Brokerage, Mandate, and Agency in Louisiana: Civilian Tradition and Modern Practice

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INTRODUCTION

The Civil Code of Louisiana regards the contract of brokerage1 as a species of mandate.2 In several cases the courts following the Code and its terminology have declared that brokerage is a mandate, agency, or procuracion;3 in others, brokerage was classified as a contract for "labor or industry"4 or simply as an "employment" contract.5

Classification in such cases is not simply a problem of semantics. The rules applicable to these various legal relations differ substantially6 and a certain classification may result in very important legal consequences for the interested parties. It is the thesis of this paper that brokerage, mandate, and agency involve distinct and distinguishable legal relations under Louisiana law and that the issues raised in a brokerage contract may be better appreciated by classifying brokerage as a sui generis contract which may or may not coincide with agency and mandate.

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1. As the principle of contractual freedom is a fundamental precept in the Louisiana Civil Code (cf. Art. 1764), the contract of brokerage may assume several forms. The typical brokerage contract may be described as an agreement whereby a person (principal) promises to another (broker) a commission for the service of producing a prospect willing, able, and ready to buy, the broker making no return promise that he can or will render such service. Cf. 1 CORBIN, CONTRACTS 150, 151 (1950). It amounts in substance "to an offer by P to pay A a stipulated amount for the performance of a stipulated service." See MECHEN, OUTLINES OF THE LAW OF AGENCY 38 (1952). Cf. note 19 infra.

2. See LA. CIVIL CODE arts. 3016-3020 (1870).


6. See also text at note 163 infra.
For the purpose of eliminating certain ambiguities, and in order to achieve a comprehensible analysis of our law, it may be useful to define at the very outset of our discussion the words mandatary, agent, and broker as used in this paper. The word mandatary, of civilian origin, will be used in connection with its civilian background and only in its original meaning under the Civil Code of Louisiana. It will denote a person having actual authority to act in a representative capacity for his principal according to the terms of a contract granting him such authority.

The word agent will have its accepted meaning at common law. An agent is a person having the power to make contracts or other negotiations of a business nature on behalf of a principal and by which the latter is bound. It has been said that "the distinguishing characteristic of the agent is that he represents his principal contractually." Unlike a mandatary under the French and Louisiana Civil Codes who is supposed to act always in a representative capacity and in accordance with powers granted him under a contract, an agent at common law

8. The meaning of Article 2985 of the Louisiana Civil Code of 1870 has changed substantially since the Louisiana Supreme Court announced in the case of Sentell v. Richardson, 211 La. 288, 289, 29 So.2d 852, 855 (1947), that "our opinion is that the words 'and in his name' are not essential to the definition of a procuration or power of attorney, as defined in Art. 2985 of the Civil Code." Cf. Procament, 8 Louisiana Law Review 409, 414 (1948); see text at notes 117, 125-217 infra.
9. See LA. CIVIL CODE art. 2985 et seq. (1870).
11. See Mechem, Outlines of the Law of Agency 4 (1952). Cf. American Law Institute, Restatement of the Law of Agency 2d, § 1 (1958) "(1) Agency is the fiduciary relation which results from the manifestation of consent of one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act; (2) The one for whom action is to be taken is the principal; (3) The one who is to act is the agent." See also Munro, The Agent's Status: The Kidd Case, 20 U. of Pitt. L. Rev. 33 (1958). Agency at common law is an all pervading institution, quite independent from mandate. It has been observed that the civilian mandate "would be unenforceable as being without consideration in the common law." Pollock, Principles of Contract, Appendix E, 749-750 (1921).
14. Cf. Clarise, De la représentation 13, 55, 87 (1949). The word mandatary has thus a much narrower meaning than the word "representative." Representation must not necessarily rest on contract but it may merely rest on consent, as common law agency. It may also rest on some rule of law in which case it is
has powers which derive from a relationship founded on consent\textsuperscript{15} or apparent consent\textsuperscript{16} and status\textsuperscript{17} and which may be exercised even on behalf of an undisclosed principal.\textsuperscript{18}

For the purpose of our discussion a broker may be defined as a person employed to find a prospect or to show an opportunity for the conclusion of a transaction.\textsuperscript{19} In contrast to both common law agency and the contract of mandate of our Civil Code, brokerage as defined does not purport to confer on the broker authority or power to transact business in his name or in the name of his principal. It merely authorizes the broker to try to find a prospect and to negotiate with him; the business is to be closed between the principal and the prospect.\textsuperscript{20} In other words, the broker, ordinarily, is not employed as a mandatary or agent, and has no actual or apparent authority to bind his principal. However, much depends on the particular transaction and on the “internal” relationship between principal and broker; and brokerage as defined may well coincide with mandate or agency.\textsuperscript{21}

In the following discussion an attempt will be made to recalled “legal representation.” Cf. Müller-Freienfels, Law of Agency, 6 Am. J. of Comp. L. 165, 168 (1957).


18. Cf. Müller-Freienfels, Law of Agency, 6 Am. J. Comp. L. 165, 178 (1957) (this is “one of the most important contrasts” between common law and civil law); Mecchem, Outlines of the Law of Agency 96 et seq. (1952).


The employment of an intermediary without representative powers is known practically to all legal systems. Substantial differences, however, exist with regard to the regulation of the relations between principal, broker, and third parties. See Kühnemann in V Schlegelberger, Rechtsvergleichendes Handwörterbuch für das Zivil und Handelsrecht des In- und Auslandes 309.

20. See Beal v. M’Kie, 6 La. 407, 417 (1834) (“The broker negotiates the bargain, he carries communications to and from the parties respectively, and they or their agent, concludes the bargain.”). Cf. Mecchem, Outlines of the Law of Agency 37 (1952). Cf. notes 149, 165, 186 et seq., infra.

examine the sources of Louisiana law relating to brokerage, mandate, and agency in their historical perspective; to ascertain certain similarities and differences between those legal relations; to test the applicability of the law of agency and mandate to a simple brokerage contract; and to demonstrate that a distinction may be conducive to a further rationalization of our law.

THE CIVILIAN TRADITION

The redactors of the Louisiana Civil Codes of 1825 and 1870 moved in this general area of problems raised by mandate, representation, and brokerage, within the framework of the French legal tradition. The relevant provisions of our Civil Code could thus be best understood through a brief historical excursus to early civilian sources, namely Roman law and French law of the pre-codification period. A further reference to the French Civil Code and to modern developments in France and Germany may illustrate the inherent inadequacies of the eighteenth century continental legal theory and legislative technique to cope with the problems arising in a modern industrialized society.

Roman Law

The contract of brokerage, though known as such in both classical and post-classical Roman law, never became elevated to an individual contractual form. A short individual title in the Digest regulated the broker's right to a commission which was called "proxenetika." The claim to such a commission, though considered "degrading," was enforceable by actio. In the absence of agreement for a commission nothing could be claimed; and where an excessive commission was stipulated, the courts could reduce it to what was considered to be reasonable under the circumstances. If such excessive commission had been already received by the broker, the excess was recoverable by action which could be instituted by the principal and his heirs against the broker and his heirs. Claims between broker and principal were settled by the Praetors in their "extra-ordinaria
cognitio,” the same form of process used in the adjudication of claims resulting from employment for liberal or scientific services.28

It seems that brokerage was classified as a contract for work, and, at times, as a species of mandate.29 It is important to notice, however, that the Roman law mandate was a materially different institution from the contract of mandate as regulated in the Louisiana Civil Code. The broker in Roman law, though perhaps a “mandatary,” was not an “agent” or “representative” of his principal.30 Representation as we understand the term today, namely, direct acquisition of rights and liabilities through contractual action of properly authorized intermediaries, was unknown to Roman law.31 However, several substitute legal devices were developed in judicial practice which facilitated the transacting of business through intermediaries. One of these substitutes for representation, and perhaps the most important, was the contract of mandate by which a mandator could authorize his mandatary to transact one of several affairs for him.32

Subject matter of the contract was the gratuitous performance of both juridical and non-juridical acts by the mandatary.33 The effect of the mandatary’s action was limited to the mandatary and third parties; the mandator did not assume any obligations nor did he acquire rights against persons who dealt with his mandatary.34 The mandator had simply an actio mandati directa against the mandatary to compel him to assign the benefits accruing in his person, and after the assignment took place, he could bring action against third persons in the name of his mandatary. The mandator, on the other hand, had an actio mandati contraria against the mandator for indemnification.35

In the post-classical Roman law, as to certain matters, the

28. Cf. Dig. 50: 13, 1, §§ 10-12; 50: 14, 3.
29. But cf. Dig. 50: 14, 2.
30. Cf. note 31 infra.
31. See Buckland, A Textbook of Roman Law 519 (1932); Buckland, Roman Law and Common Law 168 (1936); Clarise, De la Representation 35 (1949); Popesco-Ramnicsano, De la Representation dans les Actes Juridiques en Droit Comparé 25, 35, 42 (1927).
32. See Buckland, Roman Law and Common Law 168, 234 (1936); Popesco-Ramnicsano, De la Representation dans les Actes Juridiques en Droit Comparé 42 (1927).
33. See 2 De Colquhoun, A Summary of the Roman Civil Law 82 (1853).
34. See Clarise, De la Representation 36 (1949); Buckland, A Textbook of Roman Law 519 (1932).
35. See Buckland, Roman Law and Common Law 234 (1936); Popesco-Ramnicsano, De la Representation dans les Actes Juridiques en Droit Comparé 44 (1927).
mandator had an *actio utilis* against third persons; similarly, third persons could hold the mandator directly liable by an *actio institutoria* or *ad exemplum institutoriae*. Thus, it was only at the end of its historical evolution that Roman law came very close to the idea of representation through mandate, but it never developed a general institution resembling our all-pervading concept of agency.

Whether or not distinction was made as to brokers, we lack precise information. At any rate, it is hard to imagine that brokers as such, and without more, were vested with representative capacity under the Roman law of the post-classical period though they might still be regarded as "mandataries." This assumption seems to be particularly justified in view of the general hesitancy of Roman law to recognize representation even where this would be in accord with the intention of the principal and his express grant of authority.

**France**

The French Civil Code did not expressly regulate the contract of brokerage. The French Commercial Code and special laws subsequently enacted regulated what may be described as "commercial brokerage." The "civil" contract of brokerage (which in France includes the activities of a real estate broker) being thus an "innominate" contract under the Civil Code was

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37. The French Civil Code does not contain provisions corresponding to Articles 3016-3020 of the Louisiana Civil Code. Transaction of business, however, is facilitated in France through the services of several kinds of intermediaries known as "Agents d'affaires" (Cf. II Planiol-Ripert, *Traité Pratique de Droit Civil Français* 869 (1952), hereinafter cited Planiol-Ripert); "Courtier" (Of. XI Planiol-Ripert 851; Escarra-Rault, II *Traité Théorique et Pratique de Droit Commercial* 135 et seq. (1955), hereinafter cited Escarra-Rault); "Commissionnaire" (cf. II Escarra-Rault 56 et seq.); "Préteur" (cf. XI Planiol-Ripert 956).


40. Cf. id. at 73, 78, 86; Mignault, *Droit Civil Canadien* 81 (1909); Perault, *Droit Commercial* 307 (1936) (Quebec).

41. In civil law countries, distinction is commonly made between "nominate" and "innominate" contracts. See Enneccerus-Lehmann, *Lehrbuch des Bürgerlichen Rechts*, II Schroeder 381 et seq. (1954); 2 Larens, *Lehrbuch des Schuldrechts* 1 et seq. (1956); 3 Ripert-Boulanger, *Traité de Droit Civil* 437 et seq. (1958); II A Ern, A.K. (*Commentaries on the Greek Civil Code*) 357 et seq. (1949). The first are contracts specifically regulated by the civil codes in force, and as to them, the general principles applicable to all contracts are merely supplemental; the specific regulation prevails over the general provisions.
classified by the courts and writers either as a contract for work or as a mandate according to the Roman law tradition.42

The result was confusion, reflected in a body of inconsistent and contradictory case law. The Roman jurists could, perhaps, consistently with their conception of mandate, classify brokerage as a species of that contract. But in France mandate had become synonymous with representative agency43 and once the broker was termed a mandatary the courts could, perhaps with good reason, ask themselves whether the broker had the power to represent his principal and whether several other rules applicable to mandate were also applicable to the contract of brokerage.

Indeed, already by the sixteenth century, the notion of representation was infused into the old contract of mandate through the canon law maxim "qui facit per alium facit per se."44 At that time it became clear that the mandatary is nothing more than an intermediary acting on account of his mandator who alone is liable to third parties.45 Pothier was unequivocal in that regard46 while remnants of the old hesitancy to recognize representation still persisted in Domat,47 who insisted that ratification of the acts of the mandator by the mandator was a prerequisite for allowing direct action by or against the mandator.

The redactors of the French Civil Code did not construct a general institution of agency, distinguished from the contract of mandate or from other venerable civilian institutions serving as substitutes for agency.48 Particularly, following a century-old tradition, they dealt with all problems of representation under

The second category of contracts is primarily subject to the general principles, and, by analogy, to rules governing nominate contracts, "adapted to the nature" of the innominate contract under consideration. See LA. CIVIL CODE art. 1764 (1870).
43. See text at notes 48-51 infra.
44. See Popenso-Ramniceno, De la Representation dans les Actes Juridiqnes en Droit Compare 185 (1927), hereinafter cited Popenso-Ramniceno.
45. Id. at 187.
46. See 5 Oeuvres de Pothier 207 (ed. Bugnet 1831).
47. Cf. Popenso-Ramniceno at 188. According to Domat mandate could be given, as in Roman law, for both juridical and non-juridical acts. See Domat, Les Lois Civiles dans leur Ordre Naturel; Le Liv. I, tit. XV, 1, 133 (1777).
It seems that the principle of the personal character of contractual obligations created a dogmatic obstacle for an outright recognition of representation. See LA. CIVIL CODE arts. 1119, 1165 (1870); VI Planiol-Ripert 60; Popenso-Ramniceno 200.
the title on mandate.49 According to Article 1984 of the Civil Code "a mandate or procuration is an act by which one person gives to another the power to do something for the mandator and in his name."50 This definition, which confuses mandate, procuration, and representation,51 has been strongly criticized as meaningless and misleading52 and, gradually, it became apparent that it did not accurately describe the actual state of the law. According to the prevailing view in France today, mandate and representation are two different things which may or may not coincide.53 Thus, there can be mandate without representation54 and representation without mandate.55 These two distinct legal concepts have been described as two intersecting circles.56 Further, the majority view of courts and writers is

50. Art. 1984. "Le mandat ou procuration est un act par lequel une personne donne à une autre le pouvoir de faire quelque chose pour le mandant et en son nom."
51. See DALLOZ, ENCYCLOPEDIE JURIDIQUE, III REPertoire DE DROIT CIVIL 318 et seq. (1953). Procuration is the power given by the mandator to the mandatary, or the instrument establishing a mandate. It is a unilateral act which need not be accepted. Mandate is a contract conferring power of representation. In other words, procuration is one of the effects of mandate. See 11 PLANIOL-RIPERT 851, 852; POPESCO-RAMNICANO 224. Actually, it seems that Article 1984 defines procuration rather than mandate. See 6 AUBRY ET RAU, TRAITÉ DE DROIT CIVIL 153, n. 2 (5th ed. 1920); 11 PLANIOL-RIPERT 851.
52. A literal interpretation should lead to the conclusion that (1) mandate may be given for both juridical and non-juridical acts (but cf. infra note 57); (2) there can be no mandate without representation, namely, that the mandatary should always act in the name of his principal (but cf. infra notes 54-55); and (3) that the word mandate is synonymous with procuration (but cf. supra note 51).
53. See 6 PLANIOL-RIPERT 62; 11 at 851; CLARISE, DE LA REPRESENTATION 87 (1949) ("The two concepts, even where they coincide, describe two substantially different aspects of the same transaction. Mandate points to the internal relations between two persons — the mandator and the mandatary. Representation on the other hand points to the external aspects of the transaction, the relations of principal and agent toward third parties.") The French doctrine was apparently influenced by Laband, Die Stellvertretung nach dem Deutschen H.G.B., [1866] ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT 204. See POPESCO-RAMNICANO 228. According to a view previously prevailing in France, there could be no mandate without representation. See Cass. April 14, 1886, [1886] D.1.220, S.1.76; Cass. Nov. 13, 1894, [1935] S.1.60; 6 AUBRY ET RAU, TRAITÉ DE DROIT CIVIL 155 (1920). Cf. CLARISE, DE LA REPRESENTATION 87 (1949); 11 PLANIOL-RIPERT 851. The confusion between mandate and representation has been explained as due in part to the need of a distinction between mandate and employment. In Roman law mandate was distinguishable from employment in that the former involved performance of services gratuitously while the latter for compensation. In France the distinction was thought to be found in the idea of representation. See POPESCO-RAMNICANO 228.
54. E.g., "frête-nom" (mandatory conducting business in his own name); "commissionnaire" (commercial mandate without representation). See CLARISE, DE LA REPRESENTATION 86 (1949); 6 PLANIOL-RIPERT 62; 11 at 851; POPESCO-RAMNICANO 228.
55. "Legal representation"; "negotiorum gestio"; see POPESCO-RAMNICANO 228; REPertoire DALLOZ, supra note 51, at 318, §4; 11 PLANIOL-RIPERT 851; 6 at 62.
56. Cf. POPESCO-RAMNICANO 234; LEONHARD, DER ALGEMEINE THEIL DES
that only juridical acts may be the subject matter of a mandate;\textsuperscript{57} acts of a non-juridical nature may be the subject of a contract of employment or for work.\textsuperscript{58} Accordingly, mandate has been scientifically defined as a contract by which one person (mandator) gives to another (mandatary) the power to accomplish on his behalf one or more juridical acts.\textsuperscript{59}

Thus, it has been established that the broker is not always a mandatary and the brokerage contract, whether commercial or civil, is not always a mandate. The broker is a mandatary only where he has express actual authority to conclude juridical acts on behalf of his principal.\textsuperscript{60} The courts, however, are still at times inclined to regard the broker as a mandatary even where he merely brings the parties together and does not interfere with them as to the actual formation of the contract to conclude the transaction.\textsuperscript{61} The attitude of the courts in such cases has been rationalized by Professor Planiol as a device permitting reduction of excessive commissions by judicial intervention — which would not be otherwise permissible.\textsuperscript{62}

\textbf{Germany}

In Germany, and in several continental countries which share the German legal tradition, clear-cut distinction is made between mandate and brokerage,\textsuperscript{63} and the two are further distinguished from both representative and non-representative agency,\textsuperscript{64} and from the contract of employment.\textsuperscript{65} Thus, free from conceptual

\textsuperscript{Bü}rgerlichen Gesetzbuchs 315 (1900).

57. See 11 \textsc{Planiol-Ripert} 851; \textsc{Repertoire Dalloz, supra} note 51, at 318, § 2; Cns. Oct. 24, 1928, [1928] Grs. Pal. 179. Cf. \textsc{Popesco-Ramniseano} 229.

58. See \textsc{Repertoire Dalloz, supra} note 51, at 319, § 18.

59. See 11 \textsc{Planiol-Ripert} 851.

60. See 12 \textsc{Beudant-Lerembours-Pignonnière, Cours de Droit Civil Français} 332 (1947); Letarte, \textit{Problèmes juridiques de l'agent d'immeubles}, 9 \textsc{Revue du Barreau} 105, 107 (1949); \textsc{Repertoire Dalloz, supra} note 51, at 322, § 44. Cf. \textsc{Escarra, Cours de Droit Commercial} 80 (1952).

61. See 11 \textsc{Planiol-Ripert} 869.

62. Ibid.

63. See German B.G.B. §§ 662-676 (mandate); §§ 652-656 (brokerage). Swiss Code of Obligations, Arts. 394-406 (mandate); Arts. 412-418 (brokerage). Greek Civil Code, Arts. 713-729 (mandate); Arts. 703-708 (brokerage). See also 3 \textsc{Staudinger, Kommentar zum Bürgerlichen Gesetzbuch}, II \textsc{Recht der Schuldverhältnisse} 1809 (1958), hereinafter cited \textsc{Staudinger}.

64. See German B.G.B. §§ 184-181 (representation); §§ 677-687 (negotiorum gestio). Swiss Code of Obligations, Arts. 32-40 (representation); Arts. 419-424 (negotiorum gestio). Greek Civil Code, Arts. 211-234 (representation); Arts. 730-740 (negotiorum gestio). See also II 3 \textsc{Staudinger 1809}; \textsc{Müller-Freienfels, Law of Agency}, 6 Am. J. Comp. L. 165, 172 (1957).

65. See German B.G.B. §§ 611 et seq.; Swiss Code of Obligations art. 319 et seq.; Greek Civil Code art. 648 et seq. See also II 3 \textsc{Staudinger 1809}; \textsc{Larenz, II Lehrbuch des Schuldrechts} 187 (1956), hereinafter cited \textsc{Larenz}.
difficulties and confused analysis, the regulation of the contract of brokerage in Germany may serve as an illustration of modern civilian legislative technique.

Conceptual foundation: civil and commercial brokerage. Depending on the nature and object of the contemplated transaction, brokerage in Germany may be a "civil" or a "commercial" contract. The former is regulated by the Civil Code and the latter by the Commercial Code and other special laws.\textsuperscript{65} The Commercial Code deals in general with the rights and obligations of commercial brokers.\textsuperscript{66} Such brokers are professional businessmen who undertake the negotiation of contracts on behalf of third parties without entering into a permanent legal relation with them.\textsuperscript{67} Real estate, and real estate transactions in general, are not objects of commerce; accordingly, the activities of real estate brokers, as well as all other contracts of a non-commercial nature, are regulated by the Civil Code.\textsuperscript{68}

The regulation of the brokerage contract by the Civil Code is not exhaustive. The Code establishes only the conceptual foundations of civil brokerage and regulates the broker's right to a commission. Several questions, such as what is the effect of the broker's or the principal's death, and whether or not the contract may be cancelled, are to be answered according to the general provisions of the Code relating to juridical acts, and according to the general principles of the law of contract and obligations.\textsuperscript{70} Usages, and the principle of good faith, may also supplement the agreement of the parties and the discharge of their mutual obligations.

The Civil Code defines brokerage as an agreement whereby

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67. See H.G.B. § 93-104; II 3 \textit{STAUDINGER} 1810; II \textit{ENNECCERUS-LEHMANN} 648.

68. See H.G.B. § 92; II 3 \textit{STAUDINGER} 1810. Commercial brokers are distinguished from the so-called commercial agents. See \textit{STAUDINGER} id. 1811.

69. See II 3 \textit{STAUDINGER} 1813; II \textit{ENNECCERUS-LEHMANN} 648.

70. As legislative regulation is scanty, a body of case law has emerged with its attention focused on the mutual obligations of the parties and on the requirement of causal connection between the services of the broker and the conclusion of the transaction. See II 3 \textit{STAUDINGER} 1807.
\end{footnotesize}
"one promises to another a commission for showing an opportunity or acting as an intermediary in the conclusion of a contract." As freedom of contract prevails in Germany, the parties are free to shape their agreement according to their desires, and brokerage may assume several forms. The simple brokerage contract regulated by the Code is an informal, consensual agreement, unilateral in nature. The principal offers a commission in exchange for the services of the broker. The broker is not obliged to render services or to conclude a bargain; if such an obligation is undertaken the contract is one of employment or for work and the rules regulating such contracts are respectively applicable.

_Mutual rights and obligations._ According to the Civil Code, the principal undertakes the obligation to pay the stipulated commission upon the conclusion of the contemplated transaction with a prospect procured by the broker. His obligation is conditional, depending on the conclusion of the bargain "as a result of" the broker's activity. The principal is under no obligation to conclude a contract and he is free to find himself a customer or to employ other brokers. The broker in such a case has no claim for a commission, nor is he entitled in absence of

71. See B.G.B. § 652; _II Enneccerus-Lehmahn_ 646.
72. Thus brokerage may be: (i) _a unilateral contract_ (where the broker is under no obligation to try to find a prospect, but where the conclusion of the contemplated transaction by his principal gives rise to the broker's claim for compensation); (ii) _a bilateral contract_ (where the broker undertakes the obligation to try to find a prospect, to show an opportunity, or to mediate in the conclusion of a transaction). As the broker is under obligation to render services rather than achieve a result, the contract approximates employment, and the relevant articles of the Code may be applicable by analogy; and (iii) _a not-so-frequent arrangement_ whereby the broker guarantees that a contract, according to specified terms, will be concluded between his principal and a third party. In such a case the legal relation created approximates the notion of a contract for work, and the articles of the Civil Code relating to that contract may be respectively applicable. See _II Enneccerus-Lehmahn_ 647.
73. See _II Enneccerus-Lehmahn_ 649, 646, n. 2, 650; _II Staudinger_ 1807.
74. See supra note 72.
75. See B.G.B. § 652. It is not necessary that the commission be expressed in terms of money; it may consist of other commodities. See B.G.B. § 652.1; _II Enneccerus-Lehmahn_ 647, 650. There can be no claim for commission in "marriage" brokerage. B.G.B. § 656 I 1. However, where such commission is paid, it cannot be recovered. See _II Enneccerus-Lehmahn_ 654. Any disproportionate and excessive commission may be reduced by the court to a "reasonable" amount. B.G.B. § 655; _II Enneccerus-Lehmahn_ 653.
76. The burden of proof as to the causal connection rests on the broker. Knowledge by the principal that the transaction was the result of the broker's efforts is not essential. See _II Enneccerus-Lehmahn_ 652.
77. See _II Enneccerus-Lehmahn_ 653; 101 R.G.Z. 211 (1921). As to problems connected with the employment of more than one broker, see _II 3 Staudinger_ 1815.
contrary agreement to reimbursement for expenses.78 According to the Code, a commission is “impliedly stipulated where under the circumstances the broker is expected to act for remuneration.”79 The quantum of the commission in such a case is to be determined according to the official rate and in absence of such regulation according to local usage.80

Distinction is ordinarily made between a broker undertaking to show an opportunity for the conclusion of a transaction and a broker employed to negotiate a contract. The broker in the first case may validly agree on receiving a commission from both parties, while in the second case it is debatable whether the broker has such a right.81 The commercial broker may in all cases so contract as to claim commission from both parties and in absence of contrary agreement he is entitled to claim half of his commission from each party.82 The commercial broker is an impartial third person who must serve the interests of both parties and who undertakes obligations of a fiduciary nature toward both of them.83 On the contrary, the civil broker employed as a negotiator acts only on behalf of his principal with whom alone he is tied with a contractual relation. He is not permitted to take into account the interests of the other party and he is expected to secure the best possible bargain for his principal; if he acts for the other party he loses his right to a commission.84

Even where the broker undertakes no obligation to act, he is bound by certain obligations resulting from the principle of good faith and he is held to a certain standard of conduct. He is obliged to conduct the entrusted business in good faith, to promote the interests of his principal, and to protect him from possible losses.85 He must at once notify the principal with regard

78. Contrary agreement, however, is lawful. See B.G.B. § 652 II; II ENNECERUS-LEHMANN 652.  
79. B.G.B. § 653 I; II ENNECERUS-LEHMANN 648. An implied agreement to pay a commission exists even where services rendered by a “volunteer” broker and resulting to the principal’s benefit are received by the latter without objection. A false impression that no commission will be claimed cannot relieve the principal from his obligation. See 35 R.G.Z. 137; 34 H.R.R. No. 897; ENNECERUS-LEHMANN, ibid.  
80. B.G.B. § 653 II. See also II ENNECERUS-LEHMANN 648.  
81. Cf. II ENNECERUS-LEHMANN 652; ILABENZ 188.  
82. H.G.B. § 99. See also II ENNECERUS-LEHMANN 650.  
83. H.G.B. § 98.  
84. B.G.B. § 654. See also II ENNECERUS-LEHMANN 650. The third party stands in no contractual relationship with the broker even where the broker’s services result to the benefit of that party. See B.G.B. § 653 II; [1921] R.G.J. W. 1314; O.L.G. Frankfurt, [1952] N.J.W. 226.  
85. See II ENNECERUS-LEHMANN 649. The broker may delegate his authority
to all doubts or reservations he may have concerning the person of the prospect, the quality of the object of the transaction, and any other aspects capable of producing loss. In all cases he should act according to the directions of his principal. The principal, on the other hand, is under an obligation to inform the broker that the transaction is concluded, whether or not as a result of the broker’s activity, so that unnecessary efforts may be avoided.

**Termination of the contract.** The principal may withdraw from the contract of brokerage at any time, provided that he undertook no contrary obligation to continue the contract for a specified period of time. However, even in the latter case, he has the right to withdraw for good and just cause, as where his confidence in the broker is shaken. Cancellation and withdrawal from the contract relate to the future only; the broker will in such cases have a right to compensation for past services; and if a transaction is concluded between the principal and a prospect introduced by the broker, or where the conclusion of the transaction is made impossible by the principal, the broker earns his full commission.

The broker may also cancel the contract at any time, provided that he did not undertake an obligation to act. Where such an obligation is undertaken, cancellation is permissible only for just and good reasons; if no such reason exists, the broker is liable to pay damages.

The right to cancel the contract may be limited by contrary agreement. The validity of such a clause is the subject of much conflict of opinion and seems to depend on the circumstances of each case. In cases of doubt it may be interpreted as creating an obligation for the principal to pay the commission whether the customer is found by another broker or by the principal himself.

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86. See Larenz 189.
87. See II Enneccerus-Lehmann 653.
88. See II Enneccerus-Lehmann 653.
89. See II Larenz 189.
90. Where the conclusion of the contemplated transaction is made impossible by the principal acting in bad faith, the broker nevertheless earns his commission. See II Enneccerus-Lehmann 653; B.G.B. § 162 I. Such is the case where “listing” is made for a limited period of time and the principal concludes the transaction with a prospect introduced by the broker after the expiration of the listing. See II Enneccerus-Lehmann, 652.
91. Cf. B.G.B. § 626, 627; Larenz 189.
The broker must prove that the conclusion of a transaction according to the terms of the contract was possible, but was made impossible by the principal's conduct. The principal is protected from abuse by inserting into the contract a provision for termination of the contract. In absence of such provision, the customary deadline of the trade will be controlling and the principal will be able in any case to cancel the contract according to the provision of the Code regulating cancellation of unrevocable contracts.\textsuperscript{92}

Whether or not the death of the principal terminates the contract of brokerage depends on the circumstances of each case. The death of the broker is less significant, particularly where the principal is dealing with a firm rather than with individuals.\textsuperscript{93}

\section*{COMMON LAW}

Along with her civilian heritage, Louisiana has for more than a century-and-a-half shared the common law tradition of her sister-states. In matters of commercial law in general, Louisiana has taken decisive steps to make her law uniform with that of sister-states\textsuperscript{94} though that \textit{rapprochement} was frequently achieved at the expense of highly valued civilian institutions. Accordingly, it may be of interest to summarize at this point the common law approach to problems of agency and brokerage, particularly in view of the fact that common law notions have been frequently utilized in the interpretation of the relevant provisions of the Louisiana Civil Code.\textsuperscript{95}

At common law, brokers\textsuperscript{96} in general are considered as agents of the first person who employs them, and, under exceptional circumstances, as agents of both parties to a transaction con-
cluded through their efforts. However, doubts have been raised with regard to the status of certain brokers. It has been suggested, for example, that a real estate broker "barely qualifies as being technically an agent at all; his real position is more that of one to whom an offer is made which the broker tries to accept. The offer is to pay a commission (usually of specified amount) on the performance of a certain service, viz., finding for the offeror (client) a person who is ready, able and willing to buy the offeror's property on the terms which he has named to the broker." The Restatement of the Law of Agency regards all brokers as agents; yet, the definition given to the word agent and the enumeration of essentials of the agent-principal relationship do not bear out a clear conclusion that the broker is an agent. Most important, perhaps, the broker as such does not have the power to bind his principal at common law; and there is room for argument that the broker is an agent only in the sense that he owes fiduciary obligations toward his principal.

Be that as it may, it is clear that not all agents are brokers. Thus, while the rules of agency apply in principle to the relations among brokers, principals, and third parties, at the same time there is a distinct body of case law that applies to brokers alone. According to this analysis, brokerage and agency must be described graphically as two concentric circles, the broader of which represents agency and the narrower brokerage.

At common law, perhaps, there is no such thing as a "broker-

98. Mechem, Outlines of the Law of Agency 388 (1952). See also id. at 37.
100. Cf. supra note 11.
101. See American Law Institute, Restatement of the Law of Agency 2d § 12 (1958): "An agent or apparent agent holds a power to alter the legal relations between the principal and third persons and between the principal and himself." (Emphasis added.)
102. Cf. Mechem, Outlines of the Law of Agency 38 (1952) ("It comes very close to being no agency at all . . . probably a modicum of authority"); Story, Commentaries on the Law of Agency 33, 36 (8th ed. 1874) ("Properly speaking, a broker is a mere negotiator between the other parties . . . . [A]s a middleman, he is not intrusted to fix the terms but merely to interpret (as it is sometimes phrased) between the principals.")
104. See Stratford v. Montgomery, 110 Ala. 619, 625, 29 So. 127, 128 (1895) ("Every broker is, in a sense, an agent; but every agent is not a broker. There are, however, so many incidents common to both relations that it is difficult to define the precise line of demarcation.")
105. Cf. Mechem, Outlines of the Law of Agency 52 (delegation of authority); 8, 389 (capacity of an agent, licensing of brokers); 11, 389 (formalities); 347 (double agency) (1952).
age contract” in the abstract, but merely several kinds of brokers and several kinds of brokerage contracts. Consequently, generalizations are misleading. Where the parties do not exercise proper care to prescribe their mutual rights and obligations, the applicable rules may differ with the kind of the contemplated transaction and with the type of the broker’s activity. The analysis of broker’s rights and obligations at common law has been the subject of elaborate treatises and of numerous law review articles so that any repetition here would be superfluous.

LOUISIANA

The Civil Code and Judicial Practice in General

a. In contrast to the Code Napoleon, in the Civil Code of Louisiana brokerage is a “nominate” contract. Articles 3016-3020 of the Revised Civil Code of 1870, speaking “of the mandatary or agent of both parties,” regulate some important aspects of the brokerage contract. The source of these provisions which were first adopted in the Civil Code of 1825 is not officially known; yet, it seems reasonable to assume that they were taken from the text of Domat, which is reproduced almost verbatim in the French edition.

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107. *Cf. supra* note 41.

108. *Cf. supra* note 41.

109. See *La. Civil Code arts. 2985-2989* (1825); *Projet*, pp. 350-351, adopted without comment. There are no corresponding articles in the Civil Code of 1808. All articles have been cited by the courts on numerous occasions.

110. See *Domat, Les Lois Civiles dans leur ordre naturel; Le Droit Public, et Legum Delectus*, Paris 1777, Liv. I Tit. XVII, p. 162: “Des Procédées ou Entrepreneurs: Section 1, I L’engagement d’un Entrepreneurs est semblable à celui d’un Procureur constitut d’un commiss, ou autre préposé, avec cette différence, que l’Entrepreneur étant employé par des personnes qui ménagent des intérêts opposés, il est comme commiss de l’un & de l’autre, pour negocier le commerce, ou l’affaire dont il s’ entremet. Ainsi, son engagement est double, & consiste à conserver envers toutes les parties la fidélité dans l’exécution de ce que chacun veut lui confier. Et son pouvoir n’est pas de traiter, mais d’expliquer les int ention de part & d’autre, & de negocier pour mettre ceux qui l’emploient en état de traiter eux mêmes.”

“II Les Entrepreneurs ne sont pas responsables des événements des affaires dont ils d’entremettent, si ce n’est qu’il y eût du dol de leur part, ou quelque faute qui pût leur être imputée, & ils ne sont pas non plus garans de l’insolvabilité
In general, the Code gives a definition to the word broker, imposes on that person a fiduciary duty toward both parties to a transaction, relieves him from liability for warranties, and refers to the contract of mandate with regard to all other matters. According to the Code, a broker is the person “employed to negotiate a matter between two parties, and who for that reason, is considered as the mandatory of both.” The Code further declares that “the obligations of a broker are similar to those of an ordinary mandatory, with this difference, that his engagement is double, and requires that he should observe the same fidelity towards all parties, and not favor one more than another.”

As other agents, brokers are “answerable for fraud or faults,” but “they are not responsible for events which arise in the affairs in which they are employed.” And, except in case of fraud, “they are not answerable for the insolvency of those to whom they procure sales or loans,” “although they receive a reward for their agency and speak in favor of him who buys or borrows.”

Thus, following in the main the analysis of Domat, and perhaps, in accord with oncoming common law notions, the broker has been designated by the Louisiana Civil Code as a common agent or a mandatary of both parties to a transaction. Yet, as we have seen, when Domat was classifying the broker as a mandatary he had in mind the Roman law contract of mandate rather than the subsequently developed institution of representative agency through mandate. When the language of Domat was reproduced in the Civil Code in an entirely new context an analytical difficulty was created, since the Roman law mandate

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1. See LA. CIVIL CODE art. 3016 (1870).
2. Id. art. 3017.
3. Id. art. 3018.
4. Id. art. 2019. The following Article 3020 provides that “Commercial and money brokers, besides the obligations which they incur in common with other agents, have their duties prescribed by the laws regulating commerce.” It seems then that the preceding three articles were apparently intended to regulate mainly “civil” brokerage and were adopted in view of the pending introduction of the (draft) Louisiana Commercial Code.
5. See LIVERMORE, A TREATISE ON THE LAW OF PRINCIPAL AND AGENT 73 et seq. (1818) ; STORY, COMMENTARIES ON THE LAW OF AGENCY 33, 36 (8th ed. 1874), first published in 1839. Cf. cases infra note 120.
6. Cf. supra text at note 47.
had already become synonymous with the representative agency and the mandatary was simply a representative of his principal.

Indeed, the Louisiana Civil Code has defined mandate as "an act by which one person gives the power to another to transact for him and in his name, one or several affairs." Thus, classifying the broker as a mandatary would imply that the broker has authority to bind his principal in contractual transactions, which, at least with regard to certain kinds of brokerage, would be contrary to the everyday practice. Apart from the problem of authority, if brokerage were a mandate it should be regulated exclusively by the articles on mandate. It seems that this approach would be inadequate to cope with the exigencies of a modern commercial society. In that regard, what happened in both civilian and common law jurisdictions is indicative. In Germany, for example, brokerage has been given detailed regulation in the Civil and Commercial Codes as well as in special laws. In France, "civil" brokerage has emerged as a sui generis contract distinguished from mandate, and the "commercial" brokerage has been regulated by the Commercial Code and by special laws. And in common law jurisdictions specific rules have evolved applicable to brokerage contracts only.

The inadequacy of the code articles on mandate to cover brokerage in an efficient way was early felt in Louisiana, and the Code was supplemented by reference to common law rules relating to brokerage contracts. In addition, special acts were passed regulating the activities of stockbrokers, factors, and real estate brokers. The articles on mandate continued to apply only insofar as they were not inconsistent with the interests of the parties, or where brokerage coincided with mandate. As

117. LA. CIVIL CODE art. 2985 (1870). Corresponding Art. 2954 in the Code of 1825 reads as follows: "A procuration or letter of attorney is an act by which one person gives power to another to transact for him and in his name, one or several affairs." The Civil Code of 1808, p. 420, Art. 1 reads as Art. 2954 of the 1825 Code though in the English translation the words "and in his name" are omitted.

118. See e.g., Dey v. Nelkin, 131 La. 154, 59 So. 104 (1912); text at notes 140, 108-200, infra.


121. See e.g., LA. R.S. 37:1431 et seq. (real estate brokers); id. 3:500 (cotton brokers); id. 9:339; 47:349 (factors); id. 22:1161; 22:1178 (insurance agents and brokers); id. 47:347; 51:705 (securities' brokers) (1950).

122. Cf. text at notes 149-162, 186-191, infra.
a result, it may be justifiable to conclude that for all practical purposes, brokerage has become in Louisiana a contract clearly distinguished from mandate as defined in Article 2985 of the Louisiana Civil Code of 1870.

b. In the course of the years, additional difficulties were created by a gradual extension of the concept of mandate. Following the civilian tradition of the eighteenth century, and particularly French doctrine, the Louisiana Civil Code did not develop a general institution of agency or of representation. The inadequacies of such regulation and legislative technique were amply demonstrated in France. In contrast to France, however, the deficiencies of the system were cured in Louisiana by early adoption of common law agency notions rather than reference to subsequent developments in other civilian countries. Thus, the civilian conception of representative agency founded on the contract of mandate was extended by the Louisiana courts and to as yet an undetermined extent was made synonymous with the common law notion of agency.

Since the mandate of our Civil Code has been fused with common law agency and the terms mandatary and agent have been used interchangeably to designate a common law agent, the analytical difficulty created by the code sections classifying the broker as an agent or mandatary has become even more complicated. We do not know whether the broker is a mandatary in the sense that he has express actual authority to bind his principal in contractual transactions, or whether he may have even apparent authority to act in a non-representative capacity for...
an undisclosed principal like a common law "agent." Further, we do not know whether or not all other rules of the common law of agency are applicable to a simple brokerage contract.

It is submitted that all these difficulties may be overcome by realizing that as brokerage is distinguished from mandate, it is also distinguished from agency. The broker as such is neither agent nor mandatary in Louisiana, in the same way as not all agents or mandataries are brokers. The two may under certain circumstances coincide, and it may well happen for an agent to be also a broker and for a broker to be an agent or mandatary. But, ordinarily, the broker is simply an intermediary carrying certain fiduciary obligations toward his principal, and, perhaps, toward the third party to a transaction concluded through his intervention. As in the case of all other fiduciaries, the principles of agency may apply by analogy and the broker may be regarded as agent or mandatary in a figurative sense. Such terminology, however, should be avoided as confusing. This approach may accord with the intention of the redactors of the Civil Code of 1825 who, in drafting the articles under consideration, relied heavily on Domat, and used the expression "the broker ... is considered" rather than "is" a mandatary. Moreover, this interpretation may furnish an adequate basis for reconciliation of numerous seemingly conflicting judicial decisions in Louisiana.

Selected problems in the light of Louisiana cases

Status of an intermediary: broker or agent? As brokerage may be subject to a body of rules different from those governing agency, it should be interesting to ascertain the status of an

128. Cf. text at notes 9, 15-18, supra.
129. See, e.g., Apple Growers Association v. Kohman Brothers and Sugarman, 8 La. App. 165 (1928); Hughes Lumber Co. v. Madisonville Saw and Planing Mill, 4 La. App. 662 (1926); Knotts v. Midkiff, 114 La. 234, 38 So. 153 (1905); Marx v. Frey, 137 La. 948, 69 So. 757 (1915); Beal v. M'Kiernan, 6 La. 407 (1834); Conrey v. Hoover, 10 La. Ann. 437 (1855) (application of different rules as to different parts of the same transaction; broker as to sale of bill of exchange and agent as to negotiation of an extension); Scottish-American Mortg. Co. v. Ogden, 49 La. Ann. 8, 21 So. 116 (1896); Wise v. Hayward and Clark, 9 Orl. App. 123 (1912); Woods v. Rocchi, 32 La. Ann. 210 (1880). Also a real estate broker may be an agent. See Luckett Land and Emigration Co. v. Brown, 118 La. 943, 43 So. 628 (1907) (agency to sell real estate with a stipulation for commission); Pickens v. Harris, 100 La. 628, 107 So. 470 (1926). Authority, however, must be conferred in writing and in express terms. See Blythe v. Hall, 169 La. 1120, 128 So. 679 (1930) (telegram authorizing sale, held, not conferring authority since terms and conditions of sale were unknown to the principal). See also Canovsky v. Bonhage, 126 So. 252 (La. App. 1930).
130. Cf. text at notes 174-177, infra.
131. Cf. text at notes 2-5, supra; 175-177, 206, 210, infra.
intermediary, namely, to determine under what circumstances a broker is simply a "broker" and under what circumstances he is also (or only) an agent.\textsuperscript{132} In several instances the courts were faced with this question and resorted to several tests.

In one case it was held that where the intermediary acts for one of the parties he is an agent; where he acts for both of them he is a broker.\textsuperscript{133} This does not seem to be an adequate test for, apart from other difficulties, double agency is permissible under certain circumstances and the broker may well have acted as a true agent for both parties.\textsuperscript{134} In another case, some emphasis was placed on the existence of an agreement for, and the kind of, compensation.\textsuperscript{135} The court seemed to indicate that brokers are paid a commission, while agents furnish their services gratuitously or for a stipulated salary like clerks and employees.\textsuperscript{136} It is submitted that the method of compensation alone is not sufficient to determine the status of an intermediary; the method of compensation is ordinarily an incident of status — after it is established. Actually, nothing can prevent the parties from agreeing on a commission for the services of an agent and on a salary for the services of a broker. Moreover, it was announced in a more recent case that the fact that a commission was stipulated for the compensation of a certain person "was not necessarily" conclusive that the person in question was a broker.\textsuperscript{137}

\textsuperscript{132} The answer to the question whether the broker is an agent, and for whom, may be important in the determination of respective rights and obligations between principal and broker, principal and third parties, and broker and third parties. (Cf. infra text at notes 144-146.) Specifically, an agency relationship, if established, will be important in the determination of fiduciary duties owed by an agent to his principal (text at notes 174-177, infra), and with regard to the problem of compensation, expenses, and termination of the contract (text at notes 205, 208, 211 infra). Further, an established agency relationship will be important with regard to the validity of a transaction concluded through a broker (text at notes 147-151, infra), and with regard to distribution of loss resulting from the agent's representations, mistake, fraud, and violation of instructions (text at notes 152, 156, 159, infra). As "mandatary" has become synonymous with "agent" (text at note 140, infra), the discussion is made in terms of agency rather than agency and mandate.

\textsuperscript{133} See Dumaine and Co. v. Gay, Sullivan and Co., 188 So. 163 (La. App. 1939), quoting from City of Lake Charles v. Equitable Life Assurance Society, 114 La. 636, 38 So. 578 (1905) ("A broker is defined by Art. 3016 of the Civil Code to be an intermediary who is employed to negotiate a matter between two parties and who, for this reason, is considered as mandatary for both. If, on the other hand, he acts for only one of the principals, he is simply an agent for the party who employed him."). See also Tete v. Lanaux, 45 La. Ann. 1343, 14 So. 241 (1893).

\textsuperscript{134} Cf. text at note 164, infra.


\textsuperscript{136} Ibid. "For the services of the former there is a fixed stated salary, while for those of the latter, a compensation, commonly styled brokerage is allowed."

Finally, it has been held that a broker is distinguished from an agent in that the latter may "transfer or convey title" to property under a power of attorney, while a broker is employed merely to "secure a purchaser for the property; not to make title on behalf of the owner." This language in terms of power or authority, though close to an analytically acceptable distinction, may be confusing. If we were to proceed from the assumption that the broker may bind his principal only in accordance with a mandate, or an express power of attorney, the distinction should be fully acceptable, for it would be only in such cases that the broker would be regarded as agent. But since the courts have moved away from the notion of representation and have accepted the common law notion of agency, there may be instances in which the broker, like any other person, may be deemed to have implied or apparent authority to bind his principal. In such cases the broker would be an agent although acting without actual authority. Since, then, agency may rest on both actual and apparent consent, no valid distinction may be made between agent and broker in terms of pre-existing power or authority to bind his principal. In reality, it seems that there is no general test to be applied. The existence of an agency relationship, and the answer to the question whether or not the broker acted as an agent and for whom, will be established in each case as a fact on the basis of all the available evidence.

The impossibility of an a priori determination of the status of an intermediary, however, does not defy all possibilities for analysis. Thus, it is submitted, we may distinguish ex post facto between a broker who, regardless of any understanding, concludes the transaction himself (whether in his name or in the

139. Cf. Letarte, Problèmes Juridiques de l'agent d'immeubles, 9 REV. DU BARREAU 105, 107 (1949); supra text at note 63.
name of his principal), and a broker who, acting simply as an intermediary, brings the parties together and lets them alone to conclude the transaction. On the basis of this *factual* distinction we may say that in the first instance the broker could, under certain conditions, be an agent for one or even for both of the parties. In the second case, the broker cannot be said to be an agent in the accepted meaning of the word; he is simply a broker. But as suggested above, this distinction can be nothing more than a simple guide.

*The broker as agent: instances of real agency.* Quite frequently, it is in the interest of some party to a transaction concluded through a broker, whether principal, broker, or third party, to establish an agency relationship so that certain questions should be solved by reference to agency principles. Only

142. *Cf.* supra note 141; *infra* 164. In some instances the broker may act as agent for both parties with regard to different aspects of the same transaction. See, e.g., Shepherd v. Lanfear, 5 La. 336, 25 Am. Dec. 181 (1833). Where the broker acts for an undisclosed principal, he is no longer a broker or agent, but a principal. Pugh v. Moore, 44 La. Ann. 209, 10 So. 710 (1892); Sere v. Faures, 15 La. Ann. 189 (1860). To establish agency, he will be regarded as agent unless it is proved to the satisfaction of the court that the purported agent had no actual or apparent authority, namely, that he was no agent at all. Such problems will be determined by reference to the law of agency.

143. In some instances it may be futile to ask whether a given person is a broker or an agent; it may make no difference or he may plainly be both. It is believed, however, that such distinctions though not always valid serve in a majority of instances a useful purpose in analyzing and classifying the subject. See, e.g., Knotts v. Midkiff, 114 La. 234, 38 So. 153 (1905) where the principal had an interest in showing that the relation involved was agency rather than brokerage so that, in absence of agreement, no commission was due. In Pickens v. Harris, 160 La. 628, 107 So. 470 (1926) it was important for the principal to show agency so that his alleged agent would have to account upon resale of the property at a profit. See also Furlow v. Benoit, 124 La. 889, 50 So. 785 (1909).

144. *See.* supra note 144. In some instances the broker may act as agent for both parties with regard to different aspects of the same transaction. See, e.g., Knotts v. Midkiff, 114 La. 234, 38 So. 153 (1905) where the principal had an interest in showing that the relation involved was agency rather than brokerage so that, in absence of agreement, no commission was due. In Pickens v. Harris, 160 La. 628, 107 So. 470 (1926) it was important for the principal to show agency so that his alleged agent would have to account upon resale of the property at a profit. See also Furlow v. Benoit, 124 La. 889, 50 So. 785 (1909).

145. *See.* supra note 144. In some instances the broker may act as agent for both parties with regard to different aspects of the same transaction. See, e.g., Knotts v. Midkiff, 114 La. 234, 38 So. 153 (1905) where the principal had an interest in showing that the relation involved was agency rather than brokerage so that, in absence of agreement, no commission was due. In Pickens v. Harris, 160 La. 628, 107 So. 470 (1926) it was important for the principal to show agency so that his alleged agent would have to account upon resale of the property at a profit. See also Furlow v. Benoit, 124 La. 889, 50 So. 785 (1909).
a treatise on agency could, perhaps, cover all possible applications of agency principles to a contract of brokerage coinciding with agency. At this point, the discussion will be limited to certain actual problems raised by Louisiana cases. The aspects of agency law involved in such cases concern in the main the fiduciary duties of an agent to his principal (which are discussed elsewhere), the authority of an agent to conclude a valid transaction binding upon his principal, and the distribution of loss resulting from the agent’s representations, mistake, fraud, and the non-disclosure of information.

(I) Authority. The broker as such has no actual or apparent authority to bind his principal. However, where an agency relationship is established by the interested party, the broker may have such authority qua agent. In general, the authority of such agent-brokers has been narrowly construed in Louisiana, at least where it was known to the third party that the alleged agent was also a broker. In a series of cases involving suits for specific performance of contracts concluded by brokers (as agents) the courts imposed a remarkably restrictive interpretation on the agent’s authority and refused to hold the principal bound to the agreement.

(II) Knowledge, instructions, mistake, and representations. Under the law of agency, the knowledge of facts known to the agent may be imputed to the principal. Where the agent is a broker, the same rule applies.

It is also a well-settled rule of the law of agency that private

148. See text at notes 174-191, infra.
150. See Leverich v. Richards, 1 La. Ann. 348 (1846) where it was held that the intermediary had no authority to pledge property entrusted him for sale; “being known as a broker, those who dealt with him dealt at their peril.”
151. See Blythe v. Hall, 169 La. 1120, 126 So. 679 (1930), involving suit for specific performance by vendee against vendor of real estate. There was a telegram in evidence authorizing the broker to sell. The court held that it did not confer authority since the terms and conditions of sale were not known to the principal. See also Canovsky v. Bonhage, 126 So. 252 (La. App. 1930); Dey v. Nelkin, 131 La. 154, 59 So. 104 (1912).
153. See Lippman v. Rice Millers Distributing Co., 156 La. 471, 100 So. 769 (1924) (“Both plaintiff and defendant were charged with constructive knowledge, regardless of actual knowledge, of all material facts and information in the possession of their agent acting within the scope of his employment”); Tulane Improvement Co. v. Chapman and Co., 129 La. 562, 56 So. 509 (1911) (lessor charged with agent’s knowledge that lessee acted for a corporation rather than as individual).
or secret instructions given by the principal to his agent are not binding on the third party. Accordingly, where an agency relationship is established, instructions given by the principal to the broker are of no interest to the prospect who in ignorance of such instructions concludes a bargain with the broker. In *Southern Cotton Oil Co. v. Shreveport Cotton Oil Co.*, a broker acting as agent for sellers of oil disobeyed his principal's instructions and sold oil of a higher grade at a price set for oil of a lower grade. The court declared that the sellers' having held out the broker as their agent authorized to make the sale were bound by his acts notwithstanding any secret instructions they might have given him.

According to another well-established principle of the law of agency the agent's mistake is to be imputed to the principal. Accordingly, where it is established that the broker acted as agent for one of the parties to the transaction, any mistake made by the broker will be imputed to his principal. In *Rocchi v. Schwabacher*, plaintiff, through a broker acting as his agent, bought lands from defendant which proved to be of an inferior quality. Defendant made no representations as to the quality of the lands; the real estate broker who acted as agent for the purchaser, by mistake, concluded the transaction in the belief the lands were of the specified quality. The court, having found that the fault was with the broker who did not exercise due diligence, held that the broker's mistake should be imputed to the principal. And in *Apple Growers Association v. Kohlman Brothers and Sugarman*, a sale of apples was negotiated and concluded through a broker. By mistake, the broker caused the wrong quality of apples to be sent to the wrong destination, and damage resulted. The court found that the broker acted as agent for the purchaser and imputed the broker’s mistake to the latter. “Secret private instructions,” the court declared, “however binding they may be between the principal and the agent, can have no effect on a third person who deals with the agent in good faith, in ignorance of the instructions or limitations.”

Finally, it is well established that the principal is liable for his agent's representations, and according to the prevailing view

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155. 111 La. 387, 35 So. 610 (1903).
156. See Mechem, A Treatise on the Law of Agency 1308 et seq. (1914).
158. 8 La. App. 165 (1928).
in the United States for the agent's misrepresentations and fraud.\textsuperscript{159} Similarly, unauthorized representations made by an agent acting as broker will bind the principal. An early Louisiana case, however, indicated that a principal may under some circumstances be excused for misrepresentations and fraud practiced by such an agent.\textsuperscript{160}

(III) Ratification. As the acts of any other person assuming agency powers may be ratified by the supposed principal, the acts of a broker who acted without authority or exceeded his authority may be ratified. Strictly speaking, the problem is not one of agency or of authority to bind;\textsuperscript{161} however, once ratification is made, the principles of agency apply. In \textit{Woods v. Rocchi},\textsuperscript{162} plaintiff bought a certain quantity of land through a broker, who, as the court found out, was acting as his agent. The broker, while informing his principal that the bargain was concluded at a certain price, in reality closed the transaction at a much higher price. The purchaser learned of the true situation only after a substantial portion of the merchandise was delivered. The court held that the principal, by accepting the remaining portion of the goods with knowledge of the true situation, ratified the contract as made by his agent or pretended agent.

\textbf{The broker as intermediary: no agency.} (I) "\textit{Common mandatary": a technical expression.} It is a general rule of the law of agency that no one can be agent of two parties in the same transaction, except where the parties, with full knowledge, expressly agree on such double agency.\textsuperscript{163} In Louisiana, it has been held that a person may be agent of two parties in the same transaction provided there is no collusion or conflicting interests.\textsuperscript{164}

\begin{thebibliography}{99}
\bibitem{159} See \textsc{Mechem, Outlines of the Law of Agency} 84, 92 (1952).
\bibitem{161} Cf. \textsc{Mechem, Outlines of the Law of Agency} 127 et seq. (1952).
\bibitem{163} See \textsc{Mechem, Outlines of the Law of Agency} 346 et seq. (1952).
\bibitem{164} See \textit{Draughon v. Quillen}, 23 La. Ann. 237 (1871) ("The same person cannot be the agent of two parties in the same transaction when their interests are conflicting"); \textit{Florance v. Adams}, 2 Rob. 556, 38 Am. Dec. 226 (La. 1842); \textit{Shepherd v. Lanfear}, 5 La. 336, 25 Am. Dec. 181 (1833) ("The mandatary in this case was the agent of the plaintiff for the ship, and of the defendant for the cargo. The powers were separate; the interests were distinct; the objects were different; and . . . he could have discharged his duties of agent for each with perfect propriety."); See also \textit{Conn Lumber Co. v. Hertman-Salmen Co.}, 12 La. App. 165, 125 So. 137 (1929), involving suit by seller of lumber against purchaser on a contract concluded by the latter's agent. The validity of the contract was upheld although the agent was subsequently employed by the seller to supervise the lumbermen.
\end{thebibliography}
Ordinarily, the parties to a contract concluded through brokers have adverse interests and it seems that real double agency should be permissible only under exceptional circumstances. Thus, an intermediary in absence of express authorization by both parties acting with full knowledge of the situation, may well discharge the function of a broker and that of an agent representing one of the parties, but he may not act as agent for both. He may negotiate and bring the parties together, but he cannot conclude a deal.\textsuperscript{165} In \textit{Beal v. M'Kiernan},\textsuperscript{166} an early Louisiana case, the court, placing emphasis on the conflicting interests of the parties, refused to uphold the validity of a contract concluded by a broker representing both of them on the ground that "where there is but one person, there can be no agreement, no obligation; for there is not the concurrence of two minds, no one person bound to the other . . . A has an order from B to purchase cotton, and from C to sell his crop; he determines on selling C's cotton to B. The price has been determined by one person only; there is not that concurrence of two minds; aggregation \textit{mentium} is essential to the formation of the contract."

Nevertheless, the broker is frequently termed "a common agent" or "common mandatary."\textsuperscript{167} It is submitted that such language is misleading: it is merely a metaphor of doubtful utility.\textsuperscript{168} Actually all cases in point involved attempts at rationalizing the application by analogy of certain agency principles to a simple brokerage contract (as defined) rather than instances where a broker having actual authority acted as agent for both parties. "Common mandatary" seems thus to be a technical expression and when used by the courts may be taken as the statement of a conclusion, namely, that the rights and liabilities of the parties are to be determined under the circumstances by reference to agency principles, applicable by analogy. Where inter-

\textsuperscript{165} See Rhodes \& Symes v. Nadeski, 119 So. 292 (La. App. 1928) (an offer addressed to brokers as agents, and signed by them as agents is not valid as an offer). However, a broker starting out as agent of one party may subsequently serve as a middleman and thus receive a commission from both parties. See Pardue v. Sitman, 148 So. 288, 289 (1933) ("There is no inconsistency in occupying, as between Sitman and Humphreys, the position of a broker or intermediary under the Civil Code, Arts. 3016 et seq., and the fact that she may have started out as the agent of Sitman did not prevent her subsequently becoming the broker and intermediary").

\textsuperscript{166} 6 La. 407 (1834).


\textsuperscript{168} Cf. text at notes 130-131, \textit{supra}; text at note 193, \textit{infra}.
ested parties attempted to reason from the premise that the broker is a "common mandatary," and thus to import agency principles wholesale, the courts readily answered that the broker is a common mandatary or common agent only "in a sense" and "for some purposes." The allegation that the broker "represented both parties, does not alter the situation." Actually, "it is only in facilitating the transaction of business in relation to the sale and purchase of produce, that the broker is considered as the common agent of the parties, the channel of communication between them. For any other purpose he is not regarded by law as agent of either party."

In general, the phrase "common mandatary" is resorted to with reference to fiduciary duties owed by a broker toward both parties and in situations where one of the parties, whether principal, broker, or prospect, is interested in holding the other party to the agreement.

(IV) Brokerage: a sui generis contract. In a forthcoming paper I shall have the opportunity to analyze and discuss all incidents of a brokerage contract in Louisiana. At this point, I shall confine myself to a brief summary of Louisiana cases which as a whole demonstrate that brokerage has emerged as a sui generis contract, quite independent from agency and mandate.

(1) Fiduciary duties. It is well established that a broker owes certain fiduciary duties to his principal as soon as their relationship comes into existence. On the other hand, no clear rule may be deduced from the cases with regard to the broker's fiduciary duties toward the third party to a transaction. Most cases seem to indicate absence of such duties during the negotiations. According to some of these cases the broker assumes fiduciary duties toward the third party only after the bargain

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172. See Toledano v. Klingender, 6 La. 691 (1834).
173. See text at notes 174-177, 188-201, infra.
174. See Hughes Lumber Co. v. Madisonville Saw and Planing Mill, 4 La. App. 662, 667 (1928) ("At the outset the broker is the agent of the party who first employs him"); Apple Growers Association v. Kohlman Brothers and Sugarman, 8 La. App. 105 (1928) (a broker is for some purposes the agent of both parties but primarily of the party who employs him). See also Seybold v. Fidelity and Deposit Co. of Maryland, 197 La. 287, 1 So.2d 522 (1941).
is "definitely closed." It is only then that the broker may be regarded as a common mandatary in the sense that he owes fiduciary duties to both parties.

The content of the broker's fiduciary duties, originally due to the person who first employed him and after the transaction is definitely closed to both parties, is largely undefinable. Such duties are to be determined in principle by reference to the law of agency. It is questionable, however, whether the duties imposed on a broker are entirely co-extensive with those imposed on an ordinary agent. Thus, it has been held that a broker is under no obligation to advise his principal with regard to obviously unfavorable terms of an offer and with regard to the "foolishness" of a transaction.

Most actions against brokers are based on actual misrepre-


178. Cf. Assunto v. Coleman, 159 La. 537, 104 So. 318 (1925) (broker acquired interest in property adverse to that of his principal; held, the broker was a constructive trustee holding the interest for his principal); Conrey v. Hoover, 19 La. Ann. 475 (1855) (assistance to the parties "to carry out their original contract in good faith"); Roubieu v. Palmer, 10 La. Ann. 320 (1855) (return of benefits); Rhodes & Symes v. Nadeski, 119 So. 292 (La. App. 1928) (unauthorized return of earnest money to purchaser; held, a breach of fiduciary duty); Pfeiffer and Co. v. Mayer and Co., 3 La. App. 299 (1925) ("every duty involving necessary notice").


180. Spiro v. Corliss, 174 So. 255 (La. App. 1937). An agent is expected to account to his principal for all profits realized in connection with his agency. A broker may be entitled to keep such profits. See Furlow v. Benoit, 124 La. 889, 50 So. 785 (1909) (no duty to account for profits realized by sale of goods above the price set by the principal).
sentation,\textsuperscript{181} violation of instructions,\textsuperscript{182} and fraud,\textsuperscript{183} and very few cases involve attempts by principals or third parties at holding the broker to a fiduciary obligation.\textsuperscript{184} Such obligations come mainly into focus in cases where one of the parties, whether principal or prospect, brings action against the broker to recover a deposit\textsuperscript{185} given for a transaction which was never consummated. In this group of cases the courts identify the person entitled to the deposit by characterizing the broker as agent of one or of the other party, or as common agent of both. Indeed, if the broker is to be regarded as agent of the party claiming the deposit, he should account to that party; if, on the other hand, the broker is deemed to have acted as agent for the other party, he has no obligations toward the claimant, but toward his principal. Finally, if the broker is to be regarded as a “common agent,” he should be responsible to both parties.

\textsuperscript{181} See, e.g., Buddecke v. Harris, 20 La. Ann. 563 (1868) involving suit by purchaser of dishonored note against broker on the ground the latter wilfully misrepresented the credit of the debtor. Held, no recovery. Plaintiff knew he was dealing with a broker who is not responsible unless expressly personally bound. \textit{But cf.} Todd v. Burke, 27 La. Ann. 385 (1875). Brokers, in good faith, advised customer to invest on forged note, secured by forged mortgage. Testimony tended to show that the brokers “vouched for the correctness, and honesty, and uprightness of the mortgage.” Held, “the plaintiff was induced to lend her money” and is entitled to recover.

\textsuperscript{182} See Pfeiffer and Co. v. Mayer and Co., 3 La. App. 289 (1925) (broker liable to purchaser of potatoes for damage resulting from violation of instructions). See also Soudieu v. Faures, 12 La. Ann. 746 (1857). Broker undertook to make safe investments of plaintiff’s money. He disobeyed instructions and did not invest as directed. Held, “[he] is responsible for the loss consequent upon that imprudence and violation of instruction, unless plaintiff is shown to have ratified his action, after disclosure of all the material facts.” \textit{But cf.} Winston v. Tufts Femor & Hobart, 10 La. Ann. 23 (1855).

\textsuperscript{183} Cf. Amato v. Letter and Blum, Inc., 227 La. 537, 79 So.2d 575 (1955), involving suit by prospect against broker for failure to transmit an offer to the principal. Although there was no “privity of contract,” and apparently no violations of a general duty due by the broker to the prospect, the court allowed recovery by relying on LA. R.S. 37:1447 (1950), providing as follows: “Any one who is injured or damaged by the agent or broker by any wrongful act done in the furtherance of such business or by any fraud or misrepresentation by the agent or broker may sue for the recovery of the damage before any court of competent jurisdiction.” See also \textit{infra} note 184.

\textsuperscript{184} See, e.g., Seybold v. Fidelity and Deposit Co. of Maryland, 197 La. 287, 1 So.2d 522 (1941) ; Rhodes and Symes v. Nudski, 119 So. 292 (La. App. 1928). See also Therbone v. Cougot and Joubert, 3 La. App. 771 (1926), involving suit by tenants against brokers for renting defective property. The court held that the brokers were not liable to third persons for nonfeasance or for mere omission of duty, due only to their principals. Spiro v. Corliss, 174 So. 285 (La. App. 1937) (broker not liable for failure to reveal to prospective purchaser that there were outstanding encumbrances to the property to be conveyed, although the property was to be conveyed free of all encumbrances). \textit{But cf. supra} note 183.

\textsuperscript{185} Quite frequently, a suit for the return of a deposit is connected with the issue whether or not the broker has earned his commission. See Boiseau v. Valon and Jordano, 174 La. 492, 141 So. 38 (1932) ; Boone v. David, 52 So.2d 563 (La. App. 1951) ; Gairens v. Valenti, 17 La. App. 180, 135 So. 84 (1931) ; Roe v.
In Conley v. Dilbeck Dominey Ins. Agency, Inc., plaintiff brought suit against insurance broker to recover deposits on premiums received and held by the broker on behalf of the insurer who in the meanwhile had become insolvent. Plaintiff's theory was that the broker was a common mandatory, and as such, under an obligation to return to him, at his order, all deposits in his hands. The court, although granting that the broker was a common mandatory, held that in receiving the money he was the agent of the insurer. Consequently, payment should be made to the receiver of the insolvent rather than to plaintiff.

In another case, Maloney v. Aschaffenburg, plaintiff owner of real estate brought suit against broker to recover a deposit allegedly forfeited by the purchaser. This time it was the broker who objected that as a "common mandatory" he was under a duty to account to both parties and that the purchaser should be made a party defendant. The court held that the broker owed no fiduciary duty to the purchaser since the transaction was never consummated, and ordered him to pay the deposit to plaintiff.

And in Dunn v. Spiro, plaintiff purchaser brought suit against a real estate broker to recover a deposit given as a part payment for the purchase of property. The contract of sale was concededly void for indefiniteness. This time the defendant broker rested his defense on the ground that he was the agent of a disclosed principal, the vendor, and consequently, plaintiff should seek redress against that principal. The court held that the broker was the agent of both parties and ordered the return of the deposit to the purchaser, thus in reality regarding the broker as the latter's agent.


187. In another case, Titus v. Cunningham, 164 La. 431, 114 So. 86 (1927), plaintiff purchaser of real estate brought suit against a broker to recover a deposit given on account of a sale that was never consummated. He claimed also that the broker was a common mandatory holding the deposit subject to his order. The court disposed of the case on the ground that the understanding was that the deposit should be paid by the broker to the owner of the real estate.

188. 143 La. 509, 78 So. 761 (1918).

189. But cf. Hill v. Maguire, 19 La. App. 798, 140 So. 169 (1932), where a prospective purchaser brought suit against the vendor for specific performance of a contract to sell and in the alternative for the return of a deposit. The court declared that the deposit was recoverable only from the broker since he was a common mandatory. See also Baumann v. Michel, 190 La. 1, 181 So. 549 (1938); Cabral v. Barkerding, 50 So.2d 516 (La. App. 1951).

190. 153 So. 316 (La. App. 1934).

191. But cf. Martin v. Fontenot, 27 So.2d 457 (1946). Plaintiff prospective purchaser of property brought suit against broker to recover deposit given on account of a transaction that was never consummated. The court, consistently with its classification of the broker as a common mandatory, held that the seller was a
The real problem in such cases is who should recover a deposit given for a frustrated contract and how the broker should be protected from ungrounded demands. Where, as it frequently happens, a deposit is given by the purchaser to accompany an offer made to the seller, and such offer is not accepted, it seems that the purchaser should be entitled to recover his deposit.\textsuperscript{192} The obligation of the broker to return the deposit in such cases need not be justified on grounds of agency.\textsuperscript{193} Where, on the other hand, the purchaser's deposit accompanies an acceptance of an offer made by the seller, and where a contract to sell or sale is concluded, but for some reason one of the parties defaults or claims that the transaction is invalid, the broker should hold the deposit until a judicial determination of the issue.\textsuperscript{194} It is precisely in the last situation that the imposition of a fiduciary duty on the broker toward both parties may be well justified.

(2) Authority to receive communications. We have seen that a broker concluding a transaction himself may be regarded under some circumstances as agent and may bind his principal even in absence of actual authority. As in the case of any other agent, the broker's knowledge of certain facts, his mistake, his representations, and at times his misrepresentations and fraud, may thus be imputed to the principal. On the other hand, it is clear from the cases that a broker acting merely as intermediary has no authority, and, with regard to all such instances, he is a third party in the relations between principal and prospect.

The only debatable point is whether a broker (acting merely as an intermediary) has authority to receive communications binding on the person who resorts to his services. In general, communications to the agent are binding upon the principal, and in case of a contractual transaction, an offer made to, and an acceptance received by, the agent, result in a contract binding upon the principal and the third party.\textsuperscript{195} In some instances, the

necessary party defendant and that accounting should be made to both parties. \textit{Cf. infra} note 193.

\textsuperscript{192} \textit{Cf. supra} note 190.


\textsuperscript{194} \textit{Cf. supra} note 191.

\textsuperscript{195} See \textsc{mechem, A Treatise on the Law of Agency 1623 et seq. (1914).} Different rules may apply with regard to formalities. Thus, the authority given to an \textit{agent} to sell immovable property belonging to the principal must be in writing.
person first to resort to the services of a broker (principal) signs an offer to sell or purchase under certain specified conditions. In other cases, it is the prospect located by the broker who signs such an offer, or accepts an offer already made by the principal. The problem in all cases is whether the person signing an offer authorizes the broker by implication to receive an acceptance so that upon its receipt the transaction would be concluded.

The courts have consistently refused to consider the broker as the agent of either the offeror, authorized to receive an acceptance, or of the offeree, authorized to receive an offer. In Hanneman v. Uhry, involving an action for the recovery of rent under an alleged lease, defendant argued that there was no contract since lessor's acceptance of his offer was addressed to the broker and was not binding on him. The court held that the broker was not lessee's agent and that, although the latter had deposited with the broker an offer to lease, the broker was not authorized to receive an acceptance. Further, the case clearly implies that the broker was not plaintiff's agent authorized to receive an offer, although originally employed by him to rent and sell the property. In Canovsky v. Bondage, the court also found that an offer submitted by the prospect to the broker did not result in a valid contract since the principal never accepted the offer and the broker had no authority to accept on behalf of the principal. The argument that the owner had authorized the broker to receive and accept an offer complying fully with the owner's terms was of no avail. The reluctance of the courts to consider the broker as agent of either party authorized to receive communications is further illustrated in the case of Treadaway v. Giangrosso. In that case, the owner of real estate "listed" with the broker signed an offer to sell at a certain price and deposited the same with the broker. A prospect found by the broker signed an offer to buy the property according to the

Whatley v. McMillan, 152 La. 978, 94 So. 905 (1922). On the other hand, a broker employed merely to procure a purchaser with whom the principal will himself conclude the contract, need not have written authority. Kernaghan and Cor-dill v. Uthoff, 174 La. 880, 141 So. 865 (1932); Isaac v. Dronet, 31 So.2d 299 (La. App. 1947); Lally v. Dossat, 31 So.2d 41 (La. App. 1947).

196. See, e.g., infra note 200.

197. See, e.g., infra notes 198, 199, 200.

198. 8 La. App. 534 (1928).

199. 126 So. 252 (La. App. 1930).

200. 16 So.2d 877 (La. App. 1944). See also Fowler v. Phillips, 159 La. 668, 106 So. 26 (1925) (dismissing vendee's action for specific performance; offer accepted by broker after the listing was cancelled).
terms of the owner. The court held that there was no contract, as there was no offer and acceptance, but two offers in identical terms to sell and purchase. "The fact that Treadaway was a real estate agent," the court announced, "and therefore, in a sense, represented both parties, does not alter the situation."201

(8) Authority to receive payment. The authority of an agent to receive payment on behalf of his principal is generally subject to limitations and is strictly construed.202 It is well established on the other hand that the broker has no authority to receive payment. "To justify a payment . . . made to a broker, a purchaser is bound to show, either a general custom, or a special authority from the vendor."203 In absence then of express actual authority the purchaser may be obliged to second payment.

(4) Compensation. In contrast to the contract of mandate, which is gratuitous in absence of express agreement,204 the principal in a contract of brokerage assumes the obligation to compensate the broker even in absence of stipulation with regard to commission.205 The issue was squarely raised in Doll v. Weiblen Marble and Granite Co.,206 involving a suit by a broker against a lessee of properties for a commission allegedly earned when the broker found the prospect and actively participated in the nego-

201. But cf. Dane and Northrup v. Selzer, 63 So.2d 760, 762 (La. App. 1953). In this case a prospective vendee submitted a written offer to a broker to buy property listed with him and, upon the conclusion of the transaction, to pay a stipulated commission. The offer was promptly accepted by the vendor in writing but the broker failed to communicate the vendor's acceptance to the offeror. The broker's right to a commission seemed to depend on whether or not a valid contract had been concluded. The court held that the contract was perfect and valid and that written communication to the purchaser was not necessary. "A real estate agent," the court said, "is the agent of both parties to such a contract, and when Mrs. Waimer [vendee] authorized her agent to transmit her offer to Mrs. Buras [vendor], she authorized the agent to receive the acceptance of Mrs. Buras. Therefore the contract was completed and became binding as soon as the offer of Mrs. Waimer, which was made in writing was given to the agent."


203. Toledano v. Klingender, 6 La. 691, 695 (1834) ("In the absence of proof of any authority in the broker to receive payment, or of any act from which such authority might be presumed, we are of opinion that the defendant acted without due caution").

204. See LA. CIVIL CODE art. 2991 (1870); Conrey v. Hoover, 10 La. Ann. 437, 438 (1855) ("It is perfectly clear that the services were not rendered by the plaintiff as broker . . . but as attorney in fact . . . There being no contrary agreement, it is clear that the procuration in this case must be looked upon as gratuitous, a mere office d'amie"). See also Knotts v. Midkiff, 114 La. 234, 238 So. 153 (1905) (broker acted as agent in the sale of real estate; no commission).


206. 207 La. 789, 22 So.2d 59 (1945).
tations. There was no agreement with regard to commission and the defendant alleged that, as the relationship was one of mandate, Article 2991 of the Civil Code controlled and no commission was due. The court held that Article 2991 was inapplicable in the determination of the principal's liability toward the broker. "We do not think this case presents factual issues controlled by Art. 2991 of the Revised Civil Code," the court declared, "but rather that it is governed by the jurisprudence of the courts of this state to the effect that where one employs the services of another without specifying what compensation will be paid therefor, or where one avails himself of the services of another in the performance of a task, he is bound to compensate the person so employed or who performs such a service."207

(5) Expenses. Another difference between mandate, agency, and brokerage involves the right of the broker to claim expenses. In Blanc v. The New Orleans Improvement & Bank Co.,208 plaintiff signed a contract with a bank to the effect that if he were successful in procuring a loan he would be entitled to a percentage. He was unsuccessful, and he claimed reimbursement of expenses instead. The court held that he was not entitled to reimbursement as he was a broker rather than an agent. "The agent is entitled to the reimbursement of the expenses he has incurred in the execution of his agency," the court declared, "even where he has been absolutely unsuccessful." Here, "the contract was merely one of brokerage, where nothing is paid, unless a bargain is effected."209

207. Brokerage differs not only from mandate but also from the contract of employment. Cf. La. Civil Code art. 2745 et seq. (1870). The courts, on several occasions, tried to draw such a line of distinction. In one case the court observed that "there is a vast difference between the services of a broker and that of a salesman or clerk. A broker is a middleman or negotiator between two parties. He does not have possession, management, or control of the property to be sold. His principal business is to bring the parties together." Shaw v. Walker, 43 So.2d 700 (La. App. 1950). In another case the court found "the leading and essential difference" between a clerk and broker is that "the former hires his services exclusively to one person, while the latter is employed to make bargains and contracts with other persons in matters of trade, commerce, and navigation. For the services of the former there is a fixed stated salary, while for those of the latter, a compensation, commonly styled brokerage is allowed." Tete v. Lanaux, 45 La. Ann. 1345, 1346, 14 So. 241, 243 (1893). The distinction may be important with regard to the broker's right to a commission. In Shaw v. Walker, supra, plaintiff enter into a verbal agreement with defendant to find prospective purchasers of air-conditioning equipment at a 10 percent commission. Defendant claimed that plaintiff was a "salesman" rather than "broker." Thus, commission would be earned only with regard to bargains closed by plaintiff himself and not upon the conclusion of any bargain with one of plaintiff's prospects. The court found that the alleged broker was a salesman and dismissed the claim for a commission.

208. 2 Rob. 63 (La. 1842).
(6) Termination of contract. In contrast to mandate, brokerage does not terminate upon the death of the principal. The courts have been able to reach this result by classifying brokerage as a contract of employment rather than mandate. In Richardson v. Bradford, there was an exclusive listing for a period of a year, and the principal died during that year. The heirs claimed that the contract, being a mandate, had expired; the broker, on the other hand, claimed that the contract was one of employment and that in spite of the death of the principal it was still in effect. The court held that "we cannot agree with the view that a contract of the kind in this case is governed by the law of mandate as laid down in Articles 3016 et seq. of the Revised Civil Code." And, following a finding that the contract was one of employment, the obligation was declared heritable.

(7) Suits by and against a broker. While there are some doubts with regard to the right of an agent to bring suit against the other party to a transaction, "it is well settled that a broker may not maintain an action on a contract which he has negotiated for his principal against the other party to the contract unless the broker has acquired a special interest which confers upon him the right to sue." Similarly, no suit may be brought against the broker for breach of contract by the principal.

broker entitled to out-of-pocket expenses; contract of employment); Blackshear v. Landley, 46 So.2d 688 (La. App. 1950) (failure to consummate a contract to sell caused by title defect arising subsequent to the fruition of an executory contract and through no fault of the principal).

210. See LA. CIVIL CODE art. 3027 (1870).
211. 153 La. 725, 96 So. 546 (1923).
212. See also Tete v. Lanaux, 45 La. Ann. 1343, 14 So. 241 (1893) (sugar broker a clerk; obligation heritable).
214. Honore v. White, 1 Mart. (N.S.) 219 (La. 1823) ("A suit for the breach of contract made through an agent, should be brought against the principal for whom the agent contracted").