April 1964

The Real Estate Broker's Right to a Commission upon the Procurement of a Purchaser Ready, Willing, and Able to Purchase

L. Stanton Dotson

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation

Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol41/iss1/6

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
THE REAL ESTATE BROKER'S RIGHT TO A
COMMISSION UPON THE PROCUREMENT
OF A PURCHASER READY, WILLING,
AND ABLE TO PURCHASE

INTRODUCTION

The presentation of the subject matter hereof will be made in the following manner: General Rule; Analysis of the Concept of Ready, Willing, and Able Purchaser; the Right to a Commission Without Procuring a Ready, Willing, and Able Purchaser; and the Right to a Commission Upon Procuring a Ready, Willing, and Able Purchaser When the Brokerage Contract Contains Conditional Requirements.

GENERAL RULE

The general rule is that one employed to sell or exchange or to find a buyer for real estate has earned his commission when he has procured a party ready, willing, and able to consummate the transaction contemplated in his contract of employment. The leading Illinois case of Monroe v. Snow states the rule as follows:

Appellant contends, that inasmuch as he refused to ratify the contract of sale, and the purchaser could not have it specifically performed for want of written authority to the plaintiffs to make the sale, he is not bound to pay the plaintiffs anything for their services. We can not lend our sanction to this view of the law. A real estate broker employed to make sale of land, who finds a purchaser at the price fixed by the owner; who is ready, able and willing to take a conveyance and pay the purchase price, has earned the compensation agreed to be paid him; or if the compensation is not fixed by the parties, he will be entitled to recover the usual and customary reasonable compensation for the service performed.

At least one author indicates that there is authority holding that the broker earns his commission only if he succeeds in getting


2 Id. at 136, 23 N.E. at 402-3.
the purchaser to sign a binding contract. The alleged conflict is based on the distinction between the statement of the general rule in *Monroe v. Snow* and the following statement from *Wilson v. Mason*.

Some of the cases go so far as to hold, that the broker is not entitled to his commissions unless the sale is actually accomplished by the delivery of the deed of the land from vendor to the vendee and the payment of the purchase money by the latter, or unless it is proven that the sale is prevented by the fault of the vendor. Other cases seem to hold, that the broker is entitled to his commissions when the minds of the vendor and purchaser meet in a verbal agreement for the sale by the one and the purchase by the other of the land. We are not inclined to follow either of these classes of cases, regarding them as extreme and exceptional. The true rule is, that the broker is entitled to his commissions, if the purchaser presented by him and the vendor, his employer, enter into a valid, binding and enforceable contract. If, after the making of such a contract, even though executory in form, the purchaser declines to complete the sale and the seller refuses to compel performance, the broker ought not to be deprived of his commissions. He has done all that he can do when he produces a party who is able, and, in binding form, offers to purchase upon the proposed terms. An agreement by a real estate broker to procure a purchaser not only implies that the purchaser shall be one able to comply, but that the seller and the purchaser must be bound to each other in a valid contract. So, where the agreement of the real estate broker is to make a sale, his commission is earned when a contract is entered into which is mutually obligatory upon the vendor and vendee, even though the vendee afterwards refuses to execute his part of the contract of sale or purchase. (Emphasis added.)

It is believed, however, that the cases are not really in conflict, and that the *Wilson* case can be distinguished by careful analysis.

The statement of the general rule in the *Monroe* case was made in affirming the instructions given by the trial court that the jury must find that the brokers procured a purchaser ready, wil-

---

4 Anderson, Real Estate Brokers' Commissions 76 (1948). The author states:

There are several questions of brokers' commission on which there are cases in this State expressing opposite views. Take such a simple question as to whether or not a broker has earned his commission when he has found a buyer who is ready, willing, and able to buy, or when he has brought about a valid enforcement contract. . . . (The author then quotes from *Wilson v. Mason* and *Monroe v. Snow*.)

The case of Hasher (sic) v. Wells, 103 Ill. App. 418 and Jenkins v. Hollingsworth, 83 Ill. App. 199, distinguishes these two cases, but it seems to me that they express different points of view.

5 *Supra* note 2 and accompanying text.

6 158 Ill. 304, 42 N.E. 134 (1895).

7 *Id.* at 310-11, 42 N.E. at 136.
ling, and able to purchase on the terms in the brokerage contract before they will be entitled to their commission. Therefore, there can be no doubt that this decision expressed a positive rule of law regarding the performance required of a broker.

The Wilson case, however, involved a contract to purchase land by two executors, signed by only one without the written authority of the other, with no evidence showing that they had any power under the will to purchase land for the estate.

The broker alleged that the agreement was that he only had to "procure" a purchaser, and the principal contended that the agreement was to pay a commission when the purchaser "took and paid for" the property. The trial and appellate courts had decided this factual dispute in favor of the principal, and their decisions were accepted by the court.

The court held that since the brokerage agreement, in effect, required the consummation of a sale then the broker would not be permitted to recover under the above principal of law because the contract between the broker and the executor had been abandoned by the executor and was unenforceable due to the executor's lack of authority; thus, no sale had been consummated. Essentially this holding was simply that where the condition that the property be "took and paid for," is required, the mere procurement of a ready, willing, and able buyer without an enforceable contract for sale is not sufficient performance of the brokerage contract.8

8 See Fox v. Ryan, 240 Ill. 391, 88 N.E. 974 (1909), which follows and endorses this principle of law by quoting the language in the Wilson case. The broker therein was required to "effect a sale" under the terms of the brokerage contract. (It is ironical that the confusion in this area of law was caused by the Wilson case because it involved the sale of the "Real Estate Board Building" in Chicago.)

The Supreme Court, in Lawrence v. Rhodes, 188 Ill. 96, 58 N.E. 910 (1900), contributed to the confusion caused in Wilson. In that case the court denied the broker a commission because the sale was not "effected" as required by the brokerage contract. The court distinguished the Wilson case by saying that the broker therein was not required to "effect" a sale; in fact, the court could have used the Wilson case to support its decision.

The Illinois appellate courts however, have survived the confusing language of the Wilson case. In most cases in which it is cited as authority for their decisions, a condition precedent of consummation is present. Dahlgard v. Florida Development Corp., 187 Ill. App. 282 (1st Dist. 1914) (commission denied where the purchaser procured was a corporation attempting an ultravires act—therefore, the purchaser had no legal ability to purchase; also, consummation of the sale was a condition precedent); cf., Packer v. Sheppard, 127 Ill. App. 598 (1st Dist. 1906) (commission granted where the broker produced a ready, willing, and able purchaser and the contract of sale recited an option to forfeit in the principal which he exercised by not enforcing the contract claiming that
The court also held, however, that regardless of what type of performance the brokerage agreement required, the broker had not earned his commission because the executor was legally incapable of entering into a binding contract to purchase land for the estate. It is submitted that this holding is within the concept of a "ready, willing, and able" purchaser regardless of the added criteria (quoted above) utilized by the court to explain the disposition of this case, if the brokerage agreement required a consummated sale as a prerequisite to the earning of a commission. The court clearly stated the general rule on the first page of its opinion as follows: "The duty of a broker, who is employed to sell real estate, is to find and produce to the vendor a purchaser, who is ready, willing, and able to complete the purchase as proposed. This he must do before he is entitled to any commissions." Therefore, it is submitted that the Supreme Court has not deviated from the general rule expressed in the Monroe case.

Not only have the appellate courts distinguished the above quote from the Wilson case from the general rule, but the Supreme Court has cited the Wilson case as authority for the general rule expressed in the Monroe case. It is submitted that the general rule has been applied consistently in Illinois, even in those decisions not specifically stating the rule.

In all cases, where the broker alleges that he has earned a...
commission, the court must first construe the terms of the brokerage contract to determine whether the ready, willing, and able test can be applied or whether a condition precedent must be fulfilled before the broker is entitled to his commission. This is not always an easy task. A vivid recent example of a case construing the terms of a brokerage contract and deciding whether the broker had produced a ready, willing, and able buyer is *Levit v. Bowers.* In that case, the brokerage contract required the broker to "successfully negotiate a sale." The court, after considerable discussion, held that "[t]he word 'successfully' was not used in that case but, as we interpret it, the word 'successfully' as used in connection with 'negotiate' in the instant case meant negotiations which would end in an offer that met all the terms imposed by the seller." The commission was granted since the negotiations of the broker ended in an offer by the purchaser which was accepted by the principal even though a contract of sale was never consummated.

Assuming the broker has found a ready, willing, and able purchaser, he must give notice of this fact to his principal before his authority to act expires or is revoked in good faith. If the broker has found a ready, willing, and able buyer and given notice to his principal, the principal's refusal to enter into a contract or release of the purchaser from the contract will not deprive the broker of his commission, provided his employment contract did not require the consummation of a sale.

**ANALYSIS OF THE CONCEPT OF READY, WILLING, AND ABLE PURCHASER**

The courts rarely discuss the concept of ready, willing, and able in its separate facets, except in cases involving the financial ability of the purchaser. However, for the sake of convenience, this author will discuss each of the three facets separately. While
this method is novel (to the best of author's knowledge), it provides a simple means of attacking a highly complex organizational problem. Also, it is submitted that such a method of categorization as will be utilized herein, will lead to an easy and more thorough understanding of what the courts really mean in a particular case where the phrase "ready, willing, and able" is used to support the holding.

**Generally**

Certain principles apply to the entire concept of ready, willing, and able, and are worthy of discussion. For instance, a principal is not obligated to accept a purchaser procured by the broker without an opportunity to investigate his ability (both legal and financial) to comply with the terms required by the brokerage contract. But where such an opportunity has been had or waived by the manifestation of approval by the principal, then the principal cannot deny the broker his commission on the ground that the purchaser was not ready, willing, and able. This latter point will be more thoroughly discussed under later sections of this article.

In order to be entitled to his commission, a broker must always procure a purchaser who is ready, willing, and able according to the terms of the brokerage contract.

The burden of proving that the purchaser is ready, willing, and able is upon the broker. One case states via *dicta* that the burden of proof is still on the broker even after the principal accepts and enters into an agreement with the purchaser. It

---

21 Oliver v. Sattler, 233 Ill. 536, 84 N.E. 652 (1908). The broker must act strictly according to the authority conferred upon him by the brokerage contract. Hoyt v. Shepard, 70 Ill. 309 (1873).
23 Hersher v. Wells, 103 Ill. App. 418 (4th Dist. 1902). It is submitted that the court has made a highly enlightened observation via this *dicta* in its excellent decision, which isolates the "readiness" of the purchaser to perform an exchange where he is "willing" and "able," but has not proven title. See text at note 33, *infra*. 
will be pointed out in a separate section of this article that this is not always true. Most cases hold that it is not necessary for the purchaser to be ready, willing, and able if the principal has contracted with and accepted the purchaser. If the terms of the contract specifically require the broker to prove that the purchaser is ready, willing, and able, then the broker must sustain that burden even where the principal has contracted with the purchaser.

A "Ready" Purchaser

Under the organizational system herein, a "ready" purchaser will be defined as one who has the legal power or legal capability to perform under the terms of the brokerage contract. The types of cases in this area have only one thing in common—the question of whether or not the purchaser is legally capable of performing the contract of sale. Therefore, it will not be possible to point out all of the varied situations where the question arises (not because of the lack of space, but simply because the author has not exhausted his imagination in this area).

The leading case in this area is Wilson v. Mason, where the broker, under a contract to consummate a sale, procured a purchaser who lacked the legal authority under a will to purchase the property as a co-executor, and also lacked legal authority to consummate a sale since he acted without the written consent of his co-executor. As a result of this legal inability, the contract was unenforceable, and the broker was denied his commission.

In a case where the broker was only required to procure a sale or exchange, instead of consummating a sale, the court made a strikingly similar holding by using the Wilson case as authority.

24 Rasar & Johnson v. Spurling, 176 Ill. App. 349 (3d Dist. 1912), held it was not necessary that the purchaser be ready, willing and able to purchase at terms originally agreed upon by the vendor and broker, and if the vendor sold on new terms the broker was entitled to commission.

In Glatt v. Adams, 226 Ill. App. 321 (1st Dist. 1922), the court held that where the principal had accepted his wife as a purchaser, no question could thereafter arise regarding whether or not the wife was ready, willing, and able to purchase. See text accompanying note 55 infra.

25 Husak v. Maywald, 185 Ill. App. 479 (1st Dist. 1914). Such a requirement is a condition precedent to the recovery of a commission.

26 158 Ill. 304, 42 N.E. 134 (1895).

27 Dingman v. Boyle, 209 Ill. App. 311 (1st Dist. 1918), aff'd, 285 Ill. 144, 120 N.E. 487 (1918).
In that case, the purchasers procured by the broker lacked the legal authority to purchase the property because although one of them had the authority to act as a trustee in case of a vacancy, it was not affirmatively proven that a vacancy actually had occurred.

In *Dahlgard v. Florida*, the commission was denied because the purchaser procured by the broker under a contract to consummate a sale was a corporation attempting an *ultra-vires* act. Thus, the purchaser was legally incapable of performing under the terms of the brokerage contract.

The excellent decision of *Hersher v. Wells*, portrays a situation where the court held that a broker under a contract to procure a sale or trade, not to consummate the sale, produced a purchaser who was "willing" under the terms of the contract, and financially "able," but "not ready" to trade because the broker failed to prove that the purchaser had legal title. In stressing this point in the very last sentence of the opinion, the court said: "There is no evidence in the record which even remotely tends to show that the purchasers were able (legally capable or "ready") to convey title to the lands involved in the exchange."

In *Davis v. Pauler*, the court rejected the *Hersher dictum* suggesting that the burden of proving ready, willing, and able is still on the broker even after the principal accepts and enters into an agreement with the purchaser. In this case, the broker was required under his employment contract to negotiate (procure) a trade. The broker, with express or imputed knowledge of the title status, produced a purchaser who was legally incapable of passing a good title to the property, and the principal *accepted* the contract. The court held that the broker was entitled to his commission even though the purchaser was not legally capable, because the principal accepted the purchaser.

It is submitted that the result reached under the holding in

---

29 103 Ill. App. 418 (4th Dist. 1902).
30 Id. at 422-23.
32 See note 22 and accompanying text.
33 It should be noted for the sake of continuing clarification of the "ready, willing and able concept" that the purchaser in this case was both "willing" and financially "able."
this case is less desirable (from the standpoint of justice) than it would have been if the suggestion in the *Hersher* case had been followed. This contract of sale does not fulfill the prerequisites of being *valid* and *enforceable* as do the contracts in the other cases (involving “willing” and “able”) in which the court has granted recovery because the principal *accepted* the purchaser. 34 Also, the broker is more culpable when he produces the “unready” purchaser than is the principal who has hired the broker. It is the broker’s job to investigate and produce a “ready” purchaser; the principal has promised to pay him for doing his job in a thorough manner. The broker has been hired as an expert in real estate transactions and has a duty to act accordingly.

The last “failure of title” case, *Jenkins v. Hollingworth & Tabor,* 35 involved a brokerage contract requiring the consummation of a trade, and the purchaser in the trade *admittedly* did not have legal title to the property. The broker was not permitted to recover for the dual reasons that he did not meet the condition precedent of consummation, and he was not legally capable or “ready.” It is earnestly submitted that this decision is in complete accord in legal principle with the *Wilson* and *Dahlgard* cases discussed previously in this section. 36

On the other hand, it has been held that the purchaser produced by the broker is “ready” even if the contract between the principal and the purchaser is voidable under the Statute of Frauds, providing that the purchaser produced is otherwise ready, willing, and able. 37 This rule is fair because the broker is only required to produce a ready, willing, and able purchaser in all

34 See discussion in text after note 61 infra.
35 83 Ill. App. 139 (3d Dist. 1898).
36 It is further submitted that some authors have been completely misled, as indicated in the quote in note 4 supra which suggests that the legal principles applied in *Wilson* and *Jenkins* can be distinguished.
37 Carter v. Simpson, 130 Ill. App. 328 (3d Dist. 1906). In Fox v. Starr, 106 Ill. App. 273 (2d Dist. 1902), the court made the following statement:

> When a real estate agent makes a verbal contract for the sale of land, void under the statute of frauds, and which his principal refuses to carry out, the agent is nevertheless entitled to his commissions, upon showing that the prospective purchaser was able, ready, and willing to comply with his contract. . . . Nor is it necessary, between the vendor and his agent, that the latter’s authority to sell should be in writing, but the rule goes no further. . . . A real estate agent or broker, though only verbally authorized to make a sale of real estate, is entitled to commissions, upon proof of a verbal contract to sell the same upon the terms and conditions given him by his principal, if the prospective purchaser is one ready, willing, and able to consummate the purchase. *Id.* at 274-275.
cases. After this requirement has been fulfilled, the principal will be more culpable if the contract comes under the Statute of Frauds because the broker no longer has any requirements to perform under the terms of his brokerage contract. It would seem that the same result would be reached where the purchaser produced is a minor, since his contract also would be voidable. However, the author has failed to locate any cases on this point.

A "Willing" Purchaser

Under the analytical system used in this article for organizational purposes, a "willing" purchaser is one who immediately desires to purchase on the terms specified by the principal. The most common problems arising in this area concern a determination of what the principal's terms are and whether the broker's prospect was willing to buy on those terms.

As to this problem, there is a paucity of appellate decisions. This is understandable since it is obvious to the broker who fails to produce a purchaser presently desiring to enter into a contract with the seller on the terms specified that he has not earned his commission. However, one illustrative case is Close v. Browne. In that case the broker argued that a real estate broker is entitled to his commission if the principal sells to a purchaser produced by him even though the sale is made on terms different from those stated in the brokerage contract. The court rejected his contention and stated:

Such is the law applicable to cases where there is merely a departure from the terms of the contract, leaving the transaction substantially that provided for by the agreement, such as a reduction in the price asked or an extension of the time payment of all or part of the consideration; but where the transaction is wholly different from the one contemplated by the parties when the contract was made there can be no recovery upon the contract. In this class of contracts it may be fairly presumed that the parties contemplate some slight modification in the terms of the sale, provided the principal assents to such modification; but it cannot be presumed that the parties intend that the contract shall apply to a transaction wholly different from the one which they have in view when they enter into the contract.

While appellate cases are not frequent, one distinguished au-

---

88 230 Ill. 228, 82 N.E. 629 (1907).
89 Id. at 241, 82 N.E. at 633.
thor has warned that where a principal is dissatisfied with the purchaser procured by the broker, he will often seek to take refuge behind the rule that if the purchaser is not "ready" according to the terms of the brokerage contract, the broker is not entitled to his commission. He states:

This is obvious where the broker's prospect offers less than the seller's listing price, or offers to buy on an installment contract where the seller's listing contemplates a cash deal. But in addition, keep in mind that if the broker's listing contract is silent on other terms of the transaction, the law will read various implications into it, just as courts read various implications into a contract of sale that is silent. . . . And if the terms of sale as set forth in the contract of sale do not harmonize with the terms of sale set forth or implied in the listing contract, the seller may reject the broker's prospect without incurring any liability for commission.

Thus in Migneault v. Gunther, the court denied the commission by holding that the prospect for a ninety-nine year lease was not "ready" to perform the implied term in the brokerage contract that the lease include a "condemnation clause." The only term expressly required by the brokerage contract in this case was the amount of the rent.

Now that the reader has a fair idea of how the courts construe the term "willing" via desire of the purchaser to comply with the seller's terms, the requirement of the immediacy of the purchaser's desire will be explored. This aspect of whether a purchaser is "willing" or not only reaches the appellate courts in option cases.

The general rule in Illinois is that a broker employed to sell real estate and to find a purchaser for his principal is not entitled to a commission where he merely procures a purchaser of an option which is not exercised. This rule has been applied con-

---

41 Ibid. The two examples of implied terms given by Mr. Kratovil are: (1) The brokerage contract is silent on question of abstract or other evidence of title—if the sale contract prepared by the broker requires the seller to furnish evidence of title, the broker has not procured a "ready" purchaser under the brokerage contract. (2) If the brokerage contract is silent as to what will be included in the sale, the principal will only be required to sell the real estate and fixtures—if the contract of sale requires the principal to sell personal property such as furniture, then the purchaser procured is not a "ready" purchaser. Ibid.
42 171 Ill. App. 311 (1st Dist. 1912).
43 Lawrence v. Rhodes, 188 Ill. 96, 58 N.E. 910 (1900); Mason v. Miller, 179 Ill. App. 347 (2d Dist. 1913); Keach v. Bunn, 116 Ill. App. 397 (3d Dist. 1904), aff'd, 214 Ill. 259, 73 N.E. 419 (1905).
sistantly. The decisions are based on the reasoning that the broker, under the terms of his employment contract to find a purchaser or sell, is required to produce a purchaser "willing" to purchase at the present time, and not one who may never purchase at all.\textsuperscript{44}

Apparently, there is no authority in Illinois involving a situation where the purchaser procured by the broker subsequently exercises the option. However, the United States Supreme Court has held that the broker is entitled to his commission in such a situation because the purchase was made as a proximate cause of the broker's efforts.\textsuperscript{45} Thus, the Court seems to consider the purchaser "willing" \textit{pro tanto} when he exercises the option. One case indicates that Illinois might hold the other way, but this case can be distinguished by the fact that the court held the option was exercised on materially different terms than those required by the brokerage contract.\textsuperscript{46}

In Fox \textit{v.} Ryan,\textsuperscript{47} the court held that a contract of sale providing for a down payment with the other payments "strung along sixty, ninety days, six months to a year" was not an option. The court stated that this was an enforceable contract, and when the principal (after accepting the purchaser's offer) failed to enforce it upon forfeiture of the down payment, he was liable for the commission.

Of course, if the option to forfeit is in the principal, and he exercises it, the courts will permit the broker to recover his commission upon his showing that he had procured a ready, willing, and able purchaser.\textsuperscript{48}

\textbf{An "Able" Purchaser}

At first blush, the "able" purchaser is the easiest facet of the concept of "ready, willing, and able" to understand. Just as with the Rule against Perpetuities, the rule is simple; the application, however, reminds one of Justice Holme's statement that "Life consists of drawing the line." The broker is entitled to

\textsuperscript{44} Ibid.

\textsuperscript{45} Campbell \textit{v.} Rawlings, 280 Fed. 1017 (D.C. Cir. 1922). This appears to be the prevailing view. See generally Annot., 23 A.L.R. 856, 859-60 (1923).

\textsuperscript{46} Murawska \textit{v.} Boeger, 219 Ill. App. 241 (1st Dist. 1920).

\textsuperscript{47} 146 Ill. App. 245 (1st Dist. 1909), \textit{aff'd}, 240 Ill. 391, 88 N.E. 974 (1909).

\textsuperscript{48} Packer \textit{v.} Sheppard, 127 Ill. App. 598 (1st Dist. 1906).
a commission when he produces a purchaser who is financially able to perform according to the terms of the brokerage contract.\textsuperscript{48a} The questions are—what are the terms of the brokerage contract and when is the purchaser considered financially able to perform under them.

The usual dispute over what the price terms in the brokerage contract actually are is purely factual in nature, and thus settled in the trial court, usually after a great deal of controversy.

In order to meet the "able" portion of the test, it is the broker's burden to show that his purchaser was able to "command," in his own name, the funds necessary to perform the offer.\textsuperscript{49} Epstein v. Howard\textsuperscript{50} held that "to command funds" refers to the purchaser's own ability; it must not be necessary for him to depend upon a third person who is not bound to furnish the money, and over whom the purchaser has no control.

Thus, in the Epstein case, the broker, in view of the lower court's finding that the purchaser produced was not financially able himself, vigorously contended that the purchaser was acting for an undisclosed principal. The court countered with the proposition above and denied him a commission. Similarly, in Smith, Adm'r v. Penn,\textsuperscript{51} the broker was denied a commission due to the fact that the purchaser was financially unable to provide more than the earnest money.

A purchaser may be considered financially "able" even if he has to borrow the necessary funds, but it is generally held that where the purchaser has promised to procure a loan, the broker will be denied his commission if it is not procured within the

\textsuperscript{48a} Lawrence v. Rhodes, 188 Ill. 96, 58 N.E. 910 (1900); Smith, Adm'r v. Penn, 161 Ill. App. 155 (3d Dist. 1909); Marcy v. Whallon, 115 Ill. App. 435 (2d Dist. 1904). One distinguished Illinois author sums up this area by saying, "The buyer must be able to command the necessary funds to close the deal within the time required. . . . He must actually have the money to meet any such payments required and be in shape financially to meet any deferred payments." Kratovil, Real Estate Law 91 (4th ed. 1964).

\textsuperscript{49} Epstein v. Howard, 5 Ill. App. 2d 553, 126 N.E.2d 153 (1st Dist. 1955); William C. Bender and Co. v. Tritz, 338 Ill. App. 661, 88 N.E.2d 519 (1st Dist. 1949) (second mortgage commitment and cash surrender value of life insurance policies did not show command over necessary funds).

\textsuperscript{50} Ibid.

\textsuperscript{51} Supra at note 48.
time prescribed by the agreement, or if it is unlikely to be made at all.52

RIGHT TO A COMMISSION WITHOUT PROCURING A READY, WILLING, AND ABLE PURCHASER

There are certain situations where the broker apparently is not required to produce a ready, willing, and able purchaser. One example is where the broker has an “exclusive listing” or an “exclusive right to sell,” and these employment contracts are violated by the principal. The first article of this symposium discusses the broker’s rights under exclusive contracts. Also, the area of bad faith on the part of the principal is more appropriately discussed in the other articles of the symposium.

Illinois courts have sometimes permitted the broker a quantum meruit recovery where he fails to produce a ready, willing, and able purchaser, but has performed time consuming labor in connection with a transaction which was ultimately consummated.53

There is a line of cases in Illinois which has permitted the broker to recover his commission where the broker has not produced a ready, willing, and able purchaser, but the principal has accepted the purchaser by entering into an agreement with him. The reason for this is that:

[W]here the principal actually consummatesthe particular transaction with the person produced by the broker or enters a contract with him, the question of the ability, readiness, and willingness of such person is no longer material. In such a case the principal accepts the customer as ready, able, and willing, and he is estopped from denying the purchaser's ability or willingness to complete the contract, inasmuch as he is not bound to accept the offer of such person without a reasonable opportunity to inquire and satisfy himself in relation to it.54

This rule is stated via dicta in Carr v. Butterworth55 as follows:

The law in this State is well settled that where an owner lists his real estate with a broker for sale, the broker has earned his

52 Cooper v. Liberty National Bank Of Chicago, 332 Ill. App. 459, 75 N.E.2d 769 (1st Dist. 1947) (purchaser failed to procure a loan within a specified period as agreed); Adams v. Hall, 168 Ill. App. 569 (1st Dist. 1912) (borrowing money on a second mortgage on the premises sold held not likely to be successful).
53 Close v. Browne, 230 Ill. 228, 82 N.E. 629 (1907).
55 219 Ill. App. 14, 18 (2d Dist. 1920). The vast majority of cases expressly held that
commission (1) where the broker has procured a prospective purchaser, who is able, ready and willing to enter into a contract for purchase on the owner's terms and the owner refuses to enter into such contract, or (2) the broker produces a prospective purchaser, whom the owner, without fraud on the part of the broker, accepts, and with whom the owner enters into a valid, binding, enforceable contract for sale, and in the latter case it is immaterial whether the contract is carried out or fails to be carried out by the reason of the default of the prospective purchaser. (Emphasis added.)

In *Davis v. Pauler*, the purchaser was not "ready" to perform because he lacked a good title in a real estate exchange transaction. The court held that the broker could recover and stated that the principal had *accepted* the purchaser by entering into a contract with him even though it was not enforceable due to lack of mutuality. An earlier court in another district would have held the other way according to its *dicta*.

In another case, *Rushkievicz v. St. George*, the purchaser produced was not financially "able" to purchase. The court held that the broker could nevertheless recover his commission because the principal had *accepted* by entering into an enforceable con-

---

*a commission can only be recovered where the contract entered into between the principal and the purchaser is valid and enforceable. Fox v. Ryan, 240 Ill. 391, 88 N.E. 974 (1909) (commission granted; contract was enforceable in this case and the principal chose not to enforce it); Wilson v. Mason, 158 Ill. 304, 42 N.E. 184 (1895) (commission denied where the contract was not valid and enforceable); Bowers v. Hoffman, 225 Ill. App. 35 (1st Dist. 1929) (rule acknowledged and accepted, but contract was not enforceable here, and the commission was denied due to the misrepresentations (fault) of the broker; thus this case can be distinguished); Newman v. Lunley, 125 Ill. App. 382 (2d Dist. 1906) (commission granted where principal accepted purchaser but failed to enforce contract; court did not require the broker to prove the purchaser's ability to pay); Lawrence v. Rhodes, 87 Ill. App. 672 (1st Dist. 1899) (commission granted where contract was held enforceable in a court of law for damages only, not in equity for specific performance; the court held that the commission should be granted where the purchaser was accepted by the principal, but then permitted to walk out on the deal after returning the earnest money to the principal. On these facts, the court indicated that recovery could be had even though the contract might have lacked mutuality).

Under the general rule of Monroe v. Snow, 131 Ill. 126, 23 N.E. 401 (1890), the broker may be entitled to his commission though the principal and purchaser enter into an unenforceable agreement if the purchaser is ready, willing and able. Ward v. Lawrence, 79 Ill. 295 (1875); Goodmanson v. Rosenstein, 144 Ill. App. 243 (2d Dist. 1908); Carter v. Simpson, 130 Ill. App. 328 (3d Dist. 1906).

---

56 170 Ill. App. 317 (1st Dist. 1912). It is submitted that this case is a radical departure from the rule stated above since the contract completely lacked enforceability. See text accompanying note 31 for author's appraisal of this case. A *contra* result was in Lucas v. Schwartz, 243 Ill. App. 418 (1st Dist. 1927).

57 Hersher v. Wells, 103 Ill. App. 418 (4th Dist. 1902). See note 23 and text accompanying note 33 for discussion of the author's appraisal of this case.

tract. The court stated that in such a case, the principal could not later defeat the broker's commission on the ground that the purchaser was not able to pay the amount required.

Of course, if the broker himself is at fault in making the contract unenforceable or objectionable to the owner, he will not be entitled to a commission even though the owner accepts a contract from the purchaser.\(^6\)

It is submitted that all of the cases above reach fair results with the exception of Davis v. Pauler.\(^6\) These decisions can be understood best by examining the culpability of the parties. Where the broker produces a "ready" purchaser who backs down after entering into an agreement with the principal, and then the principal refuses to enforce his valid and enforceable contract, the broker has done everything required of him and should be entitled to his commission.

In cases where the broker has produced a buyer who is financially unable, but the principal accepts him, it is axiomatic that the broker has satisfied the desires of the principal regarding financial ability. Of course, if the principal rejects the broker's prospect because of lack of his financial ability, a commission is not recoverable.\(^6\)

However, when the broker produces a buyer who is legally incapable, unbeknown to both the principal and the broker, as in the Davis case, then the broker should be considered more culpable than the principal, and the broker's commission should be denied. Also, in this situation, the contract of sale is not valid or enforceable but void.

In those cases which are specifically decided one way or the other:

\(^6\) Kraus v. Campe, 328 Ill. App. 37, 65 N.E.2d 127 (1st Dist. 1946) (commission denied where the broker was at fault when he prepared the unenforceable contract of sale which contained a defective legal description); Melleh v. McDermott, 211 Ill. App. 268 (1st Dist. 1918) (commission denied where contract of sale was silent as to the depository of loan funds, and the broker's refusal to place these funds in escrow caused the seller to refuse to go through with the deal because of the breach of an implied requirement in the contract of sale to use an escrow); Quinlan v. Towle, 185 Ill. App. 592 (1st Dist. 1914) (commission denied where broker had knowledge of the principal's lack of authority to sell, caused by interest of minor heirs in property). Accord, Bowers v. Hoffman, 225 Ill. App. 35 (1st Dist. 1929); Woolf v. Sullivan, 128 Ill. App. 62 (2d Dist. 1906).

\(^6\) Supra note 56.

\(^6\) Marcy v. Whallon, supra note 58. See note 34 supra.
other depending upon whose fault it is that the deal did not go through, it is axiomatic that the court has reached a fair result.\textsuperscript{62} Just as in other fields of law, where the liability or exoneration of the parties is based upon "fault," the results, if properly reached, are always fair.\textsuperscript{63}

**Right To a Commission When the Brokerage Contract Contains Conditional Requirements**

The preceding sections dealt with the conditions that the broker must satisfy when the brokerage contract is silent, or when it simply provides that the broker earns his commission if he "pro- cures a purchaser," or "negotiates a sale."\textsuperscript{64} In such cases, the broker earns his commission if he procures a purchaser who is ready, willing, and able to buy on the terms specified by the owner, and gives notice to the owner before his authority expires or is revoked in good faith, or the principal accepts the contract from the purchaser he has procured.

However, the principal may specify other conditions which have to be met before the broker will be entitled to a commission. These provisions are conditions precedent to his recovery.

The most common provision is to require a "consummation of the Sale" as a condition to payment.\textsuperscript{65} Or the brokerage contract may provide that the commission will be paid on "payment of the purchase price," "closing of the sale," "the purchaser signing a binding contract," or "the procuring of a purchaser who takes and pays for the property."\textsuperscript{66}

These conditions, of course, might give the principal an opportunity to deny the broker a commission by simply refusing to consummate the sale to a purchaser ready, willing, and able to buy. For example, where a contract required the agent to perform to the satisfaction of the principal, it has been held that such a condition was held valid and enforceable, whether or not the

\textsuperscript{62} For examples of such cases, see note 59.
\textsuperscript{63} This proposition is so universally accepted that it needs no citation.
\textsuperscript{64} See, e.g., Levit v. Bowers, 2 Ill. App. 2d 343, 119 N.E.2d 536 (1st Dist. 1954).
\textsuperscript{65} See, e.g., Wilson v. Mason, 158 Ill. 304, 42 N.E. 134 (1895); Shotwell v. Tate, 295 Ill. App. 624, 14 N.E.2d 860 (3d Dist. 1938).
agent’s performance was competent and of a sort that would be satisfactory to a reasonable principal.  

However, it should be noted that the courts are quite liberal in protecting the broker in circumstances where the principal by his own action prevents the broker’s full performance and thus his commission. For example, in Goldstein v. Rosenberg, the broker was promised a commission on the consummation of the sale. He procured a buyer who entered into a contract to purchase. However, the principal refused to close the deal. The court held that under such circumstances the seller could not take advantage of a condition precedent, the performance of which he has rendered impossible.

**Conclusion**

In the area of law under discussion, the courts have done a commendable job, indeed, in making fair decisions. It has only been necessary to criticize the holding of the court in one case out of all the cases cited in this entire article. Such a discovery as this one emphasizes the harmony of the decisions in their holding in this complex area of law.

However, as indicated throughout this article, the courts have not always been explicit in stating, under general categories, exactly why the purchaser produced by the broker was not ready, willing, and able, except in the area of financial ability. This would lead one to believe that each case is decided on its own facts, and that there are no general guidelines under which each factual situation can be analyzed.

This author has accepted the challenge of creating appropriate guidelines by categorizing the various factual situations into four separate categories: “Ready,” “willing,” “able,” and “other cases where it is not necessary to produce a ready, willing and able

---

68 331 Ill. App. 374 (1st Dist. 1947). However, in Matteson v. Walker, 249 Ill. App. 404 (1st Dist. 1928), the contract between the owner and broker provided that “if the deal falls through and the sale is not made whatever the reason may be, Mr. Walker will pay no commission.” The court held that the broker was not entitled to a commission where the sale was not consummated, even though he had found a buyer ready, willing, and able to buy and the owner’s refusal was arbitrary. Cf. Madden v. Brown, 169 Ill. App. 456 (1st Dist. 1912).
69 Davis v. Pauler, 170 Ill. App. 317 (1st Dist. 1912).
purchaser." By the use of this analytical system, not expressly
adopted by the courts, the cases in this area in Illinois seem to fit
into a finite pattern which makes it easier to understand the
"real" reasons underlying each particular decision.

Most courts, unlike some of its critics, seem to have survived
the confusing language in the Wilson decision without failing to
realize that the Supreme Court was addressing itself to a situation
involving a condition precedent, and therefore, the ready, willing,
and able test could not be applied. In order to prevent the un-
fortunate confusion by practitioners and some courts in the future,
it is respectfully suggested that the author's analytical system be
adopted by the courts for the purpose of giving the reasons under-
lying their decisions since they actually make their decisions on
the basis of this analysis anyway. This is not a request for black
and white law; but rather it is a request for a system of separate
concepts upon which any factual situation raising the question
of "ready, willing, and able purchaser" can be decided for the
purpose of getting an easy and more thorough understanding of
what the courts really mean in a particular case where the phrase
"ready, willing, and able" is used to support the holding. It is
submitted that any factual situation involving this question can be
and is being decided upon the following five issues: (1) Is the
purchaser "ready," meaning is he legally capable of performing
the contract of sale? (2) Is the purchaser "willing," meaning, is
the purchaser presently desirous of complying with the expressed
or implied terms of the brokerage contract? (3) Is the purchaser
"able," meaning, is he financially able? (4) If the purchaser is not
ready, willing, and able, has the principal accepted the purchaser
by entering into a valid enforceable agreement with the purchaser
or is the principal at fault in preventing the broker from pro-
curing a ready, willing, and able purchaser? (5) If the purchaser
is ready, willing, and able does the brokerage contract require

70 It is not what the courts say, it is what they address themselves to that counts. As
one very fine professor at Chicago-Kent College of Law, Professor James K. Marshall, has
often said to his students reciting in class, "I know what the court has said, now tell me
what it is talking about!"

71 See note 4 supra and accompanying text.

72 Wilson v. Mason, 158 Ill. 304, 42 N.E. 134 (1895). See note 8 supra and accom-
panying text.

73 It is submitted that in the area of discussion in this article, we presently have
very few grey areas involving the actual holdings of the courts.
more than a ready, willing, and able purchaser via a condition precedent?

The above analytical system of the concept of ready, willing, and able has even greater value in a case where more than one of the above issues is involved such as in the *Wilson* case.

The reason that the above system is infallible is because the "general rule" in Illinois requires the broker to produce a purchaser who is ready, willing, and able in every case before he is entitled to a commission unless the principal has accepted the purchaser by entering into a valid and enforceable agreement with him, or except where the principal is at fault in preventing the broker from procuring a ready, willing, and able purchaser. This is a valid statement of the law in Illinois as it has been extracted from all of the cases cited herein.

L. STANTON DOTSON