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EFFECT OF QUALIFYING LISTING LANGUAGE ON REAL ESTATE BROKERS' COMMISSIONS; OBLIGATION OF A LISTING PROPERTY OWNER*

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I. INTRODUCTION

> The line of demarcation between the principles applying to the rights of a broker under a special contract and to his rights under a general agreement is clear and distinct. In the absence of a special contract, it is the general rule that a real estate broker is entitled to his commission when he has procured a purchaser ready, able and willing to purchase the property upon the terms fixed by the owner. The parties, however, may by special contract modify the general rule, and make the commission payable dependent upon certain conditions or contingencies, and when such stipulations are made, a fulfillment or performance of the prescribed conditions is generally essential to the right to compensation. The owner has a right to stipulate that he will not pay, or be obligated in any way to pay, for services in relation to the sale of his land, unless the prescribed conditions are fulfilled.[1]

This language, or its equivalent, has been repeated *ad nauseam* by the courts of nearly every state, apparently in the belief that it says something on which subsequent conduct, lay as well as legal, can safely be predicated. But, like all other legal maxims, it is superficial, and leaves more unsaid than said. While each of the above quoted sentences gives rise to a myriad of knotty problems, this analysis will deal only with those raised by the making of a "special contract."[2]

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1. Hensley v. Moretz, 90 S.E.2d 183, 186 (Va. 1955). See note 140 *infra*.

2. Many of the problems relating to "unqualified" or "general" brokerage listings are discussed in WALLACE, REAL ESTATE BROKERAGE CONTRACTS (unpublished thesis in Univ. of Michigan Law Library), and a discussion of some of the problems is presented in Wallace, *Promissory Liability Under Real Estate Brokerage Contracts*, 37 IOWA L. REV. 350 (1952).

What is such a "special contract"? While the term is also commonly used to refer to a listing in which the broker's undertaking is specified in terms other than the "ready, willing and able" of the general listing, for example, where the requirement is "to consummate a sale," for the purposes of this discussion "special contract" has reference to an agreement in which the provision for payment of the commission is placed with other language in the listing agreement having reference to some outside event, as for example, "when the property is sold" or "when title passes," unless the discussion herein specifically indicates otherwise.[3] As the article progresses the effect of specific language referring to the payment of commissions will be considered.

Will or should the making of such a "special contract"[4] always, in the words of the Virginia court quoted above, make the commission "dependent upon certain conditions or contingencies"? There have been two major rationales used in determining the meaning and effect of the use of such provisions—(1) typified by the language of the Virginia court quoted above, that there is provided a "condition precedent" to the payment of commissions, and (2) that the provision merely states a "time" at which a commission, earned under the general brokerage provisions, is to be paid. Are these two rationales mutually exclusive so that should a court utilize one in a given case in which qualifying language was used in the brokerage agreement it must adopt the same rationale in all cases involving similar language? Is the language employed the only determinative factor? An approach providing an affirmative answer to the first of these questions is to be found in most cases where the undertaking required of the broker by the offer of the listing owner is something more than mere production of a purchaser, ready, willing and able. But that such need not and should not be the case where such language is to be found only in a clause relating to payment of commissions should be evident from the following discussion. As for the second question, cases have arisen in which, because of the existence of different factual circumstances surrounding the brokerage provision, hardship would be imposed upon a party should the court mechanically follow its prior decisions in which the same brokerage language had been used. More specifically, a court about to issue a brokerage opinion must concern itself with such questions as, what will be the social effects of a particular decision which must of necessity be based on one interpretation to the exclusion of the other? If a "time" interpretation is adopted in a particular

3. See, *e.g.*, text at notes 31-37 *infra*.

4. Wallace, *supra* note 2. The courts refer to the listing agreement from its inception as a "unilateral contract." This paper will make no further reference to this matter of semantics, but will use the simple term "listing" or the phrase "listing agreement" to refer to the property owner's offer unless reference is being made to court treatment.

case, will the intention of the landowner be frustrated if he does not, without necessity of resort to legal action, receive the funds expected from the transaction? Will landowners become the unwilling tools by which one segment of our economy (the broker) is favored over another? On the other hand, if a "condition precedent" rationale is used, will the landowner be able to "play fast and loose" with a broker —accepting the broker's services if he is so disposed, rejecting them if he has "changed his mind" about the advisability of the transaction? Will the landowner be placed in an unduly favorable position? Is the fact that the broker, in dealing with the average landowner, is infinitely better equipped to secure advantageous brokerage provisions because of experience and training a proper consideration? What consideration should flow from the fact that it is usually the broker who prepares any written memorandum of the transaction?

It is submitted that an understanding of the analytical problems involved, of the consequences of acceptance of one of the rationales to the exclusion of the other in similar, yet different, cases, and of the court's behavior when confronted by the presence of such qualifying language, will best be developed by a study of the decisions of the courts of the two jurisdictions most widely credited with embracing one or the other of the rationales in brokerage cases—New Jersey ("time"), and New York ("condition precedent").

It is recognized that courts purport to ascertain the intention of the parties and that either rationale may be overdone. Further, there is often no "mutual" intent in fact, the realty owner intending to pay no commission until he has received the purchase money, the broker expecting compensation for finding a purchaser accepted by the owner.[5] A broker, being considered a fiduciary by most courts, owes his employer (the landowner) the fidelity consistent with such a status; considerations affecting matters of liability where a broker violates his attendant duty are outside the scope of this paper.[6] On the other hand, considerations involved in the handling of cases where the owner has been at fault in the defeat of a transaction, or where the owner has secured an "equivalent" performance, are pertinent to a full understanding of the effect of the adoption of one or the other of the rationales in a specific case. Therefore, such considerations will be discussed herein.[7]

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5. This statement is based upon the conflicting positions of the parties to litigated cases dealing with situations in which the broker claims commission for having found a "purchaser" although no money passes from such "purchaser" to the listing owner.

6. For consideration of this matter, see 2 MECHEM AGENCY §§ 2410-17 (2d ed. 1914).

7. See text at notes 107-26 *infra*. See also §§ II *(b)*, IV *(b) infra*.

II. New Jersey

Cases from New Jersey have been selected for the beginning discussion because they are, quite erroneously as we shall see, commonly accepted as unique in the utilization of a "time" rationale where payment provisions of the type to be discussed herein are employed. As a result, an understanding of its decisions and the reasons therefor would best seem to present the problems with which this article deals.

That the New Jersey approach has not been restricted to the "time" rationale is illustrated by the fact that its genesis is found in *Hinds v. Henry.*[8] In that case it was expressly recognized that a landowner and a real estate broker could make a special agreement based on a contingency. It was not until forty years later in *Rauchwanger v. Katzin,*[9] decided in 1912, that the New Jersey courts indicated that a qualification of the apparent force of the *Hinds* decision was inherent in the language of that opinion, and not until 1924, in *Lehrhoff v. Schwartsky,*[10] that the court expressly enunciated the "time" rationale. Since the *Lehrhoff* decision New Jersey has utilized the "condition precedent" interpretation on occasion; the acceptance of one or the other of the rationales depending upon the courts'[11] determination of the intention of the parties[12]—did they intend to state an absolute obligation to pay on the part of the property owner with the actual payment postponed until the occurrence of an outside event (usually one which would result in receipt of money by the property owner), or did they intend to state a condition precedent to any obligation to pay on the part of the property owner? While it will be obvious from the discussion to follow that there is in New Jersey an overly strong judicial preference for the "time" rationale, moderate employment of such a preference would appear to produce more realistic results than is the case where acceptance of a "condition precedent" rational has become semi-automatic, as is the situation in many of the other jurisdictions. Because of their long history of "condition" decisions, should these other courts be willing to accept the same basic dual-rationale they would probably be unwilling to match the strong "time" preference demonstrated by the New Jersey decisions. However, a comparatively liberal use of the "time" rationale would release such an adopting

8. 36 N.J.L. 328 (Sup. Ct. 1873).
9. 82 N.J.L. 339, 82 Atl. 510 (Sup. Ct. 1912).
10. 2 N.J. Misc. 353, 125 Atl. 496 (Sup. Ct. 1924).
11. Whether particular listing language creates a condition precedent to payment of a commission or merely states a time at which it is to be paid is a matter of law. Roe v. Eggleston, 6 N.J. Misc. 630, 142 Atl. 366 (Sup. Ct. 1928). See Doe v. Eggleston, 106 N.J.L. 565, 146 Atl. 175 (Ct. Err. & App. 1929). *Cf.* 3 Corbin, Contracts §§ 554, 639 (1951).
12. *E.g., with* Winter v. Toldt, 32 N.J. Super. 443, 108 A.2d 648 (App. Div. 1954) *compare* Alnor Constr. Co. v. Herchet, 10 N.J. 246, 90 A.2d 14 (Sup. Ct. 1952).

court from an otherwise "anti-broker"[13] construction, and at the same time eliminate the extremes to which over-indulgence in a "time" interpretation may lead.

(a) Qualifying Brokerage Language

1. Payable.

For the purpose of this paper, the most important brokerage language, interpretation-wise, considered by the New Jersey courts has been that involving phrases dealing with some form of the term "pay," sometimes with, sometimes without, accompanying qualifying language. Of these provisions, those stating simply that the commission is *payable* at a certain date or upon the happening of a certain event form the basic nucleus of decisional determination and it is here that an acceptance of one or the other of the rationales, depending upon the "intention" of the parties, assumes major importance.

Hinds v. Henry involved an acknowledgment by the owner of real estate that a debt was owed to a broker for services rendered in securing a "sale" of certain property. It also contained a provision for part payment of such debt "at the time that . . . the first half of the purchase money" was paid, "the balance at the expiration of one year from the date of the deed." The supreme court, treating the provision as requiring the broker to plead either the occurrence of the condition or its defeat through the "willful or fraudulent" acts of the owner, found that a "condition precedent" had been stated. But, in *Rauchwanger v. Katzin*,[14] which permitted a broker to recover a commission, that court explained the *Hinds* rule as "not intended to work injustice by putting it within the power of a vendor *after the agent has fulfilled his part of the contract* to postpone indefinitely the day of settlement, and therefore deprive the agent of the fruits of his labor. . . ."[15] Italics have been added to signify decisional language that may indicate adoption of a "time" rationale, which accords with later New Jersey interpretation of this case.[16] However, such was not specifically stated and the *Rauchwanger* decision could be construed to mean merely that

13. This "semi-hostile" term is not to be found in any decision—the usual language is that, in accordance with general contract principles, the listing contract is to be construed *most strongly against the maker* (almost always the broker); but the degree to which such "construction" has gone leads me to adopt a term that connotes something more than does the pure, dispassionate canon employed by the courts.

14. 82 N.J.L. 339, 82 Atl. 510 (Sup. Ct. 1912).

15. *Id.* at 340-41, 82 Atl. at 510. But *Hinds v. Henry* involved an "acknowledgment" that the property owner had become indebted to the broker for brokerage services. Would not that ground the conclusion that the *Hinds* court was allowing the owner to "deprive the agent of the fruits of his labor" "after the agent [had] fulfilled his part of the contract"? Compare text supported by notes 26-30 *infra*.

16. See, *e.g.*, Leschziner v. Bauman, 83 N.J.L. 743, 85 Atl. 205 (Ct. Err. & App. 1912).

a capricious refusal of the owner to complete the transaction (his wife had objected to the transaction and he had demanded that the broker reduce his commission claim) would come within the "willful or fraudulent" acts of an owner that would excuse proof of the happening of the condition within the *Hinds* decision.[17]

Any conclusion that the *Rauchwanger* decision was an unrestrained victory for the real estate broker was destined to be short-lived. Only nine months later the court of errors and appeals in *Leschziner v. Bauman*,[18] adopted the *Hinds* rationale and distinguished the *Rauchwanger* decision with the comment that in that case the broker had undeniably earned his commission and that he was merely allowing the owner to fix the date for its payment while the provision before the court at this time clearly conditioned payment of the commission. And, in discussing the applicability of the *Hinds* rule, the court said that "In varying phases of fact it has been followed or distinguished, as the reason of the rule would seem to warrant."[19] Thus, we have the highest court of New Jersey indicating that it did not intend to be bound by any one particular interpretation but would determine for itself as the brokerage provision of each individual transaction came before it whether that particular provision fell within or without the "reason" of the *Hinds* rule. It was not until nine years later, in *Lehrhoff v. Schwartsky*,[20] where the supreme court was confronted with a listing providing for a commission "to be paid . . . on the date of closing title to said premises" that a New Jersey court expressly enunciated the "time" rationale. Although the brokerage language was virtually identical with that which had been interpreted by the court of errors and appeals in *Leschziner v. Bauman* to be conditional, the supreme court now found the language referred only to time, although recognizing that a condition precedent could be employed by the use of appropriate language.[21] Following rendition of this opinion, decisions employing the "time" rationale became numerous, and in *Fieldman v. Thomas*,[22] decided in 1931, the supreme court concluded that a provision for commission on the sale price "payable when title is passed" referred to time of payment only. The substance of this provision differed from the brokerage provision involved in the *Leschziner* case only in a minor detail which, in a slightly different context, has been considered as demanding an interpretation that the clause must

17. Hinds v. Henry, 36 N.J.L. 328, 333 (Sup. Ct. 1873).
18. 83 N.J.L. 743, 85 Atl. 205 (Ct. Err. & App. 1912).
19. *Id.* at 744, 85 Atl. at 205.
20. 2 N.J. Misc. 353, 125 Atl. 496 (Sup. Ct. 1924).
21. *Id.* at 354, 125 Atl. at 496.
22. 10 N.J. Misc. 48, 157 Atl. 554 (Sup. Ct. 1931).

have reference to "time."[23] It therefore seems that a definite shift to the "time" interpretation was well under way by the early thirties.

This trend was expressly recognized by the supreme court in *Forman v. Bedminster Land Co.*,[24] where that court, in dictum, discussed the effect of clauses beginning with the term "payable." It was accepted that the "recent" New Jersey cases sustained the view that such clauses merely provided the time for payment, notwithstanding the fact that the cases so holding involved attempts by the property owners to state conditions.[25] While the actual decision, based on somewhat different language the import of which will be discussed later, found that a condition precedent was intended, the acknowledgment of the then existing interpretation so favorable to the "time" rationale —that such an interpretation would be indulged in notwithstanding the fact that the property owner had clearly attempted to state a condition precedent to his obligation to pay—seems peculiarly valuable to an understanding of the post-1930 New Jersey decisions.

The appellate division of the superior court, in *Richard v. Falleti*,[26] restated what seems to have become one crucial distinguishing feature in the determination of whether a "condition" or a "time" clause is present—*viz.*, is there a "separate, unqualified agreement to pay" the commission? But, although many opinions employing the "time" rationale have contributed to the "time" trend, in none of the statements of rationale has the New Jersey court alluded to what would clearly seem to be two other legitimate distinguishing features present in *some* of the cases, *viz.*, when was the brokerage agreement made (was it prior to, contemporaneous with, or subsequent to, the entering of a contract between the property owner and purchaser), and where was it found (a separate instrument or part of the agreement between the owner and purchaser)? There has been ample reference to the existence of an "acknowledgment" in the brokerage agreement that the commission has been earned. Does this, coupled with an apparent eagerness to find such an "acknowledgement," evidence an appreciation of the fact that a brokerage provision referring to an external event, executed after the broker has performed, lacks consideration to the extent necessary to make the event a "condition precedent"?[27] This question is not to be interpreted as a statement that

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23. The stating of a date in the brokerage provision involved in the *Leschziner* case—"on the day of passing title or July 15th." See Samuel R. Laden, Inc. v. Lidgerwood Estates, Inc., 15 N.J. Misc. 498, 192 Atl. 425 (Sup. Ct. 1937).

24. 110 N.J.L. 1, 163 Atl. 123 (Sup. Ct. 1932).

25. *Id.* at 2, 163 Atl. at 123. This, of course, lends content to the possibility recognized in the text at p. 299 *supra*, that the "time" rationale could be used to improper extremes. *Cf.* note 13 *supra* and text supported thereby.

26. 13 N.J. Super. 534, 81 A.2d 17 (App. Div. 1951).

27. *But see* Conclusion. Compare text supported by notes 103-06 *infra*.

such is, or even might be, the sole significance of the "time" interpretation.

The *Richard* decision did provide what is probably the most noteworthy attempt to rationalize the alleged superiority of the "time" rationale. After discussing the prior New Jersey "time" decisions, the court considered them to "accord with the rule governing contracts generally: Where a debt has arisen, liability will not be excused because, without fault of the creditor and due to happenings beyond his control, the time for payment, as fixed by the contract, can never arrive. *Restatement, Contracts* § 301; Williston, Contracts § 799; . . ."[28] This, of course, is the accepted view in its legitimate setting, but its use in this situation assumes the whole problem by the statement "where a debt has arisen"—when and how and has such a debt arisen? If the provision relating to commission states a condition precedent to its payment no "debt" has arisen until that condition has been satisfied by performance or legal excuse.[29]

Thus, it will be noted that the "time" rationale rests upon an interpretation either that a "separate, unqualified agreement to pay" the commission exists, or that there is an "acknowledgment" that a commission is owing. To forecast with reasonable accuracy the judicial behavior likely to be excited by a particular brokerage provision requires an informed consideration of the entire brokerage agreement, with special emphasis on its language and internal construction, in light of all the circumstances surrounding the transaction. There are many considerations that should be pondered before a particular decision is reached. Some of these are suggested at the end of the following section.[30] In the consideration of such questions only minor interpretation aids applicable to the simple "when payable" provision can be offered. The most obvious, of course, is the evinced preference for a "time" rationale. The *Richard* court recognized that the distinctions were fine, but blamed their use on the "ambiguous language used by the parties in contracting." It would seem, however, that the New Jersey courts have, as suggested above, overlooked what should be considered critical aspects—those concerned with the location and timing of enunciation of the brokerage provision. And it would seem that an informed broker organization could develop a brokerage provision which would bring its members within the letter of the "fine" distinction. Instead, other terms have been added which have caused further problems of interpretation.

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28. 13 N.J. Super. at 539, 81 A.2d at 19.

29. Compare the New York opinions to the effect that, although the commission may be earned, payment may be conditioned. See text at pp. 315-16 *infra*.

30. See text supported by pp. 307-10 *infra*.

2. Due and payable.

An example of such an addition is the use of "due and," making the commission provision read that the commission is "due and payable" when a certain event occurs. In this simple form of the additional language only two cases are to be found. In *J. R. Tucker, Inc. v. Mahaffey*[31] the commission agreement was executed after the property owner and purchaser had entered a contract for sale of the property. Without discussing a prior grant of authority referred to in the commission agreement or what, if any, consideration had passed from the owner to the broker at the time of enunciation of the brokerage provision, the court found that the agreement "in express terms recognizes that the [broker] . . . earned its commission, and simply fixed the date when payment shall become due."[32] But had there been no such recognition of a past debt, what would the result have been? In *Womersley v. Nicosia*[33] the property owner agreed, in the proposed agreement of sale between the property owner and purchaser, to pay a commission "to be due and payable upon execution and delivery of this agreement of sale." The transaction subsequently fell through. In finding for the owner in this case, the court of errors and appeals evidently considered that such delivery of the agreement was a condition precedent—especially is this likely in light of the fact that the court took pains to emphasize that the owner was in no way at fault in the failure of delivery.[34] Thus, the two "due and payable" cases resulted in the use of different rationales. On the surface, at least, it would seem that this resulted from the presence of the acknowledgment of an existing debt (the "crucial distinguishing feature" of many cases determining whether a "time" clause or "condition precedent" is present[35]) in the one case, and its absence from the other. In the absence of such an acknowledgment, it would seem that there was

31. 6 N.J. Misc. 17, 139 Atl. 806 (Sup. Ct. 1928).

32. *Id.* at 20, 139 Atl. at 806-07.

33. 135 N.J.L. 452, 52 A.2d 530 (Ct. Err. & App. 1947).

34. Only by finding a condition precedent would the question of "whose fault" it was that there was no "delivery" be material. See text supported by notes 71-73 *infra*.

35. See text supported by notes 26-27 *supra*. In Marschalk v. Weber, 11 N.J. Super. 16, 77 A.2d 505 (App. Div. 1950) the commission clause provided: "Commission . . . shall be earned when agreement of sale executed . . . . said commission shall not be payable until the deed is delivered and the purchase price is paid in full when the same shall be due and payable." It is to be regretted that the then newly formed appellate division was not presented squarely with the problem of the effect of such a provision, for it involved a kind of "hybrid" language. There was no acknowledgement of an existing debt, but the opening clause made provision for the earning of the commission when the agreement of sale was executed, while the closing clause stated that the commission was not due and payable "until the deed is delivered and the purchase price is paid." Compare the discussion at text supported by notes 41-42 *infra*.

nothing "due"[36] the broker until and unless the stated event had occurred. Moreover, the fact that the *Tucker* decision involved a situation where the broker had clearly performed the undertaking required prior to statement of the brokerage provision, whereas the provision involved in the *Womersley* case had been executed prior to any authorized activity by the broker, must not be overlooked.[37]

Most of the decisions involving the "due and payable" language have involved listings in which the broker's undertaking was something more than simply finding a purchaser ready, willing and able. When confronted with such a situation, the courts have been asked to focus their attention on the *undertaking* separated from the "when payable" clause. Therefore, clarity demands that some attention be paid to the jural effect given to the term most often employed in such an agreement—"consummate"—the purpose being to provide an understanding of how the courts act in this somewhat different situation.

In interpreting the term "consummation" as used in listing agreements generally, the New Jersey courts have "played the intention" of the parties to a high degree. Thus, in two cases in which the brokerage provision was found in the contract of sale, the New Jersey court has indicated that a "sale" is "consummated" when the owner and purchaser enter a contract of sale[38] unless the intention of the parties otherwise is clearly expressed.[39] This was accomplished by drawing a distinction between a provision for payment of a commission "at the time of consummation" and one providing for payment

36. Compare the emphasis attached to the term "due" in George H. Beckman, Inc. v. (Zinke's) Rainbow's End, Inc., 40 N.J. Super. 193, 198, 122 A.2d 519, 522 (App. Div. 1956).

37. See text supported by notes 26-27 *supra.*

38. For a clarifying discussion of what is meant by the term "sale" or "sold" in a real estate brokerage agreement, as the New Jersey court understands it, see Resky v. Meyer, 98 N.J.L. 168, 172, 119 Atl. 97, 99 (Ct. Err. & App. 1922) where it is said:

> The matter turns on the meaning to be given to the word "sold," by itself, and considered with the context. Does it mean "conveyed," or contracted by binding contract? Or does it mean purchaser and seller agree on the terms? Ordinarily, it means the last when used in a broker's commission contract. . . .

See also Steinberg v. Mindlin, 96 N.J.L. 206, 208, 114 Atl. 451, 451-52 (Ct. Err. & App. 1921); Freeman v. Van Wagenen, 90 N.J.L. 358, 101 Atl. 55 (Sup. Ct. 1917) (the case most often cited for the proposition). While not all courts would agree with the last sentence of the quotation *supra,* nearly all would agree that where the property owner and purchaser have entered into a binding, unconditional contract of sale, a "sale" has been effected and the property "sold." Compare Doe v. Eggleston, 106 N.J.L. 565, 146 Atl. 175 (Ct. Err. & App. 1929) where, without discussion, the court interpreted a provision providing for commission "for effecting this sale, to be paid at settlement" as fixing only the time for payment; Klipper v. Schlossberg, 96 N.J.L. 397, 115 Atl. 345 (Sup. Ct. 1921). *But cf.* Haber v. Goldberg, 92 N.J.L. 367, 105 Atl. 874 (Ct. Err. & App. 1918). But a conditional contract or mere option will not suffice. Bell v. Siwoff, 123 N.J.L. 11, 7 A.2d 826 (Sup. Ct. 1939), *aff'd,* 124 N.J.L. 563, 12 A.2d 881 (Ct. Err. & App. 1940).

39. Hatch v. Dayton, 130 N.J.L. 425, 33 A.2d 350 (Sup. Ct. 1943); Morse v. Conley, 83 N.J.L. 416, 85 Atl. 196 (Sup. Ct. 1912).

"for consummating this sale." Commission was denied in the former case because the court felt that the language "spoke in futuro." Recovery was allowed in the latter instance because the provision was thought not to provide a clear indication of a contrary intent.[40] Here again, the strong preference for a "time" rationale is manifested.

And, in a very recent case, the appellate division conveniently overlooked the fact that a commission agreement, found in the contract of sale, provided for the commission to be "due" as well as "payable" on the happening of an outside event.[41] The court found that the broker's commission was not contingent. In view of the "due and payable" clause, it would seem that the result was reached by interpreting the provision "in consideration of services rendered in consummating this sale" as an acknowledgement of existing debt—*ergo*, not looking "in futuro."[42]

Fieldman v. Thomas[43] involved a brokerage agreement executed *prior* to the entering of a contract of sale between the property owner and a purchaser. The agreement provided for a commission based on a percentage "of the sale price payable when title is passed." While the brokerage provision does not use the term "consummate," the opinion does in finding that, "under our cases the sale was consummated when [the owner and purchaser entered a binding contract]."[44] Thus, the *Fieldman* case would seem to indicate that the addition of a separate "when payable" provision would not affect interpretation of an independent clause employing the term "consummate."

In addition to the above considerations, the specific language accompanying an undertaking to "consummate" is of prime importance. Thus, "if title is consummated" has been regarded as a plain statement of a contingency which is not met by the obtaining of a contract of sale.[45] And, a provision that "this commission is contingent upon

40. In the present case the words "for consummating this sale" do not necessarily refer to any future event and can just as well refer to an accomplished fact, as far as the words of the contract are concerned. Hatch v. Dayton, 130 N.J.L. 425, 427, 33 A.2d 350, 352 (Sup. Ct. 1943).

41. Winter v. Toldt, 32 N.J.Super. 443, 448, 108 A.2d 648, 651 (App. Div. 1954).

42. See text supported by note 35 *supra*.

43. 10 N.J. Misc. 48, 157 Atl. 554 (Sup. Ct. 1931).

44. *Id.* at 50, 157 Atl. at 555. *Cf.* Murray Apfelbaum, Inc. v. Topf, 104 N.J.L. 343, 344, 140 Atl. 295, 296 (Ct. Err. & App. 1928) where other phrases ("if and when title . . . is passed," "it being distinctly understood that we shall not be under any obligation whatsoever . . . if for any reason . . . title to said premises is not closed," and "we shall be liable only in the event of passing of title") added to that of "consummation" led the court to interpret the provision as making the passing of title a condition precedent.

45. Kuligowski, v. McCullough, 4 N.J. Misc. 449, 133 Atl. 71 (Sup. Ct. 1926), *aff'd*, 103 N.J.L. 700, 137 Atl. 437 (Ct. Err. & App. 1927); *cf.* Murray Apfelbaum, Inc. v. Topf, 104 N.J.L. 343, 344, 140 Atl. 295, 296 (Ct. Err. & App. 1928) ("If and when title to premises is passed . . . [a commission will be paid] for effecting the consumation of the sale . . . it being distinctly understood that we shall not be under any obligation whatsoever . . . if . . . title . . . is not closed . . . , and

the transaction being consummated and in the event that such transaction is not consummated then and in that event no commission shall be paid to said brokers" has been considered clearly conditional.[46] Similarly, whether the language refers to the broker's undertaking or to the payment of commission, the use of such phrases as "actually,"[47] "in the event that,"[48] "upon,"[49] "until,"[50] "unless,"[51] "if,"[52] "when,"[53] "when and if,"[54] or "if, as and when,"[55] or a combination thereof, coupled with a named event that must of necessity occur before the owner would be divested of title and the purchaser of the purchase price, in a brokerage agreement not containing the term "consummation," results in interpretation that a condition precedent exists.[56] Where such language is employed there would normally be no justification for utilization of a "time" rationale.

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we shall be liable only in event of passing of title . . . .") where it was held that passing of title was a condition precedent and the broker was not entitled to his commission although a contract of sale had been executed.

46. Todiss v. Garruto, 34 N.J. Super. 333, 112 A.2d 285 (App. Div. 1955).

47. Alexander Summer Co. v. Weil, 16 N.J. Super. 94, 83 A.2d 787 (App. Div. 1951) (also involved use of "in the event that" and "if, as and when"); Duffy & Thomas, Inc. v. Miller, 5 N.J. Misc. 77, 135 Atl. 500 (Sup. Ct. 1927) (also involved use of "unless"); *cf.* Keifhaber v. Yannelli, 9 N.J. Super. 139, 75 A.2d 478 (App. Div. 1950) (also involved the phrases "if this is closed" and "until"). New York law was applied in the latter case, but the decision has been favorably cited in subsequent New Jersey cases. See Marschalk v. Weber, 11 N.J. Super. 16, 25, 77 A.2d 505, 510 (App. Div. 1950).

48. Alexander Summer Co. v. Weil, *supra* note 47 (also involved use of "actually," and "if, as and when"); Forman v. Bedminster Land Co., 110 N.J.L. 1, 163 Atl. 123 (Sup. Ct. 1932) (the court added the word "only" before the phrase "in the event that"; this was apparently done to add emphasis to the contingent nature of the phrase); Soloff v. Freedman, 103 N.J.L. 403, 135 Atl. 867 (Ct. Err. & App. 1927).

49. Real Estate Exchange v. Lieberman, 8 N.J. Super. 99, 102, 73 A.2d 350, 352 (App. Div. 1950) (dictum).

50. *Cf.* Marschalk v. Weber, 11 N.J. Super. 16, 20, 77 A.2d 505, 509 (App. Div. 1950) (dictum); Keifhaber v. Yannelli, 9 N.J. Super. 139, 75 A.2d 478 (App. Div. 1950) (also involved use of "if this is closed" and "actually").

51. Duffy & Thomas, Inc. v. Miller, 5 N.J. Misc. 77, 135 Atl. 500 (Sup. Ct. 1927) (also involved use of "actually").

52. Keifhaber v. Yannelli, 9 N.J. Super. 139, 75 A.2d 478 (App. Div. 1950) (also involved use of "actually").

53. Slonim, Ltd. v. Bankers Mortgage & Realty Co., 133 N.J.L. 45, 42 A.2d 396 (Sup. Ct. 1945); *cf.* Marschalk v. Weber, 11 N.J. Super. 16, 20, 77 A.2d 505, 509 (App. Div. 1950) (dictum) (also involved use of "until").

54. *Cf.* Rothman Realty Corp. v. MacLain, 16 N.J. Super. 280, 84 A.2d 482 (Ch. 1951) (suit between brokerage firm and discharged former salesman whose pay was to be a percentage of the overall commission).

55. Alexander Summer Co. v. Weil, 16 N.J. Super. 94, 83 A.2d 787 (App. Div. 1951) (also involved use of "in the event that" and "actually").

56. *Compare* Kram v. Losito, 105 N.J.L. 588, 589, 147 Atl. 465 (Ct. Err. & App. 1929) where the provision was simply an agreement to pay commission "upon the execution and payment . . . of the balance of the initial payment of the purchase prise," the court adhering to a "time" rationale, *with* Forman v. Bedminster Land Co., 110 N.J.L. 1, 163 Atl. 123 (Sup. Ct. 1932) where the agreement was to pay a commission "in the event that title closes" which was construed to state a "condition precedent." See also Feldman v. Holdman, 4 N. J. Misc. 451, 133 Atl. 71 (Sup. Ct. 1926). For a recent acknowledgment of the acceptance of the conclusions stated in the above textual paragraph, see George H. Beckmann, Inc. v. (Zinke's) Rainbow's End, Inc., 40 N.J. Super. 193, 198, 122 A.2d 519, 521-22 (App. Div. 1956) (dictum).

In the absence of such "clear" provisions the particular wording used in the brokerage provision has served to excite the drawing of exceedingly fine distinctions by the New Jersey courts, a fact recognized by the courts themselves.[57] The actual intention of the parties may be clearly stated. Thus, some provisions have been easily interpreted as stating a condition precedent,[58] while others have been regularly interpreted as providing only the time of payment.[59] Unfortunately, however, the parties often fail to use language clearly showing their intention. And even the "clear" provisions may find expression in a unique situation. Therefore, the "fine distinctions" would seem to indicate more basic considerations than are involved in mere verbal differences.

As has already been shown, the time at which the provision first finds expression is of primary importance. If it is *after* the broker has performed his undertaking, embodiment of an "acknowledgement" of debt in the brokerage terms used will result in utilization of the "time" rationale. It is here, in the extreme willingness to find such an "acknowledgement," that one clear picture of the New Jersey judicial attitude is found. If, however, the brokerage provision in question was enunciated *prior* to activity by the broker, the internal construction of the provision assumes paramount importance—is there a "separate, unqualified agreement to pay" the commission? If there is, that agreement will measure the broker's undertaking; if there is not, the "outside event" stated in the commission clause will qualify the broker's needed action. New Jersey opinions have referred to "surrounding circumstances"—what the parties were attempting to do in the light of their particular situations. But whether these are examples of considerations to which the court looks before decision or of reasoning by which a pre-determined decision is buttressed, is not clear from the opinions themselves. The careful lawyer will, of course, impress the decisional court with the consequences of a particular answer. That is, if the court concludes that the brokerage provision is intended to provide only the "time" of payment, the broker will become entitled to a commission through performing or having performed the undertaking, even though the owner may not have received funds with which to make payment. Thus, under such an interpretation, the broker will be entitled to his commission if the date on which the "outside event" was scheduled to occur has passed, or should a date not be specified, if a reasonable time for its occur-

57. Richard v. Falleti, 13 N.J. Super. 534, 81 A.2d 17 (App. Div. 1951).
58. *E.g.*, Todiss v. Garruto, 34 N.J. Super. 333, 112 A.2d 285 (App. Div. 1955).
59. See § II *supra*.

rence has elapsed.[59a] Should it be determined that a "condition precedent" is stated, the broker may find that, although he has rendered valuable services to the land owner in an attempt to accept the offer, the additional "outside event" of the commission clause has not occurred; therefore, he is not entitled to compensation. Does this mean that the owner is free to defeat the occurrence of the outside event? What, if any, action by the owner will result in an immediate obligation on his part to pay the promised commission, notwithstanding non-occurrence of the outside event? Suppose it is the purchaser who is at fault in non-occurrence of the outside event? These questions form the basis of the following discussion.

(b) Obligation of a Listing Property Owner

Side by side with the foregoing decisions interpreting the effect of the language of the commission clause upon entitlement of the broker to the stipulated commission, came decisions involving a claim by the plaintiff-broker that, although the event referred to in the brokerage agreement had failed to occur, the property owner had acted in a manner which had led to the failure; therefore, the broker was nevertheless entitled, the condition precedent to the owner's obligation to pay being no longer available. It thus became necessary to determine whether any fault of the owner would suffice to entitle the broker to his commission. For purposes of this section whether the pertinent brokerage language is expressed as a part of the broker's undertaking or has direct reference only to the payment of commissions has no basic significance; therefore, the two situations will be commingled unless expressly stated otherwise.[60] In answering a broker's contention in the simple form stated above, the courts have experienced no difficulty. However, more difficult problems were encountered. How extreme must the fault have been? To what extent must an owner "cooperate" in bringing about the occurrence of the event? And, what effect does the interpretation of the agreement as either stating a "time" for payment or a "condition precedent" have on the matter?

The *Hinds* case had a direct answer for the first question, a direct reference to the second, and a partial answer for the last. Relying primarily on English authority[61] that case answered the "extremity

59a. Since such a date has uniformly been designated either in the commission provision or in the seller-purchaser contract, recourse to the general contract rule that where an offeror has failed to specify a time limit during which the offeree has the power of acceptance, such power continues for a reasonable time, has not been necessary. See 1 CORBIN, CONTRACTS §§ 36, 96 (1950).

60. This statement, however, is not to be construed as pertaining to the effect of a holding that a stated event has reference only to the "time" of payment, and does not constitute a "condition."

61. Malins v. Freeman, 4 Bing. (N.C.) 395, 132 Eng. Rep. 839 (Ch. 1838); Doe v. Bancks, 4 B. & A. 401, 106 Eng. Rep. 984 (K.B. 1821); Planche v. Colburn, 8 Bing. 14, 131 Eng. Rep. 305 (N.P. 1831); Hall v. Conder, 2 C.B. (n.s.) 22,

of fault" question by holding that, for a broker to rely successfully on the owner's fault as excusing a "condition" requiring the happening of a named event, he must show that the failure resulted from the owner's *willful* or *fraudulent* acts "in violation of his own undertaking, express or implied."[62] Thus, under this decision, were a commission clause to be interpreted as constituting a "condition" the condition would not be excused in the absence of rather extreme action of the property owner. Could it be that a desire to by-pass such a requirement was the true reason for initiation of New Jersey's heavy preference for the "time" rationale?

With the advent of more extensive litigation involving brokerage agreements, a minor crack appeared in the "willful or fraudulent" requirement. This accompanied, in point of time, the New Jersey adoption of the "time" rationale. Thus, it was soon to be indicated that a capricious refusal to act by the owner would suffice as an excuse.[63] The decisional case raised the question, suppose the owner cannot or will not deliver good title? In the former situation it has been held that inability of the property owner to furnish good title does not constitute the severe degree of fault necessary to result in the excuse of a condition precedent.[64] It has also been accepted that refusal of a property owner to deliver good title, to operate as an excuse of a condition, would require a finding that such refusal was "capricious"[65]—and failure to disclose a title defect is not, in itself, a "willful, fraudulent, or capricious" refusal to act.[66] In reaching the latter decision, the court reviewed most of the preceding decisions

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140 Eng. Rep. 318 (C.P. 1857); Inchbald v. The Western Co., 17 C.B. (n.s.) 733, 144 Eng. Rep. 293 (C.P. 1864); Horler v. Carpenter, 2 C.B. (n.s.) 56, 140 Eng. Rep. 332 (C.P. 1857); HURLSTONE, BONDS 49.

62. 36 N.J.L. at 334. It was held that a cloud on the title, of which the broker had been apprised, did not constitute an excuse. One act clearly a violation of the owner's "implied undertaking" is the shifting of grounds for refusal to carry out a contract with the purchaser where the broker might have supplied or corrected the deficiency newly asserted had it been made at the time of first refusal. *Cf.* Schanerman v. Everett and Carbin, Inc., 10 N.J. 215, 89 A.2d 689 (1952).

63. Lehrhoff v. Schwartsky, 2 N.J. Misc. 353, 354, 125 Atl. 496 (Sup. Ct. 1924). The earlier case, Rauchwanger v. Katzin, 82 N.J.L. 339, 82 Atl. 510 (Sup. Ct. 1912) had first mentioned the effect of the "capriciousness" of the property owner. See Alexander Summer Co. v. Weil, 16 N.J. Super. 94, 83 A.2d 787 (App. Div. 1951) for a recent restatement of the rule and a discussion of its application to various fact situations. *Cf.* George H. Beckman, Inc. v. (Zinke's) Rainbow's End, Inc., 122 A.2d 519 (N.J. App. Div. 1956) (misrepresentation by owner).

64. Murray Apfelbaum, Inc. v. Topf, 104 N.J.L. 343, 140 Atl. 295 (Ct. Err. & App. 1928); *cf.* Gottlieb v. Connolly, 5 N.J. Misc. 372, 136 Atl. 599 (Sup. Ct. 1927) (trial court found that mistake in size of property involved was innocent, not fraudulent; appellate court simply held the contract secured by the broker "void through mistake," therefore the broker was not entitled to commission).

65. Lehrhoff v. Schwartsky, 2 N.J. Misc. 353, 125 Atl. 496 (Sup. Ct. 1924); Feist & Feist, Inc. v. Spitzer, 107 N.J.L. 138, 150 Atl. 436 (Ct. Err. & App. 1930) (although involving a listing treated by the court as conditional, the court relied on Dermody v. New Jersey Realties, Inc., 101 N.J.L. 334, 128 Atl. 265 (Ct. Err. & App. 1925), which case is generally considered as a "time" decision).

66. Keifhaber v. Yannelli, 9 N.J. Super. 139, 75 A.2d 478 (App. Div. 1950).

involving consideration of defective title as it is related to the matter of "willful," "fraudulent," or "capricious," distinguishing many. Of these, the most notable, because of the help they give in determining the content of the "fault" phrase, were *Keifhaber v. Yannelli*,[67] distinguished on the basis that the property owner there had made no showing of impossibility or great expense in removing the title cloud, therefore the owner was "capriciously" failing to cooperate; and *Feist & Feist, Inc. v. Spitzer*[68] on the ground that there the property owner had arbitrarily breached a valid contract with the purchaser. Then, relying on *Murray Apfelbaum, Inc. v. Topf*[69] for the proposition that only where the property owner fraudulently concealed the fact of title defect (which the court failed to find in the case then under consideration) would the condition be excused, the court reached its decision that failure to disclose the title defect did not constitute "waiver" of the condition. And, in a case where the vendee refused to consummate a contract, the court added substance to the "fraudulent, willful, or capricious" grounds upon which a waiver of a stated condition may be predicated, when it said,

> In the present case it is not evident that the announced refusal of the vendee to consummate the contract of sale was in any wise induced by the vendors. Nor is it disclosed that the vendors and vendee deceitfully contrived through the medium of the compromise agreement to defeat the claim of the brokers. Upon the occurrence of the breach the vendors in reality occupied the situation of passive victims searching only for available salvage . . . .
>
> We are not persuaded that in the circumstances of the present case the conduct of the vendors in entering into the agreement of compromise participated in the hindrance or prevention of the consummation of the contract of sale within the application of the legal principle akin to that of waiver.[70]

To this point the discussion has assumed that a condition precedent to payment of commission has been stated. Suppose, however, the brokerage provision is interpreted as stating only a "time" of payment. Would such an interpretation be significant should the outside event fail to materialize? New Jersey decisions are explicit that, if the commission provision is interpreted as providing a "time" for payment only, it is immaterial whose fault it is that the named event fails to occur—the broker's commission is earned when he has secured a purchaser on the terms specified in the listing and he is entitled to payment thereof when the date on which the event was scheduled

67. 9 N.J. Super. 139, 75 A.2d 478 (App. Div. 1950).

68. 107 N.J.L. 138, 150 Atl. 406 (Ct. Err. & App. 1930).

69. 104 N.J.L. 343, 140 Atl. 295 (Ct. Err. & App. 1928).

70. Todiss v. Garruto, 34 N.J. Super. 333, 342, 112 A.2d 285, 289-90 (App. Div. 1955).

to occur has arrived.[71] Thus, the New Jersey courts have drawn a clear distinction between a non-conditional listing and one stating a condition precedent when they have been called upon to determine the ability of the broker involved to rely on the listing owner having a marketable title. If there is no condition stated, he can, in the absence of his own knowledge of title defect,[72] rely on the owner having such, and will be entitled to his commission upon producing a purchaser according to the terms of the listing though the transaction fail because the owner's title is not marketable.[73]

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71. See Samuel R. Laden, Inc. v. Lidgerwood Estates, Inc., 15 N.J. Misc. 498, 500, 192 Atl. 425, 426 (Sup. Ct. 1937) where the court, after reviewing the accepted consideration of "whose fault" in cases involving a stated condition precedent, stated,

> [I]f a reasonable construction of the terms involved indicates a designation of the time of payment, rather than a condition precedent or a contingency, we can no longer be influenced by the question as to through whose fault the title failed to close . . . .

Then, quoting from J. R. Tucker, Inc. v. Mahaffey, 6 N.J. Misc. 17, 139 Atl. 806 (Sup. Ct. 1928), continued,

> "[I]t was immaterial whose fault it was that final settlement did not take place, since the payment of commission was not made contingent upon a final settlement taking place."

Until the *Tucker* decision nearly all New Jersey cases in which the "time" rationale had been accepted had involved failure of the occurrence of the named event due to the fault of the owner, and it was at least arguable that such fault was the real reason for development of the "time" rationale.

Before the *Tucker* decision had clearly established the immateriality of fault in the area involving a statement of "time" only, the New Jersey courts had "run the gamut" in specifying reasons for a decision favoring the broker. For example, in Ludwig v. Aberbach, 4 N.J. Misc. 169, 132 Atl. 241 (Sup. Ct. 1926) ("on delivery of the deed") the court had relied, in finding for the broker, on (1) it was the owner's fault (defective title) that there had been no "delivery"; (2) a broker can rely on his vendor's title; (3) the construction against the existence of a condition; and (4) it would be in harmony with the intent of the parties that the clause be construed to relate only to the "time of payment." After the *Tucker* decision, the first consideration stated would be immaterial in light of the fourth, and the second consideration would be but a result of the fourth. *But cf.* Fieldman v. Thomas, 10 N.J. Misc. 48, 157 Atl. 554 (Sup. Ct. 1931) where the court, after finding the involved clause related to "time of payment" only, relied on the "substituted payment" case, Dermody v. New Jersey Realties, Inc., 101 N.J.L. 334, 128 Atl. 265 (Ct. Err. & App. 1925) in saying that the property owner could not defeat the broker's claim for commission by having himself relieved of the obligation to pass title. It would seem that this decisional language resulted either from an unwarranted desire to buttress an already proper decision, or a failure to discern the true meaning of the *Tucker* case.

72. *Cf.* Krim v. Sacks, 7 N.J. Misc. 318, 145 Atl. 237 (Sup. Ct. 1929) (broker knew of a provision in the contract of sale whereby the contract would be rendered "null and void" if the owner were unable to secure an outstanding lease on the property for the purchaser—owner failed, broker not entitled to commission); Hinds v. Henry, 36 N.J.L. 328 (Sup. Ct. 1873) (where broker knew of cloud on owner's title the fact of a cloud could not support a finding of such fraud by the owner as would excuse performance of a condition precedent).

73. Ludwig v. Aberbach, 4 N.J. Misc. 169, 132 Atl. 241 (Sup. Ct. 1926); Klipper v. Schlossberg, 96 N.J.L. 397, 115 Atl. 345 (Sup. Ct. 1921) (condition to the undertaking); *cf.* J. I. Kislak, Inc. v. Judge, 102 N.J.L. 506, 133 Atl. 74 (Sup. Ct. 1926) where the court, in discussing the effect of Sadler v. Young, 78 N.J.L. 594, 75 Atl. 890 (Ct. Err. & App. 1910) which had held that the New Jersey statute of frauds did not prevent a real estate broker from recovering commission on an oral agreement where the listing party was not the "owner" of such property, found a broker entitled to a commission though the listing party was without clear title.

III. NEW YORK

Because the courts of other jurisdictions have generally accepted New York brokerage opinions as embracing the "condition precedent" rationale to the exclusion of any other, and because these same courts have professed[74] to follow the New York decisions, New York cases have been selected for individual analysis. The absolute "condition" characterization of the New York cases is unfounded, however, although the decisions do demonstrate clearly a strong preference for such analysis. Prior to the decision in *Amies v. Wesnofske*[75] in 1931 even this preference lacked clear manifestation. Thus opinions had referred, in terms connoting no preference whatever, to a proper use of the "time" rationale.[76] The two cases most often relied upon as having been based on such rationale, however, *Morgan v. Calvert*[77] and *Meltzer v. Straus*,[78] were far from full-hearted support for the proposition, for in each case, while the decisional rationale definitely stated the "time" interpretation, the fact that the property owner had been at fault in defeat of the transaction looms as a crucial factor.[79] That is, the decisional courts seemed to be convinced that a holding in terms of "time of payment" would more logically lead to the "just result"—that of precluding the owner from defeating the broker. This, of course, directly presents the problem of the co-operation required of the listing owner. But before this factor is considered, it will be wise to set forth the New York handling of various specific listing language, taking special note of the *Amies* decision which

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In stating the reason for this rule, the court in the *Ludwig* case *supra* said,

> The reason for non-delivery of a deed was directly due to the defendant's inability to give a good title. The plaintiff ought not be made to suffer on that account. If it was intended that no commission was to be paid unless an actual sale was consummated by the delivery of a deed it should have been explicitly so stated in the contract.

4 N.J. Misc. at 171, 132 Atl. at 241.

Thus, it is seen that the strong New Jersey interpretation against the presence of a condition plays a crucial part in yet another phase of the "New Jersey" rule.

74. That the decisions have not actually followed the complete New York rationale will be obvious from the following discussion.

75. 255 N.Y. 156, 174 N.E. 436 (1931).

76. See, *e.g.*, Meckes v. Mullen, 75 Misc. 303, 304, 132 N.Y. Supp. 942 (N.Y. City Ct. 1912).

77. 126 App. Div. 327, 110 N.Y. Supp. 855 (2d Dep't 1908).

78. 61 Misc. 250, 113 N.Y. Supp. 583 (Sup. Ct., App. T. 1908).

79. See, *e.g.*, Larson v. Burroughs, 131 App. Div. 877, 116 N.Y. Supp. 358 (2d Dep't 1909) which, in reversing a lower court holding for the plaintiff-broker under a listing providing for payment of commissions "when balance of cash amount to be paid is made and deed actually delivered," said,

> The learned Municipal Court rested its judgment for the plaintiff upon *Morgan v. Calvert* (126 App. Div. 327) [110 N.Y. Supp. 855]. But the point decided in that case was that the vendor who had agreed to sell his property for a specific sum on a certain day could not interpose, as a defense against the broker suing for commissions which the vendor had agreed to pay at the closing of title, his own wrong [his own defect in title] which prevented the closing thereof.

Id. at 878, 116 N.Y. Supp. at 358.

interpreted a clause providing for payment of commissions "on the closing of title"[80] as stating a "condition precedent" as a matter of court determination.[81] This was done in the face of a vigorous dissenting opinion stressing that determination of the effect of such a provision was a question of fact to be submitted to the jury.[82] From the quantum of reliance placed on the *Amies* opinion, it seems clear that it is largely responsible both for the erroneous characterization of the New York opinions and for the resultant use of the "condition precedent" rationale by other courts.

Care must be exercised in interpretation of the sense in which a New York court has employed the term "time." The fact that there might be what the court will *call* a "time" provision does not *necessarily* mean that once the time at which the event was scheduled to occur has passed the broker is entitled to his commission, for it is of the essence of the New York view that, although the *commission* has been earned, *payment* may not be due and may be conditioned upon the actual occurrence of the outside event.[83] The New York courts have, as a matter of the interpretation of the specific brokerage provision,[84] used the term "time" to describe this latter situation as

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80. The listing was oral and the conflicting testimony concerning its content provides grist for the mill of those who have decried approval of oral listings. In this case there was not only disagreement between the plaintiff-broker and the defendant-owner, but in the language used to express the alleged "condition" as delineated by the multiple owner-witnesses as well as by the trial judge and the court of appeal. See 255 N.Y. at 160-61, 174 N.E. at 437. While I have employed the phrase "on the closing of title" in the text, there was testimony that the term "when" was actually employed and the trial court in its instructions to the jury employed such term. See note 82 *infra*. And the court of appeal specifically stated that such term clearly connoted a condition. 255 N.Y. at 161, 174 N.E. at 437; *cf.* A. H. Ivins Co. v. Martin Holding Co., 84 Misc. 437, 146 N.Y. Supp. 126 (1st Dep't 1914). *But see* Levy v. Forster, 224 App. Div. 463, 231 N.Y. Supp. 238 (1st Dep't 1928). See note 87 *infra*.

81. This conclusion follows from approval of the instruction of the trial court to the jury that the plaintiff-broker "might not recover if the [owner] promised to pay . . . 'the other half of [the commission] when the title was closed.'" 255 N.Y. at 161, 174 N.E. at 437.

82. 255 N.Y. at 165, 174 N.E. at 439. If there is a dispute as to the actual terms of the listing agreement or if, considering the terms themselves and the surrounding circumstances, the terms are ambiguous, it is for the jury to say what the listing required. Slocum v. Ostrander, 141 App. Div. 380, 126 N.Y. Supp. 219 (1st Dep't 1910); *cf.* Watson v. Muskegon S.S. Corp., 208 App. Div. 158, 203 N.Y. Supp. 194 (1st Dep't 1924); see note 87 *infra*; 3 CORBIN, CONTRACTS § 554 (1951). Compare text supported by notes 152, 198-206 *infra*. In this regard, parol evidence is admissible to aid in resolving the ambiguity, but the language will usually be construed against the maker (usually the broker). See O'Connor-Sullivan, Inc. v. Otto, 283 App. Div. 269, 127 N.Y.S.2d 373 (3d Dep't 1954).

83. See, *e.g.*, Finnegan & Di Zerega v. Bank of New York, 277 App. Div. 562, 101 N.Y.S.2d 322 (1st Dep't 1950), *aff'd*, 302 N.Y. 876, 100 N.E.2d 53 (1951); *cf.* Bliven v. Lighthouse, 231 N.Y. 64, 131 N.E. 570 (1921). For extended treatment of such analysis, see 3 CORBIN, CONTRACTS § 627 (1951). Compare note 92 *infra*. Consider text supported by notes 102-06 *infra*.

84. *Cf.* Fuller v. Bradley Construction Co., 183 App. Div. 6, 170 N.Y. Supp. 320 (2d Dep't 1918), *aff'd*, 229 N.Y. 605, 129 N.E. 925 (1920).

Another pre-*Amies* decision, North Sea Developments, Inc. v. Burnett, 254 N.Y. 374, 173, N.E. 228 (1930), *reversing* 228 App. Div. 444, 239 N.Y. Supp. 634 (2d

well as that first suggested above. In fact, this found express statement in *Amies v. Wesnofske*.[85] Such use, however, does not accord with the sense in which the term is here employed.

Because the *Amies* decision in its interpretation of an oral "when payable" brokerage provision executed prior to any activity on the part of the broker, has enjoyed an exceedingly great acceptance by the courts of other jurisdictions as well as by the New York courts, it seems desirable to place it in its complete setting. First, consider the New York treatment of cases involving the same or similar "when payable" brokerage language, with and without additional qualifying language.[86] In *Amies* great reliance was placed on the meaning of the word "when" as used in the listing agreement, and the conclusion was reached that employment of such a word "clearly indicate[s] that a promise is not to be performed except upon a condition."[87]

Other listing language has in clear terms imported a condition to the payment of commission. Exemplary of these, and an early decision that has enjoyed authoritative influence, is *Fittichauer v. Van Wyck*[88] which involved a provision that commissions were not to be paid *"until* and *unless* title passed." (Emphasis supplied.) Here, thought the court, was conditional language without question. And

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Dep't 1930) had found the appellate division enunciating a "time" interpretation which was reversed by the court of appeals saying that it was a "question of fact whether before the broker had earned any commissions he agreed that his compensation should be [based on payments to be made]," the inference being that, if made prior to such time, a valid condition precedent had been stated.

85. [W]hether the one construction or the other be correct ["time" or "condition"], the result must be the same; since, if the event does not befall, or a time coincident with the happpening of the event does not arrive, in neither case may performance be exacted.

255 N.Y. at 162, 174 N.E. at 438. In fact, the *Amies* decision specifically rejected the meaning ascribed to a "when payable" clause by the New Jersey courts as well as by this paper when it continued: "Nor will it do to say that a promise to pay 'on the closing of title' is a promise to pay on the date fixed by the contract of sale for the closing of title."

86. Other New York cases involving "when payable" brokerage language will be considered in the "General" discussion that follows.

87. 255 N.Y. at 161, 174 N.E. at 437. It is interesting to note that the court relied on 2 WILLISTON, CONTRACTS § 671 (1920) and that in a later edition Professor Williston relied on the *Amies* decision. See 3 WILLISTON, CONTRACTS § 671 (rev. ed. 1936); *cf.* 3 CORBIN, CONTRACTS § 639 (1951).

At this point the dissent has some support in the prior New York decisions. For example, in Levy v. Forster, 224 App. Div. 463, 231 N.Y. Supp. 238 (1st Dep't 1928), the court had said that ordinarily "when" did not connote a condition. It is true that the court there said that the language was ambiguous in the light of surrounding circumstances and should be submitted to the jury for its determination of whether a condition had been stated. It is also true that the provision in the *Levy* case concluded with a *"due* and payable" clause keyed to another event that had not taken place and therefore it could be considered that the broker had not performed the required act of acceptance. But these facts do not change the meaning ascribed to the term "when." Prior authority for the finding of a "condition" in similar "when payable" clauses, however, was present. See, *e.g.*, Costa v. Schetz, 175 N.Y. Supp. 476, 477 (1st Dep't 1919) (dictum). See also Wisenberger v. Mayers, 281 App. Div. 171, 117 N.Y.S.2d 557 (1st Dep't 1952), *appeal withdrawn*, 306 N.Y. 732, 117 N.E.2d 910 (1954).

88. 92 N.Y. Supp. 241 (Sup. Ct., App. T. 1905).

the same result follows although only one of the terms is employed.[89] Until the *Amies* decision the presence or absence of these additional words was of prime importance,[90] but since *Amies* the words would seem to provide little more than an additional peg on which to hang a "condition" coat.

Of course, those cases involving brokerage language expressly providing that the commission shall not be deemed *earned* unless or until the named event has occurred properly result in refusal of recovery to a broker when, without the listing owner's fault, the event fails to occur.[91] In so holding the decisional language employed does not indicate that the courts are concerned with, or even aware of, the possibility that such phraseology should be considered as part of the required act for the broker's acceptance of the property owner's offer for a unilateral contract.[92] Rather, the courts have accepted, sub

89. Weiner v. Infeld, 116 Misc. 323, 190 N.Y. Supp. 82 (2d Dep't 1921) ("unless"); *cf.* Couper v. O'Neill, 53 Misc. 319, 103 N.Y. Supp. 122 (Sup. Ct. 1907) (shall not be due and payable "until"). *But cf.* Gilder v. Davis, 137 N.Y. 504, 33 N.E. 599 (1893).

90. For example, the absence of these words was made the express distinguishing factor between the statement of a "condition precedent" and a simple "time" clause in Meltzer v. Straus, 61 Misc. 250, 113 N.Y. Supp. 583 (Sup. Ct., App. T. 1908) (commission agreement was part of the contract of sale).

91. Saum v. Capital Realty Development, Inc., 268 N.Y. 335, 197 N.E. 303 (1935) ("until"); Mitchell v. Barnes, 281 App. Div. 681, 117 N.Y.S.2d 95 (2d Dep't 1952); Moffat v. Gerry Estates, Inc., 259 App. Div. 403, 19 N.Y.S.2d 579 (1st Dep't 1940) ("unless and until"); Murray R. Realty Co. v. Manhattan Co., 162 Misc. 21, 293 N.Y. Supp. 605, *aff'd mem.*, 251 App. Div. 717, 298 N.Y. Supp. 176 (1st Dep't 1937); Verity v. Ottinger, 223 App. Div. 344, 227 N.Y. Supp. 650 (1st Dep't 1928); *cf.* Reibeisen v. N.Y. Life Ins. Co., 64 N.Y.S.2d 529 (Sup. Ct. 1946), *aff'd*, 76 N.Y.S.2d 837 (1st Dep't), *appeal dismissed*, 297 N.Y. 950, 80 N.E.2d 346 (1948) ("no commission . . . if title fails to close"); Morgan v. Calvert, 126 App. Div. 327, 110 N.Y. Supp. 855 (2d Dep't 1908); Nekarda v. Presberger, 123 App. Div. 418, 107 N.Y. Supp. 897 (1st Dep't 1908).

Other examples of express provisions that serve to protect a property owner from having to pay commissions where the contemplated transaction fails to result in transferring title to the property to the proposed purchaser in exchange for the transfer of the purchase price to the owner are of course available. For example, in the early Seymour v. St. Luke's Hospital, 28 App. Div. 119, 50 N.Y. Supp. 989 (1st Dep't 1898), *appeal dismissed*, 159 N.Y. 524, 53 N.E. 1132 (1899) case there was a provision for payment of part of the commission at the close of all dealings and an additional proviso that "in the event of the transaction not being fulfilled, I waive all claims [to the deferred brokerage]." So, too, does a provision that should the transaction fail for any reason no brokerage will be paid. Heller & Henretig, Inc. v. 3620-168th Street, Inc., 274 App. Div. 1007, 84 N.Y.S.2d 767 (2d Dep't 1948); Reibeisen v. N.Y. Life Ins. Co., *supra*. See Grenell Realty Agency, Inc. v. Gruner, 63 N.Y.S.2d 443 (1st Dep't 1946); Berger v. Community Founders, Inc., 83 N.Y.S.2d 791 (N.Y. City Ct. 1948).

92. Of course, the required act of performance ("undertaking") is quite often something more than securing a purchaser ready, able and willing to purchase. Where such is the case, that act must occur before the broker is entitled. Whether an additional phrase providing for the actual payment upon the happening of some "external" event is to be considered as a "condition precedent" or as a mere "time of payment" clause usually depends upon an interpretation of the listing contract as making or not making the occurrence of that event part of the required act of acceptance or as providing a condition to the offeror's performance. For an excellent example of proper judicial handling of this situation, see Coughlan & Co., Inc. v. Frankel, 216 App. Div. 565, 215 N.Y. Supp. 625 (1st Dep't 1926), *aff'd mem.*, 243 N.Y. 599, 154 N.E. 621 (1926). Compare text supported by notes 28, 55 and 83 *supra*.

silentio, Corbin's analysis recognizing that there may be "conditions" in an offer for a unilateral contract in addition to the act of performance required by the offer,[93] "act of performance" for our purposes referring to obtaining a purchaser. That is, the New York courts have recognized that, although a commission has been earned, payment may be independently conditioned. However valuable this analysis may be in another context, the existence of the provision that commission shall not be deemed *earned* unless or until the named event has occurred would seem to render such an analysis inappropriate at this point.

Reference has already been made to interpretation of brokerage agreements employing the simple term "payable *when.*" Other language is commonly coupled with that term—e.g., "if" and "as." Where all are coupled together, as, "commissions are payable *if, as and when*" a stated event occurs, there is no question but that a "condition" has been stated,[94] and there has likewise been no trouble experienced by the courts in finding that a combination of any two of these terms serves the same purpose.[95] This is true regardless of the time in the sequence of events at which the provision is first expressed, if such provision is supported by consideration. Another term that has led to the same result is "actually"—payment shall be made when some event "actually" occurs.[96] Of course, use of the term

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93. 3 CORBIN, CONTRACTS § 626 (1951).

94. Rothschild v. Jerome Park Realty Corp., 71 N.Y.S.2d 483 (Sup. Ct.), *aff'd*, 272 App. Div. 1044, 75 N.Y.S.2d 281 (1st Dep't 1947) (combined with the term "actually"); Spero v. Kobler, 245 App. Div. 643, 283 N.Y. Supp. 791 (1st Dep't 1935); Leder v. Dry Dock Savings Institution, 8 N.Y.S.2d 68 (N.Y. City Ct. 1938).

95. Stern v. Gepo Realty Corp., 289 N.Y. 274, 45 N.E.2d 440 (1942) ("when and if consummated"); Colvin v. Post Mortgage and Land Co., 225 N.Y. 510, 122 N.E. 454 (1919) ("as and when"); Coward v. McLaughlin, 100 N.Y.S.2d 444 (N. Y. Munic. Ct. 1950) ("only if and when"); *cf.* Reichard v. Wallach, 91 N.Y. Supp. 347 (Sup. Ct., App. T. 1904) ("brokerage will be paid only to the one who actually makes and finally completes the sale and has the contract signed"); Van Varick v. Suburban Investment Co., 76 Misc. 593, 135 N.Y. Supp. 299 (Sup. Ct. 1912) (commissions from "installments actually received"). It would seem that the *Stern* and *Coward* opinions had been anticipated by the court in Levy v. Forster, 224 App. Div. 463, 231 N.Y. Supp. 238 (1st Dep't 1928) when it had suggested that the term "when" might have been used in an "if" sense.

96. Larson v. Burroughs, 131 App. Div. 877, 116 N.Y. Supp. 358 (2d Dep't 1909); *cf.* Reichard v. Wallach, 91 N.Y. Supp. 347 (Sup. Ct., App. T. 1904). See also Rothschild v. Jerome Park Realty Corp., 71 N.Y.S.2d 483 (Sup. Ct.), *aff'd*, 272 App. Div. 1044, 75 N.Y.S.2d 281 (1st Dep't 1947) ("actually" combined with "as, if, and when").

In Altman v. Heller, 127 N.Y.S.2d 129 (Sup. Ct. 1953) will be found the extreme of protection-seeking: "only when, as and if and in the event title actually closes, at which time the said brokerage commissions shall be due and payable." *Cf.* Heller & Henretig, Inc. v. 3620-168th Street, Inc., 274 App. Div. 1007, 84 N.Y.S.2d 767 (2d Dep't 1948) ("if for any reason whatsoever the contract of sale shall not be executed and delivered as aforesaid, or if the title shall not be closed and the deed be delivered under the contract of sale for any reason whatsoever except for the willful default of the seller, the undersigned hereby agrees that there shall be no brokerage or compensation due").

in combination with "unless" or "until" clearly states a condition.[97] Suppose the phrase refers to payment to be made upon receipt by the property owner of certain payments which are to be made under a contract executed between the listing owner and a purchaser. Obviously the same result should, and in fact does, obtain,[98] although, just as obviously, the broker is entitled to any commissions due on payments actually made.[99]

Just as was true in New Jersey, a provision that commissions are to be "*due* and payable" has been employed, although usually in connection with some other term connoting a condition.[100] In *Couper v. O'Neill*,[101] however, the supreme court emphasized that an isolated provision of a commission agreement executed simultaneously with a contract of sale, which related to an event at the occurrence of which payment of the commission would be due, created a "condition precedent" to the earning of commissions. Inasmuch as the term is most likely used as a synonym for "earned," the decision seems sound.

Specifically with regard to the effect of words of "conditional" import, the New York decisions, unlike those of New Jersey,[102] are noteworthy for their direct consideration of the time in the chronological sequence of events at which the "conditional" language was inserted. The jural effect of such consideration is clearly demonstrable by a comparison of two cases. In the appellate division opinion

97. Williams v. Ashner, 152 App. Div. 447, 137 N.Y. Supp. 275 (2d Dep't 1912); Murray R. Realty Co., Inc. v. Manhattan Co., 162 Misc. 21, 293 N.Y. Supp. 605, *aff'd mem.* 251 App. Div. 717, 298 N.Y. Supp. 176 (1st Dep't 1937); *cf.* Greenwald v. Rosen, 61 Misc. 260, 113 N.Y. Supp. 764 (Sup. Ct., App. T. 1908) ("no commissions are to be paid until the title is passed; if for any reason title cannot be passed no commissions are to be paid whatever").

98. See, *e.g.*, North Sea Developments, Inc. v. Burnett, 254 N.Y. 374, 173 N.E. 228 (1930); Colvin v. Post Mortgage and Land Co., 225 N.Y. 510, 122 N.E. 454 (1919); Van Varick v. Suburban Investment Co., 76 Misc. 593, 135 N.Y. Supp. 299 (Sup. Ct. 1912); *cf.* Fuller v. Bradley Contracting Co., 183 App. Div. 6, 20, 170 N.Y. Supp. 320, 328 (2d Dep't 1918), *aff'd mem.*, 229 N.Y. 605, 129 N.E. 925 (1920) (dictum); Jaffe v. New York Towers, Inc., 108 N.Y.S.2d 193 (N.Y. City Ct. 1951). *But cf.* Traylor v. Crucible Steel Co., 192 App. Div. 445, 183 N.Y. Supp. 181 (1st Dep't 1920), *aff'd*, 232 N.Y. 583, 134 N.E. 581 (1922) (dictum).

99. Van Varick v. Suburban Investment Co., 76 Misc. 593, 135 N.Y. Supp. 299 (Sup. Ct. 1912); *cf.* Gilder v. Davis, 137 N.Y. 504, 33 N.E. 599 (1893) (where commission was not to be paid "until the final purchase money is paid in," the broker was entitled, at least, to commission based upon the amount of the sum forfeited to the property owner upon the purchaser's default). But *compare* the *Gilder* decision *with* Amies v. Wesnofske, 255 N.Y. 156, 174 N.E. 436 (1931).

100. See, *e.g.*, Couper v. O'Neill, 53 Misc. 319, 103 N.Y. Supp. 122 (Sup. Ct. 1907) ("shall not be due and payable until"); *cf.* Finnegan & Di Zerega, Inc. v. Bank of New York, 277 App. Div. 562, 101 N.Y.S.2d 322 (1st Dep't 1950), *aff'd*, 302 N.Y. 876, 100 N.E.2d 53 (1951); Fuller v. Bradley Contracting Co., 183 App. Div. 6, 170 N.Y. Supp. 320 (2d Dep't 1918), *aff'd*, 229 N.Y. 605, 129 N.E. 925 (1920) ("due and payable only as and when . . . we receive payment"); Jaffe v. New York Towers, Inc., 108 N.Y.S.2d 193 (N.Y. City Ct. 1951).

101. 53 Misc. 319, 103 N.Y. Supp. 122 (Sup. Ct. 1907).

102. See text at pp. 303-04 *supra*.

in *North Sea Development, Inc. v. Burnett*,[103] the court set forth the basic distinction by referring to the problem and its conclusion thus,

> There can be no doubt that, under the well-established rule laid down in *Colvin v. Post Mortgage & Land Co.*, [225 N.Y. 510, 122 N.E. 454 (1919)] the plaintiff is entitled to full commissions unless the proof shows that the owner and the broker, *prior* to the time the contract of sale was made, agreed that the broker was to receive commissions only upon payments made under the contract.[104] (Emphasis added.)

And, in *Eckhaus v. Paramount Improvement Corp.*,[105] it was specifically held that an agreement to wait for commissions made *after* the owner and purchaser have agreed upon a sale was a mere nullity. The *Colvin* case, relied upon by the *North Sea* opinion, was expressly distinguished on the ground that the "conditional" agreement there involved had been made *before* the broker had performed the required act of acceptance.[106]

An excellent statement of the law concerning the co-operation and duties required of a listing owner as it then existed (and as the substance of it continues to exist), coupled with a good analysis of the appropriateness of the various decisions in light of the business setting in which brokerage agreements are executed, being readily

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103. 228 App. Div. 444, 239 N.Y. Supp. 634 (2d Dep't 1930).

104. *Id.* at 448, 239 N.Y. Supp. at 637. The appellate division decision was reversed on appeal, 254 N.Y. 374, 173 N.E. 228 (1930), by a holding that "whether before the broker had earned any commissions he agreed that his compensation should be [based on payments to be made under the contract]," the decision of which question would be decisive, was a question of fact.

105. 240 App. Div. 778, 265 N.Y. Supp. 1055 (2d Dep't 1933).

106. Other cases finding consideration for "conditional" language, though first enunciated after the broker had begun his efforts: Saum v. Capital Realty Development Corp., 268 N.Y. 335, 197 N.E. 303 (1935) (broker had not yet performed the required act); Couper v. O'Neill, 53 Misc. 319, 103 N.Y. Supp. 122 (Sup. Ct. 1907) (same); *cf.* Silberman v. Horowitz, 114 N.Y. Supp. 1 (Sup. Ct., App. T. 1909) (dispute over commissions due provided consideration). And see Seymour v. St. Luke's Hospital, 28 App. Div. 119, 50 N.Y. Supp. 989 (1st Dep't 1898), *appeal dismissed*, 159 N.Y. 524, 53 N.E. 1132 (1899) (although the court indicated a question concerning the consideration for the special agreement, the broker, by suing on it, was estopped to dispute its validity).

Other cases finding that, the broker having performed the required act, the commission was earned and the subsequent "conditional" agreement relating to payment was without consideration: John Reis Co. v. Zimmerli, 224 N.Y. 351, 120 N.E. 692 (1918); Miller v. Rossiter and Bankers' Trust Co., 125 Misc. 80, 209 N.Y. Supp. 767 (1st Dep't 1925); Salmon v. Mayer, 164 N.Y. Supp. 766 (1st Dep't 1917); Swee v. Neumann, 67 Misc. 605, 123 N.Y. Supp. 776 (N.Y. City Ct. 1910) (the common case of the listing owner attempting to "whittle down" an already successful broker); Taubenblatt v. Galewski, 108 N.Y. Supp. 588 (Sup. Ct., App. T. 1908); Hough v. Baldwin, 50 Misc. 546, 99 N.Y. Supp. 545 (Sup. Ct., App. T. 1906); Gilder v. Davis, 137 N.Y. 504, 509, 33 N.E. 599, 600 (1893) (dictum); *cf.* Moskowitz v. Hornberger, 20 Misc. 558, 46 N.Y. Supp. 462 (Sup. Ct., App. T. 1897). *But cf.* Nekarda v. Presberger, 123 App. Div. 418, 107 N.Y. Supp. 897 (1st Dep't 1908) where, notwithstanding an acknowledgment that the listing owner had become indebted to a broker who had brought about a contract between the owner and a purchaser, an agreement to pay upon the happening of a certain event was considered effective to provide a condition precedent. Compare text supported by note 83 *supra*.

available,[107] little more than a brief statement of the pertinent problems will be presented.[108] Here, again, the basic decision is *Amies v. Wesnofske*, where, after quoting from various authorities concerning excuse of a condition precedent where the promisor has prevented or hindered its occurrence, the court says,

> [A]ctive conduct of the conditional promisor . . . eliminates [the condition] and makes the promise absolute. No such doctrine can be efficacious to compel positive action by the promisor to bring about performance of the condition. . . .
>
> It has been very generally held that a vendor is under no duty to his broker to enforce specific performance by the vendee, when commissions are conditioned upon performance; that the vendor may accept forfeiture by the vendee, retain the down payment made, and not become liable thereby to pay his broker.[109]

Breaking this statement into its component ideas, we have first the proposition that where *active* conduct of the conditional vendor hinders performance the condition is excused. But what if the conduct is *passive* or somewhere between the two? Is there any undertaking that will be impliedly attributed to the property owner? More specifically, what about *Stern v. Gepo Realty Corp.*,[110] the opinion of which said, "a vendor of real property is under a duty to take affirmative action to convey a marketable title . . ., and, therefore, under the usual contract of sale, undertakes to pay off items which are concededly liens . . ."—how is it to be reconciled? Disposing of the latter question first, the obvious point of departure between the situations involved in the *Stern* and *Amies* cases lies in an appreciation of "whose fault" caused defeat of the occurrence of the conditional event. As was specifically observed in *Stern*, the *Amies* language dealt with the situation where the purchaser was at fault—in such a situation there was no duty cast on the owner to take affirmative action to protect the broker. But in *Stern* the fault was the listing owner's—his title was defective. This distinction, while not expressly enunciated in the *Amies* decision, had been made explicit in earlier New York cases[111] and had been pointed out in a discussion

107. Note, *Special Conditions in Real Estate Brokerage Contracts*, 32 COLUM. L. REV. 1194, 1197-1204 (1932).

108. A rather more complete discussion of this facet of the problem as handled by the New Jersey courts (see text at § II *(b) supra*) was thought necessary to illustrate, *inter alia*, that adoption of a "time" rationale in "when payable" cases has not affected the New Jersey handling of "fault" in "condition" cases.

109. 255 N.Y. at 163, 174 N.E. at 438 (1931).

110. 289 N.Y. 274, 277, 45 N.E.2d 440, 441, *affirming* 264 App. Div. 265, 35 N.Y.S.2d 240 (1st Dep't 1942).

111. See, *e.g.*, Colvin v. Post Mortgage and Land Co., 225 N.Y. 510, 122 N.E. 454 (1919); Weiner v. Infeld, 116 Misc. 323, 190 N.Y. Supp. 82 (2d Dep't 1921); Larson v. Burroughs, 131 App. Div. 877, 116 N.Y. Supp. 358 (2d Dep't 1909). The same result obtains where there has been a supervening impossibility. Greenwald v. Rosen, 61 Misc. 260, 113 N.Y. Supp. 764 (Sup. Ct., App. T. 1908); *cf.* Lougheed & Co. v. Suzuki, 216 App. Div. 487, 215 N.Y. Supp. 505 (1st Dep't), *aff'd*, 243 N.Y. 648, 154 N.E. 642 (1926).

of the "implied warranty" of title given by the mere fact an owner has listed property for sale.[112]

Of course, the foregoing discussion is but a specific facet of the broader second question—is there any implied "undertaking" by the property owner? This question is, in turn, directly related to the first—"active" versus "passive"—question. Having found that the New York courts say "yes" insofar as title is concerned, have they stopped there? Suppose the purchaser seeks to relieve himself of his obligations under the contract and the listing owner agrees to a cancellation? Following the distinction already indicated, the answer depends upon whether the listing owner's cancellation is considered as active or passive. If the cancellation takes place before the scheduled law day and before the purchaser has defaulted, the cancellation makes the completion of the contract impossible and is a breach of the listing owner's implied undertaking to do nothing to defeat the occurrence of the named event.[113] On the other hand, if the purchaser defaults, so that the transaction is no longer "living," the owner may cancel with impunity.[114] Further, he is under no duty to enforce his

112. Compare the New Jersey approach at text supported by notes 71-73 *supra*.

The following New York cases also enunciate the implied warranty of title doctrine: Colvin v. Post Mortgage and Land Co., *supra* note 111; Magrill v. Langan, 43 N.Y.S.2d 210 (2d Dep't 1943); Weiner v. Infeld, *supra* note 111; Morgan v. Calvert, 126 App. Div. 327, 110 N.Y. Supp. 855 (2d Dep't 1908); Coward v. McLaughlin, 100 N.Y.S.2d 444 (N.Y. Munic. Ct. 1950); Cash v. Diamond, 208 Misc. 712, 714, 144 N.Y.S.2d 627, 630 (N.Y. Munic. Ct. 1955) (dictum); Green v. Foreman, 53 N.Y.S.2d 863, 866 (Sup. Ct 1945) (dictum); *cf.* Holman v. Patten, 227 N.Y. 22, 124 N.E. 86, *rehearing denied*, 227 N.Y. 623, 125 N.E. 913 (1919); Moskowitz v. Hornberger, 20 Misc. 558, 46 N.Y. Supp. 462 (Sup. Ct., App. T. 1897) (exchange). *But cf.* Condict v. Cowdrey, 139 N.Y. 273, 34 N.E. 781 (1893) (although the owner's title was defective, where the purchaser had expressly reserved the right to withdraw should the owner's title be bad, the broker, not having secured an unconditionally binding contract, had not performed his undertaking and so was not entitled to commission); Hausman v. Herdtfelder, 81 App. Div. 46, 80 N.Y. Supp. 1039 (1st Dep't 1903); Traylor v. Crucible Steel Co., 192 App. Div. 445, 449, 183 N.Y. Supp. 181, 183 (1st Dep't 1920), *aff'd*, 232 N.Y. 583, 134 N.E. 581 (1922) (dictum).

In Leder v. Dry Dock Savings Institution, 8 N.Y.S.2d 68 (N.Y. City Ct. 1938) the court was presented with a brokerage claim where the transaction failed because the listed property encroached one-half inch upon a building line. In directing a verdict for the defendant-property owner, the court, its sympathies going out to an "innocent" owner, said:

> If title was clearly marketable, then there was no fault on the part of the defendant and there can be no recovery . . . . If clearly unmarketable, and the defendant had failed to communicate the basic facts to the broker, the plaintiff's contention is sound and he would be entitled to recover irrespective of "good faith" or the opposite on the part of the buyer . . . .

Id. at 69.

See Note, *Special Conditions in Real Estate Brokerage Contracts*, 32 COLUM. L. REV. 1194 (1932).

113. *Cf.* Frederick Zittel & Sons v. Schwartz, 192 App. Div. 353, 182 N.Y. Supp. 638 (1st Dep't 1920) (sale of stock); Allan S. Feldman & Co. v. Freeman, 156 N.Y.S.2d 52 (N.Y. Munic. Ct. 1956).

114. Weiner v. Infeld, 116 Misc. 323, 190 N.Y. Supp. 82 (2d Dep't 1921). Determination of who was at fault in defeat of the transaction is a jury question, Colvin v. Post Mortgage and Land Co., 225 N.Y. 510, 122 N.E. 454 (1919),

rights to any deposit or claim he may have against the purchaser.[115] In the former situation the listing owner has been active in bringing about defeat of the transaction; in the latter, only passive.[116]

Pursuing the "active-passive" distinction a bit further, the foregoing clearly indicates the truth of the *Amies* statement quoted above that a listing owner need not pursue a recalcitrant purchaser with an action for specific performance.[117] But can he compromise his claim against the purchaser, or sue for or accept a payment of damages, without incurring liability to the broker for the commission? Suppose he does bring an action for specific performance? Suppose the contract between owner and purchaser contains a provision for

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the burden of pleading and proof being on the broker to show that it was the property owner's. O'Connor-Sullivan, Inc. v. Otto, 283 App. Div. 269, 127 N.Y.S.2d 373 (3d Dep't 1954); *cf.* Windsor Investing Corp. v. T. J. McLaughlin's Sons, 130 Misc. 730, 225 N.Y. Supp. 7 (Sup. Ct. 1927), *aff'd mem.*, 224 App. Div. 715, 229 N.Y. Supp. 926 (1st Dep't 1928).

115. See, *e.g.*, Spero v. Kobler, 245 App. Div. 643, 283 N.Y. Supp. 791 (1st Dep't 1935); Seymour v. St. Luke's Hospital, 28 App. Div. 119, 50 N.Y. Supp. 989 (1st Dep't 1898), *appeal dismissed*, 159 N.Y. 524, 53 N.E. 1132 (1899); *cf.* Caldwell Co., Inc. v. Connecticut Mills Co., 225 App. Div. 270, 273-74, 232 N.Y. Supp. 625, 629 (1st Dep't 1929), *aff'd*, 251 N.Y. 565, 168 N.E. 429 (1929) ("It is quite beside the point for plaintiff to urge that, inasmuch as the defendant has received the amount by which it would have profited by performance of the agreement, it should in good conscience pay the plaintiff what it would have had to pay him upon performance . . . . [I]t was still perfectly competent for these parties to contract that in no event should commissions be payable except upon the price of goods actually shipped."); Hilsenrath v. Dale Holding Corp., 37 N.Y.S.2d 134, 136 (N.Y. Munic. Ct. 1942) (dictum).

Suppose upon a default by the purchaser the listing owner declares a forfeiture, the purchaser sues for specific performance, and the owner settles the suit. May the broker now maintain an action for commissions? Is the fact that the purchaser changes his mind and attempts to enforce the contract sufficient to remove the "fault" stigma from the purchaser and transfer it to the owner? See Windsor Investing Corp. v. T. J. McLaughlin's Sons, 130 Misc. 730, 732, 225 N.Y. Supp. 7, 11 (Sup. Ct. 1927), *aff'd mem.*, 224 App. Div. 715, 229 N.Y. Supp. 926 (1st Dep't 1928) where it was said in a suit by a broker alleging that failure of the transaction was due to the fault of the property owner in agreeing to a settlement,

> It has also been held that, where the purchaser defaults, but later demands a conveyance, which is refused by the vendor, the latter is not liable to a broker whose right to compensation was conditional upon passage of title.

116. Other cases enunciating the "active-passive" rationale include: Grenell Realty Agency, Inc. v. Gruner, 63 N.Y.S.2d 443 (1st Dep't 1946); Moffat v. Gerry Estates, Inc., 259 App. Div. 403, 19 N.Y.S.2d 579 (1st Dep't 1940); Coward v. McLaughlin, 100 N.Y.S.2d 444 (N.Y. Munic. Ct. 1950); Leder v. Dry Dock Savings Institution, 8 N.Y.S.2d 68 (N.Y. City Ct. 1938); *cf.* Caldwell Co. v. Connecticut Mills Co., 225 App. Div. 270, 232 N.Y. Supp. 625 (1st Dep't 1929), *aff'd*, 251 N.Y. 565, 168 N.E. 429 (1929); Fuller v. Bradley Constructing Co., 183 App. Div. 6, 170 N.Y. Supp. 320 (2d Dep't 1918), *aff'd mem.*, 229 N.Y. 605, 129 N.E. 925 (1920). See also, Pearce v. Knepper, 53 N.Y.S.2d 845 (Sup. Ct. 1945), *aff'd mem.*, 269 App. Div. 829, 56 N.Y.S.2d 415 (1945), *appeal denied*, 269 App. Div. 929, 57 N.Y.S.2d 841 (1st Dep't 1945).

117. In addition to the *Amies* decision, see Stern v. Gepo Realty Corp., 289 N.Y. 274, 45 N.E.2d 440 (1942); Spero v. Kobler, 245 App. Div. 643, 283 N.Y. Supp. 791 (1st Dep't 1935); Seymour v. St. Luke's Hospital, 28 App. Div. 119, 50 N.Y. Supp. 989 (1st Dep't 1898), *appeal dismissed*, 159 N.Y. 524, 53 N.E. 1132 (1899); Windsor Investing Corp. v. T. J. McLaughlin's Sons, 130 Misc. 730, 225 N.Y. Supp. 7 (Sup. Ct. 1927), *aff'd. mem.*, 224 App. Div. 715, 229 N.Y. Supp. 926 (1st Dep't. 1928).

liquidated damages and the property owner receives the sum so specified? These questions raise the problem of "colorable equivalence,"[118] but it is obvious that they are also directly related to the problem of the owner's fault in non-satisfaction of the condition.

There is no doubt that when the owner has pursued a successful action for specific performance, he has precluded a defense to liability for commissions—his action amounts to a "colorable equivalence" of the condition and it inures to the broker's benefit.[119] Nor, as shown above, is there doubt of non-liability where the owner sits quietly by on default by the purchaser. But suppose, in line with the questions posed above, he makes an attempt that falls short of an action for specific performance to gain some recompense for tribulation suffered as a result of the purchaser's default? An action for specific performance is obviously one of affirmance of the contract. So is the recovery of damages for breach of the contract,[120] but "affirmance" does not necessarily require the bringing of suit.[121] Cancellation or rescission partake of rejection of the contract. What of modification? It clearly is affirmative in nature. Is this enough to bring into operation the "specific performance" rule if the modification takes place after default by the purchaser?[122] And what of foreclosure or collection of liquidated damages? Is this "affirmative"? In a sense the answer is "yes," but in a more important sense it is "no." It is basing a claim on the writing, but it is also an acknowledgment that the primary obligation is no longer to be relied upon. Notwithstanding characterization of such a claim as negative, however, may it nevertheless be said that recovery of liquidated damages or receipt of a bid at a foreclosure sale is, in a real sense, the equivalent of the benefit contemplated by the contract? "No," said the appellate division in referring to the liquidated damages problem presented in *Watson v. Muskegon S. S. Corp.*, [123] distinguishing *Gilder v. Davis*,[124] which had allowed recovery based on the amount of forfeiture (liquidated

118. See Note, 32 COLUM. L. REV. 1194 (1932).
119. *Id.* at 1197, n.21.
120. See Amies v. Wesnofske, 255 N.Y. 156, 164, 174 N.E. 436, 438 (1931). Coughlan & Co., Inc. v. Frankel, 216 App. Div. 565, 215 N.Y. Supp. 625 (1st Dep't 1926), *aff'd mem.*, 243 N.Y. 599, 154 N.E. 621 (1926), often cited in support of this proposition, actually involved a situation where the broker's commission was to be earned upon the securing of a binding contract and the court felt that, where by suit the owner had secured damages for breach of a binder as a contract, he was estopped to deny that the broker had earned a commission.
121. See Amies v. Wesnofske, *supra* note 120.
122. This was clearly answered in the affirmative by Hilsenrath v. Dale Holding Corp., 37 N.Y.S.2d 134 (N.Y. Munic. Ct. 1942) which, although involving commissions for securing a lessee, relied upon "cases dealing with the purchase and sale of real estate."
123. 208 App. Div. 158, 203 N.Y. Supp. 194 (1st Dep't 1924).
124. 137 N.Y. 504, 33 N.E. 599 (1893). While this case involved sale of a steamship rather than of realty this factor did not enter into the decision—it proceeded in the same manner as if sale of realty were involved.

damages), on the ground that in that case the commission had been earned by the signing of the contract.[125] And the same answer is to be found where foreclosure is pursued—a bid at a foreclosure sale not being a payment made under the contract.[126]

This discussion of the New York cases began with a reference to the two New York cases most heavily relied upon as adopting a "time" rationale, *Morgan v. Calvert* and *Meltzer v. Straus,* and suggested that the court in each instance may have felt that such an analysis was the "easy" way to reach a "just" decision. Each of those cases does specifically enunciate the "time" rationale, but each could as well have been placed on excuse of a "condition"—*Morgan v. Calvert* because a defect in the listing owner's title caused the nonoccurrence of the "condition," and *Meltzer v. Straus* because the listing owner refused without justification to proceed at the law day. Subsequent cases have shown a strong preference for the "condition" rationale in all cases where an outside event has been stated in the commission clause. But, as is shown by the opinion in *Coughlan and Co. v. Frankel,*[127] where it is *clear* that the provision for payment of commissions does not refer to the broker's undertaking, the event stated in such provision will be held to state a mere "time" of payment.[128] This key to the acceptance of one of the rationales to the exclusion of the other is further illustrated by the indulgence in cross-citation to brokerage cases by opinions rendered in analogous factual situations. Thus, in *Mascioni v. I. B. Miller, Inc.,*[129] which involved a subcontractor's claim to payment for materials furnished the contractor under an agreement "Payment to be made as received from the owner," the court, in part relying on brokerage cases, found that a condition precedent had been stated. But in *O'Neil Supply Co. v. Petroleum Heat & Power Co.*[130] where again a subcontractor was claiming payment for supplies furnished, the court found that only a "time" for payment had been stated. In both of these cases the court referred to the distinction between a condition attached to the existence of the debt itself, and a condition attached only to the

125. A probability recognized by the *Gilder* court, 137 N.Y. at 509, 33 N.E. at 600-01, but not raised by that appeal.

126. North Sea Developments, Inc. v. Burnett, 254 N.Y. 374, 173 N.E. 228 (1930).

127. 216 App. Div. 565, 215 N.Y. Supp. 625 (1st Dep't), *aff'd mem.,* 243 N.Y. 599, 154 N.E. 621 (1926).

128. The thrust of the *Coughlan* decision was, however, somewhat weakened by the alternative holding that the owner had received the equivalent of performance, and thus the broker was entitled. See note 120 *supra.*

129. 261 N.Y. 1, 184 N.E. 473 (1933). *Cf.* Ley v. Fred T. Ley & Co., 271 App. Div. 439, 65 N.Y.S.2d 843 (Sup Ct., App. T. 1946) ("agreement . . . to make payments . . . from a particular fund to be realized in the future, if based on a consideration," usually makes "realization of the fund . . . a condition precedent to any liability of the promisor to make the payment.")

130. 280 N.Y. 50, 19 N.E.2d 676 (1939).

promise to pay. The *Mascioni* case, quoting from Professor Langdell, acknowledged that "a condition annexed to a promise to pay a debt will commonly . . . extend to the debt itself,"[131] and concluded that the promise to pay then before the court was not intended to be operative should the event stated not occur. That is, it was felt that the payment clause constituted a proviso that the debt should be payable only upon receipt of payments by the owner. Thus, it was then held that the trial court had not been in error in reasoning that the subcontractors "had accepted the condition as a material part of the exchange for their own promise or performance."[132]

In the *O'Neil Supply Co.* case, however, there had been previous difficulties which had led to a compromise agreement between the plaintiff and defendant by which the plaintiff relinquished certain rights in exchange for defendant's promise to pay a certain sum "five days after the completion of the installation" by a named third person.[133] The defendant completed the job after the third person had failed to do so. In holding for the plaintiff who was claiming payment for materials furnished, the court determined that "The promise of defendant to pay was independent of the completion of the work by [the third person] individually, the time of payment being based alone on the happening of the condition stated."[134] This result was based in part on the relinquishment of rights by the plaintiff against the third person in exchange for a right against the defendant (which the court felt showed clearly an intention by the plaintiff to have an absolute obligation of the defendant without reference to the third person). It was also based in part on the lack of pecuniary interest of the plaintiff in the completion of the work by the named third person individually; only the defendant could compel the third person's performance. The importance of this latter clause must not be overlooked, for the court, in ascertaining the parties' intention, felt that

> Plaintiff could not have understood the contract to provide that payment would be conditioned upon the whim or caprice or failure of defendant to show good faith or to exercise due diligence in effecting the completion of the work.[135]

As a result, the court concluded that

> If the completion of the work by [the named third person] individually was a condition precedent to any payment at all to plaintiff, if the debt itself was contingent, the defendant cannot rely on the condition precedent to prevent recovery where the non-

131. LANGDELL, SUMMARY OF THE LAW OF CONTRACTS § 36 (1880).
132. 261 N.Y. at 6, 184 N.E. at 474.
133. 280 N.Y. at 53, 19 N.E.2d at 677.
134. 280 N.Y. at 54, 19 N.E.2d at 678.
135. 280 N.Y. at 55, 19 N.E.2d at 678.

performance of the condition was caused or consented to by itself. . . .[136]

Thus, here again, we see that while the "time" rationale is not completely rejected by the New York courts, its application normally rests upon a finding that extreme hardship may result to the promisee if a "condition" is indulged. And here again we see the import of the "fault" of the promisor.[137]

The result of the acceptance of one or the other of the rationales has previously been indicated.[138] By their preference for the "condition" rationale as shown by their failure to find an absolute promise to pay divorced from the statement of an outside event, the New York courts have chosen a path which results in decisions affording a maximum of protection to a property owner.

IV. General

(a) Qualifying Brokerage Language

The preceding sections have been involved with discussion of the holdings of the two states generally considered most representative of judicial attitudes toward the effect of qualifying language relating to payment of commissions, and we have seen that any absolute characterization of either the New York or New Jersey decisions is unwarranted. The present section will concern itself with a brief analysis of the attitudes of the courts of the other American jurisdictions which, as was observed in the introduction, most usually, although neither exclusively nor wholly consistently, accord with the "condition" preference of the New York decisions. Although occasional reference to the nature of the broker's undertaking[139] in pursuance of a listing unembellished by qualifying language having reference to the payment of commissions has been and will of necessity be made in furtherance of the objectives of this paper, such problems are excluded from detailed consideration so that we do not detract from our central consideration—the effect of such "qualifying payment" language.[140]

136. 280 N.Y. at 56, 19 N.E.2d at 679.

137. Consider the query concerning the New Jersey adoption of the "time" rationale at text following note 60 *supra*.

138. See text at pp. 309-10 *supra*.

139. The most thorough discussion of these problems is to be found in Professor Floyd Mechem's masterful treatise. See 2 MECHEM, AGENCY §§ 2427-79 (2d. ed. 1914). It is the writer's intention to prepare a discussion of the problems connected with special "undertakings" for later publication.

Exemplary of words referring directly to the broker's undertaking are "to sell" and the various forms of the term "sale."

140. Included under the "general listing" category, by definition, is the requirement that the broker secure a purchaser ready, willing, and able to buy on the "special" terms imposed by the listing owner. As was said in Leicht-Benson Realty & Construction Corp. v. J. D. Stone & Co., 138 Va. 511, 514, 121 S.E. 883, 884-85 (1924):

Before embarking on a consideration of judicial handling of such phrases outside of New Jersey and New York it will be well to repeat that, whatever construction is adopted in a particular case, the decisional court is always attempting to base its interpretation of the listing agreement on the intention of the parties—did they intend to place a condition precedent to the broker's right to commission? The litigious problems arise because there is often no mutual intention in fact. With this in mind, what considerations enter into the actual determination of the legal effect of the "payment" clause? And, does a listing owner, whose "intention" is given effect when the qualifying language used is treated as establishing a "condition precedent," actually intend, at the moment of listing, to make such a condition?

Of primary importance in this connection should be the problem whether the qualifying language is entitled to *any* jural effect. Where the language is part of an agreement executed prior to the rendering of performance it will of course be given effect in some way as a part of the listing agreement.[141] But should this be true where the pertinent qualifying language is first enunciated simultaneously with or subsequent to the rendering of the required act of performance? One may rightly wonder how an affirmative answer could be given—where is the consideration for such an agreement?[142] As was pointed out

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One distinction which seems sometimes to be overlooked is as to the specific character of the employment. If the broker is employed generally to find a purchaser, and introduces him to the owner, and they negotiate a sale, the broker is entitled to his commissions; but a different rule applies, or should apply, when the terms of the sale or exchange are specifically fixed in advance, and the broker's authority is limited to finding a purchaser who will buy the property on the prescribed terms. In the latter instance, in the absence of deceit or fraud on the part of the owner, the broker is entitled to no commissions, unless he finds such a purchaser . . . .

While a listing agreement employing such "special" terms is often referred to as a "special contract of employment," [see, *e.g.*, Campbell v. Sickels, 197 Va. 298, 89 S.E.2d 14 (1955)] such an agreement does not come within the definition of "special contract" as that term has been defined herein. See text at note 3 *supra*. Rephrasing that definition, the term "special contract (agreement)" refers, in the absence of specific reference otherwise, to provisions of the listing agreement that specify some event external to the requirement of finding a purchaser, at the happening of which the commission will be paid. Is the reference to such event merely a statement of the "time" at which the commission will be paid, or is the occurrence of that event a "condition precedent" to a listing owner's obligation to pay?

141. This includes the situation where the qualifying language first finds expression in an instrument executed separate from, but simultaneous with, execution of a listing agreement designating the broker's undertaking. See, *e.g.*, Malone v. Dillard, 212 Ala. 361, 102 So. 705 (1925); Canton v. Thomas, 264 Mass. 457, 162 N.E. 769 (1928); *cf.* Dowler v. Suburban Improvement Co., 110 W. Va. 113, 157 S.E. 91 (1931).

142. Use of the phrase "rendering of the required act of performance" in the preceding sentence is meant to provide the underlying assumption of this discussion that the broker has secured a purchaser on the prescribed terms. Of course, if a prospective purchaser proposes to buy the property on different terms, acceptance by the owner of what would in effect be a counter-offer would provide consideration for a change in the brokerage agreement. See, *e.g.*, Dale v. Raines, 115 Cal. App.2d 309, 252 P.2d 22 (1953); Alison v. Chapman, 36 Cal. App. 759,

earlier,[143] many courts have simply by-passed the problem without acknowledgment that a problem existed.[144] Others, including New Jersey[145] and New York,[146] have given effect to the provision as a "time" clause as that term is employed in this paper.[147] Inasmuch as the later listing is in many instances in writing, whereas the first is often oral, courts may have recognized the problem in a given case but glossed over it by an unexpressed finding that the subsequent writing "integrated" the earlier parol.[148] Other cases have involved

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173 Pac. 389 (1918); Dean v. Williams, 56 Wash. 614, 106 Pac. 130 (1910); Estate of Boley, 211 Wis. 431, 248 N.W. 452 (1933); *cf.* Waddle v. Smith, 58 Ind. App. 587, 108 N.E. 537 (1915) (broker importuned listing owner to forego enforcement of an original contract and accept another). The same rule is applicable where the broker secures a purchaser after the listing has expired.

Similarly, if a listing owner has not provided the broker with definite terms on which a sale will be made, the terms are open to negotiation and the owner may refuse to accept such terms as are agreeable to the prospective purchaser until and unless the broker assents to the imposition of a condition precedent to the owner's obligation to pay commissions. See, *e.g.*, Dal Maso v. Gregory, 112 A.2d 923 (D.C. Munic. App. 1955); *cf.* Edgecomb v. Callahan, 132 Cal. App. 248, 22 P.2d 521 (1933).

143. See text supported by notes 27, 102-06 *supra*.

144. See, *e.g.*, Smith v. Sharp Real Estate Co., 200 Ala. 666, 77 So. 40 (1917); Smith v. Post, 167 Cal. 69, 138 Pac. 705 (1914); Teague v. Adair Realty & Loan Co., 92 Ga. App. 463, 88 S.E.2d 795 (1955); *cf.* Langford v. King Lumber & Mfg. Co., 123 Fla. 855, 167 So. 817 (1935); Crichton v. Halliburton & Moore, 154 Miss. 265, 122 So. 200 (1929); Hersch v. Kelman, 61 Ohio L. Abs. 363, 104 N.E.2d 35 (1951). *Compare* the *Hersch* opinion, *supra*, *with* that in Swee v. Neuman, 67 Misc. 605, 123 N.Y. Supp. 776 (N.Y. City Ct. 1910). And *compare* the supreme court opinion in Edwards v. Billow, 31 Cal. 2d 350, 188 P.2d 748 (1948) *with* the appellate division opinion, 180 P.2d 428 (Cal. App. 1947).

The textual discussion has not been intended as an indication that under no circumstances has a court refused, for lack of consideration, to give jural effect to a subsequent commission agreement. See, *e.g.*, Lipton v. Johansen, 105 Cal. App. 2d 363, 233 P.2d 648 (1951); United Sales Agency v. Luck Land Co., 154 Minn. 332, 191 N.W. 897 (1923); Neff v. Schrader, 49 N.D. 213, 191 N.W. 466 (1922); Rosenfeld v. Bobb, 80 Pa. Super. 280 (1922); Clark v. Battaglia, 47 Pa. Super. 290 (1911); *cf.* Clark v. Dulien Steel Products, 54 Cal. App. 2d 92, 128 P.2d 608 (1942). *But cf.* Mearkle v. Kellerman, 82 Pa. Super. 11 (1923).

145. See text supported by notes 26-27 *supra*.

146. Coughlan & Co. v. Frankel, 216 App. Div. 565, 215 N.Y. Supp. 625 (1st Dep't 1926).

147. See text at note 3, and note 140 *supra*.

148. This rationalization would be especially appropriate where the contract between the property owner and the purchaser contains the first written reference to commissions. This has been expressly recognized in some decisions. See, *e.g.*, Riggs v. Brock, 208 Ark. 1050, 189 S.W.2d 367 (1945); Lane v. Smith, 179 Ark. 533, 17 S.W.2d 319 (1929); Coulter v. Howard, 203 Cal. 17, 262 Pac. 751 (1927); Blount v. Freeman, 94 Ga. App. 110, 93 S.E.2d 820 (1956); *cf.* J. H. Hillman & Co. v. Joseph Joseph & Bros., 9 Pa. Super. 1 (1898). See also Dal Maso v. Gregory, 112 A.2d 923 (D.C. Munic. App. 1955). In each of the foregoing cases the rationale was expressly utilized.

A similar situation is presented when the applicable statute of frauds requires a written memorial of the listing agreement, *e.g.*, WASH. REV. STAT. ANN. § 5825 (1931), and the agreement between the broker and seller is first reduced to writing after execution of a contract of sale between the seller and purchaser. Two variations need to be considered. If the *oral* agreement between the broker and seller would be construed to contain a condition precedent to the seller's duty to pay (for example, the execution of a contract of sale between the seller and purchaser), the subsequent writing spelling out such a condition would in no way change the terms of the oral agreement. It is clear in such a situation that the writing serves merely as a memorial of the oral agreement, and no problem of

the action of a volunteer—no earlier commission agreement existing.[149] Either of these situations may, of course, have been the "sub silentio" reasoning of the courts which have not expressed an awareness of the problem.

Assuming that such language is entitled to some effect, however, which rationale, "time" or "condition precedent," is in fact the more often used, and which is to be preferred? If the term "time" is employed by a particular decisional court, is it done with the legal significance attached to the term by the New Jersey courts or that sometimes assigned to it by the New York courts?[150] And, if the term "condition precedent" is used, to which event, *earning* of commission or *payment* thereof, does it relate?[151] These questions will provide the grist for this and the concluding section. To facilitate the discussion, reference will be made by introductory clauses to specific provisions by which the payment of commissions is keyed to an external event. This will be followed by a discussion and analysis of the judicial approach to such provisions.

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consideration is present. 2 CORBIN, CONTRACTS § 503 (1950). If, however, the *oral* agreement did not contain such a condition, and the subsequent writing did contain such a term, the problem of consideration is present, but is answered by finding that the seller's consent to execution of the memorial, something he was under no legal obligation to give, constitutes consideration for the broker's consent to a change in the terms of the seller's promise to pay. Sams v. Olympia Holding Co., 153 Wash. 254, 279 Pac. 575 (1929). The *Sams* case also stated that,

> A contract to pay a broker's commission, unenforcible under the statute of frauds because resting in parol, may become, under certain circumstances, a moral obligation which is sufficient consideration to support a subsequent written agreement to pay a specified sum of money.

Id. at 257, 279 Pac. at 576. See also Coulter v. Howard, 203 Cal. 17, 262 Pac. 751 (1927). In many cases where this factor is present no express recognition is given. See, *e.g.*, Gaut v. Dunlap, 188 S.W. 1020 (Tex. Civ. App. 1916).

149. See, *e.g.*, Peak v. Jurgens, 5 Cal. App. 2d 573, 43 P.2d 569 (1935); Richeson v. Wilson, 187 Va. 536, 47 S.E.2d 393 (1948); Dowler v. Suburban Improvement Co., 110 W. Va. 113, 157 S.E. 91 (1931); *cf.* Cochran v. Ellsworth, 272 P.2d 904 (Cal. App. 1954). And see Baird v. Gleckler, 11 S.D. 233, 76 N.W. 931 (1898); Porizky v. United Fidelity Life Ins. Co., 178 S.W.2d 157 (Tex. Civ. App. 1944).

In Preston v. Postel, 300 Fed. 134 (S.D. Tex. 1922), the broker had originally acted under an employment agreement but had failed to satisfy the property owner. Later the owner entered a contract with a purchaser to whom he had originally been introduced by the broker. Simultaneously the owner executed a commission agreement with the broker providing for payment "as soon as said sale . . . shall have been consummated." In finding that such provided a "condition" to payment the court relied in part on the fact that there was a dispute between the owner and broker concerning the earning or nonearning of commission as a result of the prior acts of the broker. Assuming such dispute to have been bona fide, it would seem that there was consideration for a statement of a "condition." No "acknowledgment" would be involved even though the commission agreement contained reference to the past acts of the broker. See Silberman v. Horowitz, 114 N.Y. Supp. 1 (Sup. Ct., App. T. 1909).

150. See text supported by notes 82-85 *supra*. Other courts have also used the dual concept applied by the New York courts. See note 176 *infra* and text supported thereby.

151. *Ibid.*

1. Commission will be paid *when (at the time of; on; upon; as; at; after)* . . .

The statement of multiple terms employed here is an attempt to include under a single heading all terms used to introduce payment clauses which have, in some decision or decisions by some court or courts, been interpreted as providing a "time" of payment only. It is where such terms are used that a variance in interpretation as providing for a "time" of payment or a "condition precedent" thereto is not only most likely to be indulged in by the courts but is justified in theory. In the absence of serious ambiguity in the terms themselves or in the contractual setting in which they appear, their meaning is for the court.[152] Are the terms by which this section is introduced ambiguous in this sense? Assuming for present purposes that they are not, how have the courts treated them?

The influence of Professor Williston's treatise has been tremendous in the entire contract field, and treatment of the terms presently under consideration has been strongly influenced by section 671 thereof, where it is said,

> A great variety of words are now regarded as . . . *fit* for the *creation* of a condition. . . . Such words as "when," "while," "after," or "as soon as," clearly indicate that the promise is not to be performed except upon a condition.[153] (Emphasis added.)

As has already been noted,[154] an earlier edition of this text was strongly relied on by the opinion in *Amies v. Wesnofske*, and that opinion has in turn exerted authoritative influence over many subsequent decisions throughout the country. Thus, the influence of Professor Williston has been felt by both direct and indirect reliance.

On the other hand, Webster's International Dictionary is not so categorical in its definitions of the terms specified in the introduction. Thus, "when" is defined, *inter alia*, as meaning "at what time," "on what occasion," "how soon," "at which time," "at the same time or moment that," and "whereupon";[155] "on" is defined "in continuance or succession";[156] "upon" as meaning "with little or no interval after" and "by means of";[157] "as" to mean "to that or the same extent; in

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152. Because such interpretation is for the court the majority of judicial statements declare that the meaning of the words used is a "matter of law." See, *e.g.*, cases cited in note 11 *supra*. But a more careful analysis acknowledges that, while the interpretation of such words is, in the absence of doubt as to the meaning intended to be conveyed by their use, a matter for the court, such interpretation is a "question of fact." See 3 CORBIN, CONTRACTS § 554 (1951). Compare text supported by notes 155-63 *infra*. See text supported by notes 198-205 *infra*.

153. 3 WILLISTON, CONTRACTS § 671 (rev. ed. 1936). Emphasis was added to demonstrate that Professor Williston did not, as the decisions have assumed, state that such words *created* a condition *per se*.

154. See note 87 *supra*.

155. MERRIAM-WEBSTER, NEW INTERNATIONAL DICTIONARY 2910 (2d ed. 1954).

156. *Id.* at 1701

157. *Id.* at 2800.

equal degree";[158] "at" as "indicating a relation of source, cause or occasion," "indicating point or position in a series or scale," and "indicating position in time";[159] and "after" as "later in time than; subsequent to and in consequence of."[160]

With the foregoing variations attributed to the terms under consideration, that a court should not attempt to state absolutely the effect of such words unless the intention of the parties in employing the particular term is patently clear seems obvious.[161] Actually, the New York courts have recognized this,[162] but in view of the *Amies* opinion, have not felt such to be applicable where terms of the nature of those contained in the introductory clause of this section have been employed. At the same time, the New Jersey courts have similarly felt that such terms were to be given effect as a "time" clause "as a matter of law."[163] On the other hand, many courts, though professing to follow the New York methodology, have felt that such payment terms require submission to the jury and are not for the court even after parol evidence of the surrounding circumstances has been given.

Perhaps the most thorough analysis to be found in the decisions following the *Amies* rationale is that of *Hamrick v. Cooper River Lumber Co.*[164] That case is atypical of opinions adhering to the "condition precedent" rationale in that it analyzes the factual situation carefully and refers to cases which had adopted each of the pertinent rationales.[165] But in its "clinching" argument that case reverted to the reason most often found behind "condition" decisions, viz.,

> [I]f the [payment clause] . . . be regarded as ambiguous, any doubt as to its meaning must be resolved against [the broker] . . . who prepared the contract and submitted it to the seller and purchaser.[166]

And the last phrase of the foregoing quotation refers to yet another factor relied on which has often served to convince other courts as well that a "condition" was intended by the parties. Reference is of course made to the fact that the "payment" provision was contained in the contract of sale between the seller and purchaser, rather than having existence in a separate, previously expressed provision. With this present the court felt that the parties

158. *Id.* at 158-59.
159. *Id.* at 172.
160. *Id.* at 45.
161. See note 152 *supra.*
162. See note 82 *supra.*
163. See note 11 *supra.* In so doing the court is using the phrase "matter of law" to indicate that the interpretation is for the court, not the jury. Notwithstanding the language used, however, such interpretation is a "question of fact." See 3 CORBIN, CONTRACTS § 554 (1951).
164. 223 S.C. 119, 74 S.E.2d 575 (1953).
165. The discussion of New Jersey cases, however, leaves much to be desired. *Compare* that discussion *with* the discussion in § II *supra.*
166. 223 S.C. at 126, 74 S.E.2d at 578 (1953).

> clearly did not contemplate that [execution of the contract of sale would give rise to] . . . an absolute obligation on the part of the seller to pay a commission . . . , irrespective of whether the sale was ever consummated.[167]

We saw earlier that the same factor has been considered determinative by the New Jersey courts in the absence of a statement which the court will treat as an acknowledgment that the commission was owing.[168] There was no expression of such an "acknowledgment" in the *Hamrick* case. And, since the broker there was a mere volunteer, imposition of a "condition" would be supported by consideration.[169] Thus, the decision would appear sound whichever view one might take of the semantics involved.

Each of the bases for a "condition" decision presented above has, singly or in combination, served as the foundation for "condition" decisions by other courts.[170] Of more importance to our discussion than isolated decisions interpreting "payment" clauses as providing a "condition precedent," however, are opinions to be found in jurisdictions such as California and Massachusetts where the courts have accepted both that and the "time" rationale, which one being considered as appropriate for the particular case under consideration depending upon the particular circumstances surrounding the transaction. The California decisions clearly demonstrate the importance such courts attribute to the varying shades of circumstances surrounding a commission agreement. For example, in *Peak v. Jurgens*[171] a broker, without previous employment, presented a purchase offer to a property owner. The owner accepted the offer, but only after adding to the agreement a promise "to pay commission upon consummation

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167. *Ibid.*

168. See especially text supported by notes 31-37 *supra*.

169. See text supported by note 149 *supra*.

170. Perhaps the most willing acceptance of the Williston and *Amies* interpretation is to be found in Jones v. Palace Realty Co., 226 N.C. 303, 37 S.E. 2d 906 (1946) where the court discussed the meaning of the term "when" and the phrase "as soon as," coming to the "condition" conclusion in part by reliance on *Amies*. The *Jones* case, however, involved a listing that provided for payment to be made "out of the sale price." See text supported by notes 215-61 *infra*.

Other cases not involving "acknowledgment" (see text supported by notes 197-223 *infra*) which have adhered to the "condition" rationale include: Lott v. Outhwaite, 10 T.L.R. 76 (C.A. 1893); Hodges v. Lewis, 112 Cal. App. 2d 526, 246 P.2d 676 (1952); Blount v. Freeman, 94 Ga. App. 110, 93 S.E.2d 820 (1956); Kiser Real Estate Co. v. Shippen Hardwood Lumber Co., 34 Ga. App. 308, 129 S.E. 294 (1925); Tarbell v. Bomes, 48 R.I. 86, 135 Atl. 604 (1927); Smith v. Burton, 4 Utah 2d 61, 286 P.2d 806 (1955); *cf.* Willard v. Preston, 92 F.2d 851 (8th Cir. 1937); Kendrick v. Speck, 67 F.2d 295, 296 (4th Cir. 1933) (dissenting opinion); Ballard v. Shea, 121 Ill. App. 135 (1905); Gaut v. Dunlap, 188 S.W. 1020 (Tex. Civ. App. 1916).

171. 5 Cal. App. 2d 573, 43 P.2d 569 (1935). See also Hodges v. Lewis, *supra* note 170. Cf. Cochran v. Ellsworth, 272 P.2d 904 (Cal. 1954) which involved an acknowledgment that the realtor had acted as a broker. Although it was expressly stated that the purpose of the agreement was "to establish the terms of payment of the commission for such services," the court felt that the outside event named constituted a "condition precedent" to payment.

of the sale." Here there was, as in *Hamrick* and some of the New Jersey decisions, no valid ground on which to find that a commission had been earned, and the court accordingly found "consummation" to be a "condition precedent." But, in *Hiss v. Sutton*[172] where the payment provision preceded action on the part of the broker, the court, in finding that a promise to pay "in the event of the exercise of this option . . . to be paid through and at the close of escrow" did not provide a "condition precedent," said,

> The fact that . . . it was provided that the plaintiff's commission was to be paid "through and at the close of escrow" is not to be interpreted to mean that the plaintiff was to be entitled to no commission unless the agreement for the sale of the property was fully executed through the medium of such escrow, but only that if such escrow was completed plaintiff was to receive his commission through and at the time of such completion. . . .[173]

Thus, the California court clearly adopted the "time" rationale, breaking the brokerage agreement into (1) the undertaking (to secure exercise of the option) and (2) the payment clause ("through and at the close of escrow"). And the California court has likewise found that a promise to pay "when the transaction is consummated," found in a listing agreement executed before the broker had undertaken any services, provides only for the "time" of payment, again dividing the agreement into two parts, undertaking and payment.[174] These decisions gave the "time" interpretation its proper significance.[175] But, in other decisions, the California court has used the term in the sense in which it has been employed by the New York court.[176]

172. 203 Cal. 459, 264 Pac. 748 (1928).

173. *Id.* at 461, 264 Pac. at 749.

174. Wallace v. Zinman, 200 Cal. 585, 254 Pac. 946 (1927) relying on the oft-cited opinion in Purcell v. Firth, 175 Cal. 746, 167 Pac. 379 (1917).

A similar approach was presented by the opinion in Knisely v. Leathe, 178 S.W. 453 (Mo. 1915), *reaffirming* 256 Mo. 341, 166 S.W. 257 (1914). In the former opinion the court emphasized that the broker's "undertaking" was to secure a "sale"; therefore, a provision for payment of commission "out of the purchase price" merely served to provide a time at which payment would be made. Thus, although the "fund" from which payment was to be made was not realized, the broker was entitled to payment. Compare section 3 *infra*. See also Harvey v. Francisco, 35 S.W.2d 366 (Mo. App. 1931). The opinions in both cases, however, must be considered in light of the fact that each involved "fault" on the part of the listing owner. See Caneer v. Martin, 238 S.W.2d 828 (Tex. Civ. App. 1951) where the court expressly stated that each ground supported a decision in favor of the broker.

Care must be used in bisecting a commission agreement, however. It may be that the "payment" clause cannot properly be excised from the undertaking. See, *e.g.*, Leventritt v. Cowell, 21 Cal. App. 597, 132 Pac. 627 (1913).

175. See text at p. 298, and text supported by notes 82-85 *supra*.

176. Vatcher v. Grier, 50 Cal. App. 39, 195 Pac. 75 (1920), *aff'd*, 50 Cal. App. 42, 195 Pac. 76 (1921). See text supported by notes 82-85 *supra*. See also note 150 *supra* and text supported thereby. *Cf.* Althouse v. Watson, 143 Md. 650, 123 Atl. 47 (1923) where the commission agreement expressly acknowledged that a commission was owing and also provided that, for the purpose of "providing for the time of payment," commission payments would be made "as the payments of the purchase price are received"; Johnston v. Downey, 257 S.W. 504 (Mo. App. 1924). See text supported by notes 215-61 *infra*.

The Massachusetts cases clearly present the consideration such courts attach to an "acknowledgment" when the agreement to pay commission does not precede the rendering of the required services.[177] Two decisions would appear to shed the most light on the Massachusetts approach. In *Alvord v. Cook*,[178] involving an exchange agreement executed by a broker pursuant to an earlier listing, one of the exchanging landowners agreed, in an instrument separate from the contract of exchange, to pay the broker a commission "at the time 'the [agreement of exchange] . . . is carried into effect.' "[179] The court felt that such language was susceptible of either a "time" or a "condition" interpretation in the absence of the aid of parol testimony concerning the surrounding circumstances, and accordingly upheld the admission of such parol testimony. But, with such admission, the court felt that the "only reasonable" interpretation lay in a "time" construction. Why? Because the broker had done all he was *employed* to do, completion of the exchange rested solely within the power of the property owner, and

> It is not reasonable to suppose that the plaintiffs [broker] intended to leave the question of the payment of their commission in a matter where they had preformed their whole duty . . . to the chance of a subsequent cancellation of the [contract of exchange] . . . , or to the whim or caprice of *either* of the principals.[180] (Emphasis added to indicate language suggesting that the court was not merely concerned with the problem of the promisor's default, although such admittedly was an important factor in the decision.)[181]

And, in *Canton v. Thomas*,[182] the court, confronted by a provision by which the property owner agreed to pay a commission to the broker *for putting through the sale* "when papers are passed,"[183] seized upon the "recognition" of the owner that the broker had performed the required act of acceptance and concluded that the payment clause served only to designate the "time" at which payment would be made.[184] In so doing, however, the court felt that such an interpreta-

177. Compare the New Jersey handling at text supported by notes 26-27 *supra*.

178. 174 Mass. 120, 54 N.E. 499 (1899).

179. *Id.* at 124, 54 N.E. at 500. Is it significant that the opinion refers to payment to be made at the "time" when the exchange agreement is carried out whereas the actual payment clause, as quoted in the official report (174 Mass. at 121) but not to be found in the unofficial, provided for payment at the "date" when such agreement was carried out?

180. *Id.* at 125.

181. *Ibid.* Another Massachusetts decision clearly enunciated the "time" rationale as a result of the broker having earned his commission upon securing a purchaser ready, willing, and able. It was clearly held that a clause in the contract of sale providing for payment "when title is passed" provided only the time of payment. Rosenthal v. Schwartz, 214 Mass. 371, 101 N.E. 1070 (1913). See also Caneer v. Martin, 238 S.W.2d 828 (Tex. Civ. App. 1951).

182. 264 Mass. 457, 162 N.E. 769 (1928).

183. *Id.* at 458, 162 N.E. 769.

184. Compare the importance attached to this by the New Jersey courts. See especially text supported by notes 15-16 & 32-33 *supra*.

tion probably did violence to the owner's intention, but felt bound by the *Alvord* decision, saying that if the owner wanted to make the event stated in such a clause a "condition precedent" he should have used the phrase "if and when."[185]

Thus, comparing the *Hamrick* (South Carolina) case with *Alvord,* we find both courts involved with a commission agreement executed at the same time that the property owner and proposed purchaser entered into a contract—in *Hamrick* the provision was part of the contract of exchange itself; in *Alvord* it was a separate instrument executed substantially simultaneously. There are decisions which indicate that such a distinction could be crucial. Typical of these is the California decision in *Sanstrum v. Gonser*[186] where the court found that a brokerage provision finding expression only in the contract of sale between the seller and purchaser had no "life" distinct from that contract; therefore, if the contract fails, the brokerage agreement fails with it. Thus, fulfillment of the sale contract becomes a condition to payment.[187] This would not necessarily be true where the brokerage agreement is found in a separate instrument, even though for interpretation purposes the two would be considered as one.[188] But even in the case where the commission clause is to be found only in the contract between seller and buyer, as was true in *Hamrick,* if the court can find an acknowledgment that the broker has earned a commission it would seem that casualty to the seller-buyer contract should be immaterial insofar as obligation to pay commission is concerned, although such contract might well be considered as stating a "time" when actual payment is to be made. In this connection it is also important to note that the California Statute of Frauds requires that employment of brokers for the purchase or sale of real estate be committed to writing.[189] In *Sanstrum* the first memorandum sufficient to satisfy this requirement was found in the escrow instructions; therefore, there would be consideration for the statement of a "condition" at that juncture. It is further important to note that the court, in an earlier part of the opinion, had specifically referred to "acknowledgment," by implication, at least, suggesting that "acknowledgment"

185. 264 Mass. 457, 458, 162 N.E. 769 (1928). While use of such terms as those suggested has almost uniformly led to a "condition" interpretation, in most cases where there is an "acknowledgement" that the broker has performed the required services the problem of consideration for such an agreement should become of primary importance.

186. 295 P.2d 532, 537 (Cal. App. 1956), quoting from Lawrence Block Co. v. Palston, 123 Cal. App. 2d 300, 266 P.2d 856 (1954). See also Mitchell v. Johnston, 298 P.2d 170 (Cal. Super. 1956).

187. Compare note 148 *supra* and text supported thereby. *Cf.* Stanton v. Carnahan, 15 Cal. App. 527, 115 Pac. 339 (1911) (brokerage provision finding expression only in contract of sale is for broker's benefit and may be enforced by him at any time *before* the parties thereto rescind such contract).

188. See note 141 *supra.*

189. CAL. CIV. CODE § 1624(5) (Deering 1949).

would result in a different decision when it said, quoting from *Hargrave v. Moody*:[190]

> This instruction [in the escrow] was quite different from an unconditional acknowledgment of the alleged debt; it rested upon a condition . . . .[191]

Few courts have relied on the *Sanstrum* rationale first stated above. If such non-acceptance be accepted as a proper attitude, and I submit that it is, we find the *Hamrick* court feeling that it would be unreasonable to suppose that the parties felt that payment of the commission had become an absolute obligation of the owner by execution of the contract of which the payment provision was a part, whereas the *Alvord* court felt that the broker had done all he could do by securing execution of the contract of exchange and it would be unreasonable to suppose that he had intended to leave payment to the chance that the contract would not be completed. While "acknowledgment" or lack thereof finds no mention in either decision, it seems evident that such played a prominent part in each opinion, the major distinguishing feature being the eagerness or reluctance, propriety or impropriety, of the particular court to find that such existed in the absence of an express statement to that effect. It would seem that *Canton* expressed this conclusion for the Massachusetts court. On the other hand, the broker in the *Hamrick* case was a mere volunteer—there had been no prior employment—and as such could not have "earned" a commission. Should the South Carolina court be confronted with a situation where a commission could be acknowledged as "earned," would it find it "unreasonable" that the parties intended to impose an obligation on the property owner? And, even if it were to find that the agreement was ambiguous and so a proper place for receiving parol testimony to resolve the ambiguity, as had been done in *Alvord*, would it, contrary to that decision, have submitted the question to the jury?[192]

We have thus seen the importance most courts attach to an acknowledgment that commission has been earned. While parol evidence may be admissable to help resolve the "question of fact" whether a particular listing provides a "condition precedent" or "time" of payment, a discriminating court will hold to a "time" interpretation

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190. 56 Cal. App. 498, 502, 205 Pac. 890, 892 (1922).

191. 295 P.2d 532 at 536.

192. See text supported by notes 168-69 *supra*. And see *Amies v. Wesnofske* where there was acknowledgment that services had been performed pursuant to a prior employment—court looked to the terms of the prior employment "as a matter of law." *But see* Langford v. King Lumber & Mfg. Co., 123 Fla. 855, 167 So. 817 (1935) where the commission agreement provided "we hereby acknowledge that there is a balance due . . . as commission," yet the court approved submission to the jury and upheld its verdict that the payment provision following constituted a condition precedent. *Cf.* Ballas v. Lake Weir Light & Water Co., 100 Fla. 913, 130 So. 421 (1930).

where such is present. And the holding of the Massachusetts court in *Lord v. Williams*[193] must be considered as a clear expression that such does not foreclose a "condition" interpretation in similar cases where such an acknowledgment is missing. This results from the statement that the phrase "on passing of title" did not "as a matter of law" import either a "condition precedent" or a "time" of payment and from approval of submission of the meaning of such phrase to the jury.[194] The *Lord* case involved a situation where a broker with whom the property had been listed had secured a purchaser and had reduced the negotiations between the listing owner and proposed purchaser to a writing which included a provision that commission was to be paid "on passing title." Thus, it would have been just as legitimate for the court to have considered the broker as having earned his commission as it was in the *Alvord* case. It would also have been an opportunity for expression of a rationale similar to *Sanstrum*. Yet the court, stating that interpretation of the payment provision was a "question of fact," upheld the trial court's submission to the jury. But, notwithstanding the approving language, would the trial court have been upheld had the jury returned a "condition" verdict?[195] An affirmative answer is suggested by *Clark v. Hovey*,[196] but it is submitted that this suggestion would not now be followed. This conclusion rests on the fact that the *Clark* opinion was distinguished by *Canton* as resting on "ameliorating circumstances." Just what these were is not immediately apparent, and it would appear that the phrase served more as a "make-weight" to obviate an overruling than as an indication that *Clark* would be authoritative in some future controversy.[197]

Putting aside the "assumption" with which this division of the discussion began,[198] where a brokerage agreement employing a "payment" term found in the introduction to this section presents neither an express "acknowledgment" nor circumstances in which an "eager" court will, or properly may, find such,[199] is the interpretation of the instrument for court or jury? The *Lord* case said "jury," although

193. 259 Mass. 278, 156 N.E. 421 (1927).

194. It is obvious that the court was employing the phrase "matter of law" to indicate that the issue was for the court rather than the jury. See note 163 *supra*. And see notes 198-206 *infra* and text supported thereby.

195. In Langford v. King Lumber & Mfg. Co., 123 Fla. 855, 167 So. 817 (1935) the Florida court provided an affirmative answer upholding a "condition" verdict notwithstanding an express acknowledgment that a commission was due.

196. 217 Mass. 485, 105 N.E. 222 (1914).

197. The *Clark* case also raises the problem of "acknowledgment" in that the broker, employed to sell, had secured the execution of a contract between the seller and purchaser and simultaneously had executed a brokerage agreement with the seller by which payment was to be made from a "fund" still to come into existence. See text supported by notes 215-61 *infra*.

198. See text following note 152 *supra*.

199. For example, where the payment provision finds expression in an original employment which precedes the rendering of services.

its authority is questionable. *Hiss v. Sutton*[200] holding to the "time" rationale, and *Hamrick v. Cooper River Lumber Co.*[201] and *Amies v. Wesnofske*[202] adhering to the "condition" rationale, considered this as a matter for the court. Other courts have disagreed in some respects. For example, in *Hall v. Sheraton Hotel*[203] the Pennsylvania court reversed a "condition" holding and remanded the case for a new trial and a jury determination as to whether "at the time [later changed to 'date'] of settlement" constituted a condition precedent or a mere time of payment.[204] One must carefully consider the exact words employed, however, for in cases involving slightly different terminology these courts may feel that interpretation is for the court. Thus, in a case involving personal property, a lower Pennsylvania court held that a trial court had erred in submitting to the jury the meaning of a commission agreement providing for payment "as soon as" a particular fund came into existence.[205] Similarly, where the commission has been earned before expression of an outside event at the occurrence of which payment is to be made, such *courts* treat the provision as one providing only for the "time" of payment.[206]

2. Commission shall be *due* and payable when (etc.) . . .

The decided cases offer little help in setting such phraseology off as a distinctive category. This follows from the fact that the cases involving commission agreements employing such language have, with but one exception,[207] found the agreement expressed as part of the contract executed by seller and purchaser or as a part of the surroundings of such a contract,[208] and from the fact that no "acknowledgment" is present. In such a circumstance it seems obvious that an agreement that no commission would be *due* or payable would be

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200. See note 172 *supra* and text supported thereby. And see cases cited in note 174 *supra*; Miller v. Moylan, 72 So. 2d 380 (Fla. 1954); *cf.* Nunn v. Barber, 207 Okla. 393, 249 P.2d 999 (1952); Kauffman v. Marlborough Inv. Co., 154 Wash. 396, 282 Pac. 377 (1929).

201. See note 164 *supra* and text supported thereby.

202. See note 74 *supra* and text supported thereby.

203. 372 Pa. 563, 94 A.2d 363 (1953).

204. In its opinion the present court explained the earlier opinion in Simon v. Myers, 284 Pa. 3, 130 Atl. 256 (1925), inferentially explained the opinion in Amorosa v. Ovelman, 89 Pa. Super. 377 (1926), which had relied on *Simon* as well, saying that the *Simon* holding was that "Under the circumstances [there] appearing, the words 'at settlement' [were] . . . ambiguous and, therefore, open to explanation."

205. J. H. Hillman & Co. v. Joseph Joseph & Bros., 9 Pa. Super. 1 (1898). *Cf.* Matuszewski v. Grisius, 118 Pa. Super. 196, 180 Atl. 130 (1935); Baum v. Goldblatt, 81 Pa. Super. 233 (1923).

206. Clark v. Battaglia, 47 Pa. Super. 290 (1911). Compare the importance ascribed to an "acknowledgment."

207. Prideaux v. Plymouth Securities Co., 231 Mo. App. 1060, 84 S.W.2d 166 (1935). The listing involved in this case, however, provided that the commission "shall be due and payable *only* [from a named fund]." (Emphasis added.)

208. For example, in Coulter v. Howard, 203 Cal. 17, 262 Pac. 751 (1927) the commission provision found its first effective expression in the escrow instructions.

accorded no less effect than one providing merely that no commission would be "payable"—that is, the named outside event will be interpreted as providing a "condition precedent" to earning of the commission. Such has been the decision in all but one case, *Lattimore v. George J. Mellina & Co.*[209] There the Texas Court of Civil Appeals accepted a clause providing that commission "shall be due and payable when this sale has been completed," finding expression only in the contract of sale, as the controlling language, and held that such a provision stipulated only the "time" of payment. In so doing the court placed great reliance on language in the opinion in *Lippincott v. Content.*[210] Such reliance was misplaced, however. While the *Lippincott* decision dealt with "due and payable" language coupled with a "consummation" clause, the language seized upon was merely introductory dictum to the holding that a "condition precedent" had been stated. Such holding illustrates that the New Jersey court itself has not followed its "when payable" rationale in "*due* and payable" cases.[211] The Texas court indirectly recognized this when it proceeded to ignore the "due and" addition and affixed its attention solely on the term "payable." But it would seem that, in the absence of an "acknowledgment," *if the provision is entitled to any jural effect,*[212] nothing would be *due* until the stated event had occurred.[213] The term "due" would seem to give a "condition" rationale in this type of case a much more satisfactory basis than is present in a situation of the *Hamrick* type.

One analogous case has dealt with a commission clause executed prior to the rendering of services. In *Calkins v. Alley*[214] the brokerage agreement provided that commission would become "due when

209. 195 S.W.2d 250 (Tex. Civ. App. 1946).
210. 123 N.J.L. 277, 8 A.2d 362 (Ct. Err. & App. 1939).
211. See text supported by notes 31-37, 41-44 *supra.*
212. See text supported by notes 177-85 *supra.*
213. *But cf.* Gaut v. Dunlap, 188 S.W. 1020 (Tex. Civ. App. 1916) ("when this deal is closed the first party will owe [the broker] . . . commission" held, upon evidence showing that the parties treated the employment as requiring more than a sale, to require that the "deal" [an exchange] be effected or excused because of the listing owner's fault).

And in Rabinowitz v. North Texas Realty Co., 270 S.W. 579 (Tex. Civ. App. 1925) where the commission provision found expression in an instrument executed simultaneously with execution of a contract of exchange between the listing owner and the broker's client, the court may have implied that a broker could be "entitled" to a commission but its actual payment be conditioned. Compare the New York position stated at text supported by note 83 *supra.* It would seem, however, that a more logical construction of this decision lies in a finding that although the specified event had not actually occurred the broker could recover when it became clear that it would not occur. This would eliminate any need to determine whether the commission provision constituted a "condition." This suggested construction is not meant to slight the fact that the opinion used language indicating that the decisional court thought it was dealing with a "condition" which had been excused by the fault of the owner. *But see* Frischkorn Real Estate Co. v. Hinckley, 227 Mich. 399, 198 N.W. 882 (1924) *(semble).*

214. 190 Iowa 1180, 181 N.W. 427 (1921). *Cf.* Tilton v. Gates Land Co., 140 Wis. 197, 121 N.W. 331 (1909).

deals are closed." The "time" rationale was expressly urged by the broker, but the court found that no commission was earned until the deal was finally closed. On the rationale urged as applicable where the provision is "due and payable," it seems that nothing would be *due* until the outside event had occurred, and that a "condition" would be the only proper interpretation in such a case. And this the court determined.

3. Commission shall be paid from a "fund" still to come into existence.

Typical of payment provisions creating a fund from which commission payment will be made are those in which the commission is to be paid "out of the purchase price" or an installment thereof, or when a specific payment is made. Must such a "fund" come into existence before a broker is entitled to his commission? For example, where a broker is employed to negotiate the sale of certain property, but his commission is to be paid out of the purchase price, will a binding contract of sale[215] between the listing owner and a purchaser secured by the broker alone entitle the broker to his commission, or must the designated "fund" also come into existence precedent to fruition of such a claim? Most courts have simply found, as a matter for the court,[216] that designation of such a "fund" created a "condition precedent."[217] This result is usually reached without reference

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215. See note 38 *supra*.

216. *Contra*, Kirchoff v. Cummard, 26 Ariz. 512, 226 Pac. 1092 (1924) ("provided, said payment be made" considered as rendering the listing ambiguous; parol evidence admitted to resolve such ambiguity held to show an "acknowledgment" that commission was owing and was not restricted to the named "fund"; Edwards v. Baker, 39 Cal. App. 755, 180 Pac. 33 (1919), cited at note 217 *infra*, expressly distinguished as involving an unequivocal statement of a condition).

217. Fletcher v. Campbell, 15 D.L.R. 420 (Ont. Sup. Ct. 1913); Malone v. Dillard, 212 Ala. 361, 102 So. 705 (1925); Roach v. McDonald, 187 Ala. 64, 65 So. 823 (1914); Coulter v. Howard, 203 Cal. 17, 262 Pac. 751 (1927); Lindley v. Fay, 119 Cal. 239, 51 Pac. 333 (1897); McPhail v. Buell, 87 Cal. 115, 25 Pac. 266 (1890); Snell v. Wickersham, 295 P.2d 918 (Cal. App. 1956); Eddy v. Hickman, 136 Cal. App. 103, 28 P.2d 66 (1933); Mitchell v. Green, 110 Cal. App. 259, 293 Pac. 879 (1930); House v. Cook, 91 Cal. App. 617, 267 Pac. 354 (1928); Cannon v. Selmser, 85 Cal. App. 783, 260 Pac. 332 (1927) (express rejection of the "time" rationale); Miller v. Lerdo Land Co., 52 Cal. App. 662, 199 Pac. 1073 (1921); Vatcher v. Grier, 50 Cal. App. 39, 195 Pac. 75 (1921) (express rejection of the "time" rationale); Edwards v. Baker, 39 Cal. App. 755, 180 Pac. 33 (1919); Prince v. Selby Smelting & Lead Co., 35 Cal. App. 684, 170 Pac. 1075 (1917); Beckwith-Anderson Land Co. v. Allison, 26 Cal. App. 473, 147 Pac. 482 (1915); Norris v. Walsh, 71 Colo. 185, 205 Pac. 276 (1922); Seminole Fruit & Land Co. v. Rosborough-Weiner, Inc., 43 So. 2d 864 (Fla. 1950); Langford v. King Lumber & Mfg. Co., 123 Fla. 855, 167 So. 817 (1935), *reaffirmed*, 132 Fla. 143, 181 So. 395 (1938); Cherry v. Joyce, 168 Kan. 475, 213 P.2d 1010 (1950); Odem Realty Co. v. Dyer, 242 Ky. 58, 45 S.W.2d 838 (1932); Clark v. Hovey, 217 Mass. 485, 105 N.E. 222 (1914) (Could the existence of the "fund" have been the "ameliorating circumstances" on which this case was later distinguished? See text supported by note 197 *supra*.); Van Dyke & Co. v. Stuart Land Co., 245 Mich. 119, 222 N.W. 98 (1928); Colvin v. Post Mortgage and Land Co., 225 N.Y. 510, 122 N.E. 454 (1919); Larson v. Burroughs, 131 App. Div. 877, 116 N.Y. Supp. 358 (2d Dep't 1909); Nekarda v. Presberger, 123 App. Div. 418, 107 N.Y.

by the court to the instrument in which the provision was found, or to the time in the transaction chronology at which it was expressed, or to whether realization of the fund was part of the "undertaking" or created a "condition precedent" to payment. Each of these considerations would seem appropriate, but it would appear that the courts were concerned only with the latter and were satisfied that the "fund" provision was part of the broker's undertaking.[218] Other courts, however, have demonstrated a less positive approach and, in some instances,[219] have found that such a provision did not state a "condition precedent." For example, in *C. H. Graves & Co. v. Cook*[220]

Supp. 897 (1st Dep't 1908); Van Varick v. Suburban Inv. Co., 76 Misc. 593, 135 N.Y. Supp. 299 (1912); McComas v. Smith, 151 Okla. 193, 3 P.2d 213 (1931); Becker v. Oregon-Kansas Timber Co., 99 Ore. 602, 195 Pac. 1038 (1921); Columbia Realty Inv. Co. v. Alameda Land Co., 87 Ore. 277, 168 Pac. 64 (1917); Matuszewski v. Grisius, 118 Pa. Super. 196, 180 Atl. 130 (1935); Lowenstein v. McPeak, 48 Pa. Super. 280 (1911); Rhodes & Son v. Hutcheson, 284 S.W. 226 (Tex. Civ. App. 1926); Laird v. Elliott, 219 S.W. 499 (Tex. Civ. App. 1920); Burnett v. Edling, 19 Tex. Civ. App. 711, 48 S.W. 775 (1898); Watson v. Odell, 58 Utah 276, 198 Pac. 772 (1921); Murray v. Rickard, 103 Va. 132, 48 S.E. 870 (1904); Dallas Dome Wyoming Oil Fields Co. v. Brooder, 55 Wyo. 109, 97 P.2d 311 (1939); Heath v. Huffhines, 152 S.W. 176 (Tex. Civ. App. 1912) (dictum); *cf.* Waters v. Carelton, 4 Port. 205 (Ala. 1836); Lind v. Huene, 271 Pac. 1087 (Cal. 1928); Frank v. Bonnevie, 20 Colo. App. 164, 77 Pac. 363 (1904); Ballas v. Lake Weir Light & Water Co., 100 Fla. 913, 130 So. 421 (1930) (Although the case was decided on the pleadings, the court enunciated the conclusion that provision for payment from the purchase price created a condition requiring receipt of the purchase money, notwithstanding the existence of an introductory clause acknowledging that the broker had "effected a sale." Compare text supported by note 83 *supra;* conclusion at text supported by notes 293-94 *infra.*) Forbes v. Gordon & Gerber, 298 Mass. 91, 9 N.E.2d 416 (1937); Staples v. O'Reilly, 288 S.W.2d 670 (Mo. App. 1956); Gilder v. Davis, 137 N.Y. 504, 33 N.E. 600 (1893); Taylor v. Crucible Steel Co., 192 App. Div. 445, 183 N.Y. Supp. 181 (1st Dep't 1920), *aff'd,* 232 N.Y. 583, 134 N.E. 581 (1922). *But cf.* Althouse v. Watson, 143 Md. 650, 123 Atl. 47 (1923) *(semble).*

Many of the foregoing cases also involved language such as "in the event," "only," and "provided," which has been nearly universally considered as providing a condition. See text supported by notes 47-56 and 94-97 *supra,* and 262-68 *infra.* Others, although not involving an express statement of such terms, have found the court using such as descriptive of the effect of employment of a "fund" clause. See, *e.g.,* Lind v. Huene, 271 Pac. 1087 (Cal. 1928). Care should be taken in each instance to ascertain whether such language refers to the *undertaking* or merely to the commission clause. However, because the opinions usually neither separate the clauses in this fashion, nor single out such language when considering the brokerage provision as a whole, no attempt has been made to do so here. But see subdivision 4 *infra.* The existence of such language, however, may be crucial. See note 216 *supra.*

An analogous situation in which the same result is reached is presented where the commission amount is to be determined by the amount received by the owner. See especially Lee v. Greenwood Agency Co., 123 Miss. 823, 86 So. 449 (1920), *rev'd in part,* 125 Miss. 177, 87 So. 485 (1921). *Cf.* Sanstrum v. Gonser, 295 P.2d 532 (Cal. App. 1956); Goldston Brothers Inc. v. Newkirk, 233 N. C. 428, 64 S.E.2d 424 (1951).

218. Of course, the mere fact that the contract of sale secured by the broker provides for deferred payments of the purchase price does not affect the broker's commission clause based on securing a "sale." For the commission to be made dependent upon existence of a "fund," express words must be used. Rice-Wray v. Palma, 216 Mich. 324, 185 N.W. 841 (1921).

219. The Minnesota court has expressly recognized that a condition may be provided. See text supported by note 243 *infra.*

220. 115 Minn. 34, 131 N.W. 854 (1911).

the court provided the rationale that such a payment provision had been inserted in the brokerage agreement for the sole purpose of protecting the owner in himself making a sale at the same time that the broker, unknown to the owner, was likewise making one,[221] and did not affect the undertaking. The owner had raised the argument that the payment provision signified that commission was to be paid only on a "completed" sale, the court expressly rejecting such contention.[222] It is difficult to characterize the court's reasoning, however, for the arbitrary refusal of the owner to accept the purchaser procured by the broker looms as a critical factor.[223] Nevertheless it was stated that "the clear purpose of the contract is to obtain the services of the plaintiff to negotiate a sale of defendant's property"[224] and "the contract suggests no requirements as to or qualifications of the purchaser except that he be ready to pay the specified price."[225]

Courts accepting the *Graves* rationale, as well as the Minnesota court itself,[226] have not used it exclusively. Perhaps most expressive of this flexible method of handling the problem are the Arkansas decisions. In *Riggs v. Brock*,[227] where it was provided in the contract of sale that the commission would be paid "upon the payment of the residue purchase price," that court held that until the residue was paid there was nothing available to the broker—until such time as it was paid he had "failed to produce a purchaser who was ready, able and willing to purchase under the terms of the contract."[228] And the same result obtained where the owner accepted a proposed purchaser's counter-offer only after the broker agreed that a commission was to be paid when certain purchase money notes were paid.[229] Similarly, in *Boysen v. Frink*[230] the court treated as stating a "condition" a provision, contained in a listing agreement executed before rendition of services, that commission for making a sale was to be paid "one-half when one-third of purchase price has been paid, the other one-half of the commission whenever one-half of the purchase price has been paid." The property owner and purchaser had subsequently entered a binding contract of sale. As a result, the broker

221. A somewhat weak reason, for, in the absence of an express statement otherwise, a listing owner remains free to make a sale himself. See Wallace, *Promissory Liability Under Real Estate Brokerage Contracts*, 37 IOWA L. REV. 350 (1952).

222. The owner's contention had been accepted by the trial court. C. H. Graves & Co. v. Cook, 115 Minn. 34, 35, 131 N.W. 854 (1911).

223. Compare the New York situation discussed at text supported by notes 127, 136-37 *supra*.

224. 115 Minn. at 35, 131 N.W. at 854.

225. *Ibid.*

226. See text supported by notes 242-43 *infra*.

227. 208 Ark. 1050, 189 S.W.2d 367 (1945).

228. *Id.* at 1055, 189 S.W.2d at 370.

229. Trimue v. McCaleb, 172 Ark. 137, 287 S.W. 740 (1926).

230. 80 Ark. 254, 96 S.W. 1056 (1906).

would, in the absence of an express provision releasing the owner from the effect of such a rule, be entitled to his commission for having made a "sale" of the listed property.[231] Inasmuch as the court held that the payment provision placed the risk of the purchaser's financial responsibility on the broker, and remanded the case for failure to give an instruction having such as its effect, the ultimate effect of the *Boysen* decision was to treat the payment provision as the statement of a "condition." In *Beard v. Read*,[232] however, the Arkansas court expressly held, in the face of a vigorous dissent,[233] that, where the listing owner's offer provided that the broker was "to make sale," a payment provision providing for commission to be paid "from the proceeds arising from such sale" neither added to the undertaking nor conditioned payment. This conclusion rested on a determination that the owner's brokerage offer was "nothing more nor less than a contract (sic) by which the [broker] . . . agreed to furnish a purchaser, ready, willing and able."[234] And, in *Moore v. Irvin*[235] the court treated a listing agreement providing for brokerage payment " 'in consideration of [the broker's] . . . services in making a sale or transfer' to be paid 'out of the first money collected,' " as requiring only the securing of a contract of sale. Thus, the Arkansas court has utilized the same methodology in "fund" decisions as the California court has enunciated in "when payable" decisions.[236]

Cases from still other jurisdictions evidence a failure to comprehend fully the subtle ramifications present in cases involving similar, yet distinct, listing language. For example, in *Thompson v. Ryan*[237] where the property owner agreed, in a listing agreement executed during the course of the broker's negotiations with a proposed purchaser, to pay the broker a commission "if the deal or trade is made," the Iowa court felt that a further provision that the broker was to "accept securities for same" in itself showed that the parties contemplated a "fund" which must come into existence if a commission was to be paid. In reaching its decision the court properly relied on an alternative holding in *Robertson v. Vasey*,[238] but it also relied heavily on *Ormsby v. Graham*.[239] The *Ormsby* case, however, in dealing with a "net" listing which provided that the commission was "to

231. See note 38 *supra*.
232. 167 Ark. 98, 267 S.W. 577 (1924).
233. *Id.* at 107, 267 S.W. at 580. The dissent seized upon the "fund" provision, following a "to make sale" undertaking, and concluded that a completed sale was required. Compare text supported by note 240 *infra*.
234. *Id.* at 105, 267 S.W. at 580.
235. 89 Ark. 289, 116 S.W. 662 (1909).
236. See text supported by notes 170-75 *supra*.
237. 188 Iowa 395, 174 N.W. 15 (1919), *modified on rehearing*, 188 Iowa 407, 176 N.W. 275 (1920).
238. 125 Iowa 526, 101 N.W. 271 (1904).
239. 123 Iowa 202, 98 N.W. 724 (1904).

be retained in full out of the cash payment," had said that, while such required a "consummated sale," it did "not necessarily [require] a sale consummated by delivery of deeds of conveyance, but such a contract as will be enforced by the courts . . . ."[240] Thus, the *Ormsby* case, while referring to the "fund" provision as having special relevance in determining the composition of the required act of acceptance of the listing owner's offer, indirectly stated that the "cash payment" would not be essential to recovery of commission.[241]

This alone would cast doubt upon the authority of the *Thompson* opinion, but further confusion exists. The *Ormsby* opinion relied on the Minnesota decision in *Cremer v. Miller*[242] for the proposition that a listing clause providing for payment of brokerage out of the prospective cash payment required a "consummated sale," apparently overlooking the further statement in the *Cremer* opinion that,

> [I]f the contract required the sale to be consummated, and the [broker's] . . . commission depended upon the payment of the purchase money, the plaintiff could not recover unless these conditions should exist . . . .[243]

Thus, the *Cremer* decision had clearly indicated that, should the Minnesota court be faced with a commission provision making payment of brokerage dependent upon payment of the contemplated purchase money, it would adhere to a rationale making the actual existence of such a "fund" a "condition precedent." Perhaps the Iowa court deciding *Ormsby* had a premonition of the Minnesota court's later opinion in the *Graves* case.[244] It is true that the language of the *Cremer* opinion had left available, by use of the introductory phrase "if the contract required," the "time" interpretation later to be employed in the *Graves* decision, but there is no indication that the Iowa court was endowed with such insight.[245]

On the other hand, the District of Columbia Court of Municipal Appeals has shown marked appreciation of conceptual differences that flow from relatively minor language variations in the listing. Thus, in *Deibler v. Graham*[246] that court held that a provision in the contract of sale by which the owner agreed to pay commission "out of the proceeds" did not constitute a "special agreement to the contrary"—did not provide a "condition"—within a Maryland statute which provided,

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240. *Id.* at 214-15, 98 N.W. at 729.
241. But compare the reliance placed on the *Ormsby* case by Oregon Home Builders v. Montgomery Inv. Co., 94 Ore. 349, 184 Pac. 487 (1919).
242. 56 Minn. 52, 57 N.W. 318 (1893).
243. *Id.* at 55, 57 N.W. at 319.
244. See text supported by notes 217-21 *supra*.
245. The fact that the Iowa court did not refer to the phrase "time of payment" would seem to preclude any possibility that such was present.
246. 62 A.2d 553 (D.C. Mun. App. 1948).

> Whenever, in the absence of a special agreement to the contrary, a . . . broker employed to sell . . . procures in good faith a purchaser . . . and the person . . . is accepted as such . . . and enters into a valid, binding and enforceable written contract . . . the broker shall be deemed to have earned the . . . commission. . . .[247]

But in *Dal Maso v. Gregory*[248] the same court found that a provision for payment "upon receipt by us of the [deferred payment] due . . . thirteen months after the date of settlement" was a "special agreement to the contrary." This for the reason that

> The promise to pay . . . is directly and grammatically linked with the receipt by [owners] . . . of a specified payment . . . at a future specified time. . . . [To hold that a condition precedent had not been stated] would require us to ignore the words "upon receipt by us of the [payment] . . ." and to construe the agreement as one to pay . . . "thirteen months after date of settlement." This we cannot do.[249]

And, finding neither a separate, unqualified promise to pay a definite amount nor an "acknowledgment" that the commission was owing, the court concluded that a "condition" had been stated. Thus, the District of Columbia Court of Appeals has felt that designation of a "fund" alone did not condition payment of a broker's commission, but express words relating such payment to the existence of a particular fund would impose a "condition precedent." This is clearly in accord with the handling of "when payable" provisions by many discriminating courts.[250]

"Fund" decisions from still other jurisdictions demonstrate the tenacity with which the element of fault on the part of the listing owner grips judicial consideration of such commission provisions. In three West Virginia cases,[251] for example, the decisional language clearly adopts the rationale that the broker may complete the required undertaking but be unable to recover the stated commission because the "contingency" on which its *payment* depends has not occurred.[252] Yet the decisions actually involving such agreements are summarized in *Dillon v. Turkey Gap Coal & Coke Co.*[253] in language placing an *affirmative* duty on the property owner:

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247. MD. CODE ANN. art. 2, § 17 (1939).
248. 112 A.2d 923 (D.C. Mun. App. 1955).
249. *Id.* at 925.
250. Compare text supported by note 30 *supra.* And, *with* the discussion of the California cases at text supported by notes 170-75 *supra,* as well as with the textual discussion above, *compare* Knisely v. Leathe, 178 S.W. 453 (Mo. 1915), *affirming* 256 Mo. 341, 166 S.W. 257 (1914), discussed in note 174 *supra. Compare* Hinds v. Henry, 36 N.J.L. 328 (Sup. Ct. 1873) *with* Kram v. Losito, 105 N.J.L. 588, 147 Atl. 465 (Ct. Err. & App. 1929) (court found an express recognition that a commission was owing at the time a "fund" provision was stated).
251. Dillon v. Turkey Gap Coal & Coke Co., 89 W. Va. 395, 109 S.E. 334 (1921); Linton v. Johnson. 81 W. Va. 569, 94 S.E. 945 (1918); Hugill v. Weekley, 64 W. Va. 210, 61 S.E. 360 (1908).
252. Compare text supported by note 83 *supra.*
253. 89 W. Va. 395, 109 S.E. 334 (1921).

> [W]hen a broker has fully performed his contract, he can not be deprived of his compensation by the failure or refusal of the seller to enforce the valid and binding contract entered into between him and the purchaser.[254]

This, of course, is not a statement that it is "immaterial" whose fault caused defeat of the transaction, as is the case where the "time" rationale is used,[255] but in cases in which the owner has contractually accepted a purchaser in practical effect the result is the same[256]—a requirement of affirmative cooperation by the property owner in cases where the purchaser is originally at fault would seem to circumvent as effectively the "fraudulent, wilful, or capricious" requirement generally imposed in cases where a "condition" is stated as would express adoption of the "time" rationale.[257] And here we see the West Virginia court adopting the rationale that payment itself may be conditioned, rather than the "undertaking."[258]

We thus see that judicial handling of "fund" provisions parallels to a high degree that applied in simple "when payable" cases. It would seem, however, that acceptance of the "condition" rationale in "fund" cases has a stronger conceptual basis than is present where a simple "when payable" provision is involved. The decisional basis for a "condition" interpretation in either case lies in determination of the parties' intention[259] that a named outside event which envisages receipt of money or its equivalent by the owner must occur before payment of commission will be exacted. While this is only an inference when the event named is not stated in terms of monetary receipt, it seems an obvious conclusion where payment is, by express statement, related to existence of a "fund." That is, where a prospective fund from which payment is to be made is named, it would seem almost axiomatic that its existence would be intended by the parties to constitute a "condition precedent" to *payment* of commission, if not to the broker's undertaking.[260] Thus, it would seem that insertion of such a clause, in the absence of counteracting factors, would more certainly show that the broker shared the owner's intention. "Coun-

254. *Id.* at 398, 109 S.E. at 335.

255. See note 71 *supra* and text supported thereby. See also Nunn v. Barber, 207 Okla. 393, 249 P.2d 999 (1952).

Other opinions, such as that in Cheatham v. Yarbrough, 90 Tenn. 77, 15 S.W. 1076 (1890), read as though the "fund" provisions were unimportant, whereas in fact the decision turns on the fact that the listing owner caused their failure.

256. *Cf.* Knisely v. Leathe, 178 S.W. 453 (Mo. 1915), *affirming* 256 Mo. 341, 166 S.W. 257 (1914). And see Croak v. Trentman, 50 Okla. 659, 150 Pac. 1088 (1915); Hipple v. Laird, 189 Pa. 472, 42 Atl. 46 (1899).

257. See text at pp. 310-11 *supra*. Compare the New York handling of this situation discussed at text supported by notes 107-26 *supra*. *Cf.* Bankers' Loan & Inv. Co. v. Spindle, 108 Va. 426, 62 S.E. 266 (1908).

258. Compare text supported by notes 91-93 *supra*.

259. Compare text supported by notes 4-5 *supra*.

260. Compare notes 251, 252 *supra* and text supported thereby.

teracting factors" which would negative such mutuality of intent are illustrated by a comparison of the District of Columbia Court of Municipal Appeals decisions discussed earlier in this section.[261]

4. Terms clearly conditional in import.

Often terms which clearly connote that a named event must occur before a broker will be entitled to a commission have been employed.[262] In many such cases the provision for payment of the commission is simply a part of the "undertaking" clause and thus payment clearly depends upon the broker's act of acceptance of such offer. For example, a promise to pay "*if* a deal is made"[263] or "*if* a sale is consummated"[264] clearly conditions payment of commission on the securing of a "deal" or "sale."[265] Such terms, however, occasionally appear in a context in which they have reference only to payment of the commission. We have seen that such is interpreted as the statement of a "condition precedent" by the courts of New Jersey[266] and New York,[267] the two states most comprehensively adopting one or the other of the rationales available. It should come as no surprise, therefore, to find that judicial treatment, generally, is in accord.[268]

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261. See text supported by notes 246-250 *supra*.

262. Examples of such are: actually; if; if and when; if, as and when; in event; only; only if; provided; unless; until; unless and until; or a combination of such terms.

263. Cornett v. Cunningham, 75 Colo. 220, 225 Pac. 249 (1924).

264. Hoyt v. Wasatch Homes Inc., 1 Utah 2d 9, 261 P.2d 927 (1953).

265. What constitutes a "sale" or "deal" will be treated in a subsequent article. See note 38 *supra*.

266. See text supported by notes 47-56 *supra*.

267. See text supported by notes 94-97 *supra*.

268. The brokerage provisions most readily considered as stating a "condition" are those in which terms of the nature of those listed in note 262 *supra* are coupled with a "fund" provision or a provision referring directly to payment of the purchase price. Exemplary of such decisions are: Coulter v. Howard, 203 Cal. 17, 262 Pac. 751 (1927) ("but only out of funds then due and payable"); Davis v. Chipman, 282 Pac. 992 (Cal. App. 1929) ("if, as and when such purchase price is received"); Edwards v. Baker, 39 Cal. App. 755, 180 Pac. 33 (1919) ("only out of the money to be paid"); Van Norman v. Fitchette, 100 Minn. 145, 110 N.W. 851 (1907) ("if payment [made]"); Prideaux v. Plymouth Securities Co., 231 Mo. App. 1060, 84 S.W.2d 166 (1935) ("out of first payment received"); Hartman v. Selling, 97 Ore. 368, 189 Pac. 887 (1920) ("provided the price is paid"); Bush v. Abraham, 25 Ore. 336, 35 Pac. 1066 (1894) ("only when payment . . . is actually made"); Matuszewski v. Grisius, 118 Pa. Super. 196, 180 Atl. 130 (1935) ("wait until . . . the purchase money paid"); Branstetter v. Hook, 251 S.W. 257 (Tex. Civ. App. 1923) ("only if purchase price paid"); Laird v. Elliott, 219 S.W. 499 (Tex. Civ. App. 1920) ("only when . . . purchase money paid"); Crawford v. Woods, 185 S.W. 667 (Tex. Civ. App. 1916) ("unless the sale was actually consummated by payment of the cash consideration"); Parrish v. Wightman, 184 Va. 86, 34 S.E.2d 229 (1945) ("as, when and if said purchase price is paid in cash"); Dean v. Wendeberg, 175 Wis. 513, 185 N.W. 514 (1921) ("if [the purchaser] pays [the owner] that part of the purchase price . . . to be paid on March 1"); *cf.* West Coast Manufacturer's Agency v. Oregon Condensed Milk Co., 54 Wash. 247, 103 Pac. 4 (1909) ("actually paid for"). *Contra*, Kirchoff v. Cummard, 26 Ariz. 512, 226 Pac. 1092 (1924).

Other provisions which, when coupled with "clearly conditional" terms, are obviously intended to insure the listing owner's receipt of a fund from which payment of the commission may be made, include:

(b) Obligation of a Listing Property Owner

The method used in the handling of problems falling within the area of this heading have been discussed in connection with presentation of the "time"[269] and "condition"[270] rationales and will not be redeveloped here. To those discussions, however, must be added the methodology utilized by a few courts in which an obligation of *affirmative* cooperation to secure occurrence of the outside event, on which payment is conditioned, is cast upon a listing property owner who has contractually accepted a purchaser procured by a broker.[271] Depending upon the rationale adopted in the specific case, whether "time" or "condition precedent," the judicial attitude of the remaining jurisdictions closely parallels the pertinent specific discussions to which reference has been made above.

V. Non-Brokerage Analogies

Decisions rendered in analogous situations have found the courts in general less dogmatic about the effect of particular "payment" language, although the same general interpretation criteria are employed. That is, "the intention of the parties to make the debt contingent or otherwise, must be gathered from the language used, the situation of the parties, and the subject matter of the contract. . . ."[272]

(a) "settlement": Clark v. Provident Trust Co., 329 Pa. 421, 198 Atl. 36 (1938) ("only when settlement was made"); Swotes v. Schneider, 129 Pa. Super. 214, 195 Atl. 464 (1937) ("in the event of settlement"); Rottner v. Mencoff, 71 Pa. D. & C. 484 (1950) ("as, if and when settlement hereunder shall be completed only");

(b) "consummated": University Realty Co. v. Neylan, 49 Cal. App. 2d 221, 121 P.2d 500 (1942) ("in the event . . . the purchase . . . was consummated"); Connor v. Riggins, 21 Cal. App. 756, 132 Pac. 849 (1913) ("in event consummated"); Kay v. Sperling, 83 So. 2d 881 (Fla. 1956) ("unless and until a deal is consummated"); Morgan v. Wheeler, 150 Kan. 667, 95 P.2d 320 (1939) ("actually be consummated"); Baum v. Goldblatt, 81 Pa. Super. 233 (1923) ("when and if the same is consummated"); *cf.* Denbo v. Weston Inv. Co., 112 Cal. App. 2d 153, 245 P.2d 650 (1952) ("provided [commission] to be . . . paid only when, as and if [an option is exercised]");

(c) "completion": Chapman v. Winson, 20 T.L.R. 663 (C.A. 1904) ("when and if the purchase is completed"); Flower v. Davidson, 44 Minn. 46, 46 N.W. 308 (1890) ("pay . . . on the completion of the transfer"); *cf.* Cochran v. Ellsworth, 126 Cal. App. 2d 429, 272 P.2d 904 (1954) ("In event of consummation . . . commission . . . payable . . . at the close of escrow");

(d) "papers" are "passed": Spritz v. Brockton Sav. Bank, 305 Mass. 170, 25 N.E.2d 155 (1940) ("only if, as and when all papers . . . shall actually be passed"); Ivas v. Galligan, 271 Mass. 410, 171 N.E. 654 (1930) ("unless and until deed shall be actually delivered . . . and accepted"); Goldman v. Eisenberg, 256 Mass. 566, 152 N.E. 879 (1926) ("if and when papers are passed"—Rosenthal v. Schwartz, 214 Mass. 371, 101 N.E. 1070 (1913) expressly distinguished; see note 217 *supra*);

(e) "final accounting": Canner v. Cohen, 329 Mass. 536, 109 N.E.2d 133 (1952) ("upon final account").

269. See § II *(b) supra.*

270. See text at notes 105-18 *supra;* Note, *Special Conditions in Real Estate Brokerage Contracts,* 32 Colum. L. Rev. 1194, 1197-1204 (1932).

271. See text supported by notes 251-57 *supra.*

272. North American Graphite Corp. v. Allan, 184 F.2d 387, 390 (D.C. Cir. 1950).

Thus, in the decision from which the above quotation was taken, the speculative nature of the undertaking (rehabilitation of a graphite mine) and the fact that a "condition" holding would require a determination that the plaintiff had intended to accept the same compensation on a contingent basis as he was to receive on a regular basis[273] combined to persuade the court that "only the time of liability was contingent, not the liability itself."

California decisions further illustrate the importance of the wording used and the context in which it was enunciated. We have already seen the considerations indulged in by that court in brokerage cases.[274] The same factors find expression in other cases. Thus, the language of a promissory note coupled with a consideration of the circumstances which produced it led to the conclusion that the obligation evidenced by the note was not conditional—that only the time of payment was uncertain.[275] And, where a debt is acknowledged due, a reference to an outside event has been considered as designating only the time of payment.[276] On the other hand, designation of a "fund" normally results in the finding of a "condition precedent."[277]

Although decisions involving other payment provisions would suffice,[278] the handling of "fund" provisions provides the most pointed example of the less dogmatic approach in non-brokerage mercantile cases. Thus, in *William F. Mosser Co. v. Cherry River Boom & Lumber Co.*,[279] the Pennsylvania court found that where the circumstances are such as to show an absolute obligation to pay, even the designation of a "fund" from which payment is to be made will not make payment conditional. It is not in the particular holding per se that the significant difference from the brokerage cases lies, however. Rather, the significant difference lies in the comparative ease with which a "fund" provision may be considered as merely providing the "time" of payment.[280]

The apparent greater willingness of the courts to find "time" in

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273. The plaintiff, an engineer, had been employed originally under a contract which provided for compensation "when the mill is ready for operation," whereas an amended provision—the pertinent provision in question—provided for payment "as soon as the plant is in successful operation."

274. See text supported by notes 171-76 *supra.*

275. Bank of America Nat'l Trust and Savings Ass'n v. Engleman, 101 Cal. App. 2d 390, 225 P.2d 597 (1950). See also Morrison v. Sycamore Canyon Gravel Co., 102 Cal. App. 536, 283 Pac. 84 (1929); *cf.* Easom v. General Mortgage Co., 101 Cal. App. 186, 281 Pac. 514 (1929).

276. *Cf.* McNeal v. Foreman, 117 Cal. App. 155, 3 P.2d 583 (1931). *But see In re* Lynch, 163 Cal. 690, 126 Pac. 968 (1912).

277. Carpenter v. Elmer R. Sly Co., 109 Cal. App. 539, 293 Pac. 162 (1930). See also *In re* Lynch, *supra* note 276; Hodgdon v. Peet, 122 Minn. 286, 142 N.W. 808 (1913).

278. See, *e.g.*, Easom v. General Mortgage Co., 101 Cal. App. 186, 281 Pac. 514 (1929); Sanford v. Luce, 245 Iowa 74, 60 N.W.2d 885 (1953).

279. 290 Pa. 67, 138 Atl. 85 (1927).

280. See subdivision III *(a)* 3, *supra.*

analogous business decisions raises interesting considerations. In such a case the opposing parties may well be equal in intellect and experience. In brokerage cases they likely will not be. Is this to some extent responsible for the "condition" preference of most courts in brokerage cases? That is, do the courts accepting the "condition" preference feel that by so doing they are helping to protect the "common man" by offsetting the broker's experience advantage? Lacking equipment with which to read men's thoughts, these questions must remain unanswered. We can, however, appreciate the effect of a particular preference and of the strength with which it is applied.

VI. Conclusion

Proper judicial handling of brokerage agreements containing provision for payment of commission of the type herein discussed requires first a determination of the temporal sequence of events—when was the agreement first enunciated? If the answer is "preliminary to action by the broker," direct reference must be made to the language utilized by the parties to memorialize their agreement. Where such language consists of a clause introduced by one of the terms by which section 1 of the "General" division of this paper is introduced,[281] followed by designation of an outside event when payment is to be made, most courts have utilized the underlying rationale of *Amies v. Wesnofske* in holding that occurrence of the event is essential to maturing of a claim for commission.[282] In so doing, these courts are, for the most part, treating the commission clause as a part of the "undertaking." That is, the broker is considered as having been employed not simply to "find a purchaser" or "secure a sale" as the "undertaking"[283] clause may provide, but to find a purchaser or secure a sale *and* procure occurrence of the outside event. Other opinions, while in one sense separating the "undertaking" and "payment" clauses, have reached the same result by holding that, although a broker has performed his required "undertaking," payment of his commission is conditioned on occurrence of the outside event.[284] Still others have followed the lead of New Jersey and have largely searched for, and readily found, a "separate, unqualified promise" to pay a commission.

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281. While Professor Williston's treatise on Contracts provides one basis for a "condition" interpretation, it would seem that the extreme end to which his statement has been put is unwarranted. Compare note 153 *supra.*

282. Although the *Amies* case involved a commission agreement entered subsequent to rendition of services by a broker, the terms of a listing entered prior to such rendition were considered as controlling. See text supported by notes 287-89 *infra.*

283. It is believed that breaking the commission agreement into two distinct segments, "undertaking" and "payment," leads to a clearer understanding of the problems involved, and helps to illustrate what the majority "condition" courts are in fact doing.

284. See text supported by notes 83-85 *supra.*

Thus they have removed the major foundation supporting the "condition precedent" rationale—the "oneness" of the employment and payment clauses. However, it would seem clear that, although a separate promise to pay is present, if it is "qualified" a proper interpretation would follow the "additional condition" rationale.[285] The conclusion would thus be reached that, although the broker has performed his "undertaking," *payment* is conditioned. Here, again, in determining whether the payment provision is or is not subject to a condition precedent, the "time" or "condition" disposition of the court will be largely determinative.

It has been easy to demonstrate how the "condition" rationale has been overdone. But, just as a strict "condition" rationale jeopardizes accurate determination of the contract intention, overindulgence of the "time" interpretation may lead a court to conclude, as was in fact expressly acknowledged by the New Jersey court,[286] that notwithstanding the presence of an attempt to make the payment of commissions conditional on the occurrence of a named outside event, a "time" rationale is the appropriate analytical tool to be employed. It seems obvious that where such interpretation is adopted the true contract intention is jeopardized as severely as is the case where the "condition" interpretation holds the sole key to brokerage litigation concerning such terms. Although neither New York nor New Jersey has adopted one approach to the complete exclusion of the other, acceptable justification of the degree in which each court's preference has exerted itself seems impossible. Inasmuch as the primary goal of contract interpretation is ascertainment of the intention of the parties, interpretation that looks for a separate unqualified promise to pay appears to be vastly preferable to either "absolute." With moderate application, such an interpretation would seem to offer sufficient promise of truly reconciling the conflicting intentions of the property owner and broker to overcome the administrative convenience present in a semi-automatic application of either absolute.

In situations where the broker has rendered his services before the commission provision has been executed, other considerations come into play. In such a case, many courts, including those of New Jersey, give primary emphasis to the existence or non-existence of an "acknowledgment"; New York courts emphasize the "consideration" factor; while other "condition" courts seem unaware of the conceptual difference between a pre-activity and a post-activity agreement. Underlying these latter decisions is the canon "construe against the maker." In many situations search for an acknowledgment will

285. See text supported by note 93 *supra*.
286. Forman v. Bedminster Land Co., 110 N.J.L. 1, 163 Atl. 123 (Sup. Ct. 1932).

prompt the same result as search for consideration—the finding of an acknowledgment will be treated as the equivalent[287] of finding a lack of consideration.[288] In fact, the two criteria may well be combined. For example, in *Amies v. Wesnofske* the New York Court of Appeals clearly found that the broker's required act of acceptance was prescribed by the terms of an original listing because there was an "acknowledgment of a prior employment of [the brokers] to render services already performed," and without more there would be no consideration for a new brokerage provision. But once this step is taken, the difference between an acknowledgment of *prior employment* and an acknowledgment that *commission has been earned* becomes crucial. It is in the eagerness of a particular court to find that there is an acknowledgment that commission has been earned that one key to a time disposition will be found. If the court finds only an acknowledgment of prior employment, it seems obvious that resort to the terms of such prior employment is called for, which in turn leads to determination of the legal effect of the terms there employed. This was the methodology followed in the *Amies* opinion. And if an express acknowledgment that commission has been earned is found, nearly all courts would find that the broker could not be defeated in his claim by reference to the provisions of the subsequent agreement.[289] However, the broker having agreed to wait for payment of his commission until the happening of some outside event, it would seem perfectly proper to give effect to the subsequent agreement as a statement of the "time" at which payment would be made. Such consideration would, in most instances, protect the owner by providing him with the necessary finances with which to make payment. At the same time, there would be little likelihood of any real prejudice to

287. But consider the situation in which a mere volunteer introduces a purchaser to a property owner after which a commission agreement employing a clause referring to an outside event is executed. On these simple facts, the agreement would be supported by consideration and most courts would probably hold that a "condition precedent" had been stated. And, such a result would probably be forthcoming from a New York court in a case where the commission agreement also contained an acknowledgment that the volunteer had earned a commission. On the other hand, a court placing emphasis on the acknowledgment factor would likely find that the "outside event" clause served only to postpone the "time" of payment of a commission which had already been earned.

288. *E.g., with* cases cited at note 106 *supra, compare* text supported by note 27 *supra*.

289. *But cf.* Langford v. King Lumber & Mfg. Co., 123 Fla. 855, 167 So. 817 (1935); Ballas v. Lake Weir Light & Water Co., 100 Fla. 913, 130 So. 421 (1930); Hinds v. Henry, 36 N.J.L. 328 (Sup. Ct. 1873); Nekarda v. Presberger, 123 App. Div. 418, 107 N.Y. Supp. 897 (1st Dep't 1908).

Could it be that the contrary holding in *Hinds v. Henry, supra*, became the unpalatable pill leading to the sweet tasting "time" rationale adopted by the New Jersey courts? See text supported by notes 28-29 *supra*. Or, are the *Hinds*, *Nekarda*, and *Ballas* cases actually further examples of the strong "condition" influence of the statement of a "fund" from which payment is to be made, and the *Langford* opinion clearly explainable in terms of pleading problems? Compare text supported by note 250 *supra*.

the broker. On the other hand, an acknowledgment that *services have been performed,* standing alone, neither clearly connotes that there had been prior employment nor that a commission had been earned. In fact, such terms are often found where the "broker" had been a mere volunteer, in which case there would clearly be no acknowledgment of prior employment. Could it be interpreted as an acknowledgment of commission earned? Only the most eager court would so find. But suppose, in the words of the *Amies* court, there is an acknowledgment *of prior employment to render the services which have already been performed*? It seems obvious that such could, contrary to the *Amies* opinion, but with straight face, be considered the equivalent of "commission earned"—provision effective to state "time" only.

Thus, the variation in language employed in the "acknowledgment" clause may (1) be determinative of the result, as where there is an express acknowledgment of commission earned; (2) throw an interpreter back to the terms of an earlier listing (with the attendant interpretive problems presented by "pre-activity" situations); or (3) present a situation where the underlying "time" or "condition" complexion of the court will determine the result.

However, cases often arise in which there is neither an express acknowledgment nor an expression which a court with a "time" disposition can interpret as such. Where such is the case, most courts, whether classified as "time" or "condition," have found that a commission provision referring to an outside event, executed simultaneously with or subsequent to the broker's rendition of the contemplated services, presents a condition precedent to payment. If the broker was originally a volunteer such a decision seems proper. But where there had been previous employment a serious question of the existence of consideration to support the imposition of the later enunciated condition arises. Inasmuch as most courts outside New York omit any reference to such problem, it would seem that lack of acknowledgment is silently considered to negate any problem of lack of consideration.[290]

Emphasis has so far been placed on considerations dealing with matters directly bearing on the commission provision. But proper consideration of its effect cannot be divorced from the entire factual situation in which the provision was enunciated—what had transpired earlier and what was the immediate goal to which the provision was directed? And how will the one interpretation or the other bear upon its realization and on the community? It is believed that these and analogous questions, which have already been raised in an attempt to show the considerations which must be pursued by lawyers and courts

290. Compare text supported by notes 141-49 *supra.*

when called upon to decide a brokerage conflict,[291] adequately illustrate the total area to be considered. These are the questions and considerations which find expression in analogous cases, although the results reached in such cases seem more favorable to the promisee than is true in cases where the promisee is a broker.[292]

The foregoing discussion has rested on the assumption that the effect of the payment provision actually employed is a matter for court determination. While the actual interpretation is a question of fact, most courts make the final interpretation "as a matter of law" where terms of the character herein discussed have been employed.[293] In so handling the matter, substantial consistency is obtained within a given jurisdiction. Normally this is desirable. But where "consistency" results in decisions that as a practical matter do violence to the intention of the parties, just cause to question the desirability of consistency for consistency's sake is presented. Or, should there be a challenge aimed at whether true consistency is in fact achieved in such manner? Is it truly consistent to treat a simple "when payable" clause in the same manner as a clause designating a "fund" from which payment is to be made?[294]

It remains to point out the important considerations which exist concerning the obligation of a listing property owner to his broker in a court where a "time" rather than a "condition" interpretation is preferred. Such considerations assume major prominence where the named event has failed to occur only if the happening of that event is held to constitute a "condition precedent." That is, if a "time" court is presented with a brokerage claim based upon a commission provision to which such court applies a "condition" label, it will employ an interpretation substantially similar to, if not identical with, the "active-passive" dichotomy applied by most "condition" courts. As a result, if the property owner has remained passive in the defeat of a transaction, failure of the "condition precedent" will cause defeat of a broker's action. On the other hand, if the outside event is looked upon as merely designating a "time" at which a commission is to be paid, it is immaterial whose fault, the owner's or the purchaser's, caused defeat of the transaction—the commission will be considered as earned when the act of acceptance required of the broker by the "undertaking" clause has been performed, and payable when the date set for occurrence of the outside event has passed.

291. See text at pp. 307-10 *supra*.

292. See § V *supra*.

293. This is true even though some ambiguity is considered to be present and parol evidence has been admitted to aid in resolving such. If "serious" ambiguity is found to exist, a jury question is presented. See note 82 *supra* and text supported by notes 152, 198-206 *supra*.

294. See text supported by notes 259-61 *supra*.
Such criticism of the interpretation employed, however, is not to be taken as criticism of the court as the proper agency to undertake the interpretation.

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