Brokers—Commission—When Earned—Defendant, in consideration of one dollar, gave plaintiff, a real estate broker, an option to sell a lot. The contract gave plaintiff the exclusive right to sell the property within thirty days for $3,675 cash, at a fixed commission. Plaintiff entered into negotiations with the board of school commissioners of Indianapolis and within the time allowed they proposed in writing to buy the property, and pay $3,900 in cash, as soon as bonds were sold by them with the approval of the State Board of Tax Commissioners. Defendant contended that this was not a proper acceptance of his offer, and refused to make the sale as proposed. Later, after the expiration of the thirty day period, the school commissioners condemned, paying $7,000. There was no evidence that any fraud was practiced upon plaintiff. Plaintiff brings this action to recover his commission for the sale of the property. From a judgment for the defendant, plaintiff appeals.

Held, sustained. "Before the appellant would be entitled to recover in this action, he must show that he procured a purchaser within thirty days, who within said time was ready and willing to pay unconditionally the amount of the purchase price of said real estate."1

The court undoubtedly correctly decided the case, as under the circumstances the condemnation proceedings could hardly be called a "sale" within the meaning of the contract and the procuring of the proposal of the school commissioners, it being conditional, could hardly of itself have been sufficient performance to entitle plaintiff to a commission. But, is the above quotation a correct statement of the law? Is it necessary that the broker find a purchaser who is willing to pay the purchase price within the time stipulated? There is great confusion in the cases upon this point.

In Cole v. Crump2 the court held that if the agent initiated the transaction of purchase within the time prescribed, and might therefore be regarded as the procuring cause, it is immaterial that the parties did not reach an agreement within that time. In Ewan v. Power,3 it was also held that where a broker introduces a customer, within the period fixed by the proposal, to whom a sale is made after the expiration of that time, he is entitled to his commission. The argument that the court advanced in that case was that after taking advantage of the broker's services the seller was estopped from setting up the expiration of the stipulated period. The result of these cases has been reached by a number of courts. Some of them have allowed the broker to have the commission designated, while others have only allowed a recovery upon a quantum meruit basis.4

Other courts, unwilling to go so far but not wishing to hold brokers to the strictest construction of the proposal, have held that the procuring within the given time of a customer ready, able and willing to buy if given a reasonable time in which to examine title is sufficient performance to entitle the broker to his commission.5

The rule laid down by the Indiana court is, however, supported by many decisions. That is they hold that the customer must be able and

1 Conley v. Brummit, Appellate Court of Indiana, July 1, 1931, 176 N. E. 380.
willing to pay the purchase price before the expiration of the period given in which to effect the sale. The cases of Brown v. Northampton, Eastern, etc., R. R.,7 and Brown v. Mason8 illustrate the application of the same principle to situations involving other types of brokers.

An analysis of the relationship involved in the situation under discussion, and a study of the legal principles applicable, will lead to the conclusion that the rule stated by the Indiana court and in the cases last cited is a correct statement of the law. There are two sorts of relationships which exist between the owners of land and brokers. Sometimes an owner merely authorizes a broker to sell his property, promising to pay a commission if he performs, while in other cases, as in Conley v. Brumit, the broker is given the exclusive right to sell and pays a consideration for it. Where the relationship first pointed out exists there is no contract at all, for the broker has given no consideration for the owner's promise. What the seller actually does is to make an offer. When this offer is accepted it will ripen into a unilateral contract, which may be defined as "a contract created by a promise on one side given for an act other than a promise on the other side."9 Where the broker pays a consideration for the promise of the other to give him a certain time in which to negotiate the sale, the consideration only goes to the promise to hold the proposition open, and the real effect is only to change the offer into an irrevocable one.10 Thus it seems that where one procures a broker to sell property for him, what he actually does is only to make an offer. Since he is under no obligation to make an offer, an offeror can dictate any terms he sees fit. When he requires that acceptance be within a certain time, if it is not within that time the offer necessarily expires.11 In the absence of express instructions to complete a sale, the majority of the courts hold that when the word "sell" is used in empowering a real estate agent, it means to "procure a purchaser ready, able and willing to buy upon terms specified by or acceptable to the principal."12 To accept the offer made by the owner, then, a broker must produce a purchaser ready to buy. Therefore, the conclusion which we must reach, since to accept one must find a purchaser ready to buy, and since acceptance must be within the time specified, is that the Indiana court correctly stated the law when it said that to entitle himself to his commission, a broker must "show that he has procured a purchaser within the specified period, who within said time was ready and willing to pay unconditionally the amount of the purchase price of said real estate." W. H. H.

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6 Among these cases are Barney v. Yazoo Delta Land Co., 179 Ind. 337, 101 N. E. 96 (quoted in the principal case); Fultz v. Wimmer, 34 Kan. 576, 9 Pac. 316; and Hurst v. Williams, 31 Ky. L. 658, 102 S. W. 1176.
7 110 C. C. A. 193, 200 Fed. 597.
8 155 Cal. 155, 99 Pac. 867.
9 Willis, Introduction to Anglo-American Law, p. 41.
10 Williston, Contracts, Sec. 61, Vol. 1, p. 106.