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Volume 61 | Issue 4

Article 5

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June 1959

# The Broker's Exclusive Listing Contract--Unilateral or Bilateral

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## Recommended Citation

Alfred W. Meyer, *The Broker's Exclusive Listing Contract--Unilateral or Bilateral*, 61 W. Va. L. Rev. (1959).  
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## THE BROKER'S EXCLUSIVE LISTING CONTRACT— UNILATERAL OR BILATERAL?

ALFRED W. MEYER\*

MANY a contracts teacher has gleefully posed the flagpole or bridge hypothetical to bewildered first-year students, taunting them with the query "what result if the offeror revokes just as the climber (or the walker) is about to reach his destination?" The answer provided in 1932 by section 45 of the *Restatement of Contracts*,<sup>1</sup> the culmination of many years of scholarly debate,<sup>2</sup> may have been more the result of a desire to stop sadistic classroom practices than it was to provide a theory which would comfortably hold non-classroom decision-making.

At the root of the problem is the distinction drawn in English and American law between unilateral and bilateral contracts, a distinction which has necessitated a proliferation of auxiliary doctrine<sup>3</sup> in addition to that of section 45. Although the distinction has been examined and found wanting in persuasive scholarly writing,<sup>4</sup> it is by now so thoroughly ingrained in our case law that urging its abandonment seems rather futile. The task of legal research might better be one of analyzing specific case law areas to see what the

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<sup>1</sup> "If an offer for a unilateral contract is made, and 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, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time."

<sup>2</sup> The highlights of the academic debate beginning with Langdell's position that an offeror may revoke at any time prior to the complete performance of the act (LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS § 4 (2d ed. 1880)), are found in Ashby, *Offers Calling for a Consideration Other Than a Counter Promise*, 23 HARV. L. REV. 159 (1910); Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136 (1916); 1 WILLISTON, CONTRACTS § 60 (1920); McGovney, *Irrevocable Offers*, 27 HARV. L. REV. 644 (1914); FOLLOCK, PRINCIPLES OF CONTRACTS 26-27 (9th ed. 1921); Ballantine, *Acceptance of Offers for Unilateral Contracts by Partial Performance of Service Requested*, 5 MINN. L. REV. 94 (1921).

<sup>3</sup> Two of the more controversial sections of the *Restatement* are section 31 which states a presumption that an offer, in case of doubt, is to be taken as one seeking a bilateral contract and section 63 which provides that when an offer demands a promise it may be accepted by an act if the act is the performance of the promise and is completed by the time the promise should have been made. For criticism of these and other sections, see Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CALIF. L. REV. 441 (1929).

<sup>4</sup> "It is not courts' business to be looking for acts in contrast to promises, or for promises in contrast to acts. It is their business to be looking for overt expression of agreement—any overt expression of agreement." Llewellyn, *On Our Case—Law of Contract: Offer and Acceptance* (pts. I-II), 48 YALE L.J. 1, 779 (1938-39). A recent penetrating analysis of the distinction is found in Stoljar, *The False Distinction Between Bilateral and Unilateral Contracts*, 64 YALE L.J. 515 (1955).

## BROKER'S EXCLUSIVE LISTING CONTRACT 275

specific difficulties are and how they can best be solved within the existing unilateral-bilateral structure.

If prolific litigation is a symptom of theoretical disease, the area of real estate brokerage law cries for diagnosis and treatment. Professor Corbin attributes the immense amount of litigation in this area to two factors: (1) the feeling on the part of vendors and purchasers that the broker's commission is disproportionate to the services rendered; and (2) the vagueness of the contract provisions as to matters that become subjects of dispute.<sup>5</sup> The first factor finds support in the psychological reaction of the vendor who, at the time of listing his property with the broker, makes a quick calculation of the desired price, adds the amount of the broker's commission, and happily rests content with the arrangement. At the time of sale, however, the amount represented by 5% of the purchase price looms rather large in the thinking of both the seller and the buyer, each of whom considers the broker as receiving money that might have been his. The second factor, however, the vagueness of the contract provisions as to matters that become subjects of dispute, should find little support in the litigation involving professionally drafted listing contracts. These contracts are executed on printed forms which large law firms retained by the brokers' state or municipal organization have painstakingly drafted with an eye on the last appellate court decision. If vagueness is the cause of the litigation, it is not the vagueness which stems from the failure of the draftsman to anticipate the problems likely to arise. It is rather a vagueness as to the theory which an appellate court will use in applying the unilateral and bilateral law of consideration, acceptance, mutuality, conditions, etc. Perhaps this point can best be made by a comparison of three appellate court decisions of Michigan, Ohio and Indiana which involved constructions of strikingly similar exclusive listing contracts.

Michigan: *Pastras v. Oberlin*.<sup>6</sup> This case involved a form listing contract<sup>7</sup> which provided: "In consideration of your agreement to use your efforts to find a purchaser . . . I hereby grant to you the exclusive right for the term of 3 months . . . to sell the property . . . If, during such period, the property is sold by you or me or anyone else . . ., I agree to pay you a commission of

<sup>5</sup> 1 CORBIN, CONTRACTS § 50 (1950).

<sup>6</sup> 350 Mich. 183, 86 N.W.2d 264 (1957).

<sup>7</sup> The contract is not set out in the court's opinion. It is set out, however, in Brief for Appellant, pp. 3, 4.

10% . . . ." Both the broker and the owner signed the "agreement." While the broker was negotiating with a potential purchaser, the owner notified the broker that he was "withdrawing the property from sale." The broker subsequently, but within the three-month period of the contract, procured a purchaser at the listing price. The owner refused to sell and the broker brought suit for his commission. On appeal from a judgment for the defendant-owner, the appellant-broker urged "the listing agreement was a bilateral contract and that the mutual promises of the parties was a sufficient consideration to make a binding contract." The Michigan court, after stating "we are not in accord with the theory advanced by the plaintiff," characterized the listing agreement as an offer for a unilateral contract which never culminated in a binding contract because it was revoked before the plaintiff procured a purchaser. The court based its holding on a precedent which had involved a contract containing a provision that "the commission will be paid to you only upon such sale as is actually produced by you, and in no sense is this arrangement to be considered or construed as an exclusive listing or option."<sup>8</sup>

Ohio: *Bell v. Dimmerling*.<sup>9</sup> In this case the contract provided "In consideration of your agreement to use your efforts to find a purchaser . . . I hereby grant you the exclusive right for a period of ninety (90) days . . . to sell property . . . . If you are successful in finding a purchaser for my property, or if the same is sold or exchanged during the period of your exclusive agency . . . I agree to pay the commission of five per cent (5%) . . . ." The opinion does not indicate whether both parties signed the agreement. Within the 90 days the owner notified the broker that he had sold the property. On appeal from a judgment awarding the broker his commission, the appellant-owner argued "such paper writing is no more than an offer to enter into a unilateral contract, imposing no obligation on the plaintiff to do anything, mutuality and consideration are therefore lacking and the defendants were not bound in any way prior to the plaintiff actually producing a purchaser for the property." The Ohio court, after quoting the text of the "Unilateral Contracts" section of *Ohio Jurisprudence*, stated: "Conceding that at the time the contract was signed and accepted, it was a mere *nudum pactum*, when plaintiff exerted her efforts to

<sup>8</sup> Schostak v. First Liquidating Corp., 320 Mich. 406, 408, 31 N.W.2d 673-74 (1948).

<sup>9</sup> 149 Ohio St. 165, 78 N.E.2d 49 (1948).

BROKER'S EXCLUSIVE LISTING CONTRACT 277

find a purchaser' for the property, consideration was supplied, the promisor became bound . . . and a contract came into existence . . . Here the *action* required of the plaintiff was to use her 'efforts in finding a purchaser for my property.' If she actually did that, as she alleges she did, she complied with her *promise* and the promisor became obligated to comply with his." (Emphasis added.)

Indiana: *Brown v. Maris*.<sup>10</sup> In this case the contract provided "in consideration of your listing for sale and your services in undertaking to find a purchaser . . ., I hereby grant and give you the exclusive right to sell the same for a period of seven (7) months . . . In the event you find a purchaser for, or that said real estate is sold by or through you or otherwise during said time . . . then in consideration of your services tendered, I hereby agree to pay you five per cent (5%) on the selling price." The "agreement" was signed only by the owner. After substantial advertising and soliciting by the broker, the owner sold the land himself, within the seven months, and the broker brought suit for his commission. The Indiana court sustained a judgment for the owner with the following reasoning:

1. The appellee breached the contract when he sold the property involved before the appellant's exclusive right to sell it had expired.

2. Appellant had two remedies: (a) to treat the contract as still in force, find a purchaser, and sue for the commission; or (b) to treat the breach as putting an end to the contract and sue at once to recover damages.

3. Since appellant has elected to sue on the contract (suing for the commission) and since his complaint does not allege performance, the complaint was fatally defective on demurrer.

4. A promise to pay a commission on the contingency of the owner selling the property is "wholly without consideration as being of no legal benefit to the promisor or legal detriment to the promisee."

Before this opinion could be challenged in another tribunal, it was "superseded" after a rehearing, this time the court holding for the broker.<sup>11</sup> In the superseding opinion the court cited a rather

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<sup>10</sup> 147 N.E.2d 915 (Ind. App. 1958).

<sup>11</sup> 150 N.E.2d 760 (Ind. App. 1958). It is significant that the appellant's petition for rehearing was supported by an Amicus Curiae Brief filed by the Indianapolis attorney for the Indiana Real Estate Association, Inc. The Association's interest in the case was clearly stated to be its concern with its own exclusive listing form which was almost identical to that involved in the litigation. Brief for the Indianapolis Real Estate Ass'n, Inc., as Amicus Curiae, pp. 3-5.

ancient precedent which had been brought to its attention in the petition for rehearing. In this precedent,<sup>12</sup> which involved a similar listing contract, the Indiana court had stated, without discussion, "the contract rested upon a sufficient consideration."<sup>13</sup> Bowing to this "ruling precedent," the Indiana court elaborated, "the consideration for the contract, which we must treat as a whole, was the *promise* of the appellant to make use of the efforts and facilities of his office to find a purchaser for appellee's real estate." (Emphasis added.)

#### THE DIAGNOSIS—UNILATERAL OR BILATERAL?

Not one of the three courts was troubled by the problem of classifying the listing contract as unilateral or bilateral. Nowhere in the three opinions does there appear any discussion of whether the owner was bargaining for an act or a promise. No reference is made to section 31 of the *Restatement of Contracts*<sup>14</sup> or to any other rule of construction. Instead we find each court making its own assumption without discussion of the nature of the contract. The Michigan court, having before it the strongest case for bilateral classification (both parties signed an agreement which provided "in consideration of your agreement to use your efforts to find a purchaser"), held the listing contract to be an offer for a unilateral contract which never culminated in a binding contract.<sup>15</sup> The Indiana court, having before it the strongest case for unilateral treatment (only the owner signed an agreement which provided "in consideration of your listing for sale and your services in undertaking to find a purchaser"), simply refers to the "promise" of the appellant-broker to make use of the efforts and facilities of his office.<sup>16</sup> The Ohio court obviously thought it was applying unilateral contract law in spite of its concluding sentence, which contained a rather curious blend of unilateral-bilateral terminology—"here the *act* required of the plaintiff was to use her 'efforts in finding a purchaser for my property.' If she actually did that, as she alleges she did, she complied with her *promise* and the promisor became obligated to comply with his."<sup>17</sup> (Emphasis added.)

<sup>12</sup> *Singleton v. O'Blenis*, 125 Ind. 151, 25 N.E. 154 (1890).

<sup>13</sup> *Id.* at 156, 25 N.E. at 156.

<sup>14</sup> See note 3 *supra*.

<sup>15</sup> Text accompanying notes 6 and 7 *supra*.

<sup>16</sup> Text accompanying note 11 *supra*.

<sup>17</sup> Text accompanying note 9 *supra*.

## BROKER'S EXCLUSIVE LISTING CONTRACT 279

## UNILATERAL CLASSIFICATION

It is apparent that the unilateral classification employed by the Ohio and Michigan courts will lead to divergent results in the exclusive listing cases. That this is true stems from either the unwillingness to apply<sup>18</sup> or the confusion in applying<sup>19</sup> a section 45-part-performance theory to the exclusive listing contract.

<sup>18</sup> Langdell's position that an offeror may revoke at any time, prior to the complete performance of the act (see note 2 *supra*) was perhaps best stated by Judge Learned Hand when he wrote: "In principle . . . the agent makes no implied undertaking, and the promise is unilateral. It is an error to suppose that the subsequent part performance of the conditions of a unilateral promise create an obligation. . . . Although the results are often unjust, they should not pervert the rectitude of such fundamental principles of contract law as those controlling the creation of contract obligations." *Auerbach v. Internationale Wolfram Lampen Aktien Gesellschaft*, 177 Fed. 458, 462 (2d Cir. 1910).

Recent cases refusing to apply a part performance rationale include *Bartlett v. Keith*, 325 Mass. 265, 90 N.E.2d 308 (1950). The acceptance of an offer must be by all the acts contemplated by the offer. The defendant's promise was unilateral and without consideration until the plaintiff performed the condition of procuring a customer who was able, willing and ready to buy on the owner's terms. In *Baird v. Lewis*, 90 So. 2d 184 (Miss. 1956), the court permitted revocation after extensive efforts by broker. "There was no consideration for it [the exclusive listing], so it constituted only a continuing offer by appellee to sell his land for the stated sum." *Ibid*.

Several cases have discussed quantum meruit recovery by the broker who has partly performed. *Burns v. Brasco*, 327 Mass. 261, 98 N.E.2d 262 (1951) (whatever the owner promised, he did not promise to pay for the fair value of services); *Nicholson v. Alderson*, 347 Ill. App. 496, 107 N.E.2d 39 (1952) (agreement revocable at will of owner subject only to recovery by broker on a quantum meruit basis for services rendered).

<sup>19</sup> A majority of the cases have used a part performance rationale to bind the owner. See the exhaustive citation of such cases in Wallace, *Promissory Liability Under Real Estate Brokerage Contracts*, 37 IOWA L. REV. 350, 360 n.45 (1952). Significant among the cases decided in the last decade are *Baumgartner v. Meek*, 126 Cal. App. 2d 505, 272 P.2d 552 (1954) (RESTATEMENT, CONTRACTS § 45, cited followed by "the consideration for her [the owner's] promise to pay the money if the sale was made by her, was the performance of services by the brokers in securing a purchaser"); *Roudebush Realty Co. v. Toby*, 99 Ohio App. 524, 135 N.E.2d 270 (1955) ("by reason of the extensive services of plaintiff [broker], mutuality or consideration is not lacking"); *Flynn v. McGinty*, 61 So. 2d 318 (Fla. 1952) (owner was not permitted to revoke although agent had expended only \$2.00 for an ad); *McManus v. Newcomb*, 61 A.2d 37 (D.C. Munic. Ct. 1948) (reasonable efforts to find a purchaser constitute an acceptance and supply the consideration necessary to effect a mutual contract); *Thompson v. Hudson*, 76 Ga. App. 807, 47 S.E.2d 112 (1948) (although unilateral at time of execution, contract became bilateral when broker incurred expenses of advertising); *Halbert v. Block-Meeks Realty Co.*, 227 Ark. 246, 297 S.W.2d 924 (1957) (court assumes irrevocability of an exclusive listing contract—no discussion of consideration); *Chamberlain v. Grisham*, 360 Mo. App. 655, 230 S.W.2d 721 (1950) (placing of property on broker's list and broker's endeavor to procure a purchaser were acts upon the performance of which the agreement became bilateral); *Holmes v. Holik*, 238 S.W.2d 260 (Tex. Civ. App. 1951) (cited, quoted and followed *Bell v. Dimmerling*, *supra* note 9); *Rosin Co. v. Eksterowicz*, 45 Del. 314, 73 A.2d 648 (1950) (dicta that acceptance is to be inferred from advertising and bona fide efforts to sell. If such is proved, unilateral offer is converted into a binding bilateral agreement).

The Michigan court's analysis (or lack of it) exemplifies the traditional view that an offer for an act may be revoked at any time prior to the performance of the act, the act being defined as the production of a purchaser ready, willing and able to buy. The Ohio court in applying a section 45 approach finds sufficient acceptance and consideration in the part-performance of the act, the act being more broadly defined as also including the efforts exerted in trying to find a purchaser.

That there will be confusion in what constitutes the act of the broker and hence what constitutes part performance of the act is understandable. Comment A of section 45 of the *Restatement of Contracts* states, "what is tendered must be part of the consideration requested in order to preclude revocation under this section. Beginning preparations though they may be essential to carrying out the contract or to accepting the offer is not enough." Should efforts be considered "beginning preparations," or "part of the consideration"? Do efforts bear the same relationship to the procuring of a purchaser as climbing halfway to the top of a flagpole bears to climbing the flagpole?

Even if the act and the consideration are defined as including the efforts of the agent, the further question of how much effort is enough effort arises to haunt the analysis. Thus, is the mere listing of the property on the broker's books sufficient?<sup>20</sup> Is placing a \$2.00 ad in the local newspaper sufficient?<sup>21</sup> Is a telephone call by the broker to a prospective client sufficient?<sup>22</sup> It is submitted that the unilateral classification, no matter what theory is used in its application, will not comfortably hold or provide room for intelligent decision-making.

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<sup>20</sup> *Pate v. Goyne*, 212 Ark. 51, 204 S.W.2d 900 (1947) ("mere fact of listing, coupled with anticipated efforts in procuring a purchaser, would be sufficient consideration"); *Jenkins v. Vaughan*, 197 Tenn. 578, 276 S.W.2d 732 (1955) (if the agent incurs no expense or suffers no inconvenience, the agency is revocable though it is stated to be "exclusive").

<sup>21</sup> *Flynn v. McGinty*, 61 So. 2d 318 (Fla. 1952), apparently holds "yes".

<sup>22</sup> *Strother v. Ryan*, 239 S.W.2d 858 (Tex. Civ. App. 1951), holds "no".



## BROKER'S EXCLUSIVE LISTING CONTRACT 281

## BILATERAL CLASSIFICATION

Why is there such a reluctance to treat the exclusive listing contract as a bilateral contract *from its inception*?<sup>23</sup> Three propositions may be urged against the bilateral classification: (1) No promise is made by the broker; (2) the owner promises to reward success, not efforts; and (3) a promise by the broker to use efforts is too vague or indefinite, and hence there is a lack of mutuality and consideration.

(1) No promise is made by the broker.

The promise here referred to is not a promise to find a purchaser. Obviously, the broker would not be willing to guarantee a sale. There is no reason, however, why the broker should not be willing to promise his efforts in trying to find a purchaser or, to be more specific, to promise to use the facilities of his office, to advertise the property, and to show prospective purchasers the property. If the absence of such a promise in the exclusive listing contract serves to preclude bilateral classification, the broker has no one to blame but his draftsman. Just why the draftsman provides "in consideration of your *agreement* to use your efforts" rather than "in consideration of your *promise* to use your efforts" is not clear. One hesitates to ascribe to the draftsman the motive of "having his cake and eating it too," of arguing that his client has not made a promise in the event he is sued for not performing, and arguing that he has made a promise when he seeks to establish acceptance, consideration, and mutuality in the event he is suing the owner. In any event, the interpretation should not vary with the use of "agreement" or "undertaking" instead of "promise."

Even in the absence of such specific promissory terminology as "agreement" or "undertaking," the exclusive listing contract should be construed as including an *implied* promise on the part of the broker to use efforts in finding a purchaser. To quote from the opinion of Judge Cardozo in another but strikingly similar context, "A promise may be lacking, and yet the whole writing may be 'in-

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<sup>23</sup> "[F]rom its inception" is emphasized in view of the confused unilateral-bilateral terminology of decisions which characterize the unilateral contract as having become bilateral upon part performance. *Bell v. Dimmerling*, *supra* note 9, and cases cited note 19 *supra*.

One of the few cases holding a broker's contract to be bilateral from its inception is *Hammond v. C.I.T. Financial Corp.*, 203 F.2d 705 (2d Cir. 1953). The case, however, concerned an *oral* exclusive listing contract. The court said, "We think Braxton's (the broker's) promise to work intensively, since a speedy sale was desired, and to handle the matter with the utmost discretion, may fairly be implied." *Id.* at 708.

stinct with an obligation' imperfectly expressed. . . . The defendant gave an exclusive privilege . . . The acceptance of the exclusive agency was an assumption of its duties . . . Without an implied promise, the transaction cannot have such 'business efficacy as both parties must have intended that at all events it should have.'"<sup>24</sup> To appreciate the applicability of these quotations to the broker's exclusive listing contract one has only to consider the owner-broker relationship. Does it make sense that an owner would be willing to surrender his own freedom to negotiate the sale of his own property unless he receives *assurance* that the broker will exert efforts?<sup>25</sup> If the owner is indifferent as to the exercise of efforts on the part of the broker he is going to give a nonexclusive, not an exclusive listing.

(2) The owner promises to reward success, not efforts.

This proposition is an accurate description of the nonexclusive listing contract. It does not wash when applied to the exclusive listing. It confuses that which is bargained for with the conditions upon which payment of a commission depends. In the exclusive listing contract, the owner bargains for a different kind of broker's service than he does in an ordinary nonexclusive listing contract. He buys the service of one who will make the investment of both time and money<sup>26</sup> in the effort to sell, secure in the knowledge that his investment will not be jeopardized by a sale by the owner or someone else. It would seem obvious that the exclusive broker will be willing to spend more time and more money in the effort to sell than the nonexclusive broker. Thus, in a very real sense the owner is bargaining for and rewarding both efforts and success—the efforts by his promise of an exclusive listing which includes his promise to pay a commission regardless of who sells the property, and the success by the promise to pay a commission if the broker sells the property.

(3) A promise to use efforts is too vague or indefinite and hence there is a lack of mutuality and consideration.

Support for this proposition which is perhaps the most persuasive argument against a bilateral classification is found in section

<sup>24</sup> Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917).

<sup>25</sup> For an argument that it does, see Comment, 6 DE PAUL L. REV. 107, 117 (1950).

<sup>26</sup> Figures submitted to the Indianapolis Real Estate Board by A, an organization of 20 brokers and salesmen, B, an organization of 10 brokers and salesmen, and C, an individual broker, reveal that the average newspaper advertising cost per listing in 1957 was slightly more than \$100 for A and C, and \$85.50 for B. Brief for the Indiana Real Estate Association, Inc., as Amicus Curiae, pp. 10-11, Brown v. Maris, *supra* note 11.

BROKER'S EXCLUSIVE LISTING CONTRACT 283

449 of the *Restatement of Agency*, 2d (1958). The text of 449a, which is subtitled "unilateral contract of employment," states "in the ordinary listing of property with a real estate broker the broker's promises to use his best efforts or other similarly indefinite promises are not, without other facts, sufficient to indicate that consideration has been given." It should be emphasized that the characterization of the broker's promises as indefinite and insufficient is related to the "ordinary listing of property." The illustration, however, which follows the text is of an exclusive listing contract: "P lists Black Acre with A for sale, it being stated that A is to have 'the exclusive sale for three months.' A pays nothing for this and makes no agreement to do more than to list Black Acre among the properties which he has for sale and to use the facilities of his office in effecting a sale. A week later the land is sold to T, who had been introduced to P by another broker. A is entitled to no commission." One can conclude only that the broker's promises are too indefinite regardless of "ordinary listing" or "exclusive listing." No indication is given as to what might constitute the "other facts" which would make the broker's promise sufficient. Section 449(c) deals with the exclusive listing contract but the treatment is designed only to distinguish between the "exclusive agency" in which the principal may compete and the "exclusive sale" in which the principal may not compete. Since it would be uncharitable to dismiss this authority with the comment that it should have confined itself to the task of restating the law of agency, the position should be examined in its strongest light.

Those who argue that the promise to use efforts is too indefinite play their trump card by posing the question "would a court permit an owner to recover in an action for damages based on a broker's breach of his promise to use efforts?" The assumption that the answer must be in the negative seems based on the absence of any case authority for an affirmative answer. It should be pointed out, however, that there is also an absence of case authority for a negative answer. How definite need be a selling agent's promise when he is employed on a salary rather than on a commission basis? Must he promise to call on a designated number of potential purchasers each day? Would sufficient definiteness be present if the listing contract read "in consideration of your promise to advertise my property in the local paper, and in consideration of your promise to show my property to potential purchasers who come to your

office"? That such a promise would be more definite than the language found in exclusive listing contracts currently in use may be food for thought by the broker's draftsmen, but it should not preclude a court from finding sufficient definiteness in the less definite promise to use efforts. In the unlikely event that a broker with an exclusive listing did not advertise and did not show prospective purchasers the property, it would not tax the imagination to expect a court to permit an owner to recover damages. Although it might be difficult for the owner to prove damage, he could at least use the broker's failure to perform as discharging his own duty.<sup>27</sup>

That the promise to use efforts is a sufficient consideration for the owner's promise may be argued on the basis of the rationale of section 45 of the *Restatement of Contracts*. Comment *b* explains "The main offer includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer. . . . Part performance or tender may thus furnish consideration for the subsidiary promise." Since "efforts" are being widely recognized as sufficient to constitute the part performance of section 45, a promise to use efforts should constitute a sufficient consideration. The classic test of promise sufficiency is that the promise must be to do something which would itself, as an act, be sufficient consideration for a unilateral contract.<sup>28</sup>

One final point should be made. Definiteness ought to be tested by the bargain. If the owner was satisfied with the definiteness of the broker's promise, why should the courts engage in an inquiry that is fraught with distinctions impossible to draw? Is there a sufficient reason to make this another exception to the contract principle of private autonomy?

Conclusion. Unilateral classification of exclusive listing con-

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<sup>27</sup> "In promises for an agreed exchange, any material failure of performance by one party not justified by the conduct of the other discharges the latter's duty to give the agreed exchange even though his promise is not in terms conditional." *RESTATEMENT, CONTRACTS* § 274 (1932).

<sup>28</sup> "Where the doing of a thing will be a good consideration, a promise to do that thing will be so too." *Thorp v. Thorp*, 12 Mod. 455, 459 (1702). Professor Corbin has suggested that the vague or indefinite promise might constitute one of the exceptions to this rule on the theory that actual performance rendered cannot be vague and hence needs no enforcement. 1 *CORBIN, CONTRACTS* § 142 (1950). Even if such an exception exists (which Corbin doubts) it should be reserved for the extreme case of vagueness. It should not apply to the well defined procedures employed by real estate brokers such as advertising and showing the property to potential purchasers.

***BROKER'S EXCLUSIVE LISTING CONTRACT*** 285

tracts has led to divergent results in litigation stemming from like problems. It will continue to do so since neither courts nor writers will agree on what constitutes the act or the part-performance of the broker. It does not accord with the intention of the parties or the purpose of the exclusive listing contract. Bilateral classification constitutes the application of sound contract theory and will enable courts, lawyers, brokers, and owners to live, if not happy, happier ever after.