

## Louisiana Law Review

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Volume 17 | Number 4

June 1957

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# Real Estate Brokerage in Louisiana

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### Repository Citation

James L. Pelletier, *Real Estate Brokerage in Louisiana*, 17 La. L. Rev. (1957)

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the same rationale. The rationale most in accord with insurance jurisprudence, and one easily and logically applied, is that which declares the interest to vest at the time of the formation of the contract. This is the life insurance rule, which, since it is well settled and understood by the bench and bar, would minimize error in application. Because workmen's compensation and unemployment compensation are founded on statute, and not contract, another rule can logically be maintained.

The writer is of the opinion that these two types of insurance are so obviously a substitute for wages that they should be treated as such, and their character be determined as of the time the right to benefits arises.

*William L. McLeod, Jr.*

### **Real Estate Brokerage in Louisiana**

The frequency with which real estate brokers must resort to the courts for enforcement of compensative claims has created a major source of litigation. The purpose of this Comment is to make a short survey of the jurisprudence and operative legal principles involved in that litigation in Louisiana. The writer does not purport to survey all of the various exceptions and contradictions which have been created, but rather to afford a general discussion of the more important developments in this area of the law. There are various types of transactions which the broker might effect for his principal. However, for convenience, where the rules and principles are general this discussion will be in terms of sale.

#### *Statutory Regulations*

A real estate broker is statutorily defined as any person who, for compensation, "sells or offers for sale, buys or offers to buy, or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or rents or offers to rent, any real estate or the improvements thereon for others as a vocation."<sup>1</sup> Real estate salesmen<sup>2</sup> are merely employees of brokers and are prohibited by statute from accepting commissions for the per-

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1. LA. R.S. 37:1431(3) (1950).

2. *Id.* 37:1431(4).

formance of their functions from any person other than the licensed brokers by whom they are employed.<sup>3</sup> For that reason this Comment will be concerned primarily with the real estate broker: the person actually involved in litigation concerning compensation for brokerage acts.

It is expressly stated in the statutes that no person is to engage in the business of a real estate salesman or broker unless he has obtained a license.<sup>4</sup> However, a person who procures for another a purchaser in one isolated instance has been held not engaged in such business as a partial vocation and hence not required to have a license.<sup>5</sup> The sanctions imposed for violations of the licensing requirement are two-fold: first, a fine of not more than \$2,000.00 or imprisonment for not more than two years, or both,<sup>6</sup> and second, forfeiture of the violator's right to use the courts of the state to enforce his claim for compensation arising from the brokerage.<sup>7</sup>

A real estate broker's license may be obtained by any person who has resided in this state for a period of six months or longer and who can satisfy the qualifications of a good reputation for honesty and fairness, attested to by at least two citizen landowners of the parish or city in which the applicant resides.<sup>8</sup> A written application for the license must be submitted to the Louisiana Real Estate Board.<sup>9</sup> The Board has the power to refuse issuance of a license in the absence of any satisfactory proof which it might require in reference to the honesty, truthfulness, reputation, and knowledge of any applicant.<sup>10</sup> In addition, the Board is empowered to make and enforce such rules as

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3. *Id.* 37:1451.

4. *Id.* 37:1437.

5. *Sheppard v. Hulseberg*, 171 La. 659, 131 So. 840 (1930).

6. LA. R.S. 37:1458 (1950).

7. *Id.* 37:1450; *Trentman Co. v. Brown*, 176 La. 854, 147 So. 14 (1933) (holding that a broker who negotiates a purchase or sale of real estate before complying with the terms of the licensing statute, and who subsequently does so comply before claiming a commission, cannot recover); *Bergeron v. Mumphy*, 38 So.2d 411 (La. App. 1949); *Mathews-Pelton, Inc. v. LeBlanc*, 126 So. 449 (La. App. 1930) (the fact that a real estate broker, properly licensed, secured the assistance of a third person in procuring an offer to purchase property, such third person not being a licensed real estate salesman, did not preclude the broker from recovering a commission); *Levy v. Maher*, 4 La. App. 600 (1926); *Bosetta v. Jacobs*, 1 La. App. 277 (1924) (a licensed real estate broker was not refused access to the courts to enforce a claim for compensation where he had agreed to divide the commission with one not a licensed broker or salesman in return for that person's services in procuring a purchaser).

8. LA. R.S. 37:1438(A) (2) (1950).

9. *Id.* 37:1438(A) (1).

10. *Id.* 37:1437.

are necessary to administer and enforce the statutory provisions,<sup>11</sup> and to revoke or suspend licenses for any of the reasons enumerated in the statutes.<sup>12</sup>

*"Real Estate" as Contemplated by the Statutes*

The courts have generally had little difficulty in deciding what constitutes real estate within the contemplation of the statutes. However, the cases involving sales or leases of minerals and standing timber have given rise to troublesome problems.<sup>13</sup> Prior to 1953, the Louisiana courts refused to include the sale of standing timber within the scope of the statutory provisions regulating real estate brokerage,<sup>14</sup> even though standing timber had been expressly made a separate immovable estate.<sup>15</sup> In that year, the Louisiana Supreme Court overruled the previous jurisprudence<sup>16</sup> and declared the sale or lease of standing timber to be subject to the regulatory provisions governing real estate brokers.<sup>17</sup> The purchase or sale of mineral leases, however, has been considered as not falling within the scope of the brokerage statutes.<sup>18</sup> It was established in 1925 by the decision of the Louisiana Supreme Court in *Vander Sluys v. Finfrock*<sup>19</sup> that the sale of oil and gas leases is not a sale of real estate. On two subsequent occasions,<sup>20</sup> the court not only reaffirmed its position but enlarged the area to be excluded from the brokerage regulations. The first of these cases, *Stanford v. Bischoff*,<sup>21</sup> followed on the heels of the *Vander Sluys* decision, and it was there said that in addition to the exclusion of mineral leases, the *sale* or *purchase* of ordinary leases did not fall

11. *Id.* 37:1436.

12. *Id.* 37:1454, as amended, La. Acts 1956, No. 556, § 10.

13. *Ranger Land Co. v. Aetna Casualty and Surety Co.*, 224 La. 153, 68 So.2d 907 (1953) (standing timber); *Cleaton v. Dowling*, 164 La. 46, 113 So. 759 (1927); *Gonzales v. Watson*, 162 La. 1048, 111 So. 416 (1927) (minerals); *Stanford v. Bischoff*, 159 La. 892, 106 So. 371 (1925); *Van Sluys v. Finfrock*, 158 La. 175, 103 So. 730 (1925).

14. La. R.S. 37:1431 *et seq.* (1950); *Cleaton v. Dowling*, 164 La. 46, 113 So. 759 (1927).

15. La. Acts 1904, No. 188, p. 420.

16. *Cleaton v. Dowling*, 164 La. 46, 113 So. 759 (1927).

17. *Ranger Land Co. v. Aetna Casualty and Surety Co.*, 224 La. 153, 68 So.2d 907 (1953).

18. *Gonzales v. Watson*, 162 La. 1048, 111 So. 416 (1927); *Stanford v. Bischoff*, 159 La. 892, 106 So. 371 (1925); *Vander Sluys v. Finfrock*, 158 La. 175, 103 So. 730 (1925). *Cf.* OP. LA. ATTY. GEN. 1922-24, p. 1010.

19. 158 La. 175, 103 So. 730 (1925).

20. *Gonzales v. Watson*, 162 La. 1048, 111 So. 416 (1927); *Stanford v. Bischoff*, 159 La. 892, 106 So. 371 (1925).

21. 159 La. 892, 106 So. 371 (1925).

within the contemplation of the provisions. The court in that case refused to classify the lease involved as an oil lease or as an "ordinary" lease, but stated that it made no difference because the licensing provision defining real estate brokers made no provision for the *sale* or *purchase* of leases, and hence was not intended to include those transactions. The court took special notice of the language of the statute, which includes "leases or offers to lease," and stated that since it is a regulatory and restrictive statute, it should be strictly construed. Two years later, in *Gonzales v. Watson*,<sup>22</sup> the court, citing the *Vander Sluys* case as authority, held that the procurement of gravel leases was included in the exception. These decisions are the only ones in this area of the brokerage regulations and it is to be presumed that the distinctions drawn will be followed. It is highly doubtful that the passage of an act in 1938,<sup>23</sup> declaring mineral leases to be real rights and incorporeal immovable property, has had any effect upon those distinctions, for the classification set forth in that act was expressly recognized by the court in the *Vander Sluys* case.

### *Listings*

The agreement between the principal, or landowner, and the broker is called, in real estate brokerage parlance, a "listing," of which there are three types commonly used: exclusive listing, exclusive agency, and open listing.

Under an *exclusive listing* of property to be sold, the broker is entitled, in the absence of fraud or fault on his part, to a commission on any contract of sale or contract to sell effected during the period of the listing.<sup>24</sup>

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22. 162 La. 1048, 111 So. 416 (1927).

23. La. Acts 1938, No. 205, p. 491.

24. The exclusive listing was defined in *O'Neal v. Southland Lumber Co.*, 168 La. 235, 121 So. 755 (1929), as an "exclusive right to sell," thereby depriving even the owner of the right to sell during the specified period without incurring liability for the broker's commission. In the absence of any specified termination date, the principal must revoke the listing prior to effecting personally a sale, in order to avoid liability to the broker. *Swearingen v. Maynard*, 9 So.2d 272 (La. App. 1942); *Harvey v. Sehrt*, 126 So. 568 (La. App. 1930); *Connelly v. Richmond*, 119 So. 286 (La. App. 1928). It was held in *Harvey v. Benson*, 198 So. 183 (La. App. 1940), that proof that notice of revocation of a listing was deposited, properly addressed, in the United States mail creates a presumption that the notice was received by the broker, and the presumption is sufficient to terminate the listing contract in absence of satisfactory proof that it was not in fact received.

In addition to a stipulation regarding the duration of the listing, many listing agreements now contain additional clauses which protect, for a specified period following termination of the listing, the broker's claim for a commission. In the event of a sale to one originally procured by the broker during the period of the listing, the effect of such a clause is to preserve, for the additional period, the rights of the broker.<sup>25</sup>

Some exclusive listing agreements contain a stipulation that the principal is to refer all prospective vendees to the broker. If the principal, without the knowledge of the broker, sells or contracts to sell to one who contacted him during the course of the listing, the broker is entitled to recover the agreed commission.<sup>26</sup> Paradoxically, it was held in one instance that where the owner merely granted an option during the life of the broker's listing, and the option was exercised after the expiration of the stipulated time during which the broker was protected, the broker was not entitled to recover.<sup>27</sup>

An *exclusive agency listing* differs from an exclusive listing agreement in only one material respect. Whereas, in an exclusive listing, a broker is entitled to a commission on any sale made during the listing, under an exclusive agency the principal is privileged personally to sell without incurring liability for the broker's commission.<sup>28</sup> With this exception, the rights of the

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25. *Tharpe v. Tracy*, 47 So.2d 336 (La. App. 1950) (agreement between broker and principal to terminate listing did not affect stipulation that broker was to be entitled to a commission upon any sale made within six months after termination to a purchaser procured by the broker during the listing); *Ruiz v. Kiehm's Pharmacy*, 37 So.2d 720 (La. App. 1948) (sale by principal to purchaser contacted by broker during listing; even though a sale is made to one procured originally by the broker during the listing, if it is effected after the additional protective period, the broker cannot recover); *Gardner v. Fonseca*, 85 So.2d 524 (La. App. 1956). *Cf.* *Alex Dreyfus Co. v. Breen*, 126 So. 264 (La. App. 1930) (sale within specified period to one procured by broker during listing, but on terms different from that which the broker was authorized to accept — no recovery). The broker is also protected with regard to executory contracts formed during the additional period. *Caruso-Goll v. La Nasa*, 72 So.2d 13 (La. App. 1954); *Harvey v. Riedlinger*, 17 So.2d 60 (La. App. 1944); *Zollinger v. Gust*, 192 So. 132 (La. App. 1939).

26. *Doll v. Thornhill*, 6 So.2d 793 (La. App. 1942).

27. *Milling v. Succession of Barrow*, 170 La. 697, 129 So. 134 (1930) arose upon a rather unique listing. Plaintiff was granted an exclusive listing for the sale of a canal, the listing to be in effect for five years. The option was granted only one month before the termination of the listing, and the court stated that, after five years, the plaintiff's injury was too speculative in nature to be deserving of recovery.

28. *O'Neal v. Southland Lumber Co.*, 168 La. 235, 121 So. 755, (1929): "There is a marked difference between the appointment of an exclusive agent to sell real estate and the granting of the exclusive right to such agent to sell during a fixed period. This is recognized in 9 *Corpus Juris*, p. 622; 'Where, however, the broker

broker under an exclusive agency listing are determined just as they are under the exclusive listing.

Under an *open listing*, no restrictions are placed upon the principal regarding his privilege of acting through other brokers or effecting the sale personally. The rights of the broker to a commission are limited to a sale made to a purchaser procured by the broker's efforts; that is, he must be the "procuring cause" of the sale.<sup>29</sup>

### *The Nature of the Contract*

It is highly unlikely that a real estate broker and landowner in agreeing on a listing consider whether the agreement proposes the formation of a bilateral or a unilateral contract. The determination of the true nature of the agreement will in most cases not be required. However, such determination may become important if the owner undertakes to withdraw the authority of the broker prior to the expiration of the stipulated period. Where the broker has spent time, effort, and money in the furtherance of the purpose of the listing, it will be manifestly unjust to allow the landowner to deprive him of the opportunity of being successful by an untimely withdrawal of the listing. Some courts, in an effort to support a holding that a withdrawal under such circumstances is ineffective, have taken the view that the listing served to create a bilateral contract containing an implied promise by the broker to use due diligence to find a purchaser.<sup>30</sup> Other courts have simply concluded that the promise of the owner to pay the stipulated commission becomes irrevocable after partial performance on the part of the broker.<sup>31</sup> Whatever view is taken, there is general agreement that there is no privilege of revocation after the broker has expended time, effort, and money in undertaking to find a purchaser. No case has been found in which the owner has received damages from the broker because of the latter's failure to do anything in furtherance of the listing. In such an event, the owner will be adequately pro-

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is given merely an exclusive agency, as distinguished from an exclusive right to sell, it merely precludes the principal from employing another broker, and does not preclude him from making a sale himself without the broker's aid, and in such a case he will not be liable to the broker for commission."

29. See note 38 *infra*.

30. *Braniff v. Baier*, 101 Kan. 117, 165 Pac. 816, L.R.A. 1917, 1036 (1917); *Mercantile Trust Co. v. Lamar*, 148 Mo. App. 353, 128 S.W. 20 (1910).

31. *Breard v. Kanelos*, 49 So.2d 451 (La. App. 1950); *Bell v. Dimmerling*, 149 Ohio St. 165, 78 N.E.2d 49 (1948).

tected by simply allowing him to cancel the listing. Under either analysis, this should be legally permissible.<sup>32</sup>

### *Broker's Right to Compensation*

In Louisiana, it is established that the authority given to an agent or broker to sell or contract to sell immovable property belonging to the principal must be given in writing.<sup>33</sup> If such authority is given only verbally, it seems that the broker will not be allowed to recover.<sup>34</sup> On the other hand, if the broker is merely to procure a purchaser, with whom the principal will himself conclude the contract, the brokerage agreement may be verbal.<sup>35</sup>

The listing agreement may stipulate that the broker is to be paid a commission for finding a purchaser ready, willing, and able to buy, or it may stipulate that the broker is to be paid a commission only upon the actual sale of the property. If the broker satisfies the requirements of the listing, he is entitled to the agreed commission. If he fails to satisfy the listing requirements, he may still be entitled to compensation if he can bring himself within the procuring cause theory. A great number of the decisions involving the rights of brokers to compensation are based on that theory,<sup>36</sup> which generally refers to "the efforts of the broker in introducing, producing, finding, and interesting" a purchaser.<sup>37</sup> It is an accepted rule that a broker is entitled to recover a commission if he can prove that he was the procuring cause of a transaction that was within the terms of the brokerage agreement and which occurred either within the stipulated period, or in the absence thereof, within a reasonable time after his negotiations with the purchaser had ceased.<sup>38</sup> On

32. For a detailed discussion of the different views, see 1 CORBIN, CONTRACTS § 50 (1950), and cases cited therein.

33. *Whatley v. McMillan*, 152 La. 978, 94 So. 905 (1922): "[A]greements purporting to transfer, incumber, or otherwise affect real estate must be in writing."

34. *Treadaway v. Giangrosso*, 16 So.2d 677 (La. App. 1944).

35. *Kernaghan & Cordill v. Uthoff*, 174 La. 880, 141 So. 865 (1932) (broker allowed to establish by parol evidence a verbal contract); *Isaac v. Dronet*, 31 So.2d 299 (La. App. 1947); *Lally v. Dossat*, 31 So.2d 41 (La. App. 1947); *Isaac v. Calcasieu Bldg. & Loan Ass'n*, 139 So. 490 (La. App. 1932); *Whatley v. McMillan*, 152 La. 978, 94 So. 905 (1922).

36. The term "procuring cause" is used extensively in litigation concerning real estate brokers' claims for compensation. It is defined in BLACK, LAW DICTIONARY (4th ed. 1951) as "approximate cause."

37. *Foulks v. Richardson*, 87 So.2d 335, 337 (La. App. 1956).

38. *Meyers v. Meraux*, 169 La. 712, 125 So. 864 (1930); *Bullis & Thomas v. Calvert*, 162 La. 378, 110 So. 621 (1926); *Freeman & Freeman v. Torre Realty*



the other hand, if the listing agreement contains a stipulation that the broker is to be entitled to a commission upon any sale effected during a specified period following the termination of the listing, the broker cannot recover on any sale made after the expiration of that period irrespective of whether the sale was to a purchaser originally procured by the broker.<sup>39</sup> The broker, in order to be considered the procuring cause of a transaction, must show that the negotiations which eventually led to the conveyance were the result of some active effort on his part.<sup>40</sup> However, the courts have been very liberal in finding the necessary exertion by the broker. The mere introduction of a prospective vendee to the principal may be sufficient "active effort" to make the broker the procuring cause in the event that a sale is ultimately consummated with that vendee.<sup>41</sup> This is true, even if the introduction was accomplished solely as a result of advertisements placed by the broker, but in such a case the broker must prove that the purchaser contacted the principal as a result of the advertisement.<sup>42</sup> A recent case exemplifying the application of the procuring cause theory is *Dew v. Hunter*.<sup>43</sup> In that case a broker exhibited the property subject to the listing to the fiancée of the purchaser. The court held

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& Improvement Co., 157 La. 1093, 103 So. 334 (1925); *Wright v. Monsour*, 86 So.2d 536 (La. App. 1956); *Womack Agencies, Inc. v. Fisher*, 86 So.2d 732 (La. App. 1956); *Corbitt v. Robinson*, 53 So.2d 259 (La. App. 1951); *Ramsey v. Harry Bros. Co.*, 11 So.2d 256 (La. App. 1942); *Gristina v. Nunez*, 8 La. App. 531 (1928).

39. *Gardner v. Fonseca*, 85 So.2d 524 (La. App. 1956).

40. *Latter & Blum, Inc. v. Metropolitan Life Ins. Co.*, 208 La. 490, 23 So.2d 193 (1945); *Freeman & Freeman v. Torre Realty & Improvement Co.*, 157 La. 1093, 103 So. 334 (1925); *Foulks v. Richardson*, 87 So.2d 335 (La. App. 1956); *Dew v. Hunter*, 66 So.2d 400 (La. App. 1953); *Doll v. Untz*, 57 So.2d 55 (La. App. 1952); *Corbitt v. Robinson*, 53 So.2d 259 (La. App. 1951); *Lawrence v. Bailey*, 41 So.2d 474 (La. App. 1949); *Jeter & Monroe v. Daniels*, 25 So.2d 911 (La. App. 1946); *White v. Havard*, 25 So.2d 108 (La. App. 1946); *Sollie v. Peoples' Bank & Trust Co.*, 194 So. 116 (La. App. 1940); *Wolf v. Casamento*, 185 So. 537 (La. App. 1939); *Viguerie v. Mathes*, 120 So. 542 (La. App. 1929). Cf. where the broker was found not to be the procuring cause of the transaction: *Gardner v. Fonseca*, 85 So.2d 524 (La. App. 1956); *Albritton v. Bosworth*, 64 So.2d 462 (La. App. 1953); *Cobb v. Saucier*, 30 So.2d 784 (La. App. 1947); *Myevre v. Davila*, 10 So.2d 119 (La. App. 1942); *Gamblin v. Young*, 187 So. 854 (La. App. 1939); *Isaac v. Calcasieu Bldg. & Loan Ass'n*, 139 So. 490 (La. App. 1932); *Turner v. Swann*, 124 So. 717 (La. App. 1929); *Wittenberg v. McGrath*, 3 La. App. 244 (1925); *Taylor v. Martin*, 33 So. 112 (La. App. 1902).

41. *Sollie v. Peoples' Bank & Trust Co.*, 194 So. 116 (La. App. 1940). Cf. *Myevre v. Davila*, 10 So.2d 119 (La. App. 1942), where prospective purchaser read owner's ad and upon being told that the plaintiff had the listing (open), sought out the plaintiff, requested to be taken to see the owner, and subsequently consummated the sale without the aid of the broker. The court there stated that the broker had not provoked the introduction nor in any manner brought it about; consequently he was not entitled to a commission.

42. *Isaac v. Calcasieu Bldg. & Loan Ass'n*, 139 So. 490 (La. App. 1932).

43. 66 So.2d 400 (La. App. 1953).

that, since the man to whose fiancée the broker had shown the property would not otherwise have purchased it, the broker was entitled to compensation.

In the rare instances in which the listing has no specified time limitation, it may be terminated by the principal if the broker fails to procure a purchaser within a reasonable period of time.<sup>44</sup> Whether it can be terminated before a reasonable time is subject to much doubt.<sup>45</sup> Following such termination, the broker acquires no right to a commission, even though a sale is made to a customer originally contacted by the broker and despite the fact that the broker's efforts might have materially influenced the sale.<sup>46</sup> It is to be noted that this is a limitation of the general rule of procuring cause.

A principal and his broker are under mutual obligations to exercise good faith in their relationship.<sup>47</sup> If the principal, without legal cause, breaches an executory contract in which the broker has a compensable interest, or arbitrarily refuses to sell to a purchaser procured by the broker, the principal is deemed guilty of a breach of good faith and can be held liable for the broker's commission.<sup>48</sup> Where the principal is unable to com-

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44. *Lewis v. Manson*, 132 La. 817, 61 So. 835 (1913); *Clesi v. D'Angelo*, 5 La. App. 432 (1926).

45. Comments, 12 *LOUISIANA LAW REVIEW* 131 (1951), 2 *LOUISIANA LAW REVIEW* 182 (1938).

46. *Lewis v. Manson*, 132 La. 817, 61 So. 835 (1913).

47. LA. CIVIL CODE arts. 3002-3026 (1870); *Wright v. Monsour*, 86 So.2d 586 (La. App. 1956) (principal took negotiations into own hands and completed at lesser price, recovery allowed); *Adair v. Fleming*, 68 So.2d 215 (La. App. 1953) (principal conveyed to third person who, under pre-arranged plan, conveyed to purchaser procured by broker, recovery allowed); *Corbitt v. Robinson*, 53 So.2d 259 (La. App. 1951) (principal, without the knowledge of broker who was procuring cause, completed sale at lower price, recovery allowed); *Boone v. David*, 52 So.2d 563 (La. App. 1951) (principal voluntarily released purchaser from contract to sell, recovery allowed); *Lawrence v. Bailey*, 41 So.2d 474 (La. App. 1949) (principal attempted to deprive broker of commission by effecting personal sale, recovery allowed); *White v. Havard*, 25 So.2d 108 (La. App. 1946) (principal terminated broker's listing at time when principal was in negotiations with prospective purchaser procured by the broker, recovery allowed); *Lestrade v. Perera*, 6 La. Ann. 398 (1851) (principal refused to sell to purchaser procured by broker, then later effected sale to same purchaser, recovery allowed). In *Asunto v. Coleman*, 104 So. 318 (La. App. 1925), the broker acquired an interest in property adverse to the interest of his principal. The court there held that the broker must be considered as holding the interest as constructive trustee for the principal. A broker was denied recovery in *Rhodes & Symes v. Nadeski*, 119 So. 292 (La. App. 1928), because he allowed a prospective purchaser to withdraw a deposit, in violation of a clause in the brokerage agreement.

48. *Treadaway v. Amundson*, 88 So.2d 67 (La. App. 1956) (sale not consummated because of outstanding adverse mineral interest on principal's property, therefore unable to convey merchantable title); *Cox v. Green*, 70 So.2d 724 (La. App. 1954) (principal listed property which she had received as donation from ex-husband, who refused to join in conveyance, and purchaser refused to

plete the sale because of a pre-existing title defect of which the broker had no notice, the courts have held that the broker is entitled to receive his commission.<sup>49</sup> The principal cannot, however, be held liable to his broker for his failure to consummate a contract to sell if the failure to do so is caused by a title defect arising subsequent to the formation of an executory contract and through no fault of the principal.<sup>50</sup> In such a case the broker has been awarded recovery of the "out-of-pocket" expenses which he had incurred in procuring a purchaser.<sup>51</sup> The court did not adequately explain the reason or justification for granting recovery of such expenses but it probably rests on the idea that it would simply be unjust to make the broker bear that loss.

A broker's obligations differ from those of an ordinary agent in that the broker is the agent of both his principal and third persons with whom negotiations are pursued.<sup>52</sup> Consequently, a broker must deal in good faith with both parties to the negotiations. It has been held that a prospective purchaser who is pecuniarily injured through the failure of a broker to transmit the prospect's offer to the principal can recover damages from the broker.<sup>53</sup> However, it is not bad faith on the part of the broker if he fails to reveal to a prospective purchaser that there are outstanding encumbrances on the property to be conveyed, even though the property is to be conveyed free of all encumbrances.<sup>54</sup> A broker has the right to assume that his principal

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accept such title); *Boone v. David*, 52 So.2d 563 (La. App. 1951) (principal entered into contract to sell, then voluntarily released purchaser from the agreement); *Doll v. Russo*, 7 So.2d 406 (La. App. 1942) (defective title); *Caruso-Goll v. D'Alphonso*, 1 So.2d 120 (La. App. 1941) (defective title); *Neal v. Murff*, 133 So. 418 (La. App. 1931) (principal refused to execute agreement to exchange property); *Levistones v. Landreaux*, 6 La. Ann. 26 (La. App. 1851) (principal voluntarily released purchaser procured by broker, then sold to another).

49. *Mathews Bros. v. Bernius*, 169 La. 1069, 126 So. 556 (1930); *Veters v. Walsh*, 124 So. 687 (La. App. 1929).

50. *Cabral v. Barkerding*, 50 So.2d 516 (La. App. 1951) (vendor unable to consummate contract of sale because subsequent to the contract to sell wife recorded declaration that the property to be sold constituted the family homestead and refused to join in the conveyance); *Neal v. Halliburton*, 19 So.2d 625 (La. App. 1944) (recording by wife of homestead declaration).

51. *Blackshear v. Landey*, 46 So.2d 688 (La. App. 1950).

52. LA. CIVIL CODE art. 3017 (1870); *Martin v. Fontenot*, 27 So.2d 457 (La. App. 1946); *Dumaine & Co. v. Gay, Sullivan & Co.*, 188 So. 163 (La. App. 1939) (broker engaged in selling sugar, but same rules are applicable); *S. Pfeiffer & Co. v. Mayer & Co.*, 3 La. App. 289 (1925).

53. *Amato v. Latter & Blum, Inc.*, 227 La. 537, 79 So.2d 873 (1955). The court, in that case, based its decision upon LA. R.S. 37:1447 (1950), which allows anyone injured by a broker through fraud, misrepresentation, or wrongful acts to sue for recovery of damages.

54. *Spiro v. Corliss*, 174 So. 285 (La. App. 1937).

has some means of satisfying existing mortgages.<sup>55</sup>

The executory contract of sale between principal and third person frequently contains a clause stating that a breach thereof will impose liability for the broker's commission upon the breaching party. That stipulation gives to the broker, in the event of a breach of the contract by the purchaser, a right of action against the purchaser for the stated commission.<sup>56</sup> However, if an executory contract is not executed because of some fault or mistake on the part of the broker, the broker has no right to demand compensation from either party.<sup>57</sup> A violation of the terms of the listing agreement operates as a forfeiture of the broker's right to a commission.<sup>58</sup> Furthermore, the principal is not bound by acts done beyond the scope of the broker's authority.<sup>59</sup>

### *The Quantum of the Broker's Recovery*

It is stated in the Civil Code that a mandate or procuration is gratuitous unless there has been an agreement to the contrary.<sup>60</sup> However, the courts have generally not applied the articles on mandate<sup>61</sup> to contracts whereby one procures a real estate broker to act in his capacity as a broker.<sup>62</sup> In the few

55. *Ibid.*

56. *Roe v. Maniscalco*, 174 La. 526, 141 So. 49 (1932) (the purchaser, not being chargeable with violating the executory contract, was not held liable for the broker's commission); *Caruso-Goll v. DeFelice*, 72 So.2d 778 (La. App. 1954) (the neglect of the broker released the purchaser from the obligation to pay the broker's commission); *Dane & Northrup v. Selzer*, 63 So.2d 760 (La. App. 1953); *Blache v. Goodier*, 22 So.2d 82 (La. App. 1945); *Matthews-Pelton, Inc., v. LeBlanc*, 126 So. 449 (La. App. 1930); *McWilliams v. Stackhouse*, 1 La. App. 253 (1924).

57. LA. CIVIL CODE art. 3022 (1870); *Caruso-Goll v. DeFelice*, 72 So.2d 778 (La. App. 1954) (failure to give client notification within a reasonable time of the principal's acceptance of the offer to purchase); *Ernest A. Carrere's Sons v. Rumore*, 52 So.2d 57 (La. App. 1951) (through mistake of broker, printed form sent to vendor for signature varied in terms from printed form signed by purchaser); *Villemeur v. Woodward*, 134 So. 111 (La. App. 1931) (broker failed to obtain owner's signature to acceptance of offer to purchase).

58. LA. CIVIL CODE art. 3022 (1870); *Canovsky v. Bonhage*, 126 So. 252 (La. App. 1930); *Rhodes & Symes v. Nadeski*, 119 So. 292 (La. App. 1928).

59. LA. CIVIL CODE arts. 3010, 3021 (1870); *Blythe v. Hall*, 169 La. 1120, 126 So. 679 (1930).

60. LA. CIVIL CODE art. 2991 (1870).

61. *Id.* art. 2985 *et seq.*

62. *Sugar Field Oil Co. v. Carter*, 214 La. 586, 38 So.2d 249 (1949) (no agreement regarding commission, broker allowed recovery of commission on sum paid for option); *Doll v. Weiblen Marble & Granite Co.*, 207 La. 769, 22 So.2d 59 (1945) (Civil Code Article 2991, which says mandate is gratuitous unless otherwise provided, expressly held inapplicable to determine principal's liability to broker); *Richardson v. Bradford*, 153 La. 725, 98 So. 546 (1923) (expressly stated that an exclusive listing of real estate is not governed by law of mandate,

instances in which no express agreement was made regarding the compensation of the broker, the courts have usually awarded compensation customary in the locale in which the broker practices,<sup>63</sup> but no uniform rationale has been formulated.<sup>64</sup> The result is just, for it is highly unlikely that any person would expect that one who performs brokerage services as a vocation would enter into a contract for the rendition of those services gratuitously.

If the broker is employed under an exclusive listing to sell property at a fixed price for a stipulated commission, and the principal concludes a sale at a lesser price, the majority of cases have held that the broker is entitled only to a ratable proportion of the promised commission.<sup>65</sup> However, it has also been held that the broker is entitled to recover the full amount of the compensation as agreed upon in the listing agreement.<sup>66</sup>

The expenses which the broker incurs in the performance of his services are generally to be assumed by the broker. However, reimbursement for certain expenses has been allowed in the recent case of *Blackshear v. Landey*,<sup>67</sup> in which a sale could not be consummated through no fault on the part of the principal. In that case, as mentioned previously, the principal's wife, subsequent to the formation of the executory contract, had recorded an instrument designating the real estate listed with the broker

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and does not expire with the death of the principal, but only at the stated time); *Craton v. Inabnett*, 62 So.2d 129 (La. App. 1952) (no agreement as to commission; court found implied obligation to pay based on past services); *Lally v. Dossat*, 31 So.2d 41 (La. App. 1947) (brokerage contract considered as a contract of employment). *Contra*: *Knotts v. Midkiff*, 114 La. 234, 38 So. 153 (1905); *Duncan Steele, Inc. v. Labatt*, 130 So. 841 (La. App. 1930). However, it is incumbent upon the broker to prove the existence of a brokerage agreement between himself and his principal in order to recover: *Moore v. Loe*, 37 So.2d 345 (La. App. 1948); *United States Realty Sales v. Rhodes*, 34 So.2d 523 (La. App. 1948); *Doiron v. Woodruff*, 23 So.2d 366 (La. App. 1945); *Doll v. Firemen's Charitable & Benevolent Ass'n*, 8 So.2d 156 (La. App. 1942).

63. *Mobley-Rosenthal v. Weiss*, 152 So. 589 (La. App. 1934) (customary commission awarded, seemingly on theory of unjust enrichment).

64. *Sugar Field Oil Co. v. Carter*, 214 La. 586, 38 So.2d 249 (1949) (recovery allowed on basis of quantum meruit); *Doll v. Weiblen Marble & Granite Co.*, 207 La. 769, 22 So.2d 59 (1945) (recovery allowed on basis of equitable principle set forth in Civil Code Article 1965); *Craton v. Inabnett*, 62 So.2d 129 (La. App. 1952) (implied obligation found by court in light of previous dealings).

65. *J. R. Grand Agency v. Staring*, 156 La. 1094, 101 So. 723 (1924); *Grace Realty v. Peytavin Planting Co.*, 156 La. 93, 100 So. 62, 43 A.L.R. 1096 (1924); *Foulks v. Richardson*, 87 So.2d 335 (La. App. 1956); *Dew v. Hunter*, 66 So.2d 400 (La. App. 1953); *Moore v. Walther*, 66 So.2d 403 (La. App. 1953); *Corbitt v. Robinson*, 53 So.2d 259 (La. App. 1951); *Jeter & Monroe v. Daniels*, 25 So.2d 911 (La. App. 1946); *Myevre v. Norton*, 6 So.2d 215 (La. App. 1942).

66. *Lawrence v. Bailey*, 41 So.2d 474 (La. App. 1949).

67. 46 So.2d 688 (La. App. 1950).

as the family homestead.<sup>68</sup> The court, in allowing recovery in that case, cited as authority an earlier decision of the Louisiana Supreme Court which had, in similar circumstances, allowed recovery of expenses by the prospective vendee.<sup>69</sup> The court, in the *Blackshear* case, limited the recovery to "out-of-pocket" expenses incurred in advertising the property for sale. Although this limitation may seem unjust in some instances, the administrative factor involved might well have influenced the decision. If the courts were to open their doors to claims for expenses less susceptible of proof, the result might seriously impair the rights of faultless principals by subjecting them to ill-founded claims.

It is well established in this state that attorneys' fees are not recoverable unless they are expressly stipulated for in the contract or unless they are specially authorized by law.<sup>70</sup> Since there is no such statutory authority applicable to brokers' claims for compensation, it has become a general practice for the broker to insert into the listing agreement a clause imposing liability upon the principal for attorneys' fees incurred by the broker in the prosecution of a suit to recover compensation pursuant to the agreement.

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68. La. Acts 1921, No. 35, p. 38, allows the wife of a vendor to record an instrument designating real property as the family homestead, and thereafter it cannot be sold without her consent. This recordation, even after an agreement between the vendor and vendee as to the price and thing, is sufficient to prevent conveyance of the property if it is recorded before delivery of the deed and receipt of the price. *Neal v. Halliburton*, 19 So.2d 625 (La. App. 1944). The earlier cases held the broker not entitled to recover any expenses: *Blanc v. New Orleans Improvement & Banking Co.*, 2 Rob. 63 (La. 1842); *Didion v. Duralde*, 2 Rob. 163 (La. 1842). In *Hoggatt v. John*, 185 La. 227, 169 So. 69 (1936), the court disallowed a claim for expenses incurred in surveying the property pursuant to a request by a prospective purchaser. On the other hand, the broker has been awarded expenses where he acquired an interest in the property adverse to the interest of his principal. The court ruled that the broker held the property as constructive trustee for the principal, but allowed the broker to recover expenses incurred in preserving the property. See also *Assunto v. Coleman*, 158 La. 537, 104 So. 318 (1925).

69. *Baumann v. Michel*, 190 La. 1, 181 So. 549 (1938).

70. LA. CIVIL CODE art. 1934(2) (1870); *Womack Agencies v. Fisher*, 86 So.2d 732 (La. App. 1956); *Blackshear v. Landey*, 46 So.2d 688 (La. App. 1950). Recovery of attorneys' fees was allowed in *Matthews-Pelton, Inc. v. LeBlanc*, 126 So. 449 (La. App. 1930), where there was specific provision made in the contract for the payment of such fees.