker had acted for the defendant on some prior occasion constituted no ground upon which to infer that he represented the defendant in the present transaction. Secondly, the court held that the broker had in no way acted on behalf of the defendant. The broker merely sought the aid of the defendant in order to carry out his contract with the sub-lessor. The court concluded by stating that the option given by the defendant was not a benefit to him, but was given for the accommodation of the broker's client.

³⁹ 349 Ill. App. 111, 109, N.E.2d 923 (1st Dist. 1953).

As the *Forney* case, referred to previously,⁴⁰ indicates, a mere volunteer, whose services as broker have not been requested, is not entitled to any compensation.⁴¹ There is, however, an exception to this rule. If, by some action, the property owner ratifies the broker's agency,⁴² or accepts the benefit of the broker's efforts,⁴³ the courts will imply a contract of employment between the parties. In *Knotts v. Lake Shore & Mich. Southern Ry. Co.*,⁴⁴ a broker went to the defendant and inquired if he would be willing to sell his property to a certain corporation. The broker also asked if he might represent the defendant, since the buyer would not pay a commission. The defendant did not object to such an arrangement, but instead, aided the broker in bringing about negotiations. After the sale had been completed, the defendant refused to pay the broker, contending that the broker had no contract of employment. The court, in holding in favor of the broker, said:

. . . While a mere volunteer cannot recover compensation for services rendered without a contract of employment, or rendered in spite of the refusal or against the wish and desire of the owner . . . yet where it appears that the owner knows that the alleged volunteer is a broker, that he is endeavoring to effect a sale to a prospective buyer and expects to receive compensation for his services if successful, and where it also appears that with such knowledge on the part of the owner, the broker was encouraged to aid in the sale, and led by the owner to believe that he would receive compensation, a contract to pay compensation will be implied, if the sale is thereafter consummated through the efforts of such broker. . . .⁴⁵

An implied contract of employment also arose through ratification of a broker's acts in *Carlson v. Marshall*.⁴⁶ There the plaintiff, a real estate broker, employed one King who had formerly been employed by Hart, another broker. King, while employed by the plaintiff, called upon the defendant who had listed property with Hart, and told the defendant that he was working for the plaintiff and attempting to secure a purchaser for the property.

40 *Forney v. LaSusa*, 8 Ill. App. 2d 555, 132 N.E.2d 55 (1st Dist. 1956), cited at n.26.

41 *Wilcox v. Andrews*, 150 Ill. App. 27 (1st Dist. 1909).

42 *Purgett v. Weinrank*, 219 Ill. App. 28 (2d Dist. 1920); *Vossler v. Earl*, 194 Ill. App. 522 (1st Dist. 1915), *aff'd*, 273 Ill. 367, 112 N.E. 687 (1916); *Knotts v. Lake Shore & Mich. Southern Ry. Co.*, 172 Ill. App. 550 (1st Dist. 1912).

43 *Stemm v. Gavin*, 255 Ill. 480, 99 N.E. 663 (1912); *Carlson v. Marshall*, 174 Ill. App. 438 (1st Dist. 1912).

44 172 Ill. App. 550 (1st Dist. 1912).

45 *Id.* at 555.

46 174 Ill. App. 438 (1st Dist. 1912).

Later, the plaintiff took Burkland, who ultimately bought the property, to the defendant and told the defendant that he would expect a commission if Burkland purchased the property. The court held that the plaintiff was entitled to a commission, and said that since the defendant knew that the plaintiff and King, his employee, were conducting negotiations with Burkland with the expectation that the defendant would pay the plaintiff for such services, by accepting such services he adopted their acts and became liable to pay plaintiff the usual and reasonable commission for such services.

*Stemm v. Gavin*⁴⁷ presents a case in which an implied contract resulted when the vendor accepted the benefits of a broker's efforts. There the defendant, an employee of the plaintiff, a real estate broker, fraudulently acquired the plaintiff's land, and sold it at a profit. In a suit for an accounting of the profits, the court awarded the money to the plaintiff, but compelled him to pay the costs expended by the defendant in procuring the deal. The court stated: ". . . If the complainants elected to take the benefit of the transaction, they ought to take it as it was made, and the fact that the \$200 was illegitimate and a charge to cover usury would not excuse them from paying it. . . ." ⁴⁸

Although Illinois law does not require that a broker's contract of employment be in writing, many such contracts are written. In cases where a writing is involved, the question generally is not whether or not a contract exists, but what the terms of the contract actually mean. Where a broker's employment contract is ambiguous, the court will construe its terms in order to ascertain the intent of the parties. As an aid in the construction process, the parties are allowed to present extrinsic evidence as to what was intended by them when the contract was conceived.⁴⁹ Naturally, when the contract presents no ambiguity, the courts will refuse to construe its terms.⁵⁰

⁴⁷ 255 Ill. 480, 99 N.E. 663 (1912).

⁴⁸ *Id.* at 487, 99 N.E. at 666.

⁴⁹ *Buttles v. Adkins*, 318 Ill. App. 24, 47 N.E.2d 516 (4th Dist. 1943); *Gould v. Lewis*, 267 Ill. App. 569 (1st Dist. 1932).

⁵⁰ In *Matteson v. Walker*, 249 Ill. App. 404 (1st Dist. 1928), a broker's contract of employment provided that if for any reason the final sale fell through, no commission would be paid. The broker procured a buyer ready, able and willing to purchase, but his principal refused to sell. The court refused to grant a recovery to the broker on the

Typical of cases which require construction is *Gould v. Lewis*,⁵¹ where the principal agreed to pay the broker a specific sum from the "proceeds of the sale." The broker contended that "proceeds" meant anything received from the sale. It was the principal's theory, however, that "proceeds" meant any profit, and, since he had not made a profit on the sale, he owed the broker nothing. The appellate court ruled that because the word "proceeds" was susceptible to many meanings, its meaning in this case must be determined in the light of the circumstances surrounding the making of the contract. The case was, therefore, sent back to the lower court for a determination with the aid of such extrinsic evidence.

In *Topinka v. Wicena*,⁵² the contract of employment recited that the principal agreed to accept a price of \$14,000 "without commission." The broker, having procured a buyer who paid \$14,700, contended that the principal had agreed to pay him all consideration for the property in excess of \$14,000. It was the broker's contention that \$14,000 "without commission" meant that the principal agreed to net only that amount and pay the excess as a commission. The court, however, refused to accept the broker's theory. The court began by pointing out that an agent can never be antagonistic toward his principal and is, therefore, obliged to account to his principal for anything in excess of the principal's contemplated selling price. Moreover, the agent is duty bound to attempt to obtain the highest possible price for his principal's property. However, the court did not stop by holding that the broker was not entitled to the extra \$700, it went on to construe "without commission" to mean that the principal would not pay any commission and that the broker was obliged to look to the buyer for compensation.⁵³

ground that the contract clearly stated that "if for any reason" the deal fell through, no commission would be paid. The terms of the contract being clear, the court refused to construe any part of it.

⁵¹ 267 Ill. App. 569 (1st Dist. 1932).

⁵² 236 Ill. App. 607 (1st Dist. 1925).

⁵³ For cases in line with the principles set forth in *Topinka v. Wicena*, *supra* note 52, *Kerfoot v. Hyman*, 52 Ill. 512 (1869), where it was held that when a broker is given property to sell at a certain price and sells it for more, he must account to his principal for the excess; *Kellogg v. Keeler*, 27 Ill. App. 244 (1st Dist. 1888), which held that authorization for a broker to sell property at a stipulated price does not amount to an agreement on the part of the principal that the broker may keep anything above that sum; *Edwards v. Hamilton*, 168 Ill. App. 662 (3d Dist. 1921), where the court held that

Of course, the question as to whether a contract of employment exists also arises in cases where there is a writing involved. *First Nat'l Bank in Champaign v. Pace*,⁵⁴ is such a case. There a bank, as executor, sent to certain real estate brokers a letter stating that it was soliciting offers to purchase property which was part of an estate. Each letter admonished the broker that this was "not an exclusive listing with you." Penniger, a broker who had received such a letter, presented one Roth who made an offer to buy the property. Subsequently, Pace, another broker who had received one of the letters sent by the bank, appeared with Roth who, for no apparent reason, retracted his earlier offer and placed a higher bid for the property. Roth finally bought the property at a higher price, and both Penniger and Pace claimed the commission as the procuring cause of the sale. While there was no question that Penniger had procured a buyer ready, willing and able to purchase, the issue was whether he had a contract of employment with the bank. In the lower court it was held that the bank had no contract with Penniger or any other broker, but that it merely solicited them to submit offers. And, although the ultimate purchaser was procured by Penniger, the bank's acceptance of the purchaser's second offer, which was obtained by Pace, obligated the bank to pay the commission to Pace. The appellate court, however, reversed the trial court, and held that Penniger did have a contract of employment with the bank. The notice sent by the bank gave no indication that it was not to be considered a listing; if it was not to be a listing, the words "not an exclusive listing" would not have been added. The letters gave to each broker who received one a non-exclusive listing with authority to find a buyer ready, willing and able to purchase, for which a commission was to be paid. The appellate court held that Penniger had procured a buyer ready, willing and able to purchase, and his right to a commission was not defeated by the buyer's subsequent act of coming in with another broker and raising his bid.

regardless of how far the selling price may exceed the principal's asking price, the broker is only entitled to his stipulated commission, and where no commission is mentioned in his employment contract, the broker must account for all of the proceeds and take the prevailing commission.

⁵⁴ 35 Ill. App. 2d 390, 183 N.E.2d 35 (3d Dist. 1962).

THE REAL ESTATE BROKER'S AGENCY

The agency created by a real estate broker's contract of employment can fall into one of three categories: the open listing, the exclusive agency or the exclusive right to sell.⁵⁵

Where the open listing is used, the broker is employed to bring about whatever transaction his principal has contemplated, but there is nothing in the agency relationship which precludes the principal from bringing about the same transaction himself or from hiring other brokers to do so. In *Hunt v. Judd*,⁵⁶ the defendant had hired the plaintiff to find a buyer for a farm. A short time later, the plaintiff presented a prospect ready, able and willing to purchase on the defendant's terms. However, the defendant refused to go through with the sale because he had already agreed to sell to a party procured by another broker. The plaintiff brought an action, claiming that he was entitled to his commission for having fulfilled his contract of employment. The court, holding for the defendant, stated, "A contract of employment does not give the broker an exclusive agency or the exclusive right to negotiate a sale unless it is so specified in the contract of employment"⁵⁷ Here the contract of employment lacked any reference to an exclusive agency or an exclusive right to sell. Therefore, the defendant was entitled to hire as many brokers as he wished and was liable for a commission only to the first broker who procured a buyer. The plaintiff's agency was terminated at the time a buyer was presented by another broker, because such agencies automatically come to an end when the purpose for which they are created is accomplished.

An exclusive agency is created where the broker's contract of employment specifically gives him the right to bring about a transaction for his principal, exclusive of any other broker. The exclusive agency does not, however, preclude the principal from bringing about such a transaction on his own. In *Wozniak v. Siegle*,⁵⁸ the broker's contract of employment stated that he was to be the "exclusive agent" and provided that a commission would be paid if the property were sold either through the broker or "any other

⁵⁵ Kratovil, Real Estate Law §§ 162-166 (4th ed. 1964).

⁵⁶ 225 Ill. App. 395 (3d Dist. 1922).

⁵⁷ *Id.* at 397.

⁵⁸ 226 Ill. App. 619 (1st Dist. 1922).

person." After the property was sold by the principal, the broker brought an action for his commission on the ground that the words "any other person" applied to the principal as well as to other brokers. The court, however, held that the contract created only an exclusive agency, and, therefore, the principal had a right to bring about a sale on his own.

The exclusive right to sell, as its name implies, gives to the broker the right to procure a buyer exclusive of other brokers and of the principal.⁵⁹ In *Flynn v. LaSalle Nat'l Bank*,⁶⁰ the Illinois Supreme Court differentiated between the exclusive agency and the exclusive right to sell. There the court stated that where there is an exclusive agency, the owner is not precluded from selling property himself but is barred only from appointing other brokers. But with an exclusive right to sell, the owner is liable for a commission even if he sells the property on his own.⁶¹

DUAL AGENCY

Although the rule that one servant cannot serve two masters is as applicable to real estate brokers as to anyone else,⁶² there is an exception. This exception is operative where the broker is employed by both the buyer and the seller, with the full knowledge and consent of both, and acts in good faith toward both. In such a case the broker may collect a fee from each.⁶³ This exception is aptly illustrated by the case of *Field v. Ingersoll*.⁶⁴ There a broker was employed by the defendant to negotiate a trade for the de-

⁵⁹ The multiple listing, which is used frequently by today's real estate brokers, seems to be an offshoot of the exclusive right to sell. It is a method whereby a broker with an exclusive right to sell furnishes a copy to each member of a pool of brokers. If the property is sold by a member other than the original broker, the commission is split between the original broker and the selling broker. Of course there is no agency between the members of the pool and the principal and, therefore, only the original broker may sue the principal for a commission.

⁶⁰ 9 Ill. 2d 129, 37 N.E.2d 71 (1956).

⁶¹ The court was not compelled to decide which type of agency existed, since the party claiming a commission was not qualified to be a broker.

⁶² *Bunn v. Keach*, 214 Ill. 259 (1905), where a broker was precluded from recovering his commission from the seller because he was in the employ of the buyer without the knowledge and consent of the seller and showed a lack of good faith toward the seller during negotiations for the sale.

⁶³ *Field v. Ingersoll*, 228 Ill. App. 457 (2d Dist. 1923); *Goldstein v. Setka*, 195 Ill. App. 584 (1st Dist. 1915); *Madden v. Davis*, 192 Ill. App. 575 (1st Dist. 1915); *Johnson v. Kurzenknade*, 182 Ill. App. 459 (1st Dist. 1913); *Larson v. Shamberg*, 148 Ill. App. 80 (1st Dist. 1909).

⁶⁴ 228 Ill. App. 457 (2d Dist. 1923).

defendant's land. Subsequently, the other party to the trade sought to employ the broker to represent him in closing the deal. The broker declined this offer of employment until he had obtained the consent of the defendant. Then, acting with full knowledge and consent of both parties, the broker, on behalf of both parties, consummated the transaction. It was held that under such circumstances, the broker was entitled to recover compensation from the defendant as well as the other party to the trade.

R. PECK