# THE REAL ESTATE BROKER†

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## I. INTRODUCTION

1. — *The organization of real estate brokerage.* — The real estate brokerage is carried on today by individual brokers, firms and corporations. Large brokerage businesses generally have a sales manager and several salesmen working under him. A salesman will ordinarily be on a commission basis, receiving a certain percentage of the commission earned by the broker on every sale brought about through the efforts of the salesman. In exceptional circumstances a salesman may receive a basic salary in addition to a commission on each sale. A certain percentage of the commission earned on a sale is usually allowed to the listing agent or salesman who brings the property into the office even if he does not effect the sale. The balance of the salesman's share of the commission earned will go to the salesman who sells the property.

The legal relationship between the salesman and the broker presents certain difficulties of classification, but it would appear to be one of lease or hire of personal services with an implied mandate given to the salesman to bind the broker for certain purposes essential to the carrying out of the contract of employment.[1] The salesman must, I think, be deemed to have authority to make a listing[2] agreement with the client on the broker's behalf, and he will bind the broker for anything done or agreed to within the scope of his apparent authority.[3]

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[1]As to combination of mandate and lease or hire of services see Planiol & Ripert, *Traité Pratique de Droit Civil Français* (1954), vol. 11, no. 1431. The right to terminate the relationship, usually given as one of the important matters on which the two contracts differ (although the jurisprudence has largely reduced the practical importance of the difference), is often settled in practice by a written contract of employment between the broker and the salesman which provides for termination upon giving a specified notice of, for example, thirty days. Although the salesman is generally referred to in practice as the "agent", he would not appear to be a substituted mandatary or subagent but a *préposé* of the broker carrying out certain services under the direction and supervision of the broker with a mandate from the latter for certain purposes. Cf. *Juris-Classeur Civil.* C.N. 1993-1995, nos. 8,40,50. The broker will be responsible for damage caused by the fault of the salesman while in the performance of the work for which he is employed or acting within the scope of his authority, but the client should not be liable since there is no contractual relationship between himself and the salesman and the latter does not come under his control.

[2]The rules of the Montreal Real Estate Board define "listing" as follows: "Listing shall mean the placing of a property in the hands of a broker to lease, sell or exchange."

[3]He would, for example, bind the broker by an agreement to sell the property for a commission lower than the one usually charged by the broker.

2. — *The regulation of real estate brokerage in Quebec.* — Real estate brokerage is not subject to any special regulation in Quebec. Brokers and salesmen are not required to obtain a special license, although the broker must comply with the general municipal licensing regulations. There is no corporate body recognized by the legislature as having a power of regulation over all real estate brokers. Membership is voluntary in the two existing organizations, the Montreal Real Estate Board, a corporate body since 1954, and the Corporation of Real Estate Brokers of the Province of Quebec.

The Montreal Real Estate Board is described in its literature as "an organization of licensed real estate men co-operating for the betterment of their profession." It has established a code of ethics and a tariff of minimum commissions and charges which members are expected to follow, as well as a set of rules and regulations governing co-operative listing. The code of ethics covers a member's relations with his fellow members, with clients and with customers and the public. It requires that every member observe the schedule of fees established by the Board. A violation of the code of ethics is punishable by suspension or expulsion. Any business difference arising between members of the Board is supposed to be submitted to the Arbitration Committee. An appeal lies from the decision of the Arbitration Committee to the Directors.

3. — *The different kinds of listing.* — The three main kinds of listing, or authority to sell, which are encountered in practice today are the ordinary or "open" listing, the "exclusive" listing, and the "co-operative" listing. The open listing is of a non-exclusive nature; the owner is free to list the property with other brokers. The exclusive listing gives the broker, usually for a specified period, the sole and exclusive authority to sell the property. The co-operative listing is a special form of exclusive listing which has been introduced into real estate practice in Montreal only fairly recently. It is given to a "listing broker" who files the original of the listing agreement with the Montreal Real Estate Board. The Boards sends a mimeographed copy of the listing with a photograph of the property on the back (from which the listing derives its trade name of "Photo-Co-op") to all members of its Co-Operative Listing Section who may then attempt to find a purchaser for the property. The owner agrees to pay a commission which is one and a half or two per cent higher than the ordinary commission, and is divided between the listing broker, the selling broker and the Board according to a schedule established by the Board. All negotiations with the owner, including the submission of offers to purchase, are as a general rule carried out through the listing broker.

## II. The Legal Relationship Between the Real Estate Broker and His Client

4. — *The nature of the work performed by the real estate broker.* — Real estate brokers are engaged in the work of arranging sales, exchanges and leases of immoveable property as well as the placement of loans on the security

of such property. We are here chiefly concerned with the selling function of the real estate broker but the general principles applicable in this field will apply on the whole to the other kinds of work carried on by the broker. As salesman, the function of the broker is to assist his client to sell his property. He advertises the property and seeks by various means to interest prospective purchasers in it. He represents the client in negotiations with the other party. He generally obtains a written offer to purchase which he transmits to the client for his consideration and acceptance. He may receive a deposit of money on behalf of his client from the other party. Sometimes he may enter into binding legal agreements on behalf of the client. He may accept an offer to purchase or make an offer to sell on his client's behalf. Occasionally he will arrange for his client to give a prospective purchaser an option for a consideration.

The broker may, on the other hand, act for a person who desires to purchase a particular property. Here the broker may obtain for his client an offer to sell or an option from the owner, and in some cases he may act for a purchaser who prefers to remain an undisclosed principal.

5. — *The nature of the contract between the broker and his client.* — The legal relationship between the broker and his client has always been characterized by our courts as one of mandate rather than lease or hire of personal services,[4] although the representative character of the relationship, traditionally regarded as the hall mark of mandate, is not too prominent or obvious in the usual course of dealing today. As a general rule the broker does not make or accept offers on his client's behalf but merely brings the parties together by his negotiations. The parties conclude the agreement themselves. Still the broker represents the client in negotiations with the other party and will bind the client by any misrepresentations or fraud which may have induced the other party to contract. He is also the instrument by which a binding unilateral promise to purchase is formed when the prospective purchaser gives him an offer to purchase with a delay to accept.[5] When the broker takes the offer, the other party cannot withdraw it before the expiry of the delay, at least not without exposing himself to liability for breach of contract.[6] When the broker takes a deposit from the

[4]See, for example, *La Compagnie Immobilière de Montréal Est* v. *O'Connor* (1910), 12 P.R. 120 (S.C., per Demers J.); also *Stafford* v. *Smith* (1896), 10 S.C. 470 (C.R.) where it was held that the contract by which the owner of property empowered another to sell it with the stipulation that this person should have as his remuneration the surplus of the price of the sale over a determinate sum constituted a *mandat salarié* and not a partnership.

[5]The offer is in practice addressed to the broker, but it must be deemed to be made to him as agent for the owner of the property.

[6]It is not necessary here to enter into the question of whether the debtor of a unilateral promise of sale who purports to withdraw his offer before the expiry of the stipulated delay is liable at the most for damages or whether such withdrawal is without effect and cannot prevent the creditor who accepts within the required delay from insisting on specific performance, although the latter appears to be the better view.

prospective purchaser he does so as agent for the client.[7]

6. — *The authority of the broker to bind his client.* — It is characteristic of mandate that it vests certain specific authority in the mandatary or agent to bind the mandator or principal towards third persons. This authority may be expressed or implied. A mandate given to members of a certain profession or calling carries with it certain implied powers which need not be specified. They are inferred from the nature of such profession or calling.[8] When a property owner or prospective purchaser of property gives a mandate to a real estate broker what does he expressly or impliedly authorize him to do?

The ordinary, or open, listing which says nothing specific as a general rule about the precise powers of the broker obviously gives him the right to offer the property for sale upon the specified terms, that is, to advertise it as being for sale upon these terms, and to invite offers to purchase. But does it confer the power to bind the client by making an offer to sell or accepting an offer to purchase on his behalf? In practice real estate brokers apparently do not regard themselves as having such authority by virtue of the open listing or even of the terms of an exclusive or co-operative listing agreement which states that the broker is given "authority to sell" the property of the client "for the price and under the terms and conditions mentioned below or at such other price and under such other terms and conditions as I may hereafter agree to." They would not as a general rule presume to exercise such powers without more explicit authorization. Such powers are not essential to the execution of their mandate. As will be seen, the broker is deemed to have fulfilled his mandate when he brings the parties into relation with one another, even though the agreement is made directly by the parties themselves. In practice a broker obtains an offer to purchase which is addressed to him but it is accepted by the client himself.

Certainly it is reasonable to assume that the client does not ordinarily intend that the broker should have power to bind him by acceptance of an offer to purchase. The implied powers of the broker are to be determined by reference to the usage or practice in the field. And although the words "authority to sell" would admittedly on a strict interpretation include such power to bind the client, if we cannot invoke usage against such an interpretation on the ground that the expression is ambiguous, it would seem that in view of the well established practice or course of dealing there must be read into every listing a customary clause[9] that the broker is not to be deemed to have power to bind his client unless he has received explicit authority to do so.

This appears reasonable enough between broker and client, but one may question the reasonableness of applying such a customary clause against third

[7]See, for example, *Morin* v. *Turmel,* [1956] Q.B. 173.

[8]Art. 1705 C.C.

[9]Art. 1017 C.C.

persons and ask whether in so far as they are concerned the words "authority to sell" should not be deemed to disclose an apparent mandate to bind the principal. On the other hand, is the course of dealing not so well established that it must be presumed to be known by one who deals with a real estate broker? The question is a difficult one and shows a tension between law and practice. It would appear inconsistent to continue to characterize the relationship between the broker and client as one of mandate and to deny this representative character to it.

A broker may occasionally be asked to act for a client who wishes to acquire property, but desires to keep his identity secret until the terms have been settled.[10]

7. — *The rule that an agent cannot be the buyer or seller of the property.* — The Civil Code provides that "an agent employed to buy or sell a thing cannot be the buyer or seller of it on his own account."[11] The reason for this rule is that there would otherwise be a conflict between the agent's duty to the principal and his own interest as a buyer or seller, and the principal's interest would be liable to be sacrificed. But there is nothing to prevent the principal from agreeing that the agent should have the right to buy or sell the property for himself. In such a case the sale cannot be set aside. The combination of a mandate given to an agent to sell a property and a promise to sell it to the agent himself has been recognized as valid.[12] The mandate is subject to a resolutive condition. If the agent chooses to avail himself of the promise to sell and buys the property himself the mandate is extinguished.

Such would appear to be the legal situation created by certain types of "option" encountered in practice. The word "option" is often used loosely by real estate brokers to designate an exclusive mandate or listing,[13] but an option which contains an undertaking to pay a commission if the property is sold

[10]The broker may in such case obtain an option from the owner which may be accepted by a person designated by him, or he may make an offer to purchase. The broker who acts in his own name will be liable as a principal, 1716 C.C., unless he discloses his mandate and the identity of his mandator: *Doody* v. *Van Dyke* (1924), 37 K.B. 358. *Quaere,* whether the broker avoids personal liability by stating that he makes the offer "on behalf of my client" or "as a duly authorized agent." In this case the transaction resembles the sale *sous réserve d'élire command: Dagenais* v. *The Modern Realty and Investment Company Limited* (1912), 41 S.C. 428, although the authors usually distinguish this from an ordinary case of mandate.

[11]Art. 1706 C.C. See also art. 1484 C.C., providing that agents cannot become buyers, either for themselves or by parties interposed. This prohibition extends to officers of a company to whom a mandate to sell or buy has been given: *Smith* v. *Comtois,* [1927] S.C.R. 590, and would also affect the salesmen who carry it out.

[12]Planiol & Ripert, *op. cit.* vol. 11, nos. 1434(3), 1446, 1466. The fact that the French Code does not include an article corresponding to the Quebec article 1706 but only article 1596 which corresponds to the Quebec article 1484 would not appear to make the French doctrine on this question inapplicable in Quebec.

[13]See note 53, *infra.*

may be both a promise to sell to the broker himself if he desires to buy within a certain delay and a mandate to the broker to sell the property to another, the broker having the right to allow someone else to accept the offer countained in the option. If the broker takes up the option himself, he is not as a general rule entitled to the commission since the mandate is extinguished.[14]

8. — *Formation of the contract between the broker and his client.* — As with any other contract, the formation of the contract of mandate requires the consent of both parties. One person may think that he is acting for another but the other person may not have indicated a desire that he should do so. The reports contain many cases in which the courts have held that the broker did not have a mandate. The consent of both parties to the contract may be either express or implied. An express agreement may be written or verbal. (The problem of proof will be considered shortly.) Examples of express written agreements in practice are the standard exclusive and co-operative listing agreements which are signed by the owner.

The consent of the principal may be implied from certain acts. It has been held that when an owner gives a real estate broker the particulars of property which he wishes to sell, he impliedly gives the broker a mandate to sell the property and undertakes to pay the broker the usual commission if he is successful.[15] Thus the open listing, although not signed by the owner as a general rule,[16] creates an implied mandate. An exclusive mandate, however, will not be inferred from the mere fact that the owner states the price which he would be prepared to accept for the property and the commission he is prepared to pay.[17]

[14]*Lecours* v. *Dagenais* (1915), 47 S.C. 1; *Dominion Financial Corporation* v. *Donaldson* (1927), 43 K.B. 387. Cf. *Reddy* v. *Rutherford* (1913), 43 S.C. 289; (1941), 23 K.B. 493. Could one argue that the owner who has stipulated a certain price on the assumption that he will have to pay a certain commission must be deemed to have agreed to what would amount to a reduction in the price should the agent buy the property himself? Cf. Bissonnette J. in *Abbott* v. *Desmarteaux*, [1957] Q.B. 378 at 382; ". . . cette commission, si elle était légale, n'était pas autre chose qu'une diminution de prix. . . ."

[15]*Grégoire* v. *McMahon* (1935), 73 S.C. 575 (Duranleau J.); *Brouillet* v. *Lepage Limitée* (1925), 38 K.B. 143; *Handfield* v. *Binnette*, [1947] S.C. 384 (Fortier J.); *Lefebvre* v. *Blanchette*, [1957] Q.B. 702. But presumably the owner must in such a case know that he is dealing with a real estate broker and not believe that he is giving information to a prospective purchaser or the representative of a prospective purchaser. Cf. Allard J. dissenting in *Brouillet* v. *Lepage*, *supra*. See also *Dubreuil* v. *Laberge* (1908), 14 R.L. n.s. 465 (C.R.), in which a right to any surplus which the agent could obtain over a stated price was inferred from the owner's letter to agent offering to sell him the property for a certain price without commission.

[16]While the open listing is generally not signed by the owner, his acceptance of the buyer's offer to purchase usually contains his written agreement to pay the broker a commission of a specified percentage of the sale price.

[17]*Mainwaring* v. *Crane* (1902), 22 S.C. 67, holding that such a mandate requires a specific written contract or an equivalent admission of its existence from the owner.

When the broker's acceptance does not appear on the listing agreement,[18] it will be implied from the fact that he takes the written authority from the client and acts upon it.[19]

9. — *Proof of the mandate.* — The question of proof turns on the distinction between civil and commercial matters. In accordance with the traditional view that transactions involving immoveable property are civil in nature, the general rule concerning the mandate of the real estate broker is that it cannot be proved by testimony[20] unless there is a commencement of proof in writing.[21] But the sale of a business, even when it includes an immoveable property, is deemed to be commercial in nature,[22] and it has been held in several instances, some of which apparently involved an immoveable, that the mandate to sell a business may be proved by testimony.[23]

10. — *The duration of the mandate.* — A broker may be given a mandate to sell or purchase property without any stipulation of a delay, in which case the mandate remains in force until terminated by revocation or one of the other causes known to the law.[24] The open listing is usually without a stipulated delay.

In the case of an exclusive or co-operative listing it is customary to stipulate a term for the authorization. The rules of the Montreal Real Estate Board provide that a co-operative listing shall be for a period of not less than forty-five days.

Sometimes it will be stated that the mandate will remain in force until written notice to the contrary. If there is both a specified term and the stipulation concerning notice, the mandate may be considered to continue automatically

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[18]The agent or salesman usually signs as witness of the client's signature, but the broker's acceptance is not ordinarily written on the agreement. At least this is the case with the co-operative listing agreement.

[19]Art. 1701 C.C. See *Pouliot* v. *Lavoie,* [1952] R.L. 111, at 112 (Marquis J.). As to proof of acceptance see Letarte, Problèmes juridiques de l'agent d'immeubles, (1949) 9 R. du B. 105, at 109.

[20]*Ernest Pitt & Co.* v. *Payne* (1925), 31 R.L. n.s. 308, 63 S.C. 522. *Langlois* v. *Berthiaume* (1913), 19 R.L. n.s. 367 (C.R.). Cf. *Dudemaine* v. *Pelletier* (1915), 47 S.C. 154, 19 R.L. n.s. 380, where it was held that an implied mandate to sell an immoveable constitutes a quasi-contract which can be proved by testimony.

[21]As to commencement of proof in writing in cases involving real estate brokers see *Clermont* v. *Howell* (1925), 38 K.B. 238; *Lemieux* v. *Morisset,* [1948] R.L. 559; *Leroux* v. *Leclerc,* [1952] K.B. 261; *Fluet* v. *Bechand,* [1952] K.B. 478; testimony will of course be admissible if there is an admission of the mandate. *Desalliers* v. *Franmount Development Company Limited,* [1957] S.C. 307; *Brousseau* v. *Rochon* (1916), 22 R.L. n.s. 458.

[22]*Massé* v. *McEvilla* (1895), 4 Q.B. 197.

[23]*Pekolas* v. *Bloom* (1928), 34 R.L. n.s. 154 (S.C.); *Financial Trust Co.* v. *Steinman,* [1947] R.L. 171; *Handfield* v. *Binette,* [1947] S.C. 384; *Pouliot* v. *Lavoie,* [1952] R.L. 201. *Contra: Hamelin* v. *Hervieux,* [1947] S.C. 201.

[24]Art. 1755 C.C.

after the expiry of the term until written notice to the contrary.[25] The agreement may stipulate that the 'option' is automatically renewable for another period of the same duration unless a written notice to the contrary is given so many days before expiry.[26] Such a stipulation, when it contains the words "avant la dernière échéance" in referring to the required notice, has been interpreted to mean that the authorization would be automatically renewed for successive periods of the same duration so long as the required notice was not given.[27] Where, however, a printed clause in the authorization provided that the mandate would remain in force until revoked by written notice, but the principal had written by hand at the bottom of the contract that it would expire on a certain date, the latter clause prevailed.[28]

A mandate may be prolonged or renewed not only by virtue of an express stipulation providing for this upon failure to give written notice of termination within a certain delay, but it may be deemed to have been extended by the acts of the principal.[29]

11. — *Revocation of the mandate.* — The mandate given to the real estate broker, like any other mandate,[30] can as a general rule be revoked by the principal at any time. But as in other cases,[31] if such revocation is carried out in an unfair and inopportune manner,[32] the broker will be entitled to claim any damages which he can prove to have suffered.[33] He cannot claim a commission unless he completed the work for which he is entitled to a commission before the revocation,[34] but on at least one occasion a broker has been awarded a quantum meruit for his services up to the time of revocation.[35]

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[25]*Brunet* v. *Caron* (1915), 47 S.C. 244 (C.R.); *Leclerc* v. *Fissiault* (1914), 45 S.C. 182; *Huot* v. *Thériault,* [1954] S.C. 145; *Légaré* v. *Au Pierrot Gourmet Ltée,* [1948] S.C. 441; *Pouliot* v. *Lavoie,* [1952] R.L. 111.

[26]E.g. *Verdun Realties* v. *Lajoie,* [1952] S.C. 145.

[27]*Demers* v. *Chauvin,* [1952] S.C. 145.

[28]*Rodier* v. *Meehan & The House of Browne Ltd.* (1915), 48 S.C. 397 (C.R.).

[29]*Sideleau* v. *Church,* [1956] Q.B. 535; *Parent* v. *Mendelsohn* (1918), 27 K.B. 226. Cf. *Donovan* v. *Hyde* (1909), 18 K.B. 310.

[30]Art. 1756 C.C.

[31]See *Tupper Plastics & Chemicals Ltd.* v. *Ronald Parties Ltd.,* [1955] R.L. 115, at 125, for a recent statement of the law.

[32]These are the words used by Anglin C.J. in *Rodovsky* v. *California Assorted Raisin Co.,* [1926] 2 D.L.R. 481, at 482. (The French expression generally used is "intempestivement et d'une manière abusive".)

[33]These would presumably include his disbursements, *Pothier* v. *St. Germain* (1935), 41 R.L. n.s. 1, but, *semble,* he will only be entitled to damages if he can show that he had found a prospective purchaser, *Caron* v. *Couture,* (1918), 24 R.L. n.s. 44 (S.C.), or had taken steps to do so, *Blondin* v. *Duff* (1892), 1 S.C. 256. (C.R.) Cf. note 54, *infra,* as to exclusive mandate.

[34]*Laliberté* v. *Gilbert* (1940), 78 S.C. 452, 46 R.L. n.s. 240. In *Pruneau* v. *Flood* (1917), 55 S.C. 106, although the sale took place after revocation the agent was held to be entitled to his commission since he had performed the essential work before revocation.

[35]*Allard* v. *Meunier* (1914), 46 S.C. 193. Cf. *Dupuis* v. *Lépine* (1934), 72 S.C. 120, where *quantum meruit* was denied because no proof had been made of the value of the services.

A mandate may in certain circumstances be held to be irrevocable, not merely in the sense that its revocation will give rise to damages, but that it is deemed to remain in force notwithstanding the purported revocation.[36] Such is the case where the mandator renounces his right of revocation or the mandate is essential to the execution of another contract. It would not appear that the mere stipulation of a delay as in the case of an exclusive listing makes the mandate irrevocable,[37] although the particular terms of an exclusive mandate may lead the court to conclude that the principal has renounced his right to revoke for the specified term.[38] In any event the revocation of an exclusive mandate during the specified term is clearly one which gives rise to a claim for damages.

No special formality is apparently required to effect a revocation of the mandate so long as the broker can be shown to have had knowledge of the principal's loss of confidence or desire to revoke,[39] but it has been held that where the written notice provided for by the terms of the listing has been sent by non-registered letter the principal must prove that the broker received it in time.[40]

### III. When the Broker is Entitled to a Commission

12. — *The necessity of a mandate.* — The broker who takes an action for a commission must allege and prove the formation of a contract of mandate between himself and the defendant. A broker is not entitled to a commission, as such, merely because he brought the seller and purchaser into contact if he never received a mandate to do so.[41] The broker may fail to establish a mandate, either because the defendant never did in fact agree to one (or at least did not authorize the particular act for which the broker claims a commission)[42] or because the broker is unable to prove that he did. Then again the mandate may be invalid or null.[43]

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[36]See Planiol & Ripert, *op. cit.*, vol. 11, no. 1492.

[37]*Cyr* v. *Lecours* (1915), 47 S.C. 86 (Robidoux J.), The issue, of course, is whether the broker can sue for his commission or has only an action in damages.

[38]*Brown* v. *Schwartz,* [1955] S.C. 354 (Ralston J.), where the mandate was "to remain in force for a minimum of thirty days and continue thereafter until revoked. . . ."

[39]*Cyr* v. *Lecours* (1915), 47 S.C. 86. Third parties will not be affected by a revocation of which they have no knowledge (art. 1758 C.C.).

[40]*Demers* v. *Chauvin,* [1952] S.C. 145.

[41]*Plummer* v. *Gillespie* (1896), 10 S.C. 243. (Archibald J.); *Bergeron* v. *Passau,* [1952] K.B. 415.

[42]E.g. *Messier* v. *Chenery & Barnard* (1915), 21 R.L. n.s. 73 (C.R.) where it was held that the authority given to an agent to sell certain subdivisions of a lot for an agreed price did not authorize him to sell other subdivisions of the same lot, and *Desrochers* v. *Mariani,* [1947] S.C. 167, where it was held that a mandate given to an agent to obtain a loan from one company did not authorize him to obtain a loan from another one.

[43]E.g. *Gershevich* v. *Greenberg & Millman,* [1957] S.C. 265, where it was held that a mandate given on a Sunday was illegal, null and void by virtue of the *Lord's Day Act.*

Sometimes a broker acting for either the purchaser[44] or the owner[45] will claim a commission from the other party when he has never received a mandate from the latter. In such cases the normal presumption against a double mandate operates against the broker who must establish not only the existence of the second mandate but its validity in the particular circumstances.[46]

An agent who obtains an option or promise of sale in his own name or buys the property in his own name for resale to a third party without disclosing that he is a real estate agent will generally be held not to have obtained a mandate from the owner,[47] even though the sale is eventually made to a buyer presented by the agent.[48]

When an agent has introduced the parties to one another and has been the effective cause of the sale, but has not received a mandate from the party from whom he seeks payment, the courts have indicated that although he cannot sue for a commission based on a mandate he may be able to recover in such a case on some other basis, such as quantum meruit[49] or unjustified enrichment,[50] if his action is properly framed for that purpose.

13. — *The terms of the agreement between the client and the broker.* — The broker's right to a commission will depend first of all upon the general nature of his mandate, that is, whether it is an exclusive or non-exclusive one, as well as upon the specific terms in which the agreement to pay a commission is couched.

a) *The ordinary or non-exclusive mandate.*

The open listing or non-exclusive mandate is given by an owner who wishes to list the property with more than one broker or to have the right to find a purchaser himself without the obligation to pay a commission to the broker with whom he has listed the property. Although the owner's acceptance of an offer to purchase which has been obtained by the broker usually contains a written agreement to pay the broker a specified commission, the open listing as such is generally not evidenced by a written document signed by the owner. It is implied, however, that the broker will be entitled to a commission if he has been the effective cause of the sale. Just how much he must con-

[44] *Lemieux* v. *Ecclésiastiques du Séminaire de St-Sulpice* (1912), 18 R.L. n.s. 434, 8 D.L.R. 639; *Cardin* v. *L'Archevêque,* [1947] R.L. 157; *Bergeron* v. *Passau,* [1952] Q.B. 415.

[45] *Brown* v. *Gault* (1901), 19 S.C. 523; *Stampfl* v. *Rolland,* [1956] Q.B. 440.

[46] The validity of the double mandate is considered at the end of this article.

[47] *Besner* v. *Lévesque* (1912), 8 D.L.R. 494 (C.R.), 19 R. de J. 60; *Reddy* v. *Rutherford* (1913), 43 S.C., (1914), 23 K.B. 493.

[48] *Pesant* v. *Garrett* (1915), 24 K.B. 335; *Patenaude* v. *Hamel* (1923), 35 K.B. 333.

[49] *Bergeron* v. *Passau,* [1952] Q.B. 415; *Hamelin* v. *Hervieux,* [1947] S.C. 201; *Dudemaine* v. *Pelletier* (1913), 19 R.L. n.s. 380; *Lavimodière* v. *Gariépy* (1917), 51 S.C. 471 (C.R.). Strictly speaking it would seem that *quantum meruit* should lie where there is a contract, an action *de in rem verso* where there is no contract.

[50] *Zaid* v. *Delicato* (1894), 6 S.C. 219.

tribute to the completion of the sale and whether it is always necessary that a formal deed of sale be signed will be considered shortly.

b) *The exclusive listing.*

An exclusive listing or mandate (of which the co-operative listing is a special type) gives one broker the sole and exclusive authority to sell during a specified term, or if no term be stipulated, until termination of the mandate by notice. An exclusive mandate is customarily conferred by the use of the term "exclusive", but it may be sufficiently indicated by other language. It will not, as we have seen, be inferred from the fact that an owner informs the broker that he would be prepared to accept a certain price for his property and to pay a certain commission.[51] But it would appear that an exclusive mandate will be inferred from the stipulation of a delay or term for the authority to sell.[52] The word 'option' is often used in practice to designate an exclusive mandate.[53]

When a broker has received an exclusive mandate he will be entitled to a commission if the property is sold while his mandate remains in force even if the sale has not been brought about by his efforts but has been effected by the owner himself or by the intervention of another broker.[54] Unless a listing agreement stipulates otherwise, it would appear that the seller and purchaser must at least come to agreement if not sign a deed of sale during the period

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[51]See note (17), *supra.*

[52]*Gohier* v. *Villeneuve* (1894), 6 S.C. 219; *Carle* v. *Parent* (1889) M.L.R., 5 Q.B. 451; *Brunet* v. *Caron* (1915), 47 S.C. 244 (C.R.); *Allard* v. *Meunier* (1914), 46 S.C. 193. The client may, of course, reserve the right to sell himself.

[53]*Gossack* v. *Caplan,* [1956] Q.B. 750, at 754; *Lussier* v. *Cloutier,* [1950] S.C. 177; *Légaré* v. *Au Pierrot Gourmet Ltée,* [1948] S.C. 441; *Jacques* v. *Beauchesne,* [1953] Q.B. 142, at 143.

[54]*Gratton* v. *Pilon,* [1951] S.C. 59; *Wilder-Bermingham Realty Co.* v. *Lidis,* [1951] S.C. 421; *Demers* v. *Chauvin,* [1952] S.C. 145; *Blain* v. *Roy,* [1952] S.C. 327; *Barneville* v. *Thiffault,* [1953] S.C. 355; *Huot* v. *Thériault,* [1954] S.C. 251; *Malo* v. *Perrault,* [1955] R.L. 65; *Gelfenstein* v. *Sosna,* [1956] S.C. 377. But cf. *Pouliot* v. *Lavoie,* [1952] R.L. 111, per Marquis J., where the broker was given "le droit exclusif de vente", the owner agreeing to pay the commission if the broker found a purchaser or the owner sold the property himself during the term of the mandate. The property was sold by the owner himself while the mandate was still in force but the broker's action for a commission was dismissed on the ground that he had not fulfilled his mandate; not only had he done nothing whatever to carry out his mandate but had even made efforts to discourage the sale which actually took place. It is difficult, however, to determine precisely what the case can be said to stand for as a general proposition of law since the court appears to have applied the test for the non-exclusive mandate and not to have discussed the exclusive mandate as such. It was said that an agreement to pay a broker a commission although he did nothing to fulfill his mandate would be null and void, either as illegal gift or as a mandate without consideration. See also *Dufour* v. *Vasseur* (1925), 31 R.L. n.s. 241 (S.C.), where it was held that the owner of an immoveable who gave a broker an "option exclusive" for a fixed delay but sold the property himself during the delay was not obliged to pay the established commission since the broker had not offered or found a purchaser within the period of his option and would, therefore, not have sold the property even if the owner had not done so himself.

of the exclusive mandate.[55] The listing agreement will often provide, however, that the broker will in certain circumstances be entitled to his commission although the property is sold after his mandate has expired. The co-operative listing agreement of the Montreal Real Estate Board, for example, stipulates that the owner will pay the commission "If the property is sold on or before the day above mentioned [the day on which the mandate expires] or sold after that date to a person who has made an offer (or to whose attention the property has been brought) during the period of this agreement . . . whether or not the sale is arranged through your agency."[56] An identical or similar clause is found in the exclusive listing agreements of most brokers.

c) *The terms of the sale.*

The listing authorizes the broker to sell the property for a certain price and upon certain terms and conditions. The owner may add "or at such other price and under such other terms and conditions as I may hereafter agree to." The latter words are to protect the broker in the event that the owner eventually accepts a lower price or different conditions than those which he originally stipulated. The price and the terms and conditions specified in the listing must be considered from two points of view: the broker's right to offer the property for sale and his right to a commission. He may be liable in damages to the owner if he offers the property upon terms and conditions not agreed to by the owner, and he may only be entitled to his commission if the property is sold for a certain price or upon certain terms and conditions.

In considering the general rules which apply to the second of these points in the absence of an explicit agreement, it is necessary to distinguish the agreement to pay a commission which consists of a certain percentage of the sale price from the agreement to pay the broker any difference between the price stipulated by the owner and the price obtained by the broker.[57] (Where the

[55]*Légaré* v. *Au Pierrot Gourmet Ltée,* [1948] S.C. 441, (Campbell J.); Cf. *Gossack* v. *Caplan,* [1956] Q.B. 750 per. McDougall J. at 754: "During that period plaintiff is required to find and present to the principal (defendant) a buyer who is willing to pay a price acceptable to the principal."; also cases cited in *Leclerc* v. *Fissiault* (1914), 45 S.C. 182, at 189-190, holding that the broker is entitled to his commission on a sale after the expiration of his exclusive mandate to a purchaser introduced by him before its expiration, and *Massicotte* v. *Lavoie* (1911), 40 S.C. 258 (C.R.).

[56]It would appear to be clear from this clause that the offer need not have been obtained by the broker nor the property brought to the purchaser's attention by him. But compare *De Rosa* v. *McBain,* [1957] Q.B. 656, where the exclusive mandate stipulated that the broker would be entitled to his commission if the property was sold after the expiry of his mandate to persons *solicited* during the mandate. The court held that when the mandate terminated the agent could not claim a commission unless he had been the effective cause of a subsequent sale. In this case he was denied a commission on a sale of the property to the *prête-nom* of a person to whom he had sent a circular letter offering the property for sale but who had not replied to or followed up the letter in any way.

[57]E.g. *Petit* v. *Lussier* (1914), 46 S.C. 195; *Simard* v. *Dubord* (1916), 26 K.B. 81; *Lussier* v. *Cloutier,* [1950] S.C. 177; *Létourneau* v. *Martineau,* [1955] Q.B. 862; *Trem-*

broker is acting for the purchaser the difference will represent not an increase but a reduction in the price stipulated by the owner.)[58] In the latter case the broker is clearly not entitled to any commission if he does not succeed in obtaining any increase or reduction, as the case may be, in the selling price.

When the commission is to be a certain percentage of the selling price, the fact that the owner sells the property at a lower price than that which he originally asked the broker to obtain for him will not ordinarily deprive the broker of his commission if he was the effective cause of the sale.[59] But it may result from the terms of the agreement between the owner and broker that a sale at a particular price is a condition of the obligation to pay a commission, in which case the broker is not entitled to any commission if the property is sold for less than the agreed price.[60] When a broker has agreed to pay a special commission, higher than the normal one, if the broker sells the property for a specified price, it has been held that while the broker cannot claim the special commission if the property is sold on different terms than those specified he is entitled to the ordinary commission established by usage.[61]

14. — *Effective cause of the sale.* — To be entitled to his commission the broker who has an ordinary or non-exclusive mandate must show that he was the effective, or as it is sometimes called, "efficient" cause of the sale. "The agent who brings his principal into relation with the actual purchaser is the effective cause of the sale",[62] even though the sale itself is arranged

*blay* v. *Martel,* [1956] Q.B. 348; *Laurentide Realties Co. Ltd.* v. *Celestino,* [1957] Q.B. 694; *Dequoy* v. *Drolet* (1926), 40 K.B. 213. In *Dubreuil* v. *Laberge* (1908), 14 R.L. n.s. 465 (C.R.) such an agreement was inferred from the owner's letter to an agent agreeing to sell him a property for a certain price without commission. See also *Reddy* v. *Rutherford,* note 14, *supra.*

[58]Cf. *Labrecque* v. *Dombroski* (1916), 49 S.C. 289 where it was held that the broker retained by a purchaser to buy an immoveable cannot with a view to increasing his commission make his principal pay a higher price than that which was asked by the seller.

[59]*Burchell* v. *Gowrie and Blockhouse Collieries Limited,* [1910] A.C. 614; *Montreal Agencies Ltd.* v.*Kimpton,* [1927] S.C.R. 598: *Touchette* v. *Godin,* [1947] S.C. 147; *Jacques* v. *Beauchesne,* [1953] Q.B. 142; *Joseph* v. *Hendy,* [1955] R.L. 109. Presumably the same rule would apply to an exclusive mandate if the owner agreed to a sale upon different terms during the period of the mandate.

[60]*Schleifer* v. *Kaufman* (1915), 47 S.C. 145 (C.R.) revg 45 S.C. 536; *MacKenzie* v. *Piché & Baby* (1914), 20 R.L. n.s. 32 (C.R.); *Jacques* v. *Léonard* (1915), 47 S.C. 344. Also held in this case that the named woman separate as to property cannot authorize an agent to sell her property and agree to pay him a commission without a written authorization from her husband.

[61]*Langelier* v. *Roy* (1916), 22 R.L. n.s. 123. *Baikie* v. *Latourelle* (1915), 24 K.B. 171 where a lower rate of interest was agreed to and *Bousquet* v. *Mignault* (1915), 48 S.C. (C.R.) where, land having been given to an agent to sell by subdivision, it was held that the agent was entitled to the commission established by usage when the owners through his efforts sold the land *en bloc.*

[62]*Montreal Agencies Ltd.* v. *Kimpton,* [1927] S.C.R. 598 per Rinfret J. (as he then was), at 601, citing *Burchell* v. *Gowrie and Blockhouse Collieries Limited,* [1910] A.C.

directly by the principal, either with the broker's knowledge[63] or behind his back.[64] The principal will not be allowed to deprive the broker of his commission by arranging the purchase through an intermediary.[65] The broker is entitled to his commission if he performs the work which constitutes the effective cause of the sale while his mandate remains in force, although the actual sale be made after its expiration.[66]

The cases are far from clear as to precisely what is meant by bringing the principal into relation with the actual purchaser. It is generally considered that the broker fulfils his mandate when he finds a person who is willing to buy the property upon terms acceptable to the principal and puts him into contact with the latter,[67] although he may be required as part of his service to the principal to obtain a written offer to purchase from the prospective purchaser and to bring it to the principal for his acceptance. It is sometimes said that the broker must be the *causa causans* and not merely the *causa sine qua non* of the sale,[68] but the application of this general formula often presents difficulties in practice, especially where more than one broker has had something to do with the transaction, which is often the case with an open listing. In finding the person who eventually becomes the purchaser and in being the means by which he comes into contact with the owner the broker may appear to have made the essential contribution to the sale, but he may only have been the *causa sine qua non* and not the *causa causans* if he did not

614, where it was said by Lord Atkinson for the Privy Council: ". . . if an agent . . . brings a person into relation with his principal as an intending purchaser, the agent has done the most effective, and, possibly, the most laborious and expensive, part of his work, and that if the principal takes advantage of that work, and, behind the back of the agent and unknown to him, sells to the purchaser thus brought into touch with him on terms which the agent theretofore advised the principal not to accept, the agent's act may still well be the effective cause of the sale." The Supreme Court of Canada also applied the rule laid down in the *Burchell* case in *Stratton* v. *Vachon* (1910-11), 44 S.C.R. 395. See also *Budell* v. *Compton* (1922), 28 R.L. n.s. 474 (C.A.). Sometimes it has been said that the broker has been the effective cause if it was through his efforts that the purchaser became "interested" in the property. *Lafrenière* v. *Goulet,* [1952] S.C. 64; *Dalling* v. *Brun,* [1953] S.C. 29.

[63]*Dagenais* v. *Dionne,* [1947] S.C. 352; *Duhamel* v. *Paquin,* [1949] K.B. 234.

[64]*Burchell* v. *Gowrie; Montreal Agencies* v. *Kimpton, supra.; Joseph* v. *Hendy,* [1955] R.L. 109 (Brossard J.).

[65]*Lavut* v. *United 5c to $1. Stores of Canada Ltd.* (1941), 79 S.C. 143. A broker who had obtained for a company a lease with an option to purchase was held to be entitled not only to his commission for obtaining the lease but to a further commission on the transfer of the property when the option was exercised. The client attempted unsuccessfully to avoid the necessity of paying this second commission by having the purchase made by a subsidiary company under its control.

[66]*Pruneau* v. *Flood* (1919), 55 S.C. 106 (C.R.).

[67]Cf. *Girouard* v. *Beaudoin Ltée* (1914), 46 S.C. 57 (C.R.).

[68]*Ernest Pitt & Co.* v. *Payne & Co.* (1925), 31 R.L. n.s. 308; (1925), 63 S.C. 522 (Surveyer J.); *Financial Trust Co.* v. *Steinman,* [1947] R.L. 171.

conduct the negotiations which resulted in the agreement. True, the principal to whom a prospective purchaser has been introduced by a broker cannot deprive the broker of his right to a commission by negotiating directly with the prospective purchaser and concluding the agreement himself. In such a case, as we have seen, the broker will as a general rule be entitled to his commission even though the sale be made for a lower price than that which the broker was originally asked to obtain. But here the principal is liable for the commission because he prevented the broker from bringing about the agreement himself. A broker may be denied a commission even though he was the person who originally interested the purchaser in the property or introduced him to the owner, if the negotiations broke down[69] or were abandoned[70] by him during the period of his mandate and were successfully resumed by the owner or another broker acting for him. The lapse of time between the broker's introduction of the purchaser and the actual sale should not be the decisive factor, but the sale must have resulted directly from his efforts.

Two cases in recent years illustrate the difficulty confronting the courts when one broker is the means by which the purchaser becomes interested in the property or comes to the attention of the principal and another broker conducts the negotiations which are required to bring about an agreement. In the first case[71] the plaintiff broker was the one who first interested the purchaser in the property and visited it with him, but for reasons which are not too clear (apparently it was because the plaintiff asked him for a deposit, although there is a suggestion that a lack of diligence on the plaintiff's part might have been a contributing factor) the purchaser refused to deal with him further. Another broker, with whom the defendant had listed the property, did what was necessary to effect the sale. The court held that although the plaintiff did not complete the sale, he had disclosed the name of the purchaser to the defendant and had been "the primary means of bringing about the relation of buyer and seller" between them since he had first interested the purchaser in the property and it was that interest "which resulted in the purchase by him." Having come to the conclusion that the plaintiff was entitled to some remuneration for his services, the court held that under the circumstances it would be reasonable to award him one half of the commission which had been paid by the defendant to the second broker. This was in the nature of a quantum meruit which the court admitted it had to fix "arbitrarily".

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[69] *Desrochers* v. *Power*, [1944] S.C. 110; *Chadburn* v. *Pinze* (1914), 45 S.C. 442 (C.R.). *Semble*, the fact that the property was eventually sold to one who might have been interested in it by the person originally introduced by the broker will not entitle the broker to a commission. See also *Communauté des Soeurs de la Charité de l'Hôpital Général de Montréal* v. *Colonial Real Estate Co.* (1918), 27 K.B. 433, (1917-18), 57 S.C.R. 585.

[70] *The House of Browne* v. *Major Manufacturing Co.* (1915), 24 K.B. 270. *Foley* v. *Aylen* (1920), 26 R.L. n.s. 387 (C.R.); *Vallée* v. *Lemieux* (1920), 57 S.C. 499 (C.R.).

[71] *Dalling* v. *Brun*, [1953] S.C. 29 (Collins J.).

In the second case[72] the plaintiff brokers advertised the property and sent the defendant several letters containing the names of persons to whom they had given the details of the property. Contained in one of these letters, in a list of some eighteen names, was the name and telephone number of the person who eventually purchased the property. But the plaintiffs did nothing further to effect the sale, and a second broker actually introduced the purchaser to the defendant and carried out the necessary negotiations to bring about an agreement between them. The second broker was paid a commission by the defendant. The court dismissed the plaintiffs' action for commission, holding that while they might be said to have introduced the purchaser to the property, they were not the effective cause of the sale.

These two decisions, if not irreconcilable, appear to afford little basis for generalization. They seem to have turned on the view which the court took in each case of the equities and the good faith of the parties involved. The first case must be held to have been a particular application of the principle that a broker may be deemed to have been the effective cause of the sale even though another broker brought about the actual agreement. The second case illustrates the fact that it is not enough to introduce the purchaser to the property or even to bring him vaguely to the attention of the owner (although it is doubtful if the result would have been different even if the owner's attention had been especially drawn to the purchaser as in the first case) if a failure to do anything further makes it necessary for another broker to do the necessary work to bring matters to a conclusion. One cannot conclude from the first case that a court will award a commission to a broker who can be said to have made some contribution to a sale but has not been its effective cause, though it may be possible in a difficult case to modify the impact of the decision on an owner who has already paid a commission to another broker by fixing an arbitrary amount for the value of the second broker's services.[73] If brokers would like to see the commission divided in cases in which more than one broker has made some contribution to a sale they must seek their solution in agreement among themselves or recourse to the arbitration facilities of the Montreal Real Estate Board.

It has been held recently by the Superior Court that in order to be entitled to his commission a broker must show not only that he personally brought the purchaser into contact with his client but that at the time he executed the sale the client knew or had reason to believe that the person to whom

[72]*Barrette et Guay Limitée* v. *Robidoux*, [1955] S.C. 426 (Prévost J.). Cf. *John Findlay Ltd.* v. *Golden* (1923), 29 R.L. n.s. 49 (S.C.).

[73]In *Grégoire* v. *McMahon* (1935), 73 S.C. 575 (Duranleau J.), after holding that the broker had been the effective cause of the sale, the court awarded him only one half of the commission to which it said he was entitled, giving as its reason that the defendant had already paid another broker, but this would appear to be an isolated solution of an equitable nature having no firm basis in theory or jurisprudence.

he was selling had been brought into contact with him by the broker.[74] In this case the plaintiff brokers had interested the purchasers in the property and had visited the property with them but had not introduced them to the owner and indeed had abandoned their efforts to effect a sale when they had been misled by the prospective purchasers into believing that they were not interested in buying the property. Other brokers to whom the purchasers applied arranged an offer to purchase which was accepted by the owner with a written undertaking to pay the second brokers a commission.

The court based its conclusion on what it conceived to be implicit in the holding in *Burchell* v. *Gowrie*[75] and the long line of cases which had applied it. The rule appears to be a reasonable one since it saves an owner from mistakenly agreeing to pay a broker a commission when he has already become liable to pay a commission to another broker, or from agreeing to sell his property for a certain price under the misapprehension that he does not have to pay a commission on the sale. But the proper rationale of the rule presents some difficulty. Probably the simplest approach is to hold that the broker does not fulfill his mandate unless he personally introduces the purchaser to his client so that the latter has knowledge of how the purchaser came to him. There is a suggestion of this view in the Superior Court's decision but the decision seems also to have been supported by the following line of reasoning: the principal cannot be said to have agreed to pay the broker a commission unless when he executed the deed of sale, a condition of his obligation to pay a commission, he did so in full knowledge that he was thereby making himself liable to the broker for a commission because the latter had brought him into contact with the purchaser. The difficulty with this line of reasoning, if I have correctly represented it, is that it might lead one to conclude that the contractual obligation to pay a commission is created by the execution of the deed of sale and not merely made absolute by it. The mandate creates an obligation to pay the commission which is conditional on the execution of a sale. How far the principal is free to avoid payment of the commission by preventing the fulfilment of this condition is now to be considered.

15. — *The execution of a deed of sale as an essential condition of the obligation to pay a commission.* — The authority given to the broker is an authority to "sell". His commission is usually stipulated as a certain percentage of the "sale price". It is generally agreed that it is a condition of the principal's obligation to pay a commission that a sale take place. The question to be considered now is when a sale is deemed to take place and when, if ever, a broker will be entitled to his commission despite the fact

[74]*Paquette* v. *St. Jean,* [1954] S.C. 212 (Brossard J.). See also *Joseph* v. *Hendy,* [1955] R.L. 109 (Brossard J.).

[75][1910] A.C. 614.

that a sale has not taken place, or having taken place, has been subsequently set aside.

When a sale of immoveable property actually takes place in our law is a question on which there has been in the past and remains today much difference of opinion.[76] The controversy turns around the precise nature of the agreement which is formed by the acceptance of an offer to purchase or the offer to sell contained in an option. Some have held that this agreement is a contract of sale which transfers ownership between the parties to it the moment it is formed.[77] Others have taken the view that it is simply an agreement to enter into a contract of sale upon certain terms and conditions by the execution of a formal deed, which alone passes ownership between the parties.[78]

Unfortunately there is a good deal to be said for both views, and the controversy will probably only be ended by an amendment to the Civil Code which clearly establishes one or other of them as the correct one. The first view is supported by reference to the general principles governing formation and perfection of the contract of sale: that a contract of sale is formed when an offer to sell or to purchase a thing for a certain price is accepted by the other party, and that when the contract involves a specific thing it is perfected and transfers ownership by consent alone.[79] Thus the acceptance of an offer to purchase an immoveable creates a sale. This is the view held in France. It finds support there in the wording of article 1589 of the French Code, which provides that a promise of sale is equivalent to sale when the parties are in agreement upon the object and the price.

The first view is not as easily reconcilable, however, with the wording of the Quebec Code on the subject of promise of sale.[80] It is this wording which appears to be decisive to those who support the second view, although they concede that the French rule is more logical. On the one hand the Code says that "a simple promise of sale" is not equivalent to sale;[81] on the other, that "a promise of sale with tradition and actual possession" is equivalent to sale.[82] The problem, of course, is to determine what is meant by "simple promise of sale" in article 1476.

Two main arguments are put forward to support the conclusion that the Code is referring not to the unilateral promise of sale in which the promissor alone is bound, but to the bilateral contract which is formed by the acceptance of the promissor's offer. The first is that the unilateral promise of sale is so

[76]See Turgeon, Considération sur la promesse de vente, (1952-53), 55 R. du N. 321.

[77]Mignault, *Droit civil canadien*, v. 7, pp. 26-27. What is said throughout this discussion about promise of sale applies equally to promise to purchase. *Ibid.*, p. 33.

[78]Marler, *The Law of Real Property*, nos. 430, 436.

[79]Arts. 1025, 1472 C.C.

[80]Arts. 1476-1478 inclusive.

[81]Art. 1476 C.C.

[82]Art. 1478 C.C.

obviously not equivalent to sale that the Codifiers cannot be presumed to have considered it necessary to say so. All that may be said in answer to this argument, which must be conceded to have considerable force, is that Pothier,[83] whom the Codifiers were following closely in framing article 1476, thought it worthwhile to state this obvious truth, and the Codifiers could have been in sufficient doubt about what was intended by the wording of the French article 1589 to want to be especially careful to avoid any uncertainty. On the other hand it is difficult to believe that the Codifiers could have concluded from the wording of the French article, which speaks of a meeting of minds on the object and the price, that the article was referring to other than a bilateral contract.

The second argument is drawn from the words "but the creditor may demand that the debtor shall execute a deed of sale in his favour according to the terms of the promise, and in default of so doing, that the judgment will be equivalent to such deed and have all its legal effects" which follow the opening statement "[a] simple promise of sale is not equivalent to sale." It is argued that it is only the agreement formed by the acceptance of the promissor's offer which gives rise to the right of specific performance, and that, therefore, the Code must be speaking about this agreement when it speaks of "a simple promise of sale". A possible answer to this is that by a unilateral promise of sale the promissor obliges himself to sell should the creditor call upon him to do so within the stipulated delay. The obligation is to execute a deed of sale. By his "acceptance" of the promissor's offer the creditor calls upon him to perform his obligation, what is called in practice taking up the option — so that it is not unreasonable to say that a unilateral promise of sale gives the creditor the right to demand that the debtor shall execute a deed of sale in his favour according to the terms of the promise. Perhaps stronger answers than these can be formulated for the arguments based on the text of the Code which are advanced in favour of the second view, but I find it difficult to resist the conclusion that the second view finds stronger support in the Code than the other one does. Moreover, insofar as immoveable property is concerned it also seems to be based on a sound presumption of the intention of the parties resulting from the necessity of the registration of a deed in proper form in order for the sale to have effect against third parties. It is reasonable to presume from the necessity of this formality that in the absence of a contrary agreement ownership is to pass between the parties only upon the execution of a formal deed of sale. This is the point at which legal possession is given and from which all adjustments are usually calculated in practice. The formal deed of sale, once executed, constitutes the agreement of sale between the parties. Articles 1476 and following are to be applied whenever the parties are to be deemed to have made a promise of contract. They are to be deemed to have done so where there is clearly a necessity of some formal agreement, the essential terms of

[83] *Oeuvres*, éd. 3e, Bugnet, v. 3, no. 478.

which are to be agreed to in advance. It does not mean that every option, or offer to sell or purchase with a delay to accept, requires some further contract to give effect to it before ownership can be deemed to have passed. But where such a further contract is entered into in practice then the rules of article 1476 and following will be applied to determine the effect of the preliminary agreement or promise of contract unless the parties have stipulated otherwise. The second view then is to be applied as the rule of presumed intention in the absence of a clear expression to the contrary by the parties.[84]

It seems impossible to speak of the "weight of the jurisprudence" on this question. A considerable amount of judicial opinion can be found to support both views.[85] This division of opinion, as we shall see, is reflected in the cases which have involved the right of the real estate broker to a commission when the person from whom he has obtained an offer to purchase for his client has refused to sign a deed of sale.

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[84]The rule of art. 1478 C.C. that "A promise of sale with tradition and actual possession is equivalent to sale." is a rule of presumed intention. The parties may have indicated that despite the transfer of possession ownership is not to pass until the fulfilment of some further condition, such as execution of a formal deed of sale or payment of the price. *Dulac* v. *Nadeau*, [1953] 1 S.C.R. 164; Mignault, *op. cit.*, vol. 7, p. 29.

[85]In support of the first view see *Labonté* v. *Larue* (1921), 27 R.L. n.s. 60 (C.R.); *Langlois* v. *Charpentier* (1914), 47 S.C. 97; *Zusman* v. *Tremblay*, [1951] S.C.R. 659, per Taschereau J., at p. 671; although see Rinfret C.J. *contra* at p. 663. In support of the second view see *Talbot* v. *Bernier* (1897), 13 S.C. 410 (C.R.); *Shea* v. *Décary* (1914), 46 S.C. 453 (C.R.); *Greaves* v. *Cadieux* (1916), 50 S.C. 361 (C.R.); *Labelle* v. *Messier*, [1948] S.C. 465 (Salvas J.); *Cousineau* v. *Gagnon* (1914), 23 K.B. 309; *Bercovitz* v. *Pearson* (1914), 23 K.B. 323; *Drouin* v. *Dubois* et *Wilder-Birmingham Realty Co.*, [1951] S.C. 301 (Brossard J.). *Quaere*, what the bearing on this question is of the conflicting jurisprudence as to whether the seller who is suing for the price on an accepted offer to purchase is bound to tender a deed of sale. See *Lebel* v. *Les Commissaires d'Ecole pour la Municipalité de la Ville de Montmorency*, [1955] S.C.R. 298, [1954] Q.B. 824. The implication of certain cases which have held that the seller may sue for the price without tendering a deed or calling upon the other party to sign one would seem to be that there is already a sale without the necessity of a formal deed. *Charlebois* v. *Baril* (1927), 43 K.B. 295 at 305, reversed on another point by the Supreme Court, [1928] S.C.R. 88; *Molleur* v. *Ewing* (1927), 43 K.B. 223, at 233; *Desbiens* v. *Bluteau* (1929), 36 R.L. n.s. 201 (S.C.); see also *Poiricr* v. *Baril* (1914), 23 K.B. 495. Nor does it necessarily follow from the decisions holding that the seller must tender a deed of sale that the court considered there was not a sale until such a deed was executed. See Taschereau J. in the Supreme Court in the *Lebel* case, *supra*, at p. 303. The courts appear to be simply applying the doctrine of *non adimpleti contractus*. The best view, however, would seem to be that by the accepted offer to purchase the parties agree to sign a deed of sale upon the terms and conditions laid down in the offer, and it is the execution of the deed of sale which creates the obligation to pay the price. The seller's recourses, therefore, should be an *action en passation de titre* which may be accompanied by a demand for the price which will be due on execution of the deed of sale by signature or judgment, or damages, and not an action for the price alone. Cf. *Labelle* v. *Messier*, [1948] S.C. 465 per Salvas J. at 466.

The issue does not arise when the broker's client is at fault. Even assuming that there is not a sale until a deed of sale is signed, the broker is entitled to his commission since the condition of the client's obligation to pay has become absolute by his having prevented the fulfilment of it.[86] This is the case where the broker's principal refuses without justification to sign the deed of sale,[87] where the other party refuses for a reason for which the principal is responsible,[88] where the parties agree to cancel the agreement,[89] or where the sale having been concluded, it is subsequently set aside by agreement of the parties, or for a reason for which the principal is responsible.[90]

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[86]Art. 1084 C.C. The client's liability also flows from Art. 1722 C.C. which provides in part: "When there is no fault imputable to the mandatary, the mandator is not released from such reimbursement and payment, although the business has not been successfully accomplished. . . ."

[87]*Prud'homme* v. *Cruickshank* (1908), 14 R.L. n.s. 77 (C.A.), 33 S.C. 313, (where principal refused to sell, then renewed negotiations and subsequently sold to same buyer); *Gariépy* v. *Johnson* (1911), 17 R.L. n.s. 143 (C.A.); *Fraser* v. *Lande* (1914), 46 S.C. 383 (C.R.). The same rule should apply where the principal refuses to accept the offer of a financially responsible person to purchase the property on the conditions stipulated by the principal. *Jarry* v. *Baril* (1915), 48 S.C. 475 (C.R.). (Principal afterwards selling to the same person): *Roch* v. *Joron* (1915), 48 S.C. 39 (C.R.); *Shipman* v. *Péloquin* (1915), 48 S.C. 492 (C.R.); *Girard* v. *Fitzpatrick* (1925), 38 K.B. 503; *Bourgon* v. *Home Realty Corporation,* [1956] Q.B. 438 where it was held that there was no proof of a mandate.

[88]*Moscovitch* v. *de Samor* (1915), 21 R. de J. 81, (1915), 47 S.C. 337 (seller refusing to sell because purchaser for whom broker acting failed to fulfill his obligations); *Merineau* v. *Viau* (1914), 46 S.C. 197 (buyer refusing to purchase because seller inserted in deed of sale conditions different from those in option); *Brown* v. *McDonald* (1884), 6 S.C. 491 (sale not carried out because of defect in principal's title); Cf. *Leclerc* v. *Denis,* [1956] Q.B. 722, where sale not completed because of illegal openings in principal's building but Court of Appeal held, reversing Superior Court, that the broker knew of the openings when he obtained the offer to purchase and was not entitled to his commission. See also *Sofio* v. *Lussier,* [1950] K.B. 577. There have been a number of cases applying the same rule where a broker with a mandate to obtain a loan has found a prospective lender but the loan has not been made for a reason for which the principal was responsible. *Arpin* v. *Toutant,* [1949] S.C. 331; *Hétu* v. *Brodeur* (1882), 6 L.N. 59; *Lewis* v. *Lamontagne* (1897), 11 S.C. 441 (C.R.); *Promotion Co. of Canada* v. *Leriche* (1917), 23 R.L. n.s. 329 (C.R.); *McLaughlin Co. Ltd.* v. *Dupuis Frères Ltée* (1925), 40 K.B. 141, [1927] 2 D.L.R. 96; *Johnson* v. *Regent Construction Company Limited* (1918), 53 S.C. 463, (C.R.), (1918), 24 R.L. n.s. 320 (C.A.).

[89]*Brotman* v. *Meyer* (1912), 41 S.C. 433 (C.R.). *Doody* v. *Huot* (1923), 34 K.B. 176; *Héroux* c. *Dupras,* [1954] Q.B. 580; see also *Vanasse* v. *Lafontaine,* [1949] K.B. 23, where owner who put purchaser into possession under promise of sale held to have prevented fulfilment of condition.

[90]*Dupuis* v. *Breton,* [1942] S.C. 49. Cf. *Sofio* v. *Lussier,* [1950] K.B. 577. For case where sale fails for lack of object, as when transfer of license for restaurant or hotel can not be obtained, compare *Lamarre* v. *Clairmont* (1915), 48 S.C. 46 (C.R.), holding agent was entitled to commission and *Lepage* v. *Bouchard* (1912), 43 S.C. 181 (C.R.), holding that he was not.

The difficulty arises when the purchaser refuses without justification to give effect to his accepted offer to purchase by signing a deed of sale. The jurisprudence leaves an impression of uncertainty as to whether the broker is entitled to his commission in this case. The point of departure for an analysis of the present state of the jurisprudence on this question would appear to be the decision of the Court of Appeal in 1952 in *Breuer* v. *Boyer*.[91] By a three to two decision the court held that the broker was not entitled to his commission when the prospective purchasers, from whom he had obtained an offer to purchase that was accepted by the principal, refused to sign the deed of sale, stating that they did not have the money to make the required down payment. The reasons given for the majority decision were that in view of articles 1476 and following of the Civil Code the agreement formed by acceptance of the offer to purchase could not be said to be a sale, and therefore an essential condition of the owner's obligation to pay a commission had not been fulfilled, without any fault being imputable to him; and secondly, the broker failed to fulfil his mandate in presenting his principal with purchasers who did not have the means of making the required cash payment. At least two of the judges making up the majority appear to have been satisfied that at the time he presented the offer to purchase to his principal for acceptance the broker knew or had good reason to believe that the purchasers were financially incapable of meeting their obligations. The acceptance of the offer to purchase contained an acknowledgment by the owner that the work of the broker was completed on the signing of the acceptance, but the members of the majority distinguished between the work which the broker must perform to fulfil his mandate and any other condition of the principal's obligation to pay him a commission.

The dissenting judges held that there must be deemed to have been a sale by virtue of article 1472 and that failing prior knowledge by the broker of the financial incapacity of the purchasers, the broker's principal must bear the risk of such incapacity. The issue really separating the majority and minority in this particular case might therefore be reduced to one of fact: did the broker know at the time he took the offer to purchase or presented it to his principal for acceptance that the purchasers did not have the means of making the cash payment? For had the minority taken a different view of this question they

[91] [1952] Q.B. 273. For cases prior to this in which the broker's claim was rejected: *Globensky* v. *Dame Morrissette* (1893), 4 S.C. 386; *Petit* v. *Lussier* (1914), 46 S.C. 195 (C.R.); *Lussier* v. *Cloutier*, [1950] S.C. 177, all cases in which it was agreed that the broker should be entitled to anything he obtained over a certain amount; also *Communauté des Soeurs de la Charité de l'Hôpital Général de Montréal* v. *The Colonial Real Estate Company* (1918), 27 K.B. 433, (1919), S.C.R. 585; *Hoffman* v. *Deslauriers* (1915), 48 S.C. 15 (C.R.); *Petit* v. *Robert* (1930), 48 K.B. 249, where principal refused to conclude contract because property offered in lieu of price was not free from encumbrances. For a case holding that the broker was entitled to his commission when he found a prospective purchaser who made an offer that was accepted by the owner even though the prospective purchaser failed to give effect to the agreement by signing a deed of sale see *Girouard* v. *Beaudoin Ltée* (1914), 46 S.C. 57 (C.R.).

might not have dissented. But there remains the uncertainty resulting from the divergent opinions expressed as to the nature of the agreement formed by acceptance of the offer to purchase, as well as the question of whether the majority decision might have been different had the broker offered financially responsible purchasers.

Such was the case a few years later in *Barrette et Guay Limitée* v. *Morency*[92] where Surveyer J., observing that the purchaser was solvent, held that the broker was entitled to his commission although the purchaser had refused to sign the deed of sale. The offer to purchase (called 'Promesse d'achat') contained a clause concerning termination of the broker's work similar to that in the *Breuer* case. The court held that the broker had fulfilled his mandate when the offer to purchase was accepted and he was not required to see that the purchaser presented himself for signature of the deed of sale. Moreover, the bilateral promise to purchase was equivalent to sale (citing Mignault) and gave the principal recourses which, it was implied, he should exercise. Decisions rendered since this case, being mainly *causes d'espèce,* have not made too much contribution to the clarification of the general rule.[93]

Is there a solution to this problem which does not depend on the controverted application of articles 1476 and following of the Civil Code — a solution which assumes that the signature of a deed of sale is an essential condition of the broker's obligation to pay a commission? Certainly it appears reasonable to insist that the broker cannot be said to have fulfilled his mandate unless he offers a financially responsible purchaser, and it should be his duty to ascertain the financial capacity of the prospective purchaser or bear the risk of the purchaser being unable to meet his financial obligations at the time of signing the deed of sale. After that, the risk should be on the vendor, who should not, for example, have the right to recover the commission if the sale is dissolved for non-payment of the price. If the owner who has accepted an offer to purchase from a financially responsible person clearly refuses to exercise his recource against that person to compel the execution of the deed of sale then he may be considered to have prevented the fulfilment of the condition on

[92][1955] S.C. 229.

[93]In particular *Dupuy & Fils Ltée* v. *Lamy,* [1955] S.C. 422 (Collins J.) where the offer to purchase provided that if for any reason the sale failed to be completed the deposit made by the prospective purchaser should be retained by the brokers as liquidated damages. In an action by the brokers for commission after the principal had consented to a cancellation of the agreement apparently because the prospective purchaser was unable to find the necessary money to go through with the sale, the court held that the above clause in the contract defined the whole of the broker's rights in such a case and dismissed the action. Said Collins J.: ". . . clauses of the kind in question which purport to give a commission solely by reason of the execution of a promise of sale are open to suspicion and could lead to grave abuse in the hands of unscrupulous people dealing with honest people innocent of the legal effect of such contracts"., citing *Breuer* v. *Boyer.* See also dicta in *Abbott* v. *Desmarteaux,* [1957] Q.B. 378 and *Laurentide Realties Co. Ltd.* v. *Celestino,* [1957] Q.B. 694.

which his obligation to pay the commission depends, and the condition thereby becomes absolute. It is as if the owner had agreed with the other party to cancel the agreement. If the owner elects to exercise his recourse can the broker be said to be entitled to his commission before the deed of sale has been executed by signature or judgment? It is doubtful, but applying the rule of article 1722 which provides that "Where there is no fault imputable to the mandatary, the mandator is not released from such reimbursements and payment, although the business has not been successfully accomplished . . . " it may be argued that the broker who has fulfilled his mandate by finding a financially responsible purchaser is entitled to his commission at the time fixed for signature of the deed of sale, even if the deed of sale is not signed at that time, so long as the failure to sign it is not imputable to the broker's fault.

Anotber question which must be considered in connection with this whole problem is whether the agreement to pay a commission to the broker which the owner usually signs with his acceptance of the offer to purchase constitutes an unconditional obligation to pay the commission. (The statement in the standard offer to purchase approved by the Montreal Real Estate Board reads in part: "I . . . hereby accept said offer and agree to pay . . . (the broker) a commission of . . . % of the sale price. . . .") The courts do not appear to have ruled on this question yet. But assuming that the signature of a deed of sale is an implied condition of the obligation to pay a commission under every mandate given to a real estate broker, in the absence of a clear stipulation to the contrary it would seem to require more explicit language than that used in the customary formula to dispense with this condition.

It has been held that the broker who has been deprived of his commission by the purchaser's refusal to sign the deed of sale does not have a claim against the purchaser for damages.[94]

16. — *The broker's remuneration.* — The remuneration of the broker is usually stipulated as a commission consisting of a certain percentage of the sale price.[95] It may, as we have seen, consist of tbe amount by which the selling price exceeds a certain amount, or if the broker is acting for the purchaser, the amount by which the purchase price is less than a certain amount.

If the parties have said notbing about remuneration, the broker will be entitled to the commission established by usage for the particular type of transaction involved, since the mandate is by usage a remunerative one.[96] The broker

[94]*St. Louis* v. *Longtin,* [1950] S.C. 255 (Demers J.); Cf. *Moscovitch* v. *Sambor* (1915), 47 S.C. 337 (C.R.) where the majority held that the broker was entitled to damages for loss of commission owing to the purchaser's failure to sign the deed of sale, but it appears that they were also prepared to hold that the broker had a mandate from the purchaser.

[95]See *Goyette* v. *Michaud,* [1949] K.B. 235, holding that the agent will not be entitled to his commission when no proof has been made of the price for which the sale has been made.

[96]*Raymond* v. *Marcotte* (1914), 46 S.C. 384; *Dudemaine* v. *Pelletier* (1913), 19 R.L. n.s. 380 (S.C.); *Grégoire* v. *McMahon* (1935), 73 S.C. 575; *Touchette* v. *Godin,* [1947]

may also claim the commission recognized by usage when he is unable to prove an agreement to pay a special commission.[97] In such cases the broker must allege and make proof of the usage. Although the contrary has sometimes been held,[98] it would appear that a person must be a broker regularly practising as such to claim the commission established by usage.[99] The courts have on several occasions accepted the tariff of charges recommended by the Montreal Real Estate Board and observed by its members as evidence of the usage,[100] although in one case the court declined to apply the tariff of the Board to brokers who were not members of it.[101] It is a nice question how far persons who retain members of the Montreal Real Estate Board should be deemed to have agreed to pay its recommended charges in particular cases. A usage must meet certain tests before it will be applied by the courts.[102] The standard rates of commission charged for the sale of residential and business properties certainly meet these tests. But what of a rule like the following one in the Montreal Real Estate Board's tariff of minimum charges: "If a consideration, cash or otherwise, has been paid for an option arranged by a broker and the option is not exercised, the broker may charge the principal granting the option one-half of the consideration received, but in no event shall this amount exceed the sale or rental commission to which the broker would have been entitled had the option been exercised"? Is the client deemed to have impliedly agreed to pay this charge when he retains a member of the Board or does the rule simply mean that a member is authorized by the Board to stipulate this charge in his agreement with the client? The latter would appear to be the better view of the matter. Such rules may raise a presumption of what the actual practice is but they do not automatically apply to persons who retain members of the Board. The practice must be so well established that it may be presumed to have been known to the client before it can be applied as an implied term of the contract.

17. — *The double mandate.* — Although at one time it looked as if the Quebec courts might hold that it was always immoral or illegal for a real estate broker to obtain an agreement to pay a commission from both parties to a

S.C. 147; *Handfield* v. *Binnette,* [1947] S.C. 384; *Lafrenière* v. *Goulet,* [1952] S.C. 64. *Juneau* v. *Cook* (1917), 54 S.C. 291, (C.R.), a case involving a commission agent, has been cited in some of the real estate cases to support the proposition that the mandate given to the real estate broker is by usage one for remuneration.

[97]*Lemieux* v. *Morrisset,* [1948] R.L. 559. The broker may also be entitled to the commission established by usage where, because he sold the property on terms different than those originally stipulated he is not entitled to the special commission to which the principal had agreed. See note 61, *supra.*

[98]*Wright* v. *The King* (1914-16), 15 Ex. C.R. 203; *Langelier* v. *Roy* (1916), 22 R.L. n.s. 123 (C.A.).

[99]*Richards* v. *Brossard,* [1945] S.C. 179; *Lafrenière* v. *Martel,* [1948] S.C. 253.

[100]E.g. *Handfield* v. *Binette,* [1947] S.C. 384.

[101]*Dalling* v. *Brun,* [1953] S.C. 29.

[102]*Joyal* v. *Beaucage* (1921), 59 S.C. 211.

transaction, on the ground that it necessarily involved a conflict of interest,[103] the rule which has emerged from the jurisprudence is that the double mandate is not inherently illegal and may be enforced by the courts in situations where the interests of the parties do not appear to be opposed, provided the broker has frankly disclosed his position to both parties and has acted fairly and honestly in the interest of both.[104] There must not be any fraud or collusion. The rules of the Montreal Real Estate Board permit a broker to collect a commission from a purchaser if he is authorized in writing to buy property at public auction, forced sale, or private sale "and providing he is not receiving any commission from the vendor." The same rules require that "Where there is an exchange of property, full commission shall be charged to each principal as though separate transactions had been made."

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[103]*Aubut* v. *Gareau* (1928), 27 K.B. 474, revg 23 R de J. 406 (C.R.). See also *Lemieux* v. *Les Ecclésiastiques du Séminaire de St-Sulpice* (1912), 18 R.L. n.s. 434 (C.A.); *Côté* v. *Détournay* (1919), 25 R.L. n.s. 63 (S.C.). *Murphy* v. *Lafrenière* (1928), 34 R de J. 466 (S.C.); *Parnass* v. *Martel* (1927) 65 S.C. 505 (S.C.).

[104]*Brouillet* v. *Lepage Limitée* (1925), 38 K.B. 143; *Cradock Simpson Company* v. *Sperber* (1925), 63 S.C. 492 (S.C.); *Bellerose* v. *Trottier* (1927), 33 R.L. 206 (S.C.); *Dupuis* v. *Breton* (1942), 80 S.C. 49; *Roy* v. *Dupré*, [1943] R.L. 343 (S.C.); *Dagenais* v. *Dionne*, [1947] S.C. 352; *C.* v. *Dankner*, [1951] S.C. 392. In the last case it was held that since plaintiff had not acted honestly towards his other principal, his agreement with the defendant was illegal. Cf. the *Brouillet* case, *supra*, where the majority held that the broker was entitled to recover from the principal in whose interests he had acted even though it appeared that he had sacrificed the interests of the other principal. For the rights of the principal when the broker has acted fraudulently towards him or received a secret profit or commission: *Comtois* v. *Archambault* (1923), 35 K.B. 520; *Martel* v. *Pageau* (1896), 9 S.C. 175; *Loiselle* v. *Poirier* (1925), 31 R.L. n.s. 249.